BY THE COURT:

DATE SIGNED: March 26, 2019

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1, *et al.*,

Plaintiffs,

v.

Case No. 19CV302

ROBIN VOS, *et al.*,

Defendants.

DECISION AND ORDER GRANTING IN PART, AND DENYING IN PART PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION
AND
DECISION AND ORDER DENYING THE MOTION TO STAY PENDING APPEAL

In December 2018, the Wisconsin Legislature convened an extraordinary session and passed two Acts: 2017 Wis. Act 369 and 2017 Wis. Act 370. The Acts changed state statutes relating to: the Attorney General's ability to litigate cases, the legislative committees' ability to regulate certain administrative-agency actions, and the administrative agency's ability to create and disseminate "guidance documents." The Acts made other changes on the security of the capitol, judicial deference to agencies, the process of coordination with the federal government, and the general handling of enterprise zones.

Plaintiffs are a collection of labor unions and private individuals who are challenging the constitutionality of these statutory provisions under Wisconsin's constitution. They seek injunctive relief to prevent the challenged provisions from being enforced while this case

proceeds to resolution. Dkt. 8. Defendants are state officials from the state's executive and legislative branch. They disagree on whether plaintiffs are likely to succeed on the merits. The Governor and Attorney General have filed briefs in support of plaintiffs' motion, Dkt 52, while the named legislative defendants[1] have moved to dismiss, Dkt. 43. The legislative defendants have also requested a stay pending an appeal, Dkt. 43, at 38, should the court conclude that any of the challenged provisions violate the Wisconsin Constitution. Plaintiffs' motion was initially a motion for a temporary restraining order, but upon agreement of the parties, the court has construed plaintiffs' motion as one for a temporary injunction.

I. Standards on a Motion to Dismiss

The standard applicable to the legislative defendants' motion to dismiss has been set forth in the legislative defendants' brief in support of their motion. It appears that these defendants agree that on a motion to dismiss, the court accepts all the well-pled facts as true. So, in other words, if this court accepts everything the plaintiffs alleged as true, could this court, (taking a rather one-sided view) come to the conclusion that the enumerated challenged statutes are unconstitutional beyond any reasonable doubt? The legislative defendants then launch right into a thorough discussion of Wisconsin's constitution, separation of powers, quorum, bicameralism and presentment, and the various cases discussing these principles.

Where appropriate, the legislative defendants have drawn this court's attention to certain facts outside the complaint—i.e. newspaper articles in the *Milwaukee Journal Sentinel*, Governor Evers' 2020 budget proposal, and various records on file with the Legislative Fiscal Bureau. Indeed, the legislative defendants have understandably and properly responded to the affidavits

[1] The legislative defendants are Robin Vos, Wisconsin Assembly Speaker; Roger Roth, Wisconsin Senate President; Jim Steineke, Wisconsin Assembly Majority Leader; and Scott Fitzgerald, Wisconsin Senate Majority Leader.

submitted to the court by opposing counsel. *See* Dkt. 83, at 19 n.3. Ordinarily, where facts are submitted outside the pleading, the motion to dismiss is converted to a motion for summary judgment.

For the reasons stated below, this court will deny the motion to dismiss. Not only have the plaintiffs stated a claim upon which relief may be granted, but as further explained below, they are entitled to part of their request for a temporary injunction.

II. Standards on a Motion for a Temporary Injunction

The parties have briefed the constitutional questions in this case as if the matter before the court was whether to permanently declare parts of Acts 369 and 370 unconstitutional. As tempting as that may sound, and despite the efficiency with which this court could dispatch this case, the only question is whether to issue a temporary injunction preventing the enforcement of the challenged provisions while this case proceeds to resolution. Accordingly, this is not a final order for purposes of appeal.

The standard applicable to plaintiffs' motion for a temporary injunction is well-established. To obtain a temporary injunction, a plaintiff must show that (1) it will suffer irreparable harm before the final resolution of its claim without a preliminary injunction; (2) traditional legal remedies are inadequate; (3) the injunction is necessary to preserve the status quo; and (4) its claims has a reasonable probability of success on the merits. *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520-21, 259 N.W.2d 310 (1977).

The court will address the likelihood of success on the merits first, because answering the question resolves most of the issues raised in plaintiffs' motion. Generally speaking, when constitutional rights are deprived, irreparable harm results and there is really no other adequate remedy available. Here, plaintiffs are essentially asking for the status quo, which existed before

the enactment of Act 369 and 370, to be preserved. The court finds that where plaintiffs have established a reasonable probability of success on the merits, plaintiffs have also shown irreparable harm and that an injunction is necessary to preserve the status quo. Having shown that an injunction is necessary, the court will deny the legislative defendants' request for a stay pending appeal.[2]

The principal issue in this case concerns the powers shared between the Legislature and the Governor. That is what the parties have devoted most of their briefs to. Most of the actions taken by the Legislature through the Acts affect powers shared between the Legislature and the executive. The first question is whether one branch has unduly burdened or substantially interfered with another branch's role and powers. The second question is whether the statutory scheme set forth in some of the new statutes violates the constitutional requirement of quorum, bicameral passage and presentment.

Recently, the Wisconsin Supreme Court surveyed the caselaw on the court's function when considering whether one branch has unduly burdened or substantially interfered with another branch's role and powers. *See Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018

[2] To obtain a stay pending appeal, the legislative defendants must demonstrate the inverse of all the factors that plaintiffs must demonstrate for injunctive relief. *See State v. Scott*, 2018 WI 74, ¶ 46, 382 Wis. 2d 476, 914 N.W.2d 141 ("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) show 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."). The court has concluded that plaintiffs are likely to succeed on the merits on some of their claims. And during oral arguments, the legislative defendants could not identify any harm that would result if the court were to decline to issue a stay in this case. Accordingly, to the extent this court balances the interests of the parties for and against the stay, the balance overwhelmingly tips in favor of not granting one. Therefore, this court denies the legislative defendants' motion to stay this ruling pending appeal, (presuming for the moment that there will be an appeal-not something usually a litigant asserts in advance of actually reading the court's decision).

WI 75, ¶ 43, 382 Wis. 2d 496, 914 N.W.2d 21. A couple observations made by the supreme court in *Tetra Tech* are worth reiterating here.

First, the importance of this case is clear. Any case which attempts to define the proper role of one branch of state government demands the close and careful attention of the court. This court understands that it is not easy for courts to gauge the nature and degree of intrusion one branch makes upon another. Indeed, the legislative defendants would have this court believe the Legislature's actions in this case were insignificant and trivial. The plaintiffs, Governor, and Attorney General say otherwise, claiming that these Acts shake the very core of the executive branch's respective role in our government. As Justice Scalia observed in *Morrison v. Olson*:

> Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

487 U.S. 654, 698 (1988) (Scalia, J., dissenting).

In *Tetra Tech*, the Wisconsin Supreme Court reaffirmed that it is the judicial branch's central role in adjudicating these disputes. Quoting *Marbury v. Madison*, the supreme court stated: "From the earliest days of our country, we have understood that the judiciary's first and irreducible responsibility is to proclaim the law: 'It is emphatically the province and duty of the judicial department to say what the law is.'" *Tetra Tech*, 2018 WI 75, ¶ 50 (citation omitted).[3]

[3] Undoubtedly, some will suggest the court is "legislating" from the bench. This comes with the territory. But individuals who are parties in this case, should be mindful of this court's local rule that all participants in the judicial process … should conduct themselves in a manner which demonstrates sensitivity to the necessity of preserving the decorum and integrity of the judicial process. So far, the lawyers have exceeded that standard and should be complimented on their decorum.

I have discharged this "careful and perceptive analysis" in three separate ways. First, I began with an examination of Wisconsin's constitution. In determining the meaning of the relevant constitutional provisions in this case, I have considered the plain meaning of the provisions, reviewed the debates of the constitutional conventions, and examined the practices and trends of that time, which I can reasonably presume were known to the framers of the constitution. Second, I have surveyed the cases and common law on the separation-of-powers doctrine. Lastly, I have surveyed the cases and common law regarding the constitutional requirement of quorum, bicameral passage and presentment.

III. Separation of Powers Generally

As stated above, plaintiffs challenge several aspects of Acts 369 and 370. They contend that the challenged provisions violate the separation-of-powers doctrine derived from the Wisconsin Constitution and/or the constitutional requirement of quorum, bicameral passage and presentment. This court will begin with an analysis of plaintiffs' separation-of-powers argument.

A. Wisconsin's Constitution and Co-equal Branches of Government

The doctrine of separation of powers is not expressly provided for in the state constitution. *State v. Unnamed Defendant*, 150 Wis. 2d 352, 360, 441 N.W.2d 696 (1989). Rather, the doctrine is embodied in the clauses of the Wisconsin Constitution providing that: "[t]he legislative power shall be vested in a senate and assembly;" "[t]he executive power shall be vested in the governor;" and "[t]he judicial power of this state shall be vested in a unified court system." Wis. Const. art. IV, § 1l art. V, § 1, and art. VII, § 2; *see also State v. Washington*, 83 Wis. 2d 808, 816, 266 N.W.2d 597 (1978). In general, the legislative branch determines the policies and programs, reviewing the performance of previously authorized programs; the executive branch carries out the programs and policies; and the judicial branch adjudicates any

conflicts that might arise from the interpretation or application of the laws. Wis. Stat. § 15.001(1).

1. The Text of the State Constitution and Judicial Interpretation.

The basic principle of separation of powers is "to maintain the balance between the three branches of government, to preserve their respective independence and integrity, and to prevent concentration of unchecked power in the hands of any one branch." *Washington*, 83 Wis. 2d at 825-26. The Wisconsin Supreme Court has held, however, that the doctrine does not compel a complete disassociation of the branches. *See, e.g.*, *Rules of Court Case*, 204 Wis. 501, 504, 236 N.W. 717 (1931). "[G]overnmental functions and powers are too complex and interrelated to be neatly compartmentalized." *Panzer v. Doyle*, 2004 WI 52, ¶ 49, 271 Wis. 2d 295, 680 N.W.2d 666 *abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408. Accordingly, the separation of powers doctrine is not strict and absolute, but rather envisions a system of separate but interdependent parts of government, reciprocally sharing some powers while jealously guarding the autonomy of certain others. *State ex rel. Friedrich v. Circuit Court for Dane Cty.*, 192 Wis. 2d 1, 14, 531 N.W.2d 32 (1995) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

In determining whether a statute unconstitutionally infringes upon the power of a separate branch, the court must first consider whether the subject matter of the challenged statute falls within any exclusive core powers constitutionally granted to the other branch. *See State v. Horn*, 226 Wis. 2d 637, 644-45 594 N.W.2d 772 (1999). If the power in question is an exclusive one, any intrusion upon it is invalid. *Id.* at 645. If the statute occupies a zone of power shared between the Legislature and another branch, the statute will be invalidated if the party challenging the statute proves beyond a reasonable doubt that the statute unduly burdens or substantially

interferes with the constitutional powers of the other branch. *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 546, 576 N.W.2d 245 (1998).[4]

A student of the law in this area easily recognizes that courts have applied two different approaches when determining whether a statute unconstitutionally infringes upon the power of a separate branch. A formalist approach is used when the constitution clearly commits a function or duty to a particular branch, while a functional approach is used when the constitutional text is unclear. Under a functional approach, the analysis focuses on the likelihood that one branch of government will impair another branch's essential powers. Accordingly, this court has endeavored to apply a "functional approach" in analyzing plaintiffs' claims.

Although the powers are shared, it does not mean that boundaries are unimportant. The observation made by James Madison over two centuries ago is still universally accepted.

> The accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.

The Federalist No. 47 (J. Madison).

The parties in this case battle for control over the Attorney General's litigation powers. They also struggle to exert control over how the various administrative agencies perform certain tasks. The parties' arguments can largely be boiled down to two divergent views on the state's separation-of-powers doctrine. The legislative defendants believe that since the agencies are a creation of the Legislature, the agencies can be required to stay within whatever bounds the

[4] As set forth below in more detail, the ability to control litigation is the exclusive power of the executive branch. It is not shared with the legislative branch. Accordingly, Sections 26 and 30 are unconstitutional. However, even if I concluded the ability to control the litigation was a shared power, as further discussed below, these statutes impermissibly and unconstitutionally infringe on the function of the executive branch.

Legislature sets. The plaintiffs and the Governor take the view that these administrative bodies are part of the executive branch,[5] a branch that the Governor is constitutionally the head of.

2. What the Framers of Wisconsin's Constitution Would Have Understood When It Was Proposed and Ratified.

So which branch of government rightfully speaks for the State of Wisconsin in court? And who has control over the work done by these administrative agencies? A brief review of Wisconsin history sheds some light on what our founding fathers had in mind when they created our state government. History not only teaches context, but according to our constitutional analysis, guides the court today in the proper application of these constitutional principles.

> The government of the state of Wisconsin is divided into four departments: legislative, executive, administrative[6] and judicial. This is one more department than is found in the government of the United States. In that the administrative is not separated from the executive, as it is in the state government.
>
> The legislative department is the most important, because it makes the laws which are acted on by the other departments, and because, to a considerable extent, by those laws, it creates offices and confers powers upon them.
>
> The Legislature is divided into two houses, in accordance with the universal practice of the English-speaking peoples, one house being a check upon the other, to prevent hasty or unwise

[5] Sections 15.001(2)(b) and (c) of the Wisconsin Statutes make the administrative agencies part of the executive branch.

[6] In 1886, the "administrative department" of state government was made up of officers and boards. Article VI, § 1 created the following Officers: Secretary of State, Treasurer, Attorney General, and Article X, § 1 created the State Superintendent. As of 1886, the Legislature created the following additional officers by statute: the Railroad Commissioner, Insurance Commissioner, and Commissioner of Labor Statistics. The Regents of the University of Wisconsin was also part of this "administrative department" along with the Commissioner of Public Lands, the Board of Regents of Normal Schools, the State Board of Charities and Reforms, the State Board of Health and Vital Statistics, the Commissioner of Fisheries, the Board of Immigration and the State Board of Supervision of Wisconsin Charitable, Reformatory and Penal Institutions.

> legislation; and the governor with his veto being a check upon both . . . .
>
> The executive power is vested in one man rather than in a committee or board, because experience has shown that one man who has the whole responsibility will be more efficient in carrying out the laws than several together would be. When laws are to be made, it is better to have them considered by a number of persons, so as to get the wisdom of all. But when laws are to be enforced, it is better to give all the responsibility to one man, so that what is to be done can be done speedily and thoroughly. Wisdom is needed in making the laws, and that is secured by having a large Legislature; but energy is needed in carrying out the laws, and that is secured by having a single executive.

Albert Orville Wright, An Exposition of the Constitution of the State of Wisconsin 58, 86 (Madison, Wis., Midland Publ'g 1885).

From its inception, our founding fathers drafted a constitution that created a "department" of state government that presumably, they thought, optimistically, would operate in an entirely benign administrative fashion. The concept of this "fourth" department is partly explained by Fred L. Holmes in his treatise on the state's first constitutional convention in 1846.

> Compared with the vast political, social, and economic questions with which the state is now called upon to deal through its various administrative offices, the powers of the administrative department in the proposed constitutions were indeed meagre, but in advance of the New York idea. The suggestion seems to have come from the Pennsylvania constitution of 1838, and a great portion of its provisions in this regard was copied. The article provided for a secretary of state, a treasurer, and an attorney general.

Fred L. Holmes, First Constitutional Convention in Wisconsin 236-37 (Madison, Wis., State Historical Soc'y of Wis. 1906).[7]

[7] Holmes believed that portions of the Wisconsin Constitution were copied from the Pennsylvania one. Whether the Pennsylvanian Attorney General possesses common-law powers is unclear. In 1936, the Pennsylvania Supreme Court concluded that the Attorney General did have the common-law power to supersede a district attorney. *See Commonwealth ex rel. Minerd v. Margiotti*, 325 Pa. 17, 30–31, 188 A. 524 (1936) ("We conclude from the review of decided cases and historical and other authorities that the Attorney General of Pennsylvania is clothed

Our founding fathers created a fourth department, in addition to the usual three branches. At statehood, it was originally understood that the separate administrative department would operate outside the direct control of the Legislature.

> In most of the States only three departments of government – legislative, executive and judicial are provided for; but the Constitution of Wisconsin names a fourth – the administrative. This department is directly connected with the executive department in the character of its work, and no special gain is realized by making the separation.

James Alva Wilgus, The Government of the People of the State of Wisconsin 58 (Phila., Pa., Eldredege & Brother 1897).

In conclusion, the words in our constitution, according to their plain meaning and when construed according to how the framers originally understood them, provides for a fourth department serving this administrative function, and are made part of the executive branch. As such, these administrative offices became part of the executive branch and serve the people of this state under the supervision of the Governor.

IV. Quorum, Bicameral Passage and Presentment Generally

Before turning to a more in-depth analysis of how the challenged provisions affects the executive branch, the plaintiffs offer other provisions of the Wisconsin Constitution in support of their argument that this court should find some of the challenged provisions unconstitutional.

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with the powers and attributes which enveloped Attorneys General at common law[.]"). But in 1978, the supreme court did a *volte-face*, concluding that no such authority existed at common law. *See Commonwealth v. Schab*, 477 Pa. 55, 60, 383 A.2d 819 (1978) ("[w]e find the reasoning in this line of decisions to be erroneous, and therefore they should not be controlling here."). It is unclear whether the lack of the power to supersede a district attorney at common law means that that the Pennsylvanian Attorney General has no common-law powers at all. An analysis of whether the Wisconsin Attorney General has common-law powers is beyond the scope of the present motion. The Wisconsin Supreme Court has concluded that the Attorney General has none. *See State v. City of Oak Creek*, 2000 WI 9, ¶ 21, 232 Wis. 2d 612, 605 N.W.2d 526 ("we reiterated that in this state the attorney general has no common-law powers or duties.") (citation and internal quotation marks omitted).

The parties do not dispute that the constitution limits the Legislature generally in its lawmaking function to act with a quorum, pass legislation by both chambers, and present the passed bill to the Governor for signature, and if applicable, consider whether to override his or her veto.

The legislative defendants do not argue that the challenged statutory provisions contain a process of legislative review consistent with a quorum, bicameral passage and presentment. On the contrary, admitting that they do not, the legislative defendants argue that there are two exceptions to this more rigid and formalistic governmental process. First, they argue that the Wisconsin Supreme Court in *Martinez v. Dep't of Indus., Labor & Human Relations* 165 Wis. 2d 687, 691, 478 N.W.2d 582 (1992), acknowledged and approved that certain acts by the Legislature could be undertaken in the absence of a quorum, bicameral passage and presentment. Second, the legislative defendants cite *J. F. Ahern v. State Bldg. Comm'n*, 114 Wis. 2d 69, 107, 336 N.W.2d 679 (Ct. App. 1983), for the proposition that other governmental acts can be done by committee or commission without quorum, bicameral passage and presentment.

What *Martinez* actually held and the particular circumstances outlined in *Ahern* are discussed below. For some of the challenged provisions, it is the opinion of this court that the exceptions stated in *Martinez* and *Ahern* do not apply, and so, in the absence of bicameralism and presentment, these statutes violate the Wisconsin Constitution.

A. The Legislature's Power to Avoid Bicameralism as Discussed in *Martinez*

In *Martinez*, the Wisconsin Supreme Court upheld the constitutionality of a statute that allowed a legislative committee to suspend an administrative rule temporarily, pending legislative review and presentment of legislation to the governor. 165 Wis. 2d at 691. *Martinez* dealt with an earlier version of the legislative-review-after-promulgation statute, Wis. Stat. § 227.26. Under that statute, the Joint Committee for Review of Administrative Rules could suspend a rule by a majority vote. *Id.* at 699. But if the joint committee chose to do so, the joint

committee had a month to introduce a bill to repeal the rule in both houses of the Legislature. *Id.* 699-700. Passage of at least one of the bills through both houses meant that the repeal bill would be presented to the Governor. *Id.* The Governor would then sign or veto the bill. *Id.* Failure to secure passage of a repeal bill through both houses and obtain the Governor's signature meant the rule would go back into effect, and the joint committee would be prohibited from suspending the rule again. *Id.*

The inescapable conclusion from *Martinez* is that the Legislature is prohibited from suspending a properly promulgated rule without subsequently convening a quorum, passing a bill in both chambers, and presenting it to the Governor for his or her signature. In other words, *Martinez* prohibits a committee of the Legislature from permanently voiding, vacating, or repealing a properly promulgated administrative rule.

The legislative defendants argue that *Martinez* provides another alternative. They read *Martinez* to condone the constitutionality of oversight by legislative committees under certain circumstances.[8] This court respectfully disagrees with the legislative defendants' analysis of *Martinez* and concludes that the *Martinez* holding does not serve to relieve the Legislature of the constitutional requirement of quorum, bicameral passage and presentment as set forth in parts of the statutes promulgated by Act 369. Therefore, this court concludes that the plaintiffs are reasonably likely to prevail on establishing that section 64 of Act 369—which permits the multiple suspension of a properly promulgated administrative rule—is unconstitutional.

In *Martinez,* the supreme court ultimately held that the legislature's Joint Committee for Review of Administrative Rules' (JCRAR's) suspension power is delegated to it pursuant to

[8] "We agree with the attorney general's statement that 'the Legislature could empower itself or a committee of its members to affirm or set aside an agency's rule if the Legislature or the committee were subject to proper standards or safeguards.'" 165 Wis.2d at 701 (citing 63 Op. Att'y Gen at 162).

legitimate legislative standards, and, furthermore, concluded that there were "sufficient procedural safeguards to prevent unauthorized decisions by the committee." *Id.* at 702. The standards the court found adequate were set forth in Wis. Stat. § 227.19(4)(d), the legislative-review-after-promulgation statute, and the temporary suspension of the rule did not violate bicameral passage and presentment because the suspension was only temporary. Formal bicameral enactment along with executive action was required to make the suspension permanent. *Martinez* clearly holds that a joint committee of elected representatives may temporarily suspend a rule for a statutorily prescribed reason and after holding a public hearing and subsequent bicameral legislative action along with executive review; the temporary suspension can be made permanent.

The legislative defendants argue *Martinez* goes further than allowing the legislature to temporarily suspend rules. Instead, they argue that the case allows multiple suspensions. More incredibly, at oral argument, the legislative defendants argued that the legislature could constitutionally suspend a rule indefinitely, by stringing together multiple suspensions *ad infinitum*. According to the legislative defendants, "[u]nder *Martinez*, the constitutional question is not presentment, bicameralism or quorum, but whether the legislative committee is subject to proper standards or safeguards." Dkt. 83, at 15. The plaintiffs, the Governor, and the Attorney General disagree and argue the legislative defendants have misinterpreted *Martinez*. The answer to this dispute requires a thorough and careful consideration of the language in *Martinez*.

1. The Attorney General's Original Advice

What the supreme court acknowledged in *Martinez* can only be understood by examining the three prior Attorney General opinions. In his opinion, (cited by the Legislative defendants),

Attorney General Robert Warren[9] answered the State Assembly's three questions. He stated that there is no distinction between administrative rules and law. "[I]f an administrative rule is properly adopted under these criteria and is within the power of the Legislature to delegate there is no material difference between it and a law." 63 OAG 161. Attorney General Warren answered the second question and concluded that the Legislature cannot repeal an administrative rule by joint resolution if that rule was enacted. The Attorney General stated that in coming to that conclusion he relied on two earlier Attorneys General's opinions, 43 OAG 350 (1954) and 52 OAG 423 (1963).

In 43 OAG 350, Attorney General Vernon Thompson advised the Legislative Council that repeal of administrative rules by joint resolution violated the Wisconsin Constitution. It can reasonably be assumed that the language in 63 OAG 159 comes from a discussion on page 352 in 43 OAG 350. There, Attorney General Thompson opined that possibly the Legislature could create a new independent state agency bound by prescribed standards which could then review the rules promulgated by other agencies. Because, theoretically, this super-agency would not be the Legislature, this process could avoid the requirement of bicameral legislative action and executive review.

Nine years later, in 1963, Attorney General George Thompson came to a similar conclusion to a similar question. This time, Attorney General George Thompson advised the State Assembly that a proposed law empowering the committee for review of administrative rules the power to void another agency's rules would be unconstitutional. 52 OAG at 423. Explaining himself, the Attorney General wrote:

> In a 1954 opinion it was concluded that a proposal for the repeal of administrative rules by joint resolution of the Legislature would be

[9] The principle draftsperson of the opinion was Assistant Attorney General Chuck Hoornstra.

> invalid. 43 OAG 350. It was there reasoned, that since 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. Since Art. IV, sec. 17, of the Wis. const., requires that any legislative act which constitutes law must be enacted by a bill and Art. V, sec. 10, provides that any bill must be presented to the governor for approval or disapproval, the proposal was stated to be invalid as violative of both said constitutional provisions.

Id. at 424.

Tellingly, the Attorney General concluded: "[g]enerally, the principal purpose and function of a legislative committee is to make necessary investigations for the ascertainment of such facts as are a necessary predicate for the enactment of law." *Id.* at 424-25. Presumably, this meant that such committees did not themselves make law, but assisted the Legislature draft laws which if passed, were then presented to the Governor. *Id.*

Nowhere in the three opinions, by three different Attorneys General, was there any reason to conclude that any of them believed that the Wisconsin Constitution allowed a committee in the Legislature to repeal or repeatedly suspend a duly promulgated administrative rule. The only reasonable conclusion from reading these three interconnected opinions was that possibly the Legislature could create a "super-agency" that performed an administrative function of reviewing administrative rules before formal promulgation. In that fashion, these Attorneys General thought bicameralism and presentment were not required because the "super-agency" acted before the rules became law.

2. The *Martinez* Court's Reliance on 63 Op. Att'y. Gen 159

When the supreme court stated that it agreed with the Attorney General's quotation at 63 OAG at 162,[10] it could not have intended to create an exception to its underlying holding that a

[10] Nowhere on page 162 are the words quoted in the court's decision. On page 163, there are these words but not in the exact way set forth in the opinion. ("and" as opposed to "or".)

temporary suspension could not be permanent without legislative action. The language quoted by the supreme court was preceded in the Attorney General's opinion, with the preface: "As concluded in my answer to your third question." The third question was whether the Legislature by law could authorize the Legislature by joint resolution to suspend or revoke an administrative rule." The Attorney General said "no." If this was allowed, the Attorney General opined that it would unconstitutionally encroach on the executive branch of the government.

Attorney General Warren also wrote:

> I have given consideration to the argument that the Legislature could make such rule-making power contingent upon approval by some body either as a condition precedent or subsequent, and that such body might be the Legislature acting by joint resolution. On this argument the power given to the Legislature by joint resolution would not be to "suspend or revoke" an administrative rule, but would be to "affirm or set aside" such rule as a super agency, as it were, or as another level of administrative review. Such affirmance or setting aside would not be in the nature of voiding a law, as is the case with suspension or revocation, but would be in the nature of a quasi-judicial determination of the validity of an administrative rule as a correct or incorrect interpretation or application of the relevant enabling legislation.
>
> My predecessor dismissed this possibility because such a reviewing agency would not be acting pursuant to ascertainable standards. 43 OAG at 352. I agree with his analysis to the extent such a delegation would not restrict the Legislature to act pursuant to such standards. I consider, however, the possibility of a law delegating such power but providing that its exercise be pursuant to proper standards. The question facing the Legislature as such a reviewing agency would not be the policy of the enabling law or the policy of the administrative rule, those questions being not at all delegable, but the correctness of a particular administrative rule as an interpretation or application of established legislative policy under standards already legislated.

In trying to untangle the supreme court's misquotation of the Attorney General, it should be noted that the supreme court's discussion of this language was not necessary to the resolution of the issue that was presented to the court. See *American Family Mut. Ins. Co. v. Shannon*, 120

Wis.2d 560, 565, 356 N.W.2d 175 (1984), ("A dictum is a statement not addressed to the question before the court or necessary for its decision"). I do not agree with the claim by the legislative defendants made during oral argument that the one sentence on page 701 articulates any test. It seems nothing more than an aside, where the court acknowledges the earlier opinions of the Attorneys General. After all, the rule being challenged provided for bicameral legislative action and executive review. For whatever reason, the court in *Martinez* seemed to note, in passing, an agreement with the opinion of the Attorney General in 63 Op. Att'y Gen 159 at 163.

The appellate briefs filed in the *Martinez* case show that only the lawyers for the Joint Committee for Legislative Organizations (JCLO) and the Joint Committee for Review of Administrative Review (JCRAR) cited 63 Op. Att'y. Gen 162. In its appellate brief the JCLO/JCRAR faulted the lower Court of Appeals in *Martinez* for concluding that the Legislature cannot share rulemaking power with the administrative agencies. The JCLO/JCRAR argued in its brief to the supreme court that the court of appeals "misread" the Attorney General's opinion. The JCLO/JCRAR argued that a "correct" interpretation of the Attorney General's opinion was "a legislative committee could not suspend administrative rules if the committee were not acting pursuant to ascertainable standards subject to judicial review, but that 'Legislature could empower itself or a committee of its members to affirm or set aside an agency's rule if the Legislature or the committee were subject to proper standards and safeguards. Under such standards and safeguards, the Legislature or a committee of its members could affirm or set aside an administrative rule in view of changing circumstances, new knowledge, or simply as a reviewing agency examining old knowledge and circumstances in the context of established statutory policy.'" (quoting 63 Op. Att'y Gen. at 163).

A careful reading of *Martinez* and the opinions of the three Attorneys General, combined with a review of the briefs submitted to the supreme court in *Martinez,* leads this court to reject the legislative defendants' expansive interpretation of the *Martinez* holding. In this court's opinion, *Martinez* upheld the ability for a temporary suspension of a rule by a legislative committee because the suspension was temporary and in accordance with the process set forth in the statutes.

B. The Supreme Court's Interpretation of the Legislature's Power to Avoid Bicameralism Discussed in *Ahern*

The legislative defendants remind this court that not all checks against agency actions require bicameralism and presentment. In *J.F. Ahern*, the court of appeals held that the legislature's empowerment of a legislative committee—the Wisconsin Building Commission[11]—did not violate separation of powers. After struggling to characterize one part of the Commission's power "legislative" and another "executive," the court observed:

> The commission's apparent ability to exclude the executive branch from exercise of its own powers does not, however, necessarily violate the separation doctrine in this state. The purpose of the doctrine is to prevent concentration of unchecked power in the hands of any one branch. Accordingly, if the executive branch can check the commission's exercise of executive power, no violation of the separation doctrine exists.

[11] According to 2017-2018 Wisconsin Blue Book, the State of Wisconsin Building Commission coordinates the state building program, which includes the construction of new buildings; the remodeling, renovation, and maintenance of existing facilities; and the acquisition of lands and capital equipment. The commission determines the projects to be incorporated into the building program and biennially makes recommendations concerning the building program to the legislature, including the amount to be appropriated in the biennial budget. . . . All transactions for the sale of instruments that result in a state debt liability must be approved by official resolution of the commission. The eight-member commission includes three senators and three representatives. Both the majority and minority parties in each house must be represented, and one legislator from each house must also be a member of the State Supported Programs Study and Advisory Committee. The governor serves as chair.

> The power of the Building Commission over construction contracts is subject to an absolute check exercisable by the governor through another part of the statutes.

J.F. Ahern, 114 Wis. 2d at 107 (citation and internal quotation marks omitted).

At oral argument, the legislative defendants argued the *J.F. Ahern* decision provided better support for the defense of the changes to the law than *Martinez*. But there is a slight problem with that argument. *J.F. Ahern* was an earlier decision by the court of appeals. *Martinez* came later and was decided by the supreme court. The only nod that the supreme court gave to *J.F. Ahern* was in footnote 13. As such, *J.F. Ahern* can hardly be read to reach beyond the holding in *Martinez.*

The real contribution of *J.F. Ahern*, then, is that, when courts use the functional approach to examine the relationship between the branches of government, the allocation of power cannot be said to upend the constitutional requirement of balanced and shared power when there is "absolute check exercisable by the governor through another part of the statutes," *id.* at 107. Thus, the inquiry below is to inquire what power does the executive branch have in exercising a check on the legislative branch. Because there is none, *J.F. Ahern* contributes little to the legal question now before this court.

V. Application of These Constitutional Principles to 2017 Act 369, Sec. 64

As previously noted, section 64 of Act 369 gives the JCRAR [12] the power to suspend rules multiple times. *See* Wis. Stat. § 227.26(2)(im) ("[T]he committee may act to suspend a rule

[12] According to the 2017-2018 Wisconsin Blue Book, under pre-Act 369, the Joint Committee for Review of Administrative Rules must review proposed rules and may object to the promulgation of rules as part of the legislative oversight of the rule-making process. It also may suspend rules that have been promulgated; suspend or extend the effective period of emergency rules; and order an agency to put policies in rule form. Following standing committee review, a proposed rule must be referred to the joint committee. The joint committee must meet to review proposed rules that receive standing committee objections, and may meet to review any rule received without objection. The joint committee generally has 30 days to review the rule, but that

as provided under this subsection multiple times."). Neither *Martinez* nor the Attorney General's prior opinions addressed this particular scenario. Setting aside the fact that the court in *Martinez* approved the Attorney General's statement on page 162 and that the quote is found on page 164, the clear indication is that whatever the Attorney General was thinking, it was not that the Legislature could suspend a rule multiple times and absolutely not what the legislative defendants argued during oral argument, that the total effect of multiple suspensions could result in a suspension of indefinite length. After all, Attorney General Warren was clear about one thing:

> The Legislature is not competent to empower itself by joint resolution, a committee of its members or an agency to be the final arbiter of the judicial question whether a rule of an agency is valid under the proper criteria. The Legislature would usurp judicial prerogatives were it to empower any body other than a court the final authority to determine the validity of an administrative rule.
>
> Therefore, I conclude that no law can empower the Legislature to suspend or revoke, by joint resolution, an administrative rule on policy grounds. On the other hand, I conclude that the Legislature can be empowered to affirm or set aside an administrative rule by joint resolution if: (a) the delegation restricts the Legislature to application of the standards already established by the relevant

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period may be extended in certain cases. The joint committee may concur or nonconcur in the standing committee's action or may on its own accord object to a proposed rule or portion of a rule. If it objects or concurs in a standing committee's objection, it must introduce bills concurrently in both houses to prevent promulgation of the rule. If either bill is enacted, the agency may not adopt the rule unless specifically authorized to do so by a subsequent legislative enactment. The joint committee may also request that an agency modify a proposed rule. The joint committee may suspend a rule that was previously promulgated after holding a public hearing. Within 30 days following the suspension, the joint committee must introduce bills concurrently in both houses to repeal the suspended rule. If either bill is enacted, the rule is repealed and the agency may not promulgate it again unless authorized by a subsequent legislative action. If both bills fail to pass, the rule remains in effect and may not be suspended again. The joint committee receives notice of any action in a circuit court for declaratory judgments about the validity of a rule and may intervene in the action with the consent of the Joint Committee on Legislative Organization. The joint committee is composed of five senators and five representatives, and the membership from each house must include representatives of both the majority and minority parties.

> enabling law, and (b) the Legislature's joint resolution determination is subject to judicial review at the instance of a party with sufficient standing.

In answering the fourth question, the Attorney General came back to the central question presented and stated:

> The fourth question is: "May the Legislature by joint resolution or law authorize a committee or joint committee of the Legislature to suspend or revoke an administrative rule?" Because of the analysis above, the answer to this question must be no. No valid administrative rule can be suspended or revoked by the Legislature by joint resolution or by a committee or joint committee of the Legislature. Such a rule, however, could be subject to affirmance or setting aside as a matter of administrative review by such committees acting pursuant to the standards and qualifications discussed in my answer to the third question.

The question remains whether the current legislative process with the addition of section 64 of Act 369 still has sufficient "necessary proper standards and qualifications."[13] The answer is that it does not and therefor fails to pass constitutional muster. To be sure, the bicameral and presentment provisions of the legislative-review-after-promulgation statute, Wis. Stat. § 227.26, still exists. Even after the passage of Act 369, the JCRAR still must pass a repeal bill in both houses of the Legislature and obtain the Governor's signature before a rule is repealed. *See* Wis. Stat. § 227.26(2)(a)-(i). But even with this existing process, the practical effect of the "multiple times" provision pushes this change beyond what was approved in *Martinez*. There are no standards or qualifications in the statute pertaining to the length of the total period of suspension. Nowhere in the new version of the statute is there any guidance on what might cause a rule to be

[13] I do not agree with the argument that a circuit court judge must blindly follow the supreme court's opinion in the face of a real challenge as to accuracy of its quotations or its meaning. This court is bound by the decisions of the supreme court. How to interpret those decisions is simply the everyday function of the trial judge. Needless to say, because counsel for the legislative defendants argued that there were both standards and qualifications the dispute over whether the test was conjunctive or disjunctive is academic.

serially suspended more than once. The absence of any standards or qualifications on the number and nature of the multiple suspensions is constitutionally problematic. While the committee is suspending the rule, multiple times, it is doubtful that any question regarding its suspension would be ripe for judicial review. The JCRAR would not have made a final decision subjecting itself to ordinary judicial review and the absence of clear legislative language would likely make a writ of mandamus improper.

The plain meaning of section 64, then, is just that—an administrative rule could be suspended, and re-suspended limitless times. A suspension of an indefinite length is essentially revocation. On that, the *Martinez* court was clear: neither the Legislature nor a committee has that power and thus it is reasonably probable that the plaintiffs will be able to prove this section unconstitutional beyond a reasonable doubt.

Similarly, the *Ahern* decision gives the legislative defendants no safe harbor. Act 369 is different than the process and work of the State Building Commission. Act 369 does not include any provision requiring the approval of the Governor. The Governor has no role in the number or length of these multiple suspensions. Instead, what executive authority that exists requires officials in the administrative agencies to be subordinate to this legislative committee. The legislative committee's decision is otherwise not likely subject to judicial review and explicitly outside the review by the executive branch. One could scarcely design a better way to concentrate the power to suspend the law outside either of the two other branches of state government.

VI. Application of These Principles to Sections 5, 26, 30, and 97 of Act 369

Plaintiffs challenge the provisions of the Act 369 that alter the authority of the Attorney General to litigate cases. The challenged provisions largely limit the Attorney General's ability

to litigate cases by, first, creating a right for the Legislature (through its various committees) to intervene in certain types of cases, and second, by requiring the Attorney General to seek approval from the relevant legislative committee before discontinuing or compromising a case. Approval from the Legislature, (or committee), is required even if the Legislature, (or committee), does not intervene as a matter of right.

The challenged provisions involving the right to intervene and the right to decide whether civil cases are compromised raise three separate questions:

1. What inherent decision-making power does the Attorney General have when he acts as the attorney in the case?
2. If the power to compromise or to discontinue a case is not inherent in the power of the State's lawyer, to whom do those powers default?
3. Does the right to intervene in litigation, (as opposed to the power to make decisions), intrude on either the power of the executive branch to enforce the law?

A. The Right to Discontinue or Compromise Civil Lawsuits.

In this case, Act 369 does not necessarily prevent the Attorney General from initiating or defending cases. But once a case is brought, the Act curtails the Attorney General's ability to discontinue of compromise the case. Section 26 of the Act prevents the Attorney General from discontinuing or settling "[a]ny civil action prosecuted by the [department of justice]" without the approval of the Legislature. Wis. Stat. § 165.08. And section 30 prohibits the Attorney General from independently discontinuing or compromising a case that involves injunctive relief, a proposed consent decree, or challenges the validity of a state statute. *See id.* 165.25(6)(a)1.

Before Act 369, the Attorney General's authority to discontinue and compromise cases was largely based on who directed the Attorney General to initiate the case. If the Attorney

General brought the case "by direction of any officer, department, board, or commission," the case was "compromised or discontinued when so directed by such officer." Wis. Stat. § 165.08(1) (2015-2016). When the Attorney General brought the case on the Department of Justice's own "initiative" or "at the request of any individual," the case was "compromised or discontinued with the approval of the governor." *Id.* When the Attorney General was representing the state as a defendant, the case could be discontinued or compromised when "the attorney general determine[d] [it] to be in the best interest of the state." *Id.* § 165.25(6) (2015-2016).

Act 369 took the power to discontinue or compromise civil cases away from the Attorney General and gave it to either the Senate, Assembly, the Senate/Assembly Committee on Organizations or to the Legislature itself. In cases where the Attorney General is bringing the case—either by the direction of any officer, individual, or through the Department of Justice's own initiative—Section 26 of the Act eliminates the necessary approval of "such officer" and the Governor and replaces it with the Legislature's. Wis. Stat. § 165.08(1). Likewise, in cases where the Attorney General is defending the state, section 30 largely prohibits the Attorney General from discontinuing or settling the case before legislative approval. *See id.* 165.25(6)(a)1.[14] Legislative approval either comes from the Legislature acting through the Joint Committee on Finance or the Legislature acting as intervenor in the case. *See id.* §§ 165.08(1), 165.25(6)(a)1.

1. The Power to Make Decisions Generally

The Attorney General is Wisconsin's constitutional officer "elected for the purpose of prosecuting and defending all suits against the State." *Orton v. State*, 12 Wis. 509, 511 (1860).

[14] The Attorney General still has the authority to independently discontinue or compromise cases that he/she is defending. Wis. Stat. § 165.25(6)(a)1. But the Attorney General must seek legislative approval to discontinue or compromise an action that is one for injunctive relief, a proposed consent decree, or challenges the validity of a state statute. *See id.*

Under Wisconsin's constitution, "the powers of the attorney general are strictly limited." *State v. City of Oak Creek*, 2000 WI 9, ¶ 19, 232 Wis. 2d 612, 605 N.W.2d 526. The Wisconsin Constitution creates the office of attorney general and states that "[t]he powers [and] the duties . . . of the . . . attorney general shall be prescribed by law." Wis. Const. art. VI, § 3. "[B]y law" has been interpreted to mean statutory law. *Id.* ¶ 24. The Attorney General, then, has no common-law powers or duties. *Id.* ¶ 21. The lack of common-law duties means that the Attorney General has no "inherent power to initiate and prosecute litigation intended to protect or promote the interests of the state or its citizens." *Id.* ¶ 22.

According to well established case law, the Legislature is permitted to proscribe the Attorney General's duties. Just like the JCLO and JCRAR argued in their brief to the supreme court in *Martinez*, presumably the legislative defendants could similarly argue that the Legislature may:

- Withdraw powers granted to the Attorney General; and
- Prescribe the procedure through which granted powers are to be executed.

Notwithstanding the fact that the Legislature defines the power of the Attorney General, the Legislature cannot legislatively dissolve the Office of the Attorney General and deny him/her what the constitution clearly grants unto him/her: to be the lawyer for the State of Wisconsin. The legislative defendants made that argument during oral argument. It was not briefed. There are no published cases that support it. Indeed, the legislative defendants conceded that only the Attorney General may represent the State of Wisconsin. Constitutionally, the Legislature may redefine what power the Attorney General has, but it cannot legislatively prevent him or her from doing what the legislative defendants concede is his sole province: to represent and be the lawyer for the state, when that representation is authorized by law.

By law, the Attorney General can be told what cases he or she can bring or defend, even if the Attorney General had a long history of litigating those cases. *See, e.g., In re Estate of Sharp*, 63 Wis. 2d 254, 263, 217 N.W.2d 258 (1974) (holding that the Attorney General lacked statutory authority to intervene in estate proceedings). But Act 369 does something different. It does not define what types of cases the Attorney General may bring or defend. Instead, it changes the very meaning of what it means to be a lawyer. These new statutes effectively shift the lawyer's obligation to the State of Wisconsin and give the obligation to the legislative branch. Act 369 requires the Attorney General to seek approval from members of the Legislature (as intervenors or in committee) when he or she is performing his/her official duties as the state's lawyer. *See* Wis. Stats. §§ 165.08(1), 165.25(6)(a)1. (Requiring the Attorney General to seek approval of the Legislature before discontinuing certain types of cases).

The effect of the challenged provisions is a question not previously decided by any Wisconsin appellate court. For the reasons stated below, this court concludes that the shift in power caused by the new statutes, unconstitutionally undermines the Attorney General's ability to ethically act as the lawyer for the State of Wisconsin, as he/she was charged to do in the constitution and in accordance with state statutes.

2. Potential for Conflict

In defending the law, the legislative defendants did not address the possibility that in the future, the Committee on Assembly Organizations and Committee on Senate Organizations may both intervene in a case. Both are given the "right" to intervene. The question was discussed during oral argument and the legislative defendants did not see much problem with it. It is still unclear how it would work. If the chambers are controlled by different political parties, from whom should the Attorney General get approval? The new statute states the Attorney General

must get permission of "*an* intervenor." Wis. Stat. § 165.08(1) (emphasis added). But what if the two committees disagree? The statute does not state the Attorney General needs permission from all intervenors. If there are no intervenors, and the plan is to concede the unconstitutionality or "other invalidity" of a statute, apparently before seeking permission from the Joint Committee on Finance, the Attorney General must first get approval of the Joint Committee on Legislative Organizations. The end result is these statutes create considerable confusion with whom the lawyer should consult in prosecuting or defending a case.

Supreme Court Rule 20:1.2(a) states that a lawyer shall abide by a client's decision whether to settle a matter. The ABA comment to the SCR 20:1.13 recognized that "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context." What is clear, though, is that in any attorney-client relationship, there is only one client, even if that client is the government. No lawyer can effectively discharge his or her professional obligation if the lawyer is beholden to the demands of multiple people all claiming to simultaneously speak for the single client. When an officer, employee or other person associated with an organization acts in a way described in SCR 20:1.13, the rule directs the lawyer representing the organization to take steps which includes proceeding as reasonably necessary in the best interest of the organization. Ultimately, the lawyer should take direction from the "highest authority" in the organization. The "highest authority" is clearly not a legislative committee and not one or even both branches of the Legislature.

The common sense instilled in the language of SCR 20:1.13 applies to the Attorney General. All involved take an oath to serve the people of the State of Wisconsin. Every decision should be done with that in mind. Every lawyer's obligation is to the organization, (or here the

State of Wisconsin), and not to the whim of an individual officer or employee. But ultimately, just like private businesses, the "highest authority" must decide, and here, in government, that would be the Governor. So, even if the Attorney General does not retain the powers to be the lawyer for the State of Wisconsin and make decisions (which this court believes he does), that power would not come to rest in the legislative branch.

3. The Governor Retains the Power to Make Decisions in the Absence of the Attorney General.

This court agrees with the Governor on this part of his constitutional authority. In scrutinizing the changes made in the law, the question is not only how they affect the Attorney General to discharge his constitutional charge to represent the state, but rather, because the Attorney General is part of the "administrative department" assigned to the execute branch, whether the allocation of authority from executive branch to the legislative "unconstitutionality infringes upon [executive] power," see *Barland v. Eau Claire Cty.*, 216 Wis. 2d 560, 575, 575 N.W.2d 691 (1998).[15]

The Legislature "might" be able to strip the Attorney General of his power, but whether the Assembly/Senate/Legislature or the Governor assumes those powers is an entirely different question. As set forth below, giving the power to the legislative branch to make the decisions which should be made by the Attorney General, or in his absence, the Governor, violate the constitution's separation-of-powers doctrine. The Legislature has taken what rightfully belongs in the executive branch and unduly burdened or substantially interfered with the role and power vested in the executive branch.

[15] Presumably, the previous editions of the challenged provisions, Wis. Stats. § 165.08(1) and § 165.25(6)(a)1. (2015-2016), presented no separation-of-powers issues because the power to discontinue or compromise cases still resided with executive-branch officials.

4. The Language in the State Constitution and How it Was Originally Understood at the Time of Ratification as to Who Had the Power to Make Litigation-related Decisions

The Governor has cited historical authorities that the legislative defendants have yet to rebut. Dkt. 69, at 12-17. A contemporary dictionary at the time defined an "attorney general" as "an officer who conducts suits and prosecutions for the king, or for a nation or state, and whose authority is *general* ["having relation to all; common to the whole"] in the state or kingdom." *Webster's American Dictionary of the English Language*, Vol. I, 1828. The constitutional debates of the time—1846 and 1848—indicate that framers of Wisconsin "refused to confer the power of removal [of administrative officers] on the Legislature." Ray A. Brown, *The Making of the Wisconsin Constitution*, 1952 Wis. L. Rev. 23, 36. And "[t]he first Legislature that convened [in 1849] after the adoption of the Constitution enacted [] sec. 14.53(1) [Wis. Stat. § 165.25(1m)] which provides that the attorney general on request by the governor or either branch of the Legislature shall prosecute in behalf of the state[.]" *State v. Coubal*, 248 Wis. 247, 256, 21 N.W.2d 381 (1946). The 1849 statute also provided that "whenever [the Governor] receive[d] notice of the commencement of any suit" the Governor "shall inform the attorney-general thereof, and require [the Attorney General] to make every legal and equitable defense against such suit or proceeding." *Orton*, 12 Wis. at 511 (quoting R.S. 1849, c. 9, § 2).

The fact that the first Legislature enacted a statute providing that "the attorney general . . . shall prosecute in behalf of the state," *Coubal*, 248 Wis. 247, 256, and "make every legal and equitable defense against such suit or proceeding," *Orton*, 12 Wis. at 511 (citation omitted), indicates that at the time of ratification, the people of Wisconsin understood litigation to be a power exercised by the Attorney General. In short, the people of Wisconsin understood that the power to initiate and defend cases to be at the core of the Attorney General's authority.

5. The Institutional Powers of a Committee of the Legislature Are Limited and Ill-Suited to the Task of Making Litigation-related Decisions in Enforcing the Law.

In the absence of intervention, sections 26 and 30 of Act 369 give the power to make litigation decisions to the Joint Committee on Finance[16] or the Joint Committee on Legislative Organizations.[17] Neither of these two Joint Committees was previously charged with supervising state litigation and none of the matters generally assigned to them appear to pertain to issues

[16] According to the 2017-2018 Wisconsin Blue Book, the Joint Committee on Finance examines legislation that deals with state income and spending. The committee also gives final approval to a wide variety of state payments and assessments. Any bill introduced in the legislature that appropriates money, provides for revenue, or relates to taxation must be referred to the committee. The committee introduces the biennial budget as recommended by the governor. After holding a series of public hearings and executive sessions, it submits its own version of the budget as a substitute amendment to the governor's budget bill for consideration by the legislature. At regularly scheduled quarterly meetings, the committee considers agency requests to adjust their budgets. It may approve a request for emergency funds if it finds that the legislature has authorized the activities for which the appropriation is sought. It may also transfer funds between existing appropriations and change the number of positions authorized to an agency in the budget process. When required, the committee introduces legislation to pay claims against the state, resolve shortages in funds, and restore capital reserve funds of the Wisconsin Housing and Economic Development Authority to the required level. As an emergency measure, it may reduce certain state agency appropriations when there is a decrease in state revenues. . . . It includes members of the majority and minority party in each house. The cochairs are appointed in the same manner as are the chairs of standing committees in their respective houses

[17] According to the 2017-2018 Wisconsin Blue Book, the Joint Committee on Legislative Organization is the policy-making body for the Legislative Audit Bureau, the Legislative Fiscal Bureau, the Legislative Reference Bureau, and the Legislative Technology Services Bureau. In this capacity, it assigns tasks to each bureau, approves bureau budgets, and sets the salary of bureau heads. The committee selects the four bureau heads, but it acts on the recommendation of the Joint Legislative Audit Committee when appointing the state auditor. The committee also selects the director of the Legislative Council Staff. The committee may inquire into misconduct by members and employees of the legislature. It oversees a variety of operations, including the work schedule for the legislative session, computer use, space allocation for legislative offices and legislative service agencies, parking on the State Capitol Park grounds, and sale and distribution of legislative documents. The committee recommends which newspaper should serve as the official state newspaper for publication of state legal notices. It advises the Elections Commission on its operations and, upon recommendation of the Joint Legislative Audit Committee, may Units of State Government: Legislature investigate any problems the Legislative Audit Bureau finds during its audits. The committee may employ outside consultants to study ways to improve legislative staff services and organization. The ten-member committee consists of the presiding officers and party leadership of both houses

involving the application of the Wisconsin Constitution or the United States Constitution. Both Joint Committees are co-chaired by persons from each chamber appointed by the majority political party. Allocating to a decision-by-committee unnecessarily complicates the Attorney General's job to represent the State of Wisconsin and in his absence unreasonably intrudes on the Governor's job to see the laws passed by the legislature are properly and efficiently enforced.

B. Application of These Constitutional Principles to Act 369

If the Legislature disagrees with how the Attorney General is defending the validity of the state statute, the Legislature, or the Assembly or the Senate can now intervene as a matter of right and each of them can hire outside counsel. Wis. Stats. §§ 803.09(2m), 13.124. Under section 97, the Assembly/Senate/Legislature may intervene as a matter of right when the construction or the validity of a state statute is challenged. *Id.* § 803.09(2m).[18] Under section 3, the Speaker of the Assembly or the President of the Senate can hire outside counsel (i.e., counsel other than the Attorney General) when intervening. *Id.* § 13.124.[19] Obviously, the powers

[18] Other sections of Act 369 allow various other committees from the Legislature to intervene as a matter of right when the validity of a state statute is challenged. Section 5 permits the Committee on Assembly Organization, Committee on Senate Organization, and Joint Committee on Legislative Organization to intervene. Wis. Stat. § 13.165(1)-(3). Section 29 duplicatively provides that the Joint Committee on Legislative Organization can intervene. *Id.* § 165.25(1m). Section 28 allows the Joint Committee on Legislative Organization to intervene in cases on appeal or on remand. *Id.* § 165.125(1). Section 99 allows the Legislature to intervene as a matter of right on cases currently on appeal. *See id.* § 809.13.

[19] Under section 98, the Legislature is entitled to notice when the validity of a state statute is challenged. Wis. Stat. § 806.04(11). The Section further states that notice must be given when any party "challenges the construction … of a statute." The legislative defendants appeared to conceded that in most, if not all, enforcement actions, a defendant would challenge the construction of a statute arguing its inapplicability to him or her. These issues arise frequently in prison litigation. Although challenges to the constitutionality of a statute might be few, arguments over construction of a statute are commonplace. Accordingly, the obligation to provide notice will be a significant undertaking having consequences and cost, the least of which will be on how intervention at any stage of the litigation will undermine the trial court's ability to efficiently schedule cases.

retained by the Senate and the Assembly are different than those given to the three legislative committees mentioned in Acts 369 and 370, and accordingly, deserve a different constitutional analysis.

Plaintiffs argue that these amended provisions infringe on the executive branch's ability to take care that the laws be faithfully executed. In reply, the Legislative defendants repeatedly state that all they want is "a seat at the table." At first blush, what could be wrong with that? The Wisconsin Reports are filled with cases where a legislative committee has appeared as a party. But up until now, these governmental entities were either invited to state their position (on a motion to intervene), or were drawn in by being named a party.

It is axiomatic that there is only one State of Wisconsin. Although the powers of the Attorney General are set by the Legislature, the original version of the state's constitution was clear and unambiguous: "the attorney general is the lawyer for the state." No other attorney can claim that privilege unless it is given to him or her by the Attorney General himself. So when the Senate/Assembly/Legislature intervenes in a case "as a matter of right," who does the lawyer represent? Presumably it is the Assembly, or the Senate, the Legislature as a whole, or one of its committees.

The process of judicial review is not made better by hearing the parochial views of each of the participants in the legislative process. These institutions do not ordinarily have standing because of the nature of their organizations. The judicial branch interprets the law as written, not according to how the Assembly or Senate, or the Governor or any individual legislator personally intended. If allowed by the court to intervene, the intervenor becomes a full participant in the lawsuit and is treated as if it were an original party. *Kohler Co. v. Sogen Int'l Fund Inc.*, 2000 WI App 60. Generally, the question whether to allow intervention was focused

on what the intervenor had to offer and whether the intervenor's interest was adequately represented by one or more of the parties to suit. *See* Wis. Stat § 803.09(1).

The Assembly, Senate and Legislature are not allowed to tell the courts what a particular person intended when he or she voted for a particular bill. Members of the Senate and Assembly are not competent to state what the law means anymore than any other person. It is well settled in Wisconsin that a legislator cannot testify as to what the Legislature intended when it passed a particular statute or bill. *See Wis. S. Gas Co. v. Pub. Serv. Comm'n*, 57 Wis. 2d 643, 652, 205 N.W.2d 403 (1973). *State v. Consol. Freightways Corp.*, 72 Wis. 2d 727, 738, 242 N.W.2d 192 (1976); *Moorman Mfg. Co. v. Indus. Comm'n*, 241 Wis. 200, 208, 5 N.W.2d 743, 746 (1942)

Thus, as innocuous as wanting "a seat at the table" might seem, the question is for what purpose and when will these new parties join the case? The seat they might be given is never going to be occupied by a lawyer for the state. It is not going to be an invitation for the lawyer to tell the court what a legislator intended. This is because the legislative process is designed to make the individual intent of the particular legislators and the governor immaterial to the court's function of interpreting what the law means. The late Supreme Court Justice Scalia may be a controversial figure for some people, but his consistency on eschewing the fallacy of trying to discern legislative intent is legendary and quite possibly becoming the predominant view in the federal courts, at least when it comes to the suggestion that the legislative branch has something relevant to say in court.

Justice Scalia's textualist view was described by Atty. Kenneth Dorttzbach in a law-review article describing the judicial philosophy of Justice Scalia and the use of legislative history:

> By speaking out on the issue in 1987 and acting accordingly once he joined the Court, Justice Scalia sparked the resurgence of the

plain meaning rule and the rejection of the use of legislative history. After joining the Supreme Court he set a pattern of refusing to join in opinions which relied upon legislative history, instead choosing to write his own concurrences. Distrustful of legislative history, Justice Scalia borrowed the metaphor of Judge Harold Levanthal to describe the use of legislative history as "[t]he equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."

Justice Scalia has been joined by Justice Thomas, and to a great degree Justice Kennedy, in a general rejection of the use of legislative history. . . . Justice Scalia has not written a definitive exposition on his views of legislative history, but he has presented many pieces of his views in various Supreme Court decisions. He finds a number of problems with using legislative history. First, legislative history lacks legitimacy as it is not the law itself. Second, even if legislative history were legitimate, it is often prohibitively difficult to find a single true legislative intent by studying the records. Finally, even if one could find such an intent, legislative history is easily susceptible to manipulation by staff and lobbyists, and therefore it is untrustworthy.

According to Justice Scalia, the biggest problem with legislative history remains its lack of legitimacy. Scalia said it clearly in *Conroy v. Aniskoff*, "[t]he greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of Legislatures." It is the language of the statute itself which is the law. "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." Justice Scalia finds judges too often go beyond what is in the statute and ultimately enact the legislative history into law. The problem is that legislative history has neither been debated nor voted on by the Legislature nor signed into law by the executive.

Scalia agrees that the Court should enforce the intentions of the Legislature, but he disagrees over what should be done to enact those intentions. In *Pennsylvania v. Union Gas Co.*, Scalia stated:

> It is our task, as I see it, not to enter the minds of the Members of Congress-who need have nothing in mind in order for their votes to be both lawful and effective-but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.

> To give credence to the statements of individual legislators circumvents the entire legislative process[.] [In the words of Justice Scalia] [:] "An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed. Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral votes upon the text of a law and its presentment to the President."

Kenneth R. Dortzbach, *Legislative History: The Philosophies "of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 Marq. L. Rev. 161, 182–83 (1996) (citation and internal quotation marks omitted).

In conclusion, for any judge, (or lawyer), who agrees with Justice Scalia, giving the legislative defendants "a seat at the table" is a privilege of little value and quite possibly a mistake and likely to cause a significant delay in the processing of civil cases in the circuit court. The legislative defendants' lawyer cannot represent the State of Wisconsin. As set forth in this opinion, that lawyer cannot usurp the function of the executive branch to enforce the laws and control the decision of the Attorney General or in the absence of the Attorney General, the power of the Governor to see that the laws are fully and faithfully executed. And that lawyer is in no better position by virtue of his or her representation to tell the court what the assembly or senate meant when it passed a bill in its respective chamber. Some have said that these new statutes simply provide full employment for another set of lawyers to be paid for by the hardworking people of the State of Wisconsin to do nothing more than what the Attorney General is already required to do: represent the State of Wisconsin and let the court decide. However, all agreed during argument that this aspect is not relevant in examining the limits of authority under a separation-of-power analysis. The Legislature and the Governor, not the judicial branch, are tasked with deciding how to spend the state's money. I agree, however, with Justice Scalia's words and I apply his observation here: giving a seat at the table to the Senate or the Assembly is

a "frail substitute[] for bicameral votes upon the text of a law and its presentment to the [Governor]."[20]

As to the motion for a temporary injunction relating to intervention, however, I cannot say at this time that plaintiffs are reasonably likely to prove that the Senate's or the Assembly's power to intervene violates the Wisconsin Constitution. I have more questions than answers. I understand that the change is that which once was permissive, is now by right. The plaintiffs, (and the Governor), have not, in this court's opinion, adequately explained how to distinguish the points made above, with the fact that the Senate and the Assembly, and various committees, have been parties for many years in many other cases. In fact, in his brief, the Attorney General seems to concede that the Senate and Assembly should be allowed to intervene. *See* Dkt. 75, at 41 ("[a]nd even if members of the Legislature had not been named as defendants, they could (and surely would) have moved to intervene and defend Act 369. That is exactly how the system should work [when the Attorney General refuses to defend the validity of a state statute]."). I understand that the comment referenced permissive intervention, but the result is the same. [21]

[20] Perhaps lost in all the briefs is the prospect of further complication and confusion. Presently the Assembly and Senate are controlled by one party. Some day that might change. And when it does, the court will preside at a hearing where the constitutionality of the statute is at issue, and the Senate controlled by one party will argue one thing, the Assembly controlled by the other party will argue the opposite, and the Attorney General will discharge his or her role as the lawyer for the State of Wisconsin and possibly come up with his/her own remedy. The only person excluded from having a seat at the table is the Governor, the one person constitutionally obligated to apply and enforce the law.

[21] I accept that changing permissive intervention into intervention as a matter of right affects the power of the trial court judge to manage the case. Whether this change affects a core function of the judicial branch was not adequately addressed. Moreover, whether this change impermissibly and unreasonably intrudes on the judicial branch as a shared power, is even more unclear at this stage in the proceedings. The Governor has raised the question of the separation of power between the Legislature and the Judicial branch and the issue requires more thorough and thoughtful analysis.

Finally, the legislative defendants concede that sections 5 and 97 of Act 369, which give the Senate and Assembly the right to intervene in federal court is problematic under the Supremacy Clause in the United States Constitution. I agree. But the plaintiffs and Governor did not challenge them on this ground. The legislative defendants' attempt to characterize this clear language as simply indicating a policy preference that could be used in federal court on a motion to intervene is tenuous. My concerns notwithstanding, these issues were insufficiently developed at this stage to warrant a preliminary injunction. These issues can, and I am sure will, be litigated further as this case proceeds beyond this preliminary stage.

As to the motion for a temporary injunction relating to the requirement to get legislative approval, I can say, at this time, that plaintiffs are reasonably likely to prove that the Senate's or the Assembly's power to decide whether the State of Wisconsin should discontinue or compromise a case violates the Wisconsin Constitution. The power belongs to the Attorney General and alternatively, if not to him, then to the Governor, not the Legislature or any of its committees. And even if this was not the exclusive power of the executive, but instead shared, the way these new statutes operate unreasonably and unconstitutionally infringe on the executive branch's power to see that the laws are fully and faithfully executed.

VII. Analysis of Section 16 and 87 of Act 369 and Sections 10 and 11 of Act 370

Plaintiffs next challenge several provisions of Act 369 and 370 that regulate certain administrative-agency actions. Section 16 of Act 369 requires the Department of Administration to seek approval from the Joint Committee on Legislative Oversight before making changes to the security at the Capitol. Wis. Stat. § 16.84(2m). Section 87 of Act 369 requires the Wisconsin Economic Development Corporation to seek approval from the Joint Committee on Finance before designating a new enterprise zone. *See id.* § 238.399(3)(am)1. Section 10 of Act 370

requires the Department of Health Services to seek approval from the Joint Committee on Finance before submitting a request to the federal government for a "waiver or renewal, modification withdrawal, suspension, or termination of a wavier of federal law or rules or for authorization to implement a pilot program or demonstration project." *Id.* § 20.940.(2). And section 11 of Act 370 requires the Department of Children and Families to seek approval from the Joint Committee on Finance before reallocating public-assistance and local-assistance funds. *See id.* § 49.175(2)(a).[22] Plaintiffs contend that these provisions violate the bicameralism and presentment requirements of the Wisconsin Constitution.

Sections 87 of Act 369 and sections 10 and 11 of Act 370 require the Wisconsin Economic Development Corporation, Department of Health Services, and the Department of Children and Families, to submit a request to the Joint Committee on Finance before performing certain actions. Section 16 of Act 369 places a similar requirement on the Department of Administration. Those actions are, respectively, designating a new enterprise zone, submitting a waiver to the federal government for certain types of cases, reallocating public-assistance funds, and making changes to the security at the Capitol. *See* Wis. Stats. §§ 20.940(2), 49.175(2)(a), 238.399(3)(am)1, 16.84(2m).

The court agrees with plaintiffs that administrative rules have the force and effect of law. *See Burrus v. Goodrich*, 194 Wis. 2d 654, 662, 535 N.W.2d 85 (Ct. App. 1995). So any legislative action seeking to repeal the administrative rule requires bicameral passage and presentment of a new law—i.e., the passage of a bill. *See Martinez*, 165 Wis. 2d at 691, 699. But

[22] The Legislative defendants and the Governor state in their briefs that section 11 requires the Department of Workplace Development—rather than the Department of Children and Families—to seek approval from the Joint Committee on Finance. But as far as the court can tell, Act 370 did not change in the definition of "department" in the public-assistance chapter, Chapter 49, of the Wisconsin Statutes. The chapter defines "department" as the Department of Children and Families. *See* Wis. Stat. § 49.11(1e).

plaintiffs fail to address how the designation of a new enterprise zone, submission of a wavier to the federal government, the reallocating of public-assistance funds, or changes to security at the Capitol have the force and effect of law. If these agency actions—say, a change in the Capitol's security—*do not* have the force of law, it would seem odd to require the Legislature to undergo the process of passing a new law in order to check an agency's action. *Martinez* does not stretch that far. And at oral arguments, plaintiffs failed to shed any more light on these provisions. The court concludes at this time, that it cannot make the necessary finding that plaintiffs are likely to succeed on the claim that sections 16 and 87 of Act 369 and sections 10 and 11 of Act 370 violate the bicameralism and presentment requirements of the Wisconsin Constitution.

VIII. Analysis of Sections 31, 38, and 65-71 of Act 369 Dealing with Guidance Documents

Plaintiffs finally challenge Act 369's provisions regulating the creation and treatment of administrative-agency "guidance documents." Section 31 of the Act defines "guidance documents" as "any formal document or communication" issued by the agency that explains or provides advice on how the agency will implement a statute or rule. Wis. Stat. § 227.01(3m)(a). Section 38 mandates that any new document must undergo a 21-day public notice-and-comment period. *See id.* § 227.112(1)(a)-(c). Under section 38, the agency has until July 1, 2019, to place all preexisting guidance documents through the notice-and-comment process or the documents are deemed considered. *Id.* § 227.112(7)(a). And sections 65-71 create a procedure for litigants to challenge a guidance document in court. *See id.* § 227.40(1)-(4). The question put before this court is whether these new statutes unduly and impermissibly intrude on the orderly functioning of the executive branch. As noted earlier, if the statute occupies a zone of power shared between the Legislature and another branch, the statute will be invalidated if the party challenging the statute proves beyond a reasonable doubt that the statute unduly burdens or substantially

interferes with the constitutional powers of the other branch. *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 546, 576 N.W.2d 245 (1998).

For purposes of this court's analysis, the court begins with a careful examination of the text of the challenged statutes. A guidance document is not an administrative rule. *See* Wis. Stat. § 227.01(3m)(a)1. It does not have the full force and effect of law. Apparently, a guidance document can be a letter, an email, anything that explains what the state agency is doing pursuant to a statute or a rule. Because agencies have only so much authority as given to them by the Legislature, it is not an unreasonable stretch to construe the new statute to apply to most everything that comes from any state agency.

The constitutional question is whether this unduly burdens or substantially interferes with the state agency, which is part of the executive branch. The legislative defendants argue in their brief that the constitution and the common law allow the legislature to impose "cumbersome duties" on state agencies. A "cumbersome duty" is something that is large, heavy unwieldy and difficult to use, as well as something that causes things to be slow, complicated and inefficient. One might think absent a good reason, good government would not unnecessarily be by design "cumbersome."

The Legislative defendants offer no cogent explanation for making the work of the state agencies cumbersome, other than:

- These statutes are "garden-variety measures which merely alter the powers and duties of agencies;
- The *Martinez* holding allows it; and
- It's already being done to some extent voluntarily by the Department of Natural Resources.

The legislative defendants concede that before Act 369, state law set forth a careful process whereby administrative rules would become law. Additionally, state law required that agencies promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute. Dkt. 83, at 20 (quoting Wisconsin Stat. §227.10(1)); *see also Cholvin v. Wisconsin Dep't of Health & Family Servs.*, 2008 WI App 127, ¶ 29, 313 Wis. 2d 749, 758 N.W.2d 118 (noting that the phrase "should use" in an instruction manual created a mandatory duty with effect of law). Accordingly, imposing new procedures on state agencies does nothing to ensure greater compliance with their lawmaking function.

The Governor and the plaintiffs make a persuasive argument that the process serves little to no other purpose, that even if there was some value in having state agencies go further (apparently like the DNR), the breadth of the process goes well beyond what might be accomplished by a more measured approach. This court finds that these rules not only create a cumbersome burden, but that the burden substantially and unreasonably interferes with the orderly operation of the various state agencies to which they apply. Accordingly, this court concludes that the Plaintiffs are reasonably likely to succeed on proving that the new rules affecting "guidance documents" unduly burden the executive branch and are therefore, in their present form, unconstitutional.

IX. Analysis of Section 33 of Act 369

The parties spent considerable time discussing this section during oral argument and whether it was ripe for decision. The plaintiffs did not challenge it, but the Governor did. The legislative defendants believe that they did not have adequate time or opportunity to address it. At oral argument, the legislative defendants consented to the court addressing the provision if the

Governor agreed not to raise the issue of waiver in the appellate courts. The Governor agreed. The same analysis this court employed in judging the constitutionality of those sections relating to guidance documents equally applies here, and demands the same conclusion.

This court finds section 33 not only creates another cumbersome burden, but that the burden substantially and unreasonably interferes with the orderly operation of the various state agencies. Read literally, the new statute seems to apply to just about everything a government agency does. When asked at oral argument, counsel for the legislative defendants informed the court that the ability of governmental agencies to issue guidance documents, forms or pamphlets was of great importance to special interest groups. That may be. However, the fact that none of the things that Sec. 33 applies have the force and effect of law, substantially undermines their argument that this special interest should be allowed to hamstring the efficient and orderly functioning of the executive branch as it goes about to apply the laws that the legislature actually enacted. Accordingly, this court concludes that the Plaintiffs are reasonably likely to succeed on proving sec 33 of Act 369 unduly burdens the executive branch and is therefore unconstitutional.

X. Analysis of Section 35 of Act 369

Plaintiffs do not explicitly state that they are challenging section 35 of Act 369. In their complaint, plaintiffs state that "Act 369 prevents the Executive Branch from seeking deference in any proceeding based on an agency interpretation of any law." Dkt. 1, ¶ 91. This, plaintiffs claim, is "a radical proposition." *Id.*

Section 35 of Act 369 provides that "No agency may seek deference in any proceeding on the agency's interpretation of any law." Wis. Stat. § 227.10(g). Section 35 of Act 369 amended Wisconsin's Administrative Procedure Act (APA) to prohibit agencies from seeking deference "in any proceeding based on the agency's interpretation of any law." *Id.* Plaintiffs

contend that the provision violates the Wisconsin Constitution because "parties and courts are entitled to rely on the benefits of agency expertise in administrative decision-making." Dkt. 1, ¶ 91.

This new statute merely codifies the Wisconsin Supreme Court's holding in *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*. In that decision the supreme court "decided to end [the] practice of deferring to administrative agencies' conclusions of law." 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21. This statute merely prevents state agencies from doing what the supreme court said it would not welcome or allow. Accordingly, the statute can hardly be said to violate the separation of powers of the executive branch, where, under *Tetra Tech* such prerogative no longer exists.

Plaintiffs conceded these points during oral argument and are not reasonably likely to prevail on their claim section 35 violates the Wisconsin Constitution, so their motion for a temporary injunction on that section is denied.[23]

CONCLUSION

Wisconsin's constitution is like a keel on a great ship. It defines the structure of state government. It is not plainly visible, but its function is critical to the efficient operation of the state. It exists to maintain balance and to assist each branch of government in holding a straight and true course. In December, 2018 the Legislature and then Governor Scott Walker upended the balance that this State has had for most all of its 171 years. The time has come to right this ship-of-state so Wisconsin can resume smooth sailing ahead.

[23] It is also impossible to find irreparable harm when even if allowed, the argument for deference is unwelcome and unpersuasive in any Wisconsin court.

Every public official, Governor Evers, Speaker Vos, President Roth, Majority Leader Steineke, Majority Leader Fitzgerald, Attorney General Kaul, every judge and justice, takes this oath: *I swear (or affirm) that I will support the constitution of the United States and the constitution of the state of Wisconsin, and will faithfully and impartially discharge the duties of [my] office of . . . to the best of my ability. So help me God.*

We support the constitution of the State of Wisconsin because it and the United States Constitution reign supreme. Every bill, statute, or rule must conform. Every public official must pay homage to tenets and principles enshrined in the state and federal constitution. Our sacred duty transcends politics and political affiliation. Indeed, for those that believe, the oath itself invokes a higher power. Religious or not, the message should be clear to every holder of every public office in this state. No law is valid if it violates the constitution, no matter how wise it might be or how firmly anyone holds its wisdom. And equally important, with due respect to both the legislative and executive branches, the judicial branch possesses the exclusive power to say whether any law violates either the state or federal constitutions.

This court's analyses of how these laws affect other coordinate branches of government necessarily requires balancing. In some cases, context is one factor for the court to consider. *C.f. Democratic Party of Wis. v. Wis. Dep't of Justice*, 2016 WI 100, ¶ 23, 372 Wis. 2d 460, 888 N.W.2d 584 ("Additionally, the context of the records' request, although not always relevant, should be considered here. . . . [T]he language of the Democratic Party's petition for a writ of mandamus suggests a partisan purpose underlying the request."). Here, this court has endeavored to apply the constitution without regard to politics or party affiliation, and mindful, of course, that the judicial branch neither writes the laws nor is it charged with enforcing them.

Even the casual observer cannot miss the fact that this "rebalancing" of power, and the defendants' repeated demand for "a seat at the table," was not considered until the voters elected a democratic Governor and Attorney General. But 2018 did not bring to Wisconsin any different dynamic than what was present in earlier years, going back decades, if not a century or more. The only "seat at the table" was given to the Attorney General who has since 1848 been tasked with the solemn duty to represent the State of Wisconsin. Although the Attorney General's powers are set by the Legislature, the Attorney General has always been the lawyer for the state, state agencies, public officials, and state employees. Whether the Attorney General is part of this fourth department described by A. O. Smith in 1886 or the executive branch or even someone beholding to the laws written by the Legislature, makes no difference. The concept of a unitary executive (at least in theory) and the concentration of executive power have been universally accepted since statehood and before. As observed by Professor James Alva Wilgus:[24]

> Were the executive power to be vested in any other person besides the governor, the situation would be very unsatisfactory, and like that of Rome when she had two consuls with co-ordinate powers. Oftentimes there would be disagreement, delay and disaster in the management of affairs, and the public weal would suffer. The people have, therefore, wisely fixed responsibility for the execution of the laws, upon one person alone, who is accountable to them for all his deeds or misdeeds."

James Alva Wilgus, The Government of the People of the State of Wisconsin 75 (Phila., Pa., Eldredege & Brother 1897). For all its problems, Wisconsin is not like Rome, and barbarians are not at our gate. However, Professor Wilgus' observation about Wisconsin, made 122 years ago, could not be more astute. We fix the responsibility for the execution of our laws with one person, whether it is Governor Evers, or Governor Walker before him, or any of the men who preceded

[24] Professor of History and Political Science, State Normal School, Platteville, Wisconsin

either of them because to do otherwise results in unnecessary disagreement, causes avoidable delay, and in the end causes serious harm to the public good.

The Office of the Attorney General helps the executive enforce the laws which were written by the Legislature and approved by the Governor. The Legislature has the power to change the responsibilities assigned to the Attorney General, but it may not castrate his/her ability to act as the lawyer for the State of Wisconsin nor can it constitutionally usurp the power of the executive branch. The Wisconsin Supreme Court's wisdom in 1931 is still true today.

> As to the exercise of those powers, however, which are not exclusively committed to them, there should be such generous co-operation as will tend to keep the law responsive to the needs of society. This co-operation is peculiarly necessary today because the complexities of modern life and its problems make it increasingly difficult accurately to predict the value and effect of particular procedures, and increasingly necessary to move by a method of trial and error.

Rules of Court Case, 204 Wis. 501, 514 (1931).

The challenges we face today are different than the challenges faced by the country in the midst of the Great Depression. Certainly the complexities of modern life have grown in ways completely unimaginable by the court in 1931. The supreme court was instructing future generations that our focus is and should always be on the people of the State of Wisconsin, not on a parochial vision of political power held by one party, or one branch of government over another against the backdrop of an inflexible era of non-cooperation. Nothing could be further from the concept of the shared power of the three branches of state government. The people of Wisconsin deserve more and the constitution requires no less.

ORDER

For the reasons stated above, it is ORDERED that defendants' motion to dismiss, Dkt. 43 is DENIED. Defendants' request for a stay pending appeal, Dkt. 43, at 38, is DENIED. Plaintiffs' motion for a temporary injunction, Dkt. 8, is PARTIALLY GRANTED and PARTIALLY DENIED as follows.

1. The plaintiffs have met their burden on the following sections and have established a likelihood that this court will find the following sections unconstitutional; therefore, the defendants are enjoined from enforcing the associated statutory provisions until further order of this court:
    a. Sections 26 and 30 (legislative approval for discontinuing or settling cases);
    b. Sections 31, 33, 38, 65-71, and 104-105 (the creation and treatment of guidance documents and agency publications, including their initial applicability and effective date); and
    c. Section 64 (suspension of administrative rules "multiple times").

2. The plaintiffs have not met their burden on the following sections and have not sufficiently established the requisite likelihood that this court will find them unconstitutional; therefore, the defendants are not enjoined from applying these sections and their associated statutory provision:
    a. Sections 3, 5, 28, 29, 97, 98, 99 (relating to intervention);
    b. Section 87 (new enterprise zones)

c. Sections 10-11 (requests to the federal government for waivers on pilot programs and demonstration projects and reallocation of public and local-assistance funds).

The fact that this court is not issuing a preliminary injunction does not mean these sections are constitutional, but only that the plaintiffs have not presently met their initial burden. The parties have leave to continue their challenge to these sections as this case proceeds toward final judgment.

3. The plaintiffs withdrew their request that this court issue a preliminary injunction with respect to section 35 (prohibiting deference to administrative agencies' interpretation of law), section 16 (security at the Capitol), and section 72 (giving notice to the LRB). Although no preliminary injunction will be issued regarding these sections, the parties will have leave to argue their legality as this case proceeds toward final judgment.

SO ORDERED[25].

[25] Although this is not a final order for purposes of appeal, this court acknowledges that by statute, the parties have the right to immediate appellate review.