

Appeal No. 19-AP-559

SUPREME COURT OF WISCONSIN

The League of Women Voters, Disability Rights of Wisconsin, Inc., Black Leaders Organizing for Communities, Guillermo Aceves, Michael J. Cain, John S. Greene and Michael Doyle,

Plaintiffs-Respondents,

v.

Tony Evers,

Defendant-Respondent,

Wisconsin Legislature,

Intervening Defendant-Appellant.

On Appeal from the Circuit Court for Dane County
The Honorable Richard G. Niess, Presiding
Circuit Court Case No. 19-CV-84

**NON-PARTY BRIEF ON BEHALF OF SUSTAIN
RURAL WISCONSIN NETWORK, RIVER
ALLIANCE OF WISCONSIN, FRIENDS OF THE
LOWER WISCONSIN RIVERWAY, AND
MILWAUKEE RIVERKEEPER**

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INTRODUCTION

Legislation making sweeping changes to Wisconsin law warrants careful consideration and adequate public input rather than being rushed through during an unlawful extraordinary session convened on short notice. The purpose of Article IV, Section 11 of the Wisconsin Constitution, at least in part, is to protect the right of the people to be informed about potential legislation with enough time to meaningfully participate in the legislative process and make their concerns known. R. 71 at 9. Such meaningful participation was effectively denied during the December 2018 extraordinary session, which was convened on a single business day's notice and resulted in ill-considered, impractical, and costly legislation that will have adverse impacts throughout the state.

Amici have a particular interest in one of the laws passed during this extraordinary session, 2017 Wisconsin Act 369 (hereinafter, "Act 369"), based on the limitations it places on the ability of administrative agencies to

maintain and use guidance documents. Guidance documents streamline administrative processes, create regulatory certainty, reduce costs, and even ensure the consistent application of the law throughout the state. Act 369 threatens the effective and efficient administration of law in Wisconsin because it leads to the rescission of thousands of existing guidance documents and obscures the distinction between guidance documents and administrative rules. These adverse impacts will make it more difficult for *Amici* to engage administrative agencies on behalf of their constituents, and the decrease in effective advocacy will result in a corresponding increase in litigation.

Amici therefore respectfully request that this Court affirm the Circuit Court's Order granting a Temporary Injunction during the pendency of this litigation to

preserve the status quo and prevent the irreparable harm that Act 369’s implementation would cause.¹

ARGUMENT

I. The retroactivity of Act 369 is impractical and costly, will decrease efficiency, and will create regulatory uncertainty.

Section 38 of Act 369 (hereinafter, “Section 38”) imposes procedural requirements on administrative agencies to maintain guidance documents where no such requirements previously existed. Guidance documents must now be (1) submitted in an approved format to the Legislative Reference Bureau (“LRB”) for publication in the Administrative Register, (2) put through a 21-day public comment period, and (3) reviewed and certified by the head of the agency. Wis. Stat. §§ 227.112(1)(a)–(b), (6). Section 38 also applies retroactively, providing that unless existing guidance documents go through the public notice and comment period and are certified by July 1,

¹ While this Court has assumed jurisdiction in *Serv. Emps. Int’l Union v. Vos*, No. 2019-AP-622, which enjoined those portions of Act 369 discussed below, that injunction could be lifted on appeal, making the preservation of the status quo and prevention of irreparable harm equally important in both cases.

2019, those documents will be rescinded. Wis. Stat. § 227.112(7)(a).

On the surface, Section 38's new procedural requirements for agency guidance documents promote transparency while ensuring that agencies do not encroach upon the legislature's constitutional lawmaking authority. However, the retroactive application of these requirements to hundreds of thousands of existing guidance documents is impractical and costly. This will overburden the executive branch, decrease efficiency, create regulatory uncertainty, and fail to achieve the desired transparency.

Although no fiscal analysis of Act 369 was conducted before it was enacted, affidavits submitted in this case by current and former administrative agency staff make clear that the retroactive application of Section 38 is an impractical and costly unfunded mandate. A conservative estimate is that there are 200,000 existing guidance documents across all state agencies. R. 63 at 5. The Department of Health Services estimates that it alone

has 12,357 existing guidance documents that would be subject to the new requirements. R. 63 at 26. To process 450 existing guidance documents, the Department of Corrections estimates over \$650,000 in compliance costs for the first year. R. 63 at 22. The Department of Veterans Affairs estimates a cost of \$355,000 to \$400,000 in compliance costs to process 806 existing guidance documents. R. 63 at 30. Extrapolated across all state agencies, the new guidance document requirements will cost taxpayers millions of dollars. *See* R. 51 at 4.

Agencies simply do not have the resources to meet these requirements before the July 1 deadline. As a result, agencies are faced with a difficult decision: either divert resources and staff to save a fraction of their existing guidance documents or allow all of their existing guidance documents to be rescinded. Regardless, thousands of important documents will be invalidated, which will adversely impact agencies' ability to fulfill their responsibilities.

The LRB will shoulder a similar burden. Processing thousands of guidance documents for publication in the Administrative Register is a daunting task. Furthermore, guidance documents often come in forms other than writing, such as instructional or training videos, and it is not readily apparent how the LRB will accomplish the publication of atypical media in the Administrative Register. *See, e.g.*, R. 63 at 5.

Complying with the new guidance document requirements will also interfere with agencies' ability to fulfill their missions and serve the public. This will have an especially detrimental effect on agencies that are already underfunded and understaffed, like the Department of Natural Resources ("DNR"). In 2016, the Legislative Audit Bureau's report on DNR permitting and oversight of its wastewater program demonstrated how understaffing can lead to inefficiencies, such as delays in permit reissuance, inadequate reviews of annual reports, low inspection rates,

and inconsistent enforcement.² To prevent the rescission of existing guidance documents, DNR will have to divert an already shorthanded staff from a program that is vital to the protection of Wisconsin's waterways and public health.

The wholesale rescission of established guidance documents will lead to inefficiencies and regulatory uncertainty. When DNR is unable to provide permit applicants with instructions on how to fill out complex applications,³ it will cause delays, waste staff time, and increase costs. Important programs at DNR requiring certainty will also be seriously undermined. For example, guidance documents in the Remediation and Redevelopment Program provide investors and lenders with information about potential cleanup liability, how to obtain liability insurance, and how to remediate

² Legislative Audit Bureau, *Wastewater Permitting and Enforcement* (2016), <https://legis.wisconsin.gov/lab/reports/16-6full.pdf>.

³ See, e.g., Wis. Dep't of Nat. Res., *Instructions for Completing the WPDES Industrial Wastewater Discharge Permit Application* (2015), https://dnr.wi.gov/topic/wastewater/documents/applications/industrial_instructions.pdf.

contaminated property.⁴ Without the certainty that information provides, stakeholders will not proceed with brownfield redevelopment projects and communities will lose accompanying benefits such as an increased property tax base, job creation, blight removal, and protection of the environment and public health.

Even if agencies and the LRB could reasonably comply with Section 38, the transparency it seeks to promote turns out to be rather opaque in application. Providing the public with an opportunity to review and comment on proposed guidance documents is one of the principal purposes of the new requirements. *See* Wis. Stat. § 227.112(1)(b). However, were all the existing guidance documents published in the Administrative Register before the July 1 deadline, the sheer number of those documents would deprive the public of adequate participation. Members of the public who want to comment on multiple

⁴ *See, e.g.,* Wis. Dep't of Nat. Res., *General Liability Clarification Letters* (2017), <https://dnr.wi.gov/files/PDF/pubs/rr/RR619.pdf>; Wis. Dep't of Nat. Res., *Guidance on Case Closure and the Requirements for Managing Continuing Obligations* (2014), <https://dnr.wi.gov/files/pdf/pubs/rr/rr606.pdf>.

documents that are noticed simultaneously or in quick succession may not be able to review and comment on each one and may have to limit the scope of their comments.⁵ In order to provide meaningful public participation, a more reasonable timeframe for bringing existing guidance documents into compliance is necessary.

II. Act 369 obscures the distinction between guidance documents and rules, promotes the use of guidance in place of rules, and encourages litigation.

Section 31 of Act 369 (hereinafter, “Section 31”) defines the term “guidance document” where no statutory or common law definition previously existed. Before, documents setting forth agency policies that did not meet the definition of a rule under Wis. Stat. § 227.01(13) were considered guidance. Now there is substantial overlap between the definitions of guidance documents and

⁵ The public is denied an adequate opportunity to review and comment on proposed guidance documents despite the requirement that agencies must allow continued public comments on guidance documents under Wis. Stat. § 227.112(2). While agencies must consider and retain comments submitted during the initial public comment period under Wis. Stat. § 227.112(1), there is no similar requirement in Wis. Stat. § 227.112(2) for comments submitted once the proposed guidance document is adopted.

administrative rules, obscuring the distinction between the two and creating a gray area in the law. This lack of clarity may allow agencies to adopt guidance documents instead of going through the rulemaking process, resulting in less legislative and public oversight of changes to agency policies. The uncertainty as to what constitutes agency guidance created by these changes will also encourage unnecessary litigation that could flood Wisconsin courts.

A rule is defined as “(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency.” *Cholvin v. Wisc. Dep’t of Health and Family Servs.*, 2008 WI App 127, ¶ 22, 313 Wis. 2d 749, 758 N.W.2d 118 (citing *Citizens for Sensible Zoning, Inc. v. Dep’t of Nat. Res.*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)); *see*

also Wis. Stat. § 227.01(13).⁶ Section 31 defines “guidance document” as:

[A]ny formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that does any of the following:

1. Explains the agency’s implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency.
2. Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

Wis. Stat. § 227.01(3m)(a).

These two definitions essentially use different words to say the same thing. Courts have recognized that rules “may appear in various forms.” *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. Dep’t of Indus., Labor & Human Relations*, 172 Wis. 2d 299, 320, 493 N.W.2d 744 (Ct. App. 1992) (concluding that an agency manual contained rules). Thus, rules may take the form of manuals, handbooks, or directives just as readily as regulations, standards, statements of policy, or general

⁶ Section 32 of Act 369 made non-substantive changes to the definition of a rule, including and limited to changing “effect of law” to “force of law” and “which” to “that” in two instances.

orders. And while rules must be “of general application,” that has been interpreted as an action that applies to “a class of persons similarly affected.” *See, e.g., Cholvin*, 2008 WI App 127, ¶ 25; *Citizens for Sensible Zoning*, 90 Wis. 2d at 816. Clauses 1 and 2 of Wis. Stat. § 227.01(3m)(a) also merely explain what it means to implement and interpret the law, respectively.

Perhaps the most apparent distinction—whether a policy has the “force of law”—may be a distinction in name only. While the legislature declares in Act 369 that a “guidance document does not have the force of law,” Wis. Stat. § 227.112(3), Act 369 also gives such documents a legal significance that is difficult to differentiate from case law explaining what the “force of law” means. In *Cholvin*, the court held that an agency action has the force of law “where the interest of individuals of a class can be legally affected through enforcement of the agency action.” 2008 WI App 127, ¶ 26. Distinguishing between information materials and provisions “using express mandatory

language” in which “the agency speaks with an official voice intended to have the effect of law,” the court concluded that the document at issue in the case had the force of law because it left agency staff with “no discretion.” *Id.* ¶ 29.

Under Act 369, once an agency adopts a guidance document explaining how it is likely to apply a statute or rule, the agency’s discretion to vary from that policy is significantly limited. Section 38 provides that agencies cannot deviate in any proceeding from a policy set forth in a guidance document except for when agencies provide a reasonable justification for doing so and that justification outweighs an affected person’s reliance interest. Wis. Stat. § 227.112(4). Therefore, guidance documents have a legal significance akin to the force of law not only because they can affect the interests of individuals of a class, but also because agency staff may be bound to the positions set forth in those documents, as was the case in *Cholvin*.

The overlapping definitions of guidance documents and rules may now allow agencies to adopt guidance documents instead of going through the rulemaking process, limiting legislative and public oversight of changes to agency policies. Rules are subject to much greater scrutiny than guidance documents. Proposed rules are subject to two rounds of approval by both the governor and the agency's policy-making authority, economic impact analyses that may require a bill authorizing the rule, up to three public hearing and comment periods, and finally legislative review. Wis. Stat. §§ 227.135-20. This level of scrutiny and public oversight ensures that any changes in agency policies affecting public rights are thoroughly analyzed and vetted.

Act 369 also encourages unnecessary litigation. The guidance definition in Section 31 will undoubtedly lead to lawsuits over whether a policy change may go through the guidance process or whether it must be promulgated as a rule. Section 38 will also encourage litigation because as

difficult as it is for an agency to deviate from a guidance document, it may be equally difficult for that agency to rely on that document without being challenged. Specifically, any person may “contest the legality or wisdom of a position taken” in a guidance document when that document is used to that person’s detriment in any proceeding. Wis. Stat. § 227.112(3). Whether the legislature intended to create a new right to judicial or administrative review in addition to the right to review set forth in Wis. Stat. ch. 227 is unclear. That a person should have the right to challenge the legality of a guidance document used to their detriment is not in dispute, but whether a position taken in a guidance document is “wise” is an extremely ambiguous standard that invites legal challenges.

CONCLUSION

For the foregoing reasons, *Amici* request that this Court affirm the Circuit Court’s Order granting the Temporary Injunction.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2425 words.

Dated: May 3, 2019.

Robert D. Lee

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

I hereby certify that:

I have submitted an electric copy of this brief, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated: May 3, 2019.

Robert D. Lee