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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2019AP614-LV

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU),
LOCAL 1, SEIU HEALTHCARE WISCONSIN, MILWAUKEE
AREA SERVICE AND HOSPITALITY WORKERS, AFT-
WISCONSIN, WISCONSIN FEDERATION OF NURSES
AND HEALTH PROFESSIONALS, RAMON ARGANDONA,
PETER RICKMAN, AMICAR ZAPATA, KIM KOLHASS,
JEFFREY MYERS, ANDREW FELT, CANDICE OWLEY,
CONNIE SMITH and JANET BEWLEY,

Plaintiffs-Respondents,

v.

ROBIN VOS, in his official capacity as Wisconsin Assembly
Speaker, ROGER ROTH, in his official capacity as Wisconsin
Senate President, JIM STEINEKE, in his official capacity as
Wisconsin Assembly Majority Leader and SCOTT
FITZGERALD, in his official capacity as Wisconsin Senate
Majority Leader,

Defendants-Petitioners,

JOSH KAUL, in his official capacity as Attorney General of
the State of Wisconsin and TONY EVERS, in his official
capacity as Governor of the State of Wisconsin,

Defendants-Respondents.

Case No. 2019AP622

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU),
LOCAL 1, SEIU HEALTHCARE WISCONSIN,
MILWAUKEE AREA SERVICE AND HOSPITALITY
WORKERS, AFT-WISCONSIN, WISCONSIN FEDERATION
OF NURSES AND HEALTH PROFESSIONALS, RAMON
ARGANDONA, PETER RICKMAN, AMICAR ZAPATA, KIM
KOLHASS, JEFFREY MYERS, ANDREW FELT, CANDICE
OWLEY, CONNIE SMITH and JANET BEWLEY,

Plaintiffs-Respondents,

v.

ROBIN VOS, in his official capacity as Wisconsin Assembly Speaker, ROGER ROTH, in his official capacity as Wisconsin Senate President, JIM STEINEKE, in his official capacity as Wisconsin Assembly Majority Leader and SCOTT FITZGERALD, in his official capacity as Wisconsin Senate Majority Leader,

Defendants-Appellants,

JOSH KAUL, in his official capacity as Attorney General of the State of Wisconsin and TONY EVERS, in his official capacity as Governor of the State of Wisconsin,

Defendants.

ON APPEAL/PETITION FROM
THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE FRANK D. REMINGTON, PRESIDING

ATTORNEY GENERAL'S RESPONSE BRIEF

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INTRODUCTION

“The Wisconsin Constitution establishes three separate branches of government, with ‘no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another.’” *Koschkee v. Taylor*, 2019 WI 76, ¶ 10, 387 Wis.2d 552, 929 N.W.2d 600 (citation omitted). This division of powers among the legislative, executive, and judicial departments is “[o]ne of the fundamental principles of the American constitutional system.” *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 30, 387 Wis. 2d 511, 929 N.W.2d 209 (citation omitted). It is enshrined in both the United States Constitution and the Wisconsin Constitution. *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 44, 382 Wis. 2d 496, 914 N.W.2d 21. By dispersing power among the three co-equal branches, this framework provides security against the concentration of different powers in a single branch, so as to protect individual liberty and avoid tyranny. *League of Women Voters*, 387 Wis. 2d 511, ¶¶ 31–32. It forms “the bedrock of the structure by which we secure liberty in both Wisconsin and the United States.” *Tetra-Tech*, 382 Wis. 2d 496, ¶ 45 (citation omitted).

“The dangers of congressional usurpation of Executive Branch functions have long been recognized. [T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.” *Bowsher v. Synar*, 478 U.S. 714, 727 (1986) (alteration in original) (citation omitted). And, indeed, “[c]alls to abandon” structural protections against the abuse of power “in light of ‘the era’s perceived necessity’ are not unusual.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) (citations omitted). But such calls are incompatible with our

system of government. “The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government.” *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

The question presented here is whether 2017 Wis. Act 369 (“Act 369”) violates that guarantee by giving members of the legislative branch authority to approve (or not to approve) the resolution of certain cases involving the State. Rushed through an extraordinary session of the Wisconsin Legislature in December 2018, that Act radically alters Wisconsin’s long-standing framework for conducting litigation.

Since the first state legislature in 1849, the constitutional office of Attorney General has exercised the basic executive powers and duties traditionally held by a state’s chief legal officer, including representing the State, its departments, and officers in litigation involving state interests and controlling the conduct of state litigation. See Wis. Rev. Stat. ch. 9, §§ 36–41 (1849). Prior to Act 369, the Attorney General could compromise or discontinue plaintiff-side civil actions at the direction of the Governor or the state official or entity that initiated the case, and the Attorney General could compromise or settle any defense-side civil action when the Attorney General determined it was in the State’s best interest. Wis. Stat. §§ 165.08, 165.25(6)(a) (2015–16). Now, as a result of Act 369’s transfer of executive power to the legislative branch, the Attorney General must obtain consent from members of the legislative branch for certain case resolutions.

As Justice Scalia memorably wrote in his *Morrison* dissent, “[f]requently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing But this wolf comes as a wolf.” 487 U.S. at 699 (Scalia, J., dissenting). In

that case, however, executive branch authority was not transferred to another branch of government—a point highlighted by the majority: “[T]his case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. Unlike some of our previous cases, most recently *Bowsher v. Synar*, this case simply does not pose a ‘dange[r] of congressional usurpation of Executive Branch functions.’” *Id.* at 694 (second alteration in original) (citations omitted). Here, in contrast, that is precisely what has happened: Act 369 both takes power away from the executive branch *and* gives that power to execute the laws to members of the legislative branch. If the attack on the separation of powers in *Morrison* arrived as a wolf, here it appears as a T. rex.

The Legislative Defendants attempt to camouflage the breadth of Act 369’s litigation control provisions, casting them as a modest attempt to give the Legislature a “seat at the table” by preventing the Attorney General from conceding the invalidity of state statutes without an opportunity for a full, adversarial hearing. But the litigation control provisions plainly do far more than that. They give members of the legislative branch the power to directly veto resolutions of cases—and to do so not only in cases involving challenges to the validity of statutes, but also in the vast majority of cases that do not include such challenges and involve only the core executive function of administering and enforcing state laws. In such cases, Act 369 gives agents of the legislative branch a constitutionally improper role in the exclusively executive function of determining how best to resolve cases. And even in cases that *do* include a challenge to a statute’s validity, Act 369 goes too far.

To the extent the executive and legislative branches could share some power over state litigation unrelated to the validity of state law, Act 369 creates an unworkable regime.

DOJ now cannot resolve enforcement actions or certain cases against state entities without legislative approval. That introduces delay and threats to confidentiality that undermine the executive's ability to resolve state litigation. Further, Act 369 impairs the ability of the executive to use its judgment and expertise to resolve individual cases in the State's best interest.

Finally, Act 369's litigation control provisions also impermissibly infringe on exclusive constitutional powers of the judicial branch by interfering with this Court's authority over attorneys' professional obligations and by imposing requirements on settlements that interfere with the inherent power of courts to manage their own dockets to facilitate the just, speedy, and inexpensive resolution of cases.

ISSUES PRESENTED

1. In cases that do not challenge the validity of a state statute, do Act 369's litigation control provisions give the legislative branch a constitutionally improper role in the exclusively executive function of determining how best to resolve specific court cases?

2. Alternatively, if the power to control state litigation in cases that do not include a challenge to the validity of a statute is deemed a shared power, do Act 369's litigation control provisions unduly burden the executive branch's ability to manage state litigation?

3. In cases that challenge the validity of a state statute, do Act 369's litigation control provisions unduly burden the executive branch by giving the legislative branch power to block case resolutions, which goes beyond what would be needed to protect any legislative interest in the defense of a challenged statute?

4. Do Act 369's litigation control provisions unconstitutionally interfere with this Court's exclusive authority over attorneys' professional obligations and with the inherent power of courts to manage their own dockets?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court has already scheduled oral argument for October 21, 2019. Publication of the Court's decision is appropriate because this case involves novel and complex constitutional issues of great public importance.

STATEMENT OF THE CASE

I. Statutory background.

A. DOJ performs legal services for the State.

The Wisconsin Department of Justice (DOJ) litigates cases on the State's behalf both as a plaintiff and a defendant. On the plaintiff side, the State and its agencies enforce the statutes they are charged to administer in areas including consumer protection, financial regulation, environmental protection, wage claims, civil Medicaid fraud claims, and others. *See, e.g.*, Wis. Stat. §§ 165.25(1m), 165.25(4)(ar). On the defense side, the State, its agencies, and its employees become involved in civil litigation by virtue of their responsibilities in administering state programs. *See, e.g.*, Wis. Stat. § 165.25(6)(a)1. In many cases, defensive litigation involves both damages claims and injunctive challenges to the way an agency executes state or federal law. *See, e.g., Campbell v. Kallas*, __ F.3d __, 2019 WL 3886912 (7th Cir. 2019) (injunctive challenge to Department of Corrections medical treatment policy and corresponding damages claim). Much less frequently, a case also challenges the validity of a state statute. *See, e.g., Kanter v. Barr*, 919 F.3d 437 (7th Cir.

2019) (challenge to validity of Wisconsin’s felon-in-possession firearm law).

B. Act 369 restricts DOJ’s authority to resolve cases.

1. Wisconsin Stat. § 165.08(1): Resolving plaintiff-side civil actions.

Prior to Act 369, Wis. Stat. § 165.08 authorized the Attorney General, in all plaintiff-side civil actions prosecuted by DOJ, to compromise or discontinue the action at the direction of the Governor or of the state official or entity that initiated the case. Wis. Stat. § 165.08 (2015–16). That statute gave the Legislature no authority over whether the Attorney General could resolve plaintiff-side civil actions. *Id.*

Section 26 of Act 369 revised Wis. Stat. § 165.08 to provide that, in plaintiff-side civil actions prosecuted by DOJ, the Attorney General cannot “compromise or discontinu[e]” the action without approval from a legislative intervenor or, if there is no intervenor, from the Joint Committee on Finance (JCF):

Any civil action prosecuted by the department by direction of any officer, department, board, or commission, or any civil action prosecuted by the department on the initiative of the attorney general, or at the request of any individual may be compromised or discontinued with the approval of an intervenor under s. 803.09 (2m) or, if there is no intervenor, by submission of a proposed plan to the joint committee on finance for the approval of the committee. *The compromise or discontinuance may occur only if the joint committee on finance approves the proposed plan.*

Wis. Stat. § 165.08(1). The “intervenor under s. 803.09 (2m)” can be the Assembly, the Senate, or the Legislature as a whole.

**2. Wisconsin Stat. § 165.25(6)(a)1.:
Resolving defense-side civil actions for
injunctive relief or that involve a
proposed consent decree.**

Prior to Act 369, Wis. Stat. § 165.25(6)(a) authorized the Attorney General, in any civil action in which he is defending a state entity or official, to “compromise and settle the action as the attorney general determine[d] to be in the best interest of the state.” Wis. Stat. § 165.25(6)(a) (2015–16). That version of the statute gave the Legislature no authority over whether the Attorney General could resolve defense-side actions. *Id.*

Section 30 of Act 369 revised and renumbered that section to provide that, in defense-side cases for injunctive relief or in which there is a proposed consent decree, the Attorney General may not compromise or settle the action without approval from a legislative intervenor or, if there is no intervenor, from JCF. In addition, if a proposed compromise or settlement would concede that a statute is unconstitutional, preempted, or otherwise invalid, the proposal must be approved by the Joint Committee on Legislative Organization before it can be submitted to JCF. The revised statute provides:

The attorney general may compromise and settle the action as the attorney general determines to be in the best interest of the state except that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general may not compromise or settle the action without the approval of an intervenor under s. 803.09 (2m) or, if there is no intervenor, without first submitting a proposed plan to the joint committee on finance. If, within 14

working days after the plan is submitted, the cochairpersons of the committee notify the attorney general that the committee has scheduled a meeting for the purpose of reviewing the proposed plan, *the attorney general may compromise or settle the action only with the approval of the committee.*

Wis. Stat. § 165.25(6)(a)1. Again, the “intervenor under s. 803.09 (2m)” can be the Assembly, the Senate, or the Legislature as a whole.

3. Notice and intervention in cases involving the validity of state law.

Act 369 also modified state law relating to notice and intervention rights in cases involving the validity of state law.

Prior to Act 369, Wis. Stat. § 806.04(11) gave the Attorney General the right to notice and an opportunity to be heard in any action for declaratory relief in which a statute was alleged to be unconstitutional. Wis. Stat. § 806.04(11) (2015–16). Section 98 of Act 369 amended Wis. Stat. § 806.04(11) to require notice and an opportunity to be heard for specific leaders of the legislature in any action for declaratory relief in which a statute is alleged to be invalid.

Sections 5 and 97 of Act 369 created Wis. Stat. §§ 13.365 and 803.09(2m), which authorize legislative intervention when a statute is alleged to be invalid, or that involves the “construction” of a statute. Sections 28 and 29 amended Wis. Stat. § 165.25(1) and (1m) to give the same intervention rights to the Joint Committee on Legislative Organization. Section 99 amended Wis. Stat. § 809.13 to permit intervention in appeals when Wis. Stat. § 803.09(2m)’s requirements are met.

II. Procedural History

The plaintiffs in this case allege that various provisions in Act 369 and 2017 Wis. Act 370, which was also passed in the December 2018 extraordinary session, violate the Wisconsin Constitution. In the circuit court, they moved for a temporary injunction, and the Legislative Defendants moved to dismiss the case. The Attorney General filed a brief supporting the plaintiffs' position, arguing that Act 369's litigation control provisions violated the constitutional separation of powers.¹

The circuit court denied the Legislative Defendants' motion to dismiss and granted in part the plaintiffs' motion for a temporary injunction. Relevant to the Attorney General, the circuit court enjoined sections 26 and 30 of Act 369. The circuit court declined to stay the preliminary injunction order.

The Legislative Defendants then appealed from the preliminary injunction order, asked for a stay of the injunction, and moved for leave to file an interlocutory appeal of the denial of their motion to dismiss.

This Court assumed jurisdiction over both the Legislative Defendants' appeal of the preliminary injunction and their interlocutory appeal of the denial of their motion to dismiss. It also stayed the preliminary injunction, except as to certain agency guidance documents.

¹ Contrary to the Legislative Defendants' assertion (Leg. Defs.' Br. 39), the Attorney General did not concede below that any intervention provisions in Act 369 are constitutional (R. 146 Tr. 27:16–28:19). The mechanism by which the legislative branch attempts to exercise executive power is not relevant to the separation of powers inquiry.

STANDARD OF REVIEW

A motion to dismiss is reviewed de novo and “tests the legal sufficiency of a complaint, which a court will grant only if there are no conditions under which a plaintiff may recover.” *Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 7, 373 Wis. 2d 543, 892 N.W.2d 233. The circuit court’s decision to grant a temporary injunction is reviewed for abuse of discretion. *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 519, 259 N.W.2d 310 (1977).²

The substantive issues here involve the constitutionality of statutory provisions in Acts 369 and 370. Resolution of those issues “involve questions of law, which [the Court] review[s] de novo.” *League of Women Voters*, 387 Wis. 2d 511, ¶ 13.

ARGUMENT

I. The presumption of constitutionality does not apply here.

The Legislative Defendants contend that the challenged provisions of Act 369 are entitled to the presumption of constitutionality that usually applies to statutes. That

² This brief focuses on the merits of the constitutional separation of powers issue, rather than the equitable prongs of the preliminary injunction analysis. See *Werner*, 80 Wis. 2d at 519 (preliminary injunction requires showing that (1) movant will likely suffer irreparable harm; (2) movant lacks an adequate remedy at law; (3) an injunction is needed to preserve the status quo; and (4) a reasonable probability of success on the merits exists). The burdens described below that Act 369 imposes on the executive branch and judiciary cause separation of powers harms that necessarily cannot be remedied after the fact. The executive branch, the judiciary, and Wisconsin citizens therefore all face irreparable harm if the challenged provisions of Act 369 remain in place as this litigation proceeds.

presumption, however, does not apply where, as here, the legislation allegedly violates separation of powers principles.

Statutes are ordinarily presumed constitutional, and the party challenging a statute typically must prove it is unconstitutional beyond a reasonable doubt. *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63. “This presumption is based on [judicial] respect for a co-equal branch of government and is meant to promote due deference to legislative acts.” *In re Gwenevere T.*, 2011 WI 30, ¶ 46, 333 Wis. 2d 273, 797 N.W.2d 854 (citation omitted). The usual presumption of constitutionality is thus grounded in separation of powers principles.

The presumption of constitutionality cannot logically apply where a statute allegedly violates the very separation-of-powers principles on which that presumption is based. *See Morrison*, 487 U.S. at 704 (Scalia, J., dissenting) (the presumption of constitutionality “is not recited by the Court in the present case *because it does not apply*”). This is because the coordinate branches of government are co-equal. *Id.* at 704–05. “The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.” *The Federalist No. 49*, at 314 (James Madison) (Clinton Rossiter ed., 1961); *see also* Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, 447–48, 549–50 (1969).

Where, as here, the legislative and executive branches disagree over whether a statute violates the constitutional separation of powers, to apply the customary deference in favor of the legislative branch would improperly accord that branch a special authority to settle the boundaries of its own powers vis-à-vis the co-equal executive branch. In the separation of powers context, the playing field must be level and neither the legislative nor the executive branch is entitled

to the benefit of the doubt. *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting). The ordinary presumption of constitutionality thus does not apply.³

II. Where the validity of a state statute is not at issue, Act 369's litigation control provisions violate the constitutional separation of powers.

The Legislative Defendants claim that Act 369's litigation control provisions properly constrain the executive branch's ability to concede the invalidity of state laws without an opportunity for a full, adversarial hearing. The actual scope of those provisions, however, is much broader than that purported rationale. The legislative branch has given itself the power to veto proposed case resolutions not only in cases challenging the validity of statutes, but also in cases containing no such challenge. In cases that do not challenge the validity of state law, Act 369 gives the legislative branch a constitutionally improper role in the core executive function of administering and enforcing state laws.

Alternatively, even if the power to control the resolution of cases that do not involve the validity of a statute were a power shared between the legislative and executive branches, Act 369 is still unconstitutional because it unduly burdens the conduct of state litigation by the executive branch.

³ While this Court has applied the presumption in separation of powers cases, it has also acknowledged that the presumption might not apply in such cases. See *State v. Unnamed Defendant*, 150 Wis. 2d 352, 364 n.9, 441 N.W.2d 696 (1989).

A. Act 369 unconstitutionally aggrandizes the Legislature's powers by giving it a portion of the exclusive executive power to administer and enforce the law.

1. The constitutional division of powers prohibits both encroachment on exclusive powers and aggrandizement of one branch's powers at the expense of another.

The separation of powers 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 a governor”; and “[t]he judicial power of this state shall be vested in a unified court system.” Wis. Const. art. IV, § 1, art. V, § 1, art. VII, § 2. “The legislative power . . . makes the laws; the executive . . . enforces them; and the judicia[ry] . . . expounds and applies them.” *In re Appointment of Revisor*, 141 Wis. 592, 597, 124 N.W. 670 (1910); *see also* Wis. Stat. § 15.001(1).

The separation of powers is meant “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.” *State v. Washington*, 83 Wis. 2d 808, 825–26, 266 N.W.2d 597 (1978). To ensure individual freedom and responsible, democratic government, “neither the legislature nor the executive nor the judiciary ‘ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.’” *Gabler v. CVRB*, 2017 WI 67, ¶ 4, 376 Wis. 2d 147, 897 N.W.2d 384 (*quoting The Federalist No. 48*, at 305 (James Madison) (Rossiter ed. 1961)).

Each branch of government has exclusive core constitutional powers. *State v. Horn*, 226 Wis. 2d 637, 643,

594 N.W.2d 772 (1999). Those core powers reflect zones of authority upon which any other branch may not intrude. *League of Women Voters*, 387 Wis. 2d 511, ¶ 34. When dealing with core powers, “any exercise of authority by another branch of government is unconstitutional.” *Tetra Tech*, 382 Wis. 2d 496, ¶ 48 (citation omitted). Accordingly, each branch jealously guards its core zones of authority. *League of Women Voters*, 387 Wis. 2d 511, ¶ 34.

Beyond those exclusive powers, the branches have shared authority in other areas. *See State v. Holmes*, 106 Wis. 2d 31, 43, 315 N.W.2d 703 (1982). In those overlapping zones, a more flexible analysis is applied, and legislation is unconstitutional if it unduly burdens the executive or judicial branch’s ability to exercise a power shared with the legislature. *See Horn*, 226 Wis. 2d at 644–45; *Flynn v. DOA*, 216 Wis. 2d 521, 546, 552, 576 N.W.2d 245 (1998).

The more flexible analysis applied to such shared or commingled powers does not apply, however, to statutory provisions that aggrandize one branch at the expense of another, and the U.S. Supreme Court has “not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.” *Mistretta v. United States*, 488 U.S. 361, 382 (1989).⁴ This Court similarly recognizes that the constitutional separation of powers precludes the legislative branch from authorizing any part of the government to exercise an overabundance of power that would create an improper concentration of power in a single

⁴ The “principles underlying the United States Constitution . . . ‘inform [this Court’s] understanding of the separation of powers under the Wisconsin Constitution.’” *League of Women Voters*, 387 Wis. 2d 511, ¶ 31 (citation omitted).

branch. *Panzer v. Doyle*, 2004 WI 52, ¶ 52, 271 Wis. 2d 295, 680 N.W.2d 666; see also *Gabler*, 376 Wis. 2d 147, ¶¶ 4–5 (doctrine prevents the concentration of power in the same hands).

This anti-aggrandizement principle requires especially searching scrutiny of laws that usurp executive branch functions. See *Morrison*, 487 U.S. at 694 (Scalia, J., dissenting); see also *Mistretta*, 488 U.S. at 382 (“[J]ust as the Framers recognized the particular danger of the Legislative Branch’s accreting to itself judicial or executive power, so too have we invalidated attempts by Congress to exercise the responsibilities of other branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch.” (footnote omitted)). The structure of the Constitution “does not permit Congress to execute the laws,” *Bowsher*, 478 U.S. at 726, and “does not contemplate an active role for Congress in the supervision of officers charged with the execution of laws it enacts.” *Id.* at 722; see also *Springer v. Gov’t of Philippine Islands*, 277 U.S. 189, 201–02 (1928) (“Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them”). “[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.” *Bowsher*, 478 U.S. at 733–34. In Wisconsin, similarly, “[t]he legislature cannot interfere with, or exercise any powers properly belonging to the executive department.” *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 448, 208 N.W.2d 780 (1973).

2. In cases that do not challenge a statute, enforcing the law through civil litigation on the State's behalf is an exclusively executive power.

Separation of powers principles preclude the legislature from assuming governmental powers that are inherently and exclusively executive in character. Setting aside cases that involve the validity of a state statute—an issue addressed below—the power to control the conduct of litigation on the State's behalf, including the exercise of legal judgment and discretion, is an inherently and exclusively executive power and, by its nature, cannot be exercised or controlled by the legislative branch.

The distinction between legislative and executive power is clear: “Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them.’ Powers constitutionally vested in the legislature include the powers: ‘to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; [and] to fix the limits within which the law shall operate.” *Koschkee*, 387 Wis. 2d 552, ¶ 11 (alteration in original) (citations omitted).

Executive power, in contrast, is “the power to execute the laws.” *Myers v. United States*, 272 U.S. 52, 117 (1926). “[T]he very essence of ‘execution’ of the law” is “to implement the legislative mandate,” including interpreting the laws enacted by the legislative branch and exercising judgment concerning facts that affect their application. *Bowsher*, 478 U.S. at 733. “The executive must . . . interpret and apply the law; it would be impossible to perform his duties if he did not. After all, he must determine for himself what the law requires (interpretation) so that he may carry it into effect (application). Our constitution not only does not forbid this, it requires it.” *Tetra Tech*, 382 Wis. 2d 496, ¶ 53.

When the State engages in litigation, the legislature has already created the laws at issue; a concrete, justiciable controversy presents a case to the judicial branch for legal interpretation and application. By presenting the State's legal position, the State's lawyer neither makes law nor authoritatively expounds it, but rather administers and enforces existing law—an executive function. Accordingly, the conduct of actions in which the State is interested or a party has been recognized by our courts as an executive function, distinct from the legislature's role of establishing public policy by enacting legislation. See *Helgeland v. Wis. Municipalities*, 2006 WI App. 216, ¶ 14, 296 Wis. 2d 880, 724 N.W.2d 208, *aff'd* 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1.

Enforcement of the law is central to the executive function. See, e.g., *United States v. Nixon*, 418 U.S. 683, 693 (1974); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (“[I]t is as an officer of the executive department that [a prosecutor] exercises a discretion as to whether or not there shall be a prosecution in a particular case.”). Enforcement includes representing the government's interests in controversies to which the government is a party, in the role of investigator, prosecutor, or defender. *Report of the Special Committee on Administrative Law*, 61 Annual Report of the American Bar Association 720, 726–27 (1936). The U.S. Supreme Court has thus described the U.S. Attorney General as “the hand of the president in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed.” *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922). Civil enforcement suits, like criminal suits, are part of the execution of the law, and executive control over civil law enforcement should stand on the same constitutional footing as executive control over criminal law enforcement. See generally *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985).

Investigation and enforcement decisions, including decisions about litigation, “involve the balancing of innumerable legal and practical considerations.” *Morrison*, 487 U.S. at 707–08 (Scalia, J., dissenting). The balancing of those considerations “is the very essence of prosecutorial discretion.” *Id.* at 708. Because all law enforcement agencies have finite resources, and it is not possible to investigate and prosecute all violations of the law, agencies must set enforcement priorities and “select the cases for prosecution . . . in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.” *Id.* at 727–28 (quoting Robert H. Jackson, U.S. Attorney Gen., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940)). Further, allocating enforcement resources plainly includes not only initiating and conducting enforcement actions, but also deciding when to settle, dismiss, or otherwise terminate them.

3. Act 369 improperly encroaches on the exclusively executive power to conduct state litigation and unconstitutionally aggrandizes the legislative branch by empowering it to exercise a portion of that executive power.

The Attorney General’s status as the State’s chief legal officer is well established in Wisconsin law. *See Orton v. State*, 12 Wis. 509, 511 (1860). The Attorney General’s authority to use legal judgment on matters of law on the State’s behalf is inherently and exclusively executive in nature, and it is distinct from the Legislature’s constitutional role of setting public policy through legislation. *See Helgeland*, 296 Wis. 2d 880, ¶ 14.

By enabling a legislative intervenor or committee to prevent the Attorney General from resolving lawsuits, Act

369 empowers the Legislature to short circuit the Attorney General's executive functions and control those functions itself. The Legislature and legislative committees can now prevent the Attorney General from resolving litigation on the State's behalf, regardless of the Attorney General's professional judgment as the State's chief legal officer. This new power allows legislative actors to substitute their judgment for that of the Attorney General on matters pertaining to the administration and execution of the law through litigation, including the allocation of enforcement resources and legal strategy.

In cases that do not challenge the validity of a statute, the legislative branch has no share in the executive function of determining when and how particular court cases should be resolved. The litigation control provisions of Act 369 therefore usurp a core executive function—the resolution of certain cases—and unconstitutionally aggrandize the powers of the legislative branch by giving its members a veto over certain case resolutions and thus a direct role in carrying out an executive function.

4. The Legislative Defendants' arguments fail to avoid a separation of powers violation.

The Legislative Defendants make three arguments against the above analysis, none of which succeed.

First, they argue that no separation of powers issue exists because article VI, section 3 of the Wisconsin Constitution says that "[t]he powers, duties and compensation of the . . . attorney general shall be prescribed by law," and this Court has construed that to mean that the Attorney General has only those powers and duties specified by statute. See *State v. City of Oak Creek*, 2000 WI 9, ¶ 24, 232 Wis. 2d 612, 605 N.W.2d 526. The Legislative Defendants

reason that the Legislature can freely alter the Attorney General's powers and duties however it pleases without implicating the constitutional separation of powers.

That argument conflates the separation of powers issues this case presents with a question about the Attorney General's inherent authority. While it is true that the Legislature can enact general laws that specify and guide the Attorney General's powers as the State's chief legal officer, it does not follow that the Legislature can assign those powers to actors outside of the executive branch, much less reserve those powers to itself. Such a conclusion would be directly at odds with the separation of powers principles discussed above.

Second, the Legislative Defendants argue that litigating on the State's behalf must be a shared power because the Legislature has the power to enact laws that direct the conduct of the Attorney General in state litigation. That argument, too, errs by disregarding separation of powers principles. "While the legislature in the exercise of its constitutional powers is supreme in its particular field, it may not exercise the power committed by the constitution to one of the other departments." *Goodland v. Zimmerman*, 243 Wis. 459, 467, 10 N.W.2d 180 (1943). And any argument that article VI, section 3 of the Wisconsin Constitution fundamentally alters the separation of powers between the executive and legislative branches is unsupported by the plain language of that section—a grant of *legislative* authority over the Attorney General does not implicitly also confer *executive* authority; is not supported by case law; and, given the Founders' concern with the concentration of power in a single branch, is clearly ahistorical.

Moreover, bicameralism and presentment requirements prevent the Legislature from granting a subset of the Legislature the power to carry out policy in specific

applications. Legislation is enacted through passage of a bill by both legislative chambers, presentment to the Governor, and signature by the Governor or re-passage by a two-thirds legislative majority. Wis. Const. art. IV, §§ 17, 19, art. V, § 10. Once the Legislature authorizes an executive branch official to exercise an executive function, that function cannot be subjected to continuing legislative adjustment except through the constitutional process of enacting new legislation. See *INS v. Chadha*, 462 U.S. 919, 954–55 (1983) (“Disagreement with the Attorney General’s decision . . . no less than Congress’ original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President.”). In other words, even if the Wisconsin Constitution provided a general (and implicit) grant of authority to the Legislature to control litigation on behalf of the State—and it does not—Act 369’s litigation control provisions would still be impermissible because the Legislature cannot exercise its authority by acting outside of the constitutionally mandated process for the enactment of legislation.

Third, the Legislative Defendants contend that litigating on the State’s behalf is a shared power because invalidating a state statute in litigation harms the Legislature’s constitutional interest in the validity of Wisconsin law—especially if such invalidation occurs without a full adversarial presentation in court. But even if there is such a shared interest, it would exist only in litigation involving a challenge to a statute. Act 369 is not limited to such cases, however, but also applies to state cases that involve no such challenge.

In the vast majority of cases that do not concern the validity of a statute, the conduct of litigation is a purely

executive function in which the legislative branch has no shared constitutional interest, and the litigation control provisions fail under an exclusive power analysis.

B. Even under a shared power analysis, Act 369 unduly burdens the executive branch's power to manage state cases that do not challenge the validity of a statute.

The Legislative Defendants have not shown that they have *any* shared constitutional interest in directly managing individual state cases that do not challenge the validity of a statute. Act 369's litigation control provisions are thus unconstitutional in those cases, and the Court need not apply a shared power analysis to them.

If this Court nonetheless concluded that the legislative branch did share an interest in managing state cases that do not challenge state law, it should remand the case for further factual development. And even a glimpse at the facts shows that these provisions also violate the separation of powers under a shared powers analysis.

1. A shared powers analysis cannot be resolved at the motion to dismiss stage.

If this Court were to reach the shared power issue, it should not—and cannot—conclusively resolve whether the litigation control provisions substantially burden the executive branch's exercise of its power to control state litigation in cases unrelated to the validity of state law. That is a disputed factual question that cannot be resolved on a motion to dismiss.

Under a shared power analysis, legislation is invalid if it “unduly burden[s] or substantially interfere[s] with another branch.” *Tetra Tech*, 382 Wis. 2d 496, ¶ 46 (citation omitted). Answering that question requires a complete factual record

on the burden the litigation control provisions impose on the executive. In *Flynn*, for example, the Court assessed whether a statute unduly burdened the judicial branch under a shared power analysis by examining affidavits submitted by judicial branch employees. *Flynn*, 216 Wis. 2d at 552–54. The Court ultimately held that the statute did not unduly burden the judiciary, but that conclusion was expressly “[b]ased on the evidence in [the] record.” *Id.* at 555.

Unlike *Flynn*, which reviewed a summary judgment record, a motion to dismiss is on review here. That motion “tests the legal sufficiency of the complaint” and “requires a court to accept all of the complaint’s factual assertions as true, along with the reasonable inferences one may take from them.” *Wis. Carry*, 373 Wis. 2d 543, ¶ 7. Plaintiffs’ complaint alleges that the litigation control provisions impose “negative practical consequences” on the executive branch, including “unavoidably introduc[ing] chaos and uncertainty,” “making rational and consistent decision-making extraordinarily difficult if not impossible,” “imposing considerable and unnecessary costs on both courts and litigants alike,” and “interfer[ing] with basic litigation procedure and mak[ing] the prosecution of cases to conclusion much more difficult.” (R. 1:27 ¶ 77.) Those allegations and the reasonable inferences drawn therefrom adequately plead that the litigation control provisions “unduly burden [and] substantially interfere” with executive functions. *Tetra Tech*, 382 Wis. 2d 496, ¶ 46 (citation omitted). That suffices to survive a motion to dismiss.

The absence of a complete factual record should not, however, prevent this Court from affirming the circuit court’s decision to grant a preliminary injunction. That analysis only requires a likelihood of success on the merits, a finding that the current record supports. *See Werner*, 80 Wis. 2d at 519.

2. The Legislative Defendants misapprehend the shared powers analysis.

The Legislative Defendants try to avoid a substantive shared power analysis with two arguments. First, they argue that the Legislature's power under *Oak Creek* to prescribe the Attorney General's powers and duties eliminates any need for such an analysis. Second, they argue that a substantive shared power analysis is unnecessary under the Court of Appeals' decision in *J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983).

The first argument proves too much. The material question for the shared power analysis is whether Act 369 authorizes a degree of legislative participation that goes too far and unduly burdens the executive function of managing state litigation. To answer that question, the Court must determine how much legislative participation is too much.

According to the Legislative Defendants, however, the Legislature's constitutional power to prescribe the powers and duties of the Attorney General gives it *carte blanche* power to make any allocation of litigation authority it pleases between itself and the Attorney General. If that were true, the Legislature could give itself any portion of the "shared" power, up to and including exclusive power over state litigation. That conclusion is absurd on its face—the executive branch must have *some* power to control state litigation. The Legislative Defendants cannot seriously argue that the Legislature could, for instance, assume absolute control over decisions to file civil or criminal complaints, or to approve individual plea agreements in criminal cases. Because the executive (at minimum) shares in the power to litigate—indeed, that is an exclusive executive power, as set forth above—an analysis of the burden Act 369 imposes on executive functions is

required if the Court concludes that the Legislature has an interest in litigation on behalf of the State. *Oak Creek* says nothing about that key question.

The relationship between the powers of the Attorney General and the Governor—whether constitutional or statutory—cannot obviate the need for a shared power analysis. (See Leg. Defs.’ Br. 29–31.) The material question is how much of a share in managing litigation, if any, can the Legislature give itself without unduly burdening the *executive branch’s* authority over that function. How the power to manage litigation is distributed on the executive side of that balance is irrelevant to the question of whether Act 369 grabs too much of that power for the Legislature.

The Legislative Defendants’ second argument fails because *Ahern* is distinguishable. In *Ahern*, the court of appeals rejected a separation of powers challenge to a statute that required a legislatively controlled commission and the Governor to agree on state building contracts. *Ahern*, 114 Wis. 2d at 106–08. In reaching its conclusion, the court noted that the statute only required the two branches to agree, but did not empower the legislative branch to compel the executive to approve a contract. *Id.* The Legislative Defendants leap to the conclusion that *any* statute that only requires agreement between the legislative and executive branches cannot violate the separation of powers, without any need to make a more substantive examination of the specific powers in question.

That leap is not justified. First, depending on the power at issue, a statute that requires legislative consent to an executive action can have a compulsory impact on the executive branch. Under Act 369, for example, if a legislative intervenor or committee refuses to consent to a proposal to resolve an ongoing case, the practical effect may be to compel the Attorney General to continue litigating that action. In

contrast, the statute in *Ahern* did not allow the Legislature to compel any executive functions.

Second, the areas of shared power here and in *Ahern* are very different. This case involves the power to administer and enforce the law through litigation on behalf of the State. That power—if not *exclusively* executive—is plainly a *predominantly* executive power. See *supra* Argument II.A.2. *Ahern*, in contrast, involved the power to approve state building contracts, a power deeply intertwined with the Legislature’s constitutional responsibility for raising, appropriating, and spending public funds. See *e.g.* Wis. Const. art. VIII, § 2.

Again, in a shared power analysis, the Court must determine how much legislative participation in executive activity is too much. It makes sense that a larger degree of legislative participation would be permissible in a power, like approving building contracts, that is directly connected with the Legislature’s taxing, appropriating, and spending powers. It equally makes sense that less legislative participation may be permissible in a function like administering and enforcing state laws through litigation. One cannot simply assume, as the Legislative Defendants do, that the place where the constitutional line was drawn in *Ahern* would apply in the context of radically different governmental powers.

Under a shared power analysis, the Court must examine the nature of the governmental power and the facts concerning the impact of the statute at issue to determine whether the statute unduly burdens an executive function. The Legislative Defendants make no case as to why the litigation control provisions do not violate the constitution under such an analysis.

3. The litigation control provisions unconstitutionally burden the executive branch.

Setting aside how a remand would be necessary to resolve a shared power analysis, examining Act 369's necessary impact on state litigation reveals how it substantially interferes with executive judgments about how to enforce the law in four ways. *First*, section 26 empowers JCF to override executive judgments about how best to litigate enforcement actions. *Second*, section 30 empowers JCF to interfere with executive judgments about how to defend state agencies involved in litigation. *Third*, the litigation control provisions create delays that impede the executive's appropriate resolution of cases. *Fourth*, the litigation control provisions compromise the executive branch's ability to have privileged intra-branch communications regarding ongoing litigation.

The burdens that the litigation control provisions impose on settlement are not trivial. Most cases settle—around 60 to 70%, if not more. Eisenberg, Theodore & Lanvers, Charlotte, *What is the Settlement Rate and Why Should We Care?*, 6 J. Empirical Legal Stud. 111, 132 (2009).

a. Section 26 substantially interferes with enforcement actions.

Section 26 interferes with executive decision-making at every stage of the enforcement process: deciding which targets to pursue; determining when to consider consensual resolution; and fashioning a consensual remedy that best meets the needs of the State and the public.

At the very start, section 26 interferes with the executive's choices about which targets to pursue. DOJ and other agencies have limited resources to prosecute violations

of, for instance, the state's consumer and environmental protection laws. Much like criminal prosecutors, the executive cannot pursue enforcement actions against every possible violator of state law. *Cf. Morrison*, 487 U.S. at 728 ("If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain." (citation omitted)). Each enforcement action costs executive resources to pursue. Weighed against that cost is the benefit of pursuing a particular action, as certain targets pose a greater threat to the public good than others.

Inherent in this cost-benefit analysis is the executive's prediction of how an enforcement action might ultimately be resolved—settlement or a litigated judgment. Section 26 thus interferes with the executive's selection of potential enforcement targets because pursuing a litigated outcome might not be the best use of agency resources. If, for instance, the target is a large, multinational corporation with significant litigation resources, settling the State's claims might be more attractive than taking the target to trial. See Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev. 1998, 2005 (2001) (noting that, historically, "[i]n enforcement actions against national or multinational corporations, individual attorneys general often had been outgunned"); Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 Antitrust L.J. 911, 920 (2017) (noting that "[i]nvestigation and voluntary settlements comprise the bulk of the consumer protection work of most state AGs" because "[s]ettlements are the best

way to attain results for consumers at the lowest cost to all involved"). But because section 26 makes settlement more difficult and uncertain, the executive might decline to sue the target.

Section 26 also burdens the executive's ability to decide how to time the investigation and any potential litigation given existing cases and staff resources. *See Lynch, supra*, at 2005 ("A state attorney general pursuing a case against a major corporation would have to commit all or significant portions of her resources to the case, thereby preventing work on other cases."). That analysis requires the executive to predict how long both new and existing actions will last, a prediction that becomes much more difficult when settlements must receive JCF approval.

When the time comes to fashion an appropriate consensual case resolution, section 26 again interferes with the executive's discretion. A negotiated agreement reflects the executive's case-specific judgment about the best achievable remedies for Wisconsin citizens. In a given case, the target may agree to modify its behavior, whether by ceasing its misrepresentations, unlawful discharges, or anything else; agree to affirmative remediation to correct harm going forward, or pay money as a penalty or restitution to injured Wisconsin citizens. *See, e.g.*, Wis. Stat. § 100.18(11)(d) (providing injunction and restitution remedies for fraudulent representation consumer protection claims); Wis. Stat. § 283.91(1)–(5) (creating injunction, forfeiture, and fine remedies for pollution discharge claims). These remedies also serve to deter other potential targets, as they send a message about the executive's willingness to pursue wrongdoers. To craft these remedies, the executive uses its agencies' institutional experience in resolving enforcement actions for the benefit of Wisconsin citizens.

But because section 26 allows JCF to withhold its consent for a proposed settlement at its sole discretion, JCF can thus dictate which remedies the executive may consensually secure.

If a legislative committee withholds its consent for a settlement, it can force the executive to continue litigating an enforcement action against its best judgment. This delays the action's resolution, which could in turn harm Wisconsin citizens who wait longer for relief. It also delays new enforcement actions, because the executive must continue dedicating litigation resources to the ongoing action. And it risks losing the case through an unfavorable litigated judgment, a risk that could have been eliminated by reaching a negotiated resolution.

Either directly or indirectly, section 26's legislative consent requirement inserts a legislative committee into every step of the enforcement process. Each executive decision about how best to enforce the law—which target to pursue, when to pursue it, how best to conduct the litigation, when and if to seek settlement, what remedies the settlement should contain—is now subject to the unreviewable whim of a legislative committee. This “unduly burden[s] [and] substantially interfere[s] with” the exercise of executive functions and violates the separation of powers. *Flynn*, 216 Wis. 2d at 546.

b. Section 30 substantially interferes with the defense of state entities and officials.

Section 30 substantially interferes with executive judgments about how best to defend state entities and officials against litigation. Like plaintiff-side cases, defense cases involve ongoing judgments about how best to allocate state resources and resolve litigation against a state entity or

official. Section 30 empowers a legislative committee to override these executive judgments.

In defense cases, plaintiffs commonly allege that a state entity or official is not properly executing state or federal law in administering a policy or program. A plaintiff might allege, for instance, that the Department of Employee Trust Funds is not administering a state employee retirement benefit in accordance with state or federal law (*e.g.*, *Fazio v. DETF*, 2006 WI 7, 287 Wis. 2d 106, 708 N.W.2d 326), that the Department of Revenue wrongly denied a business a statutory property tax exemption (*e.g.* *Union Pacific R.R. Co. v. DOR*, 360 F. Supp. 3d 861 (W.D. Wis. 2019)), or that the Department of Corrections improperly denied an inmate access to a religious service (*e.g.* *Schlemm v. Wall*, 784 F.3d 362 (7th Cir. 2015)).

When the Attorney General receives a request to defend an executive agency or official in such a case (*see* Wis. Stat. § 165.25(6)(a)1.), DOJ must first evaluate the claim in consultation with the client. Sometimes, that review may reveal that the state defendant has not been executing state or federal law properly and thus that the litigation should be resolved quickly to bring the client into compliance with the law.

But if the litigation involves a claim for injunctive relief or if resolution requires a consent judgment, section 30 allows a legislative committee to override this process. Even if the executive client and Attorney General agree that properly executing the law requires adjusting the client's conduct, they cannot resolve the litigation without legislative committee review.

Withholding consent effectively forces the Attorney General and the state client to continue litigating rather than resolve the case by executing the law differently. This

overrides the executive judgment of both the Attorney General and the state client in three main ways.

First, preventing settlement overrides executive judgment about how best to execute the laws that the defendant agency is charged to administer. For instance, the executive might agree with plaintiffs that the Department of Corrections should run a challenged prison program in a particular way to best ensure the security of inmates and staff. Forcing litigation to continue through judgment can deny the executive the ability to administer its programs according to its best judgment in exchange for an end to litigation.

Second, even if a legislative committee simply delays a negotiated resolution, that can still significantly increase a state defendant's financial exposure.⁵ In cases with fee shifting claims (*see, e.g.*, 42 U.S.C. §§ 1983, 1988), attorney fees can rapidly increase as litigation proceeds, especially as trial approaches. *See, e.g., First Midwest Bank v. City of Chicago*, 337 F. Supp. 3d 749, 801 (N.D. Ill. 2018) (awarding over \$2.5 million in attorneys' fees against government entity following civil rights trial). Reaching a quick negotiated resolution to minimize attorney fees may thus serve a state defendant's financial interest, but, again, section 30 allows a legislative committee to override that calculus by withholding its consent.

Third, forcing executive agencies and officials to continue litigation also interferes with their decisions about

⁵ Defense-side monetary settlements are not paid from the general fund and require no special appropriation by the Legislature. Rather, executive branch agencies fund these settlements out of their existing appropriations, through premiums paid to the Department of Administration's Bureau of Risk Management. *See* Wis. Stat. § 16.865.

how to best allocate available resources. Litigation can demand significant time commitments from top-level agency officials, whether through trial and deposition testimony or helping to gather evidence. Diverting their scarce time to litigation distracts the state defendant from its core mission of executing state law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 816–817 (1982) (noting that “subjecting officials to the risks of trial” and “broad-ranging discovery” can be “peculiarly disruptive of effective government”). But a legislative committee can now force that result under section 30.

Section 30 therefore “unduly burden[s] [and] substantially interfere[es] with” the exercise of executive functions. *Flynn*, 216 Wis. 2d at 546. By allowing a legislative committee to overrule decisions about when to resolve litigation involving the execution of state law, executive agencies lose their ability to administer their programs, allocate resources, and execute state law according to their best judgment. Section 30 thus allows legislative committees to control executive agencies and officials, at least on topics that have embroiled those agencies and officials in litigation. That violates the separation of powers.

c. The litigation control provisions allow legislative committees to significantly delay the resolution of state litigation.

“[T]he fairness of a process must be adjudged on the basis of what it permits to happen, not what it produced in a particular case.” *Morrison*, 487 U.S. at 731 (Scalia, J., dissenting). Here, the litigation control provisions lack procedures or standards to guide legislative committees’

consideration of executive settlement proposals.⁶ This empowers committees to indefinitely refuse settlement proposals, or even to refuse to consider them. That delays the resolution of state litigation and thereby significantly burdens the executive branch.

Delay harms state clients and Wisconsin citizens. Litigation often reaches a critical moment best suited for consensual decision-making, a window of opportunity that may remain open only for a short time. *See, e.g.*, Stephen Paul Mahinka & Kathleen M. Sanzo, *Multistate Antitrust and Consumer Protection Investigations: Practical Concerns*, 63 Antitrust L.J. 213, 230 (1994) (noting timing issues when settling multistate consumer protection litigation). When a legislative committee withholds its consent, that window may close and the State lose the optimal settlement moment forever. While the Attorney General can litigate the case to final judgment, alternative, future resolutions will not always benefit the State as much as settlement during the optimal window.

Timing issues are particularly acute in multi-state consumer protection and Medicaid fraud cases. When multiple states settle claims against a target together, their collective leverage fosters a better resolution for all of them. *See Pridgen, supra*, at 922 (explaining that “the multistate approach can pool whatever resources the states have into a joint effort, and achieve more clout vis-à-vis sometimes

⁶ For plaintiff-side litigation, a legislative committee has no time limit to decide whether to approve a settlement the Attorney General proposes. *See* Wis. Stat. § 165.08(1). And although section 30 typically imposes a passive review process, where consent is required only if JCF schedules a meeting within 14 days of receiving a proposed settlement plan, that period can extend indefinitely if JCF rejects each proposed plan. *See* Wis. Stat. § 165.25(6)(a)1.

powerful and wealthy defendants”). But such global settlements may have small windows in which individual states can join, sometimes as little as two weeks. If Wisconsin misses such deadlines due to delays in securing legislative committee consent, it must keep litigating alone. A settlement could yet be reached, but on less advantageous terms.

Delay also causes the State to miss time-critical opportunities to remedy harms. In environmental cases, a defendant may agree to undertake remediation that is possible only during warm-weather months, before the ground freezes.

Delays also clog courts in Wisconsin with litigation that would be settled, if not for the litigation control provisions. The longer legislative committees fail to meet or withhold consent, the more trials courts will need to conduct, the more motions to decide, the more litigation, period.

And the litigation control provisions harm opposing parties who cannot cooperatively resolve litigation against state entities. When the State and an opposing party reach a negotiated agreement, the opposing party has decided that resolving the dispute at the agreed-upon time and the agreed-upon terms serves its best interests. Imagine a business alleging it was improperly denied a tax benefit—an immediate negotiated resolution may serve its best interest by clarifying its past and future tax liability, allowing it to plan future operations accordingly. The more delay caused by the legislative committee consent process, the more uncertainty parties opposing the State face.

d. The litigation control provisions prevent the executive branch from enjoying the representational right of the attorney-client privilege.

The litigation control provisions also threaten the privilege that rests at the core of the Attorney General's attorney-client relationship with executive branch clients, which imposes another substantial burden on executive functions.

To serve state clients effectively and consistent with the Rules of Professional Conduct, the Attorney General must have privileged and confidential communications with his executive clients. See Wis. Stat. § 905.03(2) ("A client has a privilege . . . to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services . . ."); SCR 20:1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . ."). This privilege "promote[s] 'full and frank communication' between client and attorney," in that "[c]lients aware that an attorney's disclosure waives the privilege may keep critical information from their attorney, thus thwarting the policy of the free flow of information that lies behind the attorney-client privilege." *Harold Sampson Children's Tr. v. The Linda Gale Sampson 1979 Tr.*, 2004 WI 57, ¶¶ 42–43, 271 Wis. 2d 610, 679 N.W.2d 794.

The litigation control provisions do not specify the information a legislative committee may demand before considering settlement proposals. That enables committees to require the Attorney General to turn over privileged attorney-client communications and confidential attorney work product, including assessments of a case's strengths and

weaknesses, the range of available settlements, and comparable settlements in similar cases.

Acceding to any such demand would require the Attorney General to disclose among the most sensitive privileged information his executive clients possess. Nearly all relevant information regarding settlement discussions, sometimes even the case at issue, is confidential. *Cf.* Fed. R. Evid. 408; Wis. Stat. § 904.08. Once an enforcement target or a plaintiff learns that the state client is even considering settlement, it can use that information to its strategic advantage. And in cases where the opposing side has not yet agreed to the proposal, disclosing the state client's evaluation of settlement alternatives puts it at a distinct disadvantage in negotiations. Moreover, adversaries in consumer and environmental protection matters, including multistate cases, may demand that settlements remain highly confidential until they have been fully negotiated and finalized. Any disclosure of settlement negotiations before the agreed-upon date would substantially interfere with the negotiations and make it harder for DOJ to participate in future settlements with other states.

Nothing in the litigation control provisions requires legislative committees to keep privileged information it receives confidential. JCF's members have no attorney-client relationship with the state client and so are not bound by any professional ethics or statute. Simply convening in closed session does not solve this confidentiality problem, either. See *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶ 44, 312 Wis. 2d 1, 754 N.W.2d 439 (finding no "broad discovery privilege for communications occurring in closed sessions of governmental bodies").

The breach of privilege forced by the litigation control provisions threatens to undermine the executive's attorney-client relationships. Requiring disclosure of privileged

settlement information forces the Attorney General to breach the attorney-client privilege whenever DOJ seeks permission to settle a case. Absent a secure privilege, those executive clients may now “fear[] that the[ir] attorney will release the documents to an adversary who will use the documents against the client.” *Sampson Children’s Tr.*, 271 Wis. 2d 610, ¶ 43. If executive clients can no longer communicate frankly with the Attorney General, they lose the benefit of the effective legal representation that is critical to a well-functioning executive branch.

The breach of privilege that the litigation control provisions require is yet another way in which they substantially interfere with executive functions and violate the separation of powers.

* * *

Although certain powers may be shared between the legislative and executive branches, control over the resolution of state litigation unrelated to the validity of state law is not among them. That is a core executive power that the Legislature cannot usurp for itself. Even if it were a shared power, remand would be the appropriate remedy to determine the burden on the executive branch. But even the facts available now show that the litigation control provisions substantially burden this executive function and violate the separation of powers.

III. Even in cases that challenge the validity of a statute, Act 369’s litigation control provisions violate the separation of powers because they interfere with executive functions more than necessary to protect any shared legislative interest.

Act 369’s litigation control provisions violate the constitutional separation of powers in cases that do not

challenge the validity of a state statute. But those provisions are also unconstitutional in cases that do include such a challenge.

The Legislative Defendants contend that litigating on the State's behalf is a power shared between the legislative and executive branches because invalidating a statute harms the Legislature's constitutional interest in the validity of the laws it enacts. The Wisconsin Court of Appeals has held, however, that any abstract interest in defending the validity of its laws does not give the Legislature a constitutional right to control litigation challenging those laws:

[B]y claiming an interest in defending its statutes against constitutional challenges, the Legislature conflates the roles of our government's separate branches. Under our tripartite system of government, the legislature's role is to determine public policy by enacting legislation. In contrast, it is exclusively the judiciary's role to determine the constitutionality of such legislation and it is the executive's role to defend the constitutionality of statutes.

Helgeland, 296 Wis. 2d 880, ¶ 14 (citations omitted). Therefore, to the extent that the Legislative Defendants contend their interest in defending statutes gives them the right to control state litigation, the contention is contrary to existing Wisconsin precedent.

It does not necessarily follow, however, that the Legislature has no shared interest in the defense of statutes. To the contrary, this Court has found that the legislative branch incurs judicially cognizable injury when a duly enacted state statute is invalidated, thereby implying a possible legislative interest in defending against such invalidation. In addition, the U.S. Supreme Court has acknowledged that invalidating a statute without an

executive-branch defense can give rise to separation of powers concerns, and that such concerns can be mitigated if the statute is defended by agents of the legislative branch or other suitable parties. See *United States v. Windsor*, 570 U.S. 744, 762–63 (2013); see also *Chadha*, 462 U.S. at 940 (“We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.”); *Hollingsworth v. Perry*, 570 U.S. 693, 709–10 (2013) (state may provide officials to defend the validity of a state statute, if the state’s attorney general declines to do so).

Therefore, although managing state litigation generally is an exclusively executive function, the power to participate in such litigation for the purpose of defending a challenged statute that the executive branch has declined to defend could be viewed as a power that is shared by the executive and legislative branches.

But even if a shared interest exists in defending a statute, the litigation control provisions of Act 369 still interfere with state litigation far more than necessary to protect any such interest. As shown above in sections II.A.2–3, in any case that does not challenge a statute, managing the resolution of the case is an exclusively executive function. Similarly, in a case that does challenge a statute, managing the aspects of the case that are independent of the statute’s validity is equally a purely executive function. Act 369, however, gives agents of the legislative branch the power to block case resolutions unrelated to the validity of a statute, either by refusing to consent to such a resolution or by blocking the resolution as an intervenor.

Where the question of a statute's validity is pending before a court, the Legislature's interest would ordinarily be satisfied simply by allowing the legislative branch to be heard. The only times that interest could warrant allowing the Legislature to block a proposed resolution in a case would be if an Attorney General proposed a resolution that would lead to a court judgment invalidating a statute without a full adversarial hearing of the relevant legal issues. In that highly uncommon type of situation, it might be permissible under a shared power analysis to require some form of legislative consent before the Attorney General could execute the proposed resolution. If that consent were withheld, the proposal would not be executed, and there would be an opportunity for a legislative intervenor to take up the defense of the challenged statute before the court.

Act 369's litigation control provisions, however, are not crafted to that narrow situation, but rather authorize the legislative branch to block a proposed case resolution even if it is unrelated to a statute's validity. That is not constitutionally permissible. Any shared interest of the legislative branch extends only to defense of a challenged statute—additional legislative interference in resolving the case unduly burdens the executive conduct of state litigation.

In contrast to Act 369, federal law provides an example of how the legislative interest in defending the validity of statutes in court can be protected without empowering the legislative branch to interfere in unrelated aspects of case management.

The Office of Senate Legal Counsel represents the U.S. Senate in court proceedings. *See* 2 U.S.C. §§ 288–288n. In any case in which the constitutionality of a federal statute is placed in issue, if the U.S. Attorney General decides to challenge or to refrain from defending the statute, he must submit a report to that Office and other designated

congressional officers within a time that will reasonably permit congressional intervention, but no later than 30 days after the Attorney General's decision. 28 U.S.C. § 530D(b)(2). *See also* 2 U.S.C. § 288k. The Senate may then direct its Counsel to intervene or appear as amicus curiae and to defend the challenged statute. *See* 2 U.S.C. §§ 288e(a), 288h.

The Counsel's participation in any such action or proceeding, however, "shall [be] limit[ed] . . . to issues relating to the powers and responsibilities of Congress." 2 U.S.C. § 288e(c). In other words, the legislative branch may participate to the extent necessary to defend the validity of an otherwise undefended federal statute, but it may not control other aspects of a court proceeding.

It might be possible for the Legislature to craft carefully tailored legislation, like the federal provisions described above, that would allow the legislative branch to participate in state litigation to the extent necessary to protect its interest in defending the validity of state laws, while also restricting participation to that issue.

Act 369's litigation control provisions go much further by allowing the legislative branch to block any proposed resolution of a case, even if the proposal does not invalidate a statute. That goes far beyond any shared legislative interest in the validity of state laws and unduly burdens the executive management of state litigation in violation of the constitutional separation of powers.

IV. The litigation control provisions impermissibly infringe on exclusive powers of the judicial branch.

Act 369's litigation control provisions also unconstitutionally infringe on two exclusive functions of the judicial branch.

First, this Court has exclusive authority over attorneys' professional obligations, which it exercises through the Rules of Professional Conduct. Yet these provisions mandate that government attorneys violate those rules by disclosing confidential client information and violating the duty of loyalty to the client.

Second, the litigation control provisions compromise the judiciary's inherent authority to manage its docket. By allowing a legislative committee to prevent settlements, the Legislature effectively eliminated the judiciary's ability to require parties to engage in settlement discussions—a central component of a court's ability to facilitate the just, speedy, and inexpensive resolution of litigation. Relatedly, the provisions place control over litigation in the hands of non-parties, removing another judicial tool for docket control.

A. The litigation control provisions interfere with the judiciary's regulation of lawyers.

“The regulation of the practice of the law is a judicial power and is vested exclusively in the supreme court’ by way of Article VII of the Wisconsin Constitution.” *Koschkee v. Evers (Koschkee I)*, 2018 WI 82, ¶ 10, 382 Wis. 2d 666, 913 N.W.2d 878 (citation omitted). This “inherent authority to regulate the bench and bar is necessary to preserve the judiciary’s ability to perform its constitutional duties as a coequal branch of government.” *State v. Schwind*, 2019 WI 48, ¶ 18, 386 Wis. 2d 526, 926 N.W.2d 742. Courts will therefore “modify or declare void any such rule, law, or regulation by whomever promulgated, which appears to the court to interfere with the court’s control” of the practice of law. *State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 206, 109 N.W.2d 685 (1961).

To regulate the practice of law, this Court has adopted Rules of Professional Conduct and rules defining and

prohibiting the unauthorized practice of law. See SCR chs. 20, 23. Two principles are relevant to the litigation control provisions at issue here: confidentiality and loyalty/avoiding conflicts.

1. Confidentiality.

This Court's rule of confidentiality provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent" SCR 20:1.6(a). Along with attorneys, courts, too, have a duty "to safeguard the sacrosanct privacy of the attorney-client relationship," thereby helping to "maintain public confidence in the legal profession" and "protecting the integrity of the judicial proceeding." *Freeman v. Chi. Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982).

As explained in Argument II.B.3.d. above, JCF has demanded that the Attorney General disclose a variety of attorney-client privileged settlement information that "relat[es] to the representation of a client," in direct violation of SCR 20:1.6(a). This Court's rules plainly prohibit such disclosures without the informed consent of the client, which creates a direct conflict with the litigation control provisions.

2. Loyalty and unconflicted representation.

This Court's Rules require attorneys to "abide by a client's decision whether to settle a matter." SCR 20:1.2(a). But the litigation control provisions conflict with SCR 20:1.2(a) by placing that decision in JCF's sole discretion.

This also creates an irreconcilable conflict for DOJ attorneys. On the one hand, they may not represent a client when there is a "significant risk" that the representation would be "materially limited" by the attorney's responsibilities to "a third person." SCR 20:1.7(a)(2). That

seemingly prevents DOJ attorneys from representing state clients, since their responsibility to seek legislative committee consent will limit their ability to follow their client's wishes. But DOJ lawyers also generally "are the only attorneys authorized to appear in the courts of the state in state matters." *Koschkee I*, 382 Wis. 2d 666, ¶ 38 (Bradley, R.G., J., concurring in part, dissenting in part) (citation omitted). DOJ attorneys cannot honor both of these commitments.

The divided loyalty created by the litigation control provisions conflicts with *Koschkee I*. There, the Solicitor General refused to represent the interests of his client, then-Superintendent Evers, instead asserting that he alone would dictate the Superintendent's litigation position, in a way contrary to the Superintendent's wishes. In rejecting that "breathtaking" approach, this Court recognized that "accepting [the Solicitor General's] argument would foist upon Evers and DPI an attorney they do not want (and have discharged), taking a position with which they do not agree. This could have ethical implications for DOJ attorneys." *Koschkee I*, 382 Wis. 2d 666, ¶ 13.

The same reasoning applies here. The litigation control provisions improperly wrest away from government clients the decision whether to settle lawsuits against them and force their lawyers to take positions contrary to their wishes.

B. The litigation control provisions interfere with the judiciary's ability to control its docket.

Central to Wisconsin courts' inherent power is their authority to "control their dockets to achieve economy of time and effort." *Hefty v. Strickhouser*, 2008 WI 96, ¶ 31 n.8, 312 Wis. 2d 530, 752 N.W.2d 820 (citation omitted). This Court therefore adopted Wis. Stat. § 802.10, which codifies courts' control over their calendars and their ability to

“facilitate[] the just, speedy, and inexpensive disposition of the action,” including by settlement. Specifically, courts possess inherent authority to order the parties to attempt alternative dispute resolution. *See* Wis. Stat. § 802.12(2)(a). To enforce these docket-control functions, courts also have “inherent authority to sanction parties for failure to prosecute, failure to comply with procedural statutes or rules, and for failure to obey court orders.” *Schaefer v. N. Assur. Co. of Am.*, 182 Wis. 2d 148, 162, 513 N.W.2d 615 (1994) (citation omitted).

Act 369’s litigation control provisions infringe on Wisconsin courts’ inherent docket management authority in two ways.

First, legislative committee control over settlements frustrates courts’ ability to manage their dockets, particularly through alternative dispute resolution. If a court orders parties to engage in mediation, even if the parties reach a settlement, JCF may nonetheless withhold its consent. This will result in more cases proceeding through discovery, summary judgment, and potentially trial, even though the parties had otherwise agreed to resolve their dispute.

Second, the litigation control provisions allow litigation to be controlled by non-parties and non-lawyers. In the typical case, both attorneys and parties will be subject to the courts’ inherent authority to impose and enforce orders, including orders to appear for settlement discussions and sanctions for failure to comply. *See Schaefer*, 182 Wis. 2d at 162. But because JCF is not a party or attorney in the litigation, its members are typically beyond the reach of these docket control mechanisms.

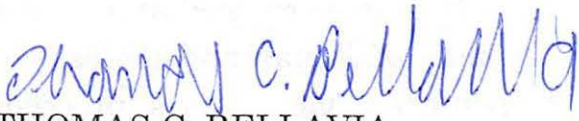
CONCLUSION

The Attorney General respectfully asks the Court to (1) declare invalid the changes to Wis. Stat. § 165.08 made by section 26 of Act 369; (2) declare invalid the changes to Wis. Stat. § 165.25(6)(a)1. made by section 30 of Act 369; and (3) declare invalid sections 5, 97, and 99 of Act 369 to the extent they empower a legislative intervenor to block a case resolution unrelated to defending the validity of a statute. The circuit court's decision denying the Legislative Defendants' motion to dismiss and granting a preliminary injunction against these sections should be affirmed.

Dated this 17th day of September, 2019.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 12,729 words.

Dated this 17th day of September, 2019.



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

I hereby certify that:


I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 opposing parties.

Dated this 17th day of September, 2019.



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