STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2022AP790

JOSH KAUL, WISCONSIN DEPARTMENT OF JUSTICE, TONY EVERS and KATHY KOLTIN BLUMENFELD,

Plaintiffs-Respondents,

v.

WISCONSIN STATE LEGISLATURE, WISCONSIN STATE LEGISLATURE JOINT COMMITTEE ON FINANCE, CHRIS KAPENGA, DEVIN LEMAHIEU, ROBIN VOS, TYLER AUGUST, HOWARD L. MARKLEIN, MARK BORN, DUEY STROEBEL and AMY LOUDENBECK,

Defendants-Appellants.

ON APPEAL FROM ORDERS OF THE DANE COUNTY CIRCUIT COURT, THE HONORABLE SUSAN M. CRAWFORD, PRESIDING

RESPONSE BRIEF OF PLAINTIFFS-RESPONDENTS

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INTRODUCTION

The Wisconsin Constitution's separation of powers protects against the dangers of the "same persons who have the power of making laws to have also in their hands the power to execute them." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 5, 376 Wis. 2d 147, 897 N.W.2d 834 (citation omitted).

Prior to Act 369, the power to settle the two categories of plaintiff-side civil actions at issue here—(1) civil enforcement actions and (2) actions the Department prosecutes on behalf of executive agencies relating to the administration of programs—rested exclusively with the Executive Branch. Rightly so, as settlement of these actions constitutes quintessential, core executive power.

Through Act 369, the Legislature took full veto power over whether, when, and how the Executive Branch may settle these actions. The Legislature did not give itself a "seat at the table;" it gave itself a throne.

The circuit court correctly held that section 165.08(1) is unconstitutional as applied to these two executive categories.

ISSUE STATEMENT

Does section 165.08(1) violate separation of powers as applied to:

(1) civil enforcement actions; and

(2) civil actions prosecuted on behalf of executive state agencies regarding the administration of statutory programs the agencies execute?

This circuit court declared section 165.08(1) unconstitutional as applied to these two categories.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Executive Branch welcomes oral argument if helpful. Publication is warranted on this novel question of statewide importance. Wis. Stat. § (Rule) 809.23(1).

STATEMENT OF THE CASE

I. The Executive Branch's authority to settle prosecuted civil actions ended with Act 369, which created a legislative veto over those settlements.

Until 2017 Wisconsin Act 369, the Executive Branch had authority to resolve civil actions prosecuted by the Department of Justice. The prior version of section 165.08, first codified nearly 100 years ago, authorized the Department to compromise or discontinue civil actions at the direction of the state entity that authorized the Department to initiate it. *See* 1923 Session Laws, ch. 240, § 1; Wis. Stat. § 165.08 (2015–16).

The types of civil actions the Department prosecutes are varied and include actions brought at the Legislature's request, actions filed by Wisconsin against other states, and actions challenging federal statutes, regulations, or policies. (R. 98:45.) During the window between Attorney General Kaul's November 2018 election and the Legislature's December 2018 enactment of Act 369, public attention concerning "which lawsuits AG-elect Kaul could drop" focused on such high-profile matters as Wisconsin's then-participation in a multi-state lawsuit challenging the federal Affordable Care Act. (R. 97:4–5; 98:48–53.)

This case does not concern those types of actions. It concerns two other categories: civil enforcement actions and actions brought on behalf of an Executive Branch agency

regarding harm to a program it administers. (R. 11; 116; *see also* R. 98:45 (listing categories not subject to this suit).)

Category 1 is civil enforcement actions prosecuted by the Department to stop and remedy violations of Wisconsin's consumer protection, environmental protection, and other statutes protecting the public. *See e.g.*, Wis. Stat. §§ 100.18 (fraudulent representations), 100.20 (unfair trade-practices); Wis. Stat. ch. 281 (water-quality and sewage-disposal standards), ch. 283 (pollution); (R. 11:14–19 (discussing other civil enforcement actions).)

Category 2 is actions brought on behalf of Executive Branch agencies relating to the administration of programs they are charged to execute. *See* Wis. Stat. § 165.25(2). These actions often involve contractual disputes with vendors or tort claims against individuals who have damaged state property managed by the agency. (R. 116:18–19.)

Settlement is critical to the Executive Branch's litigation of these actions. Generally, studies estimate that between 67% and 92% of civil cases resolve through settlement.[1] "Settlements save the parties the substantial cost of litigation." *Matter of Ests. Of Zimmer*, 151 Wis. 2d 122, 134, 442 N.W.2d 578 (Ct. App. 1989) (citation omitted). Settlement avoids the all-or-nothing risk of relying on a judge- or jury-decided outcome, spares time and stress preparing for and litigating trial, and allows for more timely resolution. (R. 73:5.)

That is particularly true for actions in these categories, where it is important to quickly rectify harms to the public and to the administration of state programs and avoid wasted

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[1] Jonathan D. Glater, *Study Finds Settling is Better than Going to Trial*, New York Times, Aug. 7, 2008 (estimating 80–92%); Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. of Empirical Leg. Studies 111, 132, 145 (2009) (estimating 67%).

state resources or an adverse verdict. (R. 73:6.) Settlement allows the parties to craft a remedy that directly addresses the agency's needs while accounting for the defendant's particular abilities to rectify injury, and fosters repair of ongoing relationships. (R. 73:6.)

In civil enforcement actions specifically, prompt resolution shortens the time the public must wait for violations to be stopped and remediated and avoids having lingering violations require more complex and expensive remedies. (R. 73:5.) In multistate enforcement actions, settlement creates consistent cross-jurisdictional expectations for defendants and helps prevent wrongdoers from moving illegal practices to a different state. (R. 73:5–6.)

Through Section 26 of Act 369, the Legislature gave a legislative committee power over whether, when, and how the Department may compromise or discontinue these civil actions:

> 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 . . . . 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); *see also* Wis. Stat. § 13.09 (JCF a legislative committee).

II. The Executive Branch brought suit to challenge section 165.08(1)'s application to two categories of plaintiff-side civil actions.

Two months after Act 369's enactment, in *SEIU*, a union brought a broad facial separation-of-powers challenge to numerous Act 369 provisions, including provisions relating to guidance documents, Capitol security, and multiple litigation provisions, including legislative intervention and defense- and plaintiff-side settlement control. *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶¶ 3–4, 9–13, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*").

In rejecting the facial challenges, the supreme court held that three "institutional interests of the legislature" could exist in "at least some cases" such that the challengers could not prove the litigation-control provisions unconstitutional in every application: where (1) the Department represents the Legislature, (2) the State would be required "to pay money to another party," and (3) a settlement would concede the invalidity of a state law. *Id.* ¶¶ 63–73.

The court "stress[ed]" its decision was "limited" and "express[ed] no opinion on whether individual applications or categories of applications may violate the separation of powers . . . ." *Id.* ¶ 73.

In June 2021, the Executive Branch brought its complaint challenging section 165.08(1)'s application in these two categories of civil actions. (R. 11.)

The Legislature filed a motion to dismiss, arguing lack of standing, that *SEIU* dispositively controlled, and claim preclusion. (R. 26; 27:7–22.)[2] The court denied the motion.

[2] The Legislature has abandoned its standing and claim-preclusion arguments. (Leg. Br. 29 n.6.)

(R. 70.)[3] Following the Legislature's discovery (*see, e.g.,* R. 98; 80), the parties filed cross-summary judgment motions. (R. 71–72; 90–91; 96–97.)

The Executive Branch argued the statute violates separation of powers as to these categories as a matter of law under either a core- or shared- powers analysis. But in response to the Legislature's proposed shared-powers test, which would look instead to the administrative harms caused by the law, the Executive Branch also presented facts that highlight the harmful effects the law has caused in these categories:[4]

- The statute gives the Department no control over whether, when, or how JCF convenes to consider proposed settlements. As of February 2022, there were 15 cases submitted to JCF it did not consider. (R. 97:15.) In two actions, the JCF Chairs refused to have JCF consider proposed settlements unless the Department agreed to forego statutory attorneys' fees. (R. 74:35.) For the proposed settlements it has considered, it has taken JCF between about one week and several months to convene and vote. (R. 73:14.) JCF has indicated that it is the Committee's decision whether a matter justifies expedited review, regardless of the Department's request (R. 73:14);
- The Department does not know whether JCF will approve a settlement and has no way to appeal a denial. That leaves the Executive Branch and defendants with uncertainty as to whether a settlement they negotiate will be final. (R. 97:13.) The Department must advise

[3] The Executive Branch also filed then withdrew a temporary injunction motion. (R. 17; 44.)

[4] The Executive Branch also discussed these harms in responding to the Legislature's motion for stay pending appeal.

defendants and any state agency client that it does not have authority to enter binding agreements. (R. 73:9–10.) And in multistate civil enforcement matters, where states must sometimes bind themselves to an agreement with a major target in 48 hours or less, the Department cannot promise that Wisconsin's participation is certain (R. 145:13–14);

- JCF meets in open session per section 13.10(3). (R. 73:14.) But the Department must protect confidential client communications and strategy pursuant to ethical rules, including SCR 20:1.6. (R. 97:10.) In multistate actions, the Department typically may not disclose confidential information without the agreement of every other state involved. (R. 97:12.) The Department must also respect the confidentiality of negotiations; parties are typically bound to keep negotiation terms confidential until a final agreement is entered (R. 73:8–9);
- JCF has not agreed to have its members enter into confidentiality agreements. (R. 97:9–12.) JCF members have disagreed on whether they can legally meet in closed session. (R. 73:14.) Even if they could, the Legislature Reference Bureau has opined that no JCF member is required to keep the information confidential (R. 73:14–15; 74:37–38);
- In civil enforcement actions, the public has waited longer for the implementation of remediation that compensates injured consumers or stops or corrects harms to the environment. (R. 73:14; 97:7–8; 145:6.) The Department cannot resolve fast-turnaround multistate matters with the same enforcement tool used by other states, and must instead use less-protective contractual settlement agreements. (*See* R. 145:23.) The Department has been asked not to

participate in a multistate civil enforcement effort because of JCF's veto power (R. 97:17);

- In both categories, the Executive Branch has lost the value of mediations, where cases often successfully resolve, because the Department does not have final settlement authority. (R. 97:14.) Further, some defendants have been unwilling to waive confidentiality and present a settlement to JCF without any assurance that JCF will approve it, out of a concern that it will publicly put its cards on the table but go to trial after a JCF veto. (R. 97:13–15.) This has required the Department to dedicate resources to unnecessary litigation and trial preparation and to decline representation in other matters to manage resources (R. 97:13–14);
- In every action in these categories, section 165.08(1) has infected and necessarily altered the Department's decision-making at every stage: whether to prosecute an action; how best to remedy a particular violation; how to advise agency clients; when and how to attempt to negotiate a resolution; and how to allocate scarce resources about which matters to pursue (R. 73:9–10; 97:12–14).

The Legislature submitted no evidence rebutting this evidence of harm and offered no evidence of any settlement in these two categories where it utilized the JCF approval power to fulfill any legislative role. At oral argument, it asserted that JCF has been "generally" approving submitted settlements "as a matter of course." (R. 129:38, 42.) Asked by the court, "Is it just a pointless formality that delays the achievement of a settlement? If the Legislature is ultimately unanimously approving the settlements then what's the point?" (R. 129:39.) The Legislature responded that it just wanted to "take a look" on the theory that an "inappropriate settlement could happen once in a while." (R. 129:40.)

The court also asked, "suppose the Legislature simply refuses to give its approval to a proposed settlement, and the Attorney General disagreed with the changes sought by the Legislature, what happens then?" (R. 129:58–59.) The Legislature answered: "There would be no settlement." (R. 129:59.)

III. The circuit court held section 165.08(1) unconstitutional in these categories.

In two separate decisions, the circuit court concluded that section 165.08(1) is unconstitutional as applied to these categories.

The court first issued a decision granting summary judgment to the Executive Branch as to Category 1 actions. (R. 106.)

The court concluded that the power to settle civil enforcement actions is a core executive power. The court found "significant persuasive value" in caselaw addressing the "quintessentially executive" "nature of civil enforcement litigation," and emphasized the absence of any legislative role in "approximately 170 years" of Wisconsin history or in "any other state." (R. 106:7–9.)

It reasoned that resolving a particular civil enforcement violation through settlement "requires the weighing of factors central to the executive branch's faithful execution of the law," and that the "time-sensitive and individualized decision-making entailed by whether and how to settle a civil prosecution against an alleged violator stands in stark contrast to the collective, deliberative, protracted process of enacting generally applicable laws that is the Legislature's constitutional purview." (R. 106:9–10.)

The court rejected the Legislature's argument that *SEIU* "already considered and rejected . . . that the settlement of civil enforcement actions is a core executive function."

(R. 106:10.) It concluded that none of the potential legislative constitutional interests identified in *SEIU* exist in civil enforcement actions. (R. 106:10–11.)

As to the Legislature's asserted interests in any settlement involving "money" or "policy," the court explained that the Legislature's actual constitutional interests instead concern expenditure of funds "by appropriation" and "authority to establish policy through the enactment of laws." (R. 106:12–13.) "A settlement agreement . . . may be a matter of public interest, but it is not 'policy making.'" (R. 106:13.)

The court held that the Executive Branch "met its burden of proving that Wis. Stat. § 165.08(1) is unconstitutional beyond a reasonable doubt as applied to the first category of cases." (R. 106:13–14.)

On Category 2 actions, the court addressed an objection by the Legislature at oral argument that it was unaware that Category 2 included no actions where the State paid money to another party. While noting that the complaint and parties' briefs reflected that Category 2 did not include such actions, the court granted leave for amended pleadings on the second claim. (R. 106:14–18.) The Executive Branch amended its complaint, adding a paragraph stating that Category 2 "does not involve any settlement in a plaintiff-side civil action that would require the payment of money to the defendant via a counterclaim or some other avenue." (R. 116:28.) The parties submitted renewed motions for summary judgment on that claim. (R. 127–33.)

The court then issued a decision granting summary judgment to the Executive Branch as to Category 2 actions. (R. 134.)

It concluded that the authority to settle "civil actions initiated by the executive branch in its administration of statutory programs is a core executive function, arising from its constitutional duty to faithfully execute enacted laws."

(R. 134:4.) It emphasized that a lawsuit is the "ultimate remedy for a breach of the law," "including a breach committed against the State's contractual, property, or other legal interests." (R. 134:4.)

It rejected the Legislature's claimed shared role based on the Legislature's "power of the purse" or "interest in establishing policy." (R. 134:5–6.) It explained that Category 2, "as clarified by the amended complaint, does not include any settlements requiring the expenditure of state funds." (R. 134:5–6.) It rejected that the Legislature still could have a constitutional interest where "the Attorney General may agree to a reduced monetary settlement based on the assertion of a potentially meritorious counterclaim." (R. 134:6.) "Given that such a settlement would not require any expenditure of state funds, the Legislature's powers under Wis. Const. art. VIII, § 2 are not implicated." (R. 134:6.)

The court emphasized that the Legislature's actual constitutional "policy" power involved "enactment of generally applicable laws," not "[d]ecisions to settle . . . lawsuits initiated by the executive branch relating to the statutory programs it administers." (R. 134:6–7.) The "absence of checks and balances" on "legislative authority under" section 165.08(1) also "distinguished it from the exercise of constitutionally-vested power to set statewide policy through the enactment of laws." (R. 134:7.) "The Legislature's desire to renegotiate settlements involving complex civil litigation in which it has played no role is not an institutional interest with constitutional dimension." (R. 134:6.)

STANDARD OF REVIEW

Whether the circuit court properly granted summary judgment and whether section 165.08(1) is unconstitutional in these categories are legal questions reviewed de novo. *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 9, 315 Wis. 2d 350, 760 N.W.2d 156; *Gabler*, 376 Wis. 2d 147, ¶ 26.

ARGUMENT

I. As applied to the two challenged categories of actions, section 165.08(1) unconstitutionally transfers core executive power to the legislative branch.

Through Act 369's amendment to section 165.08, the Legislature unconstitutionally usurped the Executive Branch's core power to execute the law through settlement in (1) civil enforcement actions and (2) civil actions on behalf of executive branch agencies relating to programs they administer. Neither *SEIU* nor the Wisconsin Constitution sets forth any shared role for the Legislature in these particular categories.

A. Separation of powers prevents one branch of government from intruding upon a core power of another branch.

The Wisconsin Constitution vests power in three separate governmental branches. Wis. Const. art. IV, § 1, art. V, § 1, art. VII, § 2. Each branch has exclusive—"core"—constitutional powers, which constitute zones of authority into which no other branch may intrude. *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999).

"Any exercise of authority by another branch" in an area of core power "is unconstitutional." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21 (citation omitted). "Core zones of authority" "are to be 'jealously guarded,'" as "[t]he state suffers essentially by every assault of one branch of government upon another." *Gabler*, 376 Wis. 2d 147, ¶¶ 30–31 (citation omitted).

The "separation of powers principles . . . enshrined in the structure of the United States Constitution, inform our understanding of the separation of powers under the Wisconsin Constitution." *Gabler*, 376 Wis. 2d 147, ¶ 11. Our

Constitution, like the U.S. Constitution, "ensure[s] that each branch will act on its own behalf and free from improper influence by the others." *Id.* ¶ 32.

Because the Legislature writes the laws, the separation-of-powers doctrine is especially wary of the Legislature stripping away power from co-equal branches through legislation. As James Madison warned, the tremendous power inherent in writing laws leaves the Legislature with "greater facility" to "mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." *Federalist* No. 48, at 310 (James Madison) (Clinton Rossiter ed., 1961).

The Framers and the Wisconsin Supreme Court understand the acute danger of the Legislature's taking the power to *execute* the law for itself—of the "same persons who have the power of making laws to have also in their hands the power to execute them." *Gabler*, 376 Wis. 2d 147, ¶ 5 (quoting John Locke, *The Second Treatise of Civil Government*, § 143).

A statute enacted by the Legislature violates separation of powers in categorical applications when it cannot be constitutionally enforced in any circumstances within those particular categories beyond a reasonable doubt. *Gabler*, 376 Wis. 2d 147, ¶ 29.[5]

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[5] Section 165.08(1) is unconstitutional beyond a reasonable doubt in these categories. But the beyond-a-reasonable-doubt standard and constitutionality presumption for constitutional challenges to statutes logically cannot apply in a co-equal branch's separation-of-powers challenge, as it elevates one branch over others. *See Morrison v. Olson*, 487 U.S. 654, 704 (1988) (Scalia, J. dissenting) (constitutionality-presumption "is not recited by the Court in th[is] [separation of powers] case because it does not apply"). The Executive Branch reserves its right to challenge that standard in the Wisconsin Supreme Court.

B. A core power is one that defines that branch's essential attributes. Historical practices further illustrate whether power is a core power.

"A branch's core powers are those that define its essential attributes." *SEIU*, 393 Wis. 2d 38, ¶ 104. "[T]he constitution itself constitutes the source. [A] core power is a power vested by the constitution that distinguishes that branch from the other two." *Id.* ¶ 104 n.15.

The Wisconsin Constitution vests legislative power in the Legislature, judicial power in the Judiciary, and executive power in the Executive. Wis. Const. art. IV, § 1, art. V, § 1, art. VII, § 2. The Attorney General is a "high constitutional executive officer" whose "duties consist in executing the law." *SEIU*, 393 Wis. 2d 38, ¶¶ 57, 60 (citation omitted); Wis. Const. art. VI, § 3. Both the Attorney General and state administrative agencies (including the Department) are "part of the executive branch" and carry out executive functions. *SEIU*, 393 Wis. 2d 38, ¶ 60.

If Wisconsin's "historical practices and laws" show that an encroaching branch has never had a role in the particular governmental arena, that further proves that the particular arena constitutes a core power of the encroached-upon branch. *See, e.g., Barland v. Eau Claire Cnty.*, 216 Wis. 2d 560, 587, 757 N.W.2d 69 (1998); *State ex rel. Fielder v. Wis. Senate*, 155 Wis. 2d 94, 99–103, 454 N.W.2d 770 (1990); *Friedrich v. Dane Cnty. Cir. Ct.*, 192 Wis. 2d 1, 20, 531 N.W.2d 32 (1995).

C. The separation-of-powers analysis requires a branch to articulate a constitutional role in the specific arena at issue.

The separation-of-powers analysis requires a branch to articulate a constitutional role in the *specific* arena at issue, not simply announce a general "interest" in a given area.

Friedrich is illustrative. There, the supreme court considered a separation-of-powers challenge to statutes setting guardian ad litem and special prosecutor compensation rates. 192 Wis. 2d at 531. It noted that though the Legislature "has power to enact legislation for the general welfare" and to allocate *out* governmental resources, that did not resolve whether the Legislature had a shared constitutional role in the *specific* constitutional arenas at issue: "compensation of guardians ad litem and special prosecutors." *Id.* at 16, 24. Moreover, "[t]hat both the legislative and judicial branches exercise power in the realm of compensating court-appointed counsel from public funds does not necessarily lead to the conclusion that the two branches share this power." *Id.* at 20.

Similarly, in *Barland*, the supreme court rejected an argument that the Legislature had a constitutional interest in the specific arena of removing judicial assistants simply because it had a general interest in the broad "realm of staff and judicial administration." 216 Wis. 2d at 584.

D. Settlement of actions in the two categories here constitutes core executive power.

Settlement of actions in the two specific categories here constitutes core power of the Executive Branch because it involves enforcement of civil statutes and execution of programs that an Executive Branch agency is charged to carry out. Executive power is "power to execute or enforce the law as enacted," *SEIU*, 393 Wis. 2d 38, ¶ 1, and the ability to execute enacted law to address particular circumstances is *the* "essential attribute[]" of the Executive Branch. *Id.*, ¶ 104.

The distinction between legislative and executive power "has been described as the difference between the power to prescribe and the power to put something into effect." *SEIU*, 393 Wis. 2d 38, ¶ 95. Once the Legislature "makes its choice in enacting legislation," its participation generally "ends."

Bowsher v. Synar, 478 U.S. 714, 733–34 (1986). The Legislature "can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Id.*

1. Settlement of civil enforcement actions constitutes a core executive power.

Settling civil enforcement actions constitutes a core Executive Branch power in which the Legislature has no constitutional role.

The U.S. Supreme Court has repeatedly emphasized the "quintessentially executive" nature of civil enforcement litigation and rejected encroachment of other branches into this particular arena.

In *Buckley v. Valeo*, the Court rejected legislative control over the Federal Election Commission. 424 U.S. 1 (1976). Because the FEC had "direct and wide ranging" civil enforcement power—including the authority to itself initiate civil actions—Congress could not appoint FEC commissioners. *Id.* at 111–12, 138–42. "[A] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take care that the Laws be faithfully executed.'" *Id.* (citation omitted).

In *Seila Law LLC v. Consumer Financial Protection Bureau*, the Court rejected Congress' ability to restrict the executive removal of the Consumer Financial Protection Bureau director, stressing that the agency had "sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans" and could "bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions." 140 S. Ct. 2183, 2200–01. This "enforcement

authority," including "the power to seek daunting monetary penalties against private parties," constituted a "*quintessentially executive power*." *Id.* at 2200 (emphasis added).[6]

In *Heckler v. Chaney*, the Court refused to allow judicial review of day-to-day decisions in civil enforcement actions because they rest on "complicated balancing of a number of factors which are peculiarly within [an executive agency's] expertise." 470 U.S. 821, 831 (1985). These factors include "whether a violation has occurred," "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies," and "whether the agency has enough resources to undertake the action at all." *Id.* The Court focused on the *specific* governmental power—prosecution of civil enforcement actions—and concluded the executive agency was "far better equipped . . . to deal with the many variables involved in the proper ordering of its priorities." *Heckler*, 470 U.S. at 831–32.

While the Wisconsin Supreme Court has not considered a law's impact on the executive's power to litigate civil enforcement matters specifically, it has agreed generally that "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them." *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600 (citation omitted).

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[6] Similarly, in a challenge to a New Hampshire law requiring legislative permission for that state's attorney general to challenge the validity of a federal statute, even the New Hampshire legislature distinguished the separation-of-powers analysis for that type of litigation from the attorney general's power in handling civil enforcement cases. The legislature *conceded* that civil enforcement matters are executive core power. *In re Opinion of Justices*, 27 A.3d 859, 869–71 (N.H. 2011).

2. Settlement of executive-agency program-administration actions constitutes a core executive power.

Settlement of executive agency civil actions relating to programs they are charged to administer also constitutes a core executive power.

An agency's day-to-day job is a classic executive function: "to implement and carry out the mandate of the legislative enactments." *DOR v. Nagle-Hart, Inc.*, 70 Wis. 2d 224, 226–27, 234 N.W.2d 350 (1975). "[W]hen an administrative agency acts . . . it is exercising executive power." *SEIU*, 393 Wis. 2d 38, ¶¶ 96–97. Executive law-implementation includes exercising judgment and discretion in applying generally applicable law. *See id.* ¶ 96. That day-to-day discretion also includes the allocation of appropriated resources. In *Chaffin v. Arkansas Game & Fish Comm'n*, 757 S.W.2d 950, 953 (Ark. 1988), for example, the Arkansas Supreme Court held that the state legislature violated separation of powers by intruding into executive branch resource-allocation decisions, explaining that "[a]llocation of resources and establishment of priorities are the essence of management."

Part of an agency's administration of programs it manages involves the tool of plaintiff-side litigation. For example, the Department of Administration may sue a vendor that has breached a contract to purchase certain services for state agencies. *See* Wis. Stat. §§ 16.705, 16.71, 16.72. That litigation, including settlement, demands the multi-factor cost-benefit analyses agencies use to "implement and carry out the mandate of . . . legislative enactments." *Nagle-Hart*, 70 Wis. 2d at 226–27.

3. Historical law and practices illustrate that settlement of these actions constitutes core executive power.

Wisconsin's historical laws and practices further confirm that settlement in these categories constitutes core executive functions. Since 1849, the Attorney General has exercised the executive powers traditionally held by a state's chief legal officer, including representing the State and its entities in and controlling the conduct of state litigation. *See* Wis. Rev. Stat. ch. 9, §§ 36–41 (1849). And critically, before Act 369, the Legislature *never* before in Wisconsin history had a role in controlling settlements of individual plaintiff-side actions in these categories.[7] The glaring absence of any historical legislative role further proves that settlement in these categories constitutes core executive power. *Barland*, 216 Wis. 2d at 587.

E. Section 165.08(1) transfers core Executive Branch power of settling actions in these categories to the Legislature.

Through Act 369, the Legislature took for itself core Executive Branch power to resolve plaintiff-side litigation in these categories of civil actions. "Any" intrusion by the Legislature here is unconstitutional. *Joni B. v. State*, 202 Wis. 2d 1, 10, 549 N.W.2d 411 (1996). And the Legislature did not just put one foot across the line. It granted itself a complete veto over the Executive Branch's core power in these categories. And it subjected every proposed settlement to a legislative review process that is incompatible with the essential characteristics of executive power.

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[7] 1923 Session Laws, ch. 240, § 1; 1965 Session Laws, ch. 66, § 9; 1969 Session Laws, ch. 276, § 48; 2007 Wis. Act 20, § 2902; 2015 Wis. Act 55, § 3501p; 2017 Wis. Act 369, § 26.

1. The Legislature took for itself the Executive Branch's power to decide whether, when, and how to settle these categories of civil actions.

First, the Legislature empowered a legislative committee to substitute its judgment for that of the Executive Branch on whether, when, and how to settle these categories of civil action, thereby effectively imposing a legislative veto.

This case is on all fours with *Gabler*, where the supreme court struck as unconstitutional a statute authorizing the Crime Victim Rights Board to conduct disciplinary review, as applied to the category of judges. *See generally* 376 Wis. 2d 147. It explained that, while the co-equal branches have some shared interest in the area of victims' rights, the Judiciary has core power to exercise judicial judgment in cases. *Id.* ¶¶ 36–37, 41–43. A statute permitting a co-equal branch to discipline judges for discretionary exercises of that core authority "effectively impos[ed] an executive veto over discretionary judicial decision-making," and had to be struck down as unconstitutional. *Id.* ¶ 36.

The separation-of-powers violation here is even more stark. In *Gabler*, the Judiciary was initially able to exercise its core powers, but was subject to a *possible* retroactive co-equal branch veto. That mere possibility, "lurk[ing] in the background of every case," violated separation of powers because of the chilling effect on judicial independence and potential to alter judicial decision-making "incentive[s]." *Id.* ¶ 44. Here, section 165.08(1) *requires* legislative approval before the Executive Branch may exercise its core executive power of settling these categories of actions.

Gabler also rebuts the Legislature's effort to advance a new standard for categorical constitutional challenges. The Legislature argues that if a single moment exists within these categories where the encroaching branch (here, itself) has not actively utilized or exploited its illegal power, the encroached-

upon branch (here, the Executive Branch) has not shown that the statute cannot be constitutionally enforced in that category "under any circumstances." (Leg. Br. 9–10, 25–26, 30–34, 45–46.) But that is plainly not *Gabler*'s holding, where the court concluded that the law was unconstitutional because the law gave the Board the *power* to do those things in every case within the category—even if the Board did not always or even often exercise it. 376 Wis. 2d 147, ¶¶ 27–50.

2. Section 165.08(1) injects the Legislature's deliberative and public procedures into an Executive Branch function requiring dispatch, flexibility, and confidentiality.

Section 165.08(1) further violates separation of powers by subjecting every proposed settlement in these categories to a legislative review process that is fundamentally incompatible with the dispatch, flexibility and need for confidentiality inherent to the Executive Branch.

JCF's procedures include noticed public hearings, roll-call votes, scheduling if and when the JCF Co-Chairs meet, and waiting periods after any vote. Wis. Stat. § 13.10. These procedures necessarily entail both delay and publicity inherent to the legislative process that are fundamentally inconsistent with *executing* the law.

As Alexander Hamilton recognized, "deliberation and circumspection" are desirable in the Legislature, where generally applicable prospective rules are made. *Federalist* No. 70, at 426–27. For the Legislature, "promptitude of a decision is oftener an evil than a benefit." *Id.* Or as Justice Rebecca Bradley recently noted, "Admittedly, the legislative process can be an arduous one. But that's no bug in the constitutional design: it is the very point." *Fabick v. Evers*,

2021 WI 28, ¶ 71, 396 Wis. 2d 231, 956 N.W.2d 856 (Bradley, R., concurring) (citation omitted).

But those same features can hinder Executive Branch decision-making, which can require "vigor and expedition" and sometimes "secrecy." *Federalist* No. 70, at 424, 427. This is why Hamilton warned that the Executive Branch's constitutional authority would be undermined by subjecting its operations to the concurrence of a council. *Id.* at 427. Imposing such group deliberative process on executive functions, he stressed, is "unnecessary," "unwise," and can lead to "pernicious" results. *Id.* at 426.

Settling a civil action in these categories requires the ability to act on short notice at a critical moment that may arise unexpectedly and remain open for days or less. (R. 73:8, 15–16.) But JCF meets and votes when it chooses, and even if JCF eventually votes, the Department has neither real-time settlement authority nor knowledge or control over JCF's timeframe. (R. 73:9.)

It is no surprise the Legislature is not equipped to exercise core Executive Branch power. As the circuit court rightly noted, the "executive decision making" the Legislature took for itself here is an "extraordinarily unlegislative role." (R. 129:78–79.)

F. The Legislature's arguments rest on a misreading of *SEIU* and novel, dangerous assertions of legislative constitutional authority.

The Legislature has offered nothing to dispute that settlement of these actions constitutes quintessentially executive functions. It can't: through settlement, the Executive Branch is *enforcing* and *executing* already-existing law in particular circumstances.

The Legislature argues instead that (1) *SEIU* controls this action in the Legislature's favor, and (2) the Legislature

has a shared constitutional role in any governmental activity involving either "money" or "policy." The first argument misreads *SEIU*, and the second is a novel assertion found nowhere in the Constitution or caselaw. The circuit court rightly rejected the Legislature's unsupported arguments.

1. *SEIU* does not help the Legislature.

The Legislature primarily argues that *SEIU* controls this case. A plain reading of *SEIU* makes clear it does not.

SEIU rejected facial challenges to numerous Act 369 provisions, including multiple litigation-related provisions: Sections 5 and 97 (amendments to legislative-intervention provisions); Section 30 (amendment to defense-side settlement control regarding those types of cases); and Section 26, at issue here. 393 Wis. 2d 38, ¶¶ 50–52. In rejecting those challenges, the court explained that "representing the state in litigation is predominately an executive function," but concluded that there are some circumstances in which state litigation falls within an arena of shared power, "most notably in cases that implicate an institutional interest of the legislature." *Id.* ¶ 63.

The court did not hold, as the Legislature asserts, that litigation is an across-the-board "shared power." (*See* Leg. Br. 10, 26–28, 33-34, 40).[8] Instead, the court identified three potential legislative constitutional interests that may, "in at least some cases," give the Legislature a shared role. But none are implicated here.

First, *SEIU* held that the Legislature may have a constitutional interest in litigation "where a legislative official, employee, or body is represented by the attorney general," or where "a legislative body is the principal authorizing the attorney general's representation." 393 Wis.

[8] The Attorney General also was not a plaintiff in *SEIU*.

2d 38, ¶ 71. Here, neither the Legislature nor any of its members authorize the action or is the client. Where authorization is required for representation in civil enforcement actions, it comes from other Executive-Branch entities. *See, e.g.,* Wis. Stat. §§ 299.95, 165.25(4)(ar). And by its terms, a Category 2 action is limited to matters where the plaintiff is an Executive-Branch agency. (R. 116:3, 17–19; 11:8, 22–24.)

Second, *SEIU* held that the Legislature may have a constitutional interest in "at least some cases" where a settlement concedes the invalidity of a state statute. 393 Wis. 2d 38, ¶¶ 68–69. As the complaint says explicitly, neither category here includes such a settlement. (R. 11:31–32 n.5; 116:26–27 n.5; 72:8 n.2; 96:25.)

Third, *SEIU* held that the Legislature may have a constitutional interest where "litigation involves requests for the state *to pay money to another party*"—where settlement would bind the State to the "*expenditure* of state funds." *SEIU*, 393 Wis. 2d 38, ¶¶ 69, 71 (emphasis added). That interest was relevant because the *SEIU* plaintiffs challenged Act 369's changes to other statutes involving the settlement of defense-side actions and separate legislative-intervention provisions.[9] Again, not applicable here: in these categories, the Department prosecutes the action, meaning a settlement will only *bring* money to victims, state agencies, and the school fund (where our Constitution requires forfeitures be credited), not pay money *out* of the treasury.

[9] In reality, defense-side monetary settlements under section 16.865(8) are generally paid not by the treasury but by a self-insured fund financed by executive agencies, using already appropriated funds. Wis. Stat. § 20.865. A settlement paid out of that fund would not be a shared power between the Executive Branch and the Legislature, but that is not at issue here.

The Legislature would rewrite *SEIU* as holding that the Legislature has a constitutional role in litigation that brings money *to* state agencies, the school fund, and injured parties on the theory that "money is fungible." (Leg. Br. 42–43.) But the relevant inquiry is the Legislature's constitutional powers, not the fungibility of currency.

In describing the "power of the purse," *SEIU* quoted from Article VIII, § 2, which gives the Legislature power to control how money may be expended out of the treasury: "No money shall be *paid out of the treasury* except in pursuance of an appropriation by law." *SEIU*, 393 Wis. 2d 38, ¶ 68. The court then held that "where litigation involves requests for the state to *pay money to another party*, the legislature, in at least some cases, has an institutional interest in the *expenditure of state funds* sufficient to justify the authority to approve certain settlements." *Id.* ¶ 69 (emphasis added).

The *SEIU* court then identified other state statutes, *all* defense-side statutes requiring legislative approval over certain settlements paying state money to another party. *Id.* ¶ 70. The Legislature asserts that section 165.08(1) is "like the other state legislatures with their respective statutes" identified in *SEIU*, (Leg. Br. 42), but it knows that's untrue; the Legislature conceded below that those laws were "defense-side," and that no other state in the *country* has a plaintiff-side statute like section 165.08(1) (R. 129:35–36).

The Legislature asserts that settlements in the categories here "cover[] almost all of Section 26's applications." (Leg. Br. 16.) The Legislature offers no support for its estimate, but that's beside the point: even if actions in the two categories are numerous, that does not translate into *SEIU* holding that they fall within a shared power. *SEIU* concerned potential legislative constitutional interests, not an arithmetic exercise.

The Legislature characterizes the circuit court's decisions as consistent with Justice Dallet's dissent and not the *SEIU* majority. (Leg. Br. 6, 28, 40–41.) Incorrect: the *SEIU* majority focused on the Wisconsin Constitution and Wisconsin historical practices in the context of facial challenges, and specifically emphasized it was *not* deciding any categories of applications—an explicit limitation notably absent from the Legislature's attempt to hide behind *SEIU* here: "*We stress that this decision is limited. We express no opinion on* whether individual applications or *categories of applications may violate the separation of powers*, or whether the legislature may have other valid institutional interests supporting application of these laws." *SEIU*, 393 Wis. 2d 38, ¶ 73 (emphasis added).

2. The Legislature's novel asserted constitutional interests contradict the Constitution.

Without support in *SEIU*, the Legislature tries to manufacture constitutional interests, arguing it has a constitutional role in any co-equal branch activity that involves money coming into the State or "policy." These arguments would allow the Legislature to engulf both co-equal branches. Indeed, these claimed interests could just as easily be aimed at the Judiciary: just replace the "Executive Branch" in the Legislature's arguments with "Wisconsin courts." These manufactured interests directly contradict our Constitution and caselaw.

a. The Legislature's taxing and spending powers do not give it a constitutional role in settling litigation in these categories.

The Legislature's taxing and spending powers do not give it a shared constitutional role in these particular arenas. As recognized in *SEIU*, Article VIII, § 2 gives the Legislature

power to control how money may be expended out of the treasury: "No money shall be *paid out of the treasury* except in pursuance of an appropriation by law." Article VIII, § 1 gives the Legislature the power to levy uniform taxes. And Article VIII, § 5 restricts the relationship between the taxing and spending powers by requiring the Legislature (a) to plan state taxing and spending to ensure anticipated revenues are sufficient to cover anticipated expenses and (b) if expenses exceed revenue, to levy a tax (through legislation) in the next year.

Nothing in the Constitution suggests that the Legislature has a shared constitutional interest in co-equal branch activities involving money coming *into* the treasury, let alone money to be paid to state agencies, injured parties through restitution, the courts, and the school fund.

The Legislature argues that the Constitution's balanced-budget requirement grants it power to "oversee[]"—i.e., directly control—all sources of state "income." (Leg. Br. 21, 36.) Wisconsin Const. art. VIII, § 5 says no such thing. Once the Legislature has passed a budget and appropriated funds to state agencies by law, its constitutional role is done. Neither *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331 (1915), nor the cited 1985 Attorney General opinion suggest anything otherwise. (*See* Leg. Br. 35–36, 42.) They simply say that the Legislature must calculate how much income is needed to cover that year's anticipated expenses plus any deficiency from the previous year. *Owen*, 151 N.W. at 365; 74 Op. Att'y Gen. 202, 203 (1985). Instead, *Owen* emphasizes that the Legislature's "purse" power must be strictly constrained—that it was "intended by the framers to be very closely fenced about," and the interplay of the Legislature's taxing and spending powers serves "to tie the

hands of the legislature as firmly as Prometheus was bound to the rock." *Owen*, 151 N.W. at 368–69.[10]

The Legislature also fails to consider the fundamental differences between taxation and individual settlements. Taxes serve to "obtain revenue for the government," not to cover particular expenses, and must—per the Constitution—be uniform. *See City of River Falls v. St. Bridget's Cath. Church of River Falls*, 182 Wis. 2d 436, 441–42, 513 N.W.2d 673 (Ct. App. 1994); Wis. Const. art. VIII, § 8.

Unlike taxation, a defendant's liability is specific to his facts: it depends on the specific violation or injury and the remediation needed. *See, e.g., State v. T.J. McQuay, Inc.*, 2008 WI App 177, ¶ 52, 315 Wis. 2d 214, 763 N.W.2d 148 (forfeitures may depend on remediation and culpability); *Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 385, 254 N.W.2d 463 (1977) ("[C]ontract damages are . . . to compensate the injured party for losses necessarily and foreseeably flowing from the breach . . ."). The Legislature's asserted interest would therefore violate both separation of powers and the Uniformity Clause: it cannot use control over these settlements to fundraise. And its attempt to cabin its expansive interest by claiming it should exist "at least where large amounts of money [is] involved," (Leg. Br. 34–42), lacks any support or limiting principle.[11]

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[10] The Legislature's "money is fungible" citation (Leg. Br. 42–43), comes from a tax ordinance case unrelated to separation of powers. *Brown Cnty. v. Brown Cnty. Taxpayers Ass'n*, 2022 WI 13, ¶ 40, 400 Wis. 2d 781, 971 N.W.2d 491.

[11] The Legislature makes a new argument not briefed below: that, in some Category 2 cases, a counterclaim may have reduced the executive agency's recovery and thus reflect a "spending" by the agency. (Leg. Br. 43.) But the Legislature still needs to appropriate nothing, and any money not recovered is out of the agency's available, already-appropriated funds.

The Legislature's hypothetical landlord "settlement" does nothing to prove it has the constitutional interest it asserts. It is simply a policy argument about why the Executive Branch's control over settlements could lead to bad results. (Leg. Br. 36–37.) And even on that policy argument, appropriate statutes prevent the outcomes that the Legislature speculates could happen without its interference: statutes prohibit the Department from bartering away a prosecution in exchange for payment to non-profits, Wis. Stat. § 778.027, and other laws require that remedies be directed to particular appropriations, including restitution to victims, Wis. Stat. §§ 100.18(11), 100.195(5m)(c); expenses of investigation and prosecution, Wis. Stat. §§ 93.20, 100.263, 20.455(1)(gh); and forfeitures, constitutionally required be credited to the school fund, Wis. Const. art. X § 2.[12]

The Legislature references the 1990s tobacco settlement and a recent opioid settlement, (Leg. Br. 30, 37–38, 40, 43), but in so doing, it just illustrates the difference between the executive function of settling cases and the legislative role of passing laws.[13] In certain multistate settlements, part of the moneys may remain undesignated by the Attorney General for any specific purpose. (R. 97:6–7.) If the Legislature wanted to direct what happens to such undesignated moneys as a general rule, it could pass a law of general application directing the moneys into general purpose

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[12] The record contains a recent housing-law complaint the Department filed, which illustrates the specific remedies it may seek. (R. 98:54–110.)

[13] This particular opioid settlement was subject to a newly-enacted statute, Wis. Stat. § 165.12. As noted by the Governor, the settlement-control provision of that statute is unconstitutional. *See* Governor Tony Evers Signing Statement AB 374, https://content.govdelivery.com/attachments/WIGOV/2021/06/30/file_attachments/1867544/Signed%20Signing%20Statement%20AB%20374.pdf (last visited Jan. 9, 2023).

revenues for the Legislature to appropriate.[14] But that is night-and-day different from enforcing the law in individual settlements by requiring monetary payments for specified purposes.

The Legislature cannot override individual settlement decisions in these categories based on an all-encompassing "interest" in any governmental activity that could affect money.

b. The Legislature's ability to enact policy through legislation does not give it a constitutional role in settling litigation in these categories.

The Legislature's novel, sweeping asserted "policy" interest (Leg. Br. 27, 39) is equally unsupported and dangerous.

The Legislature relies solely on Wis. Const. art. IV, § 1, which provides that "[t]he legislative power shall be vested in a senate and assembly." That of course does not say that "legislative power" entails controlling settlements in enforcing and executing the law in individual actions. Instead, as the Legislature's two cited cases reflect, it means the obvious: the Legislature has constitutional authority to make "policy choices" *through lawmaking*. (Leg. Br. 38–44 (citing *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 529,

[14] The Legislature has not done so. It brought suit in Polk County Circuit Court arguing that a different Act 369 provision should achieve that result, but the circuit court disagreed. The issue is on appeal. *Legislature v. Kaul*, Appeal No. 2022AP431.

576 N.W.2d 245 (1988); *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 216, 188 N.W.2d 460 (1971)).)[15]

That the Legislature has zero support is again unsurprising: fundamental differences exist between policymaking through legislation and consensual rules of conduct agreed upon in individual settlements.

Legislative power entails "devising and imposing 'generally applicable rules of private conduct' on the people" through legislation. *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 80, 391 Wis. 2d 497, 942 N.W.2d 900 (Bradley, R., J., concurring) (citation omitted). Once the Legislature enacts law, the constitutional baton passes to the Executive Branch to exercise discretion to enforce and execute the law to specific factual scenarios. *SEIU*, 393 Wis. 2d 38, ¶ 96.

Settlements do not establish generally applicable rules of private conduct, but instead resolve specific cases against specific parties for specific violations of law. Any required behavioral modifications reflect an agreement between the particular parties to address alleged violations or injuries. As the circuit court correctly held, the Legislature's argument mistakenly conflates matters of "public interest" with areas of legislative "policy making" through legislation. (R. 106:13.)

The Legislature asserts it would have a shared constitutional role because it may decide that different settlement terms constitute a "more desirable policy." (Leg. Br. 39–40.) This claim goes *exactly* to what our separation of powers prevents: the "temptation to human frailty, apt to grasp at power," that might otherwise allow the "same

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[15] *Vanko* involved a constitutional challenge to a statute, which the Court resolved through statutory interpretation: "We need only to find that the definition provided in the statute is in the field of public policy, not reaching constitutional dimensions" for it to be "for the legislature to establish." *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 216, 188 N.W.2d 460 (1971).

persons who have the power of making laws to have also in their hands the power to execute them." *Gabler*, 376 Wis. 2d 147, ¶ 5 (citation omitted).

If the Legislature believes landlord-tenant protections should be generally enforced in a certain way, it can pass a prospective law. So too, if the Legislature disagrees with the supreme court's interpretation of a statute, it can pass a prospective law. But it cannot interfere with individual co-equal branch decisions based on some all-encompassing asserted interest in "policy."

* * *

Ultimately, the Legislature tries to minimize its unprecedented usurpation by asserting that it's been a "benign gatekeeper." But whether "the Legislature may see itself as a "benign gatekeeper . . . is entirely irrelevant. *The question is whether it may install a gate at all." SEIU*, 393 Wis. 2d 38, ¶ 107 (emphasis added). Settlement of these actions are quintessentially executive functions in which the Legislature may not intrude. The circuit court correctly held that section 165.08(1) is unconstitutional in these categories.

II. Even if settlement of these actions were a shared power, the Legislature's veto power unduly burdens and substantially interferes with the Executive Branch's constitutional role.

Even if this Court believed that the Legislature did have a shared interest in settling these particular categories of actions, section 165.08(1) is still unconstitutional because JCF's total veto power unduly burdens and substantially interferes with the Executive Branch's constitutional role.

A. Under the shared-powers analysis, the dispositive question is generally whether the encroached-upon branch retains override authority.

Beyond the exclusive, core constitutional powers of each branch lie "'borderlands of power' which are not exclusively judicial, legislative or executive." *Flynn*, 216 Wis. 2d at 546 (citation omitted). These are particular "areas" of governmental action where the constitutional "zone[s] of power[s]" of more than one co-equal branch are implicated. *State v. James*, 2005 WI App 188, ¶ 15, 285 Wis. 2d 783, 703 N.W.2d 727.[16]

In the shared-powers analysis, courts assess the respective constitutional roles of each branch in the particular arena and decide whether the challenged branch's action "unduly burden[s] or substantially interfere[s] with the other branch's essential role and powers"—with the encroached-upon branch's "constitutional power"—in that particular arena. *State v. Unnamed Defendant*, 150 Wis. 2d 352, 360–61, 441 N.W.2d 696 (1989); *Flynn*, 216 Wis. 2d at 547 (citation omitted).

Applying that test, Wisconsin courts have repeatedly refused to interpret statutes in a way that would empower an encroaching branch to interfere with a decision of the encroached-upon branch and leave no ability for that branch to override the decision.

In *Matter of E.B.*, the supreme court held that a statute could not constitutionally be construed as mandating automatic reversal of a judgment if a circuit court failed to submit written jury instructions. 111 Wis. 2d 175, 186–87,

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[16] The term "shared powers" is a bit of a misnomer—each branch has its own, distinct constitutional powers. But there are *areas* of activity that implicate the distinct powers of multiple branches.

330 N.W.2d 584 (1983). Leaving the Judiciary without an ability to override the Legislature's statutory automatic reversal "impermissibly limits and circumscribes judicial power." *Id.* at 186.

Similarly, in *State v. Chvala*, the court held that a statute requiring adjournment of court proceedings involving legislators could not be construed to deprive circuit courts of "discretion whether to deny a continuance or adjournment no matter how compelling the need"; that constituted a "direct and significant interference with the judiciary's ability to exercise its inherent authority to decide, on the specific facts before it, whether the interests . . . [are] best served by a continuance." 2003 WI App 257, ¶ 21, 268 Wis. 2d 451, 673 N.W.2d 401. Even though the Legislature had a constitutional role in "enacting legislation" to "maximiz[e] the attendance of the legislature," it could not exercise its power in a way that prevented the Judiciary from performing *its* constitutional role of ensuring fair administration of justice. *Id.* ¶¶ 18, 21.

And, in *Friedrich*, the supreme court upheld a law fixing compensation paid to guardians ad litem and special prosecutors only because separate supreme court rules permitted judges to compensate at a higher rate than that set in that law: "So long as courts retain the ultimate authority to compensate court-appointed counsel at greater than the statutory rates when necessary," the statutes did not unduly burden or substantially interfere with the Judiciary's constitutional role in the particular arenas. 192 Wis. 2d at 30.

The cases establish a consistent rule: if the encroached-upon branch retains no ability to override the other branch's action, then the encroaching branch has unduly burdened and substantially interfered with the other branch's constitutional power in that shared arena.

B. Section 165.08(1) is unconstitutional under the shared-powers analysis because the Executive Branch has no ability to override JCF's veto power.

The Legislature has given itself control over whether, when, and under what conditions a settlement may be entered. As the Legislature has conceded, (R. 129:59), section 165.08(1) leaves the Executive Branch with *no* ability to override JCF. Under the shared-powers analysis, JCF's veto power in these categories therefore unduly burdens and substantially interferes with the Executive Branch's constitutional role, in violation of separation of powers. *Matter of E.B.*, 111 Wis. 2d at 186–87, *Friedrich*, 192 Wis. 2d at 30; *Chvala*, 268 Wis. 2d 451, ¶ 21.

C. The Legislature's shared-powers analysis misreads *SEIU* and ignores the relevant test.

1. *SEIU* did not rewrite the shared-powers standard.

The Legislature again misreads *SEIU*, arguing that it "rejected" and "entirely forecloses" use of the well-established analysis for separation-of-powers violations in a shared arena. (Leg. Br. 28–29, 44–45.) Instead, *SEIU* explained in a footnote that because state litigation "at least in some cases" is not "an exclusive executive power," those "types of cases"—i.e., where it is not an exclusive, executive power—"fall under a shared powers analysis." 393 Wis. 2d 38, ¶ 72 n.22. And, within those cases where those identified interests existed, "in at least some cases," "legislative exercise of this shared power . . . does not unduly burden or substantially interfere with the attorney general's executive authority." *Id.*

In *SEIU*, all it took to reject a facial challenge to section 165.08(1) was one type of case where the challenge would fail: *actions where the Legislature is the client*. Where the Legislature has standing and is a plaintiff party, the Executive Branch could not meaningfully claim an undue burden in requiring *client* approval to settle. Consistently, *SEIU* highlighted several examples where the *Legislature* brought an action, and then explained that "legislative exercise of this shared power in at least some cases does not unduly burden or substantially interfere with the attorney general's executive authority." *Id.* ¶ 72 n.21, n.22. That interest does not exist here.

2. The Legislature's hassle test is not the standard for the shared-powers analysis.

The Legislature makes no attempt to address the established shared-powers test.

It generally cites *Martinez v. DIHLR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), and *J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983) (Leg. Br. 33), to encourage the Court to apply separation-of-powers principles liberally. But neither case helps it substantively.

Martinez concerned a legislative committee's temporary suspension of delegated *legislative* power. 165 Wis. 2d at 697. And *Ahern* reviewed whether a legislative committee, empowered to appropriate money *out* of a trust fund for state building projects, could lawfully waive bidding requirements for those projects. 114 Wis. 2d at 77, 104. While the court of appeals did not use the supreme court's modern separation-of-powers formulation, it still considered whether there was a

"check" on the legislative committee's vote; it concluded the Governor's override power was such a check. *Id.* At 107.[17]

Instead of applying the actual standard, the Legislature offers a new, administrative-burden test: How much of a day-to-day hassle has this been for the Executive Branch? (Leg. Br. 44–50.) That is not the constitutional test.

"The focus of this evaluation is on whether one branch's exercise of power has impermissibly intruded on the *constitutional power* of the other branch." *Flynn*, 216 Wis. 2d at 547 (emphasis added) (citation omitted). Facts may illustrate the harmful effects of the constitutional problem in action, but the question is whether the law unduly burdens or substantially interferes with the Executive Branch's constitutional role in the specific arena at issue, not whether the encroaching branch has imposed administrative burdens on the encroached-upon branch.

In *Friedrich*, for example, once the court determined that compensation of guardians ad litem and special prosecutors involved the constitutional powers of the Judiciary and Legislature, it turned to whether the statute imposed an undue burden or substantial interference on the Judiciary's constitutional role. 192 Wis. 2d at 19, 24–30. In so doing, it *rejected* factual evidence demonstrating the administrative hardship and frequency of judges needing to exceed the statutory rate. That evidence did not change the legal question: whether "courts retain the ultimate authority

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[17] The Governor's override applied only to the committee's approval of the waiver, not a denial. But to the extent a denial meant the project would not be built, that went directly to the Legislature's power to appropriate money for the project. *Id.* The case the court relied on, *State ex rel. Schneider v. Bennett*, 547 P.2d 786, 796–98 (Kan. 1976), is consistent; it held a legislative committee could allocate emergency moneys to state agencies but rejected its "usurping" the committee's oversight of executive functions like moving appropriated funds from one area to another.

to compensate court-appointed counsel at greater than the statutory rates when necessary." *Id.* at 30.[18]

3. Even under the Legislature's proposed test, the facts would illustrate the harmful effects on the Executive Branch's constitutional role.

Even if the supreme court were to adopt the Legislature's proposed hassle test, the facts illustrate the harmful effects on the Executive Branch's constitutional role in these categories.

The Department has no way to know whether, when, or under what conditions JCF will even consider a proposed settlement, which means that some actions have settled on less favorable terms, been litigated longer, or not settled at all. JCF's veto power has meant that other states ask Wisconsin not to participate in a multistate effort. (R. 97:17.) It has made the public wait longer for needed remedial efforts, whether because JCF has refused to convene or because it has taken the Committee at times months to do so. (R. 73:14; 97:7–8; 145:6.) It has denied the Executive Branch the value of mediation as a settlement tool where the parties represent that they come to the table with settlement authority. (R.

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[18] If administrative hassle were the proper metric for a shared-powers violation, then the appropriate test would ask whether application of the requirement to all cases in a category imposes such hassles on executive power that substantially exceed any limited legislative role that might be justified by some shared legislative interest in that particular category. A statute with some constitutional applications may be invalidated if it burdens a constitutional interest and is so overbroad that the burden substantially exceeds the legislation's legitimate sweep. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Although overbreadth doctrine originated in the First Amendment context, it can also apply to statutes that burden other constitutional interests. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 533 U.S. 181, 202 (2008) (voting rights).

73:10–11; 74:22–23.) Across the board, it has affected how the Executive Branch allocates its scarce resources among competing projects and makes decisions about how to litigate those it chooses to pursue. (R. 73:9–10; 97:13–14.)

The Legislature presented no evidence to dispute these harmful effects. It argues that the Department's proof is inadequate because the Department did not provide the names of example matters. (Leg. Br. 17, 24–29, 48.) The Department did not include case names to protect attorney-client and work product confidentiality. (R. 80:3–4, 19, 36–37, 40, 55; 97:19; 98:1–47.)

The Legislature does not explain how the lack of case names makes the Executive Branch's evidence insufficient. It suggests, without development, a sort of due process argument—that it could not test whether the evidence was true. (*See, e.g.,* Leg. Br. 46–47.) But the Legislature did not challenge the Executive Branch's privilege assertions, even when asked by the circuit court whether it was raising such a challenge; instead, it told the court it did not believe a genuine factual dispute existed. (R. 129:77–78.) And, as the circuit court pointed out at argument, the Legislature did not utilize discovery tools or a request for protective order it could have if it had such concerns. (R. 154:52.)

Ignoring the harms to the Executive Branch caused by the unknowability of when JCF might convene and whether it will approve a settlement, the Legislature focuses on confidentiality and asserts the Department should have been willing to reveal privileged information to JCF. (Leg. Br. 14–15.) Confidentiality is only one of the problems with section 165.08(1), and the Legislature's alleged fixes don't work.

The Executive Branch cannot abandon its ethical duties Of representation, confidentiality agreements in multistate agreements, and confidentiality requirements for settlement negotiations. The Legislature notes that at one point it

retained counsel for JCF who signed a confidentiality agreement. (Leg. Br. 15.) But an agreement with JCF's retained attorney does not bind its individual members, and JCF refused the Department's request for its members to sign confidentiality agreements. (R. 97:11–12.) The Legislature does not reveal how the attorney would share information with JCF members who have not so agreed.

The Legislature also asserts that JCF could meet in closed session, but section 13.10(3) requires JCF to afford a public hearing, and, according to the Legislative Reference Bureau, closed sessions do not require attendees to keep discussed-matters confidential. (R. 73:14–15; 74:37–38.) As to opposing parties, the Legislature's assertion that the Department could "simply request[] permission from the opposing party" (Leg. Br. 15), ignores the established fact that many parties will not agree to such a waiver (R. 97:12).

The Legislature suggests that, under its invented test, the Executive Branch must show that every single action prosecuted by the Department could not be settled. It points out that, as things turned out in some matters, JCF met fast enough for a matter to settle. (*See* Leg. Br. 13–14.) But section 165.08(1) infects *all* the Department's representation in these categories, from deciding which actions it can bring, how to prosecute them, how to collaborate with other states and plaintiffs in multistate actions, and the results it achieves for the State and its citizens. (R. 73:9–10; 97:13–14.) The Department must constantly consider not just what is in the State's best interest, but what *JCF* is likely to approve. (R. 97:15.) These usurpations are no less severe just because, in some civil actions, the Executive Branch is able to overcome the illegal interference and consummate an acceptable settlement.

* * *

Even if the Legislature did have a shared interest in these particular categories, section 165.08(1) is still unconstitutional as to these categories. The Legislature's veto power, with no override open to the Executive Branch, unduly burdens and substantially interferes with the Executive Branch's constitutional role.

CONCLUSION

This Court should affirm the circuit court's decisions holding section 165.08(1) unconstitutional as applied to (1) civil enforcement actions and (2) civil actions prosecuted on behalf of executive state agencies regarding the administration of statutory programs the agencies execute.

Dated this 9th day of January 2023.

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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), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,986 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 9th day of January 2023.

Electronically signed by Hannah S. Jurss
HANNAH S. JURSS