STATE OF WISCONSIN

IN SUPREME COURT

No. 2022AP0790

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

Plaintiffs-Respondents-Petitioners,

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 TERRY KATSMA,

Defendants-Appellants.

PETITION FOR REVIEW

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INTRODUCTION

The Legislature may constitutionally limit the executive branch's exercise of authority through the text of the statutes it enacts, but once it does so, it cannot "insert itself into the machinery of the executive branch" to try to control how the executive branch carries out the law. *Evers v. Marklein* ("*Evers I*"), 2024 WI 31, ¶ 23, 412 Wis. 2d 525, 8 N.W.3d 395. Through a provision of 2017 Wis. Act 369, the Legislature did exactly what it cannot do: it created Wis. Stat. § 165.08(1) to give its Joint Committee on Finance the power to reject all plaintiff's-side settlements in actions prosecuted by the Attorney General and Department of Justice.

Attorney General Kaul, the Department of Justice, Governor Evers, and Department of Administration Secretary Blumenfeld ("Petitioners") brought suit to challenge the constitutionality of Wis. Stat. § 165.08(1) as applied to two categories of cases: (1) civil enforcement actions, and (2) actions brought on behalf of an executive branch agency relating to programs the agency administers. In May and June 2022, the Dane County Circuit Court (Crawford, J.), concluded that the JCF veto power intrudes on a core power of the executive branch in these categories.

The court of appeals reversed in a 2–1 opinion recommended for publication. The majority held that *Service Employees International Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, had already "dispositively" decided the question before it. The majority concluded that the Legislature has a constitutional role in executive activity that might *recover* funds, not just activity that would require the Legislature to make an appropriation. It also held that the relevant shared powers question is whether the challenged law imposes too great of an administrative burden, not whether one branch possesses total veto power over the other branch's actions in a shared arena of powers.

Judge Neubauer dissented, writing that Petitioners exercise a core executive power in litigating the two categories of cases, that *SEIU* warrants no different result, and that Petitioners would prevail even under a shared powers framework.

This Court should grant the petition for review and reverse the decision below. The majority opinion contradicts this Court's precedent and would create an unprecedented legislative constitutional power. The statutes rejected in *Evers I* are not meaningfully distinguishable from Wis. Stat. § 165.08(1) as applied to the categories of cases here. And *SEIU* did not bless the constitutionality of the law as applied to these categories, much less even hint that the Legislature has a constitutional role in supervising executive activity that could result in additional funds paid to a state program. The majority's holding would allow the Legislature to control numerous actions of both the executive and judicial branches. This Court should make clear that the Wisconsin Constitution prohibits such intrusion.

ISSUE PRESENTED

Wisconsin Stat. § 165.08(1), as created by 2017 Wisconsin Act 369, requires the Attorney General and Department of Justice to obtain permission from the Legislature's Joint Committee on Finance before they may compromise or discontinue any civil action they prosecute. If JCF vetoes a settlement or does not take action, the statute provides no opportunity to override that action or inaction.

Does Wisconsin Stat. § 165.08(1) violate the Wisconsin Constitution's separation of powers as applied to the categories of:

(1) civil enforcement actions; and

(2) civil actions prosecuted on behalf of executive agencies regarding the administration of programs the agencies are charged with executing?

The circuit court answered yes, but the court of appeals answered no. This Court should accept review and reverse the court of appeals.

STATEMENT OF THE CASE

I. The Attorney General and Department of Justice bring multiple types of plaintiff's-side civil actions; two types are at issue here.

The Attorney General and Department of Justice (together, the "Department") prosecute various types of civil actions. Two types are at issue here.

First, the Department prosecutes civil enforcement actions to stop and remedy violations of Wisconsin's consumer protection, environmental protection, and other laws 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)). The pleadings in this case call such actions "Category 1."

Second, the Department brings actions 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.) The pleadings in this case call such actions "Category 2."

The Department brings other types of plaintiff's-side civil actions that are not at issue here. (R. 11; 116; *see also* R. 98:45 (listing categories not subject to this suit).) For example, the Department sometimes brings actions against

other States, or 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 2017 Wis. Act 369, for example, 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 plaintiff's-side action challenging the federal Affordable Care Act. (R. 97:4–5; 98:48–53.)

II. Act 369 requires the Department to obtain JCF approval before compromising or discontinuing civil actions prosecuted by the Department.

Until Act 369, the executive branch had authority to resolve civil actions the Department prosecuted. *See* 1923 Session Laws, ch. 240, § 1; Wis. Stat. § 165.08 (2015–16).

Act 369, section 26 gave JCF power over whether, when, and how the Department may compromise or discontinue 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).

The law creates no deadlines or standards on how (or whether) JCF approves a particular settlement, or whether it chooses to convene. The Legislature has conceded that Wis. Stat. § 165.08(1) leaves the executive branch with no ability to override JCF. (R. 129:59.)

III. In *SEIU,* this Court considers a facial challenge to numerous provisions of Act 369, including its litigation control provisions.

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 control provisions. The litigation control provisions included laws relating to legislative intervention (new Wis. Stat. § 803.09(2m)); defense-side settlement control (amendments to Wis. Stat. § 165.25(6)); and plaintiff's-side settlement control (new Wis. Stat. § 165.08(1)). *SEIU*, 393 Wis. 2d 38, ¶¶ 3–4, 9–13.

In rejecting the facial challenges to the litigation control provisions, the Court held it needed to find only one constitutional application. Grouping the intervention and plaintiff's- and defense-side settlement provisions together, the Court identified potential legislative interests that could exist "in at least some cases":

> This is true where the attorney general's representation is in defense of the legislative official, employee, or body, or where a legislative body is the principal authorizing the prosecution of a case. And in cases where spending state money is at issue, the legislature has a constitutional institutional interest in at least some cases sufficient to allow it to require legislative agreement with certain litigation outcomes, or even to allow it to intervene.

Id. ¶ 71.[1]

[1] As to the intervention provision specifically, but not the settlement provisions, this Court also identified a potential legislative interest in some cases challenging the validity of state law. *Serv. Emps. Int'l Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶72, 393 Wis. 2d 38, 946 N.W.2d 35.

The Court "stress[ed]" that 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.

IV. Petitioners file suit, challenging the constitutionality of Wis. Stat. § 165.08(1) as applied to two categories of actions.

In June 2021, Petitioners brought a complaint in circuit court challenging the constitutionality of Wis. Stat. § 165.08(1) as applied to two categories of plaintiff's-side civil actions: (1) civil enforcement actions, and (2) actions brought on behalf of an executive branch agency relating to programs the agency administers. (R. 11.)[2] The categories excluded any settlement involving the potential legislative interests identified in *SEIU*. Neither the Legislature nor its members authorize the action or is the client. Where authorization is required to bring a Category 1 civil enforcement action, it comes from other executive branch entities, *see, e.g.,* Wis. Stat. §§ 299.95, 165.25(4)(ar), and 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). Both categories exclude any settlement that would purport to concede the invalidity of state law. (R. 11:31–32 n.5; 116:26–27 n.5; 72:8 n.2; 96:25.) And as to Category 2, the amended pleadings excluded any settlement that would require the Legislature to appropriate money. (R. 116:28.)

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[2] In November 2020, Petitioners filed a petition for an original action with this Court seeking to raise these claims. This Court denied the petition in March 2021. *Josh Kaul v. Wis. State Legislature Appeal Number 2020AP1928-OA*. Wis. Cir. Ct. & Ct. App. Access, https://wscca.wicourts.gov/caseDetails.do?caseNo=2020AP001928&cacheId=DF4221D5F6B4BBA8EDEDE84DF0B4BC8A&recordCount=1&offset=0 (choose "Case History") (last visited Dec. 5, 2024).

V. The circuit court holds Wis. Stat. § 165.08(1) unconstitutional as applied to both categories.

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

As to Category 1 actions, 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, Pet.-App. 55–57.)

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, Pet.-App. 57–58.)

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, Pet.-App. 58.) It concluded that none of the potential legislative constitutional interests identified in *SEIU* exist in civil enforcement actions. (R. 106:10–11, Pet.-App. 58–59.)

As to the Legislature's asserted interests in any settlement involving "money" or "policy," the court explained that the Legislature's constitutional powers are the expenditure of funds "by appropriation" and "authority to establish policy through the enactment of laws." (R. 106:12–

13, Pet.-App. 60–61.) "A settlement agreement . . . may be a matter of public interest, but it is not 'policy making.'" (R. 106:13, Pet.-App. 61.)

As to Category 2 actions, the circuit court held 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, Pet.-App. 71.) 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, Pet.-App. 71.)

The court rejected the Legislature's claim that it had a shared role based on a "power of the purse" or "interest in establishing policy." (R. 134:5–6, Pet.-App. 72–73.) It explained that Category 2 settlements would not implicate the Legislature's powers under Wis. Const. art. VIII, § 2. (R. 134:6, Pet.-App. 73.)

The court emphasized that the Legislature's constitutional power regarding "policy" was the "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, Pet.-App. 73–74.) The court noted that Wis. Stat. § 165.08(1) featured the "absence of checks and balances" on "legislative authority" that "the exercise of constitutionally-vested power to set statewide policy through the enactment of laws" would ensure. (R. 134:7, Pet.-App. 74.) The court reasoned that "[t]he 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, Pet.-App. 73.)

VI. A majority of the court of appeals reverses the circuit court.

On December 2, 2024, in a 2-1 opinion recommended for publication, the court of appeals reversed the circuit court. *Kaul v. Wis. State Legislature,* No. 2022AP790, 2024 WL 4926387 (Wis. Ct. App. Dec. 2, 2024) (publication recommended).

A. The majority.

The majority held that the Legislature has a shared power in litigating cases in the two categories, and that where there is a shared power, Wis. Stat. § 165.08(1) passes muster under the separation of powers.

The majority held that a "power of the purse" gave the Legislature a constitutional role in controlling the amount and allocation of proceeds from a plaintiff's-side settlement. *Kaul,* 2024 WL 4926387, ¶ 27, (Pet.-App. 17–18). The court cited Wis. Const. art. VIII, § 2, which requires the Legislature to make an appropriation "by law," and *SEIU*, which discussed situations where the State would agree to pay money out of the treasury to another party, potentially requiring the Legislature to appropriate funds. *Id.* ¶ 27, (Pet.-App. 17–18 (citing *SEIU,* 393 Wis. 2d 38, ¶ 69)).

The majority recognized that neither authority discussed a constitutional role for the Legislature where settlements result in monetary amounts *recovered* for statutory forfeitures, victim restitution, remediation, surcharges, or other amounts. But the majority decided that Wis. Const. art. VIII, § 5, which requires the Legislature to provide for an annual tax sufficient to defray the estimated expenses of the state for each year, gives the Legislature a shared constitutional role regarding the amount and allocation of moneys recovered through settlements, so that

the Legislature can "utilize those funds for purposes designated by the legislature." *Id.* ¶ 30, (Pet.-App. 19).[3]

Having determined that settling actions in the two categories is a shared power, the majority held that the law was automatically valid under *SEIU*. The court construed *SEIU* as holding in a footnote that all shared-power applications of Act 369's multiple litigation control provisions are constitutional. *Id.* ¶ 37, (Pet.-App. 23 (citing *SEIU*, 393 Wis. 2d 38, ¶ 72 n.22)).

Petitioners had argued that, in a shared powers context, as a matter of law, an encroaching branch cannot leave an encroached-upon branch without any ability to override where necessary to perform its own constitutional role. The court of appeals disagreed, holding that a different shared power analysis would apply: whether the encroached-upon party has demonstrated sufficient administrative harm, such as by showing the affected "percentage of the office's annual caseload." *Kaul,* 2024 WL 4926387, ¶ 43, (Pet.-App. 27). It concluded that Petitioners did not demonstrate sufficient practical harms under that test. *Id.*

In a footnote, the majority concluded that this Court's decision in *Evers I*—that the Legislature may not, through legislative committee veto, control execution of the law—did not control here because *Evers I* "involved funds that had already been appropriated by the legislature for use by an executive agency." *Id.* ¶ 31 n.17, (Pet.-App. 20).

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[3] The majority discussed but did not rule on the Legislature's argument that it has a constitutional role in any settlement implicating "policy." *Josh Kaul v. Wis. State Legislature,* No. 2022AP790, 2024 WL 4926387, ¶¶ 32–34 (Wis. Ct. App. Dec. 2, 2024) (publication recommended). If this Court accepts review, Petitioners will continue to explain why that is unpersuasive.

B. The dissent.

Judge Neubauer dissented. *Id.* ¶¶ 49–81 (Neubauer, J., dissenting), (Pet.-App. 31–47). She concluded that the constitutional powers at issue in these two categories were core executive power, and that even if they fell in a shared arena of power, the new law unduly burdened and substantially interfered with the executive branch because it gives JCF the "exclusive and unreviewable power to accept, reject, or renegotiate" the terms of settlements. *Id.* ¶¶ 52, 51, *see also* ¶¶ 79–81, (Pet.-App. 31–32, 46–47).

Judge Neubauer opined that the power to commence and litigate actions were "means of enforcing the law," treated throughout Wisconsin history as areas of executive responsibility. *Id.* ¶¶ 60–61, (Pet.-App. 36–37). Judge Neubauer recognized that the commencement, conduct, and resolution of that litigation involves the exercise of significant discretion, requiring the balancing of factors including available resources, agency priorities, likelihood of success, and anticipated relief. She wrote that the Legislature has no authority to compel a coordinate branch in an area of judgment and discretion delegated to it by the constitution. *Id.* ¶¶ 62 (citing *Evers I*, 412 Wis. 2d 525, ¶ 15), 63, (Pet.-App. 37–38).

Judge Neubauer wrote that the majority overread *SEIU* by inferring holdings *SEIU* did not make, and underread *Evers I* by failing to consider the principles of that case beyond its facts. *Id.* ¶¶ 75, 79 n.4, (Pet.-App. ¶¶ 43–44).

As to the "power of the purse," Judge Neubauer wrote that power is about the appropriation of money from the treasury under article VIII, section 2, not supervising monetary awards in plaintiff's side actions. *Id.* ¶ 71; (Pet.-App. 42). And as to the Legislature's power to tax—a power the framers intended to be "very closely fenced about," *id.* ¶ 73 (quoting *State ex rel. Owen v. Donald*, 160 Wis. 21,

151 N.W. 331, 334 (1915)),—Judge Neubauer wrote that "[t]he institutional interest that emanates from the taxing power is not in controlling all sources of income to the state." *Id.* ¶ 73, (Pet.-App. 43).

Judge Neubauer also pointed out that the Legislature's treatment of settlements as within its taxation power would violate uniformity principles under Wis. Const. art. VIII, ¶ 1: "[d]iscretionary decisions about what fines, forfeitures, and money damages are owing to the state in settlements are not based on efforts to balance the budget; they are made to redress violations of law and compensate for injuries attributable to the private party's unlawful conduct." *Id.* ¶ 75, (Pet.-App. 44). Judge Neubauer wrote that the Legislature's tool to guide how settlements are structured is to pass statutes providing for the allocation of remedies, not to make settlement decisions in individual cases. *Id.* ¶ 74, (Pet.-App. 43).

Finally, Judge Neubauer opined that, even if settlement in the two categories lay in a shared arena of power, Wis. Stat. § 165.08(1) would still be unconstitutional because it gives JCF full and final control over settlements:

> 'Effectively, JCF members make the [settlement] decision—not the executive branch' . . . . The exclusive and unreviewable control the statute confers upon the [JCF] leaves the executive branch with no ability to override its decisions, thereby undermining the executive branch's constitutionally-assigned role as enforcer of the law.

Id. ¶ 80 (alteration in original) (quoting *Evers I*, 412 Wis. 2d 525, ¶ 24), (Pet.-App. 47).

REASONS WHY THIS CASE MEETS THE CRITERIA FOR REVIEW

The decision below merits this Court's review because it presents a real and significant question of state constitutional law; the decision below conflicts with decisions of this Court; and review will help clarify the law and is a novel question, the resolution of which will have statewide impact. Wis. Stat. § (Rule) 809.62(1r)(a), (c)2.–3., (d).

I. Review is necessary because the constitutionality of Wis. Stat. § 165.08(1) as applied to these two categories presents a real and significant question of state constitutional law.

This case presents a real and significant question of constitutional law that will affect the co-equal branches of Wisconsin government and, as a result, the Wisconsin people. Wis. Stat. § (Rule) 809.62(1r)(a). This Court should grant review and make clear that settling actions in these two categories, consistent with the Wisconsin Constitution's separation of powers and this Court's recent decision in *Evers I*, constitutes a core executive power into which the Legislature may not intrude. Even if settling these types of actions lay in a shared arena of power, the JCF veto power would still be unconstitutional.

A. The Legislature has the power to make laws, but not the power to execute them, and it cannot give itself the power to veto another branch's exercise of its own core powers.

1. The Wisconsin Constitution divides constitutional powers between the three co-equal branches; the Legislature's power is to make laws, not enforce them.

The Wisconsin Constitution divides constitutional powers between the three co-equal branches. Wis. Const. art.

IV, § 1, art. VI, § 1, art. VII, § 2. State administrative agencies are "part of the executive branch" and carry out executive functions. *SEIU*, 393 Wis. 2d 38, ¶ 60.

Separating these powers provides the "central bulwark of our liberty," *SEIU*, 393 Wis. 2d 38, ¶ 30, by guarding against the "concentration of governmental power" in a single branch. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 4, 376 Wis. 2d 147, 897 N.W.2d 384.

Generally, "[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). After the lawmaking process is complete, the baton passes to the executive branch to execute the law. *Evers I*, 412 Wis. 2d 525, ¶ 15; *SEIU*, 393 Wis. 2d 38, ¶ 95. Neither the Legislature nor the executive branch may "possess directly or indirectly, an overruling influence over the other[ ] in the administration of their respective powers." *Evers I*, 412 Wis. 2d 525, ¶ 16 (alteration in original) (citation omitted).

2. This Court's core and shared power lenses do not alter the underlying framework; even in a shared arena of powers, the encroached-upon branch must have the ability to perform its own constitutional role.

This Court and the court of appeals have filtered well-established separation of powers principles through a lens of "core" and "shared" powers. *See SEIU*, 393 Wis. 2d 38, ¶¶ 34–35. These analytical tools do not alter the underlying constitutional principles, and the framework must be carefully employed.

A core power is one that defines the branch's essential attributes and is one into which no other branch may intrude. *SEIU*, 393 Wis. 2d 38, ¶ 104; *State v. Horn*, 226 Wis. 2d 637,

643, 594 N.W.2d 772 (1999). In an area of core power, "*any* exercise of authority by another branch . . . is unconstitutional." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21 (citation omitted).

Arenas of shared powers involve situations where two branches exercise their own core constitutional powers. Neither branch exercises the other branch's power (the judiciary, for example, cannot pass a law), and any encroachment must not "unduly burden or substantially interfere with the other branch's essential role and powers." *State v. Unnamed Defendant*, 150 Wis. 2d 352, 360–61, 441 N.W.2d 696 (1989).

To be permissible, any encroachment must not leave the encroached-upon branch without power to override the co-equal branch when necessary to perform its own constitutional role. *See State v. Stenklyft*, 2005 WI 71, ¶ 86, 281 Wis. 2d 484, 697 N.W.2d 769; *Matter of E.B. v. State*, 111 Wis. 2d 175, 186–87, 330 N.W.2d 584 (1983); *Friedrich v. State*, 192 Wis. 2d 1, 30, 531 N.W.2d 32 (1995). In *Friedrich*, for example, the Court construed a statutory ceiling on guardian ad litem rates as allowing courts to exceed those limits if they determined it was necessary. 192 Wis. 2d at 30.

3. Under *Evers I*, the Legislature cannot empower JCF to veto executive branch decisions in an area of core power.

This Court's most recent articulation of the separation was in *Evers I*, where the Court struck down statutes giving JCF the power to veto program decisions of the Department of Natural Resources because they allowed a legislative body to execute the law. The Court held that the challenged statutes "effectively create a legislative veto," allowing the Legislature to

> interfere with and even override the executive branch's core power of executing the law. . . . The review process ultimately permits the members of the JFC to serve as gatekeeper to the exercise of a core executive function. . . . This unfettered interference by the committee oversteps the boundaries of legislative authority by arrogating the executive branch's core power to choose which conservation projects best carry out the statutory purposes of the Program.

Evers I, 412 Wis. 2d 525, ¶ 24. The Court held that once the statutes are enacted, the Legislature may not "insert itself into the machinery of the executive branch in an attempt to control the executive branch's ability to carry out the law." *Id*. ¶ 23. This Court held that the challenged statutes did exactly that, "effectively creat[ing] a legislative veto" that allows JCF to "interfere with and even override the executive branch's core power of executing the law." *Id*. ¶ 24.

B. Wisconsin Stat. § 165.08(1) violates the separation of powers as applied to settlements in the two categories.

1. Settling actions in the two categories is core executive power, and Wis. Stat. § 165.08(1) intrudes on that power.

Settling actions in the two categories of actions here constitutes core executive power. Just as with the statutes at issue in *Evers I*, Wis. Stat. § 165.08(1)'s creation of a veto power for JCF intrudes on that executive power.

The Attorney General is a "high constitutional executive officer." *SEIU*, 393 Wis. 2d 38, ¶ 60 (citation omitted); Wis. Const. art. VI, § 3. He is statutorily charged with representing the State and state agencies in civil litigation, including in the two categories here. 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 litigation. *See* Wis. Rev. Stat. ch. 9, §§ 36–41 (1849). The Attorney General carries

the law into effect when he prosecutes civil enforcement actions, and he and his executive agency clients carry out core executive powers when they engage in plaintiff's-side litigation.

The U.S. Supreme Court has recognized the quintessentially executive nature of civil enforcement work and rejected legislative efforts to control executive branch decisionmaking about how to enforce such laws.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), for example, the U.S. Supreme Court rejected legislative control over the Federal Election Commission where the FEC had civil enforcement power, including the authority to itself initiate civil actions. *Id.* at 111–12, 138–42. The Court concluded that "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.* at 138 (citation omitted).

Similarly, in *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020), 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." *Id.* at 219. Its "enforcement authority," including "the power to seek daunting monetary penalties against private parties," constituted a "*quintessentially executive power*." *Id.* (emphasis added).

More generally, plaintiff-side litigation is part of the day-to-day work of their carrying out the law. 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, ¶ 97.

Part of an agency's administration of programs it manages involves the tool of bringing and resolving plaintiff's-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.

Settling cases in the two categories here constitutes core executive action. JCF's power under Wis. Stat. § 165.08(1) to veto settlements in the two categories takes core executive branch power and gives it to the Legislature. Like the JCF veto power rejected in *Evers I*, JCF's veto power here intrudes on the executive branch's core power because it gives the Legislature the power to control the strategy, handling, and disposition of a case.

The Legislature, in contrast, has no constitutional role in settling actions in these categories. As the circuit court explained in its May 2022 summary judgment decision,

> [t]he 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, Pet.-App. 57). And settlements in these categories implicate none of the potential legislative interests the Court identified in *SEIU* as to any of the litigation control provisions, much less plaintiff's-side actions. *SEIU*, 393 Wis. 2d 38, ¶ 71.

2. Even if settling litigation in these categories lay in an arena of shared power, JCF's veto power would unduly burden and substantially interfere with the executive branch's constitutional role.

Even if this Court concluded that the Legislature had a shared constitutional role in settling matters in these categories, Wis. Stat. § 165.08(1) would still be unconstitutional because the statute leaves the executive branch without the ability to override JCF's action or inaction to perform its constitutional role.

As a matter of process, the Legislature is not acting through its constitutional lawmaking role, but rather making ad hoc decisions through a committee that enmesh it in the day-to-day operations of the executive branch.

And as a matter of substance, the JCF veto power prevents the Attorney General and his executive branch clients from exercising their core powers in the shared arena. As the Legislature has conceded, if JCF does not approve the settlement, the executive branch has no ability to override that decision. (R. 129:59.) Even if litigation in these categories occupied a shared arena of power, the Legislature cannot constitutionally leave the executive branch without the ability to override the Legislature's actions to perform its constitutional role.

3. Other States' supreme courts agree that the Legislature cannot intrude into the executive branch's litigation of these types of cases.

Other States' supreme courts agree that statutes giving legislatures the power to bring or control plaintiff's-side litigation violate the separation of powers.

In *Stockman v. Leddy*, 129 P. 220, 223 (Colo. 1912), *overruled on other grounds by Denver Ass'n for Retarded Children, Inc. v. Sch. Dist. No. 1*, 535 P.2d 200, 204 (1975), the Colorado Supreme Court held that a statute violated that state's separation of powers doctrine where it gave the legislature the power to bring cases for certain civil enforcement purposes. Similarly, in *In re Opinion of Justices*, 27 A.3d 859, 869–70 (N.H. 2011), a challenge to a New Hampshire law, the New Hampshire legislature implicitly *conceded* that civil enforcement matters involve executive power. And in *State Through Board of Ethics v. Green*, 545 So. 2d 1031, 1036 (La. 1989), the Louisiana Supreme Court held that a statute allowing the legislature to file a lawsuit to collect penalties violated the separation of powers.

Beyond civil enforcement cases, courts have recognized that the control of plaintiff's-side litigation more broadly is an executive power. In *In re Opinion of Justices*, the New Hampshire Supreme Court rejected the legislature's argument that it could control the Attorney General's involvement in other types of plaintiff's-side litigation: "[i]t is the executive, not the legislative branch, in which the constitution vests the power to determine the State's interest *in any litigation*." 27 A.3d at 872 (emphasis added); *see also Ariz. ex rel. Woods v. Block*, 942 P.2d 428, 436, 437 (Ariz. 1997) (rejecting a statute that gave a legislative committee the power to initiate litigation on behalf of the state).

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This case presents a real and important issue of constitutional law: whether the decisions of the Wisconsin executive branch about settling these categories of actions can be subject to a legislative committee veto. They cannot.[4]

II. Review is necessary because the court of appeals' decision conflicts with decisions of this Court.

This appeal also merits this Court's review because the court of appeals majority decision conflicts with decisions of this Court. First, it directly conflicts with the Court's recent separation of powers holdings, including *Evers I*. Second, it misreads *SEIU* in critical ways. And third, in recognizing a new constitutional power for the Legislature in aid of its taxation power, it would violate the Wisconsin Constitution's Uniformity Clause.

A. The decision below conflicts with the Court's separation of powers decisions, most recently *Evers I*.

The decision below directly conflicts with the Court's separation of powers doctrine precedents. Most recently, in *Evers I*, this Court held that the separation of powers

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[4] Wisconsin Stat. § 165.08(1) is unconstitutional as applied to settlements in these categories under the "beyond a reasonable doubt" standard. Petitioners preserve an argument that this standard should not apply in separation of powers challenges to statutes, because it necessarily elevates one co-equal branch over the others in the analysis. *See Morrison v. Olson*, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting) (explaining that the constitutionality presumption should not apply). Petitioners also preserve the argument that an overbreadth test, not the "invalid in every application test," should apply to facial separation of powers challenges. *SEIU*, 393 Wis. 2d 38, ¶¶ 177–88 (Dallet, J., concurring in part and dissenting in part).

prohibits JCF from having the power to veto executive branch decisions about how to carry out a program the agency is statutorily charged to administer. There is no meaningful distinction between the vetoes held invalid in *Evers I* and JCF's veto power in Wis. Stat. § 165.08(1) as to the two categories here.

The court of appeals majority confined its discussion of *Evers I* to a footnote. *Kaul,* 2024 WL 4926387, ¶ 31 n.17, (Pet.-App. 20). It said the case was distinguishable on the theory that DNR was spending money, but it ignored the reasoning of the case: the laws there were unconstitutional because they gave JCF the ability to interfere with and override DNR's discretion in executing the program at issue. The same is true here. There is no principled distinction between the statutes invalidated in *Evers I* and the JCF veto power under Wis. Stat. § 165.08(1) as applied here.

B. The decision below misreads *SEIU* in critical ways.

The majority also misread *SEIU* in three critical ways, each of which warrants this Court's review.

First, the majority stated that *SEIU* was "dispositive" of this appeal, *Kaul,* 2024 WL 4926387, ¶ 31 n.17, (Pet.-App 20). That ignores the holding of *SEIU*, where this Court went out of its way to emphasize the limited nature of its holding. *SEIU*, 393 Wis. 2d 38, ¶ 73. That case involved facial challenges to numerous statutes, and all the Court decided was that there was at least one possible constitutional application of the statute.

Second, the majority misinterpreted the "power of the purse" discussed in *SEIU*. That term was used in *SEIU* to describe a potential constitutional role for the Legislature in settling certain defense-side litigation—settlements that potentially implicated the Legislature's appropriation power if they required the "state to pay money *to another party*."

SEIU, 393 Wis. 2d 38, ¶¶ 68–69 (citing Wis. Const. art. VIII, § 2). The court of appeals here expanded that legislative role to include plaintiff's-side settlements with a monetary *recovery* for a state entity or program. *Kaul,* 2024 WL 4926387, ¶¶ 27–34, (Pet.-App. 17–24). Nothing in *SEIU* even hinted at such a result. The appropriation power under Wis. Const. art. VIII, § 2 has nothing to do with the recovery of money.

Third, the majority construed footnote 22 of *SEIU* as meaning that whenever the Legislature and executive branch operate in a shared arena of powers regarding the litigation control provisions, the laws are automatically constitutional. That footnote stated that

> [a]s explained above, the attorney general's litigation authority is not, in at least some cases, an exclusive executive power. These types of cases fall under a shared powers analysis. Where the legislature has appropriate institutional interests, 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. Hence, the facial challenge gets nowhere under an "unduly burdensome" shared powers analysis.

393 Wis. 2d 38, ¶ 72 n.22. The court of appeals concluded it must "follow the binding decision of our supreme court in *SEIU* and . . . must reject the DOJ's invitation to engage in the 'unduly burdensome' shared powers analysis with respect to Wis. Stat. § 165.08(1)." *Kaul,* 2024 WL 4926387, ¶ 39, (Pet.-App. 25).

The majority misread the footnote. The *SEIU* Court was simply holding that there was at least one constitutional application of the challenged laws. It was not silently overturning Wisconsin's shared powers caselaw. As Judge Neubauer recognized in dissent, the footnote should not be read to mean that if a legislative interest is present, the JCF veto power is always constitutional: "If that were true—if the

legislature could constitutionally assume total control over the exercise of a shared power anytime its exercise implicated a legislative interest—then the 'undue burden or substantial interference' standard would be rendered a nullity." *Kaul,* 2024 WL 4926387, ¶ 79 n.4 (Neubauer, J., dissenting), (Pet.-App. 46).

Each of these misunderstandings has ramifications beyond this case. If left standing, they would significantly conflict with and undermine this Court's separation of powers doctrine.[5]

C. The decision below would allow the Legislature to violate the Wisconsin Constitution's Uniformity Cause.

The court of appeals decision also conflicts with case law beyond the separation of powers. Its new constitutional role for the Legislature in aid of taxation would conflict with the Constitution's Uniformity Clause.

Recognizing that the Legislature's appropriation power under article VIII, § 2 is not relevant to settlements recovering moneys for the State or injured victims, the court of appeals jumped to Wis. Const. art. VIII, § 5, which requires the Legislature to provide for an annual tax sufficient to defray the estimated expenses of the state for each year. *Id.* ¶ 31, (Pet.-App. 18). The majority announced that the Legislature has a shared constitutional role regarding the amount and allocation of recoveries for the State through settlements so that the Legislature can "ensure that those funds are utilized for purposes designated by the legislature." *Id.* ¶ 30, (Pet.-App. 19).

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[5] If Petitioners are incorrect, and this Court meant to issue the rulings in *SEIU* that the court of appeals majority advances, Petitioners will ask this Court to overrule those aspects of *SEIU*.

Moneys from settlements cannot constitutionally be a way for the Legislature to obtain tax revenue. Taxes serve to "obtain revenue for the government," *City of River Falls v. Saint Bridget's Catholic Church of River Falls*, 182 Wis. 2d 436, 441–42, 513 N.W.2d 673 (Ct. App. 1994), and they must be uniform, *see* Wis. Const. art. VIII, § 1. A defendant's liability in a civil enforcement action or case brought by an executive agency, in contrast, is specific to particular facts: it depends on the 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 . . ."). Settlements of cases brought by the State or executive agencies in the two categories here are thus not opportunities for legislative fundraising.

If the Legislature had a constitutional role in supervising any executive (or judicial) activity that could result in more or less money for general purpose revenues, the Legislature could insert itself in a myriad of activities that the executive or judicial branch undertakes. That outcome would make a mockery of the separation of powers, and none of this Court's precedents supports (or could co-exist with) that result.

III. Review will help clarify the law and presents a novel question, the resolution of which will have statewide impact.

Review here will help clarify the law and is a novel question, the resolution of which will have statewide impact.

The parties are unaware of any other State's court that has blessed a law like Wis. Stat. §165.08(1). And the court of appeals' misunderstandings about the separation of powers

legal framework, *SEIU*, and the difference between taxation and case settlements all warrant this Court's clarification.

Below, primarily in briefing on the Legislature's motion for stay, Petitioners presented uncontroverted evidence that Wis. Stat. § 165.08(1) has affected the types of settlements the Department enters into, especially in multi-state civil enforcement actions, resulting in less desirable outcomes for the State (R. 145:15–16, 21–23); that the law has required consideration of JCF's potential preferences in deciding whether to prosecute or settle a civil action (R. 73:9–10; 97:12–14); that the Department has been asked not to participate in a multistate action given the uncertainties of JCF review (R. 145:13); that mediations are less effective because the Department does not have final settlement authority during the mediation itself (R. 97:14); that some defendants' unwillingness to publicly reveal confidential negotiations at a public legislative committee meeting has delayed settlements, including one multi-million dollar settlement in a case brought by an agency (R. 73:14); and required the Department to dedicate resources to unnecessary litigation and trial preparation (R. 97:13–14).[6]

Beyond these individual case outcomes, the separation of powers violation harms public liberty and undermines democratic governance. *Evers* held that "[m]aintaining a strict separation between the branches is essential to the preservation of liberty because 'a government with shared legislative and executive power could first enact 'tyrannical laws' then 'execute them in a tyrannical manner.'" *Evers I*,

[6] These harms are not the separation of powers legal harm for the shared power analysis. They are facts relevant to the irreparable harm prong of the injunction analysis. Contrary to the court of appeals majority's misunderstanding (*Kaul,* 2024 WL 4926387, ¶¶ 40–44, (Pet.-App. 25–28)), the legal question for the shared powers test here is not a fact-driven assessment of administrative hassle on the encroached-upon branch.

412 Wis. 2d 525, ¶ 20 (quoting *Gabler,* 376 Wis. 2d 147, ¶ 5). And allowing the legislative branch to act through a JCF veto "undermine[s] democratic governance by circumventing the lawmaking process—which requires participation of the *entire legislature*—and punting to a committee the controversial and therefore politically costly positions legislators would otherwise need to take." *Id.* ¶ 29 (emphasis added).

And if left to stand, the court of appeals opinion could lead to broader ramifications. If the Legislature has a shared constitutional role in co-equal branch activities that may recover moneys for state programs and purposes, the Legislature could enact laws allowing JCF to veto audit actions of the Department of Revenue, for example, or require courts to submit draft decisions to JCF for review in cases that could affect money paid to the State. This Court's clarification is needed to avoid such absurd results.

CONCLUSION

Petitioners ask this Court to grant the petition for review.

Dated this 6th day of December 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 7372 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 State Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 6th day of December 2024.

Electronically signed by Hannah S. Jurss
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