STATE OF WISCONSIN

IN SUPREME COURT

Case 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.

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

# REPLY BRIEF OF PLAINTIFFS-RESPONDENTS-PETITIONERS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes**

## INTRODUCTION

Wisconsin Stat. § 165.08(1) violates the separation of powers as to the two categories of actions here by giving a legislative committee the power to veto the Department's resolution of suits. It finds no corollary in the State's prior laws or those of other states.

The Legislature's efforts to rescue the law in these applications fall flat. *SEIU* did not endorse the law's constitutionality in these applications, and *Evers I* rejected the Legislature's theory that any matter affecting state revenue or policy gives it a shared constitutional role. And the Legislature's new effort to construct a "long rooted history" relies on isolated examples that lie outside the categories here.

Wisconsin Stat. § 165.08(1) violates the executive branch's core power to execute the law in the challenged categories. And it would be unconstitutional even in a shared arena of powers framework: the Legislature ignores this Court's shared powers precedents, and its reading of *SEIU* again ignores what the decision holds.

## ARGUMENT

Wisconsin Stat. § 165.08(1) violates the Wisconsin Constitution's separation of powers as applied to these two categories of plaintiff's-side civil actions. That is true whether viewed through a core, or shared, power lens.

### I. Resolving actions in the categories here constitutes core executive power, and Wis. Stat. § 165.08(1) grants a legislative committee the ability to veto that executive exercise of power.

Resolving plaintiff's-side civil enforcement actions and executive agency actions constitutes core executive power. In

*Evers v. Marklein*, 2024 WI 31, ¶ 23, 412 Wis. 2d 525, 8 N.W.2d 395 ("*Evers I*"), this Court held that the Legislature cannot "insert itself into the machinery of the executive branch" to try and control how the executive branch carries out the law in specific applications. As applied to these categories, Wis. Stat. § 165.08(1) is unconstitutional because it gives a legislative committee the power to veto how the executive branch carries out the law.

### A. The Legislature's reliance on *SEIU* is misplaced.

The Legislature asserts that *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*"), already decided this case, and that holding Wis. Stat. § 165.08(1) unconstitutional in these categories would render *SEIU* meaningless. (Leg. Br. 35.) The Legislature misreads the case and relies on incorrect legal assumptions.

*SEIU* did not broadly endorse Wis. Stat. § 165.08(1), including its application to the categories here. Addressing facial challenges to multiple statutes, *SEIU* located a few instances where the statutes could be applied constitutionally and went no further. *See* 393 Wis. 2d 38, ¶ 71. The Court "express[ed] no opinion on whether individual applications or categories of applications may violate the separation of powers." *Id.* ¶ 73.

The Legislature argues that the Department must be wrong because the categories include many cases. But the unconstitutionality of a statute does not depend on the number of applications within the challenged category. And the Legislature's claim that the categories include all plaintiff's-side actions is factually incorrect: as the Department explained in its opening brief, this case does not address categories like actions brought at the request of the Legislature, settlements conceding the invalidity of state law,

or discontinuances of lawsuits challenging federal statutes, regulations, or policies. (R. 98:45–46.) Media attention at the time of Act 369's enactment focused on a case in the last category: Attorney General Schimel's challenge to the federal Affordable Care Act, and the possibility Attorney General Kaul would "drop[ ]" it. (R. 145:27–28; *see also* R. 145:28 (DOJ request to JCF in early 2019 asking to discontinue that case).)

The Legislature reads *SEIU* as holding that Wis. Stat. § 165.08(1) always involves a "'shared power' over entering into settlement agreements on behalf of the State." (Leg. Br. 38 (emphasis omitted).) That was not its holding: the Court held only that Wis. Stat. § 165.08(1) was not facially unconstitutional because there was at least one application where the Legislature had a shared constitutional role. 393 Wis. 2d 38, ¶¶ 71–73.

The Legislature argues that Wis. Stat. § 165.08(1) is constitutional because the Attorney General's authority to bring prosecuted actions is set forth in statutes, and that so long as the Wis. Stat. § 165.08(1) veto power is written into a statute, it is necessarily constitutional. (Leg. Br. 42.) Other courts have recognized that "[m]erely styling something as a condition on a grant of power does not make that condition constitutional." *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 470 (D.C. Cir. 1982). In *SEIU*, the Court said that "[t]he question . . . is not whether the legislature may give or take powers away from the attorney general . . . The question is whether the legislature may participate in carrying out the executive branch functions." *SEIU*, 393 Wis. 2d 38, ¶ 62. Here, the Legislature may not carry out the executive function of determining how to resolve the types of actions at issue.

### B. The Legislature does not have a constitutional role in executive action that affects revenues or policy.

Citing *SEIU* and *Evers I*, the Legislature claims it has a shared constitutional role in overseeing "both expected expenditures *and* expected revenues," as well as settlements that affect "policy." (*See* Leg. Br. 27–28 (citing *SEIU*, 393 Wis. 2d 38, ¶¶ 69–71), and Leg. Br. 22–23, 32 (citing *Evers I*, 412 Wis. 2d 525, ¶¶ 13–14).) Neither *SEIU* nor *Evers I* so held, and the Legislature has no such constitutional role.

As to revenue, *SEIU* said nothing suggesting the Legislature has a constitutional role relating to plaintiff's-side lawsuits that feature financial remedies. And *Evers I* emphasized that the Legislature has the power to act in controlling taxing and spending and setting policy "through lawmaking"—with "requirements of bicameralism and presentment temper[ing]" that power. *Evers I*, 412 Wis. 2d 525, ¶¶ 13–14.

If the Legislature wants to legislate about how, in general, types of remedial moneys are applied, it can pass a law, like Wis. Stat. § 165.12(3), that governs how opioid settlement funds are allocated among the State and county governments. What it cannot do is what it did with Wis. Stat. §§ 165.08(1) or 165.12(2): empower JCF to determine the amount and type of monetary components of a particular settlement. The Legislature offers Wis. Stat. § 165.12(2) as proof that Wis. Stat. § 165.08(1) is constitutional (Leg. Br. 31), but that statute, passed after Wis. Stat. § 165.08(1), was unconstitutional for the same reason that Wis. Stat. § 165.08(1) is unlawful in the applications at issue here.[1]

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[1] *See* Governor 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 March 13, 2025).

The Legislature incorrectly claims that Article VIII, § 5 gives it a constitutional role in overseeing positive monetary amounts flowing to the state. (Leg. Br. 40.) That provision explains that "[t]he legislature shall provide for an annual tax" and that "whenever the expenses of any year shall exceed the income, the legislature shall provide for *levying a tax* for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses." It serves to "*limit*[ ]" the Legislature's "power of taxation," which occurs via lawmaking. *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331, 366–69 (1915) (emphasis added). Article VIII, § 5 does not give the Legislature a constitutional role in determining the financial remedies obtained in litigation in the categories here, and it does not trump the Uniformity Clause. (*See* Leg. Br. 40–41.)

The Legislature also asserts that the financial magnitude of a particular resolution changes the equation. (Leg. Br. 29, 31 (claiming "the Legislature had an undeniable interest" in a large settlement).) But it offers no constitutional footing or limiting principle for that premise. Big or small, a case settlement addresses the facts of the particular case: addressing the defendant's wrongdoing, remediating harm to the public or the state agency, and paying required amounts for forfeitures and surcharges. (Dep't Br. 39 (discussing cases addressing tailoring of forms of monetary relief).)[2]

The Legislature's "policy" arguments fail for the same reasons. (Leg. Br. 32–34.) The Legislature relies on Article IV, § 1, which provides that "[t]he legislative power shall be

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[2] The Legislature's money arguments also include a "spending" theory: that if a plaintiff's-side settlement includes a partial offset for a counterclaim, the Legislature has a constitutional role because of the embedded "spending." (Leg. Br. 30.) But the Legislature needs to appropriate nothing, and any money not recovered is out of the agency's available, already-appropriated funds.

vested in a senate and assembly." That means that the Legislature has constitutional authority to make "policy choices" through lawmaking. Lawmaking, not interference with the executive branch, is the Legislature's constitutional tool to express its policy preferences. *Evers I*, 412 Wis. 2d 525, ¶¶ 13–14, 30. The Legislature's cited cases say nothing to the contrary. (Leg. Br. 32 (citing *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 529, 576 N.W.2d 245 (1998); *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 216, 188 N.W.2d 460 (1971)).)

The Legislature's landlord example illustrates the point. (Leg. Br. 29, 33.) Legislators may well take interest in a case resolution as a factual matter, but the Legislature's constitutional power is "devising and imposing 'generally applicable rules of private conduct' on the people" through legislation. *Wis. Legis. v. Palm*, 2020 WI 42, ¶ 80, 391 Wis. 2d 497, 942 N.W.2d 900 (Bradley, R., J., concurring) (citation omitted). After the Legislature enacts law, the constitutional baton passes to the executive branch to enforce and execute the law in specific factual scenarios. *SEIU*, 393 Wis. 2d 38, ¶ 96. Thus, once the Legislature has passed statutes protecting consumers, it is the executive branch's job to address an individual landlord's violations through a case resolution, whether the remedy is monetary, injunctive, or both.

### C. The Legislature's historical examples and discussion of other states' cases demonstrate that Wis. Stat. § 165.08(1) is an outlier.

Lacking support in the constitutional text or caselaw, the Legislature newly points to three isolated statutes as establishing a "long rooted history" of legislative control over settlements. (Leg. Br. 24–30, 36.) The Legislature also attempts to distinguish the Department's cited federal and out-of-state cases. Neither effort does the work the Legislature wants.

The Legislature's cited statutes illustrate the lack of historical support for its position. Searching through 170 years of history, the Legislature has discovered two one-time statutes—an 1849 directive to the Attorney General and Milwaukee County district attorney to pursue mandamus and criminal charges against the receiver of certain canal lands, and a 1909 non-statutory provision providing for settlement negotiations with railroads to resolve claims about disputed fees.[3] The Legislature also cites a 1915 law, but it is completely irrelevant: it gave an *executive* branch committee authority to pursue litigation against the United States regarding federal swamplands. (Leg. Br. 26 (citing 1915 Wis. Act 624).)[4]

None of these few examples falls in either of the categories here. But even if any did, these good-for-one-ride-only provisions addressed single, unique situations. They demonstrate no "long rooted" (Leg. Br. 36), historical tradition of legislative committee involvement in the litigation and

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[3] After the Court struck down the railroad taxation scheme as violating uniformity, the Legislature recast it as a "license fee" determined by a percentage of reported gross earnings. The license fee system was the subject of challenge and was replaced in 1903. Guy Edward Snider, "The Taxation of the Gross Receipts of Railways in Wisconsin," *Publications of the American Economic Association*, Vol. 7 No. 4, at 12–14, 25 (Nov. 1906), *available online at*: https://www.jstor.org/stable/pdf/2999914.pdf (last visited March 13, 2023); E.L. Philipp, *Political Reform in Wisconsin: A Historical Review of Primary Election, Taxation, and Railway Regulation*, at 119–23, 138–78 (1910), *available online at* https://tile.loc.gov/storage-services/public/gdcmassbookdig/politicalreformi00phil/politicalreformi00phil.pdf (last visited March 13, 2023).

[4] 1856 Wis. Act 120, § 333 (Leg. Br. 26–27), was just a more specific version of today's Wis. Stat. § 165.25(1m), which authorizes the Attorney General to appear for the State when requested by the Governor or Legislature. That situation also falls outside these categories.

resolution of cases brought by the executive branch in these categories.

The Legislature's effort to distinguish the out-of-state caselaw fares no better. It says none solely addressed settlement approvals. (Leg. Br. 37–38, 43–44.) But that distinction is not legally meaningful. The cases hold that a legislature cannot control the executive branch's choices about commencement, handling, or resolution of plaintiff's-side matters. *See, e.g., In re Opinion of Justices*, 27 A.3d 859, 870 (N.H. 2011) ("[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*.") (emphasis added); *Ariz. ex rel. Woods v. Block*, 942 P.2d 428, 436 (Ariz. 1997) (conducting state litigation is an executive function). The Legislature has conceded that it has found no other state statute allowing legislative control over settlement of plaintiff's-side civil actions. (R. 129:35–36.)

Wisconsin Stat. § 165.08(1) unconstitutionally intrudes into core executive branch power by giving JCF veto power over whether, when, and how the Department resolves these categories of plaintiff's-side civil actions.

## II. Even if these categories lay in shared arenas of power, Wis. Stat. § 165.08(1) would be unconstitutional because the executive branch has no ability to override JCF.

Even if this Court concluded the Legislature had a shared constitutional role in resolving these categories of actions, the statute is still unconstitutional as applied under a shared arena of powers framework.

### A. The Legislature offers no response to this Court's shared powers precedents.

The Legislature's shared powers discussion offers no response to the case law cited by the Department, where the

Court has refused to leave an encroached-upon branch without an ability to override the encroachment in order to perform its own constitutional role. *See, e.g., State ex rel. Friedrich v. Dane Cnty. Cir. Ct.*, 192 Wis. 2d 1, 16, 30, 531 N.W.2d 32 (1995); *Matter of E.B.*, 111 Wis. 2d 175, 186–88, 330 N.W.2d 584 (1983).

The Legislature instead erects a straw man, describing the Department's argument as that one branch can never block the action of another branch in a shared arena. But that is not the point. In a shared arena, one branch may not have the power to block another branch's exercise without any ability for the impeded branch to override it to perform its own constitutional role.

Consider *Friedrich*: the Legislature passed a law limiting compensation to be paid to guardians ad litem and special prosecutors. 192 Wis. 2d at 30. That block on judicial power did not constitute an undue burden or substantial interference because judges retained authority to award higher rates of compensation in individual cases, as the performance of their constitutional role required. *Id.*

Here, Wis. Stat. § 165.08(1) leaves the executive branch no ability to override a JCF veto in order to carry out its constitutional role. In the challenged categories, it is unconstitutional.

### B. The Legislature overreads *SEIU*.

The Legislature argues that *SEIU* already decided the shared powers question, asserting that it held that so long as any shared legislative role exists, then Wis. Stat. § 165.08(1) is automatically constitutional. *SEIU* made no such general holding: it addressed only the constitutionality of the laws as applied to the few applications it addressed. It said nothing suggesting that categorical challenges were

foreclosed, or even treated generally as a shared powers question. 393 Wis. 2d 38, ¶ 73.

### C. Even under the court of appeals majority's administrative hassle-test, Wis. Stat. § 165.08(1) would still be unconstitutional in these categories.

The Legislature and court of appeals majority have offered an administrative hassle test as the shared power standard. That is not the relevant test. But even if it were, and whether under an overbreadth analysis or not, (Dep't Br. 44–45), Wis. Stat. § 165.08(1) would still constitute an undue burden and substantial interference.

The Legislature asserts JCF has done its job well, 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.

A veto "lurks in the background of every" decision, *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 44, 376 Wis. 2d 147, 897 N.W.2d 384, not just those where the power is used. That means that in every action in these categories, the statute has infected the Department's decision-making about whether to prosecute, how to advise clients, how to allocate resources, and whether or when to try and pursue a resolution that must try and account for what JCF may or may not approve. (R. 73:9–10; 97:12–15.)

The Legislature pivots to distractions, but its points don't change the constitutional violations. It complains about the Department's assertion of privilege regarding case names, (Leg. Br. 8, 15, 47–48), but in the circuit court, it neither challenged that privilege nor utilized discovery tools like a request for protective order. (R. 129:77–78; 154:52.) And it offers "solutions" that the Department should have tried, like avoiding resolutions the JCF Co-Chairs would not like, or

sharing confidential information even if JCF members did not agree to keep negotiated settlement terms confidential. (Leg. Br. 50–51.) Those suggestions just prove the Department's point: because JCF has control over whether, when, and how the Department resolves plaintiff's-side actions in these categories, the Department must consider the veto power in deciding how to proceed at every stage of a matter. (*See, e.g.*, R. 145:7–11.)

Wisconsin Stat. § 165.08(1) does not give the Legislature a "seat at the table" (Leg. Br. 7, 9, 10, 20, 31, 35): it gives it a throne. Whether through a core or shared powers lens, that encroachment violates the separation of powers.

## CONCLUSION

This Court should reverse the court of appeals and hold that Wis. Stat. § 165.08(1) violates the Wisconsin Constitution as applied to (1) civil enforcement actions and (2) executive agency program administration actions.

Dated this 24th day of March 2025.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3000 words.

Dated this 24th day of March 2025.

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## 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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 24th day of March 2025.

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