No. 2023AP2020-OA

In the Supreme Court of Wisconsin

TONY EVERS, GOVERNOR OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES, BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, *and* MARRIAGE AND FAMILY THERAPY, PROFESSIONAL COUNSELING, AND SOCIAL WORK EXAMINING BOARD,
PETITIONERS,

v.

SENATOR HOWARD MARKLEIN *and* REPRESENTATIVE MARK BORN, *in their official capacities as chairs of the Joint Committee on Finance*; SENATOR CHRIS KAPENGA *and* REPRESENTATIVE ROBIN VOS, *in their official capacities as chairs of the Joint Committee on Employment Relations*; *and* SENATOR STEVE NASS *and* REPRESENTATIVE ADAM NEYLON, *in their official capacities as co-chairs of the Joint Committee for Review of Administrative Rules*,
RESPONDENTS.

On Petition For Original Action Before This Court

APPENDIX

MISHA TSEYTLIN
Counsel of Record
SEAN T.H. DUTTON
KEVIN M. LEROY
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street,
Suite 3900
Chicago, Illinois 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Attorneys for Respondents and Intervenor Respondent Wisconsin State Legislature

TABLE OF CONTENTS

STATE OF WISCONSIN

IN SUPREME COURT

No. 90-1266

JOSE MARTINEZ, MARIA LEONOR MARTINEZ, CARLOS MARTINEZ, MARIA ISABEL MARTINEZ, JORGE MARTINEZ, FRANCISCO CARRIZALES, SILVIA CARRIZALES, MARIO RIVERA, SR., MARTHA RIVERA, BELINDA RIVERA, MARGARITA GUERRERO and JOSE GUERRERO,

Plaintiffs-Respondents-Petitioners,

JOINT COMMITTEE ON LEGISLATIVE ORGANIZATION, and JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES,

Intervenors-Plaintiffs-Respondents-Petitioners,

v.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, CAROL SKORNICKA, Secretary of the Department of Industry, Labor and Human Relations,

Defendants-Appellants,

GARTH TOWNE, also d/b/a GARTH TOWNE'S FARM, and JOHN H. KNOCH, also d/b/a K-FARMS, and G. R. KIRK COMPANY, a Foreign Corporation,

Defendants.

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS-RESPONDENTS

JAMES E. DOYLE
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General

DAVID C. RICE
Assistant Attorney General

Attorneys for Defendants-Appellants-Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3793

TABLE OF CONTENTS

CASES CITED

Page

Page

STATUTES AND RULES CITED

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATE OF WISCONSIN

IN SUPREME COURT

No. 90-1266

JOSE MARTINEZ, MARIA LEONOR MARTINEZ, CARLOS MARTINEZ, MARIA ISABEL MARTINEZ, JORGE MARTINEZ, FRANCISCO CARRIZALES, SILVIA CARRIZALES, MARIO RIVERA, SR., MARTHA RIVERA, BELINDA RIVERA, MARGARITA GUERRERO and JOSE GUERRERO,

Plaintiffs-Respondents-Petitioners,

JOINT COMMITTEE ON LEGISLATIVE ORGANIZATION, and JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES,

Intervenors-Plaintiffs-Respondents-Petitioners,

v.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, CAROL SKORNICKA, Secretary of the Department of Industry, Labor and Human Relations,

Defendants-Appellants,

GARTH TOWNE, also d/b/a GARTH TOWNE'S FARM, and JOHN H. KNOCH, also d/b/a K-FARMS, and G. R. KIRK COMPANY, a Foreign Corporation,

Defendants.

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS-RESPONDENTS

QUESTIONS PRESENTED

1. Does sec. 227.26, Stats., violate the requirement of bicameral passage by both houses of the Legislature? The trial court answered no. The court of appeals did not reach this issue.

2. Does sec. 227.26, Stats., violate the presentment clause, art. V, § 10, of the Wisconsin Constitution? The trial court answered no. The court of appeals did not reach this issue.

3. Does sec. 227.26, Stats., violate the separation of powers doctrine of the Wisconsin Constitution? The trial court answered no. The court of appeals answered yes.

STATEMENT OF THE CASE

The case involves the interpretation of sec. 227.26, Stats., which allows the Joint Committee for Review of Administrative Rules to suspend, in whole or in part, a rule legally and properly adopted by an administrative agency and filed with the Secretary of State and the Reviser of Statutes. The Committee, using its statutory authority to suspend a rule in part, rewrote a rule, thus changing the minimum wage which certain employers were required to pay. This change in the law was not passed

on by a majority of a quorum of either house of the Legislature nor presented to the Governor for his approval or veto.

The plaintiffs-respondents-petitioners (hereafter petitioners) are migrant workers who filed this lawsuit claiming the benefits of Wis. Admin. Code ch. Ind 72 as that rule was filed following action by the Joint Committee for Review of Administrative Rules. Petitioners also raise several causes of action attacking the rule as originally filed by the Department of Industry, Labor and Human Relations (hereafter "respondents") in this case.

The respondents filed an answer, raising among other things an affirmative defense that the action by the Joint Committee for Review of Administrative Rules (hereafter "JCRAR") was unconstitutional. The Joint Committee on Legislative Organization and JCRAR, pursuant to secs. 227.50(5) and 806.04(11), Stats., moved to intervene as plaintiffs in the action, which order was granted.

The respondents moved for partial summary judgment on their affirmative defense that the action by the JCRAR was pursuant to an unconstitutional statute. The petitioners and JCRAR moved for summary judgment

contending the actions of JCRAR were pursuant to a constitutional statute and that the rule was effective as modified by JCRAR. The circuit court granted petitioners' and JCRAR's motion and denied respondents' motion. From the circuit court's final order granting petitioners' relief, respondents appealed.

STATEMENT OF FACTS

The respondents, pursuant to statutory authority, adopted Wis. Admin. Code § Ind 72.01(16), a definition of probationary employe.

> "Probationary employe" means a person who has been in employment status for an employer for a number of days equal to or less than the number of days specified in s. 101.26(3)(b)1 within a three-year period. In this subsection, "employer" means a separate entity unless there is common ownership of different establishments or enterprises and the employe worked in one or more of these establishments or enterprises during the probationary period.
>
> Example: If an employe is in employment status eighty calendar days (even if he/she works and is paid for less than eighty calendar days) in one employment period and then returns to the same employer for another employment period, they would not have to start over to reach 120 calendar days, but would only have to be in employment status for forty additional calendar days to reach the non-probationary rate.

Rules in Final Draft Form (complaint Ex. A at 4).

This rule was adopted pursuant to the provisions of secs. 227.10-227.23, Stats. The rules were filed May 15,

1989, with the Secretary of State and the Revisor of Statutes pursuant to sec. 227.20, Stats. The effective date of the rule was July 1, 1989.

Pursuant to section 227.26, on July 1, 1989, the JCRAR met in executive session. The JCRAR suspended part of the rule in question as follows:

> In the second line of section (16) the words "for an employer."
>
> In the third line of section (16) all words except the word "three" but including the hyphen.
>
> In the fourth line all words but not the period following the word "period."
>
> The fifth, sixth and seventh lines of section (16) in their entirety, and the explanatory note which follows the section.

Committee Record (complaint Ex. B at 2).

Following the action by the JCRAR, Wis. Admin. Code § Ind 72.01(16) read:

> 'Probationary employe' means a person who has been in employment status for an employer for a number of days equal to or less than three.

The JCRAR gave the following reasons for its determination:

> Testimony presented to the joint committee at its June 8, 1989 public hearing has led it to conclude that a 120-day, repeating probationary wage is not a "reasonable classification" as required by s. 104.04, Stats., nor does it represent a "living wage" as defined in s. 104.01(5), Stats.

> The joint committee finds that 120 days are not needed to train workers in the basic job skills required in minimum wage jobs. Also, the joint committee finds that such a training period does not need to be repeated with each new employer. Further, the probationary wage classification is likely to have unreasonable punitive effects on workers seeking to change employers. Finally, the joint committee finds that the wages set in the rule's probationary classification do not meet the statutory requirement that the department determine and fix a "living wage." For those reasons, the rule lacks sufficient statutory authority. (s. 227.19(4)(d)1, Stats.)
>
> The joint committee also finds that the rule fails to comply with the legislative intent that an economic floor be established which protects workers from poverty. (s. 227.19(4)(d)3, Stats.)
>
> The joint committee finds that the rule contains wages and classifications that are arbitrary, capricious and cause an undue hardship upon workers paid the minimum wage. (s. 227.19(4)(d)6, Stats.)

Committee Record (complaint Ex. B at 2-3).

JCRAR followed the procedural requirements of sec. 227.26, Stats.

STANDARD OF REVIEW

The trial court's ruling on the points raised by the respondents involves only questions of law which this court reviews ab initio. Ball v. District No. 4 Area Board, 117 Wis. 2d 529, 345 N.W.2d 389 (1984); Tavern League of Wisconsin v. City of Madison, 131 Wis. 2d 477, 389 N.W.2d 54 (Ct. App. 1986).

Section 227.26, Stats., is not entitled to a presumption that it is constituional. In City of Brookfield v. Milwaukee Metropolitan Sewerage District, 144 Wis. 2d 896, 426 N.W.2d 591 (1988), this court said:

> [B]ecause the legislature is alleged to have violated a law of consitutional stature which mandates the form in which bills must pass, the court will not indulge in a presumption of constitutionality, for to do so would make a mockery of the procedural constitutional requirement.

Id. at 913 n.5, N.W.2d at 599.

This case challenges the action of JCRAR to change the law by vote of a majority of a quorum of a committee. Article IV, section 17, of the Wisconsin Constitution requires that "[n]o law shall be enacted except by bill." Yet JCRAR's action has the effect of enacting law using a procedure other than "by bill." The case also alleges the action "enacts law" that circumvents the bicameral passage and presentment clauses. The case, therefore, alleges the Legislature has "violate[d] a law of constitutional stature which mandates the form in which [laws] must pass." Id. Under Brookfield it is not entitled to a presumption of constitutionality.

ARGUMENT

The respondents do not contest that the JCRAR followed the procedural requirements of sec. 227.26, Stats. The respondents contend that sec. 227.26, Stats., is unconstitutional because it violates the principles of bicameral passage by the Legislature, presentment to the Executive for his approval or veto, and the separation of powers doctrines, all of which are contained in the Wisconsin Constitution. The court of appeals found the statute violated the separation of powers doctrine. The court specifically did not reach the respondents' bicameral passage argument. Martinez v. DILHR, 160 Wis. 2d 272, 275 n.1, 466 N.W.2d 189, 190 (Ct. App. 1991). The court of appeals discussed the presentment clause but based its decision solely on separation of powers. Since this court can affirm for different reasons, State v. Horn, 139 Wis. 2d 473, 490, 407 N.W.2d 854, 861 (1987), respondents continue to contend that the statute violates the bicameral passage and presentment clauses in addition to the separation of powers requirement.

I. SECTION 227.26, STATS., VIOLATES THE REQUIREMENT OF BICAMERAL PASSAGE BY BOTH HOUSES OF THE LEGISLATURE.

"The legislative power shall be vested in a senate and assembly." Wis. Const. art. IV, § 1. With these words the framers of the Wisconsin Constitution vested the legislative power of the state in a senate and an assembly. The exercise of that power is subject to the limitations and restraints imposed by the Wisconsin Constitution and the Constitution and Laws of the United States. State ex rel. McCormack v. Foley, 18 Wis. 2d 274, 118 N.W.2d 211 (1962). Although it is not expressly stated, it cannot be disputed that our constitution requires that the Legislature exercise its legislative power by passing laws approved by at least a majority of a quorum of both houses.

To adopt a law, the constitution requires the Legislature follow certain "formalities . . . essential to the passage of a law." State ex rel. Fulton v. Zimmermann, 191 Wis. 10, 16, 210 N.W. 381, 384 (1926). Wisconsin Constitution art. IV, § 17, requires:

> (1) The style of all laws of the state shall be "The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:".
>
> (2) No law shall be enacted except by bill. No law shall be in force until published.
>
> (3) The legislature shall provide by law for the speedy publication of all laws.

Wisconsin Constitution art. IV, § 7, requires "a majority of each [house] shall constitute a quorum to do business . . . ." The business to be transacted by a majority of a quorum of each house of the Legislature is to determine what the law shall be. State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 52 N.W.2d 903 (1952).

Passage by a majority of a quorum may further be inferred by the specific provision for appropriation bills contained in Wis. Const. art. VIII, § 8. That provision requires:

> On the passage in either house of the legislature of any law which imposes, continues or renews a tax, or creates a debt or charge, or makes, continues or renews an appropriation of public or trust money, or releases, discharges or commutes a claim or demand of the state, the question shall be taken by yeas and nays, which shall be duly entered on the journal; and three-fifths of all members elected to such house shall in all such cases be required to constitute a quorum therein.

The language of art. VIII, § 8, has been interpreted to require a majority vote of a three-fifths quorum for the passage of appropriations bills. In State ex rel. Wisconsin Development Authority v. Dammann, 228 Wis. 147, 155, 277 N.W. 278, 279 (1938), the court stated,

> As there were not sufficient members in attendance in the senate on June 16, 1937, to constitute the quorum required by sec. 8, art.

> VIII, Wis. Const., to act on an appropriation bill, there was not then in attendance a legislative body capable under the constitution of transacting legislative business in relation to the passage of the bill . . . .

The state of New Hampshire has interpreted provisions of the New Hampshire Constitution to reach a similar result. Under the New Hampshire Constitution the legislative authority is vested in a house of representatives and a senate referred to as a general court. The New Hampshire Constitution provides:

> that neither the house of representatives, nor the senate may act in the absence of a specified quorum. N.H.Const.Pt. II, Arts. 20, 37. Left unstated, yet implicit in this constitutional scheme, is the requirement that the legislative authority of the government may be exercised only by a quorum of the two bodies of the General Court.

Opinion of the Justices, 121 N.H. 552, 431 A.2d 783, 788 (1981).

JCRAR constitutes five members from each house of the Legislature. A rule may be suspended by members of the Committee. If section 227.26 gives JCRAR the authority to legislate, the statute must be held unconstitutional because such legislation will not have passed both houses of the Legislature by a majority vote. It will have been adopted by the vote of, at most, five members of each house. It is conceivable that this

legislation could be adopted without the approval of a single member of one house. If nine members of the Committee are present and five assembly members vote to modify a rule and four senate members vote against, the rule is modified.

The authority granted the JCRAR under section 227.26 is the authority to legislate. The Wisconsin Supreme Court has not defined exactly what the legislative power is, but the court has said that the legislative power is "an act of the legislature." State ex rel. Martin v. Zimmerman, 233 Wis. 16, 20, 288 N.W. 454, 456 (1939). However, the Supreme Court of the United States and several other state supreme courts have indicated what constitutes legislation for constitutional purposes. The Supreme Court of the United States has held that when Congress acts, it is presumed to be acting within its assigned constitutional sphere. Thus, "[w]hether actions taken by either House are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" I.N.S. v. Chadha, 462 U.S. 919, 952 (1983). The Court went on to hold that an act is legislative in its character and effect if it "had the purpose and effect of

altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and [the plaintiff], all outside the Legislative Branch." Chadha, 462 U.S. at 952. Kansas has adopted the same definition. See State ex rel. Stephan v. Kansas House of Representatives, 236 Kan. 45, 687 P.2d 622, 636 (1984).

Other states have adopted similar definitions of the exercise of legislative power. In Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981), the New Hampshire Supreme Court reiterated its earlier findings that legislation was the exercise of legislative authority rather than acting as an administrative arm of the Legislature. Id. at 788. See also Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970). Finally, in Legislative Research Commission v. Brown, 664 S.W.2d 907 (Ky. 1984), the Kentucky Supreme Court held that legislative power was the power to "exercise . . . discretion as to what the law shall be." Id. at 915. The common thread running through all of these definitions is that when the Legislature affects the legal rights or burdens of persons, it is legislating.

Using this general guideline, the actions of the JCRAR acting under sec. 227.26, Stats., are the exercise

of legislative power. The respondents in this case legally adopted an administrative rule as provided in ch. 227. On July 1, 1989, that rule had the force of law. State ex rel. Staples v. DHSS, 115 Wis. 2d 363, 340 N.W.2d 194 (1983).

On that same day the JCRAR met in executive session. By vote of six legislators, the JCRAR changed the law from one requiring a 120-day period to one of 3 days. The action, as the JCRAR notes in its findings, also had the effect of eliminating the need for an employe to repeat a training period with each new employer. All persons beginning employment after July 1, 1989, were affected by the change JCRAR made in the administrative rule. JCRAR's action also had the effect of eliminating a probationary rate for the minimum wage for new workers at twenty cents per hour less than nonprobationary workers. See Analysis of Proposed Rules prepared by the Department of Industry, Labor and Human Relations (R. 4). Employers were required to pay increased wages under JCRAR's rule.

The court of appeals held JCRAR's modification of the rule constituted legislation. "By suspending portions of sec. Ind. 72.01(16), JCRAR has created new law . . . ." Martinez, 160 Wis. 2d at 280, 466 N.W.2d at

192. Regardless of the Legislature's ultimate action on a bill submitted by JCRAR, the Committee has changed policy determinations for a period of time without the bicameral passage of either house of the Legislature. In this case, employers are liable to their employes for an increased wage.

An examination of the Committee's reasons for suspending the rule indicates the policy nature of its action. The Committee concluded that the wage in question "does [not] represent a 'living wage' [and] that 120 days are not needed to train workers in basic job skills required in minimum wage jobs." Committee Record (complaint Ex. B at 2). These determinations are the type of public policy determinations that distinguish the exercise of legislative power. As such, the court of appeals correctly characterized them as legislative.

Because JCRAR's action was legislative in character, an exercise of legislative power, it must conform to the constitutional requirements for the exercise of legislative power. However, the action of the JCRAR was not adopted by a majority of a quorum of the Senate. Nor was it adopted by a majority of a quorum of the Assembly. JCRAR effectively legislated without complying with the requirements in the constitution that legislation be

passed by a majority of a quorum of both houses of the Legislature. As such, section 227.26, which authorized the JCRAR to take the action it did, is unconstitutional.

Petitioners argue that because the administrative rules upon which the Committee acts do not rise to the level of statutory law, the suspension by the Committee is likewise not legislative in character. Since agencies are creatures of the Legislature, petitioners contend that the Legislature may retain a portion of the rulemaking authority for itself. The flaw in this argument is that it mistakes the nature of rulemaking for the exercise of the legislative power. The action of administrative rulemaking is not legislative in character; it is an exercise of executive power.

Mr. Justice Holmes said: "To make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate . . . ." Springer v. Philippine Islands, 277 U.S. 189, 210 (1928) (Holmes, J., dissenting). The United States Supreme Court has also said: "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . ." Yakus v. United States, 321 U.S. 414, 424 (1944). Perhaps the best guideline was

that set forth by the United States Supreme Court in I.N.S. v. Chadha, 462 U.S. at 952: "Whether actions . . . are in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" Thus, when the purpose and effect is to "alter[] . . . legal rights, duties, and relations of persons . . . outside the Legislative Branch," id. at 952, the purpose and effect is legislative. Main Cent. R. v. Broth. of Maintenance of Way Emp., 835 F.2d 368, 372 (1st Cir. 1987).

Administrative agencies are charged with the duty to administer and interpret the statutes. In contrast to the exercise of legislative power, rulemaking is an exercise of the executive power to administer and interpret the statutes. This is sometimes referred to in the shorthand as the "execution" of the law. State ex rel. Broughton v. Zimmerman, 261 Wis. at 405, 52 N.W.2d at 906.

The Legislature has the power to make law in minute detail. It could, if it wished, attempt to imagine every situation and set forth the policy for each situation. It is, of course, not practical for the Legislature to do

this. For this reason, most statutes set forth broader policy. The breadth of the policy is up to the Legislature, in its discretion, to decide. Some statutes are so detailed that the need for interpretive rules is held to a minimum. See, for example, the rules of the road, ch. 346, Stats., or unemployment compensation, ch. 108, Stats.

Once the Legislature has exercised its legislative power to set the broad policy, an agency must apply that statute to specific facts and interpret the statute to determine which actions or individuals come within the policy set forth in the legislation and which do not. Where the statutory language creates some ambiguity, it is the agency, in the first instance, who must decide what the words mean. Likewise, if several sections of an act do not seem consistent, the agency, in the first instance, must attempt to harmonize the statutory language in its attempt to apply it. The agency must also decide, in the first instance, to whom the statute applies under the statutory language. Agencies perform these functions whether or not the Legislature gives the agency rulemaking authority. If an agency does not make these types of decisions involving day-to-day application of the statute, then the individual affected by the

statute makes his or her own decision about whether and how the statute applies to him or her.

In earlier years, agencies interpreted statutes, decided to whom they applied and enforced them without the benefit of formal rules. Legislatures and the Congress believed that these decisions should be made public so that individuals subject to the statutes were aware of how the agency believed the statutes applied to them. Another purpose was to allow the public to have input into the process of statutory interpretation and application. This is desirable to allow affected members of the public to persuade the agency its interpretation of the statute is erroneous or to point out problems created by the agency's interpretation. The agency then had an opportunity to rethink its interpretation based on public comment. A third purpose was to minimize inconsistent interpretation within an agency by publishing the interpretation of the upper level administrators. This, at least in theory, allowed those persons at the lower levels who actually dealt with the affected public to consistently follow the agency interpretation.

From this, one can see that the purpose of rulemaking is not to "make law." It was a formalization

and memorialization of that which must of necessity occur when any agency or individual is charged with actually putting into practice legislative policy which is not minutely detailed. For example, the Legislature in setting forth policy concerning the registration of motor vehicles has determined that vehicles designed "primarily for the transport of passengers" are treated differently than vehicles which primarily transport goods. While the Legislature could go through an exhaustive list of all vehicles currently sold designating each one as an automobile or a truck, it is more efficient and desirable for the Legislature to set forth the general policy; that is, an automobile is a vehicle "primarily designed to transport persons."

When an individual seeks to register his or her Plymouth Voyager, an individual in the Department of Transportation must determine whether that vehicle is "primarily for the transport of passengers." When the individual does this, he or she does not "make law." He or she administers the law. Such administration occurs whether or not Transportation adopts a rule. This is not merely a semantic difference. The individual is not setting the general policy toward vehicle registration.

He or she is attempting to apply the general policy set forth by the Legislature to a concrete situation.

When one applies these general principles to the petitioners' arguments, the flaw of those arguments becomes apparent. If JCRAR is legislating, i.e., determining general policy in its suspension of the rule, that function is subject to the constitutional requirements for the exercise of legislative power. It does not matter that in interpreting, administering and executing the law an administrative agency follows a procedure which looks very much like legislation. It does not matter because administration, interpretation and execution of the law are an exercise of executive power not subject to bicameral passage under the constitution. The fact that the Legislature has required a process resembling legislation when agencies administer, interpret and execute does not relieve the Legislature of its constitutional obligation of bicameral passage when it exercises its legislative power. JCRAR's exercise of legislative power is subject to bicameral passage even if the action is of limited duration. The fact that the Legislature violates the constitution only for a short time does not make the action any less a constitutional violation.

In analyzing the Committee's action, one can look at the end result which the Committee accomplished. The effect of their action was to create a three-day probationary period. Absent the agency's rule, no probationary period existed. Could the Legislature on its own establish a three-day probationary period through Committee action without bicameral passage and presentment to the Governor? Clearly it could not. Thus the action of JCRAR is legislative in character and effect.

II. SECTION 227.26, STATS., VIOLATES THE PRESENTMENT CLAUSE OF ART. V, § 10, OF THE WISCONSIN CONSTITUTION.

Article IV, section 17(2), of the Wisconsin Constitution provides: "No law shall be enacted except by bill."

Wisconsin Constitution art. V, § 10, provides:

> Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large upon the journal and proceed to reconsider it.

Our constitutional scheme requires the Legislature to exercise its power to legislate through bills. Those

bills are required to be presented to the Governor for his approval or veto.

The scheme envisioned by section 227.26 circumvents these requirements of the constitution. As stated above, JCRAR's action in this case was an exercise of legislative power. Yet that action was never presented to the Governor for his approval or veto. This contravenes art. V, § 10, of the Wisconsin Constitution.

Other courts which have considered similar legislative vetoes have held these vetoes to have violated the presentment clause of their state constitutions. Additionally, the United States Supreme Court has held that a one-house veto violates the presentment clause of the United States Constitution.

In I.N.S. v. Chadha, 462 U.S. 919 (1983), the United States Supreme Court held that a one-house veto which allowed either the House or the Senate to overrule a decision by the attorney general to allow a deportable alien to remain in the United States, a discretionary power granted to the attorney general by statute, violated the presentment clause of the United States Constitution.

Several states have also reached a similar conclusion. In State ex rel. Barker v. Manchin,

167 W. Va. 155, 279 S.E. 2d 622, 632 (1981), the West Virginia Supreme Court held that a West Virginia statute empowering the legislative rulemaking review committee to approve or disapprove administrative rules, in whole or in part, was unconstitutional as violating that state's presentment clause contained in W.Va. Const. art. VII, § 14.

In State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 770 (Alaska 1980), the Alaska Supreme Court held that a statute by which "[t]he Legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department" was unconstitutional because the statute violated certain provisions of the constitution for formalities for bills and because the constitution required "that no bill shall become law unless the governor has the opportunity to veto it." Id. at 772.

In State ex rel. Stephan v. Kansas House of Representatives, 687 P.2d at 626, the Kansas Supreme Court held that a statute which provided that the legislature "may adopt, modify or revoke administrative rules and regulations by concurrent resolutions passed by the legislature without presentment to the governor" violated that state's constitution.

Finally, the New Jersey Supreme Court held that a statute which "allows the Legislature to veto by a concurrent resolution of both houses '[e]very rule hereafter proposed by a State agency,' with certain limited exceptions" violated that state's presentment clause. General Assembly of the State of New Jersey v. Byrne, 90 N.J. 376, 448 A.2d 438, 439 (1982). "Any legislative action that so removes the Governor from law making as to violate the Presentment Clause, Art. V, § 1, ¶ 14, threatens the separation of powers." Id. at 443.

The A.L.I.V.E., Stephan and Byrne cases struck down statutes which suspended the agency rule on presentment grounds even though the action to suspend had passed a majority of a quorum of both houses of the legislature. Chadha struck down a statute in which the "legislative veto" was approved by a majority of a quorum of one house. As noted above, section 227.26 only requires a majority of a quorum of a ten person committee. The petitioners argue this court should ignore cases from other states because some states have explicit separation of powers provisions. Every state constitution has a presentment requirement. Regardless of wether these cases are persuasive on separation of powers issue, they are extremely persuasive on presentment.

It is clear that our statute is as constitutionally infirm as the immigration and naturalization act struck down in Chadha or the statutes of the states of West Virginia, Alaska, Kansas and New Jersey. Section 227.26 allows the JCRAR to legislate without presenting the law thus established to the Governor for his approval or veto. It violates art. V, § 10, of the Wisconsin Constitution.

The court of appeals relied on respondents' presentment argument to find that section 227.26 "unconstitutionally encroach[ed] on the executive branch of government." Martinez, 160 Wis. 2d at 280, 466 N.W.2d at 192. While the court of appeals is correct that circumventing the presentment requirement of the constitution frustrates an executive function, at the same time it constitutes a separate and distinct constitutional violation. In this case, JCRAR's actions which establish policy without the Governor's approval is a clear constitutional infirmity.

III. SECTION 227.26, STATS., IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE SEPARATION OF POWERS DOCTRINE.

"The doctrine of separation of powers is a fundamental principle of American constitutional

government." Layton School of Art & Design v. Wisconsin Employment Relations Commission, 82 Wis. 2d 324, 347, 262 N.W.2d 218, 229 (1978).

> "The Wisconsin constitution creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another." State v. Holmes, 106 Wis. 2d 31, 42 (1981).

In Matter of Complaint Against Grady, 118 Wis. 2d 762, 775, 348 N.W.2d 559, 566 (1984).

"The concept of the separation of powers . . . was designed to protect the people from the tyranny of government which could result from the accumulation of unbridled power in any one branch of the government. The Federalist No. 47 (Madison)." Opinion of the Justices, 431 A.2d at 785. The doctrine "expresses a profound belief that the concentration of governmental power increases the potential for oppression, and that fragmentation of power helps ensure its temperate use." The General Assembly of the State of New Jersey v. Byrne, 448 A.2d at 440. Thomas Jefferson explained that "'powers of government should be so divided and balanced among several bodies . . . that no one could transcend their legal limits, without being effectually checked and restrained by the others.' Thomas Jefferson, Notes on the

State of Virginia, 120 (W. Peden ed. 1955)." General Assembly v. Bryne, 448 A.2d at 440. Our court of appeals has expressed the same purpose for the doctrine in Wisconsin. See J.F. Ahern Co. v. Building Commission, 114 Wis. 2d 69, 107, 336 N.W.2d 679, 696 (Ct. App. 1983).

The doctrine of separation of powers is not absolute. This court has stated: "'The doctrine of separation of powers does not demand a strict, complete, absolute, scientific division of functions between the three branches of government. The separation of powers doctrine states the principle of shared, rather than completely separated powers. The doctrine envisions a government of separated branches sharing certain powers.'" In the Matter of Grady, 118 Wis. 2d at 775, 348 N.W.2d at 566, quoting from State v. Holmes, 106 Wis. 2d 31, 43, 315 N.W.2d 703 (1982).

The supreme courts of other states have stated the doctrine similarly. "We have long acknowledged that the complete separation of powers would interfere with the efficient operation of government, and that consequently there must be some overlapping of the power of each branch." Opinion of the Justices, 431 A.2d at 785-86.

> The fact that the powers of one department may overlap with another department's powers has long been a recognized fact. Recent cases have taken a pragmatic,

> flexible and practical approach to the doctrine, giving recognition to the fact there may be a certain degree of blending or admixture of the three powers of government and that absolute separation of powers is impossible.

State ex rel. Stephan v. Kansas House of Representatives, 687 P.2d at 634-35. "The separation of powers does not require complete insulation of the branches from each other." General Assembly of the State of New Jersey v. Byrne, 448 A.2d at 441.

"The doctrine of separation of powers should be viewed as a general principle to be applied to maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent concentration of unchecked power in the hands of any one branch." Layton School of Art & Design v. Wisconsin Employment Relations Commission, 82 Wis. 2d at 348, 262 N.W.2d at 229.

In Wisconsin the test for whether there is a violation of the separation of powers doctrine for shared powers is that "one branch of government may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's exercise of its power." In the Matter of Grady, 118 Wis. 2d at 775, 348 N.W.2d at 566. While other states may have explicit separation of powers

provisions, a comparison of these cases indicates that the doctrine is nearly identical in its application.

Applying this test to sec. 227.26, Stats., it is apparent that the statute in question unduly burdens and substantially interferes with the Executive Branch in the exercise of its power. As the court of appeals pointed out, the fact that the statute allows the JCRAR to legislate without presentment to the Governor for his approval or veto concentrates unchecked power in the hands of a small number of the Legislative Branch.

> JCRAR has created new law without presentment to the governor, thus denying the governor the power to veto the new law. . . .
>
> . . . Section 227.26, Stats., vests JCRAR with the power to suspend all or parts of rules, thus creating new rules with the force of law, without following the constitutionally mandated procedure for creating law.

Martinez, 160 Wis. 2d at 280-81, 466 N.W.2d at 192.

The statute unduly burdens the Executive Branch and substantially interferes with that branch's ability to exercise its veto power. Such a wholesale shifting of the legislative power to a small group such as this committee cannot fairly be said to represent "the legislative will." Opinion of the Justices, 431 A.2d at 788. This court counseled against such a concentration of power in Layton School of Art and Design.

This statute also sets up, in effect, a legislative veto of administrative rules. Such a veto reverses the constitutional relationship between the Legislature and the Executive. As stated by the West Virginia Supreme Court,

> The power of a small number of Committee members to approve or to disapprove otherwise validly promulgated administrative regulations, and of the entire legislative body to sustain or to reverse such actions either by [a bill] or by inertia, constitutes a legislative veto power comparable to the authority vested in the Governor, as head of the Executive Department . . . and reverses the constitutional concept of government whereby the Legislature enacts the law subject to the approval or the veto of the Governor.

State ex rel. Barker v. Manchin, 279 S.E.2d at 632.

The legislative scheme created by section 227.26 also has the undesirable effect of coercing the Executive Branch in its lawful rulemaking functions. Since the JCRAR may suspend, in whole or in part, any administrative rule, "[t]he Committee may in fact attempt to influence or dictate the content of the rules and regulations of an executive agency, separate and distinct from the Legislative Department." State ex rel. Barker v. Manchin, 279 S.E.2d at 632. In fact, an examination of the record in this case reveals that JCRAR attempted to influence the respondents to change the content of their

rule prior to suspending it. A legislative veto such as JCRAR's ability to suspend rules

> deters executive agencies in the performance of their constitutional duty to enforce existing laws. Its vice lies not only in its exercise but in its very existence. Faced with potential paralysis from repeated uses of the veto that disrupt coherent regulatory schemes, officials may retreat from the execution of their responsibilities. They will resort to compromises with legislative committees aimed at drafting rules that the current Legislature will find acceptable. . . . This process "violates two fundamental standards for informal rulemaking: reasoned decision making based on a record and the opportunity for public participants to contest opposing presentations.

General Assembly of the State of New Jersey v. Byrne, 448 A.2d at 444 (emphasis added). Such coercion or the threat of such coercion unduly burdens the Executive Branch in the execution and administration of the law thus violating the separation of powers doctrine.

Section 227.26, Stats., also upsets the balance of power between the branches of government by removing the incentive on the Legislature to carefully draft and limit the rulemaking power. As stated by the West Virginia Supreme Court:

> [T]he power of the executive to execute the laws is determined by the amount of discretion given it by the legislature, the more broadly a statute is drawn, the more power will be abdicated to the executive. Ordinarily the legislature attempts to prepare specific and narrowly drawn legislation in order to limit

> or to control the exercise of discretion by the executive. Where, however, the legislature retains jurisdiction over the discretionary power it vests in the executive, it no longer has the incentive to limit that power. The element of balance between the two branches no longer exists.

State ex rel. Barker v. Manchin, 279 S.E.2d at 636. The District of Columbia Circuit Court of Appeals stated the proposition thus: "Because of the veto, the rulemaking agency is given greater power than Congress might otherwise delegate, and Congress normally will let rules take effect unless so clearly undesirable that a veto is deemed warranted." Consumer Energy, Etc. v. F.E.R.C., 673 F.2d 425, 474-75 (D.C. Cir. 1982), aff'd sub. nom. Process Gas Consumers Group, et al. v. Consumer Energy Council of America, et al., 463 U.S. 1216 (1983).

Section 227.26 also violates the separation of power by disrupting detailed administrative regulatory schemes.

> The chief function of executive agencies is to implement statutes through the adoption of coherent regulatory schemes. The legislative veto undermines performance of that duty by allowing the Legislature to nullify virtually every existing and future scheme of regulation or any portion of it. The veto of selected parts of a coherent regulatory scheme not only negates what is overridden; it can also render the remainder . . . irrational or contrary to the goals it seeks to accomplish.

General Assembly of the State of New Jersey v. Byrne, 448 A.2d at 443. As stated by the United States Supreme

Court, "legislative interference, constant in its potentiality, can be exercised in any given case without a change in the general standards the legislature has initially decreed." Chadha v. Immigration and Naturalization Service, 634 F.2d 408, 432 (9th Cir. 1980), aff'd I.N.S v. Chadha, 462 U.S. 919 (1983).

Rulemaking is the exercise of executive power, not legislative power. Petitioners rely on the case of J.F. Ahern Co. v. Building Commission, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983), in arguing that section 227.26 does not place undue burden on the exercise of executive power. Respondents believe the Ahern case confirms that the Committee's action places an undue burden and substantially interferes with the Executive Branch.

In Ahern the court considered whether the statute creating the Building Commission violated the separation of powers doctrine. The court interpreted the statute to give the commission, controlled by the Legislature, the power of approval over construction contracts on state buildings. The court noted that the right to grant or withhold approval of a construction contract was an executive function. Ahern, 114 Wis. 2d at 106, 336 N.W.2d at 696. The court also determined, with somewhat

more difficulty, that the power to waive competitive bidding was an executive function. Id.

The court determined that the statute did not violate the separation of powers doctrine because other statutes gave the Executive Branch a power of approval over every contract involving an expenditure of more than $2,500 for construction work. The court viewed the statutes as a standoff and thus a check of one branch upon the other. The Legislature could refuse approval of contracts which the Governor wanted but were unacceptable to the Legislature. The Governor could refuse approval of contracts which the Legislature wanted but were unacceptable to the Governor. Because the court found a check by the Executive Branch on the Legislature's exercise of executive power, it upheld the statute.

The action of JCRAR on administrative rules presents a far different question. The proper focus is not on the ultimate legislative activity but upon the action of the Committee, the function of suspending or, in this case, rewriting an administrative rule. When the Committee suspends or rewrites a rule, that suspension, or as in this case the rule as rewritten through suspension, takes effect immediately. Yet, the action by the Committee is not presented to the Governor for his approval because it

is not in the form of a bill. It is in the form of a Committee vote. The Governor is presented with the opportunity to check the legislative action if and only if the Legislature ultimately ratifies the Committee's action. During the period the Legislature considers that action, the action of the Committee proceeds unabated perhaps for a period of more than two years. See Dunn & Gallagher, Legislative Committee Review of Administrative Rules of Wisconsin. 1977 Wis. L. Rev. 935, 938 n.19, 972. The Governor must wait further legislative action before it is presented for his approval or disapproval. There is absolutely no check on the action of the Committee.

As with bicameral passage and presentment, the fact that the action of the Committee is temporary in nature does not change the fact that for some period of time the Committee has frustrated the valid exercise of executive power by an agency charged with executing and administering the statutes. This is the usurpation of unchecked power not only by the Legislature but by as few as four legislators.[1] If they are the four who lost a legislative fight, they have the ability to impose their

---

[1]The minimum number needed for a quorum of JCRAR is six members. A majority of six members is four members.

will on the entire Legislature for as long as two years. The court should strike such a usurpation down.

Petitioners argue that the court should be persuaded by Mead v. Arnell, 791 P.2d 410 (Idaho 1990), which by 3 to 2 vote upheld a separation of powers attack on Idaho's counterpart to JCRAR. Yet they urge that the court ignore the six other states which have struck down such committees. They argue that these states, save Kansas, have explicit separation of powers clauses. So does Idaho. Id. at 414.

The petitioners argue that because administrative agencies are creatures of the Legislature and are responsible to it, the Legislature may engage in burdening unchecked the agency's valid exercise of an executive function. Citing Schmidt v. Local Affairs & Development Dept., 39 Wis. 2d 46, 57, 158 N.W.2d 306 (1968), the respondents argue that "the legislature may withdraw powers which have been granted [by it to an agency], prescribe the procedure through which granted powers are to be exercised, and if necessary wipe out the agency entirely." Brief of petitioners at 20. However, the action of JCRAR in suspending or rewriting an administrative rule is not a withdrawal of the powers granted to the agency. It is not a prescription of

procedure through which granted powers are to be exercised. It does not wipe out an agency entirely. It does not fit into any of the Schmidt criteria. It is the unchecked change of a validly exercised executive function. It unduly burdens and substantially interferes with the Executive Branch.

Respondents do not quarrel that the Legislature may withdraw powers granted to an agency; they may prescribe procedure through which granted powers are to be exercised which they have done; and respondents do not challenge those statutes here. They may wipe out the agency entirely. They may also take other action to dispel the "evil" which section 227.26 was meant to dispel. They may suspend or repeal the rule through normal legislation. They may statutorily provide the Committee with standing to challenge in court the improper exercise of rulemaking power. They may restrict or withdraw rulemaking authority. They may draft narrow statutes in the first place, thus validly limiting the bounds of the executive power. What they may not do is burden the exercise of an executive function by the unchecked action of a committee.

CONCLUSION

Section 227.26 confers on the JCRAR the power to legislate without complying with either the doctrine of bicameral passage by the houses of the Legislature or presentment to the Governor for his approval or veto in violation of Wis. Const. art. IV, §§ 1, 7 and 17, and art. V, § 10. The statute further violates the separation of powers doctrine by placing an undue burden upon and substantially interfering with valid exercise of executive power by the Executive Branch. The decision of the court of appeals should be affirmed.

Respectfully submitted,

JAMES E. DOYLE
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General

DAVID C. RICE
Assistant Attorney General

Attorneys for Defendants-Appellants-Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3793

May 13, 1990

Redacted or Restated Pursuant to Court Order of September 12, 2019.

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP614-LV

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

Plaintiffs-Respondents,

v.

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

Defendants-Petitioners,

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

Defendants-Respondents.

Case No. 2019AP622

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants,

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

Defendants.

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

ATTORNEY GENERAL'S RESPONSE BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

Attorneys for Defendant Josh Kaul

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8690 (TCB)
(608) 264-6219 (CTR)
(608) 267-2223 (Fax)
bellaviatc@doj.state.wi.us
rotht@doj.state.wi.us

TABLE OF CONTENTS

Page

Page

Page

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Page

Constitutional Provisions

Statutes

Page

Page

Other Authorities

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

ISSUES PRESENTED

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

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

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

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

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF THE CASE

I. Statutory background.

A. DOJ performs legal services for the State.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Procedural History

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

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

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

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

---

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

STANDARD OF REVIEW

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

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

ARGUMENT

I. The presumption of constitutionality does not apply here.

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

The separation of powers is meant "to maintain the balance between the three branches of government, to preserve their respective independence and integrity, and to prevent concentration of unchecked power in the hands of any one branch." *State v. Washington*, 83 Wis. 2d 808, 825–26, 266 N.W.2d 597 (1978). To ensure individual freedom and responsible, democratic government, "neither the legislature nor the executive nor the judiciary 'ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.'" *Gabler v. CVRB*, 2017 WI 67, ¶ 4, 376 Wis. 2d 147, 897 N.W.2d 384 (*quoting The Federalist No. 48*, at 305 (James Madison) (Rossiter ed. 1961)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Legislative Defendants misapprehend the shared powers analysis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Section 26 substantially interferes with enforcement actions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Confidentiality.

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

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

2. Loyalty and unconflicted representation.

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated this 17th day of September, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

Attorneys for Defendant Josh Kaul

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8690 (TCB)
(608) 264-6219 (CTR)
(608) 267-2223 (Fax)
bellaviatc@doj.state.wi.us
rothct@doj.state.wi.us

CERTIFICATION

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

Dated this 17th day of September, 2019.

THOMAS C. BELLAVIA
Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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

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

Dated this 17th day of September, 2019.

THOMAS C. BELLAVIA
Assistant Attorney General

CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: March 13, 2024.

Respectfully submitted,

Electronically signed by Misha Tseytlin
MISHA TSEYTLIN
(State Bar No. 1102199)
Counsel of Record
SEAN T.H. DUTTON
(State Bar No. 1134675)
KEVIN M. LEROY
(State Bar No. 1105053)
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street,
Suite 3900
Chicago, Illinois 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Attorneys for Respondents and Intervenor-Respondent Wisconsin State Legislature