STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP0790

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

Plaintiffs-Respondents-Petitioners,

v.

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

Defendants-Appellants.

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

INITIAL BRIEF OF PLAINTIFFS-RESPONDENTS-PETITIONERS

JOSHUA L. KAUL
Attorney General of Wisconsin

HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

Attorneys for Plaintiffs-
Respondents-Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8101 (HSJ)
(608) 957-5218 (CG)
(608) 294-2907 (Fax)
jursshs@doj.state.wi.us
gibsoncj@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

INTRODUCTION

The Wisconsin Constitution's separation of powers forbids the Legislature from "insert[ing] itself into the machinery of the executive branch" to try and control how the executive branch carries out the law. *Evers v. Marklein* ("*Evers I*"), 2024 WI 31, ¶ 23, 412 Wis. 2d 525, 8 N.W.2d 395. The Legislature violated that basic principle by giving its Joint Committee on Finance the power to veto decisions of the Department of Justice about how to resolve certain civil actions.

This case concerns the Department's ability to resolve two types of civil actions: civil enforcement actions and actions prosecuted on behalf of executive agencies regarding their program administration. Decisions about how to resolve such cases constitutes quintessential, core executive power. The Legislature's amendment to Wis. Stat. § 165.08, which gave JCF the power over those decisions, violates the separation of powers.

The Department challenged the constitutionality of Wis. Stat. § 165.08(1) as applied to these two types of actions, and the circuit court agreed. On appeal, however, a divided panel of the court of appeals held that the Legislature has a shared role in resolving these cases based on its duty to balance the budget, and that under *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*"), the Legislature may veto the Department's litigation decisions.

That was incorrect. The Legislature's duty to balance the budget through uniform taxation, like its powers to appropriate money and set forward-looking, generally applicable policy, empowers it to act through *lawmaking*, not through controlling the execution of the law. None of the litigation "interests" identified in *SEIU* that might put a case in an arena of shared powers exists in the two categories here.

And *SEIU* went out of its way to emphasize that it did *not* decide whether particular applications of the statute were constitutional.

This Court should reverse the court of appeals and hold that Wis. Stat. § 165.08(1) is unconstitutional in these two categories.

STATEMENT OF THE ISSUES

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

(1) civil enforcement actions; and

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

The circuit court held yes.

A divided panel of the court of appeals held no.

This Court should hold yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court granting review demonstrates that both oral argument and publication are warranted.

STATEMENT OF THE CASE

This case concerns 2017 Wisconsin Act 369's amendment to Wis. Stat. § 165.08, a statute addressing the Department of Justice's authority to compromise and discontinue civil actions prosecuted on behalf of the State and various state agencies, officers, and entities.

I. The Attorney General and Department of Justice prosecute many categories of civil actions. This case concerns only two of those categories.

The Attorney General and Department of Justice (together, the "Department") prosecute various types of civil actions. Two types are at issue here: (1) civil enforcement actions and (2) executive agency program administration actions. (R. 11; 116.)

First, the Department prosecutes civil enforcement actions to stop and remedy violations of Wisconsin's consumer protection, environmental protection, and other statutes protecting the public. *See, e.g.,* Wis. Stat. §§ 100.18 (fraudulent representations), 100.20 (unfair trade practices); Wis. Stat. ch. 281 (water quality and sewage disposal standards), ch. 283 (pollution); (R. 11:14–15 (discussing other civil enforcement actions).) The Department prosecutes these actions pursuant to statutory authority to do so. *See, e.g.,* Wis. Stat. §§ 165.25; 100.18(11)(d); 100.20(6). The pleadings call these actions "Category 1" actions.

Second, the Department prosecutes civil actions on behalf of executive branch agencies relating to the administration of programs the agencies are statutorily charged to execute. *See* Wis. Stat. § 165.25(1m), (2). These actions often involve disputes between agencies and entities or individuals with which the agencies interact, such as contractual disputes with vendors or tort claims against individuals who have damaged state property the agency manages. For example, these actions include tort claims by the Department of Transportation against drivers who have damaged bridges DOT manages. (*See* R. 116:18–19 (providing further examples).) The pleadings call these actions "Category 2" actions.

The Department prosecutes multiple other types of civil actions not at issue here. (R. 11; 116.) For example, the

Department sometimes prosecutes actions brought at the request of the Legislature, actions brought by Wisconsin against other states, and actions challenging federal statutes, regulations, or policies. (R. 98:45–46 (listing other categories).) For example, during the window between Attorney General Kaul's November 2018 election and the Legislature's December 2018 enactment of Act 369, public attention on "which lawsuits AG-elect Kaul could drop" focused on such high-profile matters as Wisconsin's then-participation in a multi-state lawsuit challenging the federal Affordable Care Act. (R. 97:4–5; 98:48–53.)

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

Until Act 369, the power to resolve the two categories of actions at issue here rested with the executive branch. *See* 1923 Session Laws, ch. 240, § 1; Wis. Stat. § 165.08 (2015–16).

Through Section 26 of Act 369, the Legislature gave the Joint Committee on Finance (JCF) control over whether, when, and how the Department may compromise or discontinue civil actions:

> Any civil action prosecuted by the department by direction of any officer, department, board, or commission, or any civil action prosecuted by the department on the initiative of the attorney general, or at the request of any individual may be compromised or discontinued. . . . by submission of a proposed plan to the joint committee on finance for the approval of the committee. ***The compromise or discontinuance may occur only if the joint committee on finance approves the proposed plan.***

Wis. Stat. § 165.08(1).

Wisconsin Stat. § 165.08(1) provides no deadlines or standards on how (or whether) JCF approves a settlement, or

whether (or when) it chooses to convene. The Legislature has conceded that Wis. Stat. § 165.08(1) leaves the executive branch with no ability to override JCF. (R. 129:58–59.)

III. In *SEIU*, this Court considers facial challenges to Act 369's multiple litigation control provisions.

Two months after Act 369's enactment, in *SEIU*, a union brought facial separation of powers challenges to numerous Act 369 provisions, including provisions relating to guidance documents, Capitol security, and control over state litigation. The challenged litigation control provisions included laws relating to legislative intervention (new Wis. Stat. § 803.09(2m)); defense-side settlement control (amendments to Wis. Stat. § 165.25(6)); and plaintiff's-side settlement control (amendments to Wis. Stat. § 165.08). *SEIU*, 393 Wis. 2d 38, ¶¶ 3–4, 9–13, 50–55.

In rejecting the facial challenges to the litigation control provisions, the Court held that it needed to find only one constitutional application of each statute. *SEIU*, 393 Wis. 2d 38, ¶¶ 38, 50–71. Considering the litigation control provisions together, the Court identified two potential legislative interests that could exist "in at least some cases." *Id.* ¶ 71.

First, the Court concluded there could be potential legislative interests in at least some cases where the Legislature or a legislative entity authorized the litigation and/or is the client: "where the attorney general's representation is in defense of the legislative official, employee, or body, or where a legislative body is the principal authorizing the prosecution of a case." *SEIU*, 393 Wis. 2d 38, ¶ 71.

Second, the Court concluded there could be a potential legislative interest in at least some cases where the resolution would implicate the Wisconsin Constitution's requirement

that no money be paid out of the treasury "except in pursuance of an appropriation by law": "in cases where spending state money is at issue, the legislature has a constitutional institutional interest in at least some cases sufficient to allow it to require legislative agreement with certain litigation outcomes, or even to allow it to intervene." *SEIU*, 393 Wis. 2d 38, ¶¶ 68, 71 (citation omitted).

As to Act 369's legislative intervention provision, the Court also identified a potential legislative interest in at least some cases challenging the validity of state law. *SEIU*, 393 Wis. 2d 38, ¶ 72.

The Court "stress[ed]" that its "decision [was] limited" and "express[ed] no opinion on whether individual applications or categories of applications may violate the separation of powers." *SEIU*, 393 Wis. 2d 38, ¶ 73.

IV. The Department challenges two categories of application of Wis. Stat. § 165.08(1).

In June 2021, the Department, joined by the Governor and Secretary of the Department of Administration, brought suit in circuit court, challenging the constitutionality of Wis. Stat. § 165.08(1) as applied to (1) civil enforcement actions and (2) executive agency program administration actions. (R. 11.)[1] These categories excluded any settlement involving the potential legislative interests identified in *SEIU*. Neither the Legislature nor its members authorize or is the client in these actions; no settlement in these categories would require the Legislature to appropriate money; and these categories expressly exclude a settlement that would concede the

[1] As Governor Evers, Attorney General Kaul, the Wisconsin Department of Justice, and Secretary Blumenfeld are all aligned in position here, any reference to "the Department's" arguments refers to the position of all petitioners.

invalidity of state law. (R. 116:4, 8, 17–19, 26–28; 11:9, 13, 31–33.)

The circuit court denied the Legislature's motion to dismiss, which argued that *SEIU* dispositively controls. (R. 27; 48; 70 (hearing transcript).) The Legislature sought discovery, (*see e.g.,* R. 98; 80), and the parties filed cross-summary judgment motions, (R. 71–72; 90–91; 96–97; 99; 128–33).

At oral argument, the Legislature asserted that JCF "generally" approved settlements "as a matter of course." (R. 129:38, 42.) The court asked, "Is it just a pointless formality that delays the achievement of a settlement? If the Legislature is ultimately unanimously approving the settlements then what's the point?" (R. 129:39.) The Legislature said it wants to "take a look" because an "inappropriate settlement could happen once in a while." (R. 129:40.)

A. The circuit court holds that Wis. Stat. § 165.08(1) violates the separation of powers in both categories.

In two separate decisions, the circuit court (Crawford, J.) held that Wis. Stat. § 165.08(1) is unconstitutional beyond a reasonable doubt in each category. (R. 106; 134, P-App. 49–76.)

As to Category 1 actions, the court concluded that the power to settle civil enforcement actions constitutes a core executive power. It found "significant persuasive value" in caselaw addressing the "quintessentially executive" "nature of civil enforcement litigation," and emphasized the absence of any legislative role in "approximately 170 years" of Wisconsin history or in "any other" state. (R. 106:7–9, P-App. 55–57.)

Resolving a particular civil enforcement violation through settlement, it reasoned, "requires the weighing of factors central to the executive branch's faithful execution of the laws," and that the "time-sensitive and individualized decision-making entailed by whether and how to settle a civil prosecution against an alleged violator stands in stark contrast to the collective, deliberative, protracted process of enacting generally-applicable laws that is the Legislature's constitutional purview." (R. 106:9–10, P-App. 57–58.)

As to Category 2 actions, the circuit court held that the authority to settle "civil actions initiated by the executive branch in its administration of statutory programs" is also "a core executive function, arising from [the] constitutional duty to faithfully execute enacted laws." (R. 134:4, P-App. 71.) It emphasized that a lawsuit is the "ultimate remedy for a breach of the law," "including a breach committed against the State's contractual, property, or other legal interests." (R. 134:4, P-App. 71.)

As to both categories, the court rejected the Legislature's arguments that it had a shared role under *SEIU* or based on its "power of the purse" or interest in "policy." (R. 106:10–13; 134:5–8, P-App. 58–61, 72–75.) It explained that the Legislature's constitutional powers are to expend moneys "by appropriation" and to "establish policy through the enactment of laws." (R. 106:12–13; 134:6, P-App. 60–61, 73.) It noted that Wis. Stat. § 165.08(1) lacks the "checks and balances" present in "the exercise of constitutionally-vested legislative power to set statewide policy through the enactment of laws." (R. 134:7.) It reasoned that "[a] settlement agreement . . . may be a matter of public interest, but it is not 'policy making,'" and "[t]he Legislature's desire to renegotiate settlements involving complex civil litigation in which it has played no role is not an institutional interest with constitutional dimension." (R. 106:12; 134:6, P-App. 60, 73.)

B. A divided panel of District II of the Court of Appeals reverses.

A divided court of appeals panel reversed the circuit court. Judge Neubauer dissented.

1. The majority.

The majority held that the Legislature has a shared constitutional role in resolving these two categories of civil actions, and that, under *SEIU*, where a shared role exists, Wis. Stat. § 165.08(1) does not violate the separation of powers. *Kaul v. Wis. State Legislature,* 2025 WI App 3, (P-App. 3–48).

The majority held that a "power of the purse" gave the Legislature a constitutional role in controlling the amount and allocation of proceeds from a plaintiff's-side settlement. *Kaul,* 2025 WI App 3, ¶ 27, (P-App. 17–18). It cited Wis. Const. art. VIII, § 2, which requires the Legislature to make an appropriation "by law," and *SEIU*, which discussed situations where the State would agree to pay money out of the treasury to another party, potentially requiring the Legislature to appropriate moneys for the settlement. *Id.* ¶ 27, (P-App. 17–18 (citing *SEIU,* 393 Wis. 2d 38, ¶ 69)). The majority held that *SEIU* is "dispositive of this appeal." *Id.* ¶ 31 n.17, (P-App. 20).

The majority recognized that neither Wis. Const. art. VIII, § 2 nor *SEIU* discussed a constitutional role for the Legislature where settlements result in monetary amounts *recovered* for statutory forfeitures, victim restitution, remediation, court surcharges, or other amounts. *Id.* ¶¶ 28, 30, (P-App. 18–20). But it adopted the Legislature's argument that Wis. Const. art. VIII, § 5, which requires the Legislature to provide for an annual tax sufficient to defray the estimated expenses of the state, gives the Legislature a shared constitutional role regarding the amount and

allocation of moneys received through settlements, so that it may "ensure that those funds are utilized for purposes designated by the legislature." *Id.* ¶ 30, (P-App. 19).

Because it adopted the "power of the purse" argument, the majority did not address the Legislature's argument that it has a shared constitutional role in activities that implicate "policy." *Id.* ¶¶ 32–34, (P-App. 21–22).

Having determined that the Legislature has a shared role in compromising these categories of civil actions, the majority held that Wis. Stat. § 165.08(1) was automatically constitutional under *SEIU*. It concluded that the *SEIU* Court held in a footnote that all shared-power applications of Act 369's litigation control provisions are constitutional. *Id.* ¶ 37, (P-App. 23 (citing *SEIU*, 393 Wis. 2d 38, ¶ 72 n.22)).

Petitioners had argued that, in a shared powers context, as a matter of law, an encroaching branch cannot leave an encroached-upon branch without any ability to override where necessary to perform its own constitutional role. The court of appeals disagreed, holding that a different shared powers analysis, advanced by the Legislature, would apply: whether the encroached-upon party has demonstrated sufficient administrative harms, such as by showing the affected "percentage of the office's annual caseload." *Kaul,* 2025 WI App 3, ¶ 43, (P-App. 27). It concluded that Petitioners did not demonstrate sufficient practical harms under that test. *Id.*

In a footnote, the majority concluded that this Court's decision in *Evers I* did not control here because *Evers I* "involved funds that had already been appropriated by the legislature for use by an executive agency." *Id.* ¶ 31 n.17, (P-App. 20).

2. The dissent.

Judge Neubauer dissented. *Id.* ¶¶ 49–81, (P-App. 31–48). She concluded that the constitutional powers at issue in these two categories constituted core executive power, and that even if they fell in shared arenas of power, the new law unduly burdened and substantially interfered with the executive branch's constitutional power because it gives JCF the "exclusive and unreviewable power to accept, reject, or renegotiate the terms under which lawsuits in these two categories are resolved." *Id.* ¶¶ 52, 51; *see also id.* ¶¶ 79–81, (P-App. 31–32, 46–47).

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

She concluded that the majority overread *SEIU* by inferring holdings the Court did not make, and underread *Evers I* by failing to consider the principles of this Court's holding beyond the facts of the case. *Id.* ¶¶ 64–69, 75, 79 n.4, (P-App. 38–41, 43–44, 46).

As to the "power of the purse," Judge Neubauer wrote the Legislature's "power of the purse" concerns appropriation of money from the treasury under Wis. Const. art. VIII, § 2, not supervising monetary awards in plaintiff's-side actions. *Id.* ¶ 71; (P-App. 42). And as to the Legislature's power to tax

under Wis. Const. art. VIII, § 5, she wrote that "[t]he institutional interest that emanates from the taxing power is not in controlling all sources of income to the state" and that the majority's adoption of the Legislature's treatment of settlements in these categories as a source of taxation would violate uniformity principles. *Id.* ¶¶ 73–75, (P-App. 42–44). If the Legislature wants to guide settlement structure, she reasoned, its tool is to pass statutes providing for allocation of remedies, not to control settlement decisions in individual actions. *Id.* ¶ 74, (P-App. 43).

Finally, Judge Neubauer opined that, even if resolving these categories of plaintiff's-side actions lay in arenas of shared power, Wis. Stat. § 165.08(1) would still be unconstitutional because it gives JCF full and final control, leaving the executive branch with no ability to override JCF's actions. *Id.* ¶ 80, (P-App. 46–47).

STANDARD OF REVIEW

Whether the circuit court properly granted summary judgment and whether Wis. Stat. § 165.08(1) is unconstitutional in these categories are legal questions this Court reviews de novo. *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 9, 315 Wis. 2d 350, 760 N.W.2d 156; *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 26, 376 Wis. 2d 147, 897 N.W.2d 384.

ARGUMENT

Wisconsin Stat. § 165.08(1) violates the Wisconsin Constitution's separation of powers as applied to (1) civil enforcement actions and (2) executive agency program administration actions.

Wisconsin Stat. § 165.08(1) violates the separation of powers in these categories by giving a legislative committee veto power over core executive branch power to execute the

law by resolving these plaintiff's-side civil actions. *SEIU* did not decide this case. The Legislature does not have a shared role in any co-equal branch activity bringing money into the State or in "policy" outside of lawmaking. Moreover, even if resolving these categories fell in shared arenas of power, Wis. Stat. § 165.08(1) would still be unconstitutional because it leaves the executive branch without any ability to override JCF to execute the law.

I. The Wisconsin Constitution's separation of powers prohibits the Legislature from giving a legislative committee veto power over the exercise of another branch's core power. In an arena of shared powers, the Legislature may not enact a statute that leaves an encroached-upon branch without override authority to exercise its own power.

The Wisconsin Constitution separates the powers of state government among three co-equal branches. In an arena of core power, any exercise of authority by another branch is unconstitutional. Once the Legislature has exercised its core power to write the law, it cannot insert itself into executive branch decision-making in executing enacted law. In an arena of shared powers—which requires the exercise of more than one branch's powers—the Legislature cannot enact a statute that leaves an encroached-upon branch without any ability to override the encroaching branch to exercise its own constitutional power.

A. The Wisconsin Constitution divides government power among three, co-equal branches.

The Wisconsin Constitution divides constitutional power among three co-equal branches. Wis. Const. art. IV, § 1, art. V, § 1, art. VII, § 2. Separating these powers provides the "central bulwark of our liberty" by guarding against the

"concentration of governmental power" in a single branch. *SEIU*, 393 Wis. 2d 38, ¶ 30; *Gabler*, 376 Wis. 2d 147, ¶ 4.

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

This Court has analyzed well-established separation of powers principles through a lens of "core powers" and "shared powers." *See, e.g., SEIU*, 393 Wis. 2d 38, ¶¶ 34–35. These analytical tools do not alter the underlying constitutional principles. The analysis must focus on the specific governmental arenas at issue, not broad categories of interest in general subject areas. *See, e.g., State ex rel. Friedrich v. Dane Cnty. Cir. Ct.*, 192 Wis. 2d 1, 16, 20, 531 N.W.2d 32 (1995) (explaining that a legislative role in writing law and appropriating money did not alone resolve whether the Legislature had a shared role in compensation of guardians ad litem and special prosecutors); *Barland v. Eau Claire Cnty.*, 216 Wis. 2d 560, 584, 575 N.W.2d 691 (1998) (rejecting a shared legislative role in the specific arena of removal of judicial assistants based on a broad lawmaking role in the "realm of staff and judicial administration").

Whether under a core or shared arena of powers analysis, an enacted statute violates separation of powers in categorical applications when it cannot be constitutionally enforced in any circumstances within the particular categories. *See Gabler*, 376 Wis. 2d 147, ¶ 29.[2]

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[2] In some less-recent separation of powers cases (but not *Gabler*, *SEIU*, or *Evers I*), the Court has also directly applied the "beyond a reasonable doubt" presumption typically required for a challenger to prove a statute unconstitutional. The Department maintains that this presumption should not apply to separation of powers challenges to statutes, *see Evers I*, 412 Wis. 2d 525,

B. In an arena of core power, any exercise of authority by another branch is unconstitutional. The executive branch has core power to execute the law.

"[A] core power is power vested by the constitution that distinguishes that branch from the other two"—core powers "define" the branch's "essential attributes." *SEIU*, 393 Wis. 2d 38, ¶ 104 n.15.

"Historical practices and laws" help confirm each branch's core powers: if an encroaching branch has never before had a role in that particular arena, that further proves that the exercise in that particular arena constitutes core power of the encroached-upon branch. *See, e.g., Barland*, 216 Wis. 2d at 587; *State ex rel. Fielder v. Wis. Senate*, 155 Wis. 2d 94, 99–103, 454 N.W.2d 770 (1990); *Friedrich*, 192 Wis. 2d at 20–24.

In an arena of core power, "[a]ny exercise of authority by another branch" is unconstitutional. *Gabler*, 376 Wis. 2d 147, ¶ 31 (citation omitted).

As James Madison warned, the tremendous power inherent in writing laws leaves the Legislature with "greater facility" to "mask . . . the encroachments which it makes on the co-ordinate departments." *Federalist* No. 48 at 310 (James Madison) (Clinton Rossiter ed., 1961). Both the Framers and this Court understand the particularly acute danger of the "same persons who have the power of making laws to have also in their hands the power to execute them." *Gabler*, 376 Wis. 2d 147, ¶ 5 (quoting John Locke, *The Second Treatise of Civil Government*, § 143 (1764)). To ensure adherence to the separation of powers, this Court "jealously guard[s]" the core

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¶¶ 38–44 (A.W. Bradley, J., concurring), but this Court need not consider that issue here because Wis. Stat. § 165.08(1) is unconstitutional beyond a reasonable doubt in these categories.

powers of the co-equal branches from legislative encroachment. *Gabler*, 376 Wis. 2d 147, ¶¶ 30–31 (citation omitted).

The Legislature has the core power to pass laws, but execution of the law is a core power of the executive branch. "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them." *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600 (citation omitted). And neither the Legislature nor the executive branch may "possess directly or indirectly, an overruling influence over the other in the administration of their respective powers." *Evers I*, 412 Wis. 2d 525, ¶ 16 (citation omitted).

So, after the lawmaking process is complete, the baton passes to the executive branch to execute the law. *Evers I*, 412 Wis. 2d 525, ¶ 23. The Legislature "can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986).

Evers I illustrates this principle. Petitioners challenged two statutes that gave JCF the power to veto decisions of the Department of Natural Resources about the execution of a land stewardship program. 412 Wis. 2d 525, ¶ 6. JCF's decisions were "not subject to a vote of the full legislature." *Id.* ¶¶ 6–7. This Court held that the statutes violated separation of powers by "effectively creat[ing] a legislative veto" that allowed JCF to "interfere with and even override the executive branch's core power of executing the law." *Id.* ¶ 24.

This Court recognized that the executive branch has the "core power" to "ensure [that] the laws are faithfully executed," and that in "executing the law, the executive branch must make decisions about how to enforce and effectuate the laws." *Evers I*, 412 Wis. 2d 525, ¶¶ 16, 18. It explained that "[o]nce the legislature passes a bill that is

signed by the governor and becomes law, 'the legislature plays no part in enforcing our statutes.'" *Id.* ¶ 23 (citation omitted).

That outcome was consistent with the holding in *Gabler*, where the Court held that a statute permitting the executive branch to discipline judges for exercising core judicial power in particular cases "effectively impos[ed] an executive veto over discretionary judicial decision-making" that violated the separation of powers. 376 Wis. 2d 147, ¶ 36. The mere possibility of discipline "lurk[ing] in the background of every case," the Court reasoned, had the problematic potential of altering judicial decision-making and "incentive[s]." *Id.* ¶ 44.

C. In an arena of shared powers, a law may not leave an encroached-upon branch without ability to override the other branch to exercise its own powers.

This Court has recognized that some government action rests in arenas of shared powers, which require the exercise of powers of more than one branch. In these "'borderlands of power' [that] lie in the interstices among the branches' core zones," *Friedrich*, 192 Wis. 2d at 14 (citation omitted), one branch still cannot exercise the core power of another branch. The term "shared powers" is therefore a bit of a misnomer, as the *type* of power may not be shared. Rather, it is the power *to act* in the shared arena that is not "exclusively judicial, legislative, or executive." *See Flynn v. Dep't. of Admin.*, 216 Wis. 2d 521, 546, 576 N.W.2d 245 (1988) (citation omitted).

When one branch challenges another branch's exercise of power as unconstitutional in such a shared arena, courts assess whether the challenged branch's actions "unduly burden[s] or substantially interfere[s] with the other branch's essential role and powers" in that particular arena. *State v.*

Unnamed Defendant, 150 Wis. 2d 352, 360, 441 N.W.2d 696 (1989); *Flynn*, 216 Wis. 2d at 547 (citation omitted).

Under Wisconsin's shared arena of powers jurisprudence, a law constitutes an undue burden and substantial interference if the encroached-upon branch is left without authority to override the encroaching branch to perform its own constitutional role. This Court has repeatedly refused to interpret statutes in a way that would leave an encroached-upon branch without any ability to override the encroachment.

In *Matter of E.B.*, the Court held that a statute could not be construed as mandating automatic judgment reversal where a circuit court fails to submit written jury instructions. 111 Wis. 2d 175, 186–88, 330 N.W.2d 584 (1983). The Court concluded that leaving the Judiciary without an ability to override the Legislature's automatic reversal statutory requirement would "impermissibly limit[ ] and circumscribe[ ] judicial power." *Id.* at 186.

Similarly, in *Friedrich*, the Court upheld statutes fixing compensation paid to guardians ad litem and special prosecutors because separate supreme court rules permitted judges to compensate at a higher rate when they deemed necessary: "[s]o long as courts retain the ultimate authority to compensate . . . at greater than the statutory rates when necessary," the statutes did not unduly burden or substantially interfere with the Judiciary's exercise of its constitutional role in the particular arenas. 192 Wis. 2d at 30.

II. Wisconsin Stat. § 165.08(1) violates the Wisconsin Constitution's separation of powers as applied to these two categories of plaintiff's-side civil actions.

Under these principles, Wis. Stat. § 165.08(1) is unconstitutional as applied to the two categories of application here. Resolving plaintiff's-side civil enforcement

actions and executive agency actions constitutes core executive power into which the legislative branch has unconstitutionally intruded. The Legislature's duty to balance the budget via uniform taxes, like its role in appropriating money or setting prospective policy, must occur through lawmaking, not through controlling execution of the law through case resolutions. Even if the Legislature did have some shared constitutional role in resolving these categories, Wis. Stat. § 165.08(1) would still be unconstitutional, because it leaves the executive branch with no ability to override JCF to execute the law.

A. Resolving these two categories of plaintiff's-side civil actions constitutes core executive power, and Wis. Stat. § 165.08(1) unconstitutionally grants a legislative committee veto power.

1. Resolving these categories of civil actions constitutes core executive power.

When the Department (in both categories) or any executive agency client (in Category 2) resolves a civil action, they are executing and enforcing written law in the particular factual circumstances at hand—textbook core executive power exercised as part of the executive branch.

The Attorney General is a "high constitutional executive officer." *SEIU*, 393 Wis. 2d 38, ¶ 60 (citation omitted); Wis. Const. art. VI, § 3. He is statutorily charged with representing the State and state agencies in civil litigation, including in these two categories. *See, e.g.*, Wis. Stat. §§ 165.25; 100.18(11)(d); 100.20(6). Since 1849, the Attorney General has exercised the executive powers traditionally held by a state's chief legal officer, including representing the State and its entities in litigation. *See* Wis. Rev. Stat. ch. 9, §§ 36–41 (1849).

Like the Attorney General, state administrative agencies—including the Department of Justice—are "part of the executive branch" and carry out executive functions. *SEIU*, 393 Wis. 2d 38, ¶ 60. Agencies "exercis[e] executive power" when they administer statutory programs the Legislature has charged them with administering. *Evers I*, 412 Wis. 2d 525, ¶ 21; *Koschkee*, 387 Wis. 2d 552, ¶ 14.

The U.S. Supreme Court has repeatedly emphasized the "quintessentially executive" nature of civil enforcement litigation and rejected co-equal branch attempts to control executive branch decision-making about how to enforce such laws.

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

Similarly, in *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020), the Court rejected Congress' ability to restrict the executive removal of the Consumer Financial Protection Bureau Director, stressing the agency's "quintessentially executive power" of prosecuting civil enforcement actions as part of its administration of consumer protection statutes. *Id.* at 219–20.

Additionally, in *Heckler v. Chaney*, 470 U.S. 821 (1985), the Court refused to allow judicial review of day-to-day decisions in civil enforcement actions because those decisions rest on "complicated balancing of a number of factors which are peculiarly within [an executive agency's] expertise." *Id.* at 831. These "many variables" include "whether a violation

has occurred," "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action . . . best fits the agency's overall policies," and "whether the agency has enough resources to undertake the action." *Id.* at 831–32.

Those "many variables"—part and parcel of day-to-day law execution—are equally present in plaintiff's-side civil litigation of executive agency program administration actions. In administering statutory programs, agencies exercise the quintessential executive function of "implement[ing] and carry[ing] out the mandate of the legislative enactments." *Wis. Dep't. of Rev. v. Nagle-Hart, Inc.*, 70 Wis. 2d 224, 226–27, 234 N.W.2d 350 (1975). "[A]llocation of resources and establishment of priorities are the essence of management" and a central part of statutory program administration. *Chaffin v. Arkansas Game & Fish Comm'n*, 757 S.W.2d 950, 953 (Ark. 1988) (holding that the state legislature violated the state's separation of powers by intruding into executive branch resource-allocation decisions).

One of the tools executive agencies use to "carry out the mandate" of a particular statutory program, *see Nagle-Hart*, 70 Wis. 2d at 226–27, is bringing and resolving plaintiff's-side civil actions against particular individuals or entities. Typical claims the agency may bring are common-law suits based on breach of contract or tort. The Department of Administration, for example, may sue a vendor that has breached a contract to purchase certain services for state agencies. *See* Wis. Stat. §§ 16.705; 16.71; 16.72. And settlements—which avoid the time, resources, and all-or-nothing risks of trials and are by

far the most common disposition—are crucial to this law execution tool.[3]

The Department and its executive agency clients engage in classic law execution by considering "many variables" to decide whether, when, and how best to resolve a particular action based on the particular needs and resources of the statutory program, the agency administering it, and the particular defendant. *See Heckler*, 470 U.S. at 831–32.

Additionally, as to both categories, the absence of any pre-Act 369 legislative role throughout Wisconsin history further demonstrates that resolving these categories of civil actions constitutes core executive power. *Barland*, 216 Wis. 2d at 587.[4] Upon its enactment, Act 369's amendment to Wis. Stat. § 165.08 was also unparalleled nationally: the Legislature conceded below that it could not find any other state statute allowing legislative control over settlement of plaintiff's-side actions like Wis. Stat. § 165.08(1). (R. 129:35.)

The Legislature has never disputed that resolving these categories of civil actions constitutes executing the law. And the Legislature cannot give JCF control over the executive branch's exercise of its core power.

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[3] Studies estimate that between 67% and 92% of civil cases resolve in settlement. Jonathan D. Glater, *Study Finds Settling is Better than Going to Trial*, New York Times, Aug. 7, 2008 (estimating 80–92%); Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. of Empirical Leg. Studies 111, 132, 145 (2009) (estimating 67%); *see also* (R. 73:5); *Matter of Ests. Of Zimmer*, 151 Wis. 2d 122, 134, 442 N.W.2d 578 (Ct. App. 1989) (citation omitted) (settlement saves parties the substantial cost of litigation).

[4] 1923 Session Laws, ch. 240, § 1; 1965 Session Laws, ch. 66, § 9; 1969 Session Laws, ch. 276, § 48; 2007 Wis. Act 20, § 2902; 2015 Wis. Act 55, § 3501p; 2017 Wis. Act 369, § 26.

2. Wisconsin Stat. § 165.08(1) violates the separation of powers in these categories by giving JCF veto power over core executive power.

Through Act 369, the Legislature took for itself control over core executive power, giving JCF veto power over whether, when, and how the executive branch may resolve plaintiff's-side litigation in these categories. "Any" intrusion by the legislature into this core executive power is unconstitutional. *Joni B. v. State*, 202 Wis. 2d 1, 10, 549 N.W.2d 411 (1996).

As in *Evers I* and *Gabler*, this Court should hold that another branch cannot possess a veto power over another branch's exercise of its core power. Just as in *Evers I*, JCF cannot serve as "gatekeeper to the exercise of a core executive function." *Evers I*, 412 Wis. 2d 525, ¶ 24. To hold otherwise would "[e]ffectively" result in "JFC members mak[ing] the . . . decision—not the executive branch." *Id.* And just as in *Gabler*, having legislative veto power "lurk[ing] in the background of every case" unconstitutionally infects the "discretionary . . . decision-making" of the executive branch in resolving these categories of actions. 376 Wis. 2d 147, ¶¶ 36, 44. As in both cases, here too, a branch's exercise of its own core power cannot be contingent on the approval of another branch.

Nothing in the Wisconsin Constitution vests the legislative branch with the power to control execution of Wisconsin law by resolving plaintiff's-side actions in these categories.

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

Even if the Court were to hold that the Legislature does have some shared role, Wis. Stat. § 165.08(1) is still unconstitutional in these categories because the statute leaves the executive branch with no ability to override JCF to perform its own constitutional role.

The Legislature has conceded that Wis. Stat. § 165.08(1) leaves the executive branch without any override authority. If JCF does not approve a settlement, "[t]here would be no settlement." (R. 129:59.) As Judge Neubauer explained, "[t]he exclusive and unreviewable control the statute confers upon the [JCF] leaves the executive branch with no ability to override its decisions, thereby undermining the executive branch's constitutionally-assigned role as enforcer of the law." *Kaul,* 2025 WI App 3, ¶ 80 (Neubauer, J., dissenting), (P-App. 47).

Under Wisconsin's shared arenas of power jurisprudence, the inability of the executive branch to override JCF to perform its own constitutional role demonstrates an undue burden and substantial interference as a matter of law. *Matter of E.B.*, 111 Wis. 2d at 186–87; *Friedrich*, 192 Wis. 2d at 30.

C. Other States' supreme courts agree that the Legislature cannot intrude into executive branch litigation of these types of plaintiff's-side civil actions.

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

In a challenge to a New Hampshire law, for example, the New Hampshire Supreme Court stressed that its executive branch has "*exclusive* power to *enforce* the law"—which includes decision-making as to "litigat[ing] a particular matter." *In re Opinion of Justices*, 27 A.3d 859, 868–69 (N.H. 2011). Notably, in trying to defend legislative control over litigation challenging the validity of federal law, the New Hampshire Legislature impliedly conceded that such control is different from "civil . . . enforcement action[s]," where "the legislature could not direct the attorney general to exercise his discretion in any particular way." *Id.* at 869–71.

Similarly, in *Stockman v. Leddy*, 129 P. 220, 223 (Colo. 1912), *overruled on other grounds by Denver Ass'n for Ret. Children, Inc. v. Sch. Dist. No. 1*, 535 P.2d 200, 204 (1975), the Colorado Supreme Court held that a statute violated that state's separation of powers doctrine where it gave the legislature the power to bring cases for certain civil enforcement purposes. The Louisiana Supreme Court also struck down as violating separation of powers a law allowing its legislature to file lawsuits to collect penalties. *State Through Board of Ethics v. Green*, 545 So. 2d 1031, 1036 (La. 1989).

Beyond civil enforcement cases, other state courts have recognized that control of plaintiff's-side litigation more broadly constitutes an executive power. *In re Opinion of Justices*, the New Hampshire Supreme Court, for example, rejected the legislature's argument that it could control the state attorney general's involvement in other types of plaintiff-side litigation: "[i]t is the executive, not the legislative branch, in which the constitution vests the power to determine the State's interest *in any litigation*." 27 A.3d at 870 (N.H. 2011) (emphasis added). The Arizona Supreme Court reached a similar conclusion when rejecting a statute giving a legislative committee the power to initiate state litigation: "conducting litigation on behalf of the state, as

authorized by the Legislature, is an executive function, because doing so carries out the purposes of the Legislature." *Arizona ex rel. Woods v. Block*, 942 P.2d 428, 436 (Ariz. 1997).

Like these other state courts, this Court should recognize that the Wisconsin Constitution's separation of powers prohibits legislative control over executive branch resolution of plaintiff's-side litigation in these categories.

D. The court of appeals' decision conflicts with the Wisconsin Constitution and this Court's caselaw.

The court of appeals majority overread *SEIU* and underread *Evers I*. The Wisconsin Constitution does not vest the Legislature with a shared role in any co-equal branch activity that could implicate money coming into the State or "policy" outside of lawmaking. Even if resolving actions in these categories did constitute arenas of shared powers, Wis. Stat. § 165.08(1) would still violate the separation of powers.

1. None of the potential legislative interests present in *SEIU* exists in these categories.

The court of appeals erred in treating this case as controlled by *SEIU*. To the contrary, the *SEIU* Court went out of its way to "stress" that it was *not* deciding any categorical challenges to particular statutes. *SEIU*, 393 Wis. 2d 38, ¶ 73. And none of the potential legislative interests in state litigation that the *SEIU* Court said could exist "in at least some cases" are present here.

First, neither the Legislature nor any of its members authorize the action or is the client in these categories of actions. *SEIU*, 393 Wis. 2d 38, ¶ 71. Where authorization is required for Category 1 civil enforcement actions, it comes from other executive branch entities. *See, e.g.,* Wis. Stat. §§ 299.95, 165.25(4)(ar). And by its terms, Category 2 is

limited to matters where the plaintiff is an executive branch agency. (R. 116:3, 17–19; 11:8, 22–24.)

Second, these categories do not involve actions where the settlement would require the Legislature to appropriate money out of the treasury pursuant to Wis. Const. art. VIII, § 2. *SEIU*, 393 Wis. 2d 38, ¶¶ 68–70. The Court recognized a potential legislative interest in at least some cases where the litigation would require the "state to pay money to another party." *Id* ¶ 69. Notably, the statutes from other States mentioned in *SEIU* all concerned legislative approval over entry of certain *defense*-side settlements. *See id.* ¶ 70 (listing other States' statutes).[5] This interest is not applicable here: no resolutions in these plaintiff's-side categories would require the Legislature to appropriate moneys. (R. 116:4, 28; 11:9.)

Third, these categories do not implicate any legislative role relating to the validity of state law, a potential interest the Court identified only as to legislative intervention, in any event. *SEIU*, 393 Wis. 2d 38, ¶ 72. These categories expressly exclude any settlement that would concede the invalidity of state law. (R. 11:31–32 n.5; 116:26–27 n.5.)[6]

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[5] In reality, defense-side monetary settlements in Wisconsin under Wis. Stat. § 16.865(8) are generally paid by a self-insured agency fund using already-appropriated moneys. Wis. Stat. § 20.865. Defense-side settlements paid with those moneys would not involve a shared legislative role.

[6] Act 369's amendments to Wis. Stat. § 165.08(1) separately require Joint Committee on Legislative Organization approval before a resolution may concede the invalidity of a state law. The Department does not concede that requirement's constitutionality, but that is not at issue here.

2. The Legislature does not have a shared role in any co-equal branch activity that could (1) bring money into the state or (2) affect "policy."

The Legislature has argued that it has a shared constitutional role in these categories because it has a shared role in any co-equal branch activity involving (1) money coming into the State (or, at least, some undefined "large" sums), and (2) "policy" outside of lawmaking. The court of appeals adopted the former; the Wisconsin Constitution tolerates neither.

a. The Legislature's duty to balance the budget through uniform taxation gives it no shared role in controlling these case resolutions.

The Legislature's duty to tax gives it no shared constitutional role in controlling all sources of state "income." Wisconsin Const. art. VIII, § 5 says no such thing. Just like the power to appropriate money by law in Wis. Const. art. VIII, § 2, Wis. Const. art. VIII, § 5 creates a duty to act through *lawmaking*.

This Court rejected the Legislature's "public fisc" argument in *Evers I*: "[w]hile the legislature's motivation for overseeing the public fisc may be well-intentioned, fundamentally, the legislature may not execute the law." 412 Wis. 2d 525, ¶ 20. The Court reasoned that if the Legislature has "concerns about the executive branch's unwillingness to faithfully execute the program in accordance with legislative policy preferences," it could address that "via numerous constitutional tools at the legislature's disposal to rein in the executive branch," such as limiting executive power through lawmaking or audits. *Id.* ¶ 30. What it could not do was "insert" its own committee "into the machinery of

the executive branch in an attempt to control the executive branch's ability to carry out the law." *Id.* ¶ 23.

Neither *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331 (1915), nor the cited Attorney General opinion (*Kaul,* 2025 WI App 3, ¶ 31, (P-App. 20)) suggests otherwise. They simply say that the Legislature must calculate how much income is needed to cover that year's anticipated expenses, plus any deficiency from the previous year. *Owen*, 151 N.W. at 364–65; 74 Op. Att'y Gen. 202, 203 (1985).

The court of appeals majority asked, "[h]ow can the legislature do so without taking into account settlement proceeds—proceeds that range from thousands of dollars to many millions of dollars?" *See Kaul,* 2025 WI App 3, ¶ 31; (P-App. 20). *Evers I* answered that question: the Legislature can conduct audits or enact statutes directing particular moneys from settlements to be credited to particular statutory appropriations. *Evers I*, 412 Wis. 2d 525, ¶ 30.

Neither the Legislature's taxing nor spending power gives it a shared role to control co-equal branch activity involving state resources. Instead, the interplay of the taxing and spending provisions serves to *limit* legislative power—to "to tie the hands of the legislature as firmly as Prometheus was bound to the rock." *Owen*, 151 N.W. at 369.

As Judge Neubauer recognized, equating the duty to balance the budget through levying taxes with controlling individual settlements also runs afoul of Wis. Const. art. VIII, § 5's requirement that taxation be *uniform*: "Discretionary decisions about what fines, forfeitures, and money damages are owing to the state in settlements are not based on efforts to balance the budget; they are made to redress violations of law and compensate for injuries attributable to the private party's unlawful conduct." *Kaul,* 2025 WI App 3, ¶ 75 (Neubauer, J., dissenting), (P-App. 44).

Taxes serve "to obtain revenue for the government" and must be uniform. *See City of River Falls v. St. Bridget's Cath. Church of River Falls*, 182 Wis. 2d 436, 441–42, 513 N.W.2d 673 (Ct. App. 1994). Unlike taxation, a defendant's liability in a civil action depends on the specific violation or injury and remediation needed. *See, e.g., State v. T.J. McQuay, Inc.*, 2008 WI App 177, ¶ 52, 315 Wis. 2d 214, 763 N.W.2d 148 (forfeitures may depend on remediation and culpability); *Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 385, 254 N.W.2d 463 (1977) ("[C]ontract damages are . . . to compensate the injured party for losses . . . .").

Nor does the Legislature have a constitutional role where "large amounts of money" are involved. (*See* Leg. COA Init. Br. 34–42.) This Court rejected that theory in *Evers I*, where the Legislature argued that its constitutional taxing and spending powers created a shared constitutional role at least where "high-value sums [are] at stake."[7] As this Court held, the Legislature can act through lawmaking, not through legislative committee veto control over the executive branch's execution of the law. *Evers I*, 412 Wis. 2d 525, ¶¶ 21, 24. So too here.

This is also why the court of appeals majority's attempts to reduce *Evers I* to factual circumstances where "funds [have] already been appropriated by the legislature for use by an executive agency" fails. *Kaul,* 2025 WI App 3, ¶ 31 n.17; (P-App. 20). The separation of powers analysis asks whether the Wisconsin Constitution vests the power at issue in the particular branch. And this Court held in *Evers I*, "[o]nce the legislature passes a bill that is signed by the governor and becomes law, 'the legislature plays no part in enforcing our

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[7] *See* Brief of Respondents and Intervenor-Respondent Wisconsin State Legislature at 32, *Evers*, 412 Wis. 2d 525 (No. 2023AP2020-OA), https://acefiling.wicourts.gov/document/eFiled/2023AP002020/777288, at 36.

statutes.' . . The constitution assigns the execution of the law to the executive branch alone." 412 Wis. 2d 525, ¶ 23 (citation omitted). Nothing in the Wisconsin Constitution changes that calculus where the executive power at issue could result in money coming to victims or state appropriations.

b. The Legislature's power to enact "policy" through lawmaking gives it no shared role in controlling these case resolutions.

The Legislature has also argued that it has a shared role because resolving these categories of actions could affect "policy." This Court rejected the Legislature's same broad "policy" argument in *Evers I*.[8] *Evers I*, 412 Wis. 2d 525, ¶ 13.

The Legislature's "policy" argument conflates forward-looking, generally applicable policy-setting through lawmaking—the role of the Legislature—with backward-looking, party-specific remediation through settling individual cases—the role of the executive branch. As Judge Neubauer and the circuit court recognized, settlements "do not impose generally applicable policies, but instead reflect consideration of the specific facts and injuries at issue and what remedies are lawful and appropriate to address the specific harms caused by the defendant." *Kaul,* 2025 WI App 3, ¶ 78 (Neubauer J., dissenting), (P-App. 45).

If the Legislature does not believe the executive branch is executing resolutions in accordance with its preferred "policy" choices, it may "repeal, modify, or alter" the remedial options the executive branch may select among "through the enactment of a bill"; it may not do so through "control[ling] executive branch efforts to carry out the law." *Evers I*,

[8] *See* Brief of Respondents and Intervenor-Respondent Wisconsin State Legislature, *supra* note 7, at 25.

412 Wis. 2d 525, ¶¶ 23, 28. The Legislature's assertion that it has a shared interest in any governmental arena that could affect "policy" outside of lawmaking is untethered to anything in the Wisconsin Constitution and, in direct contravention of the Wisconsin Constitution, would allow it to consume both the executive and judicial branches.

3. *SEIU* did not hold that resolving plaintiff's-side civil actions always constitutes an arena of shared power, or that Wis. Stat. § 165.08(1) is per se constitutional under a shared powers framework.

The court of appeals also erred in concluding that *SEIU* controlled this case by holding that resolutions of plaintiff's-side actions always constitutes an arena of shared power and that in that shared arena, the JCF veto power is necessarily constitutional.

The court of appeals relied on footnote 22 of *SEIU*:

> As explained above, the attorney general's litigation authority is not, in at least some cases, an exclusive executive power. These types of cases fall under a shared powers analysis. Where the legislature has appropriate institutional interests, legislative exercise of this shared power in at least some cases does not unduly burden or substantially interfere with the attorney general's executive authority. Hence, the facial challenge gets nowhere under an "unduly burdensome" shared powers analysis.

SEIU, 393 Wis. 2d 38, ¶ 72 n.22. The court of appeals read this footnote to mean that if the Legislature has a shared role under any litigation control statute, its exercise in that shared arena is necessarily not an "undue burden or substantial interference." But the text does not say that, and, as Judge Neubauer explained in dissent, if the majority's reading of the

footnote were correct, the "'undue burden or substantial interference' standard would be rendered a nullity." *Kaul,* 2025 WI App 3, ¶ 79 n.4 (Neubauer, J., dissenting), (P-App. 46). *SEIU* didn't silently overturn the very standard the footnote cited.

The court of appeals failed to appreciate the nature of the *SEIU* Court's facial analysis. Because the Court considered multiple facial challenges to the litigation control provisions, it reasoned that it had to find only one constitutional application for each statute where (a) the executive and legislative branches both had a role in the particular arena and (b) the Legislature's exercise in that arena would not unduly burden or substantially interfere with executive power.

Thus, for Wis. Stat. § 165.08(1) to be facially constitutional, all it needed was a single plaintiff's-side civil action where the Legislature authorized the civil action or is the client. Where the Legislature (or a legislative entity) authorized or is a plaintiff-party to the civil action, the executive branch could not claim either (a) unconstitutional intrusion or (b) undue burden or substantial interference in obtaining legislative approval to resolve the action. Consistently, *SEIU* highlighted several examples where the Legislature brought an action. *SEIU*, 393 Wis. 2d 38, ¶ 71 n.21, n.22. But such a potential legislative role does not exist in these categories, and the *SEIU* Court explicitly declined to rule on whether categories of application of the statute were constitutional. *Id.* ¶ 73.

4. The court of appeals misunderstood the applicable shared arena of powers analysis.

Instead of applying the shared powers standard that analyzes burden into or interference with another branch's "constitutional power," *Flynn*, 216 Wis. 2d at 547 (citation

omitted), the court of appeals entertained the Legislature's proposed standard: How much of a day-to-day hassle has this been for the executive branch? (*See, e.g.,* Leg. COA Init. Br. 44–50.) That test ignores this Court's shared powers case law.[9]

But even if an administrative-hassle test were the proper analysis, Wis. Stat. § 165.08(1) would still be unconstitutional in these categories based on uncontroverted evidence presented below:

Wisconsin Stat. § 165.08(1) has affected the type of settlements the Department enters into, especially in multistate civil enforcement actions, resulting in less desirable outcomes for Wisconsin. (R. 145:15–16, 21–23.) States sometimes must bind themselves to a global agreement with a major national target in 48 hours or less, but the Department cannot ensure Wisconsin's participation as it has no control over whether or when JCF convenes and JCF has refused to "give" the Department any real-time settlement negotiation authority. (R. 145:13–14; 73:10.) The Department has been asked not to participate in a multistate action given the uncertainties of JCF review. (R. 145:13.) And, in all actions, mediations are less effective because the Department does not have final authority during the mediation. (R. 97:14.)

Settlement negotiations are typically confidential and highly sensitive, but JCF convenes in open session and has refused to have its members sign confidentiality agreements. (R. 97:9–12; 73:14–15; 74:37–38.) And some defendants'

[9] To be clear, facts may illustrate the harmful effects of the constitutional problem. In certain circumstances, the shared arenas analysis may also require consideration of facts. If, for example, a statutory encroachment does give the co-equal branch override authority, but that branch is barred from ever exercising override in practice, facts may be relevant to show a de facto undue burden or substantial interference.

unwillingness to publicly reveal confidential negotiations at a legislative committee meeting has delayed settlements, including a multi-million-dollar settlement in a Category 2 action, requiring the Department to dedicate resources to unnecessary litigation and trial preparation. (R. 97:13–14.)

JCF leadership has demonstrated its willingness to use the veto power to advance other legislative goals: in two single-state prosecuted actions, for example, the JCF Co-Chairs refused to have JCF consider the proposed settlements until and unless the Department agreed to credit statutory attorneys' fees to general purpose revenues. (R. 74:35–36.)

A veto power "lurks in the background of every" decision, *Gabler*, 376 Wis. 2d 147, ¶ 44, not just those where the power is used, because the branch subject to it has no control over whether or when it is used. In every action in these categories, the statute has infected the Department's decision-making at every stage—whether to prosecute, how to advise clients, how to allocate resources, and whether or when to try and pursue a resolution that must try and account for what JCF may or may not approve. (R. 73:9–10; 97:12–14.)

This Court need not consider that evidence, because Wis. Stat. § 165.08(1) constitutes an undue burden and substantial interference as a matter of law. But even if this Court adopted the test the Legislature proposed, the record evidence demonstrates that undue burden and interference.

Further, if an "administrative burden" test were the proper inquiry for a shared arena of powers analysis, the Court should employ an overbreadth analysis, not the "under any circumstances" analysis typically employed for facial/categorical challenges. *See, e.g., SEIU*, 393 Wis. 2d 38, ¶ 10. Although overbreadth doctrine originated in the First Amendment context, it can also apply to statutes burdening other constitutional interests. *See, e.g., Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 202 (2008) (voting rights). Here,

it would ask whether application of Wis. Stat. § 165.08(1) to all actions in these categories imposes hassles on executive power that substantially exceed any limited legislative role that might be justified by some shared legislative role in the particular categories. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *see also SEIU*, 393 Wis. 2d 38, ¶¶ 177–88 (Dallet, J., concurring in part and dissenting in part).

Wisconsin Stat. § 165.08(1) would flunk that test, too: it prohibits the executive branch from resolving *any* action without affirmative JCF approval and yet the Legislature itself has explained that JCF "generally" approves settlements "as a matter of course" but just wants to "take a look." (R. 129:38–42.)

* * *

The court of appeals majority disregarded the holding of *Evers I*, misread *SEIU* to reach holdings the *SEIU* Court expressly did not reach, recognized legislative power nowhere to be found in the Wisconsin Constitution, and misunderstood and misapplied Wisconsin's separation of powers analyses. Its decision should be overruled.

CONCLUSION

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

Dated this 17th day of February 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Hannah S. Jurss
HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

Attorneys for Plaintiffs-Respondents-Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8101 (HSJ)
(608) 957-5218 (CG)
(608) 294-2907 (Fax)
jursshs@doj.state.wi.us
gibsoncj@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,914 words.

Dated this 17th day of February 2025.

Electronically signed by:

Hannah S. Jurss
HANNAH S. JURSS
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

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

Dated this 17th day of February 2025.

Electronically signed by:

Hannah S. Jurss
HANNAH S. JURSS
Assistant Attorney General