STATE OF WISCONSIN

IN SUPREME COURT

Case No. 20AP1928-OA

JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL AND WISCONSIN DEPARTMENT OF JUSTICE,

Petitioners-Cross-Respondents,

TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR, AND JOEL BRENNAN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF ADMINISTRATION,

Petitioners,

v.

WISCONSIN STATE LEGISLATURE, WISCONSIN STATE LEGISLATURE JOINT COMMITTEE ON FINANCE, CHRIS KAPENGA, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE WISCONSIN SENATE, DEVIN LEMAHIEU, IN HIS OFFICIAL CAPACITY AS THE MAJORITY LEADER OF THE WISCONSIN SENATE, ROBIN VOS IN HIS OFFICIAL CAPACITY AS THE SPEAKER OF THE WISCONSIN ASSEMBLY, JIM STEINEKE, IN HIS OFFICIAL CAPACITY AS THE MAJORITY LEADER OF THE WISCONSIN ASSEMBLY, SENATOR HOWARD L. MARKLEIN, IN HIS OFFICIAL CAPACITY AS A CO-CHAIR OF THE JOINT COMMITTEE ON FINANCE, REPRESENTATIVE MARK BORN, IN HIS OFFICIAL CAPACITY AS A CO-CHAIR OF THE JOINT COMMITTEE ON FINANCE, SENATOR DUEY STROEBEL, IN HIS

OFFICIAL CAPACITY AS A VICE CHAIR OF THE JOINT COMMITTEE ON FINANCE, AND AMY LOUDENBECK, IN HER OFFICIAL CAPACITY AS A VICE CHAIR OF THE JOINT COMMITTEE ON FINANCE,

Respondents.[1]

REPLY MEMORANDUM IN SUPPORT OF PETITIONERS' PETITION FOR AN ORIGINAL ACTION AND REQUEST FOR TEMPORARY INJUNCTIVE RELIEF AND IN OPPOSITION TO RESPONDENTS' CROSS-PETITION FOR AN ORIGINAL ACTION

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[1] By operation of Wis. Stat. § 803.10(4)(a), Senators Kapenga, LeMahieu, Marklein, and Stroeber, and Representative Born are automatically substituted as respondents, as the successors in office of, respectively, Senator Roger Roth, former Senator Scott Fitzgerald, Senator Alberta Darling, former Senator Luther Olsen, and former Representative John Nygren.

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INTRODUCTION

Petitioners ask this Court to address a pressing issue of great public importance: Whether settling individual plaintiff-side civil enforcement and executive agency program lawsuits is a quintessential executive function that the legislative branch cannot control, such that applying Wis. Stat. § 165.08 to these cases violates the constitutional separation of powers.

Respondents agree that this issue is "of great importance" and "merit[s] this Court's original jurisdiction." (Resp. Br. 13–14.) They nonetheless argue that Petitioners lack standing to defend the executive branch against legislative encroachment. They are mistaken. These executive officials not only have standing but also are the best positioned litigants to raise these separation-of-powers issues.

As for Respondents' Cross-Petition, it should be denied. It raises the same two abstract statutory interpretation issues that this Court recently declined to review in *Vos v. Kaul*, No. 2019AP1389-OA; they remain inappropriate for an original action. And while the Cross-Petition's constitutional issue—a twist on Petitioners'—is important, Respondents lack standing to assert it. In effect, the Legislature asks this Court for an advisory opinion about the validity of a law it passed. That would be improper and set a bad precedent for future legislatures who might also wonder about the validity of their legislative activity.

Turning to Petitioners' temporary injunction request, Respondents oppose it on the merits, pointing to three purported legislative interests in the public fisc, setting state policy, and preserving the validity of state law.

None of these asserted interests justifies any challenged applications of Wis. Stat. § 165.08. When Petitioners settle the plaintiff-side cases at issue, the State acquires—rather than spends—money. The legislative branch has no constitutional right to control day-to-day executive actions simply because they bring in funds. Nor do the voluntary terms in these settlements "set policy" by unilaterally imposing general rules of conduct, as the Legislature does through legislation. Instead, such terms reflect the core executive task of applying state law to remediate specific violations caused by specific defendants. And this case does not involve settlements that might concede the invalidity of state law.

On the equities, Respondents offer no facts to rebut Petitioners' showing of ongoing, multiple harms in negotiating resolutions or working with other potential plaintiffs. Respondents' theoretical "solutions"—that, if they choose, they can convene somewhat quickly and that their attorney (while not legislators themselves) will agree to keep matters confidential—have not been workable solutions in many cases.

Given Petitioners' strong showing on the merits and the continuing constitutional harms caused by the challenged applications of Wis. Stat. § 165.08, a temporary injunction should be granted.

ARGUMENT

I. This Court should grant Petitioners' petition for an original action.

The only reason Respondents oppose the Petition is that, they say, the executive officials here all lack standing to defend their branch's authority. But these officials are all directly harmed by the challenged applications of Wis. Stat.

§ 165.08, which satisfies traditional standing rules. Moreover, each branch of government—including the executive—has authority to defend its constitutional authority against intrusions by another, as this Court has long recognized.

A. Petitioners have statutory authority to bring suit.

Two statutes authorize Petitioners to bring these claims. Under Wis. Stat. § 165.25(1), the Attorney General may "appear for the state and prosecute . . . all actions and proceedings, civil or criminal, in . . . the supreme court, in which the state is interested." Similarly, Wis. Stat. § 165.25(1m) permits the Attorney General, "[i]f requested by the Governor," to "prosecute . . . in any court . . . any cause or matter, civil or criminal, in which the state or the people of this state may be interested."

This original action is a civil proceeding in the supreme court, and the Petition raises important separation-of-powers issues in which the state plainly is interested, which satisfies Wis. Stat. § 165.25(1). Moreover, the Governor has authorized the Attorney General to bring this original action and to represent both the Governor and the Department of Administration (DOA) Secretary, which satisfies Wis. Stat. § 165.25(1m). Both statutes grant Petitioners express statutory authority to prosecute this original action. This can be contrasted with *State v. City of Oak Creek*, 2000 WI 9, 232 Wis. 2d 612, 605 N.W.2d 526, where the Attorney General did not bring the action at the Governor's request. *Id.* ¶ 47.

Separately, *Oak Creek* recognizes that the Attorney General has a unique, independent authority to initiate original actions in this Court. It explained that "the attorney general can petition to invoke this court's original

jurisdiction without the governor or the legislature's authorization." *Id.* ¶ 42. That authority has long been unquestioned. *See id.* ¶¶ 42, 44, 103–08 (majority and dissenting opinions collecting cases that recognize the Attorney General's authority to petition for original actions). It derives not only from the statutes addressed above, but also from this Court's constitutional power to consider a petition from any party that presents appropriate issues of great public moment and urgency, as this Petition does.

B. Petitioners have standing to raise these constitutional separation-of-powers claims.

Respondents say that the Attorney General lacks "authority" under the statutes and *Oak Creek* (Resp. Br. 21–22) to bring these claims, that the Governor has no "free-wheeling authority to attack any law that he believes is unconstitutional," and that DOA has no "express or necessarily implied power to challenge the constitutionality of legislative enactments" (Resp. Br. 23). But Respondents ignore the holding of *Oak Creek* and the unique nature of the separation-of-powers claims asserted here by executive branch officials.

1. The Attorney General may challenge the constitutionality of this statute under *Oak Creek*.

When an original action petition is granted, the Attorney General may "attack the constitutionality of legislative action," even without specific statutory authorization. *Oak Creek*, 232 Wis. 2d 612, ¶ 46; *see also id.*, ¶ 103 (Abrahamson, C.J., dissenting). In such original actions, Attorneys General have frequently challenged the constitutionality of legislative acts. *See id.* ¶ 49 n.25 (collecting cases).

Respondents misread *Oak Creek* as limiting the Attorney General's authority to cases where the "state as polity" is injured by an unconstitutional law. (Resp. Br. 21–22.) *Oak Creek* never suggested that the "state as polity" doctrine is the source of the Attorney General's ability to challenge the constitutionality of a statute in an original action. Rather, *Oak Creek* addressed the Attorney General's independent original action authority *before* it discussed the "state as polity" doctrine, explaining that his authority is limited only by "this court's prerogative to accept or deny such a petition." *Oak Creek*, 232 Wis. 2d 612, ¶ 42. And, in any event, this case easily implicates the "state as polity" doctrine, given that legislation breaching the structural separation of powers injures the State in its "aggregate and sovereign character." *Id.*¶ 43 (citation omitted).

2. Petitioners all may challenge the law on separation-of-powers grounds.

Beyond *Oak Creek* and the original action setting, Petitioners—executive branch officials, all—have standing to challenge the constitutionality of a statute that violates the separation of powers by transferring executive authority to the legislative branch.

Respondents erect a strawman argument, asserting that Petitioners seek a "free-wheeling authority to attack any law" they do not like. (Resp. Br. 23.) This case raises no such claims. Rather, Petitioners challenge applications of a statute through which the legislative branch has unlawfully usurped executive power. This can be contrasted with a case like *Oak Creek*, where the challenged statute exempted a city from certain environmental permitting requirements, an issue that had nothing to do with the separation of powers. 232 Wis. 2d 612, ¶¶ 1, 9–10. This is a crucial distinction, since the environmental statute in *Oak Creek* did not injure

the executive branch, while the challenged applications of Wis. Stat. § 165.08 here do.

Under both traditional standing principles and this Court's case law, executive branch officials have standing to bring constitutional separation-of-powers claims like this one.

"'Standing' is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done." *Krier v. Vilione,* 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517 (citation omitted). It represents a matter of sound judicial policy rather than as a jurisdictional prerequisite. *See McConkey v. Van Hollen,* 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855. Standing thus is construed broadly and permissively in favor of those seeking access to a judicial decision. *Id.* ¶ 15.

The standing inquiry focuses on three main topics: whether a party has a personal interest or stake in the controversy; whether it will be injured or adversely affected by the disputed issues; and whether judicial policy calls for protecting its interests. *Foley–Ciccantelli v. Bishop's Grove Condo. Ass'n,* 2011 WI 36, ¶¶ 5, 40, 333 Wis. 2d 402, 797 N.W.2d 789. These principles ensure that the issues and arguments presented in a case will be carefully developed, zealously argued, and allow the court to understand the consequences of its decision. *See McConkey*, 326 Wis. 2d 1, ¶ 16. To challenge the validity of a statute, a party has standing if it has a sufficient interest in the outcome "to obtain judicial resolution of that controversy." *Norquist v. Zeuske,* 211 Wis. 2d 241, 247, 564 N.W.2d 748 (1997) (citation omitted).

Sound judicial policy supports granting standing to public officials who assert that a coordinate branch has usurped a share of their rightful constitutional authority. For the Framers of both the United States and Wisconsin Constitutions, unchecked concentrations of governmental power in a single branch of government present an extraordinary threat to liberty. *See Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶¶ 4, 11, 376 Wis. 2d 147, 897 N.W.2d 384 (*citing* The Federalist No. 47, at 298, and No. 48, at 305 (James Madison) (Clinton Rossiter ed., 1961)). "The preservation of liberty in Wisconsin turns in part upon the assurance that each branch will defend itself from encroachments by the others." *Id.* ¶ 31.

That is precisely what Petitioners seek to do here—defend their branch of government against encroachment by another. Given the crucial importance of this task, this Court has repeatedly allowed one branch to challenge another branch's unconstitutional arrogation of power.

For instance, the legislative branch frequently litigates claims asserting that gubernatorial partial vetoes of biennial budget bills improperly usurped legislative power. *See Risser v. Klauser,* 207 Wis. 2d 176, 558 N.W.2d 108 (1997); *Citizens Util. Bd. v. Klauser,* 194 Wis. 2d 484, 534 N.W.2d 608 (1995); *State ex rel. Wisconsin Senate v. Thompson,* 144 Wis. 2d 429, 424 N.W.2d 385 (1988); *State ex rel. Kleczka v. Conta,* 82 Wis. 2d 679, 264 N.W.2d 539 (1978). While some of those decisions did not expressly discuss standing, each one implicitly recognized that one branch has standing to challenge the seizure of its rightful powers by another.

In *Thompson*, the Court expressly held that different branches of state government have standing to bring their separation-of-powers disputes to this Court. First, it noted that "it is this court's function to develop and clarify the law.

Since *Marbury v. Madison* . . . it has been recognized that it is peculiarly the province of the judiciary to interpret the constitution and say what the law is." 144 Wis. 2d at 436 (citations omitted). Accordingly, it is "this court's duty to resolve disputes regarding the constitutional functions of different branches of state government." *Id.*

Thompson further reasoned that the Court "may not avoid this duty simply because one or both parties are coordinate branches of government." *Id.* To the contrary, "[i]t is the responsibility of the judiciary to act, notwithstanding the fact that the case involves political considerations or that final judgment may have practical political consequences." *Id.* at 436–37. It is hard to imagine a more straightforward endorsement of inter-branch standing in separation-of-powers cases.

More recent decisions have followed this trend. In *Panzer v. Doyle*, another separation-of-powers dispute between legislative and executive officials, this Court again acknowledged its "duty to resolve disputes regarding the constitutional functions of different branches of state government." 2004 WI 52, ¶ 41, 271 Wis. 2d 295, 680 N.W.2d 666 (citation omitted). It is proper to accord standing to affected government officials in such cases because no one else "would have an equivalent stake in the issue." *Id.* ¶ 42.

And in *Koschkee v. Evers*, the State Superintendent of Public Instruction was entitled to assert that a statute unconstitutionally infringed his constitutional authority over the supervision of public instruction. *See* 2018 WI 82, ¶¶ 3–15, 382 Wis. 2d 666, 913 N.W.2d 878. The Court's conclusion that the Superintendent was entitled to legal counsel who would advocate for the "constitutional

scope of [his] power" necessarily presupposed that the Superintendent had standing to litigate to protect the constitutional prerogatives of his office.[2] *Id.* ¶ 14.

Respondents' view seems to be that branches of government other than the Legislature can challenge statutes that violate the separation of powers only if the Legislature grants them specific statutory authority to do so. Their theory plainly runs afoul of the cases discussed above, and for good reason: it would embolden the Legislature to enact laws transferring executive (or perhaps even judicial) power to itself, without worrying about other branches defending themselves through constitutional litigation. This Court's repeated recognition that each branch can protect its prerogatives in this way prevents this significant imbalance from disrupting the separation of powers.

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[2] Even federal courts, with their more restrictive jurisdictional approach to standing, have recognized that one political branch of government may have standing to sue another when each has asserted its constitutional authority and the branches are at an impasse. *See Barnes v. Kline*, 759 F.2d 21, 28 (*citing Goldwater v. Carter*, 444 U.S. 996, 997 (Powell, J., concurring)). For example, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the U.S. Supreme Court upheld a state legislature's standing to vindicate its institutional interest in regulating federal elections under the U.S. Constitution. *See* 135 S. Ct. 2652, 2659, 2664 (2015). Likewise, it has recognized a former President's standing to litigate a claim that a federal statute unconstitutionally infringed upon the authority of the executive branch. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

C. The Governor and Department of Administration Secretary have suffered a cognizable injury.

Respondents also raise a more traditional standing objection, asserting that Wis. Stat. § 165.08 does not "harm the offices of the Governor or [DOA] Secretary in any cognizable way." (Resp. Br. 24.) That ignores Petitioners' detailed explanation of the harms that executive branch clients suffer when they lose control over litigation that DOJ initiates to protect their interests. (*See generally* Finkelmeyer Aff.)

In short, Wis. Stat. § 165.08(1) now denies the Governor and DOA Secretary authority over litigation decisions in cases affecting the programs they are charged to administer and execute. Plaintiff-side litigation is a basic tool they use when those programs suffer injury, and a crucial use of that tool involves deciding between a settlement or continued litigation. Prior to 2017 Wis. Act 369 ("Act 369"), these executive clients could make that decision based solely on their executive judgment and discretion. *See* Wis. Stat. § 165.08(1) (2015–16). Now, they may not. Moreover, the need to obtain legislative consent has compromised their ability to have candid communications with their attorneys and maintain the confidentiality of settlement negotiations. These harms easily suffice to support standing.

D. A governor may challenge a law on separation-of-powers grounds, despite the fact that a prior governor signed it.

The Governor's standing is unaffected by the fact that the prior governor did not veto Act 369. A decision by a single governor to sign a bill into law (especially one, like Act 369, that never affected the signing governor) cannot alter

the proper scope of all future governors' constitutional authority.

The structural allocation of power by our Constitution cannot be altered by the practice of government officials—in other words, "the branch in which a power is vested may not give it up or otherwise reallocate it." *Koschkee v. Taylor*, 2019 WI 76, ¶ 51, 387 Wis. 2d 552, 929 N.W.2d 600 (Bradley, R., J., concurring) (citation omitted); *see also Wis. Legislature v. Palm*, 2020 WI 42, ¶ 99, 391 Wis. 2d 497, 942 N.W.2d 900 ("The separation of powers forbids abdication of core power just as much as it protects one branch from encroachment by another.") (Kelly, J., concurring).

Accordingly, laws that purport to transfer the Governor's powers to another branch inflicts an ongoing constitutional injury that entitles future governors to sue to recover those powers. *See Pataki v. New York State Assembly*, 7 A.D.3d 74 (N.Y. App. Div. 2004) (holding that governor did not waive separation-of-powers challenge to a law by signing it).

This Court's partial veto jurisprudence illustrates this principle, as it has repeatedly allowed the Legislature to litigate the constitutionality of gubernatorial partial vetoes without considering its constitutional authority under Article V, § 10(2) to override them. *See supra* Argument I.B.2. (collecting partial veto cases). And, with respect to the President's executive authority, federal courts are in accord:

> Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents nor on whether 'the encroached-upon branch approves the encroachment' . . . . The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers . . . .

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497 (2010) (citations omitted); *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 441 (1977) (allowing former-President Nixon to challenge law signed by President Ford on separation-of-powers grounds).

This is especially true with respect to a bill, like Act 369, that has some constitutional applications.[3] Our constitution does not allow the Governor to partially veto non-appropriation bills like Act 369, *see* Wis. Const. art. V, § 10(1), and so the prior governor faced an all-or-nothing choice: either sign or veto the entire bill. One thus cannot interpret the Governor's signature as implicitly affirming the entire statute's constitutionality. Many reasons might explain why a governor would sign a bill with both constitutional and unconstitutional components, none of which have anything to do with the validity of any single part. The prior governor's decision not to veto Act 369 therefore cannot support an inference about his views on the constitutionality of the applications challenged here, let alone one that binds all future governors.

* * *

In sum, this Court should grant the Petition and assume original jurisdiction over two separation-of-powers issues of great public importance. The executive branch officials who seek relief have standing both as a matter of statutory and constitutional law. Executive officials must—

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[3] To be clear, Wis. Stat. § 165.08(1) has no constitutional applications in the categories of cases at issue here. Act 369 may have valid applications elsewhere, though. *See Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 72, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*").

and do—have the right to defend their branch of government against legislative overreach.

II. Respondents' Cross-Petition should be denied.

Respondents ask this Court to assume original jurisdiction over three issues presented in their Cross-Petition. The first asks this Court to declare that certain applications of Wis. Stat. § 165.08 comply with the separation of powers, while the second and third, already raised in a petition to this Court in 2019, present broad statutory interpretation questions about Wis. Stat. §§ 165.08 and 165.10. (Cross-Pet. 1)

None of these issues is appropriate for an original action. As for the first, members of the legislative branch lack standing to seek a judicial declaration affirming the constitutionality of statutes they enact. And as for the second and third, this Court in *Vos v. Kaul*, No. 2019AP1389-OA, already declined to exercise its original jurisdiction over these same statutory interpretation issues. It should do so again.

A. Respondents lack standing to seek a declaration affirming the validity of a statute they passed, which would amount to an advisory opinion.

Respondents frame their first issue as whether Wis. Stat. § 165.08 complies with the separation of powers as applied to the compromise or discontinuance of two categories of cases: (1) "cases civilly prosecuted by the Attorney General on the Attorney General's sole initiative;" and (2) "civil actions prosecuted by the Attorney General that are referred by other executive branch agencies and relate to statutory programs administered by the referring executive branch agencies." (Cross-Pet. 1.)

This is not an orthodox challenge to a statute's constitutionality—like Petitioners' claims—but rather an unorthodox request by the legislative branch for a judicial declaration that a statute it enacted is constitutionally valid. It represents a request for an advisory opinion, not a claim that Respondents have standing to pursue. *See Am. Med. Servs., Inc. v. Mut. Fed. Sav. & Loan Ass'n*, 52 Wis. 2d 198, 203, 188 N.W.2d 529 (1971) ("Advisory opinions should not be given under the guise of a declaration of rights.").

To establish their standing, Respondents dramatically overstate the reach of *Wisconsin Legislature v. Palm*. (Cross-Pet. ¶ 88.) According to them, *Palm* held that the Legislature has standing to bring any claims "related to the separation of powers and [the Legislature's] functions under Wisconsin law." (Cross-Pet. ¶ 89.) But in *Palm,* the Legislature did not ask this Court to affirm the validity of one of its statutes. Rather, *Palm* held that the Legislature had standing to challenge the validity of an executive order that allegedly "impinged upon the Legislature's constitutional core power." *Palm*, 391 Wis. 2d 497, ¶ 13. That constitutional injury gave the Legislature standing to defend its constitutional powers.

Here, unlike in *Palm*, Respondents do not allege that the cross-respondents they sue (the Attorney General and DOJ (Cross-Pet. ¶¶ 1–2)) have usurped the Legislature's constitutional authority. Quite the opposite—they instead ask this Court to declare that the Legislature has *not* improperly usurped executive authority. In effect, Respondents want this Court to give them a constitutional permission slip for a law they enacted. Respondents cite no authority allowing the Legislature to seek this kind of advisory relief about the validity of its statutes. Without any alleged constitutional injury, they lack standing to assert their constitutional claim.

Respondents err in asserting that they acquire standing by alleging that the Attorney General is not settling cases in accordance with Wis. Stat. § 165.08. (Cross-Pet. ¶ 90.) More specifically, they assert that the Attorney General's application of the statute denies the legislative committee its procedural right to participate in settling state lawsuits. But that allegation rests on the statute's *meaning*, not its *constitutionality*. A decision on the statute's proper scope would answer Respondents' question and redress any associated harm, without addressing the statute's constitutionality. So, while this alleged statutory harm might establish standing for a claim that the Attorney General should apply the statute differently—Respondents' *second* issue (Cross-Pet. ¶¶ 95–102)—that does not mean Respondents may seek this Court's constitutional blessing of the statute itself.

Respondents' lack of standing matters because of how they reframe the constitutional issues presented by Petitioners, perhaps to stack the deck in their favor. While the Petition's first issue addresses applications of Wis. Stat. § 165.08 to "civil enforcement cases" (Pet. ¶ 8), a category it defines specifically and at length (Pet. ¶¶ 29–54), the Cross-Petition would broadly cover *all* cases "civilly prosecuted by the Attorney General on the Attorney General's sole initiative (Cross-Pet. 1). The same is generally true for the Petition's second issue regarding plaintiff-side executive agency litigation, which the Petition defines differently (and more narrowly) than the parallel issue in the Cross-Petition. (*Compare* Pet. ¶¶ 9, 55–63, *with* Cross-Pet. 1.)

Petitioners narrowly crafted these categories to comply with *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, ¶ 72, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*"), and address the types of cases where they and Wisconsin citizens are injured most acutely. Respondents should not be

permitted to hijack this original action by materially reframing Petitioners' issues.

B. Respondents' broad interpretive question about Wis. Stat. § 165.08 is not appropriate for an original action.

The Cross-Petition also asks this Court to exercise its original jurisdiction over a second issue: "Whether Section 26 applies to '[a]ny civil action prosecuted by" the Attorney General, including when the Attorney General has engaged in some manner of pre-lawsuit negotiations." (Cross-Pet. 2.) As Respondents readily admit, however, this Court already declined to assume original jurisdiction over a word-for-word identical issue raised by the original action petition in *Vos v. Kaul*, No. 2019AP1389. (Resp. Br. 8–9.) The same reasons for denying that recent request still prevail.

First, this issue presents multiple, distinct mixed questions of law and fact that would require factual development and thus are inappropriate for an original action. Wisconsin Stat. § 165.08(1) requires the approval of the Joint Committee on Finance (JCF) when the "Department" (DOJ) seeks to wants to "discontinue" or "compromise" a "civil action" that it is "prosecuting." Multiple specific matters relied on in the Cross-Petition do not come within those terms, each for wholly distinct reasons.

Most of those reasons have nothing to do with whether "some manner of pre-lawsuit negotiations" occurred—again, the issue Respondents present. The statute's plain terms do not apply to a matter like *C.R. Bard* (Cross-Pet. ¶ 51), which resolved with a contractual agreement unaccompanied by any court action. Likewise, matters in bankruptcy like *Mallinkrodt* (Cross-Pet. ¶ 49 n.2) are "special proceedings," not "civil actions" to which the statute applies. As for

Novartis Pharmaceuticals (Cross-Pet. ¶ 49 n.2), that was a qui tam Medicaid fraud case where the State of Wisconsin is not a plaintiff; DOJ was not "prosecuting" the case. These differences underscore how the statute's scope cannot be resolved in the abstract through a single original action.

Second, these differences point to the proper venue for the answers Respondents seek: individual trial court matters that present specific, concrete interpretive disputes. That extends to cases where DOJ settled a dispute before any litigation began and then filed a consent judgment to confirm the agreement. Aware that JCF believes it should be able to approve or veto resolutions like these, DOJ has consistently notified JCF of them so that JCF can intervene or otherwise object to the substance of the resolution. So far, no legislative entity has taken DOJ up on those invitations.

In *State v. Direct Checks Unlimited*, No. 20CX01 (Wis. Cir. Ct. Dane Cty.), a consumer case providing for restitution to thousands of consumers, DOJ filed a motion to have the court determine whether section 165.08(1) applied and invited JFC to intervene, but the Legislature declined to do so. The trial court did not decide the issue because no legislative party intervened to contest it. (Pet'rs' Suppl. App. 101–05 .)

In *United States and Wisconsin v. WPSC*, U.S. District Court for the Eastern District of Wisconsin 20CV00733, where the United States and Wisconsin sought a consent decree to memorialize a settlement involving environmental claims, DOJ suggested that JCF use the 30-day comment period under CERCLA if it substantively objected to the resolution. (Pet'rs' Suppl. App. 106–08.) The Legislature and JFC chose not to intervene or object to the resolution. (Pet'rs' Suppl. App. 109–10 (court's status conference notes, counsel's exchange with Judge Griesbach).)

And in *United States v. Dairy Farmers of America,* No. 20CV2658 (N.D. Ill.), an antitrust matter intersecting with a chapter 11 bankruptcy claims, DOJ again invited JCF to take advantage of the 60-day comment period under the federal Tunney Act if it objected to the parties' resolution. The Legislature again declined to intervene or offer any concerns about the substance of the agreement. (Pet'rs' Suppl. App. 111–14 (June 17, 2020, and June 29, 2020 correspondence between DOJ and Legislature in *United States v. Dairy Farmers of America*).)

Respondents complain that the Legislature "sent a letter" in these cases but that courts declined to address its concerns. (Cross-Pet. ¶¶ 45–48.) But they neglect to mention why: because the Legislature chose not to intervene. Although it has seemed pointless for DOJ to continue to invite the Legislature to participate, DOJ continues to notify JCF when it seeks to confirm pre-litigation settlements through consent judgments. (*See, e.g.,* Pet'rs' Suppl. App. 115, January 9, 2021, cover email to JFC's designated counsel at Legislative Council regarding resolution of *Nationstar*.)

Respondents also seek to justify their Cross-Petition by arguing that the "scope and meaning of Section 26 is logically antecedent to its constitutionality." (Resp. Br. 17.) That is not the case. The separation-of-powers violations occur here because the legislative branch has assumed control over the day-to-day executive task of resolving cases. That analysis has nothing to do with the kinds of case resolutions to which the statute applies. Petitioners' constitutional claims can be resolved without addressing Respondents' statutory scope arguments.

C. Respondents' broad interpretive question about Wis. Stat. § 165.10 is not appropriate for an original action.

The Cross-Petition's third issue presents another statutory interpretation question: "Whether Section 27 of 2017 Act 369 requires the Attorney General to deposit 'all settlement funds into the general fund,' and is not limited by Section 26 in any respect." (Cross-Pet. 2.)

Again, this issue should be rejected for the same reasons this Court already declined to take it up in *Vos*. Respondents again concede that this dispute is identical to the one they presented there (Resp. Br. 8), but they offer no good explanation for why this Court should revisit its decision.

Just like before, the scope of Wis. Stat. § 165.10 cannot be resolved all at once because varied interpretive issues arise when applying it, depending on the specific case at hand. If Respondents sought to resolve a dispute over a discrete set of dollars, a court could decide whether the statute applies to those dollars given the specific related case resolutions. But that is decidedly *not* the issue Respondents present here, which is instead a broad, abstract question about the scope of Wis. Stat. § 165.10. That is not the proper subject of an original action, as this Court (rightly) already decided.

* * *

Respondents' Cross-Petition should be denied. They lack standing to seek judicial affirmance of a statute they passed, while their two statutory interpretation issues require the resolution of multiple legal and factual issues that are inappropriate for an original action.

III. Petitioners' motion for a temporary injunction should be granted.

Petitioners' motion to temporarily enjoin the challenged applications of Wis. Stat. § 165.08(1) should be granted. Respondents fail to explain persuasively why Petitioners will likely not succeed on the merits, and they also fail to rebut the specific facts that show how the balance of equities tilts in Petitioners' favor.

A. Petitioners will likely succeed on the merits.

Petitioners' opening brief demonstrated that the challenged applications of Wis. Stat. § 165.08 violate the separation of powers by transferring control over the executive power to settle certain plaintiff-side civil cases to the legislative branch. (Pet. Br. 9–28.)

Respondents answer by misreading *SEIU*, suggesting it held that the power to settle cases is *never* a "core" executive power. (Resp. Br. 29–31, 38–39.) To the contrary, *SEIU* said only that settlement authority is a "shared power *in at least some cases*"—namely, those "[w]here the legislature has appropriate institutional interests." 393 Wis. 2d 38, ¶ 72 n.22 (emphasis added). As Petitioners explained, the two types of matters at issue here implicate none of the potential interests discussed in *SEIU*: cases where the Legislature is a party; defense-side cases requiring a significant payment by the State;[4] or settlements conceding the invalidity of state law. *Id.* ¶¶ 69–71.

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[4] As Respondents note, some states have statutes requiring legislative consent before the executive branch enters into settlements requiring the expenditure of certain levels of funds. Such settlements, which potentially require a new legislative

Recognizing that they must identify some other legislative interest, Respondents proffer only two new ones: spending money out of the public fisc (Resp. Br. 32–34); and setting statewide policy (Resp. Br. 34–35). They also reprise the invalidity-of-state-law issue. (Resp. Br. 36.)[5]

As to the first two "interests," Respondents vastly overstate their proper role in the separation-of-powers framework. Respondents identify only the legislative powers to pass laws levying taxes and appropriating funds in the treasury; those specific powers do not translate into an authority to raise more money by controlling individual litigation settlements. Similarly, the Legislature does not have a shared "policymaking" interest in controlling consensual settlement terms in individual cases. And the third issue is not implicated by the Petition, which does not challenge applications of Wis. Stat. § 165.08(1) to settlements that would purport to invalidate state law.

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appropriation depending on how the particular state finances judgments against the state, have nothing to do with the applications under Wis. Stat. § 165.08(1) in plaintiff's-side cases that Petitioners challenge here.

[5] This response underscores how no meaningful disagreement exists between the parties over the nature of this constitutional challenge. (Resp. Br. 26–29, 38.) As *SEIU* explained, courts may consider whether "categories of applications . . . violate the separation of powers." 393 Wis. 2d 38, ¶ 73. Petitioners' categorical as-applied challenge asks this Court to do just that. Respondents recognize this approach's validity by resting their defense on institutional legislative interests purportedly affected by cases in the Petition's two categories.

1. The Legislature may levy taxes and appropriate money by statute, not enforce statutes in individual cases.

Respondents assert a sort of free-floating legislative interest in the "public fisc," announcing that the Legislature may control individual executive decisions when they might affect "financial inlays." (Resp. Br. 33.) Respondents offer no authority, however, to support this vast assertion of power. Moreover, their interpretation would lead to problematic outcomes even aside from the separation-of-powers violation.

The only authority on which Respondents rely is far more circumscribed than the extensive authority they claim. They cite the Legislature's power to, by statute, levy more taxes (Wis. Const. art. VIII, § 5) and appropriate monies in the treasury (Wis. Const. art. VIII, § 2). (Resp. Br. 32–33.)

Neither provision creates any legislative authority other than the ordinary power to pass general legislation. That is, neither provision says that the Legislature may, in derogation of default separation-of-powers principles, control day-to-day executive decisions about how to execute existing laws simply because those decisions might affect "financial inlays." (Resp. Br. 33.) Rather, these provisions say only that, if the Legislature desires more money to appropriate, it can levy more taxes.

It makes good sense to limit these provisions to their plain terms. As a general rule, "[f]ollowing enactment of laws, the legislature's constitutional role as originally designed is generally complete." *Palm*, 391 Wis. 2d 497, ¶ 182 (Hagedorn, J., dissenting). Departing from that general rule "turns our constitutional structure on its very head" by "subjecting executive branch enforcement of enacted laws to a legislative veto." *Id.* ¶ 218 (Hagedorn, J., dissenting). The challenged applications of Wis. Stat.

§ 165.08 accomplish such a departure by allowing the legislative branch to control individual case settlements. No such power exists under Article VIII, §§ 2 and 5.

Respondents' theory that they can increase the balance in the treasury by controlling individual settlements simply underscores why this cannot be a shared task between the branches. They say the Legislature has an interest in controlling individual settlements to fund its general policy preferences, perhaps to "cut[ ] taxes and/or increas[e] spending on a public program." (Resp. Br. 34.) That is, they claim a right to force individual defendants to settle for more money, or, alternatively, to redirect to other policy purposes settlement funds that are committed to remediate specific harms.

But individual cases seeking to enforce state law and remedy injuries to the public and executive agencies are not mere opportunities for legislative fundraising.

A defendant's liability under consumer or environmental laws depends on its conduct in violating those laws and the type of remediation needed. Any monetary forfeitures must address the statutory violations at issue by appropriately punishing the conduct, deterring future violations, and remediating harm that has been done. *Cf. State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 153, 580 N.W.2d 203 (1998) ("Fines, penalties and forfeitures, whether civil or criminal, may be considered a form of punishment." (citation omitted)); *State v. T.J. McQuay, Inc.*, 2008 WI App 177, ¶ 52, 315 Wis. 2d 214, 763 N.W.2d 148 ("[I]n determining civil forfeitures, the trial court can consider, among other matters, its cooperation in remediation, its initiation of remedial activities, the . . . harm caused, and the degree of its culpability.").

Similarly, when an executive agency suffers specific tort or contract harms, the defendant's liability rests on the specific injuries it caused to the agency program. *Cf. CLL Assocs. Ltd. P'ship v. Arrowhead Pac. Corp.*, 174 Wis. 2d 604, 610, 497 N.W.2d 115 (1993) (purposes of tort law include "shift[ing] the losses caused by a[n] . . . injury to the one at fault," "deter[ring] unsafe behavior," "compensat[ing] the victim"); *Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 385, 254 N.W.2d 463 (1977) ("[C]ontract damages are compensatory; their purpose is to compensate the injured party for losses necessarily and foreseeably flowing from the breach . . . .").

Taxes, the way the legislative branch funds its policy efforts, are fundamentally different from litigation proceeds. "[T]he primary purpose of a tax is to obtain revenue for the government," as opposed to covering the expense of providing certain services or regulation. *City of River Falls v. St. Bridget's Catholic Church of River Falls,* 182 Wis. 2d 436, 441–42, 513 N.W.2d 673 (Ct. App. 1994). Far from being imposed on individual defendants, "[t]he rule of taxation shall be uniform." Wis. Const. art. VIII, § 8. Taxes therefore are "enforced proportional contributions from persons and property" levied to support a government and its needs. *State ex rel. Bldg. Owners & Managers Ass'n v. Adamany,* 64 Wis. 2d 280, 289, 219 N.W.2d 274 (1974) (citation omitted).

Mixing taxation efforts with liability for specific civil enforcement violations and agency program injuries would undermine all these principles. Simply to increase its available revenue—the aim of general taxation—the Legislature would be forcing defendants to accede to its settlement demands in order to avoid protracted litigation. This so-called "tax" would fall on individual parties, thereby violating basic uniform taxation principles. And it would be

untethered from the defendant's culpability or any remedial goals.

Here we see the wisdom in the separation of powers. Because the executive branch's job is to enforce existing laws, it settles individual cases based on an analysis of the specific offense at hand, including the defendant's culpability and the extent of the harm. By contrast, when the Legislature seeks to bolster its fiscal reserves for the coming biennium, it may use its policy judgment to levy general taxes that fall uniformly across the state. Although both efforts may bring in money, no constitutional overlap exists between those two distinct functions that justifies the challenged applications of Wis. Stat. § 165.08(1).

As for Respondents' hypothetical worst-case scenario, it gets them no further in identifying a valid legislative interest. They imagine that DOJ might negotiate a settlement with a mortgage lender who has harmed Wisconsin homeowners. Some of the hypothetical settlement funds go to a not-for-profit housing agency to remediate harms the lender caused, while the remainder go to DOJ to use as it chooses. (Resp. Br. 1, 31.)[6]

Respondents seem to worry about self-dealing (or perhaps just unwise decisions) by the executive branch when enlisting non-profits to aid in remedial efforts. But that policy concern, even if justified, does not equate to an institutional legislative interest in how the executive branch remediates specific harms in specific cases. Simply put, the legislative branch does not acquire a constitutional interest

[6] Respondents do not identify any actual settlements with terms like these.

in day-to-day executive duties whenever it believes the executive branch might be doing a poor job.

These kinds of policy concerns can be addressed in other ways, consistent with the separation of powers. If the Attorney General repeatedly reached ineffective settlements, the voters could select someone new; if the settlement were somehow illegal (if an Attorney General funneled funds to a relative's not-for-profit, for example), a taxpayer might challenge the settlement as *ultra vires*. Or, if the Legislature believes the Attorney General should *never* enlist not-for-profits to aid in remedial efforts, it could pass a statute prospectively prohibiting that practice in all cases.

And as for leftover settlement funds going to DOJ to spend, Respondents complain that such money would be "handed to an agency . . . essentially to appropriate it as that agency sees fit." (Resp. Br. 33.) But a different provision of Act 369—one Petitioners do not challenge here—already prohibits that result. Under prior Attorneys General, DOJ had expenditure authority to receive and spend such excess monies.[7] *Compare* Wis. Stat. § 165.10 (2017–18) (allowing DOJ to spend settlement monies not committed under the terms of the settlement, subject to passive review by JCF) and 20.455(3)(g) (2015–16), *with* Wis. Stat. § 20.455(3)(g) (2019–20) (DOJ limited to spending the amount in the appropriation schedule).[8] With changes made pursuant to Act 369, DOJ lacks that spending authority.[9]

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[7] Prior to Act 369, such leftover funds paid for a number of DOJ projects and initiatives, including law enforcement salaries and positions in the (now-eliminated) Solicitor General's office.

[8] To be sure, Respondents' Cross-Petition disputes how DOJ has interpreted and applied Wis. Stat. § 165.10. But those interpretive disputes are irrelevant to whether the Legislature

This illustrates the difference between an invalid law and a valid one. Rather than improperly assume control over individual executive decisions (as Wis. Stat. § 165.08(1) does), the Legislature enacted a prospective, general statute that limits in *all* cases what DOJ can do with excess settlement funds not earmarked for remediation. That is how the Legislature can address its concerns with certain executive activity—pass general, prospective laws, not laws that allow it to control individual executive decisions on an ad hoc basis.

Respondents similarly say that they have an interest in controlling executive agencies' settlements, simply because any money at issue "originated from the Legislature's spending authority." (Resp. Br. 43.) Again, they are simply making up a constitutional power that does not exist. The Legislature has authority to appropriate funds to agencies; once it does so, its constitutional role ends. It is then up to the agency to manage those funds on a day-to-day basis, including through litigation seeking to remedy injuries it has suffered.

When agencies then spend money recovered through litigation, they are not "appropriating" it in a constitutional sense. Agencies have no "appropriation" power; "appropriation" happens when the Legislature authorizes

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can involve itself in the settlement terms of individual cases. And to the extent there are disputes about the interpretation of the statute, the Attorney General has not spent any of those amounts.

[9] DOJ continues to have spending authority regarding other amounts flowing from case resolutions and judgments, including for example restitution (Wis. Stat. § 20.455(1)(hm)), cost recovery (Wis. Stat. § 20.455(1)(gh)), and penalty surcharges (Wis. Stat. § 20.455(2)(i)).

executive officials to spend public funds for particular purposes. *See Risser*, 207 Wis. 2d 176, 192–95. So, when agencies recover lost money through litigation, they then spend it using the same authority under which the appropriated funds reached the agency in the first place. The Legislature's constitutional interest ends after that initial appropriation, long before funds return to the agency through a settlement.

Respondents' "fiscal inlay" theory would destroy any separation of powers boundaries at all: the Legislature could give itself veto power over almost any day-to-day executive activity, from the Department of Revenue's assessment of taxes to the Department of Administration's procurement decisions. Fortunately, that is not how our constitution operates.

2. The Legislature has no legislative interest in "setting policy" through overseeing individual case settlements.

Respondents offer a second purported interest: a "constitutional interest in setting the policy of the State through state law." (Resp. Br. 34). They assert an interest in ensuring that civil enforcement settlements don't "thwart or frustrate" the Legislature's policy preferences.[10]

Again, Respondents' source of authority for this asserted interest is far narrower than the broad power they assert. They rely solely on Wis. Const. art. IV, § 1, which

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[10] Respondents connect this interest to civil enforcement cases, but they make no effort to explain how it could justify any applications of Wis. Stat. § 165.08 to executive agency administration cases, the second category of cases at issue here.

provides that "[t]he legislative power shall be vested in a senate and assembly." This general language says nothing about what the "legislative power" is. Respondents offer no case law or other support for the notion that this confers a legislative interest in overseeing the terms of settlements in individual enforcement cases.

The lack of authority is unsurprising because fundamental differences exist between policymaking imposed by the Legislature and consensual rules of conduct agreed upon in individual settlement agreements. First, the Legislature sets policy by enacting prospective, general rules through legislation; that is a fundamentally different task than applying state law to specific violators. Second, settlements also do not "set policy;" they reflect mutual agreements between consenting parties, not unilateral impositions like those imposed by state law. Third, even if settlements do "set policy" in some abstract sense, that does not entitle the legislative branch to usurp the executive function of controlling individual settlements.

First, the Legislature's power to enact policy entails setting prospective and general rules, while settlement terms follow from a specific application of existing legislative policy to unique, individual factual circumstances.

The exercise of legislative power entails "devising and imposing '*generally applicable rules* of private conduct' on the people.'" *Palm*, ¶ 80 (Bradley, R., J., concurring) (emphasis added); *see also id.* ¶ 92 (legislative power includes "the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' or the power to 'prescribe general rules for the government of society'") (Kelly, J., concurring) (alteration in original) (citations omitted).

On the flip side, the "Executive may not formulate generally applicable rules of private conduct." *Koschkee,* 387 Wis. 2d 552, ¶ 50 (Bradley, R., J., concurring) (citation omitted). Rather, it uses its "judgment and discretion" to "faithfully execute the laws already on the books" by applying them to specific parties and specific factual scenarios. *Palm*, 391 Wis. 2d 497, ¶ 183 (Hagedorn, J., dissenting).

Settlement terms do not "set policy" because they do not establish generally applicable rules of private conduct. Rather, settlements resolve specific cases against individual parties for specific alleged violations of state law. Any required behavioral modifications reflect an agreement between the State and defendant to remediate or otherwise address alleged violations. Because such terms are individualized to address specific historical misconduct, they are not constitutionally equivalent to legislative "policy" that prospectively and generally regulates conduct statewide.

Consider Respondents' example mortgage servicer settlement, which illustrates this difference. (Resp. Br. 35.) There, the executive branch identified a company whose specific business practices were violating state consumer protection law and harming Wisconsin citizens. To avoid the risks of prosecution, the company agreed to modify those business practices in order to come into compliance with state law.[11] Selecting the behavioral modifications necessary to remedy those specific legal violations reflects the

[11] In multistate actions, a defendant may prefer for business reasons to agree to a single, uniform standard of conduct for all states, even if that standard is stricter than state law in some of the settling states.

judgment and discretion the executive branch uses when executing the law.

The Legislature has a role regarding such types of outcomes, but it is not enmeshing itself in individual cases. It has oversight authority through its audit function. And if it believed that good public policy justified prospectively imposing those specific servicing standards on *all* mortgage servicers statewide, it could enact a general law saying so.

This basic difference also rebuts Respondents' attempt to equate settlements and legislative policy on the basis of "statewide effects." (Resp. Br. 35.) Simply put, the difference between executive and legislative power does not turn on geography. Violations of state law may have "statewide effects," but that does not somehow transform the duty to prosecute them into a legislative policymaking power.

Second, settlements do not "set policy" because they are voluntary agreements. When the Legislature "sets policy," it passes a law that requires specified conduct. No consensual exchange occurs between the Legislature and regulated parties—they must comply with the Legislature's chosen policy, without receiving anything in return. A settling party, by contrast, voluntarily chooses to assume certain responsibilities in return for valuable consideration, typically a release of liability and cessation of prosecution that might expose them to greater losses.

This explains why Respondents' attempt to equate settlements with legislation—that they sometimes contain conditions "not required under state law"—fails. (Resp. Br. 35.) Even if that sometimes happens, it does not mean the executive branch somehow "sets policy" through settlements like the Legislature does when it imposes rules of conduct through legislation.

Wisconsin courts have already explained that settling parties may voluntarily bind themselves in ways beyond what state law requires and that this does not constitute "setting policy" by the executive branch.[12] In *Ceria M. Travis Academy, Inc. v. Evers*, 2016 WI App 86, 372 Wis. 2d 423, 887 N.W.2d 904, a private school agreed in a settlement to post certain surety bonds when not otherwise required by state law. The school later sought to escape its obligation, arguing that the regulating agency lacked settlement authority to demand surety bonds when state law did not otherwise require them.

The court disagreed, explaining that "[c]ase law has repeatedly held that although a statute permits certain actions, parties may nonetheless stipulate to the contrary." *Id.* ¶ 18. Such stipulations allow "parties to accomplish by agreement things they conclude are more to their advantage than what they could accomplish by litigation." *Id.* ¶ 16. That kind of "[m]utually advantageous resolution of disputes between represented parties is not prohibited by any statute or administrative rule." *Id.* ¶ 20. Accordingly, although the agency could not "unilaterally impos[e]" the bond requirement under existing law, the parties could "mutually agree[ ]" to it. *Id.* ¶ 19.

Ceria shows why Respondents miss the mark when aiming at the recent mortgage servicer settlement. (Resp. Br. 35.) Even if certain settlement terms there were "not required under state law" (Resp. Br. 35), they did not "set

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[12] In multistate matters, defendants may prefer an injunctive resolution that provides for a single set of requirements across all states, making it easier to achieve compliance, even if those requirements are more stringent than in some of the participating states.

policy" because DOJ did not "unilaterally impos[e]" them. 372 Wis. 2d 423, ¶ 19. Rather, like in *Ceria*, the parties agreed to a "[m]utually advantageous resolution" that avoided the risks of more litigation. *Id.* ¶ 20. Parties may reach that kind of consensual agreement, regardless of what policies the Legislature has chosen to implement through state law.

The third flaw in Respondents' "setting policy" argument is perhaps even more basic. Even if individual settlement terms somehow do "set policy" in a manner akin to legislation, that still does not entitle the Legislature to control the individual settlement decisions at issue here.

Our constitution itself dictates the role of both branches in "setting policy"—the legislative by enacting laws and the executive by executing them. So, if the legislative branch does not like the policy impact of an executive branch settlement, its constitutional power is to pass a new law altering that policy. But that disagreement does not allow the Legislature to usurp executive powers as it has done here. Similarly, the Legislature could not constitutionally pass a law requiring this Court to submit draft opinions to a legislative committee for approval to oversee the Court's "policy" choices. If the Legislature does not like the policy effect of this Court's decisions on non-constitutional questions, it can do what the constitution empowers it to do: pass a law altering them.

Whether individual settlement agreements or judicial decisions, the Legislature cannot grant itself authority over another branch's day-to-day duties consistent with the separation of powers.

3. Settlements that would concede the invalidity of state law are irrelevant here.

Lastly, Respondents identify the Legislature's "constitutional interest in the validity of the state law that it enacts." (Resp. Br. 36.) This purportedly allows them to control "prosecution-side settlements that concede the validity of state law," which is, they say, "outcome-determinative" to Petitioners' claims. (Resp. Br. 36.)

But, strangely, Respondents themselves cite the very portions of the Petition and supporting memorandum emphasizing that Petitioners *do not challenge* those applications of Wis. Stat. § 165.08, assuming they exist. (Pet. ¶ 83 n.5 ("[T]he petition does not challenge the application of Wis. Stat. § 165.08 to any settlements" that would "concede the invalidity of state law."); ¶ 89 n.6 ("[T]his lawsuit does not challenge the application of Wis. Stat. § 165.08" to "settlements . . . on behalf of state agencies" that would "concede the invalidity of state law."); Pet. Mem. 5 n.1, 20 n.8.) Because Petitioners do not challenge those applications, their validity is irrelevant here.

* * *

Respondents identify no valid legislative interest that would justify their intrusion into day-to-day settlement decisions regarding plaintiff-side civil enforcement or executive agency program cases. Because they identify no constitutional applications of Wis. Stat. § 165.08(1) in the two categories at issue, Petitioners will almost certainly succeed on the merits.

B. The balance of equities weighs in Petitioners' favor.

Respondents also fail to establish that the balance of equities tilts in their favor.

Most importantly, they do not meaningfully dispute that if Petitioners establish a strong likelihood of success on the merits—which they have—a temporary injunction should follow. They only say this "begs the . . . question" (Resp. Br. 48), but that is not a meaningful response. Given Petitioners' strong merits showing, it naturally follows that the unconstitutional challenged applications of Wis. Stat. § 165.08 should be enjoined to prevent ongoing constitutional harms.

Nor can Respondents prevail simply by pointing to the default rule that enjoining statutes harms the public. (Resp. Br. 46–47.) As Petitioners explained, that general principle provides no help in separation of powers cases like these. (Pet. Br. 33–34.) The Legislature's interest does not, as Respondents say, "join as one" with the public's (Resp. Br. 47) where the statute at issue compromises the "central bulwark" of the public's own liberty. *SEIU*, 393 Wis. 2d 38, ¶ 30.

Respondents also fail to show that the challenged applications of Wis. Stat. § 165.08 place only a "minimal, easily met burden" on Petitioners. (Resp. Br. 44.)

They first say that JCF "can and does exercise its statutory authority . . . with dispatch." (Resp. Br. 45.) But the possibility that JCF may choose to meet relatively quickly does not change the fact that it has sole discretion over whether and when to consider proposed settlements. This necessarily injects uncertainty into every single matter in the challenged categories. The parties can never be sure how quickly they might be able to reach a negotiated

resolution, since ultimate authority resides with a legislative committee that may take as much time as it wants to consider proposed settlements.

Similarly, settlement negotiations have been hindered by the confidentiality problems inherent in involving JCF in sensitive settlement negotiations. The mere fact of settlement negotiations can be highly confidential. And that is doubly true for DOJ's assessment of settlement ranges and a case's strengths and weaknesses; any disclosures of such information can cripple the State's bargaining position. (Finkelmeyer Aff. ¶ 17.) These are real harms that Petitioners have had to avoid over the past two years, which has hindered their ability to obtain JCF approval given its unwillingness to provide adequate confidentiality assurances before considering settlement proposals. (Finkelmeyer Aff. ¶ 19.)

This regime has led to less beneficial litigation outcomes in ways Respondents do not contest. They do not dispute that DOJ cannot participate in many fast-moving negotiations without final settlement authority. (Finkelmeyer Aff. ¶¶ 8, 16.) And they also do not dispute that, in such cases, DOJ now cannot obtain that authority before negotiations begin, all because JCF has only been willing to approve settlements upon reviewing final, fully negotiated agreements. (Finkelmeyer Aff. ¶ 12.) This amounts to a catch-22: DOJ cannot effectively negotiate without full settlement authority, but it cannot obtain that authority from JCF without first completing negotiations. And Respondents do not dispute that this dilemma has created specific harms over the past two years. Again, in several cases, DOJ abandoned settlements or avoided mediation entirely, given its lack of final settlement authority. (Finkelmeyer Aff. ¶¶ 21–22.)

Respondents do not dispute the problems caused by a lack of confidentiality in the settlement process. Rather, they identify three so-called "solutions" JCF has offered, none of which has proved workable. (Resp. Br. 7, 46.)

First, Respondents say JCF could meet in closed session with communications protected by the attorney-client privilege. (Resp. Br. 7.) But Respondents offer only their *ipse dixit* that JCF is a "client" in these cases—it is not, for all the same constitutional reasons that the legislative branch may not execute the law through individual prosecutions.

And even if it were, neither a closed session meeting nor a privileged communication ensures that JCF members or staff would keep confidential the sensitive settlement information they might learn. DOJ must be able to have confidential and candid attorney-client communications with its agency clients over whether, when, and how to settle cases filed on an agency's behalf. Giving final settlement authority to 16 independent legislators, who may have very different interests than the executive agency administering its own programs, eviscerates the attorney-client relationship and harms the agency seeking an outcome it deems in its best interest.

Second, Respondents note that JCF *counsel* signed a confidentiality agreement "on behalf" of JCF. (Resp. Br. 7.) But one of JCF's own members asserts that such an agreement "cannot bind individual legislators." (Resp. Supp. App. 11 (Nygren Aff. ¶ 16).) DOJ and its executive agency clients cannot risk the uncertainty that brings, because the risk of resulting public disclosures could torpedo negotiations altogether and also would impair the confidential attorney-client relationship.

Third, Respondents assert that DOJ could "simply" ask opposing parties for permission to disclose confidential settlement terms to JCF. (Resp. Br. 7.) True, there are some non-time-sensitive settlements where an opposing party does not care about disclosures to JCF. (Finkelmeyer Aff. ¶ 20.) But that is not true in many other cases. (Finkelmeyer Aff. ¶¶ 8, 15, 21–23.) It is those sensitive, confidential situations in which the challenged applications of Wis. Stat. § 165.08 have presented—and continue to present—an intractable dilemma for DOJ and its clients.

C. An injunction would restore the separation-of-powers status quo that prevailed for nearly 170 years before the passage of Act 369.

Enjoining the challenged applications of Wis. Stat. § 165.08 would preserve the status quo by restoring the separation of powers in Wisconsin as it had existed for nearly 170 years, before Act 369. Respondents contend that an injunction would "upend" the status quo (Resp. Br. 48), but two years—much of which was taken up by litigation challenging that law—cannot entrench a novel statute of dubious validity against almost two centuries of contrary constitutional tradition.

CONCLUSION

Petitioners' petition for an original action and motion for a temporary injunction should be granted, while Respondents' cross-petition for an original action should be denied.

Dated this 9th day of February 2021.

Respectfully submitted,

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