STATE OF WISCONSIN

IN SUPREME COURT

Case No. _____

JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL, WISCONSIN DEPARTMENT OF JUSTICE, 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, ROGER ROTH, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE WISCONSIN SENATE, SCOTT FITZGERALD, 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 ALBERTA DARLING, IN HER OFFICIAL CAPACITY AS A CO-CHAIR OF THE JOINT COMMITTEE ON FINANCE, REPRESENTATIVE JOHN NYGREN, IN HIS OFFICIAL CAPACITY AS A CO-CHAIR OF THE JOINT COMMITTEE ON FINANCE, SENATOR LUTHER OLSEN, 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.

MEMORANDUM IN SUPPORT OF PETITION FOR AN ORIGINAL ACTION AND REQUEST FOR TEMPORARY INJUNCTIVE RELIEF

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INTRODUCTION

Through 2017 Wis. Act 369 ("Act 369"), the Wisconsin Legislature granted to the legislative branch a fundamentally unconstitutional role in the executive function of resolving plaintiff-side civil litigation involving the State. Under Wisconsin's separation of powers doctrine, the legislative branch makes the laws and the executive branch executes them. One way the executive branch does so is by prosecuting civil litigation on behalf of the State, much like how criminal prosecutors pursue violations of Wisconsin's criminal laws. In both plaintiff-side civil litigation and criminal prosecutions, the decision to initiate cases and end them through negotiated resolutions—whether plea bargains or settlements—are quintessential executive functions.

Act 369 transferred a key piece of that executive function to the legislative branch, after the election in 2018 of a new attorney general and governor but before they took office. It did so by amending Wis. Stat. § 165.08 to provide that the Wisconsin Department of Justice (the "Department")—led by the Attorney General, an elected constitutional executive officer—cannot settle most plaintiff-side civil actions it prosecutes without first obtaining consent from the Legislature's Joint Committee on Finance (JCF).

This case challenges the constitutionality of that transfer of executive power to the legislative branch as applied to two categories of plaintiff-side civil actions. Specifically, Act 369's amendment to Wis. Stat. § 165.08 categorically violates the constitutional separation of powers as applied to: (1) civil enforcement actions brought under statutes that the Attorney General is charged with enforcing, such as environmental or consumer protection

laws; and (2) civil actions the Department prosecutes on behalf of executive-branch agencies relating to the administration of the statutory programs they execute.

Because settling these plaintiff-side civil cases represents a quintessential executive function in which the legislative branch has no legitimate institutional interest, transferring this executive authority to JCF violates the constitutional separation of powers—the "central bulwark of our liberty." *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 30, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*").

Given the significant state-wide importance of this issue, this Court should grant the petition for an original action. And because prompt action is critical to restore the proper separation of powers in Wisconsin state government, a temporary injunction against the challenged applications of Wis. Stat. § 165.08 should be granted. The executive branch has labored under these unconstitutional applications of Act 369 for long enough.

ISSUES PRESENTED

1. Should the Court assume original jurisdiction over this as-applied challenge to Wis. Stat. § 165.08, a statute through which the legislative branch has seized the executive power of settling plaintiff-side civil cases in two categories, an issue of great importance to the proper separation of powers in state government?

2. Should this Court temporarily enjoin the challenged applications of Wis. Stat. § 165.08, where Petitioners will almost certainly show that the legislative branch cannot seize the executive power to settle the cases at issue and where this unlawful usurpation will continue to irreparably harm the executive branch and Wisconsin people, absent temporary injunctive relief?

STATEMENT OF THE CASE

This original action challenges the constitutionality of applying Wis. Stat. § 165.08, as amended by Act 369, to two categories of plaintiff-side civil actions prosecuted by the Department.

I. Act 369 transfers settlement authority from the executive branch to the legislative branch.

Prior to Act 369, Wis. Stat. § 165.08 authorized the Department, in all plaintiff-side civil actions it prosecuted, to compromise or discontinue the action at the direction of the state official or entity that authorized the Department to initiate the case. *See* Wis. Stat. § 165.08 (2015–16). The legislative branch had no power over that decision in any particular case. *See id.*

Now, after Act 369, the Department cannot settle many of these plaintiff-side cases without first obtaining consent from the legislative branch. Specifically, section 26 of Act 369 amended Wis. Stat. § 165.08 to provide that the Department now cannot "compromise or discontinu[e]" plaintiff-side "civil actions" without approval from JCF:

> Any civil action prosecuted by the department by direction of any officer, department, board, or commission, or any civil action prosecuted by the department on the initiative of the attorney general, or at the request of any individual may be compromised or discontinued . . . 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.

This new veto power gives the legislative branch control not just over whether the Department can enter into settlements covered by Wis. Stat. § 165.08 at all, but also over the timing and terms of any such settlement.

As for a settlement's timing, JCF follows a statutory process under Wis. Stat. § 13.10 for considering matters under its purview, including proposed settlements under Wis. Stat. § 165.08. That process requires notice and a public hearing along with a roll call vote. *See* Wis. Stat. § 13.10(3)–(4). The hearings are held either quarterly or at JCF co-chairs' discretion (*see* Wis. Stat. § 13.10(1)), and Wis. Stat. § 165.08 imposes no other deadlines for JCF action.

And Wis. Stat. § 165.08 allows JCF to reject a settlement for any reason whatsoever; the Department cannot challenge that decision through judicial review or any other mechanism. This allows JCF to dictate settlement terms by withholding its consent until the Department presents terms JCF finds acceptable.

In the 23 months since Act 369 has been in effect, JCF has been willing to consider proposed settlements under very specific circumstances: where the Department publicly provides the exact terms of a proposal and allows JCF to meet on a timetable of its choosing in open session. In cases where the Department has not presented proposals in this format, JCF has not convened. In cases where the Department has done so, JCF generally still has taken weeks or months to schedule a hearing. Most recently, on September 30, the Department asked JCF to consider three potential settlements. As of today, JCF has not met or set a hearing on those three proposals. (Finkelmeyer Aff. ¶ 12.)

II. This case concerns two categories of civil actions that the Department now cannot settle without JCF consent.

This case challenges the constitutionality of applying Wis. Stat. § 165.08 to two categories of civil actions that the Department prosecutes on behalf of the State or executive state agencies. (*See* Pet. ¶¶ 70–89.)

First, the Department prosecutes civil enforcement actions that it may commence either upon its own discretion or upon a referral from another executive state agency. *See, e.g.*, Wis. Stat. §§ 30.03, 165.25(4)(ar), 299.95. In these civil enforcement actions, the Department prosecutes violations of Wisconsin's consumer protection statutes, environmental protection statutes, and the like. *See, e.g.*, Wis. Stat. §§ 100.18 (fraudulent representations), 100.182 (unfair method of business competition and trade practices); Wis. Stat. ch. chapter 281 (water quality and sewage disposal standards), chapter 283 (pollution discharge into the State's water supply); (*see also* Pet. ¶¶ 30–43 (discussing other kinds of civil enforcement actions)).

Second, the Department prosecutes claims on behalf of executive state agencies relating to the administration of programs they are statutorily charged to execute. *See* Wis. Stat. § 165.25(2). These cases often involve disputes between executive agencies and individuals or entities with which the agencies interact, such as contractual disputes with vendors or tort claims against individuals who have damaged state property managed by the agency. (*See* Pet. ¶¶ 60–62.)[1]

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[1] Petitioners do not believe that the Department could ever effectively concede the invalidity of state law as a plaintiff in these two categories of cases. But to the extent that could ever happen, the petition does not challenge the application of

Prior to Act 369, the executive branch had the discretion to resolve these civil matters in the State's best interests through either settlements or litigated judgments. Now, after Act 369, Wis. Stat. § 165.08 gives the legislative branch absolute power over whether, when, and how settlements may be reached in these two categories of plaintiff-side civil actions. The Department is currently handling many matters in these categories that fall within Wis. Stat. § 165.08's JCF consent requirement.

ARGUMENT

I. The important separation of powers issues presented here merit the exercise of this Court's original jurisdiction.

This case presents a significant constitutional question: May the legislative branch grant itself authority over the executive function of resolving plaintiff-side civil litigation involving state entities? This question implicates the separation of powers, a constitutional doctrine which provides the "central bulwark of our liberty." *SEIU*, 393 Wis. 2d 38, ¶ 30. The nature of this question satisfies the Court's criteria for the exercise of original jurisdiction under article VII, section 3 of the Wisconsin Constitution, in that it renders this an "exceptional case[ ] in which a judgment by the court [would] significantly affect[ ] the community at large." *Wis. Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807.

The separation of powers issues presented here are of substantial statewide interest. This Court already recognized as much when it *sua sponte* assumed jurisdiction

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Wis. Stat. § 165.08 to any settlements that would seek to do so. (*See* Pet. ¶¶ 83 n.5, 89 n.6.)

from the court of appeals over *SEIU*, which involved a facial challenge to the same provision in Wis. Stat. § 165.08 at issue here. And this Court has underscored the statewide significance of separation of powers issues by assuming original jurisdiction over multiple recent cases presenting such issues. *See, e.g., Bartlett v. Evers,* 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685, *Wisconsin Small Businesses United, Inc., v. Brennan,* 2020 WI 69, 3939 Wis. 2d 308, 946 N.W.2d 101, *Wisconsin Legislature v. Palm,* 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.

Not only is it critically important to restore the proper separation of powers in state government, but also Wis. Stat. § 165.08 concretely harms the State, state agencies, and Wisconsin citizens by impairing the executive branch's ability to secure timely and optimal settlements on behalf of the state, its agencies, and its citizens. *See infra* Argument II.B.

These ongoing and tangible constitutional harms underscore the need for "prompt and authoritative" resolution through an original action. *Citizens Utility Bd. v. Klauser*, 194 Wis. 2d 484, 488 n.1, 534 N.W.2d 608 (1995); *see also Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938) (original jurisdiction appropriate where "the questions presented are of such importance as under the circumstances to call for [a] speedy and authoritative determination by this court in the first instance"). Moreover, litigating this case through the ordinary trial and appellate process could result in multiple reversals, causing significant confusion and uncertainty over the status of state litigation while this case proceeds. Resolution by this Court as an original action will provide finality regarding the critical constitutional issues presented and avoid injecting further uncertainty into litigation.

Lastly, this case presents legal questions, not factual ones. Again, Petitioners assert that Wis. Stat. § 165.08, as applied to two categories of cases, violates the separation of powers by transferring executive power over settlements to the legislative branch. These categorical as-applied challenges present no factual disputes. And although Respondents may dispute the legal significance of certain facts offered to establish the irreparable harm needed for a temporary injunction, they cannot reasonably dispute the concrete ways in which Wis. Stat. § 165.08 transfers key executive functions to the legislative branch.

In short, this case presents the classic kind of constitutional separation-of-powers question this Court should resolve speedily and finally using its original jurisdiction.

II. This Court should immediately enjoin the challenged applications of Wis. Stat. § 165.08.

Upon assuming original jurisdiction, Petitioners also respectfully request that this Court immediately enjoin the application of Wis. Stat. § 165.08 to the two categories of cases at issue here.[2]

To obtain temporary injunctive relief a movant must show (1) a reasonable probability of success on the merits; (2) the lack of an adequate remedy at law; (3) irreparable harm in the absence of an injunction; and (4) that the

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[2] This Court recently confirmed that it may issue a temporary injunction under Wis. Stat. § 813.02 and § (Rule) 809.14, upon assuming original jurisdiction over a matter. *See James v. Heinrich*, No. 2020AP1419-OA (Sept. 10, 2020, mem. order); *Wis. Council of Religious & Indep. Schools v. Heinrich*, No. 2020AP1420-OA (same); *St. Ambrose Academy, Inc. v. Parisi*, No. 2020AP1446-OA (same).

balance of equities favors an injunction. *See, e.g., Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)). Petitioners' request here satisfies all four requirements.

A. Petitioners very likely will succeed on the merits.

Petitioners will very likely show that the challenged applications of Wis. Stat. § 165.08 violate the separation of powers. In the plaintiff-side civil actions at issue here, settlement authority falls within the executive branch's duty to execute the law. The legislative branch cannot constitutionally assume that executive function for itself, which is exactly what it has done through Wis. Stat. § 165.08's JCF consent provision.

1. The separation of powers prevents the legislative branch from participating in day-to-day executive branch decisions.

The Wisconsin Constitution separates the powers of state government power into three branches: "The legislative power shall be vested in a senate and assembly," "[t]he executive power shall be vested in a governor," and "[t]he judicial power of this state shall be vested in a unified court system." Wis. Const. art. IV, § 1, art. V, § 1, art. VII, § 2.

Each branch of government has exclusive core constitutional powers that reflect zones of authority upon which no other branch may intrude. *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999); *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 34, 387 Wis. 2d 511, 929 N.W.2d 209. When dealing with core powers, "any exercise of authority by another branch of government is

unconstitutional." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21 (citation omitted).

Relatedly, the constitutional separation of powers bars any part of the government from exercising authority that would create an improper concentration of power in a single branch. *Panzer v. Doyle*, 2004 WI 52, ¶ 52, 271 Wis. 2d 295, 680 N.W.2d 666; *see also Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶¶ 4–5, 376 Wis. 2d 147, 897 N.W.2d 384 (doctrine prevents the concentration of power in the same hands). This anti-aggrandizement principle guards against the "danger[ ] of congressional usurpation of Executive Branch functions." *Bowsher v. Synar*, 478 U.S. 714, 727 (1986); *see also Mistretta v. United States*, 488 U.S. 361, 382 (1989) (noting instances when the court "invalidated attempts by Congress to exercise the responsibilities of other Branches"). The legislative branch therefore "cannot interfere with, or exercise any powers properly belonging to the executive department." *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 448, 208 N.W.2d 780 (1973).

"'Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them.' Powers constitutionally vested in the legislature include the powers: 'to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; [and] to fix the limits within which the law shall operate.'" *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600 (alteration in original) (citations omitted). "Following enactment of laws, the legislature's constitutional role as originally designed is generally complete." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 182, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting); *see also Bowsher*, 478 U.S. at 733–34 ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the

execution of its enactment only indirectly—by passing new legislation." (citation omitted)).

Executive power, by comparison, is "the power to execute the laws." *Myers v. United States*, 272 U.S. 52, 117 (1926); *see also Palm*, 391 Wis. 2d 497, ¶ 175 ("The power to enforce and execute the law already enacted is given to the executive branch.") (Hagedorn, J., dissenting). The essence of execution of the law is to implement the legislative mandate, which includes interpreting the law and "us[ing] judgment and discretion" in the course of execution. *See Palm*, 391 Wis. 2d 497, ¶ 183 (Hagedorn, J., dissenting); *see also Bowsher*, 478 U.S. at 733; *Tetra Tech*, 382 Wis. 2d 496, ¶ 53.

In contrast to making general laws of prospective application—the core legislative function—the day-to-day application and enforcement of the law is squarely an executive function. "Our constitution's commitment to the separation of powers means the legislature should not, as a general matter, have a say in the executive branch's day-to-day application and execution of the laws. The legislature gets to make the laws, not second guess the executive branch's judgment in the execution of those laws." *Palm*, 391 Wis. 2d 497, ¶ 218 (Hagedorn, J., dissenting). Allowing the legislative branch to "subject[ ] executive branch enforcement of enacted laws to a legislative veto . . . turns our constitutional structure on its very head." *Id.*; *see also SEIU*, 393 Wis. 2d 38, ¶ 107 (permitting the legislative branch to "control the execution of the law itself" would "demote the executive branch to a wholly-owned subsidiary of the legislature").

2. Litigating the types of cases at issue here is a core executive function.

Litigation on the State's behalf—including whether to bring a case and how to resolve it—is part and parcel of the "day-to-day application and execution of the law." *Id.* As such, state litigation generally is "predominantely an executive function," not a legislative one. *SEIU*, 393 Wis. 2d 38, ¶ 63. That is why "[t]he legislature . . . is not the state's litigator-in-chief." *Palm*, 391 Wis. 2d 497, ¶ 235 (Hagedorn, J., dissenting).

As to the two types of plaintiff-side cases at issue here, litigation is a core executive function. In each type of case, the legislative branch has completed its constitutional role by enacting the substantive law that regulates private conduct or creating the program that the executive agency administers; the executive branch then uses litigation as a tool to execute its responsibilities under those statutes.

a. Civil enforcement litigation is a core executive function.

Litigating civil enforcement actions involves core executive functions in which the legislative branch has no constitutional role.

In this area, the legislative branch fulfills its constitutional function by enacting statutes regulating private conduct. When the legislative branch perceives a need to protect the public welfare, it may use its constitutional authority "to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; [and] to fix the limits within which the law shall operate." *Koschkee*, 387 Wis. 2d 552, ¶ 11 (citation omitted).

Once it enacts a civil regulatory statute using that power, "the legislature's constitutional role . . . is generally complete." *Palm*, 391 Wis. 2d 497, ¶ 182 (Hagedorn, J., dissenting). At that point, the "power to enforce and execute the law already enacted" is then "given to the executive branch." *Id.* ¶ 175. The "power to enforce" civil regulatory statutes entails one primary executive function: litigating enforcement cases against violators of those statutes.

The U.S. Supreme Court recognized the executive nature of civil enforcement actions in *Buckley v. Valeo*, 424 U.S. 1 (1976), a case rejecting on separation of powers grounds legislative control over the Federal Election Commission (FEC). Because the FEC had "direct and wide ranging" civil enforcement power, including the authority to itself initiate civil actions for various election law violations, the court held that Congress could not appoint FEC commissioners:

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. 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 111–12, 138 (citing U.S. Const. art. II, § 3).

The U.S. Supreme Court again recognized the "quintessentially executive" nature of civil enforcement litigation in *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020). There, it rejected Congress's ability to impose restrictions on the President's ability to remove the Consumer Financial Protection Bureau's (CFPB) director, again due in part to the CFPB's civil enforcement powers. The court emphasized how the

CFPB director "has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans" and thus can "bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions." *Id.* at 2200–01. This "enforcement authority," including "the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court" was "*a quintessentially executive power*." *Id.* at 2200 (emphasis added).

Likewise, in *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), the U.S. Supreme Court declined to allow judicial review of day-to-day decisions in civil enforcement actions because they rest on the "complicated balancing of a number of factors which are peculiarly within [an agency's] expertise," including:

> 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 requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all."

470 U.S. at 831. *Heckler* thus concluded that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831–32. The same is true vis-à-vis the legislative branch, whose expertise and constitutional role lies in enacting laws, not enforcing them.

The executive nature of initiating plaintiff-side civil actions parallels the executive nature of the power to begin criminal prosecutions. "[T]he Executive Branch has exclusive authority and absolute discretion to decide

whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see also Clinton v. Jones*, 520 U.S. 681, 718 (1997) ("Criminal proceedings . . . are public acts initiated and controlled by the Executive Branch.").[3] *Heckler* also recognized this parallel, noting that "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch."[4] 470 U.S. at 832.

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[3] The exceptions to this rule in Wisconsin are so-called "John Doe" criminal proceedings, which the judiciary itself may initiate. *See State v. Unnamed Defendant*, 150 Wis. 2d 352, 441 N.W.2d 696 (1989) (affirming constitutionality of "John Doe" criminal proceedings under Wis. Stat. § 968.26). But that exception embodies the long-standing recognition of a limited overlap between judicial and executive power in the area of individual criminal prosecutions. Wisconsin's constitutional tradition has not recognized a parallel overlapping of legislative and executive power in that area.

[4] Other areas of law also recognize the similarity of civil enforcement actions and criminal prosecutions. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 79 (2013) (federal courts must abstain from considering challenges to state civil enforcement actions that are "akin to a criminal prosecution"); *Butz v. Economou*, 438 U.S. 478, 515 (1978) (for immunity purposes, the decision of agency officials to initiate administrative proceedings "is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution"); *Fry v. Melaragno*, 939 F.2d 832, 837 (9th Cir. 1991) (extending prosecutorial immunity to a "government attorney's initiation and handling of civil litigation in a state or federal court . . . [g]iven the similarity of functions of government attorneys in civil, criminal and agency proceedings"); *People v. Cimarusti*, 146 Cal. Rptr. 421, 427 (Cal. Ct. App. 1978) ("Although the prosecution in this case is civil in nature, resulting in the imposition of civil penalties rather than criminal sanctions, the situation is analogous to a criminal

Just as decisions to *begin* civil enforcement actions are quintessentially executive, so too are the decisions whether, when, and how to *end* them. The fundamental differences between legislative and executive power necessarily mean that decisions at every stage of such litigation, whether initiation, day-to-day case management, or settlement, reflect executive functions. Again, the legislative power is to create laws, not execute them. As one court rightly put it, "[t]he primary function of a settlement agreement or consent decree, like that of a litigated judgment, is to enforce the [legislative] will as reflected in the statute." *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1169 (10th Cir. 2004). Civil enforcement settlements thus embody the executive function of bringing the "coercive power of the state to bear on . . . private citizens and businesses" through lawsuits as an "ultimate remedy for a breach of the law." *Seila Law, LLC*, *v. Consumer Fin. Prot. Bureau,* 140 S. Ct. 2183, 2200 (2020); *Buckley*, 424 U.S. at 138.

The executive nature of resolving state litigation is well-established in the criminal context, and those same principles apply squarely to the civil context. This Court has recognized that prosecutors have "great discretion in [the] decision to charge . . . [and the] negotiation of plea bargains." *State v. Conger*, 2010 WI 56, ¶ 20, 325 Wis. 2d 664, 797 N.W.2d 341 (alteration in original) (citation omitted).[5]

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proceeding with respect to the division of power between the executive and judicial branches of the government.").

[5] It is true that the judicial branch has some authority to accept or reject plea agreements. *See Conger*, 2010 WI 56, ¶¶ 19–27, 325 Wis. 2d 664, 797 N.W.2d 341. As with the narrow judicial role in in initiating criminal prosecutions, judicial review of plea bargains recognizes a limited overlap between judicial and executive power in individual criminal prosecutions. But there is

Courts in many other states agree that plea bargaining is an executive function.[6] Just as executive branch prosecutors must use their "great discretion" to balance many factors when deciding whether a given plea bargain would serve the public interest, so too does the executive branch when considering whether, when, and how to settle a civil enforcement case. In both settings, these case-ending decisions are quintessentially executive ones in which the legislative branch has no constitutional role.

b. Prosecuting executive agency claims is a core executive function.

Prosecuting claims on behalf of executive state agencies also involves core executive functions. As in the civil enforcement context, the legislative branch's constitutional role here has ended before any such litigation begins.

The legislative branch creates agencies and imbues them with powers and duties. "[A]dministrative agencies are

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no recognized overlap of legislative and executive power in that area, either.

[6] *See, e.g.*, *State v. Rice*, 246 P.3d 234, 241 (Wash. Ct. App. 2011), *aff'd* 279 P.3d 849 (2012) ("Deciding whether to plea bargain with a criminal defendant is a function delegated entirely to the executive branch."); *State v. Donald*, 10 P.3d 1193, 1204 (Ariz. Ct. App. 2000) ("Discretion over plea bargaining is a core prosecutorial power . . . ."); *People v. Cimarusti*, 146 Cal. Rptr. 421, 427 (Cal. Ct. App. 1978) ("It is equally the function of the executive to engage in any negotiation with the defense by which a lenient disposition of the charge made is secured without trial."); *Commonwealth v. Corey, Ky.*, 826 S.W.2d 319 (Ky. 1992) ("[W]hether to engage in plea bargaining is a matter reserved to the sound discretion of the prosecuting authority.").

the creatures of the Legislature," *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 508, 220 N.W. 929 (1928), and their "powers, duties and scope of authority are fixed and circumscribed by the legislature and subject to legislative change," *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 56, 158 N.W.2d 306 (1968). Likewise, the legislative branch funds agency operations through the biennial budget process. *See* Wis. Stat. §§ 16.43–47.

Once created by statute, "[a]gencies are considered part of the executive branch." *Koschkee*, 387 Wis. 2d 552, ¶ 14. An agency's day-to-day job is a classic executive function: "to implement and carry out the mandate of the legislative enactments . . . and stop at the limits of such legislative mandate or direction." *DOR v. Nagle-Hart, Inc.*, 70 Wis. 2d 224, 226–27, 234 N.W.2d 350 (1975). Therefore, "when an administrative agency acts . . . , it is exercising executive power." *SEIU*, 393 Wis. 2d 38, ¶¶ 96–97[7]; *see also id.* ¶ 97 ("The executive oftentimes carries out his functions through administrative agencies."). An agency also exercises executive functions when administering funds the legislative branch has appropriated to it through the biennial budget. *See Bowsher*, 478 U.S. 714 (rejecting legislative branch participation in federal budget decisions, after the budget's enactment).

The executive nature of agency action makes sense in our constitutional structure, since once the legislative branch enacts the statutes creating agencies and the programs they execute, its "constitutional role . . . is

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[7] The one exception is when an agency "exercise[s] its borrowed rulemaking function," which is a "limited legislative power" that is not at issue here. *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶¶ 97–98, 393 Wis. 2d 38, 946 N.W.2d 35.

generally complete." *Palm*, 391 Wis. 2d 497, ¶ 182 (Hagedorn, J., dissenting).

When an agency engages in the executive function of administering programs under its charge, it sometimes employs plaintiff-side litigation as a tool to carry out those responsibilities. Typical claims are common-law suits based on breach of contract or tort. For instance, the Department of Transportation (DOT) is charged with maintaining certain bridges under Wis. Stat. § 84.15; when negligent drivers damage those bridges, DOT must repair the bridges and find funds to do so. Likewise, the Department of Administration (DOA) may contract to purchase certain goods and services for state agencies. *See* Wis. Stat. §§ 16.705, 16.71, 16.72. Breaches may occur in these state contracts and thereby injure the State, just as sometimes happens during contractual relationships between private parties.

These examples illustrate how executive agencies must decide whether and how to utilize litigation as part of carrying out the programs they administer and managing their budgeted funds. Just as an agency must use its discretion and resources when fixing a given bridge or entering a given contract, it must do the same when litigating damage to that bridge or a breach of that contract. Both executive functions demand the cost-benefit analysis agencies use to "implement and carry out the mandate of . . . legislative enactments." *Nagle-Hart*, 70 Wis. 2d at 226–27.

Litigation which arises directly out of the agency's day-to-day implementation of the law therefore represents a core executive function. Just as with civil enforcement litigation, the maxim that "it is to the [executive branch], and not to the [legislative branch], that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed'" applies squarely here, too. *Buckley*, 424 U.S. at 138 (citation omitted).

3. Act 369 unconstitutionally transfers executive power over settlements of these two categories of cases to the legislative branch.

Through Act 369's amendment to Wis. Stat. § 165.08, the Legislature unconstitutionally usurped the executive branch's power to execute the law in the two categories of state litigation addressed above: (1) civil enforcement actions, such as environmental or consumer protection laws (*see* Pet. ¶¶ 29–54); and (2) civil actions on behalf of executive branch agencies relating to programs they administer by statute (*see* Pet. ¶¶ 55–63).[8]

In both categories, Wis. Stat. § 165.08 unlawfully allows the legislative branch to "subject[ ] executive branch enforcement of enacted laws to a legislative veto," thereby "turn[ing] our constitutional structure on its very head." *Palm*, 391 Wis. 2d 497, ¶ 218 (Hagedorn, J., dissenting). It accomplishes this unconstitutional result in two basic ways.

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[8] Act 369 also affects other categories of state litigation that are not at issue in this as-applied challenge. Although most of those applications likely are also unconstitutional, this petition addresses two sets of violations that are particularly obvious, categorical, and greatly impact state operations. And, again, this petition does not challenge the application of Wis. Stat. § 165.08 to settlements that would concede the invalidity of state law, assuming that a settlement could ever effectively make such a concession.

a. Section 165.08 transfers to the legislative branch the executive function of deciding whether, when, and how to settle plaintiff-side cases.

First, and most obviously, Wis. Stat. § 165.08 empowers the legislative branch to "second guess the executive branch's judgment in the execution of [the] laws" by rejecting the executive branch's decisions about whether, when, and how to settle plaintiff-side civil cases. *Id.* Put differently, Wis. Stat. § 165.08 "grant[s] the legislature a seat in every executive branch enforcement action . . . in the state of Wisconsin." *Palm*, 391 Wis. 2d 497, ¶ 239 (Hagedorn, J., dissenting). That violates the separation of powers by transferring a core executive power over cases in these two categories to the legislative branch.

JCF's new "litigator-in-chief" power, *id.* ¶ 235, to reject a proposed settlement necessarily gives the legislative branch control over executive branch decisions regarding (1) whether to resolve plaintiff-side cases through a settlement rather than litigating them to a final judgment; (2) the proper timing of such settlements; and (3) the remedies contained in such settlements.

None of those decisions implicate the legislative branch's core constitutional role "'to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; [and] to fix the limits within which the law shall operate.'" *Koschkee*, 387 Wis. 2d 552, ¶ 11. Instead, JCF now "[has] a say in the executive branch's day-to-day application and execution of the laws." *Palm*, 391 Wis. 2d 497, ¶ 218 (Hagedorn, J., dissenting). That legislative assumption of executive authority violates the separation of powers.

An illustrative example is the Department's pending consumer protection enforcement action in *State of Wisconsin v. Engine & Transmission World, LLC,* No. 17-CX-4 (Wis. Cir. Ct. Milwaukee Cty.). In that civil enforcement matter, the Department alleges that the defendant engaged in fraudulent misrepresentations and unfair billing practices when selling used automobile parts, thereby violating Wis. Stat. §§ 100.18(1), 100.18(10r), and 100.195(2)(a). (Pet. Ex. A.) As relief, the department seeks an injunction to end these violations, restitution on behalf of injured Wisconsinites, and forfeitures. (Pet. Ex. A.)

Every litigation decision in *Engine & Transmission World*—just as in any civil enforcement matter—reflects careful exercises of executive judgment and discretion. From the decision to file to the decision to settle, the Department must continuously balance many competing, complex factors to execute and enforce consumer protection laws in the public interest.

When the Department first investigated this matter, it had to decide whether to initiate an enforcement action. Like criminal prosecutors who evaluate a potential criminal prosecution, the Department considered the strength of the potential civil prosecution, the gravity of the alleged harms, the Department's available resources, and the overall public interest that prosecution would serve—the same complex balancing of competing factors recognized in *Heckler*, 470 U.S. at 831. (Finkelmeyer Aff. ¶ 4.)

And now that civil enforcement litigation has commenced, the Department must decide whether, when, and how to resolve it. This requires the Department to continually consider whether the public interest favors litigation through final judgment or a settlement. Litigation may reveal weaknesses that increase the risk of an adverse final judgment; the Department may seek to avoid those

risks through a settlement. Or the defendant may decide that more litigation is not in its best interest and offer to settle the matter on favorable terms. And, again, the Department must consider the resources required to pursue the case to a litigated final judgment. Given limited state resources, continuing to litigate one civil enforcement action may mean that another potential defendant cannot be pursued. (Finkelmeyer Aff. ¶¶ 5–6.)

When the Department decides that a civil enforcement case like *Engine & Transmission World* should be resolved through settlement, determining the proper timing is crucial. Litigation often reaches a critical moment best suited for consensual decision-making, a window of opportunity that may remain open only for a short time. (Finkelmeyer Aff. ¶ 7.) The Department has recently litigated enforcement matters where that window stayed open only for a period of days. (Finkelmeyer Aff. ¶ 9.) Just as important, delayed settlements necessarily defer monetary and equitable relief that injured members of the public would otherwise receive earlier.

Selecting the proper remedies in any settlement of *Engine & Transmission World* would represent another exercise of executive judgment about how best to serve the public interest. Should the Department demand restitution for people who bought used parts due to the target's alleged fraudulent misrepresentations and unlawful business practices? Or would injunctive relief that permanently alters those alleged fraudulent business practices suffice? And what about forfeitures?

Settling any civil enforcement case requires this complex analysis, since Wisconsin law supplies many remedial options, including injunctive-type relief, restitution, forfeitures, rescission, and cost recovery for prosecuting agencies. The Department must choose the

measures that best address the violations at issue, accounting for the defendant's particular situation, the need for quick action, the time needed to effectuate a particular remedy, and the trade-offs of different solutions. (Finkelmeyer Aff. ¶ 10.)

In sum, in both categories of cases at issue here, the legislative branch has finished its job well before civil litigation begins—in the civil enforcement context by enacting statutes to protect the public, and in the executive agency context by enacting the statutes creating agencies and the state programs they execute. Whether a settlement of ensuing litigation involves consumer protection violations, an agency's breach of contract claim, or any other claim in the two categories at issue, it is still the same "quintessentially executive" function recognized in *Buckley*, *Seila Law*, and *Heckler*.

As applied to these two types of cases, Wis. Stat. § 165.08's JCF consent provision thus unconstitutionally transfers the executive function of settling litigation to the legislative branch.

b. Section 165.08 injects the legislative process into an executive function that requires dispatch and confidentiality.

Section 165.08 "turns our constitutional structure on its very head," *Palm*, 391 Wis. 2d 497, ¶ 218 (Hagedorn, J., dissenting), in a second, independent way: by injecting incompatible legislative procedures into the executive function of prosecuting plaintiff-side civil litigation. Simply put, legislative review through JCF hearings involves a deliberative and public process that is incompatible with the dispatch and confidentiality necessary for litigating plaintiff-side civil cases. This incompatibility further shows how the statute transfers a classic executive function to the legislative branch.

JCF handles review of proposed settlements under Wis. Stat. § 165.08 using the procedural requirements of Wis. Stat. § 13.10. Those procedures include noticed public hearings (Wis. Stat. § 13.10(3)), roll call votes (Wis. Stat. § 13.10(4)), scheduling if and when the JCF's cochairs decide to meet (Wis. Stat. § 13.10(1)), and waiting periods after any vote (Wis. Stat. § 13.10(4)).

These procedures necessarily entail delay and publicity that make sense for the functions of a legislative committee like JCF but are fundamentally inconsistent with the executive function of conducting state litigation—especially settlement decisions. As Alexander Hamilton recognized, "deliberation and circumspection" is desirable in the legislative branch, where rules that prospectively govern conduct are made, because "promptitude of decision is oftener an evil than a benefit." *The Federalist No. 70*, at 425 (Clinton Rossiter ed., 2003). In other words, public input, transparency, and careful consideration are necessary to produce good laws.

But those same features can hinder executive branch decision-making. Unlike the "deliberation and circumspection" needed for wise legislative action, effective executive action can require "vigor and expedition" and even, sometimes, "secrecy." *The Federalist No. 70*, at 425 (Clinton Rossiter ed., 2003). Imposing legislative processes on some such executive functions is therefore "unnecessary," "unwise," and can lead to "pernicious" results. *Id.*

Handling plaintiff-side civil litigation—and particularly negotiating settlements of those cases—is one executive function in which speed and confidentiality are particularly essential. Settlement opportunities may arise unexpectedly or remain open only briefly. The Department and its client agencies often must act quickly to seize those opportunities. (Finkelmeyer Aff. ¶¶ 7–9, 21–22, 24.) Moreover, effective settlement negotiations require confidential communications with both clients and opposing parties that are fundamentally incompatible with the public nature of the legislative process. (Finkelmeyer Aff. ¶¶ 16–19.)

The speed and confidentiality required for settlement negotiations underscore both the executive nature of these functions and how transferring them to the legislative branch violates the constitutional separation of powers.

c. Settlements in these two categories of cases do not implicate any institutional legislative interests.

No arguable institutional legislative interest is implicated by settling the plaintiff-side cases at issue here. In none of them does the Department represent a "legislative official, employee, or body," and in none of them is "a legislative body . . . the principal authorizing the attorney general's representation in the first place." *SEIU*, 393 Wis. 2d 38, ¶ 71. Likewise, these cases do not involve "requests for the state to pay money to another party," *id.* ¶ 69, unlike cases in other states where legislative approval is required for defense-side settlements over certain dollar thresholds. *Cf. id.* ¶ 70.[9] Rather, these cases involve the Department's attempts to obtain relief *for* injured state agencies and the public at large. And this case does not challenge the application of Wis. Stat. § 165.08 to settlements that would concede the invalidity of state law, assuming that could ever happen. *Id.* ¶ 71.

Because the Legislature has no legitimate institutional interest in these "specific categor[ies] of applications," Wis. Stat. § 165.08 "[cannot] be constitutionally enforced under any circumstances" as to *any*

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[9] Wisconsin's statute that covers defense-side settlements—Wis. Stat. § 165.25(6)(a)1., which is not at issue here—is unlike these other states' statutes in that it does not require legislative consent for monetary settlements where the state agrees to pay money to another party. Moreover, Wisconsin funds those defense-side monetary settlements not through new legislative appropriations, but rather through a self-insurance program that state agencies finance using their existing appropriations. *See generally* Wis. Stat. § 16.865.

cases in these categories. *SEIU*, 393 Wis. 2d 38, ¶ 45.[10] In these applications, JCF's consent authority under Wis. Stat. § 165.08 violates the separation of powers by transferring the executive branch's settlement authority to the legislative branch.

B. The challenged applications of Wis. Stat. § 165.08 inflict irreparable harm on Petitioners for which they have no adequate remedy at law.

To obtain a temporary injunction, Petitioners must also "show that no adequate legal remedy is available, i.e., that the injury cannot be compensated by damages." *Kohlbeck v. Reliance Const. Co.*, 2002 WI App 142, ¶ 13, 256 Wis. 2d 235, 647 N.W.2d 277; *Allen v. Wisconsin Public Service Corp.*, 2005 WI App 40, ¶ 30, 279 Wis. 2d 488, 694 N.W.2d 420 ("Irreparable harm is that which is not adequately compensable in damages").

Damages (even assuming they were available here, which they are not) could not compensate Petitioners for the ongoing constitutional harms that Wis. Stat. § 165.08 has been inflicting for almost two years. Since late-December

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[10] This explains why the as-applied claims in the Petition should not be dismissed as was the facial challenge in *SEIU* to all of Act 369's litigation control provisions. Here, Petitioners do not seek to invalidate *every* application of Wis. Stat. §§ 165.08 and 165.25, as amended by Act 369. Rather, they seek to invalidate Wis. Stat. § 165.08's application to two specific categories of cases in which the Legislature has no legitimate institutional interest. *SEIU* recognized that approach as a valid type of as-applied challenge. 393 Wis. 2d 38 ¶¶ 45, 73; *see also Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 60, 376 Wis. 2d 147, 897 N.W.2d 384 (granting as-applied relief regarding a categorical subset of statutory applications).

2018, the legislative branch has unlawfully wielded executive powers, which in turn has impeded the executive branch's ability to execute the law by settling plaintiff-side civil litigation. Money cannot recompense a branch of state government that has, for years, lost a critical piece of its constitutional authority.[11]

These are not abstract harms—Act 369's transfer of executive authority to the legislative branch has harmed (and continues to harm) the Department, state agencies, and the public in very concrete ways.

First, and most obviously, Wis. Stat. § 165.08 strips the executive branch of its decision-making power over whether, when, and how to settle cases, a fundamental part of enforcing the law. In every single case the Department prosecutes in the two categories at issue, the executive branch can begin—but not end—the case as it sees fit. That necessarily alters the course of litigation in all these cases.

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[11] *See, e.g.*, *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) (explaining that the injury suffered by an unwarranted violation of separation of powers is "by its nature irreparable"); *State of N.Y. v. Dep't of Justice*, No. 18-cv-6741, 2018 WL 6257693, at *19 (S.D.N.Y. Nov. 30, 2018) (holding that the imposition of conditions that "violate the separation of powers" is "an irreparable 'constitutional injury' that cannot be adequately compensated by monetary damages"); *San Francisco v. Sessions*, No. 17-cv-04642, 2018 WL 4859528, at *30 (N.D. Cal. Oct. 5, 2018) (granting permanent injunction because challenged provisions "violate[] the separation of powers" and so have "caused and will continue to cause [the plaintiffs] constitutional injury"); 11A Wright & Miller, Federal Practice & Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

Second, the legislative processes required for JCF review are fundamentally incompatible with the executive function of settling cases. The timing and public nature of JCF proceedings can prevent the Department from acting with the dispatch and confidentiality needed during effective settlement negotiations. These problems are inherent in Wis. Stat. § 13.10, which require JCF to consider all matters in public hearings that occur either quarterly or upon the co-chairs' discretion.

The pace and public nature of JCF action create a significant dilemma for the Department in negotiating settlements: Either present JCF a fully negotiated settlement agreement or else publicly disclose confidential information to obtain pre-approval for a range of possible settlements. (Finkelmeyer Aff. ¶¶ 12, 15.)

The dilemma arises because the Department can effectively participate in fast-moving negotiations only if it has full authority to reach a final settlement. The Department can obtain that authority under Wis. Stat. § 165.08 only by seeking JCF's approval of settlement ranges before negotiations begin. But for the Department to obtain that pre-approval, it would typically have to reveal confidential case information at a public JCF hearing, including acceptable settlement ranges alongside the case's legal and factual strengths and weaknesses. (Finkelmeyer Aff. ¶ 16.)

Public disclosure of that highly sensitive information would cause two harms: it would jeopardize the State's negotiating position, and it would chill frank communication between the Department and its executive agency clients.

First, any effective negotiation requires a degree of secrecy incompatible with public discussion at a JCF hearing. The mere fact that the Department is even

considering settlement is highly confidential in many cases, and disclosure of that fact would impair the State's negotiating position. Moreover, the Department loses leverage when its settlement range is disclosed. If the other side knows that range, it can simply hold out for the lowest amount. The same happens if the Department publicly discloses its assessment of a case's strengths and weaknesses: the opposing party may use that information to insist on a lower settlement amount or lose interest in negotiating at all. (Finkelmeyer Aff. ¶ 17.)

Second, public disclosures would chill the confidential attorney-client relationship. The Department 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. (Finkelmeyer Aff. ¶ 18.) The attorney-client privilege "promote[s] 'full and frank communication' between client and attorney," in that "[c]lients [who are] aware that an attorney's disclosure waives the privilege may keep critical information from their attorney, thus thwarting the policy of the free flow of information that lies behind the attorney-client privilege." *Harold Sampson Children's Tr. v. The Linda Gale Sampson 1979 Tr.*, 2004 WI 57, ¶¶ 42–43, 271 Wis. 2d 610, 679 N.W.2d 794. Public disclosure of attorney-client settlement communications at JCF hearings would compromise the important goals the privilege serves.

Because of the need to maintain confidentiality, the Department has not publicly disclosed attorney work-product and attorney-client communications to JCF in order to obtain pre-negotiation settlement approval. (Finkelmeyer Aff. ¶ 19.) Instead, the Department has presented for JCF approval fully negotiated settlement agreements that reveal no confidential information. (Finkelmeyer Aff. ¶¶ 12, 19.) But that option is available only in some cases, those in

which the timing and other factors enable the Department to reach fully negotiated agreements before receiving JCF consent. (Finkelmeyer Aff. ¶ 20.)

In other cases that approach would not have been workable. (Finkelmeyer Aff. ¶ 21.) In those cases where Wis. Stat. § 165.08 would have applied, the Department either did not settle or else pursued a suboptimal option it would not otherwise have chosen. In some matters, the Department plans to take the case to trial where it might otherwise settle. (Finkelmeyer Aff. ¶ 22.) In others, where the Department previously would have sought a consent judgment to confirm a pre-litigation settlement, the Department has confined itself to a pre-suit resolution with no judicial enforcement to avoid even any potential application of Wis. Stat. § 165.08. These agreements have weaker enforcement mechanisms because there is no contempt remedy to enforce them. (Finkelmeyer Aff. ¶ 23.)

Moreover, it is only a matter of time before Wisconsin cannot join a settlement in a multi-party enforcement case because it cannot seek and obtain JCF's consent quickly enough. So far, in such cases where settlement negotiations occurred over a span of a few days, they either fell outside the scope of section 165.08 or did not successfully settle. (Finkelmeyer Aff. ¶ 24.)

Optimal settlement opportunities in cases like these might not come around again. If multiple states settle a case without Wisconsin, Wisconsin loses the settlement leverage provided by litigating alongside a coalition of plaintiffs. (Finkelmeyer Aff. ¶ 25.) What's more, Wis. Stat. § 165.08 means that Wisconsin's presence in multistate cases can hinder global settlement negotiations. If the Department cannot guarantee that Wisconsin will settle its claims—which it cannot, given JCF's veto power—a target seeking global peace may not be willing to settle with *any* state.

Given that possibility, some prospective co-plaintiffs have suggested that they will not join with Wisconsin in new multistate actions to avoid this problem. (Finkelmeyer Aff. ¶ 26.)

In sum, the harms described here arise on a regular basis and will continue arising as long as Wis. Stat. § 165.08 remains in effect. The Department is currently handling dozens of matters in the two categories at issue, and the statute will continue to hinder the Department's handling and prosecution of them all. (Finkelmeyer Aff. ¶ 27.)

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

These concrete, ongoing harms to Petitioners outweigh any harms that enjoining the challenged applications of Wis. Stat. § 165.08 may cause to Respondents. They will likely assert that enjoining a statute harms the public if the statute is ultimately upheld. *See, e.g.*, *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). But it would be inappropriate to always put a thumb on the scale in favor of only one branch of government—the legislative—during a separation-of-powers dispute like this one.

That is because a constitutional harm of the first magnitude must result when the legislative branch unlawfully usurps a core executive power. As this Court has said, "[t]he state suffers essentially by every . . . assault of one branch of the government upon another." *Gabler*, 376 Wis. 2d 147, ¶ 30 (citation omitted). The ongoing "assault" here, again, is Act 369's unlawful transfer of power to execute the law from Wisconsin's elected executive officials—its governor and attorney general—to the legislative branch.

That breach in the "central bulwark of our liberty," *SEIU*, 393 Wis. 2d 38, ¶ 30, harms the people of Wisconsin as much as (if not more than) enjoining a statute that has, at best, a slim chance at validity. To be sure, enjoining Act 369 would thwart the will of people's legislative representatives. *See Maryland*, 133 S. Ct. at 3. But so too has the statute thwarted the will of the people who elected a governor and attorney general in 2018, expecting them to enjoy the rightful range of executive powers that the Wisconsin Constitution provides. Both branches embody the people's will, and so there is no good reason to privilege one over the other when balancing the equities.

Simply put, if enjoining the challenged applications of Wis. Stat. § 165.08 would cause a harm of the first magnitude, so too has the separation of powers breach that Act 369 created almost two years ago.

At worst, the abstract constitutional harms to each branch would rest in equipoise and do not tilt the balance of equities in either direction. But after adding to the balance the concrete damage Wis. Stat. § 165.08 causes to the settlement process in these categories of cases, the equities tilt in Petitioners' favor. The statute compromises the executive branch's day-to-day ability to manage and resolve plaintiff-side civil cases in the public interest, threatening to delay or even derail settlements in many pending matters. And even when the Department can consummate settlements under Wis. Stat. § 165.08, they may be less optimal than if the Department had the appropriate executive power to execute the law. This undermines the public interest by harming both Wisconsin citizens and the executive agencies who receive less relief than they otherwise would in these plaintiff-side cases.

D. A preliminary injunction is necessary to preserve the pre-Act 369 status quo.

This Court sometimes—but not always—has also noted that "[t]emporary injunctions are to be issued only when necessary to preserve the status quo." *Werner*, 80 Wis. 2d at 520; *but see Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 22, 301 Wis. 2d 266, 732 N.W.2d 828 (only factors listed are likelihood of success on the merits, a likelihood of irreparable harm, and an inadequate remedy at law). To the extent this is a separate requirement, it also is met here.

The status quo, properly understood, must be the pre-Act 369 division of power between the legislative and executive branches, in which the legislative branch had not improperly arrogated executive power to execute the law. *See James v. Heinrich*, No. 2020AP1419-OA (Sept. 10, 2020 mem. op. at 5 n.4) (enjoining emergency order that had already been enacted, noting that status quo was state of affairs that existed before the challenged emergency order); *Shearer v. Congdon*, 25 Wis. 2d 663, 667–68, 131 N.W.2d 377 (1964) (affirming temporary injunction that reverted state of affairs to that which held prior to the defendants alleged unlawful conduct). A temporary injunction that bars the challenged applications of Wis. Stat. § 165.08 will restore, at least partly, the proper separation of powers that existed before Act 369.

CONCLUSION

The petition for an original action and motion for temporary injunction both should be granted.

Dated this 23rd day of November 2020.

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CERTIFICATION

I hereby certify that this memorandum conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9357 words.

Dated this 23rd day of November 2020.

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