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STATE OF WISCONSIN
IN SUPREME COURT

No. 2022AP0790

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

Plaintiffs-Respondents-Petitioners,

v.

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

Defendants-Appellants.

**MOTION TO TEMPORARILY ENJOIN WIS. STAT.
§ 165.08(1) AS APPLIED TO SETTLEMENTS IN TWO
CHALLENGED CATEGORIES OF ACTIONS
PENDING THIS COURT'S REVIEW**

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INTRODUCTION

In December 2018, the Wisconsin Legislature took for itself, through legislative committee veto power, control over the Department of Justice’s settlement of plaintiff’s-side civil actions—a usurpation unprecedented in Wisconsin history.

Six years later, this unconstitutional intrusion persists. It persists despite decisions over two years ago from the Dane County Circuit Court (Crawford, J., presiding) that Wis. Stat. § 165.08(1) violates the separation of powers as applied to two challenged categories of actions: (1) civil enforcement actions (Category 1), and (2) actions brought on behalf of an executive branch agency relating to programs the agency administers (Category 2). It persists despite this Court’s recent holding in *Evers v. Marklein* that a legislative committee cannot hold a veto power over the executive branch’s execution of enacted law.

In addition to granting their petition for review, Attorney General Kaul, the Department of Justice, Governor Evers, and Department of Administration Secretary Blumenfeld (“Petitioners”) ask this Court to temporarily enjoin Wis. Stat. § 165.08(1) in the two challenged categories during the pendency of this Court’s review. The Legislature has never disputed that settling these categories of actions constitutes *executing* the law. Until this Court resolves the appeal, the power to execute the law should remain in the hands of the co-equal branch that the People of Wisconsin, through the Wisconsin Constitution, have entrusted with it.

RELEVANT BACKGROUND

Petitioners’ petition for review sets forth the relevant background of the Legislature’s amendment to create Wis. Stat. § 165.08(1) through 2017 Wis. Act 369, this Court’s decision in *SEIU*, and the litigation of the merits below.

Here, Petitioners briefly discuss the background regarding the stays obtained by the Legislature and Petitioners' motions to lift those stays following this Court's decision in *Evers v. Marklein* ("*Evers I*"), 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395.

I. The Legislature sought and obtained stays pending appeal in 2022.

Following the circuit court's May and June 2022 decisions and orders holding that Wis. Stat. § 165.08(1) is unconstitutional as to Category 1 and Category 2 actions, respectively, the Legislature sought and obtained stays of those decisions pending appeal. The circuit court denied the Legislature's motion for a stay pending appeal as to Category 1 (civil enforcement) but granted it as to Category 2 (executive agency program administration). (R. 152; 154.) The court of appeals reversed the partial denial and granted the Legislature a stay pending appeal as to Category 1 actions, as well. (Ct. App. Stay Order, Aug. 17, 2022.)

II. Following this Court's 2024 decision in *Evers I*, Petitioners moved to lift those stays.

Two years later, this Court issued a decision in *Evers I*, holding that the Wisconsin Constitution's separation of powers prohibited the Joint Committee on Finance (JCF) from having the power to veto executive branch decisions about how to carry out a program the agency was statutorily charged to administer. 412 Wis. 2d 525.

In light of *Evers I*, Petitioners filed a motion with the court of appeals to lift the stays of the circuit court's final orders. They also asked the court of appeals to construe their motion as a notice of supplemental authority under Wis. Stat. § (Rule) 809.19(10). They explained how *Evers I* altered the balancing of the stay factors under *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995), and that in light

of *Evers I*, this appeal could now be resolved on a summary, expedited basis.

The Legislature opposed lifting the stays and characterized *Evers I* as limited to a prohibition on the Legislature's blocking the spending of executive branch funds, not interference with the executive branch's execution of the law. (Leg. Ct. App. Resp. Opp. Lifting of Stays at 19–20.) After waiting over a month without a decision on their motion, Petitioners filed a motion with this Court on October 23, 2024, seeking to lift the stays pending appeal and for consideration of assumption of jurisdiction of the appeal.

On October 25, 2024, the court of appeals issued a 2–1 order “deny[ing] the respondents’ motion to lift the stays pending appeal” and explaining that “[a] decision from this court in this appeal will be released forthwith,” which would “offer further explanation as to why the motion to lift the stays is denied.” (Ct. App. Oct. 25, 2024, Order.) On November 4, 2024, the Legislature filed its response in this Court to Petitioners’ motion.

On December 2, 2024, the court of appeals issued a split merits decision reversing the circuit court. The court did not issue a separate order explaining its decision on Petitioners’ motion to lift the stays. In footnote 11 of the decision, the majority said that it denied lifting the stays because *Evers I*: (1) did not overrule *Serv. Emps. Int’l Union, Local 1 v. Vos* (“*SEIU*”), 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, (2) applies “after the legislative process has been completed” and does not undermine the presumption of constitutionality, (3) does not address the Legislature’s constitutional role in settling litigation, and (4) involved different facts. *Kaul v. Legislature*, No. 2022AP790, 2024 WL 4926387, ¶ 13 n.11 (Wis. Ct. App. Dec. 2, 2024) (recommended for publication) (citation omitted); (Pet.-App. 10). The court did not undertake any weighing of the stay factors under *Gudenschwager*.

This Court has not ruled on Petitioners' motion to lift the stays. In light of the court of appeals' decision, Petitioners now instead seek a temporary injunction of Wis. Stat. § 165.08(1) in the challenged categories.

ARGUMENT

This Court should temporarily enjoin Wis. Stat. § 165.08(1) as to settlements in the two challenged categories of actions during the pendency of this Court's review.

The Legislature has never disputed that settling the categories of plaintiff's-side civil actions at issue here constitutes *executing* the law. The court of appeals' 2-1 decision upholding the law in these categories to allow JCF to veto that executive action flies in the face of the Wisconsin Constitution's separation of powers.

As Judge Neubauer's dissent explains, the court of appeals' decision mistakenly reads this Court's decision in *SEIU* as having decided the constitutionality of Wis. Stat. § 165.08(1) as applied to the two categories of actions here and as supporting a constitutional power for the Legislature to involve itself in other branches' decisions that may affect moneys recovered for state funds or programs. This Court expressly emphasized in *SEIU* that it was not doing the former, and it certainly did not do the latter.

Along with granting their petition for review, Petitioners also ask this Court to temporarily enjoin Wis. Stat. § 165.08(1) as applied to settlements in the categories of (1) civil enforcement actions and (2) actions the Department of Justice prosecutes on behalf of executive branch agencies relating to their administration of programs.

A. This Court has broad authority to grant interim relief pending its review, including a temporary injunction. Such interim relief is particularly important in separation of powers cases.

This Court has appellate jurisdiction and superintending and administrative authority over all Wisconsin courts. Wis. Const. art. VII, § 3. Article VII, section 3's grant of superintending and administrative authority over all state courts "is unlimited in extent" and "indefinite in character." *State v. Jennings*, 2002 WI 44, ¶ 13, 252 Wis. 2d 228, 647 N.W.2d 142 (citation omitted). Whether this Court "choose[s] to exercise [its] supervisory authority in a given situation is thus a matter of 'judicial policy rather than one relating to the power of this court.'" *In re Jerrell C.J.*, 2005 WI 105, ¶ 41, 283 Wis. 2d 145, 699 N.W.2d 110 (citation omitted).

In conjunction with this Court's broad constitutional authority over lower courts, this Court may, among other things, "grant an injunction," "[s]tay execution or enforcement of a judgment or order," or "[m]ake any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered." Wis. Stat. § 808.07(2)(a)1., 3.

This Court's exercise of that power is particularly important in the context of a separation of powers challenge between co-equal branches. It has a duty to "be assiduous in patrolling the borders between the branches' because the separation of powers doctrine 'provides structural protection against depredations on our liberties.'" *Evers I*, 412 Wis. 2d 525, ¶ 31 (citation omitted).

B. This Court should temporarily enjoin Wis. Stat. § 165.08(1) as applied to settlements in the two challenged categories pending this Court’s review.

This Court should temporarily enjoin Wis. Stat. § 165.08(1) as to settlements in the two challenged categories pending this Court’s review.

A temporary injunction is warranted where the movant shows that (1) it has a reasonable probability of success on the merits; (2) it is likely to suffer irreparable harm absent the temporary injunction; (3) it has no other adequate remedy at law; and (4) a temporary injunction is necessary to preserve the status quo. *SEIU*, 393 Wis. 2d 38, ¶ 93. Injunctive relief “is addressed” to the court’s “sound discretion”; “competing interests must be reconciled” and Petitioners must satisfy the court that “on balance equity favors issuing the injunction.” *Pure Milk Products Co-op. v. Nat’l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). The equities here favor granting a temporary injunction pending this Court’s review.

1. Evers I confirms that Petitioners will succeed on the merits before this Court.

First, Petitioners have a very strong likelihood of success on the merits. *SEIU*, 393 Wis. 2d 38, ¶ 93.

In *Evers I*, this Court recognized that the executive branch has the “core power” to “ensure [that] the laws are faithfully executed,” and that in “executing the law, the executive branch must make decisions about how to enforce and effectuate the laws.” 412 Wis. 2d 525, ¶¶ 16, 18. It explained that once the Legislature writes a generally applicable law, its constitutional role ends: “Once the legislature passes a bill that is signed by the governor and becomes law, ‘the legislature plays no part in enforcing our statutes.’” *Id.* ¶ 23 (citation omitted).

So, while the Legislature may constitutionally limit the executive branch's exercise of authority through the "text of the statutes enacted," *id.* ¶ 16, once it does so, it cannot "insert itself into the machinery of the executive branch" to try and control how the executive branch carries out the law. *Id.* ¶23. This Court held that the challenged statutes there—which gave JCF veto power over the Department of Natural Resources' execution of a land-stewardship program—did exactly that, in violation of the Wisconsin Constitution, by "effectively creat[ing] a legislative veto" that allowed JCF to "interfere with and even override the executive branch's core power of executing the law." *Id.* ¶ 24.

Here, the Legislature has never disputed that settling the two categories of plaintiff's-side civil actions constitutes *executing* the law. It has conceded that Wis. Stat. § 165.08(1) leaves the executive branch with no ability to override JCF. (R. 129:59.) The Legislature has thus taken for itself, through JCF, complete veto power over whether, when, and how the executive branch executes the law through settling these categories of actions. Particularly in light of *Evers I*, that fact alone demonstrates that Petitioners have a strong likelihood of success.

The court of appeals majority's misunderstanding of the "power of the purse" underscores the point. Looking to *SEIU*, the court of appeals held that the Legislature has a constitutional role in overseeing "other sources of income" to balance the budget, which may include moneys recovered for state funds or programs through plaintiff's-side litigation. *Kaul*, 2024 WL 4926387, ¶¶ 27–33; (Pet.-App. 17–21). This conclusion fails for three fundamental reasons.

First, *SEIU* did not hold that the Legislature may have a shared constitutional role in settlement of plaintiff's-side litigation based on its "power of the purse." It recognized a potential interest only as to some defense-side settlements, which might in rare circumstances require the payment of

money impacting the Legislature’s appropriation power. *SEIU*, 393 Wis. 2d 38, ¶¶ 68–69 (citing Wis. Const. art. VIII, § 2 (“[n]o money shall be paid *out* of the treasury except in pursuance of an appropriation by law”)).

Second, the court of appeals’ reasoning assumes that the Legislature may balance the budget not through lawmaking, but rather through a legislative committee veto of the executive branch’s execution of the law in individual cases. The majority interpreted Wis. Const. art. VIII, § 5, which requires the Legislature to levy taxes to cover the State’s expenses, to mean “that the legislature must . . . oversee ‘other sources of income’—including settlement proceeds.” *Kaul*, 2024 WL 4926387, ¶ 31; (Pet.-App. 20 (citation omitted)).

This Court rejected the same argument in *Evers I*. There too, the Legislature argued that its constitutional powers to appropriate money from the state treasury under article VIII, section 2, and responsibility to impose a tax where needed to balance the budget under article VIII, section 5, made the JCF veto power a constitutionally proper legislative role, at least where “high-value sums [are] at stake.”¹ This Court said no: “[t]he constitutional text belies this argument. ‘No money shall be paid out of the treasury except in pursuance of an *appropriation by law*.’” *Evers I*, 412 Wis. 2d 525, ¶ 18 (quoting Wis. Const. art. VIII, § 2). The Legislature exercises its constitutional role to appropriate state funds and balance the budget via taxation by lawmaking, not by controlling the executive branch’s execution of the law through a legislative committee veto. *Id.* ¶¶ 21, 24.

¹ See Brief of Respondents and Intervenor-Respondent Wisconsin State Legislature at 32, *Evers v. Marklein*, 2024 WI 31, 412 Wis. 2d 525, 8 N.W.2d 395, <https://cefiling.wicourts.gov/document/eFiled/2023AP002020/777288> (last visited Dec. 5, 2024).

The court of appeals held that *Evers I* is different because that case “involved funds that had already been appropriated by the legislature for use by an executive agency.” *Kaul*, 2024 WL 4926387, ¶ 31 n.17; (Pet.-App. 20). The majority’s apparent assumption was that the separation of powers protects only the executive branch’s spending of dollars, not other types of actions. But *Evers I* did not limit the executive branch’s core role to spending money, and no constitutional principle would so confine it.

Third, the court of appeals’ majority equates resolutions of individual defendants’ violations of law with taxation, presenting a whole separate constitutional violation. The court of appeals majority asks how the Legislature can perform its responsibilities under article VIII, Section 5, to calculate how much income is needed to cover expenses and levy taxes if the budget is deficient “without taking into account settlement proceeds?” *Kaul*, 2024 WL 4926387, ¶ 31; (Pet.-App. 20). This cannot be right, because the Wisconsin Constitution provides that the “rule of taxation shall be uniform.” Wis. Const. art. VIII, § 1. Even if the separation of powers were erased, the Legislature could not use control over litigation to fill budget holes. Settlements remediate past wrongdoings based on a defendant’s particular conduct and the harm to be addressed. They are not a version of non-uniform “taxes” for the Legislature to collect.

If this Court needed an example of the perils that follow from “the same persons who have the power of making laws to have also in their hands the power to execute them,” *Evers I*, 412 Wis. 2d 525, ¶ 20 (citation omitted)—a danger our separation of powers doctrine protects against—that outcome would be a prime one.

2. Petitioners and the Wisconsin public will suffer irreparable harm absent a temporary injunction.

Second, Petitioners and the Wisconsin public will suffer irreparable harm during the pendency of this Court's review absent a temporary injunction. *SEIU*, 393 Wis. 2d 38, ¶ 93.

The Wisconsin Constitution prohibits the Legislature from usurping executive power, both to ensure that (1) the executive branch can *execute* the laws—which necessarily requires an ability to “make decisions about how to enforce and effectuate the laws,” *Evers I*, 412 Wis. 2d 525, ¶¶ 16, 21—and (2) to ensure the preservation of the liberty of the people. *Id.* ¶ 20. An ongoing violation of our state constitution's separation of powers imposes irreparable harm both to the co-equal branch whose power has been usurped and to the Wisconsin public, which endures one branch of their government acting with power the people did not give it at the “threat” of their “liberty.” *Id.* ¶ 27.

This harm also reveals itself through the ramifications for state litigation since the law's passage. Below, primarily in briefing on the Legislature's motion for stay, Petitioners presented uncontroverted evidence that Wis. Stat. § 165.08(1) has affected the types of settlements the Department enters into, especially in multi-state civil enforcement actions, resulting in less desirable outcomes for the State (R. 145:15–16, 21–23); that the law has required consideration of JCF's potential preferences in deciding whether to prosecute or settle a civil action (R. 73:9–10; 97:12–15); that the Department has been asked not to participate in a multistate action given the uncertainties of JCF review (R. 145:13); that mediations are less effective because the Department does not have final settlement authority during the mediation

itself (R. 97:14, 16; 145:11, 14)²; that some defendants' unwillingness to publicly reveal confidential negotiations at a public legislative committee meeting has delayed settlements, including one multi-million dollar settlement in a case brought by an agency (R. 73:14); and required the Department to dedicate resources to unnecessary litigation and trial preparation (R. 97:13–14).

Particularly where *Evers I* makes so clear that the Legislature has no legal leg left to stand on, these harms should not continue during the remaining pendency of the appeal.

3. Petitioners have no other adequate remedy at law.

Without a temporary injunction from this Court, Petitioners have no other adequate remedy at law to exercise their constitutional power in settling these categories of civil actions pending this Court's review. *SEIU*, 393 Wis. 2d 38, ¶ 93. Given the current posture of this case, no Court other than this one could issue this temporary injunctive relief.

² The court of appeals majority's dismissal of this practical ramification further illustrates the point. It asserts that this ramification "seem[s] far-fetched" because "a good negotiator could use the approval process to their benefit during a mediation." *Kaul v. Legislature*, No. 2022AP790, 2024 WL 4926387, ¶ 40 n.21, (Wis. Ct. App. Dec. 2, 2024), (Pet.-App. 25). Beyond the fact that there is no evidence in the record supporting the court's view of how mediation is working with Wis. Stat. § 165.08(1) in place, the Department cannot agree to *any* plaintiff-side settlement during mediation because it does not have final settlement authority.

4. The Wisconsin Constitution's separation of powers is—and should remain—the status quo.

Lastly, a temporary injunction is necessary to preserve the status quo: the Wisconsin Constitution's separation of powers, as recently re-affirmed by this Court in *Evers I. SEIU*, 393 Wis. 2d 38, ¶ 93. While preserving the status quo most often requires leaving a challenged statute in place, *Evers I* provides otherwise for a statute that controls what is undisputedly execution of the law through legislative committee veto. The status quo here is that, consistent with the text of the Wisconsin Constitution, “[o]nce the legislature passes a bill that is signed by the Governor and becomes law, ‘the legislature plays no part in enforcing our statutes.’” *Evers I*, 412 Wis. 2d 525, ¶ 23 (citation omitted). The status quo is that the Legislature cannot pass a statute that takes from the Executive Branch, and gives to JCF, a “legislative veto” that allows JCF to “interfere with and even override” Petitioners’ power to execute the laws. *Id.* ¶ 24.

* * *

Despite Petitioners' best efforts and case law in their favor, the statute's unconstitutional intrusion in these categories has persisted for nearly six years. All four factors support this Court's issuance of a temporary injunction of Wis. Stat. § 165.08(1) as to settlements in the two categories of actions during the pendency of this Court's review.³

CONCLUSION

During the pendency of this Court's review, this Court should temporarily enjoin Wis. Stat. § 165.08(1) as applied to the Department's resolution of (1) civil enforcement actions and (2) actions the Department prosecutes on behalf of executive branch agencies relating to programs the agencies are charged with administering. If this Court concludes a stay is necessary to effectuate the temporary injunction, it should also stay the court of appeals' order reversing and/or any pending publication order from the court of appeals.

³ This Court's issuance of a temporary injunction of Wis. Stat. § 165.08(1) in the challenged categories would control, notwithstanding the court of appeals' reversal order and recommendation for publication. The filing of the petition for review stays remittitur of the court of appeals' decision. Wis. Stat. § (Rule) 809.26. But if this Court were to nevertheless disagree and conclude that staying the court of appeals' order or publication decision would be necessary to effectuate this requested temporary injunction, then Petitioners would ask this Court to issue such a stay.

Though not identical to the temporary injunction analysis, the grounds argued would also support all four factors for such a stay. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). Petitioners have a very strong likelihood of success before this Court, Petitioners and the public would be irreparably harmed, and the Legislature could not claim harm in not being allowed to continue to violate the Wisconsin Constitution in these categories.

Dated this 6th day of December 2024.

Respectfully submitted,

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CERTIFICATE OF EFILE/SERVICE

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

Dated this 6th day of December 2024.

Electronically signed by Hannah S. Jurss

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