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CIRCUIT COURT
DANE COUNTY, WI
2021CV001314

BY THE COURT:

DATE SIGNED: May 5, 2022

Electronically signed by Susan M. Crawford
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 DANE COUNTY

Josh Kaul, *et al.*,
Plaintiffs

Decision and Order Granting Plaintiffs' Motion for Summary Judgment, in Part, and Denying Defendants' Motion for Summary Judgment, in Part, and Ordering Further Proceedings, and Granting Order for Temporary Stay

vs.

Wisconsin State Legislature, *et al.*,
Defendants.

Case No. 2021CV1314

I. INTRODUCTION

In this action for declaratory and injunctive relief, the plaintiffs Attorney General Josh Kaul and others ("Attorney General") seek a declaration that Wis. Stat. § 165.08(1), as amended by Section 26 of 2017 Wisconsin Act 369, is unconstitutional as applied to certain civil actions prosecuted by the Department of Justice, and to enjoin its enforcement as to these actions. As amended, Wis. Stat. § 165.08(1) reads:

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

> intervenor under s. 803.09 (2m) or, if there is no intervenor, by submission of a proposed plan to the joint committee on finance for the approval of the committee. The compromise or discontinuance may occur only if the joint committee on finance approves the proposed plan. No proposed plan may be submitted to the joint committee on finance if the plan concedes the unconstitutionality or other invalidity of a statute, facially or as applied, or concedes that a statute violates or is preempted by federal law, without the approval of the joint committee on legislative organization.

The Legislature describes Wis. Stat. § 165.08(1) as giving it a "seat at the table" in litigation involving the State, implying that the Legislature intended to assume a prosecutorial role equal to that of the Attorney General. It is more accurate to characterize Wis. Stat. § 165.08(1) as granting absolute power to the Legislature, far greater than a "seat at the table" alongside the prosecutor. The joint finance committee's failure or refusal to approve a settlement agreement under Wis. Stat. § 165.08(1) effectively operates as a veto, with no override mechanism to act as a check on legislative authority. The statute gives the Attorney General no recourse but to continue litigation or attempt to renegotiate a settlement on terms demanded by the Legislature's joint finance committee.

The Attorney General contends that Wis. Stat. § 165.08(1), in requiring the Department of Justice to obtain the approval of the Legislature's joint committee on finance before settling or discontinuing litigation, violates the constitutional separation of power as applied to two categories of cases: (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, such as common law tort and breach of contract actions."

The Legislature previously filed a motion to dismiss the complaint on grounds that the Attorney General lacks standing, that the claims were precluded by the judgment entered in Dane County Case No. 19CV302, and that the complaint fails to state a claim on which relief can be granted. The Court denied the motion to dismiss by a written decision entered on September 10, 2021.

Both parties subsequently filed competing motions for summary judgment with supporting briefs, affidavits, and exhibits. The Court heard oral arguments from the parties on these motions on March 23, 2022.

For the reasons discussed below, the Court grants the Attorney General's motion for summary judgment in part and denies the Legislature's motion for summary judgment in part. In doing so, the Court declares Wis. Stat. § 165.08(1) unconstitutional as to the first category of applications and ordering it enjoined with respect to this category of cases. The Court holds open the motions for summary judgment as to the second category of applications for further proceedings, as instructed below.

II. Applicable Legal Principles

A. Summary Judgment

The court must grant summary judgment to a party if "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." Wis. Stat. § 802.08(2); *Brown Cty. v. Brown Cty. Taxpayers Ass'n*, 2022 WI 13, ¶ 18, 400 Wis. 2d 781, 971 N.W.2d 491. In evaluating summary judgment materials, the court

views the evidence, and reasonable inferences from that evidence, in the light most favorable to the party opposing summary judgment. *Grams v. Boss*, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

The parties, having both filed cross-motions for summary judgment, take the position that there are no genuine issues as to any material fact and that the case presents only questions of law.

B. Legal Framework for Separation of Powers

The question of law before the Court is whether the application of a state statute to certain categories of cases violates the principle of separation of powers under the Wisconsin Constitution. The Wisconsin Supreme Court recently summarized the legal framework for the separation of powers under the Wisconsin Constitution:

> Government power is divided into three separate branches, each "vested" with a specific core government power. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶11, 376 Wis. 2d 147, 897 N.W.2d 384. By "vesting" the respective powers, our constitution "clothe[s]" that branch with the corresponding power; each branch is "put in possession of" a specific governmental power. Noah Webster, *An American Dictionary of the English Language* (1828). "The legislative power shall be vested in a senate and assembly"; "The executive power shall be vested in a governor"; and "The judicial power of this state shall be vested in a unified court system." Wis. Const. art. IV, § 1; *id.* art. V, § 1; *id.* art. VII, § 2. To exercise this vested power, the legislature is tasked with the enactment of laws; the governor is instructed to "take care that the laws be faithfully executed"; and courts are empowered to adjudicate civil and criminal disputes pursuant to the law. *Id.* art. IV, § 17; *id.* art. V, § 4; *id.* art. VII, §§ 3, 5, 8, 14.
>
> While the separation of powers is easy to understand in theory, it carries with it not-insignificant complications. Notably, the Wisconsin Constitution itself sometimes takes portions of one kind of power and gives it to another branch....

> That said, these are exceptions to the default rule that legislative power is to be exercised by the legislative branch, executive power is to be exercised by the executive branch, and judicial power is to be exercised by the judicial branch. "The Wisconsin constitution creates three separate co-ordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another." *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982).
>
> Nevertheless, determining "where the functions of one branch end and those of another begin" is not always easy. *Id.* at 42-43, 315 N.W.2d 703. Thus, we have described two categories of powers within each branch—exclusive or core powers, and shared powers. *See Gabler*, 376 Wis. 2d 147, ¶30, 897 N.W.2d 384.
>
> A separation-of-powers analysis ordinarily begins by determining if the power in question is core or shared. Core powers are understood to be the powers conferred to a single branch by the constitution. *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). If a power is core, "no other branch may take it up and use it as its own." *Tetra Tech*, 382 Wis. 2d 496, ¶48, 914 N.W.2d 21 (Kelly, J.). Shared powers are those that "lie at the intersections of these exclusive core constitutional powers." *Horn*, 226 Wis. 2d at 643, 594 N.W.2d 772. "The branches may exercise power within these borderlands but no branch may unduly burden or substantially interfere with another branch." *Id.*, at 644, 594 N.W.2d 772 (*citing State ex rel. Friedrich v. Circuit Court for Dane Cty.*, 192 Wis. 2d 1, 14, 531 N.W.2d 32 (1995) (per curiam)).

Serv. Emps. Int'l Union, Loc. 1 v. Vos, 2020 WI 67, ¶¶ 31-35, 393 Wis. 2d 38, 59–62, 946 N.W.2d 35, 46–47 (cited hereafter as "*SEIU*").

C. Burden of proof

The burden of proof for a constitutional challenge to a state statute depends on the type of challenge raised. Challenges to the constitutionality of a statute generally fall into two categories: as-applied and facial. *SEIU*, 2020 WI 67, ¶ 37. As-applied challenges address a specific application of the statute against the challenging party. *Id.* A facial

challenge is a claim that a law is unconstitutional in all applications, seeking to strike down the law in its entirety. *Id.*, ¶ 38. A challenger may also bring a "hybrid" challenge to the constitutionality of a statute that has characteristics of both a facial challenge and an as-applied challenge. *See Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 28, 376 Wis. 2d 146, 897 N.W.2d 384.

As this Court previously concluded in its decision denying the motion to dismiss, the Attorney General brings a hybrid challenge here, a "broad challenge to a specific category of applications." *SEIU*, 2020 WI 67, ¶ 45 (*citing Gabler*, 2017 WI 67, ¶ 29). A party bringing a hybrid challenge, claiming that a statute is unconstitutional in a category of applications, "must meet the standard for a facial challenge" as to the identified category. *Gabler*, ¶ 29. That is, the challenger must show that "as to the specific category of applications, the statute could not be constitutionally enforced under any circumstances." *SEIU*, ¶ 45.

In meeting this standard, the challenger must overcome the "strong presumption that the statute is constitutional," *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 695, 478 N.W.2d 582 (1992), and has "a heavy burden" to "prove that the statute [at issue] is unconstitutional beyond a reasonable doubt." *State v. Cole*, 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328.[1]

III. Constitutionality of Wis. Stat. § 165.08(1) as Applied to Civil Enforcement Actions

[1] The Attorney General argues that the presumption of constitutionality should not apply when a statute is challenged on separation-of-powers grounds, but concedes that this court is bound by precedent to the contrary. This court agrees that it is so bound. It therefore applies the presumption of constitutionality and holds the plaintiff to its burden of proving that the statute is unconstitutional, as applied to the specified categories of applications, beyond a reasonable doubt.

The Attorney General first argues that the application of Wis. Stat. § 165.08(1) to settlements of civil enforcement actions violates the separation of powers. This category consists of civil actions prosecuted by the Attorney General to enforce state laws, including environmental laws, consumer protection laws, financial regulatory laws, Medical Assistance program laws, and various other laws. *See* R. 11 (Complaint), ¶¶ 30–55. The Attorney General (or the Department of Justice) is authorized by statute in these areas to prosecute civil enforcement actions at the Attorney General's initiative or at the request of executive state agencies.[2] The statutes define the remedies the Attorney General may obtain in these actions, including civil forfeitures, injunctive relief, recovery of costs of enforcement, and restitution.

As directed by the Wisconsin Supreme Court, this Court's analysis begins with determining whether this power–the power to settle a civil enforcement action initiated by the Attorney General–is a "core" power of the executive branch, or one "shared" between the executive and legislative branches. If a power is a core power belonging to one branch, the analysis ends: "no other branch may take it up and use it as its own." *SEIU*, 2020 WI 67, ¶ 35.

[2] For ease of reference, this decision will use the term "Attorney General" to refer to the Attorney General and/or the Wisconsin Department of Justice. In some areas, the Attorney General has exclusive civil enforcement authority. See Wis. Stat. §§ 299.95 (directing attorney general to enforce certain environmental laws); 165.25(4)(ar) (directing attorney general to provide legal services to executive agencies charged with enforcement responsibilities). In other areas, the Attorney General's civil enforcement authority is shared with district attorneys. *See, e.g.*, Wis. Stat. §§ 30.03(2), 100.18(11), 100.182(5). Neither Wis. Stat. §165.08 nor any other statutory provision requires district attorneys to obtain the permission of the legislature to settle civil enforcement actions in these areas of shared prosecutorial authority.

The Attorney General argues that the prosecution and settlement of civil enforcement actions are core executive functions in which the legislature has no constitutional role. As noted by the Attorney General, the United States Supreme Court has held that civil enforcement litigation is "quintessentially executive" in nature. *See Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2201 (2020). The United States Supreme Court has also held that "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, s 3." *Buckley v. Valeo*, 424 U.S. 1, 138, 96 S. Ct. 612, 691, 46 L. Ed. 2d 659 (1976).

The separation-of-powers principles enshrined in the U.S. Constitution "inform our understanding of the separation of powers under the Wisconsin Constitution." *Gabler*, ¶ 11; *see also Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 44, 382 Wis. 2d 496, 537, 914 N.W.2d 21, 41; *Panzer v. Doyle*, 2004 WI 52, ¶ 48, 271 Wis.2d 295, 680 N.W.2d 666, *overruled on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis.2d 1, 719 N.W.2d 408. The U.S. Supreme Court's holdings regarding the "quintessentially executive" nature of civil enforcement litigation thus have significant persuasive value.

The historical practices and laws of the state are also relevant in determining whether a power in question is an exclusive, core function of a particular branch of government. *See Barland v. Eau Claire County*, 216 Wis. 2d 560, 587, 575 N.W.2d 691 (1998) (*citing State ex rel. Friedrich v. Dane County Circuit Court*, 192 Wis. 2d 1, 20, 531

N.W.2d 32 (1995)). Before the enactment of 2017 Wis. Act 369, decisions to settle civil enforcement actions against a party alleged to be in violation of state laws, and on what terms, were a function of the executive branch. The legislature played no part in the settlement of civil actions enforcing state laws for approximately 170 years. The inaugural Wisconsin Legislature, in 1848, assigned the Attorney General duties consistent with serving as the state's chief legal officer, including representing the State in litigation and enforcing state laws. See Laws of 1848, at p. 10-11.[3] These duties generally remain intact today, but for 2017 Wis. Act 369. The Legislature points to no historical practice, in this state or any other, of the legislature exercising oversight (in effect, veto authority) over prosecutorial decisions by the state Attorney General about how to best enforce state laws through a negotiated settlement in a civil enforcement action.

Moreover, a prosecutor's decision to resolve a particular violation of state laws through a settlement negotiated with a party requires the weighing of factors central to the executive branch's faithful execution of the laws: the resources available to prosecute the action to conclusion, the likelihood of success in litigation, and the available remedies to address the harms caused by the violations, among others. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The time-sensitive and individualized decision-making entailed by whether and how to settle a civil prosecution against an alleged violator stands in stark contrast to the collective, deliberative, protracted

[3] Because the Laws of 1848 did not provide separate numbers for each act, each act or subsection is referenced by the pages on which it appears in the 1848 bound volume of the Laws. *See Thompson v. Craney*, 199 Wis. 2d 674, 693, 546 N.W.2d 123 (1996).

process of enacting generally-applicable laws that is the Legislature's constitutional purview.

The Legislature argues that the Wisconsin Supreme Court already considered and rejected the Attorney General's position that the settlement of civil enforcement actions is a core executive function in *SEIU*. This is incorrect. The question was not presented in that case. *SEIU* addressed a facial challenge to various provisions of 2017 Wis. Act 369 that allow the Legislature to participate in state litigation. The Court, in rejecting those facial challenges, emphasized the limited scope of its decision: "We express no opinion on whether individual applications or categories of applications may violate the separation of powers, or whether the legislature may have other valid institutional interests supporting application of these laws." *SEIU*, 2020 WI 67, ¶¶ 4, 73.

The Court in *SEIU* held that the Attorney General's representation of the State in litigation is "predominately an executive function." *Id.*, ¶ 63. It also held, however, that in at least *some* cases, participation in state litigation falls "within those borderlands of shared powers, most notably in cases that implicate an institutional interest of the legislature." *Id.*, ¶ 63. The Court cited the "legislature's institutional interest as a represented party, and as one that can authorize the attorney general to prosecute cases," *Id.*, ¶ 67; and the Legislature's power of the purse under Wis. Const. art. VIII, § 2, with respect to litigation that involves "requests for the state to pay money to another party," *Id.*, ¶ 69. The Court concluded that "[t]hese institutional interests of the legislature are sufficient to defeat the facial challenge to the provisions authorizing

legislative intervention in certain cases, and those requiring legislative consent to defend and prosecute certain cases." *Id.*, ¶ 71.

The category of civil enforcement actions at issue here does not implicate these legislative institutional interests. These are not cases in which the Attorney General is representing a legislative official, employee, or body. The category includes only cases initiated by the Attorney General or Department of Justice in its discretion or upon the referral of an executive agency, not those in which a legislative body requests or authorizes the Attorney General to file suit. And, as plaintiff-side civil enforcement actions, these are not cases in which a settlement would require the state to pay money to another party.

The Legislature cites other institutional interests that it claims may make its involvement in the settlement of some civil enforcement actions a proper exercise of legislative authority. It argues that the Legislature's interest in "policy" is implicated by settlements requiring a defendant to act or refrain from action not expressly required or prohibited by state law, and that the Legislature's "power of the purse" is implicated when a settlement requires a defendant to make monetary payments.[4]

The Wisconsin Constitution vests in the Legislature the legislative power, which is carried out by the enactment of laws. Wis. Const. art. IV, § 17. "Legislative power, as distinguished from executive power, is the authority to make laws, but *not to enforce them.*" *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 562, 929 N.W.2d 600, 605,

[4] The Legislature also argues that its institutional interests could be implicated by a settlement agreement in a civil enforcement action that concedes the unconstitutionality of a state statute. The Attorney General has excluded such cases from the category of settlements at issue. Thus, this claimed institutional interest is not implicated here.

quoting Schuette v. Van De Hey, 205 Wis. 2d 475, 480-81, 556 N.W.2d 127 (Ct. App. 1996) (emphasis added). "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.'" *Id.*

A settlement agreement in a civil enforcement action does not implicate the legislative authority to establish policy through the enactment of laws. Such agreements bind only the parties and do not establish precedent. A settlement agreement in which a defendant agrees to act or refrain from acting in a particular way may be a matter of public interest, but it is not "policy making." Policy is defined as "'a high-level overall plan embracing the general goals and acceptable procedures esp. of a governmental body.'" *Schuette v. Van De Hey*, 205 Wis. 2d 475, 480, 556 N.W.2d 127, 129 (Ct. App. 1996) (*quoting* Webster's New Collegiate Dictionary 890 (1977)). *See also* POLICY, Black's Law Dictionary (11th ed. 2019) ("A standard course of action that has been officially established by an organization, business, political party, etc.").

Furthermore, blocking a negotiated settlement is not an exercise of the Legislature's constitutionally-vested authority to enact laws to establish policy, but akin to a legislative veto, exercised by a legislative committee without the normal constitutional checks and balances on legislative action. *Cf. I.N.S. v. Chadha*, 462 U.S. 919, (1983) (holding that congressional veto of Attorney General's deportation decisions circumvents constitutional checks and balances on legislative authority and violates separation of powers under the United States Constitution).

Likewise, the negotiation of an agreement in which a defendant agrees to pay a forfeiture or other recompense does not implicate the Legislature's constitutionally vested power of the purse. The power of the purse is found in Wis. Const. art. VIII, § 2, which provides: "No money shall be paid out of the treasury except in pursuance of an appropriation by law." Accordingly, the institutional interest arising from the power of the purse identified by the Court in *SEIU* is the "institutional interest in the *expenditure* of state funds." *SEIU*, 2020 WI 67, ¶ 69 (emphasis added). Legislative approval of a settlement agreement in which a defendant agrees to pay money *to* the state or other entity to remedy harms it committed does not advance, protect, or otherwise implicate the Legislature's constitutional power to direct, by appropriation, the payment of money from the treasury.

This Court concludes that the Attorney General has met his burden of proving that Wis. Stat. § 165.08(1) is unconstitutional beyond a reasonable doubt as applied to the first category of cases. The Attorney General exercises a core function constitutionally vested in the executive branch when he agrees to settle a civil enforcement action. A branch violates the separation of powers when it exercises the "[c]ore powers," or interferes with the "exclusive zone" of authority, vested in another branch. *SIEU*, 2020 WI 67, ¶¶ 33, 35. In granting itself unilateral veto powers over the settlement of civil enforcement actions initiated by the Attorney General, the Legislature impermissibly interferes with the execution of the laws. Because the Legislature has encroached on a core constitutional power of the executive branch, the

application of Wis. Stat. § 165.08 to this category of cases violates the separation of powers established in the Wisconsin Constitution.

IV. Constitutionality of Wis. Stat. § 165.08(1) as Applied to Civil Actions Brought at the Request of an Executive Agency or Official Relating to the Administration of Statutory Programs

The Attorney General argues that Wis. Stat. § 165.08(1) is unconstitutional as applied to a second category of cases, comprising "civil actions the Department prosecutes on behalf of executive-branch agencies relating to the administration of the statutory programs they execute, such as common law tort and breach of contract actions." Similar to the first category of cases, these civil actions are initiated by the Attorney General at the request of an executive agency. A decision to settle such a case calls upon the Attorney General to consider individualized factors such as the strength of the State's legal claims, the amount of damages, the resources available to litigate the case, and other relevant factors specific to the case.

At oral argument, the Court questioned the parties about whether this category of cases could include the settlement of any claim asserted against the State, such as a counterclaim, requiring the State to pay money to another party. A settlement obligating the State to pay a party's claim could implicate the Legislature's constitutional "power of the purse" under Wis. Const. art. VIII, § 2.

Although not conceding the constitutionality of Wis. Stat. § 165.08(1) as applied to defense-side claims against the State, the Attorney General stated at oral argument that this second category consists solely of settlements of plaintiff-side civil actions and excludes any case that would require the State to pay money to another party. The

Legislature objected to the Attorney General's position, in effect arguing that the Attorney General was verbally amending its cause of action without notice.

The complaint alleges that the second category consists of "Plaintiff-side civil actions prosecuted by the Department," not "defense-side cases 'involving requests for the state to pay money to another party.'" Rec. 11, p. 9, ¶¶ 5-6. Likewise, it alleges that the second category includes actions "prosecuted" at the request of executive agency heads "relating to any matter connected with any of their departments" and "involv[ing] disputes between state agencies and individuals or entities with which the agencies interact, such as contractual disputes with vendors of goods and services or tort claims against individuals who have damaged state property managed by the agency." *Id.*, ¶ 56-57. Although the Court is required to draw any *reasonable* inferences in favor of the party opposing summary judgment, *see Grams*, 97 Wis. 2d at 339, these allegations do not support a reasonable inference that the second category includes settlements obligating the State to pay claims brought against it by another party.

The Attorney General's briefs and supporting affidavits and exhibits on the summary judgment motions are consistent with its argument that the second category does not, by definition, include any settlements resolving money claims asserted against the State. The Attorney General pointed out at oral argument that the legislature's approval of settlements of claims against the State involves a different statutory provision and procedure. *See* Wis. Stat. § 165.25(6).[5]

[5] Claims against the State also implicate the State's sovereign immunity, see Wis. Const. art. IV, § 27 (sovereign immunity). The Legislature has not consented to suits against the State in tort. *See Cords v. State*, 62 Wis. 2d 42, 50, 214 N.W.2d 405, 410 (1974). Additionally, claims must be presented by bill to the legislature before claimed in a

Notably, the Legislature's briefs and supporting affidavits also implicitly interpret the complaint as defining the second category to include only settlements of the State's claims as a plaintiff. Despite arguing vigorously that the Attorney General's categorical challenges to Wis. Stat. § 165.08(1) must fail because he fails to prove that every possible application within the category violates the separation of powers, the Legislature's written briefs do not argue that the second category could include settlements obliging the State to pay money to resolve a counterclaim or other defense-side claim against the State. It raised that argument only at oral argument in response to questions posed by the Court.

Nevertheless, the Court takes seriously the Legislature's contention that it is unfair for the Attorney General to amend or supplement his claim verbally, without notice and a full opportunity to respond. It is true that the Attorney General's complaint does not *expressly* state that the second category excludes settlements of civil actions that, although initiated by the State, include payment of claims asserted against the State, such as by a counterclaim.

Wisconsin is a notice-pleading state. A complaint must contain a statement of the general factual circumstances in support of a claim. *See* Wis. Stat. § 802.01(1), *Town of Brockman*, ¶ 15. This court has discretion to allow an amendment of pleadings under Wis. Stat. § 802.09(1), which provides that leave to amend "shall be freely given at any stage of the action when justice so requires." Wis. Stat. § 802.09(1); *see J.F. Ahern Co. v.*

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court action. *See* Wis. Stat. § 775.01; *CleanSoils Wis. Inc. v. DOT*, 229 Wis.2d 600, 610, 599 N.W.2d 903, 908 (Ct.App.1999) (affirming dismissal of cross-claims against state agency due to failure to present claim to legislature pursuant to Wis. Stat. § 775.01).

Wisconsin State Bldg. Comm'n, 114 Wis. 2d 69, 85, 336 N.W.2d 679 (Ct. App. 1983) (upholding trial court's decision allowing third amended complaint in a declaratory judgment action, alleging a new separation-of-powers constitutional claim). Leave to amend is to be freely granted in the interests of justice. *Town of Brockway v. City of Black River Falls*, 2005 WI App 174, n. 7, 285 Wis. 2d 708, 702 N.W.2d 418.

Accordingly, to the extent that the complaint did not provide adequate notice to the Legislature that the second category excludes any settlement obligating the payment of money for a claim against the State, the Court grants the Attorney General leave to amend the complaint. Granting leave to amend the complaint to clarify the second category, before the court rules on the pending summary judgment motions, is in the interests of justice. It promotes judicial efficiency, allows a full disposition of the claims, provides a clear and complete record for appellate review, and avoids unnecessary serial litigation. Because the amendment will clarify the Attorney General's intended claim, rather than present an entirely new legal theory, and because the Court will give the Legislature a full opportunity to respond to the amended claim, there is no unfair prejudice to the Legislature.

The Attorney General has leave to file an amended complaint alleging additional or amended facts as relates to the second category, consistent with its position at oral argument, no later than 30 days from the filing date of this decision. The Court will permit the Legislature to file an amended answer within 30 days after the filing of the Attorney General's amended complaint. A status/scheduling conference will be calendared to determine the parties' wishes to file supplemental briefs and to provide a

briefing schedule, if requested. Upon the filing of amended pleadings and any supplemental briefs, the court will issue a written decision and order addressing the constitutionality of Wis. Stat. § 165.08(1) as applied to the second category of cases.

V. The Plaintiffs Have Standing.

The Legislature reasserts its claim that the Attorney General lacks standing to bring this action, an argument it previously raised in its motion to dismiss. The Legislature makes no new arguments in support of this claim. The Court again finds that the Attorney General has standing to bring this action, for the reasons stated in the Court's decision and order denying the motion to dismiss. "The preservation of liberty in Wisconsin turns in part upon the assurance that each branch will defend itself from encroachments by the others." *Gabler*, 2017 WI 67, ¶ 31.

VI. Decision and Order

For the foregoing reasons, the Court grants, in part, the Attorney General's motion for summary judgment and denies, in part, the Legislature's motion for summary judgment, with respect to the application of Wis. Stat. § 165.08(1) to the first category, consisting of civil enforcement actions.

The Court hereby declares Wis. Stat. § 165.08(1) unconstitutional and in violation of the separation of powers under the Wisconsin Constitution as applied to the category of cases described in Count 1 of the complaint, and enjoins its enforcement as to that category of cases.

VII. Order of Temporary Stay

Upon the request of the defendant Legislature and stipulation of the Attorney General, the Court temporarily stays its decision granting partial summary judgment to the Attorney General, pending disposition of the defendants' anticipated motion for stay.