



SEIU v. Vos

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In *Service Employees International Union, Local 1 (SEIU) v. Robin Vos*, 2020 WI 67, the Wisconsin Supreme Court examined legislation from the Legislature's 2018 extraordinary session¹ and declared that laws relating to legislative involvement in litigation, capitol security, multiple suspensions of administrative rules, and agency deference survive a facial challenge to their constitutionality. The Court found that specified provisions affecting administrative agency "guidance documents" are unconstitutional, however. This issue brief provides relevant background information and briefly summarizes the Court's [decision](#).

PLAINTIFFS' CLAIMS UNDER SEPARATION OF POWERS DOCTRINE

The plaintiffs in *SEIU*, a group of labor organizations and individual tax payers, filed suit in Dane County Circuit Court against the Legislature,² Governor Evers, and Attorney General Kaul, arguing that several provisions of 2017 Wisconsin Acts [369](#) and [370](#) are unconstitutional under the [separation of powers doctrine](#). This doctrine provides that the legislative, executive, and judicial branches of government each have exclusive "core powers" under the Wisconsin Constitution. An exercise by one branch of a core power of another branch is impermissible. Each branch of government may exercise "shared" powers, which "lie at the intersection of exclusive core constitutional powers." [*Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 33.] However, a branch of government may exercise a shared power only to an extent that it does not unduly burden or substantially interfere with another branch's exercise of its power.

CIRCUIT COURT ORDER AND THE LEGISLATURE'S APPEAL

On March 26, 2019, the circuit court issued an [order](#) granting, in part, the plaintiffs' motion for an injunction and temporarily enjoined provisions of Act 369 that generally require legislative approval of settlements by the attorney general, allow the Legislature to suspend administrative rules multiple times, and regulate administrative agency guidance documents. The circuit court also denied the Legislature's motion to dismiss the suit. The Legislature appealed the circuit court's order and requested a stay of the order pending appeal. On April 19, 2019, the Wisconsin Supreme Court [assumed jurisdiction](#) over the Legislature's appeal of the temporary injunction on its own motion. On June 11, 2019, the Court [assumed jurisdiction](#) over the Legislature's appeal of its motion to dismiss and [stayed](#) the temporary injunction pending appeal, with the exception that the injunction remained in effect with respect to Act 369's treatment of certain guidance documents that were in existence as of March 26, 2019.

WISCONSIN SUPREME COURT DECISION

The Wisconsin Supreme Court released its decision in *SEIU* on July 9, 2020, in two majority opinions.

In the majority opinion authored by Justice Hagedorn, the Court ruled that the circuit court should have granted the Legislature's motion to dismiss the plaintiffs' claims regarding legislative involvement in litigation, capitol security, multiple suspensions of administrative rules, and agency deference.³ Critical to the Court's analysis, the plaintiffs raised facial challenges to the constitutionality of the statutes at issue. As described by the Court, "[a]s-applied challenges address a specific application of the statute against the challenging party In a facial challenge, however, the challenging party claims that the law is unconstitutional on its face—that is, it operates unconstitutionally in all applications." [Citations and quotations omitted.] The Court, however, stressed that it was not passing "judgment on the constitutionality of individual applications or categories of applications of these laws."

A second majority opinion, authored by Justice Kelly, concluded that certain provisions of Act 369 concerning guidance documents are unconstitutional.

Legislative Involvement in Litigation

Act 369 allows certain legislative committees to [intervene](#) on behalf of the Assembly, the Senate, and the Legislature in court cases in which a party has made certain challenges to a statute as part of a claim or defense. In addition, Act 369 requires the attorney general to gain legislative approval before settling specified types of civil actions. For civil actions prosecuted by the Department of Justice, the act provides that a compromise or discontinuance must be approved by a legislative intervenor or, if there is no legislative intervenor, the Joint Committee on Finance (JCF). For certain civil actions defended by the attorney general, a proposed compromise or settlement plan must be submitted to JCF for passive review if there is no legislative intervenor.⁴ The Court held that these provisions are not facially unconstitutional, citing the Legislature’s “institutional interest in litigation implicating the public purse or in cases arising from its statutorily granted right to request the attorney general’s participation in litigation.”⁵

Capitol Security

Act 369 generally requires the Joint Committee on Legislative Organization’s review of any proposed change to security at the capitol. The Court unanimously held that a facial challenge to this requirement fails because it “has at least some constitutional applications with respect to security of legislative space.”

Authority to Suspend Administrative Rules

Act 369 permits the Joint Committee for the Review of Administrative Rules (JCRAR) to suspend all or part of an administrative rule previously promulgated by a state agency multiple times. Citing *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), where the Court previously held that a three-month suspension is constitutional, the Court unanimously held that a facial challenge to JCRAR’s authority to suspend a rule multiple times fails, finding that two three-month suspensions would also be constitutional.

Agency Deference

Act 369 prohibits an agency from seeking deference in any proceeding based on the agency’s interpretation of any law, partially codifying the holding in *Tetra Tech EC, Inc., and Lower Fox River Remediation LLC v. Wisconsin Department of Revenue*, 2018 WI 75. The Court unanimously held that this provision is constitutional on its face.

Guidance Documents

Act 369 defines the term “guidance document,” specifies the procedures an administrative agency must follow to create a guidance document, includes guidance documents in certain judicial review provisions of ch. 227, Stats., and requires most administrative agencies to identify sources of law supporting the contents of agency publications, including guidance documents. The Court held the provisions of Act 369 relating to creation procedures for guidance documents and requiring identification of sources of law within guidance documents to be facially unconstitutional on the grounds that these provisions intrude upon the core powers of the executive branch.⁶ The Court held that other provisions of Act 369 relating to guidance documents survive a facial challenge.

¹ In *League of Women Voters of Wisconsin v. Evers*, 2019, WI 75, the plaintiffs challenged the constitutionality of [extraordinary sessions](#) and argued that any action undertaken during the December 2018 extraordinary session was void because the session was not convened lawfully. The Wisconsin Supreme Court held that the Legislature may convene in extraordinary session.

² This issue brief refers to the legislative leaders sued in their official capacity as the “Legislature.”

³ The Court only addressed claims concerning provisions of Act 369 that were enjoined or “sufficiently briefed and argued.”

⁴ In civil actions prosecuted or defended by the attorney general that require approval by JCF, the proposed plan may not be submitted to JCF if it 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 approval by the Joint Committee on Legislative Organization.

⁵ Justices Dallet and A.W. Bradley would have allowed the plaintiffs’ to proceed with their claim that Act 369’s provisions requiring legislative approval of certain settlements is unconstitutional. [See Justice Dallet’s concurrence/dissent.]

⁶ Chief Justice Roggensack and Justices Hagedorn, and Ziegler would have held that Act 369’s provisions relating to guidance documents withstand a facial challenge to their constitutionality. [See Chief Justice Roggensack’s concurrence/dissent and Justice Hagedorn’s concurrence/dissent.]