No.2022AP790

In the Wisconsin Court of Appeals

District II

JOSH KAUL, WISCONSIN DEPARTMENT OF JUSTICE, TONY EVERS AND KATHY KOLTIN BLUMENFELD, PLAINTIFFS-RESPONDENTS,

v.

WISCONSIN STATE LEGISLATURE, WISCONSIN STATE LEGISLATURE JOINT COMMITTEE ON FINANCE, CHRIS KAPENGA, DEVIN LEMAHIEU, ROBIN VOS, JIM STEINEKE, HOWARD L. MARKLEIN, MARK BORN, DUEY STROEBEL AND AMY LOUDENBECK, DEFENDANTS-APPELLANTS.

On Appeal From The Dane County Circuit Court,
The Honorable Susan M. Crawford, Presiding
Case No. 2021CV1314

OPENING BRIEF OF DEFENDANTS-APPELLANTS

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ISSUE PRESENTED

1. Whether Section 26 of 2017 Act 369 is unconstitutional in every possible application as to two broad categories of cases: (1) civil-enforcement actions brought under statutes the Attorney General is charged with enforcing, and (2) civil actions the Attorney General prosecutes on behalf of agencies regarding the administration of the statutory programs they execute.

The Circuit Court answered yes.

INTRODUCTION

The Wisconsin Supreme Court in *Service Employees International Union, Local 1 ("SEIU") v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, upheld the facial validity of Section 26 of 2017 Act 369, which gives the Legislature a seat at the settlement table in certain plaintiff-side cases that the Attorney General prosecutes on the State's behalf. Yet, in the present case, Attorney General Josh Kaul and Governor Tony Evers (collectively, "Plaintiffs"[1])—who were parties and lost in *SEIU*—seek to render *SEIU*'s holding as to Section 26 a dead letter by challenging Section 26's constitutionality under the same theories that failed in *SEIU*, while "limiting" their challenge to two categories that are so broad that they make up the overwhelming majority of Section 26's coverage. While the Circuit Court ruled for Plaintiffs, it did so by adopting a view of Section 26 that is consistent with the *SEIU* dissent's approach, but contrary to that adopted by the *SEIU* majority.

As the *SEIU* majority held, Section 26 is facially constitutional because the Legislature has an interest in at least some settlements that could come within its reach, and that binding holding applies just as much—and, indeed, for the same reasons—to Plaintiffs' challenge here. This Court

[1] Kathy Koltin Blumenfeld, in her official capacity as Secretary of the Department of Administration, is also a Plaintiff.

should thus reverse the Circuit Court's orders and remand for entry of summary judgment in the Legislature's favor.[2]

ORAL ARGUMENT AND PUBLICATION

Given the issues of statewide importance involved in this appeal, the Legislature respectfully contends that this case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. The Legislature Enacts Section 26 of 2017 Act 369

In December 2018, the Legislature enacted Section 26 of 2017 Act 369, which renumbered Wis. Stat. § 165.08 to Wis. Stat. § 165.08(1) and amended that provision to ensure that the Legislature had a seat at the table in certain settlements of plaintiff-side civil actions.

Before Section 26, Wis. Stat. § 165.08 provided that "[a]ny civil action prosecuted by the [Attorney General[3]] by direction of any officer, department, board or commission, shall be compromised or discontinued when so directed by such officer, department, board or commission." *Id.* § 165.08

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[2] In addition to the Legislature, Defendants are the Legislature's Joint Committee on Finance, as well as Chris Kapenga, Devin LeMahieu, Robin Vos, Jim Steineke, Howard L. Marklein, Mark Born, Duey Stroebel and Amy Loudenbeck, all in their official capacities as members of the Legislature. This Brief refers to all Defendants collectively as "the Legislature."

[3] This Brief refers to statutes that mention the "Department of Justice" as "Attorney General." *See Burkes v. Klauser*, 185 Wis. 2d 308, 322, 517 N.W.2d 503 (1994) ("The Attorney General is head of the Department of Justice[.]").

(2017). Civil actions prosecuted "on the initiative of the attorney general, or at the request of any individual may be compromised or discontinued with the approval of the governor." *Id.* Accordingly, before Section 26, the Attorney General did not give the Legislature a seat at the table in plaintiff-side settlements.

Section 26 remedied this by providing that "[a]ny civil action prosecuted by the [Attorney General] . . . may be compromised or discontinued . . . by submission of a proposed plan to the joint committee on finance[4] 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(1). Section 26 thus requires the Attorney General to obtain the Joint Committee's consent before he may "compromise[ ] or discontinue[ ]" a case that he is prosecuting (except in circumstances, not relevant here, when the Legislature is a party to the case). *Id.*

B. *SEIU* Holds That Section 26 Is Facially Valid

In *SEIU*, the Supreme Court addressed in relevant part a facial separation-of-powers challenge to Section 26. 2020 WI 67, ¶¶ 5, 50–71. In that case, private plaintiffs, alongside the Governor and Attorney General (who also are Plaintiffs here, and were nominal defendants in *SEIU*), asserted that

[4] The Legislature's Joint Committee on Finance is a standing committee of the Wisconsin Legislature, *see* Wis. Stat. § 13.09, and this Brief will hereinafter refer to it as the "Joint Committee."

Section 26 "takes a core executive power and gives it to the [L]egislature in violation of the separation of powers." *Id.* ¶¶ 18–19, 55. The Governor and Attorney General argued that the requirement of seeking legislative approval before settling certain actions "impermissibly limits the governor's duty to take care that the laws be faithfully executed," and "substantially burden[s] the executive branch." *Id.* ¶ 55 (citation omitted).

Before addressing these arguments, the majority of the Supreme Court in *SEIU* first discussed the separation-of-powers principles and the standards governing facial, hybrid, and as-applied challenges. *Id.* ¶¶ 30–49. Relying upon *Gabler v. Crime Victims Rights Board*, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384, the Court observed that a statutory challenge could include "characteristics of both a facial and an as-applied claim." *SEIU*, 2020 WI 67, ¶ 45. This "hybrid" challenge is one that "is not limited to plaintiffs' particular case," but instead "challenges application[s] of the law more broadly." *Gabler*, 2017 WI 67, ¶ 28 (citation omitted). Of particular relevance here, the Court explained that, for such a hybrid challenge, the party "is still required to demonstrate that, as to the specific category of applications, the statute could not be constitutionally enforced under any circumstances." *SEIU*, 2020 WI 67, ¶ 45. With these principles in mind, the Court held that the challenge brought by the plaintiffs was a facial one that required them to satisfy the same burden as that of a hybrid challenge—the burden to

prove that Section 26 "may not be constitutionally applied under any circumstances." *Id.* ¶ 72.

The *SEIU* majority then held that Section 26 was facially valid, as plaintiffs failed to meet their burden under the facial-challenge standard. *Id.* The *SEIU* majority explained that "[w]hile representing the State in litigation is predominantly an executive function, it is within those borderlands of shared powers" between the Legislature and the Attorney General/Governor, "most notably in cases that implicate an institutional interest of the [L]egislature." *Id.* ¶ 63. *SEIU* then offered as examples two "institutional interests" of the Legislature that were "sufficient to defeat the facial challenge" to Section 26. *Id.* ¶¶ 64–71. The first interest "is reflected in the statutory language authorizing the attorney general to represent the State or state officials," *id.* ¶ 64, and the second is "where the power of the purse is implicated," *id.* ¶¶ 68–69 (citing Wis. Const. art. VIII, § 2). These two interests are non-exhaustive, as "the [L]egislature may have other valid institutional interests." *Id.* ¶ 73. So, *SEIU* explained, while Section 26 had removed the "unilateral power" that the Attorney General had under prior law "to settle litigation impacting the State as he thought in the best interest of the State," *id.* ¶¶ 52–53, that hitherto unilateral power was not—"at least in all circumstances[—]within the exclusive zone of executive authority," *id.* ¶ 63. Thus, because "there are constitutional applications" of Section 26, the plaintiffs' "challenge cannot succeed." *Id.* ¶ 72.

Justice Dallet dissented in relevant part, joined by Justice Ann Walsh Bradley. In the dissent's view, Section 26 "plausibly . . . violates our constitutional separation of powers because it unduly burdens and substantially interferes with executive power." *Id.* ¶¶ 164, 187 (Dallet, J., dissenting in part). Unlike the *SEIU* majority's "functionalist approach," Justice Dallet explained that she would have applied a "formal[ist]" view of the separation of powers that "vigorously appl[ies] the limiting principle in [the Court's] shared-power analysis: the exercise of shared power cannot unduly burden or substantially interfere with a coequal branch's function." *Id.* ¶ 169. Using that approach, the dissent explained that Section 26 plausibly "violate[s] the separation-of-powers doctrine because [it] effectively eliminate[s] executive power to settle civil litigation by enacting an overriding legislative veto." *Id.* ¶ 170. Further, the dissent stated, "the legislature does not have a constitutionally-vested institutional interest as a represented party in civil litigation resolution," *id.* ¶ 173, and its "control of the purse strings . . . cannot be read so broadly that it allows the legislature to curtail the functions of another branch even in an area of shared authority," *id.* ¶ 175.

After the Supreme Court's decision in *SEIU*, the Circuit Court entered a final judgment based on the parties' consent, which adjudged that "Act 369, Section[ ] 26 . . . [is] not facially unconstitutional . . . without prejudice and without costs," as

to "any potential claims that those sections of Act 369 are unconstitutional as applied." App'x 213, 217–18.

C. The Joint Committee On Finance Consistently Fulfilled Its Responsibilities Under Section 26 In A Respectful, Timely Manner

Under Section 26, the Attorney General must submit proposed settlements to the Joint Committee. Wis. Stat. § 165.08(1). On numerous occasions, the Joint Committee has demonstrated its willingness and ability to work cooperatively with the Attorney General to comply with Section 26 by creating a streamlined settlement-approval process. *See generally* Wis. Stat. § 13.10; *see also* App'x 127, 140. To facilitate this process under Wis. Stat. § 165.08(1), the Joint Committee asked that the Attorney General complete a "checklist" of information that would help the Joint Committee determine whether to approve a proposed settlement and whether expedited action was required. Yet, in response, the Attorney General refused to use the checklist when submitting proposed settlements. *See* App'x 126, 144–45, 147–48, 183.

Notwithstanding the Attorney General's intransigence, the Joint Committee has expeditiously and unanimously approved many settlements following the Attorney General's submission of a memorandum summarizing the proposed settlement and case status. *See* App'x 485–86; 499–540.

In contrast, the Attorney General has repeatedly stymied the settlement approval process by obfuscating the nature (or existence) of potential compromises and refusing to disclose basic information necessary for the Joint Committee to fulfill its statutory duties. *See* App'x 126–27, 141–51.

As the record below shows, the Joint Committee has acted as quickly as necessary to approve settlement when the Attorney General provides it with certain, minimal information about the settlement. Upon receiving a settlement request from the Attorney General, the Joint Committee can meet according to the default procedures in Wis. Stat. § 13.10, which call for quarterly meetings, or as necessary if more speed is needed. App'x 142, 145. The Joint Committee has also expedited its consideration where the Attorney General presented a time-sensitive request and takes prompt action consistent with a claimed exigency. *Id.* at 145–46, 183. Indeed, in its review of every proposed settlement properly presented to the Joint Committee to date, the Joint Committee has demonstrated its ability to work cooperatively and effectively with the Attorney General to timely approve settlements. App'x 145.[5] For example, on

[5] *See also* App'x 542–43 (email noting an "urgent [settlement] request" which was a "very urgent matter" delivered on August 23, 2019, indicating a decision was needed by August 30, and Legislature responds that the Joint Committee would meet to consider it on August 27—a mere four days after receipt of the initial request); App'x 546 (email from the Joint Committee co-chairs to Charlotte Gibson stating: "You informed us late Friday afternoon that the Attorney General requested the committee

September 30, 2019, the Attorney General requested that the Joint Committee approve a proposed settlement by November 1, 2019, in *Wis. Dep't of Agric., Trade, and Consumer Prot. v. Hampton Ave. Grp. LLC*, No. 2017CX1 (Wis. Cir. Ct. Milwaukee Cnty.), while supplying the committee with the requisite information, App'x 401. Then, the Joint Committee subsequently met and approved the settlement before that deadline. *Id.*; App'x 485–86 (unanimous Joint Committee approval of settlement in *Wis. Dep't of Agric., Trade & Consumer Prot. v. Hampton Ave. Grp. LLC*, No. 2017CX1 (Wis. Cir. Ct. Milwaukee Cnty.) during § 13.10 meeting on Oct. 31, 2019).

In contrast, the Attorney General has repeatedly hindered the Section 26 process, demonstrating a lack of transparency and raising meritless confidentiality objections. Thus, the Attorney General has thwarted the approval of settlements by misrepresenting the nature (or existence) of potential compromises and refusing to divulge basic information necessary for the Joint Committee to fulfill its statutory duties. *See* App'x 126–27, 141–51. Further, the

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meet to review a case. With extremely sparse details, on the Attorney General's word, we scheduled a committee hearing within two business days of your request."); App'x 385 (agreeing "that is true, yes[,]" that the Joint Committee at times convened "with notice as little as two business days when the DOJ has requested a hearing on an urgent or time-sensitive request"); *accord id.* at 380–81 (scheduling Joint Committee meeting and approving opioid settlement under Section 165.12 within approximately four business days over a holiday weekend); App'x 493–98 (reflecting unanimous Joint Committee approval of the same opioid settlement agreement).

Attorney General has refused to accept the Joint Committee's numerous options to assuage any legitimate confidentiality concerns. As an initial matter, communications between the Attorney General and the Joint Committee about proposed settlements are protected by attorney-client privilege as a matter of law, and the Joint Committee is permitted to meet in closed session to consider settlement proposals. App'x 128–29, 142–43. Further, and notwithstanding this well-settled principle, the Joint Committee's counsel signed a confidentiality agreement on behalf of the Joint Committee. App'x 129–30, 143–44; *see also* App'x 549–51. Under this signed agreement, the Attorney General would share confidential information with the Joint Committee's counsel, who would, in turn, share that information only with the Joint Committee members who agreed to be bound by the agreement. *Id.* Finally, as another step to ensure confidentiality, in certain cases the Attorney General simply requested permission from the opposing party to reveal the terms of the settlement to the Joint Committee. App'x 130–32. This occurred, for example, in the proposed settlement discussed above in *Wisc. Dep't of Agric., Trade, and Consumer Prot. v. Hampton Ave. Grp. LLC*, No. 2017CX1 (Wis. Cir. Ct. Milwaukee Cnty.). In that case, the Attorney General requested and received approval from the settlement counterparty to share the settlement offer with the Joint Committee and provided basic information about the case and the proposed settlement. *See* App'x 482–84. After receiving

this information, the Joint Committee promptly met and unanimously approved this settlement. App'x 401–02.

D. Procedural History

1. On June 8, 2021, Plaintiffs filed a Complaint with the Dane County Circuit Court, alleging that Section 26 violates the constitutional separation of powers with respect to two categories: "(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 [of Justice] 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." R.11 at 8. These two "categories" have substantial breadth, covering almost all of Section 26's applications. Indeed, even at the conclusion of the proceedings below, Plaintiffs still could not identify any actual settlement arising during the three years of Section 26's operation falling outside of these two categories. *Compare* R.137 at 5, 12–13, *and* R.148 at 6, *with* R.144 at 22–23. Plaintiffs moved for a temporary injunction the same day that they filed their Complaint, *see* R.13, although they later withdrew that motion, *see* R.44.

On July 8, 2021, Defendants moved to dismiss Plaintiffs' Complaint. *See generally* R.26–27. On September 10, 2021, the Circuit Court entered an Order denying Defendants' Motion to Dismiss. R.48. After the Legislature

filed a petition for leave to appeal the Order, this Court issued an Order denying the petition on November 1, 2021. Dkt. Entry 11-01-2021, *Kaul v. Wis. State* Legislature, No.2021AP1674-LV (Ct. App. Oct. 8, 2021).

The parties subsequently engaged in extensive discovery. The parties answered written discovery requests and produced documents demonstrating that, contrary to Plaintiffs' allegations, the Joint Committee addressed and unanimously approved proposed settlements with the appropriate dispatch. *See, e.g.*, App'x 127, 145, 477–81. Corey F. Finkelmeyer, Deputy Administrator for the Division of Legal Services for the Attorney General, admitted as much during his lengthy deposition. Under questioning, Mr. Finkelmeyer conceded that the Joint Committee had convened "with notice as little as two business days when the DOJ ha[d] requested a hearing on any urgent or time-sensitive request." App'x 385. More broadly, Mr. Finkelmeyer was unable to identify even a single instance in which the Joint Committee, faced with a time-sensitive request for a hearing to be held by a particular date, failed to hold a hearing by the date requested. App'x 386. Indeed, Mr. Finkelmeyer could not offer a single specific case where Section 26 harmed Plaintiffs in any concrete way. So, for example, counsel for the Legislature asked Mr. Finkelmeyer whether Section 26 had ever prohibited the Department from entering into consent judgments in multistate actions, in the "three years since Act 369 was enacted," to which he replied:

> As I sit here right now, I don't believe so . . . . I don't recall, but I would like to—if I may, I'd like to think about that, and I would certainly get back to you . . . . [B]ut as I'm sitting here thinking about [it] in a general way, I cannot recall one.

App'x 395–96. (Mr. Finkelmeyer never "g[o]t back to" the Legislature with this information.) Further, at his deposition, Mr. Finkelmeyer could only speak generally about how Section 26 has allegedly "infused . . . the whole process as [the Department of Justice] handle[s] a matter in any case," without ever identifying "explicitly in a particular case." App'x 389; *see also* App'x 389–93, 395–96, 398, 412.

Plaintiffs filed their Motion For Summary Judgment on December 29, 2021, incorporating in large part their previous arguments in support of their withdrawn motion for a temporary injunction. *See generally* R.71–72. Plaintiffs argued that Wis. Stat. § 165.08(1), as applied to their two categories of cases—(1) civil enforcement actions, such as environmental or consumer protection actions, and (2) civil actions on behalf of executive branch agencies relating to programs they administer by statute—unconstitutionally transfers core executive power over settlements to the legislative branch. R.72 at 16–35. Plaintiffs also argued, in the alternative, that even assuming settlements of these plaintiff-side civil actions constitute a shared power, the Legislature's veto power under Wis. Stat. § 165.08(1) unduly burdens the executive branch's ability to exercise its constitutional power. R.72 at 36–39.

On January 28, 2022, the Legislature responded and filed its own Motion for Summary Judgment. R.90–91. First, the Legislature explained that because Plaintiffs' challenge to Wis. Stat. § 165.08(1) is a "hybrid" one—that is, a "broad challenge to a specific category of applications"—Plaintiffs must, but have failed to, meet the standard for a facial challenge as to each identified category because they could not show that Section 26 is unconstitutional in every single application within their two broad categories of cases. R.90 at 11–25. Thus, Plaintiffs' claims failed on the merits under *SEIU*, which upheld Section 26 against a facial challenge when plaintiffs in that case also failed to meet the same facial invalidity standard. *Id.* The Legislature also contended that Plaintiffs' alternative, undue burden argument failed because even assuming an undue burden analysis applied, Plaintiffs, in over three years since the enactment of Section 26, could not point to any evidence of the Joint Committee's settlement approval process causing them undue burden in any cases, let alone in their two broad categories. *Id.* at 25–29.

3. On May 5, 2022, the Court issued its decision on the parties' cross-motions for summary judgment, "declar[ing] Wis. Stat. § 165.08(1) unconstitutional and in violation of the separation of powers under the Wisconsin Constitution" as to Plaintiffs' first category of cases. *See* App'x 1–19. The Circuit Court first acknowledged that Plaintiffs' lawsuit raised a "hybrid challenge" to "categor[ies] of applications" of Section 26, requiring Plaintiffs to "meet the standard for a facial

challenge as to the identified category," meaning that Plaintiffs must show "the statute could not be constitutionally enforced under any circumstances," and meet their "heavy burden" of proof "that the statute [at issue] is unconstitutional beyond a reasonable doubt." App'x 6 (citations omitted; alteration in original). Notwithstanding, the Court reasoned that *SEIU* did not foreclose Plaintiffs' challenge against Section 26 with respect to the first category, because *SEIU* never addressed the specific issue of whether "the settlement of civil enforcement actions is a core executive function," but instead addressed a facial challenge to Section 26 "that allow[s] the Legislature to participate in state litigation." App'x 10–11. The Circuit Court then proceeded to conclude that "[t]he Attorney General exercises a core function . . . when he agrees to settle a civil enforcement action." App'x 13. Moreover, the Circuit Court concluded, Section 26 infringed upon this core power because it grants the Legislature "unilateral veto powers over the settlement of civil enforcement actions initiated by the Attorney General." App'x 13; *see also* App'x 2 ("effectively operates as a veto"). The Circuit Court also found that the first category of civil enforcement actions did not implicate any legislative institutional interests. App'x 11–13.

Turning to Plaintiffs' second category of cases relating to civil actions brought at the request of an executive-branch agency or official relating to the administration of statutory programs, the Court declined to grant Plaintiffs summary

judgment. App'x 14–18. In response to the Circuit Court's questioning at oral argument, Plaintiffs contended that this claim "consist[ed] solely of settlements of plaintiff-side civil actions and exclude[d] any case that would require the State to pay money to another party." App'x 14. The Legislature objected to this verbal amendment of the Complaint, and this Court "t[ook] seriously" this objection. App'x 15–18.

On May 16, 2022, Plaintiffs filed their Amended Complaint. *See* R.116. The "only substantive amendment" that Plaintiffs made was adding a new paragraph 89, R.117 at 1, which reads, in its entirety: "This category does not involve any settlement in a plaintiff-side civil action that would require the payment of money to the defendant via a counterclaim or some other avenue," R.116 at ¶ 89. After the Legislature filed its Answer to the Amended Complaint on May 31, 2022, R.127, Plaintiffs filed their Renewed Motion For Summary Judgment, which relied entirely on their earlier briefing before the Circuit Court, R.128 at 2.

On June 9, 2022, the Legislature filed its Renewed Motion For Summary Judgment as to the second category of cases, explaining that Plaintiffs' addition of a single substantive paragraph to Count II reinforces the conclusion that Plaintiffs' challenge is foreclosed by *SEIU* given the multiple legislative institutional interests implicated by that broad category of cases. R.131–32. The Legislature also pointed out that Plaintiffs' decision to exclude from their challenge plaintiff-side civil actions that require the payment

of money to a defendant failed to protect the Legislature's fundamental interest in overseeing the State's money. The Legislature noted the fungible nature of money, and that, for example, a decision by the Attorney General to accept a less favorable settlement from a defendant in exchange for the release of a counterclaim has the same effect on the State's coffers as the Attorney General agreeing to make an expenditure to a defendant. R.131–32.

On June 24, 2022, the Circuit Court issued a decision and order declaring that Wis. Stat § 165.08(1) was unconstitutional as applied to the second category of cases in Count II of the Amended Complaint, and enjoining enforcement of the statute as applied to that category. App'x 20–28. The Circuit Court used the same reasoning from its May 5, 2022, decision, concluding that the settlement or discontinuation of civil plaintiff-side lawsuits is a core executive function that did not implicate any of the Legislature's institutional interests. App'x 23–27. Notably, the Circuit Court agreed that, in certain cases, "the Attorney General may agree to a reduced monetary settlement based on the assertion of a potentially meritorious counterclaim." App'x 25. Nevertheless, it reasoned that because such a settlement would not technically require the expenditure of state funds, the Legislature's constitutional power of the purse was not implicated. App'x 27.

4. After the Circuit Court's decision, on July 1, 2022, the Legislature moved for a stay pending appeal. R.135, 137,

which the Circuit Court granted only in part, App'x 41–43. With respect to Count I, the Circuit Court determined that the Legislature has a strong likelihood of success on appeal due to its appeal presenting novel, constitutional separation-of-powers issues. App'x 55, 88–89. The Circuit Court further explained that the Legislature has made "compelling" arguments in favor of its position, and that appellate jurists were "quite likely" to disagree among themselves as to whether the Legislature or Plaintiffs were correct on the merits during this appeal. App'x 89. The Circuit Court also found that the Legislature has demonstrated it will suffer irreparable harm unless a stay is granted. App'x 90–91. Nevertheless, the Court weighed the remaining two stay factors against the Legislature as to Count II, finding that Plaintiffs have demonstrated "the prospect of substantial harms both to the attorney general and interested parties" and "potential harm" to the public from issuing a stay that prevents the Attorney General from settling cases without obtaining the approval of the Joint Committee. App'x 91–97.

On August 17, 2022, this Court issued an Order granting the Legislature a stay pending appeal. App'x 29–30. First, this Court observed that the "circuit court, relying on *SEIU*, correctly concluded that the Legislature" made a "strong showing of its likelihood of success on the merits," and that the Legislature would suffer irreparable harm unless a stay is granted. App'x 35–36. This Court then agreed with the Legislature that the Circuit Court "failed to properly

apply the law provided in *SEIU*" with respect to its analysis of the third and fourth stay factors. App'x 36. Specifically, this Court explained that the "circuit court spoke in terms of potential and possible harm but failed to identify a single case evidencing substantial harm to other interested parties." App'x 36–37. Relatedly, this Court explained that Plaintiffs "appear[ed] to allege only the same general harms alleged in *SEIU*," thus failing to "establish concrete harm under the third or fourth stay factors." App'x 38. Finally, regarding harm to the public, this Court held that the Circuit Court erred in ruling as to Count II that "*potential*" harms to the public "can't be remedied or mitigated after the case is fully resolved." App'x 37–38.

STANDARD OF REVIEW

This Court reviews *de novo* whether a circuit court properly granted or denied summary judgment, as it is a question of law, *Waity v. LeMahieu*, 2022 WI 6, ¶ 17, 400 Wis. 2d 356, 969 N.W.2d 263, "applying the well-established standards set forth in Wis. Stat. § 802.08," *Benson v. City of Madison*, 2017 WI 65, ¶ 19, 376 Wis. 2d 35, 897 N.W.2d 16. A court must issue summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). Summary judgment may be proper based upon

statutory, *see Waity*, 2022 WI 6, ¶ 18, or constitutional interpretation, *see Appling v. Walker*, 2014 WI 96, ¶ 16, 358 Wis. 2d 132, 853 N.W.2d 888. Appellate courts review issues of statutory and constitutional interpretation *de novo*. *In re Matthew D.*, 2016 WI 35, ¶ 15, 368 Wis. 2d 170, 880 N.W.2d 107; *Appling*, 2014 WI 96, ¶ 17. Summary judgment also may be appropriate for lack of standing, *Flowers v. City of Madison*, 2013 WI App 41, ¶¶ 1, 3, 5, 346 Wis. 2d 731, 828 N.W.2d 592, and based upon claim preclusion, *Carns v. Carns*, 2022 WI App 30, ¶¶ 2, 26, 978 N.W.2d 89.

SUMMARY OF ARGUMENT

I. Plaintiffs' "hybrid" challenge to Section 26 fails as a matter of law, since, under *SEIU*, there are at least some constitutional applications of Section 26 within Plaintiffs' two broad categories of cases.

A. Plaintiffs' separation-of-powers challenge to Section 26 here is a "hybrid" constitutional challenge against the application of this statute to two categories of cases. Such a challenge must meet the standard for a facial challenge as to each category, requiring Plaintiffs to show that Section 26 could not be constitutionally enforced in any case in each category. Further, Plaintiffs must also overcome the strong presumption that a legislative enactment like Section 26 is constitutional in order to prevail. Below, Plaintiffs did not even try to address their burden of proving that Section 26 is unconstitutional as applied to all cases within their two broad

categories, instead refuting the governing standard with arguments foreclosed by *SEIU*.

B. Plaintiffs have completely failed to show that Section 26 is unconstitutional in every single application within their two extremely broad categories of cases—(1) civil-enforcement actions brought under statutes the Attorney General is charged with enforcing, and (2) civil actions the Attorney General prosecutes on behalf of agencies regarding the administration of the statutory programs they execute. Thus, Plaintiffs are not entitled to summary judgment, and this Court should direct judgment in the Legislature's favor.

1. In *SEIU*, the Supreme Court upheld Section 26 as facially constitutional, holding that the Attorney General's power to litigate on behalf of the State is a shared power, most notably in cases that implicate an institutional interest of the Legislature. As *SEIU* explained, such institutional interests include, but are not limited to, the Legislature's constitutional power to spend the state's money by enacting laws. Thus, Section 26 has constitutional applications at least where the Legislature's power of the purse is implicated.

2. Here, Plaintiffs' hybrid challenge to Section 26 fails under *SEIU* for two independently sufficient reasons, since the Legislature has two institutional interests that each give it a shared power to litigate on behalf of the State with the Attorney General, at least in some cases within Plaintiffs' two broad categories of settlements.

First, the Legislature has a legitimate institutional and constitutional interest in its power of the purse, which power includes the power over the State's sovereign expenses and other sources of income. Given the scope of this constitutional power, the Legislature's power of the purse is at play whenever the State obtains and spends funds, at least when those funds are sufficiently large. Therefore, when the Attorney General enters into settlements with monetary conditions in Plaintiffs' two broad categories of cases, the Legislature's power of the purse is implicated—at least when the sums of money are large—giving the Legislature a constitutional interest in reviewing the proposed settlement terms. Numerous hypotheticals and real-world examples demonstrate the Legislature's interest in such settlements.

Second, the Constitution gives the Legislature an institutional interest in establishing policy for the State, which interest is implicated by settlements within Plaintiffs' two categories of challenged cases. This is because, in at least some cases in Plaintiffs' two categories, the Attorney General may include settlement provisions that the defendant to act (or to refrain from acting) in a way not otherwise required under state law, and which has broad public-policy implications. And here too, readily available hypotheticals and examples show how settlements may implicate the Legislature's constitutional public-policy-setting interest.

3. The Circuit Court's contrary rulings are incorrect.

To begin, the Circuit Court held that the Attorney General's settlement of cases within his two broad categories is a core executive function, but that is foreclosed by *SEIU*, which held that such power is a shared power. Indeed, the Circuit Court's reasoning follows the reasoning of the *SEIU* dissent, not the *SEIU* majority.

The Circuit Court also incorrectly held that settlements in Plaintiffs' two categories of cases do not implicate any of the Legislature's institutional interests. The Circuit Court held that the Legislature's power of the purse was not implicated because plaintiff-side cases do not involve a settlement that would require the state to pay money to another party, but that reflects an incorrectly narrow view of this legislative power, as *SEIU* and hypotheticals and real-world examples all show. The Circuit Court also incorrectly held that the Legislature's policy-setting interests were not implicated by these settlements, but here too the Circuit Court's understanding of this power was far too limited.

C. Plaintiffs argued below, in the alternative, that Section 26 violates separation of powers because it unduly burdens and substantially interferes with their functions, but this alternative argument also fails. To begin, *SEIU* completely forecloses this argument, since it held that a facial challenges "gets nowhere under an 'unduly burdensome' shared powers analysis." In any event, Plaintiffs' unduly burdensome, shared-powers argument would fail even if this Court conducted an undue burden analysis. Plaintiffs have

failed to find any actual evidence of the Section 26 settlement approval process causing Plaintiffs an undue burden in *any* cases, let alone in *all* cases within Plaintiffs' two broad categories. Plaintiffs have relied upon unsupported generalized claims of burden that are without evidence in the record. Indeed, Plaintiffs could not even identify a single example of a burden in a single case, as the deposition testimony of Mr. Finkelmeyer most powerfully shows.

ARGUMENT[6]

I. Plaintiffs' "Hybrid" Lawsuit Fails Because Section 26 Has At Least Some Constitutional Applications Within Plaintiffs' Two Broad Categories Under *SEIU*

A. Plaintiffs Must Make An Exceedingly Demanding Showing To Succeed On This "Hybrid" Challenge

1. A party may challenge the constitutionality of a statute in three ways: (1) a facial challenge to the statute; (2) an as-applied challenge to a specific application of the statute; and (3) a hybrid challenge that has "characteristics of

[6] The Legislature continues to believe that Plaintiffs lack standing to challenge Section 26, including under *State v. City of Oak Creek*, 2000 WI 9, 232 Wis. 2d 612, 605 N.W.2d 526, as the Legislature explained in its unsuccessful Petition for Appeal at the Motion to Dismiss. *See* Pet. For Leave To App., *Kaul v. Wis. State* Legislature, No.2021AP1674-LV (Ct. App. Oct. 8, 2021). But standing is only prudential in Wisconsin, *see Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 16, 403 Wis. 2d 607, 976 N.W.2d 519, and given that the issues here have now been fully developed in extensive discovery and briefing on cross-motions for summary judgment, the Legislature believes that this Court should decide this appeal on the merits to resolve finally this important dispute.

both a facial and an as-applied claim," such that it is a "broad challenge to a specific category of applications." *SEIU*, 2020 WI 67, ¶¶ 36–38, 45; *see Gabler*, 2017 WI 67, ¶ 28.

As relevant to this case, a party bringing a hybrid challenge against categories of a statute's application "must meet the standard for a facial challenge" as to the identified category. *Gabler*, 2017 WI 67, ¶ 29. To succeed on a facial challenge, a challenger "must show that the statute cannot be enforced under any circumstances." *SEIU*, 2020 WI 67, ¶ 38 (citation omitted). In the hybrid challenge context, the challenger "is still *required* to demonstrate that, as to the specific category of applications, the statute could not be constitutionally enforced under *any* circumstances." *Id.* ¶ 45 (emphasis added). In *Gabler*, the Supreme Court held that the challenger brought a hybrid challenge to the statute at issue and, accordingly, was required to "meet the standard for a facial challenge and demonstrate that the disputed portions of [the statute at issue] cannot be constitutionally enforced" within the category "under *any* circumstances." 2017 WI 67, ¶ 29 (citation omitted; emphasis added).

To succeed in a separation-of-powers challenge to a statute, a party must also overcome the "strong presumption that a legislative enactment is constitutional." *Martinez v. Dep't of Indus., Labor & Hum. Rels.*, 165 Wis. 2d 687, 695, 478 N.W.2d 582 (1992). Indeed, that party 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. The Supreme Court "has repeatedly held that it indulges every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, [the Court] must resolve that doubt in favor of constitutionality" to "uphold the statute as constitutional." *Id.* (citations omitted).

2. As the Circuit Court properly identified, Plaintiffs have raised a "hybrid" challenge "to two categories of litigation" under Section 26. *See* R.48 at 6. Plaintiffs challenge Section 26 "as applied to two specific categories of plaintiff-side civil actions." R.72 at 6. Therefore, because Plaintiffs' claim is a "hybrid" challenge to Section 26 as to two broad categories of cases, they "must meet the standard for a facial challenge" as to each application within each category, *Gabler*, 2017 WI 67, ¶¶ 28–29; *SEIU*, 2020 WI 67, ¶ 45, *and* must rebut the presumption of constitutionality as to *each* application within each category, *Martinez*, 165 Wis. 2d at 695. Stated differently, Plaintiffs have the burden to show that Section 26 "could never be constitutionally applied" to any cases within these two categories, "even if it could be constitutionally applied to other[ ]" cases in other categories. *SEIU*, 2020 WI 67, ¶¶ 45, 72.

3. Plaintiffs below did not even try to address their burden of proving that Section 26 is unconstitutional as applied to all cases within their two broad categories. In briefing before the Circuit Court, Plaintiffs ignored entirely their heavy burden to meet that facial invalidity standard.

Instead, Plaintiffs just attacked *SEIU*'s holdings that litigation on behalf of the State is *not* a core executive power, R.72 at 18–32; R.96 at 3–7—including as to whether to settle or otherwise end a case, R.72 at 18–24—and that the Legislature had institutional interests in the settling of at least some cases, R.96 at 12–19. Moreover, while acknowledging both that Wisconsin courts have applied the presumption of constitutionality when analyzing separation-of-powers claims and that "this Court is bound by existing precedent," Plaintiffs suggested to the Circuit Court that the presumption does not apply. R.72 at 17. Plaintiffs ignore the fact that the Attorney General raised this same argument in *SEIU* and that the *SEIU* Court rejected that argument. *SEIU*, 2020 WI 67, ¶¶ 50–57, 71–73.

B. Plaintiffs Utterly Failed To Make This Mandatory Showing, Which Ends Their Case

Plaintiffs have failed to show that Section 26 is unconstitutional in every single application within their two extremely broad categories, and the Circuit Court's contrary conclusion is incorrect as a matter of law.

1. Under the Wisconsin Constitution, the legislative power is "vested in a senate and assembly," the executive power is "vested in a governor," and the judicial power is "vested in a unified court system." *SEIU*, 2020 WI 67, ¶ 31 (citing Wis. Const. art. IV, V, VII). Implicit in this "default rule" is the doctrine of separation of powers, under which 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. *Id.* ¶¶ 33, 35, 63; *see also Martinez*, 165 Wis. 2d at 696–97. Beyond the narrow "core powers" or "exclusive zone" context, Wisconsin courts have long "interpret[ed] the Wisconsin Constitution as requiring shared and merged powers of the branches of government rather than an absolute, rigid and segregated political design." *Martinez*, 165 Wis. 2d at 696. When powers are shared between branches, "one branch of government may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's role and powers." *Id.* (citation omitted). The separation-of-powers analysis therefore applies "liberally" in this shared-powers context because the Constitution "envisions a government of separated branches sharing certain powers." *J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis. 2d 69, 102–03, 336 N.W.2d 679 (Ct. App. 1983) (quoting *State v. Holmes*, 106 Wis. 2d 31, 43, 315 N.W.2d 703 (1982)); *accord Martinez*, 165 Wis. 2d at 701 n.13 (approving *Ahern*'s "liberally applied" characterization).

In *SEIU*, the Supreme Court upheld Section 26 against a facial constitutional challenge, reasoning that the Attorney General's power to litigate on behalf of the State is a "shared power[ ], most notably in cases that implicate an institutional interest of the [L]egislature." *SEIU*, 2020 WI 67, ¶ 63. The Court provided non-exhaustive examples of such

"institutional interest[s]," noting the Legislature's shared power to represent the State in litigation and thereby deeming Section 26 facially constitutional. *Id.* ¶¶ 63–71. As one example of an "on-point institutional interest of the [L]egislature," the Court highlighted that the Wisconsin Constitution "gives the [L]egislature the general power to spend the state's money by enacting laws." *Id.* ¶¶ 68–69 (citing Wis. Const. art. VIII, § 2). In light of this power-of-the-purse, the Legislature "has an institutional interest in the expenditure of state funds sufficient to justify the authority to approve certain settlements," particularly "where litigation involves requests for the state to pay money to another party." *Id.* ¶ 69. Accordingly, Section 26 "has constitutional applications where the power of the purse is implicated." *Id.* *SEIU* also noted that other state legislatures have this power, citing similar statutes requiring legislative approval for certain settlements, particularly those involving large sums of money. *Id.* ¶ 70. Finally, "the legislature may have other valid institutional interests" sufficient to defeat a constitutional challenge. *Id.* ¶ 73.

2. Here, Plaintiffs' hybrid challenge to Section 26 fails under *SEIU*. As discussed, in order to meet the facial invalidity standard, Plaintiffs must show that *every possible* application of Section 26 within these two categories of cases violates the separation of powers, all while overcoming the presumption that each application within each category is constitutional. *See supra* Part I.A.1. Plaintiffs fall well short

of meeting this heavy burden because, just as in *SEIU*, the Legislature has "institutional interests" that provide it a "shared power" in "at least some cases" within Plaintiffs' two broad categories of settlements. 2020 WI 67, ¶¶ 71–73 & n.22.

Plaintiffs fail to satisfy the facial-invalidity standard for two separate, independent reasons.

First, as *SEIU* held, the Legislature has a "legitimate institutional" and "constitutional" interest in its "power of the purse." *Id.* ¶¶ 69–71. Under the Wisconsin Constitution, the Legislature has spending power over both the State's sovereign expenses, Wis. Const. art. VIII, § 2 (Legislature's power over appropriations), and "other sources of income," Wis. Const. art. VIII, § 5 (Legislature's balanced-budget duty to "levy[ ] a tax . . . sufficient, with other sources of income, to pay [for any] deficiency" in the State's budget), including revenue received by the State through settlements. Further, "[t]he legislature, of course, is the branch granted the power to enact laws," and so has "the general power to spend the [S]tate's money by enacting laws." *SEIU*, 2020 WI 67, ¶¶ 68–69 (citing Wis. Const. art. IV, § 17). Thus, the Constitution, "plainly contemplates legislative action to determine the sufficiency of [the State's] income each year to cover the regular expenses" of the State. *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331, 364–65 (1915) .

The Legislature's "institutional interest in . . . the public purse" is implicated whenever the State obtains or spends funds, at least where the amount of money at stake is

large. *SEIU*, 2020 WI 67, ¶¶ 10, 71. As the Attorney General has explicitly acknowledged at other times, "the constitution *requires* . . . that the Legislature plan in such a way as to insure that on an annual basis, revenues are sufficient to defray the state's expenses." Op. of Att'y Gen., No. OAG 39-85, 1985 WL 257977, at *1 (Oct. 7, 1985) (emphasis added). The Legislature is only able to effectively "determine the sufficiency" of the State's "income each year," *State ex rel. Owen*, 151 N.W. at 364–65, and "plan in such a way" that "revenues are sufficient," Op. of Att'y Gen., 1985 WL 257977, at *1, by overseeing *all* "sources of income," Wis. Const. art. VIII, § 5. Therefore, when the Attorney General enters into settlements containing monetary conditions in Plaintiffs' two broad categories, the Legislature's "power of the purse" is "implicated"—at least when the sums of money are large—giving the Legislature a constitutional interest in reviewing the proposed settlement terms. *SEIU*, 2020 WI 67, ¶¶ 68–70.

Consider, for example, the following hypothetical, which would fall squarely within Plaintiffs' two categories. The Attorney General enters into a multimillion-dollar settlement with a largescale landlord that has violated the State's housing laws. The settlement has a monetary condition which requires the landlord to pay $10 million of settlement funds to the Attorney General's preferred housing nonprofit, with another $10 million going to the Department of Agriculture, Trade and Consumer Protection ("DATCP"), for DATCP to spend how it sees fit to help with low-income

housing. This type of consequential settlement would directly affect the Legislature's constitutional authority to determine how the funds should be allocated and expended. Wis. Const. art. VIII, § 2. Accordingly, the Legislature can constitutionally have a seat at the table when the Attorney General considers this kind of settlement, given that it implicates the Legislature's constitutional power of the purse by "affecting state appropriations." *SEIU*, 2020 WI 67, ¶ 70. Thus, this hypothetical illustrates what the Legislature sought to achieve when it enacted Section 26: to have such settlement be presented to the Joint Committee to help decide how best to utilize these millions of dollars of the State's money, whether through spending priorities or by cutting taxes.

Or, consider real world examples, such as a recent settlement where opioid manufacturers paid large sums to the State for the manufacturers' practice of over-dispensing opioids to the public. *See* Wis. Dep't of Health Servs., Revised DHS Opioid Settlement Funds Proposal for SFY 2023 (hereinafter, "DHS Opioid Settlement").[7] Under Wis. Stat. § 165.12, the Attorney General had to—and did—obtain the Joint Committee's approval in order to bind the State to that opioid settlement. Wis. Stat. § 165.12. Section 165.12 operates *exactly* like Section 26, since it expressly

[7]Available at https://www.dhs.wisconsin.gov/publications/p03288.pdf (all websites last visited Oct. 17, 2022).

incorporates the Joint Committee settlement-approval "procedure under s. 165.08(1) [*i.e.*, Section 26, as codified]." *Id.* § 165.12(2)(a). And as with the hypothetical above, the Legislature should have a seat at the table for such a settlement: Funds from this and similar settlements are a critical portion of funding for statewide efforts to curb opioid addiction in Wisconsin, including through data collection and monitoring, prevention, harm reduction, treatment, recovery, and funding for local government opioid reduction policies. DHS Opioid Settlement, *supra*, at 1–3. Review of such settlements by the Joint Committee ensures that the Legislature has a say when decisions that impact its fiscal planning and expenditure of the State's funds. Similarly, in the 1990s, the State was party to a massive, multistate tobacco settlement, where it received over $1.2 billion from 1999 to 2008. Wis. Legislative Fiscal Bureau, Informational Paper 76: Tobacco Settlement and Securitization, 1–2, 4, 10.[8] The Legislature had an unquestionable interest in the distribution and use of that amount of State money, and so could have had a constitutional seat at the table had Section 26 been on the books at the relevant time.

Second, the Constitution gives the Legislature an institutional interest in establishing policy for the State, *see* Wis. Const. art. IV, § 1—as the Supreme Court has repeatedly

[8] Available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2009/0076_tobacco_settlement_and_securitization_informational_paper_76.pdf.

recognized, *e.g.*, *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 529, 576 N.W.2d 245 (1998) ("It is for the legislature to make policy choices[.]"); *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 216, 188 N.W.2d 460 (1971)—and that interest too is implicated in settlements within Plaintiffs' two categories, in at least some cases. This is because, in at least some cases within each of Plaintiffs' two categories, settlements may include provisions requiring the defendant to act (or refrain from acting) in a manner not otherwise required under state law, and which has broad public-policy implications.

The largescale-landlord hypothetical discussed above demonstrates how a settlement within Plaintiffs' two categories of cases may implicate the Legislature's institutional interest in setting policy for the State. In that hypothetical, as noted, the Attorney General's settlement with the landlord included provisions requiring the landlord to provide low-cost housing for certain indigent Wisconsin residents through payments to DATCP. *See supra* pp. 37–38. That kind of settlement term readily implicates the Legislature's policy-setting institutional interest. For example, the Legislature may conclude that the landlord paying a larger settlement amount to fund a housing-assistance voucher program designed by the Legislature (*i.e.*, not a program run through DATCP) is a more desirable policy for providing low-cost housing in the State. Determining what is "the best public policy" among "the alternatives available"—here, either a low-cost-housing program run by

DATCP, or one designed by the Legislature itself—is a *policy* choice, lying in the heartland of the Legislature's policy-setting authority. *Vanko*, 52 Wis. 2d at 216. The Legislature therefore has a sufficient institutional interest to justify its authority to approve such settlements, under *SEIU*. *See Flynn*, 216 Wis. 2d at 529 ("It is for the legislature to make policy choices[.]").

The next opioid or tobacco settlement may well include policy-laden settlement terms as well, which would also implicate the Legislature's interests. For example, the Attorney General might want to require, as a term of settlement, that opioid or tobacco or some other manufacturers pay for rehab for those Wisconsin citizens suffering from an addiction to the manufacturers' products. Yet, the Legislature may prefer that the manufacturers make payments into a central fund allocated both to rehab and to research into side effects of opioid or tobacco products. As in the landlord hypothetical, selecting among such "alternatives" is quintessentially a *policy* choice within the legislative domain, *Vanko*, 52 Wis. 2d at 216, which means the Legislature's institutional interests are at work, per *SIEU*. Accordingly (and once again), there are at least some applications of Section 26 that are constitutional.

3. The Circuit Court's rulings to the contrary were in error.

In direct contravention of *SEIU*—and apparently following the reasoning of the *SEIU* dissent—the Circuit

Court held that the Attorney General's settlement of civil enforcement actions and civil lawsuit actions initiated by the Attorney General at the request of an executive agency or official are core executive functions. App'x 7–14, 23–27; *accord SEIU*, 2020 WI 67, ¶¶ 168–69 (Dallet, J., dissenting in part) (advancing a "formal[ist]" view that "vigorously appl[ies] the limiting principle" of the "shared-power analysis"). Thus, mirroring the *SEIU* dissent, the Circuit Court held that Section 26 grants the Legislature "unilateral veto powers over the settlement[s] . . . initiated by the Attorney General." App'x at 2, 13, 26; *compare SEIU*, 2020 WI 67, ¶ 170 (Dallet, J., dissenting in part) (characterizing Section 26 as an "overriding [and impermissible] legislative veto"). Yet, the *SEIU* majority held that the "power to consent to . . . the compromise or discontinuance of a matter being prosecuted" by the Attorney General is a "*shared*" power whenever the Legislature's institutional interests are implicated in the settlement. 2020 WI 67, ¶¶ 30–35, 63, 69, 72 & n.22 (emphasis added). And, within that shared-powers context, the Legislature merely having a seat at the table for certain settlements—which is all that Section 26 provides—is constitutional. *Id.*

Further, the Circuit Court erred in concluding that settlements in Plaintiffs' two categories of cases do not implicate any of the Legislature's institutional interests.

The Circuit Court first rejected reliance on the Legislature's constitutional power of the purse interest

because, in the Circuit Court's view, Plaintiffs' two categories of plaintiff-side cases do not involve "a settlement [that] would require the state to pay money to another party." App'x 11, 13, 24. This reasoning is, with respect, flawed. As explained above, the Legislature's power of the purse covers money traveling *to* and money traveling *from* the state treasury, at least where large amounts of moneys are involved, *supra* pp. 35–37 (citing Wis. Const. art. VIII, § 5; *State ex rel. Owen*, 151 N.W. at 364–65; and Op. of Att'y Gen., 1985 WL 257977), thus it makes no constitutional difference whether Plaintiffs enter into defense-side or plaintiff-side settlements. This is why, in *SEIU*, the Court facially upheld both legislative settlement-approval statutes within Act 369—Section 26, covering plaintiff-side cases, and Section 30, covering defense-side cases—without differentiating between these two types of settlements/statutory provisions. 2020 WI 67, ¶ 71; *accord Brown Cnty. v. Brown Cnty. Taxpayers Ass'n*, 2022 WI 13, ¶ 40, 400 Wis. 2d 781, 971 N.W.2d 491 ("money is fungible"). So, like the other state legislatures with their respective state statutes requiring approval of settlements affecting state appropriations, *SEIU*, 2020 WI 67, ¶ 70, the Legislature's "institutional interest in . . . the public purse" is implicated through the State spending *and* obtaining funds, *id.* ¶ 10.

Hypotheticals and real-world examples, including those provided above, further demonstrate that the Legislature's "power of the purse" is implicated "in at least some" plaintiff-side settlements within Plaintiffs' two categories, contrary to

the Circuit Court's reasoning. *SEIU*, 2020 WI 67, ¶¶ 69, 72. With respect to Plaintiffs' first category, the State entering into massive multistate tobacco or opioid or other similar settlements involving substantial amounts of money flowing to the State obviously triggers the Legislature's constitutional interest in the public fisc, justifying its seat at the table when such settlements are made. And with respect to the second category, consider a hypothetical in which a private defendant successfully requested $5 million in a counterclaim against the Attorney General, but that sum was subsumed by the State's larger $10 million sum, resulting in a combined settlement of $5 million in the State's favor. The Circuit Court found "no conceptual problem" with such settlement because it "would not require any expenditure of state funds." R.134 at 6. But "money is fungible," *Brown Cnty.*, 2022 WI 13, ¶ 40, thus this result is no different from a defendant successfully receiving a $5 million settlement in a lawsuit.

The Circuit Court also incorrectly held that the Legislature's institutional policy interests were not implicated by these settlements. App'x 12, 25–26. According to the Circuit Court, no settlement with the State—including those implicating "a matter of public interest"—affects the Legislature's constitutional policy-making interest because such settlements do not require "enactment of laws" and "do not establish precedent." App'x 12, 25–26. But the Supreme Court does not understand the Legislature's constitutional policy-making interest so narrowly. Rather, all "[p]ublic

policy is for the legislature to establish," as the Legislature occupies "*the field of public policy*." *Vanko*, 52 Wis. 2d at 216 (emphasis added). Further, as shown by the examples and hypotheticals above, *supra* pp. 39–41, the Attorney General's settlements could thwart the Legislature's efforts to "enact[ ] . . . laws" and "establish precedent" setting policy for the State by directing funds away from the Legislature's priorities and requiring entities within the State to take specific action with statewide effects, App'x 12, 25–26. And while the Circuit Court also cites two definitions of "policy," those definitions do not salvage its holding, since settlements like the examples and hypotheticals discussed above could readily affect the "overall plan" or "standard course of action" for the State established by the Legislature. App'x 12 (citations omitted).

C. Plaintiffs' Alternative, Undue Burden Argument Fails

Plaintiffs argued before the Circuit Court that "Section 26 violates separation of powers because it unduly burdens and substantially interferes with the executive branch's ability to perform its constitutional settlement role." R.72 at 7. But *SEIU* already took this argument entirely off of the table. In any event, even if the undue burden analysis did apply, Plaintiffs' argument fails as they have come nowhere close to satisfying their burden of proof.

1. As a threshold matter, *SEIU* entirely forecloses this argument. In *SEIU*, the Attorney General unsuccessfully argued that, under a shared powers analysis, Section 26

"substantially interferes" with his executive judgments made while representing the State in litigation. App'x 259–62. *SEIU* rejected this argument out-of-hand, holding that a "facial challenge gets nowhere under an 'unduly burdensome' shared powers analysis," and, thus, it is not necessary to even conduct such an analysis for Section 26. 2020 WI 67, ¶ 72 & n.22. This holding applies equally to a "hybrid challenge," because Plaintiffs must still show that Section 26 may not be constitutionally applied as to their two broad categories "under *any* circumstances." *Id.* ¶ 45 (emphasis added).

2. In any event, even if *SEIU* did not already categorically foreclose this argument—which, to be clear, it does—Plaintiffs could not make any undue burden showing regarding even one proposed settlement in three years, much less all cases within their two categories.

Legislation is invalid only if it "unduly burden[s] or substantially interfere[s] with the other branch's role and powers." *Martinez*, 165 Wis. 2d at 696–97 (citation omitted); *see also SEIU*, 2020 WI 67, ¶ 35. Accordingly, if a power is shared and the undue burden analysis applies, the court must still make a factual determination of whether the power exercised by one branch "unduly burden[s]" or "substantially interfere[s]" with the power of the other branch. *Martinez*, 165 Wis. 2d at 696–702. To make this determination, the Court is required to "say *beyond a reasonable doubt* that the statute unduly burdens or substantially interferes with"

another branch's ability to function. *Flynn*, 216 Wis. 2d at 554 (emphasis added); *see also Cole*, 2003 WI 112, ¶ 11.

In the event that this Court elects to conduct an undue burden analysis, where, as here, Plaintiffs "must meet the standard for a facial challenge" to Section 26, they are required to show that the statute "cannot be constitutionally enforced" against the identified category "under *any* circumstances." *Gabler*, 2017 WI 67, ¶ 29 (citation omitted; emphasis added). Plaintiffs have utterly failed to meet their "heavy burden" of proving otherwise beyond a reasonable doubt, *Cole*, 2003 WI 112, ¶ 11, as to every single application of Section 26 within their two broad categories.

After more than three years since the enactment of Section 26, Plaintiffs are unable to find any actual evidence of the Joint Committee's settlement approval process causing Plaintiffs an undue burden in *any* cases, let alone in *all* cases within Plaintiffs' two broad categories. Indeed, in the three years since Section 26 was enacted, the Joint Committee has unanimously approved many settlements, including on an expedited basis where necessary. *See supra* pp. 12–15; App'x 127, 145, 378, 477–81.

On every occasion, Plaintiffs' generalized claims of burden below were entirely without evidence in the record. Thus, Plaintiffs could not find even one instance where the State did not join a multiparty settlement due to Section 26. *See* App'x 395. Nor could they name a single example where the Attorney General requested confidentiality, but the Joint

Committee refused. *See* App'x 376 (Q: "In this particular instance, did you even ask the JFC for a meeting?" A: "No."); *see also* App'x 376–77. Further, Plaintiffs failed to identify any examples where the Attorney General declined to prosecute civil actions and instead chose to apply the Department's resources to a more fulsome remedy. *See* App'x 408 ("I don't recall where the [D]epartment of Wisconsin DOJ made that decision."). Nor could Plaintiffs point to even one instance of an agency electing not to commence a civil action because of Section 26. *See id.*

Were this Court to focus only on time-sensitive settlement approvals—although, as explained above, this is not the proper inquiry in the hybrid challenge context, *see supra* PartI.A.1—Plaintiffs have put forward no examples of the Joint Committee failing to consider time-sensitive settlements with sufficient speed. Every time that the Attorney General requested that the Joint Committee approve a settlement by a particular date, the Joint Committee has convened on or before the requested date—including requests made on an expedited basis. App'x 145, 385, 542–43, 545–47. If the Attorney General identifies a proposed settlement as "time sensitive" or "urgent," the Joint Committee can exercise the option to convene specifically to approve settlements, on an as-needed basis, so as to act with all necessary speed. App'x 142, 145–46, 183, 542–43.

Similarly, even if the Court's analysis focuses solely on settlements involving confidentiality issues—which, again, is

an improperly narrow scope, *supra* Part I.A.1—Plaintiffs still cannot identify any burden. The Joint Committee can proceed while respecting all legitimate confidentiality concerns as needed, and it has offered the Attorney General three specific, independent avenues to protect any bona fide confidentiality concerns that may arise in some cases. *See supra* pp. 14–15.

The contrary arguments identified by Plaintiffs before the Circuit Court only emphasize their inability to meet their heavy burden of proof. Rather than presenting a single example of a burden in a specific case, Plaintiffs complained *generally* about the Joint Committee's settlement-approval process. *See* R.72 at 29–30, 33–34. Notably, while Plaintiffs highlighted the statistic that "between 67% and 92% of civil cases resolve through pre-trial settlement" and settlement is a "critical component of civil litigation outcomes," R.72 at 10,[9] Plaintiffs' undue burden argument consists of less than a single page of their summary-judgment brief—devoid of *any* citation of supporting facts whatsoever to show *any* actual evidence of undue burden in *any* actual case. *See* R.72 at 39.

Plaintiffs' submission of the Finkelmeyer affidavit, R.73, to the Circuit Court, does not change these conclusions. There, Mr. Finkelmeyer generically claimed that, *inter alia*, "[i]n cases where [the Joint Committee] has actually

[9] In his brief before the Supreme Court in *SEIU*, the Attorney General noted that "[m]ost cases settle—around 60 to 70%, if not more." App'x 259 (citing Eisenberg, Theodore & Lanvers, Charlotte, *What is the Settlement Rate and Why Should We Care?*, 6 J. Empirical Legal Stud. 111, 132 (2009)).

considered a proposed settlement under Wis. Stat. § 165.08(1), [the Joint Committee] has taken between one week and several months to convene and decide whether to approve it." R.73 ¶ 40. But that alleged timeline does not support the conclusion that the Joint Committee's approval-process poses a meaningful burden in most cases—let alone in *all* cases, as is Plaintiffs' burden here.

Mr. Finkelmeyer's deposition testimony strongly supports the opposite conclusion, that there is no meaningful burden in any cases as a result of Section 26, much less in all cases within Plaintiffs' two broad categories. Mr. Finkelmeyer expressly admitted at his deposition that the Joint Committee has convened "with notice as little as two business days when the DOJ had requested a hearing on any urgent or time-sensitive request[.]" App'x 385. And although Plaintiffs pointed to a single example where the Joint Committee took four months to approve three proposed settlements, *see* R.73 ¶ 40, Mr. Finkelmeyer testified that these three particular settlements were unique, such that time-sensitivity had "less of an impact" on those settlement approvals, App'x 382–83, 385–86, 390, and that each was undisputedly ultimately approved, App'x 383–84, 386. Moreover, Mr. Finkelmeyer conceded that this four-month waiting period "was probably the longest" period, and he could not identify *any other examples* of settlement approval that had taken as long. App'x 385. Further, the Attorney General did not request an expedited review of those particular

settlements or even offer a proposed timeline for the Joint Committee's action. App'x 146. Moreover, although Mr. Finkelmeyer repeatedly referenced the need for expedition in his affidavit *see, e.g.*, R.73 ¶¶ 8, 15–17, 23, 46–47, he admitted during his deposition that the dispatch required for approval depends on the circumstances of each case, *see* App'x 381, 404.

Finally, Mr. Finkelmeyer also claimed that the Joint Committee has declined to give the Department real-time authority to settle a case during mediation or negotiation, while also declining to consider any potential settlement agreements that have not been reduced to their full and final form. R.73 ¶ 29. But Plaintiffs failed to proffer any evidence to show how this lack of real-time authority is an undue burden in any case, let alone in all cases within their two broad categories. Indeed, in *SEIU*, the Court reviewed statutes from other States that likewise authorized state legislatures to review and approve certain settlements, without any indication that any of those legislatures offered real-time settlement authority. 2020 WI 67, ¶ 70.

CONCLUSION

This Court should reverse the Circuit Court's grant of summary judgment to Plaintiffs and remand for entry of summary judgment in the Legislature's favor.

Dated: October 17, 2022.

Respectfully submitted,

Electronically signed by Misha Tseytlin
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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 10,929 words.

I further certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: October 17, 2022.

Electronically signed by Misha Tseytlin
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