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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, TYLER AUGUST, HOWARD L. MARKLEIN, MARK BORN, DUEY STROEBEL AND TERRY KATSMA, DEFENDANTS-APPELLANTS.

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

DEFENDANTS-APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION 5

ARGUMENT 5

I. Because Section 26 Has At Least Some Constitutional Applications Within Plaintiffs' Two Broad Categories, Plaintiffs' "Hybrid" Challenge Fails 5

II. Plaintiffs' Categorically Foreclosed "Unduly Burdensome" Argument Similarly Fails 14

CONCLUSION..... 17

TABLE OF AUTHORITIES

Cases

Bowsher v. Synar,
478 U.S. 714 (1986) 6

Brown Cnty. v. Brown Cnty. Taxpayers Ass'n,
2022 WI 13, 400 Wis. 2d 781, 971 N.W.2d 491 11

Chaffin v. Ark. Game & Fish Comm'n,
757 S.W.2d 950 (Ark. 1988) 7

Flynn v. Dep't of Admin.,
216 Wis. 2d 521, 576 N.W.2d 245 (1998)..... 14, 15, 16

Gabler v. Crime Victims Rts. Bd.,
2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384 ..... 5, 6, 7

Heckler v. Chaney,
470 U.S. 821 (1985) 6

In re Opinion of Justices,
27 A.3d 859 (N.H. 2011)..... 7

J.F. Ahern Co. v. Wis. State Building Comm'n,
114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983) 8, 9

Koschkee v. Taylor,
2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600 8

Martinez v. Dep't of Indus., Labor & Hum. Rels.,
165 Wis. 2d 687, 478 N.W.2d 582 (1992)..... 7

Matter of E.B.,
111 Wis. 2d 175, 330 N.W.2d 584 (1983)..... 15

Morrison v. Olson,
487 U.S. 654 (1988) 6

Serv. Emps. Int'l Union, Local 1 v. Vos,
2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 ..... *passim*

State ex rel. Friedrich v. Cir. Ct. for Dane Cnty.,
192 Wis. 2d 1, 531 N.W.2d 32 (1995) 15

State ex rel. Owen v. Donald,
150 Wis. 21, 151 N.W. 331 (1915)..... 10

State ex rel. Vanko v. Kahl,
52 Wis. 2d 206, 188 N.W.2d 460 (1971)..... 13, 14

State v. Chvala,
2003 WI App 257, 268 Wis. 2d 451, 673 N.W.2d 401 15

State v. Cole,
2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 329 14

State v. Horn,
226 Wis. 2d 637, 594 N.W.2d 772 (1999)..... 8

Tavern League of Wis., Inc. v. Palm,
2021 WI 33, 396 Wis. 2d 434, 957 N.W.2d 261 5

Tetra Tech EC, Inc. v. Wis. Dep't of Revenue,
2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21 8

Wis. Legislature v. Palm,
2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900 5

Constitutional Provisions

Wis. Const. art. IV, § 1..... 13

Wis. Const. art. VI, § 3..... 7

Wis. Const. art. VIII, § 2..... 12

Wis. Const. art. VIII, § 5..... 10

Statutes

2017 Act 369..... 9

Judiciary Act of 1789, 1 Stat. 73 (1789)..... 7

Wis. Stat. § 165.08 9

Other Authorities

Attorney General's Response Brief, *SEIU v. Vos*,
No.2019AP614-LV (Wis. Sept. 17, 2019)..... 6, 8, 15

Op. of Att'y Gen., No. OAG 39-85, 1985 WL 257977
(Oct. 7, 1985) 10

Reply Brief of Legislative Defendants-Petitioners/
Defendants-Appellants, *SEIU v. Vos*, No.2019AP614-
LV (Wis. Sept. 19, 2019) 15

INTRODUCTION

Plaintiffs' response brief is part of a pattern that these public officials have, unfortunately, followed in recent cases: refusing to accept adverse decisions of the Wisconsin Supreme Court on the same legal issues. *Compare Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, *with Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, 396 Wis. 2d 434, 957 N.W.2d 261. Plaintiffs spend most of their brief making the very same arguments they made in *Service Employees International Union, Local 1 ("SEIU") v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, citing the same authorities that the Supreme Court found utterly irrelevant to the issues at stake when Plaintiffs last attacked Section 26. This Court should reverse the Circuit Court's decision, putting an end to Plaintiffs' now-almost-four-year-long effort to invalidate Section 26 through the courts.

ARGUMENT

I. Because Section 26 Has At Least Some Constitutional Applications Within Plaintiffs' Two Broad Categories, Plaintiffs' "Hybrid" Challenge Fails

Plaintiffs have not met their burden under *SEIU* and *Gabler v. Crime Victims Rights Board*, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384, and, thus, their "hybrid" challenge to Section 26 fails. *SEIU* and *Gabler* require Plaintiffs to show that every application of Section 26 within their two broad categories is unconstitutional, *SEIU*, 2020 WI 67,

¶¶ 38, 45; *Gabler*, 2017 WI 67, ¶ 29—an extremely heavy burden because any valid legislative interest in any potential settlement within these two categories ends their case, *SEIU*, 2020 WI 67, ¶¶ 63–71. The Legislature has identified two types of cases arising in these categories that plainly implicate the Legislature's interests, even providing detailed hypothetical examples, which are fatal to Plaintiffs' hybrid-challenge lawsuit. Op.Br.34–40.

Plaintiffs spend much of their response brief largely rehashing the same federal cases that they relied upon in *SEIU*, to argue that settlements of lawsuits are generally a core power. *Compare* Attorney General's Response Brief at 12–19, *SEIU v. Vos*, No.2019AP614-LV (Wis. Sept. 17, 2019) ("AG *SEIU* Resp.Br.") (citing *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Heckler v. Chaney*, 470 U.S. 821 (1985)),[1] *with* Resp.Br.21–31 (also citing *Morrison*, *Bowsher*, and *Heckler*). The Legislature respectfully urges this Court to compare Plaintiffs' response brief here and their briefs in *SEIU* to see the extraordinary overlap of their already-rejected arguments. And the reason that the Supreme Court was not convinced by Plaintiffs' federal authorities in *SEIU* is because, as *SEIU* makes clear, the office of the Wisconsin Attorney General—created by the Wisconsin Constitution, Wis. Const. art. VI, § 3, unlike its

[1] Available at https://acefiling.wicourts.gov/document/eFiled/2019AP000614/247132.

statute-based federal counterpart, Judiciary Act of 1789, 1 Stat. 73 (1789)—is unique to our State, reflecting the longstanding "understanding that the attorney general's [litigation] role is not, at least in all cases, a core executive function," *SEIU*, 2020 WI 67, ¶¶ 64–69. Moreover and relatedly, the separation-of-powers analysis under our Constitution is distinct from its federal counterpart, recognizing shared powers and interbranch comity in ways the federal system does not. *See Martinez v. Dep't of Indus., Labor & Hum. Rels.*, 165 Wis. 2d 687, 696, 478 N.W.2d 582 (1992).[2]

Plaintiffs similarly repeat their failed tactic from *SEIU* by citing entirely inapposite Wisconsin cases. Resp.Br.21–31. These cases deal with far-flung issues such as whether an agency could review and sanction judges for their judgments, *see Gabler*, 2017 WI 67, ¶¶ 37–46, whether the Legislature could require written gubernatorial approval before an agency could draft or promulgate a rule, *see Koschkee v.*

[2] Plaintiffs' out-of-state authorities do not help their cause. *Chaffin v. Arkansas Game & Fish Commission*, 757 S.W.2d 950 (Ark. 1988), involved an "independent constitutional agency" with explicit "independent, separate powers that must be respected," so the Arkansas Legislature could not constitutionally "manage the operations" of that agency, *id.* at 952–54. *In re Opinion of Justices*, 27 A.3d 859 (N.H. 2011), is similarly unavailing, as there the relevant statute required the Attorney General to enter ongoing litigation and take a particular side, which the New Hampshire Supreme Court explained was "qualitatively different" than a statute directing "the attorney general to 'pursue settlement'" in a specific case without dictating a particular outcome, *id.* at 862, 870.

Taylor, 2019 WI 76, ¶¶ 1–2, 387 Wis. 2d 552, 929 N.W.2d 600, whether an administrative agency, rather than the judiciary, could be tasked with reviewing revocation of probation, *see State v. Horn*, 226 Wis. 2d 637, 639–40, 594 N.W.2d 772 (1999), and whether it is constitutional for the judiciary to defer to agency interpretations of statutes, *see Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶¶ 2–3, 382 Wis. 2d 496, 914 N.W.2d 21. *See* AG *SEIU* Resp.Br.12–19.

As the Legislature argued in *SEIU*, by far the most on-point precedent as to Section 26 is *J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983), which involved the Legislature granting the State Building Commission—a legislative committee controlled by eight members, six of which were legislators—an analogous seat at the table when dealing with the Governor's approval of building contracts. *Id.* at 76–77, 99–100, 105–08. *Ahern*'s holding is on point to Section 26 because this Court explained there was no separation-of-powers violation in the Commission exercising "a right solely to prevent construction not meeting the commission's approval at the contract stage, not a right to administer or supervise the construction itself," and so the mere requirement that the Commission and the Governor proceed as a "cooperative venture between the two governmental branches" on this shared power was constitutional. *Id.* at 105–06, 108. Here, Section 26 operates similarly to the Commission provisions in *Ahern*, requiring that the Joint Committee agree to the

Attorney General's proposed settlement before that settlement binds the State, Wis. Stat. § 165.08(1), but without authority to enter into a settlement within Section 26's purview for the State, absent the Attorney General's agreement, just as the "practical requirement of unanimity" in *Ahern*, 114 Wis. 2d at 108.

But most importantly, the Supreme Court already considered all of these authorities and set out the following controlling rule: where a settlement implicates an institutional interest of the Legislature, settlement of that case is a shared power, and Section 26 is constitutional as to that settlement. ***Thus, the only relevant question in this hybrid challenge under SEIU is whether even one application of Section 26 within Plaintiffs' two broad categories implicates the Legislature's interests.*** *SEIU*, 2020 WI 67, ¶¶ 38, 63–71.

Turning, then, to that relevant question, Plaintiffs' conclusory claim that the Legislature's taxing and spending powers are never at issue in any plaintiff-side cases within Section 26, Resp.Br.35–41, is foreclosed by *SEIU*. There, the Court cited the Legislature's power of the purse as a "legitimate institutional" and "constitutional" interest in upholding both Sections 26 and 30 within 2017 Act 369, *SEIU*, 2020 WI 67, ¶¶ 68–70, 72, which entirely defeats Plaintiffs' proposition that this interest is somehow only sufficient in defense-side settlements covered by Section 30, Resp.Br.34–37.

More generally, Plaintiffs are wrong on the scope of the Legislature's power of the purse, and how that power interacts with settlements. Whenever the State spends *or* receives funds in a settlement, the Legislature's "institutional interest in . . . the public purse" is implicated, at least where the amount of money at stake is substantial. *SEIU*, 2020 WI 67, ¶¶ 10, 71. The Constitution "requires" the Legislature to "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)—which necessarily authorizes the Legislature to oversee *all* "sources of income," Wis. Const. art. VIII, § 5. Thus, whenever the Attorney General enters into any substantial settlement containing monetary conditions in Plaintiffs' two broad categories, the Legislature's "power of the purse" is "implicated," giving the Legislature a clear constitutional interest in reviewing the proposed settlement. *SEIU*, 2020 WI 67, ¶¶ 68–70.

Plaintiffs' attempts to draw artificial distinctions between revenue sources and spending in settlements ignores the fungible nature of money, and the Legislature's constitutional responsibility to oversee *all* "sources of income," Wis. Const. art. VIII, § 5. Taxation is only one of the revenue sources that comprise the public fisc, and the Legislature must account for and control all forms of revenue. *SEIU*, 2020 WI 67, ¶¶ 68–69; *State ex rel. Owen v. Donald*, 150 Wis. 21, 151 N.W. 331, 364–65 (1915). Despite conceding

that "the Legislature must calculate how much income is needed to cover that year's anticipated expenses plus any deficiency from the previous year," Resp.Br.36, Plaintiffs offer no explanation into how the Legislature could fulfill this obligation without any consideration of multimillion-dollar settlements, *see SEIU*, 2020 WI 67, ¶¶ 10, 71.

Cases where the State is both a plaintiff and counter-claim defendant further defeat any arguments that the Legislature's power is implicated only in defense-side cases. Contrary to Plaintiffs' claim that this argument is "new," Resp.Br.37 n.11, the Legislature raised this specific argument in its briefing below, R.132 at 6. As explained there and before this Court, if a private defendant obtains a $5 million judgment in a counterclaim against the State, but that sum is offset by a $10 million judgment to the State, the result is a combined settlement of $5 million to the State. Op.Br.42–43. Because "money is fungible," *Brown Cnty. v. Brown Cnty. Taxpayers Ass'n*, 2022 WI 13, ¶ 40, 400 Wis. 2d 781, 971 N.W.2d 491, this result is no different from a defendant successfully receiving a $5 million settlement in a lawsuit, and thus cases of this type necessarily implicate the Legislature's power of the purse.

The Legislature's proposed examples also defeat Plaintiffs' arguments on this score. With its landlord hypothetical, the Legislature illustrated how a consequential settlement—here, $20 million dollars of state funds intended to benefit Wisconsin residents through state-funded low-

income housing programs—would "affect[ ] state appropriations" and thus implicate the Legislature's constitutional authority to determine how such funds should be allocated and expended. *SEIU*, 2020 WI 67, ¶ 70; Wis. Const. art. VIII, § 2; *see* Op.Br.36–37. Plaintiffs' only response—that other statutes already "prevent" such "bad results," Resp.Br.38—defeats their position, as the Legislature's interest in state appropriations justifies those statutes, just as it justifies Section 26, in at least some applications within Plaintiffs' two categories. *SEIU*, 2020 WI 67, ¶¶ 68–70. Plaintiffs similarly have no serious response to the Legislature's opioid-settlement example, suggesting that the Legislature should "pass a law of general application" directing "undesignated" settlement funds "into general purpose revenues." Resp.Br.38–39. But again, this proves that the Legislature has a constitutional interest in hugely significant settlements, involving many millions of dollars, which relate directly to the Legislature's "power of the purse." *SEIU*, 2020 WI 67, ¶¶ 69–70.

Finally, and independently fatal to this hybrid challenge, Plaintiffs are wrong to argue that there are no possible settlements within their two broad categories that could implicate the Legislature's "institutional interest" in setting public policy for the State. *See* Resp.Br.39–41. At least some settlements within Plaintiffs' two far-reaching categories of cases could include specific, widely applicable provisions with broad public-policy consequences, necessarily

implicating the Legislature's institutional interest. *SEIU*, 2020 WI 67, ¶ 63; Wis. Const. art. IV, § 1. This is well-illustrated by the Legislature's landlord hypothetical, where directing settlement funds to a low-cost-housing program designed by the Legislature may be "the best public policy" over a state-agency-run program—a policy choice directly implicating the Legislature's constitutional policy-setting authority. *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 206, 216, 188 N.W.2d 460 (1971); Wis. Const. art. IV, § 1.

Plaintiffs' contention that all settlements "resolve specific cases against specific parties for specific violations of law," Resp.Br.40, is wrong for at least some settlements within their hybrid challenge. Op.Br.38–40; *see* Resp.Br.40. The next massive, nationwide settlement—such as the opioid settlement last year or the tobacco settlement in the 1990s—could (and probably would) require the offending companies to take steps that involve deeply significant public-policy choices. For example, the Attorney General might prefer a settlement that requires the next group of offending manufacturers to set up treatment centers for Wisconsin citizens harmed by their products, but imposing this settlement condition over "the alternatives available" requires a policy choice within the legislative domain. *Vanko*, 52 Wis. 2d at 216. The Legislature, in its policy-setting authority, may prefer that offending manufacturers contribute to a central fund allocated both to medical treatment and research into side effects of opioid or tobacco

products. Choosing the best option between such "alternatives" is a prototypical policy choice within the Legislature's constitutional interests. *Id*.

II. Plaintiffs' Categorically Foreclosed "Unduly Burdensome" Argument Similarly Fails

Plaintiffs' alternative argument that Section 26 unduly burdens and interferes substantially with their constitutional roles, Resp.Br.41, fails for two independent reasons. First, *SEIU* already categorically rejected this argument. 2020 WI 67, ¶ 72 & n.22. Second, even assuming the undue-burden analysis applied (which it cannot, given *SEIU*), Plaintiffs failed to meet their "heavy burden" of proving beyond a reasonable doubt that Section 26 "unduly burden[s] or substantially interfere[s] with" another branch's ability to function. Op.Br.45–46 (quoting *State v. Cole*, 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 329; *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 554, 576 N.W.2d 245 (1998); *SEIU*, 2020 WI 67, ¶ 35). Even though more than three years have passed since the enactment of Section 26, Plaintiffs still have no evidence that Section 26 creates any meaningful burden in *any* cases within their two categories, let alone in *all* cases. Op.Br.45–46.

Plaintiffs first assert that *SEIU* does not foreclose their undue-burden theory because *SEIU* involved a facial challenge, and this case involves a hybrid challenge. Resp.Br.44–45. But in *SEIU*, Plaintiffs argued that Section 26 was unconstitutional under an undue-burden analysis

because it subjected the Attorney General's law enforcement decisions "to the unreviewable whim of a legislative committee." *See* AG *SEIU* Resp.Br.27–35. The Legislature, in turn, explained in *SEIU* that such an analysis was improper in this context, while noting that every case that had conducted the type of burden analysis Plaintiffs sought involved statutes that interfered with the judicial function, Reply Brief of Legislative Defendants-Petitioners/Defendants-Appellants at 7, *SEIU* (Wis. Sept. 19, 2019),[3] which are the same cases that Plaintiffs cite here, Resp.Br.42–44 (citing *Matter of E.B.*, 111 Wis. 2d 175, 330 N.W.2d 584 (1983); *State ex rel. Friedrich v. Circuit Court for Dane Cnty.*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995); *State v. Chvala*, 2003 WI App 257, 268 Wis. 2d 451, 673 N.W.2d 401); *see also Flynn*, 216 Wis. 2d at 554. The Supreme Court agreed with the Legislature, holding that Plaintiffs' extensive argument on this point "gets nowhere" and dismissing it in a footnote. *SEIU*, 2020 WI 67, ¶ 72 n.22.

Even if *SEIU* had not rejected Plaintiffs' undue-burden argument and, instead, permitted this Court to apply the judicial-branch caselaw to Section 26, Plaintiffs' articulation of how to conduct that analysis is wrong. Plaintiffs' submission on this score is confusing, as their proposed test appears to be a replication of the core-powers-versus-shared-

[3] Available at https://acefiling.wicourts.gov/document/eFiled/2019AP000614/247291.

powers analysis, discussed above. Plaintiffs' "unduly burdensome" test would hold unconstitutional any law in which the "encroached-upon branch" did not retain absolute veto authority over the decisions of the "encroaching branch," without any requirement for collaboration between branches on shared powers. Resp.Br.42. But that is like the core powers test, where no branch may "take [ ] up . . . as its own" any other branch's core powers, meaning each branch retains a veto over other branches on those core powers. *SEIU*, 2020 WI 67, ¶ 35. To the extent that this Court agrees with Plaintiffs that this is the undue-burden test, the argument "gets [Plaintiffs] nowhere," *id.* ¶ 72 n.22, for the same reasons explained above: *SEIU* unequivocally establishes the Legislature has "legitimate institutional" interests in at least some cases under Section 26, and Plaintiffs have not shown that these interests are absent in all cases within Plaintiffs' two categories, ending their case. But, in fact, the judiciary-undue-burden cases involve a practical inquiry into the actual burdens of the law on the judicial function. The court in *Flynn*, for example, reviewed multiple affidavits and record evidence before concluding the plaintiff failed to show the statute at issue actually imposed an undue burden on the judiciary. 216 Wis. 2d at 553–55.

Plaintiffs' claims of undue burden fail due to lack of evidentiary support. While Plaintiffs contend that the Joint Committee's "veto power" over proposed settlements somehow creates an undue burden "[a]cross the board" by

affecting Plaintiffs' resource allocation and decisionmaking, Resp.Br.47–48, the record evidence contradicts that claim. Indeed, while Plaintiffs argue that the "veto power" has resulted in Wisconsin's exclusion from a multistate case, caused delays, and denied the value of real-time settlement authority, Resp.Br.47, Plaintiffs were unable to provide a single example of Section 26 ever causing any of these (or any other) claimed harms, Op.Br.17–18, 49–50. Since Section 26's enactment, Plaintiffs have entered into various multistate settlements and mediated cases without any problem. Resp.Br.49; *see* Op.Br.47. And Plaintiffs' alleged confidentiality concerns do not establish any burden, even beyond their failure to apply to *all* applications within Plaintiffs' two categories. Resp.Br.48–49. Past settlements have shown that the Legislature's proposed multiple avenues to protect confidentiality are successful, including when the Attorney General has obtained counterparty approval to share settlement information with the Joint Committee. Op.Br.15. And the Legislature's proposed alternatives wholly address any remaining confidentiality concerns. Op.Br.15.

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: January 25, 2023.

Respectfully submitted,

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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 2,999 words.

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CERTIFICATION OF EFILE/SERVICE

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

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