No.2022AP790

In the Supreme Court of Wisconsin

JOSH KAUL, WISCONSIN DEPARTMENT OF JUSTICE, TONY EVERS *and* KATHY KOLTIN BLUMENFELD,
PLAINTIFFS-RESPONDENTS-PETITIONERS,
v.
WISCONSIN STATE LEGISLATURE, WISCONSIN STATE LEGISLATURE JOINT COMMITTEE ON FINANCE, CHRIS KAPENGA, DEVIN LEMAHIEU, ROBIN VOS, TYLER AUGUST, HOWARD L. MARKLEIN, MARK BORN, DUEY STROEBEL *and* TERRY KATSMA,
DEFENDANTS-APPELLANTS.

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

BRIEF OF DEFENDANTS-APPELLANTS

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ISSUE PRESENTED

Whether Section 26 of 2017 Wisconsin Act 369, which requires the Attorney General to obtain the consent of the Joint Committee on Finance before "compromis[ing] or discontinu[ing]" litigation brought on behalf of the State, is unconstitutional in every possible application as to two broad categories of cases: (1) civil-enforcement actions brought under statutes that the Attorney General is charged with enforcing, and (2) civil actions that the Attorney General prosecutes on behalf of agencies regarding the administration of the statutory programs that they execute.

The Circuit Court answered yes, and the Court of Appeals answered no.

INTRODUCTION

Five years ago, this Court held in *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*"), that Section 26 of 2017 Wisconsin Act 369—which gives the Wisconsin State Legislature ("Legislature") a seat at the settlement table with the Attorney General when he litigates certain civil actions on behalf of the State—does not violate the separation-of-powers doctrine "in cases that implicate an institutional interest of the legislature." *Id.* ¶ 63. In the present case, the Attorney General and the Governor (collectively, "Plaintiffs"[1])—who eagerly joined the attack on Section 26 in *SEIU*—now ask the courts to throw out Section 26 as applied to two broad categories that, as a practical matter, cover virtually all of the provision's applications.

The Court of Appeals correctly rejected Plaintiffs' cynical lawsuit by applying *SEIU*'s clear holding. The Court of Appeals first recognized that Plaintiffs' attacks on Section 26's application to two broad categories are "hybrid" challenges, meaning that Plaintiffs must show that every possible application of Section 26 as to these categories is unconstitutional—the same facial-challenge standard that *SEIU* applied. The Court of Appeals then rightly held that Plaintiffs' claims fail because the Legislature's institutional

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

interest in the State's finances—as identified by *SEIU*—justifies application of Section 26 as to at least some cases. That was, of course, legally correct. One need only consider the recent massive opioid settlement (or the prior tobacco litigation settlement in the 1990s) to understand that plaintiff-side settlements can have enormous consequences for the State's finances.

Plaintiffs do not ask the Court to overturn *SEIU*, and yet want this Court to make that decision a nullity. Plaintiffs make numerous arguments that *SEIU* rejected, including relying upon the very same inapposite federal cases cited in the *SEIU* briefing. Indeed, the only difference between this case and *SEIU* is that this Court now has an extensive record showing how Section 26 operates in practice. That record shows that in the years since *SEIU*, the Legislature's Joint Committee on Finance ("Joint Committee") has exercised its authority under Section 26 so responsibly that the Attorney General was unable to identify even a single example of the Committee impeding the State's interests.

This Court should not break this well-functioning regime, which this Court blessed in *SEIU* and which is no different in principle than legislative involvement in certain settlements since our State's Founding. This Court should affirm the decision of the Court of Appeals.

ORAL ARGUMENT AND PUBLICATION

By granting the Petition For Review, this Court has indicated that this case is appropriate for publication. This Court has set this case for oral argument on April 2, 2025.

STATEMENT OF THE CASE

A. The Legislature Enacts Section 26 Of Act 369

In December 2018, the Legislature passed Section 26, renumbering and amending Wis. Stat. § 165.08 to Wis. Stat. § 165.08(1), to ensure that the Legislature would have a seat at the table when the Attorney General settles certain plaintiff-side civil actions on behalf of the State.

Prior to Section 26's enactment, Section 165.08 provided that "[a]ny civil action prosecuted by the [Attorney General[2]] by direction of any officer, department, board or commission, shall be compromised or discontinued when so directed by such officer, department, board or commission." Wis. Stat. § 165.08 (2017). For civil actions brought "on the initiative of the attorney general, or at the request of any individual," those cases could "be compromised or discontinued with the approval of the governor." *Id.*

Section 26 changed this regime by providing that "[a]ny civil action prosecuted by the [Attorney General] . . . may be compromised or discontinued . . . by submission of a proposed

[2] This Brief references statutes that mention the "Department of Justice" ("DOJ") as the "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[.]").

plan to the joint committee on finance[3] for the approval of the committee." 2017 Wis. Act 369, § 26; *see* Wis. Stat. § 165.08(1). "The compromise or discontinuance may occur only if the joint committee on finance approves the proposed plan." Wis. Stat. § 165.08(1). Thus, under Section 26, the Attorney General must now obtain the Joint Committee's approval before "compromis[ing] or discontinu[ing]" a case that he is prosecuting (unless the Legislature is a party to the case). *Id.*

The Legislature having a seat at the table in certain plaintiff-side cases is a practice deeply rooted in Wisconsin's history. As explained in more detail below, Wisconsin's first Legislature passed a law in 1849 directing the Attorney General to prosecute a suit for the recovery of certain state funds "to final judgment." *Infra* p.24. In 1909, the Legislature created a committee that included the Attorney General, which had the duty to propose for the Legislature's approval settlements of certain plaintiff-side actions. *Infra* pp.24–26. And in 1915, the Legislature created a committee that included the Attorney General and directed it to pursue certain claims of the State against the United States, either by settling or prosecuting them. *Infra* p.26.

[3] The Joint Committee is a bipartisan standing committee of the Legislature. Wis. Stat. § 13.09.

B. *SEIU* Facially Upholds Section 26

This Court rejected a facial separation-of-powers challenge to Section 26 in *SEIU*, 2020 WI 67, ¶¶ 5, 50–71. There, private plaintiffs, alongside nominal defendants the Governor and the Attorney General, claimed that Section 26 "takes a core executive power and gives it to the legislature in violation of the separation of powers." *Id.* ¶¶ 18–19, 55.

SEIU rejected this argument, holding—as relevant here—that Section 26 was facially valid. This Court began by articulating Wisconsin's separation-of-powers principles and the differing standards for facial, as-applied, and "hybrid" challenges. *Id.* ¶¶ 30–49. "A separation-of-powers analysis ordinarily begins by determining if the power in question is core or shared," with "[c]ore powers" defined as those "conferred to a single branch" and "[s]hared powers" defined as those that more than one branch "may exercise." *Id.* ¶ 35 (citation omitted). A party challenging a statute's constitutionality may bring a "hybrid" challenge, *SEIU*, 2020 WI 67, ¶ 45, to "application[s] of the law more broadly" to a given category. Such challenges have "characteristics of both a facial and an as-applied claim," in that they require the party "to demonstrate that, as to the specific category of applications, the statute could not be constitutionally enforced under any circumstances." *Id.* *SEIU* then determined that the challenge there was a facial challenge, requiring the challengers to prove that Section 26 "may not be constitutionally applied under any circumstances," *id.* ¶ 72—

the same standard that applies to hybrid challenges as well, *id.* ¶ 45.

The challengers in *SEIU* (as well as the Attorney General and Governor, who sided with the challengers) failed to show that Section 26 was facially unconstitutional. *Id.* ¶¶ 71–72. "While representing the State in litigation is predominantly an executive function, it is within those borderlands of shared powers" between the Legislature and the Executive, "most notably in cases that implicate an institutional interest of the legislature." *Id.* ¶ 63. *SEIU* then identified two examples of the Legislature's "institutional interests" establishing that representing the State was a shared power in at least some cases. *Id.* ¶¶ 64–71; *id.* ¶ 73 ("[T]he legislature may have other valid institutional interests."). This interest "is reflected in the statutory language authorizing the attorney general" "to represent the legislature or to represent the State at the request of the legislature." *Id.* ¶ 64. The second interest is "where the power of the purse is implicated." *Id.* ¶¶ 68–69 (citing Wis. Const. art. VIII, § 2). So, while Section 26 had removed the Attorney General's "unilateral power" under prior statutory law "to settle litigation impacting the State," *id.* ¶¶ 52–53, the existence of the Legislature's institutional interests meant that such settlement power was not—"at least in all circumstances"—"within the exclusive zone of executive [constitutional] authority," *id.* ¶ 63. And this analysis of the Legislature's shared power in settling cases on behalf of the

State is the same whether the cases are "prosecuted or defended by the attorney general." *Id.* ¶ 10. So, because plaintiffs brought "a facial challenge, and there are constitutional applications of [Section 26]," the *SEIU* majority thus concluded that the "challenge cannot succeed." *Id.* ¶ 72.

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

Since *SEIU* (and, indeed, since Section 26's enactment), the Joint Committee has acted expeditiously to approve many settlements, such that Plaintiffs have been unable to identify even one example where the Joint Committee has impeded the State's interests. *See* Supp.App.237–38; Rs.82–86. The extensive, undisputed record below shows that the Joint Committee has acted with all necessary dispatch to approve settlements whenever the Attorney General provides the minimal necessary information. After receiving a proposed settlement plan from the Attorney General, the Joint Committee may meet according to the default procedures under Wis. Stat. § 13.10, which provide for quarterly meetings, or sooner if necessary. Supp.App.63, 67, 70. That is, the Joint Committee can and does expedite its consideration of a proposed settlement when the Attorney General submits a time-sensitive request. Supp.App.71–72, 108. The Joint Committee has timely approved *every* proposed settlement properly presented to the Joint Committee by the Attorney General to date.

Supp.App.70–71. To take just one example, on September 30, 2019, the Attorney General requested that the Joint Committee approve a time-sensitive proposed settlement by November 1, 2019, and supplied the Joint Committee with the requisite information. Supp.App.153. The Joint Committee was thus able to meet and approve the settlement before that tight deadline. Supp.App.127–28, 153.[4]

D. Procedural History

1. Plaintiffs filed their Complaint in June 2021 in the Dane County Circuit Court, suing the Legislature, the Joint Committee, and certain Legislative Leadership. Supp.App.1–3. Plaintiffs allege that Section 26 violates the separation of powers with respect to two broad categories of cases: "(1) civil enforcement actions brought under statutes that the Attorney General is charged with enforcing, such as environmental or consumer protection laws," and "(2) civil actions the Department [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." Supp.App.8. Plaintiffs have not identified a single settlement falling outside these two categories since Section 26 became law. *Compare* R.137:5, 12–13, *and* R.148:6, *with* R.144:22–23.

[4] *See also* Supp.App.132–33, 137, 245–46, 249 (providing multiple additional examples of the Joint Committee meeting and approving proposed settlements on expedited timeframes).

During discovery, the Legislature deposed Corey F. Finkelmeyer, the Deputy Administrator for the Division of Legal Services for the Attorney General and Plaintiffs' own lead declarant. Supp.App.110–228. During that deposition, 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." Supp.App.137. Mr. Finkelmeyer could not identify even one instance where the Joint Committee failed to honor a time-sensitive request for a hearing. Supp.App.138. *Most tellingly, Mr. Finkelmeyer was also unable to offer a single specific case where Section 26 harmed the State's interests in any concrete way*. For example, counsel for the Legislature asked whether Section 26 had ever prohibited the State from entering into consent judgments in multistate actions in what was then the three years since the Legislature had enacted Section 26. Supp.App.147–48. Mr. Finkelmeyer replied as follows:

> 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.

Supp.App.147–48. (Mr. Finkelmeyer never "g[o]t back to" the Legislature with this information.) Mr. Finkelmeyer spoke only generally at his deposition about how Section 26 allegedly "infused" the "whole process as [the Department of Justice] handle[s] a matter in any case," while never

identifying Section 26 as having such an impact "explicitly in a particular case." Supp.App.141; *see also* Supp.App.142–45, 147–48, 150, 159.

2. The Circuit Court thereafter granted summary judgment to Plaintiffs in two separate orders, after the parties filed cross-motions for summary judgment. In its May 5, 2022 order, the Circuit Court held Section 26 unconstitutional as to Plaintiffs' first category of cases—civil-enforcement actions brought under statutes that the Attorney General is charged with enforcing—and enjoined its enforcement. *See* P-App.49–67. In its June 24, 2022 order, the Circuit Court declared Section 26 unconstitutional as applied to Plaintiffs' second category of cases—as subsequently amended by Plaintiffs in their Amended Complaint—and likewise enjoined its enforcement. P-App.68–76. While Plaintiffs had described their second category as civil actions brought at the request of an executive-branch agency or official, Supp.App.8, the Circuit Court allowed Plaintiffs to file an Amended Complaint explaining that 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," Supp.App.282.

3. After the Circuit Court issued its summary-judgment orders, the Legislature moved for a stay pending appeal. R.135, 137. The Circuit Court granted the Legislature's stay motion as to the second category of cases but denied it as to the first. R.152. The Legislature subsequently moved for a

stay pending appeal in the Court of Appeals, which motion the Court of Appeals granted. Supp.App.285–86, 295.

4. On December 2, 2024, after full merits briefing and oral argument, the Court of Appeals reversed the Circuit Court's summary-judgment orders and remanded "for entry of summary judgment in favor of the Legislature." P-App.29–30. The Court of Appeals held that the settling of litigation is a shared power in some cases within Plaintiffs' two categories, under *SEIU*, P-App.14–21, as at least some of those cases "implicate[ ] the legislature's power of the purse," P-App.22. The Court explained that the Legislature's power of the purse encompasses "both expected expenditures and expected revenues." P-App.20 (citing 74 Op. Att'y Gen. 202, 203 (1985), 1985 WL 257977). The Court then rejected Plaintiffs' alternative undue-burden, shared-powers argument because *SEIU* held that the conclusion that a power is "shared" implies that there are "at least some cases" in which the Legislature may exercise the power without burdening the Executive. P-App.23 (citation omitted). But even putting *SEIU* aside, the Court explained that Plaintiffs put forward only "[u]nsubstantiated speculation" and no "concrete evidence" of their alleged burdens. P-App.25–26 (citations omitted). Judge Neubauer dissented, articulating her view that Section 26 violated the separation-of-powers doctrine either because "the power to compromise or discontinue litigation" "is a core executive power," P-App.38 (Neubauer, J., dissenting), or because Section 26 unduly

burdens the Attorney General's "role as enforcer of the law," P-App.32.

STANDARD OF REVIEW

"Whether the circuit court properly granted summary judgment is a question of law that this [C]ourt reviews de novo," *Waity v. LeMahieu*, 2022 WI 6, ¶ 17, 400 Wis. 2d 356, 969 N.W.2d 263, applying the standards 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 grants summary judgment where "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). Such a determination may be properly based on statutory, *see Waity*, 2022 WI 6, ¶ 18, or constitutional grounds, *see Appling v. Walker*, 2014 WI 96, ¶ 16, 358 Wis. 2d 132, 853 N.W.2d 888.

ARGUMENT

I. Section 26 Has Constitutional Applications Within Plaintiffs' Two Broad Categories Under *SEIU*, So Their "Hybrid" Claims Fail

This case involves a "hybrid" challenge to Section 26. In such a challenge, the plaintiff claims that "a specific category of applications" of a statute is unconstitutional, thus this challenge has "characteristics of both a facial and an as-applied claim." *SEIU*, 2020 WI 67, ¶¶ 36–38, 45; *see Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 28, 376 Wis. 2d 147, 897 N.W.2d 384. To prevail on a hybrid challenge, the plaintiff "must meet the standard for a facial challenge" as to

the challenged category of application, *Gabler*, 2017 WI 67, ¶ 29, showing "that the statute cannot be enforced under *any* circumstances" in that category, *SEIU*, 2020 WI 67, ¶ 38 (emphasis added). Further, a challenger to a statute's constitutionality always bears the "very heavy burden" of "overcoming the presumption of constitutionality," *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 27, 383 Wis.2d 1, 914 N.W.2d 678, requiring "pro[of] that the statute is unconstitutional beyond a reasonable doubt," *State v. Cole*, 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328. It is undisputed that Plaintiffs have brought a "hybrid" challenge and that, accordingly, they must show beyond a reasonable doubt that Section 26 "could not be constitutionally enforced under any circumstances" within the two broad categories. P-App.15 (quoting *SEIU*, 2020 WI 67, ¶ 45); Br.23 (citing *Gabler*, 2017 WI 67, ¶ 29).[5] Plaintiffs failed to carry this burden under *SEIU*'s binding holding.

A. Under *SEIU*'s Unchallenged Holdings, There Are At Least Some Constitutional Applications Of Section 26 Within Plaintiffs' Two Broad Categories

Plaintiffs failed to show that Section 26 is unconstitutional in every application within Plaintiffs' two broad categories of civil actions, meaning that their lawsuit

[5] Plaintiffs do not dispute here that the unconstitutional-beyond-reasonable-doubt standard applies, even as certain of Plaintiffs have challenged that standard in *Evers v. Marklein*, No.2023AP2020-OA (Wis.). Br.23 n.2.

fails. As this Court held in *SEIU*—a decision that Plaintiffs do not ask this Court to overrule—representing the State in litigation is a shared power between the Legislature and the Attorney General where the Legislature has an institutional interest. *Infra* Part I.B.1. Where the Legislature has an institutional interest, it may constitutionally have a seat at the settlement table with the Attorney General under Section 26. *Infra* Part I.B.1. Here, under *SEIU*, the Legislature has multiple institutional interests in at least some cases within Plaintiffs' two broad categories, thus Plaintiffs' "hybrid" challenges to Section 26 must fail. *Infra* Part I.B.2. None of Plaintiffs' counterarguments changes that result, especially given *SEIU*'s on-point, unchallenged holdings. *Infra* Part I.B.3.

1. Under *SEIU*, Entering Into Binding Settlements For The State Is A Shared Power Where The Legislature Has An "Institutional Interest" In The Settlement At Issue

a. The Wisconsin Constitution provides that 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). The Constitution's separate vesting clauses imply the separation-of-powers doctrine, *see id.*, providing each branch with both a narrow set of powers that are exclusive and a broad range of powers that are shared, *id.* ¶¶ 33, 35, 63. That is, the structure of the

Constitution itself provides each branch with limited "[c]ore" or "exclusive" powers that no other branch may exercise, *id.* ¶¶ 33, 35, 63, as well as with vast swaths of "shared powers" that "lie at the intersections" of the core powers and "are not exclusive," *State v. Horn*, 226 Wis.2d 637, 643–45, 594 N.W.2d 772 (1999). Within that broad zone of shared powers, each branch "may exercise [the] power" as long as they do not "unduly burden or substantially interfere with another branch." *SEIU*, 2020 WI 67, ¶ 35 (citations omitted).

SEIU upheld Section 26 against a facial constitutional challenge, holding that "power to litigate on behalf of the State"—including whether to settle a case—is a "shared power[ ]" between the Legislature and the Attorney General in "cases that implicate an institutional interest of the legislature." *Id.* ¶¶ 63–73. In those cases where the Legislature has an "institutional interest," it "may permissibly give itself the power to consent to . . . the compromise or discontinuance of a matter being prosecuted" on behalf of the State, as with Section 26. *Id.* ¶ 72; *see also id.* ¶¶ 69, 71. *SEIU* then provided examples of the Legislature's "institutional interests" that constitutionally justify its approval of settlements under Section 26, while expressly noting that "the legislature may have other valid institutional interests supporting application of [Section 26]." *Id.* ¶¶ 64, 68, 73.

First, the Legislature has a "constitutional institutional interest in [the settling of] at least some cases" where

"spending state money is at issue." *Id.* ¶ 71. The Constitution "gives the legislature the general power to spend the state's money by enacting laws." *Id.* ¶¶ 68–69 (citing Wis. Const. art. VIII, § 2); *see also Evers v. Marklein*, 2024 WI 31, ¶ 14, 412 Wis. 2d 525, 8 N.W.2d 395 ("*Marklein I*") (observing that "[d]eterminations of how to appropriate the state's funds fall squarely within the legislative power"). So, "where the power of the purse is implicated," the Legislature "has an institutional interest . . . sufficient to justify the authority to approve certain settlements"—particularly "where litigation involves requests for the state to pay money to another party." *SEIU*, 2020 WI 67, ¶ 69.

The Legislature's constitutional interest in the "power of the purse" extends to "both expected expenditures and expected revenues." P-App.17–18. That is because in addition to vesting the Legislature with the exclusive and "general power to spend the state's money by enacting laws," *SEIU*, 2020 WI 67, ¶ 69; Wis. Const. art. VIII, § 2, the Constitution imposes upon the Legislature the duty to "provide for an annual tax sufficient to defray the estimated expenses of the state for each year," Wis. Const. art. VIII, § 5. And "whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency." *Id.*; *accord* Wis. Const. art. IV, § 33 ("The legislature shall provide for the auditing of state accounts[.]"). Thus, Sections 2 and 5 of Article VIII "combine[ ]" to

"empower[ ] the legislature . . . to make policy decisions regarding taxing and spending," *Marklein I*, 2024 WI 31, ¶ 14 (citation omitted), and the Constitution "plainly contemplates legislative action to determine the sufficiency of [the State's] income each year to cover the regular expenses," *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331, 364–65 (1915). Or, as the Attorney General himself has acknowledged decades ago, "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." 74 Op. Att'y Gen. at 203, 1985 WL 257977, at *1 (emphasis added).

Second, as another example of the Legislature's institutional interests in the settling of certain cases, *SEIU* identified the Legislature's power to "authoriz[e] the attorney general to represent the State" upon "the request of the legislature." 2020 WI 67, ¶¶ 64–65. "[W]here a legislative body is the principal authorizing the attorney general's representation [of the State] in the first place, the legislature has an institutional interest in the outcome of that litigation in at least some cases," sufficient to support the constitutionality of Section 26. *Id.* ¶ 71.[6]

[6] *SEIU* also recognized that multiple other States likewise give their legislatures a seat at the settlement table for the State. 2020 WI 67, ¶ 70 (Arizona, Connecticut, Nebraska, Oklahoma, and Utah); *see also* Tex. Civ. Prac. & Rem. Code § 111.003.

b. "Early enactments following the adoption of the constitution," *id.* ¶ 64, as well as "the historical practices and laws of this state," *Barland v. Eau Claire Cnty.*, 216 Wis. 2d 560, 586, 575 N.W.2d 691 (1998), support *SEIU*'s holding that "representing the State in litigation," including settling or discontinuing a matter, is a shared power where the State's finances are involved, 2020 WI 67, ¶¶ 63, 69, 71–72.

In 1849—just one year after the adoption of our Constitution, *see id.* ¶¶ 64–65—the first Legislature directed the Attorney General by law to bring a mandamus action in this Court against a certain Mr. David Merrill, in order to recover apparently embezzled state funds, 1849 Wis. Act 64.[7] The Legislature "authorized and required" the Attorney General to "commence suit immediately" if Mr. Merrill did not return the funds "*and to prosecute the same to final judgment*." *Id.* § 4 (emphasis added). The Legislature's directive, requiring the Attorney General to litigate to final judgment, *id.*, by its plain terms did not permit the Attorney General to discontinue the case before final judgment.

In 1909, the Legislature passed Act 441, 1909 Wis. Act 441,[8] which gave the Legislature the authority to approve plaintiff-side settlements on behalf of the State in certain pending actions involving railroads—settlements negotiated

[7] Available at https://docs.legis.wisconsin.gov/1849/related/acts/64.pdf (all websites last visited on Mar. 10, 2025).

[8] Available at https://docs.legis.wisconsin.gov/1909/related/acts/441.pdf.

by a committee created by the Legislature that also included the Attorney General, *id.* This law established a committee and provided it with the "duty" to "confer" with "several railroad corporations against which actions [were] pending for the collection of license fees, for the purpose of adjusting and settling said actions and counterclaims pleaded." *Id.* § 2. If the committee and a railroad "agreed upon" a "basis of settlement," the committee was to "report" that proposal to the Legislature. *Id.* § 4. If the Legislature "ratified" that proposal, it would become "binding on the part of both parties" and resolve the State's lawsuit against the railroad. *Id.* § 5. The committee's work led to multiple settlements approved by the Legislature. As reflected in 1911 Wisconsin Act 539,[9] the committee submitted, and the Legislature approved, multiple "offers of settlement made by the railroad corporations . . . in the name of the State," yielding significant payments from the railroads to the State. *Id.* § 1.[10] Further, the Legislature and the railroads agreed in these settlements "to release and discharge all claims and counterclaims existing in favor of said railroad corporations, respectively, against the state on account of alleged overpayments of

[9] Available at https://docs.legis.wisconsin.gov/1911/related/acts/539.pdf.

[10] The Legislature approved settlements totaling $126,670.83 for the State, *see* 1911 Wis. Act 539, § 1, amounting to over $4 million in today's dollars, *see* U.S. Bureau of Lab. Statis., *CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm (measuring inflation from 1913, the earliest date available).

license fees," as well as the State's causes of action for certain unpaid fees. *Id.* The law concluded that the State's then-pending "actions" against the railroads "shall be discontinued" "[u]pon payment into the state treasury of said sums" and upon the "release and discharge of all claims and counterclaims against the state." *Id.* § 2.

And in 1915, the Legislature enacted 1915 Wisconsin Act 624,[11] authorizing a committee that included the Attorney General to exercise "full power and authority to *settle or compromise*, or institute and prosecute such proceedings as may determine the interests of the state and *effect a settlement of*, any claim the state of Wisconsin may have against the United States" arising out of federal laws related to swamp lands. *Id.* § 1 (emphasis added).

Finally, the Legislature has historically shared power with the Attorney General to initiate suit on behalf of the State, which sharing of power also operated upon the Attorney General's ability to make litigation decisions no different in principle than Section 26. In 1856, the Legislature provided by statute that the Attorney General could only bring certain actions against corporations for the State "whenever the Legislature . . . direct[ed]." 1856 Wis. Act 120, § 333.[12] Thus, in those categories of cases, the

[11] Available at https://docs.legis.wisconsin.gov/1915/related/acts/624.pdf.

[12] Available at https://docs.legis.wisconsin.gov/1856/related/acts/120.pdf.

Legislature shared with the Attorney General the power to initiate certain cases on behalf of the State, with legislative approval being "essential to the maintenance of [such] action brought by the Attorney General." *State v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 179, 116 N.W. 900, 905 (1908); *see* Scott Van Alstyne & Larry J. Roberts, *The Powers Of The Attorney General In Wisconsin*, 1974 Wis. L. Rev. 721, 721 & n.3 (1974).

2. Here, Under *SEIU*, The Legislature Has "Institutional Interests" In At Least Some Cases Within Plaintiffs' Two Broad Categories

Plaintiffs' "hybrid" challenges to Section 26 fail because Plaintiffs cannot show that *every possible* application of Section 26 within their two categories violates the separation-of-powers doctrine. Under *SEIU*, the Legislature has at least two "institutional interests" in "at least some cases" within Plaintiffs' two categories, meaning Plaintiffs' claims fail for at least two reasons. 2020 WI 67, ¶¶ 71–73 & n.22.

First, under *SEIU*, the Legislature has an "institutional interest" in its "power of the purse" in at least some cases within Plaintiffs' two broad categories. *Id.* ¶¶ 69–71. Pursuant to our Constitution, the Legislature has authority over "both expected expenditures *and* expected revenues," P-App.17–18 (emphasis added), given its "power to spend the state's money by enacting laws," *SEIU*, 2020 WI 67, ¶¶ 68–69, and its "plain[ ]" constitutional duty to "determine the sufficiency of [the State's] income each year to cover the

regular expenses," *Owen*, 151 N.W. at 364–65; 74 Op. Att'y Gen. at 203, 1985 WL 257977, at *1. Thus, the Legislature's "institutional interest" in its "power of the purse," *SEIU*, 2020 WI 67, ¶¶ 69–71, includes overseeing the spending of State money and the receipt of *all* "sources of income"—including revenue received from settlements—given its constitutional duties to ensure a balanced budget. Wis. Const. art. VIII, § 5. The Legislature can only "determine the sufficiency" of the State's "income each year," *Owen*, 151 N.W. at 364–65, and "plan in such a way as to insure that . . . revenues are sufficient," 74 Op. Att'y Gen. at 203, 1985 WL 257977, at *1, by managing *all* "sources of income," Wis. Const. art. VIII, § 5—including income from settlements. The Legislature was pursuing this interest in the early historical statutes discussed above. *Supra* pp.24–26. For example, by directing the Attorney General to "prosecute" an embezzlement case "to final judgment" in 1849, *supra* p.24, or by tasking a committee including the Attorney General to propose settlements of money claims against certain railroads in 1909, *supra* pp.24–26, the Legislature was exercising its constitutional oversight authority over all of the State's income sources.

The following hypotheticals further demonstrate that at least some cases within Plaintiffs' two broad categories implicate the Legislature's "institutional interest" in its "power of the purse." *SEIU*, 2020 WI 67, ¶¶ 69–71.

Suppose the Attorney General enters into a multimillion-dollar settlement with a powerful landlord for

violations of the State's housing laws. In this hypothetical, the settlement has a monetary condition requiring the landlord to pay $10 million to the Attorney General's preferred housing nonprofit and another $10 million to the Department of Agriculture, Trade and Consumer Protection ("DATCP"), for DATCP to spend as it sees fit to help build low-income housing. This type of consequential settlement would directly implicate the Legislature's constitutional "power of the purse" to determine how the income of the State should be allocated and expended. Wis. Const. art. VIII, §§ 2, 5. Accordingly, the Legislature can constitutionally weigh in on these kinds of settlements, given that they bear upon its constitutional power of the purse by "affecting state appropriations." *SEIU*, 2020 WI 67, ¶ 70. This is similar to what the Legislature did in 1909 when it directed a committee including the Attorney General to propose settlements of valuable monetary claims against certain railroads for the Legislature's approval. *Supra* pp.24–26.

Or suppose the Attorney General enters into a settlement with a fraudster who hacked into the Department of Administration and stole $40 million from the General Fund. The Legislature clearly has a constitutional interest in whether, pursuant to that settlement, those significant state funds are returned to the General Fund or spent according to settlement terms chosen by the Attorney General and aligned with his own priorities. The Legislature's interest in that circumstance would be no different in principle than its

interest in the lawsuit against Mr. Merrill in 1849. *Supra* p.24.

Consider, further, a plaintiff-side case where the Attorney General "agree[s] to a reduced monetary settlement" of $5 million for a claim, in exchange for the defendant's agreement to release "a potentially meritorious counterclaim" of $5 million. *See* P-App.73. Such an agreement would clearly "implicat[e] the public purse," *SEIU*, 2020 WI 67, ¶ 10—and, therefore, trigger this institutional interest of the Legislature—in precisely the same way as a settlement where the State *received* $10 million from the defendant for its claim, but then *paid* $5 million to the defendant for his counterclaim. Indeed, this appears to be the nature of the State's settlements with the railroads: the Legislature approved these settlements—proposed by a committee including the Attorney General—wherein the railroads paid money to the State in exchange for, among other things, a release of their "counterclaims" against the State for "alleged overpayments of license fees." 1911 Wis. Act 539, § 1.

Or consider recent real-world examples, including the settlement in which opioid manufacturers paid substantial sums to the State for their roles in the opioid epidemic. *See* Wis. Dep't of Health Servs., *Revised DHS Opioid Settlement Funds Proposal for SFY 2023* (July 28, 2022) ("DHS Opioid Settlement").[13] Under Wis. Stat. § 165.12, the Attorney

[13] Available at https://www.dhs.wisconsin.gov/publications/p03288.pdf.

General had to—and did—obtain the Joint Committee's approval to bind the State to that settlement. Wis. Stat. § 165.12. Section 165.12 operates *precisely* like Section 26, expressly incorporating Section 26's mandate that the Joint Committee approve settlement proposals. *Id.* § 165.12(2)(a). As with the examples above, the Legislature can constitutionally have a say in such a settlement: funds from such settlements significantly contribute to statewide efforts to combat opioid addiction, including through data collection and monitoring, prevention, harm reduction, treatment, and recovery, as well as local-government policies aimed at reducing opioid addiction. *See* DHS Opioid Settlement, *supra*, at 2–4. Joint Committee review of such settlements ensures that the Legislature has a seat at the table over decisions impacting its fiscal planning, expenditure of the State's funds, and public-policy setting. *See infra* pp.9–10, 21–23.

Similarly, in the 1990s, Wisconsin was party to a massive, multistate tobacco settlement, receiving over $1.2 billion. Wis. Legis. Fiscal Bureau, *Informational Paper 76: Tobacco Settlement and Securitization* 1–2, 10–11 (Jan. 2009).[14] The Legislature had an undeniable interest in the allocation and use of that amount of money, and so it would have had review authority consistent with the Constitution, had Section 26 been on the books at that time.

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

Many other such examples—both real-world and hypothetical—show that there are at least some possible instances within Section 26's reach that implicate the Legislature's constitutional power of the purse. *SEIU*, 2020 WI 67, ¶¶ 68–69.

Second, the Legislature also has an institutional interest in establishing public policy for the State, *see* Wis. Const. art. IV, § 1—an interest that this Court has repeatedly recognized, *e.g.*, *Marklein I*, 2024 WI 31, ¶ 13 (noting the "expansive authority vested in the legislative branch to make policy decisions for the state"); *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 529, 576 N.W.2d 245 (1998); *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. As Professor Christenson observed over 50 years ago, the Attorney General's power to "initiate legal action," Arlen C. Christenson, *The State Attorney General*, 1970 Wis. L. Rev. 298, 299 (1970), and then "influence . . . the conduct of th[at] litigation"—including by "[s]ettlement or other termination"—allows "the Attorney General [to] exercise considerable influence in the formulation of public policy," *id.* at 311. That 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 by state law, and which could implicate public policy.

The landlord hypothetical above also demonstrates how a settlement within Plaintiffs' two categories could implicate the Legislature's institutional interest in setting policy for the State. In that hypothetical, the settlement required DATCP to provide low-cost housing funded by payments from the landlord. *See supra* pp.28–29. Such a settlement implicates the Legislature's policy-setting institutional interest, as the Legislature could conclude that its policy goals of creating low-cost housing would be better accomplished by, for example, the landlord funding a housing-assistance voucher program designed by the Legislature, rather than a program run through DATCP. Choosing "the best public policy" among "the alternatives available" in this way lies at the heart of the Legislature's policy-setting power. *Vanko*, 52 Wis. 2d at 216. The Legislature therefore has a sufficient institutional interest to justify its authority to approve such settlements, under *SEIU*. And the historical practice is in accord. For example, when the 1909 committee that included the Attorney General proposed to the Legislature settlements with certain railroads, the Legislature directed that the monies from these settlements be paid "into the state treasury," rather than directly allocated to some other specific public purpose. *Supra* pp.24–26.

The next opioid settlement may well include policy-laden settlement terms as well, implicating the Legislature's constitutional interest in legislating for the general welfare. *See generally, e.g.*, Wis. DOJ, *Attorney General Kaul*

Announces $102.5 Million Settlement with Suboxone Maker for Alleged Illegal Monopoly Tactics (June 2, 2023) ("*Suboxone*") (announcing proposed settlement with manufacturer of drug used to treat opioid addiction that includes multiple policy-based terms, while incorrectly asserting that Section 26 does not apply).[15] For example, the Attorney General might want to require, as a term of settlement, that manufacturers of opioids (or tobacco, or e-cigarettes,[16] or some other addictive substance) pay for rehabilitation programs for Wisconsinites suffering from addiction to their products. Yet, the Legislature may prefer that the manufacturers make payments into a central fund allocated both to rehabilitation and to research into side effects of opioid use. As in the landlord example, selecting among such "alternatives" is a policy choice within the legislative domain, *Vanko*, 52 Wis. 2d at 216, which means the Legislature's institutional interests are at work, under *SEIU*'s analytical framework.

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[15] Available at https://www.doj.state.wi.us/news-releases/attorney-general-kaul-announces-1025-million-settlement-suboxone-maker-alleged-illegal.

[16] Wis. DOJ, *Wisconsin DOJ, 33 States Reach $438.5 Million Agreement with JUUL Labs* (Sept. 6, 2022) ("*JUUL*") , https://www.doj.state.wi.us/news-releases/wisconsin-doj-33-states-reach-4385-million-agreement-juul-labs.

3. Plaintiffs' Counterarguments All Fail Under *SEIU*'s Unchallenged Holdings

Because Plaintiffs have not "asked [the Court] to overrule or otherwise modify [*SEIU*]," this Court must faithfully apply it here, notwithstanding the fact that some Justices "disagreed with the [*SEIU*] decision when it was made" and may, perhaps, continue to "disagree with it today." *Wis. Elections Comm'n v. LeMahieu*, 2025 WI 4, ¶¶ 32–34, 16 N.W.3d 469 (A.W. Bradley, J., concurring). Plaintiffs' decision not to challenge *SEIU* dooms their "hybrid" challenges because a faithful application of this decision shows that there are at least some constitutional applications of Section 26 within Plaintiffs' two broad categories, notwithstanding Plaintiffs' counterarguments. Notably, Plaintiffs cannot identify any *real-world* example of a settlement covered by Section 26 that would fall outside of their two broad categories. *See generally* Br.12–13. That failure betrays Plaintiffs' underlying goal in bringing this lawsuit: to render *SEIU* a dead letter, inapplicable to any actual settlement that the State may enter into in any actual case, without asking this Court to overrule *SEIU* directly.[17]

[17] In addition to upholding Section 26 as facially constitutional, *SEIU* also upheld Section 30 of 2017 Wis. Act 369, which gives the Legislature a seat at the settlement table for defense-side settlements in cases where the Legislature has an institutional interest, such as its power of the purse. *See* 2017 Wis. Act 369, § 30; *SEIU*, 2020 WI 67, ¶¶ 50, 72. Nevertheless, and directly contrary to *SEIU*, Plaintiffs claim in footnote 5 of their Brief that the Legislature "generally" has "no shared

First, Plaintiffs argue that "resolv[ing] a civil action" in their two broad categories is "textbook core executive power," Br.28–31, such that any legislative involvement violates the separation of powers, Br.32. That is the opposite of what *SEIU* held. *SEIU* 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). Further, the *SEIU* majority concluded that the Legislature merely having a seat at the settlement table with the Attorney General, which is all that Section 26 provides, is constitutional under the shared-powers framework. *Id.* And Plaintiffs' position cannot be reconciled with the State's long rooted history of legislative involvement in settlement decisions on behalf of the State, as explained above. *Supra* pp.24–26.[18]

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legislative role" in "defense-side monetary settlements" because, "[i]n reality," such settlements "are generally paid by a self-insured agency fund using already-appropriated moneys." Br.36 n.5. So, in this case, Plaintiffs have sought to gut *SEIU*'s upholding of Section 26 and, as footnote 5 makes clear, their next objective will be to gut *SEIU*'s upholding of Section 30—thus rendering *SEIU*'s recognition of the Legislature's shared role in settlements for the State in at least some cases a dead letter.

[18] That history also refutes Plaintiffs' assertion that "the absence of any pre-Act 369 legislative role throughout Wisconsin history further demonstrates that resolving these categories of civil actions constitutes core executive power." Br.31; *see also* Br.24.

Relatedly, Plaintiffs claim that their "consider[ation] [of] many variables to decide whether, when, and how best to resolve a particular action" makes the settling of cases within Plaintiffs' two broad categories a core power. Br.31 (citation omitted); *see also* Br.29–30. *SEIU* rejected that very argument, concluding that "the authority to approve certain settlements" is a shared power between the Attorney General and the Legislature where the Legislature has an "institutional interest," 2020 WI 67, ¶ 69—notwithstanding the Attorney General's claim there that settling cases "involve[s] the balancing of innumerable legal and practical considerations," Att'y Gen. Resp. Br.18, *SEIU*, Nos.2019AP614, 2019AP622, 2019 WL 4645564 (Wis. Sept. 17, 2019).

Second, Plaintiffs' recycled citations of U.S. Supreme Court cases that they and their allies relied upon in *SEIU* do not help them. *Compare* Br.25, 29–30 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976), *Heckler v. Chaney*, 470 U.S. 821 (1985), *and Bowsher v. Synar*, 478 U.S. 714 (1986)), *with* Att'y Gen. Resp.Br.1, 3, 15–16, 17, *SEIU*, 2019 WL 4645564 (citing *Heckler* and *Bowsher*), *and* Pls. Resp.Br.13–14, 21, *SEIU*, 2019 WL 4731929 (Sept. 12, 2019) (citing *Buckley*). These U.S. Supreme Court cases are as irrelevant here as they were in *SEIU*, since they do not relate to *legislative involvement in compromise or discontinuance of cases*, which is what Section 26 and *SEIU* are about. *See Buckley*, 424 U.S. at 111 (only discussing authority to "institute a civil action"); *Heckler*, 470

U.S. at 831 (only discussing lack of *judicial* review over executive decisions not to prosecute); *Bowsher*, 478 U.S. at 726 (only discussing Congress' inability to "reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment").[19] *SEIU* does address—and constitutionally blesses—legislative involvement in compromising or discontinuing cases, and that unchallenged decision controls here. *Supra* pp.20–23.

Third, nothing in this Court's decision in *Marklein I* undermines *SEIU*. *Contra* Br.37–39. *Marklein I* had nothing to do with the historically-grounded practice of the Legislature's involvement in settling cases, as it only considered "the executive branch's *core power* to execute the law" by authorizing the Legislature to halt expenditures "after the legislature already appropriated the money through the budget process." 2024 WI 31, ¶ 2 (emphasis added). Section 26, in contrast, relates to the Attorney General's and the Legislature's "*shared power*" over entering into settlement agreements on behalf of the State. *SEIU*, 2020 WI 67, ¶¶ 63, 72–73 (emphasis added). Further, *Marklein I* affirmed the Legislature's "expansive authority" to make "policy decisions for the state," including those concerning "taxing," "spending," and the "appropriat[ion] [of] the state's funds,"

[19] Plaintiffs also cite *Seila Law LLC v. Consumer Financial Protection Bureau,* 591 U.S. 197 (2020), Br.29, decided after briefing concluded in *SEIU*. It too is irrelevant. *See Seila Law*, 591 U.S. at 219–20 (only discussing authority to "seek daunting monetary penalties" in federal court).

2024 WI 31, ¶¶ 13–14 (citation omitted)—consistent with *SEIU*'s holding that the Legislature's "constitutional institutional interest" supports Section 26's constitutionality, 2020 WI 67, ¶ 71.

Fourth, Plaintiffs argue that the Legislature's "institutional interest" in its "power of the purse," *SEIU*, 2020 WI 67, ¶¶ 69–71, does not apply to any of the cases within Plaintiffs' two broad categories, but all of Plaintiffs' arguments on this score fail.

Plaintiffs first claim that the Legislature's "institutional interest" in the State's finances, *id.*, applies only when the Legislature appropriates state funds "through *lawmaking*," Br.37–40, but *SEIU* and the text of the Constitution squarely reject that thesis.

SEIU is irreconcilable with Plaintiffs' argument that the Legislature's interest in the State's finances is limited to appropriating funds "through *lawmaking*." Br.37. *SEIU* articulated the Legislature's "power of the purse" as supporting the Legislature's involvement in at least some settlements for the State without limiting that power to making appropriations by law. *See* 2020 WI 67, ¶¶ 69–70. Thus, *SEIU* explained that the Legislature's "institutional interest" here is "in the expenditure of state funds," *id.*, in cases where "the attorney general purports to enter settlements affecting state appropriations," *id.* ¶ 70, or simply "where spending state money is at issue," *id.* ¶ 71.

As for the text of the Constitution, it expressly affords the Legislature an oversight role for the State's finances. Specifically, Section 5 of Article VIII places oversight of the State's "sources of income" within the Legislature's power of the purse, Wis. Const. art. VIII, § 5, as it "plainly contemplates *legislative action* to determine the sufficiency of [the State's] income each year," *Owen*, 151 N.W. at 364–65 (emphasis added), and "*requires*" the Legislature "to insure" that "revenues are sufficient to defray the state's expenses," 74 Op. Att'y Gen. at 203, 1985 WL 257977, at *1 (emphasis added). Plaintiffs misread Section 5 of Article VIII, *Owen*, 151 N.W. at 364–65, and the Attorney General's own 1985 opinion as merely authorizing the Legislature to "calculate" the State's income, to the exclusion of taking action to protect any income stream. Br.38. The plain text of those sources rejects such a parsimonious reading, *see supra*. Indeed, there would be no reason for the Framers to place Section 5 of Article VIII into the Constitution if it only authorized the Legislature to "calculate" the State's income, as the Legislature would inherently possess that anodyne power as part of "the legislative functions" within "the power of the people to confer" and not "specifically restricted or prohibited." Ray A. Brown, *The Making of the Wisconsin Constitution, Part II*, 1952 Wis. L. Rev. 23, 32–33 (1952).

Plaintiffs challenge the applicability of the Legislature's "institutional interest" in its "power of the purse," *SEIU*, 2020 WI 67, ¶¶ 69–71, by invoking Judge

Neubauer's views about the Uniformity Clause in her dissent below, Br.38–39; P-App.41–42. As Judge Neubauer explained below, in her view, the Legislature's "taxing power" cannot support Section 26 because "[t]axation is a means of generating revenue" that must "be uniform." P-App.43–44 (citing Wis. Const. art. VIII, § 1); *see* Br.38. But the Uniformity Clause is irrelevant here because the Legislature's "institutional interest" in the "power of the purse," *SEIU*, 2020 WI 67, ¶¶ 69–71, extends beyond taxation to include oversight over all "*other sources of income*" in the State, Wis. Const. art. VIII, § 5 (emphasis added).

Fifth, Plaintiffs then make abbreviated arguments against the Legislature's "institutional interest[ ]" in setting policy for the State, but those arguments are wrong as well. Br.40–41. Plaintiffs admit that the Legislature has a constitutional interest in "generally applicable policy-setting through lawmaking," but claim that settlements are "backward-looking, party-specific remediation through settling individual cases." Br.40. Yet, settlements can involve forward-looking remedies that affect individuals across the State, such as awards of injunctive relief against major companies that have statewide ramifications. *See, e.g.*, Wis. DOJ, *Suboxone*, *supra* (imposing forward-looking disclosure obligations on a major drug manufacturer as part of a settlement); Wis. DOJ, *JUUL*, *supra* (imposing forward-looking marketing restrictions on a major manufacturer of e-cigarettes as part of a settlement). That is why Professor

Christenson identified the Attorney General's power to bring and resolve lawsuits on behalf of the State as giving the Attorney General "considerable influence in the formulation of public policy." Christenson, *supra*, at 311. And while Plaintiffs again invoke *Marklein I* for support, Br.40–41, that decision is again distinguishable because it considered a core power of the Attorney General, 2024 WI 31, ¶ 2, while here *SEIU* has already held that Section 26 operates within the shared-power realm, at least where the Legislature has an institutional interest, *SEIU,* 2020 WI 67, ¶ 63.

Sixth, Plaintiffs' claim that the Legislature has not "authorize[d]" any of the actions within their two broad categories, and thus that the Legislature cannot invoke this institutional interest, is also incorrect. Br.35–36. Every time the Attorney General prosecutes a case—including in Plaintiffs' two broad categories—he is acting pursuant to a "specific[ ] grant[ ] by the legislature," given that the Attorney General has no "inherent power to initiate and prosecute litigation" for the State. *In re Sharp's Estate*, 63 Wis. 2d 254, 261, 217 N.W.2d 258 (1974). Thus, this "institutional interest" of the Legislature also recognized in *SEIU* supports the conclusion that Section 26 may constitutionally apply in at least some cases within Plaintiffs' two broad categories. Put another way, Section 26 works together with the Legislature authorizing the Attorney General to bring any lawsuits within Plaintiffs' two broad categories by providing

an important statutory backstop to that statutorily granted litigation authority.

Finally, Plaintiffs argue that "[o]ther States' supreme courts agree that statutes giving legislatures the power to bring or control plaintiff's-side litigation violate the separation of powers." Br.33–35. But none of Plaintiffs' cited cases from other States, under different state constitutions,[20] dealt with settlement approvals. *Stockman v. Leddy*, 129 P. 220 (Colo. 1912), held that a statute giving a legislative committee the power to prosecute, defend, and join certain actions against the federal government was unconstitutional. *Id.* at 25–26, 32. Similarly, *Arizona ex rel. Woods v. Block*, 942 P.2d 428 (Ariz. 1997), invalidated a statute that gave an interbranch committee the power to initiate and pursue legal actions on behalf of the State. *Id.* at 270, 278. And *In re Opinion of Justices*, 27 A.3d 859 (N.H. 2011), advised that a bill that would have forced the New Hampshire Attorney General to join the State as a plaintiff in litigation over a federal law was unconstitutional, *id.* at 862–63, 871. In contrast with this New Hampshire case, in particular, Wisconsin has historically allowed the Legislature to direct the Attorney General to join the State in litigation, *see supra* p.24 (discussing 1849 Wis. Act 64)—including as part of a

[20] Unlike Wisconsin's Constitution, the constitutions of the States that Plaintiffs invoke contain express separation-of-powers provisions. N.H. Const. Pt. 1, art. XXXVII; Colo. Const. art. III; Ariz. Const. art. III.

committee to pursue claims "against the United States," *see supra* p.26 (discussing 1915 Wis. Act 624).

B. Plaintiffs' Alternative, Undue-Burden Argument Also Fails Under *SEIU*

Plaintiffs alternatively argue that if the power to compromise or discontinue cases on behalf of the State is a shared power in at least some cases, Section 26 still violates the separation-of-powers doctrine because it "constitutes an undue burden and substantial interference [upon the Executive] as a matter of law." Br.44; *see also* Br.26–27, 33. The Court of Appeals correctly rejected this argument, which is contrary to both *SEIU*'s clear holding and the extensive record developed here.

1. In *SEIU*, the Attorney General also argued that, even if Section 26 involved a shared power, it was still facially unconstitutional under "an 'unduly burdensome' shared powers analysis." 2020 WI 67, ¶ 72 n.22. *SEIU* held that "th[is] facial challenge gets nowhere" because, as it already held, "the attorney general's litigation authority is not . . . an exclusive executive power" but rather is a "shared power in at least some cases" where "the legislature has appropriate institutional interests." *Id.* So, where a statute facially pertains to a shared power, that *necessarily* means that, "in at least some cases," one branch's exercise of that power "does not unduly burden or substantially interfere with" another branch's "authority"—thus a claim that such a statute is facially unduly burdensome "gets nowhere." *Id.*

Here, Plaintiffs' "'unduly burdensome' shared powers" argument against Section 26 similarly "gets nowhere," *id.*, once this Court correctly holds that Section 26 concerns a shared power in at least some cases within Plaintiffs' two broad categories, *supra* Part I.A–B. Just like in *SEIU*, Section 26's application to Plaintiffs' two broad categories cannot facially impose an undue burden on the Attorney General if, as explained above, there are at least some constitutional applications of Section 26 within Plaintiffs' two broad categories. *Supra* Part I.A.

In their Brief, Plaintiffs ask this Court to ignore *SEIU*'s holding on this score. Br.41–42; *see also* Br.26–27, 33. Plaintiffs claim that the Court of Appeals misread *SEIU* as "nulli[fying]" the undue-burden or substantial-interference standard, Br.41–42 (quoting P-App.46 (Neubauer, J., dissenting)), but the Court of Appeals correctly understood *SEIU* as holding only that a statute cannot *facially* impose an undue burden once the Court has concluded that the statute *facially* involves a shared power, P-App.23 (quoting *SEIU*, 2020 WI 67, ¶ 72 n.22). That does not "nullify" the undue-burden standard, because *SEIU* (and the Court of Appeals below) leaves open *as-applied* undue-burden challenges to such statutes, including Section 26. Plaintiffs then argue that Section 26 must facially impose an undue burden because "a potential legislative role does not exist in [their two] categories" of application of Section 26, Br.42, and because Section 26 creates a "lurk[ing]" "veto power" for the

Legislature over the settlement authority of the Attorney General, Br.44 (citation omitted). But this again is just an attempt to resist *SEIU*'s holding that Section 26 is facially constitutional, at least where the Legislature has an "institutional interest," *supra* Part I.A.1—a holding that applies in full to defeat Plaintiffs' "hybrid" challenges here, given that such challenges must also meet the facial-challenge standard, *Gabler*, 2017 WI 67, ¶ 29; *SEIU*, 2020 WI 67, ¶ 38; *see also supra* Part I.A–B (further explaining that is a legislative role in at least some cases within Plaintiffs' two broad categories). Plaintiffs' "'unduly burdensome' shared powers" argument "gets nowhere." *SEIU*, 2020 WI 67, ¶ 72 n.22.

2. Even if *SEIU* did not foreclose Plaintiffs' "'unduly burdensome' shared powers" argument, *SEIU*, 2020 WI 67, ¶ 72 n.22, Plaintiffs have failed to show that the Joint Committee's settlement-approval process under Section 26 unduly burdens the Attorney General's authority in every case within Plaintiffs' two broad categories of application.

a. Legislation is invalid only if courts determine, based on the facts presented, that one branch's exercise of a shared power "unduly burden[s] or substantially interfere[s] with another branch," *Tetra Tech EC, Inc. v. Wis. Dep't of Rev.*, 2018 WI 75, ¶ 46, 382 Wis. 2d 496, 914 N.W.2d 21 (citation omitted); *see also SEIU*, 2020 WI 67, ¶ 35. Plaintiffs must meet this burden as to every case in their identified categories to succeed on their hybrid challenge that Section 26 "cannot

be constitutionally enforced in *any* circumstances within the particular categories." Br.23 (citing *Gabler*, 2017 WI 67, ¶ 29) (emphasis added). In making this determination, the Court is required to find "*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.

Six years after the enactment of Section 26, Plaintiffs have failed to present any actual evidence that Section 26's settlement-approval process causes Plaintiffs an undue burden in *any* cases within their two challenged categories—let alone in *all* cases within those categories. Plaintiffs did not provide evidence of any instance where, for example: (i) the State missed a multiparty settlement due to Section 26, *see* Supp.App.147; (ii) the Joint Committee refused the Attorney General's request for confidentiality, *see* Supp.App.128 (Q: "In this particular instance, did you even ask the JFC for a meeting?" A: "No."); *see also* Supp.App.128–29; (iii) the Attorney General declined to prosecute civil actions and instead chose to apply the Department's resources to a more fulsome remedy, *see* Supp.App.160 ("I don't recall where the [D]epartment of Wisconsin DOJ made that decision."); or (iv) an agency elected not to commence a civil action because of Section 26, *see* Supp.App.160. Further, regarding time-sensitive settlement approvals, Plaintiffs have not identified a single example in which the Joint Committee failed to consider such

settlements with sufficient speed, *see* Supp.App.68, 71–72, 108, 137, 245–46, 248–49, and, regarding settlements involving confidentiality issues, Plaintiffs fail to demonstrate that Section 26 has ever "substantially interfere[d] with the attorney general's executive authority," *SEIU*, 2020 WI 67, ¶ 72 n.22; *see supra* p.21.

2.b. Plaintiffs cannot show that Section 26 unduly burdens the Executive's exercise of its shared power to compromise or discontinue litigation on behalf of the State in *any* case within their two broad categories—let alone *every* case, as is their burden. *See* Br.41–45; *see also* Br.26–27, 32.

To begin, Plaintiffs misunderstand the shared-powers inquiry, arguing that it requires them to show only that the statute at issue permits one branch to block or veto the other branch in some way with respect to the shared power. *See* Br.32. As explained above, however, the shared-powers inquiry considers whether one branch's exercise of the shared power has "unduly burden[ed] or substantially interfere[d] with another branch['s] [exercise]" of that power. *SEIU*, 2020 WI 67, ¶ 35 (citations omitted); *supra* p.21. Indeed, *SEIU* itself directly rejects Plaintiffs' erroneous view of the shared-powers inquiry. There, this Court concluded that Section 26 has "constitutional applications" because the power to settle a case for the State is a shared power—at least where the Legislature has an institutional interest. 2020 WI 67, ¶¶ 72–73—although in all cases where Section 26 constitutionally applies "the attorney general[ ] *cannot* settle

or discontinue a case prosecuted by the attorney general *unless* . . . DOJ receives approval from the Joint Committee." *Id.* ¶ 53 (emphases added).

More broadly, Plaintiffs' misconception of the shared-powers inquiry would turn every shared power between the branches into a *de facto* core power of one branch. If the shared-powers inquiry never allows an "encroaching branch" to block the action of "the encroached-upon branch" in any respect, *see* Br.26–27, 33, that would mean that "the encroached-upon branch" ultimately has the power to act unilaterally in the domain at issue, notwithstanding the objections of another branch. So, here, for example, Plaintiffs believe that Section 26 could *only* possibly be a constitutional regulation of a "shared" power if the Attorney General had the "ability to override [the Legislature's] decisions" not to approve particular settlements. Br.33. That is another way of saying—contrary to *SEIU*—that the "power" to settle cases for the State has been "conferred to a single branch by the constitution" and that "no other branch may take it up and use it as its own"—the definition of a "core" power. *SEIU*, 2020 WI 67, ¶ 35 (citations omitted).

Shifting tactics, Plaintiffs next claim that Section 26 has imposed an undue burden on them because it supposedly "has affected the type of settlements the [Attorney General] enters into, especially in multistate civil enforcement actions," including time-sensitive settlements. Br.43. But Plaintiffs presented no evidence of Section 26 imposing such

a burden in any case of a time-sensitive settlement. *Supra* pp.13–16. In fact, the evidence in the extensive record in this case supports the opposite conclusion—that the Joint Committee has always approved settlements when the Attorney General provides the necessary information. *Supra* p.13. And the Joint Committee has consistently acted quickly when needed or otherwise requested to do so. *Supra* p.15.

Plaintiffs' concerns with the Joint Committee's ability to ensure that certain settlement negotiations remain confidential, Br.43–44, is without record support. These concerns do not show that Section 26 "substantially interfere[s] with the attorney general's executive authority." *SEIU*, 2020 WI 67, ¶ 72 n.22. The Joint Committee itself has presented numerous options to mitigate any legitimate confidentiality concerns. First, communications between the Attorney General and the Joint Committee about proposed settlements are shielded by attorney-client privilege, and the Joint Committee is permitted to consider settlement proposals in closed session. Supp.App.54–55, 68–69. Second, the Attorney General and Joint Committee can and have entered into confidentiality agreements that allow for the disclosure of confidential information with only Joint Committee members who signed the agreement. Supp.App.55–56, 69–70; *see also* Supp.App.252–54. Finally, the Attorney General in certain cases has simply sought permission from the opposing party to disclose the terms of the settlement to the Joint Committee. Supp.App.56–58; *see,*

e.g., Supp.App.153–54, 234–36. But even if legitimate confidentiality concerns were to arise in a particular case, despite the multiple protections just discussed, that would not justify invalidating Section 26 as to all cases within Plaintiffs' two broad categories. *See SEIU*, 2020 WI 67, ¶¶ 36–38, 45; *Gabler*, 2017 WI 67, ¶ 28.

Plaintiffs also assert that the Joint Committee has "refused to . . . consider [certain] proposed settlements until and unless the [Attorney General] agreed to credit statutory attorneys' fees to general purpose revenues." Br.44. However, this claim does not satisfy Plaintiffs' burden to show that Section 26 "cannot be constitutionally enforced in *any* circumstances within the particular categories." Br.23 (citing *Gabler*, 2017 WI 67, ¶ 29) (emphasis added). In any event, the claim is insufficient even to show an undue burden in those very few cases. Instead, the Legislature's negotiating terms related to the State's receipt of money in the settlements shows the "shar[ing]" of "power" between the branches, *see SEIU*, 2020 WI 67, ¶ 35, and the Legislature's appropriate input over the receipt of State funds, pursuant to its power of the purse, *supra* pp.20–23.

Finally, Plaintiffs argue that an "overbreadth analysis" should apply here, meaning that this Court would "ask whether application of [Section 26] to all actions in these categories imposes hassles on executive power that substantially exceed any limited legislative role that might be justified by some shared legislative role in the particular

categories." Br.44–45 (citation omitted). *SEIU* already rejected application of an overbreadth doctrine here, 2020 WI 67, ¶ 43 & n.14, and Plaintiffs offer no argument for why the Court should depart from that holding, *see generally* Br.44–45. And contrary to Plaintiffs' claims, all of the evidence shows that the Joint Committee has acted expeditiously to approve settlements proposed by the Attorney General, while the Attorney General cannot identify even one example of the Joint Committee harming the State's interest by using Section 26. *Supra* pp.13–16.

CONCLUSION

This Court should affirm the decision of the Court of Appeals.

Dated: March 10, 2025

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 10,637 words.

I further certify that filed with this brief is a supplemental appendix and that if the record is required by law to be confidential, the portions of the record included in the supplemental 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.

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