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No.2022AP790

In the Supreme Court of Wisconsin

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

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

RESPONSE OF DEFENDANTS-APPELLANTS-RESPONDENTS IN OPPOSITION TO PETITION FOR REVIEW

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INTRODUCTION

Four years ago, this Court held that Section 165.08(1) of the Wisconsin Statutes—which gives the Legislature a seat at the table as to the settlement of certain civil actions prosecuted by the Attorney General—is facially constitutional because the power to settle cases can reside within the "borderlands" of shared powers between the Legislature and the Attorney General. *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶¶ 63, 68–69, 393 Wis. 2d 38, 946 N.W.2d 35 (Hagedorn, J., majority op.) ("*SEIU*"). Since that time, the Joint Committee on Finance ("Joint Committee") has consistently approved settlements in a timely fashion, and the Attorney General's own affiant testified that he could not think of a single case when the Joint Committee did not meet on a requested timeframe or disapproved a settlement that the Attorney General wanted.

Unhappy with *SEIU*'s holding, Petitioners brought the present lawsuit, asking the courts to declare that Section 165.08(1) is unconstitutional for two broad categories of cases involving civil enforcement and common law actions. These categories of cases are so broad that they cover all applications of Section 165.08(1)

that have occurred since Section 165.08(1)'s enactment. Thus, if Plaintiffs prevail, *SEIU*'s holding that Section 165.08(1) is facially constitutional would be a practical nullity. The Court of Appeals understandably rejected this lawsuit under *SEIU*.

This Court should deny the Petition for Review. Although Petitioners spill much ink claiming that settling actions constitutes "core executive power," they do not ask this Court to overrule *SEIU's* contrary holding. Nor do Petitioners argue that their challenge satisfies the special considerations necessary to overcome the doctrine of *stare decisis*. Here, the Court of Appeals correctly applied *SEIU* to hold that the Legislature's institutional interest over the public fisc includes approving settlements involving the receipt of state funds as well as those expending state funds, at least in some circumstances. The Court of Appeals further held that Petitioners presented no evidence of Section 165.08(1) unduly burdening the Attorney General, Pet.-App.25–28,[1] and Petitioners do not challenge that finding—nor could they, given their own affiant's testimony below.

[1] Citations to "Pet.-App." in this Response are to Petitioners' Appendix to their Petition.

The Court should deny the Petition for Review.

STATEMENT OF THE CASE[2]

A. Section 165.08(1) provides the procedures that the Attorney General must follow to settle certain claims on behalf of the State. Prior to the enactment of Section 26 of 2017 Wisconsin Act 369 ("Section 26"), Section 165.08 provided that all civil actions "prosecuted by the [Attorney General[3]] by direction of any officer, department, board or commission, shall be compromised or discontinued when so directed by such officer, department, board or commission." Wis. Stat. § 165.08 (2016), *amended by* 2017 Wis. Act 369, § 26. Such civil actions "may be" settled "with the approval of the governor" if the Attorney General initiated the action, "or at the request of any individual." *Id.* Section 26 revised Section 165.08(1) to authorize the Attorney General to compromise or discontinue "[a]ny civil action" he prosecutes "by submission of

[2] The Statement of the Case in this Response is identical to the Statement of the Case in Respondent's simultaneously filed Response To Motion To Temporarily Enjoin Wis. Stat. § 165.08(1) As Applied To Settlements In Two Categories Of Actions Pending This Court's Review.

[3] Consistent with this Court's precedent, this Response refers to the "Attorney General" when discussing statutes that mention and regulate the Department of Justice. *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[.]").

a proposed plan to the joint committee on finance for [its] approval." Wis. Stat. § 165.08(1). Such "compromise or discontinuance may occur only if" the Joint Committee "approves the proposed plan." *Id.* As such, Wisconsin law requires the Attorney General to secure the Joint Committee's approval before settling a case, unless the Legislature is a party to the case. *Id.*

A group of plaintiffs challenged the constitutionality of Section 165.08(1)—among other provisions of 2017 Wis. Act 369—soon after it was enacted. *See* Order at 1–2, *SEIU v. Vos*, No.2019CV302 (Cir. Ct. Dane Cnty. Mar. 26, 2019). The Circuit Court granted plaintiffs' temporary injunctive relief, reasoning that Section 165.08(1) unconstitutionally denied the Attorney General the ability "to be the lawyer for the State of Wisconsin." *Id.* at 26. It then concluded that because the plaintiffs "established a reasonable probability of success on the merits," they also demonstrated "irreparable harm and that an injunction is necessary" because "when constitutional rights are deprived, irreparable harm results and there is really no other adequate remedy available." *Id.* at 3.

This Court thereafter granted the Legislature's motion to stay that temporary injunction pending appeal. R. 79, Ex. 4, Order, *SEIU v. Vos*, No.2019AP622 (June 11, 2019) ("*SEIU* Stay Order"). This Court admonished the Circuit Court for failing to follow the proper standards for issuing an injunction. *Id.* at 5–6. In so doing, the Court emphasized that Section 165.08(1) and the other challenged statutes were entitled to the "presumption of constitutionality that attaches to regularly enacted statutes," and concluded that this presumption "by itself" provides a "strong showing" of likelihood of success on appeal. *Id.* at 7. This Court also explained that the Circuit Court failed to "properly consider irreparable injuries." *Id.* at 6. Under a proper analysis, the Legislature's concrete harms—being unable to participate in settlements which could not be later unwound—outweighed any of the Attorney General's speculative harms. *Id.* at 8–9. Further, the Legislature and "the public suffer a substantial and irreparable harm of the first magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined" prior to appellate review. *Id.* at 8. Thus, the balance of equities favored of the Legislature, because the Attorney General's

speculative harms could not overcome concrete harms to the Legislature. *Id.* at 8–9.

B. This Court thereafter upheld Section 165.08(1) as facially constitutional on the merits. Plaintiffs in that case asserted that Section 165.08(1)'s mandate that the Attorney General receive legislative approval before settling certain actions violates the separation of powers and "substantially burden[s] the executive branch," by giving the legislature a "core executive power," and "impermissibly limit[ing] the governor's duty to take care that the laws be faithfully executed." *SEIU*, 2020 WI 67, ¶ 55 (citation omitted).

This Court first examined Wisconsin's separation-of-powers principles, and then reviewed the standards governing facial, hybrid, and as-applied challenges. *Id.* ¶¶ 30–49. This Court recognized that statutory challenges may include attributes of "both a facial and an as-applied claim." *Id.* ¶ 45 (citing *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 29, 376 Wis. 2d 147, 897 N.W.2d 384). Such a "hybrid" challenge extends beyond a "plaintiffs' particular case" and instead "challenges application[s] of the law more broadly." *Gabler*, 2017 WI 67, ¶ 28 (citation

omitted). To bring a hybrid challenge, a plaintiff must show that the statute "could never be constitutionally applied" as to "a specific category of applications." *SEIU*, 2020 WI 67, ¶ 45. A facial challenge and a hybrid challenge share the same burden—to demonstrate that Section 165.08(1) "may not be constitutionally applied under any circumstances." *Id.* ¶ 72.

SEIU held that Section 165.08(1) is facially valid because the plaintiffs failed to meet this heavy burden. *Id.* Although "representing the State in litigation is predominately an executive function," that "function" resides within the "borderlands of shared powers" between the legislative and executive branches, at least where a case "implicate[s] an institutional interest of the legislature." *Id.* ¶ 63. *SEIU* identified two such "institutional interests of the legislature" "sufficient to defeat the facial challenge" to Section 165.08(1). *Id.* ¶ 71. First, the Legislature has an "institutional interest" where it is a "represented party." *Id.* ¶¶ 64, 67, 71. Second, the Legislature has an institutional interest "where the power of the purse is implicated." *Id.* ¶¶ 68–69 (citing Wis. Const. art. VIII, § 2). Thus, although Section 165.08(1) removed the Attorney General's "unilateral

power" under prior law to settle litigation on behalf of the State, *id.* ¶¶ 52–53, that power does not always reside "within the exclusive zone of executive authority," *id.* ¶ 63. As such, the plaintiffs' challenge failed because "there are constitutional applications" of Section 165.08(1). *Id.* ¶ 72.

This Court also considered Section 30 of Act 369, Wis. Stat. § 165.25(6)(a)1, which requires the Attorney General to obtain approval from "any legislative intervenor" or the Joint Committee before settling actions "seeking injunctive relief or involving a proposed consent decree." *SEIU*, 2020 WI 67, ¶ 54. *SEIU* upheld the Legislature's authority to "give itself the power" to approve such agreements. *Id.* ¶ 72 (citing Wis. Stat. §§ 165.25(6)(a)1, 165.08). The Court reasoned that, "where litigation involves requests for the state to pay money to another party, the legislature, in at least some cases, has an institutional interest in the expenditure of state funds sufficient to justify the authority to approve certain settlements." *Id.* ¶ 69. The Court further noted that "[o]ther state legislatures" have the power to approve certain settlements. *Id.* ¶ 70 (citing Ariz. Rev. Stat. § 41-621(N); Conn.

Gen. Stat. § 3-125a(a); Neb. Rev. Stat. § 81-8,239.05(4); Okla. Stat. tit. 51 § 200(A)(1); Utah Code § 63G-10-202).

C. In June 2021, Petitioners filed a Complaint alleging that Section 165.08(1) violates the Wisconsin Constitution's separation of powers in two distinct contexts: "(1) civil enforcement actions brought under statutes that the Attorney General is charged with enforcing," including "environmental or consumer protection laws; and (2) civil actions the [Attorney General] prosecutes on behalf of executive-branch agencies relating to the administration of the statutory programs they execute, such as common law tort and breach of contract actions." R.11 at 8. Section 165.08(1) encompasses nearly all applications of these two categories. Indeed, Petitioners failed to identify a single settlement that fell outside of these two categories in the many years since the Legislature amended Section 165.08(1). *Compare* R.137 at 5, 12–13, *and* R.148 at 6, *with* R.144 at 22–23.

After the parties engaged in extensive discovery and summary-judgment briefing, *see* R.71–72, 90–91, the Circuit Court granted summary judgment in favor of Petitioners, *see* Pet.-App.49–76, and thereafter denied, in part, the Legislature's

motion for a stay pending appeal, *see* R.152. The Circuit Court denied the Legislature's motion as to Count 1, and granted relief with respect to Count 2. R.152 at 2–3. In support of its holding as to Count 2, the Circuit Court found that the Legislature's "strong showing of likelihood of success on the merits" and "the showing that the Legislature has [suffered an] irreparable injury" outweighed any "potential harms to interested parties" and the public interest in the Attorney General "not being able to immediately settle such cases without getting the approval of the Joint Finance Committee." R.154 at 54.

D. The Legislature appealed and, on August 17, 2022, the Court of Appeals granted the Legislature's request for a stay pending appeal with respect to actions under Count 1. *See* R.155 at 12. In reversing the Circuit Court, the Court of Appeals referenced this Court's June 11, 2019, stay order in *SEIU*, which stayed a circuit-court order temporarily enjoining certain provisions of Act 369—including Section 26—pending appeal. *See SEIU* Stay Order. The Court relied on that order's requirement that Act 369 statutes receive the same "presumption of constitutionality" that applies to "regularly enacted statutes," and

concluded that this presumption supported a "strong showing" of likelihood of success on appeal. *Id.* at 7. It also followed this Court's reasoning and acknowledged that both the Legislature and the "public suffer a substantial and irreparable harm of the first magnitude" when an enacted statute is "declared unenforceable and enjoined before any appellate review can occur." *Id.* at 8.

The Court of Appeals held that the Legislature showed a "strong" likelihood of success on appeal because the Circuit Court "enjoined a statute based on its conclusion that the statute is unconstitutional." R.155 at 7. It explained that under the third and fourth stay factors, the Circuit Court had addressed only "*potential* and *possible* harm" and failed to "identify a single case evidencing *substantial* harm to other interested parties." R.155 at 8–9. The Court of Appeals held that Petitioners had alleged "only the same general harms alleged in *SEIU*." R.155 at 10 n.11. The Court of Appeals ultimately held that the Circuit Court erred in holding that any "*potential* and *possible*" harm to the public "can't be remedied or mitigated" once the case is resolved. R.155 at 9.

F. While the case was pending before the Court of Appeals, this Court issued its decision in *Marklein* on July 5, 2024, which invalidated Wis. Stat. §§ 23.0917(6m) and (8)(g)3. *Evers v. Marklein*, 2024 WI 31, ¶ 34, 412 Wis. 2d 525, 8 N.W.3d 395. These sections provided the Joint Committee with oversight responsibilities related to the Department of Natural Resources' land purchases through the Knowles-Gaylord Nelson stewardship program, including the authority to decline expenditures of state funds over $250,000, Wis. Stat. § 23.0917(6m)(c), and to approve land acquisitions outside certain geographic boundaries, *id.* § 23.0917(8)(g). This Court held that the challenged provisions "effectively create a legislative veto," and thereby violate Wisconsin's separation-of-powers doctrine. *Marklein*, 2024 WI 31, ¶ 24. After explaining that the executive branch holds the "power to spend the funds the legislature has appropriated for a specific project," *Marklein* held that the provisions interfered with the executive's "core function to carry out the law" by authorizing the Legislature "to make spending decisions for which the legislature has already appropriated funds" and to determine how those funds may be spent. *Id.* ¶¶ 18–19. *Marklein* cited *SEIU* with approval

for several principles related to Wisconsin's separation-of-powers doctrine. *See, e.g.*, *id.* ¶¶ 9–10, 14.

G. On August 19, 2024, the Attorney General moved to lift the stay pending appeal. *See* Pls.-Resp'ts' Combined Mot. Seeking Lift Of Stays Pending Appeal And Opposing Consolidation In Light Of *Evers v. Marklein*, *Kaul v. Wis. State Legislature*, *Kaul v. Wis. State. Legislature*, No.2022AP790 (Ct. App. Aug. 19, 2024). Petitioners argued that *Marklein* "ultimately disposes of the Legislature's appeal" and "eliminates" the Legislature's prior support, if any, for stays pending appeal. *Id.* at 2. Petitioners also claimed that the Court of Appeals could affirm the Circuit Court's order granting summary judgment to Plaintiffs in reliance on *Marklein* because "*Marklein* resolves this case." *Id.* at 29. The Court of Appeals disagreed and denied the motion on October 25, 2024. *See* Order, *Kaul*, No.2022AP790 (Oct. 25, 2024).

After full merits briefing, the Court of Appeals ruled in the Legislature's favor on December 2, 2024. It held that "[t]he powers in question here are not core powers of the executive branch . . . but rather shared between the executive and the Legislature" under *SEIU*. Pet.-App.29. The Court first recognized that

Petitioners brought "a hybrid challenge that has characteristics of both a facial and an as-applied challenge because it is a broad challenge to a specific category of applications." Pet.-App.14–15 (citation omitted). As such, it "must meet the standard for a facial challenge as to an identified category of applications," requiring Petitioners to prove that "as to the specific category of applications, the statute could not be constitutionally enforced under any circumstances." Pet.-App.15 (citation omitted).

Pursuant to this Court's decision in *SEIU*, the Court of Appeals explained that representing the State in litigation "is within those borderlands of shared powers, most notably in cases that implicate an institutional interest of the legislature." Pet.-App.17 (citing *SEIU*, 2020 WI 67, ¶ 67). Consequently, if a "settlement in one of the two categories of cases implicates an institutional interest of the Legislature," then "settlement of that case is a power shared by the legislative and executive branches." *Id.*

The Court of Appeals determined that the settlement of civil litigation implicates the Legislature's "power of the purse," which encompasses "the power to decide how state funds are to be

allocated." Pet.-App.21. The Court of Appeals reasoned that settlements "could contain provisions that would allow a defendant to perform a certain act or make a certain payment that would prohibit the state from collecting additional penalties for the general fund." *Id.* Therefore, given that "settlement of at least some cases in [Petitioners'] two identified categories implicates the legislature's power of the purse," Petitioners failed to meet their "burden to show that there are no constitutional applications in these categories"—"one arrow [was] enough to fell [Petitioners'] constitutional challenge." Pet.-App.22.

The Court of Appeals also rejected Petitioners' alternative argument that, "even if settlement is a shared power," Section 165.08(1) "unduly burdens and substantially interferes with the executive branch's ability to perform its constitutional settlement role." Pet.-App.23. As the Court of Appeals recognized, this Court "rejected this exact argument" in *SEIU*. *Id.* Even assuming that this argument had merit, Petitioners "failed to overcome [their] heavy burden of proof to show beyond a reasonable doubt that the statute unduly burdens or substantially interferes with [its] ability to function." Pet.-App.25 (citation

omitted). "Unsubstantiated speculation is not sufficient to establish an undue burden or substantial interference with another branch's exercise of its authority," and Petitioners "failed to provide concrete evidence" of their alleged burdens "despite the fact that the statute has been in effect for over three years." Pet.-App.25–26.

H. While the Court of Appeals disposed of the Motion to Lift the Stay, Petitioners filed such a motion with this Court on October 23, 2024. This Court declined to grant Petitioners' requested relief for more than a month, and then denied the motion as moot on December 13, 2024.

STANDARD FOR PETITION FOR REVIEW

Whether to grant a petition for review "is a matter of judicial discretion, not of right," and this Court will "only" grant such a petition "when special and important reasons are presented." Wis. Stat. § (Rule) 809.62(1r); *see* Wis. Stat. § 808.10(1); *see also* Wis. Const. art. VII, § 3(3). As relevant to Petitioners' assertions, these "special and important reasons" include whether the petition presents a "real and significant question of . . . state constitutional law," Wis. Stat. § (Rule) 809.62(1r)(a); whether this Court's review

will "help develop, clarify or harmonize the law," *id.* § (Rule) 809.62(1r)(c); and whether the Court of Appeals' "decision is in conflict with controlling opinions of" this Court, *id.* § (Rule) 809.62(1r)(d).

ARGUMENT

I. The Case Does Not Merit This Court's Review Because Petitioners Merely Disagree With How The Court Of Appeals Applied This Court's Settled Precedent In *SEIU*

The Court of Appeals' decision below does not involve a significant question of state law, conflict with controlling precedent, or present a novel question, as Petitioners suggest. Pet.20. Instead, the Court of Appeals simply followed the rule and methodology that this Court applied in *SEIU* to the two categories of settlements at issue here.[4]

[4] In a footnote, Petitioners allegedly "preserve" a challenge to the "beyond a reasonable doubt standard" and the "invalid in every application test." Pet.28 n.4. Petitioners do not grapple with this Court's recent affirmance of these standards. *Cath. Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm'n*, 2024 WI 13, ¶ 77, 411 Wis. 2d 1, 3 N.W.3d 666 (applying "beyond a reasonable doubt" standard); *Marklein*, 2024 WI 31, ¶ 8 (applying facial challenge standard). Nor do they argue that either standard presents a "real and significant question" of state law and have waived any claim that it meets the Court's standard for granting review. *See Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶ 35, 403 Wis. 2d 369, 976 N.W.2d 584.

A. "A separation-of-powers analysis ordinarily begins by determining if the power is core or shared." *SEIU*, 2020 WI 67, ¶ 35 (citation omitted). While "[c]ore powers . . . are not for sharing," *Marklein*, 2024 WI 31, ¶ 10 (citation omitted), "shared powers 'lie at the intersections of the[ ] exclusive core constitutional powers,'" *id.* ¶ 11 (quoting *Gabler*, 2017 WI 67, ¶ 34), such that multiple "branches may exercise [these] power[s]." *SEIU*, 2020 WI 67, ¶ 35 (citation omitted). When one branch exercises a shared power, it may not "unduly burden or substantially interfere with" another branch's exercise of that power. *Id.* (citation omitted).

SEIU upheld the provision at issue, Section 165.08(1), against a facial separation-of-powers challenge. *Id.* ¶¶ 50–73. This Court explained that the power to "represent[ ] the State in litigation" can be a "shared power[ ]" between the Legislature and the executive branch, "most notably in cases that implicate an institutional interest of the legislature." *Id.* ¶ 63. *SEIU* identified "institutional interest[s]" of the Legislature justifying its involvement. *Id.* ¶ 64. As relevant here, this Court held that the Legislature's "general power to spend the state's money by

enacting laws," *id.*, ¶ 69; *see* Wis. Const. art. VIII, § 2, constitutes an "on-point institutional interest of the legislature," *SEIU*, 2020 WI 67, ¶¶ 68–69. Section 165.08(1) "has constitutional applications where the power of the purse is implicated"—a point that "[t]he Attorney General himself conceded during oral argument" in *SEIU*. *Id.* ¶ 69. The Court also noted that "the legislature may have other valid institutional interests" supporting its power to represent the State in litigation. *Id.* ¶ 73. Thus, representing the State in litigation is a "shared power[ ]," and a "facial challenge" to Section 165.08(1)'s provisions "gets nowhere under an 'unduly burdensome' shared powers analysis." *Id.* ¶ 72 n.22.

B. The Court of Appeals correctly applied *SEIU's* binding precedent to reject Petitioners' hybrid challenge here.

The Court of Appeals agreed with the Circuit Court that Petitioners brought a hybrid challenge to Section 165.08(1). Pet.-App.15 (citing *SEIU*, 2020 WI 67, ¶ 45). It then identified the standard for hybrid challenges to succeed, namely that "the statute could not be constitutionally enforced under any circumstances." *Id.* (quoting *SEIU*, 2020 WI 67, ¶ 45). And applied here, the Court

of Appeals explained that *SEIU* requires Petitioners to show that Section 165.08(1) fails that standard as to "any case within its selected two categories." *Id.*

The Court of Appeals identified *SEIU's* holding that settling cases is not a "core executive function" and that "institutional interests of the legislature are sufficient to defeat [a] facial challenge" to Section 165.08(1). Pet.-App.17 (quoting *SEIU*, 2020 WI 67, ¶ 71). Further applying *SEIU*, the Court of Appeals held "a settlement in one of the two categories of cases implicates an institutional interest of the Legislature." *Id.* (citing *SEIU*, 2020 WI 67, ¶ 67). The Court of Appeals identified the Legislature's power of the purse, the same power that defeated the facial challenge to Section 165.08(1) in *SEIU*, as applying to at least some of the settlements at issue here. Pet.-App.18.

The Court of Appeals held that, under *SEIU*, "both expected expenditures and expected revenues fall within" the power of the purse. Pet.-App.19–20. It reasoned that an Attorney General Opinion, the Wisconsin Constitution, and this Court's decision in *State ex rel. Owen v. Donald,* 160 Wis. 21, 122, 151 N.W. 331 (1915), all supported this holding. Pet.-App.20. The Court of

Appeals noted that *Marklein* had approved of *SEIU* several times and did not speak to the Legislature's interest in non-appropriated funds. Pet.-App.20 n.17. As a result, the Court of Appeals simply applied the rule from *SEIU* that "where a settlement implicates an institutional interest of the legislature, settlement is a shared power, and [Section] 165.08(1) is constitutional as to that settlement." Pet.-App.22 (citing *SEIU*, 2020 WI 67, ¶ 63).

The Court of Appeals also rejected Petitioners' "alternative" argument that Section 165.08(1) unduly burdens executive power under a shared powers analysis for two reasons. As a threshold matter, *SEIU* rejected the argument that such an analysis is necessary to decide a facial attack on Section 165.08(1). Pet.-App.23–25 (citing *SEIU*, 2020 WI 67, ¶ 72). In any event, Petitioners' claim failed because they presented "no evidence that [Section 165.08(1)] is an 'undue' burden or 'substantial' interference with [the Attorney General] functioning beyond a reasonable doubt." Pet.-App.27. The Court of Appeals examined fifteen cases that Petitioners alleged were "impacted to some degree" and found "only a single case" that the Attorney General may have to take to trial. *Id.* As a result, viewed in the light most

favorable to Petitioners, the court found that "the interference, if any, is no more than minimal." Pet.-App.28. The Court of Appeals concluded that after "more than three years" Petitioners had not presented "concrete examples" of the approval process causing an undue burden. Pet.-App.27–28.

C. Petitioners argue that this Court should grant review because the case raises a real and significant question of state law, Pet.20–27, conflicts with decisions of this Court, Pet.28–32, and presents a novel question, Pet.32–34. But Petitioners' claims that the Court of Appeals "misread" *SEIU*, Pet.29–31, and that settlements in these two categories of actions involve "core executive power" under *SEIU* and in *Marklein*, Pet.20–23, merely disagree with how the Court of Appeals applied *SEIU*'s holdings to their specific challenge. Such disagreements over the application of precedent do not present questions of state law warranting review, especially when the Court upheld the facial validity of this statute in *SEIU*.

First, Petitioners' assertion that the "majority" below "misread *SEIU* in three critical ways," Pet.29, simply disagrees with how the Court of Appeals applied *SEIU*.

Petitioners claim that the Court of Appeals incorrectly concluded "that *SEIU* was 'dispositive' of this appeal" because that decision found only that constitutional applications existed to defeat a facial challenge. Pet.29 (citing Pet.-App.20). But the Court of Appeals explained it was the application of *SEIU's* rule to Petitioners' challenge that forecloses their relief. Pet.-App.22. Although this Court noted that other "applications or categories of applications" of Section 165.08(1) "may violate the separation of powers," it expressly cited the Legislature's authority to "consent to . . . the compromise or discontinuance of a matter being prosecuted" as a "power" that "the legislature may permissibly give itself." *SEIU*, 2020 WI 67, ¶¶ 72–73 (citing Wis. Stat. § 165.08(1)). The Court of Appeals cited and applied this holding, recognizing that this Court "clearly set forth the rule that where a settlement implicates an institutional interest of the legislature, settlement is a shared power." Pet.-App.22 (citing *SEIU*, 2020 WI 67, ¶ 63). Then, the Court of Appeals "concluded that the Legislature has a legitimate institutional interest via its power of the purse in at least some settlements in the two categories of cases." *Id.* The Court of Appeals finding that "there is a sufficient basis to uphold

the constitutionality of [Section] 165.08(1)," *id.*, applies this Court's holding in *SEIU*.

Petitioners assert that the Court of Appeals' "majority misinterpreted the 'power of the purse' discussed in *SEIU*," because *SEIU* only referred to "defense-side litigation," and the "court of appeals [ ] expanded that legislative role to include plaintiff's-side settlements." Pet.29–30. But the Court of Appeals correctly relied on *SEIU* for the proposition that some settlements implicate the power of the purse. Pet.-App.17–18. After reviewing the evidence presented by the Legislature, an Attorney General Opinion, the Wisconsin Constitution, and this Court's decision in *Owen,* 160 Wis. 21, the Court of Appeals determined that the "power of the purse" includes not just the appropriation of State monies but ascertaining the State's income as well. Pet.-App.19–22. This entirely correct conclusion that the power of the purse includes expected revenues and expenditures applies *SEIU's* principles to find an institutional interest of the legislature such that Section 165.08(1) "is constitutional as to that settlement." Pet.-App.22 (citing *SEIU*, 2020 WI 67, ¶ 63).

Petitioners also allege that the Court of Appeals misread footnote 22 in *SEIU* to "silently overturn[ ] Wisconsin's shared powers caselaw" by refusing to engage in the "'unduly burdensome' shared powers analysis." Pet.30 (citation omitted). Not so. Footnote 22 explains that facial challenges, and thus hybrid challenges that are subject to the same high standard, to Section 165.08(1) "get[ ] nowhere under an 'unduly burdensome' shared powers analysis" when the Legislature has appropriate institutional interests. *SEIU*, 2020 WI 67, ¶ 72 n.22. Even though the Court of Appeals acknowledged this holding as precedent, it still spent five paragraphs applying the shared powers analysis to find that Petitioners "failed to present" evidence that Section 165.08(1) "caus[es] an undue burden to the [Attorney General] or substantially interfer[es] with the [Attorney General's] ability to settle any cases." Pet.-App.27–28.

Second, Petitioners argue that approving settlements as to the two categories of cases is a "core" executive power, not a shared power, under this Court's recent decision in *Marklein*. Pet.23–25. The Court of Appeals, however, correctly applied this Court's precedent interpreting Section 165.08(1), which holds that "the

power to consent to . . . the compromise or discontinuance of a matter being prosecuted" is a "shared power in at least some cases"—namely, those cases in which the Legislature has an institutional interest. *SEIU*, 2020 WI 67, ¶ 72 & n.22. Petitioners' "core" power arguments fall away in light of *SEIU*'s directly on-point holding that these settlements are within the "borderlands" of shared powers. *Id.* ¶ 63. Petitioners do not ask the Court to overrule *SEIU* as to that holding and fail to argue that reconsideration of *SEIU* satisfies the doctrine of *stare decisis*.[5]

The Court of Appeals also properly concluded that this Court's decision in *Marklein* did not displace *SEIU's* separation of powers analysis. *Contra* Pet.29. The Court of Appeals acknowledged that this Court had found that certain legislative oversight of the Department of Natural Resources' spending

[5] In another footnote, Petitioners ask that if "this Court meant to issue the rulings in *SEIU* that the court of appeals majority advances" those aspects should be overruled. Pet.31 n.5. Specifically, it refers to alleged holdings that laws are "automatically constitutional" in an "arena of shared powers," that the power of the purse is greater than the power to appropriate money, and that *SEIU* is dispositive to their case. Pet.29–31. Not only are Petitioners incorrect, but Petitioners have failed to explain why overruling the Court's statutory interpretation of Section 165.08(1) in *SEIU* meets any of the demanding factors for overruling *stare decisis*. *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257.

violated the separation of powers. Pet.-App.20 n.17 (citing *Marklein*, 2024 WI 31, ¶ 24). The Court of Appeals explained that *Marklein* "does not control here *because it involved funds that had already been appropriated by the legislature for use by an executive agency*." *Id.* (emphasis added); *see also Marklein*, 2024 WI 31, ¶ 18 ("[T]he power to spend the funds *the legislature has appropriated* for a specific project belongs to the executive branch." (emphasis added)); *id.* at ¶ 19 ("We conclude these statutes interfere with the executive branch's core function to carry out the law by permitting a legislative committee . . . to make spending decisions *for which the legislature has already appropriated funds*." (emphasis added)). Section 165.08(1) does not involve funds already appropriated, and Petitioners fail to explain how *Marklein* rejects *SEIU's* holding that, due to the Legislature's power of the purse, there are constitutional applications of Section 165.08(1).

Petitioners' contention that the Court of Appeals misapplied *Marklein* relies on an overly broad misinterpretation of that case. While Petitioners claim that "this Court held that the separation of powers prohibits [the Joint Committee] from having the power to veto executive branch decisions about how to carry out a

program the agency is statutorily charged to administer," Pet.28–29, they provide no citation to this Court's decision to support their reading. *Marklein* considered only "the core power of the executive to ensure the laws are faithfully executed" and the Joint Committee's power to veto executive branch decisions regarding the use of fund that the Legislature had already appropriated. *See Marklein*, 2024 WI 31, ¶ 18. Because Section 165.08(1) operates in the "borderlands" of shared powers, *SEIU*, 2020 WI 67, ¶ 63, *Marklein* does not control, even if there was a conflict.

Third, Petitioners' argument that the Court of Appeals erred in its application of this Court's precedent because Section 165.08(1) "would still be unconstitutional" "[e]ven if this Court concluded that the Legislature had a shared constitutional role in settling matters in these categories," Pet.26, misses the mark. Petitioners do not explain what the Legislature's role would be in such a shared-powers situation. Instead, they argue that the Attorney General should be given the "ability to override the Legislature's actions." Pet.26. But that claim is foreclosed by the long-settled doctrine that shared powers "are not exclusive to any

one branch." *State v. Horn*, 226 Wis. 2d 637, 643–44, 594 N.W.2d 772 (1999) (citation omitted).

Fourth, Petitioners claim that the Court of Appeals misapplied this Court's precedent because the "Legislature . . . has no constitutional role in settling actions in these categories," because of the "time-sensitive and individualized decision-making entailed by whether and how to settle a civil prosecution." Pet.25. But the record shows there are no timing issues with the Joint Committee reviewing and approving settlements promptly. *Supra* pp.13–14. And this Court has already rejected the proposition that the Legislature has no role in approving settlement for any of these cases. *SEIU,* 2020 WI 67, ¶ 72 & n.22.

Petitioners' alleged burdens, Pet.33, do not create a novel question of law, but instead show that the Court of Appeals applied existing precedent. The Court of Appeals examined Petitioners' alleged burdens, Pet.-App.25–28, and its finding that none "rise to the level of an unreasonable burden beyond a reasonable doubt," Pet.-App.26, remains true.[6] For example, Petitioners' suggestion

[6] The Petition fails to challenge the Court's finding, which results in waiver. *See Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶ 35, 403 Wis. 2d 369, 976 N.W.2d 584.

that "some defendants' unwillingness to publicly reveal confidential negotiations," Pet.33, finds no purchase because communications between the Attorney General and the Joint Committee are privileged and illustrates Petitioners' "vague references to confidentiality" that are "insufficient," Pet.-App.28.

Fifth, Petitioners' claim that decisions from the U.S. Supreme Court and other jurisdictions show that the Court of Appeals erred, Pet.24–26, is wrong. In *SEIU*, this Court recognized that several States grant their legislatures "the authority to approve certain settlements." 2020 WI 67, ¶¶ 69, 70 (collecting Arizona, Connecticut, Nebraska, and Oklahoma statutes); *see also* Tex. Civ. Prac. & Rem. Code § 111.003; Utah Code § 63G-10-303. The federal cases cited have no relevance because in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court "rejected legislative . . . authority to [ ] *initiate* civil actions," Pet.24, and in *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020), "the Court rejected Congress' ability to restrict executive removal of the Consumer Financial Protection Bureau director," Pet.24. Neither opinion opines on settling cases, which is what Section 165.08(1) and *SEIU* are about.

Similarly, Petitioners' cited cases from other jurisdictions all included the legislature *initiating* litigation. *See Stockman v. Leddy*, 55 Colo. 24, 129 P. 220, 221 (1912) (Colorado legislature could "*authorize the prosecution or defense* of [certain] . . . actions" (emphasis added)), *overruled on other grounds by Denver Ass'n for Retarded Child., Inc. v. Sch. Dist. No. 1 in City & Cnty. of Denver*, 188 Colo. 310, 535 P.2d 200 (1975); *In re Op. Of Justs.*, 162 N.H. 160, 27 A.3d 859, 866, 869 (2011) (legislation "directing the attorney general to *initiate* a specific civil lawsuit" (emphasis added)); *State Through Bd. of Ethics for Elected Offs. v. Green*, 545 So. 2d 1031, 1036 (La. 1989) (Louisiana legislature has authority to "*file* a lawsuit" (emphasis added)); *State ex rel. Woods v. Block*, 189 Ariz. 269, 277, 942 P.2d 428 (1997) (Arizona legislature had authority to "*initiate* and pursue" certain actions "in the name of th[e] state [of Arizona]" (emphasis added)). None of these cases conflict with relevant Wisconsin law or bind Wisconsin courts, and other States' practices do not create an issue of state constitutional law in Wisconsin, even if "a large majority of other jurisdictions, with no binding authority on this court, have reached opposing conclusions." *Johnson Controls*, 2003 WI 108, ¶ 100.

Finally, Petitioners fail to explain how the Court of Appeals' application of *SEIU* violates the Wisconsin Constitution's Uniformity Clause. *See* Pet.31–32. Petitioners do not cite where they previously argued that the Uniformity Clause supports their position, and so have waived this argument. *See Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177. In any event, the Court of Appeals did not just rely on the power to tax, but the Legislature's responsibility to "look to, contemplate, and oversee '*other sources of income*.'" Pet.-App.20 (quoting Wis. Const. art. VIII, § 5) (emphasis added). Notably, the constitutional provision the Court of Appeals cited distinguished these "other sources of income" from "tax[es]." Wis. Const. art. VIII, § 5.

CONCLUSION

This Court should deny the Petition For Review.

Dated: December 20, 2024

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and (bm), and (8g), 809.62(4), and 809.81 for a Response to a Petition for Review produced with a proportional serif font. The length of this response is 6,554 words.

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