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SUPREME COURT

CASE NO. 2016AP1688

IN THE WISCONSIN SUPREME COURT

Clean Wisconsin, Inc., Lynda Cochart, Amy Cochart, Roger DeJardin, Sandra Winnemueller and Chad Cochart,

PETITIONERS-RESPONDENTS,

v.

Wisconsin Department of Natural Resources,

RESPONDENT-APPELLANT,

Kinnard Farms, Inc.,

INTERVENOR-CO-APPELLANT.

NON-PARTY BRIEF OF PROFESSOR RYAN J. OWENS IN SUPPORT OF INTERVENOR-CO-APPELLANT

Ryan J. Owens
3553 Richie Road
Verona, WI 53593
(314) 420-0518
professor.ryan.owens@gmail.com
Counsel for Amicus Curiae

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STATEMENT OF INTEREST

Professor Ryan J. Owens teaches administrative law and constitutional law, studies American legal institutions, and is an affiliate law faculty at the University of Wisconsin-Madison. He has filed previous non-party briefs in this court and the Supreme Court of the United States.

STATEMENT OF THE ISSUE

May an administrative agency circumvent legislation and, in so doing, violate the separation of powers? Does the legislature rightfully enjoy the authority to withdraw power from administrative agencies? Is the legislature supreme when it comes to the public trust doctrine?

ARGUMENT

Introduction

The Framers of the Wisconsin Constitution—no less than the Framers of the United States Constitution—revered the separation of powers. *See*, *e.g.*, *Smith v. Burns*, 65 Wis. 2d 638, 223 N.W.2d 562 (1974). They knew the best way to maintain liberty is to prevent the concentration of power in one person or one branch of government. Yet, the executive branch in Wisconsin increasingly—and alarmingly—has accumulated power. In response, the legislature sought to reclaim its authority by passing 2011 Wisconsin Act 21. Act 21 defines how administrative agencies and courts must interpret state statutes. It prohibits agencies from relying on implied powers to justify their

actions and makes clear to agencies and courts that statutory preambles and broad statements of purposes do not authorize agency action. *See* Wis. Stats. §§ 227.10-227.11.[1] Act 21 reminded everyone that in Wisconsin the legislature is the supreme lawmaker. Now, the Court has the ability to restore Wisconsin's proper constitutional balance by applying Act 21 and returning administrative agencies to their appropriate constitutional position—subordinate to the legislature.

1. Allowing an Agency to Circumvent Act 21's Requirements Would Violate the Separation of Powers and Unite the Judiciary and Executive Against the Legislature.

The separation of powers exists to protect citizens' liberties. *Morrison v. Olson*, 487 U.S. 654, 697-98 (1988) (Scalia, J., dissenting). The Framers of our federal and state constitutions believed—and history has shown—that the best way to prevent the abuse of power is to prevent the concentration of power in one person or one branch of government. *See* THE FEDERALIST NO. 51 (James Madison. Because "power is of an encroaching nature," our Framers split power into multiple branches of government. FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961). As Madison wrote: "In framing a government...the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control

[1] All Wisconsin Statutes are from Wisconsin Statutes (2017-18).

itself." THE FEDERALIST NO. 51, at 322 (Clinton Rossiter ed., 1961). The Framers separated powers to help ensure government would remain a tempest contained within itself.

The Wisconsin Constitution also unmistakably recognizes the value of the separation of powers. It holds that "The legislative power shall be vested in a senate and assembly," that "The executive power shall be vested in a governor..." and that "The judicial power of this state shall be vested in a unified court system." Wis. Const. art. IV § 1; art. V § 1; art. VII § 2. And even though Article VI contains a limited "Administrative" section (which addresses the Secretary of State, the State Treasurer, the Attorney General, and County offices), the constitution nevertheless envisions a separation of powers in which the legislature is the supreme lawmaker. Wis. Const. art. VI § 1; *Wis. Citizens Concerned for Cranes and Doves v. Wis. Dep't of Natural Res.*, 2003 WI 91, ¶14, 262 Wis. 2d 500, 665 N.W.2d 375; *State (Dep't of Admin.) v. Dep't of Indus., Labor and Human Relations*, 77 Wis. 2d 126, 252 N.W.2d 353 (1977); *State v. Whitman*, 196 Wis. 472, 220 N.W.2d 929 (1928). Allowing a state administrative agency to evade Act 21 would befoul the separation of powers and the liberty it protects.

Longstanding doctrine recognizes that administrative agencies have no inherent authority; they enjoy only the authority the legislature provides them. *See, e.g., City of La Crosse v. La Crosse Gas & Elec. Co.*, 145 Wis. 408,

130 N.W. 530 (1911); *Whitman*, 196 Wis. at 472; *Oneida Cnty. v. Converse*, 180 Wis. 2d 120, 125, 508 N.W.2d 416 (1993). They are creatures of the legislature. Agencies may not create rules nor may they undertake actions the legislature failed to authorize. *Wis Citizens Concerned for Cranes and Doves*, 2003 WI 91, ¶ 14. Accordingly, "the legislature may withdraw powers which have been granted, prescribe the procedure through which granted powers are to be exercised, and if necessary wipe out the agency entirely." *Whitman*, 196 Wis. at 508. Simply put, because the constitution envisages the legislature as the supreme lawmaker in this state, the legislature properly holds administrative agencies on a short leash.

The legislature tugged hard on that leash when it passed Act 21. The Act reminded courts and agencies that the legislature is the supreme lawmaker in Wisconsin. The legislature passed Act 21 because courts granted agencies too much deference in specific statutory grant-of-power claims.[2] *See, e.g., Wis. Builders Ass'n v. Dep't of Corr.*, 2009 WI App 20, 316 Wis. 2d 301, 762 N.W.2d 845. Prior to Act 21, Wisconsin courts applied an "elemental approach" to determine whether a statute authorized an agency's action. Courts would:

> compar[e] the elements of the [agency's] rule to the elements of the enabling statute, such that the statute need not supply every detail of the rule...If the rule matches the elements contained in the statute, then the statute expressly authorizes the rule...However, if an administrative rule conflicts with an

[2] Whether agencies also receive excessive deference through overly broad *delegations* of power is an equally important question, though not directly addressed in this case.

> unambiguous statute or a clear expression of legislative intent, the rule is invalid.

Wis. Citizens Concerned for Cranes and Doves, 2003 WI 91, ¶ 14; *see also* Kirsten Koschnick, *Making "Explicit Authority" Explicit: Deciphering Wis. Act. 21's Prescriptions for Agency Rulemaking Authority*, 2019 WIS. L. REV. 993, 1007 (2019). A long train of cases had applied this erroneous elemental approach. *See, e.g., Wis. Hosp. Ass'n v. Natural Res. Bd.*, 156 Wis. 2d 688, 705, 457 N.W. 2d 879 (Ct. App. 1990); *Grafft v. Wis. Dep't of Natural Res.*, 2000 WI App 187, ¶ 7, 238 Wis. 2d 750, 618 N.W. 2d 897.

The elemental approach is exactly backwards. Courts must begin with the text of the statute and *then* examine whether the agency's actions fall within the statute's provisions. It must not look first to the agency's action and then find an implied or express grant of authority from the statute.

Act 21 stripped administrative agencies of the ability to rely on implied powers to justify their actions. It made clear both to courts and agencies that statutory preambles and broad statements of purposes cannot grant agencies power. Section 1 states that no agency "may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this chapter." Wis. Stat. § 227.10(2m).

Similarly, Section 3 tells courts and agencies they may not use broad statements of purpose or statutory preambles to support grants of authority, stating: "A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency." Wis. Stat. § 227.11(2)(a)2. Likewise, "a statutory or non-statutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency." Wis. Stat. § 227.11(2)(a)1.

Just last term, this court recognized the critical importance of Act 21 in defending the separation of powers and restoring the legislature to its rightful constitutional position. *Papa v. Wis. Dept. of Human Servs.*, 2020 WI 66, 393 Wis. 2d 1, 946 N.W.2d 17. The court held that Act 21 prohibited the Wisconsin Department of Health Services ("DHS") from imposing recoupment policies not expressly authorized by Wisconsin Statutes section 49.45(3)(f) or Chapter 106 of the Wisconsin Administrative Code. DHS sought to recoup payments it made to nurses, not for faulty services or misrepresentations, but for submitting paperwork that was "not perfect." *Papa*, 2020 WI 66, ¶ 2. Because neither state statutes nor properly created agency rules authorized such a policy, however, this court determined that Act 21 compelled it to strike down the policy, stating unanimously: "DHS may not implement or enforce the Perfection Policy unless it is explicitly required or permitted to do so by statute

or a previously promulgated rule." *Id.* ¶ 32. The court should apply that same exactitude here.

The legislature has imposed a clear regulatory scheme for granting high capacity well permits. *See* Wis. Stat. §§ 218.34-218.35. That reticulated scheme defines high capacity wells, spells out the conditions under which people can apply for them, and describes the conditions under which the Department of Natural Resources may grant them. The statutes are integral to the legislature's regulation of high capacity wells, water policy, and its overall implementation of the public trust doctrine. The statutory framework builds upon decades of legislative involvement in this important aspect of Wisconsin's economic and environmental community. And nowhere has the legislature expressly authorized the DNR to consider cumulative impacts. Wisconsin Statutes section 227.10 therefore precludes the DNR from conditioning permits accordingly.

2. *Lake Beulah* Does Not Place the DNR Above the Legislature.

The DNR believes that *Lake Beulah v. Wisconsin Department of Natural Resources,* 2011 WI 54, 355 Wis. 2d 47, 799 N.W.2d 73, and the public trust doctrine provide it with the power to impose non-statutorily-granted conditions on permits. This assertion is wrong.

To begin with, *Lake Beulah* did not directly address the effects of Act 21 and therefore does not answer the questions presented in this case. As the *Lake Beulah* court stated in footnote 31:

> None of the parties argues that the amendments to Wis. Stat. ch. 227 in 2011 Wisconsin Act 21 affect the DNR's authority in this case...We agree with the parties that 2011 Wisconsin Act 21 does not affect our analysis in this case. Therefore, we do not address this statutory change any further.

Lake Belulah, 2011 WI 54, fn. 31. Because the court did not put Act 21 through its paces, *Lake Beulah* does not control on this issue.

At any rate, even if *Lake Beulah* does control, it indicates that the *legislature* is supreme when it comes to the public trust doctrine. The court held that the public trust doctrine is "rooted in Article IX, Section 1 of the Wisconsin Constitution." *Id.* ¶ 30. It went on to note that it "has long confirmed the ongoing strength and vitality of *the State's* duty under the public trust doctrine to protect our valuable water resources." *Id.* ¶ 31 (emphasis added). As such, "*the State* holds the navigable waters and the beds underlying those waters in trust for the public." *Id.* ¶ 32 (emphasis added). To underscore that it is *the legislature* that acts on behalf of the state, the court wrote: "in furtherance of the state's affirmative obligations as trustee of navigable waters, *the legislature* has delegated substantial authority over water management matters to the DNR." *Id.* ¶ 33 (emphasis added). In other words, the court held that the legislature is supreme when it comes to the public trust

doctrine. And where, as here, the legislature essentially has occupied the regulatory field over high capacity wells, its actions control. *See* Wis. Stat. §§ 281.34-281.35.

Still, even if the above interpretation is wrong—and *Lake Beulah* did reject legislative supremacy when it comes to the public trust doctrine—this court should overrule it. It simply is not constitutionally permissible to place an administrative agency above the legislature. Agencies are creatures of the legislature. They breathe life only when the legislature provides it to them. The legislature "may withdraw powers which have been granted, prescribe the procedure through which granted powers are to be exercised, and if necessary, wipe out the agency entirely." *Whitman*, 196 Wis. at 508. This is precisely what occurred here with Act 21 and Wisconsin Statutes sections 281.34 to 281.35. A broad conception of the public trust doctrine cannot justify placing an administrative agency superior to the legislature.

3. It is More Faithful to the Rule of Law to Treat Act 21 as a Constraint on Administrative Agencies.

It is more faithful to the rule of law to treat Act 21 as a constraint on administrative agencies than to interpret it as a minor speedbump. If the rule of law means anything, it is that "government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given

circumstances and to plan one's individual affairs on the basis of this knowledge." Friedrich A. Hayek, THE ROAD TO SERFDOM 80 (1944). The "internal morality of the law demands that there be rules, that they be made known, and that they be observed in practice by those charged with their administration." Lon L. Fuller, THE MORALITY OF LAW 157 (1978). Scholars have noted that the rule of law demands, among other things:

- **Publicity** (those who follow the law must be able to determine what it is);
- **Prospectivity** (the laws must exist prior to the occurrence of the behavior they regulate);
- **Clarity** (the law must be understandable);
- **Conformability** (people must be able to change their behavior to follow the law); and
- **Stability** (law cannot change so frequently as to make adherence thereto impossible).

Id. at 35-66. The essence of the rule of law is the ability to know what the law is so a person fairly can order his or her life around it.

Indeed, clearly defined rules enhance the rule of law. Rules "establish legal boundaries based on the presence or absence of well-specified triggering facts." Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25 (2000). Rules are predictable and

can be applied consistently. Predictability and consistency motivate *stare decisis* itself. (Clear rules also reduce the need for need for expensive litigation. *Id*. at 56.) On the other hand, *ad hoc* decisions made on a piecemeal basis provide little certainty to citizens and lead to inefficient outcomes, such as a greater likelihood of litigation. *See* George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

Wisconsin Statutes sections 218.34 to 218.35 are clear and afford certainty to the regulated community. They are knowable and certain and, therefore, further rule of law principles. Imposing on permit seekers *ad hoc* requirements not found in state statutes is unworkable and squints toward tyranny and abuse because it would be unstable, unknowable ahead of time, and would prevent people from conforming their behavior to the law.

CONCLUSION

Amicus respectfully asks the court to rule in favor of intervenor co-appellants and restore Wisconsin's rightful constitutional balance.

Respectfully submitted,

Ryan J. Owens
Counsel of Record
Wis. Bar. No. 1037983
3553 Richie Road
Verona, WI 53593

(314) 420-0518
professor.ryan.owens@gmail.com
Counsel for Amicus Curiae

November 2, 2020

CERTIFICATES

CERTIFICATE AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is **2,435 words** (Introduction through Conclusion), as counted by Microsoft Word.

CERTIFICATION REGARDING ELECTRONIC BRIEF PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 809.19(12), Stats. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

CERTIFICATE OF SERVICE

I certify that on November 2, 2020, I caused three copies of the foregoing nonparty brief to be served upon counsel of record by placing the same in the U.S. Mail, first class postage.

Kathryn A. Nekola
Evan Feinauer
Clean Wisconsin, Inc.
634 W. Main Street
Suite 300
Madison, WI 53703

Robert David Lee
Andrea Gelatt
Midwest Environmental Advocates, Inc.
612 West Main Street
Suite 302
Madison, WI 53703
*copies for all five parties made

Gabe Johnson-Karp
Jennifer L. Vandermeuse
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53703

Jordan J. Hemaidan
Joseph D. Brydges
Michael Best & Friedrich LLP
P.O. Box 1806
Madison, WI 53701

CERTIFICATES SIGNED:

Ryan J. Owens
3553 Richie Road
Verona, WI 53593
(314) 420-0518
professor.ryan.owens@gmail.com
Counsel for Amicus Curiae