No. 22AP1129

IN THE

Supreme Court of Wisconsin

STATE OF WISCONSIN EX REL. CHRISTOPHER P. KAWLESKI,
Petitioner-Appellant-Petitioner,

v.

STATE OF WISCONSIN,
Respondent-Respondent-Respondent.

On Petition for Review from the
Wisconsin Court of Appeals, District IV,
Affirming a Decision of the Jefferson County Circuit Court,
Hon. William F. Hue, Presiding, Case No. 2001CF43

PETITION FOR REVIEW

JOSEPH S. DIEDRICH, 1097562
ALYSSA M. LEROY, 1115648
HUSCH BLACKWELL LLP
33 E Main St, Ste 300
Madison, WI 53703
608.255.4440
joseph.diedrich
@huschblackwell.com

SAMUEL L. MITCHELL, 1093820
HUSCH BLACKWELL LLP
120 S Riverside Plaza Ste 2200
Chicago, IL 60606
samuel.mitchell
@huschblackwell.com

Counsel to Petitioner

STATEMENT OF THE ISSUES

I.

Question Presented:

Whether Wis. Stat. § 302.113(9), which empowers employees of the Department of Corrections or Department of Administration to impose a term of reconfinement in prison—and thereby extend the overall length of a judicially-imposed criminal sentence—transfers judicial power to the executive branch in violation of the separation of powers.

Consideration Below:

In the circuit court, Kawleski argued that the reconfinement violated the separation of powers. App.39–41, 51–53. The court did not address the executive branch's authority to impose a term of reconfinement and thereby extend the overall length of a sentence. App.61.

On appeal, despite acknowledging that both sides made "persuasive arguments" on the question presented, the Court of Appeals declined to answer it, citing constitutional avoidance. App.28 (¶ 55). That avoidance was necessarily mistaken—because the answer to the question determines whether Kawleski's sentence ends in 2028 or already ended *two years ago* in 2023. *Infra* Argument III.

II.

Question Presented:

Whether habeas corpus or equity provides a remedy to a person in custody (including extended supervision) serving a sentence that, but for an unconstitutionally imposed term of reconfinement and an unconstitutionally extended time in custody, would have already ended.

Consideration Below:

In the circuit court, Kawleski argued that habeas relief was warranted. App.31–53. The circuit court denied the habeas petition without specifically addressing whether habeas provided a remedy for an unconstitutionally imposed term of reconfinement. App.61.

On appeal, the Court of Appeals declined to answer the constitutional issue on the merits. *Infra* Argument III.

TABLE OF CONTENTS

STATEMENT OF THE ISSUES 2

TABLE OF AUTHORITIES 6

INTRODUCTION 12

CONCISE STATEMENT OF CRITERIA 14

STATEMENT OF THE CASE 15

A. Background Law 15

B. Christopher Kawleski 17

ARGUMENT 18

I. Question Presented I is a significant question of constitutional law that satisfies many criteria for review. 18

A. The question presented is novel and will have statewide impact. 18

B. The question presented is a pure question of law. 19

C. The statute—and the decision below that upholds it—violates the separation of powers. 19

1. The statute and decision below conflict with Wisconsin separation-of-powers precedent. 20

2. The statute and decision below conflict with the original understanding of the Wisconsin Constitution. 25

3. The statute and decision below conflict with controlling and persuasive federal precedent. 27

4. The statute and decision below conflict with prevailing law and practice in other jurisdictions. 29

D. The question presented is recurring and important. 30

II. Question Presented II is a significant question of constitutional law that satisfies many criteria for review. 35

III. This case is an ideal vehicle. 36

CONCLUSION 38

FORM AND LENGTH CERTIFICATION 39

APPENDIX CERTIFICATION 40

TABLE OF AUTHORITIES

Cases

Adams Outdoor Advert., Ltd. v. City of Madison,
2006 WI 104, 294 Wis. 2d 441, 717 N.W.2d 803) 37

Becker v. Dane Cnty.,
2022 WI 63, 403 Wis. 2d 424, 977 N.W.2d 390..... 27

Commonwealth v. Cole,
10 N.E.3d 1081 (Mass. 2014) 30

Commonwealth v. Halloway,
42 Pa. 446 (1862) 26

Earley v. Murray,
451 F.3d 71 (2d Cir. 2006) 28

Evers v. Marklein,
2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395.....passim

Gabler v. Crime Victims Rights Bd.,
2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384.. 20, 25, 37

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 34

Gibson v. Commonwealth,
291 S.W.3d 686 (Ky. 2009)..... 29

Hill v. United States ex rel. Wampler,
298 U.S. 460 (1936) 28

In re Keylen D.K.,
2013 WI App 28, 346 Wis. 2d 75, 828 N.W.2d 251..... 14

Jones v. Cunningham,
371 U.S. 236 (1963) 15

Lassiter v. Dep't of Soc. Servs.,
452 U.S. 18 (1981) 14

League of Women Voters of Wis. v. Evers,
2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209... 20, 24, 31

Mahoney v. Derrick,
2022 Ark. 27 (2022) 29

Nixon v. United States,
506 U.S. 224 (1993) 26

Nw. Airlines, Inc. v. Wis. Dep't of Revenue,
2006 WI 88, 293 Wis. 2d 202, 717 N.W.2d 280..... 26

People v. Clancey,
299 P.3d 131 (Cal. 2013) 29

People v. McChriston,
4 N.E.3d 29 (Ill. 2014) 29

Prendergast v. State Dep't of Corr.,
856 N.Y.S.2d 725 (2008)..... 30

Serv. Emps. Int'l Union, Loc. 1 v. Vos,
2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35..... 25

State ex rel. Atty. Gen. v. Peters,
4 N.E. 81 (Ohio 1885) 26

State ex rel. Bray v. Russell,
729 N.E.2d 359 (Ohio 2000)..... 30

State ex rel. Coleman v. McCaughtry,
2006 WI 121, 297 Wis. 2d 587, 723 N.W.2d 424..... 36

State ex rel. Coleman v. McCaughtry,
2006 WI 49, 290 Wis. 2d 352, 363, 714 N.W.2d 900, 90536

State ex rel. Esteen v. State,
239 So. 3d 233 (La. 2018)..... 29

State ex rel. Payton v. Kolb,
135 Wis. 2d 202, 205, 400 N.W.2d 285 (Ct. App. 1986) . 36

State ex rel. Singh v. Kemper,
2016 WI 67, 371 Wis. 2d 127, 883 N.W.2d 86..... 28

State ex rel. Wohlfahrt v. Bodette,
95 Wis. 2d 130, 289 N.W.2d 366 (1980) 35

State v. Borrell,
167 Wis. 2d 749 482 N.W.2d 883 (1992) 25

State v. Brown,
2006 WI 131, 298 Wis. 2d 37, 725 N.W.2d 262.....passim

State v. Coviello,
288 A.3d 1 (N.J. 2023)..... 30

State v. Crawford,
13 N.W.3d 693 (Minn. Ct. App. 2024) 30

State v. Galvan,
2007 WI App 173, 304 Wis. 2d 466, 736 N.W.2d 890..... 15

State v. Grandberry,
2018 WI 29, 380 Wis. 2d 541, 910 N.W.2d 214..... 14, 19

State v. Harris,
2008 WI App 189, 315 Wis. 2d 537, 763 N.W.2d 206..... 22

State v. Horn,
226 Wis. 2d 637, 594 N.W.2d 772 (1999) 20, 21, 23, 25

State v. Odom,
2006 WI App 145, 294 Wis. 2d 844,
720 N.W.2d 695 ..... 22, 23

State v. Olivas,
347 P.3d 1189 (Idaho 2015) 29

State v. Pozo,
2002 WI App 279, 258 Wis. 2d 796, 654 N.W.2d 12. 14, 36

State v. Presley,
2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713..... 23

State v. Schwind,
2019 WI 48, 386 Wis. 2d 526, 926 N.W.2d 742..... 25

State v. Stenklyft,
2005 WI 71, 281 Wis. 2d 484,
697 N.W.2d 769 ..... 13, 21, 22, 24

State v. Swiams,
2004 WI App 217, 277 Wis. 2d 400, 690 N.W.2d 452 22

Steeno v. State,
85 Wis. 2d 663, 271 N.W.2d 396 (1978) 12, 21, 24

United States v. Grayson,
438 U.S. 41, 46 (1978). 26

United States v. Wilson,
32 U.S. 150 (1833) 26

Wis. Legislature v. Palm,
2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900..... 29

Wis. State Legislature v. Wis. Dep't of Pub. Instruction,
2025 WI 27, 416 Wis. 2d 611, 22 N.W.3d 932..... 31

Woods v. Morgan,
224 Wis. 2d 534, 591 N.W.2d 922 (Ct. App. 1999)..... 36

Statutes and Legislation

2001 Wis. Act 109 15

2009 Wis. Act 28, § 2726..... 15

Wis. Stat. § 302.113(7)..... 15, 32, 33

Wis. Stat. § 302.113(7m)..... 15

Wis. Stat. § 302.113(8m)(a) 15, 33

Wis. Stat. § 302.113(9)(ag) .....passim

Wis. Stat. § 302.113(9)(am) .....passim

Wis. Stat. § 302.113(9)(c)..... 16, 24, 33

Wis. Stat. § 809.62(1r)(c)1 ..... 14, 18, 35

Wis. Stat. § 809.62(1r)(c)2 ..... 14, 18, 35

Wis. Stat. § 809.62(1r)(c)3. ..... 14, 19, 35, 36

Wis. Stat. § 809.62(1r)(d)..... 14, 20

Wis. Stat. § 973.01(1)..... 15

Wis. Stat. § 973.01(2) 15

Wis. Stat. ch. 133 § 1 (1849) 27

Wis. Stat. ch. 133 § 2 (1849) 27

Wis. Stat. ch. 150 (1849) 27

Wis. Stat. ch. 151 (1849) 27

Administrative Rules

Wis. Admin. Code § HA 2.02(1) 32

Constitutional Provisions

Wis. Const. art. V, § 6 26

Wis. Const. art. VII, § 2 25

Wis. Const. art. VII, § 7 32

Wis. Const. art. XIV, § 13 26

Other Authorities

Amelia L. Bizzaro, *Taking Reconfinement Hearings Seriously*,
80 Wis. Law. (Apr. 5, 2007) 35

Ashley Luthern, *What to Know about Parole, Truth in Sentencing and When People Can Get Out of Prison in Wisconsin*,
Milwaukee J. Sentinel (Sept. 21, 2022) 31

Gary Lawson, *The Rise and Rise of the Administrative State*,
107 Harv. L. Rev. 1231 (1994) 33

Jacob Schuman, *Revocation and Retribution*,
96 Wash. L. Rev. 881, 885 (2021) 32

Matthew M. Fernholz, *Collateral Damage: A Guide to Criminal Appellate, Postconviction, and Habeas Corpus Litigation in Wisconsin*,
98 Marq. L. Rev. 1351 (2015) 36

Michael M. O'Hear, *Sentencing Policies and Practices in Wisconsin*,
Oxford Handbooks Online (Mar. 7, 2016) 32

Montesquieu, *The Spirit of the Laws*
(Anne M. Cohler et al. ed., Cambridge Univ. Press 1994)
(1748) 12

Nicholas Garton et al., *Wisconsin's Prison Population Swells as Other States Limit Incarceration*,
PBS Wis. (Sept. 3, 2024) 32

Renagh O'Leary, *Supervising Sentencing*,
57 U.C. Davis L. Rev. 1931 (2024)..... 34

Thomas Hammer et al., *Fully Implementing Truth-in-Sentencing*,
75 Wis. Law. (Nov. 1, 2002) 17

Wis. Dep't of Corrections, Division of Community Corrections, *2024: A Year in Review* (Dec. 2024) 30

Wis. Dep't of Corrections, *Revocations and Other Responses to Violations Dashboards, Statewide Violation Response Summary*, Jan 2018–May 2025..... 31

INTRODUCTION

"If the legislative power leaves to the executive power the right to imprison," Montesquieu warned, then "there is no longer any liberty" and "[a]ll would be lost." Montesquieu, *The Spirit of the Laws* 157, 159 (Anne M. Cohler et al. ed., Cambridge Univ. Press 1994) (1748). The Wisconsin legislature has done just that—and this Court should intervene.

With the Truth-In-Sentencing II law, Wisconsin empowered unelected, unaccountable executive branch employees to order a person reconfined in prison, make a discretionary call about the length of that confinement, and thereby extend the overall length of the person's time in custody beyond what any court ever decreed. In particular, under Wisconsin's bifurcated-sentence regime, a court imposes a sentence that includes a fixed term of confinement and a fixed term of extended supervision. If a person violates conditions of extended supervision, that extended supervision can be revoked. So far, so good. But then, Wisconsin Statutes section 302.113(9) endows the executive branch with the power to unilaterally decide whether to reconfine the person in prison and for how long. And because a person's extended supervision term is automatically tolled while in prison, the executive branch's reconfinement decision extends the overall length of the person's time in custody. *Id.*

But the power to "determine whether a person should be sent to prison and for how long" is a judicial—not executive—function. *State v. Brown*, 2006 WI 131, ¶ 28, 298 Wis. 2d 37, 725 N.W.2d 262. Indeed, "criminal sentencing is an exclusive function of the court[s]," *Steeno v. State*, 85 Wis. 2d 663, 668, 271 N.W.2d 396 (1978), and the courts' "core power" to "impose a sentence" also "embraces [their] power to modify the sentence," *State v. Stenklyft*, 2005 WI 71,

¶¶ 91–92, 281 Wis. 2d 484, 697 N.W.2d 769 (Abrahamson, J., concurring in part and dissenting in part, for a majority).

Placing the power to imprison—and the power to extend the length of a judicially-imposed sentence—in the hands of the executive branch invades the core province of the judiciary and violates the separation of powers. Section 302.113(9) conflicts with controlling Wisconsin separation-of-powers precedent, the original understanding of the Wisconsin Constitution, controlling and persuasive federal precedent, and prevailing law and practice in other states.

The statute's unconstitutionality makes all the difference to petitioner Kawleski. He was reconfined by the executive branch under section 302.113(9)(am). If that statute is constitutional and his reconfinement was lawful, his judicially-imposed sentence ends in 2028. But if that statute is unconstitutional and his reconfinement was unlawful, his sentence ended in 2023—meaning the state is unlawfully holding him in custody *today*. It also makes all the difference for the thousands of others like him who are, or will be, reconfined contrary to the Wisconsin Constitution and the rule of law.

Beyond Kawleski and those like him, the questions presented raise issues of statewide import. With Wisconsin's prison population and the cost to incarcerate both exploding, decisions about whether to imprison and for how long should be made by elected judges accountable to the public. As things stand, though, unaccountable employees of the Department of Administration or the Department of Corrections make these calls, with grave implications for criminal-justice policy and the public fisc. These officials, too, are within the same branch that investigates and prosecutes crimes and extended-supervision condition violations, thus raising the specter of structural bias.

CONCISE STATEMENT OF CRITERIA

A decision by this Court will help develop the law, and the questions presented are novel. Wis. Stat. § 809.62(1r)(c)1. Neither this Court nor the Court of Appeals has interpreted section 302.113(9)(am) in the separation-of-powers context or determined habeas's applicability in these circumstances. *Infra* Argument I.A, II.

The questions presented are pure question of law. § 809.62(1r)(c)3. Whether section 302.113(9)(am) violates the separation of powers is a legal question. *State v. Grandberry*, 2018 WI 29, ¶ 12, 380 Wis. 2d 541, 910 N.W.2d 214. So is the availability of habeas relief. *State v. Pozo*, 2002 WI App 279, ¶ 6, 258 Wis. 2d 796, 654 N.W.2d 12. *Infra* Argument I.B, II.

The questions presented are recurring and important. § 809.62(1r)(c)2., 3. The statute at issue continues to empower executive-branch imposition of reconfinement. Thousands of Wisconsinites are currently on extended supervision, and each month, hundreds are reconfined. At stake in all of these reconfinements is "the right to physical liberty," which "is recognized in our legal system as the pinnacle of liberty interests." *In re Keylen D.K.*, 2013 WI App 28, ¶ 16, 346 Wis. 2d 75, 90, 828 N.W.2d 251. *Infra* Argument I.D, II.

Review is also warranted because Wisconsin Statutes section 302.113(9)—and the decision below that upholds it—are "in conflict with controlling opinions of" this Court, controlling and persuasive opinions of federal courts, the original understanding of the Wisconsin Constitution, and prevailing law and practice in other states. § 809.62(1r)(d). *Infra* Argument I.C.

STATEMENT OF THE CASE

A. Background Law

Under current statutes, which are the subject of this petition, a person convicted of a felony receives a "bifurcated sentence." Wis. Stat. § 973.01(1). A bifurcated sentence "consists of a term of confinement in prison followed by a term of extended supervision." § 973.01(2). Whether in prison or on extended supervision, a person is in custody and serving a criminal sentence. § 302.113(8m)(a); *Jones v. Cunningham*, 371 U.S. 236, 240 (1963); *State v. Galvan*, 2007 WI App 173, ¶ 11, 304 Wis. 2d 466, 736 N.W.2d 890.

While on extended supervision, a person is subject to conditions. § 302.113(7), (7m). If a person violates a condition, extended supervision can be revoked. § 302.113(9)(am). The decision whether to revoke extended supervision is made by the executive branch—either the Department of Administration or the Department of Corrections. § 302.113(9)(ag), (am).

If extended supervision is revoked, the person is reconfined in prison. § 302.113(9)(am). In the past, the reconfinement decision—a discretionary decision "akin" to sentencing, because "both determine whether a person should be sent to prison and for how long," *Brown*, 298 Wis. 2d 37, ¶¶ 20, 25, 28—was made by the circuit court, *see* 2001 Wis. Act 109.

In 2009, however, the legislature transferred the reconfinement decision from the circuit court to the executive branch. Now a "reviewing authority"—either the Department of Administration or the Department of Corrections—"decides whether a person should be sent to prison and for how long," *Brown*, 298 Wis. 2d 37, ¶ 28; *see* 2009 Wis. Act 28, § 2726. That remains the case today. Wis. Stat. § 302.113(9)(ag), (am).

When the executive branch "reviewing authority" reconfines someone, it can order that person "be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence." § 302.113(9)(am). For purposes of this calculation, "[t]he time remaining on the bifurcated sentence" is "the total length of the bifurcated sentence, less time" served in confinement (whether initially or on a prior reconfinement). *Id.* § 302.113(9)(ag), (am).

After serving a term of reconfinement in prison, a person is then re-released to extended supervision. While that person was confined, however, the extended-supervision clock stopped. In other words, the period of time someone spends serving a lawful term of reconfinement *does not* count toward the period of time remaining on the extended supervision portion of a bifurcated sentence. This is true under both prior and current law. § 302.113(9)(c); App.17–22 (¶¶ 32–40).

All told, a reconfinement decision does not merely transfer a person from extended supervision to prison. It also involves a discretionary determination about *how long* that person will spend in prison. And it necessarily *modifies and extends* the overall *length of the person's judicially-imposed sentence*, ensuring the person spends more time in custody than any court ever ordered.

Consider an illustration. Suppose that in 2025, a jury convicts Felon, and a judge imposes a bifurcated sentence of 10 years of initial confinement in prison and 10 years of extended supervision. In 2035, after serving 10 years in prison, Felon is released to extended supervision, scheduled to end in 2045. However, in 2030, after serving 5 years of extended supervision, the Department of Administration finds that Felon violated a condition and revokes his extended supervision. Then, the Department of Administration decides to reconfine Felon for 2 years. In 2032, after serving his term of

reconfinement, Felon is again released on extended supervision. But now his sentence *does not end* in 2045. His time in custody extends further into the future—at least through 2047, and possibly longer.[1] All without a court.

B. Christopher Kawleski

On June 1, 2001, Christopher Kawleski received a bifurcated sentence for a Class B felony. App.7 (¶ 10). The circuit court imposed a 2-year, 6-month term of initial confinement and a 17-year, 6-month term of extended supervision. *Id.* Thus, his sentence was scheduled to end in 2021.

Upon completing his initial confinement term in December 2003, Kawleski was released to extended supervision. *Id.* But in 2005, Kawleski's extended supervision was revoked. *Id.* Based on the laws in effect at the time, a circuit court reconfined Kawleski for 2 years in prison, which tolled the running of his term of extended supervision. App.7–8 (¶ 10 & n.1). After he completed that period of reconfinement, Kawleski was again released to extended supervision. *Id.* At that time, his sentence was scheduled to end in 2023.[2]

In 2018, Kawleski's extended supervision was revoked a second time. This time, however, current law applied to reconfinement decisions. App.8, 24 (¶¶ 10 n.4, 45). Instead of

---

[1] Felon is subject to conditions through 2047—meaning he could be reconfined at any time through then, again lengthening his sentence. In sum, "the amount of time an offender actually spends on [extended supervision] could be longer than that ordered by the judge at sentencing"—all at the hands of the executive branch. Thomas Hammer et al., *Fully Implementing Truth-in-Sentencing*, 75 Wis. Law. (Nov. 1, 2002), https://bit.ly/3Jw9W3W.

[2] Because the statutory calculation for the period of extended supervision remaining to be served excludes time spent in reconfinement, the result of the first 2-year reconfinement was that Kawleski's overall sentence, initially scheduled to end in 2021, was extended by two years. App.17–18 (¶¶ 34–35). This initial extension was lawful because the first reconfinement was imposed by the circuit court.

a circuit court, an administrative law judge within the Department of Administration imposed a term of reconfinement of 4 years, 7 months, and 26 days. App.8 (¶ 6). Kawleski was released back to extended supervision on July 2, 2022. *Id.* After this reconfinement further tolled the running of his term of extended supervision, Kawleski's overall sentence now ends on February 10, 2028. App.24 (¶ 44). Kawleski is currently in custody, serving the remainder of his sentence on extended supervision.

Kawleski filed a pro se petition for writ of habeas corpus with the Court of Appeals. App.31–50. The court declined to exercise its concurrent jurisdiction and referred the petition to the circuit court. App.51–53. After a hearing, the circuit court denied his petition. App.8–9 (¶¶ 11–12); App.54–63.

Kawleski appealed the denial, initially without counsel. App.9 (¶ 13). The court below appointed pro bono counsel with Kawleski's consent and the case proceeded on replacement briefs. *Id.* The court concluded that Kawleski's proper maximum discharge date is February 10, 2028, but declined to address the merits of the separation of powers argument, citing constitutional avoidance. App.7, 28 (¶¶ 9, 55); *infra* Argument III. Kawleski sought reconsideration, which the court denied.

ARGUMENT

I. Question Presented I is a significant question of constitutional law that satisfies many criteria for review.

A. The question presented is novel and will have statewide impact.

The question presented "is a novel one" that will have "statewide impact." Wis. Stat. § 809.62(1r)(c)1., 2.

Neither this Court nor the Court of Appeals has addressed the validity of section 302.113(9) or the power of the

executive branch to impose a term of reconfinement in prison and thereby extend the overall length of a judicially-imposed sentence.

The answer to the question presented matters for the thousands of people in reconfinement or on extended supervision throughout the state. *Infra* Argument I.D.

B. The question presented is a pure question of law.

The question presented is a pure "question of law." Wis. Stat. § 809.62(1r)(c)3.

Whether section 302.113(9) violates the separation of powers is a pure legal question. "The constitutional validity of a statute presents a question of law that this court reviews de novo." *Grandberry*, 380 Wis. 2d 541, ¶ 12. Neither side suggested below that the answer to the question presented depends on contested facts or factual development.

C. The statute—and the decision below that upholds it—violates the separation of powers.

Section 302.113(9) violates the separation of powers by placing a core judicial function—the power to impose and modify a sentence—in the executive branch. Despite acknowledging a "potentially persuasive" separation-of-powers challenge, the court below refused to decide the issue. App.28 (¶ 55). In so doing, it implicitly upheld the statute as constitutional.

Not only was the court wrong to avoid the constitutional question, *infra* Argument III, its implicit answer is wrong, too. The statute conflicts with controlling Wisconsin separation-of-powers precedent, the original understanding of the Wisconsin Constitution, controlling and persuasive federal precedent, and prevailing law and practice in other states.

1. The statute and decision below conflict with Wisconsin separation-of-powers precedent.

Section 302.113(9) and the decision below that upholds it are "in conflict with controlling opinions of" this Court and "other court of appeals' decisions." Wis. Stat. § 809.62(1r)(d).

a. "[O]ne of the fundamental principles of the American constitutional system is that governmental powers are divided among the three departments of government[.]" *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 30, 387 Wis. 2d 511, 929 N.W.2d 209 (citation omitted). The separation of powers is "implicit in [the] tripartite division" established by Articles IV, V, and VII of the Wisconsin Constitution. *Id.* (quoting *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384). The vesting of legislative, executive, and judicial powers in different branches underscores "the importance of dispersing governmental power in order to protect individual liberty and avoid tyranny." *Id.* ¶ 31.

Under Wisconsin's separation of powers, "[e]ach branch has exclusive core constitutional powers into which other branches may not intrude." *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). These "core powers reflect 'zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding. As to these areas of authority, . . . *any* exercise of authority by another branch of government is unconstitutional.'" *League of Women Voters*, 387 Wis. 2d 511, ¶ 34 (citation omitted).

Whereas "core powers" are "not for sharing," *Evers v. Marklein*, 2024 WI 31, ¶ 10, 412 Wis. 2d 525, 8 N.W.3d 395 (citation modified), "shared powers 'lie at the intersections of the[ ] exclusive core constitutional powers,'" *id.* ¶ 11 (quoting *Gabler*, 376 Wis. 2d 147, ¶ 34). These "shared powers have

been described as 'twilight zones' and 'ambiguous territory in which the functions of two branches . . . overlap.'" *Id.* (citations omitted). If a statute implicates shared powers, it "is constitutional if it does not unduly burden or substantially interfere with either branch." *Horn*, 226 Wis. 2d at 644–45. This evaluation focuses on "whether one branch's exercise of power has impermissibly intruded on the constitutional power of the other branch." *Id.*

b. Although at a high level of generality "[s]entencing a defendant is an area of shared responsibility," when "broken down to its component parts" it "requires each of the three branches of government to exercise a *core* power." *Stenklyft*, 281 Wis. 2d 484, ¶ 91 (Abrahamson, J., concurring in part and dissenting in part, for a majority of the Court, *see* ¶¶ 81–83) (emphasis added). So broken down: "The legislature prescribes the penalty and the manner of its enforcement. The courts impose the penalty (the sentence). The executive branch decides what criminal charges to file, carries out the court-imposed sentence, and grants pardons." *Id.*; *accord Horn*, 226 Wis. 2d at 646.

With that understanding in mind, this Court has held that "criminal sentencing is an *exclusive function* of the court." *Steeno*, 85 Wis. 2d at 668 (emphasis added). Whereas "[t]he legislature has authority to determine the scope of the sentencing court's discretion," the courts maintain "discretion, within that legislatively-determined scope, to fashion a sentence." *Horn*, 226 Wis. 2d at 646. "Sentencing decisions are, and always have been, within the circuit court's reasonable exercise of discretion." *Brown*, 298 Wis. 2d 37, ¶ 30.

A court's "core power" to "impose a sentence" also "embraces the court's power to modify the sentence." *Stenklyft*, 281 Wis. 2d 484, ¶¶ 91–92 (Abrahamson, J., concurring in part and dissenting in part, for a majority); *id.* ¶ 114 ("[A] circuit court has inherent power over sentence

modification."). The court's power encompasses "imposing the sentence penalty and exercising discretion in adjusting the length of a sentence that a court has [previously] imposed." *Id.* ¶ 93.

On these principles, this Court has previously held unconstitutional a statute that gave executive officials shared power over sentence modifications. *Id.* ¶¶ 91–93, 105. In *Stenklyft*, a statute allowed a district attorney to veto a petition for sentence adjustment. A majority of the Court held that "the judicial power is compromised when the district attorney"—an executive branch official—"is given the unilateral power to end a circuit court's consideration of an inmate's petition for sentence adjustment." *Id.* ¶ 84. Indeed, the "district attorney's exercise of a *core* judicial function" under the statute "is barred by the separation of powers doctrine." *Id.* (emphasis added). As a remedy, the majority decided to "save [the statute's] constitutionality" by giving "a circuit court [the] discretion to consider (but [ ] not [be] bound by) a district attorney's objection to a petition for sentence adjustment." *Id.* ¶ 82.

Finally, it follows that "[a] reconfinement hearing after revocation is a sentencing." *State v. Odom*, 2006 WI App 145, ¶ 11, 294 Wis. 2d 844, 720 N.W.2d 695. Initial sentencing and reconfinement hearings "are closely akin to each other, because both determine whether a person should be sent to prison and for how long." *Brown*, 298 Wis. 2d 37, ¶ 28; *see State v. Swiams*, 2004 WI App 217, ¶¶ 17, 22, 277 Wis. 2d 400, 690 N.W.2d 452 ("[A] hearing to determine whether a person should be sent to prison (or returned to prison) and for how long is a 'sentencing.'"). Both "deprive[ ] the defendant of his or her liberty." *State v. Harris*, 2008 WI App 189, ¶ 11, 315 Wis. 2d 537, 763 N.W.2d 206. And a "reconfinement decision, like an initial sentencing decision, involves

the circuit court's discretion." *Brown*, 298 Wis. 2d 38, ¶¶ 20, 22.

c. Section 302.113(9) runs headlong into this precedent.

To start, the statute empowers the executive branch to determine whether a person has violated conditions of extended supervision and whether to revoke extended supervision. Wis. Stat. § 302.113(9)(ag), (am). To be clear, Kawleski *does not* challenge the executive branch's authority to *revoke* extended supervision. That authority is consistent with Wisconsin law and historical practice. *See Horn*, 226 Wis. 2d at 644–45.[3]

But the statute does not stop there. It also grants the executive branch—specifically, unelected, unaccountable employees of either the Department of Administration or the Department of Corrections—unilateral authority over the separate determination of *reconfinement*. *State v. Presley*, 2006 WI App 82, ¶ 10, 292 Wis. 2d 734, 715 N.W.2d 713 (explaining the difference between revocation and reconfinement). In so doing, the statute gives the executive branch the power to "determine whether a person should be sent to prison and for how long," *Brown*, 298 Wis. 2d 37, ¶ 28, based on an exercise of the executive branch's discretion, *id.* ¶¶ 20, 22. By giving the executive branch the power to make discretionary reconfinement decisions, the statute empowers the executive to invade the court's role in conducting sentencing. *See Odom*, 294 Wis. 2d 844, ¶ 11 ("[A] reconfinement hearing

[3] In *Horn*, the Court determined that the executive branch's decision concerning probation revocation "does not unduly burden or substantially interfere with either the judiciary's constitutional function to impose criminal penalties or its statutory authority to extend probation or modify its terms prior to the expiration of probation," reasoning that "[t]he judiciary still has authority to sentence the convicted defendant to prison or to impose probation and withhold or stay sentencing." 226 Wis. 2d at 651.

after revocation is a sentencing."). And it wrests from the courts their "discretion[ary]" power to "determine whether a person should be sent to prison and for how long." *Brown*, 298 Wis. 2d 37, ¶¶ 20, 22, 28, 30.

Nor, importantly, does the statute merely enable the executive branch to shuffle someone between extended supervision and prison for certain periods of time. Instead, when the executive branch reconfines someone, that reconfinement period *extends the overall length of the judicially-imposed sentence* (by the amount of time of the executive branch's chosen period of reconfinement, or more). § 302.113(9)(c); App.8, 24 (¶¶ 10 n.4, 45). According to the statute, any period of time a person spends in reconfinement does not count toward fulfillment of the term of extended supervision. By giving the executive branch the power to extend the overall length of a person's time in custody, the statute transfers to the executive branch the courts' "inherent power" to "modify the sentence" and "adjust[ ] [its] length." *Stenklyft*, 281 Wis. 2d 484, ¶¶ 91–93, 114 (Abrahamson, J., concurring in part and dissenting in part, for a majority). That power to modify a sentence, as explained, is "embrace[d]" within the "core power" of the courts to "impose a sentence." *Id.*

Because the imposition of a sentence is a "core power" and "exclusive function" of the judiciary, *Stenklyft*, 281 Wis. 2d 484, ¶ 91 (Abrahamson, J., concurring in part and dissenting in part, for a majority); *Steeno*, 85 Wis. 2d at 668, it is "not for sharing," *Marklein*, 412 Wis. 2d 525, ¶ 10. That the statute grants the executive branch "*any* exercise of authority" rightfully belonging to the judiciary suffices to render it unconstitutional. *League of Women Voters*, 387 Wis. 2d 511, ¶ 34 (citation omitted). But even if shared powers are implicated, the statute—at minimum—"substantially interfere[s] with" the judiciary's constitutional function to

"impose criminal penalties," thereby violating the separation of powers. *Horn*, 226 Wis. 2d at 651.

2. The statute and decision below conflict with the original understanding of the Wisconsin Constitution.

The placement of such grave sentencing power in the hands of unaccountable executive branch employees conflicts with the original understanding of the Wisconsin Constitution and longstanding Wisconsin tradition. Its deviance from the course of history should be rejected sooner rather than later.

Text and history show that the Wisconsin Constitution placed the power to impose criminal sentences solely in the courts. In 1848, the people of Wisconsin "created three branches of government, each with distinct functions and powers." *Gabler*, 376 Wis. 2d 147, ¶ 11 (citation omitted); *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 31, 393 Wis. 2d 38, 946 N.W.2d 35, *overruled on other grounds by Evers v. Marklein*, 2025 WI 36, 22 N.W.3d 789. Constitutional text "vest[s]" the "judicial power" in the courts. Wis. Const. art. VII, § 2.

It was widely understood in the statehood generation that "judicial power" encompassed imposing a sentence and determining the length time a convicted felon must spend in custody. *See State v. Schwind*, 2019 WI 48, ¶¶ 21–22, 386 Wis. 2d 526, 926 N.W.2d 742 (observing that "the inherent authority of courts to impose criminal sentences existed at common law prior to the adoption of the Wisconsin Constitution" and that that "inherent authority" was "included in the Wisconsin Constitution by the creation of a 'court' system"); *State v. Borrell*, 167 Wis. 2d 749, 769, 482 N.W.2d 883, 890 (1992) ("Wisconsin adopted the common law as it existed at the time of the state constitution in which judges possessed the inherent and discretionary power to punish

violations of law in the absence of a statute prescribing the punishment." (citing Wis. Const. art. XIV, § 13)).[4] By that era, older regimes of legislatively-mandated sentences had given way to "scheme[s] permitting the sentencing judge—or jury—to consider aggravating and mitigating circumstances surrounding an offense, and, on that basis, to select a sentence within a *range* defined by the legislature." *United States v. Grayson*, 438 U.S. 41, 46 (1978), *superseded on other grounds by statute*.

Consistent with that understanding, when the Constitution grants a non-judicial actor the power to affect the length of a sentence, it does so explicitly. In particular, in 1848 and today, the governor has the "power to grant reprieves, commutations and pardons." Wis. Const. art. V, § 6. This grant of power to affect the length of sentences enables "act[s] of grace," *United States v. Wilson*, 32 U.S. 150, 160 (1833), to "mitigate[ ] or set[ ] aside punishment," *Nixon v. United States*, 506 U.S. 224, 232 (1993). It does not allow the executive branch to *lengthen* judicially-imposed sentences, with or without the legislature's imprimatur. By expressly enumerating the governor's power to affect the length of a judicially-imposed sentence, the Constitution creates a negative implication that no *other* such power exists outside the judicial branch. *Cf. Nw. Airlines, Inc. v. Wis. Dep't of Revenue*, 2006 WI 88, ¶ 27, 293 Wis. 2d 202, 717 N.W.2d 280.

Wisconsin's 1849 statutes—which "provide particularly important evidence of how the Wisconsin Constitution was originally understood"—are in full accord. *Becker v. Dane*

[4] *See also, e.g.*, *Commonwealth v. Halloway*, 42 Pa. 446, 448 (1862) ("The trial, conviction, and sentencing of criminals are judicial duties, and the duration or period of the sentence is an essential part of a judicial judgment in a criminal record."); *State v. Grant*, 79 Mo. 113, 125 (1883) (quoting *Halloway* and comparing Pennsylvania's constitution to Missouri's); *State ex rel. Atty. Gen. v. Peters*, 4 N.E. 81, 86 (Ohio 1885) ("The trial, verdict, and sentence provided by law are judicial functions . . . .").

Cnty., 2022 WI 63, ¶¶ 62–63, 403 Wis. 2d 424, 977 N.W.2d 390 (Hagedorn, J., concurring). With the exception of the constitutionally enabled pardon power, these early laws placed all authority over the imposition of criminal sentences in the hands of the courts—and no place else.

Resembling criminal statutes of today, the 1849 statutes defined criminal offenses and set either mandatory sentences (such as the death penalty for certain killings, Wis. Stat. ch. 133 §§ 1–2 (1849)) or, more often, ranges of sentence lengths, *see generally id.* ch. 133. Within those ranges, courts had complete discretion to determine the actual length of the sentence. *Id.* ch. 150 § 1 ("In any case of legal conviction where no punishment is provided by statute, the court shall award such sentence as is according to the degree and aggravation of the offence not cruel or statute, unusual, nor repugnant to the constitutional rights of the party.").

With one exception, the executive branch shared no role in imposing a criminal sentence or determining its length. That exception—completely consistent with constitutional text—was for acts of grace. The governor could shorten a sentence by exercising his pardon power. *Id.* ch. 151. And he could delay executions of "insane" people and pregnant women. *Id.* ch. 150 § 8. Other than that, the executive branch's power extended only to carrying out judicially-imposed sentences. Ch. 150, §§ 4–5, 6–7. The executive branch had absolutely no constitutional or statutory power to place someone in prison, to determine the length of a sentence, or to extend the length of a judicially-imposed sentence.

3. The statute and decision below conflict with controlling and persuasive federal precedent.

The decision below and the statute it upholds "conflict with controlling" and persuasive "opinions" of federal courts. Wis. Stat. § 809.62(1r)(d).

Nearly a century ago, a unanimous U.S. Supreme Court held that "[t]he only sentence known to the law is the sentence or judgment entered upon the records of the court." *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936). Because sentencing is a "judicial function," *id.*, any purported sentence (or sentence extension or condition) imposed by a non-judicial actor (in *Wampler*, a court clerk) amounts to no sentence at all and cannot authorize post-conviction custody. *Id.* at 464–65; *see Earley v. Murray*, 451 F.3d 71, 75 (2d Cir. 2006) ("Only the judgment of a court, as expressed through the sentence imposed by a judge, has the power to constrain a person's liberty.").

The Second Circuit, in a 2006 opinion joined by then-Judge Sonia Sotomayor, applied *Wampler*'s rationale to a state interbranch dispute. *Earley*, 451 F.3d at 74 (cited favorably in *State ex rel. Singh v. Kemper*, 2016 WI 67, ¶¶ 69–71, 371 Wis. 2d 127, 883 N.W.2d 86). In particular, the Circuit held that the New York Department of Correctional Services lacked authority to modify the length of a sentence imposed by a court. *Id.* at 74–76. Indeed, "New York's Department of Correctional Services has no more power to alter a sentence than did the clerk of the court in *Wampler*." *Id.* at 76. By doing so, it violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 76 n.1. The altered sentence violated due process *because* a judge did not impose it: "The imposition of a sentence is a judicial act; only a judge can do it. The penalty administratively added by the Department of Corrections was, quite simply, never a part of the sentence." *Id.* at 76. "Any addition to that sentence not imposed by the judge was unlawful." *Id.* at 75.

True enough, these federal decisions were not decided on state separation-of-powers grounds. In these cases, rather, the courts held that the state had violated a person's federal rights under the Due Process Clause of the

Fourteenth Amendment. But the cases are still relevant. If this Court *upholds* section 302.113(9) on state-law grounds, it will indulge a violation of *federal* constitutional law. It should avoid doing so. *Cf. Wis. Legislature v. Palm*, 2020 WI 42, ¶ 31, 391 Wis. 2d 497, 942 N.W.2d 900 ("[W]e disfavor statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration.").

4. The statute and decision below conflict with prevailing law and practice in other jurisdictions.

By empowering the executive branch to make discretionary decisions about a person's length of time in prison—and to extend the overall length of a judicially-imposed sentence—Wisconsin Statutes section 302.113(9) departs from prevailing law and practice in other states.

Indeed, around the country today, states routinely recognize that the power to impose a sentence and determine its length, within a legislatively set range, is exclusively a judicial function.[5] And based on that, states have found

[5] *See, e.g.*, *Mahoney v. Derrick*, 2022 Ark. 27, 7 (2022) ("Ordering a defendant imprisoned is a quintessential judicial function."); *People v. Clancey*, 299 P.3d 131, 138 (Cal. 2013) ("The imposition of sentence within the legislatively determined limits. . . is exclusively a judicial function."); *State v. Olivas*, 347 P.3d 1189, 1194 (Idaho 2015) ("The power to define crimes and prescribe penalties belongs to the legislative department whereas the authority to sentence offenders who have been found guilty of those crimes lies with the judiciary." (citation omitted)); *People v. McChriston*, 4 N.E.3d 29, 32 (Ill. 2014) ("[T]he power to impose sentence is exclusively a function of the judiciary." (citation omitted)); *Gibson v. Commonwealth*, 291 S.W.3d 686, 690 (Ky. 2009) ("The power to conduct criminal trials, to adjudicate guilt and to impose sentences within the penalty range prescribed by the legislature belongs to the judicial department."); *State ex rel. Esteen v. State*, 239 So. 3d 233, 236 (La. 2018) ("One of the traditional, inherent and exclusive powers of the judiciary is the power to sentence. The fixing of penalties is purely a legislative function, but the trial judge has the discretion to determine

separation-of-powers violations when the judiciary's sentence-imposing role is infringed.[6]

D. The question presented is recurring and important.

1. Left unresolved, the question presented is "likely to recur." Wis. Stat. § 809.62(1r)(c)3. Wisconsin Statutes section 302.113(9), the statute under which Kawleski was reconfined, continues to govern reconfinement following revocation. *See* App.8, 24 (¶¶ 10 n.4, 45).

Currently, there are 18,909 people on extended supervision in Wisconsin. *See* Wis. Dep't of Corrections, Division of Community Corrections, *2024: A Year in Review*, at 8 (Dec. 2024). Between January 2018 and May 2025, 19,155 people had their extended supervision revoked. *See* Wis. Dep't of Corrections, *Revocations and Other Responses to Violations*

---

the appropriate sentence within the sentencing range fixed by the legislature." (citation modified)); *Commonwealth v. Cole*, 10 N.E.3d 1081, 1089 (Mass. 2014) ("At the core of the judicial function is the power to impose a sentence."); *State v. Crawford*, 13 N.W.3d 693, 702 (Minn. Ct. App. 2024) ("[T]he imposition of the sentence within the limits prescribed by the legislature is purely a judicial function."); *State v. Coviello*, 288 A.3d 1, 9 (N.J. 2023) (stating that "the determination of the sentence is committed to the discretion of the judiciary" and that "the pronouncement of judgment of sentence is among the most solemn and serious responsibilities of a trial court" (citation modified)); *State ex rel. Bray v. Russell*, 729 N.E.2d 359, 362 (Ohio 2000) ("The determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary.").

[6] *See, e.g.*, *Cole*, 10 N.E.3d at 1089 (holding unconstitutional statute that authorized executive agency to impose mandatory sentence for community-supervision violations, because "[a] judicially imposed sentence is final and may not be modified by another branch"); *Prendergast v. State Dep't of Corr.*, 856 N.Y.S.2d 725, 726 (2008) (holding that executive agency "may not administratively impose periods of postrelease supervision" and that a "sentence can be altered only by a judge in a subsequent proceeding"); *Bray*, 729 N.E.2d at 362 (finding separation-of-powers violation where statute allowed executive branch to sentence inmates for crimes committed while in prison).

Dashboards, Statewide Violation Response Summary, Jan 2018–May 2025, https://bit.ly/4lJSXIP (last visited Aug. 15, 2025). From January through May of this year alone, 1034 people had their extended supervision revoked, were sentenced to reconfinement in prison, and necessarily had the overall length of their sentences extended—all by executive branch employees. *Id.* All these instances raise the same separation-of-powers concerns.

2. The question presented is also important. Constitutional cases are always important, particularly those implicating the separation of powers, by which "the drafters of the Wisconsin Constitution recognized the importance of dispersing governmental power in order to protect individual liberty and avoid tyranny." *League of Women Voters*, 387 Wis. 2d 511, ¶ 31. The Court routinely hears and decides separation-of-powers issues. *See, e.g.*, *id.*; *Marklein*, 2025 WI 36; *Wis. State Legislature v. Wis. Dep't of Pub. Instruction*, 2025 WI 27, 416 Wis. 2d 611, 22 N.W.3d 932. This importance is at its height when physical liberty is at stake, as it is here. *See Keylen D.K.*, 346 Wis. 2d 75, ¶ 16 ("The right to physical liberty is recognized in our legal system as the pinnacle of liberty interests.").

The placement of reconfinement authority in the hands of the executive branch also implicates important statewide policy concerns. To begin, it costs well over $40,000 per year to incarcerate a single person—and the overall cost of reconfinement likely exceeds $100 million in taxpayer expense. Ashley Luthern, *What to Know about Parole, Truth in Sentencing and When People Can Get Out of Prison in Wisconsin*, Milwaukee J. Sentinel (Sept. 21, 2022), https://bit.ly/4lGKCpc. Such significant expense should be overseen by relatively accountable government officials. But whereas circuit court judges are elected, Wis. Const. art. VII, § 7, the executive branch "reviewing authority" is either an

unelected Department of Corrections employee or unelected administrative law judge, Wis. Admin. Code § HA 2.02(1). In short, relatively unaccountable executive employees currently oversee vast taxpayer expenditures.

And of course, it's not just about money: the lack of executive branch accountability has implications for criminal-justice policy, as well. Wisconsin's prison population continues to grow, leading to overcrowding and attendant prison-conditions concerns. The surge in prisoners has resulted in large part from administratively imposed reconfinement—not judicially-imposed sentences for criminal convictions. *See* Michael M. O'Hear, *Sentencing Policies and Practices in Wisconsin*, Oxford Handbooks Online (Mar. 7, 2016); Nicholas Garton et al., *Wisconsin's Prison Population Swells as Other States Limit Incarceration*, PBS Wis. (Sept. 3, 2024), https://bit.ly/3UJvyfp. Indeed, reconfinement after revocation of community supervision accounts for over half of all prisoners in Wisconsin, is "a major driver of mass incarceration," and "both reflects and amplifies racial inequality." Jacob Schuman, *Revocation and Retribution*, 96 Wash. L. Rev. 881, 885–86 (2021) (citations omitted).

For individuals in custody, the consequences of reconfinement are severe. As explained, reconfinement extends the overall length of time of a person's sentence. The length of a reconfinement term—and thus, the length by which a judicially-imposed sentence is extended—is determined by the same branch (and sometimes the same officials) who set extended-supervision conditions and identified the violation in the first place. *See* § 302.113(7) (authorizing Department of Corrections to set conditions of extended supervision in addition to those set by the court); § 302.113(9)(ag), (am) (enabling executive branch employees to both revoke extended supervision and make the discretionary call of how long to send someone back to prison).

The statutes' consolidation of power authorizes administrative imprisonment and sentence modification foreign to a rule-of-law government. Whether in prison or on extended supervision, a person serving a sentence is "in the legal custody of the" executive branch. Wis. Stat. § 302.113(8m)(a). The executive branch can "set conditions of extended supervision." § 302.113(7). The executive branch considers whether to authorize investigations into whether "any condition or rule of extended supervision"—including the executive branch's conditions—"has been violated." § 302.113(8m)(a). If the executive branch authorizes an investigation, the executive branch can "take physical custody of the person" by placing him in a facility maintained by the executive branch "for the investigation of the alleged violation" by the executive branch. *Id.* The executive branch then conducts the investigation. If the executive branch's investigation shows, to the satisfaction of the executive branch, that a condition of extended supervision has been violated, then the executive branch presents its case to the executive branch. § 302.113(9)(ag), (am). If the executive branch agrees with the executive branch, then the executive branch revokes extended supervision. *Id.* If the executive branch revokes a person's extended supervision, then the executive branch orders the person reconfined in a prison overseen by the executive branch for a period of time set by the executive branch. *Id.* As a result of the executive branch's decision to reconfine someone in the executive branch's prison, the executive branch extends the overall time period that a person is in the custody of the executive branch. § 302.113(9)(c); App.17–18 (¶¶ 34–35).[7]

Beyond the separation-of-powers problem, this framework is vulnerable to structural biases. As the U.S. Supreme

[7] *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1248–49 (1994).

Court recognized decades ago, "an exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation." *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973). "Even though the officer is not by this recommendation converted into a prosecutor committed to convict, his role as counsellor to the probationer or parolee is then surely compromised." *Id.* Recent scholarly work shows this concern remains evergreen: "[C]ommunity supervision agencies and officers are in a structurally antagonistic position toward defendants. They administer the punishment of community supervision, which involves surveilling compliance with invasive and burdensome supervision conditions, investigating suspected violations, initiating revocation proceedings, and seeking the incarceration of people they believe have violated their supervision conditions." Renagh O'Leary, *Supervising Sentencing*, 57 U.C. Davis L. Rev. 1931, 1989 (2024). "In keeping with this antagonistic dynamic, ethnographic research has described the dominance within some community supervision agencies of negative views about defendants, who are seen [as] 'dispositionally flawed,' 'deviant,' and 'dangerous.'" *Id.* at 1989 n.238 (citation omitted). "Agents read the criminalized, always already dangerous identity into parolees' attitudes and practices, typically viewing them as unlikely to, or even incapable of, change." *Id.*

In sum, the separation-of-powers concerns, liberty interests, and statewide criminal-justice policies at stake make this a question particularly worthy of review.

II. Question Presented II is a significant question of constitutional law that satisfies many criteria for review.

Question Presented II is a natural accompaniment to Question Presented I. It asks whether habeas corpus or equity provides a remedy to a person in custody (including extended supervision) serving a sentence that, but for an unconstitutionally imposed period of reconfinement and extension of term, would have already ended.

The question presented "is a novel one" that will have "statewide impact." Wis. Stat. § 809.62(1r)(c)1., 2. On the one hand, "[i]t is settled that the use of habeas corpus has not been limited to situations where the applicant is in actual physical custody, but is available to one subject to restraints not shared by the public generally." *State ex rel. Wohlfahrt v. Bodette*, 95 Wis. 2d 130, 133–34, 289 N.W.2d 366 (1980); *Earley,* 451 F.3d at 75 (recognizing that "[p]ost-release supervision, admitting the possibility of revocation and additional jail time, is considered to be 'custody'" for purposes of habeas corpus). On the other hand, that basic principle has not yet been extended to the situation here. The interaction between reconfinement and extended supervision is a relatively new sentencing consideration. *See* Amelia L. Bizzaro, *Taking Reconfinement Hearings Seriously*, 80 Wis. Law. (Apr. 5, 2007), https://bit.ly/45GgLsl. So is the effect of an unconstitutionally imposed term of reconfinement on the fate of a person in Kawleski's shoes. For similar reasons discussed above, a determination on the role that habeas relief plays in these circumstances would help clarify a novel question.

The question presented is also a pure "question of law." § 809.62(1r)(c)3. The availability of habeas or equitable relief here implicates constitutional and statutory interpretation. Whether a "writ of *habeas corpus* is available to the party

seeking relief is a question of the law that [the Court] review[s] *de novo*." *Pozo*, 258 Wis. 2d 796, ¶ 6 (citing *State ex rel. Woods v. Morgan,* 224 Wis. 2d 534, 537, 591 N.W.2d 922 (Ct. App. 1999)).

Finally, the question presented is important and, left unresolved, "likely to recur." § 809.62(1r)(c)3. As discussed above, the reconfinement statute is current law and thousands on extended supervision in Wisconsin remain subject to it. *See* § 302.113(9)(am). Whether habeas provides a remedy to a person in custody serving, or having served, an unconstitutionally imposed reconfinement term and subsequent unlawfully extended supervision is important—the answer determines whether that person remains in custody or regains their liberty.

III. This case is an ideal vehicle.

This case presents an ideal vehicle to answer the questions presented. The arguments were fully developed below by competent counsel on both sides. The Court of Appeals found Kawleski's arguments "potentially persuasive." App.28 (¶ 55).

It is thus particularly important to address the questions *here*, because many cases involving these questions will not feature the same persuasive counseled briefing. Indeed, "there is no constitutional right to counsel" in a habeas proceeding. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 18, 290 Wis. 2d 352, 363, 714 N.W.2d 900, 905, *opinion clarified,* 2006 WI 121, 297 Wis. 2d 587, 723 N.W.2d 424; *see* Matthew M. Fernholz, *Collateral Damage: A Guide to Criminal Appellate, Postconviction, and Habeas Corpus Litigation in Wisconsin*, 98 Marq. L. Rev. 1351, 1365 (2015). Whether the State Public Defender provides representation to habeas petitioners is within that agency's discretion. *See State ex rel. Payton v. Kolb*, 135 Wis. 2d 202, 205, 400 N.W.2d 285 (Ct. App. 1986).

The court below declined to address Kawleski's "potentially persuasive" argument upon invoking the constitutional-avoidance principle. App.28 (¶ 55) (citing *Adams Outdoor Advert., Ltd. v. City of Madison*, 2006 WI 104, ¶ 91, 294 Wis. 2d 441, 717 N.W.2d 803). But constitutional avoidance is "a matter of judicial prudence" appropriate only when an answer to the constitutional question is unnecessary to decide the case and would not make a difference in the outcome. *Gabler*, 376 Wis. 2d 147, ¶ 52. It "does not apply where the constitutionality of a statute is essential to the determination of the case." *Id.* (citation modified).

The constitutionality of section 302.113(9) is absolutely "essential to the determination" here. *Id.* Answering the constitutional questions presented on the merits would make all the difference to Kawleski's habeas petition. If the statute is constitutional, then Kawleski's sentence ends in 2028. But if the statute is unconstitutional, then Kawleski's 2018 reconfinement order—a unilateral executive branch decree that returned him to prison and purported to extend the overall length of his judicially-imposed sentence—is void, his overall sentence ended *in 2023*, and he is unlawfully in custody today.[8]

This case is especially deserving of review because it presents the starkest facts possible. If Kawleski is right, it's not merely the difference between 10 more years in custody and 15 more years. It's the difference between being in

[8] In holding the statute unconstitutional, the Court could either (a) sever the portion of the statute that *extends* the overall length of the sentence as a result of reconfinement, meaning regardless of whether a person serves time in prison or on extended supervision, the total time in custody cannot exceed the length of a bifurcated sentence set by a court; (b) declare unenforceable the portion of the statute that allows executive branch officials to make reconfinement decisions; or (c) both. Although (a) alone would still allow the executive branch to reconfine someone, it would ensure that the executive cannot unilaterally extend the overall length of a judicially-imposed sentence.

custody or not—right now. Waiting for another vehicle makes little sense—and would deny Kawleski any relief, ever.

CONCLUSION

This Court should grant the petition for review.

Dated this 25th day of August, 2025.

Electronically signed by
Joseph S. Diedrich

JOSEPH S. DIEDRICH, 1097562
ALYSSA M. LEROY, 1115648
HUSCH BLACKWELL LLP
33 E Main St, Ste 300
Madison, WI 53703
608.255.4440
joseph.diedrich
@huschblackwell.com

SAMUEL L. MITHCELL, 1093820
HUSCH BLACKWELL LLP
120 S Riverside Plaza, Ste 2200
Chicago, IL 60606
samuel.mitchell
@huschblackwell.com

Counsel for Petitioner

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 7992 words.

Dated this 25th day of August, 2025.

Electronically signed by
Joseph S. Diedrich

APPENDIX CERTIFICATION

I hereby certify that filed with this petition is an appendix that complies with Wisconsin Statutes section 809.62(2)(f), (4) and that contains, at a minimum: (1) the decision and opinion of the court of appeals; (2) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition; (3) any other portions of the record necessary for an understanding of the petition; and (4) a copy of any unpublished opinion cited under section 809.23(3)(a) or (b).

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

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

Dated this 25th day of August, 2025.

Electronically signed by
Joseph S. Diedrich