STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2023AP2020-OA

TONY EVERS, GOVERNOR OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES, BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, and MARRIAGE AND FAMILY THERAPY, PROFESSIONAL COUNSELING, and SOCIAL WORK EXAMINING BOARD,

Petitioners,

v.

SENATOR HOWARD MARKLEIN, REPRESENTATIVE MARK BORN, in their official capacities as chairs of the joint committee on finance; SENATOR CHRIS KAPENGA, REPRESENTATIVE ROBIN VOS, in their official capacities as chairs of the joint committee on employment relations; and SENATOR STEVE NASS and REPRESENTATIVE ADAM NEYLON, in their official capacities as co-chairs of the joint committee for review of administrative rules,

Respondents.

PETITIONERS' OPENING BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 957-5218 CG
(608) 266-7636 CTR
(608) 294-2907 (Fax)
gibsoncj@doj.state.wi.us
rothct1@doj.state.wi.us

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INTRODUCTION

There is scarcely a more basic separation of powers principle than this: the legislative branch's job is to make the law, and the executive branch's job is to execute it. Our constitution bakes in this division of authority through article IV, § 1, and article V, § 1, which together prevent the "same persons who have the power of making laws [from] hav[ing] also in their hands the power to execute them." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 5, 376 Wis. 2d 147, 897 N.W.2d 384. When the legislative branch tries to wield both powers itself, "those who make the laws . . . might 'suit the law, both in its making and execution, to their own private advantage.'" *Id.* (citation omitted).

The legislative vetoes challenged here present precisely those dangers. More than three decades ago, the Legislature enacted the Knowles-Nelson conservation program and charged the Department of Natural Resources (DNR) with executing it to develop Wisconsin's bountiful natural resources. But years later, the Legislature decided that it was not content to have merely enacted and financed the program; it also desired ongoing control over how DNR did its job. So, the Legislature passed laws empowering its 16-member Joint Committee on Finance to control which individual Knowles-Nelson projects DNR could pursue. The legislators on that committee need not explain their veto decisions, which are final and unreviewable.

This kind of legislative committee veto violates the bedrock principle that "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them." *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600 (citation omitted). Our constitution requires that after a "policy choice[ ]" has been "enacted into law by the legislature," it must then be "carried out by the executive branch." *Fabick v. Evers*, 2021 WI 28, ¶ 14, 396 Wis. 2d 231, 956 N.W.2d 856.

Here, the legislative branch completed its proper constitutional role when it passed laws enacting and financing the Knowles-Nelson program. But these committee vetoes give the legislative branch yet another role, this one foreign to our constitution. The Joint Committee on Finance now has the final say over Knowles-Nelson projects, which gives it—not DNR—ultimate administrative power over the program. If transferring that executive power to the legislative branch does not violate the separation of powers, it is hard to realistically imagine what would.

Equally problematic, these vetoes empower the Joint Committee on Finance to modify existing law outside the constitutional lawmaking process. Bicameral passage of bills through both legislative houses followed by presentment to the Governor represent two constitutionally required "procedural hurdles" that "limit the ability of the legislature to infringe on [the people's] rights." *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 32, 391 Wis. 2d 497, 942 N.W.2d 900. By vetoing individual Knowles-Nelson projects, the Joint Committee on Finance effectively amends existing appropriations to the Knowles-Nelson program without following bicameralism and presentment procedures. Sidestepping the lawmaking process by acting through an unrepresentative and opaque legislative committee only heightens the danger that the legislative branch will both make and execute the law for its own "private advantage." *Gabler*, 376 Wis. 2d 147, ¶ 5 (citation omitted).

To justify this constitutional aberration, Respondents rely primarily on a 41-year-old court of appeals decision, *J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983). That case addressed legislative participation in the state building process, which has little to do with executing a statutory program like Knowles-Nelson. And *Ahern* was wrongly decided and should be overruled, in any event. Its flawed

analysis conflicts with this Court's recent decisions and completely ignores bicameralism and presentment.

Wisconsin is not the first jurisdiction to confront a legislative power grab like this one. Legislatures nationwide have succumbed to the temptation to hijack the power to execute the law using legislative vetoes. But high courts have been virtually unanimous in recognizing such schemes for what they are: violations of the separation of powers. It is time for Wisconsin to do the same and restore the constitutional balance of power to our state government.

ISSUE PRESENTED

Do Wis. Stat. §§ 23.0917(6m) and (8)(g)3. facially violate the separation of powers by allowing the Legislature's Joint Committee on Finance to veto decisions of the Department of Natural Resources to award appropriated monies under the Knowles-Nelson Stewardship Program?

STATEMENT OF THE CASE

Wisconsin law charges DNR with carrying out the Knowles Nelson program, a longstanding stewardship program that provides funds to enhance public access to some of our state's most cherished parks, forests, fisheries, and wetlands.

The two statutes challenged here give a legislative committee, the Joint Committee on Finance (JCF), the power to veto DNR's choices about which projects to pursue using Knowles-Nelson funding. That veto power resides well outside the fiscal committee's original role of monitoring appropriation bills and its later role in forming the biennial budget. And that veto power has only expanded since its creation 17 years ago. Since then, the Legislature has multiplied the types of Knowles-Nelson projects that JCF may veto while removing almost all constraints on how JCF wields that power.

I. DNR administers the Knowles-Nelson Stewardship Program.

DNR administers the Knowles-Nelson Stewardship Program, a 35-year-old conservation program named after two prominent former Wisconsin governors, Warren Knowles (a Republican) and Gaylord Nelson (a Democrat). The Knowles-Nelson program has enabled Wisconsin to expand and improve public access to its natural resources by empowering DNR to acquire land, develop public recreational property, and provide grants to local units of government and nonprofit organizations to do the same. *See generally* Wis. Stat. § 23.0917.

To carry out the program, DNR reviews grant applications and awards funds based on purposes and priorities set out in statutes and administrative rules.

When financing land acquisition, DNR must select projects that serve the purposes enumerated in Wis. Stat. § 23.09(2)(d), including developing state forests, public hunting grounds, or state trails. Specific priorities are provided in Wis. Stat. § 23.0917(3)(c): projects must prioritize land that preserves or enhances the state's water resources; land for the stream bank protection program; land for habitat areas and fisheries; land for natural areas; land in the middle Kettle Moraine; and land in the Niagara Escarpment corridor. DNR has also promulgated administrative rules that further guide its discretion in selecting land acquisition projects. *See, e.g.,* Wis. Admin. Code NR § 1.40.

Similar statutes and administrative rules guide DNR's selection of projects to develop existing state land (as opposed to projects that acquire new state land). *See generally* Wis. Stat. § 23.098, Wis. Admin. Code NR §§ 51.83–.84.

The Legislature has authorized DNR to obligate specified amounts each fiscal year from various state funds for Knowles-Nelson Program projects. *See* Wis. Stat. §§ 20.866(2)(ta), 23.0917(3)–(4m).

As one example of a prominent recent Knowles-Nelson project, in 2021 DNR bought 220 acres adjacent to Devil's Lake State Park and awarded a grant to a nonprofit organization to support the acquisition of another 80 acres from the same seller. Together, these Knowles-Nelson transactions added 300 acres of recreation land to Devil's Lake State Park. *Id.* at 7.[1]

II. Wisconsin Stat. §§ 23.0917(6m) and (8)(g)3. empower the Joint Committee on Finance to veto DNR's Knowles-Nelson decisions.

DNR can spend its Knowles-Nelson funding on many types of projects only if first receives approval from JCF. Over the years, the Legislature has expanded the types of projects subject to JCF approval and eliminated virtually all limits on JCF's veto authority.

A. The Joint Committee on Finance.

JCF is a 16-person committee of the Legislature. Wis. Stat. § 13.09. Members from each house are chosen by legislative leaders from each political party, based on the party's number of representatives in each house. *Id.* Membership is not confined by any geographic or population requirements.

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[1] For many more examples of Knowles-Nelson-financed projects, see Appendices II–IV of the Wisconsin Legislative Fiscal Bureau Informational Paper 66: Warren Knowles-Gaylord Nelson Stewardship Program, https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0066_warren_knowles_gaylord_nelson_stewardship_program_informational_paper_66.pdf.

Some form of a legislative fiscal committee has existed since the State's founding. But until relatively recently, that committee's powers and duties mainly related to the process of drafting and passing a biennial budget. The Legislative Fiscal Bureau's (LFB) history of JCF and its predecessor committee describes how their original duty was limited to reviewing appropriation bills:

> On January 11, 1911, a new Legislature was seated . . . Almost immediately, Senate Bill 8 was introduced. This bill provided for the transformation of the Legislature's existing, eight-member Joint Committee on Claims into a 14-member Joint Committee on Finance, comprised of five members of the Senate and nine members of the Assembly. The old Joint Committee on Claims had been established by Chapter 59, Laws of 1857, to consider "all bills or accounts requiring the appropriation of money by the Legislature." The 1911 legislation substantially revised the new Committee's authority by directing that all bills containing appropriations, providing for revenue or relating to taxation be referred to it before being passed by the Legislature.

Legislative Fiscal Bureau Informational Paper 81: Joint Committee on Finance (Jan. 2023), at 5[2]; *see also* 1857 Wis. Laws, ch. 59 (creating Joint Committee on Claims); 1911 Wis. Laws, ch. 6 (creating Joint Committee on Finance). Whether in the original 1857 version or its 1911 recreation, the fiscal committee's job was to review bills, not to oversee how the executive branch administered enacted law.

Indeed, LFB's historical overview of JCF focuses almost entirely on the committee's role in the biennial budget process. *See generally* LFB Informational Paper 81, at 5–17. Only at the very end does LFB briefly mention JCF's power to

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[2] Legislative Fiscal Bureau Informational Paper 81: Joint Committee on Finance (Jan. 2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0081_joint_committee_on_finance_informational_paper_81.pdf.

review executive branch action when outlining JCF's "other duties and responsibilities":

> **Other Duties and Responsibilities.** In addition to the matters highlighted in this history of the Joint Committee on Finance, the Legislature has assigned a myriad of other duties and responsibilities to the Committee *relating to the approval of executive branch agency actions*, authority to make appropriations and position adjustments to numerous state agency appropriations, and the authority to approve scores of policies and actions by state agencies.

Id. at 21 (emphasis added). LFB does not discuss when these executive review powers first emerged, but they were not part of the committee's original toolset and are described as secondary to its important role in the budget process.

B. JCF's veto power over Knowles-Nelson projects.

Wisconsin Stat. § 23.0917 grants JCF two separate legislative vetoes over the Knowles-Nelson program.

First, under Wis. Stat. § 23.0917(6m)(a), DNR must submit certain proposed projects to JCF for its approval or rejection through a so-called "passive review" process. If a JCF member objects to a proposed project, DNR may not spend money on it unless JCF votes to approve it. This JCF veto applies to four categories of Knowles-Nelson projects, generally depending on their cost, location, and the State's total land holdings at the time. *See* Wis. Stat. § 23.0917(6m)(c)–(dr).

Second, Wis. Stat. § 23.0917(8)(g)3. creates an "active review" procedure for land acquisitions outside a "project boundary," defined as the boundaries for potential projects established by DNR on or before May 1, 2013. Wis. Stat. § 23.0917(8)(g)1. DNR cannot spend money on such a project unless three-fourths of JCF's members affirmatively approve it.

JCF's authority to veto Knowles-Nelson projects has expanded over time. When the program was originally created in 1989, no JCF veto provision existed. *See generally* Wis. Stat. § 23.0915 (1991–92). A veto provision was first added through 1995 Wis. Act 27, which required JCF passive review of projects costing more than $250,000. *See* Wis. Stat. § 23.0915(4) (1995–96). This veto provision was removed in 2002 but reemerged in 2007 Wis. Act 20, this time with several limits on JCF's authority. The new law required JCF members to lodge objections in writing and to hold a meeting on an objection within 16 days; only projects over $750,000 were subject to review. *See* 2007 Wis. Act 20, § 646t (creating Wis. Stat. § 23.0917(6m)(a), (bg) (2007–08)).

Since 2007, the Legislature has removed those limits and expanded the universe of projects subject to JCF review. 2011 Wis. Act 32 removed the written objection requirement, which means a single JCF member can now require a hearing through an anonymous objection. That act also removed the time limit within which JCF must hold a hearing after an objection, and it reduced the review threshold to projects costing more than $250,000. *See* 2011 Wis. Act 32, §§ 837m, 837t, 840.

In 2013 Wis. Act 20, the Legislature further expanded the types of projects subject to JCF review, including proposals outside "project boundaries." *See* 2013 Wis. Act 20, §§ 509v, 509y (creating Wis. Stat. §§ 23.0917(6m)(dg) and (8)(g)). And in 2015 Wis. Act 55, the Legislature required JCF review of all land acquisitions north of State Trunk Highway 64. *See* 2015 Wis. Act 55, § 961t (creating Wis. Stat. § 23.0917(6m)(dr)).

C. JCF's exercise of its veto power in recent years.

Between 2019 and when the Petition in this matter was filed, JCF objected to almost one-third of all Knowles-Nelson Program projects submitted by DNR for approval—27 in total. (*See* Pet. Ex. A.) Those 27 projects sat before JCF for an average of 273 days before JCF's objection was resolved by either (1) a JCF decision to approve or deny the project, or (2) a DNR decision to withdraw the proposed project from consideration as time wore on after JCF objected but failed to vote to approve or reject it.

ARGUMENT

The Wisconsin Constitution tasks the legislative branch with enacting statutory programs and financing them through appropriation bills. The Legislature did just that when it passed laws creating and financing the Knowles-Nelson program.

But the legislative vetoes here take another step: they empower a legislative committee to control how DNR executes that program when DNR selects projects it deems worthy of Knowles-Nelson funding. That veto power transfers core executive power to the legislative branch. Further, these legislative vetoes occur outside the lawmaking process with its bicameralism and presentment procedures. Wisconsin Stat. §§ 23.0917(6m) and (8)(g)3. are facially unconstitutional for these two independent reasons.

I. The Wisconsin Constitution divides the powers of government among three branches and constrains legislative authority through substantive and procedural safeguards.

Like the U.S. Constitution and all state constitutions, the Wisconsin Constitution divides governmental power among the three branches of government: the legislative,

which makes the law; the executive, which executes the law; and the judiciary, which resolves disputes over what the law means.

To preserve this delicate balance of power, the separation of powers doctrine places both procedural and substantive guardrails around the legislative branch's role. Procedurally, the legislative branch acts through lawmaking, which it must do by passing a bill in both houses and presenting it to the Governor for signature or veto (known as bicameralism and presentment). Substantively, the legislative branch's constitutional role ends when a bill becomes law; thereafter, the executive branch implements the enacted law. After that critical constitutional moment, the legislative branch may neither assume the power to execute the law nor block the executive branch's ability to do so.

A. The Wisconsin Constitution guards against the concentration of power in a single branch.

Wisconsin's separation of powers—just like the United States'—derives from three constitutional "vesting clauses" that divide the core powers of government among three branches: "The legislative power shall be vested in a senate and assembly," "[t]he executive power shall be vested in a governor," and "[t]he judicial power of this state shall be vested in a unified court system." Wis. Const. art. IV, § 1, art. V, § 1, art. VII, § 2; *cf.* U.S. Const. art. I, § 1, art. II, § 1, art. III, § 1; *see also Serv. Emp. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 31, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*") (noting that the Wisconsin Constitution was "born of the[ ] same beliefs" as those held by our nation's founders). State administrative agencies (like DNR) are "part of the executive branch" and carry out executive functions. *SEIU*, 393 Wis. 2d 38, ¶ 60.

Separating these powers provides the "central bulwark of our liberty," *id.*, by guarding against the "concentration of governmental power" in a single branch. *Gabler,* 376 Wis. 2d 147, ¶ 4. Through this separation, our constitution "ensure[s] that each branch will act on its own behalf and free from improper influence by the others." *Id.* ¶ 32. "[N]o branch [is] subordinate to the other, no branch [may] arrogate to itself control over the other except as is provided by the constitution, and no branch [may] exercise the power committed by the constitution to another." *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982).

Because the legislative branch writes the laws, the separation of powers doctrine is especially wary of it stripping away power from co-equal branches through legislation. As James Madison warned, the legislative branch is "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." The Federalist No. 48, at 309 (Clinton Rossiter ed., 1961). And the art of lawmaking enables the Legislature to "mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." *Id.* at 310. The legislative usurpation of executive power poses a particular danger because it results in the "same persons who have the power of making laws"—that is, legislators—"also [having] in their hands the power to execute them." *Gabler*, 376 Wis. 2d 147, ¶ 5 (quoting John Locke, The Second Treatise of Civil Government, § 143).

Accordingly, "the people ought to indulge all their jealousy and exhaust all their precautions" in guarding against the legislative branch's "enterprising ambition." The Federalist No. 48, *supra*, at 309.

To check legislative ambition, the Wisconsin Constitution, like the U.S. Constitution, imposes both procedural and substantive limitations on what the legislative branch may do. First, when the legislative branch "exercises its legislative power, it must follow 'the single,

finely wrought and exhaustively considered, procedures' specified in Article I [i.e. bicameral passage and presentment to the chief executive officer]." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (citation omitted). Second, the legislative branch "may not 'invest itself or its Members with either executive power or judicial power.'" *Id.* (citation omitted). These two constitutional safeguards are crucial to analyzing the legislative vetoes at issue here.

B. The legislative branch exercises its constitutional power by enacting laws, which it must do through bicameralism and presentment.

As a matter of process, the legislative branch exercises its legislative power through lawmaking. Given their fear of legislative overreach, the Framers of both the U.S. and Wisconsin constitutions created a "crucible" that "bills must overcome to become law": bicameralism and presentment. *Becker v. Dane County*, 2022 WI 63, ¶ 101, 403 Wis. 2d 424, 977 N.W.2d 390 (Bradley, R., J., dissenting).

When the legislative branch seeks to make law, it must pass a bill in both houses—bicameralism. *See* Wis. Const. art. IV, § 17. Once a bill clears that hurdle, it must then be presented to the Governor for signature or veto—presentment. *See* Wis. Const. art. V, § 10. Together, bicameralism and presentment represent a "procedural hurdle[ ]" that "limit[s] the ability of the legislature to infringe on [the people's] rights." *Palm*, 391 Wis. 2d 497, ¶ 32.

The Founders artfully defended the virtues of these procedures. James Madison explained that bicameralism "doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of

one, would otherwise be sufficient." The Federalist No. 62, at 378–79 (Clinton Rossiter ed., 1961). In other words, requiring two houses to concur on lawmaking encourages the legislative branch to act for the public good rather than private or factional interest.

Similarly, Alexander Hamilton described presentment's two main purposes. Without presentment, the executive branch would be "absolutely unable to defend [it]self against the depredations of the [legislative branch]." The Federalist No. 73, at 442 (Clinton Rossiter ed., 1961). Moreover, presentment "establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good." *Id.* at 443.

Of course, not all legislative acts must pass through the constitutional gantlet of bicameralism and presentment. A single house or legislative committee can, for example, conduct oversight hearings or audit an agency's expenditures. Whether legislative acts amount to lawmaking, with its bicameralism and presentment requirements, "depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *INS v. Chadha*, 462 U.S. 919, 952 (1983) (citation omitted). If a legislative action has the "purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the legislative branch," *id.*, then it can occur only through lawmaking procedures.

Alternatively, constitutional text may expressly carve out certain legislative acts from bicameralism and presentment requirements. As the U.S. Supreme Court explained in *Chadha*, "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." *Id.* at 955.

These principles lead to a key corollary when considering enacted laws, which have already passed through the crucible of bicameralism and presentment. If the legislative branch believes that the executive branch is implementing a law in a manner inconsistent with good public policy, the constitution provides a specific remedy: repeal or amend that law through the lawmaking process. As the U.S. Supreme Court recognized in *Chadha*, "[d]isagreement" with how the executive branch implements legislation "involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President." *Id.* at 954.

C. The legislative branch's power is to make laws, not also to execute them.

These procedural safeguards work together with substantive ones. Even when the legislative branch follows bicameralism and presentment procedures, the laws it enacts may not transfer executive power to the legislative branch. Policing this principle requires distinguishing between executive and legislative power. This task is "not always easy," *SEIU*, 393 Wis. 2d 38, ¶ 34, but some basic principles lie beyond debate.

Generally, "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them." *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600 (citation omitted). More specifically, the Legislature has constitutional authority "to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; [and] to fix the limits within which the law shall operate." *Id.* (alteration in original) (citation omitted). So, when the legislative branch wants to achieve a policy goal, it may enact statutes that empower the executive branch to administer a new program and tell the executive branch how to do so.

But "following enactment of laws, the legislature's constitutional role as originally designed is generally complete." *Palm*, 391 Wis. 2d 497, ¶ 182 (Hagedorn, J., dissenting). After the legislative branch completes its lawmaking work, the baton passes to the executive branch, whose "authority consists of executing the law." *SEIU*, 393 Wis. 2d 38, ¶ 95. Once a "policy choice[ ]" has been "enacted into law by the legislature," it is then "carried out by the executive branch." *Fabick*, 396 Wis. 2d 231, ¶ 14; *see also Palm*, 391 Wis. 2d 497, ¶ 91 (Kelly, J., concurring) ("The difference between legislative and executive authority has been described as the difference between the power to prescribe and the power to put something into effect.").

The U.S. Supreme Court underscored this baton-passing dynamic in *Bowsher v. Synar*, 478 U.S. 714 (1986). There, Congress enacted a law creating an official who could mandate, outside the ordinary legislative process, reductions in deficit spending by the executive branch. The official could be fired only by Congress. The Court held that this statute violated the separation of powers because "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Id.* at 722. This sort of scheme "reserve[s] in Congress control over the execution of the laws"—in other words, grants it a "congressional veto"—which is something "[t]he structure of the Constitution does not permit." *Id.* at 726. Simply put, "the Constitution does not permit Congress to execute the laws." *Id.*

In carrying out the legislative branch's policy choices, the executive is no mere "legislatively-controlled automaton." *SEIU*, 393 Wis. 2d 38, ¶ 96. Rather, the executive must "use judgment and discretion" in carrying out the legislative mandate. *Palm*, 391 Wis. 2d 497, ¶ 183 (Hagedorn, J., dissenting). That discretion is the very essence of the

executive's role, exactly where the legislative branch may not intrude. As the U.S. Supreme Court explained in *Bowsher*:

> Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law. Under § 251 [of the Act], the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.
>
> . . .
>
> Congress of course initially determined the content of the [Act]; and undoubtedly the content of the Act determines the nature of the executive duty. However, as *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.

478 U.S. at 732–34.

The same is true under Wisconsin's Constitution. Implementing the law requires exercising discretion and judgment about relevant facts. That is the essence of executive power, and the Legislature may not exercise it in the executive branch's stead.

* * *

In sum, the Wisconsin Constitution, like the U.S. Constitution, empowers the legislative branch to make policy choices by enacting law through bicameralism and presentment, but not to control how the executive branch implements those laws.

II. Wisconsin's core and shared power framework does not alter the underlying principles that divide legislative from executive power.

Wisconsin courts have filtered these well-established separation of powers principles through a lens of "core" and "shared" powers. *See SEIU*, 393 Wis. 2d 38, ¶¶ 34–35. But those analytical tools don't alter the underlying principles, and this framework must be carefully employed to preserve the separation of powers. The analysis must keep two key questions in mind. First, is the challenged branch exercising a power the constitution assigns it? Whether in a "core" or "shared" powers framework, each branch can use only the tools our constitution gives it. Second, can each branch still exercise its constitutionally assigned core power, despite the challenged action? If not, then a power is no longer properly "shared" but rather usurped by the encroaching branch.

A. A "core" power defines a branch's essential attributes and cannot be shared with another branch.

Each branch of government has exclusive—"core"—constitutional powers which constitute zones of authority into which no other branch may intrude. *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). "A branch's core powers are those that define its essential attributes." *SEIU*, 393 Wis. 2d 38, ¶ 104. "[A] core power is a power vested by the constitution that distinguishes that branch from the other two." *Id.* n.15.

"[C]ore zones of authority are to be 'jealously guarded,'" as "[t]he state suffers essentially by every assault of one branch of government upon another." *Gabler*, 376 Wis. 2d 147, ¶¶ 30–31 (citation omitted). Therefore, "any exercise of authority by another branch" in an area of core power "is unconstitutional." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21 (citation omitted).

In addition to examining constitutional text, history also provides insight into what powers are rightly considered "core." If Wisconsin's historical "practices and laws" from around the time of the founding show that an encroaching branch did not traditionally have a role in the power at issue, that further indicates that it is a core power of the encroached-upon branch. *State ex rel. Friedrich v. Circuit Court for Dane Cnty.*, 192 Wis. 2d 1, 38, 531 N.W.2d 32 (1995); *see also State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶ 44, 402 Wis. 2d 539, 564, 976 N.W.2d 821, 833 ("To properly confirm the meaning of the Wisconsin Constitution, we consult 'historical evidence' such as 'the practices at the time the constitution was adopted, debates over adoption of a given provision, and early legislative interpretation as evidenced by the first laws passed following the adoption." (citations omitted)).

At the most basic level, our constitution vests the legislative and executive branches with the core powers to legislate and to execute the laws, respectively. *See* Wis. Const. art. IV, § 1, art. V, §§ 1, 4, art. VII, § 2. The legislature "is tasked with the enactment of laws," and the "governor is instructed to 'take care that the laws be faithfully executed.'" *SEIU*, 393 Wis. 2d 38, ¶ 31. Because the executive branch's duty to execute the laws is its "core" power, the legislature cannot assume any share of it.

B. Even in an arena of "shared" powers, each branch can exercise only its own constitutional powers and cannot override another branch's power.

Wisconsin courts also recognize the concept of "shared" powers, which are best described as those that "lie at the intersections of . . . exclusive core constitutional powers." *SEIU*, 393 Wis. 2d 38, ¶ 35 (citation omitted). In these "shared powers" situations, one branch exercises its own constitutional powers in an arena that affects another branch's ability to exercise *its* powers. Such actions are

constitutional if they do not "unduly burden or substantially interfere with the other branch's essential role and powers." *State v. Unnamed Defendant*, 150 Wis. 2d 352, 360–61, 441 N.W.2d 696 (1989).

Calling a power "shared" is therefore something of a misnomer. What is really "shared" is the intersecting arena of governmental action—two branches are interested in the same topic, and they each use their core powers to pursue their interests. What is *not* "shared" are the core powers that each branch uses in its pursuit of its aims. Each branch exercises only its own powers, both as a matter of process and substance.

As a matter of process, a branch can act in an area of shared power only by using its constitutional tools—in the legislative branch's case, by passing laws that prospectively regulate another branch. At the end of the day, "[l]egislative power . . . is the authority to make laws." *Koschkee,* 387 Wis. 2d 552, ¶ 11 (citation omitted).

As a matter of substance, a branch exercising its core power in a shared arena cannot have the power to veto the other branch's constitutional authority to act.

In *Friedrich*, for example, this Court evaluated whether a law that impacted two branches' overlapping exercise of core powers violated the separation of powers. The statute at issue set compensation ceilings for guardians ad litem and special prosecutors, and this Court reasoned that "statutes addressing the compensation of court-appointed counsel from public funds fall squarely within" the Legislature's power to "*enact legislation* . . . to allocate government resources." *Friedrich, 192 Wis. 2d* at 16 (emphasis added). But the judiciary was exercising its core powers, too: the "power to set and order compensation at public expense for court-appointed counsel is an inherent power of the judiciary." *Id.* at 19.

Using a shared powers analysis, the Court held that the statute was not "unduly burdensome" because "courts retain[ed] the ultimate authority to compensate court-appointed counsel at greater than the statutory rates when necessary." *Id.* at 30. In other words, the statute was constitutional because the judiciary retained its core power to set compensation higher than the Legislature's statutory limit.

By contrast, in *E.B. v. State*, 111 Wis. 2d 175, 330 N.W.2d 584 (1983), the Court analyzed whether a statute could automatically require appellate courts to reverse judgments due to a circuit court's failure to submit jury instructions in written form. Like *Friedrich*, *E.B.* involved another shared arena; this time, the Legislature used its core legislative power to pass laws regulating jury instructions, which overlapped with the judiciary's core judicial power to determine reversible error on a case-by-case basis. *Id.* at 184, 186.

But even though the Legislature used the right process—passing a law—it still lacked the substantive constitutional power to mandate reversal in particular cases. To preserve the statute's constitutionality, the Court interpreted the statute as not requiring automatic reversal; otherwise, the Legislature would have prevented the judiciary from exercising its own core power. *Id.* at 186.

* * *

In sum, the legislative branch may not exercise or otherwise interfere with another branch's core power at all. And even in the so-called "shared powers" realm where core powers overlap, the legislative branch can act only through statutes that prospectively regulate another branch, and such statutes cannot bar the other branch from exercising its core constitutional authority.

III. The Joint Committee on Finance's power to veto DNR's Knowles-Nelson decisions violates the separation of powers by transferring the power to execute the law to the legislative branch and by evading bicameralism and presentment.

The legislative branch has usurped a core executive power by empowering a legislative committee to veto the executive branch's decisions about how to implement the Knowles-Nelson program. The statutory provisions creating these legislative vetoes—Wis. Stat. §§ 23.0917(6m) and (8)(g)3.—are facially unconstitutional.

The underlying constitutional principles are simple and uncontroversial: the legislative branch's role is to enact statutes creating and financing the Knowles-Nelson program, and the executive branch's role is to spend appropriated funds on individual Knowles-Nelson projects according to statutory guidelines. JCF's power to veto DNR's decisions about Knowles-Nelson projects collapses both duties into a single branch. This usurpation of core executive power is especially problematic given how the veto power resides with an unrepresentative legislative committee that acts outside the lawmaking process.

This legislative veto scheme is unconstitutional for both independent reasons: (1) it violates the separation of powers by usurping the core executive power to execute the law; and (2) it modifies existing Knowles-Nelson appropriations without bicameralism and presentment.

A. While Petitioners can prevail under any standard, the heightened burden for constitutional challenges should not apply in the separation of powers context.

Before analyzing these legislative vetoes more fully, it is worth stepping back to first consider the standard for challenging a statute's validity. Generally, a challenger bears a heavy burden: they must "prove that the statute is unconstitutional beyond a reasonable doubt." *State v. Scruggs*, 2017 WI 15, ¶ 13, 373 Wis. 2d 312, 891 N.W.2d 786 (citation omitted).

While that strict standard is often appropriate, it should not be applied to a separation of powers challenge like this one. When the legislative branch passes a law that allegedly usurps another branch's core power, presuming such a statute to be valid would improperly place a thumb on the legislative branch's side of the scale. Such an unbalanced rule would exacerbate the very danger against which the separation of powers guards: accumulation of power in a single branch. Neutrality should instead rule a case like this.

Justice Scalia made this very point in his famous dissent[3] in *Morrison v. Olson*, 487 U.S. 654 (1988), where he argued that an independent counsel statute improperly transferred executive power to Congress. He granted that in typical statutory challenges, "we ordinarily give some deference . . . to the actions of the political branches." *Id.* at

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[3] Justice Kagan has called it "one of the greatest dissents ever written." *Justice Kagan and Judges Srinivansan and Kethledge Offer Views from the Bench*, Stanford Lawyer (May 30, 2015), https://law.stanford.edu/stanford-lawyer/articles/justice-kagan-and-judges-srinivasan-and-kethledge-offer-views-from-the-bench/. In fact, the *Morrison* majority opinion has been described as "anticanonical" and no longer good law. Adrian Vereule, *Morrison v. Olson Is Bad Law*, LAWFARE (June 9, 2017, 8:14 PM), https://www.lawfaremedia.org/article/morrison-v-olson-bad-law.

704 (Scalia, A., dissenting). But in a separation of powers dispute, "neither [political branch] can be presumed correct." *Id.* Citing the Federalist Papers, he noted how the branches are "perfectly co-ordinate" and therefore none "can pretend to an exclusive or superior right of settling the boundaries between their respective powers." *Id.* at 705 (citing Federalist No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961)).

Accordingly, the "playing field . . . is a level one" in these separation of powers cases. *Id.* Neither branch should receive a presumption that its position is correct.

B. The legislative and executive branches have distinct core powers relating to the spending of appropriated money on statutory programs.

Spending appropriated money on statutory programs is part and parcel of the core executive power to execute the law. To be sure, article VIII, § 2 of the Wisconsin Constitution authorizes the legislative branch to control spending on those programs by enacting appropriation laws. But once the legislative branch does so, the executive branch then has the sole constitutional authority to execute those programs by spending the appropriated money—as courts nationwide have unanimously concluded. Allowing the legislative branch to control the execution of such laws would usurp the core executive power to spend appropriated money according to existing law.

1. The legislative branch's constitutional role in the spending arena is to enact laws appropriating state funds.

The Wisconsin Constitution precisely defines the legislative branch's power over appropriations in article VIII, § 2: "No money shall be paid out of the treasury except in pursuance of an appropriation by law."

In other words, the Legislature has the "general power to spend the state's money *by enacting laws*." *SEIU*, 393 Wis. 2d 38, ¶ 69 (emphasis added); *see also State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 454, 424 N.W.2d 385 (1988) (the "legislative power" includes the "power to pass appropriation bills"); *Flynn v. DOA*, 216 Wis. 2d 521, 547, 576 N.W.2d 245 (1998) ("[T]he legislature has the power to enact laws which appropriate funds."). Similarly, after the Legislature enacts an appropriation bill, it may later pass another law "chang[ing] [the] appropriation if, in [its] estimation, public policy so dictates." *Flynn*, 216 Wis. 2d at 542–43. The Legislature therefore has the authority (subject to the Governor's veto power in article V, § 10) to pass laws creating statutory programs and appropriating money to finance them.

Examining constitutional structure, as the U.S. Supreme Court did in *Chadha*, underscores that the Legislature may control executive branch spending only by enacting law through the legislative process.

In *Chadha*, the U.S. Supreme Court examined the U.S. Constitution to ascertain whether a federal legislative veto that required no bicameralism and presentment enjoyed any support in the constitutional text. The Supreme Court noted that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." 462 U.S. at 955. Because none of the Constitution's "carefully defined exceptions" hinted at a one-house legislative veto, *id.* at 956, the Court invalidated this mechanism of legislative control.

Here, nothing in the Wisconsin Constitution hints at a legislative power to make spending decisions short of passing a law. Subsets of the entire Legislature may, outside the ordinary lawmaking process, potentially affect the legal

rights and duties of those outside its branch only in two clearly defined situations:

- The assembly may impeach state officers and the senate composes the court for the trial of impeached officers (*see* Wis. Const. art. VII, § 1); and
- The two houses may jointly resolve for a potential constitutional amendment to appear on a statewide referendum (*see* Wis. Const. art. XII, § 1).

Accordingly, the Wisconsin Constitution does not authorize the legislative branch to veto executive branch spending outside the lawmaking process. Indeed, the only veto provision our constitution contains—article V, § 10—works in the opposite direction: it authorizes the *Governor* to constrain the *Legislature*, not the other way around. When our state's founders wanted to create a veto power, they knew how to do so and did so expressly. Their silence on any veto power residing in the legislative branch creates a powerful inference that no such power exists.

Beyond the constitutional text, the early statutory history of JCF and its predecessor fiscal committee underscores how this kind of legislative spending veto was not part of our constitution's original public meaning. JCF's predecessor, the Joint Committee on Claims, was formed by law in 1857. *See* 1857 Wis. Laws, ch. 59. Its primary power was to review "[a]ll bills . . . appropriating money." *Id.* § 2. Nothing in its original charter empowered it to veto individual executive branch spending decisions. That committee was transformed into the Joint Committee on Finance in 1911, which had a similar purpose: "[A]ll bills . . . requiring the appropriation of money by the legislature and all bills providing for revenue or relating to taxation shall be referred to said committee before being passed or allowed." *See* 1911 Wis. Laws, ch. 6, § 1. Nothing in that later law empowered the committee to veto individual executive branch spending decisions either.

Accordingly, the early history of this fiscal committee indicates that legislative spending vetoes were a relatively late innovation, not part of our state's original constitutional tradition.

2. The executive branch's constitutional role in the spending arena is to spend appropriated money according to existing law.

Once the Legislature has enacted laws creating and financing a statutory program, the baton passes to the executive branch to carry them out. The executive branch's choices when spending appropriated funds on the program entail a quintessential exercise of core executive power.

That conclusion follows from the basic principles described above in Argument I.C. Put simply, executive power is "power to execute or enforce the law as enacted," *SEIU*, 393 Wis. 2d 38, ¶ 1, and the ability to execute enacted law to address particular circumstances is *the* "essential attribute[ ]" of the executive branch. *Id.* ¶ 104. That covers decisions about how to spend appropriated money just as it does any other decision about how to execute an enacted law.

State high courts across the country have agreed. *See, e.g., McInnish v. Riley*, 925 So. 2d 174, 179 (Ala. 2005) ("[T]he 'exercise [of] discretion in determining when and how to distribute funds' is an 'executive' function." (alteration in original) (citation omitted)); *Alexander v. State By & Through Allain*, 441 So. 2d 1329, 1341 (Miss. 1983) ("Once taxes have been levied and appropriations made, the legislative prerogative ends, and executive responsibility begins to administer the appropriation and to accomplish its purpose, subject, of course, to any limitations constitutionally imposed by the legislature." (citations omitted)); *Anderson v. Lamm*, 579 P.2d 620, 627 (Colo. 1978) ("In order to fulfill [its] duty to faithfully execute the laws, the executive has the authority to

administer the funds appropriated by the legislature for programs enacted by the legislature.").

To be sure, how the executive branch uses its "judgment and discretion," *Palm*, 391 Wis. 2d 497, ¶ 183 (Hagedorn, J., dissenting), when spending appropriated money might be questioned. Legislators might disagree with these choices. But that is a benefit, not a flaw, of the constitutional design: the branches' competing viewpoints avoid the accumulation of power and allow each branch to properly fulfill its role.

C. JCF's power to veto DNR's Knowles-Nelson decisions usurps core executive power and forgoes bicameralism and presentment procedures.

JCF's power to veto DNR's choices about how to execute the Knowles-Nelson program violates these separation of powers principles, both as a matter of substance and procedure. As a matter of substance, these vetoes transfer to JCF the executive branch's core power to execute the program. And as a matter of process, JCF vetoes effectively modify existing Knowles-Nelson appropriations without following bicameralism and presentment.

1. JCF's veto transfers the core executive power to execute the Knowles-Nelson program to the legislative branch.

The Legislature usurps the core executive power of the executive branch through Wis. Stat. § 23.0917(6m) and (8)(g)3. Those statutes allow JCF to block, for any reason whatsoever, individual Knowles-Nelson projects that DNR has chosen to pursue. And this veto power is no idle threat: in recent years, JCF blocked almost a third of projects that DNR had submitted for approval. (Pet. ¶ 29; Pet. Ex. A.)

When JCF can decide which Knowles-Nelson projects can and cannot move forward, it wrests the ultimate administrative power over the program from DNR. Discretion

in carrying out the program is a core power that should rest with the executive branch, not JCF.

JCF's veto power allows the legislative branch to "control the execution of the law itself" and "demot[es] the executive branch to a wholly-owned subsidiary of the legislature." *SEIU*, 393 Wis. 2d 38, ¶ 107; *Gabler*, 376 Wis. 2d 147, ¶ 5 (decrying result where "same persons who have the power of making laws" now also hold "in their hands the power to execute them"). That is the exact kind of "concentration of . . . power[ ]" into the Legislature's "impetuous vortex" that our constitution's separation of powers is meant to block. *SEIU*, 393 Wis. 2d 38, ¶ 4; The Federalist No. 48, *supra*, at 309. Nothing now stands in the way of legislative branch officials from exercising their discretion in a pernicious way that "maximize[s]" the "danger of self-interest." *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 635–36 (W. Va. 1981).

To be sure, Respondents may well view JCF's participation in the Knowles-Nelson program as a salutary check on state spending. But it is "entirely irrelevant" whether "[t]he legislature may see itself as a benign gatekeeper." *SEIU*, 393 Wis. 2d 38, ¶ 107. The separation of powers does not bless one branch's usurpation of another's core power simply because the usurper thinks it will do a better job.

More practically, legislative vetoes like this one diminish the executive branch's ability to do its day-to-day job of executing the law. Even when the veto goes unused, executive officials may hesitate to act in fear that the actual executive-in-charge—the legislative branch—will reject their choices. New Jersey's high court described this dynamic:

> Broad legislative veto power deters executive agencies in the performance of their constitutional duty to enforce existing laws. Its vice lies not only in its exercise but in its very existence. Faced with

> potential paralysis from repeated uses of the veto that disrupt coherent regulatory schemes, officials may retreat from the execution of their responsibilities.

Gen. Assembly v. Byrne, 448 A.2d 438, 444 (N.J. 1982).

Other state legislatures have tried legislative veto schemes like the one at issue here, and their state courts have rejected them for precisely these reasons.

In *Fent v. Contingency Review Board*, 163 P.3d 512, 518 (Okla. 2007), for example, the Oklahoma Supreme Court rejected a law that appropriated money for economic development programs but required the executive branch to obtain legislative committee approval of each project. The court reasoned that any "method by which the Legislature extends its tentacles of control over an appropriation measure beyond the time when the measure stands transformed into enacted law offends the constitutional concept of separated powers and becomes a usurpation of power." *Id.* at 522.

Similarly, the New Hampshire Supreme Court rejected a law that appropriated funds for the acquisition of equipment and property maintenance but required the executive branch to obtain a legislative finance committee's permission for individual contracts in *In re Opinion of the Justs.*, 532 A.2d 195, 195, 197 (N.H. 1987). The court reasoned that "[o]nce the legislature has made an appropriation for the executive branch, the requirement of fiscal committee approval of contracts made pursuant thereto by the executive branch is an unconstitutional intrusion into the executive branch of the government." *Id.*[4]

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[4] Other state high courts agree. *See, e.g., N. Dakota Legis. Assembly v. Burgum*, 916 N.W.2d 83, 103–06 (N.D. 2018) ("After a law is enacted, further fact finding and discretionary decision-making in administering appropriated funds is an executive function."); *Alexander v. State*, 441 So. 2d 1329, 1341 (Miss. 1983) ("The constitution does not permit the legislature to directly or

The legislative vetoes here are not meaningfully different than those rejected in other states. Wisconsin Stat. §§ 23.0917(6m) and (8)(g)3 transfer a core executive power to JCF, and they are facially unconstitutional for that reason alone.

2. JCF's veto power does not comply with bicameralism and presentment.

This JCF veto power is unconstitutional for an independent reason: it allows the legislative branch to modify existing Knowles-Nelson appropriations without passing a law through bicameralism and presentment procedures. The Legislature has already passed laws appropriating money for the Knowles-Nelson program and placed guidelines on that spending. *See generally* Wis. Stat. §§ 20.866(2)(ta), 23.0917. JCF's power to veto DNR's decisions about how to spend that appropriated money effectively amends the existing appropriation. Such a change can be accomplished only by passing a new law—not by simply obtaining the majority vote of a legislative committee.

The Legislature's power to appropriate "by law," Wis. Const. art. VIII, § 2, does not permit it to modify existing appropriations through a legislative committee. Again, this

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indirectly invade the powers and prerogatives of the executive branch of government. The legislature thus may not administer an appropriation once it has been lawfully made and is prohibited from imposing new limitations, restrictions or conditions on the expenditure of such funds, short of full legislative approval."); *In re Opinion of the Justs. to the Governor*, 341 N.E.2d 254, 257 (Mass. 1976) ("[T]o entrust the executive power of expenditure to legislative officers is to violate [the mandated separation of powers] by authorizing the legislative department to exercise executive power."); *People v. Tremaine*, 168 N.E. 817, 822–23 (N.Y. 1929) ("The legislative power appropriates money, and, except as to legislative and judicial appropriations, the administrative or executive power spends the money appropriated. Members of the Legislature may not be appointed to spend the money.").

provision only grants the legislative branch the "general power to spend the state's money *by enacting laws*." *SEIU*, 393 Wis. 2d 38, ¶ 69 (emphasis added). But these JCF vetoes modify existing Knowles-Nelson appropriations by withdrawing the executive branch's statutory authority to spend the appropriated money. The vetoes therefore have the "purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the legislative branch." *Chadha*, 462 U.S. at 952. This triggers the Legislature's obligation to comply with the two express constitutional requirements for lawmaking: bicameral passage in both houses (Wis. Const. art. IV, § 17), and presentment to the Governor for signature or veto (Wis. Const. art. V, § 10).

Rather than use the constitutional lawmaking process, the JCF veto provisions empower a small group of legislators to change the Knowles-Nelson appropriation through anonymous objections to individual projects. If JCF decides to convene to consider such objections, its 16 members have the sole power to decide whether a project proceeds. That small group does not act with the approval of both houses, let alone the Governor. Moreover, Wisconsin voters have no say about who serves on the committee, and most Wisconsinites had no opportunity to vote for (or against) any of its individual members.

This shadowy process illustrates the importance of bicameralism and presentment. Without them, JCF's members may bend to factional interests or special interest pressures without the checks imposed by two-house and gubernatorial approval. As one state high court observed, "[b]y placing the final control over governmental actions in the hands of only a few individuals who are answerable only to local electorates, the committee veto avoids the concept of 'constitutional averaging'" whereby the two legislative houses' different representational bases and terms of office help to cancel out factional interests. *Barker*, 279 S.E.2d at 635; *see*

also H. Lee Watson, *Congress Steps Out; A Look at Congressional Control of the Executive*, 63 Cal. L. Rev. 983, 1037–38 (1975).

Because Wis. Stat. §§ 23.0917(6m) and (8)(g)3 allow JCF to modify existing appropriations outside bicameralism and presentment procedures, they are facially unconstitutional for this independent reason.

D. The main case on which Respondents rely, *J.F. Ahern Co. v. Wisconsin State Building Commission*, does not apply here and, even if it did, it should be overruled.

Once the legislature passes a law appropriating funds to a statutory program, it is the executive branch's core power to decide how to execute that law. The separation of powers prohibits the legislative branch from controlling those executive decisions, especially through a committee and outside the legislative process. Wisconsin Stat. §§ 23.0917(6m) and (8)(g)3. plainly violate those principles.

Respondents' contrary position relies on an inapposite court of appeals case that should be overruled anyway: *J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983).

1. *Ahern* does not apply here.

Ahern did not bless a legislative committee veto over the executive's spending of already-appropriated funds on already-enacted statutory programs. Rather, it addressed a unique context: the construction of state buildings. The iterative process of planning, financing, and constructing state buildings (*see generally* Wis. Stat. § 13.48) bears little resemblance to a program like Knowles-Nelson, where the program is enacted once (perhaps tweaked through later amendments) and then funded periodically through appropriation bills. Granting the legislative branch a shared

role in the state building process, as *Ahern* did, does not mean a legislative committee may veto ordinary executive branch spending decisions.

2. *Ahern* should be overruled.

Even if *Ahern* did apply here, the Court should overrule it. The decision is plainly inconsistent with the Court's modern separation of powers decisions in two ways: it ignored bicameralism and presentment, and it failed to distinguish between core and shared powers.[5]

a. Stare decisis does not apply to court of appeals decisions like *Ahern*.

A preliminary word is necessary about the stare decisis effect of court of appeals decisions. This Court has taken varying approaches to the issue. Sometimes, it says that "the doctrine of stare decisis applies to published court of appeals opinions and requires [the supreme] court 'to follow court of appeals precedent unless a compelling reason exists to overrule it.'" *Manitowoc County v. Samuel J.H.*, 2013 WI 68, ¶ 5 n.2, 349 Wis. 2d 202, 833 N.W.2d 109 (citation omitted); *see also State v. Johnson*, 2023 WI 39, ¶ 19, 407 Wis. 2d 195, 990 N.W.2d 174 (applying stare decisis factors when

[5] In their Petition, Petitioners also asked this Court to overrule *Martinez v. DILHR,* 165 Wis. 2d 687, 478 N.W.2d 582 (1992). But because the Court has not yet assumed original jurisdiction over the legislative vetoes involving administrative rulemaking, it need not address *Martinez*. That case did not address whether legislative committees may micromanage executive branch spending decisions, which is the only issue presented here. However, if the Court takes up the rulemaking issues presented in the Petition, Petitioners will ask the Court to overrule *Martinez*.

overruling court of appeals decision that this Court had "signaled . . . approv[al]" of in three cases[6]).

But other times, the Court emphasizes how it is "not bound by court of appeals decisions" because "[a]s the state's highest court, [it] interpret[s] legal questions independently." *State v. Yakich*, 2022 WI 8, ¶ 31, 400 Wis. 2d 549, 920 N.W.2d 12. Accordingly, "respecting court of appeals precedent is an important consideration, [but] it is not determinative." *State v. Lira*, 2021 WI 81, ¶ 45, 399 Wis. 2d 419, 966 N.W.2d 605. And even *Johnson* noted that the Court "[did] not need a special justification to overrule" the court of appeals decision at issue. 407 Wis. 2d 195, ¶ 19. This latter approach is the better one, given this Court's role as the state's highest court.

b. *Ahern* was wrongly decided and conflicts with current separation of powers doctrine.

Even if a compelling reason is needed to overrule *Ahern*, plenty exist: *Ahern*'s separation of powers analysis is unsound in principle, conflicts with recent decisions of this Court, and is being used to justify a dangerous accumulation of power in the legislative branch.

First, *Ahern* paid no attention to the critical procedural requirements of bicameralism and presentment. There, a commission controlled by the legislature could itself waive competitive bidding requirements and approve or reject construction contracts. 114 Wis. 2d at 104–05. Those actions had the "purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the legislative branch," *Chadha*, 462 U.S. at 952, and so the legislative branch could

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[6] *Ahern* is not like *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), the court of appeals decision that *Johnson* overruled. Unlike *Shiffra*, this Court has not meaningfully relied on the relevant portions of *Ahern*'s analysis in later cases.

not take them (through a commission it controlled) outside the lawmaking process.

Second, as a substantive matter, *Ahern* did not use the "core" and "shared" powers framework that this Court now applies. *See supra* Argument II. Indeed, the decision never mentioned core powers or considered whether they were at issue. *Ahern* should have concluded that the powers it expressly recognized as "executive functions" were *core* executive powers, which would have led it to the opposite result. 114 Wis. 2d at 106.

Not only did *Ahern* fail to determine whether there was any core power at issue, it wrongly borrowed from non-separation of powers cases to find a valid legislative role in the function at issue. *Ahern* concluded that waiving competitive bidding requirements for individual building projects was partly a "legislative function" simply because such decisions implicate the "best interest of the state." *Ahern*, 114 Wis. 2d at 106. To reach this flawed and overbroad conclusion, *Ahern* relied on two cases (*see id.* at 89–90): *In re City of Beloit*, 37 Wis. 2d 637, 155 N.W.2d 633 (1968), and *Gateway City Transfer Co. v. PSC*, 253 Wis. 397, 34 N.W.2d 238 (1948).

But those were not separation of powers cases. Instead, they addressed the proper standard of judicial review for agency and municipal decisions considering the public interest. Such decisions received more deferential judicial review because they could be labelled "legislative" in nature. *In re City of Beloit*, 37 Wis. 2d at 643–44; *Gateway City Transfer Co.*, 253 Wis. at 405. That "legislative" nomenclature in the context of judicial review has nothing to do with whether, for separation of powers purposes, the legislative branch has a constitutional role to play in executing statutory programs like Knowles-Nelson.

And even if *Ahern* had identified arenas of powers that were truly shared, it erred in its application of the shared powers framework. As explained in Argument II.B., a validly shared power requires two things: (1) both branches exercise their core powers in an overlapping manner; and (2) one branch does not block the other from exercising its core power.

Neither was true in *Ahern*. On the first point, the legislative branch was not exercising its core lawmaking power, but rather acting through individual legislators who controlled a commission. And on the second, *Ahern* itself observed that "construction [would] not occur unless a majority of the legislator members on the commission" agreed to it. 114 Wis. 2d at 108. That kind of veto is invalid, even in the shared powers context.

The JCF vetoes here share these same constitutional defects, even if they are analyzed under a shared powers framework. The legislative branch is not blocking Knowles-Nelson projects using its core power to legislate, but rather through individual legislators on a legislative committee. And the vetoes bar the executive branch from proceeding with Knowles-Nelson projects for which funds have already been appropriated. Neither aspect of these vetoes comports with a proper shared powers analysis.

* * *

Through Wis. Stat. §§ 23.0917(6m) and (8)(g)3., the legislative branch has usurped the executive branch's core power to execute the Knowles-Nelson program by spending appropriated money on projects that DNR selects. Moreover, through these vetoes, JCF improperly modifies existing appropriations without following bicameralism and presentment procedures. Those statutes violate the separation of powers and are facially unconstitutional for both independent reasons.

CONCLUSION

Petitioners ask this Court to declare that Wis. Stat. §§ 23.0917(6m) and (8)(g)3. are facially unconstitutional.

Dated this 22nd day of February 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 957-5218 CG
(608) 266-7636 CTR
(608) 294-2907 (Fax)
gibsoncj@doj.state.wi.us
rothct1@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,112 words.

CERTIFICATE OF EFILE/SERVICE

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

Dated this 22nd day of February 2024.

Electronically signed by:

Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845