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No. 2023AP2020-OA

In the Supreme Court of Wisconsin

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 *and* REPRESENTATIVE MARK BORN, *in their official capacities as chairs of the Joint Committee on Finance*; SENATOR CHRIS KAPENGA *and* 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.

On Petition For Original Action Before This Court

BRIEF OF RESPONDENTS AND INTERVENOR-RESPONDENT WISCONSIN STATE LEGISLATURE

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ISSUE PRESENTED

Whether this Court should overturn *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), and *J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983), and hold that that Wis. Stat. §§ 23.0917(6m) and (8)(g)3 facially violate the Wisconsin Constitution's separation of powers.

INTRODUCTION

For decades, Wisconsin courts have approved the Legislature's use of joint committees to review actions by the Governor and agencies, "explicitly authoriz[ing] stronger legislative oversight than other states.'" Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1209 (1999). In *J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983), the Court of Appeals unanimously held that the Legislature did not violate Wisconsin's unique separation-of-powers doctrine by authorizing a legislatively dominated State Building Commission to veto building projects that the Governor wanted, even though the Legislature had already appropriated funding for such projects. Then, this Court in *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), unanimously held that allowing a joint legislative committee to suspend agency rules was constitutional, while citing *Ahern* with approval and rejecting the hostile approach to such committee review that other States and the U.S. Supreme Court had taken under other constitutions.

Following the well-established review structure blessed by the Court of Appeals and this Court in *Ahern* and *Martinez*, the Legislature enacted numerous statutes that allow joint legislative committees to approve or reject certain actions by agencies. One such statute empowers the Legislature's Joint

Committee on Finance ("JCF") to review a limited category of expenditures by the Department of Natural Resources ("DNR") in order to curtail abuses of the Knowles-Nelson Stewardship Program ("Knowles-Nelson" or "the Program") by DNR. This JCF review authority is how the State Building Commission functioned in *Ahern* in all material respects.

Seeking a fundamental shift in this State's governmental structure, Petitioners attack this statutory review scheme as unconstitutional, bringing arguments that *Ahern* and *Martinez* rejected. So while the Governor has downplayed the significance of this case in the press, *see* Rich Kremer, *Evers Sues GOP Lawmakers for Blocking UW Employee Raises, Other 'Legislative Vetoes'*, Wisconsin Public Radio (Oct. 31, 2023),[1] ruling for Petitioners would threaten the system of legislative committee review that has been the law in Wisconsin for decades. Simply put, if JCF's authority to review DNR spending decisions is unconstitutional, so are numerous functions of JCF, the Building Commission, and other longstanding legislative committees.

Ahern and *Martinez* were both correctly decided, as those cogent opinions well explain; but even if this Court now believes that those unanimously decided cases may have been wrong in some respect, this is a paradigmatic case for application of *stare decisis*. Reliance interests are at their

[1] Available at https://www.wpr.org/education/evers-sues-gop-lawmakers-blocking-uw-employee-raises-other-legislative-vetoes (all websites last visited Mar. 13, 2024).

zenith when this Court and the Court of Appeals for decades tell the Legislature and Governor how they can organize their affairs and work in tandem, and those branches make political compromises and public policy on that basis. The statutes at issue here are just such an example. The Legislature could have severed DNR's management of the Knowles-Nelson Program entirely, but, relying upon *Ahern* and *Martinez*, retained DNR's authority subject to JCF's limited review. It would inflict a grave separation-of-powers insult to these co-equal branches for the judiciary to undercut these decades-long systems now, allowing agencies to have unchecked authority that the Legislature would either never have granted them or would have withdrawn without *Ahern* and *Martinez*.

ORAL ARGUMENT AND PUBLICATION

This Court has scheduled oral argument for this case for April 17, 2024. By granting Petitioners' Petition For Original Action, this Court has indicated that this case is appropriate for publication.

STATEMENT OF THE CASE

A. Wisconsin's Legislative Joint Committees Review Provisions In Historical Context

The Wisconsin Legislature has long empowered its committees to oversee and review agency decisions, particularly regarding expenditures of state funds, while vesting that authority in JCF or other joint committees.

1. The Joint Committee On Finance

The JCF's origins date back to our State's Founding. Less than a decade after statehood, the Legislature created the Joint Committee on Claims, to which "[a]ll bills, accounts, or bills appropriating money presented to the Legislature, shall be referred . . . before being allowed." 1857 Wis. Act 59, § 2; *see* Dave Loppnow, Wis. Legis. Fiscal Bureau, *Informational Paper #81: Joint Committee on Finance* 5 (Jan. 2023) ("*Info. Paper #81*").[2] Decades later, Chapter 6 of the Laws of 1911 transformed the Joint Committee on Claims into JCF and expanded its purview to include all bills containing appropriations, providing for revenue, or relating to taxation. *See* 1911 Wis. Act 6, § 1; *Info. Paper #81*, *supra*, at 5. In 1913, the Legislature created the State Board of Public Affairs ("SBPA") to scrutinize agency spending. *Info. Paper #81*, *supra*, at 7; Wis. Act 728, Laws of 1913, § 1.[3] SBPA was composed of nine members, including the Governor and four legislators. *Info. Paper #81*, *supra*, at 7. SBPA had "such supervision of every public body as shall be necessary to secure uniformity and accuracy of accounts as herein provided." Wis. Act 728, Laws of 1913, § 1. The Secretary of the SBPA acted as the Secretary of JCF beginning in 1915. *Info. Paper #81*, *supra*, at 8. In 1929, the Legislature

[2] Available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0081_joint_committee_on_finance_informational_paper_81.pdf.

[3] Also available at https://books.google.com/books?id=CMs4AAAAIAAJ.

bolstered JCF's oversight authority, requiring that the Governor deliver a bill with general fund spending recommendations, which "shall be introduced without change by the joint committee on finance . . . and when so introduced shall be referred to the joint committee on finance." *Id.* at 10–11; 1929 Wis. Act 97, § 2; *see* Wis. Stat. § 16.47.

In response to the Great Depression's economic challenges, the Legislature authorized the Emergency Board on Government Operations—comprised of the Governor and the cochairs of JCF—to reduce any state appropriation by "such amount as it deems feasible" up to 20%. *Info. Paper #81*, *supra*, at 11; 1931–32 Wis. Laws Spec. Sess., Act 30, § 1.[4] Agencies marked for reductions received notice and an opportunity to be heard by the Emergency Board. 1931–32 Wis. Laws Spec. Sess., Act 30, § 2. The Legislature increased the authority to reduce agency appropriations to 25% for the 1933–35 biennium and thereafter. *Info. Paper #81*, *supra*, at 11. Additionally, the Emergency Board, through the concurrence of the Governor and one legislative board member, could approve or deny all construction projects by the Board of Control, which later became the Department of Corrections. Wis. Stat. § 20.17(1)(d) (1929).[5] In 1959, the Legislature folded the Emergency Board into the Board on Government Operations ("BOGO"), composed of seven

[4] Available at https://docs.legis.wisconsin.gov/1931/related/acts/31ssact030.pdf

[5] Also available at https://books.google.com/books?id=HABPAQAAIAAJ.

members of the Legislature. 1959 Wis. Act 228, §§ 3, 71. BOGO also had the power to supplement appropriations or transfer them between agencies. *Id.* These powers were subject to a veto by the Governor which could be overridden by five of seven members of BOGO. *Id.*

It was during the 1970s and 1980s—at a time when the Legislature was becoming a full-time body and budget bills were being transformed into highly complex policy documents—that JCF began exercising its authority to review agency actions. *Info. Paper #81*, *supra*, at 16. Chapter 39 of the Laws of 1975 abolished BOGO and transferred its duties to JCF, including the authority to make appropriation supplementations and transfer agency funding. *Id.* at 17; *see* Wis. Stat. § 13.101. JCF still maintained authority to reduce agency appropriations during times of fiscal emergency. *Info. Paper #81*, *supra*, at 11, 17; *see* Wis. Stat. § 13.101(6)(a). Further, 1981 Wisconsin Act 20 granted JCF passive review approval authority over agency staffing through the creation or deletion of program revenue-funded positions and expenditure authority, while certain provisions of 1983 Wisconsin Act 27 codified JCF's authority to create or abolish general fund or segregated fund positions in any department, board, commission, or agency. *Info. Paper #81*, *supra*, at 17–18; *see* Wis. Stat. §§ 13.101(2), 16.50(3)(b), 16.505(1)(b).

Today, JCF maintains a wide array of powers to review the budgetary process, the appropriation and adjustment of state government positions, the introduction of bills, and—as

relevant here—the approval of various expenses, with well over 100 statutory programs requiring JCF approval. *See Info. Paper #81*, *supra*, at 26–37. To take just a couple of examples, JCF has the authority to review:

- any conservation easement purchase by the Department of Agriculture exceeding $750,000, Wis. Stat. § 93.73(6h);
- Department of Administration ("DOA") budgets in excess of $2,000 annually for special and executive committees created by statute or executive order, *id.* § 16.40(14);
- certain acquisitions of information technology resources that the DOA considers major or likely to result in a substantive change in service, *id.* § 16.971(3)(a);
- any expenditures of the Department of Corrections for building construction or purchase of equipment for new prison industries from the prison industries account, *id.* § 20.410(1)(km);
- the expenditure of all federal monies received by the Judicial Commission, *id.* § 20.665(1)(mm);
- and any expenditure in excess of $10,000 for any gubernatorial portrait as arranged by the Arts Board of the Department of Tourism, *id.* § 41.53(1)(g).

And so on. *See Info. Paper #81*, *supra*, at 26–37. JCF's "on-going review of agencies' spending plans" makes it "the Legislature's fiscal watchdog." *Info. Paper #81*, *supra*, at 4.

2. Other Legislative Committees

JCF is just one of several legislative committees that the Legislature empowered to exercise the Legislature's oversight over agencies.

Through 1953 Wisconsin Act 331, § 4 the Legislature gave itself the power to disapprove of any rule by joint resolution, and then continued to oversee administrative rulemaking through the advisory powers delegated to a legislative committee in 1955 Wisconsin Act 221, §§ 12–13. That committee later evolved into the Joint Committee for Review of Administrative Rules ("JCRAR") in 1965, 1965 Wis. Act 659, §§ 1–2 (providing JCRAR with a rule-suspension power through the creation of Wis. Stat. § 13.56, which was later amended and recodified as Wis. Stat. §§ 227.19(5), 227.26(d)). JCRAR continues to oversee the rulemaking process through a variety of mechanisms, including its ability to direct agencies to hold preliminary hearings on proposed rules, Wis. Stat. §§ 227.135(2), 227.136, 227.137(4m), 227.138, 227.19(5)(b)3, object to or request modifications of proposed rules, *id.* § 227.19(5)(c), (d), (dm), and suspend existing rules, *id.* § 227.26(2)(d), (im). In 1977, "most laws authorizing rulemaking" included provisions requiring approval by a senate or assembly committee. George Bunn & Jeff Gallagher, *Legislative Committee Review of Administrative Rules in Wisconsin*, 1977 Wis. L. Rev. 935, 965 (1977); *see, e.g.*, Wis. Stat. §§ 146.35(8) (1975) (emergency medical services); 33.06(l) (1975) (financial aids for lake rehabilitation); 144.50(10) (1975) (DNR rules concerning

certain environmental contaminants); 146.309(2) (1975) (rights of residents in certain state-licensed facilities); 194.41(4) (1975) (motor carrier insurance); 49.19(5)(a)(2) (1975) (county welfare department earned income provision); 83.42(9) (1975) (DOT rustic roads board rules); 101.955 (1975) (DILHR rules); 110.075(6) (1975) (Department of Motor Vehicles rules).

The Joint Committee on Employment Relations ("JCOER"), established in 1972, approves state employee compensation plans and contracts with represented state employees. 1971 Wis. Act 270, § 1; Wis. Stat. §§ 13.111(2), 16.53(1)(d)1, 20.916, 20.917, 20.923; *see generally* Paul Onsager, Wis. Legis. Fiscal Bureau, *Informational Paper #96: State and Local Government Employment Relations Law (Under 2011 Acts 10 and 32)* 6 (Jan. 2015).[6] Every other year, the DOA administrator submits proposed modifications to the state employee compensation plan to JCOER. Wis. Stat. § 230.12(3). JCOER may approve the proposal subject to a veto by the Governor, which veto may be overridden by six members of JCOER. *Id.* § 230.12(3)(b).

Another example is the State Building Commission, first created in 1949, which includes the Governor and six members of the Legislature. 1949 Wis. Act 563, § 1; *see* Sydney Emmerich, Wis. Legis. Fiscal Bureau, *Informational*

[6] Available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2015/0096_state_and_local_government_employment_relations_law_informational_paper_96.pdf.

Paper #83: State Building Program 1 (Jan. 2023) ("*Info. Paper #83*").[7] A 1957 Act granted the Commission the authority to approve or deny all construction projects exceeding $15,000. 1957 Wis. Act 463, § 4. Today, the Commission also has the power to approve or deny all public construction contracts for building projects exceeding $600,000 (increased from $300,000 in 2023), acquire land in certain spaces in the City of Madison, and sell or lease state property (if approved by JCF). Wis. Stat. § 13.48(2)(a), (10), (14), (17), (18); *Info. Paper #83*, *supra*, at 1–2, 5.

B. The Knowles-Nelson Stewardship Program

The Legislature created the Knowles-Nelson Stewardship Program in 1989 to acquire land for nature-based recreation and the protection environmentally sensitive areas. 1989 Wis. Act 31; *see* Eric R. Helper, Wis. Legis. Fiscal Bureau, *Informational Paper #66: Warren Knowles-Gaylord Nelson Stewardship Program* 1 (Jan. 2023) ("*Info. Paper #66*")[8]; Eric R. Helper, Wis. Legis. Fiscal Bureau, *Informational Paper #61: Warren Knowles-Gaylord Nelson Stewardship Program* 1 (Jan. 2019).[9] The Program

[7] Available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0083_state_building_program_informational_paper_83.pdf.

[8] Available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0066_warren_knowles_gaylord_nelson_stewardship_program_informational_paper_66.pdf.

[9] Available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2019/0061_warren_knowles_gaylord_nelson_stewardship_program_informational_paper_61.pdf.

authorizes DNR to acquire land or provide grants to local governments and nonprofit organizations for land acquisition and property development through both the segregated conservation fund and the issuance of state debt generally in the form of 20-year tax exempt bonds. *Info. Paper #66*, *supra*, at 1, 14; Wis. Stat. §§ 23.0917(3), (5m), 23.0953. These bonds are backed by the full faith and credit of the State of Wisconsin, such that the State must use its taxing power to repay the debt and debt service payments on stewardship bonds are primarily funded from general purpose revenue. *Info. Paper #66*, *supra*, at 1; Wis. Stat. § 20.866(2).

While the Legislature enacted the original form of the Program to run for only ten years, it has since reauthorized the Program four times with each iteration adjusting the Program's annual allotment and bonding authority. Wis. Stat. §§ 23.0915, 23.0917; *Info. Paper #66*, *supra*, at 1–2; *see* 1999 Wis. Act 9; 2007 Wis. Act 20; 2019 Wis. Act 9; 2021 Wis. Act 58. Currently, the Program's annual allotment is $33.25 million, while 2021 Wisconsin Act 58 provided $90 million in new bonding authority and authorized DNR to use an additional $11 million in unobligated bonding authority. *Info. Paper #66*, *supra*, at 1–2; *see* Wis. Stat. §§ 20.005(2), 20.866(2)(ta). Cumulatively since 2001, the Program's total statutorily authorized bonding authority is approximately $1.179 billion. *Info. Paper #66*, *supra*, at 2.

Unfortunately, the DNR has mismanaged the Knowles-Nelson Stewardship Program in several respects. DNR failed

to control spending for the Program, such that by 2018, the State required $93.6 million to cover Program debt payments—over triple the Program's current annual allotment. *Public Property: State Faces Deadline for Conservation*, 87 Wis. Taxpayer 6, 1 (June 2019)[10]; *State Faces Deadline for Conservation*, Wis. Pol'y F. (June 2019)[11]; *see Info. Paper* # 66, *supra*, at 2 (providing current allotment as $25.25 million). Further, counties and townships raised concerns about certain projects DNR has selected. These local objections are particularly important because Wisconsin's publicly held land is unevenly distributed, with most of the land, and the resulting burden, concentrated in the northern highland region. *State Faces Deadline for Conservation*, *supra*, at 2 & Fig. 2. For example, the Town of Clay Banks passed a resolution explaining how a project, "located in our pleasant rural living environment, would be a conflicting land use" and "would seriously impact the character of our agricultural community." Debra Fitzgerald, *Clay Banks Objects to Land Trust Purchase*, Door Cnty. Pulse (Feb. 22, 2024).[12] The Towns of Sugar Camp and Monico also passed resolutions opposing an easement DNR purchased under the Program, and, in response, then-Secretary of the DNR Adam

[10] Available at https://wispolicyforum.org/wp-content/uploads/2019/06/Taxpayer_19_06.pdf.

[11] Available at https://wispolicyforum.org/research/public-property-state-faces-deadline-for-conservation/.

[12] Available at https://doorcountypulse.com/clay-banks-objects-to-land-trust-purchase/.

Payne stated that local governments "should be asking" whether such purchases affect "future economic opportunities" and "impact their tax base." John Burton, *Natural Resources Board Didn't Hear of Some Town Concerns Before Vote on Pelican River Forest Project*, WXPR (Apr. 14, 2023).[13] Yet DNR failed to consider Sugar Camp's and Monico's resolutions due to a "breakdown in . . . department communications." *Id.* Thus, for these reasons and more, JCF denied the easement under Wis. Stat. § 23.0917(6m). Minutes of the Meeting Under s. 13.10, Joint Committee on Finance (Apr. 18, 2023).[14]

Given the Program's potential for massive fiscal impacts, the Legislature provided for JCF oversight. In particular, 2007 Act 20 added the requirement that JCF must approve, under a 14-day passive-review process, any Program-funded land acquisition project in excess of $750,000, effective July 1, 2010, *see* Eric Rushmer, Wis. Legis. Fiscal Bureau, *Informational Paper #60: Warren Knowles-Gaylord Nelson Stewardship Program* 22–23 (Jan. 2009).[15] Specifically, under Wis. Stat. § 23.0917(6m)(a), DNR "first notifies [JCF] in writing" of a proposal, then JCF is required

[13] Available at https://www.wxpr.org/energy-environment/2023-04-14/natural-resources-board-didnt-hear-of-some-town-concerns-before-vote-on-pelican-river-forest-project.

[14] Available at https://doa.wi.gov/budget/SBO/13.10%20Minutes%202023%2004%2018.pdf.

[15] Available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2009/0060_warren_knowles_gaylord_nelson_stewardship_program_informational_paper_60.pdf.

to notify DNR within the following 14 working days whether JCF "has scheduled a meeting to review the proposal," otherwise DNR may obligate the funds. *Id.* If JCF does give notice of a meeting, "the department may obligate the moneys only upon approval of the committee." *Id.*

2011 Act 32 later reduced the threshold for JCF approval to cover any land acquisition entailing the encumbrance or expenditure of more than $250,000, *Info. Paper #66*, *supra*, at 15; Wis. Stat. § 23.0917(5m), (6m). Further, DNR now may not split up larger projects to avoid the $250,000 threshold. Wis. Stat. §§ 23.0915(6m)(dm); *Info. Paper #66*, *supra*, at 6. Through 2013 Act 20, the Legislature required that JCF approve any land acquisition "outside of a project boundary" established before May 2013, Wis. Stat. § 23.0917(8)(g)3, along with any acquisition of land if "the amount of land owned by this state that is under [DNR's] jurisdiction exceeds 1.9 million acres," *id.* § 23.0917(6m)(dg)2. Finally, 2015 Act 55 extended the 14-day passive review process to cover all fee simple land acquisitions north of State Trunk Highway 64. *Id.* § 23.0917(6m)(dr); *Info. Paper #66*, *supra*, at 16.

C. Factual And Procedural Background

On October 31, 2023, Petitioners filed their Petition for Original Action, alleging that the statutory authority of three legislative committees infringes upon the Wisconsin Constitution's separation of powers. Pet.34–40. On February 2, 2024, this Court granted "the petition for leave to commence an original action . . . solely with respect to the first

issue," Feb. 2, 2024 Court Order at 1, *Evers v. Marklein*, No.2023AP2020-OA—namely, whether JCF review provisions in Wis. Stat. §§ 23.0917(6m) and (8)(g)3 facially violate the Wisconsin Constitution's separation of powers, Pet.6. This Court further ordered that the second and third issues in the Petition—relating to statutory provisions governing JCOER and JCRAR—are to be "held in abeyance pending further order of the court." Feb. 2, 2024 Court Order at 2, *Evers v. Marklein* No.2023AP2020-OA.

ARGUMENT

I. Wis. Stat. §§ 23.0917(6m) And (8)(g)3 Are Facially Constitutional Under *Martinez* And *Ahern*

"There is a strong presumption that a legislative enactment is constitutional." *Martinez*, 165 Wis. 2d at 695 (quoting *State v. Sher*, 149 Wis. 2d 1, 10, 437 N.W.2d 878 (1989)). "A 'facial' challenge to the constitutionality of a statute means that the challenger must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional." *State v. Cole*, 2003 WI 112, ¶ 30, 264 Wis. 2d 250, 665 N.W.2d 328 (citation omitted). Any doubt "must be resolved in favor of constitutionality." *Chappy v. LIRC*, 136 Wis. 2d 172, 185, 401 N.W.2d 568 (1987) (citation omitted). Petitioners have brought a facial challenge, not a more limited as-applied challenge, requiring them to show that the challenged provisions cannot lawfully "be enforced 'under any circumstances.'" *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 33, 383 Wis. 2d 1, 914 N.W.2d 678

(citation omitted). As the Legislature explains below, Sections 23.0917(6m) and (8)(g)3 survive the facial constitutional challenge here.

A.1. The Wisconsin Constitution "vest[s] legislative power in the assembly and senate, executive power in the governor and lieutenant governor, and judicial power in the courts, respectively." *Ahern*, 114 Wis. 2d at 101 (citation omitted). Pursuant to Wisconsin's unique "implicit[ ]" doctrine of separation of powers, a branch violates the separation of powers when it "interferes with a constitutionally guaranteed 'exclusive zone' of authority vested in another branch." *Martinez*, 165 Wis. 2d at 696–97 (citations omitted). Outside of this "exclusive zone," "Wisconsin courts interpret the Constitution as requiring shared and merged powers," "rather than an absolute, rigid and segregated political design." *Id.* (citation omitted). Under shared powers, "one branch of government may exercise power conferred on another," so long as it "does not unduly burden or substantially interfere with the other branch's role and power." *Id.* at 696 (citation omitted). As *Ahern* explained, this Court has applied the separation of powers "liberally" in the shared powers context, explaining that the Constitution "envisions a government of separated branches sharing certain powers." 114 Wis. 2d at 102–03 (quoting *State v. Holmes*, 106 Wis. 2d 31, 43, 315 N.W.2d 703 (1982)). This Court in *Martinez* cited with approval *Ahern*'s

"liberally applied" characterization of this Court's approach. 165 Wis. 2d at 701 n.13 (quoting *Ahern*, 114 Wis. 2d at 102).

This Court has identified several core powers of the Legislature and the Governor in determining the limits of Wisconsin's "liberally applied" separation-of-powers doctrine. *Id.* "[T]he legislature is tasked with the enactment of laws," while the Governor must "'take care that the laws be faithfully executed.'" *Serv. Emps. Int'l Union, Local 1* ("*SEIU*") *v. Vos*, 2020 WI 67, ¶ 31, 393 Wis. 2d 38, 946 N.W.2d 35 (citing Wis. Const. art. IV, § 17; *id.* art. V, § 4). So, while the Legislature's core lawmaking power cannot be delegated to any other branch, the Legislature may delegate to "agencies . . . the power to promulgate rules within the boundaries of enabling statutes passed by the legislature." *Koschkee v. Taylor*, 2019 WI 76, ¶ 15, 387 Wis. 2d 552, 929 N.W.2d 600 (citations omitted).

The Constitution also charges the Legislature with maintaining the State's spending power over both the State's sovereign expenses, Wis. Const. art. VIII, § 2, and "other sources of income," *id.* § 5. Thus, the Constitution "empower[s] the legislature . . . to make policy decisions regarding . . . spending" for the State, *Flynn v. Dep't of Admin.,* 216 Wis. 2d 521, 540, 576 N.W.2d 245 (1998), while the Legislature's general lawmaking authority includes the "power to spend the [S]tate's money by enacting laws," *SEIU,* 2020 WI 67, ¶¶ 68–69 (citing Wis. Const. art. IV, § 17).

Agencies have no "exclusive zone" of constitutional authority under Wisconsin's system of separation of powers. Rather, because "the legislative branch and the executive branch share inherent interests in the legislative creation and oversight of administrative agencies," any consideration of "the 'exclusive zone' of authority is not relevant" to agencies. *Martinez*, 165 Wis. 2d at 697. In other words, because "agencies are creations of the legislature" and "can exercise only those powers granted by the legislature," burdens or limits imposed on their authority are viewed as either outside the traditional separation-of-powers analysis, or require only a check to ensure "adequate standards for conducting the allocated power are in place." *Id.* (citations omitted); *see also Koschkee*, 2019 WI 76, ¶ 14. Since the "very existence of [an] administrative agency . . . is dependent upon the will of the legislature . . . [a]n administrative agency does not stand on the same footing as a [constitutionally created branch of government] when considering the doctrine of separation of powers." *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 56–57, 158 N.W.2d 306 (1968).

2. Given the unique relationship between the Legislature and administrative agencies, both this Court and the Court of Appeals have long interpreted the Constitution to allow legislative oversight of agency actions. As scholars have explained, "[c]ourts in . . . Wisconsin have explicitly authorized stronger legislative oversight than other states." Rossi, *supra*, 52 Vand. L. Rev. at 1209. For over 40 years,

beginning with the Court of Appeals' decision in *Ahern* and continuing with this Court's decision in *Martinez*, Wisconsin's jurisprudence has acknowledged a system of shared powers, including broad legislative committee authority to oversee agency actions.

In *Ahern*, the plaintiffs challenged the constitutionality of the State Building Commission—a legislative committee comprising "three assemblymen, three senators, the governor (who serves as chairperson), and a citizen appointee of the governor"—as violating the separation of powers. 114 Wis. 2d at 99–100, 106. The plaintiffs argued that the Building Commission's authority to "select sites for public buildings, to administer construction of such buildings[,] to lease the buildings," and to "waive the competitive bidding requirements" on construction projects amounted to "executive powers" that only the Governor could exercise. *Id.* at 100. The Court of Appeals rejected this rigid understanding of Wisconsin's doctrine of implied separation of powers, explaining that the Constitution envisions a "pragmatic approach" that "permits a blending or sharing of powers among the three branches of government," only "subject to the limitation against 'unchecked power.'" *Id.* at 101, 103–04 (citation omitted). *Ahern* acknowledged that the Commission's "right of prior approval over construction contracts" granted it "immense control over state construction" and was "an executive power," thereby permitting the majority legislative members of the Building

Commission "to exercise executive powers to the exclusion of the executive branch," but held that this did not "violate the separation" of powers. *Id.* at 104–07. Because the Governor could also exercise a veto to stop a construction project that the legislative members wanted to approve, the Court of Appeals held that this framework was a "cooperative venture between the two governmental branches" that did not violate the separation of powers. *Id.* at 108.

Then, in *Martinez*, this Court specifically relied upon *Ahern*'s separation-of-powers reasoning in further affirming the constitutionality of legislative committees' reviews of agency actions. There, the Department of Industry, Labor and Human Relations ("DILHR") promulgated a rule that "created a new category of employee to whom employers could pay, for a 120–day repeating probationary period, a sub-minimum wage of twenty cents an hour less than the regular minimum wage," but JCRAR voted to suspend and amend the rule by shortening the probationary period to three days. *Martinez*, 165 Wis. 2d at 692–93. Interpreting the Constitution's "implicit[ ]" separation of powers and rejecting the approaches of other "states that apply 'express' separation of powers provisions," this Court held that JCRAR's authority to suspend a rule was constitutional because "[i]t is appropriate for the legislature to delegate rule-making authority to an agency while retaining the right to review any rules promulgated under the delegated power," and "a legitimate practice for the legislature, through JCRAR, to

retain the ability to suspend a rule which is promulgated in derogation of the delegated authority." *Id.* at 696, 698, 700–01 (citations omitted). Although the Court noted that a full legislative process was necessary to "make permanent a rule suspension," such "full involvement of both houses of the legislature and the governor" was not needed for JCRAR's temporary rule suspension at issue. *Id.* at 699–700.

Finally, in *SEIU*, this Court unanimously reaffirmed *Martinez*'s holding on this point, reiterating the conclusion that the Legislature maintains the constitutional authority to review agency rulemaking and suspend rules after the agency promulgates them. 2020 WI 67, ¶¶ 78–83. After citing "the framework" of *Martinez* and *Ahern* explicitly, the Court held that Act 36, § 64—"which allows [JCRAR] to suspend a rule more than once"—was also facially unconstitutional, including because it "fits comfortably with the unchallenged reasoning of *Martinez*." *Id.* ¶¶ 75, 78–83.

In all, *Ahern* and *Martinez* (and *SEIU*) held that the Wisconsin Constitution envisions cooperative action between the branches, including legislative oversight of agency actions in all instances except those involving truly *core* executive powers. The Constitution "permits a blending or sharing of powers," only "subject to the limitation against 'unchecked power.'" *Ahern,* 114 Wis. 2d at 103 (citation omitted). The Legislature and Governor may enter into "cooperative venture[s] between the two governmental branches," even if such ventures would allow the Legislature to, from time to

time, "exercise executive powers to the exclusion of the executive branch." *Id.* at 107–08. Thus, Wisconsin's separation of powers allows "the legislature to delegate rule-making authority to an agency while retaining the right to review any rules promulgated under the delegated power," and "it is a legitimate practice for the legislature, through [a joint committee], to retain the ability to suspend [agency action] which is promulgated in derogation of the delegated authority." *Martinez,* 165 Wis. 2d at 698, 701. And, in suspending such action, the joint committee need not comply with bicameralism and presentment. *Id.* at 699–701; *see generally Ahern*, 114 Wis. 2d 69.

B. Applying these principles to the present case, JCF's authority to review certain actions by DNR under Knowles-Nelson is constitutional. The Program authorizes DNR to acquire land or provide local governments grants to acquire land across the State for use in outdoor recreation and to protect environmentally sensitive areas. *Supra* pp.18–19. JCF may review DNR's decisions in two scenarios. *Supra* pp.21–22. First, whenever DNR seeks to expend or encumber more than $250,000 for a project, DNR must submit that plan to JCF for a 14-day passive-review process. Wis. Stat. § 23.0917(5m), (6m). Second, JCF must approve any acquisition of land outside the boundaries of the stewardship projects that existed on or before May 1, 2013. Wis. Stat. § 23.0917(8)(g)3. Both of these JCF review provisions survive

Petitioners' facial separation-of-powers challenge under *Martinez* and *Ahern*.

1. As an initial matter, JCF's review authority falls within the borderlands of shared powers under Wisconsin's separation-of-powers doctrine. DNR, like all agencies, was created by statute. Wis. Stat. § 15.34. Therefore, "the legislative branch and the executive branch share inherent interests in the legislative creation and oversight of administrative agencies," so any concern about "'exclusive zone[s]' of authority is not relevant" in this case, since DNR cannot maintain any such exclusive zone of authority independent of the Legislature's constitutionally permitted oversight. *Martinez*, 165 Wis. 2d at 697; *see* Wis. Stat. §§ 23.0917(6m), (8)(g)3. Indeed, the Program creates a "compulsory unanimity" between DNR and the Legislature in the approval of certain encumbrances and expenditures on land, which "compulsory unanimity" is necessarily a shared power. *Ahern*, 114 Wis. 2d at 108. Under both Wis. Stat. § 23.0917(6m) and Wis. Stat. § 23.0917(8)(g)3, DNR is prohibited from "obligating funds" for particular purposes without JCF review, but DNR is solely responsible for bringing proposals to JCF. So, both JCF and DNR require the other to agree to a Knowles-Nelson project, thus creating the "compulsory unanimity" discussed in *Ahern*. 114 Wis. 2d at 108.

Even if JCF's review authority could possibly invade an executive-branch power in some instances, it is necessarily a

shared power in numerous others, given the Legislature's constitutional power of the purse. The Wisconsin Constitution authorizes the Legislature to maintain the State's spending power over both sovereign expenses, Wis. Const. art. VIII, § 2, and "other sources of income," *id.* art. VIII, § 5. Put another way, "the constitution gives the legislature the general power to spend the state's money by enacting laws." *SEIU*, 2020 WI 67, ¶ 69. This Court has recognized that the Legislature has a more general "interest in the expenditure of state funds" which in *SEIU* provided the means to "justify the authority to approve certain settlements" proposed by DOJ. *Id.*

The JCF review provisions at issue here are part of the Legislature's constitutional authority over "the expenditure of state funds," *id.*, and the public fisc more generally, Wis. Const. art. VIII, §§ 2, 5. To that end, Wis. Stat. §§ 23.0917 (6m), which requires DNR to clear passive review by the JCF, applies only to expenditures exceeding a high dollar amount—$250,000—implicating the Legislature's "interest in the expenditure of state funds," given the high-value sums at stake. *SEIU*, 2020 WI 67, ¶ 69. Then, Wis. Stat. § 23.0917(8)(g)3 requires DNR to receive affirmative approval for purchases in new areas not already covered by the Program—significant expenditures that similarly invoke the Legislature's "interest in the expenditure of state funds," *SEIU*, 2020 WI 67, ¶ 69, given that the expansion of the

Knowles-Nelson Program to new lands is also likely to require substantial outlays.

Since JCF's review authority is a shared power between the branches, at least in some applications, it is constitutional for all the reasons this Court and the Court of Appeals unanimously upheld the legislative review provisions in *Martinez* and *Ahern*—namely that they amount to a "cooperative venture between the two governmental branches," *Ahern*, 114 Wis. 2d at 107–08, which include "proper standards or safeguards," *Martinez*, 165 Wis. 2d at 701 (citation omitted). The Knowles-Nelson Program's JCF review procedures impose the same sort of "compulsory unanimity" that serves to make the Program "a cooperative venture between the two governmental branches," *Ahern*, 114 Wis. 2d at 108, that *Ahern* found constitutional.

Notably, *Ahern* rejected the argument that the Building Commission's prior approval right over construction contracts was the same as "'administering' the construction of state buildings." *Id.* at 105. Instead, the Court of Appeals held that prior approval is the "right solely to prevent construction not meeting the commission's approval at the contract stage, not a right to administer or supervise the construction itself." *Id.* So, even while construction projects and the right to approve and deny them were deemed "an executive function," the Commission's power requiring the unanimous consent of the governor and legislators was shared. *Id.* at 105–06. JCF review provisions for Knowles-Nelson projects are

constitutional for much the same reasons: JCF does not administer Knowles-Nelson projects, but only has the shared power of passive review. And, at most, there is compulsory unanimity between the branches for certain Knowles-Nelson projects because DNR must select projects and JCF must approve them. *See* Wis. Stat. §§ 23.0917(6m)(a), (8)(g)3. Therefore, JCF's review of Knowles-Nelson projects is a shared power with cooperative input from both branches.

Further, the program establishes requirements for Knowles-Nelson projects to guide the decisionmaking process for both of the branches engaged in this cooperative endeavor, no different than in *Ahern* and *Martinez*. Land acquisitions may be made "for the purposes specified in s. 23.09(2)(d)," which include acquisitions for "state forests," "state parks for the purpose of preserving scenic or historical values or natural wonders," "public shooting, trapping or fishing grounds or waters," and 13 other similarly specific purposes. Wis. Stat. § 23.0917(3)(a). These purposes guide the selection and review of Knowles-Nelson projects, providing "standards or safeguards." *Martinez*, 165 Wis. 2d at 701.

Because there are at least some constitutional applications of JCF's review authority, Petitioners' and Intervenor-Petitioner's facial challenge to this authority necessarily fails. *Cole*, 2003 WI 112, ¶ 30. The Legislature maintains a significant constitutional interest in the public fisc, via the Legislature's constitutional power of the purse, Wis. Const. art. VIII, §§ 2, 5; *Flynn*, 216 Wis. 2d at 540. That

interest is implicated by DNR's Knowles-Nelson decisions, as the Program allows DNR to expend or encumber large sums of state money. *Supra* pp.18–20. Thus, in at least certain cases, DNR decisions to buy new lands under the Knowles-Nelson Program will implicate the Legislature's constitutional interest in the State's funds, sufficient to show that there are at least some "possible applications or interpretations of [Wis. Stat. §§ 23.0917(6m) and (8)(g)3] which would be constitutional," thwarting this facial challenge. *Cole*, 2003 WI 112, ¶ 30 (citation omitted). For example, if DNR wanted to use all $33.25 million of its bonding authority to purchase all the open forest land in a northern county to clearcut and turn into a park, that would require a significant expenditure and implicate the Legislature's interest in overseeing the expenditure of State funds. At an absolute minimum, Petitioners and Intervenor-Petitioner have failed to overcome the "strong presumption that [JCF's review authority] is constitutional." *Martinez*, 165 Wis. 2d at 695 (citation omitted).

The practicalities of modern legislation and administrative agencies, and an understanding of separation of powers in this State, further supports finding these JCF review provisions constitutional. Modern governance frequently involves regulatory agencies administering broad legislative programs. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010); Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux:*

The Administrative State Under Siege, 131 Harv. L. Rev. 1, 7 (2017). The Legislature must remain "accountable" for "governing the public welfare," as a means to "exercise a significant check on the activities of non-elected agency bureaucrats." *Martinez*, 165 Wis. 2d at 701. Within this framework and acknowledging the realities of government agencies implementing important statutory regimes, the Legislature must be able to review and approve agency actions. This is particularly so when they pertain to core legislative interests, such as expenditure of public funds. Removing this authority from the Legislature's tool chest will cause it to exercise greater caution before empowering agencies to administer various important actions on behalf of the State, undermining the separation of powers.

2. JCF's approval of certain Knowles-Nelson expenditures does not violate the constitutional requirements of bicameralism and presentment. *Martinez* held that arguments that legislative review violated bicameralism and presentment were "unfounded" because such review of agency action "is not legislation as such." 165 Wis. 2d at 699. And *Ahern* blessed the Building Commission's review of construction contracts which plainly did not go through bicameralism and presentment. *See generally* 114 Wis. 2d 69. The same is true here. Neither of the relevant JCF review provisions, Wis. Stat. §§ 23.0917(6m) and 23.0917(8)(g)3, respectively, result in legislative action that could be characterized as "legislation as such," *id.*, rendering the

requirements of bicameralism and presentment inapplicable. Notably, this Court has not imposed such rigid bicameralism and presentment requirements for various legislative actions outside the formal lawmaking process. *Id.* at 699–701; *Ahern*, 114 Wis. 2d at 99–108; *Becker v. Dane Cnty.*, 2022 WI 63, ¶ 30, 403 Wis. 2d 424, 977 N.W.2d 390; *In re Guardianship of Klisurich*, 98 Wis. 2d 274, 279, 296 N.W.2d 742 (1980). In any event, JCF's authority to review DNR expenditures under Knowles-Nelson comes from enacted statutes, voted on by the entire Legislature and signed by the Governor, *see* Wis. Stat. § 23.0917(6m), (8)(g), thereby complying with bicameralism and presentment.

C. *Martinez* and *Ahern* answer all of the contrary arguments that Petitioners and Intervenor-Petitioner raise.

Petitioners and Intervenor-Petitioner argue that *Ahern* is distinguishable because it did not address legislative committee review over executive-branch spending of appropriated funds, Gov.Br.42–43, and the membership of the Building Commission included the Governor, Int.Pet.Br.21 n.17. As explained above, *supra* pp.27–29, *Ahern*'s holding (as well as *Martinez*'s, which built upon *Ahern* and which Petitioners and Intervenor-Petitioner do not challenge) analyzed the Legislature's authority to review and even "prevent" executive actions taken by agencies with already appropriated funds, which the Court found to be consistent with our Constitution, 114 Wis. 2d at 99–108. *Ahern* is directly on point because JCF review here "enables the

legislature, through the [JCF], to prevent [a Knowles-Nelson project]," just as DNR "may prevent the legislature from" buying more land for conservation and outdoor recreation by not selecting and submitting proposed expenditures or encumbrances to JCF. *Id.* at 107–08. And, of course, the funds available to the Building Commission for approval are appropriated funds, to the extent that they apply to state-funded buildings, *see* Wis. Stat. § 13.48(3), no different than the similarly appropriated funds under Knowles-Nelson, *see id.* § 23.0917(3), further rendering *Ahern* on point for JCF's review authority. Similarly misplaced is Intervenor-Petitioner's contention that *Ahern* is different because there the Governor was a voting member of the Building Commission—thereby rendering it, as Intervenor-Petitioner describes it, "a blended body." Int.Pet.Br.21 n.17. The *Ahern* Court explained that the "legislator members" of the Building Commission, via a simple "majority vote of [the Commission's] members," could "exercise executive powers to the exclusion of the executive branch," which the Court nevertheless held to be consistent with "the separation doctrine in this state," 114 Wis. 2d at 107, and Petitioners admit in their brief in this case that *Ahern* involved "a commission controlled by the Legislature," Gov.Br.44.

Ahern and *Martinez* refute Petitioners' and Intervenor-Petitioner's erroneous contention that JCF review usurps a core power of the executive branch—namely DNR's power to execute the law. Gov.Br.28–30, 31, 37–40; Int.Pet.Br.21–22.

JCF's review falls within a shared power under this Court's precedent both because agencies do not exercise core powers at all under *Martinez*, *see Martinez*, 165 Wis. 2d at 697–98, and because the Legislature has constitutional authority to manage state finances, *see supra* pp.24–25, 31–32. Thus, while Sections 23.0917(6m) and (8)(g)3 allow JCF to exercise some control over DNR's selection of projects, it is a "cooperative venture between the two governmental branches" and constitutional as a shared power. *Ahern*, 114 Wis. 2d at 108. And the Wisconsin Constitution permits a legislative committee to "veto" an action, *contra* Gov.Br.29, given that *Ahern* blessed the Building Commission "exercise[ing] an immense control over state construction," in the form of the "right . . . to prevent construction not meeting the commission's approval," so long as doing so does not "concentrat[e] . . . unchecked power in the hands of any one branch." 114 Wis. 2d at 105, 107. Because the statutory scheme at issue in *Ahern* also allowed the Governor to "choose[ ] not to approve a contract for a state office building" and bar construction, the Court held the power was sufficiently shared. *Id.* at 107. Here, too, DNR can choose not to propose expenditures for any particular project under Knowles-Nelson, and JCF can choose to deny any proposed expenditures, so Petitioners' various core-powers arguments all fail under the Wisconsin Constitution and *Ahern*.

Turning to bicameralism and presentment, Petitioners avoid discussing *Martinez* and *Ahern*—neither of which

involved the relevant committee going through bicameralism and presentment, *see supra* pp.27–30, 36–37—instead relying only on out-of-jurisdiction precedent for the proposition that "requiring two houses to concur on lawmaking" is in the "public good." Gov.Br.22–24; *see also* Int.Pet.Br.32 (only briefly discussing *Martinez*). But, as this Court has held, bicameralism and presentment are mandatory only when the Legislature is passing legislation; reviewing agency action is "not legislation as such," and so does not require adherence to bicameralism and presentment. *Martinez*, 165 Wis. 2d at 699–700. And, again, *Ahern* blessed the veto power of the Building Commission, where the Commission plainly did not take its actions through either bicameralism or presentment. 114 Wis. 2d at 99–108.

In this regard, Petitioners and Intervenor-Petitioner erroneously attempt to rely on *INS v. Chadha*, 462 U.S. 919 (1983)—and various courts from other States following *Chadha*—to argue that legislative review here amounts to a "legislative veto" that violates bicameralism and presentment. Gov.Br.34; Int.Pet.Br.24–28. But the U.S. Supreme Court's *Chadha* test ties these legislative requirements to whether an action has "the purpose and effect of altering the legal rights, duties and relations of persons," 462 U.S. at 952, and this Court rejected that approach in *Martinez*, *see* 165 Wis. 2d at 699. This Court issued *Martinez* over eight years after the U.S. Supreme Court issued *Chadha*, and in doing so relied upon the Idaho Supreme Court's

decision in *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990), *see Martinez*, 165 Wis. 2d at 699 n.10, which explicitly rejected *Chadha*'s approach and instead adopted Justice White's dissent in that case, *Mead*, 117 Idaho at 667–68.

This Court was well aware of *Chadha* when it rejected its core holding in *Martinez*. In *Martinez*, the Attorney General's brief extensively discussed *Chadha*'s holding for what amounts to "an exercise of legislative power," and argued in favor of applying *Chadha*'s test of any act that "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and [the plaintiff], all outside the Legislative Branch," to JCRAR's rule review authority under Section 227.26 of the Wisconsin Statutes. App.17–19, 21–22 (quoting *Chadha*, 462 U.S. at 952). Thus, the Attorney General previously made all of the same arguments for *Chadha*'s application to the Wisconsin separation of powers doctrine in the *Martinez* briefing that he does here. *Compare id.*, *with* Gov.Br.23–24, 34, 41, 44. Nevertheless, this Court rejected that argument in *Martinez*. *Supra* pp.40–41. Similarly, while the Attorney General relied on *Chadha* in *SEIU*, App.78 (quoting *Chadha*, 462 U.S. at 954–55), this Court again rejected any invitation to adopt *Chadha*'s test, *SEIU*, 2020 WI 67, ¶¶ 75, 81–82 (relying on *Ahern* and *Martinez* on bicameralism and presentment principles).

Notably, the Wisconsin Constitution differs in material respects from the U.S. Constitution. The Wisconsin

Constitution only requires "[e]very bill" to be presented to the Governor for approval, Wis. Const. art. V, § 10, whereas the U.S. Constitution requires "[e]very *Order*, *Resolution*, or *Vote*" to be presented to the President, U.S. Const. art. I, § 7, cl. 3 (emphasis added). The absence of the words "Order" and "Vote" in Wisconsin's presentment clause appears to be an explicit recognition that not all legislative actions require presentment. Indeed, *Chadha* acknowledged as much, noting that "[n]ot every action taken by either House is subject to the bicameralism and presentment requirements," even under the more expansive language in the federal Constitution. 462 U.S. at 952. Here, given that our Constitution requires presentment in more limited circumstances, *Chadha*'s reasoning on this point applies with even more force, and Petitioners fail to explain why *Chadha*'s interpretation of inapposite constitutional text should apply to Wisconsin's Constitution.

Finally, this Court should reject out-of-hand Petitioners' suggestion that a lesser standard than "beyond a reasonable doubt" should apply to constitutional challenges in separation-of-powers cases. Gov.Br.32. This Court has rejected this argument many times, including in *Martinez*. In *Martinez*, the Attorney General argued that the committee review provision there was "not entitled to a presumption that it is constitutional" because the Legislature's actions "violated a law of constitutional structure." App.12. This Court declined to adopt that argument, concluding that that statute

allowing JCRAR to review and suspend agency rules is entitled to "a strong presumption that [it] is constitutional." *Martinez*, 165 Wis. 2d at 695. This Court rejected the same argument in *SEIU*, where the Attorney General again argued that standard should be lessened "because every controversy arising from the legislative approval provisions would involve the same public parties," 2020 WI 67, ¶¶ 44–45.

II. Petitioners Have Not Made A Sufficient Showing For Overturning *Martinez* And *Ahern*

Given that Sections 23.0917(6m) and (8)(g)3 are facially constitutional under *Martinez* and *Ahern*, Petitioners and Intervenor-Petitioner cannot prevail unless this Court overrules those cases. Petitioners and Intervenor-Petitioner fail to provide any adequate justification to depart from *stare decisis* and overrule *Martinez* and *Ahern*.

A. "This court follows the doctrine of stare decisis scrupulously because of [its] abiding respect for the rule of law." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257. Adherence to prior decisions "promotes evenhanded, predictable, and consistent development of legal principles and contributes to the actual and perceived integrity of the judicial process." *Id.* ¶ 95 (citations omitted). Accordingly, this Court overturns its prior decisions only when a "special justification" is present. *Id.* ¶¶ 95–96 (citation omitted). This Court considers several criteria when considering whether there is "special justification" to overrule a prior decision and depart from *stare decisis* in a given case, including: whether "changes or

developments in the law have undermined the rationale behind a decision," *id.* ¶ 98 (citation omitted); whether "there is a need to make a decision correspond to newly ascertained facts," *id.* (citation omitted); whether "there is a showing that the precedent has become detrimental to coherence and consistency in the law," *id.* (citation omitted); and "whether the prior decision is unsound in principle, whether it is unworkable in practice, and whether reliance interests are implicated," *id.* ¶ 99 (citations omitted).

This Court has also identified criteria that it will not consider in the *stare decisis* analysis. "[T]he decision to overturn a prior case must not be undertaken merely because the composition of the court has changed." *Id.* ¶ 95 (citing *State v. Stevens*, 181 Wis. 2d 410, 442, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring)); *see also State v. Lindell*, 2001 WI 108, ¶ 146, 245 Wis. 2d 689, 629 N.W.2d 223 (A.W. Bradley, J., concurring). Further, "[i]t is not a sufficient reason for this court to overrule its precedent that a large majority of other jurisdictions, with no binding authority on this court, have reached opposing conclusions." *Johnson Controls*, 2003 WI 108, ¶ 100. And mere disagreement with a prior decision does not justify departure from that decision either. *See Lindell*, 2001 WI 108, ¶¶ 145–46 (A.W. Bradley, J., concurring).

Justice Ann Walsh Bradley, in particular, has powerfully written and spoken in defense of the "obligation to stare decisis." *Id.* ¶¶ 145–48. As Justice Ann Walsh Bradley

explained during an oral argument before this Court, the Court cannot "just throw [an opinion] out the window because we've got different Justices who might think about it differently," as "[t]hat's not the direction of how law evolves." Oral Argument, *State v. Denny*, No. 15AP202-CR, 34:45–35:30 (Oct. 26, 2016).[16] This Court should "continue to acknowledge [past cases] as precedent" "[o]ut of respect for the law and this court as an institution." *Lindell*, 2001 WI 108, ¶¶ 145–48 (A.W. Bradley, J., concurring). This Court's adherence to past cases, under the doctrine of *stare decisis*, "is fundamental to the rule of law." *Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, ¶ 58, 396 Wis. 2d 434, 957 N.W.2d 261 (A.W. Bradley, J., dissenting). Even where a Justice of this Court believes a prior decision "was wrongly decided"—and even where the Justice "continued to dissent" from that decision in later cases—that Justice should "acknowledge [that decision] as precedent." *Lindell*, 2001 WI 108, ¶ 145 (A.W. Bradley, J., concurring). So, when "nothing [has] changed but the bodies on this court," *id.* ¶ 146, the Court should not cast aside "valid precedent" and "substitute[ ] its will over its obligation to stare decisis," *id.* ¶ 148.

B. As the Legislature explained above, both *Martinez* and *Ahern* are directly on point and compel the conclusion that Sections 23.0917(6m) and (8)(g)3 are constitutional. *Supra* Part I. But even if this Court believes that *Martinez*

[16] Available at https://wiseye.org/2016/10/26/wisconsin-supreme-court-justice-on-wheels-state-of-wisconsin-v-jeffrey-c-denny/.

and *Ahern* may be incorrect on their own merits, this Court should nevertheless adhere to those decisions' holdings and reasoning here under the doctrine of st*are decisis*.

No changes in law have undermined rationale. To begin, there have been no "changes or developments in the law [that] have undermined the rationale behind" *Martinez* or *Ahern*, *Johnson Controls*, 2003 WI 108, ¶ 98, nor are these decisions "detrimental to coherence and consistency in the law" or "unsound in principle," *id.* ¶¶ 98–99. *Martinez* and *Ahern* are detailed and well-reasoned, unanimous opinions, which use the same separation-of-powers framework as this Court's more modern jurisprudence. *Id.*

Beginning with *Martinez*, it understood the Wisconsin Constitution to vest the three branches with both exclusive and shared powers. 165 Wis. 2d at 696–97. "This state's separation of powers doctrine is implicitly created by the constitution," which contemplates "shared and merged powers of the branches of government rather than an absolute, rigid and segregated political design." *Id.* at 696 (citation omitted). So, while "[t]he separation of powers doctrine is violated when one branch interferes with a constitutionally guaranteed 'exclusive zone' of authority vested in another branch," *id.* at 697 (citations omitted), "[w]hen there exists a sharing of powers . . . one branch of government may exercise power conferred on another [so long as it] does not unduly burden or substantially interfere with the other branch's role and powers," *id.* at 696–98 (citations

omitted). This shared-powers "concern is with 'actual and substantial encroachments by one branch into the province of another, not theoretical divisions of power.'" *Id.* at 697 (quoting *Ahern,* 114 Wis.2d at 104). *Martinez* then applied its reasoning to hold that JCRAR's authority to suspend a promulgated rule for specific reasons did not violate the separation of powers under a shared-powers analysis. *Id.* at 697–702. A shared-powers-analysis applied because "the legislative branch and the executive branch share inherent interests in the legislative creation and oversight of administrative agencies." *Id.* at 697. JCRAR's rule-suspension authority satisfied that shared-powers standard because "the law [ ] set forth adequate standards," *id.* at 698 (citation omitted), and "it is incumbent on the legislature . . . to maintain some legislative accountability over rule-making," *id.* at 701. Further, the Court rejected the argument that JCRAR's rule-suspension authority "is unconstitutional because it violates the requirements of bicameral passage by both houses of the legislature and the presentment clause" because "[i]t is understood that an administrative rule is not legislation as such." *Id.* at 699.

Moving to the Court of Appeals' decision in *Ahern*—which is entitled to full *stare decisis* respect before this Court, *see, e.g.*, *In re Samuel J.H.*, 2013 WI 68, ¶ 5 n.2, 349 Wis. 2d 202, 833 N.W.2d 109—its separation-of-powers reasoning accords with *Martinez*, and, indeed, *Martinez* specifically endorsed *Ahern*'s reasoning, *Martinez*, 165 Wis. 2d at 696–98,

701 n.13. *Ahern* recognized that Wisconsin's "separation of powers doctrine is implied from (rather than expressly stated in) the Wisconsin Constitution." *Ahern*, 114 Wis. 2d at 101. *Ahern* explained that "[t]he doctrine of separation of powers does not demand a strict, complete, absolute, scientific division of functions between the three branches of government," *id.* at 103 (citations omitted), but rather "permits a blending or sharing of powers among the three branches of government," *id.* at 103 & n.10. *Ahern* applied its separation-of-powers reasoning to hold that the Building Commission did not violate the separation of powers under a shared-powers analysis. *Id.* at 99–100, 106. *Ahern* acknowledged that the Commission had a "right of prior approval over construction contracts," which right granted it "immense control over state construction" and was "an executive power," that permitted a majority of the legislative members of the Commission "to exercise executive powers to the exclusion of the executive branch." *Id.* at 104–07. This did not "necessarily violate the separation" of powers, since the Governor could also exercise a veto to stop a construction project the legislative members wanted to approve. *Id.* at 107. Thus, this statutory framework was a "cooperative venture between the two governmental branches" that did not run afoul of the Constitution. *Id.* at 108.

SEIU further illustrates that no developments in the law have undermined *Martinez* or *Ahern*. 2020 WI 67, ¶¶ 78–83. Like *Martinez* and *Ahern*, *SEIU* recognizes that the

Constitution implicitly separated powers among the three branches, *id.*, ¶ 31 (citing *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384); explains that the branches may exercise "[s]hared powers" concurrently so long as they do not "unduly burden or substantially interfere with another branch," *id.* ¶ 35 (citation omitted); and considered actual and substantial encroachments on a branch's power in the shared-powers analysis, *see id.* ¶¶ 50–84, rather than simply considering the theoretical division of power among the branches, *see id.* ¶¶ 30–32; *id.* ¶ 186 (Dallet, J., concurring in part, dissenting in part) (relying explicitly on *Martinez* and *Ahern*).

No newly ascertained facts. There are no "newly ascertained facts" that would displace *Martinez* and *Ahern*. *Johnson Controls*, 2003 WI 108, ¶ 98. Both at the original-action petition stage, Pet. ¶ 109, and now, Gov.Br.42–46, Petitioners did not even attempt to cite any such new facts calling *Martinez* and *Ahern* into doubt.

Not unworkable; significant reliance interests present. Finally, *Martinez* and *Ahern* are not "unworkable in practice," and they have generated significant "reliance interests" across the State. *Johnson Controls*, 2003 WI 108, ¶ 99. The statutes providing for JCF review of agency actions are diverse, covering actions by at least 30 agencies. *Info. Paper #81*, at 26–37. When the Legislature delegated spending authority to DNR and other agencies, the Legislature understood that it would have broad review powers to prevent

these unelected agencies from misapplying the law or harming Wisconsinites. The Legislature's belief rested on the consistent line of decisions in *Ahern* and *Martinez* approving legislative review of agency action.

While *Martinez* and *Ahern* have stood the test of time, the Attorney General's position in *Martinez* has proven "unworkable" at the federal level. *Johnson Controls*, 2003 WI 108, ¶ 99. After the U.S. Supreme Court announced that Congress' legislative vetoes—which did not undergo bicameralism and presentment—were unconstitutional, 462 U.S. at 944–59, Congress responded by enacting hundreds of legislative-committee oversight provisions that are plainly inconsistent with *Chadha*, *see* Ben Wilhelm, et al., Cong. Rsch. Serv., RL30240, Congressional Oversight Manual 85 (2022) ("*Congressional Oversight Manual*").[17] Congress further relied on informal arrangements with agencies, "where an executive official pledges not to proceed with an activity until Congress or certain committees agree to it." *Id.*

Congress and federal executive agencies reached this political compromise because of the practical realities of modern governance. "Congress delegates substantial discretionary authority to agency officials to engage in rulemaking and the management of the administrative state." *Id.* at 5. Therefore, many of these modern delegations are made "on the condition that proposed executive actions be

[17] Available at https://crsreports.congress.gov/product/pdf/RL/RL30240.

submitted to Congress for review and possible disapproval before they can be put into effect." *Id.* at 84. This is a practical compromise: "[e]xecutive officials still want[ ] substantial latitude in administering delegated authority," while "legislators still insist[ ] on maintaining control without having to pass another statute." Louis Fisher, Cong. Res. Serv., RL33151, Committee Controls of Agency Decisions 16 (2005) ("*Committee Controls of Agency Decisions*").[18] *Chadha*, on the other hand, would require Congress to delegate broad authority and only hope that agencies will exercise it in accordance with the purposes of the enacting statutes—or pass exceedingly narrow statutes for agencies to administer.

As a final coda, these post-*Chadha* committee review provisions have evaded federal-court review only because Article III of the U.S. Constitution does not permit taxpayer standing. *Committee Controls of Agency Decisions*, *supra*, at 26. Wisconsin, however, has robust taxpayer standing, so the Legislature would not be able to avoid the disastrous practical consequences that Congress has avoided by simply refusing to follow *Chadha*. *See, e.g.*, *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878–80, 419 N.W.2d 249 (1988).

C. Petitioners and Intervenor-Petitioner largely ignore *Martinez*, Gov.Br.43 n.5; Int.Pet.Br.32–33, while Petitioners alone ask this Court to overrule *Ahern*, Gov.Br.42–46. *Martinez*'s rationale fully applies here, as there the Court

[18] Available at https://crsreports.congress.gov/product/pdf/RL/RL33151.

unanimously upheld the constitutionality of legislative committees' review of agency actions, a holding that comfortably applies to the JCF review provisions in Knowles-Nelson. *Supra* pp.30–43. Moreover, *Martinez* itself adopted and approved of the approach used in *Ahern*, *supra* pp.28–29, and the Knowles-Nelson JCF review provisions are a constitutional, "cooperative venture between the two governmental branches" like the Building Commission that *Ahern* affirmed, 114 Wis. 2d at 108; *supra* pp.26–27.

Petitioners' arguments in favor of overturning *Ahern* fail to provide any "special justification" to overrule it. *Johnson Controls*, 2003 WI 108, ¶¶ 95–96.

First, Petitioners claim that *Ahern* is distinguishable, Gov.Br.42–43, but, as already explained in full above, their arguments on this score are unpersuasive, *supra* pp.37–38.

Second, Petitioners claim that, contrary to this Court's precedent, "[s]tare decisis does not apply to court of appeals decisions like *Ahern*." Gov.Br.43–44 (emphasis omitted). This Court has repeatedly held that "the doctrine of stare decisis applies to published court of appeals opinions and requires [this Court] to follow court of appeals precedent unless a compelling reason exists to overrule it." *In re Samuel J.H.*, 2013 WI 68, ¶ 5 n.2 (citations omitted); *see also, e.g.*, *Cook v. Cook,* 208 Wis.2d 166, 186, 560 N.W.2d 246 (1997); Wis. Stat. § 752.41(2). While Petitioners cite *State v. Yakich*, 2022 WI 8, 400 Wis. 2d 549, 920 N.W.2d 12, and *State v. Lira*, 2021 WI 81, 399 Wis. 2d 419, 966 N.W.2d 605, Gov.Br.43–44,

neither conflicts with this line of precedent. This Court can, of course, afford Court of Appeals decisions *stare decisis* effect without being "bound by" them, no different than it treats its own prior decisions under *stare decisis*. *Yakich*, 2022 WI 8, ¶ 31. Likewise, giving Court of Appeals decisions *stare decisis* effect does not render them "determinative," for this same reason. *Lira*, 2021 WI 81, ¶ 45.

Petitioners recite, Gov.Br.44, this Court's statement in *State v. Johnson*, 2023 WI 39, 407 Wis. 2d 195, 990 N.W.2d 174, that the Court "do[es] not need a special justification to overrule" "a court of appeals decision," *id.* ¶ 20. But *Johnson* did not overrule this Court's longstanding precedent giving *stare decisis* weight to Court of Appeals decisions. In any event, *Johnson* did consider whether a "special justification" existed to overrule the Court of Appeals' decision at issue there because this Court "arguably applied [that] decision in several prior cases." *Id.* ¶ 22. As explained above, the same is true with *Ahern* here. *Supra* pp.27–29. So, at a minimum, *Johnson* would only support this Court "treat[ing] [*Ahern*] as precedent from this court" for *stare decisis* purposes. 2023 WI 39, ¶ 22.

Third, Petitioners incorrectly claim that "*Ahern* paid no attention to the critical procedural requirements of bicameralism and presentment." Gov.Br.44–45. But bicameralism and presentment are not the proper framework to analyze this issue, *see Martinez*, 165 Wis. 2d at 699, *Chadha* is not applicable in Wisconsin, *supra* pp.40–42, and

following *Chadha* would lead to disastrous results, *supra* pp.41–42.

Fourth, Petitioners argue that "*Ahern* did not use the 'core' and 'shared' powers framework that this Court now applies," Gov.Br.45, but that misreads *Ahern*. *Ahern* recognized that Wisconsin maintains an implied separation-of-powers doctrine, 114 Wis. 2d at 101, just as this Court did in *Martinez*, 165 Wis. 2d at 696 & n.8, and this Court's more modern separation-of-powers decisions like *SEIU* and *Gabler*. And *Ahern* applied the very same understanding of shared powers that this Court applied in *Martinez* and *SEIU*. Moreover, *Ahern* understood the "core powers" framework, as it recognized that "separate branches shar[e] *certain* powers"; that "within *zones of shared power*, the legislature may not unduly burden or substantially interfere with another branch of government"; and that some powers are "*exclusively* legislative, executive or judicial." 114 Wis. 2d at 102, 103 (emphasis added; citations omitted).

Fifth, Petitioners claim that *Ahern* improperly "borrowed from non-separation of powers cases to find a valid legislative role in the function at issue." Gov.Br.45. But recognizing that the Legislature maintains a valid interest—like the interest in determining what is "necessary," *In re City of Beloit*, 37 Wis. 2d 637, 644, 155 N.W.2d 633 (1968), or declaring the "public interest," *Gateway City Transfer Co. v. PSC*, 253 Wis. 397, 404–05, 34 N.W.2d 238 (1948)—is no different than declaring that the Legislature maintains a

sufficient constitutional "interest" in a function to render it a "shared power," *see SEIU*, 2020 WI 67, ¶¶ 63, 67.

Finally, Petitioners argue that "even if *Ahern* had identified arenas of power that were truly shared, it erred in its application of the shared powers framework." Gov.Br.46. As explained above, *supra* pp.27–28, 30, *Ahern* involved two branches exercising powers in an overlapping manner, given that both the Building Commission and the Governor could "check" each other's exercise of the overlapping powers, creating a "practical requirement of unanimity" which is the very sort of "cooperative venture" that shared powers are meant to create. 114 Wis. 2d at 108.

CONCLUSION

This Court should hold that Sections 23.0917(6m) and (8)(g)3. are facially constitutional and consistent with Wisconsin's doctrine of separation of powers.

Dated: March 13, 2024.

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief, as well as the requirements set out in this Court's February 2, 2024, Order in this case. The length of this brief is 10,630 words.

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