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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, 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.

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION 6

ARGUMENT 6

I. Respondents ignore virtually all separation of powers authority and simply announce that Wisconsin is "unique." 6

A. These legislative vetoes are invalid under either a core or shared powers approach. 7

B. These legislative vetoes evade bicameralism and presentment procedures. 10

C. This Court should not apply a deferential standard of review. 11

II. Respondents' reliance on *Ahern* and *Martinez* is unavailing. 12

A. Neither case controls here. 12

B. Both cases should be overruled. 13

III. Respondents' policy arguments fall short. 16

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Arizona v. Gant,
556 U.S. 332 (2009) 15

Becker v. Dane County,
2022 WI 63, 403 Wis. 2d 424, 977 N.W.2d 390..... 11

Citizens United v. Federal Election Commission,
558 U.S. 310 (2010) 15

City of Brookfield v. Milwaukee Metro. Sewerage Dist.,
144 Wis. 2d 896, 426 N.W.2d 591 (1988) 12

Gabler v. Crime Victims Rts. Bd,
2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384..... 13

INS v. Chadha,
462 U.S. 919 (1983) 7, 10, 11, 13, 16

J.F. Ahern Co. v. Wisconsin State Building Commission,
114 Wis. 2d 69, 336 N.W.2d 679
(Ct. App. 1983)..... 6, 12, 13, 14

Klisurich v. DHSS,
98 Wis. 2d 274, 296 N.W.2d 742 (1980) 11

Legislative Rsch. Comm'n v. Brown,
664 S.W.2d 907 (Ky. 1984)..... 13

Martinez v. DILHR,
165 Wis. 2d 687, 478 N.W.2d 582 (1992) 6, 7, 11

Mo. Coal. for Env't v. Joint Comm. on Admin. Rules,
948 S.W.2d 125 (Mo. 1997) 13

Morrison v. Olson,
487 U.S. 654 (1988) 11

N. Dakota Legislative Assembly v. Burgum,
916 N.W.2d 83 (N.D. 2018) 7

Payne v. Tennessee,
501 U.S. 808 (1991) 15

People v. Tremaine,
168 N.E. 817 (1929)..... 7

Progressive N. Ins. Co. v. Romanshek,
2005 WI 67, 281 Wis. 2d 300, 697 N.W.2d 417 15

Ramos v. Louisiana,
140 S. Ct. 1390 (2020) 15

Serv. Emps. Int'l Union, Loc. 1 v. Vos,
2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 .....6, *passim*

Silver Lake Sanitary Dist. v. DNR,
2000 WI App 19, 232 Wis. 2d 217, 607 N.W.2d 50 13

State ex rel. Schneider v. Bennett,
547 P.2d 786 (Kan. 1976) 7

Tetra Tech EC, Inc. v. DOR,
2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21 ..... 13, 14

Constitutional Provisions

Wis. Const. art. VIII, § 2 9

Statutes

Wis. Stat. § 16.40(14) 9

Wis. Stat. § 23.0917(3)(dm) 10

Wis. Stat. § 23.0917(6m) 8, 17

Wis. Stat. § 23.0917(8)(g)3. ..... 8, 17

Wis. Stat. § 227.19(5)(dm) 14

Other Authorities

Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*,
52 Vand. L. Rev. 1167 (1999) 7

Wisconsin Legislative Fiscal Bureau Informational Paper 66: Warren Knowles-Gaylord Nelson Stewardship Program
(Jan. 2023) 10

INTRODUCTION

Respondents offer no good answer to the principle that resolves this case: once the legislative branch creates and finances by law a statutory program like Knowles-Nelson, its job is done. It cannot thereafter participate in executing that law through legislative committees.

To justify these legislative committee vetoes, Respondents primarily rely on two flawed arguments. First, they contend that everything executive branch agencies do involves power shared with the Legislature—a "dangerous" idea this Court has already rejected. *See Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶¶ 130–31, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*"). Second, they argue that the "power of the purse" entitles legislative committees to micromanage how the executive branch executes statutory programs. But the only constitutional text they cite—article VIII, § 2—says nothing of the sort.

Respondents also lean heavily on *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582, 586 (1992), and *J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983). Neither controls here: *Martinez* concerned only rulemaking, and *Ahern* addressed the distinct context of the State's building program. Regardless, this Court should overrule both cases. *Martinez* mistakenly allowed temporary reprieves from bicameralism and presentment requirements, and *Ahern* misapplied this Court's modern "core" and "shared" powers framework.

ARGUMENT

I. Respondents ignore virtually all separation of powers authority and simply announce that Wisconsin is "unique."

Petitioners' opening brief carefully explained how the separation of powers works in Wisconsin: the legislative branch enacts laws (including laws creating and financing

statutory programs), and the executive branch implements them. (Pet. Br. 19–26, 33–37.) Respondents offer virtually no response to these basic principles.

Instead, Respondents announce that Wisconsin's constitution doesn't operate this standard way because it is "unique," pointing to its lack of an express separation of powers provision. (Resp. Br. 9, 24.) *Martinez* wrongly found some relevance to this fact, 165 Wis. 2d at 700–01, given how the U.S. Supreme Court and state high courts alike have found that implicit separation of powers provisions (like Wisconsin's) bar legislative vetoes just as jurisdictions with express provisions have done.[1]

Wisconsin lies well within the separation-of-powers mainstream: legislative committees may not use vetoes to share in the power to execute the law.

A. These legislative vetoes are invalid under either a core or shared powers approach.

Respondents do not contest Petitioners' description of core and shared powers. (Pet. Br. 27–30.) Indeed, Respondents scarcely address core powers, except to recognize that the power to "take care that the laws be faithfully executed" is a core executive power. (Resp. Br. 25) DNR does

[1] *See, e.g.*, *People v. Tremaine*, 168 N.E. 817 (1929); *State ex rel. Schneider v. Bennett*, 547 P.2d 786 (Kan. 1976); *N. Dakota Legislative Assembly v. Burgum*, 916 N.W.2d 83 (N.D. 2018); *INS v. Chadha*, 462 U.S. 919 (1983). These are all decisions from "implicit" jurisdictions. *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1191 (1999) (classifying explicit and implicit states).

exactly that when it implements Knowles-Nelson projects according to statutory criteria and spending limits.[2]

Respondent's historical overview confirms that JCF began "exercising its authority to review agency actions" only "during the 1970s and 1980s." (Resp. Br. 14.) While JCF and its predecessors may have historically been "fiscal watchdogs" (Resp. Br. 15), that "watchdog" power traditionally involved reviewing spending bills *before* their passage—not approving how the executive branch implemented them *after*. The Wisconsin Constitution originally placed no part of that core executive power in the legislative branch.

Nevertheless, Respondents insist that implementing the Knowles-Nelson program—and, by implication, *any* statutory program—involves shared powers. They are wrong.

First, they assert that agencies are legislative creations and thus never exercise core executive powers (Resp. Br. 26, 29, 31, 39.) *SEIU* rejected this "dangerous" logic:

> The executive oftentimes carries out his functions through administrative agencies. … [T]hey are one manifestation of the executive. … [W]hen an administrative agency acts … it is exercising executive power.

393 Wis. 2d 38, ¶¶ 97, 131. *SEIU* also disagreed that agencies use "delegated" legislative authority whenever they execute a statute (Resp. Br. 49): "the legislature does not confer on administrative agencies the ability to exercise executive power; that comes by virtue of being part of the executive branch." *SEIU*, 393 Wis. 2d 38, ¶ 130.

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[2] Respondents suggest that these statutory criteria also "guide [JCF's] decisionmaking process" when reviewing projects. (Resp. Br. 34.) But those criteria do not bind JCF, which may reject proposed projects for any reason whatsoever. *See generally* Wis. Stat. § 23.0917(6m)(a), (8)(g)3.

Second, Respondents argue that their "power of the purse" creates shared powers even when the executive branch executes the law. (Resp. Br. 31–33.) The very constitutional provision they cite, Wis. Const. art. VIII, § 2, shows otherwise: "[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law." Once the Legislature appropriates money "by law," the executive branch can spend appropriated money "in pursuance of" that law without further legislative participation.

This argument also proves far too much. If correct, the executive and judicial branches *always* exercise a shared power when spending appropriated money. Such a rule would enable a massive power transfer from both those branches to legislative committees via legislative vetoes just like the ones here.

In places, Respondents suggest that shared powers might arise only when the Legislature appropriates large sums of money, since "expenditures exceeding a high dollar amount" might cause "massive fiscal impacts." (Resp. Br. 21, 32.)[3] But no constitutional text, whether in article VIII, § 2 or anywhere else, supports such line-drawing. On what principled basis does the core law-execution power become a shared power at some arbitrary dollar figure? Respondents offer none.

To be sure, *SEIU* observed that some monetary settlements of defense-side state litigation implicate a shared power. (Resp. Br. 32 (citing *SEIU*, 393 Wis. 2d 38, ¶ 69).) That would be true if a monetary settlement required *new* appropriations: such a settlement would implicate the Legislature's core appropriation power under article VIII, § 2. But reading *SEIU* to cover settlements using *existing*

[3] Notably, Respondents highlight other JCF provisions involving sums as low as $2,000. (Resp. Br. 15 (citing Wis. Stat. § 16.40(14).)

appropriations would mean legislative committees can control executive action whenever appropriated money is implicated.

The legislative branch isn't powerless to control executive spending, absent a legislative veto. It can audit agency expenditures, amend statutes to bar expenditures above a threshold or narrow agency expenditure authority, or reduce agency appropriations during the biennial budget process. As just one example, Wis. Stat. § 23.0917(3)(dm) already prevents Respondents' hypothetical $33 million land acquisition project (Resp. Br. 35), as that statutory provision limits what DNR can spend on such projects.[4]

B. These legislative vetoes evade bicameralism and presentment procedures.

Respondents apparently concede that these legislative vetoes also would be invalid under *Chadha*, which holds that legislative actions with the "purpose and effect of altering the legal rights, duties and relations of persons … all outside the legislative branch" must follow bicameralism and presentment procedures. *INS v. Chadha*, 462 U.S. 919, 952 (1983).

So, Respondents ask this Court to reject *Chadha*'s standard. But their position rests on an immaterial textual distinction: that the federal constitution requires "[e]very Order, Resolution, or Vote" to be presented to the chief

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[4] Respondents' assertion that DNR has "mismanaged" the Knowles-Nelson by "fail[ing] to control spending" is puzzling. (Resp. Br. 19–20.) DNR has abided by all statutory spending limits, which the Legislature could have reduced, if it wanted. Moreover, when DNR has spent *less* than it could have, the Legislature has earmarked unspent money on additional projects. *See* Wisconsin Legislative Fiscal Bureau Informational Paper 66: Warren Knowles-Gaylord Nelson Stewardship Program, 13–14, (Jan. 2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0066_warren_knowles_gaylord_nelson_stewardship_program_informational_paper_66.pdf.

executive, while Wisconsin's constitution does not mention "orders" or "votes." (Resp. Br. 42.)

That difference has nothing to do with bicameralism procedures, which these JCF vetoes do not follow. And as for presentment, nothing in *Chadha* relies specifically on the need to present "orders" and "votes" to the President. Rather, *Chadha* derived its test from the need to identify acts that are "essentially legislative in purpose and effect." 462 U.S. at 952. Both constitutions require a functionalist test like this; otherwise, the legislative branch could easily avoid lawmaking procedures by simply calling proposed laws something else.

Indeed, Respondents cite no authority for their view that bicameralism and presentment apply only when the Legislature deems something "legislation as such." (Resp. Br. 36–37.[5]) *Chadha* rejects that semantic approach, as it would render these crucial constitutional procedures toothless. Nor did *Martinez* establish any such rule: it simply said that "an administrative rule is not legislation as such." 165 Wis. 2d at 699. That observation about rules says nothing about which legislative actions must follow lawmaking procedures.

C. This Court should not apply a deferential standard of review.

This Court should not privilege the legislative branch when evaluating this separation of powers claim. *See Morrison v. Olson*, 487 U.S. 654, 704–05 (1988) (Scalia, J., dissenting). Although *Martinez* afforded such deference, it did not analyze this argument. 165 Wis. 2d at 695. And *SEIU* discussed the standard for facial challenges, not the burden of

[5] Citing *Becker v. Dane County*, 2022 WI 63, ¶ 30, 403 Wis. 2d 424, 977 N.W.2d 390 (generally discussing delegations of legislative power); *Klisurich v. DHSS*, 98 Wis. 2d 274, 279, 296 N.W.2d 742 (1980) (same).

proof in separation of powers cases. 393 Wis. 2d 38, ¶¶ 44–45. (Resp. Br. 42–43.) This Court has declined to apply the presumption of constitutionality in comparable circumstances. *See City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d 896, 912 n.5, 426 N.W.2d 591 (1988) (challenge to bill's form). It should do the same here.

II. Respondents' reliance on *Ahern* and *Martinez* is unavailing.

Ignoring most of the authority in Petitioners' brief, Respondents lean heavily on *Ahern* and *Martinez*. Neither case saves these legislative vetoes: they do not control, and even if they were relevant, they should be overruled because they are flawed and obsolete.

A. Neither case controls here.

Martinez is irrelevant to the executive power issues presented here. It concerned only "rule-making" and "sa[id]] nothing about [the legislative branch's] ability to limit the agencies' exercise of executive authority." *SEIU*, 393 Wis. 2d 38, ¶ 130.

Ahern also does not apply here. It involved the intersection between two branches in the context of planning new state buildings. Contrary to Respondents' drastic overstatement, *Ahern* did not validate every so-called "cooperative venture" between the legislative and executive branches. (Resp. Br. 29.) Rather, it used that phrase only once, to describe "the shared power over building construction." *Ahern*, 114 Wis. 2d at 108. Similarly, *Ahern* did not bless the legislative branch's ability to "'prevent' executive actions taken by agencies with already appropriated funds" (Resp. Br. 37); the case never even mentioned "appropriated funds."

Respondents also note that *Ahern* is silent on bicameralism and presentment. (Resp. Br. 40.) But "[i]t is

blackletter law that an opinion does not establish binding precedent for an issue if that issue was neither contested nor decided." *Silver Lake Sanitary Dist. v. DNR*, 2000 WI App 19, ¶ 13, 232 Wis. 2d 217, 607 N.W.2d 50.

B. Both cases should be overruled.

If these cases had any application here, they should be overruled.

First, they were wrong when decided, as underscored by later cases undermining their rationale. (Resp. Br. 46–49.)

Martinez assumed that a legislative committee may veto executive action because bicameralism and presentment procedures would follow sometime later. 165 Wis 2d at 699. But that is inconsistent with the bedrock requirement that the legislature must follow lawmaking procedures *before* it acts legislatively in purpose and effect. *Cf. Chadha*, 462 U.S. at 953. Other state supreme courts have invalidated such temporary vetoes. *See Mo. Coal. for Env't v. Joint Comm. on Admin. Rules,* 948 S.W.2d 125, 135 (Mo. 1997) (30-day suspension); *Legislative Rsch. Comm'n v. Brown*, 664 S.W.2d 907, 918 (Ky. 1984) (up to 21-month suspension).

And *Ahern* lies well outside modern separation of powers doctrine. Today, this Court carefully examines whether a power is "core" or "shared." *See, e.g.*, *Gabler v. Crime Victims Rts. Bd*, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384; *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21; *SEIU*, 393 Wis. 2d 38. *Ahern*, by contrast, wrongly assumed that practically *all* powers can be shared, even the "implementation of established law and policy." 114 Wis. 2d at 105.

This assumption led *Ahern* astray. *Ahern* (correctly) recognized that the Building Commission exercised an "an *executive* function" through its contract approval power, 114 Wis. 2d at 105–06 (emphasis added), and it identified no corresponding *legislative* aspect of that power. Under current

doctrine, *Ahern* should have concluded that (1) this was a "core" executive power, and (2) the Building Commission's—a legislative-controlled body's—veto power was invalid, given how "any exercise of authority by another branch" in an area of core power "is unconstitutional." *Tetra Tech*, 382 Wis. 2d 496, ¶ 48 (citation omitted). But *Ahern* instead concluded that the Building Commission could permissibly "exercise [this] executive power[ ] to the exclusion of the executive branch." 114 Wis. 2d at 107. No subsequent case, including *Martinez* and *SEIU*, "endorsed" that flawed analysis. (Resp. Br. 47–49.)[6]

Second, facts have changed since *Martinez* and *Ahern*. (Resp. Br. 49.) Then, committee veto provisions were relatively rare; now, there are "over 100." (Resp. Br. 15.) Today, legislative committees micromanage vastly more executive activity with practically no procedural checks on that power. And specific to *Martinez*, two developments undermine its approval of "temporary three-month [rule] suspension[s]." *SEIU*, 393 Wis. 2d 38, ¶ 81. First, 2017 Act 57 introduced an "indefinite objection" provision, under which a committee can permanently block a rule without ever enacting legislation. *See* Wis. Stat. § 227.19(5)(dm). Second, the Legislature now manipulates *Martinez*'s so-called bill requirement to suspend rules for years without following the "critical" bicameralism and presentment procedures on which *Martinez* relied. 165 Wis. 2d at 700. (Pet. ¶¶ 79–87; Save Our Water Amicus Br. 17 (Table 1).)

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[6] *Ahern* erroneously found a legislative share of the Building Commission's separate power to waive competitive building requirements, 114 Wis. 2d at 106, an aspect of the decision that has nothing to do with spending appropriated money. In any event, Respondents do not persuasively explain why *Ahern*'s bid-waiver analysis, which improperly drew from inapposite cases about standards of judicial review, conforms to current separation-of-powers doctrine. (Resp. Br. 54–55.)

Third, stare decisis does not protect the legislative branch's "reliance" on *Martinez* and *Ahern* to enact dozens of unconstitutional legislative vetoes. (*Cf.* Resp. Br. 49.)

"Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved …." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *see also Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 44, 281 Wis. 2d 300, 326, 697 N.W.2d 417 (same). But stare decisis does not recognize the legislative branch's interest in preserving unconstitutional statutes.

The U.S. Supreme Court recognized as much in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 365 (2010), which found "[n]o serious reliance interests" where "[l]egislatures may have enacted bans on corporate expenditures believing that those bans were constitutional." If that were "a compelling interest for stare decisis," "legislative acts could prevent [courts] from overruling [their] own precedents, thereby interfering with [their] duty 'to say what the law is.'" *Id.*; *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020) (rejecting government's purported reliance on practices that would deny "constitutionally promised liberties"); *Arizona v. Gant*, 556 U.S. 332, 349 (2009) ("If … a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence.").

Fourth, *Martinez* and *Ahern* have proved "unworkable" as a meaningful check on the legislative branch. *Martinez*'s "temporary" vetoes have morphed into permanent ones, and *Ahern*'s sweeping shared powers analysis has encouraged legislative committees to gobble up executive power. While Respondents say these cases are not only workable but vital (Resp. Br. 49–51), "workability" does not mean maximizing legislative power. The opposite is true: separation-of-powers concerns are "sharpened rather than blunted by the fact that

… veto provisions are appearing with increasing frequency." *Chadha*, 462 U.S. at 944.

III. Respondents' policy arguments fall short.

Respondents ultimately retreat to policy arguments, but they offer no evidence that eliminating legislative vetoes like these would be "disastrous." (Resp. Br. 51.) What they really mean is that the legislative committees could no longer micromanage how the executive branch implements statutory programs. But that is how our constitution should function. That Congress has sometimes ignored *Chadha* does not show otherwise (Resp. Br. 50); rather, it illustrates the overwhelming temptation for legislatures to seize executive power without following lawmaking procedures.

And Respondents' view that the "practical realities of modern governance" require legislative vetoes is both unsupported and irrelevant. (Resp. Br. 50.) Even if the vetoes were "efficient, convenient, and useful in facilitating functions of government," that cannot "save [them] if [they are] contrary to the Constitution." *Chadha* 462 U.S. at 944. "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government …." *Id.*

Moreover, many other jurisdictions have rejected such vetoes (Pet. Br. 39), and Respondents provide no evidence that governance broke down as a result. Indeed, Respondents themselves identify one of the legislative branch's legitimate substitutes for unconstitutional vetoes: "exercise greater caution before empowering agencies to administer various important actions on behalf of the State." (Resp. Br. 36.) Bafflingly, Respondents suggest this result would "undermin[e] the separation of powers," (Resp. Br. 36), but that is exactly how our constitutional system should work.

CONCLUSION

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

Dated this 27th day of March 2024.

Respectfully submitted,

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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 2993 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 27th day of March 2024.

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