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SUPREME COURT

SUPREME COURT OF WISCONSIN
Appeal No. 2023AP002020 - 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 Board, Professional Counseling and Social Work Examining Board,

Petitioners,

Gathering Waters, Inc.,

Intervenor-Petitioner,

v.

Senator Howard Marklein, Representative Mark Born, in their official capacities as chairs of the joint committee on finance; Senator Chris Kapenga, Representative Robin Vos, in their official capacities as chairs of the joint committee on employment relations; Senator Steve Nass and Representative Adam Neylon, in their official capacities as co-chairs of the joint committee for review of administrative rules,

Respondents,

Wisconsin Legislature,

Intervenor-Respondent.

REPLY BRIEF OF INTERVENOR-PETITIONER GATHERING WATERS, INC.

Dated March 27, 2024

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INTRODUCTION

Respondents ("the Legislature") have given this Court no reason to reject the arguments of the Governor, the DNR, and Gathering Waters. Whether pursuant to Wisconsin's separation of powers, its lawmaking requirements, or both, this Court should invalidate JCF's veto authority and restore constitutional order.

ARGUMENT

I. JCF's veto authority is an exclusively executive power, contrary to the Legislature's strained reliance on *Ahern* and *Martinez*.

"No aspect of the [executive] power is more fundamental than" its power to execute the law. *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶37, 376 Wis. 2d 147, 897 N.W.2d 384; Wis. Const. art. V, § 1. This is not unique to Wisconsin, nor is this a close call. (*See* Gov. Br. at 24-26, 33-37; GW (Gathering Waters) Br. at 16-22) The Wisconsin Constitution does not grant the Legislature the authority to execute the law. Permitting the legislative branch of government, through a small committee, to execute Knowles-Nelson would "upend the constitutional structure of separated powers, which allocate[d]" execution of the law to the executive branch. *Gabler*, 2017 WI 67, ¶38.

A. "Fiscal impacts" as a basis for carte blanche committee authority is constitutionally unsupportable with no principled limitation.

Agency actions to execute rigorous, detailed, circumscribed statutory regimes, like Knowles-Nelson, are executive. As this Court has repeatedly held, the executive power ***is defined by*** its executory and enforcement functions. *Serv. Emps. Int'l Union, Loc. 1 v. Vos (SEIU)*, 2020 WI 67, ¶1, 393 Wis. 2d 38, 946 N.W.2d 35; *Koschkee v. Taylor*, 2019 WI 76, ¶11, 387 Wis. 2d 552, 929 N.W.2d 600. JCF, a legislative committee, cannot constitutionally claim that power as its own. *Gabler*, 2017 WI 67, ¶¶4, 36, 38. "Frequently an issue of this sort will come

before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. ***But this wolf comes as a wolf***." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (emphasis added).

The Legislature acknowledges the existence of powers it cannot exercise—what it refers to as "truly core executive powers," (Leg. Br. at 29)—but then repeatedly, and unavailingly, tries to muddy the waters. First, it argues that administrative agencies have no claim to executive power. (*Id.* at 26) But this Court rejected that argument in *SEIU*, declaring that "[w]hen an administrative agency acts … it is exercising executive power." 2020 WI 67, ¶97.

Next, the Legislature argues that, because JCF's authority involves "the expenditure of state funds" and "the public fisc more generally," committee oversight is constitutional. (Leg. Br. at 32) Put another way, the Legislature seems to posit that, for any executive power involving money, the "JCF's review authority is a shared power[.]" (*Id.* at 33) This argument is as unfounded as it is infinite. The Legislature's power over the purse is exercised ***through lawmaking***. Wis. Const. art. VIII, § 2; *SEIU*, 2020 WI 67, ¶69 ("[T]he constitution gives the legislature the general power to spend the state's money by enacting laws.")

Exercises of executive authority will ***always***, in one way or another, entail expenditure of funds that have been appropriated by the Legislature. This is what makes a presumed legislative authority to intervene where "the public fisc" is implicated so dangerous: it renders the prospect of an independent executive branch an impossibility. The Legislature's own application of its theory demonstrates its consequences. (Leg. Br. at 32-33) Per the Legislature, not only does a "high dollar amount" triggering JCF review reflect a legislative interest, so do the non-fiscal triggers for JCF review, such as proposed purchases that fall outside established project boundaries (and presumably also then purchases above

Highway 64) since, per the Legislature, such proposals mean the agency action is "likely to require substantial outlays." (*Id.* at 33) This cannot be correct.[1]

B. The Legislature's reliance on *Ahern* and *Martinez* is misplaced.

As a threshold matter, stare decisis does not preclude this Court from correcting erroneous decisions, especially when the error distorts constitutional governance. *See, e.g.*, *Koschkee*, 2019 WI 76, ¶8 n.5 ("[S]tare decisis does not require us to retain constitutional interpretations that were objectively wrong when made.") Additionally, *J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983), is a court of appeals case, and this Court is not bound by it. *See Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, ¶63, 403 Wis. 2d 1, 976 N.W.2d 263 (Grassl Bradley, J., concurring) ("This court's practice … confirms that published court of appeals decisions are not entitled to stare decisis effect"); *accord State v. Yakich*, 2022 WI 8, ¶31, 400 Wis. 2d 549, 920 N.W.2d 12. This Court's lack of reliance on *Ahern* post-*Martinez* further counsels against any allegiance. References to *Ahern* in recent majority opinions are sparse, and those references have not echoed *Ahern*'s separation-of-powers analysis.[2] Most notably, as explained in Gathering Waters' initial brief, the

[1] To the extent the Legislature relies on *SEIU,* that reliance is misplaced. While this Court found that "institutional interest in the expenditure of state funds" can "justify [JCF's] authority to approve certain [litigation] settlements," 2020 WI 67, ¶¶63, 69, here the Legislature has identified no equivalent underlying shared power (such as representing the State in litigation was in *SEIU*); further, the act of committing the State to the payment of settlement funds is not equivalent to administering funds appropriated through lawmaking.

[2] *See Wis. Legislature v. Palm*, 2020 WI 42, ¶34, 391 Wis. 2d 497, 942 N.W.2d 900 ("When a grant of legislative power is made, there must be procedural safeguards to prevent the 'arbitrary, unreasonable or oppressive conduct of the agency.'") (quoted source omitted); *Sorenson v. Batchelder*, 2016 WI 34, ¶32, 368 Wis. 2d 140, 885 N.W.2d 362 and *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶23 n.5, 273 Wis. 2d 76, 681 N.W.2d 190 (notice requirements)*; DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship*, 2004 WI 92, ¶58, 273 Wis. 2d 577, 682 N.W.2d 839 (recovery for transcripts); *Holman v. Fam. Health Plan*, 227 Wis. 2d 478, 484 n.5, 489-90 nn.14-15, 596 N.W.2d 358 (1999) and *Ness v. Digital Dial Commc'ns, Inc*., 227 Wis. 2d 592, 600-01, 596 N.W.2d 365 (1999) (effect of amended complaint and service requirements); *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 884 n.8, 419 N.W.2d 249 (1988) (standing).

SEIU Court scarcely mentioned *Ahern*. (*See* GW Br. at 21) This is unsurprising, as *Ahern* is doctrinally out of step (as Petitioners have argued) and should be limited to its facts. (*Id.*; Gov. Br. at 44-46)

As for *Martinez*, that was a rulemaking case and is of limited value to illuminating the issue at stake here. *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992). The *Martinez* Court specified that its decision was responsive to what it perceived as a need for "legislative accountability ***over rule-making***." *Id.* at 701 (emphasis added). The Legislature's reliance on *Martinez* to claim a necessary constitutional stake in an agency's administration and execution of the law outside rulemaking (*see* Leg. Br. 26-30) is misplaced.

In sum, the Legislature fails to rebut the dispositive facts that the agency action at issue here is exclusively executive and that JCF's interference exceeds its legislative authority.

II. Bicameralism and presentment are constitutional imperatives that cannot be circumvented.

The Legislature's purported power to evade bicameralism and presentment lacks a basis in the Wisconsin Constitution, common law, and democratic norms.

A. The Legislature's claim that *Chadha* is not instructive because the State and Federal presentment clauses differ has no support.

The Wisconsin Constitution provides that "[e]very bill" must "be presented to the governor." Wis. Const. art. V, § 1(a). This mirrors the Federal Constitution: "Every Bill …, shall, before it become a Law, be presented to the President of the United States[.]" U.S. Const. art. I, § 7, cl. 2. The Legislature attempts to manufacture a difference between the two documents by focusing exclusively on a corollary clause, which provides that "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary … shall be presented to the President of the United States." *Id.* art. I, § 7, cl. 3.

Clause 3 is a secondary provision that plays a "modest role" countering semantics; after all, "if the President's veto was confined to bills, it could be evaded by calling a proposed law a 'resolution' or 'vote' rather than a 'bill.'" *INS v. Chadha*, 462 U.S. 919, 981 (1983) (White, J., dissenting); *see also* Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, Regulation, Nov./Dec. 1979, at 20[3] ("The purpose of this provision… is to prevent Congress from evading the President's legislative role … by simply acting through measures that are not called 'bills.'"). Despite this consensus understanding of Clause 3's limited effect, the Legislature gloms onto Clause 3 to argue that the absence of a parallel provision in the Wisconsin Constitution means that Wisconsin's framers intended to permit the Legislature to evade presentment simply by labeling legislative conduct as something other than passing a "bill": "[b]icameralism and presentment are mandatory only when the Legislature is passing legislation." (Leg. Br. at 40) This ignores the axiom that the Wisconsin Constitution is read not as a grant of authority, but as a limitation on government power, *Bushnell v. Town of Beloit*, 10 Wis. 195, 225 (1860), rendering the Legislature's understanding of the lawmaking process incompatible with foundational principles of constitutional law.

This Court should decline the Legislature's cynical invitation to read the Wisconsin Constitution, which exists to limit the powers delegated by the people to their elected officials, as a chess game to be manipulated by legislative chicanery.

[3]Available at https://www.cato.org/sites/cato.org/files/serials/files/regulation/1979/12/v3n6-4.pdf.

B. *Ahern* and *Martinez* are not dispositive in this Court's bicameralism-and-presentment analysis.

Nor can *Ahern* reasonably be construed to limit this Court's bicameralism-and-presentment analysis. For one thing, *Ahern* is a 40-year-old Court of Appeals decision that does not trigger stare decisis. For another, *Ahern* includes no consideration of bicameralism and presentment. And notably, *Ahern* was argued nearly a year (July 23, 1982) ***before*** the U.S. Supreme Court decided *Chadha* (June 23, 1983); that is to say, *Ahern* was adjudicated against a radically different backdrop of federal constitutional law.

The Legislature's reliance on *Martinez* to support its position is even more peculiar. In *Martinez*, this Court approved legislative-veto authority over rulemaking,[4] not execution of a statutory program. *See SEIU*, 2020 WI 67, ¶¶130-31. Even putting that fundamental difference aside, this Court in *Martinez* held a legislative act negating executive action does indeed trigger bicameralism-and-presentment requirements. 165 Wis. 2d at 699.

The provisions before this Court promise no bicameral passage or gubernatorial presentment will follow a decision by JCF. And while ***other*** procedural safeguards or legislative standards would still fall woefully short of constitutionally mandated bicameralism-and-presentment requirements, Wis. Stat. § 23.0917 (6m) and (8)(g)3 are devoid of ***any*** restraint on JCF's authority. No reading of *Martinez* approves of that lack of restraint.

C. A fiscal component to an action hardly exempts the Legislature from the gauntlet of lawmaking.

The "legislative power" is "the power to make the law, to decide what the law should be." *SEIU*, 2020 WI 67, ¶1. It follows that the "constitution gives the legislature the general power to spend the state's money ***by enacting laws***." *Id.*,

[4] As does *Mead v. Arnell,* 791 P.2d 410 (Idaho 1990), the bicameralism-and-presentment case referenced by the Legislature.

¶69 (emphasis added). For "fiscal" bills, that power is specially constrained, both by a higher quorum requirement before the Legislature can pass such bills, Wis. Const. art. VIII, § 8, and by the Governor's unique power to partially veto bills that appropriate funds, art. V, § 10(1)(b). "In fact, the Wisconsin legislature's constitutional 'power of the purse' is substantially more constrained relative to other state and the federal constitutions because the Wisconsin Constitution grants the governor 'coextensive' authority over appropriations legislation." *SEIU*, 2020 WI 67, ¶175 n.12 (Dallet, J., concurring in part, dissenting in part).

The JCF vetoes at issue here function outside of, and with no regard for, these constitutional provisions establishing that fiscal determinations are inextricably linked to both bicameral legislative ***and*** executive participation.

D. The Legislature's disavowal of bicameralism and presentment has no limiting principle.

The Legislature insists that following *Chadha* and restricting JCF's authority is "unworkable." (Leg. Br. at 50-51) As an academic matter, this is hotly debated.[5] As a practical matter, the federal legislative and executive branches have continued to function post-*Chadha* for 40 years. But most importantly, the Legislature's slippery-slope argument fails to contend with the unworkability of its own position.

The challenged provisions empower JCF to hold in abeyance, reduce, or reject an executive decision made in accord with statutory specifications. Wis. Stat. § 23.0917 (6m), (8)(g)3. Yet JCF need not consider in its own determinations, much less adhere to, the statutory criteria that govern Knowles-Nelson; instead, JCF claims the power to hold an executive decision in indefinite abeyance based upon any objection by any one legislator (out of 132). The Legislature claims JCF is informed by statutory "purposes" that "guide the

[5] *See, e.g.*, Curtis Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workaround*, 13 J. Legal Analysis 439 (2021).

selection and review of Knowles-Nelson projects" and "'standards or safeguards'" under *Martinez.* (Leg. Br. at 34) But these statutory standards do not apply to, or constrain in any way, JCF's review. Wis. Stat. § 23.0917 (6m), (8)(g)3. It is clear that JCF has only grown more emboldened in wielding its legislative veto. (Gov. Br. at 18-19)

Chadha teaches that an act performed by a legislative body is "legislative in purpose and effect" if it has "the purpose and effect of altering the legal rights, duties and relations of persons … outside the legislative branch." 462 U.S. at 952. Here, JCF's exercises of authority have undeniable effects on the public, including Gathering Waters' member land trusts, but most significantly, on DNR itself. The whole Legislature, through bicameralism and presentment, delegated to DNR the authority to administer Knowles-Nelson. But JCF alone takes that authority back.

The power JCF claims here to evade bicameralism and presentment lacks a basis in the Wisconsin Constitution, permits committee action absent any requirement it comply with the policy of the Legislature as a whole, much less the Governor as an official elected by all of the people, and permits an arm of the Legislature to act unilaterally in a manner that evades judicial review. A ***legislative committee*** has no constitutional authority to rescind or block agency authority granted and established through bicameralism and presentment. JCF's claimed legislative-veto authority even "effectively amends or repeals existing law"—i.e., it negates executive authority—and thereby "offends the Constitution because it is tantamount to passage of a new law without the approval of the Governor." *Gen. Assembly of State of N. J. v. Byrne*, 448 A.2d 438, 444 (N.J. 1982).

Without intervention from this Court, "the legitimation of the legislative veto will enable continuation and expansion of the recent practice of adopting major measures by a process which preserves [legislative] control while relieving the people's representatives of the embarrassment of voting." Scalia, *supra*, at 25.

III. The Legislature's claim that JCF oversight is necessary to "curtail abuses" and "mismanagement" by DNR is inaccurate and irrelevant.

The Legislature claims that in 2018, "the State required $93.6 million to cover Program debt payments[.]" (Leg. Br. at 20) This is inaccurate, per the Legislature's own cited authority, which shows that the figure reflects two sources: debt payment "and aids to local governments[.]" *Public Property: State Faces Deadline for Conservation*, 87 Wis. Taxpayer 6, 1 (June 2019). More importantly, these debt obligations are the outcome of lawfully enacted policy approved by the Legislature and the Governor. It is not for a legislative ***committee*** to impose a contrary policy or to functionally reduce an appropriation by unilaterally stripping an agency of its statutorily delegated authority to administer a funded program. What's more, follow-up publications from the same organization the Legislature cites explain that 2018 payments were elevated because the state opted to delay debt payments during a period of recession, and these debt payments have since stabilized. *This Land is Our Land*, Wis. Pol'y F. (March 2023) at 17-19 ("[D]ebt service paid out of the state's general fund dipped below 2.7% of overall spending in fiscal 2022, essentially the lowest level since 2005.")[6]

Finally, even if there were perceived "abuses" that called into question agency operations lawfully performed pursuant to statute, it would be the Legislature's job to change the law, not to override it unilaterally. And if there were perceived "abuses" because of an agency's failure to abide by statute, addressing that is the province of the judicial branch.[7] Neither situation would warrant JCF's transgression of clear executive authority.

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[6] https://wispolicyforum.org/wp-content/uploads/2023/03/ThisLandIsOurLand_FullReport-1.pdf.

[7] The Legislature's example highlights this: "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." (Leg. Br. at 35) Such an

CONCLUSION

For the foregoing reasons, the powers exercised by JCF pursuant to Wis. Stat. § 23.0917 (6m) and (8)(g)3. contravene the Wisconsin Constitution. This Court should declare Wis. Stat. § 23.0917 (6m) and (8)(g)3. unenforceable and grant Petitioners their requested relief.

Dated March 27, 2024.

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expenditure would not comply with the rigorous statutory program, triggering judicial involvement. That is because the statutes governing Knowles-Nelson strictly control how the Program's $33.25 million annual budget allocation may be spent and subdivide the spending into categories, as discussed in Gathering Waters' Initial Brief. (GW Br. at 10-13) *See also* Eric R. Hepler, *Warren Knowles-Gaylord Nelson Stewardship Program,* Wisconsin Legislative Fiscal Bureau, Informational Paper #66, at 3 (Jan. 2023), available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0066_warren_knowles_gaylord_nelson_stewardship_program_informational_paper_66.pdf.

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,996 words.

Dated March 27, 2024.

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