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,

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.

OPENING MERITS BRIEF OF PROPOSED INTERVENOR-PETITIONER GATHERING WATERS, INC.

Dated February 22, 2024

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ISSUE PRESENTED

This Court, in its February 2, 2024 Order, accepted the first issue presented by Petitioners challenging the constitutionality of specific provisions within the statutory framework governing Wisconsin's Warren Knowles-Gaylord Nelson Stewardship Program, Wis. Stat. § 23.0917(6m) and (8)(g)3. The challenged provisions grant the Legislature's Joint Committee on Finance the power to veto grant determinations made by the Department of Natural Resources under the program.

Petitioners challenge the provision of this authority to the Joint Committee on Finance as a violation of the Wisconsin Constitution's requirement of a separation of powers among three co-equal branches, each separately elected and accountable to the people, and the requirement that law be made through the process of bicameralism and presentment. The issue before the Court, then, contains two subparts:

(a) Do Wis. Stat. § 23.0917(6m) and (8)(g)3. violate the separation of powers by allowing the Joint Committee on Finance, a legislative committee, to exercise executive power?

(b) Do Wis. Stat. § 23.0917(6m) and (8)(g)3. authorize legislative action by the Joint Committee on Finance without fulfilling the requirements of bicameralism and presentment?[1]

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court has ordered oral argument April 17, 2024. The Court's opinion on these constitutional issues should be published.

[1] The Petition for Original Action merges these questions. As the Petition makes clear, to the extent the lawmaking process includes two branches of government, it is an essential component of our system of tripartite government and the separation of powers. But the constitutional provisions implicated, the case law illuminating them, and the rationales underlying them are, in many ways, distinct, such that Gathering Waters respectfully addresses them separately.

INTRODUCTION

The process of lawmaking, albeit at times cumbersome, protects the people by "balanc[ing] interest against interest, ambition against ambition, the combinations and spirit of dominion of one body against the like combinations and spirit of another." John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 708–09 (1997) (quoted source omitted). Our framers recognized the value of checks and balances, and they deliberately designed our government to balance competing interests. The Wisconsin Constitution accomplishes these ends in part by separating governmental power among three distinct, co-equal branches. "The significance of preserving clear boundaries between the branches has been understood since the founding of our nation[.]" *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶60, 376 Wis. 2d 147, 897 N.W.2d 384. Moreover, the Wisconsin Constitution constrains the power to make law by requiring that both houses of the Legislature and the Governor be involved in the law-making process. "Bicameralism and presentment are the crucible bills must overcome to become law. By design, it is much more difficult than rule by dictatorship." *Teigen v. Wis. Elections Comm'n,* 2022 WI 64, ¶141, 403 Wis. 2d 607, 976 N.W.2d 519 (Grassl Bradley, J., concurring) (quoted source omitted).

Acting in accordance with its constitutional role—to legislate—the Legislature established the Warren Knowles-Gaylord Nelson Stewardship Program (the Knowles-Nelson Program or Knowles-Nelson) 35 years ago, 1989 Wis. Act 31, and has reauthorized that program most recently through fiscal year 2025-26. 2021 Wis. Act 58. In creating and repeatedly reauthorizing the Knowles-Nelson Program, the Legislature has exercised its constitutional authority to express its policy prerogatives through lawmaking, authorizing the Department of Natural Resources (DNR) to acquire land and provide grants to nonprofit organizations and local units of government in service of lawfully enacted policy, including to "provide an adequate and flexible system for the protection,

development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state." Wis. Stat. § 23.09(1).

At first blush, this is a classic separation-of-powers tale: legislative branch passes law, executive branch executes it, judicial branch reviews executive branch action to ensure faithful conformity with the law. But the Knowles-Nelson story has one significant aberration that now brings it before the Court: the Legislature has reserved for a tiny sliver of its members—only 16 legislators, or fewer than 1 in 8 members of the legislative branch, appointed to the Joint Committee on Finance (JCF)—the authority to veto DNR's considered determinations of which grants and acquisitions to make under the Knowles-Nelson Program. Wis. Stat. § 23.0917(6m), (8)(g)3. And unlike the transparent and arduous process of DNR review (detailed below in Section I.B), JCF members block execution of agency determinations anonymously and single-handedly, are under no apparent statutory obligation to examine the processes, procedures, and considerations mandated in the statutory text that governs the Knowles-Nelson Program, and derail execution of the law without full legislative consideration or gubernatorial approval.

This process suffers from two separate, but related, constitutional infirmities, each of which is fatal. First, though part of the legislative branch, JCF is statutorily authorized to exercise executive authority, thus violating the Wisconsin Constitution's separation of powers. Second, the role JCF plays in the Knowles-Nelson Program after funds are appropriated for the program through the biennial budget process does not comport with the constitutionally required bicameralism and presentment process, thereby flouting the Legislature's obligation to govern through constitutional lawmaking, not committee decree.

STATEMENT OF THE CASE

I. Background on the Knowles-Nelson Stewardship Program

A. The Design of the Knowles-Nelson Stewardship Program

DNR administers the Knowles-Nelson Stewardship Program, which advances Wisconsin's statutorily recognized interest in the "protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources." Wis. Stat. § 23.09(1). DNR is currently authorized to obligate a maximum of $33,250,000 annually through the end of fiscal year 2025-26 from a blend of authorized bonding authority and segregated funds. Wis. Stat. § 20.866(2)(ta).

While annual obligations under the program are capped at $33,250,000, this is hardly an unrestrained bucket of spending authority for DNR. At the outset, the Wisconsin Statutes first require DNR to maintain several subprograms with specific legislatively authorized spending authority for each. Wis. Stat. § 23.0917(2)(a). These include:

- "land acquisition for conservation and recreational purposes,"[2]
- "property development and local assistance," and
- "recreational boating aid."

Id.[3]

The first subprogram (land acquisition) is statutorily subdivided into funding categories, currently: (1) DNR purchases of land and conservation easements, which can total up to $6,000,000 annually; (2) grants to nonprofit

[2] "Land" for purposes of administering the Knowles-Nelson Program generally includes "land in fee simple, conservation easements, other easements in land and development rights in land." Wis. Stat. § 23.0917(1)(d).

[3] *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.

conservation organizations (NCOs[4]), which can total up to $7,000,000 annually; and (3) grants to counties for the acquisition of productive forestland, which can total up to $3,000,000 annually. *See* Wis. Stat. § 23.0917(3)(b), (br), (bt), and (bw)2. The remaining $17,250,000 in annual authority is divided between the second and third subprograms. Wis. Stat. § 23.0917(4) and (4j).[5]

B. The NCO Grant Application Process

NCOs include those member land trusts that Gathering Waters represents. (Affidavit of Michael Carlson in Support of Gathering Waters, Inc.'s Motion to Intervene, ¶11).

An NCO's application to obtain a Knowles-Nelson Program land-acquisition grant triggers a detailed and technical competitive review process. As the Legislative Fiscal Bureau recently highlighted, "[e]ach year, DNR accepts applications from NCOs for stewardship projects on an annual grant funding cycle. Applications are considered for funding in a competitive process in which each project is scored on a rubric that seeks to quantify how well a project may accomplish the state's conservation goals."[6]

An applicant must submit proof of its eligibility as an NCO, including copies of its most recent tax returns, audit, annual financial statements, bylaws, articles of incorporation, IRS tax-exempt status determination letter, an adopted Board of Directors resolution evincing the organization's "commitment to continual progress toward implementation of Land Trust Standards and Practices," and any other relevant supporting materials. Wis. Admin. Code § NR 51.04(2).

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[4] "Nonprofit conservation organization" is defined as "a nonprofit corporation, a charitable trust or other nonprofit association whose purposes include the acquisition of property for conservation purposes and that is described in section 501(c)(3) of the internal revenue code and is exempt from federal income tax under section 501(a) of the internal revenue code." Wis. Stat. § 23.0955(1).

[5] Two other subprograms appear in statute but are inactive. Wis. Stat. § 23.0917(2)(a)3., 4.; *see also* Hepler, *supra*, at 12.

[6] Hepler, *supra,* at 12.

DNR staff then review the application for compliance with statutory requirements, prioritizing the issuance of grants to NCOs for land acquisitions that serve statutorily defined purposes, including the acquisition of land that "preserves or enhances the state's water resources" and constitutes "habitat areas and fisheries," or "natural areas," defined in part as "land or water which has educational or scientific value or is important as a reservoir of the state's genetic or biologic diversity," among others priorities. Wis. Stat. §§ 23.0917(3)(c), 23.27(1)(e); Wis. Admin. Code § NR 51.06. Where DNR awards funding to an NCO under the land-acquisition subprogram, that NCO is further limited in acquisition purpose. Wis. Stat. § 23.096(2).

A Knowles-Nelson Program grant to an NCO cannot cover more than a fraction of the total cost of the project at issue. In no circumstances can a Knowles-Nelson grant cover more than 75 percent of an NCO's costs for a land-acquisition project. Wis. Stat. § 23.0963(2m). And a Knowles-Nelson grant cannot exceed 50 percent of an NCO's acquisition costs unless the Natural Resources Board, which functions as DNR's governing body, *see* Wis. Stat. § 15.34(1), makes certain statutorily required findings. Wis. Stat. § 23.096(2)(b), (2m). Thus, before approving an NCO's application for Knowles-Nelson funds, DNR routinely requires, with very limited exceptions, submission of at least one independent appraisal, and two such appraisals are required any time the estimated fair market value of the property at issue exceeds $350,000. Wis. Stat. § 23.0917(7); Wis. Admin. Code §§ NR 51.006(2), 51.08(2).

In addition to evidence of eligibility and the requisite appraisals, an applicant seeking Knowles-Nelson funds to assist with a land-acquisition project must submit "an environmental inspection or assessment report showing the property contains no undesirable environmental conditions, potential liabilities or hazards that are unacceptable to" DNR, a title insurance policy, and any requisite easement documents, if applicable, for DNR's review and approval. Wis. Admin. Code § NR 51.08(3), (4), (7).

Once an NCO applicant runs the gauntlet of this extensive process, any resulting contract with DNR must ensure the NCO will maintain acceptable property-management standards and guarantee public access in most circumstances. Wis. Stat. §§ 23.096(3), 23.0916(2).[7] The NCO's contract with the State must specify not only that any subsequent sale or transfer must be approved by DNR, but also that any purchasers or transferees shall be subject to DNR's contracting requirements. Wis. Stat. § 23.096(4)(a).

In the 35 years since the Knowles-Nelson Program's inception, 1989 Wis. Act 31, requirements have expanded, both through legislative action and regulatory accretion. Nothing about the process to apply for a grant under the Knowles-Nelson Program can be described as laissez faire. The process is strictly prescribed by the Legislature, through detailed statutory specifications and additional requirements that have accrued under delegated rulemaking authority.

C. Legislative Interference with DNR's Execution of the Knowles-Nelson Program.

Buried within the statutory details of the Knowles-Nelson Program and its application process, however, is authority for a single legislative committee to exercise a veto over any project that survives the extensive application process devised by the Legislature. Wis. Stat. § 23.0917(6m), (8)(g)3. Generally, where "a project or activity … exceeds $250,000," JCF can: (1) passively approve through 14 working days of inaction; or (2) "notify" DNR that JCF has "scheduled a meeting to review the proposal." Wis. Stat. § 23.0917(6m)(a). After notification is given to DNR that a meeting has been scheduled, and in the absence of a statutory provision placing a time constraint on when a hearing must actually occur, the statutory text seemingly permits JCF to hold a proposal in abeyance indefinitely. *Id.* Should JCF hold a meeting pursuant to its review authority, JCF may object or

[7] Included in the Appendix accompanying this brief is a copy of the current DNR Project Score Criteria for NCOs. *See* GW App. 004-023. The NCO project scoring criteria (Form 8700-259A) is also available at https://dnr.wisconsin.gov/topic/Stewardship/ApplyNCO, along with the entire suite of application materials relevant to NCO grant applications.

approve the DNR grant. *Id.* While not expressly permitted in statute, and as demonstrated below, JCF has interpreted its authority to permit it to use the leverage created by its veto power to negotiate reduced sums with proposed grant recipients. This authority applies to all projects involving fee-simple acquisition of land located north of State Highway 64, regardless of the project price or amount of financial support sought from the Knowles-Nelson Program. Wis. Stat. § 23.0917(6m)(dr). In addition to JCF review under Wis. Stat. § 23.0917(6m), DNR must also get JCF approval for any land acquisitions outside a "project boundary," which are defined areas DNR may acquire property, if the project boundary was established before May 1, 2013. Wis. Stat. § 23.097(8)(g)3.

Two recent examples show how this process allows JCF improper interference in DNR's executive decision-making. The Pelican River Forest acquisition was one project denied after being held in limbo for nearly six months after DNR submission to JCF. DNR granted a request for approximately $4 million for a 56,259-acre conservation easement for the Forest Legacy Program and received an objection.[8, 9] The project was denied 168 days later.[10]

Likewise, the Town of Grand Chute's request for funding to support a park redevelopment was approved by JCF at a substantially lower amount than what DNR had approved. In February 2023, the Town of Grand Chute requested a local assistance grant of $663,800 out of the Knowles-Nelson local-assistance

[8] Letter from Bob Lang, Director, Legislative Fiscal Bureau, to the Members of the Joint Committee on Finance (April 18, 2023), *see* GW App. 024-029, also available at https://docs.legis.wisconsin.gov/misc/lfb/section_13_10/2023_04_18_natural_resources_stewardship_pelican_river_forest_acquisition.pdf.

[9] This Court may take judicial notice of the public records referenced in this brief and provided to this Court in Gathering Waters' Appendix. Wis. Stat. § 902.01.

[10] Joint Committee on Finance, Section 13.10 Meeting Minutes (April 18, 2023), *see* GW App. 030-037, also available at https://doa.wi.gov/budget/SBO/13.10%20Minutes%202023%2004%2018.pdf

subprogram (the second bullet-point on page 10, *supra*).[11] After an anonymous objection[12] from an unnamed "committee member," the matter was heard by JCF, which reduced the grant amount by nearly 40 percent, to $400,000.[13]

JCF's authority is unmoored from the rigorous process prescribed by the Legislature in the Wisconsin Statutes and amplified by DNR in Wis. Admin. Code. ch. NR 51. JCF is not obligated to consider any statutorily recognized interests in land conservation, is not required to make any determination that the statutorily or administratively proscribed processes or procedures were not followed by DNR, and is not required to articulate its reasonings at any point or in any way prior to issuance of a decision (should it ever give one). Wis. Stat. § 23.0917(6m), (8)(g)3.

Finally, and significantly, JCF's rejection of a DNR-approved project does not necessarily mean that grants funds will be available for future projects that an applicant may hope aligns with JCF membership's proclivities. Instead, unused bonding authority cannot be obligated in subsequent fiscal years, subject to legislatively enacted exceptions. *See* Wis. Stat. § 23.0917(5g).[14]

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[11] Letter from Bob Lang, Director, Legislative Fiscal Bureau, to the Members of the Joint Committee on Finance (Feb. 15, 2023), *see* GW App. 038-040, also available at https://docs.legis.wisconsin.gov/misc/lfb/section_13_10/2023_02_15_natural_resources_stewardship_grand_chute_arrowhead_park.pdf.

[12] Letter from Howard Marklein, Senate Chair, and Mark Born, Assembly Chair, Joint Committee on Finance, to Preston D. Cole, Secretary, Wisconsin Department of Natural Resources (Dec. 5, 2022), *see* GW App. 041, also available at https://www.documentcloud.org/documents/23696640-JCF-objection-letter-for-town-of-grand-chute-1.

[13] Joint Committee on Finance, Section 13.10 Meeting Minutes (Feb. 15, 2023), *see* GW App. 042-049, also available at https://doa.wi.gov/budget/SBO/13.10%20Minutes%202023%2002%2015.pdf.

[14] As of December 2022, $184,042,879 in unobligated bonding authority remained outstanding for encumbrances through the end of fiscal year 2025-26. Sydney Emmerich, State Level Debt Issuance, Wisconsin Legislative Fiscal Bureau, Informational Paper #82, at 30 (Jan. 2023), available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0082_state_level_debt_issuance_informational_paper_82.pdf.

ARGUMENT

I. The Joint Committee on Finance's Legislative Veto is an Exercise of Executive Power that Violates the Separation of Powers.

The Wisconsin Constitution contains three "vesting clauses" that separate the powers of state government into three branches: "The legislative power shall be vested in a senate and assembly," "[t]he executive power shall be vested in a governor," and "[t]he judicial power of this state shall be vested in a unified court system." Wis. Const. art. IV, § 1; *id.* art. V, § 1; *id.* art. VII, § 2. "We must be assiduous in patrolling the borders between the branches. This is not just a practical matter of efficient and effective government. We maintain this separation because it provides structural protection against depredations on our liberties." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶45, 382 Wis. 2d 496, 914 N.W.2d 21 (lead op.). "Our constitution's commitment to the separation of powers means the legislature should not, as a general matter, have a say in the executive branch's day-to-day application and execution of the laws." *Wis. Legislature v. Palm*, 2020 WI 42, ¶218, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting). "These separation of powers principles, established at the founding of our nation and enshrined in the structure of the United States Constitution, inform our understanding of the separation of powers under the Wisconsin Constitution." *Gabler,* 2017 WI 67, ¶11.[15]

A. It is well settled that, after a law is enacted and an appropriation is made, the executive branch is tasked with execution.

Wisconsin's constitutional structure "consists of policy choices enacted into law by the legislature and carried out by the executive branch." *Fabick v. Evers*, 2021 WI 28, ¶14, 396 Wis. 2d 231, 956 N.W.2d 856. "The people bestowed much power on the legislature, comprised of their representatives whom the people elect to make the laws. However, ever vigilant in averting the accumulation of power by

[15] "Wisconsin's separation of powers is a reflection of that found in the United States Constitution[.]" *Tetra Tech EC, Inc.*, 2018 WI 75, ¶58 (lead op.).

one body—a grave threat to liberty—the people devised a diffusion of governmental power[.]" *Gabler*, 2017 WI 67, ¶60. "The significance of preserving clear boundaries between the branches has been understood since the founding of our nation[.]" *Id*.

"Executive power is power to execute or enforce the law as enacted." *Serv. Emps. Int'l Union, Loc. 1 v. Vos (SEIU)*, 2020 WI 67, ¶1, 393 Wis. 2d 38, 946 N.W.2d 35. Administrative agencies, like DNR, are "manifestation[s] of the executive" and are part of the executive branch. *Id*., ¶97. "[W]hen an administrative agency acts … it is exercising executive power." *Id*.

"Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them." *Koschkee v. Taylor*, 2019 WI 76, ¶11, 387 Wis. 2d 552, 929 N.W.2d 600 (quoting *Schuette v. Van de Hey,* 205 Wis. 2d 475, 480–81, 556 N.W.2d 127 (Ct. App. 1996)). This distinction is central to our system of government. "Powers constitutionally vested in the legislature include the powers: to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; and to fix the limits within which the law shall operate." *Koschkee,* 2019 WI 76, ¶11 (cleaned up).[16]

Permitting the Legislature, or any constituent part thereof, to execute the law is incompatible with the constitutional separation of powers—the executive power ***is defined by its executory and enforcement functions***. *State ex rel. Friedrich v. Cir. Ct. for Dane Cnty.,* 192 Wis. 2d 1, 13, 531 N.W.2d 32 (1995) (emphasis added) ("Each branch has a core zone of exclusive authority into which the other branches may not intrude."). And for good reason. "John Locke … observed that 'it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them.'" *Gabler*, 2017 WI 67, ¶5 (citing John

[16] This brief uses the signal "cleaned up" when internal quotation marks, ellipses, and other metadata have been omitted from a quotation to improve its readability without altering its meaning. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017).

Locke, *The Second Treatise of Civil Government* § 143 (1764). "As Madison explained when advocating for the Constitution's adoption, neither the legislature nor the executive nor the judiciary 'ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.'" *Gabler*, 2017 WI 67, ¶4 (quoting Federalist No. 48 (James Madison)).

Nor can the Legislature retain control over agency executive action simply by virtue of having created an agency through lawmaking. As this Court recognized in *SEIU*, "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." 2020 WI 67, ¶130. By way of example, the court analogized: "The Wisconsin Constitution provides for a circuit court, but does not say how many circuit court judges there shall be." *Id.* While that means "the existence of any given circuit court judge is dependent entirely on the legislature's choice to create the position," it does not follow that "the legislature could tell circuit court judges how to exercise their judicial power on the grounds that it did not have to create the circuit court position in the first place and could eliminate it." *Id.*, ¶131. "[O]nce Congress makes its choice in enacting legislation, its participation ends." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (Supreme Court held that official subservient to legislature could not also execute laws, as doing so intruded on executive branch). A tripartite structure is axiomatic to American government:

> It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined.

Kilbourn v. Thompson, 103 U.S. 168, 190–91 (1880).

The Colorado Supreme Court in *Anderson v. Lamm* upheld the veto of a provision that would have required its Department of Social Services to get approval from a legislative committee before implementing a per-case increase in monthly payments to certain state-run facilities. 195 Colo. 437, 446–47, 579 P.2d 620 (Colo. 1978). In soundly rejecting this legislative intrusion on "the executive's power to administer appropriated funds," the court stated: "[b]y imposing this condition, the legislature is not merely limiting the overall funds available for the program, but rather is attempting to undertake an executive function in deciding whether a rate increase is appropriate. In our view, this is a clear violation of the separation of powers doctrine." *Id.* at 623, 627; *see also Opinion of the Justices*, 892 So. 2d 332, 337-38 (Ala. 2004) ("We understand [this bill] … to permit either the House or the Senate, through action or inaction, effectively to veto a contract entered into by the executive branch for the purpose of carrying out its executive function… . [I]t is our opinion that [such a veto] would impermissibly interfere with the core executive power, and, therefore, would be unconstitutional."); *N.D. Legis. Assembly v. Burgum,* 2018 ND 189, ¶55, 916 N.W.2d 83 (N.D. 2018) ("After a law is enacted, further fact finding and discretionary decision-making in administering appropriated funds is an executive function.").

This Court has said that "our constitutional structure does not contemplate unilateral rule by executive decree." *Fabick*, 2021 WI 28, ¶14. The same principles must necessarily apply to the Legislature. The Legislature cannot, in compliance with the Wisconsin Constitution, anoint itself, nor any subset of its members, to execute the law while also enacting it.

B. The Legislature's insertion of its Joint Committee on Finance into the execution of the Knowles-Nelson Program unconstitutionally usurps executive power.

DNR, as an executive agency, exercises executive power in administering the Knowles-Nelson Program. *See SEIU*, 2020 WI 67, ¶97. "The legislature gets to make the laws, not second guess the executive branch's judgment in the execution

of those laws." *Palm*, 2020 WI 42, ¶218 (Hagedorn, J., dissenting). "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher*, 478 U.S. at 733 .

Although the execution of an enacted program is irrefutably an executive function, Wis. Stat. § 23.0917(6m) and (8)(g)3. give a single legislative committee—only 16 of 132 total Wisconsin legislators—the authority to wield ultimate control over a grant program that was enacted, and continues to be reauthorized and funded, through the full legislative and gubernatorial review and approval process. With these provisions, after both houses of the Legislature have approved the program, the Governor has signed the program into law, and DNR has put grant-funding applications through an extensive vetting process, JCF can unilaterally halt the execution of the law in its tracks. At its core, this is a legislative attempt to execute a law—that is, it is an attempt to collapse two separate branches of our government into one.

While it is undeniable that the Legislature, through *lawmaking*, drives the appropriation process, Wis. Const. art. VIII, § 2, the inclusion of an appropriation in an enacted program does not convert an agency's administration to an exercise of legislative power. Indeed, no money is to be paid except by appropriation (which is made through law). *Id*. But once appropriation is made, it is the executive's role to "administer the appropriation and to accomplish its purpose, subject, of course to any limitations constitutionally imposed by the legislature." *Clark v. Bryant*, 253 So. 3d 297, 302 (Miss. 2018) (quoted source omitted).

The Legislature has exercised its constitutional power in appropriating funds to the Knowles-Nelson Program. But after creating the program, establishing criteria to guide DNR in administering the program, and appropriating

funds for the program's operation, the Legislature's role is complete until and unless it pursues further lawmaking.[17]

Yet, as the law currently stands, JCF is permitted to act, ostensibly on behalf of the entire Legislature, with respect to approving or denying Knowles-Nelson grants. What's worse, the provisions at issue here, Wis. Stat. § 23.0917(6m) and (8)(g)3., do not give even a pretense of broader legislative review or executive-branch participation of the kind that might avoid the "[i]ncremental erosion [that] undermines the checks and balances … designed to promote governmental accountability and deter abuse." *SEIU,* 2020 WI 67, ¶138 (Dallet, J., concurring in part) (quoted source omitted). Nor are the JCF review provisions at issue in this case particularly arduous for JCF to implement. In exercising its review authority, JCF, unlike DNR, is not bound by the statutory Knowles-Nelson purpose language, nor by any other limiting factor. Once an objection is issued (for any reason, public or secret, a JCF member fancies), state law does not require JCF to act pursuant to any timetable, functionally allowing JCF to relegate a grant proposal to indefinite purgatory. Finally, these review provisions do not explicitly restrict JCF from negotiating with recipients or

[17] To the extent Respondents intend to rely on *J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983), that case is inapposite. *Ahern* involved a challenge to the authority of the State Building Commission to "select sites for public buildings, to administer construction of such buildings and to lease the buildings." *Id*. at 100. Most obviously, *Ahern* is inapposite on its face because the legislative body at issue was split between members of the legislative and executive branches. *Id.* The constitutionality of a blended body is not before this Court. Nor did the *Ahern* decision adopt a *de facto* rule granting constitutional sanction to any statute requiring cooperation between the legislative and executive branches. The Court of Appeals held that a separation of powers challenge requires judicial examination of the specific powers being exercised under the statute at issue and specifically limited its ruling to "the power of the Building Commission over the construction of state office buildings[.]" *Id.* at 104–05. True to that limiting language, the Court's decision in *SEIU* paid little heed to *Ahern,* despite Petitioner's request for greater weight, limiting its discussion of the case to only its limited conclusion that: "[C]ontrol of at least legislative space in the Capitol is a shared power between the legislature and executive branches … . [I]f the legislature can control the use of legislative space … it can also control the security measures put in place for use of that space." *SEIU*, 2020 WI 67, ¶77.

approving reduced amounts.[18] Instead, the statutes afford JCF broad authority to intervene in DNR's determinations—that is, its execution of the law—without any regard for the processes, procedures, or policy determinations required by the lawmaking process.

The powers JCF wields under Wis. Stat. § 23.0917(6m) and (8)(g)3. facially invalid. A provision is facially invalid if, beyond any reasonable doubt, "the law cannot be enforced under any circumstances." *Winnebago Cnty. v. C.S.*, 2020 WI 33, ¶14, 391 Wis. 2d 35, 940 N.W.2d 875 (quoted source omitted). That standard is met here. Whatever decision JCF makes—whether to halt, indefinitely suspend, deny, approve, or modify a Knowles-Nelson grant—JCF is exercising the power to execute the law. Permitting the Legislature to both write and execute the laws, regardless of the manner in which the Legislature chooses to execute (be it abeyance, voiding, modifying, or approving), would "upend the constitutional structure of separated powers." *See Gabler*, 2017 WI 67, ¶38. These provisions cannot stand.

II. The Joint Committee on Finance's Legislative Veto Authority Violates Bicameralism and Presentment Principles.

As noted above, the Wisconsin Constitution vests the "legislative power" in the State Assembly and State Senate. Wis. Const. art. IV. § 1. The "legislative power" is not boundless but, rather, is "the authority to make laws[.]" *Van de Hey,* 205 Wis. 2d 480-81. The Legislature's power, thereby, lies in lawmaking.[19] The

[18] *See* email correspondence between Wisconsin State Senator and Knowles-Nelson recipient regarding negotiations on grant amount at GW App. 050-055, also available at https://www.documentcloud.org/documents/23697889-grand-chute-dec-2022-emails, *see also* Wisconsin Watch, *"There's no transparency"; Secretive "pocket veto" in JCF scuttles Wisconsin projects*, (Mar. 22, 2023), available at https://pbswisconsin.org/news-item/theres-no-transparency-secretive-pocket-veto-in-JCF-scuttles-wisconsin-projects/.

[19] Where the Constitution assigns the Legislature other powers outside lawmaking, it does so explicitly, *e.g.*, each house's authority to set its own internal rules (art. III, §§ 7, 8, 9); the Senate's power to confirm certain appointees to state office (art. XIII, § 10); the Assembly and Senate's distinct roles in impeachments (art. VII, § 1); powers to propose constitutional amendments, call constitutional conventions (art. XII, §§ 1, 2), power to break a tie in an election for governor and lieutenant governor (art. V, § 3), and remove justices by address (art. VII, § 13).

lawmaking process has two distinct steps: passage of a bill by both houses (bicameralism), Wis. Const. art. IV, § 17, and presentation for the Governor's consideration (presentment), Wis. Const. art. V, § 10. If the Governor signs a bill passed by both houses of the Legislature, the bill becomes a law. Wis. Const. art. V, § 10(1)(b). The Governor's veto authority is constrained by the Legislature's power to override it with a two-thirds supermajority vote. Wis. Const. art. V, § 10(2)(a)-(b). The Wisconsin Constitution does not provide any authority, explicit or implicit, for legislative committees or individual legislators to make law outside of the bicameralism and presentment process.

And yet, Wis. Stat. § 23.0917(6m) and (8)(g)3. require DNR to prostrate to a single legislative committee (JCF) before fully executing the program that its statutorily tasked with administering. Such a grant of authority to JCF contravenes our constitutional framework. Just as the Legislature was required to pass a bill to establish the Knowles-Nelson Program and additional bills to appropriate funds for that program, so too must it use the lawmaking process to enforce its will as to the manner in which DNR executes the stewardship program.

A. Committee decree is not a constitutionally valid replacement for lawmaking.

"Bicameralism and presentment are the crucible bills must overcome to become law. By design, it is much more difficult than rule by dictatorship." *Teigen*, 2022 WI 64, ¶141 (Grassl Bradley, J., concurring) (quoted source omitted). Part of that design reinforces the separation of powers:

> By separating the lawmaking and law enforcement functions, the framers sought to thwart the ability of an individual or group to exercise arbitrary or absolute power. And by restricting lawmaking to one branch and forcing any legislation to endure bicameralism and presentment, the framers sought to make the task of lawmaking more arduous still.

Koschkee, 2019 WI 76, ¶56 (Grassl Bradley, J., concurring) (quoted source omitted). The arduous nature of the legislative power is "no bug in the constitutional design: it is the very point of the design." *Id.* (quoting *Gutierrez-*

Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring)). The paired requirements of bicameralism and presentment balance the legislature's power to make legislature with a limited check on that power through a gubernatorial veto, the likes of which the legislature can override with sufficient support of the body.

Bicameralism also protects against tyranny within the legislative branch itself. It "makes the exercise of legislative power a bit more cumbersome and deliberate," requiring "two legislative institutions, instead of one, … for political action." Richard Champagne, Legislative Reference Bureau, *The Foundations for Legislating in Wisconsin*, 2 (2015).[20] By design, then, bicameralism "diffuses political power *within the legislature*, making it difficult for any one interest to dictate its public policy preferences in the lawmaking process." *Id.* (emphasis added). "[C]arving up the lawmaking power in this way … makes it harder for self-interested factions to capture the legislative process for private advantage [and] restrains momentary passions by promoting caution and deliberation." John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1982-83 (2011).

The United States Supreme Court reinforced the majoritarian aspect of bicameralism and presentment in *I.N.S. v. Chadha*, 462 U.S. 919 (1983).[21] In *Chadha*, the Supreme Court reviewed a one-House power to veto the Attorney General's deportation determination, the latter of which was delegated to him by Congress to suspend "in his discretion[.]" *Id.* at 923-25. In *Chadha*, the Attorney General recommended suspension of Chadha's deportation, and a single

[20] Available at https://docs.legis.wisconsin.gov/misc/lrb/legislating_in_wisconsin/lrb_legislating_in_wisconsin_no_1.pdf.

[21] "Where [] the language of the provision in the state constitution is 'virtually identical' to that of the federal provision or where no difference in intent is discernible, Wisconsin courts have normally construed the state constitution consistent with the United States Supreme Court's construction of the federal constitution." *State v. Agnello*, 226 Wis. 2d 164, 180, 593 N.W.2d 427 (1999). Wisconsin's lawmaking process largely mirrors the federal process. *See* U.S. Const. art. I, § 7.

Representative introduced a resolution opposing a series grants of deportation relief, including Chadha's, which passed. *Id.* at 925–26. The passed resolution was not printed, was not made available to House members prior to its vote, was not debated, was not adopted by a recorded vote, and was not submitted to the Senate or president. *Id.* at 926–28.

The Supreme Court addressed both procedural components of lawmaking—bicameralism and presentment—to find that the "legislative veto" Congress enacted sought to authorize acts that were "legislative [in] character" without passing through required bicameralism and presentment. *Id*. at 954–55. The Court reasoned 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" (including the executive branch officials and Chadha himself). *Id*. at 952. In so concluding, the Supreme Court observed that the Constitution lacks any enumerated authority for a single house to act alone, but for narrow enumerated exceptions not implicated by the statute at issue. *Id*. at 956–57. The Supreme Court also reasoned that the single house's reservation of power to conduct a back-end policy determination overruling a decision conferred by law to an executive officer was as equally legislative in character as the original choice to delegate the decision to the Attorney General was. Each of those decisions—the initial grant of authority and the policy decision to override the Attorney General's judgment—"involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President." *Id*. at 954–55. It follows, the Court held, that "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.*

Courts elsewhere have recognized bicameralism and presentment as an inviolable limitation on legislative power. Consider *McInnish v. Riley*, 925 So. 2d 174, 176 (Ala. 2005), where the Supreme Court of Alabama invalidated a framework that established a joint legislative committee to review and approve

grant applications from legislators seeking funds appropriated to the committee by the full legislature. Through principally a separation of powers analysis, the *McInnish* court concluded that the committee was unlawfully executing a grant program through a process that "begins and ends in the legislature[.]" *Id.* at 188. The Alabama Supreme Court later spoke to its ruling in *McInnish*: "The result of the statutory scheme in *McInnish* was that the Legislature could pass an appropriation act and then, after that enactment, apply its own criteria and decide more specifically where the appropriation should go. The problem was not that the Legislature made the more specific decision as to where the money would go, but that the Legislature was making that decision post-enactment, in a manner other than by enacting new legislation[.]." *State ex rel. King v. Morton*, 955 So. 2d 1012, 1018–19 (Ala. 2006) (emphasis added). No one could reasonably question that Alabama could make these same legislative determinations through proper lawmaking. It just couldn't make them through committee.

The Supreme Court of Kentucky also invalidated a delegation of what it considered to be "purely legislative in nature" in *Legis. Rsch. Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984). The statute at issue gave state agencies the authority to seek federal block grants, but subject to the interjection of a legislative research commission (which the court referred to as an "arm" of its legislature). That commission, in turn, had broad authority to modify grant applications and overrule agency decisions. *Id*. at 911, 929. Characterizing the authority as "absolute control, without criteria, standards or guidelines, over the process of seeking block grants," the court held that the Legislature could not bypass lawmaking by delegating to its "arm" such a "legislative matter" or any question so "legislative in nature." *Id*.

Courts that have upheld the power of legislative subsets to act legislatively short of lawmaking have done so where strict standards applied and an underlying emergent need was shown. Take *Hunter v. State*, in which Vermont's Supreme Court surveyed a law that authorized the legislature's Joint Fiscal Committee to

approve appropriation changes as part of a "deficit prevention plan," which applied only in circumstances where state revenues were reduced to such extent that the plan was "necessary to ensure a balanced budget," and furthermore was a committee mechanism limited to times when the full legislature was not in session. 2004 VT 108, ¶2, 865 A.2d 381 (Vt. 2004). The *Hunter* court ultimately upheld the "decision-making power of the JFC" *because* of the emergency circumstances that triggered the authority and "sufficient standards to ensure that the spending priorities of the full Legislature are respected." *Id*., ¶34.

Other courts have been less flexible. In addition to *McInnish* and *Brown*, consider *State ex rel. Judge v. Legis. Fin. Comm. & Its Members,* 168 Mont. 470, 543 P.2d 1317 (Mont. 1975). There, the Montana Supreme Court struck down law "empowering the Finance Committee to approve budget amendments" because that arrangement "delegated a power properly exercisable only by either the entire legislature or an executive officer or agency, to one of its interim committees." *Id.* at 477. As the Court explained, "[t]he power in question here resides in either the entire legislative body while in session or, if properly delegated, in an executive agency." *Id.* These cases show an established understanding that a foundational component of a tripartite government is that a legislative body cannot evade bicameralism and presentment through assigning lawmaking powers to a subset of its members, at least not outside of emergency circumstance or without strict guidelines.

Finally, it is no rejoinder that lawmaking, at times, may be "clumsy, inefficient, even unworkable." *Chadha*, 462 U.S. at 959. As noted earlier, those difficulties are features, not bugs. *Koschkee*, 2019 WI 76, ¶56 (Grassl Bradley, J., concurring) (quoting *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring)). Or, as the *Chadha* Court put it: "There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided." *Chadha*, 462 U.S. at 959. To the

contrary, even factoring in "all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id*.

This Court resoundingly rejected appeals to override mandatory processes in *Palm*, 2020 WI 42. There, the Legislature challenged emergency measures put in place by the Department of Health Services (DHS) on several grounds, including that the emergency measures failed to comply with statutorily enacted rulemaking requirements. DHS responded that the rulemaking procedures were "incompatible with the executive's duty to respond to a public health crisis." *See* Respondent's Response to Petition for an Original Action and Motion for Temporary Injunction, *See* Respondents' Response to Petition for an Original Action and Motion for Temporary Injunction, *Wis. Legislature v. Palm*, No. 2020AP765-OA at 52 (April 28, 2020). This Court emphatically held that exigency could not excuse deviation from a required procedure: "The procedural requirements of Wis. Stat. ch. 227 must be followed because they safeguard all people." *Palm*, 2020 WI 42, ¶58. This Court later extended *Palm*'s approach in *Fabick*: "Whether the policy choices reflected in the law give the governor too much or too little authority to respond to the present health crisis does not guide our analysis. Our inquiry is simply whether the law gives the governor the authority to successively declare states of emergency in this circumstance." 2021 WI 28, ¶15. The *Fabick* Court dismissed "outcome-focused concerns" that gave insufficient consideration to the Court's obligation to "interpret and apply the law, whether we like it or not." *Id*., ¶15 n.6.

Fabick and *Palm* both concern ***statutory*** constraints. Their holdings apply with even greater force to the ***constitutional*** rules implicated here. As cornerstones of our constitutional republic, these rules cannot be evaded. Lawmaking is a function of constitutional mandates which, as the *Chadha* Court recognized, cannot be sidestepped by authorizing a subset of legislators to exercise the

legislative policy-making power after the fact to nullify the executive branch's faithful execution of existing law.

B. The Joint Committee on Finance's authority over the Knowles-Nelson Program is incompatible with the Wisconsin Constitution's bicameralism and presentment requirements.

The Knowles-Nelson Program is a result of bicameralism and presentment. Through exercise of its lawmaking power, the Legislature created a framework that requires DNR to operate several subprograms under the umbrella of the Knowles-Nelson Program, assess proposals for Knowles-Nelson grants, and "obligate moneys" already appropriated for the program, all by applying statutory mandates that govern all manners of the Program's operations. This authorization, through enacted statute, necessarily conformed with bicameralism and presentment. By contrast, when JCF exercises its claimed authority to override DNR's determinations, it does not.

The very text of Wisconsin's Constitution underscores that the Legislature acts through lawmaking. The Wisconsin Constitution contains no mention of legislative committees. This fact, along with the text of related provisions, suggests that the legislative power is vested in the Legislature collectively. "The legislative power" is vested in "a senate and assembly." Wis. Const. art. IV § 1. The word "and" is conjunctive. *See, e.g.*, *Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 2006 WI 91, ¶79, 293 Wis. 2d 38, 717 N.W.2d 216. "A majority of each [house] shall constitute a quorum to do business." Wis. Const. art. IV § 7. Even the individual houses generally lack authority to act as individual bodies outside their role in lawmaking.[22]

This Court's opinion in *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110, underscores that the Legislature speaks through statutory text. As the Court recognized, "the legislature's intent is expressed in the statutory language." *Id.*, ¶44. "The principles of statutory

[22] Note 19, *supra*, discusses the limited exceptions.

interpretation that we have restated here are rooted in and fundamental to the rule of law." *Id*., ¶52. Among those principles are: "Ours is 'a government of laws not men' and 'it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.'" *Id*. (quoting Antonin Scalia, *A Matter of Interpretation*, at 17 (Princeton University Press, 1997). From this, the *Kalal* Court reasoned, it necessarily follows that "'only the laws that [legislators] enact [] bind us.'" *Id*. Or, as Justice Scalia put it elsewhere, the "Constitution sets forth the only manner in which the Members of Congress have the power to impose their will upon the country: by a bill that passes both Houses and is either signed by the President or repassed by a supermajority after his veto." *United States v. Est. of Romani*, 523 U.S. 517, 535 (1998) (Scalia, J., concurring).

It can hardly be a matter of debate that the Wisconsin Constitution does not permit a single legislator to single handedly approve, deny, or modify determinations made by executive branch officials acting pursuant to a legislatively created program that expressly authorizes those determinations. Yet, in practice, that is what JCF's review entails. JCF's review provisions operate to permit the objection of a single[23] committee member to serve as the impetus for a JCF notice of a future meeting, which then stalls—even indefinitely—the grant. Wis. Stat. § 23.0917(6m) and (8)(g)3. A committee quorum is no more constitutionally recognized as permitted to implement its policy preferences outside the lawmaking process than the individual. And because JCF has 16 members and requires a mere majority as a quorum, JCF can take action that

[23] Note 12, *supra*, references one such objection notification, informing DNR of "*an* objection". (emphasis added). *See* GW App. 041.

requires majority approval with as few as ***five consenting members*** at a meeting at which a minimum quorum (nine members) is present.[24]

The nature of JCF's exercise of power pursuant to Wis. Stat. § 23.0917(6m) and (8)(g)3. embodies the very policy-determinations that intuitively (and constitutionally) requires lawmaking. It is a process that impermissibly "begins and ends in the legislature[.]" *McInnish*, 925 So.2d at 176.

JCF exercises legislative power through its approvals, denials, modifications, and holds (*i.e.* its legislative veto authority) insofar as any exercise of its statutory authority affects the rights of DNR and the public, including Gathering Waters and its member land trusts. But just as implementing the policy to establish and fund Knowles-Nelson required bicameralism and presentment, so do JCF's actions against DNR's grant decisions. *See Chadha,* 462 U.S. at 954. The Legislature (whether it be the whole body or a subset) cannot exercise this type of power without complying with the Constitution's procedures of bicameralism and presentment. *See id.* at 957 ("The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps.").

Separate and apart from the nature of the power is Wis. Stat. § 23.0917(6m) and (8)(g)3.'s complete lack of standards, procedure, or accountability, which support the conclusion that this is the very type of decision that is best left to

[24] The concentration of legislative decision making is amplified given the statutory composition of JCF's membership, which ensures that a single party (the majority party) controls its actions. Under state law, JCF consists "of 8 senators and 8 representatives to the assembly appointed as are the members of standing committees in their respective houses." Wis. Stat. § 13.09(1) The Speaker appoints representatives from the Assembly, and the Majority Leader appoints members from the Senate. Assembly Rule 9(2)(b), (c); Senate Rule 20(2)(a). The Speaker determines the allocation of appointments between the majority and minority parties for Assembly Representatives. Assembly Rule 9(2)(a). The Senate Majority Leader determines the allocation of appointments between the majority and minority parties for Senators, which generally must be at least proportional to the representation of the majority and minority parties in the Senate, unless proportionate representation would put the Senate majority party in a minority position on the committee. Senate Rule 20(2)(c).

lawmaking. *See Brown*, 664 S.W.2d 907; *Hunter*, 2004 VT 108. On the one hand, consider the extensive DNR review process detailed in Section I.B, *supra*, faithfully executing requirements adopted through enactment of statutory mandates. Contrast that, on the other hand, with JCF's claim of wholly unconstrained authority to countermand DNR's determinations that result from execution of those mandates. The carte blanche authority JCF is exercising pales in comparison, both as a logical matter and, even more clearly, as a constitutional one.

This Court has had only one occasion to weigh a legislative committee's authority against the constitutional requirements of bicameralism and presentment. In *Martinez v. DILHR,* 165 Wis. 2d 687, 699, 478 N.W.2d 582 (1992), this Court allowed a legislative committee to temporarily suspend administrative rules where those suspensions were purportedly issued to facilitate bicameral review by the Legislature as a whole and presentment to the Governor for signature or veto. *Id.* Without conceding that *Martinez* was correctly decided or that its underlying premise (that suspensions would necessarily be subject to meaningful bicameralism and presentment) was true,[25] *Martinez* still bears discussion, as one of the few times this Court has addressed bicameralism and presentment. Taken at face value, *Martinez,* too, requires that, at minimum, a legislative committee's expression of policy must face the gauntlet of bicameralism and presentment. *Id.* Such an imminent check against JCF's policy actions is wholly absent here. Indeed, JCF has repeatedly flouted even the minimal procedural safeguards the

[25] JCF's authority over the Knowles-Nelson Program is distinct from DNR's rulemaking authority, and the core holdings of *Martinez* are not before this Court. However, Gathering Waters would be remiss not to point out that, to the extent it is relevant to the bicameralism and presentment discussion, the *Martinez* ruling was premised on the understanding that a legislative suspension would indeed face bicameralism and presentment. 165 Wis. 2d at 699. Since *Martinez,* the Legislature has passed a series of laws that expand its ability to evade bicameral review and presentment of a suspension decision. 2017 Wis. Act 57, §§ 28–31 (allowing indefinite objections without bill introduction); 2017 Wis. Act 369, § 64 (allowing unlimited committee suspensions). These innovations are questionable, *at minimum*, under *Martinez* because they do not contain any requirement for satisfaction of bicameralism and presentment.

Knowles-Nelson statute does assert on the committee, failing to take the simple step of scheduling meetings to discuss approved programs being held up, if not outright derailed, by anonymous objections. In practice, JCF has taken to simply issuing notices stating that an objection was raised and hearings ***will*** be scheduled.[26] Even ignoring JCF's actual conduct and assuming such meetings would be held in the future, the prescribed committee meetings fall woefully short of meeting constitutional muster under bicameralism and presentment.

The powers and prerogatives that JCF claims under Wis. Stat. § 23.0917(6m) and (8)(g)3. are unconstitutional under any circumstance and are therefore invalid. *Winnebago Cnty.*, 2020 WI 33, ¶14. Here, the procedural defect pervades Wis. Stat. § 23.0917(6m) and (8)(g)3. regardless of the particular policy preference JCF exercises in any given instance. Whether JCF vetoes a DNR proposal, affirms it, holds it in abeyance pursuant to an objection, or unilaterally modifies a grant already approved by DNR, the committee's authority to impose its policy preferences is unconstitutional. This imposition is nothing more than a post-enactment change to the statutory requirements governing the Knowles-Nelson Program; such a change cannot be accomplished outside of bicameralism and presentment.

Where, as here, the procedure is constitutionally infirm, it does not matter whether JCF's actions have ever had the effect of delaying anything. *See* Respondent's Response in Opposition to Petition for Original Action at 28, and Brief in Support of Unopposed Motion to Intervene by Gathering Waters at 5-7, 13; Carlson Aff., ¶¶ 35, 42-45, 48; Exhibit A to the Petition for Original Action.

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[26] Note 12, *supra*, demonstrates the Legislature's noncompliance with the minimal requirements of its review process. Relatedly, the Legislature's own attorney opined that JCF's practice of notifying parties an objection without scheduling a hearing is insufficient to satisfy the procedural requirements established in Wis. Stat. § 23.0917(6m) for triggering the need for JCF approval prior to DNR obligating bonding authority. Henning, Anna, Wisconsin Legislative Council, Memorandum RE: Legal Considerations Relating to Joint Committee on Finance Review of Stewardship Proposals, May 12, 2022, *see* GW App. 056-060, available at https://www.documentcloud.org/documents/23697326-51222-stewardship-memo.

The Legislature has adopted provisions that purport to give JCF power to do something it cannot do absent bicameralism and present. *Any* exercise of that purported power is constitutionally prohibited. Wisconsin Stat. § 23.0917 (6m) and (8)(g)3. are unconstitutional regardless of the policy determination JCF ultimately makes in any given instance. The procedural noncompliance is a fatal flaw warranting facial invalidation. "An unconstitutional act of the Legislature is not a law. It confers no rights, imposes no penalty, affords no protection, is not operative, and in legal contemplation has no existence." *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 532, 280 N.W.2d 316 (Ct. App. 1979)).

CONCLUSION

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

Dated: February 22, 2024.

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

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes Section 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 9,100 words.

Dated: February 22, 2024.

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