IN THE SUPREME COURT OF WISCONSIN
No. 2023-AP-2020-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.

NON-PARTY BRIEF OF *AMICUS CURIAE* FORMER WISCONSIN JUDGES

Chris Donahoe, SBN 1092282
Daniel S. Lenz, SBN 1082058
T.R. Edwards, SBN 119447
LAW FORWARD, INC.
222 West Washington Avenue, Suite 250
Madison, Wisconsin 53703
cdonahoe@lawforward.org
dlenz@lawforward.org
tedwards@lawforward.org
608.535.9808

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTERESTS OF AMICUS CURIAE

The Honorable Paul Lundsten, Richard Sankovitz, John Markson, and Richard Niess are former Wisconsin State Court judges. Judge Paul Lundsten served on the Wisconsin Court of Appeals for 19 years and as an Assistant Attorney General for 17 years before that. Judge Richard Sankovitz served as a Circuit Court judge in Milwaukee County for 22 years. And Judges John Markson and Richard Niess served as Circuit Court judges in Dane County for ten years and 16 years, respectively. As former judges, they have a unique understanding of the role of the judicial branch, including how it serves as a check on the legislative and executive branches.

INTRODUCTION

Wisconsin's democracy, and its fundamental principle of separation of powers, depend on the judicial branch retaining an effective check on legislative overreach. The judiciary accomplishes this task through its core power to interpret and apply the law. This case addresses statutes which empower the Joint Committee on Finance (JCF) to block grants under the Knowles-Nelson project. Petitioner, Governor Tony Evers, and the Proposed Intervenor-Petitioner, Gathering Waters, address how that legislative veto unconstitutionally intrudes on the executive power and violates basic requirements of how the Legislature may enact statutes subject to the Governor's veto.

The veto authority that the Legislature created for itself, and similar statutes, also unconstitutionally encroach upon the judicial power. This brief discusses the crucial role that the judiciary plays in preventing legislative abuses of power and how the JCF's power to veto administrative decisions under the Knowles-Nelson project encroach on the judiciary's core function to interpret, apply, and strike down administrative actions. This brief also discusses other legislative powers, which are not directly part of this case, because they illustrate a troubling trend: over decades, the Legislature has gradually increased its own power in a way that usurps judicial power and violates the separation of powers.

ARGUMENT

I. The judiciary limits unconstitutional, undemocratic legislative overreach through its own power to interpret and apply the law.

The Wisconsin Constitution, which limits legislative power, establishes a separation of power between the legislative, judicial, and executive branches. The judiciary guards against legislative abuse and overreach through its power to interpret and apply the law.

A. *The Wisconsin Constitution was established in part to guard against legislative abuses.*

The separation of powers is fundamental and necessary for a functioning democracy and individual freedom. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶¶44-45, 382 Wis. 2d 496, 914 N.W.2d 21. The Wisconsin Constitution established the separation of powers, in the wake of unchecked legislative power, consistent with historic concerns about consolidation of power in any one branch. "The accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few, or many, and whether hereditary self-appointed, or elective, may justly be pronounced the very definition of tyranny." Federalist No. 47 (J.Madison) (Clinton Rossiter ed., 1961).

In 1835, Tocqueville warned against consolidation of power in state legislatures: "the legislature of each state is faced by no power capable of resisting it." Alexis de Tocqueville, *Democracy in America* 269 (J.P. Mayer ed., George Lawrence trans., Doubleday 1969) (1835). After widespread abuse of

legislative power, states across the country began to impose limitations on state legislatures through their constitutions. G. Alan Tarr, *Understanding State Constitutions*, 65 Temple L. Rev. 1169, 1174 (1992).

Likewise, the Wisconsin Legislature was "a target of sustained suspicion by constitutional drafters." Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 920 (2021). The Wisconsin Constitution thus aims to limit legislative power and protect the people from legislative abuses. *Id*. Responsiveness to the public at large was a guiding principle. *Id*. It was widely believed at the time that the Legislature was too vulnerable to special interests. *Id*. at 894.

The Constitution limits legislative power to increase transparency, and "ensure a more open and orderly deliberative process … in response to widespread legislative abuses." Tarr, *supra* at 1174; *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶50, 387 Wis. 2d 511, 929 N.W.2d 209 (Dallet, J. dissenting) (same). For example, it prohibits the Legislature from enacting special and private laws. Wis. Const. art. IV, § 31. It constrains and limits where, when, and how often the Legislature can meet. Wis. Const. art. IV, § 11; *League of Women*, 2019 WI 75, ¶50 (Dallet, J. dissenting). And importantly, it provides that voters—not legislatures—choose judges. Voters, it was believed, would pick "wiser and far better" judges than would the legislature, with its "political 'intrigue.'" Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123

Harv. L. Rev. 1061, 1109 (2010) (quoting *The Election of Judges*, 3 W.L.J. 423, 423 (1851)). "[V]oters would never tolerate a feckless, wavering judge." *Id.* (internal citation omitted).

B. *The judiciary's core role interpreting and applying the law serves as a critical check on legislative abuses.*

The Wisconsin Constitution vests judicial power in the state's unified court system. Wis. Const. art. VII, § 2. The judiciary interprets and applies the law. In *Tetra Tech*, this Court analyzed two centuries of constitutional history and case law and found that interpreting and applying the law is the most "central," "fundamental," "core," "necess[ary]," "proper," and "exclusive" function of the judiciary. 2018 WI 75, ¶¶48, 54 (internal quotations and citations omitted). The Wisconsin Constitution "entrusts the judiciary with the duty of interpreting and applying laws made and enforced by coordinate branches of state government." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶37, 376 Wis. 2d 147, 897 N.W.2d 384.

The Legislature has acknowledged the Court's authority to make legal determinations. For instance, Wis. Stat. § 806.04 describes courts' sweeping "power to declare rights, status, and other legal relations." Wis. Stat. § 806.04(1). Its purpose is to resolve issues and afford relief from "uncertainty and insecurity with respect to rights." Wis. Stat § 806.04(12). And it "is to be liberally construed and administered. *Id.* The statute explicitly recognizes courts' "general powers" to adjudicate "any proceeding where declaratory relief

is sought, in which a judgment or decree will terminate the controversy or remove uncertainty." Wis. Stat. § 806.04(5).

Likewise, Wis. Stat. Ch. 227 specifies the judiciary's role of reviewing administrative actions. *See Tetra Tech EC, Inc.*, 2018 WI 75, ¶11. Wisconsin courts will not defer to agencies' conclusions of law. *Id.*, ¶3. Even when other branches exercise quasi-judicial functions, they can never exercise purely judicial functions because the judiciary decides the ultimate resolution of a particular case. *Id.* at ¶53.

II. JCF's veto authority intrudes upon the judicial power.

By appropriating *post hoc* review of agency actions and the ability to block enforcement of previously passed enactments by legislative veto, the Legislature usurps the judicial power to ensure compliance with the law. Instead of performing its actual function—enacting statutes through the constitutional process that authorizes, defines, and limits agency action—the Legislature has taken onto itself the authority to review agency action after the fact. *See Koschkee v. Taylor*, 2019 WI 76, ¶11, 387 Wis. 2d 552, 929 N.W.2d 600; *Wis. Legislature v. Palm*, 2020 WI 42, ¶182, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting). While also invading executive power, this type of post-enactment review short-circuits the core power of the judiciary to ensure that agency action accords with both the authorizing statute and the additional requirements imposed by Wisconsin's Administrative Procedures Act. *See generally* Wis. Stat. Ch. 227; *see also Palm*, 2020 WI 42, ¶¶33-34.

"Whenever any branch of government exceeds the boundaries of authority conferred by the people, it is the duty of the judicial branch to say so." *Palm*, 2020 WI 42, ¶66 (Bradley, R.G., concurring).

The Legislature has made committees like JCF, rather than the Courts, the predominant check on agency power and, in so doing, has improperly seized that power from the courts. *Gabler*, 2017 WI 67, ¶37. After the baton has passed from the legislative to the executive branch, it should then pass to the judicial branch to ensure that the execution complied with law. The legislative vetoes at issue in this case, however, collapse that process into a sub-part of one branch—JCF. This means, it is the legislative branch, at least initially, that may determine whether DNR's conduct in awarding grants under the Knowles-Nelson stewardship program meets the requirements of the various subprograms prescribed by statute.[1] Wis. Stat. § 23.0917(2).

JCF's review process, however, lacks the standards of review and due process that make our judiciary fair and accountable. To highlight the problem, nothing about JCF's review, under either Wis. Stat. § 23.0917(6m) or (8)(g)3, requires the committee to designate whether it is interfering with a proposed grant based on policy (i.e. an assessment the money would be better spent elsewhere) or statutory requirements (i.e. an assessment the grant will not be used for "nature-based outdoor recreation"). Unlike a court, the committee has

[1] As discussed in Section III, *infra*, this concern is even more acute where, as in Wis. Stat. § 227.19(4)(d), a committee may object to, and thereby block, agency action based on specific, legal requirements.

no standards for review and no obligation to provide, let alone substantiate, its reasoning. Wis. Stat. § 23.0917(6m), (8)(g)3. Interested parties have no due process rights to be heard. None of the other protections of due process—the rules of evidence, burdens of proof, impartial arbiters—apply.

JCF's decision has the same effect as a permanent injunction from a Court. The spending, and therefore the agency action, is blocked. But unlike an injunction from a trial court (or an adverse decision from an administrative body), an aggrieved party has no obvious route to seek review. *Cf.* Wis. Stat. § 227.52; Wis. Stat. § 813.025; *see also* Gathering Waters Br. 11-13 (documenting DNR's review process); Gov. Br. 14.

When JCF objects to a grant as violating the law, the committee improperly exercises judicial power. Just as allowing an administrative agency to interpret the law "allow[s] some part of the state's judicial power to take up residence in the executive branch of government," *Tetra Tech* 2018 WI 75, ¶43, so too does allowing a legislative committee to interpret the law allow the judicial power to reside in the legislative branch.

This is not to say that the Legislature has no power to prevent expenditures it does not want. To the contrary, just as the Legislature has the authority to create the Knowles-Nelson program, it has the authority to get rid of it. Wis. Const. art. VIII, § 2. In the same way, it can impose limits and guidelines on how DNR executes the program, and what types of projects are eligible for funding. *See e.g.* Wis. Stat. § 23.0917(2)(a), 3(dm), (5m), (5t), (8)-

(12). This is consistent with the Legislature's expansive authority to establish, dismantle, and otherwise regulate the conduct of administrative agencies. The Legislature properly exercises its authority prospectively, by enacting laws through normal legislative procedure. *Service Emps. Int'l Union, Loc. 1 v. Vos* (*SEIU*), 2020 WI 67, ¶69, 393 Wis. 2d 38, 946 N.W.2d 35; Wis. Const. art. IV, § 17, art. V, § 10. Once passed, it is up to the executive to enforce those laws, and the judiciary to ensure that the law is followed.

The Legislature knows this and has not hesitated to go to the courts when it believes an agency is not complying with law. In *Palm*, for example, the Legislature brought an original action against the Secretary of the Department of Health Services, arguing in part that she had exceeded her authority under Wis. Stat. § 252.02. 2020 WI 42, ¶2. This Court agreed and declared the Secretary's order unlawful. *Id.*, ¶59. More recently, the Legislature joined as an intervenor to challenge the Wisconsin Elections Commission's guidance regarding witness address defects. *White v. Wis. Elec. Comm'n*, 2022CV001008 (Waukesha Cnty. Cir. Ct.). Through Chapter 227 and other related statutes, the Legislature has enabled aggrieved parties to challenge agency action through the courts using transparent, pre-existing standards. *See* Wis. Stat. §§ 227.40, 227.52, 227.58. This is all in addition to the Legislature's sole authority to pass laws that constrain or define agency actions.

Legislative vetoes, like those applicable to the Knowles-Nelson program, permit the Legislature to do an end-run around those procedures and obtain the same outcome without any of the safeguards involved in judicial (or legislative) proceedings. This violation of the separation of powers undermines our constitutional design and, therefore our democracy.

III. Other legislative vetoes usurp judicial power.

Although this Court has yet to consider the ability of Joint Committee for the Review of Administrative Rules (JCRAR) to veto administrative rulemaking, through objections and suspensions, those provisions also highlight how the Legislature has usurped judicial authority in violation of the separation-of-powers doctrine. Rulemaking is a shared power, but the determination of what the law requires is the province of the courts.

A. *JCRAR's ability to declare what is, or is not, a rule is unconstitutional.*

In Wisconsin's administrative scheme, a rule: 1) is a regulation, standard, statement of policy, or general order; 2) has general application; 3) has the effect of law; 4) is issued by an agency; and 5) is used to implement, interpret, or make specific legislation administered by the agency. *Wisconsin Electric Power Co. v. DNR*, 93 Wis. 2d 222, 232, 287 N.W.2d 113 (1980).

JCRAR was established with a reasonable goal: to provide guidance and support to agencies as they create rules that carry the force of law. Over time, however, the legislature has impermissibly syphoned off more power to itself and marginalized the role of the court (and the executive). *See* Pet. ¶¶103-105;

Pet.'s Memo. ISO Pet. 52-53. The Legislature's desire to make policy does not supersede the boundaries of our Constitutional framework. See *Fabick v. Evers*, 2021 WI 28, ¶15, 396 Wis. 2d 231, 956 N.W.2d 856 (good policy does not supersede constitutional order). With the consolidation of power within small legislative committees, such as JCRAR, we risk intolerable "depredations on our liberties." *Tetra Tech*, 2018 WI 75, ¶45.

B. *The Legislature has assumed the authority to determine whether a rule has statutory authority.*

When the Legislature enacted Wis. Stat. § 227.19, it unconstitutionally took the power to determine whether an administrative rule is valid.[2] Under Wis. Stat. § 227.19(4)(d) the Legislature—through JCRAR—has sole authority to determine whether a rule complies with legislative intent, or conflicts with state law, even when enacted under a different legislature. *See e.g.* Wis. Stat. § 227.19(4)(d)1., 3.–4.; *see also* Wis. Stat. §§ 227.19(5)(d), (5)(dm), 227.26(2)(d). This grant of power is a bridge too far.

JCRAR's spurious authority under these provisions is judicial. For example, to determine whether a proposed rule exceeds the agency's statutory authority requires a construction of the authorizing statute and the proposed rule. *See Conway v. Bd. of Police & Fire Comm'rs of City of Madison*, 2003 WI 53, ¶29, 262 Wis. 2d 1, 662 N.W.2d 335. And determining whether a rule is

[2] Wisconsin Legislative Council, Powers of the Joint Committee for Review of Administrative Rules (Jan. 27, 2021) https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2021/administrative_rules/ib_jcrar_sg_2021_01_27

arbitrary or capricious requires a body to compare the action with a body of substantive law. *See Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶32, 284 Wis. 2d 264, 700 N.W.2d 158. These are fundamentally judicial tasks, which require reasoned opinions subject to appellate review.

Other jurisdictions have come to the same conclusion. The Supreme Court of Kentucky, reviewing that state's legislative veto scheme, stated: "It will also be recalled that the review of the regulations was for the stated legislative purpose of determining if they comported with statutory authority and if they carried out the legislative intent. It requires no citation of authority to state unequivocally that such a determination is a judicial matter and is within the purview of the judiciary, the Court of Justice." *Legislative Rsch. Comm'n v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984). That court acknowledged that other branches of government may form opinions as to the legality of certain actions, which is certainly true here as well, *see e.g.* Wis. Stat. § 227.112, but that the ability to veto executive action, to the extent it is moved to the legislative branch, is invalid. *Legislative Rsch. Comm'n*, 664 S.W.2d at 919 n.14. "The function of courts in reviewing agency action is to interpret the statutory delegation and determine whether the administrative decision is in compliance with that delegation … If one house vetoes a rule, the courts are prevented from exercising review." *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 478 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983)

JCRAR's legislated authority to determine what is, or is not, "law" is even more offensive to our constitutional separation of powers. JCRAR has been wrongly accorded authority to determine whether a policy meets the definition of a rule–in other words, whether it has the force of law—and may thereafter suspend that "rule" indefinitely. Wis. Stat. § 227.26(2)(b), (d), (im). This, too, is a fundamental judicial determination.

The JCRAR vetoes, like the JCF vetoes, constitute a burdensome constitutional overstep. This Court must zealously guard the judiciary's ability to review statutory delegation and constitutional compliance. Whether in this case, or through future action, this Constitutional question and intrusion of judicial authority must end.

CONCLUSION

For the reasons described above, amicus curiae, Judges Markson, Lundsten, Sankovitz, and Niess, urge this Court to grant judgment in favor of Petitioner Tony Evers and, if intervention is granted, Proposed Intervenor-Petitioner Gathering Waters.

Respectfully submitted this 13th day of March, 2024.

Electronically signed by Chris Donahoe
Chris Donahoe, SBN 1092282
Daniel S. Lenz, SBN 1082058
T.R. Edwards, SBN 119447
LAW FORWARD, INC.
222 West Washington Avenue, Suite 250
Madison, Wisconsin 53703
cdonahoe@lawforward.org
dlenz@lawforward.org
tedwards@lawforward.org
608.535.9808

Attorneys For Amicus Curiae
Former Wisconsin Judges

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19 (7)(d), (8)(b), (bm), and (c) for a brief produced with proportional serif font. The length of this brief is 2,822 words.

Dated March 13, 2024.

Electronically signed by Chris Donahoe
Chris Donahoe, SBN 1092282
Daniel S. Lenz, SBN 1082058
T.R. Edwards, SBN 119447
LAW FORWARD, INC.
222 West Washington Avenue, Suite 250
Madison, Wisconsin 53703
cdonahoe@lawforward.org
dlenz@lawforward.org
tedwards@lawforward.org
608.535.9808