STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2020AP2020-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 CLEAN WISCONSIN IN SUPPORT OF PETITIONERS

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Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*,
90 Harv. L. Rev. 1369 (1977) 6

Chad M. Oldfather, *Some Observations on Separation of Powers and the Wisconsin Constitution*,
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STATEMENT OF INTEREST

Clean Wisconsin has an interest in this matter for several reasons. First, Clean Wisconsin is a nonprofit environmental organization advocating for clean water, clean air, and a healthy environment for all Wisconsin's residents. We are therefore interested in the successful administration of the Knowles-Nelson conservation program, which, like other land conservation programs, is critical to protecting "forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state." Wis. Stat. § 23.09(1). The Knowles-Nelson conservation program prioritizes, in part, land acquisition that "preserves or enhances the state's water resources[.]" Wis. Stat. 23.0917(3)(c)(1). Clean Wisconsin has long supported this and other important conservation programs.

Second, Clean Wisconsin's advocacy for appropriations to fund environmental programs is affected by this case. Clean Wisconsin lobbies the governor and legislators to fund environmental programs every budget cycle. Adequate funding is critical to the success of these programs. Whether legislative vetoes that block allocations of already-appropriated money survive this Court's scrutiny is thus of interest to Clean Wisconsin and its members.

Third, resolving this case may result in the Court revisiting its separation of powers jurisprudence more broadly. It is plausible the result will implicate other instances where legislative committees exercise vetoes affecting the administration of environmental programs important to Clean Wisconsin. To give just one salient example, there is significant overlap between legislative vetoes in the rulemaking and appropriations contexts. This compels Clean Wisconsin to weigh in here, given the magnitude of our interest in state agencies' ability to promulgate effective environmental standards via regulation.

ARGUMENT

Clean Wisconsin makes two arguments. First, legislative vetoes violate the separation of powers and are thus not constitutionally valid. Second, legislative vetoes also negatively affect government decision-making in multiple ways. This presents a functionalist argument for disposing of legislative vetoes and undermines arguments that legislative vetoes are necessary for good governance.

I. JCF's Vetoes of the Department of Natural Resources' Knowles-Nelson Decisions Violate the Separation of Powers.

Petitioners and Intervenor-Petitioner are correct that the legislative Joint Committee on Finance's (JCF's) power to veto

Department of Natural Resources (DNR) decisions under the Knowles-Nelson conservation program violates the separation of powers. Clean Wisconsin agrees with the analysis provided by these parties in support of that position, so rather than repeat arguments well-stated elsewhere, we briefly emphasize that these legislative vetoes are unconstitutional for at least two independent reasons.

First, when JCF vetoes DNR decisions it controls how the law is implemented or enforced. This is an exercise of executive, not legislative, power. The constitution forbids this. *See Koschkee v. Taylor*, 2019 WI 76, ¶11, 387 Wis. 2d 552, 929 N.W.2d 600; *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982) ("no branch [is] to exercise the power committed by the constitution to another.").

Second, any valid exercise of legislative power requires compliance with bicameralism and presentment. *See Legislature v. Palm*, 2020 WI 42, ¶32, 391 Wis. 2d 497, 942 N.W.2d 900. JCF's vetoes, however, operate without bicameralism and presentment, yet affect the legal status of important conservation projects. Indeed, these vetoes vest a small handful of legislators with authority to block DNR's decisions about how to execute a program that the full legislature charged it with executing in a statute that *did* go through bicameralism

and presentment. In this way, JCF's veto authority effectively amends statutory language in the absence of actual lawmaking, an outcome prohibited by the separation of powers.

II. Legislative Committee Vetoes Undermine, Rather than Support, Functional Government Decision-Making.

Legislative vetoes undermine good governance. This important point anticipates and rebuts the position that legislative vetoes serve a practical function and should therefore not be constitutionally disfavored, even if legislative vetoes cannot otherwise be squared with separation of powers principles.

This Court has understood separation of powers, at least in part, as a bulwark against the deprivation of liberty, caused by the accumulation of too much power in a single branch. *SEIU, Local 1 v. Vos*, 2020 WI 67, ¶30, 393 Wis. 2d 38, 946 N.W.2d 35. One critical question is whether the status quo allocation of power among the branches prevents or threatens this accumulation of power. As the Petitioners ably point out, legislative vetoes concentrate power by placing the power to say what the law is and the power to execute the law in the same set of hands. Petitioners Br. 20-22. Legislative vetoes vest a handful of committee members with the power to stymie the implementation of statutory mandates crafted by the full legislature, a

body representing the aggregated preferences of the state, and signed into law by the governor, an official elected in a statewide election.[1] In doing so, these vetoes suppress the democratic will of Wisconsin voters, presenting a threat to liberty in this state. But there is strong evidence that legislative vetoes create tangible problems for good governance and democratic responsiveness in other ways, and the Court should view these problems as germane to the constitutional separation of powers inquiry. *See* Chad M. Oldfather, *Some Observations on Separation of Powers and the Wisconsin Constitution*, 105 Marq. L. Rev. 845, 866 (2022) (observing that preservation of liberty is an important but non-exclusive functionalist end that a separation of powers jurisprudence might emphasize).

Legislative vetoes of executive branch action "can increase the opportunities for special interest group influence, increase the

[1] JCF has 16 members: 8 senators and 8 representatives. Assuming all 16 members are present, 9 votes are needed to approve many Knowles-Nelson conservation program expenditures, per Wis. Stat. 23.0917(6m). 8 votes *not* to approve is therefore sufficient to block a project's funding. If the 8 "no" votes are all representatives, then legislators representing approximately 476,264 people, or just 8.08% of the state's population, can block executive action. If it were 4 senators and 4 representatives blocking the DNR's decision, then legislators representing approximately 952,524, or just 16.16% of the state's population, can block executive action. For the estimated current senate and assembly district size underlying this analysis, see Legislative Reference Bureau, Memorandum to Majority Leader Devin LeMahieu and Speaker Robin Vos (October 20, 2021), available online at https://www.wisdc.org/images/files/pdf_imported/redistricting/LRB.5017-and-LRB_5071_10.20.2021_3.pdf

likelihood of partisan gridlock, and reduce bureaucratic rationality in the administration of statutes." Curtis A. Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds*, 13:1 J. Legal Analysis 439, 486 (2021).

Concerns regarding the amplifying effect of legislative vetoes on special interest group influence are not new. Scholars conducting empirical research concluded years before *INS v. Chadha*, 462 U.S. 919, the 1983 U.S. Supreme Court case invalidating the use of legislative vetoes in the federal system, that legislative vetoes *increased* the ability of special interest groups to produce outcomes that serve their narrow interest at the expense of the general public, by targeting a small number of legislators or even a single legislator, such as the committee chair or co-chair. Bradley at 486, citing Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1413, 1417 (1977).[2]

[2] This dynamic was described by then-Senator Jospeh Biden in the wake of *INS v. Chadha*. Senator Joseph R. Biden Jr., *Who Needs the Legislative Veto?*, 35 Syracuse Law Rev. 685 (1984). Stating that he had "become convinced that using the legislative veto to overrule agency actions creates more problems for Congress than it solves," Senator Biden observed the effect it had on special interest lobbying in the Capitol:

> ... Congress used the veto to evade legislative labors and responsibilities, and more and more often the result was to tempt growing hordes of lobbyists onto Capitol Hill.... Single-interest groups have multiplied, representing business, trade associations, unions,

Partisan gridlock becomes more likely in a context of split government and hyper partisanship. Bradley at 487. Wisconsin is of course no stranger to these political phenomena in recent years. It could be argued that one's undesirable partisan gridlock is another's properly operating checks and balances, and it is thus improper to assume high or increased gridlock is inherently problematic. However, the third documented problem with legislative vetoes—increased arbitrariness of government decision making—undermines the idea that this gridlock-inducing effect of legislative vetoes plays a salutary role in government functioning.

The reason legislative vetoes increase the arbitrariness of government decisions is straightforward: "legislative vetoes effectively convert sub-units of [the legislature] into the functional equivalent of administrative agencies, without the rationalizing forces of

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> political action committees, and others. All of them claim to speak in the name of the American people, but very often I have found them speaking only in the narrowest of goals, goals that are not infrequently contrary to the public interest.... we have found ourselves more and more often haggling with lobbyists over their real or imagined grievances with the regulatory agencies.

Biden at 691-692. Instead, Senator Biden argued that "enacting clearer statutory standards, engaging in active oversight, passing legislation to overcome agency action that is objectionable, and limiting agency funds where necessary" allows the legislative branch to make agencies accountable without the downsides of the legislative veto. Biden at 690.

administrative law." Bradley at 488. The legislature or a legislative committee can veto executive branch action without holding a hearing, providing reasons for the veto, or even recording a vote. Bradley at 487, citing Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78:2 N.Y.U. L. Rev. 461, 520 (2003). Legislative vetoes shift the focus of policymaking to closed-door interactions between interest groups and individual legislators, and the result is to undermine, rather than increase, transparent and rational decision making. Bradley at 485.

As Intervenor-Petitioner Gathering Waters describes, an anonymous, unexplained objection of a single legislator blocked a land acquisition decision by DNR under the Knowles-Nelson conservation program that followed the requirements imposed by the relevant statute. Intervenor-Petitioners Brief at 9, 14-15. One could hardly ask for a better illustration of the problems caused by the legislative veto. The veto was non-transparent, unexplained, and not tethered to any requirements for qualifying conservation programs in the statute itself. These problems are not limited to some JCF vetoes of DNR decisions under the Knowles-Nelson conservation program. Rather, as the

experts that have studied the effect of legislative vetoes would predict, these problems arise wherever legislative vetoes are present.

Clean Wisconsin recently experienced some of these problems firsthand in its work relating to commercial building standards, which includes advocating for updates to the state energy conservation code.[3]

Governor Evers has recognized the energy conservation code as essential to achieving Wisconsin's climate goals. Energy conservation in buildings is critically important to abating air pollution and reducing emissions of greenhouse gases contributing to climate change. *See* State of Wis., *Governor's Task Force on Climate Change Rep.*, at 39 (2020), *available at* https://climatechange.wi.gov/Documents/Final%20Report/GovernorsTaskForceonClimateChangeReport-HighRes.pdf. Buildings are responsible for 24% of total greenhouse-gas emissions in Wisconsin. *Id.* at 28. The Governor's Task Force on Climate Change Report includes "Update state commercial and residential building codes" as one of 12 key energy-related strategies. *Id.* at 38. The Governor's Clean Energy Plan includes "Make [Wisconsin] a leader on [b]uilding [c]odes" as one of three "high impact strategies" to "modernize buildings and

[3] The rulemaking to update the state energy conservation code is the subject of one of the issues raised by the Governor in his Petition for Original Action, which was held in abeyance by the Court's February 2, 2024 Order.

industry." State of Wis. Office of Sustainability & Clean Energy, *Clean Energy Plan*, at 129-131 (2022), *available at* https://osce.wi.gov/Documents/SOW-CleanEnergyPlan2022.pdf. Updating Wisconsin building energy codes to 2021 standards would reduce greenhouse-gas emissions by an estimated 9 million metric tons over a 30-year period.[4] U.S. Dep't of Energy, DOE/EE-2438, *Energy Efficiency and Renewable Energy: Building Energy Codes*, at 187 (2021), *available at* https://www.energycodes.gov/sites/default/files/2021-07/EED_1365_BROCH_StateEnergyCodes_states_WISCONSIN.pdf.

State law requires the Department of Safety and Professional Services (DSPS) to review the state energy conservation code and regularly promulgate rules to improve energy conservation. Wis. Stat. § 101.027(2), (3). Specifically, DSPS must commence a review upon publication of revisions to the International Energy Conservation Code or whenever three years have passed since DSPS last submitted proposed rules changing the energy conservation code to the legislature. Wis. Stat. § 101.027(3). The energy conservation code (Wis. Admin. Code Ch. SPS 363) is part of the larger "Wisconsin Commercial

[4] 9 million metric tons is roughly the amount of greenhouse gas emissions that will be avoided by Red Barn, Wisconsin's newest wind farm, over a 33-year period. *See Red Barn Energy, LLC*, *available at* https://alletecleanenergy.com/EnergySites/RedBarn (last visited Mar. 12, 2024).

Building Code." Wis. Admin. Code Chs. SPS 361-366. The state energy conservation code includes energy-efficiency requirements for insulation, lighting, and heating and cooling systems. Wis. Admin. Code Ch. SPS 363.

The process of updating the commercial code follows standard agency rulemaking procedures under Wis. Stat. Ch. 227, including a preliminary public hearing and comment period on the statement of scope (Wis. Stat. § 227.136), an economic impact analysis (Wis. Stat. § 227.137), and a public hearing on the proposed rule (Wis. Stat. § 227.16).

DSPS must also consult with its commercial building codes council ("the Council") in preparing rules. Wis. Stat. § 101.023. The Council comprises 10 voting members, two of whom must represent "the skilled building trades" and two of whom must represent building contractors. Wis. Stat. § 15.407(18).

In the most recent update process, DSPS published the statement of scope on December 7, 2020, and the Council met monthly from February to December of 2021. *See* State of Wis. Dep't of Admin., DOA-2049, *Fiscal Estimate and Economic Impact Analysis*, at 2 (2023), *available at* https://docs.legis.wisconsin.gov/code/misc/chr/lc_ruletext/

cr_23_007_fiscal_estimate_and_economic_impact_analysis.pdf. Stakeholders, including Clean Wisconsin, engaged in these meetings by submitting agenda items to the Council. On February 25, 2023, DSPS submitted the proposed rule to the Wisconsin Legislative Council Clearinghouse, and on April 24 and 25 DSPS held a public hearing. *See* State of Wis. Dep't of Safety & Prof'l Servs., CR 23-007, *Notice of Submittal of Proposed Rule to Legislative Council Rules Clearinghouse* (2023), *available at* https://docs.legis.wisconsin.gov/code/register/2023/807a1/register/submit_proposed/cr_23_007_submittal_notice/cr_23_007_submittal_notice. After revising the rule in response to comments received, DSPS submitted it to the legislature on May 30. State of Wis. Dep't of Safety & Prof'l Servs., CR 23-007, *Notice of Submittal of Rule to Legislature* (2023), *available at* https://docs.legis.wisconsin.gov/code/register/2023/810a1/register/submit/cr_23_007/cr_23_007.

On July 18, the Assembly Committee on Housing & Real Estate and the Senate Committee on Housing, Rural Issues & Forestry held a joint public hearing on the rule. Assembly Committee on Housing and Real Estate, CR 23-007, *Record of Committee Proceedings* (July 18, 2023), *available at* https://docs.legis.wisconsin.gov/2023/related/records/assembly/housing_and_real_estate/1738870. Following the hearing, the

rule was referred to the Joint Committee for Review of Administrative Rules ("JCRAR"), which, by paper ballot in executive session, *i.e.* without a meeting, passed a motion for indefinite objection to the rule on September 29, 2023. *See* Joint Comm. for Rev. of Admin. Rules, CR 23-007, *Record of Committee Proceedings* (2023), *available at* https://docs.legis.wisconsin.gov/2023/related/records/joint/administrative_rules/1748291.

During the near 27-month period during which DSPS and the Council were developing the proposed rule according to statutory processes, only six organizations, including Clean Wisconsin, registered lobbying activity related to the rule with the state ethics commission. Wis. Ethics Comm'n, *Legislative Efforts for Department of Safety and Professional Services (SPS) - Commercial building code*, *available at* https://lobbying.wi.gov/What/AdministrativeRuleInformation/2023REG/Information/8352?tab=Principals (last visited March 11, 2024). None of these groups indicated opposition to the rule. By contrast, an additional 11 organizations registered with the ethics commission for the first time *after* DSPS submitted the proposed rule to the Wisconsin Legislative Council Clearinghouse, eight of which indicated opposition to the rule.

Of the eight organizations that eventually opposed, only one participated in the April 2023 DSPS hearing. Four more groups, however, began their lobbying activity around the time of the joint committee hearing in July, and three did not begin lobbying until the proposed rule had reached JCRAR—some 32 months after the publication of the scope statement. One of these, the Rental Property Association of Wisconsin, Inc., began lobbying four days before JCRAR's vote. *Id.*

During this flurry of last-minute lobbying of its members, JCRAR elected to not hold a public hearing on the rule or even to meet in person, but to use the most opaque procedural maneuver possible—the paper ballot. Although there was notice of the executive session, JCRAR returned paper ballots to the co-chairs without meeting, and the public had no knowledge of the substance of the motion to be voted on until after the vote. Joint Comm. for Rev. of Admin. Rules, CR 23-007, *Executive Session Notice* (2023), *available at* https://docs.legis.wisconsin.gov/raw/cid/1747843.

The groups opposed to the rule had ample opportunity to participate in the preliminary public hearing, to suggest agenda items to the Council, to offer comments on the economic impact analysis, and

to suggest revisions at the DSPS hearing. The fact that they declined to engage with the statutorily provided rulemaking process strongly suggests that reasonable implementation of state statutory requirements was not their goal. These groups likely calculated that the work of DSPS to propose updates—while required by law—was irrelevant to their desired outcome. Irrelevant because a single committee of the legislature had the ability—behind closed doors—to veto the executive branch's execution of the law.

The legislative veto is what makes this arbitrary, undemocratic process possible. The ability of a single legislative committee to block rules indefinitely empowers special interests seeking to nullify statutory requirements, creates gridlock, and produces arbitrary outcomes by allowing committees to block executive branch actions without public hearings or any transparency around the rationale for blocking the rule.

CONCLUSION

We urge the Court to hold that legislative vetoes of DNR Decisions under the Knowles-Nelson conservation program are invalid. We further urge the Court to assess the inherent functional problems presented by legislative committee vetoes more generally, and strongly

consider an approach to this case, including taking up the issues it currently has held in abeyance, that addresses all constitutionally suspect legislative vetoes. There is no reason for Wisconsin's citizens to live under government dysfunction any longer than necessary.

Dated this 13th day of March, 2024.

Respectfully submitted,

Electronically Signed by Evan Feinauer

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief with a proportional serif font. The length of this brief is 2,998 words.

Dated this 13th day of March, 2024.

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