No. 23AP2020-OA

In the Supreme Court of Wisconsin

TONY EVERS, GOVERNOR OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES, BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, and MARRIAGE AND FAMILY THERAPY, PROFESSIONAL COUNSELING, AND SOCIAL WORK EXAMINING BOARD,

PETITIONERS,

v.

SENATOR HOWARD MARKLEIN and REPRESENTATIVE MARK BORN, in their official capacities as chairs of the Joint Committee on Finance; SENATOR CHRIS KAPENGA AND REPRESENTATIVE, in their official capacities as chairs of the Joint Committee on Employment Relations; and SENATOR STEVE NASS and REPRESENTATIVE ADAM NEYLON, in their official capacities as co-chairs of the Joint Committee for Review of Administrative Rules,

RESPONDENTS.

NON-PARTY BRIEF OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC. IN SUPPORT OF NEITHER SIDE

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

RICHARD M. ESENBERG
LUCAS T. VEBBER
SKYLAR CROY
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Phone: (414) 727-9455
Facsimile: (414) 727-6385

Counsel for Amicus

TABLE OF CONTENTS

STATEMENT OF THE ISSUE 5

INTRODUCTION 5

I. This Court should revitalize the non-delegation doctrine but not if it will be applied selectively to aggregate power in one branch. 7

II. This Court should proceed cautiously because Governor Evers and Gathering Waters' arguments, if accepted, will have far-reaching consequences. 13

CONCLUSION 15

CERTIFICATION 17

TABLE OF AUTHORITIES

Cases

Becker v. Dane County, 2022 WI 63, 403 Wis. 2d 424, 977 N.W.2d 390 ..... 5, 12

Becker v. Dane County, 2023 WI 36, 407 Wis. 2d 45, 989 N.W.2d 606 5

Brown County v. DHSS, 103 Wis. 2d 37, 307 N.W.2d 247 (1981) 11

Cincinnati, Wilmington & Zanesville, R.R. v. Comm'rs of Clinton Cnty., 1 Ohio St. 77 (1852) 10

Dowling v. Lancashire Ins., 92 Wis. 63, 65 N.W. 738 (1896) 9

Gundy v. United States, 139 S. Ct. 2116 (2019) 6

In re Constitutionality of § 252.18, Wis., Statutes, 204 Wis. 2d 501, 236 N.W. 717 (1931) 12

J.F. Ahern Co. v. Wis. State Bldg. Comm'n, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983) 6

Koschkee v. Taylor, 2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600. 7, 11, 13

Martinez v. DILHR, 165 Wis. 2d 687, 478 N.W.2d 582 (1992) 5, 11, 15

SEIU v. Vos, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 ..... 6, 13

Slinger v. Henneman, 38 Wis. 504 (1875) 9

State ex rel. Adams v. Burdge, 95 Wis. 390, 70 N.W.2d 347 (1897) .. 5, 10

State ex rel. Wis. Inspection Bureau v. Whitman, 196 Wis. 472, 220 N.W. 929 (1928) 5, 9, 11

Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) 12

Teigen v. WEC, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519 13

Van Slyke v. Trempealeau Cnty. Farmers' Mut. Fire Ins., 39 Wis. 390 (1876) 10

Statutes

Wis. Stat. § 15.105 14

Wis. Stat. § 16.83 14

Wis. Stat. § 23.0917 ..... 5, 6, 13

Wis. Stat. § 775.05 14

Other Authorities

72 Am. Jur. 2d States, Etc. § 54, Westlaw (database updated Feb. 2024) 14

Journal Council Legis. Assemb. Wis. 1841 (1842), https://babel.hathitrust.org/cgi/pt?id=nyp.33433082089768&view=1up&seq=28&q1=delegated 8

Legislative: Afternoon Session, Tri-Weekly Argus, Feb. 12, 1848 8

Philip Hamburger, *Is Administrative Law Unlawful?* (2014) 7

Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New-York (1846), https://babel.hathitrust.org/cgi/pt?id=umn.31951001567377o&seq=1076 8

State Bd. of Health, *Biennial Report for the Period from Nov., 1882 to Sept. 30, 1884* (1885) 9

State Government—No. 1, reprinted in The Movement for Statehood: 1845–46 (1846), at 372 (1918) 9

Taxation—Borrowing Money (1846), *reprinted in The Movement for Statehood: 1845–46*, at 177 (1918) 7

Constitutional Provisions

Const. art. IV, § 17 15

Const. art. IV, § 22 7

Const. art. V, § 1 7

Const. art. VII, § 2 7

Wis. Const. art. I, § 1 7

Wis. Const. art. IV, § 1 7

STATEMENT OF THE ISSUE

Whether this Court should revitalize the non-delegation doctrine.

INTRODUCTION

The non-delegation doctrine once prevented a branch of government from assigning power vested in it to another entity. *State ex rel. Adams v. Burdge*, 95 Wis. 390, 402, 70 N.W.2d 347 (1897). In the 1920s, this Court began curtailing the doctrine so that the legislature could assign legislative power to administrative agencies. *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928). Little remains of the doctrine: currently, a power can be shared if nominal "safeguards" are in place. *E.g.*, *Becker v. Dane County*, 2022 WI 63, ¶31, 403 Wis. 2d 424, 977 N.W.2d 390 (lead opinion), *reconsideration denied*, 2023 WI 36, 407 Wis. 2d 45, 989 N.W.2d 606. Recently, this Court declined to revitalize the doctrine. *Id.*, ¶33; *id.*, ¶¶49–50 (Hagedorn, J., concurring).

Over three decades ago, this Court, in *Martinez v. DILHR*, recognized the non-delegation doctrine's status in holding that a legislative committee could suspend an administrative rule. 165 Wis. 2d 687, 697–99, 702, 478 N.W.2d 582 (1992). As this Court reasoned, if the legislature can assign legislative power to the executive, the legislature can also assign legislative power to a legislative committee, and the same "safeguards" standard applies. *Id.*

Governor Tony Evers and Gathering Waters, Inc. effectively ask this Court to overrule *Martinez* and revitalize the non-delegation doctrine—but only to the extent that it aggregates power in the executive. They complain that, via Wis. Stat. § 23.0917(6m) and (8)(g)3., the legislature authorized a legislative committee to "veto" expenditures

proposed by an administrative agency through a process that is not subject to bicameralism and presentment. *E.g.,* Br. Gathering Waters, at 7. Confusingly, however, they reject the same logic when applied in a manner that would limit executive overreach: They do not want rulemaking subject to a revitalized doctrine. *See, e.g.*, *id.* 32 n.25. Yet they do not adequately explain why the legislature can use a committee to oversee rulemaking but not to oversee the "power of the purse." *See SEIU v. Vos*, 2020 WI 67, ¶69, 393 Wis. 2d 38, 946 N.W.2d 35 (Hagedorn, J., majority opinion).

If accepted, Governor Evers and Gathering Waters' arguments would be either a dramatic rework of existing jurisprudence or a "freakish" exception to it. *See Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment) (recognizing the non-delegation doctrine should be revitalized but refusing to do so given that a majority was not willing to embrace the doctrine fully). Governor Evers and Gathering Waters say that all this Court needs to do to accept their arguments is overrule one supposedly wrong court of appeals decision, but, in actuality, the change they seek is foundational. *See* Br. Gov. Evers, at 12 (citing *J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983)).

Amicus would welcome a return to non-delegation first principles but urges this Court to proceed cautiously. At a minimum, this Court should order additional briefing on whether to overrule *Martinez* and, assuming it does not overrule *Martinez*, whether Wis. Stat. § 23.0917(6m) and (8)(g)3. meet the safeguards standard.

ARGUMENTS

I. This Court should revitalize the non-delegation doctrine but not if it will be applied selectively to aggregate power in one branch.

The non-delegation doctrine is grounded in the text and history of the Wisconsin Constitution. Article I, Section 1 recognizes that the people, to secure their natural rights, "instituted" government, which "deriv[es]" its "just powers" from their "consent." The people "vested" three distinct powers in three distinct branches via three distinct clauses. *Koschkee v. Taylor*, 2019 WI 76, ¶47, 387 Wis. 2d 552, 929 N.W.2d 600 (Rebecca Grassl Bradley, J., concurring). The "legislative power" is "vested in a senate and assembly" via Article IV, Section 1, the "executive power" in a "governor" via Article V, Section 1, and the "judicial power" in a "unified court system" via Article VII, Section 2. The people believed themselves to be creating "agents" who would carry out their will as if by "power of attorney." *See Taxation—Borrowing Money* (1846), *reprinted in The Movement for Statehood: 1845–46*, at 177, 179 (1918). As one law professor has explained, under the common law of agency, "the agent ordinarily cannot subdelegate the power to a sub-agent, as this runs counter to the apparent intent of the principal." *See* Philip Hamburger, *Is Administrative Law Unlawful?* 380 (2014). Article IV, Section 22 confirms, by exception, that a similar rule applies in constitutional law: "The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe." This section comes almost word for word from the 1846 New York Constitution, and as a representative at that state's convention said, "powers of local legislation cannot be conferred upon the several

boards of supervisors, without a constitutional section permitting the state legislature to [sub]delegate such power." *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New-York* 1070 (1846) (statement of Rep. Campbell, Jr.), https://babel.hathitrust.org/cgi/pt?id=umn.31951001567377o&seq=1076 .

Even before statehood, the historical record indicates an unease with subdelegated power. For example, in 1848—the year that Wisconsin became a state—the territorial legislature considered a bill that would have authorized the electors of Washington County to vote on which municipality should be the seat of county government. *Legislative: Afternoon Session*, Tri-Weekly Argus, Feb. 12, 1848, at 4 (summarizing a floor debate). One legislator objected, explaining that he was "opposed to all bills which did not propose definite and definitive legislation" by "the only legal legislative power." *Id.* (statement of Rep. Holliday). In his words, "[t]he body to whom the legislative power was given up could not [sub]delegate it to any other body"—even the electors of a county. *Id.*; *see also id.* at 2 (statement of Rep. Cothren). Some legislators questioned if the bill would actually subdelegate legislative power, but only one legislator questioned the non-delegation doctrine's soundness. *Id.* at 2, 4 (statement of Rep. Mooers). Ultimately, the bill was sent back to committee. *Id.* at 2; *see also* Journal Council Legis. Assemb. Wis. 1841, at 22 (1842) (documenting the territorial governor's argument that legislative power could not be "[sub]delegated"), https://babel.hathitrust.org/cgi/pt?id=nyp.33433082089768&view=1up&seq=28&q1=delegated.

The ratification debates also reflect skepticism toward subdelegated power, with one citizen noting that the people did not want their "popular sovereignty" contravened by a branch "[sub]delegate[ing] [power vested in it] to others," thereby effectively making these others "thinkers for the people." *See State Government—No. 1* (1846)*, reprinted in The Movement for Statehood*, at 372, 375–76.

The administrative state in the second half of the 1800s was relatively small, and, accordingly, disputes about the non-delegation doctrine seldom reached this Court; however, when they did, this Court's decisions reflected the skepticism toward subdelegated power common in that era. *See, e.g.*, *Whitman*, 196 Wis. at 494 (stating, hyperbolically, administrative agencies "were not only unknown but undreamed of . . . at the time most state constitutions were adopted"); State Bd. of Health, *Biennial Report for the Period from Nov., 1882 to Sept. 30, 1884*, at 27 (1885) (explaining while local health boards had purportedly "ample powers" under contemporary statutes, boards, with few exceptions, "seldom had more than a nominal existence" and "almost wholly" declined to exercise these powers).

For example, in *Dowling v. Lancashire Insurance*, an 1896 decision, this Court held an administrative rule unenforceable, concluding that "a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the . . . [sub]delegate of the legislature . . . ." 92 Wis. 63, 74, 65 N.W. 738 (1896); *see Slinger v. Henneman*, 38 Wis. 504, 509–10 (1875) ("[T]he power . . . conferred upon the legislature cannot be [sub]delegated by that department to any other body or authority."); *cf. Van Slyke v. Trempealeau Cnty. Farmers' Mut.*

Fire Ins., 39 Wis. 390, 392 (1876) ("[Judges cannot] subdelegate their judicial functions.").

State ex rel. Adams v. Burdge, decided a year after *Dowling*, is also illustrative. 95 Wis. at 401–02. The dispute involved a statute authorizing a board of health "to make such rules and regulations and to take such measures as may, in its judgment, be necessary for the protection of the people from Asiatic cholera, or other dangerous disease." *Id.* at 401. The statute noted it was to "be construed and understood" to cover "such diseases as the . . . board . . . *shall designate as contagious and dangerous* . . . ." *Id.* Purporting to act under the statute, the board promulgated a vaccination requirement for children desiring to attend a public school during a Smallpox outbreak. *Id.* at 404. This Court held that the requirement was unenforceable. *Id.* at 405. This Court explained that the board had no "legislative power," and "no part of the legislative power c[ould] be [sub]delegated by the legislature to [it]." *Id.* at 400. Rulemaking, this Court held, could be done only if the authorizing statute was sufficiently complete in and of itself such that rulemaking did not "involve[] a discretion as to what . . . [the law] shall be" but merely "discretion as to its execution . . . ." *Id.* at 402 (quoting *Cincinnati, Wilmington & Zanesville, R.R. v. Comm'rs of Clinton Cnty.*, 1 Ohio St. 77, 88 (1852)).

The takeaway from *Dowling* and *Burdge* is that the "distinction" between lawful and unlawful administrative rulemaking was the point at which rulemaking began to function like legislating rather than executing a statute. *Id.* (quoting *Cincinnati*, 1 Ohio St. at 88) (explaining the "test" is whether the statute subdelegates the "power to make the law," which "cannot be done," or "relates to the execution of the statute"

by "conferring authority or discretion as to its execution," which is permissible). For example, a statute could lawfully authorize an agency to "ascertain[]" whether a particular "event" has occurred that would trigger the "operation" of a provision in the statute. *Id.*

In *State ex rel. Wisconsin Inspection Bureau v. Whitman*, a 1928 decision, this Court rejected the distinction so that the administrative state could grow. 196 Wis. at 498. In this Court's words, "courts, legislatures, and executives . . . agree . . . that there is an overpowering necessity for a modification of the doctrine of separation and nondelegation of powers of government." *Id.* "In the face of that necessity," this Court said, "courts have upheld laws granting legislative power under the guise of the power to make rules and regulations . . . ." *Id.* It then began to permit delegations of legislative power, declaring that the distinction "leads to confusion and error." *Id.* at 506.

Post-*Whitman*, this Court has consistently described administrative rulemaking as an exercise of legislative power, which the legislature and administrative agencies share. *E.g.*, *Koschkee*, 387 Wis. 2d 552, ¶12 (majority opinion) (citing *Whitman*, 196 Wis. at 505–06, *and Brown County v. DHSS*, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981)).

The outcome in *Martinez* stems from this Court's post-*Whitman* treatment of administrative rulemaking. *Compare Martinez*, 165 Wis. 2d at 697 ("We have long recognized that administrative agencies are creations of the legislature and they can exercise only those powers granted by the legislature."), *with Whitman*, 196 Wis. at 508 ("The emergence of . . . agencies will not impair or destroy the checks and balances of the constitution. . . . [A]gencies are the creatures of the legislature and responsible to it.").

In Governor Evers' petition, he advocated for a return to conceptualizing administrative rulemaking as "executive branch decision-making" but seemingly without realizing what that would mean. *See* Pet. Original Action, ¶¶1, 104. Few rules in force today would survive if Governor Evers' argument were taken to its logical end.

Relatedly, Governor Evers and Gathering Waters rely heavily on separate writings in which members of this Court have decried the status of the non-delegation doctrine, which merely illustrates that they do not want this Court to apply its jurisprudence—they want this Court to change it. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) ("[A separate writing] is generally not the best source of legal advice on how to comply with the majority opinion."). For example, Governor Evers begins a section of his opening brief by quoting Justice Rebecca Grassl Bradley's dissenting opinion in *Becker v. Dane County*, in which she explained how this Court had disregarded bicameralism and presentment by minimizing the non-delegation doctrine. Br. Gov. Evers, at 22 (quoting *Becker*, 403 Wis. 2d 424, ¶101 (Rebecca Grassl Bradley, J., dissenting)). Never mind that in *Becker*, this Court rejected a non-delegation argument, and three justices emphasized in a lead opinion that the separation of powers is merely "inferred" and said that this Court has never taken the relevant provisions of the constitution "literal[ly]." *Id.*, ¶30 (lead opinion). These three went so far as to say that legislative power does not belong "peculiarly and intrinsically" to the legislature, so the executive can exercise it. *Id.* (quoting *In re Constitutionality of § 252.18, Wis., Statutes*, 204 Wis. 2d 501, 503, 236 N.W. 717 (1931)). Gathering Waters references two additional separate writings of Justice Bradley, in which she

similarly lamented this Court's refusal to revitalize the doctrine. Br. Clean Water, at 8 (quoting *Teigen v. WEC*, 2022 WI 64, ¶141, 403 Wis. 2d 607, 976 N.W.2d 519 (Rebecca Grassl Bradley, J., concurring)); *see also id.* at 23 (quoting *Koschkee*, 387 Wis. 2d 552, ¶56 (Rebecca Grassl Bradley, J., concurring)).

Governor Evers also suggests that the only way the legislature can effectuate its interest in the power of the purse is "*by enacting laws*," quoting this Court's decision in *SEIU v. Vos*. Br. Gov. Evers, at 34 (quoting *SEIU*, 393 Wis. 2d 38, ¶69). Ironically, though, in *SEIU*, this Court upheld a statute that requires the attorney general to, under some circumstances, seek approval from a legislative committee before settling a legal action because the attorney general's conduct could implicate the public fisc. 393 Wis. 2d 38, ¶69. "[L]itigation," this Court acknowledged, "is predominately an executive function"; however, the legislature's interest permits it to "assume . . . at least in part for itself" that function, so long as the legislature does not unduly burden the executive. *Id.*, ¶¶62–63.

Gathering Waters argues that even if the statutes at issue in *Martinez* satisfied the safeguards standard, Wis. Stat. § 23.0917(6m) and (8)(g)3. are distinguishable; however, this argument is confined to a single page and is underdeveloped. Amicus takes no position on this argument other than to note that if this Court is considering it, additional briefing would be wise.

II. This Court should proceed cautiously because Governor Evers and Gathering Waters' arguments, if accepted, will have far-reaching consequences.

If this Court is not careful in evaluating Governor Evers and Gathering Waters' arguments, the consequences could be devastating.

For example, Governor Evers claims that the legislature must act subject to bicameralism and presentment whenever the legislature "affect[s] the legal rights and duties of those outside its branch," barring two carve-outs for impeachment and proposing constitutional amendments, while contradictorily acknowledging "[a] . . . legislative committee can . . . conduct oversight hearings . . . ." Br. Gov. Evers, at 23, 34–35. Governor Evers does not explain the line he would have this Court draw. In conclusory fashion, he just says that when "rights" and "duties" are at stake, bicameralism and presentment are near-absolute requirements—never mind administrative rulemaking, though. *See id.* at 34–35. Apparently, in his view, a subpoena issued by a legislative committee does not affect "rights" and "duties," but his position does not make sense. *See* 72 Am. Jur. 2d States, Etc. § 54, Westlaw (database updated Feb. 2024).

If accepted, Governor Evers and Gathering Waters' arguments will have a domino effect that they have not considered. For example, the Claims Board will be unconstitutional. The board, created by Wis. Stat. § 15.105(2), has five members, two of whom are legislators and three of whom work in the executive. Among other things, the board is statutorily authorized to award up to $25,000 to certain people who have been wrongfully imprisoned. Wis. Stat. § 775.05(4). The legislature has given two of its own 40 percent of the voting power on the board, and the board can give people money from the public fisc via a process that is not subject to bicameralism and presentment. *See also* Wis. Stat. §§ 15.105(5), 16.83(2) (creating the State Capitol and Executive Residence Board, which has six legislators on it and can spend money via a process that is not subject to bicameralism and presentment).

Indeed, if the legislative power, regardless of whether it is being used to make law, must be exercised subject to bicameralism and presentment, all administrative rulemaking is unconstitutional. As noted in *Martinez*, an administrative rule is not law. 165 Wis. 2d at 699 & n.10. It actually cannot be law because Article IV, Section 17(2) of the constitution specifies that "[n]o law shall be enacted except by bill." Rulemaking does not follow this procedure; therefore, the rules it produces cannot be "law." Instead, a rule merely has the force and effect of law, as explained in *Martinez*, and rulemaking—and rule suspending—are legislative powers not because they are lawmaking but because they are so bound up with lawmaking. *See* 165 Wis. 2d at 699 & n.10. The same logic applies when a legislative committee "vetoes" proposed expenditures.

CONCLUSION

This Court should proceed cautiously to avoid making a doctrinal hash. If it is seriously considering the non-delegation arguments raised in this action, it should, at a minimum, order additional briefing.

Dated: March 27th, 2024.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

Electronically signed by Skylar Croy

Richard M. Esenberg (WI Bar No. 1005622)
Lucas T. Vebber (WI Bar No. 1067543)
Skylar Croy (WI Bar No. 1117831)
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Lucas@will-law.org

Skylar@will-law.org

Counsel for Amicus

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c). The length of this brief is 2,986 words as calculated by Microsoft Word.

Dated: March 27th, 2024.

Electronically signed by Skylar Croy
Skylar Croy (WI Bar No. 1117831)
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Skylar@will-law.org