IN THE SUPREME COURT OF WISCONSIN

No. 2023AP2020

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,

GATHERING WATERS, INC.,

Intervenor-Petitioner,

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 ROBIN VOS 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,

WISCONSIN LEGISLATURE,

Intervenor-Respondent.

NON-PARTY BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

Amici, identified in the Appendix, are eight legal scholars with nationally recognized expertise in state constitutional law, the legislative process, and separation-of-powers doctrine. They have researched and published extensively in this area and have a professional interest in promoting a sound understanding of the constitutional provisions and principles implicated here.

INTRODUCTION

The Joint Committee on Finance (JCF) powers challenged in this case flatly violate the Wisconsin Constitution by making an unrepresentative legislative committee the final word on significant statewide decisions. A five-member minority of the committee can block land acquisitions under the Knowles-Nelson program, *see* Wis. Stat. § 23.0917(8)(g)3, and any individual committee member can anonymously halt funding of conservation projects, *see id.* § 23.0917(6m)(a). This scheme of legislative committee governance violates any plausible version of the Constitution's structural limits.

While separation-of-powers law is rife with gray areas, the violations here are crystal clear. First, JCF's veto powers impermissibly "arrogate … control" of executive-branch implementation of appropriations. *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982). Second, JCF's powers amount to attempted amendments of appropriations statutes, flouting bicameralism and presentment. *See Martinez v. DILHR,* 165 Wis.

2d 687, 478 N.W.2d 582 (1992); Wis. Const. art. IV, § 17; art. V, § 10.

The Wisconsin Constitution's overarching democratic commitments reinforce the unconstitutionality of JCF's usurpations of authority. A central purpose of constitutionally separated powers is to ensure that government remains accountable to the entirety of the people of the state. From the beginning, a prime concern of the Constitution's design has been "wresting power from the few and vesting it in its true repository, the many." Milo M. Quaife, *The Convention of 1846* at 291 (1919) (Charles Minton Baker). The Legislature's novel system of committee vetoes does just the opposite.

Wisconsin's outsized committee lawmaking power makes the state a national outlier. Whether formalist or functionalist, state courts across the country consistently hold that legislative committees cannot make statewide law.

ARGUMENT

I. THE CHALLENGED POWERS FLOUT THE WISCONSIN CONSTITUTION'S COMMITMENT TO ACCOUNTABLE, SEPARATED POWER.

The Wisconsin Constitution imposes numerous structural limits on the exercise of governmental authority, including that no branch may arrogate another's power and that lawmaking requires bicameralism and presentment. These are not idle abstractions: They have long been understood as mechanisms of avoiding "unchecked power," *State v. Washington*, 83 Wis. 2d 808,

826, 266 N.W.2d 597 (1978), and ensuring that "sovereignty resides in the people … and in them alone," *Att'y Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567, 660 (1855). The JCF powers at issue cannot be squared with these structural mandates or their underlying democratic commitments.

A. The challenged powers patently violate the Wisconsin Constitution's structural requirements.

First, JCF's veto authority flouts a fundamental separation-of-powers rule: that "[l]egislative 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. JCF's challenged powers seize the executive's core power to manage already-appropriated funds. *See* Petr's Br. 37-38. Even if spending were not viewed as a core power, JCF's vetoes "substantially interfer[e]" with executive power over expenditures, *see Holmes*, 106 Wis. 2d at 68—indeed, they nullify that power.

Second, the challenged provisions attempt to alter appropriations without full lawmaking. The requirement of bicameralism and presentment is "absolutely essential"; these are the steps that "mak[e] a law." *State v. Wendler*, 94 Wis. 369, 68 N.W. 759, 762 (1896). The Legislature's notion that JCF's powers are insufficient to trigger this requirement is misplaced. Though the moniker "14-day review process" might suggest a temporary pause, JCF decisions are conclusive. *See* Petr's Br. 17. They overturn otherwise final executive decisions and "make permanent" JCF's preferred outcome. *Martinez*, 165 Wis. 2d at 699.

Contrary to the Legislature's assertions, neither *Martinez* nor *SEIU* validates JCF's veto powers. *Martinez* cautioned that the "critical elements" saving the disputed suspension were the "full involvement of both houses of the legislature and the governor" through bicameralism and presentment, without which the suspension could not become permanent. *Martinez*, 165 Wis. 2d at 700. And *SEIU* explained that "[u]nder *Martinez*, an endless suspension of rules could not stand; there exists at least some required end point after which bicameral passage and presentment to the governor must occur." *Serv. Emps. Int'l Union, Local 1 ("SEIU") v. Vos*, 2020 WI 67, ¶ 81, 393 Wis. 2d 38, 946 N.W.2d 35. In contrast, JCF's decisions here are final, not temporary—a dispositive difference.[1]

History also cuts strongly against the Legislature's position. To discern constitutional meaning, this Court sometimes looks to "early legislative interpretation as evidenced by the first laws passed following the [Constitution's] adoption." *SEIU*, 2020 WI at ¶28 n.10. But the JCF powers at issue are recent arrogations with no historical pedigree. The powers originated in 1995 and have since been expanded—in 2011, 2013, and 2015. 2011 Wis. Act 32, § 838 (lowering project threshold to $250,000); 2013 Wis. Act 20, § 509y (expanding power to proposals outside "project boundaries"); 2015 Wis. Act 55, § 961t (requiring JCF review of all land acquisitions north of State Trunk Highway 64). Nor do other JCF powers come close to liquidating the veto practice. None of

[1] *Amici* do not address whether to overturn *Martinez*, a question on which this Court did not accept review.

JCF's powers to reject executive-branch decisions over appropriated funds predates the 1970s. Nearly 85% of all JCF veto powers originated in the 1980s or later, and nearly a third originated or were substantively modified after 2010—typically to expand JCF's authority.[2]

To be sure, the separation of powers is not a straitjacket against innovation or functional collaboration. *See* Legis. Br. 46. Many forms of legislative oversight of the executive branch are well within constitutional bounds. But no plausible version of Wisconsin's constitutional structure allows committees or individual legislators to countermand the executive and make binding law.

B. The Wisconsin Constitution's commitment to democratic self-government powerfully reinforces the challenged provisions' unconstitutionality.

The Wisconsin Constitution's abiding commitment to democracy reinforces the unconstitutionality of the challenged provisions. Separating power among three branches has never been a mere technicality or an end in itself. *See, e.g.*, *Washington*, 83 Wis. 2d at 826 & n.13. Rather, as this court has recognized, its purpose has always been to fulfill the Constitution's core commitments: to curb "unchecked power," *id.* at 826, and to ensure that the people remain sovereign, *Bashford*, 4 Wis. at 661, that government remains "accountable," *Martinez*, 165 Wis. 2d at 701, and that "the republican form of government" is not "lost," *Gabler*

[2] *See* Harry Isaiah Black, *Research Note: History of Wisconsin's Joint Committee on Finance's Veto Powers* (2024), https://go.wisc.edu/k95sgb.

v. Crime Victims Rights Bd., 2017 WI 67, ¶39, 376 Wis. 2d 147, 897 N.W.2d 384.

Through and through, the Constitution establishes a government accountable to statewide popular majorities.[3] The tripartite structure itself directly links the people to elected officials who exercise power in their name. *See* Wis. Const. art. IV, §§ 4, 5 (legislature); art. V, § 3 (executive); art. VII, § 4(1) (judiciary); art. XIII, § 12 (recall). By separating responsibilities among multiple independently elected institutions, the Constitution helps the public "more easily and efficiently isolate who within government is responsible for bad outcomes" and "respond ... by directly targeting responsible officials." Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke L.J. 545, 617 (2023); *see id.* at 551 ("the 'public accountability' rationale for the separation of powers ... is at the core of state constitutional design").

Moreover, when the Legislature makes law, procedural restraints promote accountability to the entirety of the state's people. *See* Robert F. Williams, *State Constitutional Law Processes*, 24 Wm. & Mary L. Rev. 169, 201 (1983) ("one of the most important themes in state constitutional law" is the rise of restrictions on state legislative power). For example, the

[3] The Constitution's extensive rights and suffrage provisions underscore its commitment to democracy. From the Preamble's invocation of "the people" to the Declaration of Rights, Wis. Const. art. I, to an entire Article securing the fundamental right to vote, *id.* art. III, the document champions popular sovereignty, majority rule, and political equality. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 864 (2021).

Legislature must maintain journals and keep its doors open to the public, Wis. Const. art. IV, § 10, and a majority of legislators must be present to "do business," *id.* § 7—a requirement that JCF's dispositive powers may independently violate.

Atop this foundation of majoritarian elections and legislative procedure, bicameralism and presentment ensure that the lawmaking power ultimately resides with the people. *Cf. id.* § 17(1) (requiring laws to begin: "The people of the state of Wisconsin, represented in senate and assembly, do enact as follows"). A bill must secure majority support from both legislative chambers (bicameralism), *id.* § 17(2), and then be presented to the governor for signature or veto (presentment), *id.* art. V, § 10. These requirements bring together the people's district-based representatives from throughout the state and "the one institution guaranteed to represent the majority of the voting inhabitants of the state, the Governor," rendering "[b]oth the Governor and the legislature … indispensable parts of the legislative process." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 556-57, 126 N.W.2d 551 (1964).

Against the backdrop of these democratic commitments, legislative committees—accountable to neither the people nor other branches—are a constitutionally impermissible repository of statewide power.

Consider first the baseline constitutional arrangement: The legislative process establishing the Knowles-Nelson program complied with bicameralism and presentment, and the statute details standards for DNR's decision-making. *See* Wis. Stat. §

23.0917. When the executive branch exercises its duty to "faithfully execut[e]" the statute, Wis. Const. art. V, § 4, it acts through the DNR Secretary, an official nominated by the Governor and confirmable by the state Senate, who serves at the Governor's pleasure, Wis. Stat. § 15.05(c). DNR decisions are subject to numerous checks from the people and their elected representatives: The Legislature can pass laws countermanding DNR decisions or changing the Knowles-Nelson program; the Governor can remove the DNR Secretary; and the Senate can refuse to confirm the Secretary. Finally, judicial review is available to ensure legal compliance. *See* Wis. Stat. § 227.52.

In contrast, the challenged JCF powers shift final decision-making authority to a small group of legislators unaccountable to most voters. Of Wisconsin's 132 legislators, only 16 serve on JCF. Wis. Stat. § 13.09. Despite Wisconsin's status as one of the nation's tightest swing states, one party currently controls twelve of JCF's sixteen seats (75%). *See* 2023 Joint Committee on Finance, Wisconsin State Legislature, https://docs.legis.wisconsin.gov/2023/committees/joint/2640.

Worse, the challenged powers enable small subsets of JCF's already small membership—and even individual members—to act for the entire state. Because DNR needs approval from twelve of JCF's sixteen members for certain land acquisitions outside project boundaries, a five-member minority—representing as little as 5% of Wisconsinites—can permanently block approval. Wis. Stat. § 23.0917(8)(g)3. Likewise, individual committee members can (anonymously) halt DNR's funding of conservation projects

that exceed $250,000. Wis. Stat. § 23.0917(6m)(a). And the Legislature's position is presumably that these JCF decisions are not judicially reviewable—the ultimate lack of "proper standards or safeguards." *Martinez*, 165 Wis. 2d. at 701 (quoting 63 Op. Att'y Gen. 159, 162 (1974)).

JCF's challenged powers thus create a policy-making process devoid of public accountability and ripe for "capture by political elites"—something the founders specifically sought to prevent by allocating power to three elected branches. Marshfield, *supra*, at 551-52. There is no way to square these JCF powers with "the fundamental purpose of the constitution as a whole, to wit: to create and define the institutions whereby a representative democratic form of government may effectively function." *Reynolds*, 22 Wis. 2d at 555.

II. OTHER STATE COURTS HAVE OVERWHELMINGLY HELD LEGISLATIVE VETOES UNCONSTITUTIONAL

More than 20 state courts have considered challenges to legislative vetoes, and they have rejected them with "virtual unanimity." *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 773 (Alaska 1980); *see also McInnish v. Riley*, 925 So.2d 174, 182-83 (Ala. 2005) (collecting budget-expenditure cases); *Blank v. Dep't of Corr.*, 611 N.W.2d 530, 538-39 (Mich. 2000) (collecting administrative-rule cases); Derek Clinger & Miriam Seifter, *Unpacking State Legislative Vetoes* 25 (2023), https://go.wisc.edu/xm275i. These opinions hold that legislative vetoes usurp the executive power to spend appropriated funds, *e.g.*, *McInnish*, 925 So.2d at 182-83, and flout bicameralism and

presentment, *e.g.*, *N.D. Legis. Assembly v. Burgum*, 916 N.W.2d 83, 105 (N.D. 2018). And like Wisconsin, many of these states have an implied separation-of-powers doctrine. *See A.L.I.V.E. Voluntary*, 606 P.2d 769, *State ex rel. Stephan v. Kan. House of Representatives*, 687 P.2d 622 (Kan. 1984); *People v. Tremaine*, 168 N.E. 817 (N.Y. 1929), *Burgum*, 916 N.W.2d 83; *Com. v. Sessoms*, 532 A.2d 775 (Pa. 1987).

A recurring concern in these decisions is the anti-democratic nature of supercharged legislative committees. *See A.L.I.V.E. Voluntary*, 606 P.2d at 778 (observing that "most authorities have rejected … laws conferring either affirmative or negatory legislative powers on individual legislators or legislative committees"). Under state constitutions, "[t]he legislative power lies solely within the province of the General Assembly *and its entire, publicly elected membership*"—not a committee that "consists of a small percentage of the total membership of the two houses." *Legis. Rsch. Comm'n v. Brown*, 664 S.W.2d 907, 911 (Ky. 1984). Mere legislative committees "cannot fairly be said to represent the 'legislative will,'" *Op. of the Justices*, 431 A.2d 783, 788 (N.H. 1981); thus, "[n]ormally, legislative committees have no final authority and may only report to the authorities which created them," *State ex rel. McLeod v. McInnis*, 295 S.E.2d 633, 635, 638 (S.C. 1982) (rejecting 12-member legislative committee's authority "to control expenditures by administration rather than by legislation").

The Legislature appeals to functionalist reasoning to support JCF's powers, *see* Legis. Br. 24-36, but states adopting

functional analyses reject legislative-committee vetoes. For example, the Kansas Supreme Court embraces flexibility and pragmatism in its separation-of-powers analysis, but it has recognized that allowing a legislative committee to act "as a little legislature with the power to appropriate and authorize the expenditures of state moneys" yields what "the separation of powers doctrine was designed to prevent": the "danger of unchecked power and the concentration of power in the hands of a single person or group." *State ex rel. Schneider v. Bennett*, 547 P.2d 786, 791, 799 (Kan. 1976); *see also Stephan,* 687 P.2d at 635 (rejecting two-house veto of agency rules). Likewise, the West Virginia Supreme Court has rejected "placing the final control over governmental actions in the hands of only a few individuals who are answerable only to local electorates." *State ex rel. Barker v. Manchin,* 279 S.E.2d 622, 635 (W.Va. 1981); *see also State ex rel. Meadows v. Hechler*, 462 S.E.2d 586, 592 (W.Va. 1995) ("[T]his ability of a few individuals to curb further consideration of proposed regulations illustrates the very abuse of power that our country's forefathers sought to prevent by requiring a separation of the three branches of government.").

Indeed, whether formalist or functionalist, no state court has upheld a scheme of committee-based governance like Wisconsin's.[4]

[4] Idaho's outlier decision, *Mead v. Arnell*, is inapposite: That legislative review occurred by joint resolution, not committee veto, and the court limited its ruling to rulemaking, opining that other legislative vetoes would be unconstitutional. *See* 791 P.2d 410, 412, 417 (Idaho 1990), *overruled on other grounds by Idaho State Athletic Comm'n by & through Stoddard v. Off. of the Admin. Rules Coordinator*, 542 P.3d 718 (Idaho 2024). Moreover, given the decision's precariousness, the legislature secured passage of a constitutional

Whereas more challenging separation-of-powers questions divide courts, the unconstitutionality of committee lawmaking unites them. To be sure, state legislatures continue to experiment with oversight mechanisms, *see* Clinger & Seifter, 21-24 (describing advisory and objection-based processes beyond legislative-veto mechanisms), and a few states have amended their constitutions to increase legislative oversight.[5] But when legislative-committee veto measures arrive in court, the result has been nearly uniform rejection, and for good reason. These unconstitutional mechanisms install the very rule by "the few" that state constitutions, including the Wisconsin Constitution, were written to avoid. *See* Quaife, *supra*, at 291; Marshfield, *supra*, at 551.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to hold that JCF's challenged powers violate the Wisconsin Constitution's separation-of-powers and bicameralism and

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amendment authorizing legislative regulatory review. *See Idaho State Athletic Comm'n*, 542 P.3d 718; Idaho Const. art. III, § 29.

[5] *See, e.g.*, Ark. Const. art. V, § 42 (committee veto over agency rules); Conn. Const. art. II (veto of agency rules by "general assembly or a committee thereof"); Idaho Const. art. III, § 29 (veto of agency rules by concurrent resolution of legislature); Iowa Const. art. III, § 40 (same); N.J. Const. art. V, § 4, ¶ 6 (same); S.D. Const. art. III, § 30 (committee suspension of rules between legislative sessions). At least two other states appear to have committee-veto powers over agency rules that are neither authorized by constitutional text nor tested in litigation. North Dakota has case law rejecting other legislative committee vetoes, *see Burgum*, 916 N.W.2d 83, and its rulemaking committee-veto statute makes the provision advisory if overturned in litigation, *see* 2001 N.D. Laws, Ch. 293, § 36; North Dakota Legis. Council, *Administrative Rules Committee – Background Memorandum*, at *4 (Sep. 2021) https://perma.cc/3MNY-QUJ9. In Illinois, an evenly bipartisan committee's veto power over agency rules has not been adjudicated. *See* Marc D. Falkoff, *The Legislative Veto in Illinois: Why JCAR Review of Agency Rulemaking is Unconstitutional*, 47 Loy. U. Chi. L.J. 1055, 1060-61 (2016).

presentment requirements—and defy the Constitution's democratic commitments.

Dated this 27th day of March, 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b), (bm), and (c) for a brief. The length of this brief is 2,939 words.

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