STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2015AP2019

TETRA TECH EC, INC and LOWER FOX RIVER REMEDIATION, LLC

Petitioners-Appellants-Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent-Respondent.

ON APPEAL FROM THE AUGUST 20, 2015 DECISION AND ORDER BY THE BROWN COUNTY CIRCUIT COURT, CASE NO. 2015CV132, THE HONORABLE MARC A. HAMMER, PRESIDING

BRIEF OF AMICUS CURIAE WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

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INTEREST OF AMICUS

Amicus Wisconsin Institute for Law & Liberty, Inc. is a nonprofit, public interest law firm dedicated to promoting the public interest in free markets, limited government, individual liberty, and a robust civil society. It frequently litigates unresolved questions of public law in which agency interpretations are pertinent. Through its Center for Competitive Federalism, it conducts policy research and engages in litigation involving federalism and the separation of powers at both the federal and state level.

ARGUMENT

The Court has asked for briefing on whether deferring to agency interpretations of statutes comports with Article VII, Section 2 of the Wisconsin Constitution, which vests judicial power in a unified court system. It does not.[1] "Great weight" deference is a violation of the constitutional separation of powers. "Due weight" deference is equally problematic in that it calls for categorical deference to an agency interpretation without regard to whether or not an agency's technical knowledge or expertise is relevant to its exercise of statutory interpretation. Agencies are not "better" at reading the law nor are they presumptively in a "better" position to adjudicate how they should exercise their authority or what policy "should" be in the areas within their jurisdiction. The structure

[1] Amicus takes no position on the proper interpretation of the provisions at issue in this case.

of our Constitution – its separation of powers and the rationale for that separation – suggests that the presumption should run in the other direction.

I. Judges Say What the Law Means.

This Court has repeatedly said that it is the duty of the judiciary to say what the law is. *State v. Williams*, 2012 WI 59, ¶36, n. 13, 341 Wis. 2d 191, 814 N.W.2d 460; *State v. Van Brocklin*, 194 Wis. 441, 217 N.W. 277, 277 (1927) ("'[J]udicial power' is that power which adjudicates and protects the rights and interests of individual citizens, and to that end construes and applies the laws.") (citing 2 Words and Phrases, Second Series, p. 1268).

Current doctrine departs from this principle. It allows someone else to say what the law is. When affording "great weight" deference, courts must defer to agency interpretations that are "reasonable" even if another interpretation is more reasonable, *i.e.*, even when the court concludes that a statute means something else. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 661, 539 N.W.2d 98 (1995). In applying due weight deference, a court must allow an agency to interpret the law as long as it is "equally" as reasonable as some other interpretation. *Operton v. LIRC*, 2017 WI 46, ¶21, 375 Wis. 2d 1, 894 N.W.2d 426.

Both levels of deference, when applicable, are categorical. They apply to the entirety of the agency's interpretation and are not limited to deferring to an agency's technical expertise or specialized knowledge.

Although great weight deference requires that an agency have employed "its expertise of specialized knowledge in forming the interpretation," *Harnischfeger*, 196 Wis. 2d at 660, and due weight deference applies only when an agency "has at least some expertise in the interpretation of the statute of question," *Operton*, 2017 WI 46, ¶20, neither standard limits judicial deference to areas where this specialized knowledge or expertise is relevant to statutory interpretation. Deference is required to the entire interpretation without regard to how it was arrived at.

Current doctrine does not simply allow the executive to offer its own interpretation subject to independent judicial examination. It does not simply require that courts seriously consider what the agency has to say. Rather, in the great run of cases, "great weight deference" makes the executive's interpretation dispositive and superior to the judiciary's interpretation. It commands a court to substitute an agency's determination for its own. Even "due weight" deference commands that courts adopt someone else's interpretation and decline to adopt their own. This is unconstitutional. *See Gabler v. Crime Victims Right Board*, 2017 WI 67, ¶36, __ Wis. 2d __, __ N.W.2d __ (noting that it is unconstitutional to, among other things, "permit an executive entity to substitute its judgment for that of the judge").

Because this doctrine calls for judicial abdication – for a refusal to decide – it cannot be justified as a "prudential" rule of decision. As this

Court recently reiterated, the judicial power cannot be delegated. *State ex rel. Universal Processing Services of Wisconsin, LLC v. Circuit Court of Milwaukee County*, 2017 WI 26, ¶¶76-77, 374 Wis. 2d 26, 829 N.W.2d 267; *see also Town of Holland v. Village of Cedar Grove*, 230 Wis. 177, 282 N.W. 111, 118 (1938) ("This court has repeatedly held that the judicial power vested by the constitution in the courts cannot be exercised by administrative or executive agencies."); *Klein v. Barry*, 182 Wis. 255, 196 N.W. 457 (1923) (striking down a statute creating a railroad commission as an unconstitutional delegation of judicial power).

II. Separation of Powers Requires that Courts Judge.

This rule of non-delegation highlights – and is rooted in – the role played by the separation of powers in our constitutional system. The separation of powers does not exist to serve the interests of each branch of government. To the contrary, a robust defense of their constitutional roles is an essential safeguard of the individual rights and liberties of the people:

> Resolute resistance to intrusions across the constitutionally constructed judicial perimeter does not represent a power play by one branch vis-à-vis another. "The purpose of the separation and equilibration of powers in general ... was not merely to assure effective government but to preserve individual freedom." *Morrison v. Olson*, 487 U.S. 654, 727, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (Scalia, J., dissenting). If the judiciary passively permits another branch to arrogate judicial power unto itself, however estimable the professed purpose for asserting this prerogative, the people inevitably suffer.

Gabler, 2017 WI 46, ¶39; *Operton*, 2017 WI 46, ¶78 & n. 5 (Grassl Bradley, J., concurring) (citing The Federalist No. 51).

As Madison observed, through federalism and the separation of powers "a double security arises to the rights of the people." The Federalist No. 51. The separation of powers is an "essential precaution in favor of liberty," The Federalist No. 47, based in a clear-eyed view of human limitations and an epistemic humility about the capacity of any one decision-maker to get things right:

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Federalist No. 51. The checks and balances of power provided by divided government – "where the constant aim is to divide and arrange the several offices in such a manner as that they may be a check on the other" – are critical to this auxiliary protection. *Id.*; *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting) (citing The Federalist No. 47) ("One of the principal authors of the Constitution

famously wrote 'the accumulation of all powers, legislative, executive, and judiciary, in the same hands, … may justly be pronounced the very definition of tyranny.") (ellipses in original); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("Even more importantly, the founders considered the separation of powers a vital guard against governmental encroachment on the people's liberties, including all those later enumerated in the Bill of Rights."); *Gabler*, 2017 WI 67, ¶4 ("To the Framers of the United States Constitution, the concentration of governmental power presented an extraordinary threat to individual liberty.").

This essential division of power suggests that each branch must accept the responsibilities of its assigned role and be wary of deferring to or basing its decision on the actions of another. As then-Judge Gorsuch put it:

> [T]he framers endowed the people's representatives with the authority to prescribe new rules of general applicability prospectively. In the executive, they placed the task of ensuring the legislature's rules are faithfully executed in the hands of a single person also responsive to the people. And in the judiciary, they charged individuals insulated from political pressures with the job of interpreting the law and applying it retroactively to resolve past disputes.

Gutierrez-Brizuela, 834 F.3d at 1149 (Gorsuch, J., concurring). Similarly, our state's Constitution vests the legislative power in an Assembly and

Senate (Art. IV, sec. 1), the executive power in the Governor[2] (Art. V, sec. 1), and the judicial power in the Supreme Court and a unified court system (Art. VII, sec. 2).

This separated authority does not preclude the sharing of certain powers. *See State ex rel. Fiedler v. Wisconsin Senate*, 155 Wis. 2d 94, 100, 454 N.W.2d 770 (1990). But there are lines that cannot be crossed, core functions that cannot be shared:

> [T]he separation of powers doctrine does not render every power conferred upon one branch of government a power which may be shared by another branch. There are zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding. As to these areas of authority, the unreasonable burden or substantial interference test does not apply: any exercise of authority by another branch of government is unconstitutional.

Id. (citing *In Re Grady*, 118 Wis. 2d 762, 776, 348 N.W.2d 559 (1984)).

The essence of the judicial power is to decide cases and interpret the law. As this Court recently observed, "[b]y vesting the judicial power in a unified court system, the Wisconsin Constitution entrusts the judiciary with the duty of interpreting and applying laws made and enforced by coordinate branches of state government." *Gabler*, 2017 WI 67, ¶37. The judicial power is "the power to hear and determine controversies between parties

[2] Wisconsin does not, however, have the same type of unitary executive as our federal government since there other constitutional officers in which certain particularized powers are vested. *See* Art. VI, secs. 2 (secretary of state) & 3 (treasurer, attorney general); Art. X, sec. 1 (superintendent of public instruction). This limited subdivision of executive authority is not at issue here, although it further underscores our framers' emphasis on divided authority.

before the courts." *Williams*, 2012 WI 59, ¶36. It is "the ultimate adjudicative authority of the courts to decide rights and responsibilities as between individuals." *Id.*

Others may play a role in the process – a court commissioner might issue a search warrant or a referee might make a recommendation. Exercise of the court's adjudicatory function must respect the exercise of those powers reserved to other branches, such as the legislature's passage of the law and the prerogative of the executive to administer it. But courts cannot permit themselves to become subordinate to other branches in the exercise of core judicial functions. As this Court has observed, "[e]ach branch's core powers reflect 'zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding. As to these areas of authority, … any exercise of authority by another branch of government is unconstitutional.'" *Gabler*, 2017 WI 67, ¶5 (quoting *Fiedler*, 155 Wis. 2d at 100) (ellipses in original). It is axiomatic that "[n]o aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law." *Id.*, ¶37.

III. Both Great Weight and Due Weight Deference Are Unconstitutional.

Rubber stamping the interpretation of an agency as long as it is within some broad zone of "reasonableness" is, as Chief Justice

Roggensack has suggested, "decision-avoidance" – a refusal to judge. Patience Drake Roggensack, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in this Court of Last Resort?*, 89 MARQ. L. REV. 541 (2006). The judicial power "requires a court to exercise its independent judgment in interpreting and expounding upon the law." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting *Perez. v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment).

Excessive deference constitutes such a refusal. In *Universal Processing Services*, this Court held that Art. VII, sec. 2 was violated by a circuit court's appointment of a referee to "hear and decide all motions filed, whether discovery or dispositive, subject to review under the standard of erroneous exercise of discretion." 2017 WI 26, ¶77. This Court held that even that standard of review – as applied to a court-appointed official – constituted an unconstitutional abdication of judicial power by "prohibiting the circuit court from freely rejecting the referee's rulings and conducting its own independent inquiry and reducing the function of the circuit court to that of a reviewing court." *Id.*

Great weight and due weight deference to agency interpretation of a statute suffer from the same infirmity. They require a court to refrain from saying what the law is and from freely rejecting an agency interpretation.

A court bound by great weight deference does not even make a judgment that the agency was not wrong; only that any error did not stray beyond the bounds of rationality or direct contravention of the legislature's command. It is for courts, disinterested judges limited by the strictures and conventions of legal analysis, to resolve questions about just what the legislature has done – not regulators serving an executive who may have different policy objectives than the legislature who enacted it. *Cf. Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring) (quoting *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)) ("[A]gencies 'interpreting' ambiguous statutes typically are not engaged in acts of interpretation at all" but rather are engaged in the "'formulation of policy.'").

Due weight deference is no less problematic. A court bound by due weight deference is not simply according weight to an agency's expertise where that expertise is relevant to statutory interpretation, but following a rule that "the tie goes" to the agency's interpretation without regard to how the agency may have reached that conclusion.

To be sure, Chapter 227 commands that, under certain circumstances, something called "due weight" be accorded agency determinations. But that deference – however it is to exercised – is only to "the experience, technical competence and specialized knowledge of the agency involved" and not to its legal acumen. Wis. Stat. §227.57(10). In

fact, §227.57(5) says that courts "shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law" resulting in that action" (emphasis added).

Chapter 227 does not set the constitutional boundaries on judicial deference, but does suggest the problems with due weight deference as formulated by this Court. First, it is overly broad. It applies to all agency interpretations and not just those that involve the application of "experience, technical competence and specialized knowledge." Second, it is categorical. It requires deference to an agency whenever its interpretation is equally reasonable to another. It sanctions a judicial refusal to decide.

This is contrary to the command of our Constitution that judges – and not agencies – say what the law is. It has grave consequences for the separation of powers. The legislature makes policy and the executive (including agencies) implements it. When it is unclear just what the legislature has done, disinterested judicial decision-makers answer the question. Collapsing the making of policy into its administration, places that decision in the hands of an interested party and is inconsistent with the "auxiliary precautions" that underlie the separation of powers adopted by the framers of Wisconsin's Constitution.

To say otherwise not only usurps the judicial role but threatens to impinge on the legislative function because it changes the nature of statutory interpretation. Instead of seeking to best interpret the intent of the

legislature, courts instead permit the executive to interpret the law however it wishes, so long as the interpretation is not absurd or, in the case of due deference, can be said to be as reasonable as others. Such an approach collapses administration, adjudication, and perhaps even legislation into one. As Justice Thomas has noted, allowing an administrative agency to say what the law is – to make policy outside the parameters established for legislative delegation of rule-making powers and permitted to administrative discretion – "runs headlong into the teeth of Article I, which vests "[a]ll legislative Powers herein granted" in Congress." *Michigan v. EPA*, 135 S.Ct. at 2713 (Thomas, J., concurring). If the legislature has been unclear, courts resolve the ambiguity.

For that reason, even due weight deference must be cabined to provide deference only to those things that agencies are charged to do. When a technical determination or definition or a longstanding administrative practice is relevant to statutory interpretation, then deference is proper. And, of course, an agency's arguments as to what the law means should always be considered. But for the courts to stand down in systematic and categorical ways is not proper.

CONCLUSION

An over-eagerness to defer to executive authority is at odds with the vesting of power in three separate branches. Any combination of law-making, law-interpreting and execution of the law presents precisely the

concentration of power that our Constitution's division of authority sought to avoid. It confounds the "auxiliary protection" envisioned by Madison in light of the need for "ambition" to counteract "ambition." With respect to core functions of the judiciary, the absence of deference is not a bug of our tripartite government. It's a feature.

Dated: July 21, 2017.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE WITH
RULE 809.19(8)(b) AND (c)

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 2,989 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: July 21, 2017

RICHARD M. ESENBERG

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: July 21, 2017

RICHARD M. ESENBERG

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017, 22 copies of the Motion and Brief of Amicus Curiae Wisconsin Institute for Law & Liberty, Inc. were filed in the Wisconsin Supreme Court via hand delivery, and three 3 copies of the motion and brief were served upon parties of record via first-class mail.

Dated: July 21, 2017

RICHARD M. ESENBERG