STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2016AP1365

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Plaintiff-Respondent-Petitioner,

v.

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant-Appellant,

VALERIE BERES and MEQUON JEWISH CAMPUS, INC.,

Defendants.

ON APPEAL FROM THE JUNE 8, 2016 FINAL ORDER BY THE OZAUKEE COUNTY CIRCUIT COURT, CASE NO. 2015CV358, THE HONORABLE SANDY A. WILLIAMS, 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. ("WILL") is a nonprofit, public interest law and policy center 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

In an amicus brief filed in *Tetra Tech, Inc. v. Department of Revenue*, App. No. 2015 AP 2019, WILL showed that great weight and due weight deference are inconsistent with the allocation of all judicial power to a unified court system under Art. VII, sec. 2 of the Wisconsin Constitution. This brief focuses on how certain aspects of this case and positions taken by the Labor and Industry Review Commission ("the Commission") further illuminate the specific constitutional difficulties of such deference.

I. The Judicial Function Is Not Preserved by Retaining the Power to Disapprove Unreasonable Interpretations

The Commission argues that this Court has not listed "statutory interpretation of statutes administered by executive branch agencies" as an exclusively judicial function. (D.-App. Br. 2.) By describing the "function"

at issue with such breadth and generality, the Commission misses the point. Of course, an agency and executive officer must interpret the law in order to administer it. Of course, both of the litigants here had to adopt some interpretation of Wis. Stat. §108.04(5)(e) to take action on Ms. Beres' application for unemployment benefits and to review the denial of those benefits. But that the executive must take a position on what the law means does not mean that this determination controls any subsequent dispute over whether that position is correct.

In adjudicating that dispute, it is the role of the judiciary to provide the final say as to 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). Ascertaining what a legislative enactment means is a "core" judicial function in 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." *Gabler v. Crime Victims Right Board*, 2017 WI 67, ¶37, 376 Wis. 2d 147, 897 N.W.2d 147.

If this was not a core judicial function and was instead a shared power, there would be no need for the executive to follow the courts'

interpretation of the law. Deference to agency interpretation would not be something chosen by the courts, but compelled by our constitutional structure. Neither party – here or in *Tetra Tech* – has argued that this is the case. Whether or not this Court has listed statutory interpretation as something that only a court can ever do regardless of context, it has made clear that the judicial function may not 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).

This Court has also made clear that deference to another decision-maker can constitute an improper delegation of that function – a refusal to decide. 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. Although the circuit court retained the power to set aside decisions that were unreasonable or that exceeded the referee's delegated authority, this

Court held that the appointment 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.* In *Gabler*, this Court noted that it is unconstitutional to, among other things, "permit an executive entity to substitute its judgment for that of the judge." 2017 WI 67, ¶36.

Under both great weight and due weight deference, this abdication of the judicial function is systematic and far-reaching. Under great weight deference, courts allow erroneous interpretations of a statute to stand as long as the error is not extreme. *See Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 661, 539 N.W.2d 98 (1995). Under due weight deference, they refuse to choose among interpretations that seem equally persuasive. *See Operton v. LIRC*, 2017 WI 46, ¶21, 375 Wis. 2d 1, 894 N.W.2d 426. In both cases, courts refuse to make a decision within some boundary of reasonableness or plausibility.

But the "core judicial function" of determining what the law is, is not preserved by retaining what the Commission calls the "minimal jurisdictional or acting-in-excess-of-its-powers-inquiry" that it believes is the only power the courts are due and are constitutionally charged to preserve. (D.-App. Br. 16.) It is not preserved by ending the interpretive process when it appears that one interpretation is approximately as

plausible as another. Both approaches amount to policing the boundaries of a delegation that our Constitution and this Court say is impermissible. Nor is it preserved by permitting courts to determine only whether an interpretation is "good enough" – "wrong but not too wrong" – in the case of great weight deference, and "as good as any other" in the case of due weight deference. Under such circumstances, a court is not saying what the law is, but, at best, saying what the law might be and letting the agency pick its favorite interpretation.

This violates the separation of powers in two ways. As noted above, it involves an abdication of the judicial role. Courts are charged with determining what a statute means not by reference to what the executive might want it to mean, but by discerning what the legislature intended. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. In doing so, they employ the tools and disciplines that courts employ to ascertain meaning. It is not a mechanical process. Different judges may disagree on the outcome in any given case, but the charge remains to follow the process and reach an answer. Even due weight deference involves a refusal to reach that answer.

This abdication of the judicial function also impinges on the exercise of core legislative authority – to decide what the law should be. It subtly – or perhaps not so subtly in the case of great weight deference – changes the interpretive question. The court's objective is no longer the determination

of what the legislature actually intended, but whether the choice of meaning (and, therefore, policy) made by the agency is defensible given whatever outer bounds are established by statutory language. In this way, it shifts a portion of the policy choice from the legislature to the executive. Instead of what the legislature intended, the public is left with what the executive intended. Perhaps that could be justified if the legislature properly delegated decision-making to the executive with adequate guidelines to govern that delegation. *See, e.g.*, *Martinez v. DILHR*, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992). But no one claims that is what happened here.

II. The Separation of Powers Preserves Liberty

Deference cannot be defended as a matter of comity or a rule of administrative convenience. As this Court recently observed, "our state constitution created three branches of government, each with distinct functions and powers," *Gabler*, 2017 WI 67, ¶11 (quoting *Panzer v. Doyle*, 2004 WI 52, ¶48, 271 N.W.2d 295, 680 N.W.2d 666, *overruled on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408). Quoting Joseph Story, this Court noted that it is a "maxim of vital importance" that the three great powers of government should forever be kept separate and distinct." *Id.*, ¶3 (quoting 2 Joseph Story Commentaries on the Constitution of the United States, § 519, 2-3 (Boston, Hilliard, Gray, & Co., 1833)). It recognized that "[t]he preservation of liberty in Wisconsin turns in part upon the assurance that

each branch will defend itself from encroachments by others." *Id*., ¶31. Thus, it reiterated that "[c]ore zones of authority are to be 'jealously guarded by each branch of government." *Id.* (quoting *Barland v. Eau Claire County*, 216 Wis. 2d 560, 573, 575 N.W.2d 1991 (1998)) (citation omitted).

In other words, courts do not insist on protecting the judicial function for the sake of judges or legislative power for the benefit of legislators but because doing to is a guarantee of liberty. *See Gabler*, 2017 WI 67, ¶¶3-9, 60 (discussing the labors of the framers to separate government power as a bulwark for liberty and calling the accumulation of governmental authority in one body "a grave threat to liberty"); *Operton*, 2017 WI 46, ¶¶78-80 & n. 5 (R.G. Bradley, J., concurring) (describing the separation of powers as "the essential safeguard of individual rights and liberty" and noting that "the judiciary risks the liberty of all citizens if it abdicates its constitutional responsibility to check executive interpretations of the law").

Of course, this does not mean that it is possible to arrive at an "absolute division without overlap" (LIRC Br., p. 4), enforced with "pedantic vigor" (*Id*. at 11 (citing *Layton School of Art & Design v. WERC*, 82 Wis. 2d 324, 347-48, 262 N.W.2d 218 (1978))). There are areas of shared power. But it is simply false to say, as the Commission does, that the "majority" of governmental powers are assigned to the borderlands of

shared powers. (D.-App. Br. 3 (quoting *Barland*,[1] 216 Wis. 2d at 573).) Borders, after all, are at the edges and exclude the core. If the separation of powers is an important guarantor of liberty, then it simply cannot be the case that most powers are shared. Under such a regime, the branches could not effectively serve as a check on each other. As the *Gabler* Court recognized, while "'[s]hared powers lie at the intersections of the[] exclusive core constitutional powers," 2017 WI 67, ¶34 (quoting *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999)), others must be "'jealously guard[ed],'" *Id.*, ¶31 (quoting *Barland*, 216 Wis. 2d at 573), because only a division of power can serve as a "self-executing safeguard," *Id.*, ¶7 (quoting *Clinton v. Jones*, 520 U.S. 681, 699 (1997)), against the "concentration of governmental power [that] present[s] an extraordinary threat to individual liberty," *Id.*, ¶4. It is hardly pedantic to say that separation requires separation. As noted above, resolving disputes as to what the law means is a core judicial function. *Id.*, ¶37.

The difficulty with great weight and due weight deference is that they are both broad and categorical. They are broad in that they apply to all agency interpretations and not just those involving the application of

[1] *Barland* cites *In re Revisor*, 141 Wis. 2d 592, 597, 124 N.W. 670 (1910), for the proposition that the "majority of governmental powers lie within these 'great borderlands' of shared authority." *Barland*, 216 Wis. 2d at 573. However, *Revisor* did not say that the "majority" of powers fell in that shared area, but rather that such shared powers exist. 141 Wis. 2d at 597. The *Barland* court inserted "majority" on its own, without an analysis of whether that is actually true. Moreover, *Revisor* predates the growth of the modern administrative state and the administrative agencies that wield broad executive, legislative, and judicial powers.

technical expertise, experience, competence, or specialized knowledge. They are categorical in that they afford conclusory effect to not only determinations informed by expertise and specialized knowledge, but to the agency's legal conclusion. Courts do not defer simply to an agency's technical claims and experience to the extent these are relevant to interpretation, but to the interpretation itself.

The shortcomings of this approach are demonstrated by this case. The question here is whether the statute establishes a floor for misconduct – a legislative judgment that less than two absences in a 120-day period should never be misconduct – or a default that can be altered by agreement expressed in the written policies of the employer and accepted by those who choose to work for that employer. The latter would represent a legislative judgment that employees who wish to collect unemployment insurance ought to have complied with the clearly stated policies of their employers.

The choice between these two alternatives is a policy judgment about what obligations to place upon employees and employers with respect to absences and unemployment compensation. It is for the legislature to make and no amount of "technical expertise, experience, competence and specialized knowledge" decides what that choice ought to be or even to determine what choice has been made. The arguments made by the Commission in support of its interpretation do not involve the

application of any technical expertise or specialized knowledge. They amount to normative claims that permitting employer policies that would be stricter than the default rule would be too harsh (perhaps suggesting that the legislature could not have intended to permit it). The Commission argues that such a rule might be abused but offers no experience or specialized knowledge to that effect, offering only an argument that such a thing might be possible. It offers arguments from semantics, the choice of language, potential interaction with federal law, and constitutional avoidance. They might all be good arguments, but they are not beyond the ken or competence of the courts. They are at the core of what judges do. The Commission here did nothing that a judge could not or would not do just as well.

This ought to be fatal to a claim for any form of deference. In their brief for the Department of Workforce Development, the Attorney General and Solicitor General recognize that, when given its proper meaning, due weight deference is not deference at all. (P.-Resp.-Pet. Br. 20 (citing *County of Dane v. Labor & Industry Review Commission*, 2009 WI 9, ¶19, 315 Wis. 2d 293, 759 N.W.2d 571).) This is the key to understanding the proper scope of due weight deference and why this Court should abandon the broad and categorical language of deference in favor of respect for informed agency contributions.

In its brief, the Department of Workforce Development argues for a "due weight, sliding scale approach," depending on the closeness of the question to an area of specialized expertise and the nature of the legal question presented. (P.-Resp.-Pet. Br. 34, comparing *McCarthy v. Sawyer-Goodman Company*, 194 Wis. 198, 215 N.W. 824 (1927), with *Drivers Local No. 695 v. LIRC*, 154 Wis. 2d 75, 84, 452 N.W.2d 368 (1990).) A sliding scale can indeed illuminate the limits of the factors that inform a legal conclusion and the relationship among them. But like all forms of balancing tests, they can obscure the basis of decision-making. With respect, we would urge this Court to explain precisely what deference or respect does and does not entail. The question is less about the degree of deference than it is about the nature of the judgments to which deference or respect is owed.

Courts should not defer to agencies as forums or to the legal conclusions that they draw. But agencies ought to be respected as sources of information that might, depending on the interpretive question at issue, be relevant to resolving it. The executive's view of the law is not entitled to deference. While, as the Department points out, the executive is charged to uphold the law, it is not charged with being the final arbiter of its meaning. And just as an agency can contribute expertise, it is also subject to regulatory capture and, particularly in technical matters that are not of broad public interest, the outsized influence of those who are intensely

interested in a matter. Given this expertise, an agency might be expected to offer legal arguments that others might overlook, but those arguments can be evaluated on the merits without special regard for who has made them.

Although the application of technical expertise may be more associated with factual findings, it can be relevant in determining the meaning of a word chosen by the legislature. It might be relevant in determining how a clearly expressed – or judicially discerned – legislative purpose might best be served. But it is not categorically relevant in answering all interpretive questions arising with respect to a statute that it administers. Thus, it should not be the case that whenever a question arises in an area in which an agency has expertise or is administering a statutory scheme, its legal interpretation is entitled to pride of place for that reason alone. There is no reason to think that agencies have some generally applicable expertise with respect to all legal questions to which courts may defer. Agencies ought to be seen as sources of information and not conclusions. With respect to questions of legislative interpretation, agencies' views warrant respectful consideration and no more.

Dated: October 6, 2017.

Respectfully Submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY

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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 2,946 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: October 6, 2017

THOMAS C. KAMENICK

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: October 6, 2017

THOMAS C. KAMENICK