STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2019AP614-LV

Service Employees International Union (SEIU), Local 1, SEIU Healthcare Wisconsin, Milwaukee Area Service and Hospitality Workers, AFT-Wisconsin, Wisconsin Federation of Nurses and Health Professionals, Ramon Argandona, Peter Rickman, Amicar Zapata, Kim Kohlhaas, Jeffrey Myers, Andrew Felt, Candice Owley, Connie Smith and Janet Bewley,

Plaintiffs-Respondents,

v.

Robin Vos, in his official capacity as Wisconsin Assembly Speaker, Roger Roth, in his official capacity as Wisconsin Senate President, Jim Steineke, in his official capacity as Wisconsin Assembly Majority Leader and Scott Fitzgerald, in his official capacity as Wisconsin Senate Majority Leader,

Defendants-Petitioners, and

Josh Kaul, in his official capacity as Attorney General of the State of Wisconsin and Tony Evers, in his official capacity as Governor of the State of Wisconsin,

Defendants-Respondents.

Appeal No. 2019AP622

Service Employees International Union (SEIU), Local 1, SEIU Healthcare Wisconsin, Milwaukee Area Service and Hospitality Workers, AFT-Wisconsin, Wisconsin Federation of Nurses and Health Professionals, Ramon Argandona, Peter Rickman, Amicar Zapata, Kim Kohlhaas, Jeffrey Myers, Andrew Felt, Candice Owley, Connie Smith and Janet Bewley,

Plaintiffs-Respondents,

v.

Robin Vos, in his official capacity as Wisconsin Assembly Speaker, Roger Roth, in his official capacity as Wisconsin Senate President, Jim Steineke, in his official capacity as Wisconsin Assembly Majority Leader and Scott Fitzgerald, in his official capacity as Wisconsin Senate Majority Leader,

Defendants-Appellants, and

Josh Kaul, in his official capacity as Attorney General of the State of Wisconsin and Tony Evers, in his official capacity as Governor of the State of Wisconsin,

Defendants.

ON APPEAL/PETITION FROM THE DANE COUNTY CIRCUIT COURT, THE HONORABLE FRANK D. REMINGTON, PRESIDING
CASE NO. 2019CV000302

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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 conducts policy research and engages in litigation involving the separation of powers and the constitutional authority of administrative agencies.

SUMMARY OF ARGUMENT

This case raises critical issues regarding the separation of powers and, in particular, what restraints are permitted or required on the delegation of legislative power to the executive. Section 64 of 2017 Wis. Act 369 expands the existing capacity of the Joint Committee for the Review of Administrative Rules ("JCRAR") to suspend a proposed rule, providing that JCRAR may now do so multiple times. Prior to section 64, JCRAR could suspend a proposed rule only once and a suspended rule would go into effect unless a bill permanently blocking the rule was enacted into law within a prescribed time period. In enacting section 64, the legislature sought to further limit the manner in which agencies exercise what is clearly a delegated *legislative* – not executive – function. *Koschkee v. Taylor*, 2019 WI 76, ¶12, 387 Wis.2d 552, 929 N.W.2d 600 ("Therefore, when administrative agencies promulgate rules, they are exercising legislative power that the legislature has chosen to delegate to them by statute."). Thus, the constitutionality of section 64 is not about a potential encroachment on executive power but the manner in which the legislature may delegate a portion of its own authority to another branch.

The Circuit Court recognized that our Constitution places limits on the way in which the legislature exercises its authority. But it came to a passingly odd conclusion. It found that the legislature could retain no ability to control the way in which its own delegated authority is exercised without that control being accomplished through subsequently enacted laws, *i.e.*, by bicameral passage of a bill that is presented to the Governor for approval. This is so, in its view, because rule-making (or the suspension of rule-making) is law-making.

That leads to an anomalous result. On the Circuit Court's view, the legislature may delegate broad legislative authority to the executive branch which can then itself make laws without bicameral passage and presentment. But the legislature may retain no authority to block such law-making without bicameral passage and presentment of the suspension to the governor for approval. In the Circuit Court's view, the legislature, in delegating its authority, *must* create a machine that will go of itself. It *must* authorize executive rule-making without legislative supervision that stops short of a law that undoes its delegation. It *must* empower the executive to do what it cannot.

The Circuit Court focused on procedural safeguards that would "protect" the independence of the administrative agency by limiting the basis on which and the extent to which the legislature might block rule-making. *See Service Employees International Union (SEIU), Local 1 v. Vos*, No. 19CV302, at 21-23 (Wis. Cir. Ct. Mar. 26, 2019). But the issue raised by a legislature's delegation of its own authority is not protection of the executive, but whether the delegation is itself proper and whether any steps taken to control the delegation are justified by the need to protect against the derogation of the *legislature's* power.

For that reason, the constitutionality of section 64 cannot be understood without understanding the ways in which our Constitution limits the delegation of legislative authority. At the federal level, the nondelegation doctrine is understood as a prohibition on the delegation of legislative power to the executive or judicial branches. *Mistretta v. United States*, 488 U.S. 361, 371-372 (1989). Wisconsin case law has defined the doctrine more broadly as providing simply that while "one branch of government may delegate power to another branch, . . . it may not delegate too much, thereby fusing an overabundance of power in the recipient branch." *Panzer v. Doyle*, 2004 WI 52, ¶52, 271 Wis. 2d 295, 680 N.W.2d 666, *abrogated in part on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408.

As explained below, the nondelegation doctrine is currently underdeveloped. This Court should revive the nondelegation doctrine in Wisconsin in order to restore the functioning of state government to that originally intended by those who instituted it. While section 64 does not itself address the need for robust judicial enforcement of the nondelegation principle, it is an effort by the legislature to avoid complete abdication of its constitutional principles and should be viewed in that light.

ARGUMENT

I. The federal nondelegation doctrine is all but a dead letter

This Court has indicated that "separation of powers principles" applicable to the United States Constitution "inform our understanding of the separation of powers under the Wisconsin Constitution." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67,

¶11, 376 Wis. 2d 147, 897 N.W.2d 384. Consequently, it is helpful, before examining the nondelegation doctrine in Wisconsin, to examine its federal analogue.

The seminal case is *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). Congress had delegated to the President the authority to increase or decrease duties imposed on imports when necessary to bring into balance the cost of producing those items in the United States rather than in a foreign country. *J.W. Hampton, Jr., & Co.*, 276 U.S. at 400-402. A unanimous Court upheld the delegation to alter duty rates, announcing that: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409. In the Court's view, Congress had merely "describ[ed] with clearness . . . its policy and plan . . . and then authoriz[ed] a member of the executive branch to carry [it] out." *Id.* at 405. The Court explained:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Id. at 407 (quoting *Cincinnati, W. & Z.R. Co. v. Clinton Cty. Comm'rs*, 1 Ohio St. 77, 88 (1852)).

Initially this rule had teeth, with the Supreme Court invalidating a pair of laws that failed to appropriately limit congressional delegations of authority to the President by sufficiently guiding or

cabining his exercise of discretion. *See Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (law gave President authority to prohibit interstate and foreign transport of petroleum and petroleum products produced or withdrawn from storage in excess of state law but said nothing about whether or when the President should exercise that authority); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521-22, 542 (1935) (law gave President "virtually unfettered" "discretion" to approve or adopt so-called "codes of fair competition").

But nondelegation challenges since that time have repeatedly failed before the Supreme Court, *see, e.g.*, *Mistretta*, 488 U.S. at 373-74 (collecting cases), with Justice Thomas recently observing that "the intelligible principle test now requires nothing more than a minimal degree of specificity in the instructions Congress gives to the Executive when it authorizes the Executive to make rules having the force and effect of law . . . very minimal indeed." *Dep't of Transp. v. Ass'n of Am. Railroads*, ___ U.S. ___, 135 S. Ct. 1225, 1251 (2015) (Thomas, J., concurring in the judgment).

The atrophy of the nondelegation doctrine at the federal level has been the subject of substantial criticism. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1237-1241 (1994). And the Supreme Court could be set to revive the doctrine. In *Gundy v. United States*, a case challenging the Sex Offender Registration and Notification Act as an unlawful delegation of legislative power, four out of eight justices sitting on the case signaled a willingness to revisit the Court's nondelegation caselaw. *See Gundy v. United States*, ___ U.S. ___, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *id.* (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.)

("Justice ALITO supplies the fifth vote for today's judgment . . . , indicating . . . that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait."). Justice Kavanaugh may turn out to be the fifth.

II. Wisconsin's nondelegation doctrine has required little more than procedural safeguards

Though the two share some similarities, the development of Wisconsin's nondelegation doctrine has not precisely tracked that of the federal doctrine. As in in the federal system, this Court began formulating its nondelegation doctrine at a relatively early point in its history and initially this Court did not hesitate to strike down laws as invalid delegations of legislative power. *See, e.g.*, *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N.W. 738, 741 (1896) ("[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 . . . delegate of the legislature . . . ."); *see also State v. Burdge*, 95 Wis. 390, 70 N.W. 347, 350 (1897) (prior to making rules and regulations "there must first be some substantive provision of law to be administered and carried into effect.").

This Court began to alter course in 1928, the same year that the Supreme Court of the United States decided *J.W. Hampton*. Asked to review a delegation of power from the legislature to the Commissioner of Insurance, this Court announced widespread agreement amongst "courts, Legislatures, and executives, as well as students of the law" that "there is an overpowering necessity for a modification of the doctrine of separation and nondelegation of powers of government." *State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 939 (1928). Noting that *Dowling* had "been undermined by subsequent decisions and its foundations removed," this Court did

not – as it could not – abandon the Constitution's exclusive vesting of lawmaking authority in the legislature:

> The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate—is a power which is vested by our Constitution in the Legislature, and may not be delegated. When, however, the Legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose . . . .

Id. at 941. *Whitman* is notable for two additional reasons. The first is the Court's blunt statement that "[i]t only leads to confusion and error to say that the power [of administrative agencies] to fill up the details and promulgate rules and regulations is not legislative power," *id.*, a statement at odds with the federal case law discussed above.

The second is the Court's "respon[se] to the suggestions made in responsible quarters that the delegation of power to subordinate administrative agencies is fraught with danger." *Id.* at 942. The Court allayed these fears in part by explaining that agencies were required to "conform precisely to the statute which grants the power," and that "the Legislature may withdraw powers which have been granted, prescribe the procedure through which granted powers are to be exercised, and, if necessary, wipe out the agency entirely." *Id.*

Whether this Court intended it or not, these latter statements discussing procedural, as opposed to substantive safeguards

planted the seeds for a drastic change in Wisconsin delegation law: a "shift[] [of] focus away from the nature of the power delegated through scrutiny of the delegating standard's language and more toward the safeguards surrounding the delegated power." *Gilbert v. State, Med. Examining Bd.*, 119 Wis. 2d 168, 185, 349 N.W.2d 68 (1984).

This emphasis on process turned into a rule that "[a] delegation of legislative power to a subordinate agency will be upheld if the purpose of the delegating statute is ascertainable and there are procedural safe-guards to insure that the board or agency acts within that legislative purpose," *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971), which then turned into a rule that "*broad grants* of legislative powers will be permitted where there are procedural and judicial safeguards against arbitrary, unreasonable, or oppressive conduct of the agency," *Westring v. James*, 71 Wis. 2d 462, 468, 238 N.W.2d 695 (1976) (emphasis added) (citing *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 158 N.W.2d 306 (1968)). As of 2004, this Court was candidly declaring that while "the nature of the delegated power still plays a role in Wisconsin's nondelegation doctrine," "[t]he presence of adequate procedural safeguards is the paramount consideration." *Panzer*, 271 Wis. 2d 295, ¶79 & n.29; *see also id.* at ¶¶54-55.

III. This Court should reinvigorate Wisconsin's nondelegation doctrine, but until it does so it must continue to allow the legislature to place procedural limits on the exercise of delegated authority by administrative agencies

The Court's gradual switch to a nondelegation doctrine "primarily concerned with the presence of procedural safeguards," *Panzer*,

271 Wis. 2d 295, ¶55, was a mistake. It is fundamentally inconsistent with the Wisconsin Constitution's "vest[ing]" of "[t]he legislative power" in the legislature, and the legislature alone, Wis. Const. art. IV, § 1, to permit administrative agencies to engage in lawmaking without specific, meaningful direction.

This is not a mere procedural or "formalist" concern. As Madison observed, the separation of powers is an "essential precaution in favor of liberty," The Federalist No. 47. It is 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. It is a device by which "[a]mbition [is] made to counteract ambition." 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 each may be a check on the other" – are critical to this auxiliary protection. *Id.*; *see also City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) ("One of the principal authors of the Constitution famously wrote that the 'accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.'" (quoting The Federalist No. 47)) (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*, 376 Wis. 2d 147, ¶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 means 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 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.'" *Id.* at ¶5 (quoting *State ex rel. Fiedler v. Wis. Senate*, 155 Wis.2d 94, 100, 454 N.W.2d 770 (1990)) (ellipses in original). Because the duty of each branch to "jealously guard[]" its authority, *id.* at ¶34 (quoting *State ex rel. Friedrich v. Circuit Court for Dane Cty.*, 192 Wis. 2d 1, 14, 531 N.W.2d 32 (1995) (per curiam)), is not an institutional prerogative but a constitutional obligation, judicial enforcement of this separation of powers is a constitutional imperative.

A procedure to block delegated law-making is not the same as making new law. It does not encroach on the power of other branches but is an attempt by the legislature to "jealously guard[]" its authority. And while the Circuit Court recognized the need for law to be made as prescribed by the Constitution, the effect of its decision not only allows but encourages the legislature to abdicate its authority. If it is to delegate, it must do so completely without reservation of authority. The result is precisely the opposite of that intended by the Constitution. Law is made by the executive without the constitutionally prescribed safeguards that the Circuit Court sought to protect.

Section 64 is not an *adequate* safeguard against excessive delegation of authority. This Court should revitalize Wisconsin's nondelegation doctrine by requiring courts to assess legislative delegations to agencies for the presence of specific, substantive standards to guide agency rulemaking and other agency action.

But it is *a* safeguard. Until the Court reinvigorates the nondelegation doctrine, it must at least allow the legislature to impose the procedural safeguards it deems necessary to prevent agencies from exercising legislative power free from control. This trade-off – procedural safeguards for substantive safeguards – was the bargain this Court made in order to give the legislature and agencies a freer hand in the conduct of governmental affairs while still resting the legitimacy of the administrative state on *some* theoretical foundation. The alternative is to authorize the creation of unaccountable shadow legislatures with the freedom to utterly dominate the individuals under their regulatory authority.

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that this Court ensure the existence of a nondelegation doctrine that adequately protects the people of this state.

DATED this 26th day of September, 2019,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this non-party brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,999 words, calculated using Microsoft Word.

DATED this 26th day of September, 2019,

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CERTIFICATE REGARDING ELECTRONIC FILING OF BRIEF PURSUANT TO WIS. STAT. § 809.19(12)(f)

I hereby certify that:

I have submitted an electronic copy of this non-party brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 parties.

DATED this 26th day of September, 2019,

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I, Richard M. Esenberg, attorney for Amicus Curiae, hereby certify that on the 26th day of September, 2019, I caused three (3) true and correct copies of the foregoing non-party brief to be served upon counsel of record by placing the same in the U.S. Mail, first-class postage, as follows:

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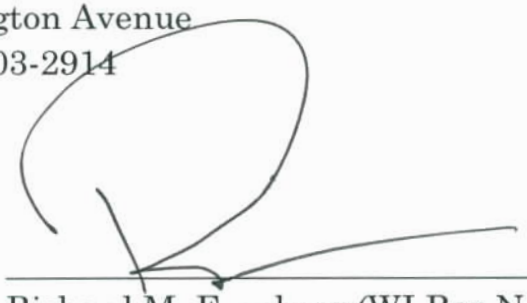

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