

Subject: RE: Public Records Law Request (WI-SEN-24-1515)
Date: Wednesday, October 30, 2024 at 3:54:29 PM Eastern Daylight Time
From: Gillitzer, Erin
To: AO Records
CC: Sen.LeMahieu
Attachments: Combined Records.pdf

EXTERNAL SENDER

Good afternoon,

The purpose of this email is to notify you that the records responsive to the public records request you made to Senator LeMahieu have been compiled. All records that are responsive to your request are attached to this email.

If you have any questions, please do not hesitate to contact Senator LeMahieu' 's office by phone or email.

Erin Gillitzer

Legislative Operations Clerk – Senate Chief Clerk’s Office
P.O. Box 7882, Madison, WI 53707
608-504-5680

From: "ashley.czaja@legis.wisconsin.gov" <ashley.czaja@legis.wisconsin.gov>
Sent: Monday, April 22, 2024, 9:32 AM
To: Matthew Fernholz <mmf@cmlawgroup.com>
Subject: Accepted: [REDACTED] Call

SUPREME COURT OF WISCONSIN

CASE No. : 2023AP2020-OA

COMPLETE TITLE: 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 Board Professional Counseling and Social Work Examining Board, Petitioners, Gathering Waters, Inc., Intervenor-Petitioner,

v.

Senator Howard Marklein, Representative Mark Born in their official capacities as chairs of the joint committee on finance, Senator Chris Kapenga, Representative Robin Vos in their official capacities as chairs of the joint committee on employment relations, 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.

ORIGINAL ACTION

OPINION FILED: July 5, 2024
SUBMITTED ON BRIEFS:
ORAL ARGUMENT: April 17, 2024

SOURCE OF APPEAL:

COURT:

COUNTY:

JUDGE:

JUSTICES:

REBECCA GRASSL BRADLEY, J., delivered the majority opinion of the Court, in which ANN WALSH BRADLEY, DALLET, HAGEDORN, KAROFSKY, and PROTASWIECZ, JJ., joined. ANN WALSH BRADLEY, J., filed a concurring opinion, in which DALLET and PROTASWIECZ, JJ., joined. REBECCA GRASSL BRADLEY, J., filed a concurring opinion. DALLET, J., filed a concurring opinion, in which ANN WALSH BRADLEY, KAROFSKY, and PROTASWIECZ, JJ., joined. ZIEGLER, C.J., filed a dissenting opinion.

NOT PARTICIPATING:

ATTORNEYS:

For the petitioners, there were briefs filed by *Charlotte Gibson*, assistant attorney general, *Colin T. Roth*, assistant attorney general, with whom on the brief was *Joshua L. Kaul*, attorney general. There was an oral argument by *Colin T. Roth*, assistant attorney general.

For the intervenor-petitioner, there were briefs filed by *Erin K. Deeley*, *Jeffrey A. Mandell*, *Rachel E. Snyder*, *Carly Gerads*, and *Stafford Rosenbaum LLP, Madison*. There was an oral argument by *Erin K. Deeley*.

For the respondents and intervenor-respondent, there was a brief filed by *Misha Tseytlin*, *Sean T.H. Dutton*, *Kevin M. LeRoy*, and *Troutman Pepper Hamilton Sanders LLP, Chicago, IL*. There was an oral argument by *Misha Tseytlin*.

An amicus curiae brief was filed by *Evan Feinauer*, *Brett Korte*, *David Tipson*, and *Clean Wisconsin, Madison*, on behalf of *Clean Wisconsin*.

An amicus curiae brief was filed by *Chris Donahoe*, *Daniel S. Lenz*, *T.R. Edwards*, and *Law Forward, Inc., Madison*, on behalf of *Former Wisconsin Judges*.

An amicus curiae brief was filed by *Tony Wilkin Gibart, Robert D. Lee, and Midwest Environmental Advocates, Madison*, on behalf of Save our Water and Wisconsin Conservation Voters.

An amicus curiae brief was filed by *Bryna Godar, Miriam Seifter, and State Democracy Research Initiative, University of Wisconsin Law School, Madison*, on behalf of Legal Scholars.

An amicus curiae brief was filed by *Richard M. Esenberg, Lucas T. Vebber, Skylar Croy, and Wisconsin Institute for Law & Liberty, Inc., Milwaukee*, on behalf of Wisconsin Institute for Law & Liberty, Inc.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2023AP2020-OA

STATE OF WISCONSIN

:

IN SUPREME COURT

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 Board Professional Counseling and Social Work Examining Board,

Petitioners,

Gathering Waters, Inc.,

Intervenor-Petitioner,

v.

Senator Howard Marklein, Representative Mark Born in their official capacities as chairs of the joint committee on finance, Senator Chris Kapenga, Representative Robin Vos in their official capacities as chairs of the joint committee on employment relations, 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.

FILED

JUL 5, 2024

Samuel A. Christensen
Clerk of Supreme Court

REBECCA GRASSL BRADLEY, J., delivered the majority opinion of the Court, in which ANN WALSH BRADLEY, DALLET, HAGEDORN, KAROFISKY, and PROTASWIECZ, JJ., joined. ANN WALSH BRADLEY, J., filed a concurring opinion, in which DALLET and PROTASWIECZ, JJ., joined. REBECCA GRASSL BRADLEY, J., filed a concurring opinion. DALLET, J., filed a concurring opinion, in which ANN WALSH BRADLEY, KAROFISKY, and PROTASWIECZ, JJ., joined. ZIEGLER, C.J., filed a dissenting opinion.

ORIGINAL ACTION. *Rights declared.*

¶1 REBECCA GRASSL BRADLEY, J. The Wisconsin Constitution vests each of the three branches of government with separate and distinct powers. When one branch challenges the exercise of power by another, the judiciary must ensure constitutional boundaries have not been breached. Safeguarding the structural separation of powers prevents one branch from encroaching upon or seizing the powers of another, averting "'a gradual concentration of the several powers in the same department.'" Gabler v. Crime Victims Rts. Bd., 2017 WI 67, ¶7, 376 Wis. 2d 147, 897 N.W.2d 384 (quoting The Federalist No. 51, at 318-19 (James Madison) (Clinton Rossiter ed., 1961)). The "preservation of liberty requires that the three great departments of power should be separate and distinct." The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961).

¶2 In this case, the petitioners¹ claim the legislature has impermissibly intruded upon the executive branch's core power to

¹ This original action was brought by the attorney general on behalf of Governor Tony Evers, the Department of Natural Resources ("DNR"), the Board of Regents for the University of Wisconsin, the

execute the law by authorizing a legislative committee to halt expenditures for land conservation measures after the legislature already appropriated the money through the budget process. The legislative respondents² defend the statutes based on the legislature's interest in overseeing the executive branch's expenditure of state funds. We hold that Wis. Stat. §§ 23.0917(6m) and 23.0917(8)(g)3. (2021-22)³ unconstitutionally authorize the legislative branch to arrogate and impede the executive's core power to execute the law, violating the separation of powers structurally enshrined in our constitution.

I. BACKGROUND

¶3 In 1989, the legislature created the Knowles-Nelson Stewardship Program ("the Program") "to acquire land to expand nature-based outdoor recreational opportunities and protect environmentally sensitive areas." Eric Helper, Warren Knowles-Gaylord Nelson Stewardship Program, Wis. Legis. Fiscal Bureau, Informational Paper #66, 1 (Jan. 2023); 1989 Wis. Act 31, § 650fq. The Program allows the Department of Natural Resources ("DNR") to

Department of Safety and Professional Services, and the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board. After we granted the original action petition, we granted Gathering Waters, Inc.'s motion to intervene as a petitioner.

² The legislative respondents are Senators Howard Marklein, Chris Kapenga, and Steve Nass, and Representatives Mark Born, Robin Vos, and Adam Neylon, each named in his official capacity. After we granted the original action petition, we granted the Wisconsin Legislature's motion to intervene as a respondent.

³ All subsequent references to the Wisconsin Statutes are to the 2021-22 version unless otherwise indicated.

purchase land or disburse state funds to local governments and nonprofit organizations to acquire land for nature-based outdoor recreation. Land acquired under the Program must remain accessible to the public unless public safety or environmental concerns counsel against public access. See generally Wis. Stat. § 23.0916. Since its creation, the legislature has reauthorized funding for the Program multiple times, primarily through the biennial budget process. 2021 Wis. Act 58, § 97m. Currently, the legislature has authorized the DNR to obligate up to \$33,250,000 in each fiscal year through 2025-26 for land acquisition projects. Wis. Stat. § 20.866(2)(ta).

¶4 To carry out the Program, the DNR reviews applications submitted by local governments and conservation nonprofits to determine whether the requested expenditure fulfills the statutory purposes outlined in Wis. Stat. § 23.09(2)(d) for land acquisition. The DNR also may purchase land under the Program. Wis. Stat. § 23.0917(3)(a). The DNR has promulgated detailed administrative rules to implement and administer the Program, including rules establishing eligibility requirements for proposed projects. See generally Wis. Admin. Code NR § 51. Those rules provide additional guidance for land acquisition proposals. Wis. Admin. Code NR § 1.40.

¶5 In October 2023, the governor filed an original action petition with this court raising three separate but related issues regarding the exercise of legislative review procedures over

executive branch actions.⁴ We granted review solely with respect to the legislative review provisions governing the Program and held the other two issues in abeyance pending the resolution of this issue.

¶6 The petitioners challenge the constitutionality of Wis. Stat. §§ 23.0917(6m) and (8)(g)3., which allow the Joint Committee on Finance ("JFC")⁵ to engage in a review process for certain expenditures under the Program. Specifically, subsection (6m) requires the DNR⁶ to notify the members of the JFC if an expenditure under the Program exceeds \$250,000.⁷ § 23.0917(6m)(c). The statute allows the members of the JFC to review the expenditure

⁴ Specifically, the petitioners challenged legislative review provisions in Wis. Stat. §§ 23.0917(6m) and 23.0917(8)(g)3., Wis. Stat. § 230.12(3)(e)1., and Wis. Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d) and (im).

⁵ The Joint Committee on Finance has existed in some form since 1911. Its principal function is to serve as the legislative committee reviewing state funding and appropriations, which are generally handled through the biennial budget process. Dave Loppow, Joint Committee on Finance, Wis. Legis. Fiscal Bureau, Informational Paper #81, 1 (Jan. 2023). The committee comprises sixteen legislators, consisting of eight senators and eight representatives to the assembly. Wis. Stat. § 13.09(1). The Senate Majority Leader and the Speaker of the Assembly select committee members.

⁶ The legislature created the DNR and placed its supervision within the executive branch under the "the direction and supervision of the natural resources board." Wis. Stat. § 15.34(1).

⁷ The review process applies to certain expenditures under \$250,000, but a full recitation of its reach is unnecessary because the petitioners facially challenge the legislature's ability to reject the disbursement of appropriated funds.

over a 14-day period and the JFC can temporarily block the expenditure of the funds by the executive branch until the committee holds a meeting on the proposed project. If a meeting is requested by a member of the JFC, the DNR cannot obligate the funds for the project until the committee approves the expenditure. Nothing within the statutory review provisions mandates when the committee must hold a meeting on the expenditure. After a meeting is held, the JFC votes on whether to allow the specific expenditure by the DNR. The JFC's decision is not subject to a vote of the full legislature.

¶7 Subsection (8)(g)3. operates in the same way as subsection (6m) but applies to land acquisition projects "outside of a project boundary" regardless of the amount of the expenditure. Under this subsection, the DNR cannot obligate money for a land acquisition "outside of a project boundary" unless 12 members of the JFC "approve the land acquisition." Wis. Stat. § 23.0917(8)(g)3. The full legislature does not review or vote on the JFC's decision. If the JFC rejects the expenditure, the money cannot be spent on the project. The petitioners allege the JFC has prohibited or delayed a number of the DNR's proposed Program expenditures, thereby affecting the executive branch's ability to effectuate the policy purposes of the Program.

II. STANDARD OF REVIEW

¶8 The petitioners assert the statutes permitting the JFC to review certain expenditures under the Program are facially unconstitutional because they violate the separation of powers embedded in the Wisconsin Constitution's vesting clauses. In

making a facial challenge, petitioners "face a tall task." Serv. Emps. Int'l Union, Loc. 1 v. Vos, 2020 WI 67, ¶4, 393 Wis. 2d 38, 946 N.W.2d 35 ("SEIU"). "[T]he challenging party must show that the statute cannot be enforced 'under any circumstances.'" Id., ¶38 (quoted source omitted). The facial challenge to the statutes in this case presents issues of constitutional and statutory interpretation, which are questions of law this court reviews de novo. League of Women Voters of Wis. v. Evers, 2019 WI 75, ¶13, 387 Wis. 2d 511, 929 N.W.2d 209 (citing Milwaukee J. Sentinel v. DOA, 2009 WI 79, ¶14, 319 Wis. 2d 439, 768 N.W.2d 700).

III. ANALYSIS

¶9 Mirroring the United States Constitution,⁸ the Wisconsin Constitution "creates three separate coordinate branches of government," with the understanding that no branch of government can subordinate, control, or exercise the power of another branch. State v. Holmes, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1981). Each branch is "'vested' with a specific core governmental power." SEIU, 393 Wis. 2d 38, ¶31 (citing Gabler, 376 Wis. 2d 147, ¶11). "The legislative power shall be vested in a senate and assembly"; "The executive power shall be vested in a governor"; and "The

⁸ As a general principle, the separation of powers framework undergirding the Wisconsin Constitution reflects the principles embodied in the United States Constitution. Gabler v. Crime Victims Rts. Bd., 2017 WI 67, ¶11, 376 Wis. 2d 147, 897 N.W.2d 384; Serv. Emps. Int'l Union, Loc. 1 v. Vos, 2020 WI 67, ¶31, 393 Wis. 2d 38, 946 N.W.2d 35 ("SEIU"). We may consult federal sources on the separation of powers because they "inform our understanding of the separation of powers under the Wisconsin Constitution." Gabler, 376 Wis. 2d 147, ¶11.

judicial power of this state shall be vested in a unified court system." Wis. Const. art. IV, § 1; id. art. V, § 1; id. art. VII, § 2. Under the dispersion of these powers between the branches, "[e]very positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department or person. If it did not, the whole constitutional fabric might be undermined and destroyed." State v. Hastings, 10 Wis. 468 [*525], 475 [*531] (1860). "By vesting certain powers exclusively within each of the three co-equal branches of government, the drafters of the Wisconsin Constitution recognized the importance of dispersing governmental power in order to protect individual liberty and avoid tyranny." League of Women Voters, 387 Wis. 2d 511, ¶31 (citation omitted).

¶10 Historically, we have recognized "core powers" of each branch and "shared powers" between the branches. SEIU, 393 Wis. 2d 38, ¶35. "Core powers," we have said, "are not for sharing." Tetra Tech EC, Inc. v. DOR, 2018 WI 75, ¶47, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion). "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." State ex rel. Fiedler v. Wis. Senate, 155 Wis. 2d 94, 100, 454 N.W.2d 770 (1990) (citing In Matter of Complaint Against Grady, 118 Wis. 2d 762, 776, 348 N.W.2d 559 (1984)).

¶11 In contrast, shared powers "lie at the intersections of the[] exclusive core constitutional powers." Gabler, 376 Wis. 2d 147, ¶34 (quoting State v. Horn, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999)). Incapable of precise classification, shared powers have been described as "twilight zones" and "ambiguous territory in which the functions of two branches . . . overlap." Holmes, 106 Wis. 2d at 43-44. For example, we have "acknowledged that some legislative actions affecting the courts do not contravene the separation of powers." Gabler, 376 Wis. 2d 147, ¶35. Identifying the core powers of the legislature and the executive branch facilitates our review of the challenged statutes under a separation of powers analysis.

¶12 Article IV, Section 1 of the Wisconsin Constitution vests the "senate and assembly" with the "legislative power" which "'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 (quoting Schuetz v. Van De Hey, 205 Wis. 2d 475, 480-81, 556 N.W.2d 127 (Ct. App. 1996)). The legislative power encompasses the ability to determine whether there shall be a law, to what extent the law seeks to accomplish a certain goal, and any limitations on the execution of the law. Id.; see also State ex rel. Wis. Inspection Bureau v. Whitman, 196 Wis. 472, 505, 220 N.W. 929 (1928); SEIU, 393 Wis. 2d 38, ¶1 ("Legislative power is the power to make the law, to decide what the law should be."). The legislative power is vast: "it is competent for the legislature to exercise all legislative power not forbidden by the constitution or delegated to the general government, or prohibited

by the constitution of the United States. The legislature, subject to a qualified veto of the executive, possesses all the legislative power of the state." Bushnell v. Town of Beloit, 10 Wis. 155 [*195], 168-69 [*225] (1860).

¶13 The procedural requirements of bicameralism and presentment temper the expansive authority vested in the legislative branch to make policy decisions for the state. For a bill to be enacted into law it must pass through both the assembly and the senate and then be presented to the governor for his approval or veto. Wis. Const. art. V, § 10(1)(a) ("Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor."). "A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures." Reynolds v. Sims, 377 U.S. 533, 576 (1964). Bicameralism and presentment thereby cabin the immense power vested in the legislature to enact laws. See Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 464 (D.C. Cir. 1982) (bicameralism and presentment "ultimately serve the same fundamental purpose: to restrict the operation of the legislative power to those policies which meet the approval of three constituencies, or a supermajority of two.").

¶14 Determinations of how to appropriate the state's funds fall squarely within the legislative power. The legislature derives its spending power from Article VIII, Section 2 of the Wisconsin Constitution: "No money shall be paid out of the treasury except in pursuance of an appropriation by law." This

provision, combined with Article VIII, Section 5,⁹ "empower[s] the legislature . . . to make policy decisions regarding taxing and spending." Flynn v. DOA, 216 Wis. 2d 521, 540, 576 N.W.2d 245 (1998). Controlling the expenditure of state funds through lawmaking constitutes an exercise of the legislature's appropriation authority. See id. at 547; SEIU, 393 Wis. 2d 38, ¶69 ("[T]he constitution gives the legislature the general power to spend the state's money by enacting laws.").

¶15 Article V, Section 1 of the Wisconsin Constitution vests the governor with the "executive power." The governor is entrusted to "take care that the laws be faithfully executed." Wis. Const. art. V, § 4. The executive branch's role is to effectuate the policies passed by the legislature. The "executive, however, is not a legislatively-controlled automaton. Before executing, he must of necessity determine for himself what the law requires him to do." SEIU, 393 Wis. 2d 38, ¶96 (Kelly, J., majority op.).¹⁰ The executive power vested in the governor comprises the ability to determine "what the law requires as well as applying it[.]"

⁹ Wis. Const. art. VIII, § 5 ("The legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year; and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year.")

¹⁰ In SEIU, there were two majority opinions. Justice Hagedorn authored one majority opinion joined by Chief Justice Roggensack and Justices Annette Ziegler, Rebecca Grassl Bradley, and Daniel Kelly. See SEIU, 393 Wis. 2d 38, ¶6. Justice Kelly authored a separate majority opinion joined by Justices Ann Walsh Bradley, Rebecca Grassl Bradley, and Rebecca Frank Dallet.

Id., ¶99. An early case of the Wisconsin Supreme Court expounded the powers of the executive branch: "whatever power or duty is expressly given to, or imposed upon the executive department, is altogether free from the interference of the other branches of the government. Especially is this the case, where the subject is committed to the discretion of the chief executive officer, either by the constitution or by the laws. So long as the power is vested in him, it is to be by him exercised, and no other branch of the government can control its exercise." Att'y Gen. ex rel. Taylor v. Brown, 1 Wis. 422 [513*], 449 [522*] (1853).

¶16 In executing the law, the executive branch must make decisions about how to enforce and effectuate the laws. The text of the statutes enacted by the legislature limits the exercise of executive discretion. Fabick v. Evers, 2021 WI 28, ¶14, 396 Wis. 2d 231, 956 N.W.2d 856 ("[I]f the governor has authority to exercise certain expanded powers not provided in our constitution, it must be because the legislature has enacted a law that passes constitutional muster and gives the governor that authority."). Put simply, "the legislature's authority comprises the power to make the law, whereas the executive's authority consists of executing the law. The distinction between the two has been described as the difference between the power to prescribe and the power to put something into effect[.]" SEIU, 393 Wis. 2d 38, ¶95. Neither the legislature nor the executive "ought to possess directly or indirectly, an overruling influence over the other[] in the administration of their respective powers." The Federalist No. 48, supra, at 332 (James Madison).

¶17 Wisconsin Stat. §§ 23.0917(6m) and 23.0917(8)(g)3. establish a legislative review process requiring the DNR to notify the JFC if it intends to obligate state funds for certain land acquisition projects. The statutes allow the JFC to indefinitely delay an expenditure if one of its members requests a meeting on the proposed expenditure. The petitioners contend this procedure unlawfully intrudes upon the governor's core powers to "take care that the laws be faithfully executed." Wis. Const. art. V, § 4. The legislative respondents urge this court to instead classify the statutory scheme as falling within the shared powers of the executive and legislative branches because the DNR is an administrative agency created by the legislature and subject to legislative oversight. The respondents additionally argue that spending appropriated funds is a shared power because Article VIII, § 2 of the Wisconsin Constitution gives the legislature the power to appropriate funds.

¶18 The constitutional text belies this argument. "No money shall be paid out of the treasury except in pursuance of an appropriation by law." Wis. Const. art. VIII, § 2 (Emphasis added.). While the constitution gives the legislature the power to appropriate funds, the power to spend the funds the legislature has appropriated for a specific project belongs to the executive branch. This is true even though the legislature created the DNR. While the legislature has the power create an agency, define its powers, and appropriate funds to fulfill the purpose for which the legislature established it, the power to spend appropriated funds in accordance with the law enacted by the legislature lies solely

within the core power of the executive to ensure the laws are faithfully executed.

¶19 We conclude these statutes interfere with the executive branch's core function to carry out the law by permitting a legislative committee, rather than an executive branch agency, to make spending decisions for which the legislature has already appropriated funds and defined the parameters by which those funds may be spent. A statute authorizing the legislative branch to exercise core powers of the executive branch violates the constitutional separation of powers and cannot be enforced under any circumstances. The legislative review provisions governing expenditures under the Program in Wis. Stat. §§ 23.0917(6m) and 23.0917(8)(g)3. are unconstitutional.

¶20 Although the legislature retains the authority to conduct oversight investigations¹¹ and audits of administrative agencies,¹² empowering a legislative committee to block the expenditure of appropriated funds exceeds the legislative power and intrudes upon the executive branch's authority to execute the law. Once the legislature appropriates funds for a particular purpose, the executive branch possesses the power to dole out those

¹¹ State v. Frear, 138 Wis. 173, 119 N.W.2d 894, 895 (1909) (holding "[t]he Legislature has very broad discretionary power to investigate any subject respecting which it may desire information in aid of the proper discharge of its function to make or unmake written laws").

¹² See Wis. Const. art. IV, § 33 (giving the legislature the authority to audit "state accounts"); Wis. Stat. § 13.53 (establishing a joint legislative audit committee).

funds in accordance with the purposes outlined by the legislature. See Frank H. Easterbrook, "Success" and the Judicial Power, 65 Ind. L.J. 277, 281 (1990) ("[H]anding out public money is a classically executive function."). While the legislature's motivation for overseeing the public fisc may be well-intentioned, fundamentally, the legislature may not execute the law; the people gave the executive alone this power. Maintaining a strict separation between the branches is essential to the preservation of liberty because "a government with shared legislative and executive power could first 'enact tyrannical laws' then 'execute them in a tyrannical manner.'" Gabler, 376 Wis. 2d 147, ¶5 (quoting 1 Montesquieu, The Spirit of the Laws 151-52 (Oskar Piest et al. eds., Thomas Nugent trans., 1949) (1748)). To prevent this dangerous concentration of power, the constitution prohibits "'the same persons who have the power of making laws to have also in their hands the power to execute them.'" Id. (quoting John Locke, The Second Treatise of Civil Government § 143 (1764), reprinted in Two Treatises of Government 119, 194 (Thomas I. Cook ed., 1947)).

¶21 When the executive branch acts under a grant of authority from the legislature, its authority "is at its maximum." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The decision of the DNR to distribute funds for a specific project or land acquisition is an exercise of executive power because the legislature conferred that authority on the executive when it established and reauthorized the program. The legislature retains the authority to "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." Whitman, 196 Wis. at 508. The legislature could take away or limit the discretion of the executive branch to make spending decisions for the Program, but once it has conferred spending power on the executive, the legislative branch lacks any constitutional authority to reject an executive decision short of exercising its lawmaking power with the full participation of the legislature.

¶22 In this case, the legislature has prescribed by law the parameters of how and where the DNR may expend state funds under the Program. For example, Wis. Stat. § 23.0917(3)(c) identifies a variety of purposes the DNR should prioritize in obligating funds for land acquisition. The statutes authorizing the Program also identify both prohibitions and limitations on the types of projects eligible for funding. For example, the DNR may not obligate funds "for the acquisition of land for golf courses or for the development of golf courses." § 23.0917(8)(a). The statutes also limit how much money the DNR can obligate for land acquisition each fiscal year. § 23.0917(3)(dm). This sort of statutory line drawing lies squarely within the legislature's core powers to enact laws and make spending decisions for the state. Flynn, 216 Wis. 2d at 547 ("Several sections of the Wisconsin Constitution together provide that the legislature has the power to enact laws which appropriate funds."); State ex rel. Friedrich v. Cir. Ct. for Dane Cnty., 192 Wis. 2d 1, 16, 531 N.W.2d 32 (1995) (per curiam) ("The legislature has power to enact legislation for the general welfare and to allocate government resources."). However,

§§ 23.0917(6m) and 23.0917(8)(g)3. give JFC members the power to decide how the funds should be used after the lawmaking process has been completed and the funds have been appropriated to the DNR—a quintessential executive function.

¶23 Once the legislature passes a bill that is signed by the governor and becomes law, "the legislature plays no part in enforcing our statutes[.]" Soc'y Ins. v. LIRC, 2010 WI 68, ¶27, 326 Wis. 2d 444, 786 N.W.2d 385. The constitution assigns the execution of the law to the executive branch alone. Wis. Const. art. V, § 4. After the legislative process has been completed and funds have been appropriated, the legislature cannot insert itself into the machinery of the executive branch in an attempt to control the executive branch's ability to carry out the law. While the legislature retains the power to repeal, modify, or alter a law through the enactment of a bill, it cannot seize for itself the authority to prevent an expenditure of state funds appropriated under Article VIII, Section 2. See Bowsher v. Synar, 478 U.S. 714, 734 (1986) (Congress cannot retain "control over the execution" of a statute).

¶24 Wisconsin Stat. §§ 23.0197(6m) and 23.0197(8)(g)3. effectively create a legislative veto, allowing the JFC to interfere with and even override the executive branch's core power of executing the law. If the JFC does not object to a proposed project within the 14 day review window, the DNR may spend the money. But if a single JFC member objects to the DNR's project proposal, the JFC will hold a meeting and can either approve the proposed funding in full, modify the amount to be disbursed, or

outright reject the project. The statutes omit a deadline for the JFC to hold a meeting if there is an objection to a proposed expenditure. The review process ultimately permits the members of the JFC to serve as gatekeeper to the exercise of a core executive function. Effectively, JFC members make the spending decision—not the executive branch. This unfettered interference by the committee oversteps the boundaries of legislative authority by arrogating the executive branch's core power to choose which conservation projects best carry out the statutory purposes of the Program.

¶25 In defending the JFC's statutory review process, the legislature did not offer any historical support surrounding the state's founding for similar post-enactment legislative review processes as a prerequisite for executive branch action. Instead, the legislature cites the emergence of complex state governance in the 1970s and 1980s as the impetus for legislative committee review provisions. Rather than grounding their arguments in our constitution's text or our state's history, as reflected in our recent separation of powers jurisprudence, the legislative respondents primarily rely on the court of appeals decision J.F. Ahern Co. v. Wisconsin State Building Commission, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983), to justify the legislative review process created by Wis. Stat. §§ 23.0917(6m) and 23.0917(8)(g)3. The respondents argue the opinion is "detailed and well-reasoned" and "entitled to full stare decisis respect" from this court. We disagree and overrule Ahern to the extent its reasoning conflicts with our analysis in this case. We are "not bound by court of

appeals decisions" and they may be overruled without any special justification. State v. Yakich, 2022 WI 8, ¶31, 400 Wis. 2d 549, 970 N.W.2d 12; accord Cook v. Cook, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997) (This court "has the power to overrule, modify or withdraw language from a published opinion of the court of appeals"); State v. Lira, 2021 WI 81, ¶45, 399 Wis. 2d 419, 966 N.W.2d 605 ("This court has never applied the five factors commonly used in a decision to overturn supreme court caselaw to override an interpretation derived solely from the court of appeals."); State v. Johnson, 2023 WI 39, ¶20, 407 Wis. 2d 195, 990 N.W.2d 174 ("[W]e have never required a special justification to overturn a decision of the court of appeals.").

¶26 In Ahern, the appellants alleged the State Building Commission—a legislative committee consisting of three assemblymen, three senators, the governor, and a citizen appointee of the governor—was authorized to exercise executive power in violation of the separation of powers. 114 Wis. 2d at 99-100. At issue was the Building Commission's statutory authority to waive a competitive bidding law on state construction contracts and its right of prior approval over a contract for the construction of any building that involved a cost exceeding \$15,000. Id. at 104-05. Although the court of appeals recognized this scheme allowed members of the legislature "to exercise executive powers to the

exclusion of the executive branch[,]" it nevertheless upheld it.¹³ Id. at 107. According to the court, the separation of powers is not strictly enforced and instead "liberally applied." Id. at 102. It employed a "pragmatic approach" to the doctrine, finding no violation because the respective powers of the executive and legislative branches ostensibly were balanced: "[T]he Wisconsin Constitution, subject to the limitation against 'unchecked power,' permits a blending or sharing of powers among the three branches of government." Id. at 103-04. Because the governor could always choose not to approve a contract, the court of appeals deemed the executive and legislative powers adequately balanced. Id. at 107 ("[I]f the executive branch can check the commission's exercise of executive power, no violation of the separation doctrine exists."). The court of appeals viewed this "compulsory unanimity" between the legislature and executive as a "cooperative venture between the two governmental branches." Id. at 108.

¶27 The pragmatic approach applied in Ahern cannot be squared with the separation of powers principles embedded in our state constitution or the rationale underlying them: the dispersal of distinct powers among the three branches of government and the threats to liberty arising from the concentration of powers in one branch. See Gabler, 376 Wis. 2d 147, ¶7; SEIU, 393 Wis. 2d 38, ¶30; League of Women Voters, 387 Wis. 2d 511, ¶31. Absent the

¹³ J.F. Ahern Co. v. Wis. State Bldg. Comm'n, 114 Wis. 2d 69, 105, 336 N.W.2d 679 (Ct. App. 1983) ("Because that right of prior approval affects the implementation of established law and policy, it is an executive power.").

consent of the governed, none of the branches bear any authority to reallocate the powers the people constitutionally assigned to them. We overrule Ahern to the extent it endorses a restructuring of the constitutional separation of powers. Its functionalist analysis—which condones the "cooperative" sharing of core powers—subverted the constitution's separation of governmental powers.

¶28 The legislative respondents defend the legislative review process based on the "practicalities of modern legislation and administrative agencies . . . [which] frequently involve[] regulatory agencies administering broad legislative programs." According to the respondents, review is particularly imperative in this case because "the DNR has mismanaged the Knowles-Nelson Stewardship Program," including failing to control spending. We reject the respondents' pragmatic arguments for sustaining the statutes because the legislature has no authority to control executive branch efforts to carry out the law. The constitution does not empower any branch to circumvent the constitutional confines of its authority even if it "believe[s] that more or different power is necessary." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935). "[I]n the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous." Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). Upholding the statutes based on pragmatic considerations would reallocate the constitutionally prescribed core powers of the executive branch and the legislative branch in our state constitution. The power to do so belongs to the people alone.

"Resolute resistance to intrusions across the constitutionally constructed . . . perimeter[s] 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.'" Gabler, 376 Wis. 2d 147, ¶39 (quoting Morrison v. Olson, 487 U.S. 654, 727 (Scalia, J., dissenting)).

¶29 Legislative vetoes disrupt the governmental accountability the separation of powers facilitates. By appropriating a sum of money to the DNR for the Program with only broad direction, the legislature avoids the political judgments and votes necessary to appropriate funds with greater specificity. "[T]he legitimation of the legislative veto will enable continuation and expansion of the recent practice of adopting major measures by a process which preserves congressional control while relieving the people's representatives of the embarrassment of voting." Antonin Scalia, The Legislative Veto: A False Remedy for System Overload, 3 Regulation: AEI Journal on Government and Society, 19, 25 (Nov./Dec. 1979). "If [the legislature] is willing to commit a matter to the executive, well and good; but if [the legislature] wants to retain control of the matter, and thereby admits that it has not completed its legislative function—then it must act by voting[.]" Id. The veto provisions undermine democratic governance by circumventing the lawmaking process—which requires the participation of the entire legislature—and punting to a committee the controversial and therefore politically costly positions legislators would otherwise need to take.

¶30 The legislature's concerns about the executive branch's unwillingness to faithfully execute the program in accordance with legislative policy preferences may be addressed via numerous constitutional tools at the legislature's disposal to rein in the executive branch. The legislature could lawfully limit the Program using its appropriation power to decrease funding for the Program, by narrowing the scope of discretion afforded to the executive branch through legislation, by enacting sunset provisions¹⁴ requiring the Program to be reauthorized by a later legislative session, by auditing the executive agency administering the Program, or by eliminating the Program altogether. Whitman, 196 Wis. at 508 ("[A]dministrative agencies are the creatures of the legislature and are responsible to it. Consequently 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."). Additionally, the legislature could enact line-item appropriations for specific projects.¹⁵

¶31 Our holding does not expand executive power but rather preserves the constitutional roles the people assigned to the

¹⁴ The legislature in fact included a sunset provision for the Program, authorizing current funding levels only through the 2025-26 fiscal year. Wis. Stat. § 23.0917(3)(dm)(8).

¹⁵ When the legislature created the land acquisition and conservation program, the statutes identified specific projects and areas to be funded through the appropriation (e.g., "Hank Aaron State Trail") but also identified general areas on which the funds could be spent (e.g., "Wildlife habitat restoration and fisheries"). See generally Wis. Stat. § 23.0915 (1991-92).

executive and legislative branches. We reiterate the constitutional boundaries of governmental powers to ensure the branches do not "abdicate or permit others to infringe upon such powers as are exclusively committed to them by the constitution." Rules of Court Case, 204 Wis. 501, 514, 236 N.W. 717 (1931). As part of our judicial duty, this court "must be assiduous in patrolling the borders between the branches" because the separation of powers doctrine "provides structural protection against depredations on our liberties." Tetra Tech, 382 Wis. 2d 496, ¶45. Our decision neither enhances executive power nor curtails legislative power. We simply confine the legislature to lawmaking and leave the execution of the laws to the executive as the Wisconsin Constitution commands. Gabler, 376 Wis. 2d 147, ¶60 ("The significance of preserving clear boundaries between the branches has been understood since the founding of our nation"). In doing so, we expound the law, which in this case involves applying principles embodied in the state constitution since ratification. "In the same fashion as the United States Constitution, the Wisconsin Constitution preserves the independence of each branch vis-à-vis the others and precludes each branch from obstructing the performance of another branch's constitutional duties." League of Women Voters, 387 Wis. 2d 511, ¶32 (citing United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872)).

¶32 James Madison warned of the ambition of the legislative branch to grasp at powers beyond its constitutional realm: "The legislative department is everywhere extending the sphere of its

activity, and drawing all power into its impetuous vortex." The Federalist No. 48, supra, at 333. The legislative "powers being at once more extensive, and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." Id. at 334. In granting the JFC the ability to stymie the executive branch from carrying out the laws passed by the legislature, the statutes encroach upon the governor's constitutional mandate to execute the law.

¶33 While the legislature possesses the power to determine whether and how to fund the land acquisition portion of the Program,¹⁶ the constitution does not empower the legislature to participate in the execution of the law, nor can the legislature give itself such authority. The legislative review provisions in Wis. Stat. §§ 23.0917(6m) and 23.0917(8)(g)3. violate the Wisconsin Constitution by assigning the core executive power to carry out the law to a legislative committee. The constitution's vesting of core powers in each of the three branches of government may not be statutorily altered. In declaring these separation of powers principles, we ensure the branches do not arrogate powers the people never gave them.

IV. CONCLUSION

¶34 Article IV, Section 1 of the Wisconsin Constitution

¹⁶ Flynn v. DOA, 216 Wis. 2d 521, 253-54, 576 N.W.2d 245 (1998) ("The legislature, as the government body closest to the will of the people, may change an appropriation if, in their estimation, public policy so dictates. It is the legislature's role to determine whether to reallocate limited resources.").

vests broad authority in the legislature to pass laws reflecting the legislature's policy choices. In enacting the Program, the legislature elected to leave some decisions to executive branch discretion, subject to a legislative veto embodied in a committee the legislature empowered to reject the executive's manner of carrying out the law. Wisconsin Stat. §§ 23.0917(6m) and 23.0917(8)(g)3. invade the executive branch's authority to "take care that the laws be faithfully executed," Wis. Const. Art. V, § 4, by interfering with the exercise of discretion the legislature gave it to execute the Program. Maintaining the separation of powers between the branches is essential for the preservation of liberty and a government accountable to the people. By placing the power of the executive branch to carry out the law in a committee of the legislature, the legislative branch subsumed the executive power. Because §§ 23.0917(6m) and 23.0917(8)(g)3. give core executive power to the legislative branch, they are unconstitutional.

By the court—Wis. Stat. §§ 23.0917(6m) and 23.0917(8)(g)3. are declared unconstitutional.

¶35 ANN WALSH BRADLEY, J. (*concurring*). Sometimes it is just as important to emphasize what a majority opinion is not about as it is to clarify what the opinion is about. This is such an occasion.

¶36 The focus of the majority opinion is on core executive powers. It need not, and does not, define the contours of any core legislative powers or shared powers. Additionally, despite the exchange in the separate writings below, this case is not about the non-delegation doctrine. It was not briefed or argued by the parties and the majority opinion does not address it.

¶37 Having delineated the substance of the majority opinion, I turn next to discuss why I concur. I join the majority opinion but write separately to briefly address the standard of review in constitutional cases.

¶38 As in any case, our review in the present case is guided and circumscribed by our standard of review. In constitutional cases, we have long adhered to a standard that places a "heavy burden" on a challenging party. See, e.g., Mayo v. Wis. Injured Patients & Fams. Comp. Fund, 2018 WI 78, ¶27, 383 Wis. 2d 1, 914 N.W.2d 678.

¶39 Namely, we have presumed that a statute is constitutional and placed the onus on the challenger to demonstrate that the statute is unconstitutional "beyond a reasonable doubt." State v. Prado, 2021 WI 64, ¶37, 397 Wis. 2d 719, 960 N.W.2d 869; see also Cath. Charities Bureau, Inc. v. LIRC, 2024 WI 13, ¶¶5, 77, 94, 411 Wis. 2d 1, 3 N.W.3d 666; State v. Christen, 2021 WI

39, ¶32, 396 Wis. 2d 705, 958 N.W.2d 746; State v. Roundtree, 2021 WI 1, ¶18, 395 Wis. 2d 94, 952 N.W.2d 765; Winnebago County v. C.S., 2020 WI 33, ¶14, 391 Wis. 2d 35, 940 N.W.2d 875. The phrase "beyond a reasonable doubt" "expresses the 'force or conviction with which a court must conclude, as a matter of law, that a statute is unconstitutional before the statute . . . can be set aside.'" Mayo, 383 Wis. 2d 1, ¶27 (quoted source omitted).

¶40 In the briefing in this case, the Governor advocated for a narrow alteration to our constitutional standard of review. This argument was circumscribed, advancing that the standard of review for constitutional cases should change in the context of a separation-of-powers dispute only. Namely, the Governor argued: "When the legislative branch passes a law that allegedly usurps another branch's core power, presuming such a statute to be valid would improperly place a thumb on the legislative branch's side of the scale."

¶41 The argument is persuasive, and I agree with it. The reasoning behind this is succinctly stated in Justice Scalia's dissent in Morrison v. Olson, where it is explained that if the branches of government are to be truly equal, none may begin inter-branch litigation with the advantage that a presumption of constitutionality affords:

Where a private citizen challenges action of the Government on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective spheres. But where the issue pertains to separation of powers, and the political branches are

(as here) in disagreement, neither can be presumed correct.

487 U.S. 654, 704-05 (1988) (Scalia, J., dissenting). If the branches of government are "perfectly co-ordinate," then the playing field must be a level one. See id. at 705. Where the very issue before the court is the contours of the branches' powers vis-à-vis each other, it is not logical to begin the case with a slant in either direction.

¶42 I emphasize that our "beyond a reasonable doubt" standard of review retains vitality, but as presented in the argument before us, I conclude that the "beyond a reasonable doubt" standard is a poor fit in the separation-of-powers context. Abandoning the standard in the context of separation of powers evens the playing field between the branches, while leaving the standard of review for other types of constitutional challenges intact.

¶43 For the foregoing reasons, I respectfully concur.

¶44 I am authorized to state that Justices REBECCA FRANK DALLET and JANET C. PROTASIEWICZ join this concurrence.

¶45 REBECCA GRASSL BRADLEY, J. (*concurring*). "[T]hat the legislative, executive and judiciary departments ought to be separate and distinct" is an "essential precaution in favor of liberty." The Federalist No. 47, at 323 (James Madison) (Jacob E. Cooke ed., 1961). Like the Framers of the Federal Constitution, the Founders of our state believed the separation of powers was "essential to the preservation of liberty." The Federalist No. 51, *supra*, at 348 (James Madison). The "tripartite separation of independent governmental power" enshrined in our constitutions "remains the bedrock of the structure by which we secure liberty in both Wisconsin and the United States." Gabler v. Crime Victims Rts. Bd., 2017 WI 67, ¶3, 376 Wis. 2d 147, 897 N.W.2d 384.

¶46 The structural separation of powers protects the liberty of the People by barring the aggregation of power within one branch of government. League of Women Voters of Wis. v. Evers, 2019 WI 75, ¶31, 387 Wis. 2d 511, 929 N.W.2d 209; Koschkee v. Taylor, 2019 WI 76, ¶45, 387 Wis. 2d 552, 929 N.W.2d 600 (Rebecca Grassl Bradley, J., *concurring*); Gundy v. United States, 588 U.S. 128, 156-57 (2019) (Gorsuch, J., *dissenting*). "[A] mere demarcation on parchment of the constitutional limits of the several departments," however, "is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." The Federalist No. 48, *supra*, at 338 (James Madison). Keeping each branch "within the limits assigned to their authority" rests largely with the judiciary because constitutional limitations on the exercise of governmental power "can be preserved in practice no other way than

through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." The Federalist No. 78, supra, at 524-25 (Alexander Hamilton).

¶47 In 2017, this court protected the judicial branch's core powers from legislative interference. Gabler, 376 Wis. 2d 147. In 2019, this court safeguarded the legislature's core powers against judicial encroachment. League of Women Voters, 387 Wis. 2d 511. Today, this court restores the executive branch's core powers after legislative arrogation. Consistent application of the separation of powers principles espoused in these cases requires the court to retrieve the legislature's core lawmaking power from the administrative apparatus residing in the executive branch.

¶48 As the court expounded in Gabler and reiterates in this case, preservation of the separation of powers does not prefer one branch over another. We defend the constitutional boundaries of governmental authority to preserve individual freedom, to ensure the people remain sovereign over those to whom the people delegated the power to govern. "[D]eriving [its] just powers from the consent of the governed," Wisconsin's government was instituted to secure the people's inherent rights, including "life, liberty and the pursuit of happiness[.]" Wis. Const. art. I, § 1.

¶49 Our constitution vests three separate branches—the legislature, the executive, and the judiciary—with particular powers, which no other branch may wield. See majority op., ¶9.

"When the [g]overnment is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it."¹ Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 68 (2015) (Thomas, J., concurring in the judgment). Any deviation from the division of powers the people delegated to each branch would be illegitimate, having been made without the people's consent.

¶50 In this case, the court vindicates the constitution's design by holding the legislature cannot take for itself the executive's core function of executing the law, even if the executive at one time consented to the arrangement. The court's decision in this case does not enhance executive power; rather, it returns the legislature to its constitutionally prescribed domain. See Fabick v. Evers, 2021 WI 28, ¶57, 396 Wis. 2d 231, 956 N.W.2d 856 (Rebecca Grassl Bradley, J., concurring) ("This court does not referee partisan battles; our duty is to ensure that each branch of government respects the constitutional limits of its authority."). The separation of powers, and its protection of the people's liberty, would collapse if one branch could seize for itself the powers of another. See Gabler, 376 Wis. 2d 147, ¶31.

¶51 The constitution guards against one branch's attempts to cede its powers to another branch as much as it prevents one branch from usurping another branch's powers. Tetra Tech EC, Inc. v.

¹ While "[t]he allocation of powers in the Constitution is absolute," Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 69 (2015) (Thomas, J., concurring in the judgment) (citation omitted), the powers of each branch at times overlap. See Gabler v. Crime Victims Rts. Bd., 2017 WI 67, ¶34, 376 Wis. 2d 147, 897 N.W.2d 384.

DOR, 2018 WI 75, ¶48, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion) (a branch may not "abdicat[e]" or "abandon" its power and the other branches cannot "take [] up" the powers of another). "Acknowledging the dangers of accumulated power," our constitution "preclude[s] each branch of government from delegating its own vested powers." Fabick, 396 Wis. 2d 231, ¶54 (Rebecca Grassl Bradley, J., concurring). The legislative power, "the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' or the power to 'prescribe general rules for the government of society,'" Gundy, 588 U.S. at 153 (Gorsuch, J., dissenting) (citations omitted) (alteration in original), belongs to the legislature alone. Wis. Const. art. IV, § 1 ("The legislative power shall be vested in a senate and assembly."); see also id. art. IV, § 22 (creating one exception); Becker v. Dane Cnty., 2022 WI 63, ¶¶76, 113–16, 403 Wis. 2d 424, 977 N.W.2d 390 (Rebecca Grassl Bradley, J., dissenting).

¶52 The vesting clauses conclusively confer the powers each branch may exercise: "No one"—not the legislature, the executive, or the judiciary—may "alter [the] arrangement" enshrined in our constitution. Gundy, 588 U.S. at 153 (Gorsuch, J., dissenting); League of Women Voters, 387 Wis. 2d 511, ¶35 (quoting Goodland v. Zimmerman, 243 Wis. 459, 467, 10 N.W.2d 180 (1943)) ("The separation of powers 'operates in a general way to confine legislative powers to the legislature.'"); Wis. Legislature v. Palm, 2020 WI 42, ¶67, 391 Wis. 2d 497, 942 N.W.2d 900 (Rebecca

Grassl Bradley, J., concurring) (footnote omitted) ("Statutory law being subordinate to the constitution, not even the people's representatives in the legislature may consolidate [] power in one person."). The "'power to make law . . . was reserved exclusively to the Legislature, and any attempt to abdicate it in any particular field, though valid in form, must, necessarily, be held void.'" Rules of Court Case, 204 Wis. 501, 503, 236 N.W. 717 (1931) (quoting State ex rel. Mueller v. Thompson, 149 Wis. 488, 491, 137 N.W. 20 (1912)). "Because the people gave the legislature its power to make laws, the legislature alone must exercise it. Our constitutional structure confers no authority on any branch to subdelegate any powers the sovereign people themselves delegated to particular governmental actors." Fabick, 396 Wis. 2d 231, ¶56 (Rebecca Grassl Bradley, J., concurring).

¶53 This court's enforcement of the non-delegation doctrine embedded in our constitution eroded over time. The court has allowed executive branch officials and unelected bureaucrats to exercise the lawmaking power of the legislature, see, e.g., Koschkee, 387 Wis. 2d 552, ¶12 (stating "when administrative agencies promulgate rules, they are exercising legislative power that the legislature has chosen to delegate to them by statute"), provided adequate "procedural safeguards" are in place. Panzer v. Doyle, 2004 WI 52, ¶¶54-55, 70-71, 271 Wis. 2d 295, 680 N.W.2d 666, abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408; Gilbert v. State, Med. Examining Bd., 119 Wis. 2d 168, 186, 349 N.W.2d 68 (1984); Westring v. James, 71 Wis. 2d 462, 468, 238 N.W.2d 695

(1976); Watchmaking Examining Bd. v. Husar, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971); Schmidt v. Dep't of Res. Dev., 39 Wis. 2d 46, 57-58, 158 N.W.2d 306 (1968). The procedural safeguard requirement is not demanding. Panzer, 271 Wis. 2d 295, ¶¶70-71. The court replaced the constitution's bar on subdelegating legislative power with illusory "limits drawn by the judiciary." Fabick, 396 Wis. 2d 231, ¶61 (Rebecca Grassl Bradley, J., concurring); Becker, 403 Wis. 2d 424, ¶111 (Rebecca Grassl Bradley, J., dissenting).

¶54 The court's reluctance to enforce the constitutional constraints on subdelegation emerged long after Wisconsin's founding. "In the early years of Wisconsin's statehood, this court understood that the three branches of government could not delegate their vested powers, imposing substantive limitations on the legislature's assignment of authority to the executive to carry out the legislature's policies." Fabick, 396 Wis. 2d 231, ¶64 (Rebecca Grassl Bradley, J., concurring). As the court in Slinger v. Henneman explained, "It is a settled maxim of constitutional law, that the power thus conferred upon the legislature cannot be delegated by that department to any other body or authority." 38 Wis. 504, 509-10 (1875). "Legislators have no power to anoint legislators; only the people do." Becker, 403 Wis. 2d 424, ¶75 (Rebecca Grassl Bradley, J., dissenting). Accordingly, the constitution requires 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 electors or other appointee or delegate of the legislature."

Dowling v. Lancashire Ins. Co., 92 Wis. 63, 74, 65 N.W. 738 (1896); accord State ex rel. Adams v. Burdge, 95 Wis. 390, 401-02, 70 N.W. 347 (1897). Laws violating this rule were held "inoperative and void." Slinger, 38 Wis. at 510. It was only "in the wake of the Progressive era[] [that] this court began to uproot substantive limits on the legislature's delegation of its constitutionally-conferred powers." Fabick, 396 Wis. 2d 231, ¶64 (Rebecca Grassl Bradley, J., concurring).

¶55 Apologists for delegations of legislative authority to the executive branch primarily invoke the ostensible "overpowering necessity" of modern governance. State ex rel. Wis. Inspection Bureau v. Whitman, 196 Wis. 472, 498, 220 N.W. 929 (1928); Koschkee, 387 Wis. 2d 552, ¶17 (quoting Gilbert, 119 Wis. 2d at 184) ("We have long recognized that 'the delegation of the power to make rules and effectively administer a given policy is a necessary ingredient of an efficiently functioning government.'"); Mistretta v. United States, 488 U.S. 361, 372 (1989) (citations omitted) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."). But "[t]hose to whom the people have conferred constitutional powers may not circumvent those grants simply 'because they believe that more or different power is necessary.'" Koschkee, 387 Wis. 2d 552, ¶46 (Rebecca Grassl Bradley, J., concurring) (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935)). Even "[e]xtraordinary

conditions"—such as a global pandemic—"do not create or enlarge constitutional power." A.L.A. Schechter, 295 U.S. at 528; Fabick, 396 Wis. 2d 231, ¶50 (Rebecca Grassl Bradley, J., concurring); Palm, 391 Wis. 2d 497, ¶¶70, 73 (Rebecca Grassl Bradley, J., concurring). If emergencies do not enlarge the legislature's ability to delegate legislative power, then the permanent, ongoing "necessity" known as "modernity" does not either. See Philip Hamburger, Is Administrative Law Unlawful?, at 422 (2014).

¶56 In this case, the court vindicates that principle, rejecting the legislative respondents' pragmatic arguments rooted in the supposed necessity of revamping the Founders' design in favor of modern, but constitutionally suspect, governance. Majority op., ¶28. "Whenever any branch of government exceeds the boundaries of authority conferred by the people, it is the duty of the judicial branch to say so." Palm, 391 Wis. 2d 497, ¶66 (Rebecca Grassl Bradley, J., concurring). The first principles espoused in this court's decision should revitalize the dormant non-delegation doctrine, reject the discredited notion that the "necessities" of modern governance justify disregarding our constitution's commands, and restore our original understanding of the vesting clauses, which bar any subdelegation of the legislature's powers.

¶57 Today, the court upholds the structural separation of powers enshrined in the constitution. Not all members of the majority have done so in the past. See, e.g., Becker, 403 Wis. 2d 424, ¶30 (lead opinion) (minimizing the separation of powers as something the court has "inferred" but "never

interpreted . . . in a literal sense"); League of Women Voters, 387 Wis. 2d 511, ¶¶43-54 (Dallet, J., dissenting) (joined by Ann Walsh Bradley, J.) (dissenting from decision declaring the December 2018 extraordinary session of the Wisconsin Legislature constitutional). As Chief Justice Annette Kingsland Ziegler notes in her dissent, "we have no assurance that constitutional principles . . . will be equally applied, in the same manner, across the board, to the other branches in the future." Dissent, ¶83. The Chief Justice's concern is well founded. With respect to the exercise of governmental powers, three members of the majority (Justices Ann Walsh Bradley, Rebecca Frank Dallet, and Jill J. Karofsky) have invariably ruled against the legislature and in favor of the executive branch.² They have been the only

² See, e.g., Clarke v. Wis. Elections Comm'n, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370 (adopting Governor Evers' position and invalidating the legislature's redistricting maps); Wis. Mfrs. & Com. v. Evers, 2022 WI 38, ___ Wis. 2d ___, 977 N.W.2d 374 (allowing Governor Evers' Department of Health Services to release the names of Wisconsin employers whose employees tested positive for COVID-19); Johnson v. Wis. Elections Comm'n, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402, rev'd sub nom. Wis. Legislature v. Wis. Elections Comm'n, 595 U.S. 398 (per curiam) (adopting Governor Evers' proposed congressional map and state legislative maps and rejecting the legislature's); Clean Wis., Inc. v. DNR, 2021 WI 72, 398 Wis. 2d 433, 961 N.W.2d 611 (ruling against the legislature and expanding executive branch power by allowing administrative agencies to impose requirements not explicitly permitted by statute); Clean Wis., Inc. v. DNR, 2021 WI 71, 398 Wis. 2d 386, 961 N.W.2d 346 (ruling against the legislature and in favor of Governor Evers' Department of Natural Resources in allowing the DNR to impose requirements not explicitly permitted by statute); Fabick v. Evers, 2021 WI 28, ¶¶74-148, 396 Wis. 2d 231, 956 N.W.2d 856 (Ann Walsh Bradley, J., dissenting) (joined by Dallet and Karofsky, JJ.) (dissenting from decision that Governor Evers' executive orders proclaiming successive states of emergency based on COVID-19 exceeded the Governor's powers); Democratic Nat'l Comm. v. Bostelmann, 2020 WI 80, ¶¶15-27, 394 Wis. 2d 33, 949 N.W.2d 423 (Dallet, J., dissenting)

justices during the past five years to demonstrate uniform allegiance to one branch and unvarying hostility toward another.

¶58 "Working from an understanding of the [c]onstitution at war with its text and history," Justice Rebecca Frank Dallet's denialism toward the non-delegation doctrine—a foundational principle "respecting the people's sovereign choice to vest the legislative power in [the legislature] alone"—betrays a willingness to destabilize "a structure designed to protect [the people's] liberties, minority rights, fair notice, and the rule of

(joined by Ann Walsh Bradley and Karofsky, JJ.) (dissenting from decision recognizing legislature's right to participate as a party in litigation defending the validity of state laws); Bartlett v. Evers, 2020 WI 68, ¶¶109-71, 393 Wis. 2d 172, 945 N.W.2d 685 (Ann Walsh Bradley, J., concurring in part, dissenting in part) (joined by Dallet, J.) (in original action requesting a declaration that Governor Evers exceeded his constitutional authority to partially veto appropriation bills, Justices Ann Walsh Bradley and Dallet were the only justices who would have declared all of Governor Evers' vetoes constitutional); Serv. Emps. Int'l Union, Loc. 1 v. Vos, 2020 WI 67, ¶¶163-88, 393 Wis. 2d 38, 946 N.W.2d 35 (Dallet, J., concurring in part, dissenting in part) (joined by Ann Walsh Bradley, J.) (dissenting from decision upholding the constitutionality of the legislature's involvement in certain litigation prosecuted or defended by the attorney general and joining decision invalidating legislature's regulation of guidance documents issued by the executive branch); Wis. Legislature v. Palm, 2020 WI 42, ¶¶122-30, 391 Wis. 2d 497, 942 N.W.2d 900 (Ann Walsh Bradley, J., dissenting) (joined by Dallet, J.) (dissenting from decision declaring Governor Evers' appointed DHS Secretary failed to follow the emergency rulemaking procedures established by the legislature and exceeded her powers in issuing order confining all people to their homes, forbidding travel and closing businesses); id., ¶¶132-63 (Dallet, J., dissenting) (joined by Ann Walsh Bradley, J.) (same); League of Women Voters of Wis. v. Evers, 2019 WI 75, ¶¶43-54, 387 Wis. 2d 511, 929 N.W.2d 209 (Dallet, J., dissenting) (joined by Ann Walsh Bradley, J.) (dissenting from decision declaring the December 2018 extraordinary session of the legislature constitutional and embracing Governor Evers' position to the contrary).

law."³ Gundy, 588 U.S. at 149, 156 (Gorsuch, J., dissenting). Justice Dallet's concurrence lends credence to the Chief Justice's apprehension that four members of the majority will "restrain[] only the legislative branch" and will "aggregate power in the [] executive branch." Dissent, ¶83. Foreshadowing a contemporary remaking of the traditional "Schoolhouse Rock understanding of civics," Justice Dallet's concurrence, ¶62, Justice Dallet joined Justice Ann Walsh Bradley's dissent from a decision reaffirming that "when administrative agencies promulgate rules, they are exercising legislative power that the legislature has chosen to delegate to them by statute." Koschkee, 387 Wis. 2d 552, ¶12. In her concurrence in this case, Justice Dallet declares "it is

³ Justice Rebecca Frank Dallet's suggestion that the non-delegation doctrine "never existed" is plainly wrong. Justice Dallet's concurrence, ¶72. "Evidence of the non-delegation principle underlying the separation of powers in the Wisconsin Constitution has been well-documented by Wisconsin's seminal source for originalist constitutional interpretation." Becker v. Dane Cnty., 2022 WI 63, ¶93, 403 Wis. 2d 424, 977 N.W.2d 390 (Rebecca Grassl Bradley, J., dissenting) (citing A Convention Editorial (1846), reprinted in The Movement for Statehood, 1845-46, at 309, 310-11 (Milo M. Quaife ed., 1918)). "The non-delegation principle traces its origins to English law." Id., ¶97 (citing Jarkesy v. SEC, 34 F.4th 446, 460 n.12 (5th Cir. 2022)). "Even the king of England, following the rise of popular sovereignty, was not permitted to transfer certain powers vested in him by Parliament." Id. (first citing Penal Statutes (1605), Coke, Reports, 7:36b-37a; and then citing Philip Hamburger, Is Administrative Law Unlawful?, at 381 (2014)).

Although Justice Dallet decries the legislature's request for what she labels a "radical[] alter[ation]" of our separation of powers doctrine, she advocates for one herself, opining that making rules governing society is somehow an executive function if a statute allows for it—or is at least a shared power. Justice Dallet's concurrence, ¶¶67, 73. This vision of governmental power is a contemporary invention unknown at the founding.

unsettled whether executive branch agencies exercise legislative power at all when they execute a statute within the bounds set by the legislature, including by making administrative rules" Justice Dallet's concurrence, ¶73. This misconception of governmental power suggests this court will stray from its ring, masquerade as the ringmaster, and expansively redraw the ring of the executive while shrinking the legislature's. See Schoolhouse Rock: Three Ring Government (ABC March 13, 1979).

¶59 The constitution cannot be construed as a one-way ratchet. The separation of powers must be maintained across the board, for both political branches irrespective of which party controls them. The constitution does not permit the legislature to wield the powers vested in the executive branch, nor does the constitution permit the legislature to cede its lawmaking authority to the executive. If this court fails to apply the separation of powers consistently, the court will compromise the structural integrity of the constitution and expose the people it protects to depredations of their liberty by facilitating the "gradual concentration of the several powers" in one branch. The Federalist No. 51, supra, at 349 (James Madison). While some members of this court may prefer (for now) the executive branch to the legislative, the constitution does not. Construing it otherwise risks the demise of our constitutional republic.

¶60 REBECCA FRANK DALLET, J. (*concurring*). I join the majority opinion and Justice Ann Walsh Bradley's concurrence. I write separately to emphasize that this case implicates only the governor's core power to faithfully execute the laws, and does not involve what we have called "shared powers" or implicate the so-called "non-delegation doctrine." No power was shared, and nothing was delegated.

I

¶61 Our constitution creates a tripartite system of government, vesting the executive power in the governor, the legislative power in the senate and assembly, and the judicial power in the court system. See Wis. Const. art. IV, § 1; art. V, § 1; art. VII, § 2. Because these powers are "conferred to a single branch by the constitution," they are the "core powers" of each branch. SEIU, Local 1 v. Vos, 2020 WI 67, ¶35, 393 Wis. 2d 38, 946 N.W.2d 35. Where core powers are concerned, the separation of powers is clear: No branch may "take [another branch's core power] up and use it as its own." Id. (quoting another source).

¶62 When only core powers are at issue, separation-of-powers questions often have clear answers. You don't need much more than a Schoolhouse Rock understanding of civics to know that the legislature can't pass a law authorizing a legislative committee to exercise the judicial power. See Schoolhouse Rock!, Three Ring Government (1979), <https://www.youtube.com/watch?v=pKSGyiT-o3o> ("Ring one, Executive. Two is Legislative, that's Congress. Ring three, Judiciary."). That power belongs to the judiciary. See Wis. Const. art. VII, § 2. Likewise, the legislature cannot enact

statutes like Wis. Stat. §§ 23.0917(6m) and 23.0917(8)(g)3., which authorize a legislative committee "to make spending decisions for which the legislature has already appropriated funds and defined the parameters by which those funds may be spent." Majority op., ¶19. That power belongs to the executive. See Wis. Const. art. V, § 1.

¶63 But it is important to emphasize that this simple, core-powers vision of the separation of powers is just the beginning, not "an ending too." See Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 265 (2020) (Kagan, J., concurring in part). Like the United States Constitution, the Wisconsin Constitution creates a separation of powers that is, "by design, neither rigid nor complete." See id. As we have put it, "determining 'where the functions of one branch end and those of another begin' is not always easy." SEIU, 393 Wis. 2d 38, ¶34 (quoting State v. Holmes, 106 Wis. 2d 31, 42-43, 315 N.W.2d 703 (1982)). That is why we have recognized another category of governmental powers: Shared powers. Shared powers are those that "lie at the intersections of . . . core constitutional powers." State v. Horn, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). In these "borderlands" between the branches' core powers, we have held that each branch may exercise power "but no branch may unduly burden or substantially interfere with another branch." Id. at 644. Nothing in our decision today alters that longstanding approach to shared powers, or undermines the basic insight of our shared powers cases: That the separation of powers must have some flexibility when the powers of coordinate branches of government intersect.

¶64 The legislature offered two unconvincing arguments for why the authority granted to the Joint Finance Committee by §§ 23.0917(6m) and 23.0917(8)(g)3. falls within the category of shared powers. First, because DNR is an executive branch agency created by statute, the legislature asserts that both it and the governor have "inherent interests" in DNR's execution of the Knowles-Nelson program. See Wis. Stat. § 15.34 (creating DNR). And second, because DNR spends money the legislature appropriated through the Knowles-Nelson program, the legislature's appropriations power justifies its authority to review those spending decisions DNR makes.

¶65 The legislature's first argument is unpersuasive because, as we have said before, the governor "oftentimes carries out his functions through administrative agencies." SEIU, 393 Wis. 2d 38, ¶97. When he does so, those agencies are "exercising executive power," even if they were created by the legislature. Id. In other words, "the legislature does not confer on administrative agencies the ability to exercise executive power; that comes by virtue of being part of the executive branch." Id., ¶131. And as the majority opinion correctly explains, DNR is exercising core executive power when it administers the Knowles-Nelson program. See majority op., ¶¶18-19. Although the legislature has the power to create agencies and define their scope of authority, "the power to spend appropriated funds in accordance with the law enacted by the legislature" falls within the executive's core power to faithfully execute the laws. Id., ¶18.

¶66 The legislature's second argument—that its power to pass appropriations bills means that whenever DNR spends money in accordance with an appropriation, that expenditure is an exercise of shared power—is similarly unavailing. To be sure, our constitution provides that "[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law." Wis. Const. art. VIII, § 2. And this provision means that the legislature has a role to play with respect to appropriations; the legislature must make "an appropriation by law." Id. But once it does so, spending money "in pursuance of" that law falls within the core executive power to faithfully execute the laws. See id.

¶67 Accepting either of the legislature's shared powers arguments would radically alter the separation of powers in Wisconsin. As we have suggested before, we would head down "a dangerous path" if we concluded that the legislature may control everything an agency or officer does simply because the legislature created that agency or officer. SEIU, 393 Wis. 2d 38, ¶131 (explaining that similar reasoning would allow the legislature to control how circuit court judges exercise their judicial power since the legislature "did not have to create the circuit court position in the first place and could eliminate it"). And it is similarly dangerous to suggest that every expenditure of state money pursuant to a lawful appropriation somehow implicates shared powers. If that were true, then even a \$5 expenditure under an already enacted appropriation could be conditioned on the approval of a single member of the legislature. That cannot be, because not only would it grind government to a halt, but it would also

allow one branch, the legislature, to dictate how and whether other branches may exercise their core powers.

¶68 To summarize, this case doesn't involve shared powers at all. Rather, this case involves only the executive's core power to faithfully execute the laws. Because §§ 23.0917(6m) and 23.0917(8)(g)3. purport to arrogate that core power to a legislative committee, thus allowing the legislature to impede the governor's exercise of his core power, these statutes are facially unconstitutional.

II

¶69 Additionally, this case does not involve the so-called "non-delegation doctrine." Before explaining why, it is helpful first to identify what people mean when they invoke the "non-delegation doctrine." One formulation—widely accepted in our cases—is the simple inference derived from the three-branch structure of our government "that none of the three governmental powers—executive, legislative, or judicial—can be entirely delegated away from the branch to which the constitution vests it." Becker v. Dane County, 2022 WI 63, ¶30, 403 Wis. 2d 424, 977 N.W.2d 390 (lead op.) (citing In re Constitutionality of § 251.18, Wis. Statutes, 204 Wis. 501, 503, 236 N.W. 717 (1931)). In other words, our constitution does not permit, for example, the wholesale delegation of the legislative power to the governor, or the executive power to the legislature. See id.

¶70 Nevertheless, our constitution allows for some delegation of legislative authority. Klisurich v. DHSS, 98 Wis. 2d 274, 279, 296 N.W.2d 742 (1980). Indeed, "[w]e have long

recognized that "the delegation of the power to make rules and effectively administer a given policy is a necessary ingredient of an efficiently functioning government.'" Koschkee v. Taylor, 2019 WI 76, ¶17, 387 Wis. 2d 552, 929 N.W.2d 600 (quoting Gilbert v. Med. Examining Bd., 119 Wis. 2d 168, 184, 349 N.W.2d 68 (1984)). In assessing whether a law delegating legislative authority to an executive branch agency violates our constitution, we "examine both the substantive nature of the granted power and the adequacy of attending procedural safeguards against arbitrary exercise of that power." Becker, 403 Wis. 2d 424, ¶31 (lead op.). So long as a legislative grant of authority contains both an "ascertainable" purpose and "procedural safeguards," it is constitutional. Klisurich, 98 Wis. 2d at 280. The upshot of these cases is that our non-delegation inquiry, like its federal equivalent, "always begins (and often almost ends) with statutory interpretation." See Gundy v. United States, 588 U.S. 128, 135 (2019) (plurality op.).

¶71 In recent years, however, some have argued that we should revisit these cases, and adopt a more restrictive version of the non-delegation doctrine that would prohibit the delegation of any legislative power to the other branches. See Becker, 403 Wis. 2d 424, ¶33 (lead op.) (rejecting such an argument with respect to delegations of local authority to local health officials). In this case, an amicus curiae argued that the governor's separation-of-powers arguments "effectively ask this Court to . . . revitalize the non-delegation doctrine—but only to the extent that it aggregates power in the executive." And in her

concurrency, Justice Rebecca Grassl Bradley suggests that "[t]he first principles espoused in this court's decision should revitalize the dormant non-delegation doctrine, reject the discredited notion that the 'necessities' of modern governance justify disregarding our constitution's commands, and restore our original understanding of the vesting clauses, which bar any subdelegation of the legislature's powers." Justice Rebecca Grassl Bradley's concurrence, ¶56.

¶72 This account of today's decision is incorrect, for several reasons. For starters, we cannot "revitalize" a "dormant" doctrine that never existed before. As some scholars have argued, the historical case for a more restrictive version of the non-delegation doctrine, at least at the federal level, is weak. See Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277, 279-81 (2021); but see Ilan Wurman, Nondelegation at the Founding, 130 Yale L.J. 1490, 1494 (2021) (arguing that "[a]lthough the history is messy," it supports a version of the non-delegation doctrine). Some proponents of a more restrictive version of the non-delegation doctrine nevertheless argue that "[t]he non-delegation principle traces its origins to English law," see Becker, 403 Wis. 2d 424, ¶97 (Rebecca Grassl Bradley, J., dissenting), specifically to an analogy from a supposed rule of the common law of agency that prevented agents from further delegating authority granted by their principal. See id., ¶¶96-97. But "[i]t is hard to overstate the ahistoricity of this claim," because this supposed principle of the common law of agency may never have been widely accepted and, in any event, there

is no evidence anyone thought the analogy to agency law should govern constitutional interpretation. See Mortenson & Bagley, supra at 297. Moreover, the historical evidence for a more restrictive non-delegation doctrine in Wisconsin is virtually non-existent. The sweeping claim that the people who drafted and ratified the Wisconsin Constitution in 1848 understood it implicitly to prohibit any delegation of authority from one branch to another one demands far more evidence than a couple of newspaper editorials in 1846 describing the legislature in passing as "agents of the people," or explaining that "[a]ll legitimate power proceeds from the people." See Becker, 403 Wis. 2d 424, ¶¶93-95 (Rebecca Grassl Bradley, J., dissenting) (quoting Taxation—Borrowing Money (1846) and A Convention Editorial (1846), reprinted in The Movement for Statehood, 1845-46, at 179, 310 (Milo M. Quaife, ed. 1918)). Given the lack of historical evidence in Wisconsin supporting a more restrictive version of the non-delegation doctrine, it should not be a surprise that we have "never interpreted" the Wisconsin Constitution "in a literal sense to bar the delegation of any legislative power outside the senate and assembly." Becker, 403 Wis. 2d 424, ¶30 (lead op.).

¶73 But putting history aside, the substantive case for a more restrictive version of the non-delegation doctrine is also weak under the Wisconsin Constitution. All our constitution says is that the legislative, executive, and judicial powers are vested in each respective branch of government. See Wis. Const. art. IV, § 1; art. V, § 1; art. VII, § 2. It contains no express limitation on delegations of that authority; the non-delegation doctrine is

simply an inference from our constitutional structure. Moreover, it is unsettled whether executive branch agencies exercise legislative power at all when they execute a statute within the bounds set by the legislature, including by making administrative rules pursuant to legislative authorization. Even if agencies do, however, "exercise both executive and legislative powers" in such circumstances, see SEIU, 393 Wis. 2d 38, ¶130, a more restrictive version of the non-delegation doctrine may nevertheless be in tension with our shared powers cases. See Horn, 226 Wis. 2d at 643-44. If administrative agencies exercise shared powers without "unduly burden[ing] or substantially interfer[ing] with another branch," there is no separation-of-powers problem. Id. at 644.

¶74 But more fundamentally, accepting the governor's position in this case does not implicate any version of the non-delegation doctrine, let alone a more restrictive one. Sections 23.0917(6m) and 23.0917(8)(g)3. purport to claim a power for the Joint Finance Committee that was never the legislature's to begin with: The executive power to faithfully execute the law. "The legislature cannot delegate a power it does not have."¹ Panzer v. Doyle, 2004 WI 52, ¶61, 271 Wis. 2d 295, 680 N.W.2d 666, abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle, 2006

¹ Moreover, to the extent our cases have ever been concerned with delegations of authority from one branch to another it has been the legislature delegating some of its power to the executive or the judiciary. See, e.g., Klisurich, 98 Wis. 2d at 279-80; Panzer v. Doyle, 2004 WI 52, ¶¶53-58, 271 Wis. 2d 295, 680 N.W.2d 666, abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408; Town of Beloit v. City of Beloit, 37 Wis. 2d 637, 643-45, 155 N.W.2d 633 (1968).

WI 107, 295 Wis. 2d 1, 719 N.W.2d 408. And for that reason, this case doesn't involve the non-delegation doctrine at all.

* * *

¶75 I conclude by addressing a disturbing aspect of some recent opinions in our court, which level accusations of bad faith and bias against my colleagues and me. Here, we have two separate writings that do so. In her dissent, Chief Justice Ziegler stoops to accusations of bad faith and political bias rather than engage in a reasoned debate about the law. And Justice Rebecca Grassl Bradley can't pass up an opportunity to join in. In a bizarre twist, she writes separately to accuse the very justices who join her majority opinion of doing so only for political reasons.

¶76 At best, these writings are a distraction from what should be the focus. Today, we reached a nearly unanimous conclusion that §§ 23.0917(6m) and 23.0917(8)(g)3. violate the separation of powers enshrined in our constitution. This case illustrates how we can reach consensus, even when weighty issues are involved.

¶77 Perhaps it is inevitable that some will mistake our decisions simply as "wins" for one set of political interests over another. But Wisconsin Supreme Court Justices should not fuel those misperceptions with headline-seeking rhetoric. Doing so undermines the rule of law and harms both this institution and our state. We are all judges committed to fairly, neutrally, and impartially considering the issues before us without prejudgment and rendering decisions that follow the law, not the party line.

No one—least of all other members of this court—should suggest otherwise.

¶78 I am authorized to state that Justices ANN WALSH BRADLEY, JILL J. KAROFKY, and JANET C. PROTASIEWICZ join this opinion.

¶79 ANNETTE KINGSLAND ZIEGLER, C.J. (*dissenting*). As was said in the dissent to the order granting this petition for original action, this case "raises substantial questions about the proper roles of the executive and legislative branches under the Wisconsin Constitution."¹ There is no doubt that the legal questions presented in this case affect matters of statewide importance,² but there is no emergency here, nor was there a need to fast-track just one issue in the case—a challenge to the Knowles-Nelson Stewardship Program, outlined in Wis. Stat. § 23.0917 and administered through the Department of Natural Resources ("DNR").³ In this one of three issues handpicked by four members of the court, we have been asked to decide whether the Wisconsin Legislature's Joint Committee on Finance's ("JFC") vetoes of the DNR's choices relating to the Knowles-Nelson

¹ Order granting petition for original action, Evers v. Marklein, No. 2023AP2020-OA, unpublished order (Wis. Feb. 2, 2024), at 4 (Hagedorn, J., dissenting).

² Legal questions which affect matters of statewide importance are traditionally a prerequisite for this court to accept a case. See Wis. Stat. § (Rule) 809.62(1r):

CRITERIA FOR GRANTING REVIEW. Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:

(a) A real and significant question of federal or state constitutional law is presented.

§ (Rule) 809.62(1r)(a).

³ Marklein, No. 2023AP2020-OA, unpublished order, supra n.1, at 1.

Stewardship program, which vetoes are authorized by § 23.0917(6m) and (8)(g)3., facially violate the separation of powers. "As is often the case with original-jurisdiction petitions, the question is not whether we can grant the petition but whether we should." Johnson v. Wisconsin Elections Comm'n, No. 2021AP1450-OA, unpublished order, at 14 (Wis. Sept. 22, 2021) (Dallet, J., dissenting from grant of petition for original action). Here, the issues, together, should be fully vetted.⁴

⁴ In this one case, there are three issues. Four members of the court selected one issue to decide, leaving the following two issues "held in abeyance pending further order of the court":

[Issue 2] Wisconsin's biennial budget bill, 2023 Wis. Act 19, provides a pay adjustment for [University of Wisconsin (UW)] and all other state employees. Again, courts have universally recognized that spending appropriated funds is an executive power and that legislative committees cannot block the executive's exercise of that power. Wisconsin Stat. § 230.12(3)(e)1. authorizes the Joint Committee on Employment Relations, an eight-member legislative committee, to veto UW's pay adjustments. Does this veto provision facially violate the separation of powers?

[Issue 3] Under various provisions of Wis. Stat. ch. 101, [Department of Safety and Professional Services (DSPS)] is charged with promulgating rules relating to commercial building safety, accessibility, and energy efficiency. Under Wis. Stat. § 457.03(2), the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board is responsible for developing ethics standards for social workers, marriage and family therapists, and professional counselors. Courts have broadly recognized that blocking executive branch agencies' rules violates bicameralism and presentment procedures and infringes on executive and judicial authority. Wisconsin Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d) and (im) authorize the Joint Committee for Review of Administrative Rules, a 10-member legislative committee, to veto administrative rules. Do these veto provisions violate the separation of powers by allowing this committee to block executive agency

¶80 As stated in the dissent to the order accepting this petition:

Under current law, the [JFC] has reviewed gubernatorial appropriations under the Knowles-Nelson Stewardship Program (the Program) for more than fifteen years. 2007 Wis. Act 20, § 646t; Wisconsin Legislative Fiscal Bureau, Warren Knowles-Gaylord Nelson Stewardship Program (Informational Paper # 61, prepared by Eric Helper, Jan. 2019). The Governor suddenly asserts this legislative oversight of appropriations under the Program violates the separation of powers doctrine and urgently warrants this court invoking its original

rulemaking or, at minimum, DSPS's and the Board's rulemaking authority over commercial building standards and ethics standards for social workers, marriage and family therapists, and professional counselors?

Interestingly, employing the opposite approach, those four members of the court recently granted two separate cases, with separate issues therein, to be decided together even though normally one would be held in abeyance. See Kaul v. Urmanski, No. 2023AP2362, unpublished order (Wis. July 2, 2024) (granting petition for bypass), and Planned Parenthood v. Urmanski, No. 2024AP330-OA, unpublished order (Wis. July 2, 2024) (granting petition for original action). As to these two separate cases, Justice Karofsky tried to justify this disparate treatment, stating:

Here, the court is granting a petition whose resolution may depend on how we rule in another case [I]t is not particularly groundbreaking for this court to schedule two cases with interdependent issues at the same time. . . .

The court does not know how it should resolve a particular case until it reviews all of the arguments made by the parties. Consequently, it makes good sense to hear all of the relevant legal arguments before rendering a decision

Planned Parenthood, No. 2024AP330-OA, unpublished order at 4 (Karofsky, J., concurring) (emphasis added). For the new majority, different principles apply depending on whether a "pet issue" is at stake. Planned Parenthood, No. 2024AP330-OA, unpublished order at 11 (Hagedorn, J., dissenting).

jurisdiction. The timing is no coincidence; the Governor knows he has a friendly foursome standing by to do his bidding.

Evers v. Marklein, No. 2023AP2020-OA, unpublished order (Wis. Feb. 2, 2024), at 2-3 (Rebecca Grassl Bradley, J., dissenting). Here, "[i]nvoking our original jurisdiction sets this court on a perilous path to resolve interbranch disputes whenever the Governor complains the Legislature is hindering his policy agenda." Id. at 3.

¶81 Nonetheless, and despite the strong dissent of three of their colleagues, four members of the court handpicked but one issue to fast-track and decide.⁵ I dissented then, and I dissent now. Consistency has not always been the new majority's strong suit, but when it comes to picking political favorites, they have been unwaveringly faithful to the cause.⁶ Instead of allowing this

⁵ This term, four members of the court have established a consistent record of handpicking and fast-tracking certain political "pet issues"—issues such as redistricting, absentee voting, ballot box use, and abortion. See, e.g., Clarke v. Wisconsin Elections Comm'n, 2023 WI 79, ¶¶78-184, 410 Wis. 2d 1, 998 N.W.2d 370 (Ziegler, C.J., dissenting) (redistricting); Brown v. Wisconsin Elections Comm'n, No. 2024AP232, unpublished order (Wis. May 3, 2024) (absentee voting practices); Priorities USA v. Wisconsin Elections Comm'n, No. 2024AP164, unpublished order (Wis. Mar. 12, 2024) (ballot drop boxes); Planned Parenthood, No. 2024AP330-OA, unpublished order supra n.4 (abortion).

⁶ See Clarke, 410 Wis. 2d 2, ¶¶78-184 (Ziegler, C.J., dissenting); Brown v. Wisconsin Elections Comm'n, No. 2024AP232, unpublished order (Wis. Jun. 11, 2024) (Rebecca Grassl Bradley, J., dissenting to grant of motion for stay (in part) pending appeal); Brown, No. 2024AP232, unpublished order supra n.5, at 4-10 (Ziegler, C.J., dissenting to grant of petition for bypass); Priorities USA v. Wisconsin Elections Comm'n, No. 2024AP164, unpublished order (Apr. 18, 2024), at 2 (Hagedorn, J., dissenting to grant of Governor's motion to intervene); Priorities USA, No. 2024AP164, unpublished order supra n.5, at 2-6 (Rebecca Grassl Bradley, J., dissenting to grant of petition for bypass).

case to proceed through the process, sifting and winnowing the issues, and then taking all the issues at the same time, which would serve to produce consistency, they forge on. Selecting an issue that only impacts the Republican-controlled legislature and the longstanding Knowles-Nelson Stewardship Program should raise eyebrows. Determining all issues at the same time could serve to hold my colleagues to application of the same principles in the same way, even when it comes to a Democratic-controlled branch of government. Unfortunately, we will wait to see if that consistency will be forthcoming, as the majority handpicked and now limits only the legislative branch's longstanding, statutorily authorized practice.

¶82 Simply stated, there is no good reason why those four members of the court gave preferential selection to part of this case, fast-tracking only one of the three issues, rushing to decide that lone issue, which just happens to limit legislative power only. What's the rush? There is absolutely no good reason to have handpicked this case and this one issue, ahead of all the other cases, taking it out of turn, and placing it to the front of the line. That is not our usual practice, nor should it be. We should not be picking favorites and delivering results.

¶83 As to the merits of this case, I recognize that the majority opinion has cabined its analysis to separation of powers principles and concludes that the legislative branch cannot exercise a core power of the executive branch. I raise concern about deciding this one issue alone, applying these principles to the legislature only. At least two of my colleagues would not

have decided this one issue alone in this case at this time.⁷ If this becomes a singular application of separation of power principles or the non-delegation doctrine, which restrains only the legislative branch, that amounts to aggregation of power which runs counter to fundamental constitutional principles. The principles the majority applies today must have consistent application, which could have been more even-handedly accomplished by hearing all the issues in due course. Because this sole issue is being decided in a vacuum and on an expedited basis, we are at risk of seeing a selective application of separation of power and non-delegation principles and, ultimately, imbalance between the branches. The petitioners⁸ effectively ask this court to revitalize separation of powers and the non-delegation doctrine, but as applied to the Republican-controlled branch only. This limited application could ultimately serve to aggregate power in the Democratic-controlled executive branch. Without considering all issues together and in due course, the doctrine may be applied

⁷ See Marklein, No. 2023AP2020-OA, unpublished order supra n.1, at 2 (Rebecca Grassl Bradley, J., dissenting) ("By accepting only one of the issues raised by the Governor and holding the other two issues in abeyance, the majority refashions this court as the Governor's avenue for imposing policy changes without the consent of the governed. When the majority's political allies say jump, the new majority responds: 'How high?'); see also Marklein, No. 2023AP2020-OA, unpublished order supra n.1, at 5 (Hagedorn, J., dissenting) ("Letting a case mature through the normal process is not the only reason we should exercise caution here. This claim involves a power struggle between the executive and legislative branches. . . . Because the court here enters the fray too quickly, we risk further incentivizing what Justice Scalia called the 'overjudicialization of the process of self-governance[.]'").

⁸ In this instance, "the petitioners" refers to Governor Tony Evers and Gathering Waters, Inc.

inconsistently. Here, because one issue is being taken up in a vacuum, handpicked for quick "justice," we have no assurance that constitutional principles, whether separation of powers or non-delegation doctrine principles, will be equally applied, in the same manner, across the board, to the other branches in the future. For that, we wait. Those issues were not fast-tracked for decision this term.

¶84 Instead, my colleagues who accepted this case for review and then accepted only one limited issue, fail to "see the prudence of patience and humility" and the worth of proceeding cautiously.⁹ The statutory authority that the JFC has retained over the Knowles-Nelson Stewardship Program complies with bicameralism and presentment requirements,¹⁰ as the JFC's authority to review expenditures was voted on by the entire legislature and signed by the governor. The decision the court makes today limits only the Republican legislature's continued control over already allocated money—a longstanding practice. Having said that, no relief appears to exist for the legislature to claw back appropriations that it may not have allocated if it knew that it would lose any

⁹ Marklein, No. 2023AP2020-OA, unpublished order supra n.1, at 5 (Hagedorn, J., dissenting).

¹⁰ The Wisconsin Constitution does differ from the United States Constitution. The Wisconsin Constitution requires "[e]very bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor." Wis. Const. art. V, § 10(1)(a). The United States Constitution requires "[e]very order, resolution, or vote" to be presented to the President. U.S. Const. art. I, § 7. Our court should not be so quick to determine that the Wisconsin Constitution requires presentment in the same manner, as the language of the Wisconsin Constitution appears to be more limited.

ability to ensure the expenditures were being made appropriately. Government tends to spend what it has been allocated, and this procedure provided a check on that spending.

¶85 The majority does not grapple with the unintended consequences of this ruling. Consequential reasoning is not necessarily legal reasoning, but there are likely practical implications. An unintended consequence might be that this opinion could be used to impact other longstanding practices, even though this opinion is limited to this one program. Another unintended consequence may be that the legislature will proceed quite differently in its decision making and allocations. For example, the legislature could decide that it will no longer allocate funds to the longstanding and respected Knowles-Nelson Stewardship Program. This could result in less, not more, allocations for important projects, like those accomplished by the Knowles-Nelson Stewardship Program. The legislature may need to, more formally and less efficiently, address funding of individual worthy projects, because continued control of the purse has been limited.

¶86 More specifically with respect to the issue at hand, I lament how handpicking this lone issue has the appearance of being

just one more in a series of political "power grabs."¹¹ Why now is it so important to put a stop to this decades' long practice? For decades, the legislature has used joint committees, like this one, to review actions by the governor and state agencies. This practice has been approved, tacitly or explicitly, by all three branches of government: the legislative, executive, and judicial branches. The statutes at issue were passed by the legislature and signed by the governor and each branch operated pursuant to them. These practices were cloaked with judicial approval.

¶87 In J.F. Ahern Co. v. Wisconsin State Building Comm'n, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983), the court of appeals unanimously determined that it was not a violation of Wisconsin's separation of powers doctrine to allow a legislative committee such as the JFC—in this instance, the State Building

¹¹ See Clarke, 410 Wis. 2d 1, ¶¶78-184 (Ziegler, C.J., dissenting); Statement of Chief Justice Annette Kingsland Ziegler (Aug. 2, 2023), <https://www.wispolitics.com/2023/chief-justice-annette-kingsland-ziegler-statement/>; Press Release, Chief Justice Annette Kingsland Ziegler (Aug. 4, 2023), <https://www.wicourts.gov/news/archives/view.jsp?id=1578&year=2023>; Clarke v. Wisconsin Elections Comm'n, No. 2023AP1399-OA, published order (Wis. Oct. 6, 2023), at 34-35 (Hagedorn, J., dissenting to grant of petition for leave to commence original action) (noting that in spite of petitioners "standing by until the court's composition changed, the court dutifully adopts an accelerated briefing and oral argument schedule. It even changed our internal writing deadlines on original actions to ensure this case would be fast-tracked"), https://www.wicourts.gov/courts/supreme/origact/docs/23ap1399_1006order.pdf; see also ¶83 n.7, supra.

Commission¹²—to "exercise executive powers to the exclusion of the executive branch." J.F. Ahern Co., 114 Wis. 2d at 108. The court determined the Commission's "apparent ability to exclude the executive branch from exercise of its own powers does not . . . necessarily violate the separation doctrine" Id. Rather, "[a] practical requirement of unanimity between the legislative members of the Building Commission, on the one hand, and the governor, on the other, therefore exists. That compulsory unanimity converts the shared power over building construction into a cooperative venture between the two governmental branches." Id. Our court did not overturn that decision until now, over 40 years later. For decades, the legislative and executive branches relied on those principles and complied with them.

¶88 In Martinez v. DILHR, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), our court unanimously held it was constitutional for the joint legislative committee to suspend agency rules. Martinez, 165 Wis. 2d at 699-700. J.F. Ahern Co. was cited with approval. See id. at 697 (citing J.F. Ahern Co., 114 Wis. 2d at 88) ("Legislative power may be delegated to an administrative agency as long as adequate standards for conducting the allocated power are in place."). The legislature is endowed with constitutional authority to manage the public fisc and has the constitutional

¹² The State Building Commission is a legislative committee, "controlled by six legislators," which "shares executive powers with the governor and one voting citizen member appointed by the governor." J.F. Ahern Co. v. Wisconsin State Building Comm'n, 114 Wis. 2d 69, 106-07, 336 N.W.2d 679 (Ct. App. 1983). The Building Commission, among other things, controls construction contracts for the construction of state office buildings.

power of the purse.¹³ The JFC has operated as a vehicle for the legislature to remain "accountable" for governing the public fisc and to "check on the activities of non-elected agency bureaucrats." Martinez, 165 Wis. 2d at 701.¹⁴

¶89 The court pays little heed to the doctrine of stare decisis when it reaches its conclusions and technically it need not with respect to a court of appeals decision. Although the majority reverses a court of appeals case rather than our

¹³ See Wis. Const. art. VIII, § 2 ("No money shall be paid out of the treasury except in pursuance of an appropriation by law."); see also Wis. Const. art. VIII, § 5 ("The legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year; and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year.").

¹⁴ Martinez v. DILHR, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), is a "horizontal precedent" which binds this court, absent a showing of a special justification for overruling it. It is not overturned by the majority. See Bryan A. Garner, et al., The Law of Judicial Precedent 35 (2016) (Horizontal Precedents) ("A high court . . . generally adheres to horizontal precedents—namely, its own earlier decisions. But if there is a special justification to depart from or overrule precedent, a full court may overturn its own prior decision."); see also Johnson Controls, Inc. v. Emp. Ins. of Wausau, 2003 WI 108, ¶94, 264 Wis. 2d 60, 665 N.W.2d 257; State v. Johnson, 2023 WI 39, ¶¶19-20, 407 Wis. 2d 195, 990 N.W.2d 174; State v. Young, 2006 WI 98, ¶51 n.16, 294 Wis. 2d 1, 717 N.W.2d 729. Adherence to precedent is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991); see also Johnson Controls, Inc., 264 Wis. 2d 60, ¶95; Progressive N. Ins. Co. v. Romanshek, 2005 WI 67, ¶41, 281 Wis. 2d 300, 697 N.W.2d 417 ("Any time this court is asked to overturn a prior case, we must thoroughly consider the doctrine of stare decisis.").

precedent, all three branches of government have engaged in the longstanding practices of the JFC. Given the longstanding practice recognized and approved by all three branches of government and cited with approval in Martinez, 165 Wis. 2d at 697, it seems fair to at least talk about stare decisis principles. We "repeatedly recognized the importance of stare decisis to the rule of law." State v. Johnson, 2023 WI 39, ¶19, 407 Wis. 2d 195, 990 N.W.2d 174. We "follow[] the doctrine of stare decisis scrupulously" State v. Luedtke, 2015 WI 42, ¶40, 362 Wis. 2d 1, 863 N.W.2d 592 (quoting Johnson Controls, Inc. v. Emp. Ins. of Wausau, 2003 WI 108, ¶94, 264 Wis. 2d 60, 665 N.W.2d 257).¹⁵

¹⁵ J.F. Ahern Co., 114 Wis. 2d 69, is a court of appeals decision which generally this court is neither bound by nor needs special justification to overturn. See Cook v. Cook, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (determining that this court "has the power to overrule, modify, or withdraw language from a published opinion of the court of appeals"); see also State v. Johnson, 407 Wis. 2d 195, ¶20 ("[W]e have never required a special justification to overturn a decision of the court of appeals."). Nonetheless, stare decisis principles are worth noting. "[A]ny departure from the doctrine of stare decisis demands special justification." Johnson Controls, Inc., 264 Wis. 2d 60, ¶94; see also State v. Johnson, 407 Wis. 2d 195, ¶19; Young, 294 Wis. 2d 1, ¶51 n.16; Schultz v. Natwick, 2002 WI 125, ¶37, 257 Wis. 2d 19, 653 N.W.2d 266. These special justifications include:

(1) the law has changed in a way that undermines the prior decision's rationale; (2) there is a "need to make a decision correspond to newly ascertained facts;" (3) our precedent "has become detrimental to coherence and consistency in the law;" (4) the decision is "unsound in principle;" or (5) it is "unworkable in practice."

State v. Johnson, 407 Wis. 2d 195, ¶20 (citing Young, 294 Wis. 2d 1, ¶51 n.16).

¶90 Unfortunately, facilitating inconsistency in the law, as has been the practice of the new majority, does not put the state of Wisconsin on better footing. While I recognize that the court declares this JFC review to be unconstitutional because it violates separation of powers, stare decisis principles are absent and overturning case law has been wrongly based on mere disagreement with a prior decision. See Clarke v. Wisconsin Elections Comm'n, 2023 WI 79, ¶¶78-184, 410 Wis. 2d 1, 998 N.W.2d 370 (Ziegler, C.J., dissenting) (redistricting); see also, State v. Roberson, 2019 WI 102, ¶97, 389 Wis. 2d 190, 935 N.W.2d 813 (Dallet, J., dissenting) (quoted source omitted) ("The outcome of a case should not turn on whether the current members of the court find one legal argument more persuasive but, rather, on "whether today's [majority] has come forward with the type of extraordinary showing that this court has historically demanded before overruling one of its precedents.""); Ramos v. Louisiana, 590 U.S. 83, 121-22 (2020) (Kavanaugh, J., concurring in part) ("A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it.").

¶91 For over a century, the JFC has been an important part of how allocations in Wisconsin are managed. This longstanding review structure allowed joint legislative committees to approve or reject important matters. The JFC reviews certain limited expenditures by the DNR to address the Knowles-Nelson Stewardship Program. For decades, the JFC has been a fundamental part of

governmental structure in Wisconsin. While application of separation of power principles are the basis for the court's conclusion that the JFC's authority to review DNR spending decisions is unconstitutional, we know not the other implications of this decision even though the majority limits its decision to the one issue selected—the Knowles-Nelson Stewardship Program. That program and the JFC have long functioned in a fundamental and important way to allow review and decision making regarding fiscal expenditures.

¶92 The JFC is a statutory standing committee, constituted under the Wisconsin Legislature. The JFC exists to review all state appropriations and revenues, including the governor's recommended budget and other fiscal bills, as well as providing supplementation of agency appropriations. The JFC also is empowered to attach an emergency clause to any appropriation bill decreasing state revenues or increasing the cost of state government in advance of the budget bill. The JFC acts upon agency requests for changes in their authorized position levels, as most of those positions are provided for through the biennial budget. Additionally, the JFC has many other statutory duties, which while not at issue in this case, are nonetheless instructive of how

essential the JFC is.¹⁶ The JFC is one of several legislative committees, but given its role, it is an important one. Ever since its initial iteration in 1911, the JFC and its oversight have long provided guidance and checks on programs that have the potential for huge economic outlay.

¶93 The decision of the court today, despite being limited to this particular program and based on separation of power principles, could be perceived as having broader impact on the way Wisconsin government has managed the power of the purse for over 100 years. All three branches of government have functioned with the understanding that the JFC operates with authority to review certain spending and in fact, that review has been deemed constitutional by our court. The other branches of government have implicitly and explicitly approved such JFC review. If the

¹⁶ The list of statutory sections implicated by the JFC's approval is non-exhaustive, and the JFC's reach is broad: The JFC is responsible for reviewing, submitting recommendations to, and advising and approving programs and monies in categories such as Natural Resources (the Program at issue here); Administration; Agriculture, Trade and Consumer Protection; Building Commission; Child Abuse and Neglect Prevention Board; Children and Families; Corrections; Distance Learning Authorization Board; Educational Communications Board; Elections Commission; Employee Trust Funds; Financial Institutions; Health Services; Higher Educational Aids Board; Historical Society; Housing and Economic Development Authority; Insurance; Judicial Commission; Justice; Military Affairs; Public Instruction; Revenue; Safety and Professional Services; Tourism; Transportation; University of Wisconsin Hospitals and Clinics Authority; University of Wisconsin System; Wisconsin Aerospace Authority; Wisconsin Economic Development Corporation; Workforce Development, among other things. Additionally, many of these same agencies and boards are statutorily required to submit reports to, and appear before, the JFC. Joint Committee on Finance Informational Paper #78, Legislative Fiscal Bureau (Jan. 2021).

court is "declaring rights," it should consider how it might do so for the next budget cycle, as no other relief seems available for the past. Allowing the case to proceed in accordance with our standard practice and not rushing to judgment on this one issue, would have been the most practical way to give notice to the legislature of this groundbreaking change. Proceeding through the normal process, would more fairly have provided the legislature the ability to plan for the next budget cycle. Instead, they may be without any relief for certain past allocations that are no longer under their control.

¶94 In short, I disagree with rushing to judgment, on this limited issue, taking this case out of turn. There is simply no need.

¶95 As a result, I respectfully dissent.

From: Jessie Augustyn <jessie@augustynlaw.com>
Sent: Friday, July 5, 2024, 8:47 AM
To: "Czaja, Ashley" <Ashley.Czaja@legis.wisconsin.gov>; "Radday, Brian"
<Brian.Radday@legis.wisconsin.gov>
Subject: Priorities USA decision (drop boxes) and Marklein (stewardship)
Attachments: PrioritiesUSA.pdf; Marklein.pdf

SUPREME COURT OF WISCONSIN

CASE No.: 2024AP164

COMPLETE TITLE: Priorities USA, Wisconsin Alliance for Retired Americans and William Franks, Jr.,
Plaintiffs-Appellants,
Governor Tony Evers,
Intervenor-Appellant,
v.
Wisconsin Elections Commission,
Defendant-Respondent,
Wisconsin State Legislature,
Intervenor-Respondent.

ON BYPASS FROM THE COURT OF APPEALS

OPINION FILED: July 5, 2024
SUBMITTED ON BRIEFS:
ORAL ARGUMENT: May 13, 2024

SOURCE OF APPEAL:
COURT: Circuit
COUNTY: Dane
JUDGE: Ann M. Peacock

JUSTICES:
ANN WALSH BRADLEY, J., delivered the majority opinion of the Court, in which DALLET, KAROFSKY, and PROTASIEWICZ, JJ., joined. REBECCA GRASSL BRADLEY, J., filed a dissenting opinion, in which ZIEGLER, C.J., and HAGEDORN, J., joined.
NOT PARTICIPATING:

ATTORNEYS:

For the plaintiffs-appellants, there were briefs filed by Diane M. Welsh, and Pines Bach LLP, Madison; David R. Fox (pro hac vice), Justin Baxenberg (pro hac vice), Richard A. Medina (pro hac vice), Omeed Alerasool (pro hac vice), and Elias Law Group LLP, Washington, D.C. There was an oral argument by David R. Fox.

For the intervenor-appellant, there were briefs filed by *Erin K. Deeley*, *David P. Hollander*, *Rachel E. Snyder*, *Carly Gerads*, and *Stafford Rosenbaum LLP*, Madison; *Mel Barnes*, and *Office of Governor Tony Evers*, Madison; *Christine P. Sun* (pro hac vice), *Zack Goldberg* (pro hac vice), and *States United Democracy Center*, New York, NY. There was an oral argument by *Erin K. Deeley*.

For the defendant-respondent, there was a brief filed by *Charlotte Gibson*, assistant attorney general, *Faye B. Hipsman*, assistant attorney general, *Steven C. Kilpatrick*, assistant attorney general, with whom on the brief was *Joshua L. Kaul*, attorney general. There was an oral argument by *Faye B. Hipsman*, assistant attorney general.

For the intervenor-respondent, there was a brief filed by *Misha Tseytlin*, *Kevin M. LeRoy*, *Sean T.H. Dutton*, *Emily A. O'Brien*, and *Troutman Pepper Hamilton Sanders LLP*, Chicago, IL. There was an oral argument by *Misha Tseytlin*.

An amicus curiae brief was filed by *Nicholas Fairweather*, and *Hawks Quindel*, S.C., Madison; *Graham Provost* (pro hac vice), and *Public Rights Project*, Oakland, CA, on behalf of Wisconsin Election Officials.

An amicus curiae brief was filed by *Lane E. Ruhland*, and *Ruhland Law and Strategy, LLC*, Waunakee, on behalf of Center for Election Confidence.

An amicus curiae brief was filed by *Matthew M. Fernholz*, and *Cramer Multhauf LLP*, Waukesha; *Thomas R. McCarthy* (pro hac vice), *Conor D. Woodfin* (pro hac vice), *R. Gabriel Anderson* (pro hac vice), and *Consovoy McCarthy PLLC*, Arlington, VA, on behalf

of The Republican National Committee, The Republican Party of Wisconsin, and RITE PAC.

An amicus curiae brief was filed by *Scott B. Thompson, Daniel S. Lenz, and Law Forward, Inc., Madison*, on behalf of Disability Rights Wisconsin, The League of Women Voters of Wisconsin, and Wisconsin Faith Voices for Justice.

An amicus curiae brief was filed by *Jason Myatt, Mark Cherry (pro hac vice), Zachary Goldstein (pro hac vice), Narayan Narasimhan (pro hac vice), and Gibson, Dunn & Crutcher LLP, New York, NY; Gregg J. Costa (pro hac vice), and Gibson, Dunn & Crutcher LLP, Houston, TX*, on behalf of Common Cause Wisconsin.

An amicus curiae brief was filed by *Richard M. Esenberg, Luke N. Berg, Nathalie E. Burgmeister, and Wisconsin Institute for Law & Liberty, Inc., Milwaukee*, on behalf of Richard Teigen, Richard Thom, and The Association of Mature American Citizens, Inc.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2024AP164
(L.C. No. 2023CV1900)

STATE OF WISCONSIN : IN SUPREME COURT

**Priorities USA, Wisconsin Alliance for Retired
Americans and William Franks, Jr.,**

Plaintiffs-Appellants,

Governor Tony Evers,

Intervenor-Appellant,

v.

Wisconsin Elections Commission,

Defendant-Respondent,

Wisconsin State Legislature,

Intervenor-Respondent.

FILED

JUL 5, 2024

Samuel A. Christensen
Clerk of Supreme Court

ANN WALSH BRADLEY, J., delivered the majority opinion of the Court, in which DALLET, KAROFSKY, and PROTASIEWICZ, JJ., joined. REBECCA GRASSL BRADLEY, J., filed a dissenting opinion, in which ZIEGLER, C.J., and HAGEDORN, J., joined.

APPEAL from an order of the Circuit Court for Dane County,
Ann M. Peacock, Judge. *Reversed and remanded.*

¶1 ANN WALSH BRADLEY, J. The petitioners, Priorities USA, Alliance for Retired Americans, and William Franks, Jr. (collectively, petitioners), have challenged several voting requirements on statutory and constitutional grounds. Among these was the requirement that absentee ballots be returned only by mail or in person to the clerk's office and not to a secure drop box.¹ The circuit court concluded that it was bound by Teigen v. Wisconsin Elections Commission, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, in determining the legality of ballot drop boxes and accordingly granted a motion to dismiss that claim.²

¶2 After the petitioners sought bypass of the court of appeals, we granted bypass on a single issue: "Whether to overrule the Court's holding in Teigen v. Wisconsin Elections Commission, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, that

¹ In addition to the drop-box ban at issue here, the petitioners also challenged the following: (1) the requirement that absentee voters vote in the presence of a witness, (2) the requirement that defects in absentee ballots be cured by election day, and (3) the interpretation of Wis. Stat. § 6.84 that purportedly treats "absentee votes as being less valuable and worthy of protection than in-person ballots cast on election day." None of these other challenges is at issue before us.

² This case arose in the circuit court for Dane County, Ann M. Peacock, Judge.

Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks."³

¶3 The petitioners, along with intervenor Governor Tony Evers and respondent WEC, contend that Teigen was wrongly decided and ask that we overrule it. They specifically assert that Wis. Stat. § 6.87(4)(b)1. (2021-22),⁴ contrary to the conclusion of the Teigen majority, allows the use of ballot drop boxes.

¶4 In contrast, the Wisconsin Legislature advances that we should reaffirm Teigen. It contends that the court's statutory interpretation in that case was correct and that no intervening changes should cause us to revisit that decision.

¶5 We conclude that Wis. Stat. § 6.87(4)(b)1. allows the use of ballot drop boxes. For the reasons set forth below, we determine that the court's contrary conclusion in Teigen was unsound in principle, and as a consequence, we overrule it.

¶6 Our decision today does not force or require that any municipal clerks use drop boxes. It merely acknowledges what

³ The petitioners sought bypass on two additional issues: (1) "Whether laws that burden the right to vote, including by burdening absentee voting, are subject to strict scrutiny just like laws burdening other fundamental rights, such that the State must prove that the burden they impose is narrowly tailored to serve a compelling state interest," and (2) "Whether a voting law is immune from facial challenge where it imposes some unjustifiable burden on all voters it regulates, but some voters are more burdened than others." We denied bypass of these issues, and they are therefore not presently before the court.

⁴ All subsequent references to the Wisconsin Statutes are to the 2021-22 version unless otherwise indicated.

Wis. Stat. § 6.87(4)(b)1. has always meant: that clerks may lawfully utilize secure drop boxes in an exercise of their statutorily-conferred discretion. See Wis. Stat. § 7.15(1); State ex rel. Zignego v. WEC, 2021 WI 32, ¶¶13, 15, 396 Wis. 2d 391, 957 N.W.2d 208.

¶7 Accordingly, we reverse the order of the circuit court dismissing the petitioners' claim for a declaratory judgment that Wis. Stat. § 6.87(4)(b)1. allows the use of drop boxes and remand to the circuit court to reinstate the petitioners' drop-box claim.

I

¶8 We begin by setting forth the procedural posture of this case in greater detail. The petitioners challenged several election procedures. Part of their claim was a contention that "the Wisconsin Supreme Court should revisit its decision in Teigen and confirm that § 6.87(4)(b)1. allows the use of drop boxes consistent with the statutory text and constitutional principles."

¶9 WEC and the legislature moved to dismiss the complaint, arguing that the petitioners did not state a claim upon which relief may be granted.⁵ The circuit court denied the motion in part and granted it in part. As relevant here, it agreed with WEC and the legislature and granted dismissal with respect to the drop-box claim. Specifically, the circuit court determined that it "doesn't have the authority to revisit the

⁵ See Wis. Stat. § 802.06(2)(a)6.

soundness of the statutory interpretation in Teigen." It continued: "Even if I agree that Teigen was incorrectly decided, I must follow the Teigen precedent and I leave any revisiting of that decision to the Wisconsin Supreme Court."

¶10 The petitioners appealed and subsequently petitioned for bypass of the court of appeals.⁶ As stated, we granted bypass of a single issue only: "Whether to overrule the Court's holding in Teigen v. Wisconsin Elections Commission, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks."

II

¶11 We are called upon to review the circuit court's determination on a motion to dismiss. Whether a motion to dismiss was properly granted or denied is a question of law this court reviews independently of the determinations of the circuit court and court of appeals. State ex rel. City of Waukesha v. City of Waukesha Bd. of Rev., 2021 WI 89, ¶11, 399 Wis. 2d 696, 967 N.W.2d 460. A complaint survives a motion to dismiss for failure to state a claim upon which relief may be granted if it pleads facts, which if true, would entitle the plaintiff to relief. Cattau v. Nat'l Ins. Servs. of Wis., Inc., 2019 WI 46, ¶4, 386 Wis. 2d 515, 926 N.W.2d 756; Data Key Partners v. Permira Advisers, LLC, 2014 WI 86, ¶21, 356 Wis. 2d 665, 849 N.W.2d 693.

⁶ See Wis. Stat. § (Rule) 809.60.

¶12 In our review, we interpret several Wisconsin statutes. Statutory interpretation presents a question of law we likewise review independently of the determinations rendered by the circuit court and court of appeals. Brown County v. Brown Cnty. Taxpayers Ass'n, 2022 WI 13, ¶19, 400 Wis. 2d 781, 971 N.W.2d 491.

III

¶13 We begin by addressing the relevant election statutes, looking first to the language of those statutes. Next we proceed to analyze the interpretation advanced in Teigen and then engage in our independent examination of the statutory language. Finally, we examine whether stare decisis compels us to uphold Teigen.

A

¶14 In examining the subject statutes, we begin with the statutory language. Sw. Airlines Co. v. DOR, 2021 WI 54, ¶22, 397 Wis. 2d 431, 960 N.W.2d 384 (citing State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110). If the meaning of the statute is plain, we need not inquire further. Id.

¶15 We give statutory language its "common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." Id., ¶23. Additionally, we "interpret statutory language 'in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to

avoid absurd or unreasonable results.'" Id. (quoting Kalal, 271 Wis. 2d 633, ¶46).

¶16 Wisconsin Stat. § 6.87, entitled "Absent voting procedure," sets forth requirements for the return of absentee ballots and the envelopes containing those ballots. The statutory language at the center of this case comes from Wis. Stat. § 6.87(4)(b)1., and is not extensive: "The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." There is no assertion here that using a drop box is "mailing" a ballot, so we focus on the requirement that the ballot be "delivered in person, to the municipal clerk issuing the ballot or ballots."

¶17 In Teigen, the majority⁷ interpreted this provision to ban drop boxes, concluding that "[a]n absentee ballot must be returned by mail or the voter must personally deliver it to the municipal clerk at the clerk's office or a designated alternate site." Teigen, 403 Wis. 2d 607, ¶4. Specifically, the Teigen majority highlighted the phrase "to the municipal clerk," determining that "[a]n inanimate object, such as a ballot drop box, cannot be the municipal clerk. At a minimum, accordingly,

⁷ Teigen was a split opinion, consisting of a majority/lead opinion, three concurrences, and a dissent. Although the entirety of the majority/lead opinion was not joined by a majority of justices, the portions of that opinion referred to here as the "majority" do represent the position of four justices. For further discussion of lead opinions, see Koss Corp. v. Park Bank, 2019 WI 7, ¶76 n.1, 385 Wis. 2d 261, 922 N.W.2d 20 (Ann Walsh Bradley, J., concurring).

dropping a ballot into an unattended drop box is not delivery 'to the municipal clerk[.]'" Id., ¶55.

¶18 It also looked to surrounding election statutes to support its result. First, the Teigen majority looked to Wis. Stat. § 6.84. Subsection (1) of this statute sets out the legislative policy that "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place" that "must be carefully regulated to prevent the potential for fraud or abuse." Additionally, subsec. (2) indicates that § 6.87(4)'s provisions "shall be construed as mandatory." The Teigen majority took this to mean that it must strictly construe § 6.87's requirements for absentee voting with a skeptical eye, resulting in a prohibition against the use of drop boxes. See Teigen, 403 Wis. 2d 607, ¶53.

¶19 The majority in Teigen also looked to Wis. Stat. § 6.855, which governs alternate absentee ballot sites, in an attempt to bolster its analysis.⁸ An "alternate absentee ballot site" is a location designated by the municipal clerk outside of the municipal clerk's office where voters may request, vote, and return absentee ballots. Trump v. Biden, 2020 WI 91, ¶56, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring). It

⁸ Wisconsin Stat. § 6.855 allows the "governing body of a municipality" to "elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election" and provides requirements for such sites.

concluded that an absentee ballot drop box is not an alternate absentee ballot site under § 6.855 "because a voter can only return the voter's absentee ballot to a drop box, while an alternate site must also allow voters to request and vote absentee at the site." Teigen, 403 Wis. 2d 607, ¶57. The majority continued:

If ballot drop boxes are not alternate absentee ballot sites, 'what [are] they?' Trump v. Biden, 2020 WI 91, ¶101, 394 Wis. 2d 629, 951 N.W.2d 568 (Roggensack, C.J., dissenting). Existing outside the statutory parameters for voting, drop boxes are a novel creation of executive branch officials, not the legislature. The legislature enacted a detailed statutory construct for alternate sites. In contrast, the details of the drop box scheme are found nowhere in the statutes, but only in memos prepared by WEC staff, who did not cite any statutes whatsoever to support their invention.

Teigen, 403 Wis. 2d 607, ¶58.

¶20 We begin our independent analysis of the language of Wis. Stat. § 6.87(4)(b)1. by observing that the statute requires that a completed absentee ballot be "mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." In the petitioners' view, delivering a ballot to a drop box is a means of delivering it in person "to the municipal clerk." Taking a contrary position, the Teigen court drew a distinction between an inanimate object like a drop box and a "municipal clerk," a person to whom delivery must be made. Teigen, 403 Wis. 2d 607, ¶55. Yet, it also dismissed a distinction of even greater import—the distinction our statutes make between a "municipal clerk" and the "municipal clerk's office."

¶21 Throughout our election statutes there exist references to the "office of the municipal clerk," "office of the clerk," or the "clerk's office." When "office" is used in conjunction with a reference to the clerk, such "office" is specified as a place where a delivery or an action takes place. See, e.g., Wis. Stat. §§ 5.81(3) (discussing ballots and envelopes "voted in person in the office of the municipal clerk"); 6.18 (requiring that a form "shall be returned to the municipal clerk's office"); 6.32(2) (setting forth that an elector "appear at the clerk's office"); 6.855(2) (addressing the display of a notice "in the office of the municipal clerk"); 12.035(3)(d) (discussing a "building containing the office of the municipal clerk").⁹

¶22 On the other hand, "municipal clerk" is defined as "the city clerk, town clerk, village clerk and the executive director of the city election commission and their authorized representatives. Where applicable, 'municipal clerk' also includes the clerk of a school district." Wis. Stat. § 5.02(10). Synthesizing the above information regarding the "office" of the clerk with the statutory definition of "municipal clerk" leads to the conclusion that the two terms are

⁹ See also Wis. Stat. §§ 6.15(2)(bm), 6.28(1)(b), 6.29(2)(a), 6.30(4), 6.32(3), 6.35(3), 6.45(1m), 6.47(2), 6.50(1), 6.55(2)(cm), 6.56(4), 6.86(1)(a)2., 6.86(3)(c), 6.87(3)(a), 6.87(4)(b)4., 6.88(1), 6.97(3)(b), 7.41(1), 7.53(1)(b), 7.53(2)(d), 8.10(6)(c), 12.03(1), 12.03(2)(a)2., 12.035(3)(c).

distinct. Put simply, the "municipal clerk" is a person, while the "office of the municipal clerk" is a location.

¶23 This principle must also apply to Wis. Stat. § 6.87 just as it does elsewhere in the statutes. "If a word or words are used in one subsection but are not used in another subsection, we must conclude that the legislature specifically intended a different meaning." Responsible Use of Rural and Agr. Land v. Pub. Serv. Comm'n, 2000 WI 129, ¶39, 239 Wis. 2d 660, 619 N.W.2d 888 (quoting Oney v. Schrauth, 197 Wis. 2d 891, 902, 541 N.W.2d 229 (Ct. App. 1995)). Had the legislature wanted to require delivery of an absentee ballot to a specific location, i.e., the clerk's office, it could have done so, and the wide usage of the term "clerk's office" throughout the election statutes certainly indicates that the legislature knew how to do so. See Southport Commons, LLC v. DOT, 2021 WI 52, ¶32, 397 Wis. 2d 362, 960 N.W.2d 17 ("The legislature is presumed to 'carefully and precisely' choose statutory language to express a desired meaning.").

¶24 It even tried to do so. In 2021, the legislature attempted to pass a revision to the language of Wis. Stat. § 6.87(4)(b)1. that would have seemingly accomplished the result it seeks in this case. Namely, the legislature voted on language requiring return of an absentee ballot "to the office of the municipal clerk issuing the ballot or ballots." 2021 S.B. 203, § 3. However, such language was vetoed by the Governor and accordingly never became law.

¶25 By mandating that an absentee ballot be returned not to the "municipal clerk's office," but "to the municipal clerk," the legislature disclaimed the idea that the ballot must be delivered to a specific location and instead embraced delivery of an absentee ballot to a person—the "municipal clerk." Given this, the question then becomes whether delivery to a drop box constitutes delivery "to the municipal clerk" within the meaning of Wis. Stat. § 6.87(4)(b)1.

¶26 We conclude that it does. A drop box is set up, maintained, secured, and emptied by the municipal clerk.¹⁰ This is the case even if the drop box is in a location other than the municipal clerk's office. As analyzed, the statute does not specify a location to which a ballot must be returned and requires only that the ballot be delivered to a location the municipal clerk, within his or her discretion, designates. See Wis. Stat. § 7.15(1).

¶27 Such an interpretation of Wis. Stat. § 6.87(4)(b)1. is consistent with the discretion afforded to municipal clerks in running Wisconsin's elections at the local level. Election administration in this state is "highly decentralized." Zignego, 396 Wis. 2d 391, ¶13. "Rather than a top-down arrangement with a central state entity or official controlling

¹⁰ Importantly, we observe that the statutory definition of "municipal clerk" includes "the city clerk, town clerk, village clerk and the executive director of the city election commission and their authorized representatives." Wis. Stat. § 5.02(10) (emphasis added). Thus, a single person need not set up, maintain, secure, and empty all drop boxes in a municipality.

local actors, Wisconsin gives some power to its state election agency (the Commission) and places significant responsibility on a small army of local election officials." Id.; see Wis. Stat. § 7.15(1) (setting forth that "[e]ach municipal clerk has charge and supervision of elections and registration in the municipality" and listing duties the clerk "shall perform," which includes "any others which may be necessary to properly conduct elections or registration"). Those local election officials, i.e., municipal clerks, are "primarily responsible for election administration in Wisconsin." Zignego, 396 Wis. 2d 391, ¶15.

¶28 Reading "to the municipal clerk" to reference a person rather than a location entrusts some discretion to municipal clerks in how best to conduct elections in their respective jurisdictions. Such discretion is consistent with the statutory scheme as a whole, under which Wisconsin's 1,850 municipal clerks serve the "primary role" in running elections via our "decentralized" system. Id., ¶¶13, 15. By endorsing a one-size-fits-all approach, the Teigen court arrived at a conclusion that runs counter to the statutory scheme as a whole. See Sw. Airlines, 397 Wis. 2d 431, ¶23 (indicating that statutory language must be interpreted "in the context in which it is used" and "not in isolation but as part of a whole").

¶29 The surrounding election statutes relied upon by the Teigen majority and proffered as support by the legislature here do not change this result. To begin, Wis. Stat. § 6.855 is of little use to the question presented. Section 6.855 allows a

municipality to designate alternate absentee ballot sites where "electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election." § 6.855(1). The Teigen majority noted that drop boxes are not alternate absentee ballot sites because ballots cannot be requested and voted at a drop box. Teigen, 403 Wis. 2d 607, ¶57. This is true. But this conclusion is ultimately of little consequence, as the statute simply does not apply to drop boxes.

¶30 "An alternative absentee ballot site . . . must be a location not only where voters may return absentee ballots, but also a location where voters 'may request and vote absentee ballots.'" Trump, 394 Wis. 2d 629, ¶56 (Hagedorn, J., concurring). On its face, this does not describe a drop box. The fact that the legislature "enacted a detailed statutory construct for alternate sites" while not doing the same for drop boxes has nothing to say about the legality of drop boxes. See Teigen, 403 Wis. 2d 607, ¶58. Indeed, the legislature would have no reason for enacting such a scheme because drop boxes are already allowed by the plain language of § 6.87(4)(b)1.

¶31 Similarly, Wis. Stat. § 6.84 does not warrant the import the Teigen court imparted on it. Contrary to the Teigen court's suggestion that it directs us to take a "skeptical" view of absentee voting, all § 6.84 does is set forth the consequences of a statutory violation. As will be addressed more fully infra, ¶¶41-46, § 6.84(2) states that the absentee ballot provisions must be construed as mandatory and that

ballots cast "in contravention" of those procedures "may not be counted." Construing a provision as mandatory rather than directory does not change the provision's meaning, nor require that any gloss, much less a "skeptical" one, be placed on its interpretation.

¶32 Section 6.84(1) is merely a declaration of legislative policy setting forth that "absentee balloting must be carefully regulated." The subsequent statutes do just that. See Wis. Stat. §§ 6.84-6.89. Again, nothing in subsec. (1) provides any rule of interpretation applying to the statutes that follow.

¶33 Had the legislature wanted to impose a rule of statutory construction on the absentee balloting statutes, it certainly knows how to do that. In several other areas of the law, the legislature has explicitly directed that statutes should be either liberally or strictly construed. As an example, Wis. Stat. § 19.81(4) does both within a single statute. § 19.81(4) ("This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to

interpretations thereof."). Further examples are plentiful.¹¹ The legislature did nothing of the sort with regard to absentee balloting, and it would be error to read in such a restriction where none is present. See Dawson v. Town of Jackson, 2011 WI 77, ¶42, 336 Wis. 2d 318, 801 N.W.2d 316 ("We decline to read into the statute words the legislature did not see fit to write.").

¶34 As the above analysis demonstrates, the Teigen court incorrectly interpreted Wis. Stat. § 6.87(4)(b)1. Accordingly, we conclude that Wis. Stat. § 6.87(4)(b)1. allows the use of ballot drop boxes.

B

¶35 Having concluded that the Teigen majority incorrectly interpreted the statute at issue, the next question becomes whether stare decisis nevertheless requires this court to uphold Teigen.

¹¹ See, e.g., Wis. Stat. §§ 49.498(7)(b) (setting forth assertions that a previous paragraph "may not be construed to do"); 70.109 (mandating that tax exemptions be strictly construed); 77.54(6)(cn) (directing that tax exemptions "under this subsection shall be strictly construed"); 111.15 (stating that in a statutory subchapter on employment relations, "nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this subchapter be so construed as to invade unlawfully the right to freedom of speech. Nothing in this subchapter shall be so construed or applied as to deprive any employee of any unemployment benefit which the employee might otherwise be entitled to receive under ch. 108").

¶36 Stare decisis refers to the principle that requires courts to "stand by things decided." Hinrichs v. DOW Chem. Co., 2020 WI 2, ¶66 n.12, 389 Wis. 2d 669, 937 N.W.2d 37. Such a principle is "fundamental to the rule of law." Johnson Controls, Inc. v. Emp. Ins. of Wausau, 2003 WI 108, ¶94, 264 Wis. 2d 60, 665 N.W.2d 257.

¶37 "Fidelity to precedent ensures that existing law will not be abandoned lightly. When existing law is open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results." Schultz v. Natwick, 2002 WI 125, ¶37, 257 Wis. 2d 19, 653 N.W.2d 266 (cleaned up). Accordingly, any departure from stare decisis requires "special justification." Id.; State v. Johnson, 2023 WI 39, ¶¶19-20, 407 Wis. 2d 195, 990 N.W.2d 174.

¶38 However, stare decisis is "neither a straightjacket nor an immutable rule." Johnson Controls, 264 Wis. 2d 60, ¶100. It is not an "inexorable command." State v. Denny, 2017 WI 17, ¶71, 373 Wis. 2d 390, 891 N.W.2d 144. Indeed, "[w]e do more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision." Johnson Controls, 264 Wis. 2d 60, ¶100.

¶39 Case law has identified several situations in which this court will overturn a prior case. "First, changes or developments in the law have undermined the rationale behind a decision." Id., ¶98. "Second, there is a need to make a decision correspond to newly ascertained facts." Id. "Third, there is a showing that the precedent has become detrimental to

coherence and consistency in the law." Id. We also consider "whether the prior decision is unsound in principle, whether it is unworkable in practice, and whether reliance interests are implicated." Id., ¶99.

¶40 Mere disagreement with the Teigen court's rationale is insufficient to overturn it—something more is required. Id., ¶93; Progressive N. Ins. Co. v. Romanshek, 2005 WI 67, ¶46, 281 Wis. 2d 300, 697 N.W.2d 417. Here, something more is present.

¶41 The "something more," which permeated the entirety of the Teigen majority's analysis, was its misinterpretation of Wis. Stat. § 6.84 and the "skeptical" gloss with which the court examined § 6.87(4)(b)1. As is partially explained above, see supra, ¶¶31-32, the Teigen court took what is a statute stating a legislative policy and dictating the consequences for a violation of the absentee balloting statutes and turned it into something else entirely. Instead, it treated § 6.84 as a principle of statutory interpretation that resulted in the distortion of the language of § 6.87 and that could have consequences for other election procedures.

¶42 Section 6.84 has two subsections. The first, entitled "Legislative policy," provides:

The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may

prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Wis. Stat. § 6.84(1). The second, entitled "Interpretation," sets forth:

Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

§ 6.84(2).

¶43 The Teigen majority determined that these provisions together mandate a "skeptical" view of absentee voting. It saw the statement of legislative policy set forth in subsec. (1) as one that "cannot be reconciled with the statements of policy contained in WEC's memos" authorizing drop boxes. Teigen, 403 Wis. 2d 607, ¶53. Further, it divined from subsec. (2) the uncontroversial proposition that mandatory election requirements must be "strictly adhered to" and "strictly observed." Id. (citing State ex rel. Ahlgrimm v. State Elections Bd., 82 Wis. 2d 585, 592-93, 263 N.W.2d 152 (1978)).

¶44 Again, § 6.84 cannot carry the weight the Teigen majority assigns it. Subsection 1 provides that absentee balloting must be "carefully regulated." Indeed it is "carefully regulated"—through statutes passed by the legislature and signed by the governor, and which we have determined above permit the use of drop boxes. It is not up to

this court to "regulate" absentee voting. Such "regulation" falls to the legislative process and Wisconsin's 1,850 municipal clerks through our decentralized system of election administration. Further, by framing its analysis as a comparison between the "statement of legislative policy" in § 6.84(1) and the "statements of policy contained in WEC's memos" allowing drop boxes, Teigen, 403 Wis. 2d 607, ¶53, the Teigen court allowed policy concerns to alter the lens through which it viewed the statutory language, if not completely supplant the plain language of § 6.87(4)(b)1.

¶45 Subsection 2 indicates that any votes cast "in contravention of" the statutory procedures "may not be counted." This provision says nothing about what is prohibited—it merely sets out the consequence should a ballot be cast in a prohibited manner. In other words, § 6.84 gives us no principles of interpretation that give any insight into the actual meaning of the absentee balloting statutes that follow it. Observing that a statute must be "strictly adhered to," as the Teigen majority portrays, does not inform the meaning of the statute. We still must interpret it, and after we do, then we must ensure that it is being followed "strictly."¹² Our determination here is that

¹² The ramifications of the Teigen majority's "skeptical" view are evidenced by the apparent confusion it has caused among both parties and lower courts. An amicus brief filed in the present case by the Teigen plaintiffs contends that Wis. Stat. § 6.84 "command[s] that absentee ballot procedures are to be 'carefully regulated' and strictly construed" (Emphasis added). However, as described, there is a difference between strict adherence and strict construction, and the statute does not provide for the latter.

drop boxes are not "in contravention" of the statutory procedures, and § 6.84 does nothing to alter the statutory interpretation that led to this conclusion.

¶46 The Teigen court's error in this regard permeated its analysis to such a degree that its analysis was not merely wrong, but was unsound in principle. Essential to its conclusion was the assertion that "[i]nterpreting Wis. Stat. § 6.87(4)(b)1. to permit such methods of casting an absentee ballot would contravene the legislative policy expressed in Wis. Stat. § 6.84(1) and border on the absurd." Teigen, 403 Wis. 2d 607, ¶62. Additionally, it relied on the "detailed and unambiguous language of Wis. Stat. §[] 6.84" in determining that drop boxes are prohibited because they are a "mechanism not specified by the legislature." Id., ¶63. As a result of misinterpreting § 6.84, the Teigen court, despite the word "skeptical" appearing nowhere in the Wisconsin statutes, applied a "skeptical" gloss permeating its analysis, leading it astray and causing its analysis to be "unsound in principle."

¶47 We have previously stated a general principle that "stare decisis concerns are paramount where a court has

Similarly, WEC advances that circuit courts have interpreted the Teigen court's "skeptical" view as a broadly applicable principle of interpretation. See Brown v. WEC, Racine County Case No. 2022CV1324 (Jan. 10, 2024) (describing Teigen and Wis. Stat. § 6.84 as "suppl[ying] the lens through which absentee voting statues are to be viewed"); Kormanik v. WEC, Waukesha County Case No. 2022CV1395 (Nov. 29, 2023) (stating that the legislative policy language in § 6.84 "needs to be recognized as setting very firm guardrails to curb the analysis").

authoritatively interpreted a statute because the legislature remains free to alter its construction." Progressive N. Ins., 281 Wis. 2d 300, ¶45. Assuming such a principle applies here, stare decisis does not require us to uphold Teigen in this instance.¹³

¶48 An underlying purpose of strong adherence to stare decisis where a statute is involved is to protect reliance interests attendant to a precedential opinion. See id., ¶¶46-47; cf. Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 457 (2015). Here, no such reliance interests counsel in favor of upholding an erroneous interpretation of Wis. Stat. § 6.87(4)(b)1. Teigen has neither fostered reliance nor created a settled body of law.

¶49 Accordingly, we determine that the court's conclusion in Teigen, 403 Wis. 2d 607, that the subject statutes prohibit ballot drop boxes was unsound in principle, and as a consequence, we overrule it. Because the complaint sets forth allegations, which if true, would entitle the plaintiff to relief, the motion to dismiss the drop-box claim was wrongly denied.

¹³ Contrary to the suggestion of the Legislature at oral argument, our decision in this case does not portend the death of statutory stare decisis. We strongly stand by our principles of stare decisis and our decision in this case to depart from precedent was not made casually. See State v. Stevens, 181 Wis. 2d 410, 442, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring).

¶50 We therefore reverse the order of the circuit court dismissing the petitioners' claim for a declaratory judgment that Wis. Stat. § 6.87(4)(b)1. allows the use of drop boxes and remand to the circuit court to reinstate the petitioners' drop-box claim.

By the Court.—The order of the circuit court is reversed and the cause is remanded to the circuit court.

¶51 REBECCA GRASSL BRADLEY, J. (*dissenting*). The majority again forsakes the rule of law in an attempt to advance its political agenda. The majority began this term by tossing the legislative maps adopted by this court in Johnson v. Wisconsin Elections Commission, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559, for the sole purpose of facilitating "the redistribution of political power in the Wisconsin legislature." Clarke v. Wis. Elections Comm'n, 2023 WI 79, ¶302, 410 Wis. 2d 1, 998 N.W.2d 370 (Hagedorn, J., dissenting). The majority ends the term by loosening the legislature's regulations governing the privilege of absentee voting in the hopes of tipping the scales in future elections.¹

¶52 Just two years ago, in Teigen v. Wisconsin Elections Commission, this court held "ballot drop boxes are illegal under Wisconsin statutes[,] [and] [a]n absentee ballot must be returned by mail or the voter must personally deliver it to the

¹ This case is not about whether drop boxes improve or hinder any political party's electoral fortunes or whether using drop boxes is a good policy. Those questions are reserved for resolution by the people's representatives in the legislature and irrelevant for purposes of statutory interpretation. See Teigen v. Wis. Elections Comm'n, 2022 WI 64, ¶52 n.25, 403 Wis. 2d 607, 976 N.W.2d 519 ("While the dissenters would permit ballot drop boxes, the court must respect the constitutional restraints on our power and refuse to act as a super-legislature. It poses a grave threat to democracy to mislead the people into believing we are one."); id., ¶151 (Hagedorn, J., concurring) ("Our obligation is to follow the law, which may mean the policy result is undesirable or unpopular."). It is "lamentable" my colleagues indulge their policy preferences at the expense of the law. See id., ¶¶205-07 (Ann Walsh Bradley, J., dissenting).

municipal clerk at the clerk's office or a designated alternate site." 2022 WI 64, ¶4, 403 Wis. 2d 607, 976 N.W.2d 519. Three of the justices making up today's majority dissented. Id., ¶¶205-48 (Ann Walsh Bradley, J., dissenting) (joined by Dallet and Karofsky, JJ.). The same dissenters, joined by the newest member of the court, form a majority in this case to overrule Teigen, converting the Teigen dissent into the new majority opinion and holding absentee ballots may be delivered virtually anywhere a municipal clerk designates. To reach this conclusion, the majority misrepresents the court's decision in Teigen, replaces the only reasonable interpretation of the law with a highly implausible one, and tramples the doctrine of stare decisis. I dissent.

I

¶53 Stare decisis—"to stand by the thing decided and not disturb the calm"²—is a foundational principle in the Anglo-American legal system.

For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.

² Ramos v. Louisiana, 590 U.S. 83, 115 (2020) (Kavanaugh, J., concurring in part).

1 William Blackstone, Commentaries *69. This venerable doctrine exists for the sake of stability in the law, to restrain the impulse of judges to overturn decisions with which they disagree. When judges instead indulge their preferences, every case is on the table as new judges take the bench, displacing the rule of law with the whim of judges. To avoid such volatility, "stare decisis beseeches judges to 'follow earlier judicial decisions when the same points arise again in litigation.'" Friends of Frame Park, U.A. v. City of Waukesha, 2022 WI 57, ¶55, 403 Wis. 2d 1, 976 N.W.2d 263 (Rebecca Grassl Bradley, J., concurring) (quoting stare decisis, Black's Law Dictionary 1696 (11th ed. 2019)). This court has articulated many times that it abides by the doctrine "scrupulously" because "respect for prior decisions is fundamental to the rule of law." Johnson Controls, Inc. v. Emps. Ins. of Wausau, 2003 WI 108, ¶94, 264 Wis. 2d 60, 665 N.W.2d 257.

¶54 This court has declared: "'Stare decisis is the preferred course of judicial action because it promotes evenhanded, predictable, and consistent development of legal principles,'" Id., ¶95 (quoting State v. Ferron, 219 Wis. 2d 481, 504, 579 N.W.2d 654 (1998)), and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals" Vasquez v. Hillery, 474 U.S. 254, 265 (1986). The decision-making process of this court cannot "become[] a mere exercise of judicial will" State v. Outagamie Cnty. Bd. of Adjustment, 2001 WI 78, ¶29, 244 Wis. 2d 613, 628 N.W.2d 376 (internal quotation

marks omitted) (quoting Citizens Util. Bd. v. Klauser, 194 Wis. 2d 484, 513, 534 N.W.2d 608 (1995) (Abrahamson, J., dissenting)). When the court "frequent[ly]" and "careless[ly]" overrules its prior decisions, its credibility suffers. Johnson Controls, 264 Wis. 2d 60, ¶95 (citing State v. Lindell, 2001 WI 108, ¶169, 245 Wis. 2d 689, 629 N.W.2d 223 (Abrahamson, C.J., dissenting)).

¶55 "'A court should not depart from precedent without sufficient justification.'" Id., ¶94 (quoting State v. Stevens, 181 Wis. 2d 410, 442, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring)). Our cases make clear prior decisions should not be "abandoned lightly." Outagamie Cnty., 244 Wis. 2d 613, ¶29 (citing Stevens, 181 Wis. 2d at 441 (Abrahamson, J., concurring)). "Overruling precedent is never a small matter." Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015).

¶56 Our cases have customarily required a "special" or "compelling" justification before overturning a prior decision of this court. Johnson Controls, 264 Wis. 2d 60, ¶¶93, 96. In the past, this court has identified five special justifications for overruling precedent:

(1) the law has changed in a way that undermines the prior decision's rationale; (2) there is a "need to make a decision correspond to newly ascertained facts;" (3) our precedent "has become detrimental to coherence and consistency in the law;" (4) the decision is "unsound in principle;" or (5) it is "unworkable in practice."

State v. Johnson, 2023 WI 39, ¶20, 407 Wis. 2d 195, 990 N.W.2d 174 (quoting State v. Young, 2006 WI 98, ¶51 n.16, 294 Wis. 2d 1, 717 N.W.2d 729). Predictably, the former dissenters,

who now find themselves in the majority, abuse the rule of law, replacing the majority opinion in Teigen with Justice Ann Walsh Bradley's dissent. They decree the decision "unsound in principle," emptying the phrase of any meaning and making it merely a mechanism to tip the scales of justice toward their preferred outcomes.

¶57 While the doctrine is the subject of much debate, the members of the majority purport to adhere to our traditional approach to stare decisis. By any measure, its decision violates the principles the majority professes to apply. Under its weakest application, stare decisis demands upholding Teigen.

¶58 Although the majority purports to "assum[e]" "'stare decisis concerns are paramount where a court has authoritatively interpreted a statute[,]" the majority discards that principle as an inconvenient obstacle to its policy preferences. Majority op., ¶47 (quoting Progressive N. Ins. Co. v. Romanshek, 2005 WI 67, ¶45, 281 Wis. 2d 300, 697 N.W.2d 417). According to the majority, stare decisis receives heightened force only if reliance interests are present because "[a]n underlying purpose of strong adherence to stare decisis where a statute is involved is to protect reliance interests attendant to a precedential opinion." Id., ¶48. That is a gross misrepresentation of the principle the majority claims to apply. As Justice Brett Kavanaugh recently explained, stare decisis is "comparatively strict" for statutory interpretation cases "because Congress and the President can alter a statutory precedent by enacting new legislation." Ramos v. Louisiana, 590 U.S. 83, 118 (2020)

(Kavanaugh, J., concurring in part). Like the United States Supreme Court, this court has said stare decisis should receive extra consideration in statutory interpretation cases because the legislature may correct any errors in this court's interpretation. See, e.g., Progressive N. Ins. Co., 281 Wis. 2d 300, ¶45 (citing Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991)) ("[S]tare decisis concerns are paramount where a court has authoritatively interpreted a statute because the legislature remains free to alter its construction."); Kimble, 576 U.S. at 456 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989)) ("[S]tare decisis carries enhanced force when a decision . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees."). Scholarly sources are in accord. See, e.g., Bryan A. Garner et al., The Law of Judicial Precedent 333-35, 409-10 (2016).

¶59 The majority does not cite a single case suggesting the protection of reliance interests is an "underlying purpose" of according stare decisis additional weight in statutory interpretation cases. Giving stare decisis added heft when considering whether to overturn a decision that interpreted a statute is not universally observed; the principle is debatable. I have rejected the concept, "particularly when applied to interpretations wholly unsupported by the statute's text." See Manitowoc Co. v. Lanning, 2018 WI 6, ¶81 n.5, 379 Wis. 2d 189, 906 N.W.2d 130 (Rebecca Grassl Bradley, J., concurring); see

also Gamble v. United States, 587 U.S. 678, 723 (2019) (Thomas, J., concurring). The author of the majority opinion in this case has not. The majority's claim to adhere to this principle of stare decisis is disingenuous, and it should be transparent about changing the doctrine so dramatically. This case marks the "death of statutory stare decisis" in Wisconsin. The fact that the majority disputes the upshot of its decision only serves to prove it. See majority op., ¶47 n.13. The purpose of stare decisis is to protect the rule of law. Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). By refusing to apply its own purported principle, while distorting it sub silentio, the majority perverts the rule of law.

¶60 Going forward, whether decisions that interpreted statutes receive extra stare decisis protection will depend solely on the will of four and the extent to which respecting or discarding the doctrine favors their preferred outcome. The majority may revive statutory stare decisis whenever the four find it convenient. Such manipulations of the doctrine will only prove what a "result-oriented expedient" today's decision is. Lawrence v. Texas, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting).

¶61 Opinions that are "objectively wrong," Pagoudis v. Keidl, 2023 WI 27, ¶88, 406 Wis. 2d 542, 988 N.W.2d 606 (Rebecca Grassl Bradley, J., concurring in part, dissenting in part) (citing Manitowoc Co., 379 Wis. 2d 189, ¶81 n.5 (Rebecca Grassl Bradley, J., concurring)), or "'demonstrably'" or "irrefutably" erroneous, St. Augustine Sch. v. Taylor, 2021 WI 70, ¶125, 398

Wis. 2d 92, 961 N.W.2d 635 (Rebecca Grassl Bradley, J., dissenting) (quoting Gamble, 587 U.S. at 711 (Thomas, J., concurring)), are unsound in principle and may be overruled. Koschkee v. Taylor, 2019 WI 76, ¶8 n.5, 387 Wis. 2d 552, 929 N.W.2d 600; State v. Reyes Fuerte, 2017 WI 104, ¶18, 378 Wis. 2d 504, 904 N.W.2d 773. But when a prior decision interpreted the law "within the range of permissible interpretations," the decision should generally stand. Gamble, 587 U.S. at 721 (Thomas, J., concurring); see St. Augustine Sch., 398 Wis. 2d 92, ¶¶124-25 (Rebecca Grassl Bradley, J., dissenting). The majority in this case must show more than it has been able to muster to justify overturning Teigen. Discarding a decision requires something more than saying the court was merely "mistaken" or the current majority sees the statute differently. Wenke v. Gehl Co., 2004 WI 103, ¶21, 274 Wis. 2d 220, 682 N.W.2d 405; see Progressive N. Ins. Co., 281 Wis. 2d 300, ¶¶50-51; Kimble, 576 U.S. at 455. A "garden-variety . . . disagreement does not suffice to overrule" a prior decision. Ramos, 590 U.S. at 121-22 (Kavanaugh, J., concurring in part). As one member of the current majority once put it, "The outcome of a case should not turn on whether the current members of the court find one legal argument more persuasive but, rather, on whether today's majority has come forward with the type of extraordinary showing that this court has historically demanded before overruling one of its precedents." State v. Roberson, 2019 WI 102, ¶97, 389 Wis. 2d 190, 935 N.W.2d 813 (Dallet, J., dissenting) (cleaned up) (quoting State

v. Lynch, 2016 WI 66, ¶101, 371 Wis. 2d 1, 885 N.W.2d 89 (Abrahamson & Ann Walsh Bradley, JJ., concurring in part, dissenting in part)). Having become an inconvenient obstacle to their agenda, the members of the new majority abandon yet another principle they once espoused.³

II

¶62 Teigen provided the best (or "fairest," Teigen, 403 Wis. 2d 607, ¶62) interpretation of Wis. Stat. § 6.87(4)(b)1., and the new majority fails to demonstrate its alternative interpretation is superior. It may prefer a different construction than Teigen's, but stare decisis commands the new majority nevertheless "acknowledge it as valid precedent" "despite [its] disagreement" with the decision. Lindell, 245 Wis. 2d 689, ¶145 (Ann Walsh Bradley, J., concurring).

¶63 The majority's principal argument against Teigen focuses on the heading introducing the discussion of Wis. Stat.

³ This court has overruled prior opinions with alarming frequency this term. Of the fourteen opinions this court released resolving the merits, three (including this one) overruled at least one prior opinion of this court. Clarke v. Wis. Elections Comm'n, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370 (overruling Johnson v. Wisconsin Elections Commission, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469, Johnson v. Wisconsin Elections Commission, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402, and Johnson v. Wisconsin Elections Commission, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559); Waukesha Cnty. v. M.A.C., 2024 WI ___, ___ Wis. 2d ___, ___ N.W.2d ___ (overruling Waukesha County v. S.L.L., 2019 WI 66, 387 Wis. 2d 333, 929 N.W.2d 140). That is, twenty-one percent of the opinions issued by this court this term overruled a prior decision. Last term, this court issued forty-four opinions resolving the merits, only one of which overruled a prior opinion of this court. In other words, only two percent of opinions last term overruled a prior opinion.

§ 6.84: "Legislative Policy Directs Us to Take a Skeptical View of Absentee Voting." Majority op., ¶41. Teigen must be overruled, the majority rationalizes, because taking a "'skeptical' view" of absentee voting, as directed by § 6.84, "permeated the entirety of the Teigen majority's analysis," rendering the decision somehow unsound in principle. Id., ¶¶41, 43; see also id., ¶46. That's a stretch. The word "skeptical" appears once in the entire opinion—in a header no less—and the term is merely shorthand for the legislative policy statement in § 6.84(1). Teigen mentions § 6.84 only twice in its analysis of the legality of drop boxes, and only as additional support for the analysis. Section 6.84 was in no sense "[e]ssential" for the court's conclusions. Id., ¶46. If the legislative policy statement did not exist, the court would have decided Teigen the exact same way.⁴

¶64 A second and more fatal blow to the majority's attempted take-down of Teigen is the majority's misunderstanding of Wis. Stat. § 6.84's role in statutory interpretation. Section 6.84(1) provides a statement of legislative policy for absentee voting:

LEGISLATIVE POLICY. The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast,

⁴ Although the majority opinion in this case rehashes the arguments made by the dissent in Teigen—sometimes nearly word for word—the dissent in Teigen made no mention of the majority's invocation of Wis. Stat. § 6.84 in its analysis of the legality of drop boxes. If Teigen's use of § 6.84 permeated every aspect of the decision, rendering it unsound in principle, it is curious the dissenters noticed only now. Notably, the author of today's decision authored the dissent in Teigen too.

voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

(Emphasis added.) While statutory policy statements cannot be used to contravene a statute's clear import, they may be used to inform the meaning of a statute's text. Milwaukee Dist. Council 48 v. Milwaukee Cnty., 2019 WI 24, ¶21, 385 Wis. 2d 748, 924 N.W.2d 153; Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 217 (2012) ("A preamble, purpose clause, or recital is a permissible indicator of meaning."). That is exactly how Teigen utilized § 6.84(1). Interpretations directly contradicting § 6.84(1)'s statement that "voting by absentee ballot must be carefully regulated" are less favored than plausible interpretations of the statute in harmony with the statement.

¶65 The majority's assertion that Wis. Stat. § 6.84 cannot provide any interpretive insight because it does not specifically direct the court to apply a liberal or strict construction is baseless. See majority op., ¶32 (calling § 6.84(1) "merely a declaration of legislative policy" that does not "provide[] any rule of interpretation applying to the statutes that follow"). The majority cites nothing to support this newly created rule, which contradicts the very same majority's decision in Catholic Charities Bureau, Inc. v. LIRC,

authored just months ago by the same author of the majority opinion in this case. 2024 WI 13, ¶¶27-29, 411 Wis. 2d 1, 3 N.W.2d 666 (interpreting a tax exemption strictly because of a statutory public policy statement, found in Wis. Stat. § 108.01, that itself does not explicitly direct that the statutes should be strictly or liberally construed). In short, Teigen's reference to § 6.84 supplies no legitimate basis for overruling a recent decision of this court.⁵

III

¶66 Aside from mischaracterizing Teigen in order to deem it "unsound in principle," the majority fails to put a dent in Teigen's interpretation of the statute. Wisconsin Stat. § 6.87(4)(b)1. requires an absentee ballot to be returned to the municipal clerk one of two ways: "The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Teigen held the statute does not allow offsite, unattended drop boxes. Wisconsin Stat. § 5.02(10) defines "municipal clerk" as "the city clerk, town clerk, village clerk and the executive director of the city election commission and their authorized representatives. Where

⁵ To bolster its argument, the majority suggests Teigen has caused "confusion" in the lower courts. Majority op., ¶45 n.12. This court recently accepted a petition for bypass in one of the circuit court decisions the majority critiques. Brown v. Wis. Elections Comm'n, No. 2024AP232, unpublished order (Wis. May 3, 2024) (granting the petition for bypass). The majority's criticism of the circuit court's decision is unnecessary. More importantly, it is generally inappropriate to cast aspersions on lower court decisions this court has only just agreed to review. It is also inappropriate to hide behind a party while doing so. See majority op., ¶45 n.12.

applicable, 'municipal clerk' also includes the clerk of a school district." Interpreting the clear text, Teigen recognized § 6.87(4)(b)1. requires an absentee voter to either send the absentee ballot by mail or "deliver[]" the ballot "to the municipal clerk"—a person, not an inanimate object—"in person." Teigen, 403 Wis. 2d 607, ¶55. To "deliver[]" something "to" another person, "in person," requires a person-to-person exchange. Id. That is what the statute means, and what it has always been understood to mean. Id., ¶175 (Hagedorn, J., concurring) (quoting 5 Wis. Op. Att'y Gen. 591, 593 (1916)) ("Less than a year after enactment [of the precursor to § 6.87(4)(b)1.], the attorney general opined on the precise interpretive question before us today: '"Delivery in person" must mean handed directly by an elector to the officer; it means manual transmission by the one to the other.'"); see also Sommerfeld v. Bd. of Canvassers of the City of St. Francis, 269 Wis. 299, 69 N.W.2d 235 (1955) (taking for granted the law was violated when voters returned absentee ballots through third parties). Requiring person-to-person transmission of the ballot under § 6.87(4)(b)1. obviously precludes the use of unattended drop boxes.

¶67 As Teigen also observed, other statutes contemplate only two locations at which a voter may deliver an absentee ballot in person: At the municipal clerk's office or at a designated "alternate site" under Wis. Stat. § 6.855.

The governing body of a municipality may elect to designate a site other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality

may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. The designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners and no site may be designated that affords an advantage to any political party. An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15 (1) (cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15 (1) (cm), if a primary is not scheduled to be held, and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.

§ 6.855(1) (emphasis added). As Teigen explained, § 6.855 "identifies the sites at which in person absentee voting may be accomplished—either 'the office of the municipal clerk' or 'an alternate site' but not both. 'An alternate site' serves as a replacement for 'the office of the municipal clerk' rather than an additional site for absentee voting." Teigen, 403 Wis. 2d 607, ¶59. Alternate sites are also carefully regulated by the legislature. They must be "located as near as practicable to the office of the municipal clerk or board of election commissioners and no site may be designated that affords an advantage to any political party." § 6.855(1). Given this detailed statutory language, § 6.855 does not contemplate in person absentee voting at a location other than the office of the municipal clerk or an alternate site, and the

explicit rules for alternate sites leave no reasonable room for in person absentee voting at any other locations.

¶68 This conclusion is reinforced by Wis. Stat. § 5.81(3), which like Wis. Stat. § 6.855(1), confirms that in person absentee voting will occur "in person in the office of the municipal clerk."

If a municipality utilizes an electronic voting system in which ballots distributed to electors are employed, absentee ballots may consist of ballots utilized with the system or paper ballots and envelopes voted in person in the office of the municipal clerk or voted by mail.

§ 5.81(3) (emphasis added). "The legislature did not contemplate absentee ballots 'consist[ing]' of ballots cast via a drop box." Teigen, 403 Wis. 2d 607, ¶60 (alteration in original). The legislature's policy choices, enacted in §§ 6.855(1) and 5.81(3), prescribe only two locations where in person absentee ballots can be delivered—the office of the municipal clerk or a designated alternate site.

¶69 The Legislature, as intervenor-respondent, points to another statute that lends support for Teigen's interpretation. Wisconsin Stat. § 7.41(1) provides members of the public the right to observe in person absentee voting:

Any member of the public may be present at any polling place, in the office of any municipal clerk whose office is located in a public building on any day that absentee ballots may be cast in that office, or at an alternate site under s. 6.855 on any day that absentee ballots may be cast at that site for the purpose of observation of an election and the absentee ballot voting process, except a candidate whose name appears on the ballot at the polling place or on an absentee ballot to be cast at the clerk's office or alternate site at that election. The chief inspector or

municipal clerk may reasonably limit the number of persons representing the same organization who are permitted to observe under this subsection at the same time. Each person permitted to observe under this subsection shall print his or her name in and sign and date a log maintained by the chief inspector or municipal clerk for that polling place, office, or alternate site.

Like Wis. Stat. § 6.855(1), § 7.41(1) contemplates that absentee voters may deliver their ballots only at the office of the municipal clerk or an alternate site. The statutes simply do not envision in person delivery of absentee ballots at any other locations. The majority offers no response to the Legislature's argument.

¶70 Providing even further textual support, Justice Hagedorn's concurrence in Teigen highlighted Wis. Stat. § 6.88,⁶

⁶ Wisconsin Stat. § 6.88(1) and (2):

(1) When an absentee ballot arrives at the office of the municipal clerk, or at an alternate site under s. 6.855, if applicable, the clerk shall enclose it, unopened, in a carrier envelope which shall be securely sealed and endorsed with the name and official title of the clerk, and the words "This envelope contains the ballot of an absent elector and must be opened in the same room where votes are being cast at the polls during polling hours on election day or, in municipalities where absentee ballots are canvassed under s. 7.52, stats., at a meeting of the municipal board of absentee ballot canvassers under s. 7.52, stats." If the elector is a military elector, as defined in s. 6.34 (1), or an overseas elector, regardless of whether the elector qualifies as a resident of this state under s. 6.10, and the ballot was received by the elector by facsimile transmission or electronic mail and is accompanied by a separate certificate, the clerk shall enclose the ballot in a certificate envelope and securely append the completed certificate to the outside of the envelope before enclosing the ballot in the carrier envelope. The clerk shall keep the ballot in the clerk's office or at the alternate site, if applicable until delivered,

which "prescribes what happens after an absentee ballot is received by the clerk." Teigen, 403 Wis. 2d 607, ¶180 (Hagedorn, J., concurring). As Justice Hagedorn observed, § 6.88(1) "ensures a strict chain of custody for ballots" once delivered and § 6.88(2) "provides detailed instructions regarding the secure transfer of ballots from clerks to the proper election officials, ensuring there is no opportunity to tamper with the ballots." Id. "Given the detailed ballot custody regulations once the ballot arrives at the clerk's office or an alternate site, legislative silence with respect to ballots delivered anywhere else strongly indicates delivery is not permitted anywhere else." Id. (citing Alberte v. Anew Health Care Servs., Inc., 2000 WI 7, ¶17, 232 Wis. 2d 587, 605 N.W.2d 515).

as required in sub. (2).

(2) When an absentee ballot is received by the municipal clerk prior to the delivery of the official ballots to the election officials of the ward in which the elector resides or, where absentee ballots are canvassed under s. 7.52, to the municipal board of absentee ballot canvassers, the municipal clerk shall seal the ballot envelope in the carrier envelope as provided under sub. (1), and shall enclose the envelope in a package and deliver the package to the election inspectors of the proper ward or election district or, in municipalities where absentee ballots are canvassed under s. 7.52, to the municipal board of absentee ballot canvassers when it convenes under s. 7.52 (1). When the official ballots for the ward or election district have been delivered to the election inspectors before the receipt of an absentee ballot, the clerk shall immediately enclose the envelope containing the absentee ballot in a carrier envelope as provided under sub. (1) and deliver it in person to the proper election officials.

¶71 The majority in this case builds a straw man to attack Teigen. It insists Teigen conflated the phrases "to the municipal clerk" and "to the municipal clerk's office." See majority op., ¶20. Teigen did no such thing. That case held Wis. Stat. § 6.87(4)(b)1. is best read as requiring a person-to-person exchange of an absentee ballot between the voter and the municipal clerk. The court explained how Wis. Stat. §§ 6.855(1) and 5.81(3) restrict delivery of absentee ballots in person to the municipal clerk's office or a designated alternate site. Teigen never conflated the municipal clerk and the clerk's office.

¶72 The majority dismisses the relevance of Wis. Stat. § 6.855(1)—and simply ignores Wis. Stat. §§ 5.81(3), 7.41(1), and 6.88(1) and (2)—without ever grappling with the actual statutory text: In person delivery of a ballot can occur only at the municipal clerk's office or a designated alternate site. The majority's argument that the detailed and restrictive statute for the use of alternate sites says nothing about drop boxes because "drop boxes are already allowed" under Wis. Stat. § 6.87(4)(b)1. merely assumes the majority's conclusion rather than proves it. Id., ¶30. Given the detailed restrictions in § 6.855 on the use of alternate sites, the most plausible reading of the statute would preclude unmentioned methods of delivering absentee ballots; otherwise, there would be no reason whatsoever for the legislature to enact textual restrictions. The majority provides no rebuttal to this point.

¶73 The majority's reading of Wis. Stat. § 6.87(4)(b)1. is not impossible, just implausible, which is why a court committed to declaring the law rejected it and preserved the statute's historical meaning. For a more exhaustive exposition of the law, see Teigen, 403 Wis. 2d 607, ¶¶52-63. For a clearer glimpse of the policy preferences motivating the majority to rewrite the law more to its liking, see Justice Ann Walsh Bradley's dissent in Teigen, in which

Justice Ann Walsh Bradley accuses the court of "erect[ing] yet another barrier for voters[.]" [B]ut to the extent any "barriers" to voting exist, they are of the legislature's making. Establishing rules governing the casting of ballots outside of election day rests solely within the power of the people's representatives because such regulations affect only the privilege of absentee voting and not the right to vote itself. Justice Ann Walsh Bradley says "[a] ballot drop box is a simple and perfectly legal solution to make voting easier[.]" While they might be a simple solution, the decision to devise solutions to make voting easier belongs to the legislature, not [the Wisconsin Elections Commission] and certainly not the judiciary. While the dissenters would permit ballot drop boxes, the court must respect the constitutional restraints on our power and refuse to act as a super-legislature. It poses a grave threat to democracy to mislead the people into believing we are one.

Id., ¶52 n.25 (some alterations in original) (internal citations omitted).

¶74 Despite the deceptively narrow framing of the majority's opinion, this case is not just about drop boxes. The majority offers no limiting principle for its interpretation of Wis. Stat. § 6.87(4)(b)1. The endeavor would fail because the majority's reading of the statute is boundless by design. The

majority dismantles the carefully regulated privilege of absentee voting in order to legitimize any method of getting absentee ballots to a municipal clerk that the clerk may choose. "[T]he statute does not specify a location to which a ballot must be returned and requires only that the ballot be delivered to a location the municipal clerk, within his or her discretion, designates." Majority op., ¶26. An unattended cardboard box on the clerk's driveway? An unsecured sack sitting outside the local library or on a college campus? Door-to-door retrieval from voters' homes or dorm rooms? Under the majority's logic, because the statute doesn't expressly forbid such methods of ballot delivery, they are perfectly lawful. This case is limited to the use of drop boxes "only if one entertains the belief that principle and logic have nothing to do with the decisions of this [c]ourt." Lawrence, 539 U.S. at 605 (Scalia, J., dissenting). While true of the majority's decision in this case, that's not how courts of law operate.

¶75 The majority's reading of Wis. Stat. § 6.87(4)(b)1. allows municipal clerks to create "monumentally different voting mechanism[s] not specified by the legislature." Teigen, 403 Wis. 2d 607, ¶63 (citing EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 528 (2014) (Scalia, J., dissenting)). The majority would have us believe that buried within four innocuous words, "to the municipal clerk," is a delegation of vast power to municipal clerks to create an absentee voting regime unlike anything resembling the law. That is not how any reasonable reader—much less a judge—reads statutes. Legislatures do not

"hide elephants in mouseholes," Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); that is, a reasonable reader assumes "the legislature 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions[.]'" Teigen, 403 Wis. 2d 607, ¶63 (alteration in original) (quoting Whitman, 531 U.S. at 468). The majority makes the municipal clerk the law giver.⁷ Having constitutionally vested the legislative power in the legislature alone, the People never authorized this court to give the lawmaking power to anyone else.

IV

¶76 Nothing relevant has changed since this court decided Teigen two years ago. There have been no intervening changes in the facts or law to warrant overruling the decision. See Johnson, 407 Wis. 2d 195, ¶20. Nor has any evidence emerged demonstrating the decision is detrimental to the coherence of the law or unworkable in practice. Id. The policy-laden arguments against this court's decision in Teigen have not changed either; the majority in this case has simply recycled the dissent in Teigen, rebranding it the opinion of a court. Compare majority op., ¶¶20-23, with Teigen, 403 Wis. 2d 607, ¶¶219-23 (Ann Walsh Bradley, J., dissenting), and majority op.,

⁷ See Teigen, 403 Wis. 2d 607, ¶58 ("Existing outside the statutory parameters for voting, drop boxes are a novel creation of executive branch officials, not the legislature. The legislature enacted a detailed statutory construct for alternate sites. In contrast, the details of the drop box scheme are found nowhere in the statutes, but only in memos prepared by WEC staff, who did not cite any statutes whatsoever to support their invention.").

¶¶29-30, with Teigen, 403 Wis. 2d 607, ¶¶227-29 (Ann Walsh Bradley, J., dissenting). It does not deserve the title.

¶77 The only thing that has changed since Teigen is the court's membership. Cf. Clarke, 410 Wis. 2d 1, ¶¶258-61 (Rebecca Grassl Bradley, J., dissenting). As Justice Ann Walsh Bradley put it in a different case, "There has been no change in the relevant statutes, no change in the constitution, and no change in the underlying principles. Nonetheless, the majority substitutes its will over its obligation to stare decisis." Lindell, 245 Wis. 2d 689, ¶148 (Ann Walsh Bradley, J., concurring).

¶78 Judicial elections do not change the law. See Clarke, 410 Wis. 2d 1, ¶¶258, 262 (Rebecca Grassl Bradley, J., dissenting); Garner, supra, 415-16. This court has made clear a change in the membership of this court is an illegitimate basis for reconsidering a prior decision—and at least two members of the majority have emphatically reiterated that point in their earlier writings,⁸ only to forsake the principle with alacrity.

⁸ St. Croix Cnty. Dep't of Health & Hum. Servs. v. Michael D., 2016 WI 35, ¶93, 368 Wis. 2d 170, 880 N.W.2d 107 (Abrahamson & Ann Walsh Bradley, JJ., dissenting); State v. Lynch, 2016 WI 66, ¶102, 371 Wis. 2d 1, 885 N.W.2d 89 (Abrahamson & Ann Walsh Bradley, JJ., concurring in part, dissenting in part); Koschkee v. Taylor, 2019 WI 76, ¶¶62, 70, 387 Wis. 2d 552, 929 N.W.2d 600 (Ann Walsh Bradley, J., dissenting) (joined by Dallet, J.); State v. Lindell, 2001 WI 108, ¶146, 245 Wis. 2d 689, 629 N.W.2d 223 (Ann Walsh Bradley, J., concurring); Mayo v. Wis. Injured Patients & Fams. Comp. Fund, 2018 WI 78, ¶110, 383 Wis. 2d 1, 914 N.W.2d 678 (Ann Walsh Bradley, J., dissenting); State v. Roberson, 2019 WI 102, ¶98, 389 Wis. 2d 190, 935 N.W.2d 813 (Dallet, J., dissenting) (joined by Ann Walsh Bradley, J.).

The justices forming the majority make no attempt to reconcile their prior writings with today's opinion. "[P]rinciples adopted when convenient, and ignored when inconvenient, are not principles at all. It is precisely when one's principles are tested and costly—yet are kept nonetheless—that they prove themselves truly held." Clarke, 410 Wis. 2d 1, ¶268 (Hagedorn, J., dissenting).

V

¶79 "[T]he Judge should never be the Legislator: Because, then the Will of the Judge would be the Law[.]" Rogers v. Tennessee, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) (internal quotation marks omitted) (quoting 1 M. Horwitz, Transformation of American Law 1780-1860, at 5 (1977)). The members of the majority in this case make their will the law, according four lawyers on the state's highest court the unchecked power to say what the law shall be, rather than what it is. The author of today's decree once deemed this court's analysis of the law as "downright dangerous to our democracy," Teigen, 403 Wis. 2d 607, ¶246 (Ann Walsh Bradley, J., dissenting), but the real danger lies in the new majority's arrogation of power the People never gave it. "[L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments." The Federalist No. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

¶80 Intense partisan politics saturate our nation, exacerbated by a lack of institutional trust. The legitimacy of

elections continues to be questioned, each side accusing the other of "election interference" and "threatening democracy" or even the very foundation of our constitutional republic. The majority's decision in this case will only fuel the fires of suspicion.

¶81 Whatever can be said of the majority's decision, it "is not the product of neutral, principled judging." Clarke, 410 Wis. 2d 1, ¶265 (Hagedorn, J., dissenting). Although the majority attempts to package its disagreements with Teigen as legal, the truth is obvious: The majority disagrees with the decision as a matter of policy and politics, not law. The members of the majority believe using drop boxes is good policy, and one they hope will aid their preferred political party. Teigen upheld the historical meaning of Wis. Stat. § 6.87(4)(b)1., which bars the use of offsite, unmanned drop boxes. The majority in this case overrules Teigen not because it is legally erroneous, but because the majority finds it politically inconvenient. The majority's activism marks another triumph of political power over legal principle in this court. I dissent.

¶82 I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER and Justice BRIAN HAGEDORN join this dissent.

IN THE SUPREME COURT OF WISCONSIN

APPEAL NO: 2024AP000330

PLANNED PARENTHOOD OF WISCONSIN, on behalf of itself, its employees, and its patients, KATHY KING, M.D., ALLISON LINTON, M.D., M.P.H., on behalf of themselves and their patients, MARIA L., JENNIFER S., LESLIE K., and ANAIS L.,
Petitioners,

v.

JOEL URMANSKI, in his official capacity as District Attorney for Sheboygan County, Wisconsin, ISMAEL R. OZANNE, in his official capacity as District Attorney for Dane County, Wisconsin and JOHN T. CHISHOLM, in his official capacity as District Attorney for Milwaukee County, Wisconsin,
Respondents.

On Petition For Original Action Before This Court

**RESPONDENT JOEL URMANSKI'S RESPONSE IN OPPOSITION TO
PETITION FOR AN ORIGINAL ACTION**

Andrew T. Phillips, SBN 1022232
Matthew J. Thome, SBN 1113463
Attolles Law, s.c.
222 E. Erie St., Ste. 210
Milwaukee, WI 53202
Telephone: (414) 285-0825
aphillips@attolles.com
mthome@attolles.com

Counsel for Respondent Joel Urmanski

TABLE OF CONTENTS

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES 3

INTRODUCTION 6

STATEMENT OF THE CASE..... 8

I. Legal and Factual Background..... 8

II. The *Kaul v. Urmanski* Litigation..... 9

III. Procedural Background 11

ARGUMENT 11

I. No Exigency Requires that this Court Decide Petitioners’ Claims in the First Instance..... 12

II. It Is Unclear Whether Petitioners’ Claims May Result in Factual Disputes 15

III. Petitioners’ Claims Fail on the Merits 16

 A. Counts I and II May Not Present Justiciable Controversies..... 17

 B. Count I of the Petition Lacks Merit..... 18

 C. Count II of the Petition Lacks Merit 22

 D. Count III of the Petition Lacks Merit 23

 E. Count IV of the Petition Lacks Merit..... 23

IV. If the Court Takes Original Jurisdiction, It Should Consider Petitioners’ Claims Only If *Kaul* Is Decided in Urmanski’s Favor..... 24

V. If the Court Takes Original Jurisdiction, Urmanski Should Be Allowed the Opportunity to Submit a Responsive Pleading and Affidavits Prior to Merits Briefing..... 27

CONCLUSION..... 28

CERTIFICATION 30

TABLE OF AUTHORITIES

Cases

Adams Outdoor Advertising, Ltd. v. City of Madison, 2006 WI 104, 294 Wis. 2d 441, 717 N.W.2d 803..... 26

Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund, 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849. 17, 18

Bd. of Regents of State College v. Roth, 408 U.S. 564 (1972)..... 24

Boden v. Milwaukee, 8 Wis. 2d 318, 99 N.W.2d 156 (1959) 19

Chicago & N.W. Ry. Co. v. La Follette, 43 Wis. 2d 631, 169 N.W.2d 441 (1969) 18

County of Kenosha v. C&S Management, Inc., 223 Wis. 2d 373, 588 N.W.2d 236 (1999)..... 6, 18

Dobbs v. Jackson Women’s Health Org., 597 U.S. 215 (2022) passim

Gabler v. Crime Victim Rts. Bd., 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384 26

Gainesville Woman Care v. State, 210 So. 1243 (Fla. 2017) 21

Goulding v. Feinglass, 811 F.2d 1099 (7th Cir. 1987) 24

Green for Wis. v. State Elections Bd., 2006 WI 120, 297 Wis. 2d 300, 723 N.W.2d 418 15

Haase v. Sawicki, 20 Wis. 2d 308, 121 N.W.2d 876 (1963) 19

In re Crawford, 194 F.3d 954 (9th Cir. 1999) 24

Jacobs v. Major, 139 Wis. 2d 492, 407 N.W.2d 832 (1987)..... 6

June Med. Servs. LLC v. Russo, 591 U.S. 299 (2020)..... 18

Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis. 2d 1, 914 N.W.2d 678 18, 19

Members of the Medical Licensing Bd. of Ind. v. Planned Parenthood Great Northwest, Hawai’i, Alaska, Indiana, Kentucky, Inc., 211 N.E.3d 957 (Ind. 2023)..... 21

Olson v. Town of Cottage Grove, 2008 WI 51, 309 Wis.2d 365, 749 N.W.2d 211..... 17

Petition of Heil, 230 Wis. 428, 284 N.W.2d 42 (1939) 12, 13, 16, 17

Planned Parenthood Arizona, Inc. v. Mayes, --- P.3d ----, No. CV-23-0005-PR, 2024 WL 1517392 (Ariz. April 9, 2024)..... 25

Planned Parenthood Great Northwest v. Idaho, 522 P.3d 1132 (2023) 21, 22

Planned Parenthood of Southwest and Central Florida v. State, --- So. 3d ----,
Nos. SC2022-1050, SC2022-1127, 2024 WL 1363525 (Fla. April 1, 2024)..... 21

Porter v. State, 2018 WI 79, 382 Wis.2d 697, 913 N.W.2d 842 24

Putnam v. Time Warner Cable of Southeastern Wisconsin, Ltd. Partnership, 2002
WI 108, 255 Wis. 2d 447, 649 N.W.2d 626 17

Raidoo v. Moylan, 75 F.4th 1115 (9th Cir. 2023)..... 23

Roe v. Wade, 410 U.S. 113 (1973)..... passim

State v. Black, 188 Wis. 2d 639, 526 N.W.2d 132 (1994)..... 8, 10

State ex rel. Bolens v. Frear: The Income Tax Cases, 148 Wis. 456, 134 N.W. 673
(1912)..... 16

State v. Cissell, 127 Wis. 2d 205, 378 N.W.2d 691 (1985) 22, 23

State v. Heft, 185 Wis. 2d 288, 517 N.W.2d 494 (1994) 22

State v. Horn, 126 Wis. 2d 447, 377 N.W.2d 176 (Ct. App. 1985)..... 18

State v. Mac Gresens, 40 Wis. 2d 179, 161 N.W.2d 245 (1968)..... 8

State v. Oakley, 2001 WI 103, 245 Wis.2d 447, 629 N.W.2d 200 20

State ex rel. Ozanne v. Fitzgerald, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436.
..... 7, 16

State v. Roberson, 2019 WI 102, 389 Wis. 2d 190, 935 N.W.2d 813 6, 22

State v. Scott, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141 26

State v. Smith, 2010 WI 16, 323 Wis. 2d 377, 780 N.W.2d 90 22, 23

State ex rel. Sonneborn v. Sylvester, 26 Wis. 2d 43, 132 N.W.2d 249 (1965)..... 19

*State ex rel. State Central Committee of Progressive Party v. Bd. of Election
Commissioners of Milwaukee*, 240 Wis. 204, 3 N.W.2d 123 (1942)..... 27

Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection,
560 U.S. 702 (2010) 24

Wisconsin Justice Initiative, Inc. v. WEC, 2023 WI 38, 407 Wis. 2d 87, 990
N.W.2d 122..... 19

Zorzi v. Cty. of Putnam, 30 F.3d 885 (7th Cir. 1994) 24

Constitutional Provisions

Wis. Const. art. I, § 1 passim

Wis. Const. art. XIV, § 13. 21

Statutes

Revised Statutes of Wisconsin, ch. 133, § 11 (1849) 8, 20
Revised Statutes of Wisconsin, ch. 164, § 11 (1858) 8, 20
Revised Statutes of Wisconsin, ch. 169, § 58 (1858) 8, 20
Revised Statutes of Wisconsin, ch. 169, § 59 (1858) 8, 20
Wis. Stat. § 340.095 8
Wis. Stat. §351.22 8
Wis. Stat. §351.23 8
Wis. Stat. § 802.02(2) 15
Wis. Stat. § 802.06(1) 28
Wis. Stat. § 809.62(1r)..... 12
Wis. Stat. § 809.70(2) 27
Wis. Stat. § 809.70(3) 27
Wis. Stat. § 940.04 passim

Other Authorities

2011 Wisconsin Act 217, § 11 8
Cooley, Constitutional Limitations (6th ed.) 6
Skylar Reese Croy & Alexander Lemke, An Unnatural Reading: The Revisionist History of Abortion in Hodes v. Schmidt, 32 U. Fla. J. L. & Pub. Pol’y 71, 82 (2021)..... 20

INTRODUCTION

The Petitioners seek to side-step the normal litigation process and exhort this Court to “recognize the state constitutional right to abortion now.” (Pet. 26). In doing so, Petitioners ask this Court to disregard its own precedents interpreting Article I, Section 1 of the Wisconsin Constitution and take for itself power that rightly belongs to the people of Wisconsin and their elected representatives. Whatever one’s policy preferences or personal values, the Wisconsin Constitution, like the U.S. Constitution, “does not take sides on the issue of abortion.” *See Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 337 (2022) (Kavanaugh, J., concurring); *see also County of Kenosha v. C&S Management, Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236, 246 (1999) (“On more than a few occasions we have expressly held that the due process and equal protection clauses of our state constitution and the United States Constitution are essentially the same[.]”). Simply put, the Petitioners are asking this Court to exercise a power it does not have: rewriting our Constitution to create a right that is not supported by the text or historical meaning of that document. *State v. Roberson*, 2019 WI 102, ¶56, 389 Wis. 2d 190, 935 N.W.2d 813 (“A state court does not have the power to write into its state constitution additional protection that is not supported by its text or historical meaning.”).

It is precisely in a moment like this—when confronting a political and moral issue that inspires deep and intractable passions on both sides of a hyper-partisan political divide—that this Court should demonstrate judicial humility and independence by refusing to “bend the Constitution to suit the law of the hour.” Cooley, *Constitutional Limitations*, 86-87 n.2 (6th ed.) (quoting *Greencastle Twp. v. Black*, 5 Ind. 557, 565 (1854)). For this Court to do otherwise, and to grant the Petitioners the relief they seek, would be ill-advised. *Jacobs v. Major*, 139 Wis. 2d 492, 512, 407 N.W.2d 832 (1987) (“Courts would be ill-advised to rewrite history and plain, clear constitutional language to create some new rights contrary to history.”). And it would set this Court on an uncharted path that could result in any

number of unforeseen impacts on this Court’s jurisprudence. *Dobbs*, 597 U.S. at 286 (“*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions.”).

This Court certainly should not embark on this unprecedented course by abandoning the normal litigation process and taking the extraordinary step of exercising its original jurisdiction in an original action. Urmanski has been clear that he believes the applicability of Wis. Stat. § 940.04 to abortion presents a question of significant public importance that should be decided as soon as possible. This is one reason why Urmanski petitioned for bypass of the court of appeals in *Kaul v. Urmanski*, No. 23AP2362—to allow this Court to consider and resolve the questions presented in that case expeditiously. Nevertheless, there is a difference between Urmanski’s request that this Court expedite its exercise of its primary function as an appellate court of last resort in the direct appeal in *Kaul* and Petitioners’ request that this Court exercise its “extraordinary power” to “take an original action.” *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶147, 334 Wis. 2d 70, 798 N.W.2d 436 (N. Patrick Crooks, J., concurring in part and dissenting in part).

Urmanski does not dispute that the issues presented by Petitioners may merit this Court’s review at the appropriate time and in the appropriate context. But, “[t]here is a right way to address these issues and a wrong way.” *State ex rel. Ozanne*, 2011 WI 43 at ¶152 (N. Patrick Crooks, J., concurring in part and dissenting in part). For the reasons set forth below, Urmanski respectfully submits that the Petition does not satisfy this Court’s criteria for exercising original jurisdiction over a petition for an original action. Because rules and procedures should matter, and because Petitioners’ claims should fail on the merits anyway, the petition for an original action should be denied.

STATEMENT OF THE CASE

I. Legal and Factual Background

Wisconsin enacted its first prohibition on abortion in 1849. *See* Revised Statutes of Wisconsin, ch. 133, § 11 (1849). It provided: “[e]very person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.” In 1858, the Legislature removed the requirement the unborn child be “quick.” Revised Statutes of Wisconsin, ch. 164, § 11 (1858). The Legislature also enacted related provisions with lesser penalties (1) prohibiting persons from attempting to assist a pregnant woman to “procure a miscarriage” and (2) prohibiting a woman from attempting to procure her own miscarriage. *Id.* at ch. 169, §§ 58, 59.

Wisconsin’s abortion laws remained relatively unchanged, except for modifications to their penalties, until the 1950s when the Legislature revised the criminal code. *See generally State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994) (Appendix to Dissent); Wis. Stat. §§ 340.095, 351.22, and 351.23 (1947 versions). Section 940.04 was created as part of this revision. Prior to the U.S. Supreme Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1973), which made statutes like § 940.04(1) unenforceable, district attorneys enforced this statute and obtained convictions under it. *See, e.g., State v. Mac Gresens*, 40 Wis. 2d 179, 161 N.W.2d 245 (1968) (upholding conviction for the crime of committing an abortion in violation of § 940.04(1)).

After *Roe*, the Legislature enacted various statutes that regulate abortion within the constitutional constraints *Roe* and its progeny imposed. But, the Legislature never expressly repealed § 940.04(1)’s abortion ban—even as it repealed other parts of § 940.04. *See* 2011 Wisconsin Act 217, § 11 (repealing §

940.04(3) and (4)). The U.S. Supreme Court has now overturned *Roe* and “return[ed] the issue of abortion to the people’s elected representatives.” *Dobbs*, 597 U.S. at 232. Thus, *Roe* and its progeny no longer preclude Wisconsin’s district attorneys from exercising their own discretion in determining whether to prosecute violations of § 940.04(1).

II. The *Kaul v. Urmanski* Litigation¹

After *Dobbs*, the Attorney General, as well as other state officials and agencies (collectively, the “State Agencies”), initiated a lawsuit that, in its amended form, names Urmanski and the district attorneys of Milwaukee County and Dane County as defendants. The State Agencies sought a declaratory judgment that § 940.04 is unenforceable as applied to abortions based on arguments that § 940.04 had been superseded by subsequent laws or, alternatively, was unenforceable as to abortions due to disuse. Thereafter, various doctors were allowed to intervene (the “Doctor-Intervenors”). The Doctor-Intervenors also sought a declaratory judgment that § 940.04 is unenforceable as applied to abortions, as well as a permanent injunction against the application of § 940.04 to abortions. Like the State Agencies, they claimed § 940.04 had been superseded by subsequent legislation. They also claimed § 940.04 was unenforceable because it is premised on arcane language, belies modern medicine, and contains impossible requirements.

Urmanski moved to dismiss. Urmanski argued dismissal was warranted because (1) § 940.04 (and § 940.04(1), (5), and (6) in particular) applies to and prohibits performing consensual abortions from conception until birth, subject to the exception in § 940.04(5) for abortions to save the life of the mother; (2) this prohibition has not been impliedly repealed or superseded; (3) this prohibition is not unconstitutionally vague on its face and compliance is not impossible; and (4) the State Agencies’ allegations of disuse and reliance on *Roe* did not state a claim that

¹ The history in this section is also addressed, with relevant sources, in Urmanski’s Petition to Bypass in *Kaul v. Urmanski*. See Pet. to Bypass of Urmanski, *Kaul v. Urmanski*, No. 23AP2362 (Wis. Feb. 20, 2024).

would make the prohibition unenforceable. The circuit court denied Urmanski's motion to dismiss and ultimately granted judgment against Urmanski. The circuit court, relying on this Court's decision in *State v. Black*, concluded that § 940.04 does not prohibit consensual abortions and is a feticide statute only.

Urmanski subsequently appealed and has filed a petition to bypass with this Court. Urmanski's petition presents several issues relevant to the enforceability of § 940.04, including: (1) whether § 940.04, and § 940.04(1), (5), and (6) specifically, prohibits performing consensual abortions subject to the exception in § 940.04(5); (2) whether, if § 940.04 otherwise would apply to prohibit performing consensual abortions, that prohibition has been impliedly repealed or superseded by subsequent legislation such that it can no longer be applied to consensual abortions; (3) whether, if § 940.04 otherwise would apply to and prohibit performing abortions, that prohibition is unenforceable under the Due Process Clause because it is unconstitutionally vague on its face or compliance is impossible; and (4) whether, if § 940.04 otherwise would apply to and prohibit performing abortions, that prohibition is unenforceable because of alleged disuse and reliance on *Roe v. Wade* and its progeny. Urmanski seeks reversal of the circuit court's decision in *Kaul* and dismissal of the claims against him. Urmanski believes that Wis. Stat. § 940.04(1), properly interpreted, prohibits performing abortions (including consensual abortions) from conception until birth (subject to the exception for therapeutic abortions in § 940.04(5)); that § 940.04 does not conflict with, and was not impliedly repealed by, subsequent statutes; that § 940.04 is not unconstitutionally vague on its face and compliance with § 940.04 is possible; and that § 940.04 remains enforceable.

After Urmanski filed his petition to bypass, the State Agencies and the Doctor-Intervenors in *Kaul* both indicated their intent to argue, as an alternative ground for affirmance, that enforcing Wis. Stat. § 940.04 as an abortion ban would violate rights protected by Article I, Section 1 of the Wisconsin Constitution. See Intervenors-Respondents' Response to Pet. for Bypass, *Kaul v. Urmanski*, No.

23AP2362 (Wis. Feb. 22, 2024); Plaintiffs-Respondents’ Supplemental Petition In Support of Request to Bypass the Court of Appeals, *Kaul v. Urmanski*, No. 23AP2362 (Wis. Feb. 27, 2024). Urmanski has taken no position on the question of whether it would be appropriate for this Court to consider that alternative argument when deciding *Kaul*, but Urmanski has also been clear that such an argument lacks merit and that Urmanski is entitled to reversal in *Kaul*. Defendant-Appellant Joel Urmanski’s Response to Supplemental Petition In Support of Request to Bypass the Court of Appeals, *Kaul v. Urmanski* No. 23AP2362 (Wis. March 12, 2024). It is Urmanski’s position that Article I, Section 1 of the Wisconsin Constitution does not prevent enforcing Wis. Stat. § 940.04 as an abortion ban. *Id.*

III. Procedural Background

This Petition was filed on February 22, 2024, two days after Urmanski petitioned this Court for bypass in *Kaul*. The Petitioners are Planned Parenthood of Wisconsin (“Planned Parenthood”), which provides abortions in Wisconsin, and two of its physicians who provide abortions. The Petitioners also include four women who received abortions between 2008 and 2016, but none of whom are currently pregnant and all of whom are actively taking measures to prevent pregnancy. The Petition names Urmanski as a respondent, as well as the district attorneys for Dane County and Milwaukee County, because Planned Parenthood performs abortions in Sheboygan, Dane, and Milwaukee counties. The Petition raises claims similar to those the State Agencies and Doctor-Intervenors have told the Court they intend to raise as alternative grounds for affirmance in *Kaul*. Specifically, the Petition alleges that enforcing Wis. Stat. § 940.04 as an abortion ban would violate the rights to life, liberty, and equal protection of physicians who perform abortions and those who seek abortions. On April 16, 2024, this Court ordered Urmanski to provide a response by April 26, 2024.

ARGUMENT

Urmanski does not dispute that the question of whether Wis. Stat. § 940.04 can be applied to prohibit abortion in Wisconsin is an important legal question, the

resolution of which will have a statewide impact. To the extent Petitioners raise arguments that would resolve that question, Urmanski acknowledges such arguments might merit this Court’s review in the ordinary course of the normal litigation process. *See* Wis. Stat. § 809.62(1r). Urmanski does not agree with Petitioners, however, that it is appropriate to raise these matters via an original action with this Court, which raises special considerations. As set forth below, this Court should deny the petition for several reasons: (1) there is no exigency justifying exercise of this Court’s original jurisdiction; (2) the petition may raise factual disputes; and (3) the claims in the petition are of doubtful merit.

I. No Exigency Requires that this Court Decide Petitioners’ Claims in the First Instance

First, although Petitioners assert their claims require a “prompt and authoritative” determination by this Court, they do not demonstrate the existence of a current exigency requiring that this Court abandon the normal litigation process. *See Petition of Heil*, 230 Wis. 428, 442-43, 284 N.W.2d 42 (1939). Indeed, the normal litigation process provided, and still provides, multiple avenues for Petitioners to press their claims. The Petitioners could have raised the claims in this petition almost two years ago, once the U.S. Supreme Court decided *Dobbs*, either by initiating their own action or intervening in *Kaul v. Urmanski* at that time. Any exigency that Petitioners believe now exists is wholly self-created.

Even now, the Petitioners could seek intervention in *Kaul* and try to press their arguments in that appeal. The State Agencies and Doctor-Intervenors in that case have indicated they intend to make similar arguments as potential alternative grounds for affirmance. While Urmanski believes such arguments must ultimately be rejected, he has taken no position at this time as to whether this Court should consider such arguments as part of the appeal in *Kaul*. If this Court does choose to consider such arguments in *Kaul*, that is plainly an available alternative for such claims to be considered that would preclude the need for this action. Finally, Petitioners could simply await the outcome of *Kaul* and initiate a new action raising

their constitutional claims in the event this Court rules in Urmanski’s favor in *Kaul* and does not address these constitutional arguments in that case.

Petitioners suggest “the simple magnitude of the number of people affected by abortion access speak to the need for a swift and final decision.” (Pet. 37). No doubt, the subject of abortion is one that is of immense public interest. But, simply because a case involves a matter of statewide concern does not mean an exigency exists that justifies abandoning the traditional legal process, especially when the case does not involve the sovereignty of the state. *Heil*, 284 N.W.2d at 48-49.

Petitioners assert this Court must exercise its original jurisdiction because they claim that Wisconsinites are being denied abortion care. They seem to suggest an exigency exists because not a single abortion has been performed after June 2022. (Pet. 38). This is not a true statement. As Planned Parenthood is aware, it resumed abortion services in Milwaukee and Dane counties on September 18, 2023 and in Sheboygan County on December 28, 2023.² In other words, abortions are currently available in Wisconsin, as the circuit court’s decision in *Kaul* has not been stayed pending appeal and Planned Parenthood is providing abortions. True, if this Court rules in Urmanski’s favor in *Kaul*, Planned Parenthood will, presumably, cease providing such services again. But the Petitioners fail to explain why that possibility precludes them from pressing their new constitutional claims through normal litigation procedures, either by moving to intervene in *Kaul* or by initiating a new lawsuit at the circuit court level that raises the claims they make to this Court.

Regardless, the Petitioners’ claims of exigency are belied by the fact that they waited almost two years to bring these new constitutional claims. Petitioners could have pursued these claims in June 2022 after the U.S. Supreme Court issued *Dobbs*. One could speculate as to why they did not, but the bottom line is that if there was

² See Planned Parenthood of Wisconsin, Inc., *Abortion Care Resumes in Wisconsin*, available at <https://www.plannedparenthood.org/planned-parenthood-wisconsin/get-involved/ppwi-resumes-abortion-services#:~:text=On%20Sept.,the%20Madison%20East%20Health%20Center>.

no exigency spurring Petitioners to action then, it is hard to see why there is now an exigency requiring this Court to exercise its original jurisdiction.

Third, Petitioners argue that pregnancy is “risky,” but it is difficult to understand why this alleged fact means there is an exigency that requires this Court’s immediate involvement. Again, Petitioners waited almost two years to bring these claims. Whatever risks the Petitioners believe justify this Court’s immediate involvement now have been present since the *Dobbs* decision was issued almost two years ago.

Fourth, Petitioners cite what they describe as “[t]he yoke of legal uncertainty” under which they claim physicians are operating. Petitioners claim physicians have borne that uncertainty “for more than 17 months since *Dobbs*” and that “[n]o longer is that uncertainty acceptable.” (Pet. 39). But again, the question is why, especially when Petitioners could have pursued their claims when *Dobbs* was decided. Urmanski doubts something fundamental to Petitioners’ claims has changed since *Dobbs* that requires the abandonment of the normal litigation process and this Court’s immediate involvement to protect Petitioners’ alleged interests. This Court should not endorse Petitioners’ knowing delay in seeking legal redress.

Finally, the Petitioners argue this Court should step in now because the legal landscape is “new.” Petitioners repeat the debunked talking point that *Dobbs* was unique in American history because “[n]ever before in U.S. history has an established federal right evaporated overnight.” Such claims are not true. This is not the first time the Supreme Court has rolled back individual rights that it had previously held were protected by the Constitution. *See, e.g., Dobbs*, 597 U.S. at 265 (explaining that *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) “signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation”). Regardless, Petitioners fail to explain why a “new” legal landscape means there is an exigency warranting a departure from the normal processes of litigation. Petitioners express frustration that policymakers have “declined to rise to the occasion” to pass new

legislation, but this Court does not assume original jurisdiction just to break legislative logjams.

II. It Is Unclear Whether Petitioners' Claims May Result in Factual Disputes

This Court “generally will not exercise its original jurisdiction in matters involving contested issues of fact.” *Green for Wis. v. State Elections Bd.*, 2006 WI 120, 297 Wis. 2d 300, 302, 723 N.W.2d 418. Here, the Petitioners argue their petition presents “purely a question of law” and that “[n]o fact finding is necessary,” (Pet. 41). But, they simultaneously have submitted seven affidavits, including an affidavit from counsel containing 420 pages of exhibits. These submissions make a number of claims regarding the relative safety of abortions, the frequency of abortions, medical ethics, and various other matters. At this early stage in this proceeding—before this Court has decided whether it will take jurisdiction of this case, let alone set a schedule for pleading—it is difficult to divine whether any of Petitioners’ various factual claims are material to the dispute or would be subject to dispute by Urmanski if this matter were to proceed. Indeed, if Urmanski were required to file a responsive pleading at this time, Urmanski would be in the position of denying many of the factual claims made in the Petition because he lacks knowledge or information sufficient to form a belief as to their truth. Wis. Stat. § 802.02(2).

Petitioners also seem to base their argument on their assertion that this Court must employ the strict-scrutiny standard of review when evaluating their claims. Petitioners are wrong on this point. As explained in more detail in Part III below, it is doubtful that Petitioners’ claims have merit or that anything other than rational basis review will apply.

Moreover, even if Petitioners are right that the Wisconsin Constitution does grant them the right to obtain or perform an abortion, it does not necessarily follow that strict-scrutiny review applies. Prior to *Dobbs*, abortion restrictions were not analyzed using strict scrutiny under federal law; rather, courts used the “undue

burden” standard of review. *See Dobbs*, 597 U.S. at 220. Thus, Petitioners’ argument that this Court must use strict scrutiny when assessing their claims is notable, because it demonstrates that Petitioners are asking this Court to provide even more protection for abortion rights than was provided under *Roe* and its progeny at the time the U.S. Supreme Court decided *Dobbs*. Petitioners are not simply asking this Court to find the same protections for abortion in the Wisconsin Constitution that had been recognized under federal law prior to *Dobbs*; they are asking this Court for even more. Regardless, the point remains that Petitioners seem to imply that the applicable standard of review could affect whether further factual development is necessary in this case, and it is not clear what the appropriate standard of review would be even if this Court agrees with Petitioners that the Wisconsin Constitution protects the right to an abortion.

Finally, the Petitioners argue that if this Court does find itself in need of factual development, this Court can make the necessary factual determinations or refer those issues to a circuit court or referee. (Pet. 41.) But, “such approaches are unwieldy and time-consuming” for this Court when compared to this Court’s primary role of conducting appellate review after the parties have had the opportunity to flesh out any relevant factual disputes in the lower courts. *State ex rel. Ozanne*, 2011 WI 43 at ¶148. (N. Patrick Crooks, J., concurring in part and dissenting in part).

III. Petitioners’ Claims Fail on the Merits

The merits of Petitioners’ claims are not currently at issue. That said, this Court will not take jurisdiction over an original action in “doubtful cases.” *Heil*, 284 N.W. at 51. “No trivial grounds should impel this court” to take original jurisdiction, and this Court has suggested that it is only the “flagrant and patent” defiance of constitutional commands that will justify such action by this Court. *State ex rel. Bolens v. Frear: The Income Tax Cases*, 148 Wis. 456, 134 N.W. 673, 687 (1912); *see also Heil*, 284 N.W. at 50 (“[T]his court will only take the exceptional or flagrant cases.”).

Although Urmanski will not address the merits of Petitioners’ constitutional claims in depth at this time, the following discussion should suffice to demonstrate that Petitioners’ claims ultimately lack merit. The Petition does not present a “flagrant” violation of our Constitution as would ordinarily justify an exercise of this Court’s original jurisdiction. To the contrary, if this Court adheres to precedent and does not depart from its well-established methodology for interpreting our Constitution it is clear Petitioners’ claims must ultimately fail.

A. Counts I and II May Not Present Justiciable Controversies

As an initial matter, to the extent Petitioners seek to assert the alleged constitutional rights of those who may seek abortions—*i.e.*, Counts I and II of the petition—the Petitioners have a justiciability problem. The Petitioners include several individuals who have had abortions years ago—between 2008 and 2016—but none of whom are currently pregnant or are likely to become pregnant in the future. Indeed, each of these individual petitioners has averred that they are taking active measures to prevent pregnancy. *See* Pet. at 8, 18, 19, 20.

These individual petitioners do not present a controversy that is ripe for judicial determination. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶29, 309 Wis.2d 365, 749 N.W.2d 211. They are asking for a determination of their rights based on “contingent or uncertain” potential future events. *See Putnam v. Time Warner Cable of Southeastern Wisconsin, Ltd. Partnership*, 2002 WI 108, ¶44, 255 Wis. 2d 447, 649 N.W.2d 626. There is no basis from which to conclude that any of these individual petitioners faces an “imminent and practical certainty” of being pregnant, desiring an abortion, and being denied one due to Wis. Stat. § 940.04. *Putnam*, 2002 WI 108 at ¶46. Simply put, none of the individual petitioners is in a position to attack the constitutionality of Wis. Stat. § 940.04. *See also Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund*, 2000 WI 98, ¶73, 237 Wis. 2d 99, 613 N.W.2d 849.

Nor is it clear that it would be appropriate to allow the abortion providers who are petitioners to advance claims on behalf of their future patients who might

seek abortions. Although it is true that, in the past, the U.S. Supreme Court has “permitted abortion providers to invoke the rights of their actual or potential patients,” *June Med. Servs. LLC v. Russo*, 591 U.S. 299, 318-19 (2020), the ongoing validity of such precedents is in doubt after *Dobbs*. See *Dobbs*, 597 U.S. at 286-87. Nor would allowing providers to press the claims of their patients be consistent with Wisconsin precedents. “[C]onstitutional rights are personal and may not be asserted vicariously.” *Aicher*, 2000 WI 98 at ¶73 (quoting *State v. Janssen*, 219 Wis.2d 362, 371, 580 N.W.2d 260 (1998)); see also *State v. Horn*, 126 Wis. 2d 447, 453, 377 N.W.2d 176 (Ct. App. 1985) (“A party may not rest his legal claims or defenses upon the rights of third parties.”). At minimum, there is a significant question regarding whether Counts I and II of the Petition—which assert the alleged constitutional rights of women who are pregnant to seek an abortion—are currently justiciable as presented. This case is thus not a good vehicle for the Court to exercise its power of original jurisdiction over an original action.

B. Count I of the Petition Lacks Merit

In their first claim, the Petitioners assert that Wis. Stat. § 940.04, if it is an abortion ban, violates their right to life and liberty under Article I, Section 1 of the Wisconsin Constitution. This claim must fail under this Court’s precedents. This Court has long interpreted Article I, Section 1 of the Wisconsin Constitution in lockstep with the Fourteenth Amendment of the U.S. Constitution, which does not protect a right to an abortion. As this Court has stated: “On more than a few occasions we have expressly held that the due process and equal protection clauses of our state constitution and the United States Constitution are essentially the same.” *County of Kenosha v. C&S Management, Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999); see also *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, 2018 WI 78, ¶35, 383 Wis. 2d 1, 914 N.W.2d 678 (“Article I, Section 1 has been interpreted as providing the same equal protection and due process rights afforded by the Fourteenth Amendment to the United States Constitution.”); *Chicago & N.W. Ry. Co. v. La Follette*, 43 Wis. 2d 631, 643, 169

N.W.2d 441 (1969) (“We deem that the constitutional guarantees of individual privileges and the restraints placed upon the legislature are of the same effect in both constitutions in deciding the issues of this case.”); *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 49, 132 N.W.2d 249 (1965) (“Art I, Sec. 1, of the Wisconsin Constitution ... many times has been held to be substantially equivalent of the due process and the equal-protection clauses of the 14th Amendment to the U.S. Constitution.”); *Haase v. Sawicki*, 20 Wis. 2d 308, 311 n.2, 121 N.W.2d 876 (1963) (“It is well settled by Wisconsin case law that the various freedoms preserved by sec. 1, art. I, Wis. Const., are substantially the equivalent of the due process and equal-protection-of-the-laws clauses of the Fourteenth Amendment to the United States constitution.”); *Boden v. Milwaukee*, 8 Wis. 2d 318, 324, 99 N.W.2d 156 (1959) (“We are aware of no decision of this court which has determined that sec. 1, art. I of the Wisconsin constitution, imposes any greater restriction on the exercise of the police power than do the due process and equal protection of the laws clauses of the Fourteenth amendment.”) The Petitioners do not even acknowledge these precedents, let alone provide any explanation for why this Court should turn its back on decades of its own jurisprudence interpreting Article I, Section 1 of the Wisconsin Constitution.

Even absent the above precedents, Petitioners’ claim lacks merit. This Court has repeatedly reaffirmed that “the purpose of constitutional interpretation is to determine what the constitutional text meant when it was written” and that a determination of the “original meaning of the constitution” involves consideration of (1) the constitutional text, read reasonably and in context, (2) the debates and practices at the time of adoption, and (3) early legislative enactments. *Wisconsin Justice Initiative, Inc. v. WEC*, 2023 WI 38, ¶¶21-28, 407 Wis. 2d 87, 990 N.W.2d 122. Here, any argument that the constitutional text protects a right to an abortion or was understood to do so when our Constitution was adopted plainly lacks merit. From at least the beginning of statehood, Wisconsin has had legislatively enacted prohibitions on abortion. *See Revised Statutes of Wisconsin*, ch. 133, § 11 (1849;

Revised Statutes of Wisconsin, ch. 164, § 11 (1858); Revised Statutes of Wisconsin, ch. 169, §§ 58, 59 (1858). Wisconsin’s ban on abortion during all phases of pregnancy except to save the life of the mother was in effect and enforced for over a century until it was held unconstitutional under the U.S. Constitution, but it is now clear that the U.S. Constitution does not preclude such a ban.

The petition hints at some arguments that Petitioners may make to try to argue for an abortion right in the Wisconsin Constitution, but Petitioners’ initial suggestions are flimsy reeds on which to base their arguments.

First, Petitioners note Article I, Section 1 of our constitution “is rooted in the philosophy of John Locke.” (Pet. 21). Petitioners fail to inform this Court, however, that Locke “explicitly condemned abortion.” Skylar Reese Croy & Alexander Lemke, *An Unnatural Reading: The Revisionist History of Abortion in Hodes v. Schmidt*, 32 U. Fla. J. L. & Pub. Pol’y 71, 82 (2021).

Second, Petitioners cite various precedents dealing with matters like a person’s right to refuse life sustaining medical treatment and a right to consent to medical treatment. (Pet. 21). Petitioners fail to acknowledge, however, that abortion is fundamentally different from these other cases, or other cases in which this Court has “recognized the fundamental liberty interest of a citizen to choose whether or not to procreate.” *State v. Oakley*, 2001 WI 103, ¶16, 245 Wis.2d 447, 629 N.W.2d 200. As the U.S. Supreme Court has explained, abortion is different because it destroys “fetal life”—what Wis. Stat. § 940.04(6) describes as an “unborn child.” *Dobbs*, 597 U.S. at 231.

Third, Petitioners assert that at the time the Wisconsin Constitution was ratified, women could obtain abortifacient medicines and manuals promoting them, but Petitioners’ point is unclear. Perhaps this is another way of making their argument that common law did not consider abortion to be a crime prior to quickening. (Pet. 26). Even if it was legal at one time under the common law for women to obtain and use such medicines, which it certainly was not after 1858, that does not mean our founders recognized a constitutional right to such access. Our

Constitution does not place off limits for legislation every form of conduct that was legal at the founding. *See, e.g., Dobbs*, 597 U.S. at 253 (“[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so.”). Indeed, our Constitution expressly contemplates that the common law can be altered by the Legislature. Art. XIV, § 13. Even if, as Petitioners contend, the common law allowed for abortions prior to quickening, that does not mean such abortions are a constitutional right beyond the scope of legislative prohibition.

Next, Petitioners point to amendments that Wisconsin voters made to Article I, Section 1 in 1982, to make the language of that provision gender neutral. (Pet. 68). But, Petitioners fail to explain why such amendments were anything other than stylistic changes that had no substantive effect on the underlying meaning of Article I, Section 1. *Cf. Members of the Medical Licensing Bd. of Ind. v. Planned Parenthood Great Northwest, Hawai’i, Alaska, Indiana, Kentucky, Inc.*, 211 N.E.3d 957, 981-84 (Ind. 2023).

Last, Petitioners direct the Court to decisions in nine other states that Petitioners assert recognized the right to an abortion under their own state constitutions. As an initial matter, at least one of the decisions on which Petitioners rely—*Gainesville Woman Care v. State*, 210 So. 1243, 1254 (Fla. 2017)—has since been overruled. *See Planned Parenthood of Southwest and Central Florida v. State*, --- So. 3d ----, Nos. SC2022-1050, SC2022-1127, 2024 WL 1363525, at *14-15 (Fla. April 1, 2024). And, of course, Petitioners fail to mention courts that have rejected the existence of a broad abortion right in their state constitutions that Petitioners claim here. *See, e.g., Planned Parenthood Great Northwest v. Idaho*, 522 P.3d 1132 (2023). The bottom line remains, however, that regardless of what courts in other states have held under the language of their own constitutions, this Court has repeatedly held that it interprets Article I, Section 1 in lockstep with the Fourteenth Amendment (which does not protect the right to an abortion). Petitioners make no argument for departing from that precedent. And, even absent that

precedent, under this Court’s well-established methodology of constitutional interpretation, there is no basis for recognizing a fundamental right to an abortion in Article I, Section 1 of the Wisconsin Constitution.

Because there is no fundamental right to an abortion under the Wisconsin Constitution, Wis. Stat. § 940.04 is subject only to rational basis review. *State v. Smith*, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W.2d 90. And, the statute must ultimately be upheld under such review, because the State has rational bases for the proscription on abortions in that statute: “respect for and preservation of prenatal life at all stages of development,” among others. *Dobbs*, 597 U.S. at 300-01; *see also Planned Parenthood Great Northwest*, 522 P.3d at 1195-96.

C. Count II of the Petition Lacks Merit

In their second claim, the Petitioners assert that Wis. Stat. § 940.04, if it is an abortion ban, violates the equal protection rights of those who seek or may seek abortion services. Petitioners assert that “[t]he scope of the federal Equal Protection Clause does not limit Wisconsin’s own” and again cite to the general principle that Wisconsin’s Constitution can afford greater protection to individuals than that mandated by the U.S. Constitution. Again, however, merely invoking that general principle does not ask the right question, which “is whether [the] state constitution *actually* affords greater protection.” *Roberson*, 2019 WI 102 at ¶56 (emphasis added). And, again, on this point this Court has been clear: “The equal protection clause in the Wisconsin Constitution requires the identical interpretation as that given to the parallel provision of the United States Constitution.” *State v. Heft*, 185 Wis. 2d 288, 293 n.3, 517 N.W.2d 494 (1994); *see also State v. Cissell*, 127 Wis. 2d 205, 223, 378 N.W.2d 691 (1985) (“We previously have held that the due process and equal protection clauses of our state constitution and the United States Constitution are essentially the same.”).

In *Dobbs*, the U.S. Supreme Court explained why regulations of abortion procedures are not subjected to heightened scrutiny under the federal Equal Protection Clause. 597 U.S. at 236-37. Here, Petitioners provide no explanation—

other than, perhaps, their dissatisfaction with the outcome of *Dobbs*—for why the reasoning in *Dobbs* should not also carry the day here. *Cissell*, 127 Wis. 2d at 223. Absent any explanation for why this Court should depart from the above precedents, Petitioners’ equal protection claim on behalf of those who may seek abortions will fail. Their claim should not be subject to heightened scrutiny, and as already discussed Wis. Stat. § 940.04 serves legitimate state interests.

D. Count III of the Petition Lacks Merit

Next, in their third claim the Petitioners assert that Wis. Stat. § 940.04, if it is an abortion ban, violates the equal protection rights of physicians who provide abortions. This claim also has no merit. In assessing this claim, “the threshold question is whether a fundamental right is implicated or whether a suspect class is disadvantaged by the challenged legislation.” *State v. Smith*, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W.2d 90. The class that Petitioners identify—physicians who provide abortion services—is not a suspect class. And, as already discussed, Wis. Stat. § 940.04 does not implicate a fundamental right to an abortion; there is no such right. Again, rational basis review will apply to this Court’s review of this claim. *Smith*, 2010 WI 16 at ¶ 12. And, Wis. Stat. § 940.04 is rationally related to the state’s legitimate interest in protecting the life of the unborn. *Id.* at ¶ 16 (“[A]s a practical matter, the rational basis analysis applicable to *Smith*’s substantive due process challenge is also relevant to his equal protection challenge.”); *see also Raidoo v. Moylan*, 75 F.4th 1115, 1125 (9th Cir. 2023) (“Even assuming that doctors who perform abortions are otherwise similarly situated to doctors who perform other medical services, it was rational for Guam legislature to treat them differently because abortion presents different considerations than other medical procedures.”).

E. Count IV of the Petition Lacks Merit

Finally, Petitioners’ fourth claim presents the question of whether Wis. Stat. § 940.04’s abortion ban violates Wisconsin physicians’ right to liberty under Art. I, Sec. 1, by infringing on their right to practice their chosen profession. The answer is plainly no. As an initial matter, Petitioners appear to rely on the U.S. Supreme

Court’s decision in *Bd. of Regents of State College v. Roth*, 408 U.S. 564 (1972), to claim that “[t]he constitutional guarantee of liberty also includes the fundamental right to practice one’s chosen lawful profession.” (Pet. 24). *Roth* was a procedural due process case, however, and the “occupational liberty” of the type claimed by Petitioners is not a fundamental liberty interest that commands heightened scrutiny. See, e.g., *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Environmental Protection*, 560 U.S. 702, 721 (2010) (“[W]e have held for many years ... that the ‘liberties’ protected by substantive due process do not include economic liberties.”); *In re Crawford*, 194 F.3d 954, 961 (9th Cir. 1999) (“While the pursuit of a profession has been recognized as a protected liberty interest, in the post-*Lochner* era a restriction on the conduct of a profession will run afoul of substantive due process rights only if it is irrational.” (citing *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955))); *Zorzi v. Cty. of Putnam*, 30 F.3d 885, 895 (7th Cir. 1994) (“Occupational liberty ... is not protected by substantive due process.”).

Moreover, Wis. Stat. § 940.04 simply does not deprive anyone of their ability to be a physician or to practice that occupation. Cf. *Goulding v. Feinglass*, 811 F.2d 1099, 1102-03 (7th Cir. 1987) (no deprivation of liberty interest when plaintiff could still practice law). It just precludes physicians from performing abortions except when necessary to save the life of the mother. The statute is plainly the type of occupational, health or safety legislation that, although it might impose some limitation on how physicians can practice, is nevertheless subject to rational basis scrutiny. See, e.g., *Porter v. State*, 2018 WI 79, 382 Wis.2d 697, 913 N.W.2d 842. And, again, rational bases exist that support § 940.04, as already discussed.

IV. If the Court Takes Original Jurisdiction, It Should Consider Petitioners’ Claims Only If *Kaul* Is Decided in Urmanski’s Favor.

Next, if this Court grants leave to commence an original action on one or more of Petitioners’ claims, this Court must reject Petitioners’ request that the Court decide their constitutional claims before the statutory-interpretation questions in *Kaul* are resolved. As this Court is aware, the appeal in *Kaul* presents multiple

statutory-interpretation questions that could resolve the issue of the applicability of Wis. Stat. § 940.04 to abortion without the need for examining the constitutionality of that statute. *See* Pet. to Bypass of Urmanski, *Kaul v. Urmanski*, No. 23AP2362 (Wis. Feb. 20, 2024).

To be sure, it is Urmanski’s position that consideration of Petitioners’ constitutional claims will likely be necessary at some point, because Urmanski is correct on the statutory interpretation questions presented in *Kaul*. Wis. Stat. § 940.04(1), properly interpreted, prohibits performing abortions (including consensual abortions) from conception until birth (subject to the exception for therapeutic abortions in § 940.04(5)). And, Wis. Stat. § 940.04(1) does not conflict with, and was not impliedly repealed by, subsequent statutes that impose restrictions on abortion in ways that would comply with *Roe* and its progeny. *Cf. Planned Parenthood Arizona, Inc. v. Mayes*, --- P.3d ----, No. CV-23-0005-PR, 2024 WL 1517392 (Ariz. April 9, 2024) (rejecting argument that a subsequently enacted statute prohibiting physicians from performing elective abortions after fifteen weeks’ gestation impliedly repealed a broader pre-*Roe* ban on abortion unless necessary to save the life of the woman).

It nevertheless is possible this Court (or the court of appeals, if this Court declines to grant bypass) will disagree with Urmanski on one or more of the statutory-interpretation questions in *Kaul*, and conclude that Wis. Stat. § 940.04(1) does not apply to abortions either because it was never an abortion statute in the first place or because its applicability to abortion was impliedly repealed by subsequent legislation. If the circuit court’s decision in *Kaul* is ultimately affirmed on such grounds, resolution of Petitioners’ claims in this action would be unnecessary as each of Petitioners’ claims here presumes that Wis. Stat. § 940.04 is interpreted as an abortion ban. Thus, this Court’s well-established doctrine of constitutional avoidance counsels against consideration of Petitioners’ constitutional claims in this action until after this Court addresses the statutory-interpretation questions in *Kaul*, and only if this Court agrees with Urmanski that, as a matter of statutory

interpretation, Wis. Stat. § 940.04(1) does still apply to prohibit performing abortions. *See generally State v. Scott*, 2018 WI 74, ¶12, 382 Wis. 2d 476, 914 N.W.2d 141 (“We adhere to the doctrine of constitutional avoidance: A court ordinarily resolves a case on available non-constitutional grounds.”); *Adams Outdoor Advertising, Ltd. v. City of Madison*, 2006 WI 104, ¶91, 294 Wis. 2d 441, 717 N.W.2d 803 (“This court does not normally decide constitutional questions if the case can be resolved on other grounds.”).

The Petitioners point out that constitutional avoidance “is ‘a matter of judicial prudence’ and does not apply where the constitutionality of a statute is ‘essential to the determination of the case.’” (Pet. 30 (quoting *Gabler v. Crime Victim Rts. Bd.*, 2017 WI 67, ¶52, 376 Wis. 2d 147, 897 N.W.2d 384).) This case does not necessarily call for application of that exception, however, because there would not be any need to address the constitutional claims raised by Petitioners if this Court rules against Urmanski on the statutory-interpretation questions presented in *Kaul*. *Cf. Gabler*, 2017 WI 67 at ¶53 (“Even if we agreed with the Board’s non-constitutional arguments, we would nevertheless need to decide [the constitutional question].”). If this Court rules against Urmanski on the statutory-interpretation questions in *Kaul*, and concludes that Wis. Stat. § 940.04 is not a currently effective abortion ban, it will be unnecessary to decide Petitioners’ claims (which assume Wis. Stat. § 940.04 is “an abortion ban”).

The Petitioners assert that, even if this Court accepts bypass in *Kaul* and affirms the circuit court’s decision, their “constitutional question regarding section 940.04 is likely to recur” because, in their view, “Legislative efforts to restrict abortion continue.” Petitioners do not demonstrate a likelihood that, if this Court decides *Kaul* on statutory-interpretation grounds, new legislation similar to Wis. Stat. § 940.04 will be enacted. Indeed, our Governor has declared that he will veto any such legislation,³ and has even vowed to veto measures that would allow for

³ Associated Press, *Evers in State of the State Address Vows to Veto Any Bill That Would Limit Access to Abortions*, U.S. News & World Report (Jan. 23, 2024), available at

abortions in the first fourteen weeks of pregnancy and provide broader exceptions than those provided in Wis. Stat. § 940.04.⁴

Finally, Petitioners’ suggestion that “[d]eclaring what the Wisconsin Constitution protects would guide the Legislature should it consider amending current statutes or passing new statutes governing abortion,” (Pet. 30), is a clear and inappropriate request for an advisory opinion. Such requests do not provide grounds for an original action. *See, e.g., State ex rel. State Central Committee of Progressive Party v. Bd. of Election Commissioners of Milwaukee*, 240 Wis. 204, 214, 3 N.W.2d 123 (1942).

V. If the Court Takes Original Jurisdiction, Urmanski Should Be Allowed the Opportunity to Submit a Responsive Pleading and Affidavits Prior to Merits Briefing

Urmanski understands this Court’s April 16 order as requiring a response from him on the question of whether this Court should take original jurisdiction in this matter. *See* Wis. Stat. § 809.70(2). Thus, Urmanski does not understand the merits of this case to be at issue now. Nor has Urmanski prepared a responsive pleading at this time. Wis. Stat. § 809.70(3) (stating that the Court may establish a schedule for pleading, briefing and submission if it grants the petition). If this Court does take original jurisdiction, however, Urmanski respectfully suggests the following path forward for the Court’s consideration:

- The Court should treat the numbered paragraphs and relief sought at pages 7-35 of the Petition as the complaint in this action;
- Urmanski should be allowed at least 45 days to prepare a responsive pleading, including any affidavits Urmanski would like to submit, *cf.*

<https://www.usnews.com/news/best-states/wisconsin/articles/2024-01-23/evers-in-state-of-the-state-address-vows-to-veto-any-bill-that-would-limit-access-to-abortion>.

⁴ Jessie Opoien, *Assembly passes referendum on 14-week abortion ban that faces certain Evers veto*, Milwaukee Journal Sentinel (Jan. 25, 2024), available at <https://www.jsonline.com/story/news/politics/2024/01/25/wisconsin-assembly-passes-14-week-abortion-ban-that-faces-certain-veto/72343075007/>.

Wis. Stat. § 802.06(1) (state officers receive 45 days to answer a complaint); and

- The Court should then set an appropriate briefing schedule for the parties to brief the merits of this case.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for an original action. Alternatively, if the Court does grant the petition, it should treat the numbered paragraphs and relief sought at pages 7-35 of the petition as the complaint, allow Urmanski forty-five days to submit a responsive pleading and affidavits, and then set an appropriate briefing schedule for the parties to brief the merits of this case. In no event should this Court decide the constitutional questions presented in this case before the issues in *Kaul v. Urmanski* are resolved, and subject to the nature of this Court's resolution of those issues. And, regardless, of how this Court chooses to hear these issues, this Court must reject Petitioners' claims and conclude that Wis. Stat. § 940.04 is constitutional and can be enforced as an abortion ban.

Dated this 26th day of April, 2024.

ATTOLLES LAW, S.C.

Attorneys for Respondent Joel Urmanski

By: Electronically signed by Matthew J. Thome

Andrew T. Phillips
State Bar No. 1022232
Matthew J. Thome
State Bar No. 1113463

P.O. ADDRESS:

222 E. Erie Street
Suite 210
Milwaukee, WI 53202
414-279-0962 (Phillips phone)
414-285-0825 (Thome phone)
Email: aphillips@attolles.com
mthome@attolles.com

CERTIFICATION

I hereby certify this Response conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (8)(bm), and (8)(g). The length of this response is 7859 words. Word processing software (Microsoft Word) was used to determine the length of this response. The word count above is inclusive of all words in the Introduction, Statement of the Case, Argument, and Conclusion sections, including the text of all such sections' headings and footnotes.

Dated this 26th day of April, 2024.

ATTOLLES LAW, S.C.

Attorneys for Respondent Joel Urmanski

By: Electronically signed by Matthew J. Thome

Andrew T. Phillips
State Bar No. 1022232
Matthew J. Thome
State Bar No. 1113463

P.O. ADDRESS:

222 E. Erie Street
Suite 210
Milwaukee, WI 53202
414-279-0962 (Phillips phone)
414-285-0825 (Thome phone)
Email: aphillips@attolles.com
mthome@attolles.com

IN THE SUPREME COURT OF WISCONSIN

APPEAL NO: 2024AP000330

PLANNED PARENTHOOD OF WISCONSIN, on behalf of itself, its employees, and its patients, KATHY KING, M.D., ALLISON LINTON, M.D., M.P.H., on behalf of themselves and their patients, MARIA L., JENNIFER S., LESLIE K., and ANAIS L.,
Petitioners,

v.

JOEL URMANSKI, in his official capacity as District Attorney for Sheboygan County, Wisconsin, ISMAEL R. OZANNE, in his official capacity as District Attorney for Dane County, Wisconsin and JOHN T. CHISHOLM, in his official capacity as District Attorney for Milwaukee County, Wisconsin,
Respondents.

On Petition For Original Action Before This Court

**RESPONDENT JOEL URMANSKI'S RESPONSE TO MOTION TO
PROCEED USING PSEUDONYMS AND ASSOCIATED RELIEF**

Andrew T. Phillips, SBN 1022232
Matthew J. Thome, SBN 1113463
Attolles Law, s.c.
222 E. Erie St., Ste. 210
Milwaukee, WI 53202
Telephone: (414) 285-0825
aphillips@attolles.com
mthome@attolles.com

Counsel for Respondent Joel Urmanski

Respondent Joel Urmanski does not object to the Petitioners' request that Petitioners Maria L., Jennifer S., Leslie K., and Anais L. be allowed to proceed anonymously by using pseudonyms as the Court considers whether to grant the Petition for Original Action. In the event the Court grants the Petition, Urmanski does not object to the entry of an appropriate protective order. Urmanski respectfully suggests the appropriate course should be, if the Petition is granted, for the Court to direct the parties to meet and confer on proposed language for such an order and to present a draft order to the Court. In the event a dispute develops over appropriate language for such an order, the parties can present it to the Court at that time.

Dated this 26th day of April, 2024.

ATTOLLES LAW, S.C.

Attorneys for Respondent Joel Urmanski

By: Electronically signed by Matthew J. Thome

Andrew T. Phillips
State Bar No. 1022232
Matthew J. Thome
State Bar No. 1113463

P.O. ADDRESS:

222 E. Erie Street
Suite 210
Milwaukee, WI 53202
414-279-0962 (Phillips phone)
414-285-0825 (Thome phone)
Email: aphillips@attolles.com
mthome@attolles.com

From: "ashley.czaja@legis.wisconsin.gov" <ashley.czaja@legis.wisconsin.gov>
Sent: Monday, April 22, 2024, 10:00 AM
To: Matthew Fernholz <mmf@cmlawgroup.com>
Subject: Tentative: [REDACTED] Call
