No. 2015AP2019

In the Supreme Court of Wisconsin

TETRA TECH EC, INC., AND
LOWER FOX RIVER REMEDIATION LLC,
PETITIONERS-APPELLANTS-PETITIONERS,

v.

WISCONSIN DEPARTMENT OF REVENUE,
RESPONDENT-RESPONDENT.

On Appeal From The Brown County Circuit Court,
The Honorable Marc A. Hammer, Presiding,
Case No. 2015CV132

RESPONSE BRIEF OF THE DEPARTMENT OF REVENUE

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ISSUES PRESENTED

1. Does the practice of deferring to agency interpretations of statutes comport with Article VII, Section 2 of the Wisconsin Constitution, which vests the judicial power in the unified court system?

The circuit court and the Court of Appeals did not answer this question.

2. Does the multistep process of filtering contaminated riverbed sediment into its constituent parts for purposes of recycling and disposal qualify as "processing" as used in Wis. Stat. § 77.52(2)(a)11?

The circuit court and the Court of Appeals answered "Yes."

INTRODUCTION

The dispute in this case is straightforward: whether "processing," as used in Wis. Stat. § 77.52(2)(a)11, means what the dictionary definitions say it does. The Tax Appeals Commission, the circuit court, and the Court of Appeals all concluded that this statutory term has a simple, commonly understood meaning, as uniformly defined by dictionaries. It is *undisputed* that the service at issue here—the separation of contaminated riverbed material into its component parts for disposal and recycling—falls squarely within those definitions. In their Opening Brief, Tetra Tech EC, Inc., and Lower Fox River Remediation LLC (hereinafter, collectively "Tetra Tech") do not provide a contrary definition of "processing," Opening Br. 31 n.14, offering instead various non-textual objections. Because "[w]ords in a statute should be given their ordinary and accepted meaning," *Telemark Co. v. Wis. Dep't of Taxation*, 28 Wis. 2d 637, 641, 137 N.W.2d 407 (1965), these arguments cannot overcome the commonly understood, dictionary definition of "processing." Accordingly, the Tax Appeals Commission's conclusion that the services here are "processing" would obtain regardless of what level of deference or weight, if any, this Court were to give to the Commission's views on the matter.

While the underlying dispute in this case is simple, this appeal is now significantly more consequential and complex because this Court has asked the parties to brief whether this Court's doctrine of deferring to agency interpretations of

statutes violates the Wisconsin Constitution. As discussed in detail below, this Court's deference doctrine is unsound—on both statutory and constitutional grounds—to the extent that it requires courts to give great weight deference to agency statutory interpretation. Chapter 227's text explains that Wisconsin courts must provide *independent* review of agency interpretation of a statute, Wis. Stat. §§ 227.57(5), (8), while affording "due weight" to "the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it," *id.* § 227.57(10). Chapter 227 nowhere mentions great weight deference, meaning that applying that form of deference violates Chapter 227's "due weight" instruction. In addition, great weight deference violates the Wisconsin Constitution because it abdicates the judiciary's core responsibility to "say what the law is." *Operton v. Labor & Indus. Review Comm'n*, 2017 WI 46, ¶ 78, 375 Wis. 2d 1, 894 N.W.2d 426 (R.G. Bradley, J., concurring) (citing *State v. Williams*, 2012 WI 59, ¶ 36 n.13, 341 Wis. 2d 191, 814 N.W.2d 460 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

ORAL ARGUMENT AND PUBLICATION

This Court has indicated that this case will be "scheduled for oral argument on the same date as the oral argument" in *Wisconsin DWD v. Wisconsin LIRC*, Appeal No. 2016AP1365.

STATEMENT OF THE CASE

A. Statutory Background

Wisconsin law imposes a 5% retail sales tax "[f]or the privilege of selling, licensing, performing or furnishing the services" listed in the subsections of Wis. Stat. § 77.52(2)(a). This case involves one of those subsections—Subsection 77.52(2)(a)11—which imposes this tax on "[t]he producing, fabricating, *processing*, printing, or imprinting of *tangible personal property or items*, property, or goods . . . for a *consideration for consumers who furnish directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting*." Wis. Stat. § 77.52(2)(a)11 (emphases added). Although most of the terms that Subsection 77.52(2)(a)11 employs—producing, fabricating, processing, printing, or imprinting—do not contain statutory definitions,[1] an administrative rule, Wis. Admin. Code § TAX 11.38(2), includes a non-exhaustive list of "examples" of "fabricating and processing services," preceded by the term "include," *id.* This list contains "[c]utting or crushing stones, gravel, or other construction materials"; "[d]rying, planing, or ripping lumber"; "[b]ookbinding"; "[t]ailoring a suit"; "[m]aking curtains"; and other activities. *Id.*

Persons must file sales-and-use tax returns with the Department of Revenue ("the Department") to report sales and use taxes owed. Wis. Stat. § 77.58(2)–(3). The

[1] *But see* Wis. Stat. § 77.51(11) (defining "printing" and "imprinting").

Department may conduct an audit of those returns to determine if additional taxes are owed or if refunds are due. *Id.* § 77.59(1)–(2). The Department's sales-and-use determination is final "unless, within 60 days after receipt of the notice of the determination, the taxpayer, or other person directly interested, petitions the department for a redetermination." *Id.* § 77.59(6). If the Department denies that petition, an interested party may appeal to the Tax Appeals Commission. *See id.* § 77.59(6)(b). The Commission is "the final authority for the hearing and determination of all questions of law and fact arising under . . . [ss.] 77.59(5m) and (6)." *Id.* § 73.01(4)(a). The Commission's decisions are "subject to review in the manner provided in ch. 227." *Id.* § 73.015(2). The taxpayer may petition the circuit court for review, Wis. Stat. § 227.52, may then appeal to the Court of Appeals, *id.* § 808.03, and may then petition this Court for review, *id.* § 808.10.

B. Factual and Procedural Background

1. In 2007, the U.S. Environmental Protection Agency ordered several paper companies in Wisconsin to remove polychlorinated biphenyls ("PCBs") that they had released, which had settled into the Fox River's riverbed. App. 2–3. The companies formed the LLC to complete this task, and the LLC then hired Tetra Tech as the general contractor to conduct the remediation. App. 2–3. Tetra Tech, in turn,

subcontracted with Stuyvesant Dredging, Inc., ("SDI") to perform one subtask of the remediation. App. 3, 26.

Tetra Tech hired SDI to "separate the material [Tetra Tech] dredge[s] from the Fox River into its constituent components so that those components could be delivered to, and disposed of, by Tetra Tech." App. 3. SDI's activities were "conducted in the sediment processing building located on the former Shell property." App. 31 (citation omitted). Tetra Tech described SDI's services as "the desanding and dewatering portions of the [r]emediation." App. 31. It is "a physical separation process of [Fox River] sediments based on differences in grain size and specific gravity." App. 33. Tetra Tech's Vice President of Project Engineering and Senior Engineer on the Fox River project testified that "SDI processes and changes the sediment it receives [ ] from Tetra Tech." App. 33. An operations manager who had overseen SDI's remediation project for the Fox River testified that SDI "processes" the sediment. App. 33.

Tetra Tech and SDI also described this procedure in a plan they submitted to EPA. App. 31. The plan discusses multiples stages: "dredged sediment from the Fox River enters SDI's processing facility through dredge pipelines." App. 31. It then "goes through [a] scalping screen, [a] slurry holding tank and [a] slurry thickener tank, [and then] the sediment enters the coarse and fine sand separation processes." App. 31. This is "meant to separate, wash and dewater all +150 micron sand from the sediment slurry."

App. 31. Then, all sand between "63 to 150 micron" is "separate[d], wash[ed], and dewater[ed]." App. 31–32. Following the desanding and dewatering process, SDI delivers the sand, water, and sediment back to Tetra Tech, which treats the water, recycles the sand, and disposes of the sediment (which contains the PCBs). App. 18, 31, 54, 66.

2. In 2010, the Department's audit concluded that SDI's services were taxable as the "cleaning" of tangible personal property under Subsection § 77.52(2)(a)10. *See* App. 3, 26–28. The Department assessed sales tax on Tetra Tech's sales of those services to the LLC for part of the audit period and use tax on the LLC's purchase of those services for part of the audit period. The Department notified the taxpayers of their respective assessments with Notices of Field Audit Action, delivered in late 2010. App. 27–28. The Department denied petitions for redetermination filed by Tetra Tech and the LLC with respect to the taxability of SDI's services. App. 28–29.

3. Tetra Tech and the LLC filed a petition for review with the Tax Appeals Commission. App. 29. The Department argued, among other things, that SDI's services were taxable under Wis. Stat. § 77.52(2)(a)11 as the "processing" of tangible personal property. App. 36. The Department explained that the Commission should interpret "processing" according to the dictionary definition of "put[ting] through the steps of a prescribed procedure; or, to prepare, treat, or convert by subjecting to a special process." App. 162 (citing *The American Heritage Dictionary* 1444 (3d ed. 1996)).

The Commission ruled that SDI's services were taxable because "what SDI does with the sediment is 'processing . . . for a consideration for consumers [Tetra Tech] who furnish directly or indirectly the materials [sediment] used in the . . . processing' under the meaning of Wis. Stat. § 77.52(2)(a)11." App. 36 (alterations in original). The Commission reasoned that "[t]he dictionary definition of 'processing' is 'to put through the steps of a prescribed procedure; or, to prepare, treat or convert by subjecting to a special process.' SDI's activities certainly fall within that definition." App. 36. The Commission relied on one of its prior decisions, *Hammersley Stone Company, Inc. v. Wisconsin Department of Revenue*, Wis. Tax Rptr. (CCH) ¶ 400-383 (WTAC 1998), which concluded that "the crushing of rock into gravel was the 'processing' of tangible personal property," App. 37.

4. Tetra Tech and the LLC filed a petition for review in circuit court under Chapter 227. App. 17. The circuit court held that "it is not necessary . . . to make a [deference] determination" because "[e]ven if the Court afforded the lowest amount of deference, *de novo*, the Court would reach the same conclusion as if it applied great weight deference." App. 20. The circuit court applied the "common, ordinary definition" of the word "processing" and found the definition from *The American Heritage Dictionary* to be "helpful to an understanding of the word." App. 22. The court held that the services at issue fell within that definition because SDI put the sediment "through the steps of a prescribed procedure,

which prepares the product into separate groups for eventual reuse or disposal." App. 23.

5. The Court of Appeals affirmed, App. 2, concluding that the Tax Appeals Commission was entitled to "great weight deference" under this Court's doctrine. The Court of Appeals then agreed with the Commission's conclusion that SDI's activities reasonably qualified as "processing" under Subsection 77.52(2)(a)11. The court referenced the *Webster's Third New International Dictionary* definition of the term: "to subject to a particular method, system, or technique of preparation, handling, or other treatment designed to effect a particular result." App. 9.

The Court of Appeals also rejected Tetra Tech's four arguments to the contrary. First, the definition of "processing" did not turn the tax "into a general sales and use tax on all retail services" because it attached only to services applied to tangible personal property supplied by the consumer. App. 10–11. Second, there was no ambiguity in whether SDI's services were taxable because SDI "was engaged in physical separation processing" and could not escape taxation merely by characterizing its services as "separation." App. 11–12. Third, the fact that the list of examples of "processing" in Wis. Admin. Code § TAX 11.38(2) did not contain "separation" was immaterial because the regulation was "a non-exhaustive, illustrative list of services" covered by the tax. App. 12. Lastly, the other statutory terms—"producing, fabricating, [ ] printing, or imprinting,"

Wis. Stat. § 77.52(2)(a)11—retained independent meaning despite the definition of "processing," thus there was no surplusage problem. App. 12–14.[2]

6. Tetra Tech petitioned this Court for review, arguing that the Court of Appeals erred in interpreting "processing" in Wis. Stat. § 77.52(2)(a)11. On April 24, 2017, this Court granted Tetra Tech's Petition for Review and "directed" "the parties . . . to brief an additional issue: Does the practice of deferring to agency interpretations of statutes comport with Article VII, Section 2 of the Wisconsin Constitution, which vests the judicial power in the unified court system?" Order Granting Petition for Review, *Tetra Tech v. DOR*, No. 2015AP2019 (Wis. April 24, 2017).

STANDARD OF REVIEW

Typically, a challenge "to an agency decision is governed by" Chapter 227. *Lake Beulah Mgmt. Dist. v. Dep't of Nat. Res.,* 2011 WI 54, ¶ 26, 335 Wis. 2d 47, 799 N.W.2d 73. When considering "an appeal [ ] taken from a circuit court order reviewing an agency decision," this Court reviews "the decision of the agency, not the circuit court." *Id.* ¶ 25 (citation omitted). In this case, the "agency" refers to the Tax Appeals Commission, not the Department of Revenue. *See Wis. Dep't*

[2] The Court of Appeals also concluded that the Department had the authority to assert an alternative legal justification for a tax that was not originally presented in the written notice to the taxpayer. App. 14–15. Tetra Tech has not challenged this portion of the Court of Appeals' opinion in its briefing to this Court.

of Revenue v. Menasha Corp., 2008 WI 88, ¶ 46, 311 Wis. 2d 579, 754 N.W.2d 95. In cases reviewing "[a]dministrative decisions which adversely affect the substantial interests of any person, whether by action or inaction," Wis. Stat. § 227.52, a court must give "due weight" to "the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it," *id.* § 227.57(10); *see infra* pp. 29–31.

SUMMARY OF ARGUMENT

I. This Court should revise its approach to reviewing agency decisions under Chapter 227.

A. This Court's caselaw has developed three levels of deference for courts reviewing an agency's conclusions of law: great weight deference, due weight deference, and no deference. *See Harnischfeger Corp. v. Labor & Indus. Review Comm'n*, 196 Wis. 2d 650, 659–60, 539 N.W.2d 98 (1995). When great weight deference applies, the agency's interpretation of a statute must merely be reasonable for it to be sustained, even if the court believes another reading of the statute is correct. An interpretation is only unreasonable if it directly contravenes the statute's text, is clearly contrary to legislative history, or is without a rational basis. *See id.* at 661.

B. Affording great weight deference to an agency's interpretation of a statute violates Chapter 227's text and the Wisconsin Constitution.

1. Chapter 227 calls for independent judicial review of agency interpretations of law. *See* Wis. Stat. §§ 227.57(5), (8). At the same time, Chapter 227 requires the court to afford "due weight" to an agency's interpretation, "accord[ing to] the experience, technical competence, and specialized knowledge of the agency as well as discretionary authority conferred upon it." *Id.* § 227.57(10). Great weight deference, in contrast, requires the court to review agency views only for clearance of the low reasonableness threshold. This improperly narrows the statutory standard of review, in violation of Chapter 227's plain text.

2. Great weight deference also violates the Wisconsin Constitution's separation of powers. The judicial power encompasses the "ultimate adjudicative authority [ ] to finally decide rights and responsibilities" between parties. This includes the duty to interpret and apply the law, the duty to say what the law is. *See Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶¶ 35–37, No. 2016AP275 (June 27, 2017) (citation omitted). Affording great weight deference places this essential element of judicial power in the hands of administrative agencies. By requiring courts to defer to reasonable agency interpretations, the doctrine deprives litigants of an independent judiciary, one that is duty-bound to interpret statutes for itself.

C. Chapter 227's statutory provision of due weight respect for agency expertise and discretion is a lawful

approach for reviewing an agency's interpretation of a statute, unlike great weight deference.

The instruction to courts to give due weight to agency interpretations of law, commensurate to the agency's "experience, technical competence, and specialized knowledge," "as well as [the] discretionary authority conferred upon it," is plainly stated in Subsection 227.57(10). The level of weight due depends upon the strength of the agency's showing on these factors and the statutory text at issue: the stronger the showing and the broader the text, the more weight should be due.

Affording due weight to agency interpretations of law is consistent with the Wisconsin Constitution, as the courts maintain their independent duty to say what the law is. Due weight merely directs the courts to give respect to the agency's views. In *every* case, the court must ultimately interpret the law for itself; thus, unlike with great weight deference, the court does not cede interpretive authority to the executive. The text of the Constitution, the long history of giving respect to executive interpretations of the law, and the history of Chapter 227 all support the constitutionality of courts affording due weight to agencies.

II. The services at issue in this case are "processing" under Wis. Stat. § 77.52(2)(a)11.

This Court gives statutory text its common, ordinary, and accepted meaning. In seeking to determine ordinary meaning, this Court will often look to dictionary definitions,

including when interpreting the tax laws. *See Telemark,* 28 Wis. 2d at 641; *Nat'l Amusement Co. v. Wis. Dep't of Taxation*, 41 Wis. 2d 261, 269–70, 163 N.W.2d 625 (1969); *Xerox Corp. v. Wis. Dep't of Revenue*, 2009 WI App 113, ¶ 63, 321 Wis. 2d 181, 772 N.W.2d 677.

Here, the retail sales tax applies "[f]or the privilege of selling, licensing, performing or furnishing the services" listed in the subsections of Wis. Stat. § 77.52(2)(a). This list includes: "[t]he producing, fabricating, *processing*, printing, or imprinting of *tangible personal property or items*, property, or goods . . . for a consideration for consumers who furnish directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting." Wis. Stat. § 77.52(2)(a)11 (emphasis added).

The only dispute here is whether the services at issue—the separation of contaminated riverbed material into its component parts for disposal and recycling—qualify as "processing." The Tax Appeals Commission adopted the definition of "processing" found in *The American Heritage Dictionary*. "Processing" means "to put through the steps of a prescribed procedure; or, to prepare, treat, or convert by subjecting to a special process." App. 162. Other dictionaries are in agreement. *See* 12 *Oxford English Dictionary* 546, 548 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989); App. 9 (citing *Webster's Third New International Dictionary*).

The services at issue here fall squarely within this ordinary and accepted definition. SDI put the dredged

riverbed material through the steps of a prescribed procedure; SDI prepared or treated it by running it through dredge pipelines, a scalping screen, a slurry holding tank, and then a slurry thickener tank. This special procedure separated, washed, and dewatered the materials in preparation for delivery to Tetra Tech. These prescribed steps had to occur in this order to cleanly separate the riverbed material.

Proper application of Subsection 227.57(10)'s due-weight framework further supports the Tax Appeals Commission's interpretation of "processing." The Legislature conferred authority on the Commission to determine questions of tax law and the Commission has experience, technical competence, and specialized knowledge, especially since the tax code is a technical area of the law.

ARGUMENT

I. This Court Should Revise Its Approach To Reviewing Agency Decisions Under Chapter 227

A. This Court's Current Doctrine For Reviewing Agency Statutory Interpretation

Under this Court's caselaw, courts must afford varying levels deference when reviewing agency actions.[3] For agency

[3] Two categories of review—questions of fact and mixed questions of law and fact—are not at issue in this case. For agency resolutions of fact, courts will uphold the agency's conclusion if "reasonable minds could arrive at the same conclusion." *Hilton ex rel. Pages Homeowners' Ass'n v. Dep't of Nat. Res.*, 2006 WI 84, ¶¶ 16–17, 293 Wis. 2d 1, 717 N.W.2d 166; *see also* Wis. Stat. § 227.57(6). For agency resolutions of mixed questions of law and fact, this Court has treated them as questions of

resolutions of questions of law, in particular, this Court has developed several review doctrines, depending on the different types of legal questions at issue and the considerations animating deference.[4]

The relevant doctrine for purposes of this case involves an agency interpretation of the meaning of a state statute. Under this Court's caselaw, "an agency's interpretation of a statute is entitled to one of . . . three levels of deference: great weight deference, due weight deference or no deference."

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law, granting the same deference for those questions as explained herein. *See Brown v. Labor & Indus. Rev. Comm'n*, 2003 WI 142, ¶¶ 10–12, 267 Wis. 2d 31, 671 N.W.2d 279.

[4] For example, this Court has held that, when an agency interprets statutes governing "the scope of the agency's powers, its competency, or its subject matter jurisdiction to decide an issue," this Court reviews that interpretation de novo. *Jocz v. Labor & Indus. Rev. Comm'n*, 196 Wis. 2d 273, 291, 538 N.W.2d 588 (1995), *abrogated on other grounds by Coulee Catholic Sch. v. Labor & Indus. Rev. Comm'n*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868. If an agency's "responsibility includes interpreting and applying [ ] federal statutes governing [federal programs]," then this Court has afforded deference to the agency in the same manner as it does for agency interpretations of state statutes. *Gould v. Dep't of Health & Soc. Servs.*, 216 Wis. 2d 356, 372–74, 576 N.W.2d 292 (Ct. App. 1998) (applying *Tannler v. Wis. Dep't of Health & Soc. Servs.*, 211 Wis. 2d. 179, 184–85, 564 N.W.2d 735 (1997)). If the agency does not have such responsibility, the court has reviewed agency interpretations of federal law de novo. *See id.* at 374. And this Court has held that agency interpretations of the agency's own regulations are given "controlling weight," which is "similar to the great weight standard applied to statutory interpretations." *Aguilar v. Husco Int'l, Inc.*, 2015 WI 36, ¶ 17, 361 Wis. 2d 597, 863 N.W.2d 556 (citation omitted). Finally, this Court has applied no deference to agency interpretations of court decisions. *See Beecher v. Labor & Indus. Rev. Comm'n*, 2004 WI 88, ¶ 26, 273 Wis. 2d 136, 682 N.W.2d 29.

Operton v. Labor & Indus. Review Comm'n, 2017 WI 46, ¶ 19, 375 Wis. 2d 1, 894 N.W.2d 426 (citation omitted).

The court must afford great weight deference when "(1) the agency was charged by the legislature with the duty of administering the statute; (2) [ ] the interpretation of the agency is one of long-standing; (3) [ ] the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) [ ] the agency's interpretation will provide uniformity and consistency in the application of the statute." *Harnischfeger*, 196 Wis. 2d at 660. When great weight deference applies, the agency's interpretation "must [ ] merely be reasonable for it to be sustained"—and an interpretation is unreasonable only if "it directly contravenes the words of the statute, [ ] is clearly contrary to legislative intent[,] or [ ] is without rational basis." *Id.* at 661–62; *accord* Patience Drake Roggensack, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in This Court of Last Resort?*, 89 Marq. L. Rev. 541, 547, 555 (2006) (great weight deference is an "extraordinary level of deference" that "has grown over time").

Due weight deference applies when: "[1] the statute is one that the agency was charged with administering and [2] the agency has at least some expertise in the interpretation of the statute in question." *Operton*, 375 Wis. 2d 1, ¶ 20 (citation omitted). The court "defer[s] to an agency's statutory interpretation only when [it] conclude[s] that another interpretation of the statute is not more reasonable than that

chosen by the agency." *Id.* ¶ 21 (citation omitted). Notably, "there is little difference between due weight deference and no deference." *Id.* ¶ 22 (citation omitted).

Finally, a court will review an agency's decision de novo when "the issue before the agency is clearly one of first impression, or when an agency's position on an issue has been so inconsistent so as to provide no real guidance." *Masri v. Labor & Indus. Review Comm'n*, 2014 WI 81, ¶ 24, 356 Wis. 2d 405, 850 N.W.2d 298.

B. Affording Great Weight Deference To An Agency's Interpretation Of A Statute Violates Chapter 227's Text And The Wisconsin Constitution

1. Chapter 227's Text

This Court's great weight deference doctrine violates Chapter 227's plain text.

a. Chapter 227 establishes administrative procedures for much of agency action in Wisconsin, *see* Wis. Stat. §§ 227.01(1), (13); 227.03, as well as judicial review of those agency actions, Wis. Stat. §§ 227.40; 227.52; *see generally* Ralph M. Hoyt, *The Wisconsin Administrative Procedure Act*, 1944 Wis. L. Rev. 214, 217, 229–30 (1944). For both types of review, Chapter 227 specifies the standards for the courts to follow. As this Court has explained, "the right of judicial review is entirely statutory, and orders of administrative agencies are not reviewable unless made so by the statutes." *See Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 93

Wis. 2d 650, 657, 287 N.W.2d 737 (1980). Chapter 227's judicial review provisions are thus an exercise of the Legislature's constitutional authority to "confer jurisdiction [to review administrative action] upon the circuit court . . . *and prescribe its extent*." *Clintonville Transfer Line v. Pub. Serv. Comm'n*, 248 Wis. 59, 75–76, 21 N.W.2d 5 (1945) (emphasis added); *see also* Wis. Const. Art. VII, §§ 5(3), 8.

Chapter 227 provides detailed instructions for review of agency actions, the type of review at issue in this case. *See* Wis. Stat. § 227.57(1)–(12).[5] A court's "review shall be conducted by the court without a jury and shall be confined to the record [unless a procedural irregularity is present]." Wis. Stat. § 227.57(1). The court shall affirm the agency action "[u]nless the court finds a ground for setting aside, modifying, remanding or ordering agency action," *id.* § 227.57(2), grounds which are explicitly stated in Wis. Stat. § 227.57(4)–(8). Further, the court "shall separately treat disputed issues of agency procedure, interpretations of law, [and] determinations of fact or policy within the agency's exercise of delegated discretion." Wis. Stat. § 227.57(3).

Chapter 227 provides that the courts must independently review agency statutory interpretation. In

[5] For review of agency rules, Chapter 227 provides that "[i]n any proceeding pursuant to this section for judicial review of a rule, the court shall declare the rule invalid if it finds that it [1] violates constitutional provisions or [2] exceeds the statutory authority of the agency or [3] was promulgated without compliance with statutory rule-making procedures." Wis. Stat. § 227.40(4)(a).

particular, the court "shall set aside or modify the agency action if [the court] finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case . . . for further action under a correct interpretation of the provision of law." Wis. Stat. § 227.57(5). "[I]f [the court] finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law . . . or is otherwise in violation of a constitutional or statutory provision," it "shall reverse or remand the case to the agency," "but [ ] shall not substitute its judgment for that of the agency on an issue of discretion." *Id.* § 227.57(8).

At the same time, Chapter 227 explicitly and unambiguously requires courts to give "due weight" to the agency's conclusions, with one statutory exception. Specifically, Wis. Stat. § 227.57(10) provides that "[s]ubject to sub. (11), upon [ ] review *due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it*." Wis. Stat. § 227.57(10) (emphasis added). Subsection 227.57(11) provides the only exception, explaining that "the court shall accord no deference to the agency's interpretation of law" when "review[ing] [ ] an agency action or decision affecting a property owner's use of [his] property" "if the agency action or decision restricts the property owner's free use of [his] property." Wis. Stat. § 227.57(11).

In sum, Chapter 227 mandates independent judicial review of agency interpretations of law, *id.* §§ 227.57(5), (8), while ensuring appropriate respect for agency expertise and experience, *id.* § 227.57(10), except for the cases that fall within Subsection 227.57(11).

b. Chapter 227's text forecloses affording great weight deference to agency interpretations of statutes.

Chapter 227 provides independent review of agency interpretations of statutes, while affording "due weight" to the agency's view (except in Subsection 227.57(11) cases). This entails giving the agency's position respectful consideration, commensurate to the "experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it" Wis. Stat. § 227.57(10). Appropriately calibrating this statutorily mandated respect is discussed below. *Infra* pp. 29–31.

In contrast to Chapter 227's judicial-review provisions, great weight deference requires the court to review agency interpretations of statutes only for irreconcilable conflict with the text. *See Harnischfeger*, 196 Wis. 2d at 661–62. If the agency can clear that low bar, the court may not interpret the statute for itself. *See id.* at 661–64. Thus, great weight deference requires the court to defer to the agency even when another reading of the statute is *more* reasonable and forecloses the court from exercising its independent judgment. *See Operton*, 375 Wis. 2d 1, ¶ 74 (R.G. Bradley, J.,

concurring); *compare with id.* ¶ 21 (due weight always allows the Court to adopt a more reasonable interpretation).

Since great weight deference improperly narrows the review that Chapter 227 instructs the courts to provide, that doctrine is unlawful. Through Chapter 227, the Legislature exercised its authority to "confer jurisdiction [to review administrative action] upon the circuit court . . . *and prescribe its extent*." *Clintonville*, 248 Wis. at 75–76 (emphasis added). As this Court has previously noted, "[b]y according [something other] than the appropriate level of deference, [the] court [has] invade[d], albeit indirectly, the province of the legislature." *Beecher v. Labor & Indus. Rev. Comm'n*, 2004 WI 88, ¶ 24, 273 Wis. 2d 136, 682 N.W.2d 29. While *Beecher* addressed the problem of a court "according *less* than the appropriate level of deference," the point applies with equal strength here: affording a different level of deference than the Legislature established by statute violates that statute. *Id.* (emphasis added).

c. In *Racine Harley-Davidson, Inc. v. State Division of Hearings & Appeals*, 2006 WI 86, 292 Wis. 2d 549, 717 N.W.2d 184, this Court held that the three "levels of deference" doctrine—including great weight deference—were "in accord with Wis. Stat. § 227.57(10)." *Id.* ¶ 13. But, with all respect, there is simply "no indication in § 227.57['s text] that great weight deference should ever be accorded." *Id.* ¶ 112 (Roggensack, J., concurring) (footnote omitted). In addition, the factors that this Court uses to determine whether a court

will give great weight, due weight, or no deference differ from Subsection 227.57(10)'s statutory factors to determine what amount of weight is "due." For example, whether an agency's interpretation "will provide uniformity and consistency in the application of the statute" or whether "the agency's position on the issue has been so inconsistent as to provide no real guidance" is nowhere in the statutory text. *Compare Racine*, 292 Wis. 2d 549, ¶¶ 16, 18–19, *with* Wis. Stat. § 227.57(10). Given these textual points, as well as the constitutional analysis discussed below, *see infra* pp. 23–29, *Racine* (as well as this Court's other cases upholding great weight deference) is "unsound in principle" and should be overruled, *State v. Denny*, 2017 WI 17, ¶70, 373 Wis. 2d 390, 891 N.W.2d 144 (citation omitted); *accord* Roggensack, *supra*, at 542, 560.[6]

2. The Wisconsin Constitution

Affording great weight deference to agency interpretations of state statutes also violates the Wisconsin Constitution's separation of powers, at least where such deference is not the product of legislative instruction.[7]

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[6] Similarly textually impermissible is Tetra Tech's assertion that Subsection 227.57(10) does not apply to "an agency's interpretation of a statute." Opening Br. 14. Subsection 227.57(10) does not carve out statutory interpretation from its general due weight instruction, even as Subsection 227.57(11) creates one exception. *See Am. Bank & Trust Co. v. Dallas Cnty.*, 463 U.S. 855, 864 (1983) (inclusion of enumerated exception strongly implies exclusion of other exceptions).

[7] The Department takes no position on whether the Legislature could alter the separation of powers analysis by invoking its own constitutional

a. When interpreting the Wisconsin Constitution, this Court "look[s] to intrinsic as well as extrinsic sources" to "give effect to the apparent understanding of the drafters and the people who adopted the constitutional provision under consideration." *State v. Williams*, 2012 WI 59, ¶ 15, 341 Wis. 2d 191, 814 N.W.2d 460. First and foremost, this Court "look[s] to the plain meaning of the words [of the Constitution] in the context used." *Id.* (citation omitted). Second, this Court looks to "the historical analysis of the constitutional debates relative to the constitutional provision under review; the prevailing practices [ ] when the provision was adopted; and the earliest legislative interpretations of the provision as manifested in the first laws passed that bear on the provision." *Id.* (citation omitted). Lastly, the court will "seek to ascertain what the people understood the purpose of the amendment to be." *Id.*

The Wisconsin Constitution's structure establishes the separation-of-powers doctrine. *See Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 11, No. 2016AP275 (June 27, 2017). The three branches are "co-ordinate"; "no branch [is] subordinate to the other, no branch [may] arrogate to itself control over the other except as is provided by the constitution, and no branch [may] exercise the power committed by the constitution to another." *State v. Holmes*,

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authority, *see,* Wis. Const. Art. VII, §§ 5(3), 8, to require great weight deference. As explained below, *see infra* pp. 31–35, the Legislature's due weight instruction complies with the separation of powers.

106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982); *Gabler*, 2017 WI 67, ¶ 31.

As relevant here, Article VII, Section 2 provides that "[t]he judicial power of this state shall be vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform statewide jurisdiction as the legislature may create by law, and a municipal court if authorized by the legislature." Wis. Const. Art. VII, § 2. The text of the Constitution "does not define . . . judicial power," *Holmes*, 106 Wis. 2d at 42, so this Court has looked to "the common law and [ ] the history of our institutions as they existed anterior to and at the time of the adoption of the constitution" to define the term, *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717, 718 (1931) (citations omitted).

The "[j]udicial power" "encompasses" the "ultimate adjudicative authority of courts to finally decide rights and responsibilities as between individuals." *Gabler*, 2017 WI 67, ¶ 37 (citation omitted). This is "the power to hear and determine controversies between parties before courts." *Williams*, 341 Wis. 2d 191, ¶¶ 35–36 (analogizing to Article III of the United States Constitution). This includes the "duty of interpreting and applying laws." *Gabler*, 2017 WI 67, ¶ 37. "No less than in the federal system, in Wisconsin '[it] is emphatically the province and duty of the judicial department to say what the law is.'" *Operton*, 375 Wis. 2d 1, ¶ 78 (R.G. Bradley, J., concurring) (citing *Williams*, 341 Wis. 2d 91, ¶ 36

n.13 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))); Roggensack, *supra*, at 542, 560.

b. Affording great weight deference to agencies violates the Wisconsin Constitution because that doctrine places an essential element of the judicial power in administrative agencies, without legislative approval.

Great weight deference violates the separation of powers because it unilaterally abdicates the court's "constitutional responsibilit[y]" "to finally decide rights and responsibilities as between individuals." *Gabler*, 2017 WI 67, ¶¶ 37, 44; *accord* Roggensack, *supra*, at 542, 560. This doctrine requires the court to accept an agency's interpretation if it is "merely [ ] reasonable," even if another interpretation is more reasonable. *Operton*, 375 Wis. 2d 1, ¶ 74 (R.G. Bradley, J., concurring) (citation omitted). Only agency interpretations that "directly contravene[ ] the words of the statute, [are] clearly contrary to legislative intent, or [are] without rational basis" will be considered "unreasonable." *Id.* (citation omitted). In other words, under great weight deference, the courts "are expected to rationalize and rubberstamp the agency's decisions unless the agency's legal interpretation is plainly wrong." *Hilton ex rel. Pages Homeowners' Ass'n v. Dep't of Nat. Res.*, 2006 WI 84, ¶ 55, 293 Wis.2d 1, 717 N.W.2d 166 (Prosser, J., concurring); *accord* Roggensack, *supra*, at 559 ("The mantra of great weight deference is substituted for the judicial reasoning that should tie the facts found to the law the legislature enacted."). "The

result" of this doctrine "is that many litigants have lost their right to a decision by an *independent* judiciary." *Hilton*, 293 Wis. 2d 1, ¶ 55 (Prosser, J., concurring); *accord* Roggensack, *supra*, at 545–46. Indeed, the agency need not even "justify its interpretation" as reasonable: "[t]he burden of proof to show that the agency's interpretation is unreasonable is on the party seeking to overturn the agency action." *Harnischfeger*, 196 Wis. 2d at 661. Great weight deference does not require the court to "construe the statute [itself]"—apart from the "clearly erroneous" threshold mentioned above. *Operton*, 375 Wis. 2d 1, ¶ 21.

This level of deference means that the court is not the "*ultimate* adjudicative authority," or acting to "*finally* decide rights and responsibilities as between individuals." *Gabler*, 2017 WI 67, ¶ 37 (citation omitted, emphases added); *see Operton*, 375 Wis. 2d 1, ¶¶ 73, 78 (R.G. Bradley, J., concurring). Rather, the agency is this authority, so long as its interpretations do not fall into the narrow category of blatant statutory violations. *See* Roggensack, *supra*, at 559. Since the Wisconsin Constitution mandates a separation of powers, great weight deference violates the Constitution. *Operton*, 375 Wis. 2d 1, ¶ 80 (R.G. Bradley, J., concurring); *see also* Roggensack, *supra*, at 542, 545–46, 560.

c. Federal jurists have echoed constitutional concerns about affording broad judicial deference to agencies, in the context of the doctrine announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),

which doctrine is (at least in some respects) analogous to great weight deference, *see Operton*, 375 Wis. 2d 1, ¶ 77 n.4 (R.G. Bradley, J, concurring). Justice Clarence Thomas, for example, has argued that "*Chevron* deference raises serious separation-of-powers questions." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). Similarly, then-Judge Neil Gorsuch explained that by adopting an agency's statutory interpretation under *Chevron*, even when the courts conclude a better interpretation exists, the courts fail to "fulfill their duty to exercise their independent judgment about what the law *is*." *Guitierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring); *accord Waterkeeper Alliance v. Envtl. Prot. Agency*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) (*Chevron* deference "trivialize[s]" the judiciary's duty to faithfully interpret the text of the law); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) (book review) ("*Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278–79 (3d Cir. 2017) (Jordan, J., concurring in the judgment).

Notably, despite the similarities between *Chevron* and Wisconsin's great weight deference, there is (at least) one critical doctrinal difference, which makes great weight deference even less defensible than its federal counterpart. The federal courts have typically justified *Chevron* deference as an *implicit delegation* of legislative power from Congress

to an executive agency. Although this is a questionable proposition as a matter of federal statutory interpretation, *see Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring); *Gutierrez-Brizuela*, 834 F.3d at 1151–52 (Gorsuch, J., concurring), at least it attempts to ground *Chevron* in Congress' constitutional authority. In sharp contrast, Chapter 227 *explicitly* directs courts to provide agency views due weight, *see supra* pp. 19–22, meaning there is no basis for speculating about the Legislature's *implicit* intent to delegate.

C. Chapter 227's "Due Weight" Framework Offers A Lawful Approach For Reviewing An Agency's Interpretation Of A Statute

1. Chapter 227's instruction to courts to give "due weight" to agency views is grounded in statutory text.

As a threshold matter, Chapter 227's "due weight" approach unambiguously applies to issues of statutory interpretation. Chapter 227 provides for independent judicial review, Wis. Stat. §§ 227.57(5), (8), while "accord[ing]" "due weight [to] the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it," except where Subsection 227.57(11) applies. Wis. Stat. § 227.57(10).

Subsection 227.57(10)'s "due weight" provision also instructs how courts should carry out this review. "Due" means giving what is "[o]wing by right of circumstances or condition; that ought to be given or rendered; proper to be

conferred [or] granted"; "as ought to be, to be observed, or to be done; fitting; proper; rightful." 4 *Oxford English Dictionary* 1105 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). The level of weight "due" to an agency's statutory interpretation turns on the factors that the Legislature enumerated in Subsection 227.57(10): "the experience" of the agency, its "technical competence," its "specialized knowledge," and the "discretionary authority conferred upon" the agency. When an agency's statutory construction embodies long-standing "experience," "technical competence," and "specialized knowledge," more weight is "due." Wis. Stat. § 227.57(10). It is, after all, "fitting," "proper," and "rightful" for courts to give respect to such informed views of the law. 4 *Oxford English Dictionary* 1105. Further, the Legislature's use of "broad and open-ended terms" that may call for a technical judgment—"like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable,'" Kavanaugh, *supra*, at 2153–54—increases the weight that is "due" because such terms evidence a broader "discretionary authority conferred upon" the agency. Wis. Stat. § 227.57(10).

On the other hand, certain situations suggest that less weight is "due" to an agency's interpretation. For example, agency interpretations of new statutes and statutes that involve no technical judgments may be "due" less weight when not grounded in the agency's "experience," "technical competence," and "specialized knowledge." Wis. Stat. § 227.57(10). Similarly, when an issue of statutory

interpretation would settle questions of vast "economic and political significance," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000), considerably less "weight" is "due" to the agency because agencies are not "conferred" "discretion," Wis. Stat. § 227.57(10), over such foundational questions, *see generally U.S. Telecom Assoc. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

2. Affording "due weight" to agency interpretations of law involving the agency's "experience, technical competence, and specialized knowledge," and the "discretionary authority conferred upon" the agency, Wis. Stat. § 227.57(10), is consistent with the Wisconsin Constitution.

As explained above, "the judicial power" includes the "ultimate adjudicative authority [ ] to finally decide rights and responsibilities as between individuals," which necessarily includes the duty to independently "say what the law is." *Gabler*, 2017 WI 67, ¶ 37 (citations omitted). Unlike great weight deference, affording due weight to agency interpretations of law does not oust the court as the "ultimate" authority or "final[ ]" arbiter. Rather, due weight simply directs the courts to give respectful, appropriate consideration to the agency's views, as part for this Court rendering its own independent judgment. *See supra* pp. 19–20. In *every* case, the court must ultimately interpret the law for itself: it does not "entirely ced[e] interpretive authority to the executive," unlike with great weight deference. *Operton*, 375 Wis. 2d 1,

¶ 78 (R.G. Bradley, J., concurring). Therefore, there is no "encroachment[ ]," "intru[sion]," "undu[e] burden[ ]," or "substantial[ ] interfer[ence]" with the court's constitutional authority. *Gabler*, 2017 WI 67, ¶¶ 31, 35; *supra* pp. 19–20.

The Constitution's text bolsters the point. Executive officials, like members of the judiciary, take the oath "to support . . . the constitution of the state of Wisconsin, and faithfully to discharge the duties of their respective offices to the best of their ability." Wis. Const. Art. IV, § 28. This necessarily requires executive officials to interpret the law in the course of "discharg[ing] the[ir] duties." *Id.* Thus, affording such interpretations due respect simply recognizes the Constitution's own allocation of interpretative duties.

A "historical analysis" of "the prevailing [constitutional] practices," *Williams*, 341 Wis. 2d 191, ¶ 15 (citation omitted), provides further support for the constitutionality of giving "due weight" to agency views. This Court has recognized the value of executive interpretations of the law for over 150 years. This Court understood that executive-branch officers are "appointed by law to carry [the law's] provisions into effect"; they have the "duty" to "interpret[ ], underst[and] and act[ ] upon" the law. *Harrington v. Smith*, 28 Wis. 43, 67–68 (1871); *Operton*, 375 Wis. 2d 1, ¶¶ 77–78 (R.G. Bradley, J., concurring) (discussing *Harrington* and *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206 (1827)). The depth of this historical "prevailing practice" supports the conclusion that granting executive interpretations respectful consideration

comports with the Constitution's separation of powers. *See Williams*, 341 Wis. 2d 191, ¶ 15.

Chapter 227's history offers further support. The Legislature adopted Chapter 227 in 1943, Laws of Wis. ch. 375 (1943), and its relevant review structure has remained essentially unchanged, *see generally* Hoyt, *supra*. When the Legislature enacted Chapter 227, "its novelty [laid] principally in the collection of all [administrative procedures] into a single chapter . . . [as opposed to] scattered statutes applicable to particular agencies, or in court decisions alone." *Id.* at 214. This "novelty" was not in creating "new" administrative procedures or modifying judicial review of those procedures. *Id.*; *see also Aetna Life Ins. Co. v. Mitchell*, 101 Wis. 2d 90, 127, 303 N.W.2d 639 (1981) (Abrahamson, J., dissenting) ("To a large extent, [Chapter 227] codifies the rules of review the courts have traditionally employed.").[8]

Under the original Chapter 227, like the current Chapter 227, the courts were simply directed to reverse administrative actions that were "contrary to the appellant's constitutional rights or privileges," were "in excess of [ ] statutory authority," or were "affected by other error of law."

[8] With the passage of Chapter 227, the Legislature became one of the "first . . . state legislature[s] to codify in a single chapter of the statutes, and make applicable to virtually all state-wide administrative activities, the procedure to be followed by administrative agencies with reference to their rules and regulations and their conduct of contested cases, and to the method of judicially reviewing their determinations." Hoyt, *supra*, at 214; *see generally* Kenneth K. Luce, *The Wisconsin Idea in Administrative Law*, 34 Marq. L. Rev. 1 (1950).

Hoyt, *supra*, at 234. This review of legal questions was "nothing really new." *Id.* at 218. Wisconsin's "declaratory judgment act itself provide[d] that the construction and validity of statutes and ordinances may be tested by action for declaratory relief, so the extension of that jurisdiction to administrative rules [was] entirely logical." *Id.* (footnote omitted).[9] Commentators at the time of Chapter 227's passage made no mention of great weight deference to an agency's conclusions of law. *See* Hoyt, *supra*, at 234; Kenneth K. Luce, *The Wisconsin Idea in Administrative Law*, 34 Marq. L. Rev. 1, 12–14 (1950).

And while great weight deference was absent, due respect was not: Chapter 227 from the beginning "explicitly directed [the courts] to give due weight to the experience, technical competency, and specialized knowledge of the agency, as well as discretionary authority conferred upon it." Hoyt, *supra*, at 234 & n.69 (citing Wis. Stat. § 227.20(2) (1943)); *accord* Luce, *supra*, at 13; *Operton*, 375 Wis. 2d. 1, ¶ 78 (R.G. Bradley, J., concurring) (describing this Court's historic recognition of "the value of executive interpretations without entirely ceding interpretive authority to the executive").

[9] "Prior to 1943 there were no less than seventy-four different statutes in Wisconsin providing methods of judicially reviewing the orders of administrative agencies in contested cases." Hoyt, *supra*, at 226–27.

This Court's decision in *International Association of Machinists v. Wisconsin Employment Relations Board*, 249 Wis. 112, 23 N.W.2d 489 (1946), decided only three years after the passage of Chapter 227, is instructive. In that case, this Court considered an agency's decision that a group of "employees of [the] appellant constitute[d] the machinists' craft," such that these employees qualified as a "collective bargaining unit" under Wis. Stat. § 111.02(6) (1945). *Int'l Machinists*, 249 Wis. at 117–18. This Court interpreted the statutory term "craft" for itself—with no mention of deference—but noted that Chapter 227 requires this Court to give "due weight . . . [to] the experience, technical competence, and specialized knowledge of the [Board]" when reviewing the Board's "findings and orders." *Id.* at 119–20, 123 (citation omitted).

3. Many of the same federal jurists discussed above recognized the need for measured respect to agencies' views, in appropriate cases, even as they criticized *Chevron*. As then-Judge Gorsuch explained, even without *Chevron* deference, "courts could and would consult agency views and apply the agency's interpretation when it accords with the best reading of the statute." *Guitierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring). Similarly, Judge Jordan articulated that agencies' views are entitled to respect because those agencies "unquestionably have institutional expertise that allows them to understand some provisions of law 'based upon more specialized experience and broader

investigations and information than is likely to come to a judge in a particular case.'" *Egan*, 851 F.3d at 281 (Jordan, J., concurring in the judgment) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)).

II. The Services At Issue Here Are "Processing" Under Subsection 77.52(2)(a)11

A. When interpreting a statute, this Court "focus[es] primarily on the language of the statute," giving the text its "common, ordinary, and accepted meaning," unless it is clear from the context that a "technical or special definitional meaning" applies. *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶¶ 44–45, 271 Wis. 2d 633, 681 N.W.2d 110. In conducting an inquiry into the "common, ordinary, and accepted meaning" of a statutory term, this Court regularly looks to dictionary definitions. *See, e.g.*, *id.* ¶ 53.

This approach to statutory interpretation applies to interpreting tax laws. In *Telemark Co. v. Wisconsin Department of Taxation,* 28 Wis. 2d 637, 137 N.W.2d 407 (1965), this Court looked to the "ordinary and accepted" dictionary definitions to understand the meaning of "facilities." *Id.* at 641. Similarly, in *National Amusement Co. v. Wisconsin Department of Taxation*, 41 Wis. 2d 261, 163 N.W.2d 625 (1969), this Court relied upon dictionary definitions—including of "food" and "beverage"—to interpret a tax provision, explaining that "[t]he legislature intended the phrase 'engaged in the business of preparing food or beverages' to have a broad meaning." *Id.* at 269–70. And in

Xerox Corp. v. Wisconsin Department of Revenue, 2009 WI App 113, 321 Wis. 2d 181, 772 N.W.2d 677, the Court of Appeals looked to the dictionary definition of "peripheral." *Id.* ¶ 63.

B. In the present case, a 5% retail sales tax applies "[f]or the privilege of selling, licensing, performing or furnishing the services" listed in the subsections of Wis. Stat. § 77.52(2)(a). This list includes: "[t]he producing, fabricating, *processing*, printing, or imprinting of *tangible personal property or items*, property, or goods . . . *for a consideration for consumers who furnish directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting*." Wis. Stat. § 77.52(2)(a)11 (emphases added). Here, there is no dispute that the riverbed material is "tangible personal property," that was "furnish[ed]," and that SDI's services were "for [ ] consideration." *Id.* Thus, the only dispute is whether SDI's services are "processing."

The term "processing" is susceptible to an easily understood dictionary definition. Below, the Tax Appeals Commission cited *The American Heritage Dictionary*, which defines "processing" as follows: "to put through the steps of a prescribed procedure; or, to prepare, treat, or convert by subjecting to a special process." App. 162. The Court of Appeals, in turn, looked to *Webster's Third New International Dictionary*: "to subject to a particular method, system, or technique of preparation, handling, or other treatment designed to effect a particular result." App. 9. And the *Oxford*

English Dictionary defines "processing" as: "[t]o institute a process," which is "[a] continuous and regular action or succession of actions, taking place . . . in a definite manner, and leading to the accomplishment of some result." 12 *Oxford English Dictionary* 546, 548 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

SDI's remediation activities fall squarely within the "ordinary and accepted" dictionary definition of "processing." *See Telemark,* 28 Wis. 2d at 641; *Nat'l Amusement*, 41 Wis. 2d at 269–70; *Xerox*, 321 Wis. 2d 181, ¶ 61. SDI "put [the dredged riverbed material] through the steps of a prescribed procedure." *The American Heritage Dictionary* 1444. It "prepare[d]" or "treat[ed]," *id.*, the dredged material by running it "through dredge pipelines," a "scalping screen," "a slurry holding tank," and a "slurry thickener tank." *Supra* p. 6. This "special process," *The American Heritage Dictionary* 1444, "separate[d]," "wash[ed]," and "dewater[ed]" the material—first with the larger particles and then the smaller particles. *Supra* pp. 6–7. Finally, SDI delivered the constitutive parts to Tetra Tech. These "steps" needed to occur in this "prescribed" order to cleanly separate the riverbed material. *The American Heritage Dictionary* 1444; *see supra* pp. 7–8. The same analysis and conclusion would obtain if this Court were to look to the *Webster's Third New International Dictionary*'s definition, as the Court of Appeals did, App. 9, or the *Oxford English Dictionary* definition

provided above, *supra* p. 14, as those definitions are functionally identical.

That SDI's activities are "processing" is further reinforced by the companies' own words. Tetra Tech's plan submitted to EPA includes a "Process Flow Diagram" that "descri[bes]" all of the "processes" involved in completing this step of the remediation. App. 31. The "dredged sediment from the Fox River enters SDI's *processing* facility"; "goes through the scalping screen, slurry holding tank[,] and slurry thickener tank"; and then "enters the course and fine sand separation *processes*." App. 31 (quoting plan) (emphases added). "The sediment will be *processed* through several stages to enable efficient and effective mechanical dewatering of the fines using membrane-type filter presses." App. 32 (citation omitted, emphasis added). Tetra Tech's own witnesses understood that "processing" services were being provided. "Tetra Tech's Vice President of Project Engineering and Senior Engineer" on the Fox River project testified "that SDI *processes* and changes the sediment it receives indirectly from Tetra Tech." App. 33 (citation omitted, emphasis added). "An operations manager" who "had overseen SDI's remediation processes for the Fox River" likewise testified that "SDI *processes* the sediment." App. 33 (citation omitted, emphasis added). Tetra Tech's expert witness explained in an affidavit that "SDI is conducting a physical separation process of [Fox River] sediments based on differences in grain size and specific gravity," and used the word "process" numerous other

times to describe SDI's services. *See* App. 33 (quoting affidavit).

C. In arguing that SDI's activities are not "processing," Tetra Tech has failed to offer any alternative definition of the term. *See* Opening Br. 31 n.14. The counterarguments that Tetra Tech does raise are not persuasive.

First, Tetra Tech claims that Section 77.52(2) is a peculiarly narrow and limited statute. *E.g.* Opening Br. 1, 20. But while Wisconsin sales tax applies only to the specific services listed, "a selective-sales-tax enactment does not need to itemize each specific object of taxation." *Telemark*, 28 Wis. 2d at 640. Thus, the tax applies to *all* services that fit within the "ordinary and accepted meaning" of the terms that the statute uses. *Id.* at 641.

Second, Tetra Tech argues that the Commission's definition of "processing" converts the sales-and-use tax into a general retail sales tax. *E.g.* Opening Br. 19–21. This objection is misplaced because Subsection 77.52(2)(a)11 contains other important limitations. Specifically, this tax attaches only to services performed on "[1] tangible personal property . . . [2] furnish[ed] directly or indirectly" by [3] the "consumers" themselves. Wis. Stat. § 77.52(2)(a)11. A service that fails to meet any of these particular elements cannot be taxed under Subsection 77.52(2)(a)11.

Third, Tetra Tech points to the rule that "a tax cannot be imposed without clear and express language for that purpose." Opening Br. 23–24 (citation omitted); *Wis. Dep't of*

Revenue v. Milwaukee Refin. Corp., 80 Wis. 2d 44, 48–49, 257 N.W.2d 855 (1977). But this rule of construction does not come into play when the statute's meaning is unambiguous. *Milwaukee Refin. Corp*, 80 Wis. 2d at 48. As shown above, the unambiguous "ordinary and accepted meaning" of "processing" covers SDI's services. *See supra* pp. 37–38.

In addition and relatedly, a statute is ambiguous only "if it is capable of being understood by reasonably well-informed persons in two or more senses." *Kalal*, 271 Wis. 2d 633, ¶ 47. The Tax Appeals Commission, the circuit court, and the Court of Appeals all used dictionary definitions of "processing," which is an accepted method of statutory interpretation. *See supra* pp. 36–37. In contrast, Tetra Tech has never offered an alternative definition. *See* Opening Br. 31 n.14. As a result, there are not two competing definitions before this Court, and no ambiguity exists.

Fourth, Tetra Tech claims that the Department's definition of "processing" renders the other categories in Subsection 77.52(2)(a)11 superfluous. Opening Br. 25. This argument is both wrong on the general rule against surplusage and its specific application in this case.

The rule against surplusage applies when a reading of a statute "total[ly] disregards [ ] a provision" or "renders [a provision] pointless." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (1st ed. 2012). Therefore, the rule is not implicated when a statute lists categories that may overlap to some degree—like how

Subsection 77.52(2)(a)11 lists a series of services ("producing, fabricating, processing, printing, or imprinting") joined by the disjunctive "or." Indeed, this Court has observed that the Legislature's "use of different words joined by the disjunctive connector 'or' normally *broadens* the coverage of the statute to reach distinct, *although potentially overlapping sets*." *Pawlowski v. Am. Family Mut. Ins. Co.*, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67 (emphases added). Thus, the fact that "processing" may overlap with some of the other terms (like "producing" or "fabricating") is no cause for concern. *See, e.g.*, Wis. Admin. Code § TAX 11.38(2) (providing examples "fabricating *and* processing services" (emphasis added)).

The statutory categories in Subsection 77.52(2)(a)11 bear distinct, although sometimes overlapping, meanings. The terms "producing" and "fabricating" cover the creation of a new product out of raw materials that goes beyond mere preparing, treating, or converting. For example, the dictionary that the Tax Appeals Commission used, *see* App. 162, defines "produce" as "[t]o create by physical [ ] effort," "[t]o manufacture"; it defines "fabricate" as "[t]o make; create," "[t]o construct by combining or assembling diverse, typically standardized parts," *The American Heritage Dictionary* 652, 1445. In addition, "printing" and "imprinting" have specific meanings relating to producing marks or patterns on a surface. "[P]rint" means "[t]o press [a mark or design, for example] onto or into a surface," and "imprint" as

"[t]o produce (a mark or pattern) on a surface by pressure," "[t]o produce a mark on (a surface) by pressure." *Id.* at 1441, 908.

The Commission's interpretation of "processing" in Subsection 77.52(2)(a)11 also does not implicate the rule against surplusage with respect to the services listed in Wis. Stat. § 77.52(2)(a)10, which imposes sales tax on "the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of all items of tangible personal property." The services in Subsection 77.52(2)(a)10 will have independent meaning because they are taxed in all instances. In contrast, Subsection 77.52(2)(a)11 imposes the tax on a narrower class of services "for consumers who furnish directly or indirectly the materials used in [ ] producing, fabricating, processing, printing, or imprinting." *Id.* § 77.52(2)(a)11.

Fifth, Tetra Tech argues that SDI's services are "*separation*" services, thus they cannot be taxed under Subsection 77.52(2)(a)11 since "'[s]eparation' is not listed as a category" of taxable services in the statute. Opening Br. 28–29. But whether SDI's activities fall within Subsection 77.52(2)(a)11 does not depend on how Tetra Tech labels those services. Rather, it depends on identifying what the services *actually* are and then determining whether they are "processing" (or any other category listed in Subsection 77.52(2)(a)11). *See Wis. Carry Inc. v. City of Madison*, 2017 WI 19, ¶¶ 25–26, 373 Wis. 2d 543, 892 N.W.2d 233 ("[T]he

label given to a legislative device is not dispositive—one identifies the device's taxonomy functionally.").

Finally, Tetra Tech claims that "processing" is defined in Wis. Admin. Code § TAX 11.38, and that this definition does not include SDI's services, Opening Br. 29–32. This argument fails because Section 11.38 is an agency rule that provides a non-exhaustive list of "examples of fabricating and processing services," Wis. Admin. Code § TAX 11.38(2), preceded by the expansive term "include." As this Court has explained, "generally, the word 'includes' is to be given an expansive meaning, indicating that which follows is but a part of the whole." *In re Chezron M.*, 2005 WI 80, ¶ 26, 281 Wis. 2d 685, 698 N.W.2d 95 (citation omitted); *accord Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99–100 (1941). That is precisely how Wis. Admin. Code § TAX 11.38 uses the word "include." By expressly referring to undifferentiated "examples" of "fabricating *and* processing services"—and by listing services as varied as "[b]ending glass tubes into neon signs," "[b]ookbinding," "crushing stones," and "[t]ailoring a suit"—the regulation shows the range of the types of services covered by Subsection 77.52(2)(a)11. SDI's activities are in line with these examples, only further bolstering the conclusion that they are "processing."

D. Although the interpretation of "processing" discussed above would be correct even if this Court concluded that no weight at all is due to the Tax Appeals Commission's conclusions, App. 20, a proper application of Subsection

227.57(10)'s due weight framework further supports the Commission's conclusion. As explained above, under Subsection 227.57(10), an agency's views ought to be given weight when it has "experience," "technical competence," and "specialized knowledge," and based upon the scope of the "discretionary authority conferred upon" the agency. Wis. Stat. § 227.57(10); *supra* pp. 29–31.

Here, the Legislature "conferred" to the Commission, Wis. Stat. § 227.57(10), the "final authority for the hearing and determination of all questions of law and fact arising under [the tax statutes]," Wis. Stat. § 73.01(4). And the Commission has "experience," "technical competence," and "specialized knowledge," Wis. Stat. § 227.57(10), as the tax code is an especially "technical" area of the law. The Commission's adopted dictionary definition of processing—"to put through the steps of a prescribed procedure; or, to prepare, treat, or convert by subjecting to a special process," App. 162—is consistent with its interpretation of this term in *Hammersley Stone Co. v. DOR*, Wis. Tax Rep. (CCH) ¶400-383 at 31,399 (WTAC 1998), which the Tax Appeals Commission decided in 1998. App. 37. *Hammersley* held that "processing" is "comprehensive," including within its reach the "service of crushing stone" for a consumer. App. 37.

Given that Tetra Tech erroneously believes that Subsection 227.57(10)'s due weight mandate does not apply at all to statutory interpretation, *see supra* p. 23 n.6, the company's brief fails to address that Subsection's statutorily

mandated factors for determining the amount of "weight" "due" to the Tax Appeals Commission's conclusions. However, Tetra Tech does argue that the Tax Appeals Commission did not "utilize any special knowledge or expertise" because the Tax Appeals Commission adopted a dictionary definition of "processing," Opening Br. 26, which can be taken as an argument under Subsection 227.57(10)'s "experience," "technical competence," and "specialized knowledge" factors. Tetra Tech's argument on this score is wrong because the Commission's expertise lies in understanding how the tax code operates, including whether and when common or technical definitions are used in this statute. The Commission has brought its expertise to bear on the "processing" question for almost two decades, and its views are entitled to due weight. *See supra* pp. 8, 45.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated this 10th day of July, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,729 words.

Dated this 10th day of July, 2017.

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MISHA TSEYTLIN
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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 10th day of July, 2017.

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