RECEIVED
07-31-2017
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN SUPREME COURT
Appeal No. 2015AP2019

TETRA TECH EC, INC., and

LOWER FOX RIVER REMEDIATION LLC,

Petitioners-Appellants-Petitioners

v.
WISCONSIN DEPARTMENT OF REVENUE

Respondent-Respondent

AMICUS CURIAE BRIEF BY WISCONSIN MANUFACTURERS AND COMMERCE, INC., MIDWEST FOOD PRODUCTS ASSOCIATION, METROPOLITAN MILWAUKEE ASSOCIATION OF COMMERCE, WISCONSIN BANKERS ASSOCIATION, WISCONSIN CHEESE MAKERS ASSOCIATION, WISCONSIN PAPER COUNCIL, DAIRY BUSINESS ASSOCIATION, INC., ASSOCIATED BUILDERS AND CONTRACTORS, INC. (WISCONSIN CHAPTER), WISCONSIN POTATO AND VEGETABLE GROWERS ASSOCIATION, WISCONSIN FARM BUREAU FEDERATION, AND WISCONSIN CORN GROWERS ASSOCIATION

On Appeal from District III of the Court of Appeals' December 28, 2016, decision affirming the September 11, 2015, Order of Brown County Circuit Court
The Honorable Marc A. Hammer, Presiding

Robert I. Fassbender
Great Lakes Legal Foundation
(State Bar No. 1013985)
10 East Doty Street, Suite 504
Madison, WI 53703
(608) 310-5315
fassbender@greatlakeslegalfoundation.org

Attorney for *Amici Curiae*

July 31, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. Under Wisconsin's Constitution, the Power and Duty to Determine What the Law Is Lies Exclusively with the Courts. Agency Deference to Interpret the Law Impermissibly Encroaches on this Constitutional Authority and Duty 2

A. Wisconsin's Constitution Requires the Judicial Branch to Determine What the Law Is 2

1. The Constitutional Balance of Powers Among the Three Branches of Government is Essential to Liberty 3

2. The Power to Determine What the Law Is Lies Exclusively with the Courts 3

3. Deference to an Agency's Interpretation of the Law Impermissibly Subordinates the Law 4

B. Great Weight Deference Requires Courts to Yield to Agency's Interpretation of the Law 5

C. Great Weight Deference to Agency Interpretations of Statutes Does Not Comport with Article VII, Section 2 of Wisconsin's Constitution 5

D. Any Agency Deference to Interpret the Law Impermissibly Encroaches on the Court's Constitutional Authority and Duty 5

II. Deference Afforded Agencies to Interpret the Law Compromises the Courts' Duty to Be Impartial Arbiters of

The Law. Such Systematic Bias that Benefits One Party, Deprives Other Parties of Due Process 6

A. Due Process Entitles All Parties to An Impartial and Disinterested Tribunal 6

B. Due Process Disallowed an Agency to Judge Its Own Cause Because Its Interest Would Bias Its Judgment 8

C. There Is No Meaningful Justification to Provide Already Powerful Bureaucrats with Predisposed Favoritism 10

1. Agencies Lack Expertise to Interpret the Law 10

2. Legislators Don't Leave Holes in The Law to Allow for Bureaucratic Backfilling 10

3. There is No Judicial Economy in the Due Deference Methodology. It should be Abandoned 12

III. The Due Weight Provision at Wis. Stat. §227.57(10) Should not Apply to Statutory Interpretations. If so, Any Weight Due Agencies' Viewpoints Should be Limited 12

IV. The Commission's Interpretation of Wis. Stat. §77.52(2)(a)11 Is Incorrect And Should Be Reversed .. 14

CONCLUSION 14

CERTIFICATION RE. FORM AND LENGTH 16

CERTIFICATION RE. ELECTRONIC BRIEF 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Cases

County of Kenosha v. C & S Management, Inc.,
223 Wis.2d 373,
588 N.W.2d 236 (1999)..5

Gabler v. Crime Victims Rights Bd.,
2017 WI 67, No. 2016AP275 (June 27, 2017) 2, 3

Guitierrez-Brizuela v. Lynch,
834 F.3d 1142 (10th Cir. 2016)... 5, 6, 8

Marshall v. Jericho, Inc.,
446 U.S. 238, 242 (1980) 5

Operton v. Labor & Indus. Review Comm'n,
2017 WI 46,
375 Wis. 2d 1, 894 N.W.2d 426 .... *passim*

Osborne v. Bank of the United States,
22 U.S. 738, 866 (1824) 3

Wis. Environmental Decade v. Public Service Comm.
81 Wis.2d 344, 351, 260 N.W.2d 712 (1978) 6

Statutes

Wis. Stat. § 227.10 7

Wis. Stat. §§ 227.11 7

Wis. Stat. § 227.57 9

Constitutional Provisions

Wis. Const. Art. VII, § 2 10

Other Authorities

Antonin Scalia
Duke Law Journal, pp.516 (June 1989) 7

The Federalist No. 10 (James Madison) 6

The Federalist No. 47 (James Madison) 2

The Federalist No. 78 (Alexander Hamilton) 2

Patience Drake Roggensack, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in This Court of Last Resort?*,
89 Marq. L. Rev. 541 (2006) 4, 7, 8

INTRODUCTION

This case addresses the deference Wisconsin courts afford regulatory agencies when interpreting statutory provisions that ultimately define agencies own power and reach. Currently, the courts extend agencies too much deference on these questions of law. Under our state and federal constitutions, the core duty of judges is to say what the law is. Judicial review of agency actions is the last line of defense against the excess of discretionary power in the hands of regulators. *Amici Curiae* have grave concerns when courts grant deference to any agency's interpretation of the law, whether great weight deference, due deference, due weight, or simply *respectful consideration*. Such predisposed bias that benefits one litigant to the detriment of other parties poses profound constitutional issues, particularly fundamental due process fairness issues. It is especially troublesome when such systematic bias is afforded the increasingly powerful and omnipresent administrative state.

Amici Curiae are 11 Wisconsin associations that represent virtually every sector of Wisconsin's economy. Their member businesses (collectively, Wisconsin Employers) are engaged in manufacturing, farming, building, healthcare, insurance, banking, and other industrial and commercial operations that are the engine of Wisconsin's economy. They are Wisconsin's job creators. They range from small-town main street businesses and family farms to large

industrial operations. They are diverse, yet share deep concerns over the costs and growing burdens associated with increasingly complex and intrusive regulatory mandates.

Judicial deference to the increasingly powerful "fourth branch" of government cannot be reconciled with Wisconsin's constitution. It is undeserved and unjust. Deference providing systematic advantage to one party necessarily imposes a systematic disadvantage to the other. The disadvantaged "other" is invariably a Wisconsin business or citizen.

ARGUMENT

I. Under Wisconsin's Constitution, the Power and Duty to Determine What the Law Is Lies Exclusively with the Courts. Agency Deference to Interpret the Law Impermissibly Encroaches on this Constitutional Authority and Duty.

A. Wisconsin's Constitution Requires the Judicial Branch to Determine What the Law Is.

Three constitutional principles define the exclusive role of the courts on questions of law.

- The constitution balances specific powers and duties conferred upon the three branches of government;
- The power and duty to determine what the law is lies exclusively with the courts; and,
- The supremacy of the law binds judges to follow the law, yielding to nothing else.

1. The Constitutional Balance of Powers Among the Three Branches of Government is Essential to Liberty.

The framers of the United States Constitution structured the national government to avoid a concentration of power in any of the three branches. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶4, No. 2016AP275 (June 27, 2017), quoting *The Federalist* No. 47 (James Madison).

Respecting the judiciary, "there is no liberty, if the power of judging is not separated from the legislative and executive powers." *The Federalist* No. 78 (Alexander Hamilton). Granting agencies deference to interpret the law puts askew the constitutional balance among the branches of government by conceding executive branch authorities belonging exclusively to the judicial branch.

2. The Power to Determine What the Law Is Lies Exclusively with the Courts.

Alexander Hamilton wrote, "[t]he interpretation of laws is the proper and particular province of the courts." *Id.* This Court turned back an "invasion of core judicial powers" in *Gabler*, finding "[n]o aspect of the judicial power is more fundamental than the judiciary's *exclusive* responsibility to exercise judgment in cases and controversies arising under the law." *Gabler,* 2017 WI 67, ¶37 (Emphasis added).

"[I]t is the province of the judiciary, not executive, to say what the law is. Consistent with this venerable principle, our constitution vests the judicial power in Wisconsin's unified court system, and that judicial power confers on the judges an *exclusive responsibility to exercise independent judgment* in cases over which they preside." *Gabler,* 2017 WI 67, ¶46 (Emphasis added). When a court confers deference to an agency to interpret the law, it impermissibly delegates to another branch of government its exclusive power to say what the law is.

3. Deference to an Agency's Interpretation of the Law Impermissibly Subordinates the Law.

Wisconsin's Constitution laid the foundations for both judicial authority and the supremacy of the law. Both preclude granting deference to administrative agencies to interpret the law. Chief Justice Marshall wrote:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. . . Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

Osborn v. Bank of the United States, 22 U.S. 738, 866 (1824).

The judicial power of the courts is bound to the duty of judges to follow the law; therefore, judicial power cannot yield to anything but the law.

B. Great Weight Deference Requires Courts to Yield to Agency's Interpretation of the Law.

Wisconsin's case law provides agencies' interpretations of statutes are entitled to one of the following three levels of deference: great weight deference, due weight deference, or no deference. Great weight deference requires an agency's interpretation of the law to control "even if the court decides that an alternative conclusion is more reasonable."[1]

C. Great Weight Deference to Agency Interpretations of Statutes Does Not Comport with Article VII, Section 2 of Wisconsin's Constitution.

Wisconsin Employers join Tetra Tech and the Solicitor General in concluding great weight deference is unconstitutional. Great weight deference abrogates the judiciary's duty to determine what the law is. Requiring courts to abandon independent judgment, the judicially-created great weight deference does not comport with the Wisconsin Constitution, which vests the judicial power in the unified court system.

D. Any Agency Deference to Interpret the Law Impermissibly Encroaches on the Court's Constitutional Authority and Duty.

"[T]he doctrine of deference to agencies' statutory interpretation is a judicial creation that circumvents the court's duties

---

[1] 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 (2006).

to say what the law is and risks perpetuating erroneous declarations of the law." *Operton v. Labor & Indus. Review Comm'n*, 2017 WI 46, ¶73, 375 Wis. 2d 1, 894 N.W.2d 426 (R.G. Bradley, J., concurring). This observation advances the proposition that any deference conferred upon an agency to interpret law is suspect.

The word "deference" appears nowhere in the Wisconsin Constitution. The courts and dictionaries give the term disparate interpretations, but the common meaning is *to yield to another*. For example, "deference" means "a yielding in opinion, judgment, or wishes." Webster's New World College Dictionary 379 (Michael Agnes ed., 4th ed. 1999).

If the court must ultimately say what the law is, it is necessarily deferring to no one on the what the law is. Eliminating deference on issues of law would simplify judicial review and lift some of the regulatory fog through which Wisconsin Employers must navigate. More important, it would realign judicial review of agency decisions within recognized constitutional constraints.

II. Deference Afforded Agencies to Interpret the Law Compromises the Courts' Duty to Be Impartial Arbiters of The Law. Such Systematic Bias that Benefits One Party Deprives Other Parties of Due Process.

A. Due Process Entitles All Parties to An Impartial and Disinterested Tribunal.

The Fifth Amendment to the U.S. Constitution demands that no person shall be "deprived of life, liberty, or property, without due

process of law." Wisconsin's constitution lacks an explicit due process clause, but "[o]n more than a few occasions [this Court has] expressly held that the due process and equal protection clauses of our state constitution and the United States Constitution are essentially the same." *Cty. of Kenosha v. C & S Mgmt., Inc.*, 223 Wis.2d 373, 393, 588 N.W.2d 236 (1999).

Due process "entitles the person to an impartial and disinterested tribunal in both civil and criminal cases. . . [I]t preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jericho, Inc*., 446 U.S. 238, 242 (1980).

Then Judge Neil Gorsuch explained, "transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions." *Guitierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

When the government as a party is systematically given predisposed deference, the other litigants are systematically disadvantaged. It is invariably a zero-sum game to the detriment of Wisconsin Employers.

B. Due Process Disallows an Agency to Judge Its Own Cause Because Its Interest Would Bias Its Judgment.

Due process incorporates the common law maxim that "[n]o man is allowed to be a judge in his own cause because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time." *The Federalist* No. 10 (James Madison). This maxim is particularly pertinent and insightful when the "man" judging his own cause is the government.

By illustration, a baseball umpire has absolute authority to call "balls and strikes," like the authority the constitution provides judges to say what the law is. Great weight deference is akin to giving a pitcher the authority to call a strike even if the umpire saw the pitch as a ball. Due weight deference would have the umpire consult with the pitcher on whether it was a ball or strike. Standing helplessly at the plate, never consulted and at a severe disadvantage, the batter simply awaits his or her fate. Wisconsin Employers are similarly disadvantaged when the courts let agencies call balls and strikes on their own statutory interpretations.

Judge Gorsuch appears to agree it may not be a level playing field when courts concede deference on questions of law to powerful agencies. He observed he "would have thought powerful and centralized authorities like today's administrative agencies would

have warranted less deference from other branches, not more." *Guitierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring)

Wisconsin Employers do not believe regulatory agencies are impartial or disinterested on questions of their powers. So-called agency experts have personal and institutional biases. It is the job of the tax collector to assess and collect taxes. They are inclined, as in this case, to seek broad interpretations of the law to accomplish those ends. Similarly, regulators regulate. It would be extraordinary for a regulatory agency to construe a statute in a manner restricting rather than expanding its regulatory reach.

Agency decisions "which deal with the scope of the agency's own power are not binding on [the] court." *Wis. Envtl. Decade, Inc. v. Public Service Comm'n.*, 81 Wis.2d 344, 351, 260 N.W.2d 712 (1978). Under both great weight and due weight deference methodologies, a court must find that the legislature charged an agency with the administration of the statutory provisions at issue. It is difficult to discern situations where any agency is interpreting enabling legislation that does not touch upon the extent of its authorities. For example, the Department of Revenue and the Tax Appeals Commission both concluded that Tetra Tech's activity is taxable. The power to tax has been equated to the power to destroy. This legal conclusion clearly deals with the *scope of the agency's own power*. Yet, the lower court concluded the agency interpretation deserves great weight deference. For the same rationale that agencies

should not define their own statutory authority, they should not get deference on any statutory interpretations, as those interpretations ultimately define an agency's power and reach over the regulated community.

C. There Is No Meaningful Justification to Provide Already Powerful Bureaucrats with Predisposed Favoritism.

1. Agencies Lack Expertise to Interpret the Law.

Chief Justice Roggensack determined that the "history of at least some of the agencies to which the court defers does not support the conclusion that agency expertise is superior to the courts expertise." Roggensack, *supra* at 558. Even so, subject matter expertise is frequently not relevant when the court is charged, and is seeking assistance, with *reading the law*. Judges have relevant education, training, and most importantly, the experience to discern what the law is (underscoring their unique constitutional duty), whereas agency bureaucrats generally have no training on or knowledge of the legal methods of statutory interpretation.

2. Legislators Don't Leave Holes in The Law to Allow for Bureaucratic Backfilling.

Another flawed rationale for agency deference is the belief legislators intentionally leave statutes' meaning unclear to give agencies flexibility to choose how to best achieve legislative policy goals. Justice Scalia, some 30 years ago, found deference appropriate when "Congress had no particular intent on the subject, but meant to

leave its resolution to the agency." The Honorable Justice Scalia, *Judicial Deference to Administrative Interpretation of Law*, Duke L. J. 516 (1989). There is no proof and it is counterintuitive that legislators purposefully draft legislation with "holes" expecting the *rest of the story* be written by unelected bureaucrats. Recent legislative enactments in Wisconsin prove the point.

In fact, 2011 Wis. Act 21 (Act 21), Governor Walker's watershed regulatory reform legislation, contains key provisions intended to eliminate implied agency authorities. First, the application of Wis. Stat. § 227.10 (2m), created by Act 21, prohibits agencies from issuing regulatory mandates that are not explicitly allowed by statute or rule. Second, Wis. Stat. §§ 227.11 (2)(a)1. and 2. provide that statutory preambles – declarations of legislative intent, purpose, findings, or policy, as well as descriptions of an agency's general powers or duties – are not to be used by agencies as a wildcard to assert regulatory authority when explicit authority does not exist.

In Wisconsin, if the statutory language appears to courts to be lacking, or not explicit, or just too broad, the legislature does not intend for the courts to allow agencies to fill in the blanks. It is for the courts to decide what the law is, and judges must do their best to find that meaning of the law in the text of the statutes. As noted by Judge Gorsuch, if the executive or legislative branches believe the courts missed the mark, "the Constitution prescribes the appropriate

remedial process. It's called legislation." *Guitierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring).

3. There is No Judicial Economy in the Due Deference Methodology. It should be Abandoned.

Under due weight deference, the court defers to an agency statutory interpretation only when it concludes that another interpretation of the statute is not more reasonable than that chosen by the agency. *Operton*, 375 Wis. 2d at 8. The *Operton* Court explains that "there is little difference between due weight deference and no deference, since both situations require us to construe the statutes ourselves." *Id*. Therefore, the court sees no judicial economy when choosing due deference over no deference. Because due weight deference is judicially prescribed, it can be judicially surrendered. And it should be. It causes wasteful analysis by the courts and litigants.

III. The Due Weight Provision at Wis. Stat. §227.57(10) Should not Apply to Statutory Interpretations. If so, Any Weight Due Agencies' Viewpoints Should be Limited.

Wisconsin Employers believe any judicial review of statutes giving weight to regulatory agencies' viewpoints is inconsistent with our Constitution and provides an unfair bias toward government litigants. This would apply to the "due weight" approach set forth in Wis. Stat. §227.57(10). Consistent with the view no deference should be afforded agencies on questions of law, we respectfully ask the court

find that the due weight consideration found at Wis. Stat. §227.57(10) not apply to statutory interpretations.

The Solicitor General concludes due weight under Wis. Stat. §227.57(10) "simply directs the courts to give *respectful, appropriate consideration* to the agency's view, as part of this courts rendering its own independent judgment. (Resp. Br.at 31.) (Emphasis added) If the court concludes this section may apply to statutory interpretation, the *respectful consideration* standard offered by the Solicitor General can only be useful if structured and anchored to such purpose.

As suggested in *Operton*, the "standard of review analysis in cases involving agency's interpretation of a statute should include a threshold determination of whether the agency has articulated its interpretation of the statute." *Operton* 375 Wis. 2d at 8. fn 11. If there has been no interpretation, then there is no *respectful consideration* due. If there has been an interpretation of a statute by the agency, any *respectful consideration* of such interpretation should consider both the agency bias and limited qualifications for agencies to interpret the law. Notably, and we are in complete agreement, the Solicitor General concludes "in *every* case, the court must ultimately interpret the law for itself." *Id.* at 31 (Emphasis theirs).

IV. THE COMMISSION'S INTERPRETATION OF WIS. STAT. §77.52(2)(a)11 IS INCORRECT AND SHOULD BE REVERSED.

Wisconsin employers support Tetra Tech's position that the tax imposed is based on a definition of the term "processing" that is contrary to legislative intent and established law. Wis. Stat. § 227.10 (2m) prohibits agencies from issuing regulatory mandates that are not explicitly allowed by statute or rule.

CONCLUSION

The court should hold that agency deference on questions of law is incompatible with Article VII, section 2 of the Wisconsin Constitution and that the Commission's interpretation of Wis. Stat. §77.52(2)(a)11 is incorrect and should be reversed.

DATED this 31st day of July, 2017.

Respectfully Submitted,

By:

Robert I. Fassbender (#1013985)
GREAT LAKES LEGAL FOUNDATION
10 East Doty Street, Suite 504
Madison, WI 53703
fassbender@greatlakeslegalfoundation.org
Telephone: (608) 310-5315

Attorney for Amici Curiae

Wisconsin Manufacturers and Commerce

Midwest Food Products Association

Metropolitan Milwaukee Association of Commerce

Wisconsin Bankers Association

Wisconsin Cheese Makers Association

Wisconsin Paper Council

Dairy Business Association, Inc.

Associated Builders and Contractors, Inc. (Wisconsin Chapter)

Wisconsin Potato and Vegetable Growers Association

Wisconsin Farm Bureau Federation

Wisconsin Corn Growers Association

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a non-party brief produced with a proportional serif font. The length of this brief, including footnotes, is 2,960 words.

Robert I. Fassbender

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.

Robert I. Fassbender

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2017, I caused a copy of this brief to be served upon each of the following persons via U.S. Mail, First Class:

Brian P. Keenan
Wisconsin Department of Justice
P.O. Box 7857
Madison, Wisconsin 53707-7857

Kevin M. LeRoy
Deputy Solicitor General
P.O. Box 7857
Madison, Wisconsin 53707-7857

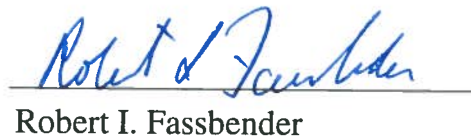
Mischa Tseytlin
Solicitor General
P.O. Box 7857
Madison, WI 53707-7857

Frederic J. Brouner
Donald Leo Bach
Barret V. Van Sicklen
DeWitt Ross & Stevens S.C.
Two East Mifflin Street, Suite 600
Madison, WI 53703-2865

Richard M. Esenberg
Thomas C. Kamenick
Wisconsin Institute for Law & Liberty
Bloodgood House
1139 E. Knapp St.
Milwaukee, WI 53202-2828

James Eric Goldschmidt
Quarles & Brady LLP
411 E. Wisconsin Ave., Ste. 2350
Milwaukee, WI 53202-4426

Bradley Jackson
Quarles & Brady LLP
33 East Main St., Ste. 900
Madison, WI 53703



Robert I. Fassbender