STATE OF WISCONSIN
IN SUPREME COURT

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

Petitioners-Appellants-Petitioners,

v.

WISCONSIN DEPARTMENT OF
REVENUE,

Respondent-Respondent,

APPEAL NO. 2015-AP-2019
Brown County Case No. 15-CV-132

BRIEF OF *AMICUS CURIAE* WISCONSIN UTILITIES ASSOCIATION

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INTRODUCTION

The Court has asked whether the practice of deferring to agency interpretations of statutes comports with Article VII, Section 2 of the Wisconsin Constitution, which vests the judicial power in the unified court system.

Petitioners argue *any* deference to state agencies in matters of statutory interpretation is unconstitutional. (Pet. Br. at 10-18). The Solicitor General argues such deference is not *per se* unconstitutional, but "great weight deference"—which upholds an agency interpretation if it is reasonable—violates the Wisconsin Constitution. (Resp. Br. at 15-36).

No party has entered the field to speak in favor of great weight deference or the present deference structure more generally. Before dispatching with decades of Wisconsin case law, administrative practice, and business expectations built upon that structure, the Court should hear that position, too.

Since 1922, the Wisconsin Utilities Association ("WUA") has represented public utilities providing retail electric and natural gas service to residential, business, and industrial customers in Wisconsin. WUA's member utilities are regulated by the Public Service Commission of Wisconsin, and therefore rely upon the rulings of that agency (the "Commission") in conducting their business. Decisions of the Commission are among those commonly afforded great weight deference in appellate review.

WUA has two aims in offering this brief: (1) to explain how the present deference structure comports with the Wisconsin Constitution and Chapter 227 of the Wisconsin Statutes; and (2) to warn that jettisoning the present deference structure may have unforeseen and undesirable consequences for regulated businesses in Wisconsin.

ARGUMENT

I. Granting *due* deference to agencies' legal interpretations is commanded by statute and compatible with the Constitution; the question in any case is *how much* deference is "due."

A. Wis. Stat. § 227.57 correctly directs courts to give "due weight" to agency experience.

In Wisconsin, the right to judicial review of agency action is enshrined in law: "Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review." Wis. Stat. § 227.52.[1]

The *scope* of that review is set forth in Wis. Stat. § 227.57, which directs a court to affirm agency action unless it "finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section." Wis. Stat. § 227.57(2).

One of those grounds—at issue here—is legal error by the agency: "The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted

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[1] This provision and those that follow are part of the Administrative Procedure Act ("APA"). In 1943, Wisconsin became the second state in the nation to adopt a comprehensive statute on administrative procedure and judicial review of agency decisions. Ralph M. Hoyt, *The Wisconsin Administrative Procedure Act*, 1944 Wis. L. Rev. 214 (July 1944). The 1943 Act was a predecessor of the first model APA promulgated in 1946 by the National Conference of Commissioners on Uniform State Laws. The present APA derives from the 1961 model version promulgated by the same body, in use in over half the states today. *See* Prefatory Note, *Revised Model State Administrative Procedure Act*, National Conf. of Comm'rs on Uniform State Laws (Oct. 2010) at 1.

a provision of law and a correct interpretation compels a particular action . . .” Wis. Stat. § 227.57(5). This provision of the statute plainly preserves to the judicial branch the authority to set aside or modify agency decisions on the basis of legal error. The error is the court’s to identify (“if *it* finds…”) and it is likewise the court’s prerogative to identify the “correct interpretation” of the law. *Id.* (emphasis added).

Wis. Stat. § 227.57 concludes with a directive to the courts: “Subject to sub. (11),[2] upon such 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).

The Solicitor General agrees this admonition presents no constitutional conflict. (Resp. Br. at 29-35). Indeed, the legislative directive to provide “due weight” to an agency’s specialized competency is of long pedigree and comports with decisions of this Court reaching back more than 150 years. (*Id.*) And the factors listed in the directive (experience, technical competence, specialized knowledge) guide the *court’s* decision on how much deference is due. (*Id.*)

B. The question of how much deference is due is (almost) always left to the reviewing court.

Critically, with a lone exception, nothing in § 227.57 (or Chapter 227 more generally) prescribes a particular level of deference for particular agency decisions. Instead, as the Solicitor General also acknowledges, how much deference is “due” depends upon the particular case. (Resp. Br. at 29-31).

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[2] *See* Section I.B, *infra*.

The exception is § 227.57(11), which expressly notes one circumstance where *no* deference is due: where an agency action or decision restricts a property owner's free use of property. Otherwise, the reviewing court decides how much deference is due in each case. *Cf.* 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, 545 (2006) (such doctrines of judicial administration "are refused or employed based solely on the choice of the court").

That the court holds the power to select the deference due an agency interpretation of law must, on one hand, assuage any constitutional concerns: so long as no level of deference is *compelled*, the degree of deference accorded the agency in a particular case is itself the product of the judicial power vested in the courts by Article VII, Section 2.

On the other hand, affording *too much* deference to an agency in matters of statutory interpretation may seem to abdicate the judicial role. It is this concern that appears to motivate the Court's inquiry in this matter: if what Wisconsin courts call "great weight deference" is merely a mantra short-circuiting meaningful judicial analysis, then have the agencies benefitting from that deference usurped the judiciary's prerogative to "say what the law is"? *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

This concern is understandable, particularly given the growth of the administrative state. For the reasons stated below, however, WUA submits the most helpful question is not whether great weight deference *per se* violates the Wisconsin Constitution, but whether there are times—and there may be—when an agency's interpretation of a statute merits a level of deference justifying what amounts to rational basis review.

C. Great weight deference is effectively rational basis review for certain agency interpretations of statutes.

In its own right, Wis. Stat. § 227.57 merely directs courts reviewing agency actions to grant agencies' legal interpretations "due" deference, implying a continuum of deference ranging from no deference on one end to some greater amount of deference on the other. Because Chapter 227 provides no upper limit on the continuum, that limit must come from elsewhere. The Court asks whether it comes from Article VII, Section 2 of the Wisconsin Constitution.

In answering that question, the parties agree that wherever the upper limit of the deference continuum may be, great weight deference is on the wrong side of it. Petitioners argue great weight deference is particularly egregious as it permits an agency interpretation to stand even where there may be a more reasonable reading of the statute. (Pet. Br. at 13). The Solicitor General agrees: great weight deference "abdicates the court's constitutional responsibility to finally decide rights and responsibilities as between individuals," ceding that authority to the agency "so long as its interpretations do not fall into the narrow category of blatant statutory violations." (Resp. Br. at 26-27).

Lest rhetoric obscure the analysis, it should be noted that great weight deference as practiced in Wisconsin *is* a form of judicial review. It is simply judicial review asking a different question: is the agency's interpretation of the statute *reasonable*? If so, then while other readings of the statute may be equally or more reasonable, the court will not substitute its view of reasonableness for the agency's in light of the relative competencies giving rise to that level of deference in the first place.

This form of judicial review in no way abdicates the judicial role or cedes statutory interpretation to the agency. The court first exercises its judicial role to identify the right level of deference, then does so again in scrutinizing whether the agency's interpretation of the statute is reasonable. *See*, *e.g.*, *Racine Harley-Davidson v. Div. of Hearings & Appeals*, 2006 WI 86, ¶ 15, 292 Wis. 2d 549, 717 N.W.2d 184 ("The court itself must always interpret the statute to determine the reasonableness of the agency interpretation").

Providing further comfort, assessing reasonableness calls upon the fundamental tools of statutory interpretation: "An agency's conclusion of law is unreasonable and may be reversed by a reviewing court if it directly contravenes the statute or the federal or state constitution, if it is clearly contrary to the legislative intent, history, or purpose of the statute, or if it is without a rational basis." *Id.* ¶ 17. A court must be satisfied that none of these conditions is violated before it can deem the agency interpretation reasonable, the prerequisite of great weight deference. *Id.* ¶ 15.

All of this is core judicial function. But the real rub arises *after* the court has completed these steps and is left with a reasonable agency interpretation to which great weight deference applies. At that point, the court—having independently determined both of these things—is now self-obligated to disregard other readings of the same statute that appear equally *or more* reasonable. *Id.* ¶ 17.

It is this aspect of great weight deference that most attracts the ire of its detractors. *See id.* ¶ 112, fn. 8 (Roggensack, J., concurring) ("When we apply great weight deference, we affirm an agency's interpretation of a statute even though we conclude that another interpretation is more reasonable"); *Operton v. LIRC*, 2017 WI 46, ¶ 80, 375 Wis. 2d 1, 894 N.W.2d 426 (Grassl Bradley, J., concurring) (great

weight deference "relinquishes the court's responsibility to independently interpret statutes"). This implies judicial review is independent and adequate only if the court's view of what is *most* reasonable prevails.

But the decisions establishing great weight deference and delimiting the circumstances under which it applies reached a different conclusion. They concluded that in some cases, and particularly where the agency exercises broad delegated authority to implement policy, the agency is better equipped than the court to say what is *most* reasonable. In such matters, the court still plays a critical role—it must guard against *unreasonable* interpretations, with all that entails—but where the case boils down to a reasonableness contest, the tie goes to the agency by virtue of its expertise in matters involving specialized knowledge and experience.

No authority cited by the parties holds this type of deference violates the Constitution. And nothing in the Constitution deems the judiciary the ultimate arbiter of what is *most* reasonable among reasonable alternatives, particularly where legal and policy considerations intertwine. To the contrary, under separation of powers principles the judiciary's view of what is *most* reasonable must yield to the views of the executive and the legislature, including their agencies. *See*, *e.g.*, *Nat'l Muffler Dealers Ass'n, Inc. v. U.S.*, 440 U.S. 472, 488 (1979) ("The choice among reasonable interpretations is for the Commissioner, not the courts"); *U.S. v. Correll*, 389 U.S. 299, 307 (1967) ("The role of the judiciary in cases of this sort begins and ends with assuring that the [agency's] regulations fall within [its] authority to implement the congressional mandate in some reasonable manner").

The most familiar application of this theory is rational basis review, whereby a law will be sustained against constitutional challenge if it is rationally related to a legitimate government interest. A court engaged in rational basis review is limited to determining whether the legislation at issue is reasonable, not whether it is wise.

This Court frequently employs that approach. *See*, *e.g.*, *Kohn v. Darlington Cmty. Schools*, 2005 WI 99, ¶ 47, 283 Wis. 2d 1, 698 N.W.2d 794 ("When applying the rational basis test, *it is not our task to determine the wisdom of the rationale or the legislation*." Rather, "*it is the court's obligation to locate or construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds the legislative determination*, even if that rationale is not likely to be indisputable") (internal punctuation omitted, emphasis in original); *Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶ 29, 236 Wis. 2d 316, 613 N.W.2d 120 ("In applying the rational basis standard . . . this court is not concerned with the wisdom or correctness of the legislative determination. Rather, we determine only whether there was a reasonable basis upon which the legislature enacted [the law]") (internal citation omitted).

If it is the norm for Wisconsin's courts to engage in rational basis review when presented with constitutional challenges to state or federal statutes, why does it violate the Constitution for them to do the same when presented with an agency's legal interpretation? Conversely, if the former counts as independent and adequate appellate review—with constitutional rights at stake, no less—how does the latter abdicate the Court's constitutional responsibilities?

The better conclusion is that "great weight deference" is merely the name Wisconsin courts have given to rational basis review as it is employed when agencies interpret

statutes within their core areas of expertise. The real challenge is not to the constitutionality of the practice, but to clarify when its use is appropriate. At a minimum, great weight deference is due where the ultimate challenge is to reasonableness, and the relative competencies of court and agency show the agency is best suited to determine what is *most* reasonable.

II. The Commission's rate-setting decisions are quintessential candidates for great weight deference.

Great weight deference serves an important function in administrative review because there are many cases where the link to statutory interpretation, while present, is much more attenuated. Such cases include public utility rate proceedings before the Commission, which is tasked by the Legislature with establishing public utility rates that are "reasonable." Wis. Stat. § 196.37. Pursuant to this directive, for over a century, the Commission has developed a highly specialized process for forecasting a utility's costs, allocating those costs (plus an authorized rate of return) across classes of customers, and approving the rates charged to collect those costs from ratepayers. The Commission does this for electric, natural gas, water and sewer utilities across Wisconsin, managing numerous self-contained markets with a combination of advanced practical and theoretical tools and experience.

While all of this may seem a far cry from statutory interpretation, in each utility rate case the Commission interprets and applies Wis. Stat. § 196.37, which prohibits rates that are "unjust," "insufficient," or "unjustly discriminatory or preferential." *Id.* When the Commission's rate decisions are challenged, it is on these statutory terms.

In light of the highly technical nature of utility rate proceedings, courts reviewing such challenges grant the Commission's rate-setting decisions great weight deference. *See*, *e.g.*, *Wis. Bell, Inc. v. Pub. Serv. Comm'n*, 2004 WI App 8, ¶ 22 fn. 8, 269 Wis. 2d 409, 675 N.W.2d 242, *aff'd*, 2005 WI 23, 279 Wis. 2d 1, 693 N.W.2d 301 ("complex determinations" like those involved in utility rate case "have led courts, traditionally, to accord great-weight deference in the area of utility rates") (collecting Wisconsin cases); *Wis. End-User Gas Ass'n v. Pub. Serv. Comm'n*, 218 Wis. 2d 558, 561, 581 N.W.2d 556 (Ct. App. 1998) ("we owe the PSC great deference in matters of statutory interpretation and rate setting").

Courts do so because they recognize that when a plaintiff challenges a utility rate as "unreasonable," this implicates "statutory interpretation" by the agency only in the loosest sense of the term. What is really at issue is reasonableness, and courts understand the Commission is best able to balance the multitude of technical, equitable and policy considerations that underlie a "reasonable" rate.

Moreover, WUA's members have come to rely on this level of deference to the Commission's rate-setting decisions. It deters what would otherwise be prolonged legal challenges to new rates, terms and conditions of public utility service, while at the same time guaranteeing any challenges that do arise do not devolve into judicial scrutiny of highly technical policy choices by an expert agency. In a world *without* great weight deference, it is difficult to see what would prevent a reviewing court from substituting its own view of how utility costs should be apportioned among various customer classes or what level of carrying costs should be authorized on a particular escrow account—all because, on some level, these issues go to the Commission's "interpretation" of the statutory directive to set "reasonable" rates.

Against this backdrop, what is true in general would be true of WUA's members in particular: "There is little doubt that ending the court's practice of according deference to agency interpretations of statutes would constitute a sea change in Wisconsin law." *Operton*, *supra*, ¶ 71 (Ziegler, J., concurring). And there is no telling how far the floodwaters would spread: how many other statutes, like Wis. Stat. § 196.37, are sufficiently broad that their "interpretation" by state agencies effectively constitutes policy-making? And are the courts prepared to undertake the complex task of deciding which policy outcomes are *most* reasonable?

WUA therefore urges the Court not to upset well-established law in this sphere, or if it must do so, then to clarify that great weight deference is still warranted for the class of agency decisions encompassing utility rate cases, i.e., those only loosely implicating statutory interpretation, and ultimately resolving to policy questions of reasonableness.

CONCLUSION

The Court should hold that the present structure of agency deference is compatible with Article VII, section 2 of the Wisconsin Constitution, or at a minimum that any holding to the contrary does not implicate rate-setting decisions by the Commission.

Respectfully submitted this
24th day of July, 2017.

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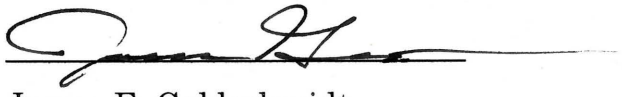
FORM AND LENGTH CERTIFICATION

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 2,998 words.



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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.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th 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:

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