DAVID CRAIG

STATE SENATOR

Senate Committee on Labor and Regulatory Reform
Public Hearing, February 6, 2018
Senate Bill 745
Senator David Craig, 28th Senate District

Chairman Nass and Committee Members,

Thank you for taking testimony on Senate Bill 745 relating to "Agency Transparency Reform" which would provide increased oversight of state agencies and give the public greater access and opportunity for input on agency policies which effectively hold the force of law.

2011 Wisconsin Act 21 reformed the agency rulemaking process to increase agency accountability, clarify an agency's authority, and evaluate the economic impact of administrative rules. The underlying principle of 2011 Act 21 was that elected officials should make the ultimate decisions that affect the regulated community and the taxpayers of this state, not unelected, unaccountable bureaucrats. Act 21 was an important step towards right-sizing agency authority.

However, with the expansion of the Chapter 227 agency rulemaking process, agencies pursued ways to avoid the deliberative process of rulemaking with "guidance documents". These guidance documents are meant to explain the law as it exists, but are often used to subtly change the law to mold the interpretation to fit the views of the agency and not reflect the law passed by the legislature. These agency-crafted guidance documents are then used as the basis of agency decisions which have the force of law over citizens and the regulated community. This bill ensures these guidance documents are given a public hearing and are publically posted on the agency's website rather than being buried in an agency desk drawer.

Over the years, agencies have also expanded their regulatory authority outside of the legislative rulemaking process through the loophole of "sue and settle" whereby an agency will settle a lawsuit agreeing to enforce a standard or create a rule which is outside of the scope of their enforcement authority. Our legislation prohibits an agency from settling a lawsuit with an agreement to promulgate a rule at the time of the settlement.

This bill also prohibits the court from giving deference to agency interpretations of law during a court action. This ensures those agencies are held on equal footing with citizens and the regulated community if there is ever a dispute in court over an agency decision.

In closing, agency actions have a real-world impact on businesses, homeowners, and other members of the regulated community. The "Agency Transparency Reform" rebalances the scales to give citizens, through their elected representatives, the ability to check agency overreach and provide taxpayers the accountable, transparent government they deserve.

Thank you for considering my testimony. I would be happy to answer any questions you may have on the bill.

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Chairman Nass and Members of the Senate Committee on Labor and Regulatory Reform,

Thank you for the opportunity to testify with Sen. Craig today as the authors of Senate Bill 745, which would provide more transparency, accountability and oversight of state agencies and give the public greater access and opportunity for input. This "Agency Transparency Reform Act" is necessary if we intend to fully achieve the laudable goals set in motion by the passage of 2011 Act 21.

This legislation ensures that state agencies are not overstepping their regulatory authority and imposing new regulations that have not been through the rulemaking process. This bill clearly defines what a guidance document is and lays out a process through which proposed guidance documents are published.

Under this bill, proposed guidance documents are subject to public comment and publication on an agency's website. The proposal clarifies that these documents do not have the force of law and do not provide the authority for implementing or enforcing a standard, requirement or threshold. Further, this bill allows the regulated community to petition an agency to promulgate a rule in place of a guidance document. This legislation also ensures that agencies will not agree to promulgate a rule as a term in any settlement agreement, consent decree, or stipulated order of a court unless the agency has explicit statutory authority to promulgate the rule at the time the settlement agreement, consent decree, or stipulated order of a court is executed, closing what is commonly known as the "sue and settle" loophole through which agencies have sought to gain regulatory authority outside of the legislative process.

2011 Wisconsin Act 21 completely reformed the administrative agency rulemaking process in order to increase agency accountability, clarify an agency's regulatory authority and evaluate the economic impact of administrative rules. The principle underlying 2011 Act 21 was that elected officials should make the ultimate decisions that affect the regulated community and the taxpayers of this state, not unelected, unaccountable bureaucrats. Act 21 was a critical step in achieving these ends.

The REINS Act, recently signed into law, goes even further to expand public input, cost transparency and legislative oversight to the agency rulemaking process. However, one key area where agencies often wield an incredible amount of authority without the checks and balances of the Chapter 227 rulemaking process is through the use of guidance documents. Often, in order to avoid the somewhat lengthy, deliberative process of rulemaking, agencies will make new "rules" that have the force of law on the regulation community through guidance documents. Sometimes, simply through sending a letter.

These guidance documents are meant to be used to explain the law as it exists, but is often used as a vehicle to actually change the law. Guidance documents buried in an agency's desk drawer should not be used as a vehicle to avoid the rulemaking process. Guidance documents have a real impact on businesses and other members of the regulated community, most of the time without any accountability or oversight by those elected to create laws.

Thank you for your consideration of SB 745.

WMC

WISCONSIN MANUFACTURERS & COMMERCE

TESTIMONY BEFORE THE SENATE COMMITTEE ON LABOR AND REGULATORY REFORM IN SUPPORT OF SENATE BILL 745

Chairman Nass and Senators:

Thank you for the opportunity to testify today. My name is Lucas Vebber and I am the General Counsel and Director of Environmental and Energy Policy at Wisconsin Manufacturers and Commerce (WMC). WMC is the state's chamber of commerce and manufacturers' association. With approximately 3,800 members, we are the largest business trade association in Wisconsin. WMC represents members from all over Wisconsin of all sizes and in every sector of the state's economy. I am submitting these comments today in support of Senate Bill 745.

This legislation does three things: (1) It requires all agencies to follow a guidance process that is substantially similar to that which is being implemented by the Department of Natural Resources; (2) it makes clear in statute that the Legislature gets to write laws and chooses when to delegate that authority to state agencies for rulemaking; and (3) it makes clear that courts, not bureaucrats, are interpreting laws.

1. Guidance

Guidance documents are not currently defined by Chapter 227. Arguably they would call under the Wis. Stat.§ 227.01(13)(r) exemption to rulemaking for something that "[i]s a pamphlet or other explanatory material that is not intended or designed as interpretation of legislation enforced or administered by an agency, but which is merely informational in nature." This bill provides a definition and makes clear that guidance documents convey no regulatory authority.

This bill requires agencies to post guidance for public comment at least 21 days before adopting it. Agencies have to consider those comments when finalizing any guidance document, and also requires guidance documents to be signed by the agency head and posted on the agency's website.

2. Agency Deference

This bill also makes clear that duly elected judges are to interpret the law, not agencies, by eliminating the current law practice of deferring to agency decisions. It is important to note that the Supreme Court has recently taken up this issue in several cases, notably Tetra Tech v. Wisconsin DOR, in which the Court, *sua sponte*, asked the parties to brief them on the question of: "Does the practice of deferring to

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agency interpretations of statutes comport with Article VII, Section 2 of the Wisconsin Constitution, which vests the judicial power in the unified court system?" A decision in that case is expected in the coming months.

Giving deference to agencies raises a number of constitutional concerns, including violations of due process and equal protection. When courts accord the government deference, the court is no longer impartial. All other litigations are disadvantaged and forced to overcome this advantage that has been given to the government over other litigants.

State agencies are not impartial or disinterested when it comes to interpreting their own authority. In reality, agencies seek broad interpretations of the law to give themselves the broadest of powers to accomplish their tasks. Here in Wisconsin, state law specifically prohibits agencies from taking regulatory action that is not explicitly allowed by statute or by rule, and courts should not be deferring to those agencies to interpret those very statutes or rules.

Courts decide what the law is, and duly elected judges, accountable to the people they represent, are best suited for that task. This legislation accomplishes that.

3. Rulemaking Authority

Lastly, this bill re-iterates that the Legislature alone may delegate rulemaking authority to agencies. Specifically, this bill makes clear that settlement agreements, consent decrees and court orders do not confer rulemaking authority. We have seen this at some state agencies, who have cited a stipulation as authority in a rulemaking proceeding (*see* CR-15-084 and CR-15-085).

This change simply re-asserts Legislative authority over rulemaking, as required by our Constitution.

Thank you for the opportunity to testify today, I would be happy to answer any questions that you may have.

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

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July 31, 2017

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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

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[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: 

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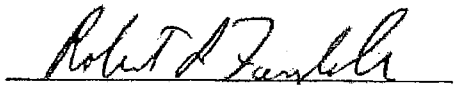
Wisconsin Farm Bureau Federation
Wisconsin Corn Growers Association

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:

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Testimony on SB 745
February 6, 2018

My name is Rick Esenberg and I am President and General Counsel of the Wisconsin Institute for Law & Liberty, also known as WILL.

WILL is a non-profit law and policy organization that champions market-oriented public policy, limited government and individual freedom. We have a longstanding interest in issues related to administrative law, the appropriate role of administrative agencies, and judicial deference to those agencies. For that reason, I appreciate the opportunity to offer my thoughts on SB 745.

We are all familiar with the growth of the administrative state. As society has perhaps grown more complex and government has certainly grown more ambitious, legislatures have increasingly grown unable – or perhaps unwilling – to fully specify policy in the laws that they pass. Nancy Pelosi's oft-derided statement that Congress needed to pass the Affordable Care Act to find out what was in it may have been emblematic of the new age. Legislatures often pass law that cannot be evaluated until administrative agencies say what they are.

The problem is obvious. Legislatures are charged with making the law, and the executive with administering it. Allowing agencies to make law subverts the constitutional separation of powers. So this is a concerning development but it need not be one that we completely repudiate. If agencies act in accordance with legislative guidance – if the legislature delegates rule-making authority accompanied by adequate guidance and limitations as to how that authority is to be exercised – then administrative rule-making can, perhaps, be reconciled with our constitution.

But there is yet another problem. Someone must ensure that agencies act in accordance with the law including the extent to which the legislature has and has not delegated rule-making authority. Under our constitution, the task falls to the courts.

This is not a matter of merely academic concern. It is not something of interest only to law nerds or political philosophers. Our founders – at both the state and federal levels – understood that the separation of powers – in which each branch of government acts as a check on the others – is an "auxiliary precaution" that protects both the rule of law and liberty. But any branch can stem abuses from the other only if it is permitted to exercise its prescribed role.

When courts defer to an agency's interpretation of the law – whether under the "great weight" or "due weight" standards – they are abdicating their prescribed role. It is the duty of courts to interpret the law. When they allow agencies to do it instead, they are allowing the execution and enforcement of the law to be combined in the same hands.

To address this danger, the Wisconsin Supreme Court recently called for briefing on the question of judicial deference to agency interpretations of the law in two pending cases, *Tetra Tech v. Wisconsin Department of Revenue* and *Department of Workforce Development v. Labor and Industry Review Commission.*

As my organization stated in our *amicus* brief in *Tetra Tech,* judicial deference to agency interpretations of law "is contrary to the command of our Constitution that judges – and not agencies – say what the law is. It has grave consequences for the separation of powers. The legislature makes policy and the executive (including agencies) implements it. When it is unclear just what the legislature has done, disinterested judicial decision-makers answer the question. Collapsing the making of policy into its administration [as Chapter 227 currently does], places that decision in the hands of an interested party and is inconsistent with the "auxiliary precautions" that underlie the separation of powers adopted by the framers of Wisconsin's Constitution."

There is a limit to the extent to which the legislature can tell courts how to interpret the law. But SB 745 has the salutary effect of making clear that the legislature neither commands or desires courts to defer to agency's legal conclusions as opposed to their technical findings.

But there's more. SB 745 also protects this body's legislative duties. As we said in our *amicus* in *Department of Workforce Development*, deference to agency interpretations of the law "impinges on the exercise of core legislative authority – to decide what the law should be. It

subtly . . . changes the interpretive question. The court's objective is no longer the determination of what the legislature actually intended, but whether the choice of meaning (and, therefore, policy) made by the agency is defensible given whatever outer bounds are established by statutory language. In this way, it shifts a portion of the policy choice from the legislature to the executive."

So judicial deference to agency interpretations of the law not only usurps the judicial role but threatens to impinge on the legislative function because it changes the nature of statutory interpretation. Instead of seeking to best interpret the intent of the legislature, courts instead permit the executive (via administrative agencies) to interpret the law however it wishes, so long as, in the case of great weight deference, the interpretation is not absurd or, in the case of due deference, can be said to be as reasonable as others. Such an approach collapses administration, adjudication, and perhaps even legislation into one. As Justice Thomas has noted, allowing an administrative agency to say what the law is – to make policy outside the parameters established for legislative delegation of rule-making powers and committed to administrative discretion – "runs headlong into the teeth of Article I, which vests "[a]ll legislative Powers herein granted" in Congress." *Michigan v. EPA*. If the legislature has been unclear, courts resolve the ambiguity.

It is sometimes said that deference to administrative agencies is like the deference that courts show in assessing the constitutionality of legislation. This is a category error. Deference to the legislature is rooted in the need to grant it the scope to exercise its constitutionally appointed power. It is an effort to respect the separation of powers. But agencies do not have legislative power. They are not charged with interpreting the law. Deferring to their attempts to do either serves no constitutional purpose.

At other times, we hear that courts need to defer to agency's technical expertise. There are times when that is appropriate, but caution is appropriate. Writing in Federalist No. 10, James Madison warned against the danger of what he called "faction" – the risk that "a number of citizens, whether amounting to a majority or minority of the whole, who are united by and actuated by some common impulse of passion or interest, adverse to rights of other citizens, or to the paramount and aggregate interests of the community" might be able to bend government to its will. Modern public choice theory confirms our Founders' concern, teaching us that highly

motivated special interests – often acting in prosaic areas unlikely to attract much attention – can enlist the coercive power of the state to extract economic rent from the rest of us.

It should come as no surprise that deference is being supported – and SB 745 is being opposed – by certain regulated industries. Regulatory capture is a much remarked upon phenomenon in which the foxes gain control of the hen house and oppose interference from outsiders.

Deference can be appropriate in resolving technical questions that are relevant to a judicial interpretation. SB 745 would not alter the provision in Chapter 227 which states, " 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). But it is one thing to defer to technical findings of fact. It is quite another to defer to legal interpretations. Administrative agencies are not courts. They have no special expertise – none – in saying what the law is.

Having outlined my general support for SB 745 and addressed some likely objections to it, I would like to recommend a few areas where the Committee should consider changes.

Another way in which we ensure that agencies stay within bounds is notice and comment rulemaking. SB 745 prohibits attempts to use agency guidance documents as means of avoiding the legally prescribed rule-making process. To be sure, this shouldn't happen. According to Chapter 227, a "rule" is "a regulation, standard, statement of policy, or general order of general application which has the effect of law and which is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency." Rules require rule-making. SB 745 reiterates that if an agency Guidance Document bears these characteristics – that is, if it prescribes a policy for agency action and is used to enforce a law administered by the agency – it is a rule. And since it is a rule, it must be promulgated using rule-making procedures.

But SB 745 provides additional protection. The bill clarifies that guidance documents are not rules and do not have the force of law. It requires the agency head to certify that the Document is not a rule and will not be applied as a rule. And, while guidance documents are not banned, it further protects the legislative process and public by providing for public comment and

consideration of those comments in their promulgation. By making guidance documents public, moreover, it places all citizens on an equal footing.

Finally, SB 745 prohibits an agency from adopting rules, based on a court order, settlement agreement, or consent decree, without going through the prescribed rule-making process. "Sue and settle" ought not to expand an agency's authority. SB 745 makes that clear.

Thank you again for the opportunity to testify and I would be happy to respond to any questions.

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