FILED
10-31-2023
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2023-XXXX OA

TONY EVERS, GOVERNOR OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES, BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, and MARRIAGE AND FAMILY THERAPY, PROFESSIONAL COUNSELING, AND SOCIAL WORK EXAMINING BOARD,

Petitioners,

v.

SENATOR HOWARD MARKLEIN, and REPRESENTATIVE MARK BORN, in their official capacities as chairs of the joint committee on finance; SENATOR CHRIS KAPENGA AND REPRESENTATIVE ROBIN VOS, in their official capacities as chairs of the joint committee on employment relations; and SENATOR STEVE NASS and REPRESENTATIVE ADAM NEYLON, in their official capacities as co-chairs of the joint committee for review of administrative rules,

Respondents.

PETITION FOR ORIGINAL ACTION

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INTRODUCTION

1. Our state's founders recognized the great danger of placing in the same hands the power both to create law and to execute it. So, our constitution—like all others nationwide—separated those powers between the legislative and executive branches. But Wisconsin's state government has wandered far astray from that foundational division of authority. Through statutes that allow legislative committees to veto executive branch decision-making, small groups of legislators exercise executive authority over large swaths of government activity. The powers to create and to execute the law need to be separated again.

2. Wisconsin is not the first jurisdiction to confront a legislative veto that collapses these powers into a single branch of government. Legislatures across the country have similarly tried to empower themselves to execute the laws they enact. But courts nationwide have rejected such efforts with virtual unanimity. Most famously, in *INS v. Chadha*, 462 U.S. 919 (1983), the U.S. Supreme Court invalidated a legislative veto, underscoring the critical importance of

"preserv[ing] freedom . . . by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id.* at 959.

3. This Petition challenges three specific legislative vetoes that likewise evade our constitution's "carefully crafted restraints."

4. First, the Legislature's Joint Committee on Finance (JCF) has used its veto power dozens of times in recent years to block conservation projects selected by the Department of Natural Resources (DNR) under the Knowles-Nelson Stewardship Program.

5. Second, the Legislature's Joint Committee on Employment Relations (JCOER) is using its veto power to hold hostage statutory pay raises for about 35,500 University of Wisconsin System (UW) Employees, demanding that UW first make policy concessions not found in any law.

6. And third, the Legislature's Joint Committee for Review of Administrative Rules (JCRAR) has vetoed rules developed by the Department of Safety and Professional Services (DSPS) and an attached board, the Marriage and

Family Therapy, Professional Counseling, and Social Work Examining Board, that would update the state's commercial building standards and ethics standards for social workers, marriage and family therapists, and professional counselors.

7. In each of these areas, the legislative branch is using legislative committee vetoes to reach far beyond its proper zone of constitutional lawmaking authority.

8. These vetoes evade the constitutional lawmaking procedures of bicameralism—passage of a bill through both houses—and presentment to the Governor for signature or veto. By using committee vetoes rather than ordinary lawmaking to "alter[ ] the legal rights, duties and relations of persons . . . all outside the legislative branch," *Chadha*, 462 U.S. at 952, the legislative branch improperly sidesteps these key constitutional safeguards.

9. Equally important, these vetoes empower legislative committees to interfere with executive branch authority and exercise executive power themselves. After the full Legislature enacts laws defining what the executive branch can do, "its participation ends." *Bowsher v. Synar*,

478 U.S. 714, 733–34 (1986). By then using legislative committee vetoes to control how the executive branch implements those laws, the legislative branch wrongly transfers executive authority to itself.

10. Petitioners ask this Court to exercise its original jurisdiction, review the three sets of statutes that grant these legislative committees their veto powers, and declare those statutes unconstitutional in the categories described.

ISSUES PRESENTED

11. Wisconsin Stat. § 23.0917 charges DNR with administering the Knowles-Nelson Stewardship Program, through which DNR awards already-appropriated funds to expand public access to the State's natural resources. Courts have universally recognized that spending appropriated funds is an executive power and that legislative committees cannot block the executive's exercise of that power. Wisconsin Stat. § 23.0917(6m) and (8)(g)3. authorize the Joint Committee on Finance, a 16-member legislative committee, to veto DNR's choices. Do those veto provisions facially violate the separation of powers?

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

13. Under various provisions of Wis. Stat. ch 101, DSPS is charged with promulgating rules relating to commercial building safety, accessibility, and energy efficiency. Under Wis. Stat. § 457.03(2), the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board is responsible for developing ethics standards for social workers, marriage and family therapists, and professional counselors. Courts have broadly recognized that blocking executive branch agencies' rules violates bicameralism and presentment procedures and infringes on executive and judicial authority. Wisconsin Stat.

§§ 227.19(5)(c), (d), (dm), and 227.26(2)(d) and (im) authorize the Joint Committee for Review of Administrative Rules, a 10-member legislative committee, to veto administrative rules. Do these veto provisions violate the separation of powers by allowing this committee to block executive agency rulemaking or, at minimum, DSPS's and the Board's rulemaking authority over commercial building standards and ethics standards for social workers, marriage and family therapists, and professional counselors?

PARTIES

14. Petitioners are the Governor, three executive branch agencies, and one attached Board: Tony Evers, Governor of Wisconsin; the Department of Natural Resources (Wis. Stat. § 15.34); the Board of Regents for the University of Wisconsin (Wis. Stat. § 15.91); the Department of Safety and Professional Services (Wis. Stat. § 15.40); and the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board, which is attached to DSPS (Wis. Stat. § 15.405(7c)) (the "Board").

15. The Attorney General may bring suit on behalf of state agencies and officials in any cause or matter "in which the state or the people of this state may be interested," when requested by the Governor. Wis. Stat. § 165.25(1m). Governor Evers has asked Attorney General Kaul to commence this suit on behalf of all Petitioners here.

16. Respondents Senator Howard Marklein and Representative Mark Born are the Co-Chairs of JCF. They are named in their official capacities.

17. Respondents Senator Chris Kapenga and Representative Robin Vos are the Co-Chairs of JCOER. They are named in their official capacities.

18. Respondents Senator Steve Nass and Representative Adam Neylon are the Co-Chairs of JCRAR. They are named in their official capacities.

FACTUAL ALLEGATIONS

19. This Petition asks the Court to review three sets of statutes that empower legislative committees to veto executive acts. This section explains how these vetoes work.

I. The Joint Committee on Finance has veto authority over DNR's administration of the Knowles-Nelson Stewardship Program.

A. DNR administers the Knowles-Nelson Stewardship Program.

20. DNR administers the Knowles-Nelson Stewardship Program, a conservation program named after two prominent former Wisconsin governors, Warren Knowles (a Republican) and Gaylord Nelson (a Democrat). *See generally* Wis. Stat. § 23.0917. The Knowles-Nelson Program helps Wisconsin expand and improve public access to its natural resources by empowering DNR to acquire land, to develop public recreational property, and to provide grants to local units of government and nonprofit organizations to do the same.

21. DNR reviews grant applications and awards funds based on purposes and priorities set out in statutes and administrative rules. When financing land acquisition, DNR must select projects that serve the purposes enumerated in Wis. Stat. § 23.09(2)(d), including developing state forests, public hunting grounds, or state trails. Specific priorities are provided in Wis. Stat. § 23.0917(3)(c): projects must prioritize

land that preserves or enhances the state's water resources; land for the stream bank protection program; land for habitat areas and fisheries; land for natural areas; land in the middle Kettle Moraine; and land in the Niagara Escarpment corridor. DNR has also promulgated administrative rules that further guide its discretion in selecting land acquisition projects. *See, e.g.*, Wis. Admin. Code NR § 1.40.

22. The Legislature has authorized DNR to obligate specified amounts each fiscal year from various state funds for Knowles-Nelson Program projects. *See* Wis. Stat. §§ 20.866(2)(ta), 23.0917(3)–(4m).

B. Wisconsin Stat. § 23.0917(6m) and (8)(g)3. give JCF veto power over DNR's Knowles-Nelson Program decisions.

23. Despite those appropriations, DNR can spend money within its yearly statutory limits on many types of projects only if first receives approval from JCF.

24. JCF is a 16-person committee of the Legislature. Wis. Stat. § 13.09. Members from each house are chosen by legislative leaders from each political party, based on the

party's number of representatives in each house. *Id.* It is not confined by any geographic or population requirements.

25. Wisconsin Stat. § 23.0917 grants JCF two separate legislative vetoes over the Knowles-Nelson Program.

26. First, under Wis. Stat. § 23.0917(6m)(a), DNR must submit certain proposed projects to JCF for its approval or rejection through a so-called "passive review" process. If JCF objects, DNR may not spend money on the proposed project until and unless JCF decides to consider and approve it. This JCF legislative veto applies to four categories of Knowles-Nelson Program projects, generally depending on their cost, location, and the State's total land holdings at the time. *See* Wis. Stat. § 23.0917(6m)(c)–(dr).

27. Second, Wis. Stat. § 23.0917(8)(g)3. creates a separate "active review" procedure for land acquisitions outside a "project boundary," defined as boundaries for potential projects established by DNR on or before May 1, 2013. Wis. Stat. § 23.0917(8)(g)1. For this review, DNR cannot spend already-appropriated money unless three-fourths of JCF's members affirmatively approves the proposed project.

28. Since 2007, the Legislature has repeatedly expanded the universe of Knowles-Nelson Program projects subject to JCF review.[1]

C. JCF has often exercised its power to veto Knowles-Nelson Program projects since 2019.

29. Since 2019, JCF has objected to almost one-third of all Knowles-Nelson Program projects that DNR has submitted for approval—27 in total. (*See* Pet. Ex. A.)

30. Those 27 projects sat before JCF for an average of around 273 days before JCF's objection was resolved by either a JCF decision to approve the project, a JCF decision to deny the project, a JCF decision to lift its objection, or a DNR decision to withdraw the proposed project altogether. (*See* Pet. Ex. A.)

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[1] *See* 2007 Wis. Act 20, § 646t (creating Wis. Stat. § 23.0917(6m)(a), (bg) (2007–08), which required JCF to lodge objections in writing and hold a meeting within 16 days and set review threshold at $750,000); 2011 Wis. Act 32, §§ 837m, 837t, 840 (removing written objection and meeting time limits and lowering review threshold to $250,000); 2013 Wis. Act 20, §§ 509v, 509y (creating Wis. Stat. §§ 23.0917(6m)(dg), (8)(g), which require JCF review of proposals outside "project boundaries" and those where state land holdings exceed a threshold); 2015 Wis. Act 55, § 961t (creating Wis. Stat. § 23.0917(6m)(dr), which requires JCF review of land acquisitions north of State Trunk Highway 64).

II. The Joint Committee on Employment Relations has veto authority over pay adjustments for UW employees.

A. UW employees receive pay adjustments in the biennial budget bill.

31. The Board of Regents administers UW, the State's comprehensive public university system. Across its 13 universities and 26 campuses, UW employs around 42,000 people, including maintenance and service workers, healthcare providers, faculty, researchers, scientists, technicians, and law enforcement officers.

32. During the biennial budget process, one point of negotiation between the Legislature and the Governor involved the general wage adjustment for UW and all other state employees. The Governor proposed two pay raises of 5% and 3% over the coming biennium, and the Legislature countered with 4% and 2% raises.[2]

[2] Wis. Legis. Fiscal Bureau, 2023–25 Wis. State Budget, *Summary of Provisions* 134–35, 137 (Aug. 2023), https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/202_comparative_summary_of_provisions_2023_act_19_august_2023_entire_document.pdf.

33. The 4% and 2% raises were ultimately incorporated in 2023 Wis. Act 19, the biennial budget bill, which both houses of the Legislature passed and the Governor signed.[3]

B. Wisconsin Stat. § 230.12(3)(e)1. gives JCOER veto power over UW's implementation of the budgeted pay adjustments.

34. Although the budget bill is law, UW cannot yet implement the budgeted pay adjustments for its employees. Under Wis. Stat. § 230.12(3)(e)1., all budgeted "pay adjustments for [UW] employees" must be approved by JCOER before they can take effect.

35. JCOER is an eight-person committee of the Legislature. Wis. Stat. § 13.111(1). Members represent the leadership of each house, *id.*, so the partisan makeup depends on the majority in each house. It is not confined by any geographic or population requirements.

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[3] Wis. Legis. Fiscal Bureau, 2023–25 Wis. State Budget, *Summary of Provisions* 68 (July 2023), https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/102_summary_of_provisions_2023_act_19_july_2023_entire_document.pdf.

36. After receiving UW's proposed pay adjustments, JCOER "shall hold a public hearing on the proposal." Wis. Stat. § 230.12(3)(b). The statute specifies no timeframe for that meeting. The proposed pay plan adjustments, "as may be modified by [JCOER]," take effect only after JCOER completes its review. Wis. Stat. § 230.12(3)(b).

37. The Governor may disapprove of JCOER's modifications within ten calendar days, but JCOER can override that disapproval through a vote of six members on the committee. Wis. Stat. § 230.12(3)(b).

C. JCOER is using its veto power to block the budgeted pay adjustments for UW employees.

38. In August 2023, UW submitted its proposed pay adjustments to the Department of Administration, as required by Wis. Stat. § 230.12(3)(e)1. The proposed pay adjustments matched the 4% and 2% raises passed in the biennial budget bill.

39. The Department of Administration submitted UW's proposed pay adjustments to JCOER on July 31, 2023.

40. On October 17, 2023, JCOER held a hearing on compensation for all state employees. The committee allowed the 4% and 2% pay raises to take effect for all state employees outside UW. It did not, however, approve the pay raises for UW employees, and so those raises still have not taken effect.[4]

41. One JCOER co-chair has explained that the committee will continue to block the budgeted pay adjustments for UW employees until UW cuts employee positions dedicated to diversity, equity, and inclusion or else gives up its authority to create employee positions.[5] The co-chair commented, "I don't think that they [i.e. UW] deserve to have any more resources until they accomplish the goal," and "Not a nickel. When I say a nickel, that's what I mean."[6]

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[4] Baylor Spears, *Lawmakers approve raises for all but UW employees*, Wisconsin Examiner (Oct. 17, 2023), https://wisconsinexaminer.com/brief/lawmakers-approve-raises-for-all-but-uw-employees/.

[5] Robert D'Andrea, *Wisconsin Republicans deny UW System staff pay raises over diversity funding,* Wis. Pub. Radio (Oct. 17, 2023, updated 3:30 PM), https://www.wpr.org/wisconsin-republicans-deny-uw-system-staff-pay-raises-over-diversity-funding.

[6] *Vos will seek to block pay raises for UW employees unless DEI positions cut,* WisPolitics (Sept. 19, 2023), https://www.wispolitics.com/2023/vos-will-seek-to-block-pay-raises-for-uw-employees-unless-dei-positions-cut/.

42. The Legislature sought to cut diversity, equity, and inclusion positions in the biennial budget bill, but the Governor vetoed that provision. *See* 2023 Wis. Act 19, § 9147(1) (vetoed in part). Although that provision is thus not part of the law, the co-chair is seeking to implement that same policy through JCOER's veto power.

III. The Joint Committee for Review of Administrative Rules has veto authority over administrative rules proposed by executive branch agencies, including DSPS and the Board.

A. DSPS and the Board are responsible for rulemaking regarding commercial building standards and ethics standards for social workers, marriage and family therapists, and professional counselors.

43. DSPS and the Board have statutory administrative rulemaking authority in two areas that have recently triggered JCRAR's exercise of its legislative veto power: rules that set commercial building standards; and rules establishing ethics standards for social workers, marriage and family therapists, and professional counselors.

1. DSPS develops a rule updating commercial building standards.

44. Under various provisions of Wis. Stat. ch 101, DSPS is responsible for developing and updating the commercial building standards contained in Wis. Admin. Code. chs. SPS 361–366. These rules are meant to protect the health, safety, and welfare of the public by establishing minimum standards for the design, construction, maintenance, and inspection of public buildings, including multifamily dwellings and places of employment. Wis. Admin. Code SPS § 361.01.

45. Commercial building standards are constantly evolving to reflect technological advances, accommodations for people with disabilities, and changing conservation standards. The administrative rules currently in effect rest on international model codes from 2015, codes that have twice since been updated, in 2018 and 2021.

46. Wisconsin's commercial building standards also must comply with various federal laws, including requirements in the Fair Housing Act, Americans with

Disabilities Act, and federal statutes relating to energy conservation.[7]

47. Relatedly, DSPS is statutorily obligated to regularly update energy conservation standards. *See* Wis. Stat. § 101.027(2), (3).

48. In 2020, DSPS initiated rulemaking efforts to update the commercial building standards and bring them into compliance with current building standards.

49. The rulemaking process for all agencies—including DSPS—has numerous steps, including: publishing a scope statement and receiving the Governor's approval of it, Wis. Stat. § 227.135; drafting the rule's text, Wis. Stat. § 227.14; preparing an economic impact analysis, Wis. Stat. § 227.137; submitting materials to Legislative Council staff, who may recommend changes, Wis. Stat. § 227.15; holding a public hearing on the proposed rule, Wis. Stat. § 227.16; and

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[7] Wis. State Leg., *Statement of Scope, Department of Safety & Professional Services, SS 149-20,* https://docs.legis.wisconsin.gov/code/register/2020/780a1/register/ss/ss_149_20/ss_149_20 (last visited Oct. 26, 2023).

submitting the rule to the Governor for approval or rejection, Wis. Stat. § 227.185.

50. In addition to complying with the general rulemaking steps, DSPS also must consult with the Commercial Building Code Council in designing the revised rules. Wis. Stat. § 101.023. The Council is a statutory body that includes Wisconsin representatives from building-related professions: skilled tradespeople; building inspectors; firefighters; building contractors; architects; engineers; and designers. Wis. Stat. § 15.407(18).

51. DSPS and the Council held numerous meetings to draft and review the proposed rule.[8]

52. DSPS completed its work on the proposed rule and submitted it to the Legislature for review in May 2023.[9]

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[8] State of Wis., Dep't of Admin., *Administrative Rules, Fiscal Estimate & Economic Impact Analysis* 2, https://docs.legis.wisconsin.gov/code/misc/chr/lc_ruletext/cr_23_007_fiscal_estimate_and_economic_impact_analysis.pdf (last visited Oct. 26, 2023).

[9] Wis. State Leg., *Clearinghouse Rule CR 23-007,* https://docs.legis.wisconsin.gov/code/chr/all/cr_23_007 (last visited Oct. 26, 2023).

2. The Board develops a rule revising ethics standards for social workers, marriage and family therapists, and professional counselors.

53. DSPS and its attached boards regulate a variety of licensed professions. The Board's regulatory area includes social workers, marriage and family therapists, and professional counselors. *See generally* Wis. Stat. § 15.405(7c), Wis. Stat. ch. 457. The Board is charged with establishing minimum standards for these professions in the areas of education, certification, and licensing. *See* Wis. Stat. § 457.03.

54. Specifically, the Board must promulgate administrative rules that establish ethics standards for people licensed in these professions. Wis. Stat. § 457.03(2). The Board has carried out this statutory responsibility through Wis. Admin. Code ch. MPSW 20.

55. In 2019 and 2020, the Board developed a proposed administrative rule that would update these ethics standards. One provision would define as unethical conduct employing or promoting any intervention or method with the purpose of attempting to change a person's sexual orientation or gender identity. *See* Wis. Admin. Code MPSW § 20.02(25).

56. The Board completed its work on the proposed rule and submitted it to the Legislature for review in February 2020.[10]

B. JCRAR has multiple statutory tools to veto administrative rules.

57. Even if an executive branch agency—including DSPS or the Board—completes all steps up to and including obtaining the Governor's approval of a proposed rule, it cannot promulgate the rule until and unless JCRAR approves it. Moreover, JCRAR has multiple opportunities to veto a rule; it can block a proposed rule before its promulgation and it can suspend a promulgated rule an unlimited number of times.

58. JCRAR is a ten-person committee of the Legislature. Members from each house are chosen by legislative leaders from each political party, based on the party's number of representatives in each house. Wis. Stat. § 13.56. Membership is not determined by any geographic or population requirements.

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[10] Wis. State Leg., *Clearinghouse Rule CR 19-166,* https://docs.legis.wisconsin.gov/code/chr/all/cr_19_166 (last visited Oct. 26, 2023).

1. General bar on promulgation until JCRAR acts: Wis. Stat. § 227.19(5)(c).

59. After the Governor approves a proposed rule under Wis. Stat. § 227.185, the rule does not go into effect. Instead, it travels to the legislative branch and stops at a standing committee that reviews the rule and recommends to JCRAR whether the proposed rule be approved or vetoed. Wis. Stat. § 227.19(2), (4).

60. Until JCRAR acts on the standing committee's recommendation (or fails to act while the rule is under JCRAR's jurisdiction), Wis. Stat. § 227.19(5)(c) bars an agency from promulgating the proposed rule.

2. Objections to proposed rules: Wis. Stat. § 227.19(5)(d) and (5)(dm).

61. Once a proposed rule is referred to JCRAR (*see generally* Wis. Stat. § 227.19(5)), it may veto the proposed rule through: (1) a regular "objection" under Wis. Stat. § 227.19(5)(d); or (2) an "indefinite objection" under Wis. Stat. § 227.19(5)(dm).

62. For either type of objection, JCRAR must offer one of six general reasons for objecting to a rule: an "absence of statutory authority"; an "emergency relating to public health, safety, or welfare"; a "failure to comply with legislative intent"; a "conflict with state law"; a "change in circumstances" since the enactment of the law authorizing rulemaking; "arbitrariness and capriciousness"; or the "imposition of an undue hardship." Wis. Stat. § 227.19(4)(d); *see also* Wis. Stat. §§ 227.19(5)(d) (cross-referencing section 227.19(4)(d)), 227.19(5)(dm) (same).[11]

63. JCRAR may lodge a *regular objection* under Wis. Stat. § 227.19(5)(d), which empowers JCRAR to "object to a proposed rule or a part of a proposed rule." Once JCRAR makes a regular objection, it must introduce a bill in each house of the Legislature to "support" the objection. Wis. Stat. § 227.19(5)(e).

[11] For regulations relating to dwellings, JCRAR may proffer a seventh reason to reject a rule: that it would increase the cost of constructing or remodeling a dwelling more than $1,000. Wis. Stat. § 227.19(4)(d)7.

64. If JCRAR objects under subsection (5)(d), "an agency may not promulgate the proposed rule or part of the proposed rule objected to until a bill introduced under par. (e) fails to be enacted." Wis. Stat. § 227.19(5)(d).

65. If either such bill becomes law, "the agency may not promulgate the proposed rule or part of the proposed rule that was objected to unless a subsequent law specifically authorizes its promulgation." Wis. Stat. § 227.19(5)(f).

66. If, however, "both bills required under par. (e) are defeated, or fail to be enacted in any other manner, the agency may promulgate the proposed rule or part of the proposed rule that was objected to." Wis. Stat. § 227.19(5)(f).

67. Although Wis. Stat. § 227.19 includes some time limits regarding the required bills, there is no requirement that the full Legislature ever vote on them. *See* Wis. Stat. § 227.19(5)(e), (6)(b). If both houses of the Legislature do not pass one of these bills by the end of the last floor period in a legislative session, they automatically fail to be enacted (like all other bills). *See* Rule 83(4)(a), Joint Rules of the Wisconsin Legislature.

68. Separately, JCRAR can "*indefinitely object*" to a proposed rule. Wis. Stat. § 227.19(5)(dm), (em), (fm). Under these provisions, added as part of 2017 Wis. Act 57, known as the "Regulations from the Executive in Need of Scrutiny" (or "REINS") Act, if JCRAR indefinitely objects, "the agency may not promulgate the proposed rule or part of the proposed rule objected to until a bill introduced under par. (em) is enacted." Wis. Stat. § 227.19(5)(dm). The Legislature "may" introduce such a bill, but it is not obligated to do so. Wis. Stat. § 227.19(5)(em).

69. A rule under an "indefinite" objection cannot go into effect unless the Legislature affirmatively passes a law permitting it. If a bill introduced under Wis. Stat. § 227.19(5)(em) fails to be enacted, "the agency may not promulgate the proposed rule or part of the proposed rule that was objected to unless subsequent law specifically authorizes its promulgation." Wis. Stat. § 227.19(5)(fm).

3. Suspensions of promulgated rules: Wis. Stat. § 227.26(2)(d) and (im).

70. If a rule survives the objection process, it may be promulgated and go into effect. But JCRAR may then indefinitely suspend the rule.

71. Under Wis. Stat. § 227.26(2)(d), JCRAR may, by majority vote, suspend any rule after its promulgation, citing one (or more) of the reasons specified in Wis. Stat. § 227.19(4)(d).

72. The rule remains suspended while JCRAR takes executive action and each house of the Legislature introduces a bill to support the suspension. Wis. Stat. § 227.26(2)(f). If such a bill becomes law, "the rule is repealed and may not be promulgated again unless a subsequent law specifically authorizes such action." Wis. Stat. § 227.26(2)(i).

73. As with "regular" objections to rules pre-promulgation, Wis. Stat. § 227.26 sets some timelines for these bills, but there is no requirement that the full Legislature ever vote on them. Wis. Stat. §§ 227.26(2)(f), (h), (j).

74. Prior to 2017 Wis. Act 369, if both bills failed to be enacted, the rule would again take effect and the committee could not suspend it again. Wis. Stat. § 227.26(2)(i). But a provision added in 2017 Wis. Act 369 provides that JCRAR "may act to suspend a rule as provided under this subsection multiple times." Wis. Stat. § 227.26(2)(im); *see* 2017 Wis. Act 369, § 64.

C. JCRAR is exercising its veto power to block DSPS's and the Board's rulemaking efforts.

75. JCRAR is using this suite of legislative vetoes to block and suspend DSPS's and the Board's administrative rules updating commercial building standards and the ethics standards for social workers, marriage and family therapists, and professional counselors.

1. JCRAR indefinitely objects to the proposed rule updating commercial building standards.

76. In May 2023, DSPS submitted for legislative review the proposed rule updating commercial building standards in Wis. Admin. Code chs. SPS 361–366.[12]

77. In an executive session held September 29, 2023, JCRAR voted 6-4 to indefinitely object to the rule under Wis. Stat. § 227.19(5)(dm). Its proffered reasons included a failure to comply with legislative intent, a conflict with state law, arbitrary and capricious action, and a supposedly "deficient" economic impact analysis.[13]

78. This proposed rule may not be promulgated unless the Legislature passes a bill to authorize the promulgation and the Governor signs it into law. Wis. Stat.

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[12] Wis. State Leg., *Clearinghouse Rule CR 23-007,* https://docs.legis.wisconsin.gov/code/chr/all/cr_23_007 (last visited Oct 26, 2023).

[13] Record of Committee Proceedings, Joint Committee for Review of Administrative Rules, CR 23-007 https://docs.legis.wisconsin.gov/code/register/2023/814A1/register/actions_by_jcrar/actions_taken_by_jcrar_on_september_29_2023_cr_23_007/actions_taken_by_jcrar_on_september_29_2023_cr_23_007 (last visited Oct. 26, 2023).

§ 227.19(5)(em), (fm). The Legislature has no obligation to ever introduce such a law, let alone pass one in both houses.

2. JCRAR objects to and then suspends part of the rule revising ethics standards for social workers, marriage and family therapists, and professional counselors.

79. In February 2020, the Board submitted the proposed rule updating the professional ethics standards in Wis. Admin. Code ch. MPSW 20 for JCRAR review.[14]

80. In an executive session held June 25, 2020, JCRAR considered the rule. JCRAR first voted on whether to indefinitely object to the rule under Wis. Stat. § 227.19(5)(dm). After deadlocking 5-5, it voted 6-4 to make a regular objection to the proposed rule under Wis. Stat. § 227.19(5)(d).[15]

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[14] Wis. State Leg., *Clearinghouse Rule CR 19-166,* https://docs.legis.wisconsin.gov/code/chr/all/cr_19_166 (last visited Oct. 26, 2023).

[15] Wis. State Leg., *Record of Committee Proceedings Joint Committee for Review of Administrative Rules, Clearinghouse Rule 19-166,* https://docs.legis.wisconsin.gov/2019/related/records/joint/administrative_rules/1558939 (last visited Oct. 26, 2023).

81. The rule sat blocked, waiting for legislative action. Nearly six months later, in later January 2021, JCRAR introduced two bills in support of its objection: 2021 Assembly Bill 14 and 2021 Senate Bill 31. The bills were referred to committees in the respective chambers. The bills were placed on the calendar of each house for further consideration on March 16, 2021. Rather than vote on the bills, both houses referred them back to committees.[16]

82. About one year later, both bills terminated without further action at the end of the legislative session's last general-business floor period.[17] The failure of these bills to be enacted finally lifted JCRAR's objection to the rule, nearly two years after the committee lodged a regular objection.

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[16] *See* 2021–22 Wis. State Leg., *Assembly Bill 14,* https://docs.legis.wisconsin.gov/2021/proposals/ab14 (last visited Oct. 26, 2023); 2021–22 Wis. State Leg., *Senate Bill 31,* https://docs.legis.wisconsin.gov/2021/proposals/sb31 (last visited Oct. 26, 2023).

[17] Wis. State Leg., *State of Wisconsin Assembly Journal, Mar. 15, 2022,* https://docs.legis.wisconsin.gov/2021/related/journals/assembly/20220315/_131 (last visited Oct. 26, 2023).

83. On November 28, 2022, the proposed rule was published in Wisconsin Administrative Register No. 803, and it took effect on December 1, 2022.[18]

84. Less than six weeks later, on January 12, 2023, JCRAR held an executive session and, by a 6-4 vote, used its authority under Wis. Stat. § 227.26(2)(d) to suspend Wis. Admin. Code MPSW § 20.02(25), the portion of the rule defining interventions with the aim of attempting to change a person's sexual orientation or gender identity as unethical.[19]

85. The legislative process began again. About a month later, JCRAR introduced two bills to support its suspension of the rule: 2023 Assembly Bill 3 and 2023 Senate Bill 4. The bills were referred to a committee in each house, placed on the calendar in both houses in mid-March, and,

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[18] Wis. State Leg., *State of Wisconsin Senate Journal, Nov. 28, 2022,* https://docs.legis.wisconsin.gov/2021/related/journals/senate/20221128/_14 (last visited Oct. 26, 2023).

[19] Record of Committee Proceedings, Joint Committee for Review of Administrative Rules, Marriage & Fam. Therapy, Pro. Counseling, & Soc. Work Examining Bd. https://docs.legis.wisconsin.gov/code/register/2023/805a3/register/actions_by_jcrar/actions_taken_by_jcrar_on_january_12_2023_ch_mpsw_20/actions_taken_by_jcrar_on_january_12_2023_ch_mpsw_20 (last visited Oct. 26, 2023).

without an up-or-down vote, referred back to a committee. The Legislature has taken no further action on either bill.[20]

86. As of November 1, 2023, the rule will have been suspended post-promulgation for almost ten months.

87. Over three years have elapsed since JCRAR first blocked the proposed rule on June 25, 2020. During this time, the Legislature has never voted to pass a bill blocking the rule or presented such a bill to the Governor for his signature or veto.

CLAIMS FOR RELIEF

COUNT I

The JCF review provisions in Wis. Stat. § 23.0917(6m) and (8)(g)3. are facially unconstitutional legislative vetoes that violate the Wisconsin Constitution's separation of powers.

(Declaratory relief sought)

88. Plaintiffs reallege and incorporate herein by reference each foregoing paragraph of this Petition as if set forth here in full.

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[20] 2023–24 Wis. State Leg., *Assembly Bill 3* https://docs.legis.wisconsin.gov/2023/proposals/ab3 (last visited Oct. 26, 2023); 2023–24 Wis. State Leg., *Senate Bill 4* https://docs.legis.wisconsin.gov/2023/proposals/sb4 (last visited Oct. 26, 2023).

89. Any court of record in this State is authorized to enter a declaratory judgment declaring that a statutory provision, or an application of a statutory provision, is unconstitutional. *See* Wis. Stat. § 806.04(1). Further relief based on a declaratory judgment may also be granted whenever necessary or proper. *See* Wis. Stat. § 806.04(8).

90. The Knowles-Nelson Program legislative committee veto provisions in Wis. Stat. § 23.0917(6m) and (8)(g)3. violate the Wisconsin Constitution's separation of powers.

91. First, the legislative committee veto mechanisms in Wis. Stat. § 23.0917(6m) and (8)(g)3. unconstitutionally intrude on the executive branch's power to administer the Knowles-Nelson Program. Once the Legislature enacted statutes creating the program, the baton passed to the executive branch to administer the program within statutory spending limits and criteria. But these legislative vetoes empower JCF to delay, approve, or reject a proposed Knowles-Nelson Program project for any reason. That intrusion on executive branch authority violates the separation of powers.

92. Second, these legislative vetoes improperly empower JCF to control executive action without passing new law. When the Legislature acts through a few of its members in this manner, it violates the procedural lawmaking requirements of bicameralism and presentment built into Wisconsin's constitution.

93. These legislative veto provisions are facially unconstitutional.

COUNT II

The JCOER review provision in Wis. Stat. § 230.12(3)(e)1. is a facially unconstitutional legislative veto that violates the Wisconsin Constitution's separation of powers.

(Declaratory relief sought)

94. Plaintiffs reallege and incorporate herein by reference each foregoing paragraph of this Petition as if set forth here in full.

95. Any court of record in this State is authorized to enter a declaratory judgment declaring that a statutory provision, or an application of a statutory provision, is unconstitutional. *See* Wis. Stat. § 806.04(1). Further relief

based on a declaratory judgment may also be granted whenever necessary or proper. *See* Wis. Stat. § 806.04(8).

96. The legislative committee veto provision in Wis. Stat. § 230.12(3)(e)1. covering UW pay adjustments violates the Wisconsin Constitution's separation of powers.

97. First, this legislative committee veto mechanism unconstitutionally intrudes on the executive branch's power to implement UW employee pay adjustments. Once the Legislature passed the biennial budget bill, the baton passed to the executive branch to administer the pay adjustments therein. But this legislative veto permits JCOER to delay, approve, or reject UW's pay adjustments for any reason. That intrusion on executive branch authority violates the separation of powers.

98. Second, the legislative veto improperly empowers JCOER to control executive action without passing new law. When the Legislature acts through a few of its members in this manner, this violates the procedural lawmaking requirements of bicameralism and presentment built into Wisconsin's constitution.

99. This legislative veto provision is facially unconstitutional.

COUNT III

The JCRAR veto provisions in Wis. Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d) and (im) violate the Wisconsin Constitution's separation of powers as applied to executive branch agency rulemaking and, alternatively, as applied to DSPS's and the Board's rulemaking authority over commercial building standards and social worker, marriage and family therapist, and professional counselor ethics.

(Declaratory relief sought)

100. Plaintiffs reallege and incorporate herein by reference each foregoing paragraph of this Petition as if set forth here in full.

101. Any court of record in this State is authorized to enter a declaratory judgment declaring that a statutory provision, or an application of a statutory provision, is unconstitutional. *See* Wis. Stat. § 806.04(1). Further relief based on a declaratory judgment may also be granted whenever necessary or proper. *See* Wis. Stat. § 806.04(8).

102. The legislative committee veto provisions in Wis. Stat. §§ 227.19(5)(c), (d), and (dm), and 227.26(2)(d) and (im) violate the Wisconsin Constitution's separation of powers.

Here, the Legislature overstepped its constitutional role by granting a legislative committee the power to block and suspend individual administrative rules, again for two reasons.

103. First, these legislative committee vetoes improperly empower JCRAR to make new law by blocking or suspending the rules that administrative agencies have developed, without following constitutionally prescribed lawmaking procedures. This affects the law not only by blocking or suspending the administrative rules themselves, but also by effectively amending the promulgating agency's statutory rulemaking authority. JCRAR's ability to accomplish this without bicameral passage of a bill and presentment to the Governor is unconstitutional.[21]

[21] Petitioners acknowledge that accepting this argument would require overruling *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), and the related discussion in *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, ¶¶ 12, 78–83, 393 Wis. 2d 38, 946 N.W.2d 35. They therefore ask the Court to do so.

104. Second, these legislative vetoes improperly intrude on the executive branch's authority to promulgate administrative rules. When the executive branch engages in rulemaking, it is not exercising a fundamentally different power than the core power it uses when it otherwise implements a statutory program. In both cases, the executive branch uses executive discretion to execute the law within the statutory boundaries set by the Legislature. And even if rulemaking is viewed as a power shared by the executive and legislative branches, the constitution still does not authorize the Legislature to absolutely block executive branch rulemaking through a legislative committee and without enacting laws.

105. These legislative veto provisions may never be constitutionally applied to executive branch agency rulemaking. Alternatively, these provisions violate the separation of powers as applied to DSPS's and the Board's rulemaking authority over commercial building standards and the ethical standards for social workers, marriage and family therapists, and professional counselors.

WHY THIS COURT SHOULD ACCEPT REVIEW

106. This case falls within the category of *publici juris* cases meriting this Court's original jurisdiction, for reasons more fully discussed in the memorandum accompanying this petition.

107. In short, the separation of powers questions satisfy the Court's criteria for the exercise of original jurisdiction under article VII, section 3 of the Wisconsin Constitution and make this an "exceptional case[] in which a judgment by the court [would] significantly affect[] the community at large." *Wis. Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807 (accepting original jurisdiction of a case affecting pension interests of Wisconsin Retirement System participants).

108. Time matters. Original jurisdiction is appropriate where "the questions presented are of such importance as under the circumstances to call for [a] speedy and authoritative determination by this court in the first instance." *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1939). These unconstitutional legislative committee vetoes have led to exigent harms including indefinite program

delays, unpaid wages, and failures to achieve modern building standards. These ongoing and tangible constitutional harms underscore the need for "speedy and authoritative" resolution through an original action. *Id.*

109. This case presents legal issues, not factual ones. Although recent uses of the legislative veto help illustrate how these provisions work and why the problem is so urgent, the provisions all violate the separation of powers as a matter of law. In any event, all referenced facts involve public actions by administrative agencies and legislative committees; they are matters of public record that cannot be disputed.

110. The Petition asks for *Martinez v. DILHR,* 165 Wis. 2d 687, 478 N.W.2d 582 (1992), and passages that rely on *Martinez* in *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, to be overruled, and only this Court can do so.

CONCLUSION

111. For the reasons set forth above and in the accompanying memorandum, Petitioners respectfully request that this Court exercise its original jurisdiction over this action and grant a declaratory judgment in Petitioners' favor.

Dated this 31st day of October 2023.

Respectfully submitted,

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