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.

MEMORANDUM IN SUPPORT OF PETITION FOR ORIGINAL ACTION

JOSHUA L. KAUL
Attorney General of Wisconsin

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 957-5218 CG
(608) 266-7636 CTR
(608) 294-2907 (Fax)
gibsoncj@doj.state.wi.us
rothct1@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Consitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Original actions are meant to be rare, and for good reason. But sometimes an issue of significant statewide importance merits this Court's prompt attention. This Petition presents one of them: whether the Wisconsin Constitution allows for a system of government-by-legislative-committee via legislative vetoes or, instead, preserves the separation between legislative and executive power through constitutional lawmaking procedures.

Today, our state government often operates at the whim of legislative committees, even after the lawmaking process ends. How did we get here? Over the last several decades, the Legislature has steadily created more and more legislative vetoes that empower legislative committees—outside the ordinary lawmaking process—to block individual executive branch actions.

This Petition challenges three such vetoes: (1) the Joint Committee on Finance's (JCF) power to veto conservation projects under the Knowles-Nelson Stewardship Program; (2) the Joint Committee on Employment Relations' (JCOER) power to veto already-budgeted pay adjustments for University of Wisconsin System (UW) employees; and (3) the Joint Committee for Review of Administrative Rules' (JCRAR) power to veto administrative rules promulgated by executive branch agencies, including those of the Department of Safety and Professional Services and one of its attached boards, the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board (the "Board").

This is no mere academic issue. These vetoes are in regular use, and some present highly acute issues. JCF has blocked almost one-third of all proposed Knowles-Nelson conservation projects just since 2019. JCOER is using its veto power to hold hostage pay adjustments for most of UW's 42,000 employees on the condition that UW make policy

concessions the full Legislature failed to obtain during biennial budget negotiations. And JCRAR is blocking two important administrative rules: a modernization of the state's commercial building standards to improve safety, accessibility, and energy efficiency; and a revision of professional ethics standards that would define techniques aimed at changing a person's sexual orientation or gender identity (often called "conversion therapy") as unethical.

The peril of the "same persons who have the power of making laws [also having] in their hands the power to execute them" has thus materialized. *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 5, 376 Wis. 2d 147, 897 N.W.2d 834 (citation omitted). Through these vetoes, the legislative branch has empowered itself—through small, unrepresentative, legislative committees—not only to write the laws, but also to control how the executive branch implements them.

That violates the Wisconsin Constitution, for two basic reasons. First, these vetoes allow legislative committees to exercise the quintessential executive power of deciding how to administer the law. This improperly transfers executive power to the legislative branch and interferes with the executive branch's constitutional authority. Second, especially in the rulemaking context, these legislative committees use their veto power to effectively change the law outside the constitutional lawmaking process, which requires passing a bill through both houses (bicameralism) and sending it to the Governor for his signature or veto (presentment). For these same reasons, both the U.S. Supreme Court and state high courts nationwide have overwhelmingly rejected legislative veto schemes just like these.

It is time to return Wisconsin to the mainstream. Petitioners ask that this Court accept this matter as an original action and restore the constitutional balance of power to Wisconsin's state government.

ISSUES PRESENTED

1. Should the Court assume original jurisdiction over this challenge to three sets of statutes that empower legislative committees to veto executive branch spending and rulemaking decisions?

2. Do the three sets of challenged legislative vetoes violate the separation of powers:

a. Do Wis. Stat. § 23.0917(6m) and (8)(g)3. violate the separation of powers by allowing the Legislature's Joint Committee on Finance to veto decisions of the Department of Natural Resources to award monies under the Knowles-Nelson Stewardship Program?

b. Does Wis. Stat. § 230.12(3)(e)1. violate the separation of powers by allowing the Legislature's Joint Committee on Employment Relations to veto implementation of pay adjustments for UW employees that are included in the biennial budget act?

c. Do Wis. Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d) and (im) violate the separation of powers by allowing the Legislature's Joint Committee for Review of Administrative Rules to veto rules promulgated by executive branch agencies, or at least those from the Department of Safety and Professional Services and the Board relating to commercial building standards and ethics standards for social workers, marriage and family therapists, and professional counselors?

STATEMENT OF THE CASE

Petitioners will not repeat the relevant facts alleged in the Petition accompanying this memorandum. Briefly, Petitioners challenge legislative veto provisions that cover three statutory programs.

First, Petitioner Department of Natural Resources (DNR) administers the Knowles-Nelson Stewardship Program. *See generally* Wis. Stat. § 23.0917. Under Wis. Stat. § 23.0917(6m) and (8)(g)3., DNR cannot proceed with most Knowles-Nelson projects if JCF objects to them. Over the past five years, JCF has blocked—at least temporarily—almost a third of the Knowles-Nelson projects that DNR has sought to pursue.

Second, Petitioner Board of Regents of the University of Wisconsin System administers employee compensation for its 42,000 employees. Under the enacted biennial budget, most of those employees are entitled to pay adjustments. But under Wis. Stat. § 230.12(3)(e)1., UW cannot implement these pay adjustments until and unless JCOER approves them. The committee's co-chair has said that it will not approve the pay adjustments unless UW first makes policy concessions unrelated to any law.

Third, Petitioner Department of Safety and Professional Services (DSPS) has statutory authority to promulgate administrative rules relating to commercial building standards, and the Board has statutory authority to set ethics standards for social workers, marriage and family therapists, and professional counselors. But the Joint Committee for Review of Administrative Rules has veto power under Wis. Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d) and (im) to block all agencies' proposed rules and suspend promulgated rules. JCRAR is now exercising that power to indefinitely block and suspend administrative rules proposed and promulgated by DSPS and the Board in these two areas.

ARGUMENT

I. This Court should grant the Petition because it presents separation of powers issues of significant statewide importance.

Petitioners recognize that this Court rarely exercises its original jurisdiction, and for good reason. But that does not mean it never does. Such cases are appropriate when 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 (1938). Historically, "original jurisdiction was given to this court in order that the state might use it to protect itself and its sovereignty and the liberties of the people at large." *State ex rel. Bolens v. Frear*, 148 Wis. 456, 134 N.W. 673, 681 (1912). Accordingly, issues that are "public . . . in their character" and involve "the sovereignty of the state" are appropriate for original jurisdiction. *Att'y Gen. v. City of Eau Claire*, 37 Wis. 400, 407 (1875).

So, even before the COVID-19 pandemic—an era that saw a "veritable explosion" of original action petitions[1]—this Court sometimes accepted original actions in cases of the highest statewide importance, often involving separation of powers disputes. *See, e.g.*, *Wis. Small Businesses United, Inc. v. Brennan*, 2020 WI 69, 393 Wis. 2d 308, 946 N.W.2d 101; *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685; *Koschkee v. Taylor*, 2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600; *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436; *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666; *Thompson v. Craney*,

[1] Order at 10, *Jane Doe 4 v. Madison Metro. Sch. Dist.*, Nos. 2022AP2042, 2023AP305, 2023AP306 (Wis. Sup. Ct. May 19, 2022).

199 Wis. 2d 674, 546 N.W.2d 123 (1996).[2] Similarly, it has exercised original jurisdiction over constitutional cases that "significantly affect[ ] the community at large." *Wis. Pro. Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807 (accepting case affecting the pension interests of state employees).

This Petition fits squarely within this Court's tradition of resolving important separation of powers and other constitutional issues through original actions. It presents a critical question: Does our constitution permit Wisconsin's current system of government-by-legislative-committee? Day-to-day state government operations look very different given how legislative committees may control how the executive branch spends appropriated funds and promulgates administrative rules. Right now, it is difficult to say that Wisconsin has any meaningful separation of powers in the many areas where legislative committees may veto executive action. The same hands that write the laws may now execute them, a dual role that threatens "the central bulwark of our liberty." *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 30, 393 Wis. 2d 38, 946 N.W.2d 35 (*SEIU*).

---

[2] Virtually all partial veto disputes have been considered through original actions. *See Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997) (original action); *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 534 N.W.2d 608 (1995) (same); *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988) (same); *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978) (same); *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 237 N.W.2d 910 (1976) (same); *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 289 N.W. 662 (1940) (same); *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622 (1936) (same); *State ex rel. Wis. Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935) (same).

Moreover, time is of the essence. One legislative committee is blocking already-budgeted pay adjustments for most of UW's 42,000 employees. Another is blocking important updates to the state's commercial building standards and ethics standards for social workers, marriage and family therapists, and professional counselors. And yet another has repeatedly blocked conservation projects that would expand outdoor recreation activities across the State. A typical court case takes years to wind its way through the lower courts, and that is far too long for Wisconsinites to wait for critical powers of their state government to be returned to their rightful place.[3]

And the Petition presents pure legal issues that require no factual development. (*See* Sup. Ct. Int. Op. Pro. III. B.3. (explaining that the court "generally will not exercise its original jurisdiction in matters involving contested issues of fact"). 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

---

[3] It is unlikely that Petitioners could obtain timely relief for these exigent circumstances from a circuit court. The only effective "temporary" relief for these legislative vetoes would closely track the relief Petitioners could obtain at a final judgment—and temporary injunctions "ordinarily" are not granted under these circumstances. *See Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 172, 127 N.W.2d 29 (1964). Moreover, the standard for stays pending appeal favors parties defending the validity of statutes, which means any favorable temporary injunction could be stayed either by the circuit court itself or an appellate court. *See Waity v. LeMahieu*, 2022 WI 6, ¶¶ 48–61, 400 Wis. 2d 356, 969 N.W.2d 263; *State v. Gudenschwager*, 191 Wis. 2d 431, 440–44, 529 N.W.2d 225 (1995). And even if Petitioners prevailed in a final circuit court judgment (presumably many months from now), the unfavorable stay-pending-appeal standard would still stand in the way of obtaining any relief before a final appellate ruling (presumably years from now).

public actions by administrative agencies and legislative bodies; they are matters of public record that cannot be disputed.

Last, the Petition asks this Court to revisit and overrule its decision in *Martinez v. DILHR,* 165 Wis. 2d 687, 478 N.W.2d 582 (1992), and passages that rely on *Martinez* in *SEIU*. Only this Court can do that work.

II. The challenged legislative committee veto provisions violate the Wisconsin Constitution's separation of powers.

An original action is also merited because Petitioners very likely will show that the challenged legislative committee veto provisions violate the separation of powers.

Although the legislative branch has significant constitutional authority to enact statutes that prospectively regulate other branches' behavior, the use of legislative committees to veto individual executive branch decisions is another matter entirely. At least in the context of the executive branch's duties (1) to spend appropriated money on the Knowles-Nelson Program and UW employee pay adjustments, and (2) to promulgate administrative rules, this kind of legislative veto power is unconstitutional.

A. The Wisconsin Constitution allows the legislative branch to exercise its power by enacting laws, not by executing the law through legislative committees.

Before analyzing the specific legislative committee vetoes at issue, one must first revisit fundamental separation of powers principles.

The Wisconsin Constitution creates three branches of government: the legislative, which makes the law; the executive, which executes it; and the judiciary, which resolves disputes over it. When the Legislature makes the law, it must

do so by passing bills in both houses and presenting them to the Governor for signature or veto. After doing so, the Legislature's constitutional role ends and the executive branch takes over to implement the enacted law. The legislative branch may neither assume that executive duty itself nor block the executive branch's ability to carry it out, whether the power at issue might be considered "core" to one branch or "shared" between two.

1. The Wisconsin Constitution divides the powers of government into three branches, and it bars the branches from improperly encroaching on one other's powers.

The Wisconsin Constitution contains three "vesting clauses" that separate the powers of state government into three branches: "The legislative power shall be vested in a senate and assembly," "[t]he executive power shall be vested in a governor," and "[t]he judicial power of this state shall be vested in a unified court system." Wis. Const. art. IV, § 1, art. V, § 1, art. VII, § 2; *see also SEIU*, 393 Wis. 2d 38, ¶ 31.

This separation guards against the "concentration of governmental power" that poses an "extraordinary threat to individual liberty." *Gabler*, 376 Wis. 2d 147, ¶ 4. Our Constitution, like the U.S. Constitution, "ensure[s] that each branch will act on its own behalf and free from improper influence by the others." *Id.* ¶ 32. In this tripartite scheme, "no branch [is] subordinate to the other, no branch [may] arrogate to itself control over the other except as is provided by the constitution, and no branch [may] exercise the power committed by the constitution to another." *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982).

Because the Legislature writes the laws, the separation-of-powers doctrine is especially wary of that branch stripping away power from co-equal branches through legislation. As James Madison warned, the legislative branch

is "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." Federalist No. 48, at 309 (Clinton Rossiter ed., 1961). And the art of lawmaking enables the Legislature to "mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." *Id*. at 310. This all poses a particular danger because it results in the "same persons who have the power of making laws"—that is, legislators—"also [having] in their hands the power to execute them." *Gabler*, 376 Wis. 2d 147, ¶ 5 (quoting John Locke, The Second Treatise of Civil Government, § 143).

Accordingly, "the people ought to indulge all their jealousy and exhaust all their precautions" in guarding against the legislative branch's "enterprising ambition." Federalist No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

2. The process of bicameralism and presentment is critical to constrain legislative branch power.

As one check on the legislative branch's "enterprising ambition," the Framers of both the United States and Wisconsin constitutions created a "crucible" that "bills must overcome to become law." *Becker v. Dane County*, 2022 WI 63, ¶ 101, 403 Wis. 2d 424, 977 N.W.2d 390. When the legislative branch seeks to make law, it must pass a bill in both houses—bicameralism. Wis. Const. art. IV, § 17. Once it clears that hurdle, it must present the bill to the Governor for signature or veto—presentment. Wis. Const. art. V, § 10. Together, bicameralism and presentment represent a "procedural hurdle[ ]" that "limit[s] the ability of the legislature to infringe on [the people's] rights." *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 32, 391 Wis. 2d 497, 942 N.W.2d 900.

The Founding Fathers artfully defended the virtues of these procedures. James Madison explained that bicameralism "doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient." Federalist No. 62, at 378–79 (Clinton Rossiter ed., 1961). In other words, requiring two houses to concur on lawmaking encourages the legislative branch to act for the public good rather than private or factional interest.

Similarly, Alexander Hamilton described presentment's two main purposes. Without it, the executive branch would be "absolutely unable to defend [it]self against the depredations of the [legislative branch]." Federalist No. 73, at 442 (Clinton Rossiter ed., 1961). Moreover, presentment "establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good." *Id.* at 443.

3. Substantively, the legislative branch's power is to enact the law, not to execute it.

Layered on top of these procedural safeguards are substantive ones. The legislative branch must enact laws through bicameralism and presentment, but, even when it does so, those laws may not usurp executive power. Policing this principle requires distinguishing between executive and legislative power. This task is "not always easy," *SEIU*, 393 Wis. 2d 38, ¶ 34, but some basic principles lie beyond debate.

Generally, "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them." *Koschkee*, 387 Wis. 2d 552, ¶ 11 (citation omitted). More specifically, the Legislature has constitutional authority "to declare whether or not there shall be a law; to

determine the general purpose or policy to be achieved by the law; [and] to fix the limits within which the law shall operate." *Id.* (alteration in original) (citation omitted).

"[F]ollowing enactment of laws, the legislature's constitutional role as originally designed is generally complete." *Palm*, 391 Wis. 2d 497, ¶ 182 (Hagedorn, J., dissenting); *see also Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.").

After the legislative branch completes its lawmaking work, the baton passes to the executive branch, whose "authority consists of executing the law." *SEIU*, 393 Wis. 2d 38, ¶ 95. Once a "policy choice[ ]" has been "enacted into law by the legislature," it is then "carried out by the executive branch." *Fabick v. Evers*, 2021 WI 28, ¶ 14, 396 Wis. 2d 231, 956 N.W.2d 856; *see also Palm*, 391 Wis. 2d 497, ¶ 91 (Kelly, J., concurring) ("The difference between legislative and executive authority has been described as the difference between the power to prescribe and the power to put something into effect.").

In carrying out the Legislature's policy choices, the executive is no mere "legislatively-controlled automaton." *SEIU*, 393 Wis. 2d 38, ¶ 96. Rather, the executive must "use judgment and discretion" in carrying out the legislative mandate. *Palm*, 391 Wis. 2d 497, ¶ 183 (Hagedorn, J., dissenting); *see also Bowsher*, 478 U.S. at 733 (explaining that "execution of the law in constitutional terms" includes "exercis[ing] judgment concerning facts that affect the application" of the law).

Taken together, the Wisconsin constitution empowers the Legislature to make policy choices by enacting law, but it does not allow the Legislature to manage how the executive branch implements those policy choices. Where the

Legislature "insert[s] [itself] as a gatekeeper" that allows it to "control the execution of the law itself," that improperly "demote[s] the executive branch to a wholly-owned subsidiary of the legislature." *SEIU*, 393 Wis. 2d 38, ¶ 107.

4. Whether dealing with a branch's core powers or a shared area of powers between two, the encroaching branch may not assign itself powers not found in the constitution or veto the encroached-upon branch.

Partly because the boundaries between legislative, executive, and judicial power are not always clear and well-defined, Wisconsin has developed the concept of "core" and "shared" powers. *See SEIU*, 393 Wis. 2d 38, ¶¶ 34–35.

Each branch of government has exclusive—"core"—constitutional powers, which constitute zones of authority into which no other branch may intrude. *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). "A branch's core powers are those that define its essential attributes." *SEIU*, 393 Wis. 2d 38, ¶ 104. " [A] core power is a power vested by the constitution that distinguishes that branch from the other two." *Id.* ¶ 104 n.15.

"Core zones of authority" "are to be 'jealously guarded,'" as "[t]he state suffers essentially by every assault of one branch of government upon another." *Gabler*, 376 Wis. 2d 147, ¶¶ 30–31 (citation omitted). Therefore, "any exercise of authority by another branch" in an area of core power "is unconstitutional." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21 (citation omitted).

Beyond the core constitutional powers of each branch lie "'borderlands of power' which are not exclusively judicial, legislative or executive." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 546, 576 N.W.2d 245 (1998) (citation omitted). These are particular "areas" of governmental action where the

constitutional "zone of power" of more than one co-equal branch is implicated. *State v. James*, 2005 WI App 188, ¶ 15, 285 Wis. 2d 783, 703 N.W.2d 727. In these areas one branch may not "unduly burden or substantially interfere with the other branch's essential role and powers." *State v. Unnamed Defendant*, 150 Wis. 2d 352, 360–61, 441 N.W.2d 696 (1989).

But this "borderland of power" is not the Wild West—some rules limit what the branches may do even in the shared powers context.

Most basically, a branch does not acquire new constitutional tools to use when advancing its interest in a shared power. When, for instance, the Legislature wants to act in an area of shared power, it may do so by enacting statutes that prospectively burden another branch (but not "unduly" so). Simply invoking "shared powers," however, does not entitle the legislative branch to burden other branches through methods other than its constitutional authority to enact statutes—for example, by vetoing their decisions through a legislative committee. At the end of the day, "[l]egislative power . . . is the authority to make laws." *Koschkee,* 387 Wis. 2d 552, ¶ 11 (citation omitted).

This Court's shared powers cases implicitly recognize as much. In those cases, when the legislative branch permissibly exercised its portion of a shared area of power, the same pattern held: it did so by enacting a statute (through bicameralism and presentment) that prospectively regulated another branch. *See, e.g.*, *Horn*, 226 Wis. 2d at 637; *State ex rel. Friedrich v. Circuit Court for Dane Cnty.*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995). In other words, once the Legislature passed a statute regulating another branch, its work was done.

This leads to another critical point: just as invoking "shared powers" does not grant the legislative branch new, non-lawmaking tools to control another branch, it also does not allow the Legislature—even by statute—to strip away another branch's constitutional authority to act.

So, for instance, in *Friedrich*, this Court upheld a statute that set compensation paid to guardians ad litem and special prosecutors—an area of shared power between the legislative and judicial branches. That was so because, despite the statute, "courts retain[ed] the ultimate authority to compensate court-appointed counsel at greater than the statutory rates when necessary, there [was] no showing generally of undue burden or substantial interference." *Friedrich*, 192 Wis. 2d at 30. In other words, the statute survived because did not absolutely block the judicial branch from exercising its portion of the shared power.

By contrast, in *E.B. v. State*, 111 Wis. 2d 175, 330 N.W.2d 584 (1983), the Court confronted a statute that required jury instructions to be submitted in written form. Even though this involved another area of shared power, this Court rejected a reading of the statute that would have required courts to reverse a judgment for failure to submit such instructions. It reasoned that "[i]t is a function of the judiciary to determine on a case-by-case basis whether error is reversible." *Id.* at 186. Therefore, a statute mandating reversal would "impermissibly limit[ ] and circumscribe[ ] judicial power." *Id.*

In sum, the legislative branch may not exercise or otherwise interfere with another branch's core power at all. And even in the shared powers realm, the Legislature can only enact statutes that prospectively regulate another branch—and even those statutes cannot bar the other branch from exercising its constitutional authority.

B. The legislative committee power to veto Knowles-Nelson projects and UW employee pay adjustments violates the separation of powers.

Here, the legislative branch has overstepped its constitutional role by granting a veto power to legislative committees over Knowles-Nelson projects and UW employee pay adjustments. The statutory provisions creating these vetoes—Wis. Stat. §§ 23.0917(6m), (8)(g)3., and 230.12(3)(e)1. —are facially unconstitutional.

1. These kinds of legislative committee vetoes are unconstitutional, as many states have recognized.

In the appropriations context, the basic rule is simple: the legislative branch appropriates, and the executive branch spends. But these vetoes effectively collapse both duties into a single branch. This is especially problematic given how the veto power resides with legislative committees, small entities that do not represent the entire state. Many state high courts have invalidated similar legislative vetoes for these reasons.

a. Once the Legislature passes a law appropriating money and setting spending criteria, it cannot further control how the executive branch spends that money, except by enacting a new law.

The legislative branch's power over appropriations can be found in article VII, § 2 of the Wisconsin Constitution: "No money shall be paid out of the treasury except in pursuance of an appropriation by law." The Legislature therefore has the "general power to spend the state's money by enacting laws." *SEIU*, 393 Wis. 2d 38, ¶ 69; *see also State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 454, 424 N.W.2d 385 (1988)

(the "legislative power" includes the "power to pass appropriation bills"); *Flynn*, 216 Wis. 2d at 547 ("[T]he legislature has the power to enact laws which appropriate funds.").[4] And after the Legislature makes an appropriation, it may later pass another law "chang[ing] [the] appropriation if, in [its] estimation, public policy so dictates." *Flynn*, 216 Wis. 2d at 542–43.

The Legislature therefore has the authority (subject to the Governor's veto power) to pass laws appropriating money and setting prospective criteria by which the executive branch spends it. And the executive branch is correspondingly barred from "pa[ying] [money] out of the treasury except in pursuance of an appropriation by law." Wis. Const. art. VII, § 2.

But like with all other kinds of legislation, once the Legislature enacts such laws, its "constitutional role as originally designed is generally complete." *Palm*, 391 Wis. 2d 497, ¶ 182 (Hagedorn, J., dissenting). Such legislation is then "carried out by the executive branch," *Fabick*, 396 Wis. 2d 231, ¶ 14, by spending the appropriated money pursuant to statutorily prescribed criteria.

To be sure, the executive branch very often must exercise "judgment and discretion," *Palm*, 391 Wis. 2d 497, ¶ 183 (Hagedorn, J., dissenting), in deciding how to spend the appropriated money. It is not a "legislatively-controlled automaton." *SEIU*, 393 Wis. 2d 38, ¶ 96. Rarely do statutes mandate expenditures in precisely one way. Naturally, then, when the executive branch chooses how to spend appropriated money within the bounds of applicable statutory criteria, legislators may sometimes disagree with those choices on policy grounds.

---

[4] Of course, the Legislature's authority to enact appropriation bills is subject to the Governor's veto power in article V, § 10 of the Wisconsin Constitution.

But such disagreement does not mean the legislative branch may, *after* enacting a statutory program, control how the executive branch exercises its discretion in spending appropriated money. Where a "subject is committed to the discretion of the chief executive officer, either by the constitution or by the laws . . . it is to be by him exercised, and no other branch of the government can control its exercise." *Att'y Gen. ex rel. Taylor v. Brown*, 1 Wis. 513, 522 (1853). Although the Legislature may have a "legitimate interest in keeping itself apprised of the activities" of the executive branch, "it cannot do so in a manner that interferes or precludes the exercise of constitutionally conferred executive power." *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 450, 208 N.W.2d 780 (1973).

The constitution provides the legislative branch with its remedy for quarrels over how the executive branch spends appropriated money: pass a new law. The U.S. Supreme Court recognized this basic point in *INS v. Chadha*, 462 U.S. 919 (1983). "[D]isagreement" with how the executive branch implements legislation may "involve[ ] determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President." *Id.* at 954. The legislative branch may, again, "change [the] appropriation if, in [its] estimation, public policy so dictates." *Flynn*, 216 Wis. 2d at 542–43. But it may do so only by passing a new law.

It may not, by contrast, grant itself the authority to block individual executive branch spending decisions through a legislative veto. That allows the legislative branch to "control the execution of the law itself" and thereby "demote[s] the executive branch to a wholly-owned subsidiary of the legislature." *SEIU*, 393 Wis. 2d 38, ¶ 107. Such authority represents the exact kind of "concentration of . . . power[ ]" into the Legislature's "impetuous vortex" that our constitution's separation of powers is meant to

block. *SEIU*, 393 Wis. 2d 38, ¶ 4; Federalist No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

b. Legislative vetoes create serious constitutional harms.

Legislative vetoes—especially legislative *committee* vetoes—violate the constitution in two ways. As a matter of substance, these vetoes effectively transfer the power to execute spending laws to the legislative branch—the "same persons who have the power of making laws" now also hold "in their hands the power to execute them." *Gabler*, 376 Wis. 2d 147, ¶ 5. As a matter of process, this collapsing of power all happens without the legislative branch following the constitutionally required procedures for lawmaking: bicameralism and presentment, the critical procedures aimed at "limit[ing] the ability of the Legislature to infringe on [the people's] rights." *Palm*, 391 Wis. 2d 497, ¶ 32.

These aspects of the legislative veto create three types of harm.

First, "the executive exercise of discretion is replaced by [legislative] committee exercise of discretion" in a pernicious way that "maximize[s]" the "danger of self-interest." *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 635–36 (W. Va. 1981). This has long been recognized as a primary danger against which the separation of powers guards. *See Gabler*, 376 Wis. 2d 147, ¶ 5 ("[A] government with shared legislative and executive power could first 'enact tyrannical laws' then 'execute them in a tyrannical manner.'" (quoting 1 Montesquieu, *The Spirit of the Laws* 151–52 (Oskar Piest, et al. eds., Thomas Nugent trans., 1949) (1748))).

Second, placing this remarkable power in the hands of small, unrepresentative legislative committees exacerbates the harm. As one state high court observed, "[b]y placing the final control over governmental actions in the hands of only a few individuals who are answerable only to local electorates, the committee veto avoids the concept of 'constitutional averaging'" whereby the two legislative houses' different representational bases and terms of office help to cancel out factional interests. *Barker*, 279 S.E.2d at 635; *see also* H. Lee Watson, *Congress Steps Out; A Look at Congressional Control of the Executive*, 63 Cal. L. Rev. 983, 1037–38 (1975).

Third, legislative vetoes eviscerate the executive branch's ability to do its basic job of executing the law. Where "legislators must be consulted and their consent obtained," "such control, softly phrased by the word 'approval,' carries with it the power to run the [administrative] office." *People v. Tremaine*, 168 N.E. 817, 827–828 (N.Y. 1929) (Crane, J., concurring). This "power is immense and . . . may be so arbitrary as to make the Legislature, through its committees or its single member, control . . . executive department[s]." *Id.* at 827.

Moreover, this influence on executive branch behavior occurs not only when the legislative branch uses its veto power, but also when it does not. New Jersey's high court identified this troubling dynamic:

> Broad legislative veto power deters executive agencies in the performance of their constitutional duty to enforce existing laws. Its vice lies not only in its exercise but in its very existence. Faced with potential paralysis from repeated uses of the veto that disrupt coherent regulatory schemes, officials may retreat from the execution of their responsibilities.

Gen. Assembly v. Byrne, 448 A.2d 438, 444 (N.J. 1982). *Byrne*'s observation focused on the administrative rulemaking context, but it applies just as well to the executive's administration of spending statutes.

c. Other states' high courts have rejected these kinds of legislative vetoes.

Outside Wisconsin, other states' legislatures have tried such legislative veto schemes, and their state courts have consistently rejected them. Two examples illustrate the point.

In Oklahoma, the legislature enacted a bill appropriating money to an "Opportunity Fund" meant to finance economic development projects. *See Fent v. Contingency Rev. Bd.*, 163 P.3d 512, 518 (Okla. 2007). The bill charged a state agency to administer the program and propose projects in accordance with legislative guidelines. *Id.* But the agency could not spend appropriated money on individual projects without the unanimous consent of a state board controlled by the legislature. *Id.*

The Oklahoma supreme court found that this scheme amounted to an unconstitutional legislative veto. It reasoned that any "method by which the Legislature extends its tentacles of control over an appropriation measure beyond the time when the measure stands transformed into enacted law offends the constitutional concept of separated powers and becomes a usurpation of power." *Id.* at 522. Once the legislature appropriated money to the Opportunity Fund, "all legislative control over the funds ceased and passed to the executive branch to expend them for economic development projects selected by that service of government based on the expressly imposed legislative criteria." *Id.* Placing a legislature-controlled entity "in control of all disbursements from the fund through their exercise of veto power" was unconstitutional. *Id.*

Similarly, in New Hampshire, the legislature appropriated funds but required approval from a legislative fiscal committee before the executive branch could spend them to acquire computer equipment or to maintain state buildings and grounds. *See In re Opinion of the Justs.*,

532 A.2d 195, 195 (N.H. 1987). New Hampshire's supreme court rejected the scheme as an unconstitutional legislative veto. It recognized that the "power to make contracts for the expenditure of the State's funds is characteristically an executive function." *Id.* at 197. Therefore, "[o]nce the legislature has made an appropriation for the executive branch, the requirement of fiscal committee approval of contracts made pursuant thereto by the executive branch is an unconstitutional intrusion into the executive branch of the government." *Id.*

Many other state high courts have reached similar results.[5]

---

[5] *See N. Dakota Legis. Assembly v. Burgum*, 916 N.W.2d 83, 103–06 (N.D. 2018) ("After a law is enacted, further fact finding and discretionary decision-making in administering appropriated funds is an executive function."); *McInnish v. Riley*, 925 So. 2d 174, 179 (Ala. 2005) ("[T]he Joint Fiscal Committee concedes—as it must—that the 'exercise [of] discretion in determining when and how to distribute funds' is an 'executive' function." (alteration in original) (citation omitted)); *Alexander v. State*, 441 So.2d 1329, 1341 (Miss. 1983) ("Once taxes have been levied and appropriations made, the legislative prerogative ends, and executive responsibility begins . . . ."); *State ex rel. McLeod v. McInnes*, 295 S.E.2d 633, 637 (S.C. 1982) ("The legislature, through these sections, has attempted to delegate to JARC the power to control expenditure of state and federal funds. These sections are constitutionally invalid because they would permit the twelve Defendants to control expenditures by administration rather than by legislation. JARC would have, in effect, a veto power."); *Anderson v. Lamm*, 579 P.2d 620, 627 (Colo. 1978) ("[T]he requirement for Joint Budget Committee approval unconstitutionally infringes upon the executive's power to administer appropriated funds."); *In re Opinion of the Justs. to the Senate*, 376 N.E.2d 1217, 1222 (Mass. 1978) ("[T]he activity of spending money is essentially an executive task."); *In re Opinion of the Justs. to the Governor*, 341 N.E.2d 254, 257 (Mass. 1976) ("[T]o entrust the executive power of expenditure to legislative officers is to violate [the mandated separation of powers] by

2. The legislative committee vetoes over Knowles-Nelson projects and UW pay adjustments are facially unconstitutional.

The Wisconsin Legislature has violated these basic separation of powers principles by granting legislative committees the power to veto DNR's administration of the Knowles-Nelson Program and UW's implementation of already-budgeted pay adjustments for its employees.

In both cases, the Legislature completed its constitutional role by passing laws appropriating money and guiding its expenditure. In the Knowles-Nelson context, it passed laws (signed by the Governor) that (1) appropriate money to DNR to finance individual projects, and (2) establish the criteria DNR must use when evaluating potential projects. *See generally* Wis. Stat. § 23.0917. And in the UW context, it passed a biennial budget bill (signed by the Governor) appropriating money for pay adjustments. *See generally* 2023 Wis. Act 19. After the Legislature passed those statutes and sent them to the Governor for his signature or veto, its constitutional role ended.

But in each case, the legislative branch is playing the leading role both in creating the law and in executing it. Rather than enacting spending statutes and then allowing the

---

authorizing the legislative department to exercise executive power."); *State ex rel. Schneider v. Bennett*, 547 P.2d 786, 797–98 (Kan. 1976) ("The legislature has by these statutes placed the state finance council, a body controlled by legislators, at the apex of the administrative structure of the state department of administration in a position where it exerts, both directly and indirectly, a coercive influence on that executive department."); *People v. Tremaine*, 168 N.E. 817, 822–23 (N.Y. 1929) ("The legislative power appropriates money, and, except as to legislative and judicial appropriations, the administrative or executive power spends the money appropriated. Members of the Legislature may not be appointed to spend the money.").

executive branch to execute them—as our constitution requires—it has instead created legislative vetoes that empower small legislative committees to micromanage how the executive branch spends appropriated money.

First, through Wis. Stat. § 23.0917(6m) and (8)(g), the 16-member Joint Committee on Finance may block, for any reason whatsoever, individual Knowles-Nelson projects that DNR has chosen to pursue. That legislative committee is effectively the ultimate administrator of the Knowles-Nelson Program, not DNR or anyone else in the executive branch. And this veto power is no idle threat: in recent years, that committee has repeatedly blocked almost a third of projects that DNR has submitted for approval. (Pet. ¶ 29; Pet. Ex. A.)

Second, through Wis. Stat. § 230.12(3)(e)1., the eight-member Joint Committee on Employment Relations may block pay adjustments that were included in the biennial budget for most of UW's 42,000 employees. Worse, that committee is now doing so in service of a policy aim that the full Legislature failed to accomplish through legislation. The committee's co-chair has said that—despite the committee approving pay adjustments for other state employees[6]—UW employees will "not [get] a nickel" "until [UW] accomplish[es]

[6] Harm Venhuizen, *Wisconsin Republicans withhold university pay raises in fight over school diversity funding,* AP News (Oct. 17, 2023, updated 12:37 PM), https://apnews.com/article/university-wisconsin-legislature-diversity-dei-pay-raises-ddee5255f27e54da9a36e2a76b0f5489.

the goal" of eliminating diversity, equity, and employment positions or giving up its authority to create employee positions.[7]

These legislative committee veto provisions are unconstitutional on their face.

They improperly interfere with the executive branch's authority to administer the Knowles-Nelson Program and UW pay adjustments. And they transfer this executive authority to small, unrepresentative legislative committees who now act as administrators of these programs.

Moreover, they effectively allow legislative committees to modify existing spending laws without following constitutionally required bicameralism and presentment procedures. If the legislative branch wants to place new limits on the Knowles-Nelson Program or UW pay adjustments, it can do so by enacting new law. But it cannot do so outside the constitutional lawmaking process through legislative committees that effectively exercise executive power.

C. The legislative committee power to veto administrative rules, such as those promulgated by DSPS and the Board, violates the separation of powers.

Also unconstitutional are the legislative committee vetoes in Wis. Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d) and (im) over the executive branch's administrative rulemaking efforts. To be sure, much ink has been spilled

---

[7] *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/; 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.

debating the virtue of the administrative state and how it fits within our tripartite system of government. But this Petition presents a different question: given that legislatures at both the state and federal levels have chosen to create the administrative state and empower executive branch agencies to promulgate administrative rules, may they also grant legislative committees the authority to veto individual administrative rules?

If the constitutional separation of powers is to retain any force, the answer must be no. As high courts across the country have recognized, such vetoes improperly allow the legislative branch to change legal rights and duties without following the constitutional lawmaking procedures of bicameralism and presentment.

Moreover, it is the executive branch's constitutional role to administer and implement statutory schemes, including by promulgating administrative rules. Blocking its ability to do so improperly infringes on executive branch authority. And when a legislative committee vetoes a rule on the purported basis that it exceeds the agency's statutory authority, that intrudes on the judicial function of deciding questions like these.

1. Vetoes of rulemaking by legislative committees violate bicameralism and presentment principles.

a. Once the Legislature passes a law authorizing rulemaking, it cannot modify that authorization except through a new law.

The legislative branch cannot make law without passing through the constitutional gantlet of bicameralism and presentment. Wis. Const. art. IV, § 17; art. V, § 10. Of course, not all legislative acts require these procedures—a single house or legislative committee can, for example,

conduct oversight hearings. Whether legislative acts trigger bicameralism and presentment requirements "depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *Chadha*, 462 U.S. at 952 (citation omitted). One key trigger is legislative action that has the "purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the legislative branch." *Id.*

That is precisely what the legislative branch does when it vetoes administrative rules. Such rules, when promulgated, have the "force of law." Wis. Stat. § 227.01(13); *see also State ex rel. Staples v. Dep't of Health & Soc. Servs.,* 115 Wis. 2d 363, 367, 340 N.W.2d 194, 196 (1983) ("Administrative rules enacted pursuant to statutory rulemaking authority have the force and effect of law in Wisconsin."). When a promulgated rule is suspended, then, that necessarily changes the "legal rights, duties, and relations of persons . . . outside the legislative branch." *Chadha*, 462 U.S. at 952. And when a proposed rule is blocked, that alters the scope of the executive branch's discretion under the applicable statutory rulemaking authorization. The rulemaking statute is effectively amended to withdraw a portion of the agency's power.

In both circumstances, the legislative veto allows the legislative branch to change legal rights and duties without engaging in bicameralism and presentment. That is unconstitutional.

Examining constitutional structure, as the U.S. Supreme Court did in *Chadha*, underscores this conclusion. There, the U.S. Supreme Court examined the U.S. Constitution to ascertain whether a federal legislative veto that required no bicameralism and presentment enjoyed any support in the constitutional text. The Court noted that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative

role, they narrowly and precisely defined the procedure for such action." 462 U.S. at 955. Because none of the Constitution's "carefully defined exceptions" hinted at a one-house legislative veto, *id.* at 956, the Court invalidated this mechanism of legislative control.

Here, too, nothing in Wisconsin's constitution hints at a legislative veto power over rulemaking. Subsets of the entire Legislature may, outside the ordinary lawmaking process, potentially affect the legal rights and duties of those outside its branch only in two clearly defined situations:

- The assembly may impeach state officers, under article VII § 1, and the senate composes the court for the trial of impeached officers, again under article VII § 1; and
- The two houses may jointly resolve for a potential constitutional amendment to appear on the ballot before the People under article XII § 1.

Like the U.S. Constitution, nothing in the Wisconsin Constitution even hints at authorizing legislative committees to veto administrative rulemaking efforts. To the contrary, the only veto provision, in article V, § 10, authorizes the *Governor* to veto legislation. So, when our state's founders wanted to create a veto power, they knew how to do so and did so expressly. Their silence on any converse veto power residing in the legislative branch creates a powerful inference that no such power exists.

Legislative veto proponents commonly defend it by arguing that this legislative check on rulemaking is necessary to rein in the administrative state. But the U.S. Supreme Court knocked down this argument in *Chadha*, explaining that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." 462 U.S. at 944.

And the logic does not work, even on its own terms. As one federal court recognized, the Legislature has proper constitutional tools to fix any arguable "problem" it created:

> If Congress has given away too much power, it may by statute take it back or may in the future enact more specific delegations. It is one thing to agree that "[d]elegation of lawmaking power is a categorical imperative of modern government," and quite another to conclude that because Congress fails to constrain its delegations sufficiently to produce accountability, it may therefore insert itself into the administrative process.

Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 476 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983).

b. Other states' high courts have rejected these kinds of legislative vetoes.

High courts in other states have repeatedly agreed that legislative vetoes of administrative rulemaking violate bicameralism and presentment requirements.

One of the first state supreme courts to consider the issue was Alaska's, in *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980). There, the Alaska legislature empowered itself to suspend administrative rules through a concurrent resolution of both houses (not just a legislative committee). The court found the statute unconstitutional because "when [the legislature] means to take action having a binding effect on those outside the legislature it may do so only by following the enactment procedures" of bicameralism and presentment. *Id.*

Nor have other states found a meaningful distinction between legislative vetoes that block proposed administrative rules rather than suspend promulgated ones. For instance, New Jersey's high court invalidated a statute that "require[d] submission to the Legislature of virtually every rule proposed by any state agency," which could then block a rule by concurrent resolution. *Byrne*, 448 A.2d at 440 (footnote omitted). This power improperly allowed the legislative branch to "exert a policy-making effect equivalent to amending or repealing existing legislation," because the "[t]he unlimited power to foreclose agency action" granted by the legislative veto allowed the legislature "to nullify enabling legislation or to redirect its application as if the statute had been amended or repealed." *Id.* at 444–45. That improperly amounted to "passage of a new law without the approval of the Governor." *Id.* at 444.

The use of legislative committees to execute these vetoes exacerbates these constitutional defects. In West Virginia, the legislature enacted a statute empowering its "Legislative Rule-Making Review Committee"—made up of six members from each house—to block proposed administrative rules. *See Barker*, 279 S.E.2d at 626. In finding that the scheme violated bicameralism and presentment requirements, the West Virginia Supreme Court noted that "the legislative committee veto is the most clearly constitutionally invalid of the legislative control devices." *Id.* at 635.

These cases from Alaska, West Virginia, and New Jersey provide but a sample of state high court decisions reaching the same result: legislative vetoes over administrative rulemaking violate constitutional bicameralism and presentment requirements.[8]

---

[8] *See also Blank v. Dep't of Corr.*, 611 N.W.2d 530, 536, 539 (Mich. 2000) ("[I]f JCAR or the Legislature can block the implementation of DOC rules, it has the power to alter the rights, duties, and relations of parties outside the legislative branch. . . . [P]assing a resolution to override rules promulgated by an executive branch agency . . . has the same purpose and effect as legislation."); *Mo. Coal. for Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. 1997) ("A preemptive action of the legislature, whether such action be suspension of a rule, revocation of a rule, or prior approval of a proposed rule, must be a 'legislative' action. For if such action is not legislative, the legislature has no right to do it. . . . As such, it is subject to the constitutional mandates for bill passage."); *Gilliam County v. Dep't of Env't Quality*, 849 P.2d 500, 505 (Or. 1993) ("[A] veto is a legislative act, and a legislative act by less than a majority vote of each chamber is unconstitutional."), *rev'd on other grounds*, *Oregon Waste Sys., Inc. v. Dep't of Env't Quality*, 511 U.S. 93 (1994); *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622, 638 (Kan. 1984) ("Where our legislature attempts to reject, modify or revoke administrative rules and regulations by concurrent resolution it is enacting legislation which must comply with art. 2, § 14 [i.e. bicameralism and presentment requirements]."); *Gen. Assembly v. Byrne*, 448 A.2d 438, 444 (N.J. 1982) ("The legislative veto gives the Legislature unlimited potential to block any rules promulgated pursuant to a particular statute. The legislature can use this power to exert a policy-making effect equivalent to amending or repealing existing legislation. A veto which effectively amends or repeals existing law offends the Constitution because it is tantamount to passage of a new law without the approval of the Governor."); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 633 (W. Va. 1981) ("What the Legislature has attempted to do here is to invest itself with the power to promulgate rules having the force and effect of law outside the constitutional limitations imposed upon the legislative branch in the exercise of that power.").

Only one decision from another state has gone another way: *Mead v. Arnell*, 791 P.2d 410 (Idaho 1990). While it acknowledged that administrative rules have the "force and effect of law," it disagreed that legislative vetoes of them triggered bicameralism and presentment requirements because rules are not "equal in dignity or status to statutory law." *Id.* at 415. Whatever that means, it ignores how legislative lawmaking "depends not on [its] form" but on whether it has the "purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the legislative branch." *Chadha*, 462 U.S. at 952. That is precisely what administrative rules do, as virtually all other courts to consider the issue have concluded.

c. The legislative rulemaking vetoes at issue violate bicameralism and presentment requirements.

The legislative veto provisions at issue here in Wis. Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d) and (im) violate bicameralism and presentment requirements, just like the ones struck down elsewhere. Each provision allows a single legislative committee to alter the law without passing a law through both houses and presenting it to the Governor for his signature. Here, JCRAR has blocked DSPS's revisions to commercial building standards and the Board's revisions to professional ethics standards, and those vetoes did not follow either bicameralism or presentment procedures. That violates the Wisconsin Constitution.

To be sure, thirty-one years ago this Court reached a somewhat different conclusion when considering Wis. Stat. § 227.26(2) in *Martinez v. DILHR,* 165 Wis. 2d 687, 478 N.W.2d 582 (1992). The time has come to revisit that decision

which, together with *Mead*, represent the only two cases nationwide affirming this kind of legislative veto.

First, *Martinez*, like *Mead*, ignored the nature of rulemaking. The court cryptically reasoned that "an administrative rule is not legislation as such." *Martinez,* 165 Wis 2d at 699. That is true, but it does not exempt legislative vetoes of rules from bicameralism and presentment procedures. Again, form doesn't matter—substance does.

Second, *Martinez* wrongly reasoned that a temporary suspension would be permissible given how—at the time, at least—a rule could not be permanently suspended absent bicameral passage of a bill and signature by the Governor. *Id.* But our constitution contains no exception to its lawmaking procedures for "short-term" legislating. Any length of time in which the legislative branch unconstitutionally ignores bicameralism and presentment requirements is too long. Indeed, other state supreme courts have invalidated temporary rule suspension provisions on constitutional grounds. *See Mo. Coal. for Env't v. Joint Comm. on Admin. Rules,* 948 S.W.2d 125, 135 (Mo. 1997) (30-day suspension); *Legislative Rsch. Comm'n v. Brown*, 664 S.W.2d 907, 918 (Ky. 1984) (up to 21-month suspension).

The main policy justification for temporary rule suspension—that the Legislature needs time to consider whether to enact a law blocking a rule—makes little sense. An enacted rule has already passed through the lengthy administrative rulemaking process, which often takes many months. During that time, the legislative branch has ample opportunity to review proposed rules and prepare legislation to block them. It does not need a "bonus" suspension period in which to decide whether to exercise its constitutional lawmaking authority.

Third, the "critical" element on which *Martinez* relied was its assumption that a bill adhering to bicameralism and presentment procedures would follow closely on the heels of a

JCRAR rule suspension. 165 Wis. 2d at 700; *see also SEIU*, 393 Wis. 2d 38, ¶¶ 80–81 (describing *Martinez* as approving a three-month suspension). That assumption was not accurate then, and it is even less accurate now.

As the Board's current effort to revise professional ethics standards has shown, JCRAR may use its ordinary objection and suspension powers under Wis. Stat. §§ 227.19(5)(d) and 227.26(2)(d) in combination to unilaterally block a rule for years. Because the full Legislature never needs to vote on a bill blocking or suspending a rule, it can sustain JCRAR's veto simply by introducing such a bill and letting it languish in committee throughout the legislative session. That is precisely what the Legislature has now done with the ethics rule, resulting in a years'-long veto with no bicameralism or presentment. (Pet. ¶¶ 79–87.)

Moreover, two laws passed since *Martinez* allow for an unending JCRAR veto, one that *never* requires a bill to pass through bicameralism and presentment. 2017 Wis. Act 369, § 64 allows the legislative branch to suspend a rule an unlimited number of times. *See* Wis. Stat. § 227.26(2)(im). And 2017 Wis. Act 57, §§ 28–31, allows JCRAR to indefinitely object to a proposed rule without ever introducing a bill to block it. *See* Wis. Stat. § 227.19(5)(dm). Given these two changes, the "three-month suspension" approved in *Martinez* tracks reality even less now than it did then. *SEIU*, 393 Wis. 2d 38, ¶¶ 80–81.

Once this Court rejects *Martinez*, it should also revisit its decision in *SEIU* affirming the facial validity of Wis. Stat. § 227.26(2)(im), the provision allowing multiple suspensions of administrative rules. *See SEIU*, 393 Wis. 2d 38, ¶¶ 78–83. The Court noted there that "[t]he parties [did] not ask us to revisit *Martinez* or any of its conclusions" and thus rested its holding on the "unchallenged reasoning of *Martinez*." *Id.*

¶¶ 81–82. Because this Petition argues that *Martinez* should be overruled, *SEIU* should not control.

2. Vetoes of rulemaking by legislative committees unduly intrude on executive powers.

Even if legislative vetoes of administrative rulemaking did not violate bicameralism and presentment procedures, they would still be constitutionally infirm. Attention would then shift from the legislative veto process itself to the nature of administrative rulemaking. The best view is that such activity represents core executive power, and so the Legislature's interference in it represents an improper intrusion into executive authority. But even if the rulemaking power is a shared one, the legislative branch still oversteps its constitutional role through a committee veto.

a. Administrative rulemaking involves core executive powers, and so legislative vetoes of rulemaking efforts are invalid.

Long ago, this Court rightly observed that administrative rules "serve to provide the details for the execution of the provisions of the law in its actual administration, to fix the way in which the requirements of the statute are to be met, and to secure obedience of its mandates." *State ex rel. Buell v. Frear*, 146 Wis. 291, 131 N.W. 832, 836 (1911). When rulemaking power is conferred on an agency "for the purpose of carrying the provisions of [a] statute into effect," that grant of authority "restricts them to making and enforcing such rules as are appropriate to obtain an effective execution of the law." *Id.* Accordingly, "[s]uch action is not legislative in character, but is the performance of an executive . . . duty within the regulations provided in the [authorizing] act." *Id.*

That analysis was right, and it leads directly to the conclusion that a legislative veto of executive branch rulemaking efforts is unconstitutional. Just as it is a core executive function to apply statutes to individual circumstances, so too it is to "provide the details for the execution of the provisions of the law in its actual administration"—in other words, to articulate the guidelines the executive branch will use when administering a statute. *Id*. Either way, the legislative branch may not interfere, once it has created a statutory scheme and charged the executive branch with administering it.

To be sure, "administrative agencies are creations of the legislature and . . . can exercise only those powers granted by the legislature." *Martinez*, 165 Wis. 2d at 697. But that alone does not mean everything—or even anything—agencies do is somehow "legislative" in character. As *Chadha* recognized, "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." 462 U.S. at 951. So, when the Legislature authorizes an agency to act, the agency is still virtually always exercising executive power.

Rulemaking is not meaningfully different from the executive branch's effort to apply the law in specific cases. As one court aptly put it, "rules may be described as (hopefully) understandable, reasoned, public statements of a method of operation chosen by the executive to ensure fairness in pursuing his responsibility to execute the laws enacted by the legislature." *Commonwealth v. Sessoms*, 532 A.2d 775, 779 (Pa. 1987). In both situations, the legislative branch enacts a statute and requires the executive branch to use its discretion about how to interpret and enforce it. Whether the executive branch does so pursuant to a rule that explains its intentions ahead of time or instead simply does so without a rule, it is exercising executive power. The rule itself does not meaningfully change anything.

This insight explains why many states' high courts have invalidated legislative vetoes of rulemaking on the grounds that they interfere with an executive function.[9]

New Jersey's high court, for instance, reasoned (much like *Buell*) that "[t]he chief function of executive agencies is to implement statutes through the adoption of coherent regulatory schemes." *Byrne*, 448 A.2d at 443. And because one way the executive does so is through rulemaking, legislative vetoes are invalid because they "allow[ ] the Legislature to nullify virtually every existing and future scheme of regulation or any portion of it." *Id.* Moreover, the veto's mere existence "deters executive agencies in the performance of their constitutional duty" because "repeated uses of the veto" leads to "paralysis" whereby agencies "retreat from the execution of their responsibilities." *Id.* at 444.

Kentucky's high court reached a similar result in *Legislative Research Commission*. There, a legislative committee was empowered through its rulemaking veto power to "block, for a period of nearly twenty-one months, the administrative policy of the executive branch of government." *Leg. Research Comm.*, 664 S.W.2d at 918. Because "the adoption of administrative regulations

---

[9] *See State ex rel. Meadows v. Hechler*, 462 S.E.2d 586, 593 (W. Va. 1995) ("After the Executive branch developed the regulations necessary to implement the comprehensive regulatory scheme, implementation was thwarted by legislative veto. The veto amounted to an intrusion into the Executive branch's ability to effectuate its mandated responsibilities."); *Mo. Coal. for Env't*, 948 S.W.2d at 133 (holding that rulemaking veto "unconstitutionally interfere[d] with the functions of the executive branch"); *State ex rel. Stephan*, 687 P.2d at 635 (holding that rulemaking veto was "a significant interference by the legislative branch with the executive branch and constitutes an unconstitutional usurpation of powers"); *Sessoms*, 532 A.2d at 779 ("Notwithstanding the view that such regulations are adopted under a delegation of the legislative power to the agency, administrative rulemaking may be viewed as entirely executive in nature.").

necessary to implement and carry out the purpose of legislative enactments is executive in nature," this legislative veto power improperly encroached on executive branch authority. *Id.* at 919.

To be sure, this Court has not consistently treated rulemaking itself as falling exclusively within either the executive or legislative power. *See Palm*, 391 Wis. 2d 497, ¶¶ 191–94 (Hagedorn, J., dissenting) (discussing that history). Older cases emphasize the executive side, but more recent decisions focus on how agencies have no inherent power to make rules and instead must rely on "delegated" power from the legislative branch. *See, e.g.*, *Martinez*, 165 Wis. 2d at 697. As explained above, the older view is the correct one, and this Court should return to it.

b. Even if rulemaking power is shared by the executive and legislative branches, a committee veto is still unconstitutional.

Assuming *arguendo* that administrative rulemaking power is shared by the executive and legislative branches, that still does not save the legislative committee veto. Even in the shared powers context, the encroaching branch cannot "unduly burden or substantially interfere" with the encroached-upon branch. *Unnamed Defendant*, 150 Wis. 2d at 360–61. There can be no greater burden on one branch's action than an absolute veto and so, practically by definition, such a power goes too far (unless, of course, the constitutional text expressly authorizes it, as with the gubernatorial veto).

Simply invoking shared powers does not grant the legislative branch a blank check to do whatever it wants. As discussed above, two key principles still constrain it. One, it may exercise its portion of a shared power only by enacting statutes that prospectively regulate another branch. Second, it may not enact statutes that absolutely prohibit

another branch from exercising its constitutional authority. *See supra* Argument II.A.4. A legislative committee veto of administrative rulemaking violates both these principles.

First, this veto allows the legislative branch to exercise a new kind of power, beyond its traditional lawmaking one. The Legislature can enact statutes that prospectively guide how the executive branch engages in rulemaking. Such statutes can establish reasonable rulemaking procedures (*see, e.g.*, Wis. Stat. §§ 227.135, 227.136, 227.137), and they can cabin an agency's substantive rulemaking authority (*see, e.g.*, Wis. Stat. § 457.03). But the power of a legislative committee to block individual rules, after enacting statutes that prospectively govern rulemaking procedure and substance, far exceeds the Legislature's constitutional lawmaking power.

Second, a legislative veto absolutely blocks the executive branch's ability to exercise its portion of the shared power. Even a shared powers analysis would rest on the premise that, when promulgating administrative rules, agencies are exercising—at least partly—the executive power to administer statutes. But when a legislative veto occurs, the executive branch is stopped in its tracks and cannot proceed in executing the law. In effect, the veto leaves the executive with essentially no share of the ostensibly "shared" power.

That outcome makes the veto unconstitutional under shared powers cases like *Friedrich*, where the statute survived scrutiny because "courts retain[ed] the ultimate authority to compensate court-appointed counsel at greater than the statutory rates when necessary." 192 Wis. 2d at 30. Because executive branch agencies now lack the "ultimate authority" to promulgate rules, this veto power is more like the jury instruction statute in *E.B.*, which could not deprive the judiciary of its "function . . . to determine on a case-by-case basis whether error is reversible." 111 Wis. 2d at 186. At bottom, when legislative committees prohibit agencies from

doing their part of a shared job, that is hoarding power, not "sharing" it.

c. The legislative rulemaking vetoes at issue infringe on executive power.

Given these principles, the legislative rulemaking vetoes in Wis. Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d) and (im) unconstitutionally intrude on executive branch power, whether an agency's rulemaking activities involve core executive power or an arena of shared powers.

If they are core powers where another branch is "prohibited from intruding," *Gabler*, 376 Wis. 2d 147, ¶ 31, then JCRAR's ability to block executive branch agencies like DSPS and the Board from promulgating rules is plainly unconstitutional.

And if rulemaking instead involves an arena of shared powers, JCRAR is still improperly (a) exercising authority over executive branch agencies through a method other than lawmaking and (b) wielding a veto such that the executive branch does not "retain the ultimate authority" to execute the law using its rulemaking authority. *Friedrich*, 192 Wis. 2d at 30.

Either way, a legislative veto over executive branch agency rulemaking is unconstitutional. At a minimum, it is invalid as applied to rules that DSPS promulgates under its authority to revise the state's commercial building standards and that the Board promulgates under its authority to revise professional ethics standards.

3. These legislative vetoes intrude on core judicial power because they give the legislative branch a definitive say on what statutory rulemaking authorizations mean.

Leaving aside executive power, legislative committee vetoes of administrative rulemaking sometimes encroach on core judicial powers, too.

The question of what the law definitively means is the job of the judiciary to answer. *See Tetra Tech EC, Inc.* 382 Wis. 2d 496, ¶ 50 ("It is emphatically the province and duty of the judicial department to say what the law is." (citing *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803))). Accordingly, it is "[t]he function of courts in reviewing agency action . . . to interpret the statutory delegation and determine whether the administrative decision is in compliance with that delegation." *Consumer Energy Council of Am.*, 673 F.2d at 478. So, when a legislative veto occurs on the basis that the agency has purportedly exceeded its statutory authority in promulgating a rule, "the courts are prevented from exercising review, even though under prior decisions on the same statute, or on analogous statutes, they might have upheld the agency's exercise of discretion." *Id.*

Courts have therefore rejected statutes that empower a legislative committee to review whether a rule "comport[s] with statutory authority" and "carrie[s] out the legislative intent." *Legis. Res. Comm'n*, 664 S.W.2d at 917, 919. They do so because that kind of "determination is a judicial matter and is within the purview of the judiciary." *Id.* at 919. Moreover, a legislative committee reviewing a rule "will inevitably look not primarily to the objective legislative intent at the time the statute was enacted, but rather to the 'intent' at the present," which effectively permits the legislative branch "to alter the meaning of a statute as circumstances and [its] composition . . . change over time." *Consumer Energy Council*

of Am., 673 F.2d at 478. This unconstitutionally "diminishes the role of the [j]udiciary." *Id.*

Here, JCRAR may veto a rule on the basis that the rule lacks statutory authority, fails to comply with legislative intent, or conflicts with state law. Wis. Stat. § 227.19(4)(d)1., 3.–4.; *see also* Wis. Stat. §§ 227.19(5)(d), (5)(dm), 227.26(2)(d). That decision is unreviewable, and so JCRAR's veto amounts to the final say on what the law means. That usurps core judicial power and is therefore unconstitutional.

* * *

At the end of the day, these legislative rulemaking vetoes are invalid, whether the power at issue is classified as executive, legislative, or judicial. "If the power is executive"—or judicial, for that matter—"the Constitution does not permit an agent of [the legislature] to exercise it. If the power is legislative, [the legislature] must exercise it in conformity with . . . bicameralism and presentment requirements . . . ." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991). Either way, JCRAR cannot wield its veto power under Wis. Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d) and (im) consistent with our constitution.

CONCLUSION

The petition for an original action should be granted.

Dated this 31st day of October 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 957-5218 CG
(608) 266-7636 CTR
(608) 294-2907 (Fax)
gibsoncj@doj.state.wi.us
rothct1@doj.state.wi.us