FILED
11-21-2023
CLERK OF WISCONSIN
SUPREME COURT

No. 2023AP2020-OA

In the Supreme Court of Wisconsin

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.

On Petition For Original Action Before This Court

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR ORIGINAL ACTION

MISHA TSEYTLIN
Counsel of Record
SEAN T.H. DUTTON
KEVIN M. LEROY
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street,
Suite 3900
Chicago, Illinois 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Attorneys for Respondents

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INTRODUCTION

Petitioners ask this Court to transform how our state government has worked for decades, as the Wisconsin State Legislature ("Legislature"), Governors, and the People have relied upon this Court's unanimous decision in *Martinez v. Department of Industry, Labor & Human Relations*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992) (as well as its predecessor, the also unanimous Court of Appeals decision in *J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983)), to work collaboratively for the People. In *Martinez*, this Court rejected the approach to legislative committee provisions that certain other States had taken, just as the Court of Appeals had the prior decade in *Ahern*, and the only change that has taken place in the last thirty years is that the Legislature, Governors, and the People have relied upon this Court's unanimous decision in structuring their affairs. Petitioners present no serious argument that any exigency would justify granting their Petition For Original Action to entertain their novel, deeply disruptive theory, which, under Petitioners' own understanding of the separation of powers, involves factual issues that would need to be developed through discovery.

This Court should thus deny the Petition.

STATEMENT

A. *Ahern* And *Martinez*

Wisconsin courts have long understood this State's separation of powers to not only allow but also require

legislative oversight of agency actions. Indeed, for over 40 years, beginning with the Court of Appeals' decision in *Ahern* and continuing with this Court's decision in *Martinez*, Wisconsin's jurisprudence has acknowledged a system of shared powers between the branches, including legislative authority to review and oversee agency actions.

In *Ahern*, the plaintiffs challenged the constitutionality of the State Building Commission—a legislative committee comprising "three assemblymen, three senators, the governor (who serves as chairperson), and a citizen appointee of the governor"—as violating the separation of powers under the Wisconsin Constitution. 114 Wis. 2d at 99–100, 106. The plaintiffs argued that the Building Commission's authority to "select sites for public buildings, to administer construction of such buildings[,] to lease the buildings," and to "waive the competitive bidding requirements" on construction projects all amounted to "executive powers" that only the executive branch could exercise. *Id.* at 100. The Court of Appeals rejected this rigid understanding of Wisconsin's doctrine of implied separation of powers, explaining that the Constitution envisions a "pragmatic approach" that "permits a blending or sharing of powers among the three branches of government," only "subject to the limitation against 'unchecked power.'" *Id.* at 101, 103–04 (citation omitted). Applying this understanding to the "specific facts and circumstances presented," the Court of Appeals acknowledged that the Building Commission's "right of prior approval over

construction contracts" granted it "immense control over state construction" and was "an executive power," thereby permitting the majority legislative members of the Building Commission "to exercise executive powers to the exclusion of the executive branch," but held that this did "not . . . necessarily violate the separation" of powers. *Id.* at 104–07. Because the Governor could also exercise a veto to stop a construction project the legislative members of the Building Commission wanted to approve, the Court of Appeals held that this statutory framework was a "cooperative venture between the two governmental branches" that did not violate the separation of powers. *Id.* at 108.

Then, in *Martinez*, this Court built upon *Ahern*'s well-reasoned understanding of the separation of powers in Wisconsin. There, the Department of Industry, Labor and Human Relations ("DILHR") promulgated a rule that "created a new category of employee to whom employers could pay, for a 120–day repeating probationary period, a sub-minimum wage of twenty cents an hour less than the regular minimum wage," but the Joint Committee for Review of Administrative Rules ("JCRAR") voted to suspend and amend the rule by shortening the probationary period to three days. *Martinez*, 165 Wis. 2d at 692–93. DILHR advised employers to ignore JCRAR's changes and stated that DILHR would not take action against employers who complied with the initial, now-suspended rule and, after being sued by migrant workers affected by the rule, argued that the statute permitting

JCRAR to review agency promulgations violated bicameralism, the presentment clause, and separation of powers. *Id.* at 693–94. Interpreting the Wisconsin Constitution's "implicit[ ]" separation of powers and rejecting the approaches of other "states that apply 'express' separation of powers provisions," this Court held that JCRAR's authority to suspend a promulgated rule for specific reasons was constitutional because "[i]t is appropriate for the legislature to delegate rule-making authority to an agency while retaining the right to review any rules promulgated under the delegated power." *Id.* at 696, 698, 700–01. Indeed, this Court held that "it is a legitimate practice for the legislature, through JCRAR, to retain the ability to suspend a rule which is promulgated in derogation of the delegated authority." *Id.* at 701. And this Court recently upheld *Martinez*'s holding on this point, unanimously reaffirming the conclusion that the Legislature maintains the constitutional authority to review agency rulemaking and suspend rules after the agency promulgates them. *Serv. Emps. Int'l Union, Local 1 ("SEIU") v. Vos*, 2020 WI 67, ¶¶ 78–83, 393 Wis. 2d 38, 946 N.W.2d 35.

B. Wisconsin's Legislative Committees

The Legislature, Governors, and the People have all relied upon *Ahern*'s and *Martinez*'s understanding of the separation of powers and the authority of legislative committees for decades to effectively govern in the State, developing and expanding numerous legislative committees to serve the State productively. This Petition implicates just

three of these numerous committee provisions, which are ubiquitous throughout Wisconsin state government.

The Joint Committee on Finance. The Joint Committee on Finance ("JCF") is a statutory standing committee of the Legislature, first established in 1911. Act of Mar. 3, 1911, ch. 6, 1911 Wis. Sess. Laws 8; Wis. Stat. § 13.09; Dave Loppnow, Wis. Legis. Fiscal Bureau, *Informational Paper #81: Joint Committee on Finance* 1, 5–6 (Jan. 2023) ("*Info. Paper #81*").[1] A bipartisan Committee, the Speaker of the Assembly and the Senate Majority Leader appoint JCF's 16 members, with eight members coming from each chamber. Wis. Stat. § 13.09(1); *Info. Paper #81*, *supra*, at 1; Wis. State Legis/, *2023 Joint Committee on Finance*.[2]

Consistent with the statutory mandate that "[a]ll bills introduced in either house of the legislature for the appropriation of money, providing for revenue or relating to taxation shall be referred to [JCF] before being passed," Wis. Stat. § 13.093(1), JCF reviews all revenue or spending bills, including the biennial budget recommendations of the Governor, *id.* § 13.09(5); *Info. Paper #81*, *supra*, at 1–2. After the Governor introduces his executive budget, JCF receives briefings on the budget, holds public hearings, and commences executive sessions to make changes to the

[1] Available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0081_joint_committee_on_finance_informational_paper_81.pdf.

[2] Available at https://docs.legis.wisconsin.gov/2023/committees/joint/2640.

proposal, resulting in a budget adopted for consideration by the full Assembly and Senate. *Info. Paper #81*, *supra*, at 1–2; *see generally* Liz Barton, Becky Hannah, & Bob Lang, Wis. Legis. Fiscal Bureau, *Informational Paper #78: State Budget Process* 1–13 (Jan. 2023).[3]

JCF has other specific statutory duties, *Info. Paper #81*, *supra*, at 4, two of which are particularly relevant here. First, JCF may decline, under a 14-day passive review process, the encumbrance or expenditure of more than $250,000 for any project (except Department of Natural Resources property development projects) to be funded from the Warren Knowles-Gaylord Nelson Stewardship 2000 program ("Knowles-Nelson"). Wis. Stat. § 23.0917(6m); *Info. Paper #81*, *supra*, at 34. Second, JCF must approve, with 12 of 16 members voting in favor, any acquisition of land under Knowles-Nelson for land that is outside of the boundaries of stewardship projects established before May 1, 2013. Wis. Stat. § 23.0917(8)(g); *Info. Paper #81*, *supra*, at 34.

The Joint Committee on Employment Relations. The Joint Committee on Employment Relations ("JCOER"), Wis. Stat. § 13.111, approves state employee compensation plans and contracts with represented state employees, along with other, smaller expenses relating to state employment, Wis. Stat. §§ 13.111(2), 16.53(1)(d)1, 20.916, 20.917, 20.923;

[3] Available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0078_state_budget_process_informational_paper_78.pdf.

Jessica Karls-Ruplinger, Wis. Legis. Council, *Joint Committee on Employment Relations* 1 (Oct. 2019) ("*Joint Committee on Employment Relations*").[4] Wis. Stat. § 13.111(1) defines JCOER membership, with the Assembly Speaker and Senate President serving as co-chairs. *Joint Committee on Employment Relations*, *supra*, at 1; Wis. State Legis., *2023 Joint Committee on Employment Relations*.[5]

The Administrator of the Division of Personnel Management ("DPM") in the Department of Administration must submit to JCOER any proposed changes to certain state employee compensation plans, including, as relevant here, the compensation and benefit adjustments for employees of the University of Wisconsin ("UW") System. Wis. Stat. §§ 230.12(1), (3)(a), (3)(e)1., 20.923(4); *Joint Committee on Employment Relations*, *supra*, at 1. After receiving any proposed changes, JCOER must hold a public hearing on the proposal, and then may approve or modify the proposal. Wis. Stat. § 230.12(3)(b). Thereafter, the Governor may "disapprove[ ]" any JCOER modifications "within 10 calendar days," which disapproval JCOER may "set aside" by vote of six of the Committee's eight members. *Id.* Once this process is complete, the modifications, together with any unchanged provisions, constitutes the compensation plan for the ensuing

[4] Available at https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2019/employment_and_labor/ib_jcoer_jk_2019_10_01.

[5] Available at https://docs.legis.wisconsin.gov/2023/committees/joint/2635.

fiscal year or until a new or modified plan is adopted. *Id.*; *Joint Committee on Employment Relations*, *supra*, at 1.

The Joint Committee for Review of Administrative Rules. JCRAR, the committee involved in *Martinez*, is a bipartisan statutory standing committee, "consisting of 5 senators and 5 representatives to the assembly appointed as are the members of standing committees in their respective houses." Wis. Stat. § 13.56(1); *see also* Scott Grosz, Wis. Legis. Council, *Powers of the Joint Committee for Review of Administrative Rules* (Jan. 2021).[6] JCRAR oversees the administrative rulemaking process, *see* Wis. Stat. ch. 227, through a variety of mechanisms, including directing an agency to hold a preliminary hearing on a proposed rule within 10 days of the publication of a scope statement, Wis. Stat. §§ 227.135(2), 227.136, requesting an independent economic impact analysis of a proposed or existin" rul", Wis. Stat. §§ 227.137(4m), 227.19(5)(b)3, 227.138, objecting to or requesting modification of a proposed rule, Wis. Stat. § 227.19(5)(c), (d), (dm), and suspending an existing rule, Wis. Stat. § 227.26(2)(d), (im); *see also* Info. Mem., Wis. Legis. Council, *Administrative Rulemaking* (Mar. 2021).[7]

In general, and as relevant here, proposed agency rules are referred to JCRAR for a 30-day review period, Wis. Stat.

[6] Available at https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2021/administrative_rules/ib_jcrar_sg_2021_01_27

[7] Available at https://docs.legis.wisconsin.gov/misc/lc/information_memos/2021/im_2021_08#:~:text=An%20agency%20must%20prepare%20an,Legislative%20Council%20staff%20for%20review.

§ 227.19(5), during which JCRAR may request modifications to a rule and may object to all or part of a proposed rule for certain statutorily defined reasons, Wis. Stat. § 227.19(5)(d). An objection bars the relevant agency from promulgating the rule until the Legislature either fails to enact a bill supporting the objection, Wis. Stat. § 227.19(5)(d), (e), or enacts a bill authorizing promulgation, Wis. Stat. § 227.19(5)(dm), (em). JCRAR may also suspend an existing agency rule. Wis. Stat. § 227.26(2)(d). A s"spension requires JCRAR to introduce a bill to repeal the suspended rule, *id.* § 227.26(f), which both houses of the Legislature must enact, lest the rule remain in effect, *id.* § 227.26(i).

C. Factual And Procedural Background

Petitioners filed their Petition on October 31, 2023, alleging that statutory provisions governing the authority of three legislative committees violate separation of powers. Pet.34–40. Petitioners are the Governor, Tony Evers, along with three executive agencies—the Department of Natural Resources, the Board of Regents for UW, and the Department of Safety and Professional Services ("DSPS")—and a licensing board within DSPS, the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board ("the Board"). Pet.8. Petitioners have named six members of the Legislature as Respondents: Senator Howard Marklein and Representative Mark Born, in their official capacities as co-chairs of JCF; Senator Chris Kapenga and Speaker of the Assembly Robin Vos, in their official capacities as co-

chairs of JCOER; and Senator Steve Nass and Representative Adam Neylon, in their official capacities as co-chairs of JCRAR. Pet.9.

The Petition presents three constitutional challenges to the statutory authority of JCF, JCOER, and JCRAR. First, Petitioners claim that the JCF review provisions in Wis. Stat. § 23.0917(6m) and (8)(g)3 violate the Wisconsin Constitution's separation of powers in all circumstances and thus are facially unconstitutional. Pet.34–36. Second, Petitioners assert that the JCOER review provision in Wis. Stat. § 230.12(3)(e)1. Is likewise a facially unconstitutional legislative veto that violates the constitutional separation of powers. Pet.36–38. Finally, Petitioners argue that JCRAR veto provisions in Wis. Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d), (im) are unconstitutional legislative vetoes as applied to all executive agency rulemaking. Pet.38–40. For their final claim, Petitioners also argue that, alternatively, JCRAR veto provisions are unconstitutional as applied to DSPS's and the Board's rulemakings in two more narrow categories: commercial building standards and social worker, marriage and family therapist, and professional counselor ethics. Pet.40.

Petitioners seek a declaratory judgment declaring that the challenged statutory provisions governing JCF and JCOER are facially unconstitutional and that the statutory provisions governing JCRAR are unconstitutional as applied to all executive branch agency rulemaking. Petitioners also

ask this Court to overrule its unanimous decision in *Martinez*, 165 Wis. 2d 687, as well as the unanimous portions of *SEIU*, 2020 WI 67, that rely on *Martinez*.

ARGUMENT

When deciding whether to grant a petition for original action, this Court considers three factors. *See generally* Wis. Const. art. VII, § 3. First, a petitioner must demonstrate "exigency" related to the circumstances underlying the petition, *Petition of Heil*, 230 Wis. 428, 442–47, 284 N.W. 42 (1939), sufficient to depart from conventional litigation, and that the underlying circumstances are such that the petitioner will suffer "great and irreparable hardship" absent the Court's exercise of original jurisdiction, *Application of Sherper's, Inc.*, 253 Wis. 224, 228, 33 N.W.2d 178 (1948). Second, an original action may only proceed when it presents limited material factual disputes, thereby allowing this Court to reach "a speedy and authoritative determination" on the presented legal questions. *Heil*, 230 Wis. at 446; *see also State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 683, 264 N.W.2d 539 (1978); *Bartlett v. Evers*, 2020 WI 68, ¶ 25 & n.11, 393 Wis. 2d. 172, 945 N.W.2d 685 (opinion of Roggensack, C.J.). Finally, an original action petition must raise "*publici juris*," or questions that are of statewide "importance." *Heil*, 230 Wis. at 431, 442–46; *Wis. Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807 (noting that the issues presented must "significantly affect[ ] the community at large").

I. There Is No "Exigency" Causing "Great And Irreparable Hardship" That Would Justify This Court Exercising Its Original Action Jurisdiction

A. Original actions are typically reserved for those petitions presenting exigent circumstances prohibiting this Court's effective review of the questions in the petition in the ordinary course of appeal. *Heil*, 230 Wis. at 445. In general, such "exigency," *id.* at 442–47, is shown with proof that the failure to accept original jurisdiction would cause the petitioner "great and irreparable hardship," *Sherper's, Inc.*, 253 Wis. at 228, thereby rendering any "remedy" offered by "the circuit court" "inadequate," *Heil*, 230 Wis. at 442. The party seeking to invoke the Court's original jurisdiction must show that an exigency exists, with reference to factual evidence and/or legal support, where appropriate. *See* Order at 2–3, *Wis. Voters All. v. Wis. Elec. Comm'n*, No. 2020AP1930-OA (Wis. Dec. 4, 2020) (Hagedorn, J., joined by A.W. Bradley, Dallet, and Karofsky, JJ., concurring).

This Court has recently rejected original action petitions presenting separation-of-powers disputes for presumably just this reason. In *Kaul v. Wisconsin State Legislature*, No. 2020AP1928-OA (Wis. Nov. 23, 2020), the Attorney General, Governor, and Secretary of the Department of Administration filed a petition for original action challenging a provision that allows JFC to review the Attorney General's decisions to "compromise or discontinu[e] . . . civil enforcement actions" and actions "prosecuted on behalf of executive-branch agencies," *see* Order at 1, *Kaul*,

No. 2020AP1928-OA (Mar. 24, 2021). In response, the Legislature filed its own cross-petition for original action, asking the Court to review those same separation-of-powers issues, as well as other interbranch disputes over settlement funds. *Id.* at 2. Notwithstanding this request from the other two branches of state government, this Court denied both petitions with no noted dissents. *Id.* That denial confirmed this Court's prior denial of the Legislature's original action petition in *Vos v. Kaul*, in which this Court similarly denied the Legislature's request to review an interbranch separation-of-powers dispute. Order, *Vos v. Kaul*, No. 2019AP1389-OA (Wis. Sept. 22, 2020). The Attorney General and the Legislature then filed challenges in the circuit courts, engaging in discovery and full briefing, and proceeded to resolution in the normal course, with both lawsuits presently on appeal before the Court of Appeals. *See Kaul v. Wis. State Legislature*, No. 2022AP790 (Ct. App.); *Wis. State Legislature v. Kaul*, No. 2022AP431 (Ct. App.).

B. Here, because Petitioners failed to show the existence of exigent circumstances necessary to support this Court's original jurisdiction, this Court should take the same approach it did in *Kaul* and *Vos* and deny the Petition.

This Petition presents no exigency justifying a different approach than in *Kaul* and *Vos*. Petitioners challenge statutory review-and-approval regimes that have been in place for years. For example, the Legislature's authority to review Knowles-Nelson projects began in 2007, *see* 2007 Wis.

Act 20, § 646t, and was most recently amended in 2015, *see* 2015 Wis. Act 55, § 961p, t. Similarly, JCOER has maintained authority to review "proposal[s] for adjusting compensation and employee benefits for employees" of the UW system since at least 2009. *See* Wis. Stat. § 230.12(3)(e)1. (2009). And JCRAR has maintained authority to review and suspend agency rulemaking since before this Court's *Martinez* decision, 165 Wis. 2d 687, and has been able to issue "indefinite objection[s]" under Wis. Stat. § 227.19(5)(dm) since 2017, *see* 2017 Wis. Act 57, § 28.

C. Petitioners' arguments in favor of this Court's original action jurisdiction are unconvincing.

Petitioners' reliance on this Court's decisions on gubernatorial partial vetoes are inapposite. This Court has for decades granted original action petitions in the gubernatorial partial veto context as a matter of longstanding historical practice, as Petitioners acknowledge. *See* Br.17 n.2 (citing *Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997); *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 534 N.W.2d 608 (1995); *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988); *Kleczka*, 82 Wis. 2d 679; *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 237 N.W.2d 910 (1976); *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 289 N.W. 662 (1940); *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622 (1936); *State ex rel. Wis. Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935)). But this precedent provides no support for this Court to consider this

separation-of-powers dispute between the Legislature and various agencies, as shown by this Court's recent denials of petitions in *Kaul* and *Vos*. *See supra* pp.19–20. Notably, *Martinez* and *Ahern* both arose out of cases filed in circuit court, not through an original action. *Martinez*, 165 Wis. 2d at 692; *Ahern*, 114 Wis. 2d at 75, 78. Similarly, *SEIU* found its genesis in a lawsuit filed in Dane County Circuit Court by several labor organizations and taxpayers who challenged numerous portions of 2017 Wis. Act 369 and 2017 Wis. Act 370, suing Legislators, the Attorney General, and the Governor, in a conventional litigation posture, not an original action in this Court. 2020 WI 67, ¶¶ 3, 16.

Petitioners' concerns about "already-budgeted pay adjustments" for UW employees, Br.18, does not create exigent circumstances meriting this Court's original action jurisdiction. Exigent circumstances require a petitioner to show "great and *irreparable* hardship," *Sherper's, Inc.*, 253 Wis. at 228 (emphasis added), caused by the circuit court's inability to offer an "adequate" remedy, *Heil* 230 Wis. at 441–42. But, in the unlikely event that a lower court or this Court holds that JCOER had no constitutional authority to review and approve such raises for UW employees, the remedy could include making those employees whole by retroactively giving them the raises Petitioners claim the UW employees are due under the budget. *See Kempfer v. Auto. Finishing, Inc.*, 211 Wis. 2d 100, 119–20, 564 N.W.2d 692 (1997). The availability of this "remedy at law" for JCOER's alleged unconstitutional

exercise of authority renders any hardship Petitioners allege plainly not "irreparable," *Kocken v. Wis. Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 27 n.12, 301 Wis. 2d 266, 732 N.W.2d 828 (citing *Pure Milk Prod. Co-op v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979)), and so does not suffice to show exigency, *Sherper's, Inc.*, 253 Wis. at 228; *Heil*, 230 Wis. at 442–47.

Petitioners have not shown exigency as to the committee review provisions that they challenge in their Petition, merely worrying about standard litigation practices and timelines. Br.18. Petitioners do not explain how committee decisions delaying or blocking regular "updates to the state's commercial building standards and ethics standards" for certain counselors and therapists, as well as certain conservation projects create any exigency considerations here. *Id.* Instead, they simply contend that they should not have to "wait" and engage in conventional litigation to raise their novel challenges to Wisconsin's separation of powers. *Id.* But, of course, *Ahern* and *Martinez* both went through the circuit courts and appellate process before resolution, *Ahern*, 114 Wis. 2d at 75, 78; *Martinez*, 165 Wis. 2d at 692, which is how Wisconsin's court system is supposed to work in these kinds of cases.

II. Factual Disputes Relevant To Petitioners' Challenges To The Various Statutory Review Provisions Frustrate This Court's Review

A. This Court's "principal function" is "to review cases which have been tried" by "the circuit court." *Heil*, 230 Wis.

at 448. In this manner, this Court "primarily" operates as "an appellate court," *id.*, whose operations "benefit from the analyses of the circuit court and the court of appeals," *State v. Lira*, 2021 WI 81, ¶ 21, 399 Wis. 2d 419, 966 N.W.2d 605; *Est. of Miller v. Storey*, 2017 WI 99, ¶ 25, 378 Wis. 2d 358, 903 N.W.2d 759; *see also State v. Harrison*, 2015 WI 5, ¶ 37, 360 Wis. 2d 246, 858 N.W.2d 372. On the other hand, "[t]he circuit court is much better equipped for the trial and disposition of questions of fact than is this court and such cases"—that is, those involving any factual determinations—"should be first presented to that court." *In re Exercise of Original Jurisdiction of Supreme Ct.*, 201 Wis. 123, 128, 229 N.W. 643 (1930); *cf. Heil*, 230 Wis. at 436; *In re State ex rel. Atty. Gen.*, 220 Wis. 25, 44, 264 N.W. 633 (1936); *Green for Wis. v. State Elections Bd.*, 2006 WI 120, 297 Wis. 2d 300, 302–03, 723 N.W.2d 418; Order at 2, *Wis. Voters All.*, No. 2020AP1930-OA (Hagedorn, J., joined by A.W. Bradley, Dallet, and Karofsky, JJ., concurring); *see also Kleczka*, 82 Wis. 2d at 683. Consistent with that breakdown of general institutional competencies, where a petition asking for leave to commence an original action in this Court involves "disputed factual claims," Order at 2, *Wis. Voters All.*, No. 2020AP1930-OA (Hagedorn, J., joined by A.W. Bradley, Dallet, and Karofsky, JJ., concurring), that alone can be sufficient grounds to deny the petition, *see, e.g.*, *id.*; *Heil*, 230 Wis. at 436, 448.

B. Here, there are complex disputes of fact that preclude adjudication of Petitioners' claims, even assuming

that the legal theories underlying those claims are valid. *But see infra* Part III (briefly summarizing the Legislature's view that Petitioners' claims fail as a matter of law).

Recent litigation between the Legislature and Attorney General shows how separation-of-powers issues like those Petitioners raise here can involve factual disputes. After this Court denied the petition and cross-petition for original action in *Kaul*, the Governor, Attorney General, and Secretary of the Department of Administration filed a Complaint in the Dane County Circuit Court, challenging the constitutionality of Wis. Stat. § 165.08(1), which permits JCF to review and approve or reject any proposal by the Attorney General to "compromise[ ] or discontinue[ ]" a "civil action prosecuted by the [Attorney General] by direction of any officer, department, board, or commission, . . . on the initiative of the [A]ttorney [G]eneral, or at the request of any individual," as applied to two categories of cases: (1) civil enforcement actions brought under statutes the Attorney General has the duty to enforce, and (2) certain civil actions the Attorney General prosecutes on behalf of executive branch agencies. *See* Op. Br. of Defs.-Apps. at 7–8, 16, *Kaul v. Wis. State Legislature*, No.2022AP790 (Ct. App. Oct. 18, 2022).[8] The Legislature moved to dismiss that lawsuit for failure to state a claim, but the circuit court denied the Legislature's motion. *Id.* at 16.

[8] Available at https://acefiling.wicourts.gov/document/eFiled/2022AP000790/580241.

Following the circuit court's denial of the Legislature's motion to dismiss, the parties engaged in discovery to address the Attorney General's arguments that JCF's settlement-review-and-approval authority violated the separation of powers because it imposed an undue burden on the Attorney General's litigation authority for the State. *Id.* at 16, 18. This discovery included "written discovery requests," production of documents, and depositions of relevant agency employees to determine how these statutes impact the Attorney General and whether JCF's reviews actually caused the Attorney General any harms or undue burdens. *See id.* at 17–18. Discovery also involved a lengthy deposition of Corey F. Finkelmeyer, the Deputy Administrator for the Division of Legal Services for the Attorney General. *Id.* He testified regarding the actual operations of the Attorney General's office, particularly as they related to the process for seeking JCF approvals of proposed settlements and, when pressed to describe any examples of JCF's reviews of settlements actually delaying or hindering a proposed settlement, thereby causing the Attorney General any harm, he was unable to identify even a single instance in which JCF had delayed a request to review a settlement proposal or otherwise prohibited the Attorney General from completing his litigation duties. *Id.* And this factual dispute over burdens has played a central role in the parties' appellate briefing on the issue in *Kaul*. *Id.* at 45–50; *see also* Resp. Br. of Pls.-Resps. at 41–50, *Kaul v. Wis. State Legislature*,

No.2022AP790 (Ct. App. Jan. 9, 2023) (discussing the "undue burden" standard and alleged burdens JCF's review authority allegedly imposed on the Attorney General).[9]

Here, if the Attorney General's theory of separation of powers and undue burdens that he asserted in *Kaul* is correct, Petitioners' constitutional challenges to committee review authority implicate factual disputes better reserved for the circuit courts. Petitioners first claim that statutory provisions allowing JCF to review Knowles-Nelson projects unconstitutionally "empower JCF to delay, approve, or reject a proposed Knowles-Nelson project for any reason," under various "passive review" and "active review" processes through which JCF has supposedly delayed and prohibited various projects the Department of Natural Resources wanted to undertake. Pet.12–13, 35. And Petitioners also argue that the statutory provisions permitting JCRAR to review and suspend agency rules for various reasons are facially unconstitutional because, even assuming this falls within the shared powers of the Legislature and executive branch, these rules permit the Legislature to "block" such rulemaking via committee without enacting laws. Pet.24–29, 39–40.

Under the Attorney General's understanding of the framework for reviewing separation-of-powers disputes, both of these claims include factual disputes that would require resolution before these constitutional challenges can be

[9] Available at https://acefiling.wicourts.gov/document/eFiled/2022AP000790/609942.

resolved. For example, regarding its first claim, challenging JCF's review of Knowles-Nelson projects, Petitioners specifically allege that "JCF has objected to almost one-third of all" such projects, with each sitting for an average of 273 days before resolution. Pet.13; *id.*, Ex.A. But to prove that the Legislature's review process and any alleged attendant delays imposed a burden on the Department of Natural Resources under Petitioners' theory—as necessary for the Court to determine whether the committee review statute could *ever* constitutionally apply, *SEIU*, 2020 WI 67, ¶ 38—the parties would need to present evidence of whether these delays precluded the agency from completing all valid projects, such that the Department of Natural Resources was never able to proceed successfully. Thus, proof of this claim, much like in *Kaul*, would involve factual disputes and related discovery better reserved for the circuit courts. *In re Exercise of Original Jurisdiction*, 201 Wis. at 128.

The same is true for Petitioners' challenge to JCRAR's authority, which contends that such committee review authority "may never be constitutionally applied to executive branch agency rulemaking" or, alternatively, to "rulemaking authority over commercial building standards and the ethical standards for social workers, marriage and family therapists, and professional counselors." Pet.40. But, again, the Attorney General's understanding of separation-of-powers disputes would require the Court to determine whether the Legislature's authority to review rulemaking unduly burdens

executive branch agencies' operations. To that end, the parties would need to present evidence regarding all such review processes and determine if, in any situation, *SEIU*, 2020 WI 67, ¶ 38, the Legislature has applied its review without burdening executive branch agencies. This would require evidence of how JCRAR has applied its review authority in the past, to determine if such reviews have always impermissibly burdened executive branch authority in this area. As in *Kaul*, such evidence could involve written discovery between the parties, document requests to determine how the two branches have operated regarding such reviews of agency rulemaking, and possibly even depositions of executive branch employees to determine whether reviews have burdened agency operations, permissibly or otherwise—the very sorts of factual developments and disputes best suited to conventional litigation, not this Court's original action jurisdiction. *In re Exercise of Original Jurisdiction*, 201 Wis. at 128.

III. Legislative Committees Are Constitutional And Petitioners' Claims Risk Creating Serious Separation-Of-Powers Concerns Themselves, Further Supporting Denial Of The Petition

This Court exercises its original action jurisdiction only in cases that present serious disputes over questions of statewide "importance"—that is, matters of "publici juris." *Heil*, 230 Wis. at 431, 442–46; *Wis. Prof'l Police Ass'n*, 2001 WI 59, ¶ 4 ("significantly affect[ ] the community at large"). For decades, courts have well understood Wisconsin's doctrine

of separation of powers, uniformly applying that understanding to the relationship between the executive and the legislative branches, and Petitioners here fall far short of making the demanding showing this Court requires to overturn its previous rulings. As such, the Petition does not present a sufficient issue of public "importance" to warrant this Court's original jurisdiction. *See Heil*, 230 Wis. at 431, 442–46.

A. Wisconsin's "separation of powers doctrine is implicitly created by the constitution," *Martinez*, 165 Wis. 2d at 696 & n.8, which vests "'[t]he legislative power . . . in a senate and assembly'; '[t]he executive power . . . in a governor"; and '[t]he judicial power . . . in a unified court system,'" *SEIU*, 2020 WI 67, ¶ 31 (quoting Wis. Const. art. IV, § 1; *id.* art. V, § 1; *id.* art. VII, § 2). The courts have long viewed "[t]he constitutional powers of each branch of government" as falling into one of "two categories: exclusive powers and shared powers," *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 30, 376 Wis. 2d 147, 897 N.W.2d 384.

In the realm of core powers, "the legislature is tasked with the enactment of laws," while "the governor is instructed to 'take care that the laws be faithfully executed.'" *SEIU*, 2020 WI 67, ¶ 31 (citing Wis. Const. art. IV, § 17; *id.* art. V, § 4). Because "the constitution says the legislature is vested with legislative power, the inference is that core legislative power may not be placed elsewhere, by the legislature or otherwise." *Becker v. Dane Cnty.*, 2022 WI 63, ¶ 52, 403 Wis.

2d 424, 977 N.W.2d 390 (Hagedorn, J., concurring), *reconsideration denied*, 2023 WI 36, 407 Wis. 2d 45, 989 N.W.2d 606. So, while the Legislature's core lawmaking power cannot be delegated to any other branch or entity, the Legislature may delegate "to administrative agencies . . . the power to promulgate rules within the boundaries of enabling statutes passed by the legislature." *Koschkee v. Taylor*, 2019 WI 76, ¶ 15, 387 Wis. 2d 552, 929 N.W.2d 600. The Constitution also charges the Legislature with maintaining the State's spending power over both the State's sovereign expenses, Wis. Const. art. VIII, § 2, and "other sources of income," Wis. Const. art. VIII, § 5. As this Court has explained, this constitutional authority "empower[s] the legislature . . . to make policy decisions regarding . . . spending" for the State, *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 540, 576 N.W.2d 245 (1998), while the Legislature's general lawmaking authority includes the "power to spend the [S]tate's money by enacting laws," *SEIU*, 2020 WI 67, ¶¶ 68–69 (citing Wis. Const. art. IV, § 17).

Ahern and *Martinez* thus held that the separation of powers does not require rigid boundaries between the branches and that the Legislature can maintain some authority to review agency actions. Unlike under certain other States' constitutions, the Wisconsin Constitution "permits a blending or sharing of powers among the three branches of government," "subject to the limitation against unchecked power." *Ahern*, 114 Wis. 2d at 103 (citation

omitted). Thus, the Legislature and Governor can engage in "cooperative venture[s] between the two governmental branches," even if doing so allows the Legislature to, at times, "exercise executive powers to the exclusion of the executive branch." *Id.* at 107–08. To that end, Wisconsin's separation of powers operates to allow "the legislature to delegate rule-making authority to an agency while retaining the right to review any rules promulgated under the delegated power," and so "it is a legitimate practice for the legislature, through JCRAR, to retain the ability to suspend a rule which is promulgated in derogation of the delegated authority." *Martinez*, 165 Wis. 2d at 698, 701. And this Court recently unanimously reaffirmed this understanding of legislative authority over executive branch agencies—including the specific authority to review and suspend agency rules after promulgation—in *SEIU*. 2020 WI 67, ¶¶ 78–83.

B. Petitioners' claims all fail under these principles, for the same reason the challenges in *Ahern* and *Martinez* failed.

Petitioners' challenge to JCF reviews of Knowles-Nelson projects fails to show a separation-of-powers violation, given the Legislature's explicit authority over expenditures of state money, which provides it at least a "blend[ed]" or "shar[ed] power" sufficient to overcome Petitioners' facial challenge. *Ahern*, 114 Wis. 2d at 103; *see also Martinez*, 165 Wis. 2d at 697–99. Knowles-Nelson projects involve the Department of Natural Resources "obligating moneys" for projects involving "land acquisition for conservation and

recreational purposes," "property development and local assistance," "bluff protection," and the like. Wis. Stat. § 23.0917(2), (3). In doing so, Knowles-Nelson requires the Department of Natural Resources to notify JCF of any "project or activity that exceeds $250,000" for JCF's passive review, *id.* § 23.0917(6m), and to seek JCF's affirmative three-fourths approval for any acquisition of new land that is outside a project boundary that existed as of May 1, 2013, *id.* § 23.0917(8)(g)1. But such projects explicitly involve the expenditure of public funds, thereby implicating the Legislature's power of the purse, sufficient to support JCF's review authority as a constitutional matter. Wis. Const. art. VIII, §§ 2, 5; *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331, 364–65 (1915).

The same is true for JCOER's authority to review UW raises, which also directly involve the Legislature's power of the purse. Under Section 230.12(3)(e)1., JCOER is authorized to review and approve submissions on UW employee compensation and benefits from the DPM administrator. Wis. Stat. § 230.12(3)(e)1. Employees of the UW system are, of course, state employees, *see, e.g.*, *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶ 50, 302 Wis. 2d 358, 735 N.W.2d 30 (Abrahamson, C.J., dissenting), and so any changes to compensation and benefits for those state employees is paid out of, and has a direct effect on, the public fisc. Because the Legislature maintains an interest in these state funds under its power of the purse, Wis. Const. art. VIII, §§ 2, 5, the

Legislature, through its committees, is permitted to review and approve such expenditures, consistent with the separation of powers and Wisconsin Constitution, *Ahern*, 114 Wis. 2d at 101, 103–04; *Martinez*, 165 Wis. 2d at 698–701.

In this regard, the Legislature's previous appropriation of raises for UW employees within the annual budget bill, *see* 2023 Wis. Act 19, §§ 49, 9101; Wis. Legis. Fiscal Bureau, *2023–25 Wis. State Budget: Comparative Summary of Provisions* 136–38 (Aug. 2023),[10] does not end the Legislature's involvement. When the Legislature enacts statutes, including an appropriations bill, it does not do so on a blank slate; instead, there is a "fundamental proposition that the legislature, in enacting statutes, is presumed to do so with full knowledge and awareness of existing statutes," *State ex rel. McDonald v. Cir. Ct. for Douglas Cnty., Branch II*, 100 Wis. 2d 569, 578, 302 N.W.2d 462 (1981), and the courts also "appropriate[ly] . . . presume the Governor is also fully informed," particularly when involved in legislative negotiations, *see Belding v. Demoulin*, 2014 WI 8, ¶ 38, 352 Wis. 2d 359, 843 N.W.2d 373, as the Governor was here, Pet.14. Thus, when the Legislature enacted the annual budget bill and the Governor signed it, all well knew that any appropriations for UW employees nevertheless remained subject to JCOER's approval under Section 230.12(3)(e)1.

[10] Available at 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.

Petitioners' challenge to JCRAR's rule review authority also fails under *Martinez*. As this Court has confirmed on multiple occasions, JCRAR's administrative rule review authority is wholly consistent with the separation of powers and does not violate the Constitution's bicameralism and presentment requirements. *Martinez*, 165 Wis. 2d at 699–700. And any permanent rule suspension still requires "[t]he full involvement" of both branches. *Id.* at 700. JCRAR's rulemaking review authority simply "provides a legislative check on agency action which prevents potential agency over-reaching." *Id.* at 701. Indeed, "it is incumbent on the legislature, pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making." *Id.*; *see also SEIU*, 2020 WI 67, ¶¶ 78–83. Because *Martinez* and *SEIU* explicitly upheld the authority challenged here, Petitioners' final claim also fails.

3. Petitioners have not satisfied the high standard required for this Court to overrule longstanding precedent.

Wisconsin courts "follow[ ] the doctrine of stare decisis scrupulously because of [their] abiding respect for the rule of law." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257. The doctrine ensures "the law furnish[es] a clear guide for conduct of individuals," provides "fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case," and "maintain[s] public faith in the judiciary as a source of impersonal and reasoned judgments." *Id.* ¶ 95

(quoting *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 403 (1970)). Without faithful "adherence to the doctrine," *id.* ¶ 94, "deciding cases [would] become[ ] a mere exercise of judicial will, with arbitrary and unpredictable results," *Schultz v. Natwick*, 2002 WI 125, ¶ 37, 257 Wis. 2d 19, 653 N.W.2d 266. For that reason, "any departure from the doctrine of stare decisis demands special justification," and this Court will not "overturn[ ] prior cases" unless (1) "changes or developments in the law have undermined the rationale behind a decision"; (2) "there is a need to make a decision correspond to newly ascertained facts"; and (3) "there is a showing that the precedent has become detrimental to coherence and consistency in the law," as well as considering "whether reliance interests are implicated" by the proposed change in law. *Johnson Controls*, 2003 WI 108, ¶¶ 94, 98–99. While stare decisis "is neither a straightjacket nor an immutable rule," this Court "has no apprehension about being a solitary beacon in the law if [its] position is based on a sound application of this state's jurisprudence." *Id.* ¶ 100.

Petitioners recognize that their Petition would require this Court to overturn *Martinez* and the relevant portions of *SEIU* (they do not mention *Ahern*, notwithstanding the *stare decisis* effect of that decision, *see Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405), yet they never even attempt to "satisfy the demanding standards" for doing so. *Johnson Controls*, 2003 WI 108, ¶ 98. Petitioners do not, and cannot, argue that any "changes or developments in the

law have undermined the rationale behind [those] decision[s]" as the relevant provisions have not changed since before *SEIU* was decided. *Johnson Controls*, 2003 WI 108, ¶ 98. Nor do Petitioners identify any "newly ascertained facts" that would support overturning *Martinez*, *SEIU*, and *Ahern*, *id.*, instead expressly (but wrongly, *see supra* Part II) asserting that "[t]his case presents legal issues, not factual ones," Pet.42. And Petitioners make no "showing that the precedent has become detrimental to coherence and consistency in the law." *Johnson Controls*, 2003 WI 108, ¶ 98.

Petitioners ignore the significant reliance interests the Legislature, Governors, and the People have developed on *Martinez*'s and *Ahern*'s longstanding interpretation of Wisconsin's constitutional structure and separation-of-powers system. *See id.* ¶ 99. Both before and after *Ahern* and *Martinez*, the Legislature has routinely crafted legislative committees to do the difficult and important work of collaborating with the executive branch on various issues affecting the public. *See Ahern*, 114 Wis. 2d at 108. Relying on this proper understanding of the Wisconsin Constitution as permitting "a blending or sharing of powers among the three branches of government," *id.* at 103, such that there is no concern with the Legislature "retaining the right to review" agency actions, *Martinez*, 165 Wis. 2d at 698, the Legislature has continued to employ legislative committees to work with the executive branch. Departing from this precedent would upset a longstanding system of collaboration between the

Legislature and executive branch, and Petitioners nowhere grapple with that shortcoming in their request.

Petitioners' primary justification for overruling *Martinez* and *SEIU* is that other States have struck down legislative committee review provisions for violating bicameralism and presentment requirements, so the provisions at issue here must also be unconstitutional, thus necessitating this Court's reversal of prior contrary decisions. Petitioners' attempted reliance on inapposite, out-of-state precedent is unavailing. Br.43–46; *see also id.* at 32 & n.5. "It is not a sufficient reason for this court to overrule its precedent that a large majority of other jurisdictions, with no binding authority on this court, have reached opposing conclusions." *Johnson Controls*, 2003 WI 108, ¶ 100.

"[T]he practice of other states is not determinative of the constitutional questions before" this Court in this Petition, *SEIU*, 2020 WI 67, ¶ 70, especially given Wisconsin's unique "implicit" separation-of-powers doctrine, *Martinez*, 165 Wis. 2d at 696 & n.8. This Court "give[s] little weight to precedents from states that apply 'express' separation of powers provisions." *Id.* at 700–01. As for legislative rulemaking review authority, this Court has explicitly "distinguish[ed] Wisconsin from the statutory schemes found to violate separation of powers doctrines in other states." *Id.* at 700. This Court's stare decisis doctrine requires it to remain "a solitary beacon in the law" where, as is the case here, "[its] position is based on a sound application of this

state's jurisprudence." *Johnson Controls*, 2003 WI 108, ¶ 100. Thus, other States' decisions simply have no bearing on the questions put before the Court by this Petition.

Nor do the general requirements for bicameralism and presentment of full statutory enactments negate JCF's, JCOER's, and JCRAR's authority to review agency actions. This Court has long eschewed rigid requirements for bicameralism and presentment outside of the formal lawmaking process. *See Becker*, 2022 WI 63, ¶ 30; *In re Guardianship of Klisurich*, 98 Wis. 2d 274, 279, 296 N.W.2d 742 (1980). Indeed, this Court has affirmed JCRAR's authority to review and suspend even formal agency rulemaking without following the requirements of bicameralism and presentment, *Martinez*, 165 Wis. 2d at 699, rendering Petitioners' objections to committee review provisions misplaced. Moreover, JCF's and JCOER's authority to review expenditures come from enacted statutes, voted on by the entire Legislature and signed by the Governor, *see* Wis. Stat. §§ 23.0917(6m), (8)(g), 230.12(3)(e)1., and so the very authority that these committees have retained itself complies with the bicameralism and presentment requirements Petitioners now urge. And JCOER's authority to review changes to UW compensation plans explicitly incorporates gubernatorial oversight, Wis. Stat. § 230.12(3)(b), further undercutting Petitioners' concerns.

Petitioners are wrong to claim that the Legislature's constitutional authority over the public fisc ends upon the

passing of an appropriations bill. Br.28. The Constitution explicitly permits the branches to "cooperat[e]" in this manner, *Ahern*, 114 Wis. 2d at 108, particularly in instances of "shared and merged powers" between the branches, *Martinez*, 165 Wis. 2d at 696, such as situations implicating the Legislature's noted authority over the public fisc, Wis. Const. art. VIII, §§ 2, 5. The Legislature maintains the authority to "review" agency action in such cases, *Martinez*, 165 Wis. 2d at 698, consistent with that institutional interest in public funds. Petitioners' arguments thus conflict with this Court's precedent and offer no basis to declare JCF's and JCOER's spending-review authority unconstitutional.

Petitioners are also incorrect in arguing that the Department of Natural Resources and DPM Administrator have the legally "committed . . . discretion" to either engage in a Knowles-Nelson project or give pay raises to UW employees. Br.29 (quoting *Att'y Gen. ex rel. Taylor v. Brown*, 1 Wis. 513, 522 (1853)). As explained above, Knowles-Nelson explicitly retains for JCF the authority to review any projects meeting certain criteria. *Supra* pp.12–13, 32–33. And Section 230.121(3)(e)1. similarly reserves to JCOER the authority to review and approve changes in compensation and benefits to UW employees. *Supra* pp.13–15, 33–34. The Legislature can determine whether the "very existence of [these] administrative agenc[ies]" should continue, *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 56, 158 N.W.2d 306 (1968), let alone how much authority they can wield. So Petitioners'

contention that the Department of Natural Resources and DPM Administrator maintain unfettered "discretion" in these areas to make such expenditures, Br.30, simply finds no statutory or constitutional hook.

Petitioners argue that JCRAR's exercise of its review authority over executive agency rulemaking "unduly intrude[s] on executive powers," Br.46–51, but this Court's decisions in *Martinez*, 165 Wis. 2d 687, and *SEIU*, 2020 WI 67, show that JCRAR's review authority in fact furthers the proper balance of power between branches, *see Martinez*, 165 Wis. 2d at 697–98, 700; *SEIU*, 2020 WI 67, ¶¶ 97–99 (opinion of Kelly, J.). As an initial matter, Petitioners' claim that "[a]dministrative rulemaking involves core executive powers" is plainly wrong. Br.46–49. "[A]dministrative agencies are creations of the legislature," *Martinez*, 165 Wis. 2d at 697, and "when an agency promulgates a rule, it is exercising 'a legislative power,'" *SEIU*, 2020 WI 67, ¶ 98 (opinion of Kelly, J.) (quoting *Koschkee*, 2019 WI 76, ¶ 39). Agencies "ha[ve] no inherent constitutional authority to make rules," *Martinez*, 165 Wis. 2d at 698, and thus, when an agency is authorized to promulgate rules, that authority "comes solely through express delegation from the legislature," *SEIU*, 2020 WI 67, ¶ 98 (opinion of Kelly, J.). Thus, the executive can never exercise an exclusive "core" power over agency rulemaking.

Petitioners' alternate argument that "even if rulemaking power is shared by the executive and legislative branches," Br.49–51, JCRAR's review authority "absolutely

blocks the executive branch's ability to exercise its portion of the shared power," *id.* at 50, likewise fails. Any permanent rule suspension requires "[t]he full involvement" of both branches. *Martinez*, 165 Wis. 2d at 700. JCRAR's rulemaking review authority simply "provides a legislative check on agency action which prevents potential agency over-reaching." *Id.* at 701. Indeed, "it is incumbent on the legislature, pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making." *Id.* And, moreover, any analysis of the separation-of-powers issue under this framework would require factual development to determine how the committee review provisions actually work in practice and how they burden, if at all, executive branch agencies' efforts. *Supra* Part II.

Petitioners' assertion that JCRAR's review authority "sometimes encroach[es] on core judicial powers, too," Br.52–53, only serves to confirm that their claim is premised on a legally baseless view of the separation of powers. The judicial branch is charged with "the duty of interpreting and applying laws made and enforced by coordinate branches of state government," *Gabler*, 2017 WI 67, ¶ 37, and this Court has the final word as to the meaning of Wisconsin's statutes, *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 50, 382 Wis. 2d 496, 914 N.W.2d 21. While agency rules can "have the force and effect of law," *SEIU*, 2020 WI 67, ¶ 98–99, "an administrative rule is not legislation as such," *Martinez*, 165 Wis. 2d at 699. So, while this Court may interpret

administrative rules while resolving disputes before it, it is not exercising its "first and irreducible responsibility . . . to proclaim the law." *Tetra Tech EC, Inc.*, 2018 WI 75, ¶ 50. In this manner, while the judicial branch has the final say on the meaning of the statutes governing administrative agencies, JCRAR's rule review process does not intrude on the judiciary's ability to "authoritatively interpret and apply the law in cases before [its] courts." *Id.* ¶ 54.

Finally, even beyond the other problems with this Petition discussed above, the remedy that Petitioners seek here would *create* significant separation-of-powers concerns. This Court endeavors to decide the cases before it "in a manner that will avoid a constitutional conflict." *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 64, 357 Wis. 2d 469, 501, 851 N.W.2d 262. Wisconsin's separation-of-powers doctrine requires "the legislature, pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making," so the Legislature maintains a nondelegable "legislative responsibility," *Martinez*, 165 Wis. 2d at 701, to "fix[ ] and circumscribe[ ]" the "powers, duties and scope of [agency] authority," including the authority to "retract or limit any delegation of rulemaking authority, determine the methods by which agencies must promulgate rules, and review rules prior to implementation," *Koschkee*, 2019 WI 76, ¶ 20. Contrary to these principles, the Petition asks this Court, in part, to remove JCRAR's (and thus the Legislature's)

authority over executive branch agencies' exercise of delegated legislative power—an unprecedented judicial action that would upset the long-established equilibrium of power between the executive and legislative branches. Pet.38–40; Br.36–53. Thus, Petitioners' desired outcome would allow the Governor to intrude on legislative authority, by removing necessary limitations on the exercise of delegated legislative authority by executive agencies, contrary to the Legislature's duty to "fix[ ] and circumscribe[ ]" agency rulemaking, including through "review[ing] rules prior to implementation." *Koschkee*, 2019 WI 76, ¶ 20; *see also Martinez*, 165 Wis. 2d at 701.

IV. If This Court Grants The Petition, It Should Also Grant The Legislature's Motion To Intervene As The Real Party In Interest, And Dismiss The Individual Legislators From The Case After Granting The Legislature's Motion

Respondents respectfully submit that, if the Court does grant the Petition, it should take two further actions to ensure that this case involves the proper Respondents.

First, this Court should grant the Legislature's Motion To Intervene, filed contemporaneously with this Response. As noted in that Motion, Petitioners challenge the constitutionality of statutory provisions governing the authority of three legislative committees, which statutes the Legislature enacted to facilitate the legislative process in the State consistent with the exercise of its constitutional law-making authority. This challenge triggers the Legislature's

right to intervene on three indepedent grounds: intervention as of statutory right under Wis. Stat. § 803.09(2m); mandatory intervention under Wis. Stat. § 803.09(1); and permissive intervention under Wis. Stat. § 803.09(2).

Second, if this Court grants the Legislature's motion to intervene, this Court should dismiss the individually named Legislator Respondents—Senator Howard Marklein, Representative Mark Born, Senator Chris Kapenga, Speaker Robin Vos, Senator Steve Nass, and Representative Adam Neylon. These Legislators are all sued in their official capacities as co-chairs of the three legislative committees whose authority this Petition challenges. But under Article IV, § 16, "[n]o member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate." Wis. Const. art. IV, § 16. In other words, Legislators have a "privilege" from being "a party to a civil action," *State v. Beno*, 116 Wis. 2d 122, 140–41, 341 N.W.2d 668 (1984), that seeks to hold him or her liable for "matters that are an integral part of the processes by which members of the legislature participate with respect to the consideration of proposed legislation or with respect to other matters which are within the regular course of the legislative process"—including the "giving of a vote," *id.* at 143–44 (citation omitted); *see also id.* at 144 (explaining that Article IV, § 16 is "broader than the actual deliberations on the floors of the houses"). At bottom, "state legislators have absolute immunity from those actions

performed in the scope of their legislative functions." *Zinn v. State*, 112 Wis. 2d 417, 431, 334 N.W.2d 67 (1983). Here, Petitioners have named these six Legislators as Respondents to their lawsuit asserting broad constitutional claims, seeking to hold them responsible for the Legislature's enactment of statutes that define the powers of legislative committees, as well as those committees' specific review and approval determinations taken pursuant to that statutory authority. *See, e.g.*, Pet.4–6, 42. Thus, Petitioners seek to hold these six Legislators liable for their "giving of a vote," which is prohibited under Article IV, § 16's grant of immunity to Legislators. *Beno*, 116 Wis. 2d at 143–44.

At a minimum, this Court should dismiss all the Respondents except for Respondent Speaker Vos. Speaker Vos serves as Speaker of the Assembly and so, in this role, he speaks for one half of the Legislature. *See* Wis. Stat. § 13.13(1). In this capacity, Speaker Vos may remain a party in this case to speak on behalf of the Assembly, although that would be unnecessary if this Court permits the Legislature to intervene. *See, e.g.*, *SEIU*, 2020 WI 67.

CONCLUSION

This Court should deny the Petition For Original Action.

Dated: November 21, 2023.

Respectfully submitted,

Electronically signed by Misha Tseytlin
MISHA TSEYTLIN
(State Bar No. 1102199)
Counsel of Record
SEAN T.H. DUTTON
(State Bar No. 1134675)
KEVIN M. LEROY
(State Bar No. 1105053)
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street,
Suite 3900
Chicago, Illinois 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Attorneys for Respondents