



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

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SUPREME COURT**

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December 19, 2023

VIA ELECTRONIC FILING NOTICE

Samuel A. Christensen
Clerk of the Supreme Court and Court of Appeals
110 East Main Street, Suite 215
Post Office Box 1688
Madison, WI 53701-1688

Re: *Evers, et al. v. Marklein, et al.*
Case No. 2023AP2020-OA

Dear Mr. Christensen:

I write regarding a recent factual development in this matter. One of Petitioners' claims involves the power of the Legislature's Joint Committee on Employment Relations (JCOER) under Wis. Stat. § 230.12(3)(e)1. to veto pay adjustments for University of Wisconsin System (UW) employees. (See Pet. ¶¶ 31–42, 94–99.) Until today, JCOER had been exercising that power to block pay adjustments for UW employees that were included in the biennial budget bill. Earlier today, December 19, 2023, JCOER voted to release those pay adjustments which will now take effect.

JCOER's vote does not affect the issues in the Petition.

It obviously has no effect on Petitioners' claims regarding legislative committee vetoes over the Knowles-Nelson program (see Pet. ¶¶ 20–30, 88–93) and administrative rulemaking (see Pet. ¶¶ 43–87, 100–05), since those claims have nothing factual to do with JCOER's veto power over UW pay adjustments. The Joint Committee on Finance still brandishes its veto power over Knowles-Nelson conservation projects, and the Joint Committee on Administrative Rules continues to block critical rules updating Wisconsin's commercial building code and defining so-called "conversion therapy" as unethical professional conduct for social workers, marriage and family therapists, and professional counselors. It remains just as important as ever to restore to state government the proper separation of powers in these areas.

Samuel A. Christensen
December 19, 2023
Page 2

Nor does this development moot Petitioners' facial challenge to JCOER's veto power, precisely because Petitioners' challenge is a *facial* one. Petitioners assert that the legislative committee veto provision in Wis. Stat. § 230.12(3)(e)1. is facially unconstitutional in all applications, not just as applied to JCOER's recent use of its veto power. An issue is mooted only "when its resolution will have no practical effect on the underlying controversy." *Matter of Commitment of J.W.K.*, 2019 WI 54, ¶ 11, 386 Wis. 2d 672, 927 N.W.2d 509 (citation omitted). The underlying controversy here is whether JCOER may possess the power to veto UW pay adjustments at all, not whether it permissibly wielded that veto power in any particular situation. That controversy therefore still exists even though JCOER has, for now at least, shelved its veto power. Petitioners could have brought this facial challenge even if JCOER had not blocked UW pay adjustments, and so JCOER's approval of those pay adjustments changes nothing. *Cf. Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 (considering facial challenges to multiple statutes without regard to any specific applications); *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 44, n.9, 309 Wis. 2d 365, 749 N.W.2d 211 ("[Facial] challenges to ordinances are generally ripe the moment the challenged ordinance is passed.").

And even if Petitioners' facial challenge could be mooted, the Court should nevertheless address it because "the issues are of great public importance," "the constitutionality of a statute is involved," "the issue is likely to arise again and should be resolved by the court to avoid uncertainty;" and the issue is "capable and likely of repetition and yet evades review." *Matter of Commitment of J.W.K.*, 386 Wis. 2d 672, ¶ 12 (citation omitted). If this issue is not resolved now, JCOER can perpetually hold its veto threat over UW's head in future budget cycles. And if JCOER can evade judicial review every time UW files suit or submits to a JCOER demand, the validity of this veto power might never be resolved.

Sincerely,

Electronically signed by Colin T. Roth
Colin T. Roth
Assistant Attorney General

CTR:jrs

cc: parties via-efile