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IN THE SUPREME COURT OF WISCONSIN
NO. 2023AP2020-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,
REPRESENTATIVE MARK BORN, in their
official capacities as chairs of the joint
committee on finance; SENATOR CHRIS
KAPENGA, 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.

IN AN ORIGINAL ACTION TO THE
SUPREME COURT OF WISCONSIN

***AMICUS CURIAE* BRIEF OF NATIONAL ASSOCIATION OF SOCIAL
WORKERS, INCLUDING ITS WISCONSIN CHAPTER,
IN SUPPORT OF GRANTING REVIEW**

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INTEREST OF *AMICUS CURIAE*

The National Association of Social Workers (NASW), established in 1955, is the largest association of professional social workers in the world, with approximately 110,000 members and chapters throughout the United States. The Wisconsin Chapter of NASW (NASW-WI) has more than 1,500 members. NASW develops and disseminates standards of social work practice, enforces the NASW Code of Ethics, conducts research, and provides policy statements on issues of importance to the social work profession. Consistent with its published policy statements, NASW, including its Wisconsin Chapter, condemns the use of conversion therapy, and any therapies and treatments designed to change sexual orientation.

NASW-WI worked with the State of Wisconsin's Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board, which is part of the Wisconsin Executive Branch's Department of Safety and Professional Services, to craft an administrative rule banning the use of conversion therapy by regulated professionals – a rule that is urgently needed in Wisconsin and after a two year legislative committee block went into effect on December 1, 2022. Nonetheless, the Joint Committee for Review of Administrative Rules (JCRAR) suspended the rule from January 12, 2023, through April 15, 2024, and could do so again in the future.

The JCRAR veto provisions in Wis. Stat. §§ 227.19(5)(c)(d)(dm), and 227.26(2)(d) and (im) (JCRAR veto provisions) violate the Wisconsin Constitution's separation of powers as applied to executive branch agency rulemaking broadly, including over social worker, marriage and family therapist, and professional counselor ethics rules. NASW and NASW-WI are well positioned to shed light on the real-world impact of the Wisconsin

Legislature's repeated and persistent intrusions on the authority of the Executive Branch.

INTRODUCTION

This Court has begun restoring the balance of powers in Wisconsin's government by deciding one of the three issues presented, but there is more work left to do. JCRAR's ability to temporarily block and then repeatedly suspend administrative rules has unconstitutionally infringed on Executive Branch powers. JCRAR blocked and suspended a rule promulgated by the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board (the Board) banning conversion therapy, for a total of over three years, and under the current statutes, suspension could happen again as soon as the beginning of the next legislative session. This overriding of an administrative agency's completed rulemaking is deeply dysfunctional and harms the people of Wisconsin.

As the Legislature uses strategies of obstructing Executive Branch agencies through unconstitutional legislative committee vetoes, the very balance of the separation of powers is at stake. This Court has already found that the Joint Committee on Finance's veto powers intrude into the Executive Branch's mandate to execute the laws. The JCRAR vetoes differ enough from the Joint Committee on Finance's legislative veto that they require individual attention. The Court should now take up and decide that the JCRAR veto provisions likewise violate the Wisconsin Constitution.

ARGUMENT

JCRAR's veto provisions are unconstitutional and cause real harm to Wisconsinites. When JCRAR blocked and then suspended a rule banning conversion therapy for over three years total, it perfectly illustrated the dangers of this kind of legislative overreach. The legislative vetoes unconstitutionally intruded on the powers of the executive branch, and if suspension is repeated as § 227.26(2)(im) permits, the constitutional harms will multiply. Those constitutional harms reverberate in the real world: the veto ignored the expertise of qualified healthcare professionals, to the detriment of Wisconsin youth.

I. As recently applied to the conversion therapy ban, the JCRAR veto provisions violate the separation of powers.

The JCRAR veto provisions, as the Legislature applied them to the conversion therapy ban, crossed beyond the powers of the Legislative Branch and into the powers of the Executive Branch, violating the separation of powers. Wisconsin's Constitution "create[s] three branches of government, each with distinct functions and powers." *Gabler v. Crime Victims' Rights Bd.*, 2017 WI 67, ¶11, 376 Wis. 2d 147, 897 N.W.2d 384 (cleaned up). Legislative power is vested in a senate and assembly, Wis. Const. art. IV, §1; executive power is vested in a Governor, Wis. Const. art. V, §1, and judicial power is vested in a unified court system, Wis. Const. art. VII, §2. The Wisconsin Constitution thus adopted the separation of powers doctrine.

Under this doctrine, it is the Legislature's responsibility to "determine[] what the law should be." *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 449, 208 N.W.2d 780, 814 (1973). The Executive Branch, including the Governor and administrative agencies, then has the

authority to interpret and apply the law. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶53, 382 Wis. 2d 496, 914 N.W.2d 21; *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶59, 393 Wis. 2d 38, 946 N.W.2d 35 (“our cases have made clear that these ‘administrative’ officers carry out executive functions...state administrative agencies ‘are considered part of the executive branch.’”). “The legislature cannot interfere with, or exercise any powers properly belonging to the executive department.” *Nusbaum*, 59 Wis. 2d at 448. The separation of powers protects against the threat of one branch encroaching on the power of another. *Gabler*, 376 Wis. 2d 147, ¶7.

Yet, here, a small group of legislators held a state agency rule hostage, first blocking it for nearly two years, then suspending it for 15 months a mere six weeks after it went into effect (see II.B., *infra*). Administrative agencies are tasked with interpreting and applying highly technical law. When an agency has carefully weighed and addressed an issue, using the statutory power authorized, and a legislative committee interferes with that decision, the legislative committee is doing precisely what it cannot and should not do – interfering with powers properly belonging to the Executive Branch.

The extended block and suspension of the conversion ban rule is precisely the kind of legislative overreach that violates the Constitution. This Court has previously treated rulemaking as a shared power and rejected a facial challenge to § 227.26(2)(im), which permits JCRAR to suspend rules repeatedly. *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35. The Court declined to find the provision *facially* unconstitutional, explaining that two three-month suspensions would pass constitutional muster. *Id.* ¶¶81–83 (citing *Martinez v. Dep't of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992)).

However, the Court also noted that “an endless of suspension of rules could not stand; there exists at least some required end point after which bicameral passage and presentment to the governor must occur.” *Id.* ¶81.

That end point lies somewhere between the six months the Court approved in *SEIU*, and the three years JCRAR held the conversion therapy ban hostage (and counting, should it exercise its statutory power again). This was no “modest suspension that is temporary in nature,” but a long-term encroachment on executive power. *SEIU*, 2020 WI 67 ¶82.

The Court should take up the challenge and find the JCRAR veto provisions unconstitutional, at least as exercised over the conversion therapy ban.

II. The legislative committee veto of the conversion therapy ban demonstrates the dangers of legislative overreach.

JCRAR’s block and suspension of Wis. Admin. Code § MPSW 20.02(25) (§ MPSW 20.02(25)) illustrate the harm that can result when the balance of powers goes askew. This administrative rule prohibits professionals licensed by the State of Wisconsin’s Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board, which is part of the Department of Safety and Professional Services, from providing “conversion therapy.” “Conversion therapy” is widely discredited by experts, but JCRAR blocked and suspended the ban for a total of over three years and could do so again.

A. “Conversion therapy” is harmful and widely discredited.

Sexual Orientation and Gender Identity Change Efforts (SOGICE), also known as “conversion therapy,” is a practice aimed at affecting a patient’s sexual orientation and/or gender identity. It is typically intended

to cause a patient identifying as lesbian, gay, bisexual, transgender, or gender-nonconforming (LGBT) to abandon that identity and adopt and/or exhibit a heterosexual sexual orientation and gender identity consistent with the one assigned to them at birth. Conversion therapy has been scientifically discredited and demonstrated to harm patients. Experts have described the practice as torture.¹ Conversion therapy has included, both historically and today, enforcing rigid gender roles through talk therapy, repeating homophobic or transphobic slurs, isolation from friends and family, “corrective” rape, exorcism, and aversion “therapies” such as using electrical shock devices or nausea-inducing medication to induce a negative response to stimuli associated with being lesbian, gay, bisexual, or transgender.²

It is well-documented that conversion therapy harms LGBT individuals and society. The practice is associated with increased depression, psychological distress, substance use, suicidal thoughts, and suicide attempts as well as lower educational attainment and lower weekly incomes.³ Exposure to conversion therapy has also been associated with an

¹ Mason D. Bracken, *Torture is not protected speech: Free speech analysis of bans on gay conversion therapy*, 63 Washington Univ. in St. Louis J. L. and Pol’y 325 (2020).

² Douglas C. Haldeman, *The practice and ethics of sexual orientation conversion therapy*, 62 Journal of Consulting and Clinical Psychology 221-227 (2014), <https://doi.org/10.1037/0022-006X.62.2.221>.

³ Jake Camp, Silia Vitoratou, & Katharine A. Rimes, *LGBQ+ self acceptance and its relationship with minority stressors and mental health: A systematic literature review*, 49 Archives of Sexual Behavior 2353 (2020), <https://doi.org/10.1007/s10508-020-01755-2>; Anna Forsythe et al, *Humanistic and economic burden of conversion therapy among LGBTQ youths in the United States*, 176 JAMA Pediatrics 493 (2022), <https://doi.org/10.1001/jamapediatrics.2022.0042>; Amy Przeworski, Emily Peterson, & Alexandra Piedra, *A systematic review of the efficacy, harmful effects, and ethical issues related to sexual orientation change efforts*, 28 Clinical Psychology: Science and Practice 81 (2021), <https://doi.org/10.1111/cpsp.12377>; Caitlin Ryan, Russel B. Toomey, Rafael M. Diaz, & Stephen T. Russell, *Parent-initiated sexual orientation change efforts with LGBT adolescents:*

increased likelihood that transgender and gender-diverse youth will attempt suicide or run away from home, as well as disruptions to healthy aging and long-term increased stress, even if the efforts were practiced during childhood or adolescence.⁴ Conversion therapy and its harms are extremely costly for society, as experts estimate that the practice has a total annual cost of \$650.16 million and the economic burden due to the harms is approximately \$9.23 billion.⁵

Mainstream mental health and medical associations have reached a consensus that conversion therapy is harmful and should not be practiced. In addition to NASW, organizations that have formally rejected the practice include: American Academy of Child and Adolescent Psychiatry⁶; American Academy of Pediatrics⁷; American Medical Association⁸; American Psychoanalytic Association⁹; American School Counselor

Implications for young adult mental health and adjustment. 67 *Journal of Homosexuality* 159 (2020), <https://doi.org/10.1080/00918369.2018.1538407>.

⁴ Travis Campbell & Yana van de Meulen Rodgers, *Conversion therapy, suicidality, and running away: An analysis of transgender youth in the U. S.*, 89 *Journal of Health Economics* 09 (2023), <https://doi.org/10.1016/j.jhealeco.2023.102750>; Steven Meanley et al., *Lifetime Exposure to Conversion Therapy and Psychosocial Health Among Midlife and Older Adult Men Who Have Sex With Men*, 60 *The Gerontologist* 1291 (2020), <https://doi.org/10.1093/geront/gnaa069>.

⁵ Anna Forsythe et al, *Humanistic and economic burden of conversion therapy among LGBTQ youths in the United States*, 176 *JAMA Pediatrics* 493 (2022), <https://doi.org/10.1001/jamapediatrics.2022.0042>.

⁶ American Academy of Child & Adolescent Psychiatry, *Conversion Therapy*, (Feb. 2018), https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx.

⁷ American Academy of Pediatrics, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 *Pediatrics* (Aug. 2023), <https://publications.aap.org/pediatrics/article/142/4/e20182162/37381/Ensuring-Comprehensive-Care-and-Support-for?autologincheck=redirected>.

⁸ American Medical Association, *Advocating for the LGBTQ Community*, <https://www.ama-assn.org/delivering-care/population-care/advocating-lgbtq-community> (last visited July 26, 2024).

⁹ American Psychoanalytic Association, *American Psychoanalytic Association Denounces Court Decision on Conversion Therapy*, (Nov. 25, 2020) <https://apsa.org/wp-content/uploads/2022/10/Conversion-Therapy-Statement-1.pdf>.

Association¹⁰; Substance Abuse and Mental Health Services Administration¹¹; American Psychological Association¹²; and, the American Association of Sexuality Educators, Counselors, and Therapists.¹³

Despite the clear, scientific evidence that the practice of conversion therapy is extremely harmful, it is still widely practiced – including in Wisconsin.¹⁴ It was recently estimated that 16,000 LGBT youth would receive conversion therapy from a licensed mental health professional before the age of 18 in states that allow the practice.¹⁵ Wisconsin was long among those states because of JCRAR's veto of § MPSW 20.02(25).

¹⁰ American School Counselor Association, *The School Counselor and Transgender and Nonbinary Youth*, (2022) <https://www.schoolcounselor.org/Standards-Positions/Position-Statements/ASCA-Position-Statements/The-School-Counselor-and-Transgender-Gender-noncon>.

¹¹ Substance Abuse and Mental Health Services Administration, *Ending Conversion Therapy: Support and Affirming LGBTQ Youth* (Oct. 2015), <https://store.samhsa.gov/sites/default/files/sma15-4928.pdf>.

¹² American Psychological Association, *APA Resolution on Gender Identity Change Efforts* (Feb. 2021), <https://www.apa.org/about/policy/resolution-gender-identity-change-efforts.pdf>.

¹³ American Association of Sexuality Educators, Counselors and Therapists (AASECT), *Position on Reparative Therapy*, (Feb. 9, 2017), <https://www.aasect.org/position-reparative-therapy#:~:text=We%20oppose%20any%20%E2%80%9Ccreparative%E2%80%9D%20or,fi%20or%20%E2%80%9Cchanged.%E2%80%9D>.

¹⁴ The Trevor Project, *It's still happening: A report on practitioners of so-called conversion "therapy" in the U.S.*, https://www.thetrevorproject.org/wp-content/uploads/2023/12/FINAL_Its-Still-Happening-Report.pdf (last visited July 24, 2024).

¹⁵ Christy Mallory, Taylor N.T. Brown, & Kerith J. Conron, *Conversion therapy and LGBT youth: Update*, Williams Institute, University of California Los Angeles School of Law (June 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-Update-Jun-2019.pdf>.

B. JCRAR unconstitutionally vetoed the administrative rule banning conversion therapy.

Understanding the harm of conversion therapy, the Wisconsin Chapter of NASW worked with the appropriate State licensing entity, the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board, to add the practice of conversion therapy to the list of “unprofessional conduct” under § MPSW 20.02, applicable to those licensed by the Board (i.e., marriage and family therapists, professional counselors, and social workers). On January 30, 2018, the Board voted to review and revise the rule. Then-Governor Scott Walker approved the Statement of Scope.¹⁶ The Board is authorized to make such rules by Wis. Stat. § 15.08(5)(b) (“Each examining board...[s]hall promulgate rules for its own guidance...and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession”) and Wis. Stat. § 457.03(2) (“Upon the advice of the social worker section...[the examining board shall] promulgate rules establishing a code of ethics to govern the professional conduct of certificate holders and licensees.”).

The rule the Board prepared and ultimately enacted provides that unprofessional conduct includes:

Employing or promoting any intervention or method that has the purpose of attempting to change a person’s sexual orientation or gender identity, including attempting to change behaviors or expressions of self or to reduce sexual or romantic attractions or feelings toward individuals of the same gender. This does not include counseling that assists a client who is seeking to undergo a gender transition or who is in the process of undergoing a gender transition, or counseling that provides a client with acceptance, support, understanding, or that facilitates a client’s coping, social support, and identity exploration or development. Nor does it include counseling in the form of sexual orientation-neutral or gender

¹⁶ See SS 060-18, https://docs.legis.wisconsin.gov/code/scope_statements/all/060_18.

identity-neutral interventions provided for the purpose of preventing or addressing unlawful conduct or unsafe sexual practices, so long as the counseling is not provided for the purpose of attempting to change the client's sexual orientation or gender identity.

Wis. Admin. Code § MPSW 20.02(25).

In January 2020, the Board held a hearing and voted unanimously to forward the rule to Governor Tony Evers and the Legislature.¹⁷ Governor Evers approved the rule on February 27, 2020¹⁸; however, pursuant to Wis. Stat. § 227.19(5), the rule needed approval from JCRAR. On a 6-4 vote, JCRAR recorded an objection to the rule.¹⁹ This blocked the rule. As detailed in the Petition at paragraphs 79–85, JCRAR first blocked the rule from taking effect for over two years. Then, only six weeks after it took effect on December 1, 2022, JCRAR suspended the rule, voting 6-4, on January 12, 2023, to suspend § MPSW 20.02(25) “on the grounds that the provision is arbitrary and capricious and fails to comply with legislative intent.”²⁰ As required by statute, JCRAR then introduced bills supporting the rule's suspension.²¹ Wis. Stat. § 227.26(2)(f). The bills never passed, and the legislative session ended on April 15, 2024.²² When the bills “fail[ed] to

¹⁷ See 771A2 Wis. Admin. Reg. (March 9, 2020),

<https://docs.legis.wisconsin.gov/code/register/2020/771a2/register>; CR 19-166, https://docs.legis.wisconsin.gov/code/chr/all/cr_19_166.

¹⁸ CR 19-166, https://docs.legis.wisconsin.gov/code/chr/all/cr_19_166.

¹⁹ See Joint Committee for Review of Administrative Rules, *Record of Committee Proceedings, Clearinghouse Rule 19-166* (June 25, 2020),

https://docs.legis.wisconsin.gov/2019/related/records/joint/administrative_rules/1558939.

²⁰ See JCRAR, *Record of Committee Proceedings, Review of Administrative Rules* (Jan. 12, 2023),

https://docs.legis.wisconsin.gov/code/register/2023/805a3/register/actions_by_jcrar/actions_taken_by_jcrar_on_january_12_2023_ch_mpsw_20/actions_taken_by_jcrar_on_january_12_2023_ch_mpsw_20.

²¹ AB3, <https://docs.legis.wisconsin.gov/2023/proposals/ab3>; SB4, <https://docs.legis.wisconsin.gov/2023/proposals/sb4>.

²² *Id.*

be enacted,” the conversion therapy ban took effect anew. Wis. Stat. § 227.26(2)(i).

The rule banning conversion therapy was thus blocked for two years and then suspended for 15 months, and under Wis. Stat. § 227.26(2)(im), JCRAR could suspend it again. Such extended and repeated blocks and suspensions exceed the boundaries this Court has previously set. *See SEIU*, 2020 WI 67, ¶81 (“there exists at least some required end point after which bicameral passage and presentment to the governor must occur”).

Six legislators were able to stop an administrative rule banning a known-to-be-harmful practice. Six legislators stopped a rule that was unanimously supported by a thirteen-member professional licensing board²³, approved by a governor who was elected by over 49% of the state’s electorate²⁴, and never blocked by a bill passed by the legislature. This is both unconstitutional and anti-democratic.

The block and suspension of the conversion therapy ban illustrate why rulemaking should be left to administrative agencies. Board members are subject-matter experts qualified to make informed judgments about conversion therapy. The JCRAR members who overrode their judgment lack this expertise.

The legislative committee vetoes of duly enacted § MPSW 20.02(25) bypassed any real check or balance on Legislative power and violated the Constitution.

²³ See Wis. Stat. § 15.405(7c).

²⁴ *Wisconsin Governor Election Results 2018*, Politico, <https://www.politico.com/election-results/2018/wisconsin/governor> (last visited July 26, 2024).

CONCLUSION

NASW and NASW-WI urge the Court to grant review of the third issue in the Petition, and hold that §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d) and (im), authorizing the Joint Committee for Review of Administrative Rules to veto agency rules, as applied to the conversion therapy ban, violate the separation of powers and are therefore unconstitutional and invalid.

Respectfully submitted this 26th day of July 2024.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a nonparty brief filed under s. 809.19(7), produced with a proportional serif font. The length of this brief is 2,478 words.

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