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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 BOARD 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*, SENATOR STEVE NASS *and* REPRESENTATIVE ADAM NEYLON *in their official capacities as co-chairs of the joint committee for review of administrative rules*,
RESPONDENTS,
and
WISCONSIN LEGISLATURE,
INTERVENOR-RESPONDENT.

On Petition For Original Action Before This Court

BRIEF OF RESPONDENTS AND INTERVENOR-RESPONDENT WISCONSIN STATE LEGISLATURE

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TABLE OF CONTENTS

ISSUE PRESENTED....6
INTRODUCTION....7
ORAL ARGUMENT AND PUBLICATION....8
STATEMENT OF THE CASE....8
A. Legislative Review Of Administrative Rules Is Deeply Rooted In Wisconsin History....8
B. Factual And Procedural Background....13
ARGUMENT....17
I. Sections 227.19(5)(c), (d), And (dm) And 227.26(2)(d) And (im) Are Facially Constitutional Under *Martinez* And *SEIU*....17
A. Rulemaking Authority Is A Delegation Of Legislative Power From The Legislature To Administrative Agencies....18
B. JCRAR's Statutory Oversight Authority Over Rulemaking Does Not Facially Violate The Separation Of Powers Or Bicameralism And Presentment Requirements....23
1. JCRAR's Statutory Oversight Authority Over Rulemaking Does Not Facially Violate The Separation Of Powers....23
2. JCRAR's Statutory Oversight Authority Over Rulemaking Does Not Facially Violate Bicameralism And Presentment Requirements....28
C. Petitioners' Various Counterarguments All Fail Under *Martinez* And This Court's Other Binding Precedents....31
II. Petitioners Have Not Met The High Burden For Overturning *Martinez* And *SEIU*....40
CONCLUSION....52

TABLE OF AUTHORITIES

Cases

Att'y Gen. ex rel. Taylor v. Brown,
1 Wis. 513 (1853) 36

Chappy v. LIRC,
136 Wis. 2d 172, 401 N.W.2d 568 (1987) 18

City of Appleton v. Town of Menasha,
142 Wis. 2d 870, 419 N.W.2d 249 (1988) 48

Evers v. Marklein,
2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395 ..... *passim*

Gabler v. Crime Victims Rts. Bd.,
2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384 ..... 39, 40

INS v. Chadha,
462 U.S. 919 (1983) 35, 36, 46

J.F. Ahern Co. v. Wis. State Bldg. Comm'n,
114 Wis. 2d 69 (1983) 49, 50

Johnson Controls, Inc. v. Emps. Ins. of Wausau,
2003 WI 108, 264 Wis. 2d 60,
665 N.W.2d 257 ..... 41, 42, 43, 46

Koschkee v. Taylor,
2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600 ..... 34, 44, 45

Martinez v. DILHR,
165 Wis. 2d 687, 478 N.W.2d 582 (1992) ..... *passim*

Petition of Heil,
230 Wis. 428, 284 N.W. 42 (1939) 39

Rules of Court Case,
204 Wis. 501, 236 N.W. 717 (1931) 20

Service Employees International Union, Local 1 v. Vos,
2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 ..... *passim*

State ex rel. Buell v. Frear,
146 Wis. 291, 131 N.W. 832 (1911) 36, 37

State v. Cole,
2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 25

State v. Lindell,
2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223 42

State v. Wood,
2010 WI 17, 323 Wis. 2d 321, 780 N.W.2d 63 39

Wis. Env't Decade, Inc. v. JCRAR,
73 Wis. 2d 234, 243 N.W.2d 497 (1976) 40

Constitutional Provisions

Wis. Const. art. IV 29

Wis. Const. art. V 29, 30

Statutes And Rules

1959 Wis. Act 537 9

1979 Wis. Sess. Laws 345 11

Acts of 1965, ch. 659 10

Wis. Stat. § 101.02 13

Wis. Stat. § 227.031 (1953) 8

Wis. Stat. § 227.041 (1955) 9

Wis. Stat. § 227.19 ..... *passim*

Wis. Stat. § 227.26 ..... *passim*

Wis. Stat. § 457.03 13

Wis. State Leg., CR 23-007 14

Wis. State Leg., CR 19-166 15

Regulations

Wis. Admin. Code MPSW § 20.02(25) 16, 40, 51

Other Authorities

2021 Assembly Bill 14 15

2021 Senate Bill 31 15

Ben Wilhelm, et al., Cong. Rsch. Serv., RL30240,
Congressional Oversight Manual (2022) 46, 47

Black's Law Dictionary (12th ed. 2024) 19

Erik Gunn, Senate Panel Votes To Kill Building Code, *Wis. Exam'r* (Aug. 11, 2023) 14

JCRAR Executive Session (June 25, 2020) 15

Jillian Slaight, *Rewriting the Rules: Senator David Berger Looks Back on His Legislative Career*, 3 Wis. Hist. Project, Jan. 2021 10

Louis Fisher, Cong. Res. Serv., RL33151, Committee Controls of Agency Decisions (2005) 47, 48

Michael E. Duchek, Legislative Power to Suspend Administrative Rules: A Historical Look, Wis. Lawyer (Sept. 6, 2024) 9, 10

Orrin L. Helstad & Earl Sachse, *A Study of Administrative Rule Making in Wisconsin*, 1954 Wis. L. Rev. 368 (1954) 8

Record of Committee Proceedings, Committee on Public Benefits (Apr. 29, 2020) 15

Record of Committee Proceedings, JCRAR (Jan. 12, 2023) 16

Record of Committee Proceedings, JCRAR (Sept. 29, 2023) .. 14, 15

Report of the Wisconsin Legislative Council, in Volume II, Conclusions and Recommendations of the Committee on Administrative Rule Making (Dec. 1954) 9

State of Wisconsin Senate Journal, 105th Reg. Sess. (Mar. 15, 2022) 16

State of Wisconsin Senate Journal, 105th Reg. Sess. (Nov. 28, 2022) 16

ISSUE PRESENTED

Whether this Court should overturn *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), and *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, and hold that Wis. Stat. §§ 227.26(2)(d) and (im), as well as §§ 227.19 (5)(c), (d), and (dm), facially violate the Wisconsin Constitution's separation-of-powers doctrine and/or bicameralism-and-presentment requirements.

INTRODUCTION

This Court in *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), unanimously held that the authority of the Legislature's Joint Committee for Review of Administrative Rules ("JCRAR") to suspend agency rules was constitutional because rulemaking—the power to make legally binding requirements—is primarily a legislative power. As this Court later explained in applying *Martinez* in *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*"), "when an agency promulgates a rule, it is exercising a legislative power." *Id.* ¶ 98 (majority op. of Kelly, J.) (brackets omitted; citations omitted). "Because this capability [to make agency rules] is only on loan [from the Legislature], agencies necessarily remain subordinate to the legislature with regard to their rulemaking authority." *Id.* (citations omitted).

Petitioners now ask this Court to upend retroactively decades of the Legislature's broad delegation of *legislative* rulemaking authority to administrative agencies, which delegations the Legislature never would have granted if it could not rely upon *Martinez*'s unanimous blessing of JCRAR's oversight authority over rulemaking. They also request that this Court end the provisions that briefly pause the promulgation of specific rules while the Legislature decides whether to act on them. It would be a grave affront to the separation of powers and interbranch comity for this Court now to overturn *Martinez* and invalidate the crucial

JCRAR oversight upon which the Legislature relied, while otherwise leaving those delegations of legislative power to administrative agencies in place. This Court should keep its unanimous word to the Legislature and the People in *Martinez* and *SEIU* and reject Petitioners' deeply disruptive position.

ORAL ARGUMENT AND PUBLICATION

This Court has scheduled oral argument for this case for January 16, 2025. By granting the Petition For Original Action, this Court has indicated that this case is appropriate for publication.

STATEMENT OF THE CASE

A. Legislative Review Of Administrative Rules Is Deeply Rooted In Wisconsin History

1. More than seventy years ago, the Legislature first codified its power to disapprove and void any rule by joint resolution. Wis. Stat. § 227.031 (1953). That 1953 enactment established a joint special legislative committee to study "problems relating to the rule-making powers and activities of administrative agencies." *Id.* § 227.001(1) (1953). Lawmakers created the committee because neither they nor the public understood the full scope of each agency's rulemaking powers or the procedures used to enact administrative rules. Orrin L. Helstad & Earl Sachse, *A Study of Administrative Rule Making in Wisconsin*, 1954 Wis. L. Rev. 368, 371 (1954). A summary of the committee's post-study recommendations remarked that constituents would often complain to their representatives about "laws" that,

upon further investigation, were actually administrative rules wielding the force of law. *Report of the Wisconsin Legislative Council*, in Volume II, Conclusions and Recommendations of the Committee on Administrative Rule Making (Dec. 1954).

Although that authority to void agency rules by joint resolution lapsed, the Legislature created a joint legislative committee to oversee agency rulemaking—the predecessor to JCRAR. Wis. Stat. § 227.041 (1955). Although it only possessed advisory powers, the final bill noted that "its advice no doubt will carry considerable weight." *Id.* § 227.041 (committee note). This committee could compel agencies to hold hearings to consider rule changes. 1959 Wis. Act 537 (amended and recodified at Wis. Stat. § 227.26(3)).

The unparallelled growth of administrative rulemaking over subsequent years sparked increased legislative scrutiny to temper agency overreach. As the Speaker of the Assembly remarked in 1964, "[t]he set of administrative rules is a bigger set of books than the statute books." Michael E. Duchek, Legislative Power to Suspend Administrative Rules: A Historical Look, Wis. Lawyer (Sept. 6, 2024).[1] Another lawmaker lamented that agencies had engaged in "backdoor law making" by promulgating a rule that, when in the form of a bill, had failed to receive legislative approval in multiple

[1] Available at https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=97&Issue=8&ArticleID=30626&source=carousel (all websites last visited Dec. 6, 2024).

sessions. *Id.* And some agency rules seemed "purposeless or outright illogical," according to the JCRAR chair from 1975 to 1982. Jillian Slaight, *Rewriting the Rules: Senator David Berger Looks Back on His Legislative Career*, 3 Wis. Hist. Project, Jan. 2021, at 8.[2] For example, an agency rule denied an adoption to a couple on the grounds that they were "obese." *Id.*

In 1966, the Legislature transformed the 1955 joint committee into JCRAR, with the mandate to "promote adequate and proper rules by agencies and an understanding upon the part of the public respecting such rules." Acts of 1965, ch. 659, § 2 (originally seating four senators and five assemblymen on JCRAR). Most notably, the Legislature gave JCRAR the power to "suspend" promulgated administrative rules upon a vote of at least six of its members. *Id.* Following such a suspension, the law required JCRAR to then introduce a bill in the Legislature "to repeal the suspended rule." *Id.* If the bill failed, the suspended rule would be revived and could not be suspended again. *Id.* But if the bill passed (thus repealing the suspended rule), the agency could not re-promulgate the rule until a new law "specifically authorize[d] the adoption of that rule." *Id.*

2. After a decade of JCRAR exercising its power to suspend post-promulgation rules, the Legislature passed a law giving JCRAR the additional power to object to rules

[2] Available at https://legis.wisconsin.gov/LRB/media/lf3ouclw/rewriting_the_rules_berger.pdf.

before promulgation. That new law—passed over the Governor's veto—required agencies to notify and provide reports to both legislative chambers when a proposed rule reached final draft form. 1979 Wis. Sess. Laws 345. The law also created procedures for standing committees to review and object to proposed rules. *Id.* at 345–46. If a standing committee lodged an objection, JCRAR would receive a referral of the proposed rule for a thirty-day review period. *Id.* at 346. JCRAR could then object to the proposed rule itself for one of six statutorily defined reasons still found in the law today, *id.*, as described further below, *infra* p.12. Similar to the process for suspending post-promulgation rules, JCRAR then had thirty days after objecting to a proposed rule to introduce bills to support the objection. *Id.* at 346. If such bills failed, the agency could then promulgate the proposed rule. *Id.* But if a bill became law, the agency could not promulgate the proposed rule until a new law "specifically authorize[d]" it. *Id.*

3. Today, consistent with this longstanding history, JCRAR has the power to review and object to proposed rules, Wis. Stat. § 227.19(5); to lodge "indefinite objections" to proposed rules prior to their promulgation, *id.* § 227.19(5)(dm); and to suspend promulgated rules, *id.* § 227.26(2), including "multiple" times, *id.* § 227.26(2)(im). JCRAR's exercise of these powers follows specific statutory procedures, discussed immediately below.

a. To begin, JCRAR's review of a proposed rule starts with a referral of an objection to the proposed rule from a standing committee. *Id.* § 227.19(5)(a). While JCRAR considers such an objection, there is "promulgation pause" prohibiting the agency from promulgating the proposed rule, thereby allowing JCRAR time to consider whether to approve, object, or take no action on the rule. *Id.* § 227.19(5)(c).

b. JCRAR may lodge a regular objection to a proposed rule, based on six enumerated reasons. *Id.* § 227.19(5)(d). Those reasons are: (1) "[a]n absence of statutory authority"; (2) "[a]n emergency relating to public health, safety, or welfare"; (3) "[a] failure to comply with legislative intent"; (4) "conflict with state law"; (5) "[a] change in circumstances since enactment of the earliest law upon which the proposed rule is based"; or (6) "[a]rbitrariness and capriciousness, or imposition of an undue hardship," Wis. Stat. § 227.19(4)(d). Within thirty days of a regular objection, JCRAR must introduce bills to support the objection. *Id.* § 227.19(5)(e). If the bills fail, the agency may promulgate the rule. *Id.* § 227.19(5)(f). But if a bill becomes law, the agency may not promulgate the proposed rule until "a subsequent law specifically authorizes its promulgation." *Id.*

c. Separately, JCRAR may block a proposed rule by lodging an "indefinite objection." *Id.* § 227.19(5)(dm). Similar to a regular objection, an indefinite objection prevents the proposed rule from taking effect. *Id.* § 227.19(dm). However, unlike a regular objection, an indefinite objection requires the

Legislature to enact a bill to authorize promulgation of the objected-to proposed rule. *Id.* § 227.19(em). JCRAR must rest an indefinite objection on one of the same six, enumerated reasons provided in Wis. Stat. § 227.19(4)(d).

d. Finally, JCRAR may temporarily suspend a promulgated rule, again based on the six reasons in Section 227.19(4)(d), after holding a public hearing. *Id.* § 227.26(2)(d). Then, JCRAR must introduce a bill in each house of the Legislature within thirty days to continue the rule's suspension. *Id.* § 227.26(2)(f). If one of these bills becomes law, the rule is repealed; if both bills fail, the rule becomes effective again. *Id.* § 227.26(2)(i). JCRAR may suspend a rule "multiple times." *Id.* § 227.26(2)(im).

B. Factual And Procedural Background

1. This case arises out of JCRAR's suspension of a rule from the Department of Safety and Professional Services ("DSPS") and a rule from the Marriage And Family Therapy, Professional Counseling, and Social Work Examining Board (the "Board"). The Legislature delegated to DSPS the power to promulgate rules regarding construction codes, *id.* § 101.02(1)(b), and to the Board (housed within DSPS) the power to promulgate rules governing the conduct of social workers, *id.* § 457.03(2). However, the Legislature subjected the promulgation powers of DSPS and the Board, respectively, to JCRAR review. *Id.* § 227.19(5).

a. In June 2023, DSPS proposed Clearinghouse Rule 23-007, which sought to change the state commercial building code in line with regional and national changes to

construction and fire prevention practices, as well as energy conservation provisions. Wis. State Leg., CR 23-007.[3] During its review of CR 23-007, JCRAR found that the economic impact analysis for the rule violated Wis. Stat. § 227.137(3)(b)1, which requires the agency to quantify the proposed rule's costs reasonably expected to be borne by businesses, local governments, and individuals in a single dollar figure. JCRAR Record of Committee Proceedings (Sept. 29, 2023).[4] Given this failing from DSPS, JCRAR members expressed concern that CR 23-007 would inflict increased costs onto a rapidly inflating property market. Erik Gunn, Senate Panel Votes To Kill Building Code, *Wis. Exam'r* (Aug. 11, 2023); *see* JCRAR Record of Committee Proceedings, (Sept. 29, 2023). JCRAR lodged an indefinite objection to the proposed rule on the grounds that it failed to comply with legislative intent, conflicted with state law, and was arbitrary and capricious. Wis. Stat. § 227.19(4)(d)(3)–(4), (6); JCRAR Record of Committee Proceedings (Sept. 29, 2023).

b. In February 2020, the Board proposed Clearinghouse Rule 19-166, defining as "unprofessional conduct" any method of treatment that has the purpose of attempting to change a person's sexual orientation or gender identity.[5] Wis. State

[3] Available at https://docs.legis.wisconsin.gov/code/chr/all/cr_23_007 (all websites last accessed December 6, 2024).

[4] Available at https://docs.legis.wisconsin.gov/2023/related/records/joint/administrative_rules/1748962s.

[5] Sometimes called "conversion therapy."

Leg., CR 19-166.[6] During the Legislature's review of CR 19-166, members raised concerns that the Board lacked authority to issue the rule and that the rule unlawfully threatened therapists' licenses, free speech rights, and religious rights. *See* JCRAR Executive Session, at 1:56:40-1:57:20 (June 25, 2020).[7]

On June 25, 2020, JCRAR lodged a temporary objection to CR 19-166 under Wis. Stat. § 227.19(5)(d), Record of Committee Proceedings, JCRAR (June 25, 2020),[8] upon a recommendation from a standing committee, *see* Record of Committee Proceedings, Committee on Public Benefits (Apr. 29, 2020).[9] Six months later, JCRAR introduced bills to support its objection. 2021–22 Wis. State Leg., Assembly Bill 14[10]; 2021–22 Wis. State Leg., Senate Bill 31[11]; Wis. Stat. § 227.19(5)(g). However, the bills eventually lapsed at the close of the legislative session, allowing the Board's proposed rule to go into effect on December 1, 2022. State of Wisconsin

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[6] Available at https://docs.legis.wisconsin.gov/code/chr/all/cr_19_166.

[7] Available at https://wiseye.org/2020/06/25/joint-committee-for-review-of-administrative-rules-53/.

[8] Available at https://docs.legis.wisconsin.gov/2019/related/records/joint/administrative_rules/1558939.pdf.

[9] Available at https://docs.legis.wisconsin.gov/2019/related/records/senate/public_benefits_licensing_and_state_federal_relations/1552480.

[10] Available at https://docs.legis.wisconsin.gov/2021/proposals/ab14.

[11] Available at https://docs.legis.wisconsin.gov/2021/proposals/sb31.

Senate Journal, 105th Reg. Sess. (Mar. 15, 2022)[12]; State of Wisconsin Senate Journal, 105th Reg. Sess. (Nov. 28, 2022).[13]

After the Board's rule took effect, JCRAR renewed its review, held a public hearing, and temporarily suspended the rule on the grounds that it was arbitrary and capricious and failed to comply with legislative intent. Record of Committee Proceedings, JCRAR (Jan. 12, 2023).[14] While JCRAR introduced bills to repeal the rule, 2023 Assembly Bill 3 and 2023 Senate Bill 4, both bills terminated in committee without further action at the end of the legislative session, on April 15, 2024. *Id.* Thus, the Board's rule is now in effect. Wis. Admin. Code MPSW § 20.02(25).

2. In October 2023, Petitioners filed their Petition For Original Action raising three issues, with each issue alleging that the statutory authority of a legislative committee violated the Wisconsin Constitution's separation of powers. Pet.34–40. This Court resolved the first issue in *Evers v. Marklein*, 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395 ("*Marklein I*"), concluding that the authority of the Legislature's Joint Committee on Finance to review

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[12] Available at https://docs.legis.wisconsin.gov/2021/related/journals/senate/20220315/_45.

[13] Available at https://docs.legis.wisconsin.gov/2021/related/journals/senate/20221128/_14.

[14] Available a: 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.

appropriations actions interfered with the Executive Branch's "core function" of carrying out the law. *Id.* ¶ 19.

On October 9, 2024, this Court ordered that it would consider the third issue in the Petition: whether JCRAR's "veto provisions violate the separation of powers." Oct. 9, 2024 Order at 2, *Evers v. Marklein*, No.2023AP2020-OA (Wis.). More specifically, the Petition's third issue challenges the constitutionality of JCRAR's oversight authority over agency rulemaking under Section 227.19(5)(c), (d), and (dm), and Section 227.26(2)(d) and (im). Pet.8; *see supra* pp.11–13 (describing this authority). Petitioners claimed that those provisions were facially unconstitutional—that is, invalid as to all administrative-agency rulemaking—or, alternatively, unconstitutional as to DSPS's rulemaking authority over commercial building standards and the Board's rulemaking authority over therapist ethics standards. Pet.38, 40.[15]

ARGUMENT

I. Sections 227.19(5)(c), (d), And (dm) And 227.26(2)(d) And (im) Are Facially Constitutional Under *Martinez* And *SEIU*

Petitioners' facial challenge to JCRAR's oversight authority over agency rulemaking under Section 227.19(5)(c), (d), and (dm), and Section 227.26(2)(d) and (im) "seek[s] to strike down application of the[se] challenged laws in their entirety, rather than as applied to a given party or a set of

[15] Also in this order, the Court dismissed the second issue relating to the Joint Committee on Employment Relations. Oct. 9, 2024 Order at 1, *Marklein*, No.2023AP2020-OA.

circumstances." *SEIU*, 2020 WI 67, ¶ 4; *see also id.* ¶ 38. Petitioners thus face the "tall task" of showing that these statutes "cannot be enforced under any circumstances" to succeed on their facial claim. *Marklein I*, 2024 WI 31, ¶ 8 (citations omitted); *accord SEIU*, 2020 WI 67, ¶ 39. So, if "there are constitutional applications of these laws," Petitioners' facial challenge "cannot succeed." *SEIU*, 2020 WI 67, ¶ 72; *see also id.* ¶ 83. Petitioners also must overcome the "strong presumption that a legislative enactment is constitutional" in order to succeed here, *Martinez*, 165 Wis. 2d at 695 (citations omitted), with any doubt about a statute's constitutionality "resolved in favor of [its] constitutionality," *Chappy v. LIRC*, 136 Wis. 2d 172, 185, 401 N.W.2d 568 (1987) (citation omitted).

A. Rulemaking Authority Is A Delegation Of Legislative Power From The Legislature To Administrative Agencies

1. In *Martinez*, this Court unanimously held that JCRAR's rule-suspension powers were constitutional. 165 Wis. 2d at 691, 702. As *Martinez* explained, an agency's rule-promulgation power is a "[l]egislative power," 165 Wis. 2d at 697—that is, the power to make new legal requirements that are binding on private parties, *see Law*, Black's Law Dictionary (12th ed. 2024). The Legislature simply "delegate[s]" this legislative power to executive agencies. *Martinez*, 165 Wis. 2d at 698. So, given that "rule-making authority" is "delegate[d]" to the agency out of the Legislature's legislative power, "[i]t is appropriate for the

legislature to . . . retain[ ] the right to review any rules promulgated under the delegated power." *Id.*

a. *Martinez* arose from JCRAR's suspension of a rule promulgated by the Department of Industry, Labor and Human Relations ("DILHR"), which rule "created a new category of employee" who could be paid a below-minimum wage for a certain period. *Id.* at 692. JCRAR voted to suspend this promulgated rule on several grounds enumerated in Section 227.26(2)(d). *Id.* at 692–93. Nevertheless, DILHR advised employers to ignore that JCRAR suspension and enforce the rule, which worked to the detriment of certain migrant workers. *Id.* Those migrant workers sued, and DILHR ultimately argued that JCRAR's suspension violated the Constitution's separation-of-powers doctrine and bicameralism-and-presentment requirements. *Id.* at 694.

b. *Martinez* unanimously rejected DILHR's constitutional arguments. *Id.* at 695–702.

i. Beginning with the separation of powers, *Martinez* explained that an agency's rulemaking power is a "*[l]egislative power*" that is "delegated" to the agency by the Legislature. *Id.* at 697 (emphasis added). "[A]dministrative agencies are creations of the legislature" and "can exercise only those powers granted by the Legislature." *Id.* at 697. Agencies have "no inherent constitutional authority to make rules," and what "rule-making powers" they do have by statute "can be repealed by the legislature." *Id.* at 698.

Martinez then explained that "[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.* (emphasis added) (citing *Rules of Court Case*, 204 Wis. 501, 513, 236 N.W. 717 (1931)). It is "incumbent on the legislature, pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making," as this ensures that "the people of this state, through their elected representatives, will continue to exercise a significant check on the activities of non-elected agency bureaucrats." *Id.* at 701.

JCRAR's rule-suspension power under Section 227.26(2)(d) "set[s] forth adequate standards for JCRAR to follow when exercising its powers," including by setting forth "the grounds upon which JCRAR may temporarily suspend a rule." *Id.* at 697–98; *see supra* pp.11–13.

Given these separation-of-powers principles, *Martinez* ultimately concluded that agency rulemaking is a delegation of the Legislature's "[l]egislative power" to the Executive Branch, so it is "appropriate" for that delegation to come with the Legislature's "right to review any rules promulgated." 165 Wis. 2d at 697–98. So, by definition, the Legislature's "right to review," *id.* at 698, "does not unduly burden or substantially interfere with the [Executive Branch's] role and powers," *id.* at 696–97 (citations omitted).

ii. Moving to bicameralism and presentment, *Martinez* explained that JCRAR's suspension of a rule need not comply with "bicameral passage" requirement or "the presentment clause" in the Constitution. *Id.* at 699–700. Although the power to issue administrative rules is a delegated legislative power, *id.* at 698, "[i]t is understood that an administrative rule is not legislation as such," which is enough to avoid bicameralism-and-presentment requirements, *id.* at 699.

2. This Court's decision in *SEIU* unanimously applied *Martinez*'s separation-of-powers principles to uphold Section 227.26(2)(im)'s allowance for "multiple suspensions of administrative rules" against a facial constitutional challenge. *SEIU*, 2020 WI 67, ¶¶ 12, 78–83; *see also id.* ¶ 164 n.2 (Dallet, J., concurring in part, dissenting in part).

a. As an initial matter, *SEIU* rejected an argument from the Attorney General—who had joined in the facial challenge to Section 227.26(2)(im), *id.* ¶ 19—that the Court should adopt a "more lenient" facial-challenge standard that allows the Court to "strike down [ ] laws in their entirety" despite the "existence of constitutional applications of the challenged provisions," *id.* ¶¶ 46–47. That position, this *SEIU* majority explained, was "contrary to an appropriate exercise of judicial power." *Id.* ¶ 47. Thus, *SEIU* reaffirmed this Court's "clear and [ ] longstanding" facial-challenge standard that requires the challenger to show that "all applications" of the [challenged law] are unconstitutional." *Id.* ¶ 48.

b. Turning to JCRAR's multiple-rule-suspension power, *SEIU* unanimously held that it facially complied with the separation of powers under *Martinez*. *SEIU*, 2020 WI 67, ¶¶ 12, 78–83; *see also id.* ¶ 164 n.2 (Dallet, J., concurring in part and dissenting in part). Thus, *SEIU* reaffirmed that "rule-making authority" is a "delegat[ion]" of legislative "power" from the Legislature, and that it is "appropriate" for the Legislature to "retain[ ] the right to review any rules promulgated under the delegated power." *Id.* ¶ 80 (quoting *Martinez*, 165 Wis. 2d at 698); *accord id.* ¶ 98 (majority op. of Kelly, J.). For example, "[t]he legislature can establish the procedures by which an agency promulgates rules"; "may limit or retract its delegation of rulemaking authority"; and may "review rules prior to implementation." *Id.* ¶ 79 (majority op. of Hagedorn, J.) (citations omitted). *SEIU* then held that Section 227.26(2)(im) was facially consistent with the Legislature's agency-oversight authority, as at least one application—the use of "two three-month suspensions"—"fits comfortably within . . . *Martinez*." *Id.* ¶ 83.

c. Justice Kelly's separate majority opinion in *SEIU* likewise reaffirmed *Martinez*'s separation-of-powers holdings in the context of addressing the constitutionality of certain other provisions. *Id.* ¶¶ 98, 130 (majority op. of Kelly, J.). In particular, Justice Kelly's majority opinion reiterated that "*Martinez* related to the legislature's ability to govern the rule-making authority—that is, the legislative power—it delegates to administrative agencies." *Id.* ¶ 130. With respect

to that power, "[t]he legislature undeniably has *plenary authority* to govern administrative agencies' exercise of their delegated rule-making power because the legislature could simply choose to revoke it altogether." *Id.* (citing *Martinez*, 165 Wis. 2d at 698) (emphasis added).

B. JCRAR's Statutory Oversight Authority Over Rulemaking Does Not Facially Violate The Separation Of Powers Or Bicameralism And Presentment Requirements

1. JCRAR's Statutory Oversight Authority Over Rulemaking Does Not Facially Violate The Separation Of Powers

Neither JCRAR's pre-promulgation objection powers under Section 227.19 nor its post-promulgation suspension powers under Section 227.26 facially violate the Wisconsin Constitution's separation-of-powers doctrine.

a. *JCRAR's regular objection authority under Wis. Stat. § 227.19(5)(d)*. Under Section 227.19(5)(d), JCRAR may object to a proposed rule, in whole or in part, based on the six grounds in Section 227.19(4)(d). Within thirty days, JCRAR must introduce bills to support that objection. Wis. Stat. § 227.19(4)(e). If the bills are not enacted, the agency may promulgate the proposed rule. *Id.* § 227.19(5)(f). But if either bill becomes law, the agency may not promulgate the proposed rule "unless a subsequent law specifically authorizes its promulgation." *Id.*

Following *Martinez* and *SEIU*, JCRAR's power to lodge a regular objection to a proposed rule is appropriate legislative oversight over the rulemaking power that the

Legislature has delegated to agencies. *Martinez*, 165 Wis. 2d at 697; *SEIU*, 2020 WI 67, ¶ 98 (majority op. of Kelly, J.). As explained, "when an agency promulgates a rule, it is exercising a legislative power"—not an executive power. *SEIU*, 2020 WI 67, ¶ 98 (majority op. of Kelly, J.) (citations omitted); *Martinez*, 165 Wis. 2d at 697–98. Thus, it is "appropriate" that the Legislature—through JCRAR—has the "right to review any rules promulgated under the delegated power," *Martinez*, 165 Wis. 2d at 697–98, and the exact same reasoning applies to JCRAR's power to object to proposed rules, *see id.* at 696–97.

Further, JCRAR's power to lodge a regular objection to a proposed rule is facially constitutional because it contains "adequate standards" and "does not unduly burden or substantially interfere with" the Executive Branch in at least some circumstances. *Martinez*, 165 Wis. 2d at 696–97 (citations omitted). JCRAR may only object for specific reasons, Wis. Stat. § 227.19(4)(d), and its objection is time-limited, *id.* §§ 227.19(5)(e), (f). A JCRAR objection to a proposed rule that is made for a statutorily authorized reason and that is time-limited in no way burdens or interferes with an agency's rulemaking authority, *see Martinez*, 165 Wis. 2d at 696–97, which is sufficient to defeat Petitioners' facial challenge here, *State v. Cole*, 2003 WI 112, ¶ 30, 264 Wis. 2d 520, 665 N.W.2d 328.

b. *JCRAR's indefinite objection authority under Wis. Stat. § 227.19(5)(dm).* Under Section 227.19(5)(dm), JCRAR

may lodge an "indefinite objection" to a proposed rule, in whole or in part. As with a regular objection, JCRAR must ground an indefinite objection in the criteria under Section 227.19(4)(d). Unlike a temporary objection, JCRAR need not introduce bills to support an indefinite objection. Wis. Stat. § 227.19(5)(em). However, any member of the Legislature may introduce a bill to authorize promulgation of the objected-to proposed rule. *Id.* § 227.19(5)(em), (fm).

At the very minimum, JCRAR's authority under Section 227.19(5)(dm) is constitutional where JCRAR issues an indefinite objection but the Legislature shortly thereafter authorizes the proposed rule by passing a bill, *supra* pp.11–13, which is enough to defeat the facial challenged here, *SEIU*, 2020 WI 67, ¶¶ 12, 81–83. Again, agency rulemaking is a delegation of "[l]egislative power" to executive agencies, and so it is "appropriate" for the Legislature to maintain oversight over an agency's use of that delegated power, so long as there are adequate "safeguards." *Martinez*, 165 Wis. 2d at 697–98; *supra* pp.11–13. At least when JCRAR lodges an indefinite objection with a statutory reason and that objection has limited effect (due to the Legislature's timely passage of a bill allowing the promulgation of the proposed rule, *id.* §§ 227.19(5)(em), (fm)), Section 227.19(5)(dm) contains sufficient "safeguards" that do not "unduly burden or substantially interfere with the [Executive Branch's] role and powers," *Martinez*, 165 Wis. 2d at 696–97 (citations omitted).

c. *The "promulgation pause" under Wis. Stat. § 227.19(5)(c)*. Under Section 227.19(5)(c), an agency may not promulgate a proposed rule while JCRAR considers an objection to the proposed rule from a standing committee. Wis. Stat. §§ 227.19(5)(b)1, (5)(c). This "promulgation pause" automatically expires at the end of the JCRAR review period, which initially lasts for thirty days, *id.* §§ 227.19(5)(b)1, (5)(c), but may be extended under certain circumstances, *id.* § 227.19(5)(b)1–3.[16] Regardless of any extension, a promulgation pause ceases before the next legislative session convenes. *Id.* § 227.19(5)(b)4. The promulgation pause also ends when JCRAR lodges any objection. *See id.* § 227.19(5)(c).

The "promulgation pause" is another valid exercise of the Legislature's oversight authority over agency rulemaking under *Martinez* and *SEIU*, which "does not unduly burden or substantially interfere with the [Executive Branch's] role and powers," and so does not facially violate the separation of powers. *Martinez*, 165 Wis. 2d at 696–97 (citations omitted). Indeed, the "promulgation pause" clearly provides adequate "safeguards" in at least some circumstances, including where the pause is limited in time. *See id.*; *see also infra* p.35. So, because the "promulgation pause" does not "unduly burden or substantially interfere" with executive power in all circumstances, it is facially constitutional. *Id.*

[16] The promulgation pause includes a 30-day committee review period and a 30-day JCRAR review period that automatically expire unless a legislative procedure extends the review period. Wis. Stat. §§ 227.19(4)(b)(1), (5)(b).

d. *JCRAR's temporary suspension authority under Wis. Stat. § 227.26(2)(d).* Under Section 227.26(2)(d), JCRAR may suspend a promulgated rule, but "only on the basis of testimony in relation to that rule at a public hearing" and only for the reasons specified in Section 227.19(4)(d). As with a regular objection, JCRAR must, within thirty days of a temporary suspension, introduce bills to support the suspension. Wis. Stat. § 227.26(2)(f). If the bill fails to become law, then the promulgated rule remains in effect. *Id.* § 227.26(2)(i). If either bill becomes law, "the rule is repealed and may not be promulgated again unless a subsequent law specifically authorizes such action." *Id.*

There are at least some constitutional applications of Section 227.26(2), meaning this provision facially complies with the separation of powers. As explained in *Martinez*, 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." 165 Wis. 2d at 701. Thus, at the very minimum, JCRAR's temporary rule suspension authority contains "sufficient procedural safeguards" to be a constitutional exercise of the Legislature's rulemaking-oversight authority where the suspension is based on an enumerated reason, is limited in nature, and is supported by the Legislature. *See id.* at 701–02.

e. *JCRAR's multiple suspension authority under Wis. Stat. § 227.26(2)(im).* Finally, Section 227.26(2)(im) permits JCRAR to suspend a rule multiple times. As with any

suspension, JCRAR may suspend a rule "only on the basis of testimony in relation to that rule received at a public hearing" and only for the reasons specified in Section 227.19(4)(d). Wis. Stat. § 227.26(2)(d). And within thirty days of any such additional suspension, JCRAR must introduce bills to support the suspension, *id.* § 227.26(2)(f), with rule remaining in effect if the bills fail to become law, *id.* § 227.26(2)(i). If a bill does become law, "the rule is repealed and may not be re-promulgated again unless a subsequent law specifically authorizes such action." *Id.*

SEIU already held that JCRAR's authority to issue multiple rule suspensions is constitutional at least where JCRAR only suspends a rule for a second time. 2020 WI 67, ¶ 82. That is, a combined "six-month . . . delay" due to two JCRAR suspensions does not "unduly burden or substantially interfere" with executive authority, as it "fits comfortably" within *Martinez*. *Id.* Thus, because Section 227.26(2)(d) also has at least one constitutional application, it too is facially constitutional. *Martinez*, 165 Wis. 2d at 696–97.

2. JCRAR's Statutory Oversight Authority Over Rulemaking Does Not Facially Violate Bicameralism And Presentment Requirements

For similar reasons, JCRAR's rule-making oversight authority does not facially violate the Wisconsin Constitution's bicameralism-and-presentment requirements.

A. Article IV, Section 17 establishes the bicameralism requirement for the passage of laws, providing that the Senate and the Assembly must approve a bill before it may

become law. Wis. Const. art. IV, § 17(1)–(2); *accord* Wis. Const. art. IV, § 1 ("The legislative power shall be vested in a senate and assembly."). Article V, Section 10 establishes the presentment requirement, stating that "[e]very bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor." Wis. Const. art. V, § 10(1)(a). "If the governor approves and signs the bill, the bill shall become law." Wis. Const. art. V, § 10(1)(b). "If the governor rejects the bill, the governor shall return the bill" to the Legislature, Wis. Const. art. V, § 10(2)(a), which may override the Governor's veto by a two-thirds vote, *id.*

Martinez held that the Constitution's bicameralism and presentment requirements do not apply to JCRAR's power to suspend administrative rules, in an exercise of the Legislature's appropriate oversight over rulemaking, 165 Wis. 2d at 699–700. That is because bicameralism and presentment attach to "legislation as such," but "it is understood that an administrative rule is not legislation as such"—although an agency's rule-promulgating power is delegated legislative power. *Id.*; *accord* Wis. Const. art. V, § 10(1)(a) (providing only that "[e]very *bill* which shall have passed the legislature shall, before it becomes a law, be presented to the governor" (emphasis added)). Thus, neither bicameralism nor presentment apply to JCRAR's suspension of rules. *Id.*

B. Here, as in *Martinez*, JCRAR's oversight authority over rulemaking does not facially violate bicameralism-and-

presentment requirements. Instead, as in *Martinez*, JCRAR's authority here is part of the Legislature's "appropriate" rulemaking oversight authority that does not trigger bicameralism and presentment. 165 Wis. 2d at 698.

Beginning with JCRAR's suspension powers, they do not facially violate bicameralism and presentment under *Martinez*. JCRAR's suspension powers operate to suspend only a promulgated *administrative rule*, consistent with the Legislature's "appropriate" oversight authority over agency rulemaking. *Martinez*, 165 Wis. 2d at 698. "[A]n administrative rule is not legislation as such," *id.* at 699, and so a suspension of such a rule by JCRAR need not comply with bicameralism and presentment—at least in the context of one or two suspensions, followed by a vote of the Legislature, *see SEIU*, 2020 WI 67, ¶ 81.

JCRAR's objection powers clearly show that the Constitution's bicameralism and presentment requirements do not apply. This JCRAR authority applies only to *proposed* rules, which by definition lack the "force of law." *See id.* ¶ 79. So, because promulgated rules—which do have the "force of law," *id.* (citation omitted)—are not "legislation as such," *Martinez*, 165 Wis. 2d at 699, proposed rules are obviously not "legislation as such" either, *id.* Thus, because *Martinez* does not require bicameralism and presentment for at least some suspensions of promulgated rules, *id.*, bicameralism and presentment are not required for at least some objections to

proposed rules, such as a time-limited objection followed by a supporting vote of the Legislature. *See supra* pp.23–28.

Finally, nothing in *Marklein I* changes this analysis under *Martinez* or *SEIU*. *Marklein I* only briefly addresses the constitutional requirements of bicameralism and presentment, in a single paragraph, which paragraph did not cite or even discuss *Martinez* or *SEIU* in any way. *See Marklein I*, 2024 WI 31, ¶ 13.

C. Petitioners' Various Counterarguments All Fail Under *Martinez* And This Court's Other Binding Precedents

This Court's decisions in *Martinez* and *SEIU* answer all of the various contrary arguments that Petitioners raise in their Opening Brief.

First, consistent with *Marklein I*, this Court should again reject Petitioners' attempt to weaken the standard of review applicable to constitutional challenges in separation-of-powers cases. Br.36. Changing this standard would not just require overturning *SEIU*, as suggested by Petitioners, Br. 37, but also *Marklein I* and *Martinez*. In *Martinez*, this Court rejected the Attorney General's similar argument, concluding that the relevant statute is entitled to "a strong presumption that [it] is constitutional." 165 Wis. 2d at 695. This Court again rejected the argument in *SEIU*. 2020 WI 67, ¶¶ 44–45; *see also* Attorney General's Response Brief at 11, *SEIU v. Vos*, 393 Wis.2d 38 (2020) (No. 2019AP614), 2019 WL 4645564, at *11 (arguing that there is no presumption of constitutionality in separation-of-powers challenges);

Attorney General's Supplemental Brief at 2–5, *SEIU v. Vos*, 393 Wis.2d 38 (2020) (No. 2019AP614) (Nov. 12, 2019) (arguing that the Court should strike down the relevant provisions "even if it concludes that those provisions can constitutionally applied" in certain circumstances). As the *SEIU* Court explained, "facial challenges [are] 'disfavored,' and the type of constitutional attack that raises the risk of judicial overreach." 2020 WI 67, ¶ 40 (citation omitted). The beyond-a-reasonable-doubt standard is necessary because "it would be an overstep on [the Court's] part to strike down a legislative enactment with constitutional applications." *Id.* ¶ 42. And "caution in the face of a facial challenge shows due respect to the other branches of government." *Id.* ¶ 40. The Court reaffirmed this conclusion in *Marklein I*, explaining that the challenging party in separation-of-powers cases "must show that the statute cannot be enforced 'under any circumstances.'" 2024 WI 31, ¶ 8 (quoting *SEIU*, 2020 WI 67, ¶ 38).

Petitioners' arguments fail to meet the high standard required for this Court to overrule its prior decisions. *See infra* Part II. Petitioners do not even try to show how they have satisfied stare decisis factors. Nor can they do so. It is well established that courts disfavor facial challenges and exercise caution before "short circuit[ing] the democratic process by preventing laws embodying the will of the people from being implemented." *SEIU*, 393 Wis. 2d 38, ¶ 40. That principle equally applies to cases involving separation-of-

powers challenges and the delegation of legislative power to agencies. The beyond-a-reasonable-doubt standard ensures that courts do "not nullify more of a . . . law than necessary." *Id.* ¶ 42 (citation omitted). Moreover, Petitioners do not cite changes or developments in the law since the Court adhered to the beyond a reasonable doubt standard of review earlier this year in *Marklein I*, over Petitioners' objection. No new facts suggest change is necessary. By striking down a law earlier this year for violating the separation of powers, this Court has shown that the standard of review is not unworkable in practice, *see id.* ¶34, while still "show[ing] due respect to the other branches of government," *id.* ¶ 40.

Second, Petitioners argue that JCRAR's objections under Sections 227.19(5)(d) and (dm) unlawfully amend the scope of power delegated to agencies, and therefore affect a change in law. But this misunderstands that an agency's rulemaking power arises from the Legislature delegating such power in a law subject to and defined by the conditions placed on it by the Legislature. Here, the Legislature's delegation of that power was tied to JCRAR oversight from the outset. Stated differently, the Legislature's delegation of its rulemaking authority is not severable from JCRAR review. Sections 227.19(5)(d) and (dm) therefore do not in any way amend the power given to agencies.

Petitioners' argument ignores that the Legislature has repeatedly, through laws passed through bicameralism and presentment, limited agencies' power to create rules by

providing JCRAR with the power to review, suspend, and object to agency rules.[17] Courts have continuously upheld the Legislature's authority in this regard—"[t]he legislature may . . . retract or limit any delegation of rulemaking authority, determine the methods by which agencies must promulgate rules, and review rules prior to implementation." *Koschkee v. Taylor*, 2019 WI 76, ¶ 20, 387 Wis. 2d 552, 929 N.W.2d 600. Similar to delegations of legislative power to agencies, the Legislature has limited its delegation to JCRAR. Any objections under Section 227.19(5)(d) must be ratified by a bill within 30 days of that objection. And any objections under Section 227.19(5)(dm), must be overridden by a bill proposed by any single member of the Legislature. *See supra* Part I.B.2.

Petitioners' arguments that the "promulgation pause," which by statute automatically expires after 60 days, violates the separation of powers are even less sensible. The pause before the JCRAR terminates after, at most, 60 days because further legislative action must occur to extend the review period. Wis. Stat. § 227.19(5)(c) (referring to subsection (b)(1)); *see supra* pp.26–27 & n.16. No authority has

[17] Petitioners claim that lawmakers may not object to proposed rules without violating the bicameralism and presentment requirements, citing an article by then-Professor Antonin Scalia. Br.27. But that view relies on the premise that an objection alters "the legal rights and duties" of executive officials and withdraws "executive power previously conferred," *id.*, which does not apply because rulemaking arises from a delegation of legislative power in Wisconsin, *Martinez*, 165 Wis. 2d at 697.

questioned the Legislature's right to require a brief pause between when a final rule is proposed for the Legislature to review when it is in session. Indeed, the promulgation pause is functionally identical to provisions requiring rules to be posted for 90 days before issuance and those mandating a notice-and-comment delay under the federal Administrative Procedure Act. And given that Wisconsin's promulgation pause is temporary (automatically expiring after 60 days), it is clearly constitutional under *Martinez* and *SEIU*.

Third, this Court has repeatedly rejected Petitioners' claim that the JCRAR's actions amount to a legislative "veto" under *INS v. Chadha*, 462 U.S. 919 (1983). Br.25. The Attorney General unsuccessfully argued in *Martinez* that JCRAR's statutory review authority amount to "an exercise of legislative power," because it "ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons." App.17–19, 21–22 (Mar. 13, 2024) (quoting *Chadha*, 462 U.S. at 952). But not only did this Court disagree with *Chadha's* test then, it rejected any invitation to adopt *Chadha*'s test in *SEIU*, 2020 WI 67, ¶¶ 75, 81–82 (relying on *Martinez* on bicameralism and presentment principles), and this Court did not discuss *Chadha* in *Marklein I*, despite the Governor's repeated requests to apply that test. Pet'rs Op. Br. 23, 41, 44, *Evers v. Marklein*, No.2023AP2020-OA (Wis. Feb. 22, 2024). In any event, *Chadha* does not apply because it did not involve

rulemaking, but Congress' ability to veto the Attorney General's deportation determinations. 462 U.S. at 923–25.[18]

Fourth, Petitioners mischaracterize rulemaking as "a core executive power," dismissing decades of contrary precedent that repeatedly characterizes rulemaking as delegated legislative authority. Br.39.

Petitioners here point to a pair of cases from 1853 and 1911, but neither case supports their position. *Attorney General ex rel. Taylor v. Brown*, 1 Wis. 513, 522 (1853), had nothing to do with agency rulemaking. This Court ruled that the new law had appropriately "committed to the *discretion* of the chief executive officer" the power to appoint a particular officeholder. *Id.* at 522. Agencies and legislative delegations to agencies played no role in the case. Petitioners' reliance on *State ex rel. Buell v. Frear*, 146 Wis. 291, 131 N.W. 832 (1911), fares no better. There, this Court reviewed the constitutionality of the civil service commission to oversee governmental appointments and other human resources decisions. *See generally id.* The commission performed "executive and ministerial" duties to "ascertain the facts and to apply the rules of law." *Id.* at 836. This Court upheld the statute because the commission was authorized to promulgate rules "to provide the details for the execution of the provisions of the law in its actual administration" but the

[18] Petitioners rely on several out-of-state cases to support their claims, Br.33–36, but *Martinez* already rejected reliance on other States' precedent in this area, 165 Wis. 2d at 700–01 & nn.12–13.

statute did not "authorize[ ] any rule to be made that can add to or in any way alter or amend the regulations made by the law." *Id.* Neither case supports Petitioners.

Fifth, Petitioners contend that, in the area of shared powers, the Legislature can act "by prospectively regulating the other branch via statute," Br.45, and not by "block[ing]" another branch from performing its constitutional role," Br.46. But this Court has already concluded that there is no constitutional violation under a shared powers analysis when the "blocking"—via a suspension or objection—is of limited duration and is followed by legislative action. *Martinez*, 165 Wis. 2d at 697; *SEIU*, 2020 WI 67, ¶ 98 (majority op. of Kelly, J.). Because "legislative exercise of this shared power in at least some cases does not unduly burden or substantially interfere" with executive authority, Petitioners' facial challenge "gets nowhere under an 'unduly burdensome' shared powers analysis." *SEIU*, 2020 WI 67, ¶ 72 n.22.

Sixth, Petitioners erroneously contend that "JCRAR's rulemaking vetoes violate constitutional bicameralism and presentment requirements," Br.24, because they "have the purpose and effect of altering the legal rights, duties and relations of persons" outside the legislative branch, Br.25. The oversight provisions at issues do not trigger such procedures. "[S]uspension[s] that are temporary in nature" do not require bicameralism and presentment. *SEIU*, 2020 WI 67, ¶ 82. This rings true when the "checks and balances"

of legislative action oversee any temporary rule suspension. *Martinez*, 165 Wis.2d at 699.

JCRAR's oversight provisions involve only temporary suspensions of rulemaking, and they contain the "mandatory checks and balances on any temporary rule suspension." *Id.* at 699. If JCRAR temporarily suspends a rule under Section 227.26(2)(d), JCRAR must within 30 days introduce a bill in each chamber to support the suspension. Wis. Stat. § 227.26(2)(f). If the bills are not enacted, the rule remains in effect. *Id.* § 227.26(2)(i). Regarding a regular objection, within 30 days of making the objection, JCRAR must introduce a bill in each chamber to support it. *Id.* § 227.19(5)(e). If the bills fail to be enacted, the agency may promulgate the rule. If JCRAR indefinitely objects to a rule under Section 227.19(5)(dm), then any member of the Legislature may introduce a bill to authorize the promulgation of the proposed rule. *Id.* § 227.19(5)(em). Petitioners' bicameralism and presentment arguments are therefore inapplicable.

Finally, although Petitioners focused the vast majority of both their Opening Brief and Petition For Original Action on their facial challenge, they purport to make an as-applied challenge in the final pages of their Opening Brief, limited to the JCRAR suspensions here. *See* Br.50–51. This Court should reject that as-applied challenge as well. As-applied challenges involve fact-intensive study "of the particular case in front of [the Court], not hypothetical facts in other

situations." *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63. It would be premature and inappropriate for this Court to rule on the as-applied challenge in this original action without the benefit of factual development, discovery, or consideration by the lower courts. *See Petition of Heil*, 230 Wis. 428, 446, 284 N.W. 42 (1939) (original action proper only when it presents limited material factual disputes, allowing this Court to reach a "speedy and authoritative determination" on the presented legal questions).

Elsewhere, Petitioners also appear to articulate a "hybrid challenge," *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 28, 376 Wis. 2d 147, 897 N.W.2d 384, to JCRAR's exercise of oversight authority as to DSPS's and the Board's rulemaking authority over commercial building standards and social worker, marriage and family therapist, and professional counselor ethics, *see* Pet.8, 38, 40; Br.14. That is, Petitioners briefly argue that JCRAR may never exercise oversight authority as to those categories of rulemaking from DSPS and the Board, not simply as applied to JCRAR's recent actions concerning the building code update and conversion-therapy proposals here. *See Gabler*, 2017 WI 67, ¶¶ 28–29. But Petitioners' hybrid claim also "must meet the standard for a facial challenge." *Id.* ¶ 29. So, for all the same reasons described above, *supra* Part I.A–B, Petitioners have failed to show that JCRAR's review procedures would be unconstitutional as to all possible rule proposals governing

commercial building standards and therapist ethics from DSPS and the Board.

Finally, and in any event, the challenge to the suspension of the conversion therapy rule is now moot, since the rule is in effect. Wis. Admin. Code MPSW § 20.02(25); *see Wis. Env't Decade, Inc. v. JCRAR*, 73 Wis. 2d 234, 236, 243 N.W.2d 497 (1976) (dismissing challenge to JCRAR suspension as moot where bill to repeal rule failed and modified version of rule went into effect). Any ruling from this Court on the procedures applied to the conversion therapy rule would serve as an impermissible "advisory" opinion because it cannot possibly have any effect on whether that rule goes into effect.

II. Petitioners Have Not Met The High Burden For Overturning *Martinez* And *SEIU*

Because Sections 227.19(5)(c), (d), and (dm), as well as Sections 227.26(2)(d) and (im), are facially constitutional under *Martinez* and *SEIU*, Petitioners cannot prevail unless this Court overrules those decisions. Petitioners fail to meet their high burden of providing a special justification for departing from stare decisis and discarding long-held precedent. This Court should therefore deny Petitioners' request to overturn *Martinez* and *SEIU*.

A. "This court follows the doctrine of stare decisis scrupulously because of [its] 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. "When existing law is open to revision in every case, deciding cases becomes

a mere exercise of judicial will, with arbitrary and unpredictable results." *Id.* (citation omitted). Adherence to stare decisis, in contrast, "promotes evenhanded, predictable, and consistent development of legal principles and contributes to the actual and perceived integrity of the judicial process." *Id.* ¶ 95 (citations omitted).

Given this need to ensure evenhandedness and stability in judicial decisionmaking, this Court will not "depart[ ] from the doctrine of stare decisis" without "special justification." *Id.* ¶ 94 (citation omitted). To determine whether there is a "special justification" that warrants undermining past precedent, this Court considers several factors, including whether "changes or developments in the law have undermined the rationale behind a decision," *id.* ¶ 98 (citation omitted); whether "there is a need to make a decision correspond to newly ascertained facts," *id.* (citation omitted); whether "there is a showing that the precedent has become detrimental to coherence and consistency in the law," *id.* (citation omitted); and "whether the prior decision is unsound in principle, whether it is unworkable in practice, and whether reliance interests are implicated," *id.* ¶ 99 (citations omitted).

Certain reasons will not support departing from precedent. For instance, "[i]t 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." *Id.* ¶ 100. Further, the Court

will not overturn a prior case simply because it disagrees with it. *See State v. Lindell*, 2001 WI 108, ¶¶ 145–46, 245 Wis. 2d 689, 629 N.W.2d 223 (A.W. Bradley, J., concurring). Nor will it do so "merely because the composition of the court has changed." *Johnson Controls*, 2003 WI 108, ¶ 95; *see also Lindell*, 2001 WI 108, ¶ 146 (A.W. Bradley, J., concurring).

B. As the Legislature explained above, *Martinez* and *SEIU* are directly on point and compel the conclusion that Sections 227.19(5)(c), (d), and (dm) and 227.26(2)(d) and (im) are constitutional. *Supra* Part I. But even if this Court believes that *Martinez* and *SEIU* may, in its view, be incorrect, this Court should nevertheless adhere to *Martinez*'s and *SEIU*'s holding and reasoning here under stare decisis.

No changes in law have undermined Martinez*'s or* SEIU's *rationale.* To start, there have been no "changes or developments in the law [that] have undermined the rationale behind" *Martinez* or *SEIU*, nor is either decision "detrimental to coherence and consistency in the law" or "unsound in principle," *Johnson Controls*, 2003 WI 108, ¶¶ 98–99. Both are detailed, well-reasoned, and unanimous opinions in relevant part, which rest upon the Court's extant separation-of-powers framework, and both have repeatedly been relied on by this Court. *Id.*

Martinez understood the Wisconsin Constitution to vest the three branches with both exclusive and shared powers and this exclusive-versus-shared-power dichotomy was essential to the Court's separation-of-powers analysis. 165

Wis. 2d at 696–97. The *Martinez* Court explained that the "separation of powers doctrine is violated when one branch interferes with a constitutionally guaranteed 'exclusive zone' of authority vested in another branch." *Id.* at 697 (citations omitted). Applying these principles, the *Martinez* Court held that JCRAR's authority to suspend a promulgated rule for specific reasons did not violate the separation of powers. *Id.* at 696–97. In particular, this Court explained that an agency's rulemaking authority "derives from authority delegated to [the agency] by the legislature." *Id.* at 697. Because rulemaking is a delegated legislative power and JCRAR's rule-suspension authority did not unduly burden the executive's powers, the Court concluded that it was "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 698.

This Court recommitted to those principles in *SEIU*, recognizing that an agency's rulemaking "capability is only on loan" from the Legislature. 2020 WI 67, ¶ 98. *SEIU* reaffirmed that the Legislature controls its delegations of rulemaking authority, *id.* ¶ 79, and upheld the administrative review provisions as constitutional, *id.* ¶¶ 81–82.

That approach is consistent with this Court's very recent decision in *Marklein I*, 2024 WI 31. There, this Court applied the same separation-of-powers analysis as *Martinez*, focusing on whether the Joint Committee on Finance's review of certain executive expenditures was an exercise of core

executive or shared powers. *Id.* ¶¶ 9–16. The constitutional difference between *Marklein I*'s holding and *Martinez*'s holding is that *Marklein I* involved a core executive power—"the power to spend appropriated funds"—and *Martinez* did not. *Id.* ¶ 18. *Martinez* involved a *legislative* power—rulemaking. 165 Wis. 2d at 699. Because an agency's ability to promulgate rules "comes solely through express delegation from the legislature," agencies "necessarily 'remain subordinate to the legislature with regard to their rulemaking authority.'" *SEIU*, 2020 WI 67, ¶ 98 (majority op. of Kelly, J.) (quoting *Koschkee*, 2019 WI 76, ¶ 18). That is not the case with an agency's power to spend funds appropriated to it, as in *Marklein I*. It was that difference, rather than any change in this Court's separation-of-powers analysis, that led this Court to conclude in *Marklein I* that the Joint Committee on Finance's actions under Sections 23.0917(6m) and 23.0917(8)(g) were unconstitutional. 2024 WI 31, ¶ 19. As Justice Dallet "emphasize[d]" in her concurring opinion, *Marklein I* in no way affects this Court's "longstanding approach to shared powers, or undermines the basic insight of our shared powers cases: that the separation of powers must have some flexibility when the powers of coordinate branches of government intersect." *Id.* ¶ 63 (Dallet, J., concurring). As *Martinez* also made clear, when shared powers are involved, "each branch may exercise [the relevant] power" so long as it does not "unduly burden or substantially interfere with another branch." *Compare id.* (citation

omitted), *with Martinez*, 165 Wis. 2d at 696–97. Thus, *Marklein I* confirms that *Martinez*'s reasoning remains on strong legal footing.

SEIU further illustrates that no developments in the law have undermined *Martinez*, given that *SEIU* specifically relied on *Martinez*. Even Petitioners recognize as much, acknowledging that aspects of the *SEIU* decision would "necessarily lack legal effect if this Court overrules *Martinez*." Br.30 n.11. Indeed, like *Martinez*, *SEIU* recognizes that the Constitution implicitly separated powers among the three branches, 2020 WI 67, ¶ 31, explained that the branches may exercise "[s]hared powers" concurrently so long as they do not "unduly burden or substantially interfere with another branch," *id.* ¶ 35 (citation omitted), and reaffirmed that rulemaking is a delegated "legislative power" that is simply "on loan" from the Legislature, *id.* ¶ 98; *see id.* ¶ 186 (Dallet, J., concurring in part and dissenting in part) (relying explicitly on *Martinez*). In so doing, *SEIU* also relied on *Koschkee*, another case that explicitly relied on *Martinez*'s reasoning. *See Koschkee*, 2019 WI 76, ¶ 33 ("[Agencies'] rulemaking authority comes from the legislature, and may be limited, conditioned, or taken away by the legislature.").

No newly ascertained facts. There are no "newly ascertained facts" displacing *Martinez* or *SEIU*. *Johnson Controls*, 2003 WI 108, ¶ 98. Both at the original-action-petition stage, Pet. ¶ 109, and now, Br.30–33, Petitioners

made no attempt to cite any new facts that would call *Martinez* or *SEIU* into doubt.

Not unworkable; significant reliance interests. Finally, *Martinez* and *SEIU* are not "unworkable in practice," and have generated significant "reliance interests" across the State. *Johnson Controls*, 2003 WI 108, ¶ 99.

While *Martinez* has stood the test of time, the Attorney General's position in this case has proven "unworkable" at the federal level. *Id.* After the U.S. Supreme Court announced that Congress' legislative vetoes—which did not undergo bicameralism and presentment—were unconstitutional, *Chadha*, 462 U.S. at 944–59, Congress responded by enacting hundreds of legislative-committee oversight provisions that are clearly in conflict with *Chadha*, *see* Ben Wilhelm, et al., Cong. Rsch. Serv., RL30240, Congressional Oversight Manual 85 (2022).[19] Congress further relied on informal arrangements with agencies, "where an executive official pledges not to proceed with an activity until Congress or certain committees agree to it." *Id.*

Congress and federal executive agencies reached this political compromise because of the realities of modern governance. "Congress delegates substantial discretionary authority to agency officials to engage in rulemaking and the management of the administrative state." *Id.* at 5. Thus, many of today's delegations are made "on the condition that

[19] Available at https://crsreports.congress.gov/product/pdf/RL/RL30240.

proposed executive actions be submitted to Congress for review and possible disapproval before they can be put into effect." *Id.* at 84. This is mutually beneficial: "[e]xecutive officials still want[ ] substantial latitude in administering delegated authority," while "legislators still insist[ ] on maintaining control without having to pass another statute." Louis Fisher, Cong. Res. Serv., RL33151, Committee Controls of Agency Decisions 16 (2005) ("*Committee Controls of Agency Decisions*").[20] *Chadha*, on the other hand, would require Congress to delegate broad authority and only hope that agencies will exercise it in accordance with the enacting statutes' purposes—or pass exceedingly narrow statutes for agencies to administer.

Notably, these post-*Chadha* committee review provisions have evaded federal-court review—despite Congress' decision to decline to follow *Chadha*—only because there is no taxpayer standing under Article III of the U.S. Constitution, *Committee Controls of Agency Decisions*, *supra*, at 26, unlike under Wisconsin law, *see, e.g.*, *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878–80, 419 N.W.2d 249 (1988).

The Legislature has also consistently relied on this Court's clear approval of the Legislature's oversight over rulemaking to delegate broad legislative rulemaking authority to agencies—something it would not have done

[20] Available at https://crsreports.congress.gov/product/pdf/RL/RL33151.

absent this Court's blessing. Indeed, in delegating rulemaking authority to DSPS, the Board, and other agencies, the Legislature understood that it would have powers to prevent these unelected agencies from enacting rules that are unlawful or that may harm Wisconsinites. The Legislature's understanding rested on this Court's repeated treatment of rulemaking as legislative power and *Martinez*'s clear approval of the Legislature's resulting ability to "maintain some legislative accountability over rule-making" through its suspension authority. *Martinez*, 165 Wis. 2d at 701.

Nonetheless, after decades of broad delegations of legislative rulemaking authority enacted in reliance on *Martinez*, Petitioners now ask this Court to overturn its longstanding sanctioning of JCRAR's oversight over rulemaking. Petitioners ask this Court to overrule *Martinez* while leaving broad delegations of legislative power in place without any JCRAR oversight—oversight that the Legislature relied upon in making those delegations in the first place. In this way, Petitioners ask the Court to allow executive agencies to exercise legislative power without the Legislature's involvement, in a manner the Legislature would not have approved had it known that this requested change in the law was in the offing.

C. Petitioners' arguments for overruling *Martinez* and *SEIU* are without merit.

First, Petitioners contend that *Martinez* relied on the same "functionalist analysis" employed in *J.F. Ahern Co. v.*

Wisconsin State Building Commission,114 Wis. 2d 69 (1983), which this Court rejected in *Marklein I*, and that *Martinez*'s "thoroughly functionalist approach" therefore "sits in serious tension with this Court's recent jurisprudential shift toward a more formal treatment of the separation of powers." Br.31. Petitioners are wrong.

Martinez's analysis, which involved the sharing of a legislative power, is distinguishable from *Ahern*'s. At issue in *Ahern* was a legislative commission's power to (1) pre-approve certain construction contracts and (2) waive the competitive bidding requirement normally applicable to such contracts. *J.F. Ahern Co.*, 114 Wis. 2d at 104–05. Despite recognizing that the legislative commission was exercising "executive powers to the exclusion of the executive branch," the *Ahern* court concluded that there was no separation-of-powers violation. *Id.* at 106–08. To the *Ahern* court, the separate branches could share powers up until the Legislature "usurp[s] powers generally regarded as the exclusive province of the executive." *Id.* at 104. Applying this approach, the court concluded that the legislative commission did not usurp executive function because the executive still had a check on the commission's executive power—the Governor retained the right to approve any construction contract. *Id.* at 107–08. And so, "construction [would] not occur unless a majority of the legislator members on the commission and the governor agree." *Id.* at 108. "That compulsory unanimity convert[ed] the shared power over

building construction into a cooperative venture between the two governmental branches." *Id.*

Fatal to the *Ahern* court's analysis, it sanctioned the sharing of *core* executive power without addressing the core-versus-shared-power dichotomy. The *Marklein I* Court therefore overruled *Ahern*, rejecting *Ahern*'s condonation of "the 'cooperative' sharing of core powers.'" 2024 WI 31, ¶ 27. But unlike in *Ahern*, *Martinez* did no such thing. *Martinez* determined there was no constitutional violation because rulemaking authority is a *legislative*—not executive—power. 165 Wis. 2d. at 697 ("The separation of powers doctrine is violated when one branch interferes with a constitutionally guaranteed 'exclusive zone' of authority vested in another branch."). Thus, contrary to Petitioners' contention otherwise, *Martinez*'s analysis is not "indistinguishable from *Ahern*'s," Br.32, and *Martinez* continues to be good law.

Second, Petitioners wrongly contend that "*Martinez* has proven to be unworkable" because it "plainly intended to bless only a 'temporary' JCRAR veto" and "experience has demonstrated that JCRAR can veto rules for years without a bill's enactment." Br.32. That too is wrong. *Martinez* correctly concluded that vetoes nearly identical to the ones at issue here are constitutional. 165 Wis. 2d at 699. It reasoned that the legislative vetoes at issue there "further[ ] bicameral passage, presentment and separation of powers principles by imposing mandatory checks and balances on any temporary rule suspension—only the formal bicameral enactment

process coupled with executive action can make permanent a rule suspension." *Id.* That continues to be true under Sections 227.19(5)(c), (d), and (dm) and 227.26(2)(d) and (im). Nothing about this system is unworkable, as evidenced by decades of effective Wisconsin government under *Martinez*. During that time, many rules have gone into effect, including the Board's ethics rule at issue here. Wis. Admin. Code MPSW § 20.02(25). That some rules issued after legislative proceedings does not show unworkability; to the contrary, Petitioners' position is unworkable for effective governing. *Supra* pp.46–48.

Third, Petitioners erroneously state that "*Martinez* was unsound in principle and wrongly decided from the start." Br.33. Again, *Martinez* applied this Court's modern separation-of-powers jurisprudence and correctly determined that rulemaking is a legislative power, which the Legislature may constitutionality oversee. An agency's rulemaking authority is, after all, "only on loan" from the legislature. *SEIU*, 2020 WI 67, ¶ 98 (majority op. of Kelly, J.). As a result, "agencies remain subordinate to the legislature with regard to their rulemaking authority." *Id.* (citation omitted). The Court therefore properly determined 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 [Legislature's] delegated authority," *Martinez*, 165 Wis.2d at 701. That decision continues to correctly apply this Court's separation-of-powers precedent.

CONCLUSION

This Court should hold that Sections 227.26(2)(d) and (im), and 227.19(5)(c), (d), and (dm), are facially constitutional under the Wisconsin Constitution's separation-of-powers doctrine and bicameralism-and-presentment requirements.

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19 (8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 10,364 words.

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