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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 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,

Wisconsin Legislature,
Intervenor-Respondent.

NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS AND COMMERCE INC.

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TABLE OF CONTENTS

INTRODUCTION 5
ARGUMENT 6
I. This Court should hold that a party bringing a separation-of-powers claim need not establish unconstitutionality beyond a reasonable doubt. 6
II. This Court should not consider the facial challenges to the legislative-oversight provisions in Wis. Stat. ch. 227. 6
III. The legislative-objection provisions in Wis. Stat. § 227.19 are facially constitutional. 8
A. Wisconsin Stat. § 227.19 does not trigger bicameralism and presentment requirements. 8
B. Wisconsin Stat. § 227.19 does not violate the separation of powers. 11
CONCLUSION 13
FORM AND LENGTH CERTIFICATION 15
CERTIFICATE OF E-FILE/SERVICE 15

TABLE OF AUTHORITIES

Cases

City of Eau Claire v. DNR,
60 Wis. 2d 751, 210 N.W.2d 771 (1973) (per curiam) 7
Clean Wisconsin, Inc. v. DNR,
2021 WI 72, 398 Wis. 2d 433, 961 N.W.2d 611 9
Columbia Cnty. v. Bd. of Trustees of Wisconsin Ret. Fund,
17 Wis. 2d 310, 116 N.W.2d 142 (1962) 7
Dane Cnty. v. DHSS,
79 Wis. 2d 323, 255 N.W.2d 539 (1977) 7
Debeck v. DNR,
172 Wis. 2d 382, 493 N.W.2d 234 (Ct. App. 1992) 12
Evers v. Marklein,
2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395 .... 6, 7, 8
Fulton Found. v. Dep't of Tax'n,
13 Wis. 2d 1, 108 N.W.2d 312 (1961) 7
Koschkee v. Taylor,
2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600 12
Martinez v. DILHR,
165 Wis. 2d 687, 478 N.W.2d 582 (1992) 5, 13
Metz v. Veterinary Examining Bd.,
2007 WI App 220, 305 Wis. 2d 788, 741 N.W.2d 244 7
Midwest Renewable Energy Ass'n v. PSC,
2024 WI App 34, 412 Wis. 2d 698, 8 N.W.3d 848 10
Schmidt v. Dep't of Res. Dev.,
39 Wis. 2d 46, 158 N.W.2d 306 (1968) 12, 13
Seider v. O'Connell,
2000 WI 76, 236 Wis. 2d 211, 612 N.W.2d 659 9
Serv. Emps. Int'l Union, Loc. 1 v. Vos,
2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 .... 8, 9, 11, 12
Silver Lake Sanitary Dist. v. DNR,
2000 WI App 19, 232 Wis. 2d 217, 607 N.W.2d 50 .... 7, 8
State ex rel. City of La Crosse v. Rothwell,
25 Wis. 2d 228, 130 N.W.2d 806 (1964) 7
State ex rel. Wis. Inspection Bureau v. Whitman,
196 Wis. 472, 220 N.W. 929 (1928) 12

State v. City of Oak Creek,
2000 WI 9, 232 Wis. 2d 612, 605 N.W.2d 526 8
Town of Somerset v. DNR,
2011 WI App 55, 332 Wis. 2d 777, 798 N.W.2d 282 7
Whitman v. Am. Trucking Associations,
531 U.S. 457 (2001)... 12
Winnebago County v. C.S.,
2020 WI 33, 391 Wis. 2d 35, 940 N.W.2d 875 6
Wisconsin Ass'n of State Prosecutors v. WERC,
2018 WI 17, 380 Wis. 2d 1, 907 N.W.2d 425 9
Wisconsin Citizens Concerned for Cranes & Doves v. DNR,
2004 WI 40, 270 Wis. 2d 318, 677 N.W.2d 612 10
Wisconsin Realtors Ass'n v. PSC,
2015 WI 63, 363 Wis. 2d 430, 867 N.W.2d 364 5

Statutes

Wis. Stat. § 165.25(1).. 8
Wis. Stat. § 227.135(4)... 11
Wis. Stat. § 227.16(1)... 13
Wis. Stat. § 227.17 13
Wis. Stat. § 227.18(1)(c).. 13
Wis. Stat. § 227.19 ....passim
Wis. Stat. § 227.19(4)(d)4. 11
Wis. Stat. § 227.40(4)(a) 9

INTRODUCTION

Under the modern administrative state, legislatures enact broad statutory mandates and delegate lawmaking power to the executive-branch agencies that enforce those mandates, authorizing agencies to adopt rules to fill in the statutory gaps. To prevent agency overreach, however, our legislature must retain some control over the rulemaking process. As this Court unanimously recognized, "it is incumbent on the legislature, pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making." *Martinez v. DILHR*, 165 Wis. 2d 687, 701, 478 N.W.2d 582 (1992).

This legislative oversight is mandated by Wis. Stat. ch. 227. "Chapter 227 provides for expansive legislative review of rules both before their promulgation and after their promulgation." *Wisconsin Realtors Ass'n v. PSC*, 2015 WI 63, ¶97, 363 Wis. 2d 430, 867 N.W.2d 364 (footnote omitted). "Pursuant to these statutes, the legislature has the opportunity to request modifications to proposed rules, to prevent the promulgation of proposed rules, to temporarily suspend rules that have been promulgated, and to repeal promulgated rules altogether." *Id.* ¶98 (footnotes omitted).

The legislature's power to object to a proposed rule, pursuant to Wis. Stat. § 227.19, is a crucial check on executive-branch lawmaking. Administrative agencies regularly propose rules that would impose costs on businesses, making it harder for them to grow the economy and create jobs. Amicus curiae Wisconsin Manufacturers & Commerce Inc. (WMC)—our state's chamber of commerce and manufacturers' association—supports Wis. Stat. § 227.19. This statute allows the legislature to prevent agencies from promulgating unlawful rules. It also enables the legislature to compel agencies to fix problematic aspects of their proposed rules before they take effect.

The legislative-objection provisions in Wis. Stat. § 227.19 are constitutional. This Court should uphold them.[1]

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[1] In this brief, WMC focuses on the power of legislative committees to object to *proposed* rules, which have not been promulgated and lack the force of law. This brief

ARGUMENT

I. This Court should hold that a party bringing a separation-of-powers claim need not establish unconstitutionality beyond a reasonable doubt.

As an initial matter, this Court should clarify the legal standard that governs a separation-of-powers claim. It should make clear that the "beyond a reasonable doubt" standard has no application in this context.

This Court has long stated that "the burden is on the party challenging the statute to prove that it is unconstitutional beyond a reasonable doubt." *Winnebago County v. C.S.*, 2020 WI 33, ¶14, 391 Wis. 2d 35, 940 N.W.2d 875. Notably, however, this Court did not apply the "beyond a reasonable doubt" standard to the separation-of-powers claim in *Evers v. Marklein*, 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395. Three justices in *Evers* argued that this standard is inapplicable in separation-of-powers cases. *Evers*, 2024 WI 31, ¶¶39–42 (A.W. Bradley, J., concurring, joined by Dallet and Protasiewicz, JJ.). "Where the very issue before the court is the contours of the branches' powers vis-à-vis each other, it is not logical to begin the case with a slant in either direction." *Id.* ¶41. More broadly, a fourth justice has previously argued that the Court should scrap this standard altogether for constitutional challenges. *C.S.*, 2020 WI 33, ¶¶48, 63–69 (R.G. Bradley, J., dissenting).

For the reasons stated in Justice Ann Walsh Bradley's concurrence in *Evers*, this Court should hold that the "beyond a reasonable doubt" standard does not apply to separation-of-powers issues.

II. This Court should not consider the facial challenges to the legislative-oversight provisions in Wis. Stat. ch. 227.

The petitioners argue that certain legislative-oversight provisions in Wis. Stat. ch. 227 are facially unconstitutional on bicameralism-and-presentment grounds and separation-of-powers grounds. (Evers' Br. 24–36, 38–49.) This Court should decline to consider those facial challenges because the petitioners lack standing to raise them.

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does not discuss the suspension or repeal of *promulgated* rules, which have the force of law.

"The general rule is that state agencies or public officers cannot question the constitutionality of a statute unless it is their official duty to do so, or they will be personally affected if they fail to do so and the statute is held invalid." *Fulton Found. v. Dep't of Tax'n*, 13 Wis. 2d 1, 11, 108 N.W.2d 312 (1961). These two exceptions "apply only to cases between *private litigants* and a municipality or state agency and *not to suits* between agencies of the state, or between an agency or municipal corporation and the state." *Dane Cnty. v. DHSS*, 79 Wis. 2d 323, 331, 255 N.W.2d 539 (1977) (emphases added); *see also Town of Somerset v. DNR*, 2011 WI App 55, ¶13, 332 Wis. 2d 777, 798 N.W.2d 282 (noting these exceptions to the no-standing rule apply only in cases involving private litigants); *Silver Lake Sanitary Dist. v. DNR*, 2000 WI App 19, ¶¶7–8, 232 Wis. 2d 217, 607 N.W.2d 50 (same).

This no-standing rule is well established. *See, e.g.*, *City of Eau Claire v. DNR*, 60 Wis. 2d 751, 751–52, 210 N.W.2d 771 (1973) (per curiam) ("We decline to reach the merits of this appeal because the Department of Natural Resources does not have standing to raise the constitutional issue which is the only issue in this case."); *see also State ex rel. City of La Crosse v. Rothwell*, 25 Wis. 2d 228, 233, 130 N.W.2d 806 (1964); *Columbia Cnty. v. Bd. of Trustees of Wisconsin Ret. Fund*, 17 Wis. 2d 310, 318, 116 N.W.2d 142 (1962).[2]

The present case does not involve private litigants. The petitioners consist exclusively of Governor Evers (a public officer) and several state agencies. All the respondents are public officers. And the intervenor-respondent is the Wisconsin Legislature. Because this case has no private litigants, the petitioners lack standing to challenge the constitutionality of statutes.[3]

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[2] Arguably, the no-standing rule might apply only to facial challenges but not to as-applied challenges. *Cf. Metz v. Veterinary Examining Bd.*, 2007 WI App 220, ¶¶21–22, 305 Wis. 2d 788, 741 N.W.2d 244 (noting a state agency may conclude a statute is being unconstitutionally *applied* although the agency may not declare a statute *facially* unconstitutional).

[3] This Court reached the merits of a facial challenge previously in this case. *Evers v. Marklein*, 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395. But the Court did not address whether the petitioners had standing to bring a facial challenge. "It is blackletter law that an opinion does not establish binding precedent for an issue if

Likewise, the petitioners' attorney—the attorney general—has no power to argue that the challenged statutes are unconstitutional. "Although [Wis. Stat.] § 165.25(1) grants the attorney general the authority to represent the state as a party in civil cases in circuit court, that authority is not equivalent to authority to challenge the constitutionality of state statutes." *State v. City of Oak Creek*, 2000 WI 9, ¶34, 232 Wis. 2d 612, 605 N.W.2d 526. Instead, "the attorney general's duty is to defend, not challenge the state statutes' constitutionality." *Id.*

This Court should decline to consider the petitioners' facial challenges to the statutes at issue.[4]

III. The legislative-objection provisions in Wis. Stat. § 227.19 are facially constitutional.

If this Court considers the petitioners' facial challenges to the legislative-objection provisions in Wis. Stat. § 227.19, it should conclude these provisions are facially constitutional. These provisions do not trigger bicameralism and presentment requirements or violate the separation of powers.

A. Wisconsin Stat. § 227.19 does not trigger bicameralism and presentment requirements.

"[T]o successfully challenge a law on its face, the challenging party must show that the statute cannot be enforced 'under any circumstances.'" *Serv. Emps. Int'l Union, Loc. 1* (*SEIU*) *v. Vos*, 2020 WI 67, ¶38, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted). A facial

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that issue was neither contested nor decided." *Silver Lake Sanitary Dist. v. DNR*, 2000 WI App 19, ¶13, 232 Wis. 2d 217, 607 N.W.2d 50. So when a decision by this Court does not resolve whether the parties had standing, it is not precedential on that issue. *See id.* ¶¶12–13.

[4] As an alternative to the facial challenges raised here, the petitioners urge this Court to apply the overbreadth doctrine. (Evers' Br. 36–37, 49 n.19.) But this Court and the United States Supreme Court have limited the overbreadth doctrine to First Amendment claims. *See Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶43 n.14, 393 Wis. 2d 38, 946 N.W.2d 35. A chilling effect on First Amendment freedoms is not analogous to legislative checks on government regulations. The purpose of the separation of powers is "to protect individual liberty and avoid tyranny." *Evers*, 2024 WI 31, ¶ 9 (citation omitted). Wisconsin Stat. § 227.19's "chilling effect" on government regulators is conducive, not abrasive, to individual liberty.

"challenge cannot succeed" if "there are constitutional applications" of the statute at issue. *Id.* ¶72.

Governor Evers argues that Wis. Stat. § 227.19 is facially unconstitutional because it violates bicameralism and presentment requirements.[5] According to the Governor, when the Joint Committee for Review of Administrative Rules (JCRAR) "vetoes a proposed rule, it effectively amends the statute under which the executive agency proposed that rule." (Evers' Br. 27.) "The agency had statutory authority to promulgate the rule; after JCRAR's veto, it does not." (Evers' Br. 27–28.)

That argument has two flawed premises: it assumes that every rule that is ever proposed has statutory authority, and it overlooks that an agency's rulemaking authority is conditioned on compliance with rulemaking procedures (including legislative oversight in Wis. Stat. § 227.19).

Turning to the first flawed premise, the Governor's argument assumes that whenever JCRAR objects to a proposed rule, "[t]he agency had statutory authority to promulgate the rule." (Evers' Br. 27–28.) That assumption is wrong: "An administrative rule is invalid if it exceeds the statutory authority of the promulgating agency." *Seider v. O'Connell*, 2000 WI 76, ¶70, 236 Wis. 2d 211, 612 N.W.2d 659 (citing Wis. Stat. § 227.40(4)(a)). An agency rule must have explicit statutory authority. *See Clean Wisconsin, Inc. v. DNR*, 2021 WI 72, ¶30, 398 Wis. 2d 433, 961 N.W.2d 611. Enabling statutes that authorize rulemaking must be strictly construed. *Wisconsin Ass'n of State Prosecutors v. WERC*, 2018 WI 17, ¶37, 380 Wis. 2d 1, 907 N.W.2d 425.

So, contrary to the Governor's suggestion, agencies are capable of proposing rules that exceed their statutory authority. Imagine, for example, that the Wisconsin Department of Natural Resources (DNR) proposed a rule requiring all property owners in Wisconsin to annually pay property taxes to DNR. A legislative committee could put a quick end to that proposed rule without raising constitutional concerns. The

[5] This brief refers to the petitioners collectively as "Governor Evers" or "the Governor" except where they are discussed separately.

legislature's power to object to unlawful proposed rules reduces the need for litigation, preserving scarce judicial resources and taxpayer dollars spent on litigation between the other two branches of government.

The upshot is that the legislative-objection provisions in Wis. Stat. § 227.19 are facially constitutional. At the very least, if an agency proposed a rule that clearly exceeded the agency's statutory authority, JCRAR could object to the proposed rule without altering the agency's statutory authority in any way. Because § 227.19 can be constitutionally applied, the Governor's bicameralism-and-presentment facial challenge to this statute fails.

Moving on to the other flawed premise in the Governor's argument, when JCRAR objects to a proposed rule, JCRAR is *not* "effectively amend[ing] the statute under which the executive agency proposed that rule." (Evers' Br. 27.) The Governor's argument wrongly assumes that an agency's rulemaking authority "is unfettered or unaffected by other provisions outside of" an enabling statute. *Wisconsin Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶25, 270 Wis. 2d 318, 677 N.W.2d 612. An agency's rulemaking authority under an enabling statute is qualified by the procedural requirements in Wis. Stat. ch. 227. *See id.* As relevant here, "the legislature may object to any proposed rule … pursuant to Wis. Stat. § 227.19." *Id.* Section 227.19 is thus one of the "limitations" on an agency's rulemaking authority under an enabling statute. *See id.*

Enabling statutes do not negate the rulemaking requirements in ch. 227, including the possibility of a legislative objection under § 227.19. Rather, rulemaking is subject to the requirements in ch. 227. A rule must be "proposed as a rule and promulgated in compliance with the statutory rulemaking procedures set forth in Wis. Stat. ch. 227." *Midwest Renewable Energy Ass'n v. PSC*, 2024 WI App 34, ¶14, 412 Wis. 2d 698, 8 N.W.3d 848. These ch. 227 procedural requirements are "baked into" an enabling statute. Essentially, an enabling statute carries an asterisk stating that the agency cannot promulgate a rule without following all ch. 227 requirements. When the rulemaking process triggers procedural requirements under ch. 227, those requirements do not "amend" the

enabling statute. Rather, the enabling statute presupposes that the agency will follow ch. 227 rulemaking procedures. The Governor's argument, if adopted by this Court, would effectively amend § 227.19 by removing its pre-promulgation legislative-objection provisions.

Scope statements help illustrate why JCRAR may constitutionally object to proposed rules. An agency must revise its scope statement if "the agency changes the scope of the proposed rule in any meaningful or measurable way." Wis. Stat. § 227.135(4). If an agency fails to revise its scope statement as required by § 227.135(4), JCRAR could object to the proposed rule on the grounds that it "conflict[s] with state law." Wis. Stat. § 227.19(4)(d)4. Bicameralism and presentment would not be constitutionally required because such an objection would not "amend" the enabling statute. Again, an enabling statute presupposes that an agency will comply with ch. 227, including § 227.135(4). An enabling statute explains *what* kinds of rules an agency may promulgate, and ch. 227 explains *how* an agency may promulgate those rules.

In short, the legislative-objection provisions in Wis. Stat. § 227.19 are facially constitutional. They do not trigger bicameralism and presentment requirements.

B. Wisconsin Stat. § 227.19 does not violate the separation of powers.

"The Wisconsin constitution creates three separate co-ordinate branches of government…." *SEIU*, 2020 WI 67, ¶33. "A separation-of-powers analysis ordinarily begins by determining if the power in question is core or shared." *Id.* ¶35.

Governor Evers argues that agency rulemaking is a core *executive* power, and so the legislature's statutory checks on the rulemaking process are facially unconstitutional. (Evers' Br. 39–42.) The Governor is wrong.

If this Court were to hold that rulemaking is a core executive power, it would dramatically alter our state government and upend almost 100 years of precedent. "Even as early as 1928," this Court "recognized that" agency rulemaking "was legislative-law-making."

Schmidt v. Dep't of Res. Dev., 39 Wis. 2d 46, 58–59, 158 N.W.2d 306 (1968) (citing *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928)). Much more recently, this Court reiterated that "when an agency promulgates a rule, it is exercising 'a legislative power.'" *SEIU*, 2020 WI 67, ¶98 (quoting *Koschkee v. Taylor*, 2019 WI 76, ¶39, 387 Wis. 2d 552, 929 N.W.2d 600); *see also Whitman v. Am. Trucking Associations*, 531 U.S. 457, 489 (2001) (Stevens, J., concurring in part and concurring in the judgment) ("It seems clear that an executive agency's exercise of rulemaking authority pursuant to a valid delegation from Congress is 'legislative.'"). "'It only leads to confusion and error to say that the power to fill up the details and promulgate rules and regulations is not legislative power." *Schmidt*, 39 Wis. 2d at 59 (citation omitted).

This longstanding conception of rulemaking as a delegated *legislative* power is correct. Rulemaking is a "legislative power" because it "depends entirely on the legislature's delegation of the power to promulgate rules that have the force and effect of law." *SEIU*, 2020 WI 67, ¶98. Because "[a]dministrative rules are equal to statutes in their power to regulate behavior," *Debeck v. DNR*, 172 Wis. 2d 382, 387, 493 N.W.2d 234 (Ct. App. 1992), rulemaking is a *legislative* function, just like enacting statutes.

By contrast, this Court held that an agency guidance document is an exercise of *executive* authority because, "unlike a rule," "a guidance document does not have the force or effect of law." *SEIU*, 2020 WI 67, ¶100. If rulemaking were not legislative in nature, then rules would essentially be guidance documents. This Court made the same point nearly 100 years ago, observing that if rulemaking is *not* a delegated *legislative* power, then "the rules and regulations of administrative bodies cannot be given the force and effect of law." *Whitman*, 220 N.W. at 941. Instead, rulemaking would amount "to little more than the power to give advice." *Id.* at 942.

Also, if rulemaking were a core executive power, then seemingly every procedural requirement in Wis. Stat. ch. 227 would be unconstitutional. For example, an agency must notify the public of a

proposed rule and accept public comments on it. Wis. Stat. §§ 227.16(1), 227.17, 227.18(1)(c). Under the Governor's "core executive power" reasoning, those requirements would be unconstitutional. That result would be untenable because ch. 227 is an important "procedural safeguard" and one of the "checks upon the abuse of power by administrative agencies." *Schmidt*, 39 Wis. 2d at 57 & n.1.

This Court has recognized the importance of legislative oversight of agency rulemaking. As this Court unanimously explained, "[a]s a matter of public policy, it is incumbent on the legislature, pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making." *Martinez*, 165 Wis. 2d at 701. "Such legislative responsibility adheres to the fundamental political principle and design of our democracy which makes elected officials accountable for rules governing the public welfare." *Id.*

In short, the legislative-objection provisions in Wis. Stat. § 227.19 are facially constitutional. They do not implicate a core executive power and do not violate the separation of powers.

CONCLUSION

This Court should uphold the legislative-objection provisions in Wis. Stat. § 227.19.

Dated this 17th day of December 2024.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of the relevant portions of this brief is 2,974 words.

Dated this 17th day of December 2024.

Electronically signed by

Scott E. Rosenow
____
Scott E. Rosenow

CERTIFICATE OF E-FILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court and Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 17th day of December 2024.

Electronically signed by

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