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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,

Wisconsin Legislature,

Intervenor-Respondent.

NON-PARTY BRIEF OF SAVE OUR WATER AND WISCONSIN CONSERVATION VOTERS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Save Our Water ("S.O.H2O") is an all-volunteer, grassroots nonprofit organization formed by residents of Marinette and Peshtigo in response to the extensive PFAS contamination in that area, which stems from the Tyco/Johnson Controls firefighting foam manufacturing, training, and testing facilities there. S.O.H2O has an interest in this matter because, as described in its March 25, 2024 brief, a committee veto has permanently weakened the implementation of 2019 Wisconsin Act 101 ("Act 101"), a law that should prevent the discharge of PFAS-containing firefighting foam. S.O.H2O's members worked with the authors of that law, including their own state representative, to advocate for the inclusion of critical provisions in Act 101. They subsequently opposed industry efforts to weaken Act 101 through the committee veto process.

More broadly, since learning of the PFAS contamination in their community in 2017, S.O.H2O has urged the implementation of health-based PFAS water quality standards pursuant to Wisconsin's drinking water, surface water and groundwater protections laws. Over the course of that time, state officials have told S.O.H2O members that threats of committee vetoes, like the one lodged during the implementation of Act 101, are significant

barriers to the adoption of these water quality standards as emergency or permanent rules.

Wisconsin Conservation Voters ("WCV") is a nonprofit membership organization that engages Wisconsinites to protect their environment and democracy through advocacy, education and elections. WCV advocates for the faithful implementation of environmental laws by encouraging its members to engage in public comment and hearing processes, lobbying decision-makers, working with the media to highlight the urgency of problems and the need for solutions, and educating voters. WCV is concerned with committee vetoes because directives under state statutes implementing the Clean Water Act, the Clean Air Act and a host of other state-level environmental laws require the executive branch to regularly promulgate and update administrative rules. Ongoing rulemaking is a key feature of these environmental laws, as they charge the executive to apply statutory environmental protections to changing ecological conditions, new forms of pollution and technological developments.

INTRODUCTION

S.O.H2O and WCV ("Amici") submitted a non-party brief as the Court was considering the first claim of the petition. S.O.H2O Br. (March 25, 2024). In that brief, Amici drew from their firsthand experiences advocating for responses to PFAS contamination to illustrate how committee vetoes frustrate the proper execution of laws. *Id.* at 6-16. Specifically, Amici recounted how the Joint Committee for the Review of Administrative Rules ("JCRAR") suspended critical portions of a rule to implement Act 101, which was designed to prevent the discharge of PFAS-containing firefighting foam to wastewater treatment plants. S.O.H2O Br. at 7-10. Through a committee veto, a handful of legislators altered legal rights and responsibilities related to the disposal of PFAS-containing firefighting foam. *Id.* at 11. That veto had a permanent effect but was never subjected to bicameralism and presentment. *Id.* From this example, Amici argued that the foundational assumptions of *Martinez v. Department of Industry, Labor & Human Relations*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992) were, and continue to be, incorrect—committee vetoes of administrative rules are not short in duration, are almost never subjected to bicameralism and presentment and frustrate democratic accountability.

Amici submit this brief to describe additional experiences they have gained by advocating for faithful implementation of

environmental statutes. These experiences show why committee vetoes are unconstitutional in all circumstances. The presence of committee vetoes in our state's system of governance obstructs the proper execution of statutory rulemaking authorizations whether or not the veto is ever exercised. This chilling effect has grown stronger in Wisconsin in recent years due to the increasing complexity of the rulemaking process.

ARGUMENT

I. The ability of the executive to reliably complete the rulemaking process is often integral to the faithful execution of law.

For over a century, Wisconsin legislatures have counted on agency rulemaking as a necessary step in the implementation of legislative enactments. *See* Joseph A. Ranney, *Trusting Nothing to Providence: A History of Wisconsin's Legal System* 378 (1999). This is especially true for enactments designed to preserve clean water and environmental stewardship, which require the executive to regularly use the rulemaking process to respond to dynamic ecological conditions, new forms of and changing levels of pollution, and scientific innovation. *See* Richard J. Lazarus, *The Making of Environmental Law* 191 (2004) (arguing that a "feature of environmental law that has proven critical to its

success" are broad delegations of rulemaking authority to executive agencies, "albeit under strict deadlines.")

Indeed, in critical respects, the Wisconsin legislature has chosen to task the executive with responding relatively quickly under environmental protection statutes. For instance, the legislature has chosen to implement the federal Clean Water Act in our state, and it has charged the Department of Natural Resources ("DNR") to update water pollution limitations in the state's implementing regulations "as soon as practicable but no later than one year after the U.S. environmental protection agency promulgates an effluent standard for the pollutant." WIS. STAT. § 283.21(1)(c).[1]

Another example, the state's groundwater protection law, codified in Chapter 160, contains numerous timelines for swift agency actions to identify and evaluate groundwater contaminants, culminating in the codification of groundwater quality standards and regulatory responses in the administrative code. See WIS. STAT. § 160.001(1).[2] This law is relevant to S.O.H2O's members whose private drinking water wells are currently contaminated, or at risk of being contaminated, by toxic

[1] All citations are to the 2021-22 version of the Wisconsin Statutes.
[2] Wis. Stat. § 160.001(1) reads, "This chapter will establish an administrative process which will produce numerical standards, comprised of enforcement standards and preventive action limits, for substances in groundwater….[A]dministrative procedures also provide for minimizing the concentration of substances in groundwater."

PFAS compounds. Under the groundwater protection law, all state agencies are required to identify potentially harmful substances detected in or having a probably of entering groundwater. WIS. STAT. § 160.05 (1). Once a substance is identified, DNR has 60 days to categorize and prioritize the substance based on a variety of public health and welfare criteria. WIS. STAT. § 160.05 (3). Then, within 10 days, DNR must submit the "current list of categories and rankings of substances to the department of health services" for the recommendation of health-based standards according to statutorily prescribed criteria and methodologies. WIS. STAT. §§ 160.07(2), 160.13. Within nine months of that transmittal to the Department of Health Services ("DHS"), the DNR is directed to propose rules to establish the DHS recommendation as an enforceable standard. WIS. STAT. § 160.07(5). The statutory scheme of the groundwater protection law reflects that mandatory, timely and dependable rulemaking is often *sine qua non* of the execution of a legislative act.

II. Wisconsin's rulemaking procedures are increasingly difficult for the executive to navigate.

Since *Martinez* was decided, the state's administrative rulemaking process has grown in procedural complexity, leading to protracted timelines and requiring executive branch officials to dedicate more resources to fulfill statutory directives. For instance, 2011 Wisconsin Act 21 brought about numerous

procedural additions, including, *inter alia*, requiring more extensive economic analyses and prohibiting state employees from working on a rule prior to gubernatorial approval of a scope statement for the proposed rule. 2011 Wis. Act 101 §§ 4, 7-28. *See also* Ronald Sklansky, Changing the Rules on Rulemaking, Wis. Lawyer, Aug. 2011, at 10. A later enactment, 2017 Wisconsin Act 57, now requires the Department of Administration (DOA) to approve a proposed rule's scope statement prior to approval by the governor. 2017 Wis. Act 57 § 2. That same act empowers certain chairpersons of legislative committees to require agencies to conduct additional preliminary public hearings, after gubernatorial and DOA approvals but before the agency creates a preliminary draft of the rule. 2017 Wis. Act 57 § 2. For agencies that have a governing board, like DNR, this means that the board must make two additional preliminary approvals to even start a rulemaking process during two separate meetings, first to approve the preliminary hearing and then to approve the scope statement. All of this occurs *before* the agency begins working on the draft rule.

In Amici's experience, many of these procedural additions sometimes serve no purpose besides delay. For example, the Co-chair of JCRAR recently used 2017 Wisconsin Act 57 to require DNR to hold a preliminary hearing on a scope statement for a straightforward rulemaking that is necessary for Wisconsin to

maintain compliance with the federal Safe Drinking Water Act. *See* Nat. Res. Bd. Agenda Item No. 2.B. (Sept. 25, 2024) at 2.[3] This action required the Natural Resources Board ("NRB") to act during a public meeting to order that a hearing and public comment period be held. *Id.* DNR then held the hearing and comment period. *See* Nat. Res. Bd. Agenda Item No. 4.E. (Oct. 23, 2024).[4] The only testimony and comments were from Amici and like-minded organizations that fully supported the scope statement and Wisconsin's remaining in compliance with the federal Safe Drinking Water Act. *Id.* No one opposed, or expressed concern with, the scope statement. *Id.* Amici and others struggled to make comments that were germane to the ostensible purpose of the hearing: to provide comments on the proposed scope of the eventual proposed rule. In this case, the main elements of the future proposed rule are dictated by federal and state law to maintain Wisconsin's compliance with the federal Safe Drinking Water Act. There was no meaningful comment to be made on the scope statement itself. After this *pro forma* hearing and comment period, the NRB met again and approved the scope statement. *Id.*

These kinds of recent procedural accretions and delays have consequences beyond requiring the executive to expend time

[3] https://widnr.widen.net/s/qmzc8s9zqx/item-2.b.-prelim-hearing-dg-01-24.
[4] https://widnr.widen.net/s/gccfkzjjcd/item-4.e.-scope---dg-01-24.

and limited capacity. For starters, a statutory shot clock is ticking. Under 2017 Wisconsin Act 39, if an agency does not submit a final rule for legislative review within 30 months of the date the proposed scope statement was published in the administrative register, the rulemaking fails and the agency needs to start the process over again to execute the law. WIS. STAT. § 227.135(5).

Second, the procedural complexity can mean that critical laws go unimplemented. For example, prior to 2011 Wisconsin Act 21, the DNR could typically propose and finalize groundwater protection standards within the statutorily prescribed processes and timeframes described above. In 2009, a rulemaking to set groundwater protection standards for 15 new contaminants and make 15 other revisions to then-existing standards started at the end of November of that year, and agency action concluded with DNR submitting a final draft for legislative review the following September. *Compare* 647b Wis. Admin. Reg. (Nov. 30, 2009) *with* 657a Wis. Admin. Reg. (Sept. 14, 2010). Now, DNR indicates that its rulemaking process "generally takes about 31 months from initiation to promulgation." Wis. Dep't of Nat. Res., *Proposed Administrative Rules and Public Input Opportunities.*[5]

[5] https://dnr.wisconsin.gov/news/input/ProposedRules.html (last visited Dec. 12, 2024). There is not an inconsistency between DNR's statement that the rulemaking promulgation generally takes 31 months and the 30-month deadline, under Wis. Stat. § 227.135(5), for the agency to submit the final

Amici have observed the consequences of these changes. In 2024, DNR reported that 47 new or revised groundwater standards should be proposed or revised according to the requirements of Chapter 160. Wis. Groundwater Coordinating Council, *Report to the Legislature* 8 (2024).[6] The agency has said publicly that it has limited capacity to move multiple rulemakings forward at once, and DNR is not actively initiating rulemakings to make progress on the backlog. Wis. Public Radio, State Faces Backlog in Setting Dozens of Groundwater Standards (Sept. 5, 2024).[7]

III. In this context, the threat of the committee veto looms large, altering rulemakings or causing the agency to forgo the process altogether.

Amici do not contend that procedural rigor is without value. The legislature has wide latitude to define through its lawmaking power the process the executive must follow to promulgate a rule. *Koschkee v. Taylor*, 2019 WI 76, ¶20, 387 Wis. 2d 552, 929 N.W.2d 600. Indeed, "[t]he rulemaking process is filled with checks and double checks and public input and

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draft rule to the legislature because promulgation includes the legislative review period.

[6] https://widnr.widen.net/view/pdf/c5e61bs1x6/DG_GCC_Report_2024.pdf.

[7] https://www.wpr.org/news/wisconsin-dnr-backlog-groundwater-standards-pfas.

imposed waiting periods to discourage some rulemaking, and to ensure a final product that is fully vetted, sufficiently clear, statutorily grounded, and able to guide agency action moving forward." *Wis. Legislature v. Palm*, 2020 WI 42, ¶228, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting). Justice Hagedorn has likened the administrative rulemaking process to "a canoe traversing the Atlantic Ocean. It's not impossible, but it's not a particularly fun trip." *Id*. However, when committee vetoes exist, the unpleasant trip might in fact be impossible. Executive officials are at the mercy of small groups of legislators or connected interest groups who can sink their canoe just before it reaches shore—likely after investing two or more years of effort that could have been dedicated to other executive functions.

Amici have witnessed rulemakings that have been substantively altered because of the threat of committee vetoes. A pending example illustrates how committee vetoes obstruct the executive even when the veto is not exercised. Over three and a half years ago, the governor approved a scope statement for a DNR rulemaking to bring elements of Wisconsin's implementation of the Clean Water Act in line with federal requirements. 785b Wis. Admin. Reg. SS 051-21 (May 24, 2021). Specifically, the rule would update the state administrative code to ensure that new or increased discharges of pollutants do not unnecessarily degrade Wisconsin's lakes, rivers and streams. *Id*.

Over the course of the rulemaking process, DNR held numerous stakeholder meetings that included significant representation from industries that discharge pollutants. *See* CR 23-010, Rec. Of Comm. Proceedings for Comm. Jobs, Economy and Small Bus. Dev., Testimony of Adrian Stocks (Nov. 28, 2023). After receiving multiple rounds of feedback, DNR made draft revisions, including exempting and adding cost-saving options for certain proposed discharges. *Id*. This was a long and robust process; DNR submitted the draft rule for legislative review one month before hitting the 30-month deadline. 814a4 Wis. Admin. Reg. CR 23-010 (Oct 23, 2023).

Over one year later, however, the final rule remains in limbo, presumably because DNR must attend to the threat of a JCRAR veto that could undermine this yearslong effort. As part of the legislative review, the rule was referred to the Assembly Committee on Jobs, Economy and Small Business Development, which held a hearing on the rule. CR 23-010, Rec. of Comm. Proceedings for Comm. Jobs, Economy and Small Bus. Dev. (Nov. 28, 2023). A representative from Wisconsin Manufacturers and Commerce was the only person to testify at the hearing in opposition to the rule. *Id*. The committee then voted to request unspecified changes to the rule under WIS. STAT. § 227.19(4)(b)2.

Comm. Reports, State of Wis. Assemb. J., Dec. 14, 2023, at 508.[8] DNR agreed to the request to consider changes, and, after another round of meetings, made additional changes. Wis. Leg. Clearinghouse, CR 23-010 (Dec. 18, 2023).[9] Still, several months later the chairperson of the assembly committee sent DNR a letter stating that the "improvements" were not satisfactory and encouraging further conversations with the business community. Letter from State Rep. Rick Gundrum to Adrian Stocks (May 31, 2024).[10] Since then, the committee has not taken further action, and the rule has not been promulgated.

The example illustrates the chilling effect of committee vetoes. Over the three and a half years this rulemaking has been pending, the executive branch fulfilled the multiple public notice and input requirements of Chapter 227. It demonstrably incorporated stakeholder feedback into the final draft rule. It considered and acted on statutory requirements to limit the discharge of pollutants that meet the baseline requirements of the federal Clean Water Act. *See* WIS. STAT. § 283.13(5). Still, a legislator is directing the executive branch to make additional changes at the behest of a very small group of legislators and allied interest groups.

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[8] https://docs.legis.wisconsin.gov/2023/related/journals/assembly/20231214/_48.

[9] https://docs.legis.wisconsin.gov/code/chr/all/cr_23_010

[10] On file with the author.

It is worth noting that the publicly available communications from the assembly committee and its chair about this draft rule make no mention of ten separate sections of the state statutes DNR cites for its rulemaking authority, *see* 785b Wis. Admin. Reg. SS 051-21 (May 24, 2021), and, therefore, show no consideration for the actual law the executive is attempting to implement. Rather, the overriding concern of the legislators wielding the threat of a committee objection appears to be subjective policy judgments about the impact of executing the law.

The executive branch is certainly aware of the political reality that JCRAR has recently vetoed rulemakings under similar circumstances. *See* Clean Wis. Br. (March 20, 2024). Caught between its legal obligations and an implied threat to torpedo the rulemaking, DNR could reasonably believe that it has few good options. If committee vetoes remain operative in Wisconsin, the executive branch will find itself burdened in similar situations. The execution of laws that are designed to achieve important objectives, such as maintaining clean water and public health, will not be carried out as intended.

Amici are also aware that the prospect of committee vetoes is a reason agencies decline to begin rulemakings in the first place. For example, Amici have been told by agency officials that the potential for committee vetoes is a significant factor in DNR's

lack of progress in proposing new and updated groundwater standards, pursuant to Chapter 160, for contaminants that are present in Wisconsin drinking water supplies and that pose risks to human health.

IV. The Court should find that committee vetoes are facially unconstitutional.

Committee vetoes allow small groups of legislators to burden core executive functions and to change the state of the law outside of the constitutionally prescribed process of bicameralism and presentment. Amici agree with Petitioners that the test for determining whether these statutes are facially unconstitutional should not turn on whether Respondents can point to hypothetical implementations of the statutes that would not violate the constitution. Pet'rs' Opening Br. at 36-37 (Nov. 8, 2024) (arguing that an overbreadth analysis should be used if some applications might be constitutional). Amici do not believe such theoretical examples exist.[11] Regardless, as described above, the committee veto statutes obstruct the faithful execution of law

[11] The Respondents stretch the "cannot be enforced under any circumstances" test to the point of absurdity. They argue that, if indefinite vetoes are generally unconstitutional, they are not unconstitutional under all circumstances because the relevant statute provides that the veto will be lifted if a bill authorizing the rule is introduced and enacted into law. Resp't Br. (Dec. 6, 2014) at 25. Any unconstitutional law can be subsequently nullified through a later legislative enactment. Writing this elementary fact into a statute cannot save it.

by their mere existence and in ways that extend beyond their actual application. Therefore, an attempt to parse the constitutional and unconstitutional applications of the statutes would not remedy the true harm.

Further, a ruling from this Court that some limited categories of vetoes are potentially constitutional is not workable. The legislature has a history of using committee vetoes well beyond the temporal guideposts of this Court's previous decisions in *Martinez* and *SEIU*. *See* S.O.H2O Br. (March 25, 2024) at 11-13. Moreover, the executive branch is rarely in a position to bring as-applied challenges to address committee vetoes that stray from judicial guardrails. This kind of litigation is often only ripe after the executive has expended significant time and resources to advance the rulemaking process to the legislative review stage, and the litigation itself can take years. Faced with this situation, executive officials will often make the choice to alter the rulemaking because the prospect of no rule may be untenable given the policy situation they are charged to address. Rulemaking often serves to fulfill legislative directives that the underlying law is applied to changing circumstances in a timely way; delaying the rulemaking can defeat its purpose.

CONCLUSION

For the foregoing reasons, Amici respectfully urge the Court to hold that JCRAR vetoes of administrative rules are facially unconstitutional.

Dated this 18th day of December, 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,999 words.

Dated: December 18, 2024.

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