STATE OF WISCONSIN
IN SUPREME COURT

Case 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.

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Legislative committee vetoes violate our constitution whether they block DNR's Knowles-Nelson choices, as this Court held in *Evers I*, or whether they block agency rules. No constitutional text suspends bicameralism-and-presentment requirements when JCRAR rulemaking vetoes alter parties' rights, duties, and relations for weeks, months, or years. Likewise, the Legislature may confer broad or narrow discretion on agencies to promulgate rules, but legislative committees have no authority to veto how the executive branch exercises that statutory discretion.

The Legislature offers only *Martinez* to avoid bicameralism and presentment. But that case should be overruled: it conflicts with the constitutional text, uses outdated functionalist reasoning, and has proved unworkable. And to defend its separation of powers violation, the Legislature relies on labeling, calling rulemaking "delegated legislative power." But, however it characterizes rulemaking, the Legislature never persuasively explains why it may enact rulemaking statutes and then use committees to control how agencies execute those laws.

It is time to end this failed constitutional experiment, criticized since its conception, and return Wisconsin to the constitutional mainstream.

ARGUMENT

I. JCRAR's rulemaking vetoes are facially invalid.

JCRAR's vetoes are facially invalid, for two independent reasons: they trigger bicameralism and presentment requirements but do not follow them; and they intrude on either core or shared executive power. This Court should overrule *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), and the passages of *Service Employees International Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67,

393 Wis. 2d 38, 946 N.W.2d 35, applying it. The Legislature has found no valid application of JCRAR vetoes, but even if it had, this Court should facially invalidate them under an overbreadth analysis.

A. JCRAR's vetoes violate bicameralism and presentment requirements.

1. Bicameralism and presentment apply to legislative action affecting others' legal rights, duties, and relations.

Bicameralism and presentment are required for legislative action that has the "purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the legislative branch," a test adopted both by the U.S. Supreme Court and other state supreme courts. (Pet. Br. 24–25.)

Rather than critique this test, the Legislature suggests that this Court has rejected it. (Leg. Br. 35–36.) But neither *Martinez*, *SEIU*, nor *Evers v. Marklein*, 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395 (*"Evers I"*), discussed a test to determine when legislative action triggers bicameralism and presentment. It matters not that *I.N.S. v. Chadha*, 462 U.S. 919 (1983), did not involve rulemaking: the test it applied is a general one, used to evaluate legislative vetoes of rulemaking, deportation decisions, or anything else. And state courts have concluded that rulemaking vetoes trigger bicameralism and presentment, with or without *Chadha*. (Pet. Br. 33–36.)

The Legislature contends that, because rules are not "legislation as such," JCRAR's vetoes do not require bicameralism and presentment. (Leg. Br. 29–30 (citing *Martinez*, 165 Wis. 2d at 699).) But the question here is not whether the *executive branch's* action (whether rulemaking or otherwise) qualifies as "legislation." Instead, it is whether the *legislative committee's* action legally affects those outside the

legislative branch. Even *Martinez* recognized (contrary to the Legislature's argument (Leg. Br. 21, 29, 37)) that JCRAR's vetoes needed to "meet[ ] presentment and bicameral requirements," 165 Wis. 2d at 692, although *Martinez* erred in holding that they did.

The Legislature also suggests that bicameralism and presentment requirements do not apply because a JCRAR veto is not a "bill" (Leg. Br. 29), but that elevates form over substance. The point of the test is to prevent the legislative branch from evading these key constitutional procedures through relabeling.

2. All JCRAR's vetoes fail the legal rights, duties and relations test.

All JCRAR's vetoes modify legal rights, duties, and relations test without following bicameralism and presentment.

As to *suspensions* under Wis. Stat. § 227.26(2)(d) and (im), a JCRAR veto means that a rule that previously had legal effect on regulated parties no longer does. (Pet. Br. 26–27.) The Legislature's defense relies entirely on *Martinez*, (Leg. Br. 37–38), but *Martinez* erred, as discussed below in Argument I.C.

As to *objections* under Wis. Stat. § 227.19(5)(d) and (dm), JCRAR's vetoes amend a rulemaking authorization statute to prohibit the agency from promulgating the vetoed rule. (Pet. Br. 27–28.) For instance, DSPS's social work board exercised its statutory authority under Wis. Stat. § 457.03(2) when it "promulgate[d] rules establishing a code of ethics." It

lost that statutory authority when JCRAR vetoed the proposed rule.[1]

The Legislature argues that no such change occurs because JCRAR's objection authority already "conditioned" the agencies' rulemaking power. (Leg. Br. 33–34.) But the mere possibility of a JCRAR veto does not narrow an agency's statutory rulemaking authority; only JCRAR's vetoes do that. And the Legislature in *Evers I* similarly cited the "burdens and limits" built into DNR's authority, but this Court did not accept that defense.[2] Other courts have agreed that "[m]erely styling something as a condition on a grant of power does not make that condition constitutional." *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 470 (D.C. Cir. 1982); *see also Blank v. Dep't of Corr.*, 611 N.W.2d 530, 536 (Mich. 2000); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 633 (W. Va. 1981); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 777 (Alaska 1980).

The Legislature relatedly contends that, because rulemaking supposedly is a "delegate[ed] legislative power," JCRAR's objections do not alter an agency's statutory rulemaking authority. (Leg. Br. 34 n.17.) While Petitioners disagree that rulemaking statutes confer legislative power on the executive, that question is irrelevant for bicameralism and presentment purposes. The Legislature has statutorily authorized the executive branch to promulgate rules; when JCRAR blocks proposed rules, it effectively amends those

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[1] Although Wis. Stat. § 227.19(4)(d) allows JCRAR to veto a rule for purportedly exceeding the agency's statutory authority, such vetoes do not defeat this facial challenge because they unconstitutionally usurp the *judiciary's* core power to say what the law is. *See infra* Section I.C. (*Cf.* WMC Br. 9–10.)

[2] *Evers v. Marklein*, Brief of Respondent filed March 13, 2024, at 26.

statutes. That legislative change in legal rights, duties, and relations triggers bicameralism and presentment.

Last, the *promulgation prohibition* under Wis. Stat. § 227.19(5)(c) prohibits an agency from promulgating a rule based on multiple committee choices: a JCRAR objection under Wis. Stat. § 227.19(5)(d) or (dm); JCRAR's or the standing committee's choice to extend the two default 30-day pauses under Wis. Stat. § 227.19(4)(b)1. and (5)(b)1.; or JCRAR's order that the agency obtain an independent economic analysis under Wis. Stat. § 227.19(5)(b)3. It is not an "automatically expir[ing]" 60-day pause. (Leg. Br. 26, 34–35.)

3. The indefinite objection power is invalid, even under *Martinez*.

Even if *Martinez* stands, Wis. Stat. § 227.19(5)(dm) is still invalid: JCRAR's indefinite objection kills a rule unless the Legislature decides to pass a "subsequent law [that] specifically authorizes [the rule's] promulgation." Wis. Stat. § 227.19(5)(fm). (Pet. Br. 29–30.)

Martinez emphasized that the Legislature "must" introduce bills to ratify JCRAR's veto. 165 Wis. 2d at 699–700. Wisconsin Stat. § 227.19(5)(dm) disregards *Martinez* in two ways. First, it makes bill introduction merely an option, not a mandate. Second, even if the Legislature chooses to introduce a bill, (Leg. Br. 25), that bill does not *ratify* JCRAR's veto—it *reverses* it. The vetoes are never made permanent through the "formal bicameral enactment process coupled with executive action." 165 Wis. 2d at 699.

B. JCRAR's vetoes facially violate the separation-of-power doctrine.

Independently of bicameralism and presentment, the JCRAR vetoes also violate the separation of powers.

1. JCRAR's rulemaking vetoes intrude on core executive power.

Executive agencies exercise their core law-execution power when implementing rulemaking statutes, just like any others. (Pet. Br. 39–44.)

The Legislature's efforts to distinguish *State ex rel. Buell v. Frear*, 146 Wis. 291, 131 N.W. 832 (1911), and *Att'y Gen. ex rel. Taylor v. Brown*, 1 Wis. 513 (1853), are unavailing. It describes *Frear* as involving rules that "provide the details for the execution[s] of the provisions of the law in its actual administration" (Leg. Br. 36), but it never explains why this description does not apply to rulemaking generally. And while *Taylor* involved the executive's statutory discretion to appoint officeholders, (Leg. Br. 36), the principle holds true for statutory discretion generally: "[w]hen the executive branch acts under a grant of authority from the legislature, its authority 'is at its maximum.'" *Evers I*, 412 Wis. 2d 525, ¶ 21 (citation omitted).

The Legislature repeats observations from *Martinez* and *SEIU* about the "legislative" nature of rulemaking. (Leg. Br. 18–23.)[3] Although both statutes and rules legally bind regulated parties, that does not mean the executive branch exercises legislative power when it implements rulemaking statutes. Quite the opposite: when the executive exercises discretion in executing a statute, that is quintessential executive power, whether the discretion involves rulemaking, Knowles-Nelson projects, or anything else. *See Evers I*, 412 Wis. 2d 525, ¶ 65 (Dallet, J., concurring). Legislatures "may provide detailed rules of conduct to be administered without discretion by administrative officers, or [they] may provide broad policy guidance and leave the details to be filled in by administrative officers exercising substantial

[3] Petitioners ask that, if needed, any such observations be treated as overruled as unsound in principle.

discretion," but "[they] may not, however, insert one of [their] houses as an effective administrative decisionmaker." *FERC*, 673 F.2d at 476.

To be sure, the Legislature may "limit[ ] the exercise of executive discretion" through "[t]he text of the statutes enacted" or withdraw the corresponding regulatory power altogether. *Evers I*, 412 Wis. 2d 525, ¶ 16, 21. But by "interfering with the exercise of discretion the legislature" gave the executive branch, the Legislature interferes with the core executive authority to "take care that the laws be faithfully executed." *Id.* ¶ 34 (citing Wis. Const. art. V, § 4).

2. Alternatively, JCRAR's rulemaking vetoes violate shared powers principles.

JCRAR's vetoes are facially invalid even under a shared powers analysis because they violate two bedrock shared powers principles: (1) procedurally, the Legislature must act in a shared powers arena by enacting prospective statutes; and (2) substantively, such statutes cannot block another branch from performing its own constitutional role in that arena. (Pet. Br. 44–49.)

The Legislature ignores the cases embodying these principles and instead relies on *Martinez* and *SEIU*'s footnote 22. (Leg. Br. 37.) Those cases scarcely discussed shared powers except to note generally that one branch may not "unduly burden or substantially interfere" with another. *SEIU*, 393 Wis. 2d 38, ¶ 35 (citation omitted); *Martinez*, 165 Wis. 2d at 696. Neither case considered whether the Legislature may act in a shared arena through a committee or block the other branch from exercising its own core powers.

And *SEIU* footnote 22 does not do the work the Legislature asks. It addressed a potential constitutional role for the Legislature in state litigation settlements, featuring the Legislature as a "represented party" or implicating its

appropriation power. *SEIU*, 393 Wis. 2d 38, ¶¶ 67, 69. Rulemaking vetoes implicate neither legislative role, and the Legislature identifies no other powers in play. Even without JCRAR's vetoes, the Legislature can always repeal or modify an agency's rule or regulatory powers by passing a law.

C. *Martinez* and parts of *SEIU* should be overruled.

The Legislature's stare decisis arguments do not justify preserving *Martinez* and the corresponding portions of *SEIU*.

Unsound in principle. As to bicameralism and presentment, neither *Martinez* nor *SEIU* identified textual support for the premise that those requirements can be "temporar[ily]" put on hold. 165 Wis. 2d at 699. However long JCRAR's vetoes last—weeks, months, or years—they alter the legal rights, duties, and relations of parties without bicameral legislative action and gubernatorial signoff. Nothing in our constitution's text supports that practice.

As to the separation of powers, if *Martinez* and *SEIU* are read as precluding Petitioners' shared powers argument, they would represent outliers from this Court's shared powers jurisprudence by allowing legislative action outside the ordinary lawmaking power that vetoes another branch's power to carry out its own constitutional role. (Pet. Br. 45–47.)

The Legislature cites what *Martinez* described as "safeguards": the statutory reasons JCRAR invokes for its vetoes and the vetoes' "time limited" nature. (Leg. Br. 23–28.) But neither "safeguard" is constitutionally permissible.

First, the grounds for JCRAR vetoes listed in Wis. Stat. § 227.19(4)(d) entail legal and policy determinations entrusted to other branches. It the judiciary's job—not JCRAR's—to decide whether a rule lacks "statutory authority," "fail[s] to comply with legislative intent," "conflict[s] with state law," or is "arbitrary and capricious."

Wis. Stat. § 227.19(4)(d)1., 3.–4., 6; *see also FERC*, 673 F.2d at 478 (legislative vetoes prevent courts "from exercising review, even though . . . they might have upheld the agency's exercise of discretion"); *Legis. Research Comm'n By & Through Prather v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984) (noting that such "determination[s] [are] a judicial matter"). And whether a rule ignores "a change in circumstances," imposes an "undue hardship," or creates an "emergency," Wis. Stat. § 227.19(4)(d)2., 5.–6., merely second-guesses the executive branch's choices in implementing a statute. The Legislature may not use committee vetoes to express its disagreement with those choices: "concerns" about whether the executive's decisions "accord[ ] with legislative policy preferences" can be addressed through "numerous constitutional tools" aside from committee vetoes. *Evers I*, 412 Wis. 2d 525, ¶ 30.

Second, the vetoes' "temporary" nature still disrupts the executive's law-execution power for the veto's duration, a time period entirely controlled by the Legislature.

Developments in the law. *Evers I* rejected *Martinez*'s functionalist bicameralism and presentment analysis by overruling *JF Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983). (Pet. Br. 31–32.) The Legislature tries to steady *Martinez* by arguing that *Ahern*, unlike *Martinez*, "sanctioned the sharing of core executive power." (Leg. Br. 50 (emphasis omitted).) But both *Evers I* and *Martinez* involved categorical constitutional requirements: in *Evers I*, no sharing of core executive powers (Wis. Const. art. V, § 4), and in *Martinez*, bicameralism and presentment procedures (Wis. Const. art. IV, § 17, art. V, § 10(1)(a)). Just as *Ahern* wrongly used functionalist reasoning to relax the former categorical requirement, *see Evers I*, 412 Wis. 2d 525, ¶¶ 25–26, *Martinez* did the same regarding the latter.

The Legislature points to *SEIU* as bolstering *Martinez*'s shared powers analysis. (Leg. Br. 43, 45.) But to the extent *SEIU* does so, Petitioners ask that such passages be treated as superseded.

Unworkability. The Legislature offers no meaningful response to the contrast between *Martinez*—blessing only a "temporary" JCRAR veto, 165 Wis. 2d at 699, which *SEIU* read as three months, 393 Wis. 2d 38, ¶ 80—and real life, where JCRAR's rule vetoes can last for years. (Leg. Br. 50–51; Pet. Br. 32–33.)

The Legislature instead notes that Congress ignored *Chadha* by continuing to enact legislative vetoes. (Leg. Br. 46–47.) That does not mean Petitioners' approach is unworkable; it merely underscores this Court's role in stopping the legislative branch from "drawing all power into its impetuous vortex." *Evers I*, 412 Wis. 2d 525, ¶ 32 (citation omitted).

And the Legislature's other workability arguments highlight the very tools for addressing its concerns. The judiciary, not "hope," ensures that agencies promulgate rules "in accordance with the enacting statutes." (Leg. Br. 47.) Likewise, the Legislature can enact "narrow[er] statutes for agencies to administer." (Leg. Br. 47.)

Reliance. The Legislature also suggests that prior legislatures would not have granted agencies broad rulemaking authority without *Martinez*'s blessing of JCRAR's veto powers. (Leg. Br. 7–8, 47–48.) But that is sheer speculation. Though the Legislature asserts that "rulemaking authority is not severable from JCRAR review" (Leg. Br. 33), it neither performs a severability analysis nor cites authority finding that provisions in separate bills and statutory chapters can be nonseverable.

D. An overbreadth facial challenge standard should apply here.

JCRAR's rulemaking vetoes are facially invalid: the Legislature can never temporarily depart from bicameralism and presentment or veto executive rulemaking discretion. But even if the Legislature had identified some exceptional, valid application, JCRAR's vetoes are still facially overbroad. (Pet. Br. 36–37.)[4]

SEIU's rejection of that standard for separation of powers cases like this one is unsound in principle and unworkable in practice. Ordinarily, the invalid-in-every-application standard shows "due respect" to the Legislature's lawmaking power. *SEIU,* 393 Wis. 2d 38, ¶ 40. But in separation-of-powers cases where the Legislature encroaches on another branch's constitutional role, the overbreadth standard is needed to give "due respect" to both branches. *Id.* Here, forcing the executive branch to litigate serial as-applied challenges to each rulemaking veto hardly "allow[s] . . . the executive to execute" the law. *Id.*

II. Alternatively, JCRAR's vetoes were invalid as applied to the rules here.

At minimum, JCRAR unconstitutionally applied its veto powers to the two DSPS rules at issue. (Pet. Br. 38, 50–51.) The Legislature advocates for further delay: a return to trial court for discovery and factfinding. (Leg. Br. 38–39.) But everyone agrees on the only material fact: JCRAR's vetoes blocked these rules for years. The Legislature identifies no undeveloped facts that might matter.

The Legislature also contends that an as-applied challenge to JCRAR's veto of the conversion therapy rule is

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[4] Petitioners' argument does not concern the standard of proof for constitutional challenges, which requires challengers to show invalidity beyond a reasonable doubt. (Leg. Br. 31.)

moot. (Leg. Br. 40.) But several mootness exceptions apply. The issue has "great public importance," involves the "constitutionality of a statute," is "likely to arise again," and is "capable and likely of repetition and yet evades review." *Matter of Commitment of J.W.K.*, 2019 WI 54, ¶ 29, 386 Wis. 2d 672, 927 N.W.2d 509 (citation omitted). Indeed, JCRAR can re-suspend the rule under Wis. Stat. § 227.26(2)(im). The executive branch needs to know whether there is a limit to JCRAR's vetoes.

CONCLUSION

JCRAR's rulemaking vetoes should be facially invalidated or, alternatively, invalidated as applied here.

Dated this 20th 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 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 3,000 words.

Dated this 20th day of December 2024.

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CERTIFICATE OF EFILE/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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of December 2024.

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