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,

Gathering Waters, Inc.,

Intervenor-Petitioner,

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 below, 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 ("PFAS 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 and ultimate efficacy 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 is concerned about the obstruction of conservation projects and the execution of other laws to protect natural resources that occurs through committee vetoes.

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. When Act 101 was implemented, WCV had chosen safe drinking water as a priority issue given the emergence of PFAS as one of the most dangerous classes of pollutants and the lack of regulations in place to protect communities. WCV continues to advocate for health-based standards for PFAS through legislation and administrative rules.

WCV is concerned with separation of powers issues 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 update administrative rules. Ongoing implementation through rulemaking is an essential component of statutory design, requiring the executive to respond to dynamic conditions, new and changing levels of pollution, and scientific innovation.

STATEMENT OF THE CASE

Petitioners filed this case as a petition for an original action, challenging three types of committee vetoes as violating separation of powers and bicameralism and presentment. The Court granted the petition regarding the authority of the Joint Committee on Finance (JFC) to impede grant awards under the Knowles-Nelson Stewardship Program. The Court held the other two challenges in abeyance. Those claims respectively relate to the authority of the Joint Committee on Employee Relations to veto pay adjustments and the authority of the Joint Committee for the Review of Administrative Rules (JCRAR) to veto administrative rules that are promulgated by the executive branch and approved by the governor.

INTRODUCTION

Respondents argue *Martinez v. Department of Industry, Labor & Human Relations*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), which dealt with JCRAR vetoes of administrative rules, is precedential on the question of JFC vetoes of stewardship grants. *See generally* Resp'ts' Br. S.O.H2O and WCV ("Amici") agree with Petitioners that the Court need not address *Martinez* to answer the question before it. However, to the extent the Court considers giving *Martinez* any weight on this matter, Amici explain from their experiences that *Martinez* is built on two flawed and inaccurate assumptions about the relationship of committee vetoes to bicameralism and presentment and to democratic accountability. Therefore, the Court should not extend *Martinez* to condone committee micromanaging of stewardship grants and should hold that JFC vetoes violate the state constitution. Further, Amici urge the Court to take up the JCRAR claim, allowing Wisconsinites to have effective accountability over their elected officials.

ARGUMENT

I. *Martinez* Hinges on Assumptions that Committee Vetoes Enhance Democratic Accountability and are Short-Term in Effect.

In *Martinez*, the Court ruled that JCRAR's objection to an administrative rule did not violate separation of powers or bicameralism and presentment. 165 Wis. 2d at 699.

A. Balance of power and democratic accountability

The *Martinez* decision did not engage in a substantive analysis of the nature of the rulemaking power at issue. *See* Chad M. Oldfather, *Some Observations on Separation of Powers and the Wisconsin Constitution*, 105 Marq. L. Rev. 845, 868-69 (2022) (calling the decision's reasoning "thin" and "something of a mishmash."). Instead, the Court primarily concerned itself with maintaining "balance," "prevent[ing the] concentration of unchecked power," and the belief the JCRAR veto has a salutary effect on democratic accountability. *Martinez*, 165 Wis. 2d at 696, 701 (citations omitted). The Court stated that the veto "adheres to the … design of our democracy which makes elected officials accountable for rules governing the public welfare," and is, "designed so that the people of this state, through their elected representatives, will continue to exercise a significant check on … nonelected agency bureaucrats." *Id*. at 701.

B. Short-term effect

Of course, even assuming JCRAR vetoes have a beneficial effect on democratic accountability, giving legislative committees the power to alter law outside of bicameralism and presentment runs afoul of the state constitution. *Martinez* justified endowing a committee with this power by casting the power as temporary and pointing to the "critical elements" that require "[t]he full involvement of both houses…and the governor." *Id.* at 700. More recently, *Service Employees International Union (SEIU), Local 1 v. Vos* emphasized that the *Martinez* decision "stressed the importance of the temporary nature" of JCRAR's vetoes. 2020 WI 67, ¶80, 393 Wis. 2d 38, 946 N.W.2d 35. *SEIU* repeated the phrase "three months" or "three-month" nine times to underline the notion that JCRAR vetoes are short-term pauses subject to bicameralism and presentment. *Id.*, ¶¶12, 80-82.

II. *Martinez*'s Assumptions are Incorrect; Committee Vetoes Undermine Enacted Law with Lasting Impact and Weaken Democratic Accountability.

Amici discuss the implementation of Act 101 because their first-hand experience with that process demonstrates how JCRAR suspensions, presumed to be temporary, functionally empower a single legislative committee to veto administrative rules with lasting, if not permanent, effect, and without a meaningful mechanism for democratic accountability.

A. The enactment and implementation of Act 101.

Act 101 prohibits the use or discharge of certain PFAS foams. Wis. Stat. § 299.48(2). There are two exemptions to that prohibition, the second of which is relevant here. That exemption authorizes the testing of PFAS foam if entities testing the foam implement appropriate (1) containment; (2) treatment; and (3) storage or disposal measures "to prevent discharges of the foam to the environment." Wis. Stat. § 299.48(3)(b). A particular provision of Act 101 that S.O.H2O advocated for also clarifies that appropriate treatment and disposal may not include discharging the foam down the sanitary sewer. *Id.*

Amici understood these provisions as addressing situations such as Tyco/Johnson Controls discharging PFAS foam down the sanitary sewer to the Marinette wastewater treatment plant (WWTP). During the time Act 101 was being enacted, Tyco/Johnson Controls had suspended discharges of PFAS foam down the sanitary sewer. *See* City of Marinette, *Marinette Wastewater Treatment Source Reduction*.[1] Since Marinette's WWTP is not equipped to treat wastewater for PFAS, PFAS had previously accumulated in biosolids, which were then spread on 61 nearby fields, resulting in widespread contamination of drinking water. DNR, *PFAS Contamination in the Marinette and*

[1] https://www.marinette.wi.us/DocumentCenter/View/1926/Wastewater-PFAS-History.

Peshtigo Area.[2] Marinette's WWTP also discharged PFAS in its effluent into the Menominee River. *See* WPDES Permit No. WI-0026182-09-1 Issued to the City of Marinette.[3]

Act 101 required DNR to "promulgate rules to implement and administer this section, including to determine appropriate containment, treatment, and disposal or storage measures for testing facilities." Wis. Stat. § 299.48(5). That requirement included the promulgation of an interim emergency rule and then a permanent rule to take its place. *Id. See also* Act 101, § 2.

DNR complied with the requirement to promulgate an emergency rule. *See* 780a1 Wis. Admin. Reg. EmR2045 (Dec. 7, 2019).[4] Among other things, that rule identified an appropriate treatment technology and required ongoing monitoring for numerical "indicator parameters." *Id.*, § 159.08(1)(b). DNR included those indicator parameters to ensure that the treatment technology was appropriately "optimized" to remove PFAS. *Id.*, § 159.08(1)(b)4. S.O.H2O advocated for the emergency rule to prevent any PFAS from being disposed down the sanitary sewer, but ultimately accepted DNR's implementation of the prohibition on disposing of PFAS foam down the sanitary sewer because DNR was requiring monitoring for the indicator parameters.

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[2] https://dnr.wisconsin.gov/topic/PFAS/Marinette.html.
[3] Available by entering "Marinette" in the "Facility Name" search box at https://apps.dnr.wi.gov/potw/.
[4] https://docs.legis.wisconsin.gov/code/register/2020/780a1/register/emr/emr2045_rule_text/emr2045_rule_text.

JCRAR thereafter exercised its authority under Wis. Stat. § 227.26 to review promulgated rules. JCRAR purported to hold the statutorily required public hearing on December 18, 2020, the Friday before Christmas. *See* Wis. Stat. § 227.26(2)(c). However, the hearing was anything but public and instead open to "Invited Speakers only as determined by the Co-Chairs." JCRAR, *Notice of Pub. Hearing* (Dec. 18, 2020).[5] DNR spoke in favor of the rule, while three industry representatives were apparently invited to appear in opposition. *See* EmR2045, Rec. of Comm. Proceedings for JCRAR (Dec. 18, 2020).[6]

Immediately following the hearing, JCRAR partially suspended the emergency rule pursuant to Wis. Stat. § 227.26(2)(d). *Id.* JCRAR did so "on the grounds that the emergency rule fail[ed] to comply with legislative intent and an absence of statutory authority." *Id.* The suspension eliminated the indicator parameters. *Id.*

After JCRAR's suspension, DNR was prohibited from including the suspended provisions in the corresponding permanent rule while the suspension remained in effect. *See* Wis. Stat. § 227.26(2)(L). JCRAR then introduced a bill in each house of the legislature, one of which needed to be enacted to make the

[5] http://docs.legis.wisconsin.gov/raw/cid/1581839.
[6] http://docs.legis.wisconsin.gov/code/register/2020/780a3/register/actions_by_jcrar/actions_taken_by_jcrar_on_december_18_2020/actions_taken_by_jcrar_on_december_18_2020.

suspension permanent. *See* Wis. Stat. § 227.26(2)(f)-(g), (i). *See also, e.g.,* 2021 Wis. S.B. 34.

Both bills were brought to the floor of each house within the prescribed 40-day period; however, both houses simply referred the bills back to the standing committees from whence they came. *See, e.g.,* Bill History of 2021 Wis. S.B. 34.[7] Those bills then languished and did not receive further consideration until the close of the legislative session disposed of the bills on March 15, 2022. *Id.* All the while, the partial suspension and the prohibition on introducing suspended provisions in the permanent rule remained in effect. *See* Wis. Stat. § 227.26(2)(i), (L). Accordingly, the suspended provisions were not included in the permanent rule. *See generally* Wis. Admin. Code NR ch. 159.

B. The Act 101 rulemaking process and the reality of committee vetoes more broadly demonstrate that *Martinez's* assumptions are incorrect.

i. Committee vetoes almost always have long-term effects and avoid bicameralism and presentment.

SEIU repeatedly described *Martinez* as authorizing the temporary suspension of rules for up to three months. *SEIU*, 2020 WI 67, ¶¶12, 80-82. JCRAR's suspension of DNR's rule implementing Act 101, however, was in effect for 452 days. More importantly, the impact of the rule suspension has become

[7] https://docs.legis.wisconsin.gov/2021/proposals/sb34

permanent given Wis. Stat. § 227.26(2)(L)'s prohibition on agencies promulgating permanent rules containing vetoed provisions of emergency rules.

Because JCRAR's rule suspension was prolonged, DNR's rulemaking authority would have expired had it not promulgated a permanent rule while the suspension was in effect. *See* Wis. Stat. § 227.135(5). When that permanent rule became law, so too did JCRAR's suspension. As a result, PFAS foam may be treated and disposed down the sanitary sewer to WWTPs that are not designed to remove PFAS, contrary to S.O.H2O's understanding of the legislative intent behind the exact provision for which it had advocated including in Act 101. Tyco/Johnson Controls has since resumed its discharge of PFAS down the sanitary sewer to Marinette's WWTPs. *See* City of Marinette, *Marinette Wastewater Treatment Source Reduction, supra* note1. That means PFAS are still being discharged to surface water from Marinette's WWTP. That also means PFAS are still accumulating in Marinette's biosolids, making disposal of those biosolids challenging, costly, and risky to the environment and public health.

Protracted or even functionally permanent vetoes are not peculiar to JCRAR's veto of Act 101's rule; they are the norm. Table1 below shows every instance of bills being introduced to sustain JCRAR's vetoes over the last 20 years, as recorded by the Joint Legislative Council. *See* Wis. Legis. Council Rules

Clearinghouse, *2022 Annual Report*, at 9-12 (2023).[8] Table1 shows the legislature has never acted on any of these bills within 90 days of the JCRAR objection.

Table1.

JCRAR Veto Date	Bills	Did one or both houses send bills back to committee?	Final Resolution Date	Number of Days to Resolution	Enacted into law?
1/21/2023	2023AB3/SB4	Both	*4/11/2024	446	No
4/26/2022	2023AB5/SB3	Both	*4/11/2024	716	No
7/20/2022	2023AB4/SB5	Both	*4/11/2024	631	No
3/9/2023	2023AB229/SB228	Both	*4/11/2024	399	No
6/25/2020	2021AB14/SB31	Both	3/15/2022	628	No
3/5/2020	2021AB12/SB35	Both	3/15/2022	740	No
3/17/2020	2021AB11/SB32	Both	3/15/2022	728	No
6/2/2016	2017AB29/SB5	Both	4/16/2018	683	Yes
3/3/2016	2017AB30/SB6	Both	4/16/2018	774	Yes
3/3/2016	2017AB31/SB4	Both	3/28/2018	755	No
6/2/2011	2011AB196/SB139	Both	3/23/2012	295	No
4/18/2006	2007AB37/SB9	One	3/21/2008	703	No
5/16/2006	2007AB27/SB10	Both	3/21/2008	675	No
12/16/2004	2005AB8/SB8	Both	7/18/2006	579	No
9/23/2004	2005AB12/SB12	Both	7/18/2006	663	No
3/31/2005	2005AB401/SB200	Both	7/18/2006	474	No
3/31/2005	2005AB404/SB201	Both	7/18/2006	474	No
4/27/2005	2005AB442/SB220	Both	7/18/2006	447	No
3/6/2003	2003AB253/SB123	Both	3/31/2004	391	No
1/10/2002	2003AB25/SB19	Both	3/31/2004	811	No

* Last floorperiod under 2023 Sen. Joint Res. 1. Note: In the 2021 session, JCRAR made three indefinite objections for which bills were not introduced. *See* Wis. Stat. § 227.19 (5) (dm).

[8] https://legis.wisconsin.gov/lc/media/1777/22annreport_chr.pdf.

The prolonged impact of the veto is compounded because legislative leaders choose to avoid bicameralism and presentment by not voting on the bills to sustain the veto, instead sending them back to committee for the remainder of the biennial session. The average time from JCRAR veto to final disposition of a bill is 601 days.

The threat of the committee veto also alters the state of the law. Instead of objecting, committees will often request modifications to the rule. *See, e.g.,* CR19-094, Rec. Of Comm. Proceedings for JCRAR (Aug. 25, 2022).[9] Implicitly, the executive must agree to the modifications or face a potentially yearslong veto. Many times, the potential delay can undermine the objective of the rulemaking, particularly because rulemaking authority is included in statutory design to allow the executive to apply the underlying law to dynamic conditions in a timely manner.

ii. Committee vetoes create unchecked power and frustrate democratic accountability.

Under the constitution, every Wisconsin voter has three elected officials involved in the legislative process, one state representative, one state senator and the governor. Wis. Const. art. IV, §§ 4-5, art. V, § 3. S.O.H2O members worked with the

[9] https://docs.legis.wisconsin.gov/2021/related/records/joint/administrative_rules/1688110.

authors of the bill that would become Act 101, including their state representative, to ensure it contained a prohibition on the discharge of PFAS foam. They then interacted with DNR to advocate for the effective implementation through the promulgation of rules. The governor approved the scope statement and final emergency rule.[10]

However, JCRAR's veto changed the law through means that elude democratic accountability. First, JCRAR excluded S.O.H2O members by holding a "public" hearing on the vetoes at which members of the public were not allowed to appear unless invited. Then, after industry lobbyists addressed the committee, six legislators decided to suspend numerous portions of the emergency rule, in ways that significantly undermined what S.O.H2O believed the legislature had accomplished by prohibiting the disposal of PFAS foam down the sanitary sewer. None of the JCRAR members who made this decision represented the Marinette and Peshtigo area, and the governor, who represents the people as a whole, had no check to override the decision of six legislators.

JCRAR ostensibly vetoed the rule's provisions because they did not comply with legislative intent and exceeded legislative authority. However, Senator Cowles, the author of Act 101,

[10] Gubernatorial approvals are a statutorily required part of the administrative rulemaking process. 2011 Wis. Act 21, §§ 4, 32.

publicly disagreed with the committee's judgment. Press Release, *Cowles Statement on JCRAR Actions on Firefighting Foam Rules* (Dec. 18, 2020).[11] This shows how committee vetoes can easily be abused to implement arbitrary policy preferences, even when there is good reason to believe the executive is acting within the four corners of the law. The result left S.O.H2O members with no politically viable course of action to ensure the law would be faithfully executed.

But, again, it is not just Act 101, and it is not just S.O.H2O. All Wisconsinites are disempowered by committee vetoes, save perhaps those interest groups with the lobbying infrastructure and resources to influence the few legislators who sit on these committees.

JCRAR's choice to act the Friday before Christmas is emblematic of the strategic obscurity in which committee vetoes operate. WCV knows from its civic engagement efforts that committee veto processes are not well understood. Of the few highly-informed Wisconsinites who know about the powerful role of committees, only those from a handful of districts have much hope of influencing their decision-making. The legislature's practice of sending the bills to sustain a veto back to committee

[11] https://www.wispolitics.com/wp-content/uploads/2020/12/Statement-on-JCRAR-Actions-12-18-20.pdf.

allows legislators to diffuse responsibility and further escape accountability.

S.O.H2O's experience shows how committee vetoes can be even more exasperating. Members of S.O.H2O asked the executive to include the suspended provisions of the emergency rule in the permanent rule, only to be told that was not legally possible because six legislators decided those provisions were not consistent with the legislative intent. The author of Act 101 disagreed, but, because the bills pertaining to the veto were stuck in parliamentary limbo, nothing could be done.

Martinez hoped that condoning committee vetoes would save Wisconsinites from bureaucracy. Instead, it has allowed policymaking to be lost in Kafkaesque dead ends. Small groups of legislators, who most Wisconsinites do not elect, are given significant leverage, and sometimes final say, over the implementation of laws, over and against the democratically elected governor.

III. The Court Should Not Extend *Martinez*'s Flaws to This Case; Rather, It Should Apply Separation of Powers Precedents that Enable Clear Lines of Accountability.

Petitioners have outlined separation of powers precedents that better adhere to the constitution's text and structure and that provide for greater conceptual clarity. *See* Mem. Supp. Pet. for Original Action, at 46-49. In addition, as a corollary to clarity,

this line of precedent promotes democratic accountability by providing Wisconsinites with an intelligible framework for holding elected officials responsible for their respective responsibilities. At critical times, Amici's members are understandably confused and frustrated when trying to understand who, if anyone, is responsible for executing the law.

This confusion is enabled by a form of separation of powers analysis that suggests a virtually unbounded role for legislative committees. The Legislature claims that executive power is "shared" with committees when any of several sweeping exceptions apply; for instance, executive power is shared when the law cannot be executed individually by the governor or other executive officers directly, and must be carried out by executive agencies, or when the law involves the expenditure of funds. Resp'ts' Br. 36.

The Legislature also states that preventing its committees from possessing executive authority in these areas "will cause it to exercise greater caution before empowering agencies to administer various important actions…" *Id.* This argument is akin to logic that finds JCRAR vetoes comport with separation of powers because the legislature could theoretically retract the rulemaking authority altogether.[12] *E.g. Koschkee v. Taylor*, 2019

[12] In reality, the legislature is extremely reluctant to act on the most limited retractions of rulemaking authority. *See* supra Section II.B.a.

WI 76 ¶20, 387 Wis. 2d 552, 929 N.W.2d 600. Both lines of thinking portray the legislature as a detached institution, one that is primarily concerned with its own institutional power and less interested in whatever policy objectives and political demands caused the executive authority to be enacted in the first place.

Moving forward, the Court should decline to follow these justifications for committee vetoes because they forget in whose name the legislature acts. No authorization of executive action has ever been given in the name of the legislature as an institution; legislation is always to be an expression of the will of the people. Wis. Const. art. IV, § 17. When the legislature passes a bill to protect drinking water, preserve natural areas or set forth some other important policy, which *necessarily* requires significant executive actions, the legislature is not charitably giving up some power that it could in any meaningful way keep for itself. It is responding to demands from the people of the state. The legislature's reliance on the executive branch to carry out the will of the people is a feature of its constitutionally designed interdependence.

CONCLUSION

Therefore, in addition to holding that JFC vetoes of stewardship grants are unconstitutional, Amici urge the Court to take up the JCRAR claim in the petition for original action and

apply separation of powers precedents that enable Wisconsinites to have clear accountability over the elected officials who act in their name.

Dated this 22nd day of March, 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 3,000 words.

Dated: March 22, 2024.

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