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,

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; and SENATOR STEVE NASS,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' OPENING BRIEF

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INTRODUCTION

Like the Knowles-Nelson Stewardship Program veto invalidated in *Evers v. Marklein*, 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395 ("*Evers I*"), this case involves another effort by the Legislature to control the executive branch through legislative committee vetoes. Here, the Legislature has empowered the Joint Committee for Review of Administrative Rules (JCRAR) to veto administrative rules proposed and promulgated by executive agencies. Just as in *Evers I*, that legislative veto violates the Wisconsin Constitution.

JCRAR's vetoes of two important rules illustrate the problem. JCRAR indefinitely blocked a rule of the Department of Safety and Professional Services updating Wisconsin's commercial building standards, a veto that will last forever, unless a bill is enacted allowing the rule. And JCRAR "temporarily" vetoed a rule updating professional ethics standards for therapists and social workers to define therapy techniques seeking to change a person's sexual orientation or gender identity (often called "conversion therapy") as unethical. That "temporary" veto lasted roughly three-and-a-half years—without the Legislature's passing a bill to support it.

JCRAR's authority to veto administrative rules like this is facially unconstitutional, for two independent reasons.

First, such vetoes violate constitutional bicameralism and presentment requirements. When the legislative branch alters the legal rights and duties of others, it must pass a bill through both houses and present it to the Governor. JCRAR's vetoes have that exact effect, since they alter the legal rights and duties of those outside the legislative branch. Even *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), recognized as much. JCRAR's "indefinite" vetoes, which are never accompanied by constitutional lawmaking procedures, are unconstitutional even under *Martinez*. As to JCRAR's

"temporary" vetoes, *Martinez* erred by holding that such vetoes are constitutionally permissible, and its unsound analysis, which excused departures from lawmaking procedures, should be overruled.

Second, JCRAR's vetoes intrude on executive authority. When the Legislature enacts a statute that grants rulemaking authority to an executive agency, the agency exercises core executive power in carrying out that statute. JCRAR's ability to block this core law-execution power is invalid.

Even if rulemaking were instead viewed as a shared power, the Legislature still cannot act through a committee outside its lawmaking function, and it cannot block the executive branch from acting. That is exactly what JCRAR's vetoes do.

If this Court declines to facially invalidate JCRAR's rulemaking vetoes, it should still hold that they were unconstitutional as applied to the rules at issue here. Under any test, blocking the building code rule indefinitely and the conversion therapy rule for three-and-a-half years goes too far.

ISSUE PRESENTED

Do Wis. Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d) and (im) violate bicameralism and presentment and the separation of powers by allowing JCRAR to veto rules promulgated by executive branch agencies, or at least those from the Department of Safety and Professional Services and its attached Marriage And Family Therapy, Professional Counseling, and Social Work Examining Board (the "Board"), relating to commercial building standards and ethics standards for social workers, marriage and family therapists, and professional counselors?

STATEMENT OF THE CASE

I. JCRAR has multiple rulemaking veto powers.

Before a proposed administrative rule leaves the executive branch, it must travel through a lengthy promulgation process, including publishing a scope statement and receiving the Governor's approval of it (Wis. Stat. § 227.135); drafting the rule's text (Wis. Stat. § 227.14); preparing an economic impact analysis (Wis. Stat. § 227.137); submitting materials to Legislative Council staff, who may recommend changes (Wis. Stat. § 227.15); holding a public hearing on the proposed rule (Wis. Stat. § 227.16); and submitting the rule to the Governor for approval or rejection (Wis. Stat. § 227.185).

But even once an executive branch agency completes all these steps, it cannot promulgate the rule until and unless JCRAR approves it. And even after a rule is promulgated, JCRAR can suspend it an unlimited number of times.

A. JCRAR may temporarily or indefinitely "object" to the promulgation of a proposed rule under Wis. Stat. § 227.19(5)(c), (d), and (dm).

After the Governor approves a proposed rule under Wis. Stat. § 227.185, the rule does not go into effect. Instead, it travels to the legislative branch and stops at a standing committee that reviews the rule and recommends whether the proposed rule be approved or vetoed. *See* Wis. Stat. § 227.19(2), (4). The rule then travels to JCRAR, a ten-person legislative committee. JCRAR's members are chosen by legislative leaders from each political party in both houses, based on the party's number of representatives in each house. Wis. Stat. § 13.56. Membership is not determined by any geographic or population requirements.

Until JCRAR acts on the standing committee's recommendation (or fails to act while the rule is under JCRAR's jurisdiction), Wis. Stat. § 227.19(5)(c) bars an agency from promulgating the proposed rule. While the rule is under JCRAR's jurisdiction, that legislative committee has two options for vetoing it: a regular "objection" under Wis. Stat. § 227.19(5)(d) or an "indefinite objection" under Wis. Stat. § 227.19(5)(dm).

JCRAR may lodge a *regular objection* under Wis. Stat. § 227.19(5)(d), which empowers JCRAR to "object to a proposed rule or a part of a proposed rule." After JCRAR makes a regular objection, it must introduce a bill in each house of the Legislature to "support" the objection. Wis. Stat. § 227.19(5)(e). The agency "may not promulgate the proposed rule or part of the proposed rule objected to until a bill introduced under par. (e) fails to be enacted." Wis. Stat. § 227.19(5)(d). If such a bill becomes law, the proposed rule cannot be promulgated unless a later law authorizes it. *See* Wis. Stat. § 227.19(5)(f). If, however, the bills are defeated or otherwise fail to be enacted[1], the agency can promulgate the rule. *See* Wis. Stat. § 227.19(5)(f). Although Wis. Stat. § 227.19 includes some time limits regarding the required bills, there is no requirement that the full Legislature ever vote on them. *See* Wis. Stat. § 227.19(5)(e), (6)(b).

JCRAR can also "*indefinitely object*" to a proposed rule under Wis. Stat. § 227.19(5)(dm). If JCRAR does so, "the agency may not promulgate the proposed rule or part of the proposed rule objected to until a bill introduced under par. (em) is enacted." Wis. Stat. § 227.19(5)(dm); *see also* Wis. Stat.

[1] If both houses of the Legislature do not pass one of these bills by the end of the last floor period in a two-year legislative session, they automatically fail to be enacted (like all other bills). *See* Rule 83(4)(a), Joint Rules of the Wisconsin Legislature.

§ 227.19(5)(fm). The Legislature "may" introduce such a bill, but it need not do so. Wis. Stat. § 227.19(5)(em).

For either type of objection, JCRAR must offer one of six reasons for its objection: an "absence of statutory authority"; an "emergency relating to public health, safety, or welfare"; a "failure to comply with legislative intent"; a "conflict with state law"; a "change in circumstances" since the enactment of the law authorizing rulemaking; "arbitrariness and capriciousness"; or the "imposition of an undue hardship." Wis. Stat. § 227.19(4)(d); *see also* Wis. Stat. § 227.19(5)(d) (cross-referencing section 227.19(4)(d)), 227.19(5)(dm)) (same).[2]

B. JCRAR may suspend promulgated rules unlimited times under Wis. Stat. § 227.26(2)(d) and (im).

If a rule survives the objection process, it may be promulgated and go into effect. But, under Wis. Stat. § 227.26(2)(d), JCRAR may then suspend the rule, citing one or more of the reasons specified in Wis. Stat. § 227.19(4)(d).

Such a rule remains suspended while JCRAR takes executive action and each house of the Legislature introduces a bill to support the suspension. Wis. Stat. § 227.26(2)(f). If such a bill becomes law, "the rule is repealed and may not be promulgated again unless a subsequent law specifically authorizes such action." Wis. Stat. § 227.26(2)(i). As with "regular" objections to rules pre-promulgation, Wis. Stat. § 227.26 sets some timelines for these bills, but there is no requirement that the full Legislature ever vote on them. Wis. Stat. § 227.26(2)(f), (h), (j).

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[2] For regulations relating to dwellings, JCRAR may proffer a seventh reason to reject a rule: that it would increase the cost of constructing or remodeling a dwelling more than $1,000. Wis. Stat. § 227.19(4)(d)7.

Prior to 2018, if both bills failed to be enacted, the rule would again take effect, and the committee could not suspend it again. *See* Wis. Stat. § 227.26(2)(i). But Wis. Stat. § 227.26(2)(im), added through 2017 Act 369 now provides that JCRAR "may act to suspend a rule as provided under this subsection multiple times."

C. These JCRAR veto powers have been constitutionally controversial for decades.

Constitutional controversy has dogged these JCRAR veto provisions since they were first proposed in the 1950s.[3]

In 1953, the Legislature first enacted a provision allowing itself to veto an administrative rule by joint resolution. *See* Wis. Stat. § 227.031 (1953–54). Shortly thereafter, Attorney General Vernon Thompson issued an opinion concluding that the provision was unconstitutional. *See* 43 Wis. Op. Att'y Gen. 350 (1954); (Pet. App. 87). His opinion rested on two key premises: (1) "adopted rules and regulations of administrative agencies have the force and effect of law"; and (2) "any legislative act which constitutes law must be enacted by a bill and it must have the style of an enactment as there prescribed." *Id.* at 353–54; (Pet. App. 90–91). Because the joint resolutions repealed administrative rules—thereby modifying legal obligations—without following constitutional bill-passing procedures, the Attorney General opined that they were unconstitutional. *Id.* at 359–60; (Pet. App. 96–97).

Apparently in response to the Attorney General's opinion, the Legislature promptly repealed this veto provision as part of an overhaul of chapter 227's rulemaking

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[3] Much of this historical overview is drawn from research done by Michael Duchek of the Legislative Reference Bureau. *See Legislative Power to Suspend Administrative Rules: A Historical Look*, Wisconsin Lawyer (Sept. 2024).

procedures. *See* 1955 Wis. Act 221, § 12. As part of this overhaul, the Legislature created JCRAR but gave it "advisory powers only." *See id.* § 13 (creating Wis. Stat. § 227.041 (1955–56)).

In 1963, the Legislature sought to expand JCRAR's power by allowing it to invalidate rules; Attorney General George Thompson, citing his predecessor's opinion, again concluded that such a provision would be unconstitutional. *See* 52 Wis. Op. Att'y Gen. 423 (1963); (Pet. App. 98). In his view, such a provision would improperly "attempt[ ] a change in law by repeal of or change in administrative rules by other than the enactment of a bill." *Id.* at 424; (Pet. App. 99). The proposed bill failed to pass.

In 1965, legislators introduced a proposed constitutional amendment that would have expressly allowed JCRAR to suspend administrative rules. 1965 S.J.R. 72; (Pet. App. 47–48). This measure also never passed.

But the next year, in 1966, the Legislature granted JCRAR such a power by statute. *See* 1965 Wis. Act 659, § 2 (creating Wis. Stat. § 13.56(2) (1967–68)). For the first time, by a supermajority vote[4], JCRAR could suspend promulgated administrative rules. The provision included bill-introduction provisions like the ones that exist today. *See* Wis. Stat. § 13.56(2) (1967–68). Attorney General Warren issued a series of opinions concluding that this provision was unconstitutional, for largely the same reasons as his predecessors. *See* 63 Wis. Op. Att'y Gen. 159 (1974); *id.* at 168; *id.* at 173; (Pet. App. 101, 110, 115).

Yet the Legislature continued to expand JCRAR's power, allowing it to object to proposed rules in addition to suspending promulgated ones. The Legislature first tried to

[4] This was later reduced to a majority vote requirement. *See* 1973 Wis. Act 162, § 1.

add such a power in 1977, but Governor Schreiber vetoed it due to both "practical and constitutional" concerns. (Pet. App. 50.) The Legislature tried again, accomplishing its goal in the 1979 budget bill. Governor Dreyfus partially vetoed the JCRAR objection provisions, again citing "basic separation of powers" concerns with "legislators want[ing] to become administrators." (Pet. App. 61.) But the Legislature overrode his veto, and the provisions took effect. *See* 1979 Wis. Act 34, § 1019ua (creating Wis. Stat. § 227.018(5) (1979–80)).[5]

The Legislature has since increased JCRAR's power even further. In 2017, through the "Regulations from the Executive in Need of Scrutiny" (or "REINS") Act, the Legislature added the indefinite objection statutes, Wis. Stat. § 227.19(5)(dm), (em), and (fm). *See* 2017 Wis. Act 57, §§ 28–29, 31. And in 2018, the Legislature empowered JCRAR to suspend rules multiple times. *See* 2017 Wis. Act 369, § 64.

II. JCRAR uses its veto powers to block and suspend two DSPS administrative rules.

DSPS and the Board have administrative rulemaking authority in two areas that have recently triggered JCRAR's exercise of its veto power: rules that set commercial building standards; and rules establishing ethics standards for social workers, marriage and family therapists, and professional counselors.

A. JCRAR indefinitely objects to DSPS's proposed rule revising the state's commercial building standards.

Under various provisions of Wis. Stat. ch 101, DSPS is responsible for developing and updating the commercial building standards contained in Wis. Admin. Code. chs. SPS

[5] These new provisions generally tracked the "regular" objection provisions now found in Wis. Stat. § 227.19(5)(d), (e), and (f).

361–366. These rules protect the health, safety, and welfare of the public by establishing minimum standards for the design, construction, maintenance, and inspection of public buildings, including multifamily dwellings and places of employment. *See* Wis. Admin. Code SPS § 361.01.

In 2020, DSPS initiated rulemaking efforts to update the commercial building standards and bring them into compliance with current building standards.[6] DSPS and the Commercial Building Code Council[7] held numerous meetings to draft and review the proposed rule. DSPS completed its work on the proposed rule and submitted it to the Legislature for review in May 2023. (Pet. App. 24, 33 (Pet. ¶¶ 52, 76).)

In an executive session held September 29, 2023, JCRAR voted 6-4 to indefinitely object to the rule under Wis. Stat. § 227.19(5)(dm). Its proffered reasons included a failure to comply with legislative intent, a conflict with state law, arbitrary and capricious action, and a supposedly "deficient" economic impact analysis. (Pet. App. 33 (Pet. ¶¶ 77–78).) The Legislature has not passed a bill authorizing this rule, and so it has not been promulgated.

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[6] Wisconsin's commercial building standards must comply with various federal laws, including the Fair Housing Act, Americans with Disabilities Act, and federal statutes relating to energy conservation. Relatedly, DSPS is statutorily obligated to regularly update energy conservation standards. *See* Wis. Stat. § 101.027(2)–(3).

[7] DSPS must consult with the Commercial Building Code Council in designing these rules. *See* Wis. Stat. § 101.023. The Council is a statutory body that includes representatives from building-related professions: skilled tradespeople; building inspectors; firefighters; building contractors; architects; engineers; and designers. *See* Wis. Stat. § 15.407(18).

B. JCRAR temporarily objects to the proposed conversion therapy rule and then suspends it after promulgation.

DSPS and its attached boards regulate various licensed professions, including social workers, marriage and family therapists, and professional counselors. *See* Wis. Stat. § 15.405(7c); Wis. Stat. ch. 457. As part of its duties, the Board must promulgate administrative rules that establish ethics standards for people licensed in these professions. *See* Wis. Stat. § 457.03(2). The Board has carried out this statutory responsibility through Wis. Admin. Code ch. MPSW 20.

In 2019 and 2020, the Board proposed an administrative rule that would have updated these ethics standards. One provision would have defined as unethical conduct employing or promoting any intervention or method with the purpose of attempting to change a person's sexual orientation or gender identity. *See* Wis. Admin. Code MPSW § 20.02(25). In February 2020, the Board completed its work on the proposed rule and submitted it to the Legislature for review. (Pet. App. 26 (Pet. ¶ 56).)

In an executive session held June 25, 2020, JCRAR considered the rule. JCRAR first voted on whether to indefinitely object to the rule under Wis. Stat. § 227.19(5)(dm). After deadlocking 5-5, it voted 6-4 to make a regular objection under Wis. Stat. § 227.19(5)(d). (Pet. App. 34 (Pet. ¶ 80).)

The rule sat blocked, waiting for legislative action. Nearly six months later, in late January 2021, JCRAR introduced two bills in support of its objection: 2021 Assembly Bill 14 and 2021 Senate Bill 31.[8] The bills were referred to committees in the respective chambers. The bills were placed

[8] JCRAR was entitled to wait this long under Wis. Stat. § 227.19(5)(g), which covers bill-introduction procedures when the Legislature is out of session.

on the calendar of each house for further consideration on March 16, 2021. Rather than vote on the bills, both houses referred them back to committees. (Pet. App. 35 (Pet. ¶ 81).)

About one year later, both bills terminated without further action at the end of the legislative session's last general-business floor period. The failure of the bills to be enacted finally lifted JCRAR's objection to the rule, nearly two years after the committee lodged a regular objection. (Pet. App. 35 (Pet. ¶ 82).) On November 28, 2022, the proposed rule was published in Wisconsin Administrative Register No. 803, and it took effect on December 1, 2022. (Pet. App. 36 (Pet. ¶ 83).)

Less than six weeks later, on January 12, 2023, JCRAR held an executive session and, by a 6-4 vote, used its authority under Wis. Stat. § 227.26(2)(d) to suspend Wis. Admin. Code MPSW § 20.02(25), the portion of the rule defining interventions with the aim of attempting to change a person's sexual orientation or gender identity as unethical. (Pet. App. 36 (Pet. ¶ 84).)

The legislative process began again. About a month later, JCRAR introduced two bills to support its suspension of the rule: 2023 Assembly Bill 3 and 2023 Senate Bill 4. The bills were referred to a committee in each house, placed on the calendar in both houses in mid-March 2023, and, without an up-or-down vote, referred back to a committee. (Pet. App. 36 (Pet. ¶ 85).) Over one year later, both bills terminated without further action at the end of the legislative session's last general-business floor period.[9] The rule then took effect.

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[9] *State of Wis. Assembly J. (Corrected Copy)*, Wis. State Legis., https://docs.legis.wisconsin.gov/2023/related/journals/assembly/20240415/_9 (last visited Nov. 7, 2024); *State of Wis. Assembly J.*, Wis. State Legis., https://docs.legis.wisconsin.gov/2023/related/journals/senate/20240415/_11 (last visited Nov. 7, 2024).

During the more-than-four years between when the Board first submitted the proposed rule to JCRAR in February 2020 and when the temporary suspension lifted in April 2024, this rule was in effect for less than six weeks. The Legislature never voted to pass a bill blocking the rule or presented such a bill to the Governor for his signature or veto.

ARGUMENT

I. JCRAR's rulemaking vetoes violate constitutional bicameralism and presentment requirements.

When the legislative branch alters the legal rights and duties of others, it must do so by passing a bill through both houses and presenting it to the Governor for his signature—bicameralism and presentment. JCRAR's rulemaking vetoes are facially invalid because they fail to follow those requirements.

A. When the legislative branch alters legal rights and duties, it must do so through a law enacted via bicameralism and presentment.

Given their fear of legislative overreach, the Framers of both the U.S. and Wisconsin constitutions created a "crucible" that "bills must overcome to become law": bicameralism and presentment. *Becker v. Dane County*, 2022 WI 63, ¶ 101, 403 Wis. 2d 424, 977 N.W.2d 390 (Bradley, R., J., dissenting).

When the legislative branch seeks to make law, it must pass a bill in both houses—bicameralism. *See* Wis. Const. art. IV, § 17. The bill must then be presented to the Governor for signature or veto—presentment. *See* Wis. Const. art. V, § 10. Together, bicameralism and presentment "cabin the immense power vested in the legislature to enact laws." *Evers I*, 412 Wis. 2d 525, ¶ 13.

Of course, not all legislative acts must pass through the constitutional gantlet of bicameralism and presentment. A single house or legislative committee can, for example, conduct oversight hearings or audit an agency's expenditures. Whether legislative acts amount to lawmaking, with its bicameralism and presentment requirements, "depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *INS v. Chadha*, 462 U.S. 919, 952 (1983) (citation omitted). If a legislative action has the "purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the legislative branch," *id.*, then it can occur only through lawmaking procedures.[10]

B. JCRAR's vetoes trigger bicameralism and presentment because they alter the legal rights, duties, and relations of those outside the legislative branch.

All JCRAR's rulemaking vetoes—whether pre- or post-promulgation—have the "purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the legislative branch." *Id.* at 952. So, they all trigger bicameralism and presentment.

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[10] This Court has never addressed a test for deciding when legislative action triggers bicameralism and presentment requirements, but *Chadha*'s test is a good one, and other state high courts have adopted it. *See, e.g.*, *Blank v. Dep't of Corr.*, 611 N.W.2d 530, 536–37 (Mich. 2000); *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622, 638 (1984); *see also State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 773 (Alaska 1980) (pre-*Chadha* decision applying similar test).

1. JCRAR's suspension power under Wis. Stat. § 227.26(2)(d) and (im).

Regarding JCRAR's power to suspend promulgated administrative rules, the key premise is that "[a]dministrative rules enacted pursuant to statutory rulemaking authority have the force and effect of law." *Kieninger v. Crown Equip. Corp.*, 2019 WI 27, ¶ 16 n.8, 386 Wis. 2d 1, 924 N.W.2d 172. When an agency promulgates an administrative rule with the "force and effect of law," it "alter[s] the legal rights, duties and relations of persons . . . outside the legislative branch." The same is true when JCRAR uses Wis. Stat. § 227.26(2)(d) or 227.26(2)(im) to suspend a promulgated administrative rule—the "legal rights, duties and relations" of regulated parties change back to what they were, prior to the rule's promulgation.

This Court implicitly recognized as much in *Martinez*. Although *Martinez* upheld Wis. Stat. § 227.26(2)(d)—wrongly, as explained below—it emphasized that "only the formal bicameral enactment process coupled with executive action can make permanent a rule suspension," pointing to the bill-introduction requirements in Wis. Stat. § 227.26(2). 165 Wis. 2d at 699. This "full involvement of both houses of the legislature and the governor [were] critical elements" on which the Court rested its decision. *Id.* at 700.

As an example of the veto's law-altering effect, when the Board promulgated the conversion therapy rule, regulated professionals could not practice conversion therapy without facing professional discipline. *See* Wis. Stat. § 457.26(2)(f) (allowing the Board to "deny, limit, suspend, or revoke" a license for "unprofessional or unethical conduct in violation of the code of ethics established in the rules promulgated under s. 457.03 (2)"). When JCRAR suspended the rule under Wis. Stat. § 227.16(2)(d), regulated professionals recovered the right to practice conversion therapy without facing such discipline.

The same pattern repeats itself with all JCRAR rule suspensions. Because administrative rules have the force of law, JCRAR always changes legal relations when it suspends them. These suspensions thus always trigger bicameralism and presentment.

2. JCRAR's objection power under Wis. Stat. § 227.19(5)(c), (d) and (dm).

JCRAR's powers to object to proposed administrative rules also trigger bicameralism and presentment, just under a slightly different analysis. Because proposed rules have not yet taken effect and thus do not yet have the force of law, JCRAR's *objections* (unlike its *suspensions*) do not change the legal rights and duties of regulated parties. However, JCRAR's pre-promulgation objections do change the legal rights and duties of a different group outside the legislative branch: the executive officials with statutory rulemaking authority. Then-Professor Scalia explained this law-altering dynamic:

> Laws can generally be divided into two types, which sometimes overlap: The first confers rights and obligations upon private individuals. The second . . . confers powers or imposes prohibitions upon executive . . . officials . . . . [T]he withdrawal of executive power previously conferred—that is to say, the prohibition of executive action which is currently legitimate—can only be done by law, that is, by that process which invokes the presidential veto power.

Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, 3 Regulation: AEI Journal on Government and Society, 21 (Nov./Dec. 1979); (Pet. App. 118–25, at 120).

In other words, when JCRAR vetoes a proposed rule, it effectively amends the statute under which the executive agency proposed that rule—it "withdraws executive power previously conferred" (or "prohibits executive action which is currently legitimate") as Justice Scalia put it. The agency had

statutory authority to promulgate the rule; after JCRAR's veto, it does not.

The conversion therapy rule illustrates this point. Under Wis. Stat. § 457.03(2), the Legislature required the Board to "promulgate rules establishing a code of ethics to govern the professional conduct of certificate holders and licensees." By proposing the conversion therapy rule, the Board exercised that statutory authority. By objecting to that rule, JCRAR effectively withdrew a share of the statutory authority the Legislature had granted to the Board. It is as if JCRAR amended Wis. Stat. § 457.03(2) to allow the Board to "promulgate rules establishing a code of ethics to govern the professional conduct of certificate holders and licensees, *but not one barring conversion therapy*."

JCRAR does not have that power—only the full Legislature does. JCRAR's pre-promulgation vetoes trigger bicameralism and presentment.

3. The promulgation pause under Wis. Stat. § 227.19(5)(c).

The same is true for Wis. Stat. § 227.19(5)(c), which forbids agencies from promulgating a rule until JCRAR approves it (through action or inaction) or, if JCRAR objects, until the supporting bill fails to be enacted.

Like an affirmative JCRAR objection that prevents promulgation of a rule, the required pause under § 227.19(5)(c) amends the underlying rulemaking statute, triggering bicameralism and presentment. The provision acts as a "pocket veto" period during which both JCRAR (under Wis. Stat. § 227.19(5)(b)) and another legislative standing committee (under Wis. Stat. § 227.19(4)(b)) may block a rule for at least 120 days while the two committees review it, and longer if they require additional economic impact analysis.

That is functionally indistinguishable from what happens after JCRAR objects to a rule. In both situations, a legislative committee effectively tells the agency that it cannot exercise a portion of its statutory rulemaking authority until the committee says so. That also requires bicameralism and presentment.

C. JCRAR's vetoes are facially invalid because they do not comply with bicameralism and presentment.

All JCRAR's rulemaking vetoes are facially invalid. JCRAR's indefinite objection power, which never requires an enacted bill to sustain the veto, is facially invalid even under *Martinez*. And JCRAR's "temporary" vetoes, including the promulgation pause, are facially invalid too: *Martinez* erred on this point and should be overruled.

1. JCRAR's indefinite objection authority under Wis. Stat. § 227.19(5)(dm) is facially invalid, even under *Martinez*.

Bicameralism and presentment principles invalidate JCRAR's indefinite objection power under Wis. Stat. § 227.19(5)(dm), even under *Martinez*. *Martinez* upheld JCRAR's "temporary" rule suspension power on the theory it would eventually comply with the "formal bicameral enactment process." 165 Wis. 2d at 699. That is not true with section 227.19(5)(dm).

JCRAR's indefinite objections are not "temporary." When one occurs, "the agency may not promulgate the proposed rule or part of the proposed rule that was objected to *unless subsequent law specifically authorizes its promulgation*." Wis. Stat. § 227.19(5)(fm). So, JCRAR can "make permanent a rule suspension" without the Legislature's *ever* needing to "follow the formal bicameral enactment process." *Martinez*, 165 Wis. 2d at 699. Indeed, that is exactly what JCRAR is doing to DSPS's proposed rule

updating Wisconsin's commercial building code. That violates even *Martinez*'s view of bicameralism and presentment.

2. This Court should overrule *Martinez* and invalidate JCRAR's "temporary" objection and suspension powers under Wis. Stat. § 227.19(5)(c) and (d), and Wis. Stat. § 227.26(2)(d) and (im).

JCRAR's vetoes under Wis. Stat. § 227.19(5)(c) and (d) and § 227.26(2)(d) and (im) can be made permanent only through bills passed by the full Legislature and signed by the Governor. But that feature does not save them: our constitution contains no exception for ostensibly "temporary" departures from bicameralism and presentment. *Martinez* was wrong on that point and should be overruled.[11]

Stare decisis promotes balanced legal development and the integrity of the judicial system, but it is not always the right result, and there are circumstances when a prior decision of this Court should be revisited. *See Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶¶ 95–96, 264 Wis. 2d 60, 665 N.W.2d 257. It may be appropriate to overturn precedent when a decision, among other things, lies in tension with "changes or developments in the law," is "unworkable in practice," and is "unsound in principle." *Id.* ¶¶ 98–99. Those three principles apply here in spades.

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[11] In *Service Employees International Union, Local 1 v. Vos*, this Court upheld the multiple rule suspension provision—Wis. Stat. § 227.26(2)(im)—against a facial challenge by relying on *Martinez*. The Court noted that "no party ask[ed] [the Court] to revisit *Martinez* or its principles." 2020 WI 67, ¶ 12, 393 Wis. 2d 38, 946 N.W.2d 35. Because that holding rests on *Martinez*, it will necessarily lack legal effect if this Court overrules *Martinez*.

First, *Martinez*'s "thoroughly functionalist" approach sits in serious tension with this Court's recent "jurisprudential shift" toward a more formal treatment of the separation of powers. *See* Chad M. Oldfather, *Some Observations on Separation of Powers and the Wisconsin Constitution*, 105 Marq. L. Rev. 845, 867–70, 900–01 (2022). Although *Martinez* recognized that bicameralism and presentment is essential when JCRAR vetoes administrative rules, 165 Wis. 2d at 699–700, it forgave a "temporary" departure from these constitutional requirements based on little more than a hunch about what represents good "public policy," *id.* at 700–01, and the view that our constitution "require[es] shared and merged powers of the branches," *id.* at 696.

In *Evers I*, this Court rejected that kind of "pragmatic approach" to interpreting our constitution when overruling *J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983). *Ahern* had upheld a scheme allowing the legislative branch to exercise core executive power because (in *Ahern*'s view) the branches' powers "ostensibly were balanced." *Evers I*, 412 Wis. 2d 525, ¶¶ 26–27. *Evers I* found that *Ahern* erred by allowing a "restructuring of the constitutional separation of powers" based on this kind of "functionalist analysis." *Id.* ¶ 27.

Martinez relied on the same *Ahern*-style "functionalist analysis" rejected by *Evers I*. Just as *Ahern* forgave a legislative committee's exercise of core executive power based on its view of an "adequate[ ] balance[ ]" between the branches *id.* ¶ 26, so too *Martinez* forgave a temporary departure from bicameralism and presentment requirements based on JCRAR's supposedly "legitimate practice" and as "a matter of

public policy," not constitutional text, 165 Wis. 2d at 701. That functionalist analysis is indistinguishable from *Ahern*'s.[12]

Second, *Martinez* has proven to be unworkable. *Martinez* plainly intended to bless only a "temporary" JCRAR veto, 165 Wis. 2d at 699; indeed, *SEIU* read *Martinez* as approving only the ability to "temporarily suspend a rule for three months," 393 Wis. 2d 38, ¶ 80. But experience has demonstrated that JCRAR can veto rules for years without a bill's enactment. JCRAR can do so not only through an individual objection or suspension (like the ones *Martinez* wrongly assumed would be short term), but also by stacking an objection and suspensions in a way *Martinez* never imagined.

The Board's conversion therapy rule is a prime example. JCRAR first blocked it for almost two-and-a-half years by objecting to the proposed rule; this veto lasted until the end of the legislative session, when the supporting bills finally died without a vote by either house. And when the rule then took effect, JCRAR suspended it, and the Legislature again sat on the introduced bills for another year until they expired at the end of another legislative session. The rule sat vetoed for around three-and-a-half years, without an enacted bill supporting JCRAR's vetoes. Worse, the multiple suspension provision added through 2017 Wis. Act 369, Wis. Stat. § 227.26(2)(im), now allows JCRAR to serially suspend the rule every legislative session, even if a supporting bill is *never* enacted.

That experience reveals the dangers of *Martinez*'s "functionalist approach": it "is vulnerable to one branch's accretion of another's power." *SEIU*, 393 Wis. 2d 38, ¶ 169 (Dallet, J., concurring). What might have seemed in 1992 like a reasonable and modest pause of constitutional requirements

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[12] *Martinez* cited *Ahern* for support. *See Martinez v. DILHR*, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992).

now results in years-long committee vetoes with no enacted bills supporting them.

Third, *Martinez* was unsound in principle and wrongly decided from the start. For one, it wrongly approved "temporary" departures from bicameralism and presentment with no support in the constitutional text. And these so-called "temporary" departures have proven to be anything but. That indefiniteness is yet another reason *Martinez* should not have strayed from the constitutional text.

Overruling *Martinez* leads directly to the facial invalidity of JCRAR's "temporary" vetoes under Wis. Stat. § 227.19(5)(c) and (d) and Wis. Stat. § 227.26(2)(d) and (im). They all trigger bicameralism and presentment requirements, and no constitutional text justifies temporary or indefinite departures from those requirements.

3. Other states agree that rulemaking vetoes violate bicameralism and presentment requirements.

Virtually all other states to consider similar rulemaking vetoes have invalidated them on bicameralism and presentment grounds, regardless of whether they are pre-promulgation, post-promulgation, or temporary.

Begin with post-promulgation vetoes like Wis. Stat. § 227.26(2)(d). In *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980), the Alaska legislature empowered itself to suspend administrative rules through a concurrent resolution of both houses. The court found the statute unconstitutional because "when [the legislature] means to take action having a binding effect on those outside the legislature it may do so

only by following the enactment procedures" of bicameralism and presentment. *Id.*[13]

Turn then to pre-promulgation veto powers like Wis. Stat. § 227.19(5)(c) and (d). New Jersey's high court rejected such a veto in *General Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982). The statute there "require[d] submission to the Legislature of virtually every rule proposed by any state agency," which could then block a rule by concurrent resolution. *Id.* at 440. This power improperly allowed the legislative branch to "exert a policy-making effect equivalent to amending or repealing existing legislation," because the "[t]he unlimited power to foreclose agency action" granted by the legislative veto allowed the legislature "to nullify enabling legislation or to redirect its application as if the statute had been amended or repealed." *Id.* at 444–45. That amounted to "passage of a new law without the approval of the Governor." *Id.* at 444.

West Virginia's high court reached a similar conclusion in *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981), where a statute provided that "no agency rule or regulation shall become effective" until a designated legislative committee approved it. *Id.* at 626. The court rejected the scheme, partly on bicameralism and presentment grounds. It reasoned that the "Legislature at one time created and delegated powers and responsibilities" to the relevant agency but then "at a later time attempted to take away some of those important powers and responsibilities" and hand them back to a committee. *Id.* at 633. The Legislature could do so only by "act[ing] as a legislature through its collective

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[13] *See also State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622, 638 (Kan. 1984) ("Where our legislature attempts to reject, modify or revoke administrative rules and regulations by concurrent resolution it is enacting legislation which must comply with [bicameralism and presentment requirements].").

wisdom and will, within the confines of the enactment procedures mandated by [the] constitution." *Id.*[14]

And courts have rejected vetoes even if they have limited duration. In *Missouri Coalition for Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125 (Mo. 1997), Missouri's high court struck down a statute that permitted a legislative committee to block the promulgation of rules "for up to twenty days while the legislature reviewed such rules" (and to permanently suspend them with the approval of a joint resolution). *Id.* at 128. The court concluded that all the veto provisions at issue, including the twenty-day pause, amounted to "'legislative' action" that failed to follow the "constitutional mandates for bill passage . . . and presentment." *Id.* at 134.

Only one out-of-state case has gone the other way: *Mead v. Arnell*, 791 P.2d 410 (Idaho 1990). While *Mead* acknowledged that administrative rules have the "force and effect of law," it disagreed that legislative vetoes of them required bicameralism and presentment because rules are not "equal in dignity or status to statutory law." *Id.* at 415. That ignores that legislative lawmaking "depends not on [its] form" but on whether it has the "purpose and effect of altering the

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[14] Several other courts have invalidated pre-promulgation vetoes using this same logic. *See Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 465 (D.C. Cir. 1982) (invalidating pre-promulgation veto because it "effectively changed the law by altering the scope of [the agency's] discretion and preventing an otherwise valid regulation from taking effect"); *Blank*, 611 N.W.2d at 536 (same, reasoning that "[i]f the Legislature or JCAR invalidates a rule proposed by DOC, it effectively overrides the authority the Legislature has delegated to DOC"); *Gilliam County v. Dep't of Env't Quality*, 849 P.2d 500, 505 (Or. 1993) (same, because "a veto is a legislative act, and a legislative act by less than a majority vote of each chamber is unconstitutional"), *rev'd on other grounds*, *Oregon Waste Sys., Inc. v. Dep't of Env't Quality*, 511 U.S. 93 (1994).

legal rights, duties and relations of persons . . . all outside the legislative branch." *Chadha*, 462 U.S. at 952. That is precisely what administrative rules do, as virtually all other courts to consider the issue have concluded.

D. An overbreadth analysis should be used to facially invalidate JCRAR's vetoes, even if some applications might be constitutional.

Respondents will presumably try to save the facial validity of JCRAR's vetoes by arguing that some application is constitutional. Even if they could discover such an application, it should not save these veto provisions from a facial challenge.

Although the Court generally requires facial challenges to show that the "statute cannot be enforced 'under any circumstances,'" *SEIU*, 393 Wis. 2d 38, ¶ 38, Justice Dallet's *SEIU* concurrence persuasively explains why an exception should apply in some (and perhaps all) separation of powers cases. *Id.* ¶¶ 176–87. Such cases merit application of the "overbreadth" doctrine, which has already been recognized as an exception to the strict facial challenge standard in certain settings, most notably in First Amendment challenges. *Id.* ¶ 43 n.14; *Sabri v. United States,* 541 U.S. 600, 610 (2004) (noting other applications of overbreadth doctrine). In First Amendment cases, courts worry that overbroad statutes "deter or 'chill' constitutionally protected speech," since regulated parties will "choose simply to abstain from protected speech" rather than risk prosecution or engage in case-by-case litigation. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

JCRAR's rulemaking vetoes cause a very similar chilling effect, this time on executive action. New Jersey's high court explained the problem:

> Broad legislative veto power deters executive agencies in the performance of their constitutional duty to enforce existing laws. Its vice lies not only in its exercise but in its very existence. Faced with potential paralysis from repeated uses of the veto that disrupt coherent regulatory schemes, officials may retreat from the execution of their responsibilities.

Byrne, 448 A.2d at 444. Scholars have likewise recognized that the mere existence of legislative vetoes hinders agency's rulemaking decisions: "An implied [veto] threat may occur when an agency alters course based on its own expectations and predictions of what the legislature could do even though the legislature has not yet acted. Because of this threat, an agency may modify or eliminate proposed regulations." Nicole Martin & Steven Huefner, *State Legislative Vetoes: An Unwelcome Resurgence*, 63 Harv. J. on Legis. 379, 411 (2024). This kind of harm—the executive branch retreating from its duties—is "as grave as the chilling effect on protected speech in the First Amendment context." *SEIU*, 393 Wis. 2d 38, ¶ 183 (Dallet, J., concurring).

So, even if Respondents could show that JCRAR's vetoes are valid in a single situation, it should not ward off this facial attack. The provisions would remain unconstitutional in most applications and thereby severely burden legitimate executive branch action. To avoid this "incremental erosion" of the separation of powers, *id.*, JCRAR's veto provisions should be invalidated on their face.

To be sure, *SEIU* declined to adopt this kind of overbreadth test in that facial challenge. But that was partly because no party advanced the argument, which is not the case here. *Id.* ¶ 43 n.14. If *SEIU* is nevertheless read as rejecting this argument, that aspect of the case should be overruled because applying such a strict facial challenge standard in cases like these is "unsound in principle" and "unworkable in practice." *Johnson Controls*, 264 Wis. 2d 60, ¶ 98.

E. Alternatively, JCRAR's application of its vetoes to the rules at issue here violated bicameralism and presentment.

Even if this Court declined to facially invalidate JCRAR's veto powers on bicameralism and presentment grounds, it should still hold that JCRAR unconstitutionally used its veto power here.

As *SEIU* described *Martinez*, "there exists at least some required end point after which bicameral passage and presentment to the governor must occur." *SEIU*, 393 Wis. 2d 38, ¶ 81. A lengthy JCRAR veto without a supporting bill cannot be considered the kind of "modest suspension that is temporary in nature" that *Martinez* approved. *Id.* The "required end point" should be anything over the three-month period that *SEIU* saw *Martinez* as approving. *Id.* ¶¶ 80–81.

So, even under *Martinez*, JCRAR's year-plus indefinite objection under Wis. Stat. § 227.19(5)(c) and (dm) to the building code rule was unconstitutional. And JCRAR's two-plus year objection to the conversion therapy rule under Wis. Stat. § 227.19(5)(c) and (d), and its subsequent sixteen-month suspension of that rule under Wis. Stat. § 227.26(2)(d)—stacked together, around three-and-a-half years without an enacted bill—were unconstitutional.

* * *

In sum, JCRAR's vetoes are all facially invalid because they entail a legislative committee's altering legal rights and duties outside the lawmaking process. At a minimum, the years-long JCRAR vetoes of the rules at issue were invalid.

II. JCRAR's rulemaking vetoes improperly intrude on executive branch authority.

JCRAR's vetoes are invalid for an independent reason: they unconstitutionally intrude on executive power. That is true whether the executive function of promulgating rules is

seen as a core or a shared power. Either way, JCRAR cannot block executive agencies from executing statutes the Legislature has enacted.

A. Executing statutes that authorize agencies to promulgate rules is a core executive function, and so all JCRAR's rulemaking vetoes are facially invalid.

"Each branch is "vested' with a specific core governmental power." *Evers I*, 412 Wis. 2d 525, ¶ 9 (citation omitted). The legislative branch's core power is "the authority to make laws, but not to enforce them." *Id.* ¶ 12 (citation omitted). By contrast, the executive branch's core power is to "take care that the laws be faithfully executed," Wis. Const. art. V, § 4. Those core powers "are not for sharing," and "any exercise" of one branch's core power by another "is unconstitutional." *Id.* ¶ 10 (citation omitted).

When an agency promulgates administrative rules pursuant to statutory authorization, that is an aspect of the core executive power to exercise discretion in executing the law. JCRAR's rulemaking vetoes interfere with that core executive power and are facially invalid.

1. The best conception of rulemaking is as a core executive power with which JCRAR cannot interfere.

As Justice Dallet observed in *Evers I*, "it is unsettled whether executive branch agencies exercise legislative power at all when they execute a statute within the bounds set by the legislature, including by making administrative rules pursuant to legislative authorization." 412 Wis. 2d 525, ¶ 72.

In recent decades, this Court has often described administrative rulemaking as at least partly (if not entirely) a delegated legislative power. *See, e.g.*, *Koschkee v. Taylor*, 2019 WI 76, ¶ 12, 387 Wis. 2d 552, 929 N.W.2d 600 ("[W]hen administrative agencies promulgate rules, they are exercising

legislative power that the legislature has chosen to delegate to them by statute."); *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 194, 391 Wis. 2d 497, 942 N.W.2d 900 (noting that "over time, this court has come to describe rulemaking as closer to a legislative power").

But this Court once took a different view. In one of the first cases to touch on the nature of administrative rulemaking, *State ex rel. Buell v. Frear*, 146 Wis. 291, 306–07, 131 N.W. 832 (1911), this Court described rulemaking as an executive power. *Buell* explained how administrative rules "serve to provide the details for the execution of the provisions of the law in its actual administration, to fix the way in which the requirements of the statute are to be met, and to secure obedience of its mandates." *Buell*, 131 N.W. at 836. When rulemaking power is conferred on an agency "for the purpose of carrying the provisions of [a] statute into effect," that grant of authority "restricts them to making and enforcing such rules as are appropriate to obtain an effective execution of the law." *Id.* Accordingly, "[s]uch action is not legislative in character, but is the performance of an executive . . . duty within the regulations provided in the [authorizing] act." *Id.*

That view flows naturally from this Court's early understanding of the executive power. In 1853, the Court observed that "whatever power or duty is expressly given to, or imposed upon the executive department, is altogether free from the interference of the other branches of the government." *Att'y Gen. ex rel. Taylor v. Brown*, 1 Wis. 513, 522 (1853); *see also Evers I*, 412 Wis. 2d 525, ¶ 15 (quoting *Taylor*). This is "especially . . . the case, where the subject is committed to the discretion of the chief executive officer, either by the constitution or by the laws. So long as the power is vested in him, it is to be by him exercised, and no other branch of the government can control its exercise." *Taylor*, 1 Wis. at 522.

Under *Taylor*, when the Legislature authorizes (or requires) executive branch rulemaking, that "power or duty is expressly given to . . . the executive department," and the power to select specific rules is "committed to the discretion of the chief executive officer" through his executive agencies. *Id*. Then, as *Buell* explained, the executive branch promulgates rules to "provide the details for the execution of the provisions of the law in its actual administration." *Buell*, 131 N.W. at 836.

Put simply, promulgating administrative rules is just another way the executive branch exercises its core power to "take care that the laws be faithfully executed," Wis. Const. art. V, § 4. "The constitution assigns the execution of the law to the executive branch alone." *Evers I,* 412 Wis. 2d 525, ¶ 23. Virtually all laws require discretion and interpretation in their enforcement. When the executive branch exercises that discretion by interpreting and applying the law in individual cases, there is no doubt that is core executive power. *See SEIU*, 393 Wis. 2d 38, ¶ 96 ("The executive must certainly interpret and apply the law.") (citation omitted). The answer should be no different when the executive branch regularizes its discretion and enforcement decisions through an administrative rule.

Of course, the executive branch's power to make rules is limited by the Legislature's grant of statutory power: the Legislature can, by statute, determine the kinds of rules the executive can enact. But once an agency has such statutory power, it is its core executive function to execute that statute.

Because JCRAR's legislative vetoes intrude on that core executive power, they are facially unconstitutional. Just as the legislative vetoes in *Evers I* "interfere[ed] with the exercise of discretion the legislature gave [the executive branch] to execute," 412 Wis. 2d 525, ¶ 34, so too JCRAR's vetoes interfere with the exercise of discretion the Legislature

granted to executive branch agencies to promulgate administrative rules.

2. Other states and the federal courts agree that similar vetoes improperly interfere with the executive power.

Other states and the federal courts have rejected legislative rulemaking vetoes on executive power grounds, adopting reasoning much like *Buell*'s.

In *Byrne*, New Jersey's high court rejected a pre-promulgation rulemaking veto because it not only violated bicameralism and presentment, but also "illegitimately interfere[d] with executive attempts to enforce the law." 448 A.2d at 443. The court reasoned that "[t]he chief function of executive agencies is to implement statutes through the adoption of coherent regulatory schemes." *Id.* Administrative rules rationalize and regularize how the executive branch administers statutory schemes: they "further the policy goals of legislation by developing coherent and rational codes of conduct 'so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance.'" *Id.* (citation omitted). Rulemaking vetoes therefore "impair the functions of agencies charged with enforcing statutes" by "allowing the Legislature to nullify virtually every existing and future scheme of regulation or any portion of it." *Id.*

Several other state courts have reached a similar result. Striking down a pre-promulgation veto, Kentucky's high court reasoned that "[t]he adoption of administrative regulations necessary to implement and carry out the purpose of legislative enactments is executive in nature and is ordinarily within the constitutional purview of the executive branch of government." *Legislative Rsch. Comm'n By & Through Prather v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984). Kansas' high court rejected a similar veto provision, explaining that

"the power to adopt rules and regulations is essentially executive or administrative in nature, not legislative." *State ex rel. Stephan v. Kansas House of Representatives*, 687 P.2d 622, 635 (Kan. 1984). And in *State ex rel. Meadows v. Hechler*, 462 S.E.2d 586 (1995), West Virginia's high court did the same, explaining that once the "Legislature delegated a broad responsibility to the Executive branch for the purpose of establishing standards and enforcement mechanisms," a subsequent veto "amounted to an intrusion into the Executive branch's ability to effectuate its mandated responsibilities." *Id.* at 593.

Federal courts agree. Most directly, in *City of Arlington, Tex. v. F.C.C.*, Justice Scalia explained that "[a]gencies make rules ('Private cattle may be grazed on public lands *X, Y,* and *Z* subject to certain conditions') . . . and have done so since the beginning of the Republic." 569 U.S. 290, 304 n.4 (2013). He granted that such "activities take 'legislative' . . . forms," but nevertheless found them to be "exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'"[15] *Id.*; *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–14 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (citation omitted); *Terran ex rel. Terran v. Sec'y of Health & Hum. Servs.*, 195 F.3d 1302, 1312 (Fed. Cir. 1999) ("The Presentment Clause is inapplicable to administrative rulemaking in general, of

[15] Justice Scalia long held this view. Scalia, *The Legislative Veto: A False Remedy for System Overload*, 3 Regulation: AEI Journal on Government and Society, 19, 21 (Nov./Dec. 1979) (observing that "rulemaking has been an executive function from the beginning" and that "[r]ulemaking authority, if conferred with adequate standards, is perfectly valid and perfectly executive."); (Pet. App. 120).

course, because rulemaking is by definition not a legislative act, but rather an exercise of executive function properly entrusted to administrative agencies."); *Consumer Energy Council of Am.*, 673 F.2d at 471 ("[R]ulemaking is substantially a function of administering and enforcing the public law. As such, Congress may not create a device enabling it, or one of its houses, to control agency rulemaking.").

B. Even viewing rulemaking as a shared power, JCRAR's rulemaking vetoes are facially invalid.

Even if administrative rulemaking is seen instead as a power shared by the executive and legislative branches, JCRAR's veto powers are still facially invalid.

1. In an arena of shared powers, the Legislature can act only by enacting prospective statutes, which cannot block the other branch from exercising its constitutional power.

Shared powers are those that "lie at the intersections of . . . exclusive core constitutional powers." *SEIU*, 393 Wis. 2d 38, ¶ 35 (citation omitted). In these "shared powers" situations, one branch exercises its own constitutional powers in an arena that affects another branch's ability to exercise *its* powers. Such actions are valid if they do not "unduly burden or substantially interfere with the other branch's essential role and powers." *State v. Unnamed Defendant*, 150 Wis. 2d 352, 360–61, 441 N.W.2d 696 (1989). Calling a power "shared" is therefore something of a misnomer. What is really "shared" is the intersecting arena of governmental action—two branches have authority to act in the same arena, and they each use their respective constitutional powers to do so. What is *not* "shared" are the powers that each branch uses in its pursuit of its aims.

Two important principles emerge from this Court's shared powers cases: one procedural and the other substantive.

Procedurally, when the Legislature acts in an arena of "shared" powers, it does so by prospectively regulating the other branch via statute. For example, in *Matter of E.B.*, the Court upheld a jury instruction statute that prospectively (and generally) regulated the shared power "to regulate practice and procedure in the courts." 111 Wis. 2d 175, 184–88, 30 N.W.2d 584 (1983). The same is true in every other case in which this Court has upheld the Legislature's exercise of part of a shared power—in each one, the legislative branch shares power with another branch using its "[l]egislative power," which "is the authority to make laws." *Koschkee,* 387 Wis. 2d 552, ¶ 11 (citation omitted).[16]

Substantively, valid exercises of shared power cannot involve one branch's blocking (by statute or otherwise) the other branch from exercising its constitutionally vested authority. So, the Legislature may enact a statute that guides how the judiciary or executive exercises its authority in a

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[16] *See also State v. Stenklyft*, 2005 WI 71, ¶¶ 24–27, 281 Wis. 2d 484, 697 N.W.2d 679 (2005) (statute governing sentence adjustments); *Maurin v. Hall*, 2004 WI 100, ¶¶ 25, 102, 274 Wis. 2d 28, 682 N.W.2d 866 (2004) (statute capping noneconomic damages in wrongful death cases); *State v. Horn*, 226 Wis. 2d 637, ¶ 7, 594 N.W.2d 772 (1999) (statute regulating parole revocation); *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, ¶ 8, 576 N.W.2d 245 (1998) (statute lapsing unexpended judicial appropriations into general fund); *State ex rel. Friedrich v. Cir. Ct. for Dane Cnty.*, 192 Wis. 2d 1, 9–10, 531 N.W.2d 32 (1995) (statute regulating compensation for court-appointed counsel); *State v. Borrell*, 167 Wis. 2d 749, 759–61, 482 N.W.2d 883 (1992) (statute regulating parole eligibility); *Demmith v. Wisconsin Jud. Conf.*, 166 Wis. 2d 649, 653–54, 480 N.W.2d 502 (1992) (statute regulating bail administration); *State v. Holmes*, 106 Wis. 2d 31, 31, 315 N.W. 2d 703 (1982) (statute regulating judicial substitution).

shared arena, but the statute cannot block another branch from performing its constitutional role.

In *Matter of E.B.*, although the statute at issue required circuit courts to submit written jury instructions, the Court interpreted it *not* to mandate reversal for noncompliance to preserve the "function of the judiciary to determine on a case-by-case basis whether error is reversible." 111 Wis. 2d at 187–88. In all other validly-shared power cases, the Legislature's statute channeled the other branch's constitutional role rather than blocked it.[17]

Where, by contrast, a statute blocks the other branch's ability to exercise its share of a power, the statute is invalid. Three cases make this plain: *Joni B. v. State*, 202 Wis. 2d 1, 549 N.W.2d 411 (1996); *Matter of E.B.*; and *State v. Stenklyft*, 2005 WI 71, 281 Wis. 2d 484, 697 N.W.2d 679.

Joni B. invalidated a statute that barred circuit courts from appointing counsel in child protective services (CHIPS) actions. 202 Wis. 2d at 5–6. The Court assumed that the power to appoint counsel was shared by the judicial and legislative branches. *Id.* at 10. Even so, it concluded that the

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[17] *See also Maurin*, 274 Wis. 2d 28, ¶ 104 (damage cap statute "[did] not prevent a circuit court from exercising the powers of remittitur and additur"); *Horn*, 226 Wis. 2d 637, ¶ 23 (parole revocation statute allowed courts to "fully exercise[ ] their discretion and constitutional function in determining the sentence"); *Flynn*, 216 Wis. 2d 521, ¶ 56 (despite statute lapsing appropriations, the judiciary's "needs continued to be met, though at a slower pace"); *Friedrich*, 192 Wis. 2d at 21 (court-appointed counsel compensation statute left "ultimate authority in the courts"); *Borrell*, 167 Wis. 2d at 768 (parole eligibility statute "determine[d] the scope of the sentencing court's discretion"); *Demmith*, 166 Wis. 2d at 666 (bail administration statute "accord[ed] [judges] wide discretion in complying with the statutory standard"); *State v. Holmes*, 106 Wis. 2d at 69–70 (did not "defeat[ ] the circuit courts' exercise of judicial power," and instead simply "stop[ped] a particular circuit court judge from exercising his or her authority to hear the particular case").

statute's "flat prohibition on appointment of counsel . . . unreasonably burden[ed] and substantially interfere[d] with" the judiciary's share of that power. *Id.*

And in the two other cases, the Court upheld statutes against a shared powers challenge by construing them *not* to impose a veto on the regulated branch.

In *Matter of E.B.*, the relevant statute said circuit courts "shall" submit written jury instructions. The Court held that the statute could not be interpreted to "mandate automatic reversal" because "[i]t is a function of the judiciary to determine on a case-by-case basis whether error is reversible." 111 Wis. 2d at 186. The statute could not categorically prohibit the judiciary from exercising its discretionary authority.

In *Stenklyft*, this Court rejected a prosecutorial veto over the shared power of criminal sentencing. The statute at issue said inmates could petition for early release, but if the district attorney objected, the court "shall" deny the petition. *See* Wis. Stat. § 973.195(1r)(c). The Court held that interpreting "shall" as mandatory—allowing the prosecutor to veto a sentence adjustment petition—would "impermissibl[y] burden and substantial[ly] interfere[ ] with the judicial branch's authority." 281 Wis. 2d 484, ¶ 86.[18]

In sum, shared powers cases embody two basic principles: (1) the Legislature acts in a shared arena by enacting prospective, general laws; and (2) those laws cannot bar the regulated branch from exercising its constitutional authority.

[18] The lead opinion in *Stenklyft* reached the opposite result, but it recognized that "[t]he concurrences/dissents are the opinion of the majority of the court." 281 Wis. 2d 484, ¶ 6 n.2.

2. *SEIU* should not be read as silently overruling this Court's shared powers precedents.

SEIU might seem to sit in some tension with these two principles, but it should not be read as silently overruling this Court's shared powers precedents.

There, the Court rejected a facial challenge to three "litigation control" provisions added in Act 369, including a legislative intervention provision and two measures that allowed a legislative committee to veto litigation settlements. 393 Wis. 2d 38, ¶¶ 51–54. The Court identified two situations that would lie "within the zone of shared powers": where the legislative branch is a "represented party" and where a settlement could implicate the Legislature's appropriation power. *Id.* ¶¶ 67, 69. In a footnote without much analysis, *SEIU* indicated such situations would sometimes survive a shared powers analysis. *Id.* ¶ 72 n.22.

To the extent *SEIU* blessed the procedural route of the Legislature's acting through a committee (rather than by passing a statute), that analysis cannot be squared with every other shared powers case this Court has decided. And if footnote 22 suggests that a legislative veto in a zone of shared powers automatically passes constitutional muster, that would conflict with cases like *Joni B.*, which recognize that the Legislature cannot bar other branches from acting in such situations.

SEIU did not address the two shared powers conditions from this Court's prior cases and should not be read as implicitly modifying them. If *SEIU* did so, that aspect of its shared powers analysis was "unsound in principle" and should be overruled. *Johnson Controls*, 264 Wis. 2d 60, ¶ 98.

3. JCRAR's vetoes are facially invalid under a shared powers analysis.

JCRAR's rulemaking vetoes are facially unconstitutional under these shared powers principles.[19]

First, JCRAR exercises its portion of the shared rulemaking power outside the constitutional lawmaking process. None of these veto provisions entail the full Legislature's prospectively regulating the rulemaking process via statute. Rather, a legislative committee makes ad hoc decisions to block individual administrative rules. That is not the lawmaking power our constitution vests in the legislative branch.

Second, JCRAR enjoys an absolute veto. Such a veto necessarily "unduly burden[s] or substantially interfere[s] with the other branch's essential role and powers." *Unnamed Defendant*, 150 Wis. 2d at 360–61. When JCRAR vetoes a rule, the executive branch is stopped in its tracks and cannot execute the rulemaking statute at all. In effect, the veto leaves the executive unable to exercise any part of the ostensibly "shared" power.

JCRAR's veto powers are unconstitutional under these principles. It does not matter whether JCRAR blocks a proposed rule under Wis. Stat. § 227.19 (temporarily or indefinitely), or whether it suspends a promulgated rule once (or multiple times) under Wis. Stat. § 227.26. All these provisions allow a legislative committee to exercise a shared power outside the lawmaking process and to veto the executive branch's power. They are all facially invalid.

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[19] Again, even if Respondents could show one or two valid applications from a separation-of-powers perspective, an overbreadth analysis should be used here too, for the same reasons explained above in Argument I.D.

C. Alternatively, JCRAR's vetoes unduly burdened the executive as applied here.

At minimum, JCRAR's vetoes of the rules at issue here went too far as applied under a shared powers analysis.

As for rules relating to Wisconsin's commercial building code, many provisions in Wis. Stat. ch. 101 empower DSPS to regulate commercial building standards through administrative rules.[20] For instance, under Wis. Stat. § 101.027(2), DSPS "shall promulgate rules that change the requirements of the energy conservation code to improve energy conservation." And under Wis. Stat. § 101.14(4)(a), DSPS "shall make rules . . . requiring owners of places of employment and public buildings to install such fire detection, prevention or suppression devices as will protect the health, welfare and safety." To carry out its duty to execute these statutes, DSPS proposed an administrative rule updating the building code in these areas (among many others).

But for over a year now, JCRAR has blocked promulgation of this proposed administrative rule—a block that will last indefinitely. DSPS has thus lost its statutory power to regulate commercial building standards, contrary to DSPS's charge to protect the public's health, safety, and welfare, comply with federal law, and regularly update energy conservation standards.

JCRAR's long-term objection to (and then suspension of) the proposed conversion therapy rule similarly interfered with the Board's authority to regulate social workers, therapists, and the like. The Legislature charged the Board

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[20] *See also Dep't of Pro. & Safety Servs.*, State of Wisconsin, https://docs.legis.wisconsin.gov/code/misc/chr/lc_ruletext/cr_23_007_rule_text_filed_with_legislature_part_1.pdf at 2–3 (listing chapter 101 statutes that authorize rulemaking) (last visited Nov. 8, 2024).

in Wis. Stat. § 457.03(2) with "establishing[ing] a code of ethics to govern the professional conduct" of regulated professionals. And JCRAR blocked the Board's ability to use its discretion in executing that law for around three-and-a-half years.

Under any measure, the uncertainty and delay caused by these vetoes "unduly burden[ed]" and "substantially interfere[d] with" DSPS and the Board's ability to exercise its executive authority to implement these rulemaking statutes. *Unnamed Defendant*, 150 Wis. 2d at 360–61.

* * *

When the Legislature enacts a law that empowers the executive branch to act, it cannot thereafter block such executive action through a legislative committee. That is true in the rulemaking context just like any other, whether rulemaking is seen as a core executive power or one shared with the legislative branch. Either way, JCRAR's rulemaking vetoes unconstitutionally intrude on executive power.

CONCLUSION

JCRAR's rulemaking vetoes all should be facially invalidated or, at minimum, declared unconstitutional as applied here.

Dated this 8th day of November 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 10,847 words.

Dated this 8th day of November 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 8th day of November 2024.

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