IN THE SUPREME COURT OF WISCONSIN

No. 2023AP2020

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, PROFESSIONAL COUNSELING, AND SOCIAL WORK EXAMINING BOARD,

Petitioners,

v.

SENATOR HOWARD MARKLEIN AND REPRESENTATIVE MARK BORN IN THEIR OFFICIAL CAPACITIES AS CHAIRS OF THE JOINT COMMITTEE ON FINANCE, SENATOR CHRIS KAPENGA AND REPRESENTATIVE ROBIN VOS IN THEIR OFFICIAL CAPACITIES AS CHAIRS OF THE JOINT COMMITTEE ON EMPLOYMENT RELATIONS, AND 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 *AMICI CURIAE* LEGAL SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

Amici, identified in the Appendix, are eight legal scholars with nationally recognized expertise in state constitutional law, the legislative process, and separation-of-powers doctrines. They have researched and published extensively in these areas and have a professional interest in promoting a sound understanding of the constitutional provisions and principles implicated here. *Amici* were previously granted leave to participate in this case and filed a brief on March 27, 2024.

INTRODUCTION

This court recently rejected the Joint Committee on Finance (JCF)'s legislative veto powers, holding that the provisions violated the Wisconsin Constitution's separation-of-powers commitments. *Evers v. Marklein* ("*Evers I*"), 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395. The legislative veto powers of the Joint Committee for Review of Administrative Rules (JCRAR) suffer from parallel—and additional—constitutional defects. Wisconsin's anomalous statutory scheme allows a handful of legislators to determine whether administrative rules are lawful; to suspend otherwise final rules forever or rescind them once in force; and to act without deadlines or judicial review. The Constitution readily permits other forms of agency oversight, but it precludes these committee overreaches into the domains of the executive branch, the judiciary, and the people.

I. The challenged provisions flout basic separation-of-powers principles. They impermissibly authorize a legislative

committee to make law without bicameralism and presentment. *See* Wis. Const. art. IV, § 17; art. V, § 10. They also permit the committee to "arrogate…control" of the executive branch's authority to implement the law. *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982). And they usurp the judiciary's exclusive power to say what the law is. *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384. The vetoes do all this while thwarting the Constitution's underlying democratic commitments, giving a small committee control of statewide policy matters. *Evers I*, 2024 WI 31, ¶ 29 (concluding that "[l]egislative vetoes disrupt…governmental accountability" and that JCF's "veto provisions undermine democratic governance").

II. JCRAR's outsized power makes Wisconsin a national outlier in agency rulemaking oversight. Most states utilize conventional oversight, not committee vetoes. Beyond the eight states with constitutional amendments that authorize legislative vetoes, such mechanisms have overwhelmingly lost in state court. And among states with legislative vetoes that have not yet been tested in court, Wisconsin stands alone in the breadth of its veto power and lack of public accountability.

ARGUMENT

I. JCRAR'S CHALLENGED POWERS DEFY THE WISCONSIN CONSTITUTION'S STRUCTURAL MANDATES AND DEMOCRATIC COMMITMENTS.

The Wisconsin Constitution's "structurally enshrined" separation-of-powers provisions require bicameralism and presentment for lawmaking and forbid any branch from arrogating another's power. *Evers I*, 2024 WI 31, ¶ 2. These are not idle abstractions; they are "essential for the preservation of liberty and a government accountable to the people." *Id.* ¶ 34. JCRAR's challenged powers flout these structural mandates and their underlying democratic commitments.

A. The challenged powers violate the Constitution's lawmaking requirements.

The challenged provisions enable JCRAR to effect binding legal change without the "absolutely essential" lawmaking procedures of bicameralism and presentment. *State v. Wendler*, 94 Wis. 369, 68 N.W. 759, 762 (1896). Those procedures plainly apply when legislators "make policy decisions for the state." *Evers I*, 2024 WI 31, ¶ 13; *see also INS v. Chadha*, 462 U.S. 919, 952 (1983) (bicameralism and presentment required when legislative action "alter[s] the legal rights, duties and relations of persons…outside the legislative branch"). JCRAR's vetoes do just that. Absent the legislative vetoes, administrative rules bind the public. *Kieninger v. Crown Equip. Corp.*, 2019 WI 27, ¶ 16 n.8, 386 Wis. 2d 1, 924 N.W.2d 172. It is only the legislative veto that changes their legal effect. *See Chadha*, 462 U.S. at 952-53 (deeming a one-house veto "legislative" because the Attorney General's determination would

have been final "absent the veto"). Moreover, the power to veto "part of a rule" permits creation of an entirely new legal mandate. *Cf. State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 134, 237 N.W.2d 910 (1976) (explaining that partial vetoes necessarily entail policy change).

JCRAR's "[i]ndefinite objection" power, Wis. Stat. § 227.19(5)(dm), is a straightforward—indeed, explicit—bicameralism and presentment violation. By objecting indefinitely, the committee wields unilateral, unconstrained power to set statewide policy, reversible only by a full-dress statute, *see* Wis. Stat. §§ 227.19(5)(em), (fm).

JCRAR's other powers fare no better. The committee's promulgation pause, Wis. Stat. § 227.19(5)(c), regular objection power, *id.* § 227.19(5)(d), and suspension power, *id.* § 227.26(2)(d), all impose no deadline for the full legislature's decision on the veto during a two-year legislative session (or even the next legislative session, *see id.* §§ 227.19(5)(g), 227.26(2)(j)). And JCRAR's power to stack "[m]ultiple suspensions" compounds the problem. *Id.* § 227.26(2)(im). Each provision impermissibly allows JCRAR to control state policy; together, they extend the power for a full gubernatorial term or longer. That is unconstitutional committee lawmaking. *See Evers I*, 2024 WI 31, ¶ 13; *see also Legis. Rsch. Comm'n v. Brown*, 664 S.W.2d 907, 917-20 (Ky. 1984) (rejecting a provision authorizing a legislative committee to block administrative rules until the next legislative session, a delay of up to 21 months).

To be sure, *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), (and, derivatively, *Serv. Emps. Int'l Union, Local 1 ("SEIU") v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35) upheld a shorter, confined pause to allow legislative consideration of a committee veto. But those cases mischaracterize state separation-of-powers law, rest on outdated assumptions, and should be overruled.

First, the inventive reasoning of *Martinez* and *SEIU* cannot be squared with the Constitution's text or structure. The Constitution offers no temporal exemptions from bicameralism and presentment. And *SEIU*'s reasoning—that the possibility of a 6-month suspension defeats a facial challenge, 2020 WI 67, ¶ 82—mistakes a constitutional problem for a solution. JCRAR's unbridled power to decide whether a rule will be barred forever or for 6 months is itself a potent and impermissible form of statewide policymaking. JCRAR cannot cure this inherent flaw by choosing to wield its legislative power narrowly (which, in practice, it does not do).

Second, *Martinez* reasoned that JCRAR's veto power was limited to a single rule suspension; that JCRAR "infrequently" used the power; that the full legislature and governor had to approve a permanent suspension; and, relying on an Attorney General opinion, that JCRAR's decisions would be subject to judicial review. 165 Wis. 2d at 699-702; *see also* 63 Op. Att'y Gen. 159, 164-66 (1974). The legislature has since supercharged JCRAR's role. Petitioners' Brief at 15-20; Respondents' Brief at 11-13. The legislature may now describe JCRAR's power as temporary

or limited, but the Court need not indulge descriptions that diverge so plainly from reality. *Cf. Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019) (courts need not "exhibit a naiveté from which ordinary citizens are free").

B. The challenged powers violate the Constitution's separation of powers.

The challenged provisions also independently violate the separation of powers by permitting a legislative committee, which properly wields "no final authority," *State ex rel. McLeod v. McInnis*, 295 S.E.2d 633, 635 (S.C. 1982), to usurp the roles of the executive and judiciary.

Most centrally, the legislative vetoes impermissibly arrogate executive power. That is so whether administrative rulemaking is a "core" executive power or a "shared" one,[1] for JCRAR's vetoes authorize it to "subsume[]" executive-branch duties. *Evers I*, 2024 WI 31, ¶ 34. The executive branch must "take care that the laws be faithfully executed," Wis. Const. art. V, § 4, which requires "effectuat[ing] the policies passed by the legislature." *Evers I*, 2024 WI 31, ¶ 15. Rulemaking is a mechanism for doing just that. *See* Wis. Stat. § 227.11(2)(a); *id.* § 227.19(1)(b) (agencies receive rulemaking authority to "facilitate administration of legislative policy"). JCRAR's vetoes, however, empower it to "reject the executive's manner of carrying out the law." *Evers I*, 2024 WI 31, ¶ 34. At a minimum, these vetoes, remarkable in their sweep and

[1] This Court's early cases described rulemaking as executive, whereas later cases have described it as legislative. *See Wis. Legis. v. Palm*, 2020 WI 42, ¶¶ 193-94, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting) (discussing this history).

scope, "unduly burden or substantially interfere" with the executive branch's ability to implement the law. *State v. Horn*, 226 Wis. 2d 637, 644, 594 N.W.2d 772 (1999).

As described above, JCRAR has carte blanche to determine whether an agency can ever promulgate or enforce a rule, thereby displacing the executive's role of implementing the law. *See Gen. Assembly of State of N.J. v. Byrne*, 448 A.2d 438, 443 (1982). The challenged provisions also authorize JCRAR to wield a *partial* legislative veto, thereby producing rules the executive branch never promulgated. *See, e.g.*, *Martinez*, 165 Wis. 2d at 693 (explaining how JCRAR's partial rule suspension changed the promulgated rule); Statement from Attorney General J.B. Van Hollen on Suspension of Concealed Carry Training Requirements, Wis. Dep't of Justice (Nov. 7, 2011) (noting JCRAR's partial suspension of emergency rule changed concealed carry application requirements). These powers do not just "unduly burden" and "substantially interfere" with executive administration, *Horn*, 226 Wis. 2d at 644; they amount to "unfettered interference" in which a mere legislative committee acts as final decisionmaker, *Evers I*, 2024 WI 31, ¶ 24.

Exacerbating the constitutional error, JCRAR's vetoes also usurp judicial authority. The Wisconsin Constitution "entrusts the judiciary with the duty of interpreting and applying laws made and enforced by coordinate branches of state government." *Gabler*, 2017 WI 67, ¶ 37. It is "fundamental" that the judiciary has the "exclusive responsibility to exercise judgment in cases and controversies arising under the law." *Id.*; *see also Tetra Tech EC,*

Inc. v. Wis. Dep't of Revenue, 2018 WI 75, ¶ 50, 382 Wis. 2d 496, 914 N.W.2d 21 ("the judiciary's first and irreducible responsibility is to proclaim the law"). Statutes expressly acknowledge the Court's authority to determine whether administrative rules and actions comply with state law. *See* Wis. Stat. § 227.40.

Yet the challenged provisions allow JCRAR to "proclaim the law" as to the legality of agency rules. *Tetra Tech*, 2018 WI 75, ¶ 50. The committee reviews proposed and final rules to determine whether they comply with statutory authority, carry out legislative intent, conflict with state law, are arbitrary or capricious, or impose an undue hardship, among other determinations. Wis. Stat. § 227.19(4)(d). These decisions are fundamentally judicial in nature. *Cf. Chadha v. INS*, 634 F.2d 408, 420 (9th Cir. 1980) (Kennedy, J.) (invalidating a legislative veto in part because it undermined the judicial role); *Legis. Rsch. Comm'n*, 664 S.W.2d at 919 (legislative committee's determination whether agency rules complied with statutory authority was "unequivocally" an impermissible exercise of judicial authority). That JCRAR wields this power without any judicial review of its vetoes cements the flagrant violation.

C. The challenged powers undermine the Constitution's commitment to democratic self-government.

JCRAR's challenged powers also undermine the Wisconsin Constitution's "fundamental purpose," which is "to create and define the institutions whereby a representative democratic form of government may effectively function." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 555, 126 N.W.2d 551 (1964).

The Constitution champions popular sovereignty, majority rule, and political equality through a tripartite government held accountable to statewide popular majorities. *See* Non-Party Brief of *Amici Curiae* Legal Scholars in Support of Petitioners at 11-15, *Evers I*, 2024 WI 31 (No. 2023AP2020) [hereinafter Scholars' Brief]; *see also* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 864-65 (2021). The Constitution's separation of powers serves these ends, fostering "a government accountable to the people." *Evers I*, 2024 WI 31, ¶ 34.

Legislative committee vetoes do the opposite: They "disrupt the governmental accountability the separation of powers facilitates" and "undermine democratic governance." *Id.* ¶ 29. They do this "by circumventing the lawmaking process—which requires the participation of the entire legislature—and punting to a committee the controversial and therefore politically costly positions legislators would otherwise need to take." *Id.*

Although billed as agency oversight, JCRAR's vetoes make rulemaking far less accountable. Consider first the baseline arrangement. Legislation authorizing agency rulemaking must comply with bicameralism and presentment and provide standards. *E.g.*, Wis. Stat. § 227.11. When the executive branch "faithfully execute[s]" the law through rulemaking, Wis. Const. art. V, § 4, it acts through agency heads nominated (and removable) by the Governor and subject to Senate confirmation, *see, e.g.*, Wis. Stat. § 15.05(1)(a). Agencies, in turn, face multiple checks from the people and their elected representatives: The

Legislature can pass laws that countermand particular administrative rules or narrow an agency's rulemaking authority, and the rulemaking process itself involves multiple gubernatorial approvals (*id.* §§ 227.135(2), 227.185), public hearing and comment periods (*id.* §§ 227.136, 227.16-.18), review by legislative council staff (*id.* § 227.15), and a separate passive review by the legislature's standing committees (*id.* § 227.19(4)). Finally, judicial review—by courts selected by the people, in accordance with the Wisconsin Constitution—is available to ensure agencies act within their authority. *Id.* §§ 227.40-.60.

In contrast, JCRAR's challenged powers shift final decisionmaking authority to a small group of legislators who are neither chosen by a majority of Wisconsinites nor directly answerable to anyone who is. Of Wisconsin's 132 legislators, only 10 serve on JCRAR, *id.* § 13.56(1), and a mere majority of a quorum—as few as four legislators—may exercise a veto, *e.g.*, *id.* § 227.26(2)(d). This flouts the Constitution's accountability-forcing requirement that "a majority of each" legislative chamber "shall constitute a quorum to do business." Wis. Const. art. IV, § 7. And, despite the view of the Attorney General opinion cited in *Martinez*, JCRAR vetoes do not receive judicial review—the ultimate lack of "proper standards or safeguards." *Martinez*, 165 Wis. 2d. at 701 (quoting 63 Op. Att'y Gen. at 162); *cf. Commc'ns Workers of Am., AFL-CIO v. N.J. Civ. Serv. Comm'n*, 191 A.3d 643, 649 (N.J. 2018) (holding legislative vetoes judicially reviewable).

JCRAR's challenged powers thus create a policymaking process in which "the legislature avoids the political judgments

and votes necessary" to decide policy matters of statewide concern. *Evers I*, 2024 WI 31, ¶ 29. Such a system lacks public accountability and is ripe for "capture by political elites"—something the founders specifically sought to prevent by allocating power to three elected branches. Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke L.J. 545, 551-52 (2023). Because this contravenes the Constitution's abiding commitment to democracy, the court should invalidate the challenged provisions.

II. WISCONSIN IS AN OUTLIER IN THE BREADTH OF VETO POWER IT GIVES TO A LEGISLATIVE COMMITTEE.

JCRAR's broad veto powers make Wisconsin a national outlier. Conventional oversight, not committee vetoes, is the norm. *See* Derek Clinger & Miriam Seifter, *Unpacking State Legislative Vetoes* 21, State Democracy Research Initiative (2023), https://go.wisc.edu/r6w3k0. Outside of the eight states with express constitutional amendments on point, legislative vetoes have overwhelmingly lost in court. Scholars' Brief at 15-18. And among legislative-veto authorizations that have not been tested in court, no state has combined features that so dramatically defy the separation of powers and public accountability.

To start, Wisconsin is unusual in authorizing so many committee veto powers over administrative rules. Only one other state, South Dakota, equips a legislative committee with a comparable array of veto tools. *Cf.* Clinger & Seifter, *supra*, at 6-17. But South Dakota's Constitution, unlike Wisconsin's, expressly

authorizes legislative vetoes, at least in part. *See* S.D. Const. art. III, § 30 (authorizing certain legislative vetoes "during recesses or between sessions").

Further, Wisconsin is the only state that authorizes the legislative branch to repeatedly impose lengthy "temporary" suspensions without limit. Fourteen other states authorize temporary suspensions of rules or proposed rules, with maximum lengths that range from as few as 21 days to adjournment of the next regular legislative session. *Cf.* Clinger & Seifter, *supra*, at 16 n.60. No other state allows the legislature to indefinitely reimpose suspensions. *Id.*

Among the handful of states with strong-form legislative vetoes that have neither been authorized by constitutional amendment nor tested in state court, Wisconsin is one of only two that allows a legislative committee to unilaterally bar an agency from finalizing a rule. *Cf.* Clinger & Seifter, *supra*, at 11-13. The other is Illinois.[2] *See* 5 Ill. Comp. Stat. Ann. 100/5-115. Illinois, however, imposes constraints that Wisconsin law does not. For instance, Illinois law mandates equal partisan representation in the rule review committee's membership and leadership. 25 Ill. Comp. Stat. Ann. 130/1-5(a). Illinois law also requires a three-fifths supermajority of the committee to exercise the veto—

[2] North Dakota and North Carolina (which has a hybrid executive-legislative commission) allow agencies to revise their rules in response to committee/commission objections and also provide for judicial or legislative review of those objections. *See* N.C. Gen. Stat. Ann. § 150B-21.12; N.C. Gen. Stat. Ann. § 150B-21.8(d); N.D. Cent. Code Ann. § 28-32-18(2)-(3). *Cf.* Wis. Stat. § 227.19(5)(dm) (if JCRAR objects, "the agency may not promulgate the proposed rule or part of the proposed rule objected to…until a bill…is enacted").

compared to the majority of a quorum needed in Wisconsin—ensuring bipartisan support for vetoes. 5 Ill. Comp. Stat. Ann. 100/5-115(a). These design choices may not cure constitutional errors. But they underscore that JCRAR's unconstrained powers stand alone.

These yet-to-be-challenged sibling state experiments, like others before them, may ultimately fail in state court. Regardless, it is striking that no other legislature gives a legislative committee such unfettered power over executive-branch rulemaking. The Legislature can, as other states do, utilize myriad permissible alternatives to oversee rulemaking, including through hearings, investigations, information requests, and new legislation. But JCRAR's sweeping and unaccountable committee vetoes violate the Constitution.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to hold that JCRAR's challenged powers violate the Wisconsin Constitution's separation-of-powers and bicameralism and presentment requirements—and defy the Constitution's democratic commitments.

Dated this 20th day of December, 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b), (bm), and (c) for a brief. The length of this brief is 2,962 words.

Dated: December 20, 2024

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