**WISupremeCourtOralargumentsEversvsMarklein.mp3**

[00:00:02] **Speaker 1** An emergency.

[00:00:14] **Speaker 2** Yeah. My eyes. Have. What else?

[00:02:24] **Unidentified** Churches now have just.

[00:03:13] **Speaker 3** Yeah.

[00:03:54] **Unidentified** Thanks, guys. Well to.

[00:03:57] **Speaker 3** Right. That's what I.

[00:04:04] **Unidentified** Wow. Right. Right? Yeah, I. I thought so. Yeah. Right on. As part of. I will try and stay. All rise. Hearing, Hearing.

[00:11:05] **Speaker 2** Hearing. The Wisconsin Supreme Court is now in session.

[00:11:09] **Unidentified** Chief justice in that case, Lynn Ziglar presiding. Your filing is commanded.

[00:11:16] **Speaker 3** All right. Please stand. Good morning, everyone. It's nice to have you here today on oral argument. This morning, we do have the Senate scholar program here. If you could stand up so we can acknowledge you. Right. I think Justices Pratasevich and Dalot are both meeting with you afterwards. They didn't arm wrestle and determine who is doing it. So you get them both. Anyway, it's nice to have you here today. Go ahead and have a seat. The case that we call for this morning is 23 AP 2020. Tony Evers versus Howard Mark Klein. Could I start with your appearances time? When? All right. Good morning. 25 minutes till my 30, followed by five minutes in rebuttal. That's the lineup. There was a motion, though, that I want to start out with so we know what. The plan is today. It was filed by counsel for. The legislature and hopefully you've had a chance to look at it. Okay. Do you object to the motion? Do you want to be heard on the motion in its entirety? She's about to.

[00:12:59] **Speaker 2** Speak up, please.

[00:13:01] **Speaker 3** We think it's untimely, but if the court has questions about it, we could ask questions. If you wish to be heard further. I'm happy to give you that opportunity. Otherwise, we're prepared to rule on it. Okay. All right, then we're going to grant the motion so it will be admitted. And you can argue about it at least then you know where you are on that. Okay. All right. Let's get started. Attorney Gibson.

[00:13:47] **Speaker 1** Madam Chief Justice, and may it please the Court. For over 70 years, the great weight of authority, former governors, attorneys general.

[00:13:56] **Speaker 2** Counsel.

[00:13:56] **Speaker 3** I'm going to jump in right at the beginning, because you certainly.

[00:13:59] **Speaker 2** Presented a multitude of constitutional challenges.

[00:14:03] **Speaker 1** Correct? That's right, Your Honor.

[00:14:05] **Speaker 2** I think five perhaps, which is the strongest.

[00:14:12] **Speaker 1** When we have two legal grounds and they're independent for why all five statutes are unconstitutional. We think they're equally strong. The court could use either or both of them to decide the case. But we think all five statutes are facially unconstitutional under both doctrines. And the reason is because we've seen that consensus of authority for the past 70 years. We deviated from that authority and. Mark Lane. But our experience since that time, which has included the Legislature's creation of even more powerful vetoes and rules languishing for years, has shown us that that consensus was right. So as I said to Justice Protasevich, what we're, what's what we're asking for today, is it that this court overrule Martinez and strike those five statutes as violating both by criminalizing and presentment and the separation of powers?

[00:15:06] **Speaker 4** Council rules have the force and effect of law, correct?

[00:15:10] **Speaker 1** That's correct. Under 227 or 113.

[00:15:14] **Speaker 4** So I'm understanding your argument to be that if the legislature wants to pass a law and I agree with you under the Constitution, it must meet the bicameral ism and presentment requirements that are constitutionally prescribed for legislation. But I understand your argument to mean that if the executive branch wants to make laws, it can just do whatever it wants without any checks, without any balances. And so my question for you is where in the Constitution did the people consent to being governed by laws, by rules, by regulations promulgated by the executive branch, made by the executive branch? Because I have, as I'm sure you have studied the Wisconsin Constitution extensively with the division of powers that the people authorized and gave to different branches of government. And nowhere do I see that the people ever consented to being governed by an administrative state instead of their elected representatives in the legislature.

[00:16:16] **Speaker 1** Well, Your Honor, there are a number of embedded premises in your comments there, several of which we disagree with. First is the Constitution would purport to create the same rules of the road for the legislature and the executive branch. And as the court said in China, the the caramel ism and presentment, which Your Honor recognizes apply to the legislature, doesn't apply to the executive branch. Second, while rules.

[00:16:41] **Speaker 4** Have been a step in the right there, first of all, charter and the rules that it made that relates to the federal Constitution, which is different from the Wisconsin Constitution in this court has never adopted the rule made in Chad. Are you asking the court to do that? Because we didn't do that the last time you the government, were here in Evers one, as we're calling it, for shorthand.

[00:17:06] **Speaker 1** Right. So I'd like to finish my response to your question and then maybe we could turn to your your next question. You may have to remind me because I may forget the next question. But second, another premise of your comment was that a rule and a statute are the same thing, but they're not when they're law, when the legislature passes a statute, they can dream up any public policy they want and make up a law that tries to address that public policy. But when when the executive branch promulgates a rule, all they're trying to do is effectuate the statute that the legislature has charged them to carry out. And then the idea the third premise that was in your comments is I and I won't get your quotation exactly right, so I apologize, but that there are no rules. No no guardrails on that. But that's not true. The legislature can and has put in a number of guardrails and our constitutional that limit the executive branch's discretion to 2011. Act 21 is a great example of something that put in lots and lots of limits on executive branch's discretion and how it promulgates rules.

[00:18:12] **Speaker 4** Well, that's that's where I'm struggling to see where you're going to draw the line, because a logical conclusion from your argument is that the legislature, once it cedes and I understand your position that you disagree with me, although you haven't really explored that in your briefing. I know you disagree with me. You think that rulemaking is an executive function, but the lawmaking power, the lawmaking authority was given by the people to the legislature. There's nothing in the Constitution giving that to the executive. So why can't why are you saying that? And I think this is the crux of the issue here. Chapter 227 Some of it's okay. Some of it is okay for the legislature to prescribe the rules by which rulemaking can occur, but you don't like some of the provisions. So where are you drawing the line? How are you drawing the line? When is it okay for the legislature to prescribe limits on the exercise of this lawmaking rulemaking power? But when is it not? Okay.

[00:19:22] **Speaker 1** So first of all, your description of it as lawmaking power again, I think begs the question of whether rulemaking is lawmaking power. But and even if we describe. The ability to promulgate rules as potentially as describable as legislative while it's sitting with the legislative branch. When it's conferred on the executive branch, it becomes that kind of power. And it's no different than if the executive branch were carrying out the law on a case by case basis. It's just regularizing its enforcement and implementation of law through rulemaking, which many of the justices, I think is a good thing. And I'm sorry, I forgot your next question. What are the limits? So the limits are that the that the many provisions in 227 today and as I said, some of the more exciting ones came from act 21 are all things the executive branch has to carry out itself. It has to do a scope statement and goes to the governor for his approval. It stops the DOJ. It sends the rule to large council for their review. And there's public hearings. There's a whole long list of things. And as you saw from our statement of the case in the petition, the two rules that are examples here went through a years long process with tons of feedback, including from experts from the Building Council, which is a statutory body comprised of experts in all parts of the building field, and that disperse board, which is people who are appointed by the governor and actually confirmed by the Senate. So all of that is fine. What's not fine is when the legislature comes in at the end through a committee and says, no, actually rules no good, we're vetoing it.

[00:21:02] **Speaker 4** But it's not an after the fact consideration. The the ability for the legislature to do this is built into the statute as a guardrail. But I know you disagree with me on that. But I, I don't know how this court can decide this case, Martinez or Martinez, Whether we overrule that or not really doesn't decide the issue. We have to look at what is the fundamental nature of legislative power versus executive power. I don't know how we can decide this case without answering that. And for decades, this court has recognized rulemaking to be a legislative function that the legislature and I don't agree that the legislature has the power to do that, but they have given to the executive branch. So as I'm reading your argument, you really haven't asked us to overrule anything other than Martinez, but we would have to overrule decades of cases, including recent cases where we again reiterated what this court has recognized for decades. And Caskey in SEIU and countless other cases. Are you asking us to overturn all this body of case law? And really, as I see it, transform how government has operated for decades, if not 100 years in this state?

[00:22:21] **Speaker 1** Well, I think there are a number of questions in that question, too. So I'll try to pull them apart and answer them individually. I'm going to offer this court three different ways that it can decide this case. And we recognize that Martinez is kind of the prop that's propping them up. So that is important that the court overrule Martinez. The first way is to decide the case. And by cameral ism and presentment alone, that implicates nine of justice for back and Bragg and leaves questions about how we what the right description of rulemaking power is, whether it's legislative or executive. We know that in men's rights and duties of people outside the legislative branch. And so the legislature has to pass a bill through both houses and present it to the governor for his signature veto that triggers by cameral ism and presentment. And Martinez recognize that which is good. It was a good first start. Where Martinez went astray is thinking, well, the committee can change the law initially and someday, if we want to make that change permanent, we'll get around by camera. Lisbon Presentment by cameral ism and presentment is the very method through which the legislature has to act when it wants to amend the law. It's not a security check after the fact. And if we think about it, the committee acts, our acts, they change, they change the law, they change those rights and duties. And for that whole period, whether it's three months or three years and Your Honor's have seen it tends to be more of the latter. The law is changed with no bicameral wisdom in presentment. The Constitution doesn't create a free zone. There's no there's no there's no space where the legislature gets to operate outside the constitutional constraints. So bicameral isn't presentment alone justifies the striking of the five statutes here. The second way.

[00:24:03] **Speaker 5** I work, I just want to ask.

[00:24:05] **Speaker 1** Yes, Your Honor.

[00:24:06] **Speaker 5** We're like in like a rushing nesting doll situation here with your argument, I realize. But now you're out by camera. Was one presentment. You've talked about Martinez under that, which is the first option that you are discussing. We'd have to overrule Martinez. Correct.

[00:24:21] **Speaker 1** So our view of the importance of Martinez is not to to 2719 five deem that's the indefinite veto. And we think even the Martinez court back in 92 would have said, Whoa. Not that one. We also would urge the court to facially overrule two 2720 62I am, which is the repeated suspension law. Now we recognize that would require the court to overrule. Paragraph 78 to 83. I'm hoping I'm getting the numbers right. I've got SEIU, which pretty much relied on Martinez. I think one of the plaintiffs in the case you and kind of urge the court to go that route. But that that case assume that you had to wait and see just how long the repeated vetoes were applied. We think that's wrong. The power to do it repeatedly is what is what's relevant here. Now, what happens with the other three statutes if you don't overrule Martinez, we would ask the court to at least construe Martinez as having a three month limit, and the triggering of the limit would depend on it, whether it's a suspension, when it would be triggered by the suspension itself or an objection which would be triggered by when the legislature acquires jurisdiction. Because for an objection, there's a longer process. It also includes a visit to the standing committee.

[00:25:42] **Speaker 5** Can I just kind of can I just follow up on that? Okay. So Martinez had the three month limit. It was extended to six months and SEIU. But you're asking us to overrule SEIU anyhow because of two 2720 62I am. So if we limit this to three months. We don't have to worry about the six months in SEIU because we've already. Overrule that because of the indefiniteness of two 2720 62I am. Am I correct? Okay.

[00:26:16] **Speaker 6** My question to follow up on that is why would we want to even say three months is okay if you're saying it's a violation of the Constitution, why isn't like one seconds too much?

[00:26:27] **Speaker 1** Thank you, Your Honor. Our our feeling is that by cameral ism and presentment is violated, even if it's one day. And I you know, we cite a case from the I think the Kentucky Supreme Court where they said a 20 day pause was too long by cameral ism. And presentment, as I said, is the way the legislature has to act when it wants to amend the law. It's not an after the fact moment when we say, well, after three years to make something really permanent, we use it, then that's not what the Constitution.

[00:26:53] **Speaker 5** How does Martinez survive?

[00:26:55] **Speaker 6** Well, we.

[00:26:56] **Speaker 1** We are strongly urging the court to overrule Martinez. I understood your question to mean if we don't want to. What could we do if we just. If I can't convince you.

[00:27:05] **Speaker 2** What's what's the big bad.

[00:27:08] **Speaker 1** Question.

[00:27:08] **Speaker 5** On my part? I understand. I mean.

[00:27:10] **Speaker 1** I'm even beyond the, you know, plain constitutional problems with Martinez and the rule making problem here. If you read the case carefully, you know, I think they say. Cite A'Hearn three times. Its whole reasoning, its whole zeitgeist is just not consistent with the court's minor in separation of powers.

[00:27:29] **Speaker 7** That's what I want to talk about counsel a little bit is your bicameral ISM presentment argument. And here's my question to you. I'm having a very difficult time seeing any daylight between your to your two principal arguments. That is, it seems to me that if the argument is. Once the legislature enacts a law, the legislature cannot cannot. Has no constitutional role in checking the enforcement of that law without going through by camel ism presentment. What you're really saying is the legislature can only change the law by changing the law through the constitutional method. Ergo, rulemaking is a core executive power. And in other words, I don't know that if you if you go the by cameral ism presentment route. I'm having a difficult time seeing analytically any distinction between those two arguments. It seems to me they're saying the same thing. One's asking maybe an indirect question, but it gets you to the same spot, which is you're saying the legislature, the legislature's, you know, only constitutional authority after it enacts a law is to enact a new law, which is to say any form of rulemaking that's prescribed by statute must be left to the executive branch without a check from the legislature outside of new lawmaking.

[00:28:48] **Speaker 1** So I kind of see two different pieces in that question. And on the first question, I agree with Your Honor that both by Camilla Zimmerman presentment and the separation of powers, whether we're talking core or shared power, both have that piece that the legislature has to act through its own constitutional tools, which are lawmaking. And the piece and the question of, okay, if that's true, are there any checks that the legislature has? It doesn't have a veto check. It doesn't have this case by case veto check like Jay Crow currently has. But there are other things it can do, obviously, including, you know, have hearings.

[00:29:23] **Speaker 7** I recognize you can do hearings. You can, you know, if you want to subpoena people and as you press releases and all that stuff, I get it. My main question, though, is analytically, I do not see any difference between the bicameral wisdom, presentment argument and the argument that administrative rulemaking is a core executive power. If you answer the first question, the way you presented it to us seems to me that the answer to the second necessarily follows, and that's just an indirect way of getting there.

[00:29:50] **Speaker 1** I think at least says it's applying under the laws At issue here, that seems to be true. I guess I'm I'm hedging a little bit because I'm wondering whether there could, you know, if this court went with a shared powers analysis, for example, would there be ways that the legislature could permissibly act through lawmaking that would create, you know, different kinds of constraints on the legislature and the branch like they have with.

[00:30:16] **Speaker 7** But I think that harmless and presentment necessarily means it's not a shared power, because what you're saying is you can't act unless a new laws passed. Ergo, the legislature's role is done from at least a having an illegal effect. And again, that may be correct. I'm not commenting on the argument one way or the other. Right. I'm just trying to figure out, you know, literally whether those are two different things. And seems to me like cannibalism. Presentment is sort of like a distracting question. It doesn't actually answer the question, as you correctly, I think pointed out by Campbell's. And presentment is simply the method by which the Constitution prescribes for the enactment of laws. And so if the argument is the legislature's constitutional role is to enact laws and after that, it can't it can't tell the executive how to enact, how to enforce the law it's enacted without enacting new laws. Then you're saying. Rulemaking is a core executive power.

[00:31:10] **Speaker 1** I think now we I haven't thought about this before. It's an interesting idea. It may be kind of two sides of the same coin that by commercialism and presentment is really focused on the process the legislature uses where a separation of powers we think about what are the substantive powers that each branch has, but maybe you end up with the same answer.

[00:31:28] **Speaker 2** Counsel I often say to my clerks or others, lead with your right.

[00:31:36] **Speaker 1** And I'm left handed. Yes.

[00:31:38] **Speaker 2** Your left. I'd say to you, Leave with your left. So what is your left here in terms of your argument? Which one are you advancing?

[00:31:51] **Speaker 1** So as I've said to the court, I think the last time we were together, I love consensus. And I think if the court can get behind by caramelizing in presentment more easily because there are fewer doctrinal issues, we embrace that. We do think that, you know, most of the state supreme courts that have looked at this question have rejected statutes just like this one, these ones. And both grounds. And I think it's helpful to keep cleaning up our separation of powers doctrine because as this court saw with the kind of mess that A'Hearn caused, as long as we have cases sitting around like Martinez that have very different language than what the court's using now, I think it causes confusion for litigants about what are the.

[00:32:35] **Speaker 2** Rules of the court, you indicate? I have two questions. You indicate fewer doctrinal issues if you go a route of. The presentment route. And you also indicate cases that in your brief that may have to be overruled if you go the separation of powers right route. So what do you mean by fewer doctrinal issues to deal with?

[00:33:09] **Speaker 1** Right. I think I think and this one thing I want to really emphasize about our separation of powers test is we have both a core powers analysis, but we also have a shared powers analysis. And we strongly believe that the five statutes here all feel, even if this court wants to go with a shared powers and. Which our view is that would require only overruling Martinez and then those derivative paragraphs and SEIU and I just want to review the separation of powers framework that this court has recognized again and again in its shared powers test, which is twofold. One is the legislature has to act through its alleged constitutional role in making law. Procedurally and substantively, it can't have the power to override the other branches exercise of its own constitutional role.

[00:33:58] **Speaker 4** Well, that's where we have to define the constitutional powers, don't we? Counsel again, I go back to my question to you, and I don't remember if you answered it because there were other interjections, which is fine, but I don't know how we answer this question without determining. The very nature of rulemaking. I have written about this extensively in other cases, so you know how I see it. I see rulemaking, as this court has said, as a power delegated by the legislature, which means that if it's in I again disagree with the the authority, so-called, of the legislature to give away the power that the people gave it. But setting that aside for a moment, we have declared over and over again that rulemaking is indeed a legislative power, which thereby therefore empowers the legislature to prescribe the manner in which the executive branch can create rules.

[00:34:57] **Speaker 1** So I think this idea that it's purely legislative and not a shared power is is incorrect. So you're asking.

[00:35:04] **Speaker 4** Us to overturn.

[00:35:05] **Speaker 1** Those in. Martinez So if I can answer, Your Honor, but.

[00:35:08] **Speaker 4** Then Counsel, we I do want to hear you and but please, please address in your response. You are then asking us to overturn case after case that we where we have said for decades that rulemaking is a legislative power.

[00:35:23] **Speaker 1** Now, there's two different questions. One is whether it's been described generally as delegated legislative power, which doesn't answer the question of what it becomes when it's conferred upon the executive branch and the. There has to be executive power as part of that shared power analysis, or Martinez even wouldn't have said it's a shared power and the shared power the executive branch has in rulemaking is exactly that. It's executing the law. It's it's it's regularizing its application and execution of the law through that rulemaking. And so at the very least, it has that piece of the pie. It's the room, it's a shared power. Your honors, your honors premise is that it's essentially solely a legislative power. But that and I think that's inconsistent with your Honor's writing in Evers one at paragraph 17 to 18, we were.

[00:36:11] **Speaker 4** Talking about rulemaking.

[00:36:12] **Speaker 1** It's true. But Your Honor said that just because the legislature gives the agency's. Their existence in the process doesn't mean that once those statutes are created, it can do whatever it wants to. To them. And it's a completely different context.

[00:36:25] **Speaker 4** I think.

[00:36:25] **Speaker 1** An analogy, a very good analogy to that is this rulemaking. They've given them the power to regularize their application of the law through rulemaking, and that's the executive branch is now, even if it's a shared power, the legislature still can't have the power to veto the. The executive branch's application of a law that way, which is exactly what they did with the commercial building code here.

[00:36:47] **Speaker 7** If we agreed with your argument that rulemaking is core executive power. Talk a little bit about what the impacts of that might be. How broad is that? How narrow is that? Is that is that a big a big change? I mean, obviously, our cases have used to describe it as executive power and now more have described it that way. But talk to me a little bit about the impacts of that. I'm just curious, what other areas of law does it affect? We can try to think about the doctrinal consequences of a pronouncement like that. You've indicated maybe there'd be less with the cameras in prison. I'm not sure if there are not, but I'm curious how you see that.

[00:37:29] **Speaker 1** Well, we actually think it could be salutary in the sense that it would incentivize the legislature to, you know, pass laws that maybe are clear about what it intends to do. And also. During the rulemaking process, I think it's going to encourage both stakeholders who are interested in a rule and the legislature itself to communicate with the agency. While it's making a rule right now, nobody has an incentive to communicate with agencies because they can just wait until that last week before the JCR vote and talk to them. So we think from a public policy perspective, there's going to be a lot of great ramifications of this. I don't see legally there being these ripple effects that are problematic that are any different than what this court already decided in EVAs one. And of course, as I said, we concede that the Chapter 2227 procedures about how agencies make rules are constitutional. We're not challenging those.

[00:38:23] **Speaker 2** Count Counsel, If you went the route or this court went the route of saying. That it is a core executive power. How many cases would we have to overrule?

[00:38:35] **Speaker 1** Well, it gets a little bit into your know, Dick General. Your Honor.

[00:38:39] **Speaker 2** We think doesn't.

[00:38:40] **Speaker 7** Exist.

[00:38:43] **Speaker 1** It's not three votes. It's not.

[00:38:45] **Speaker 2** Complicated.

[00:38:48] **Speaker 1** And in terms of in terms of direct holdings, we we continue to think it's Martinez and those derivative I'm calling it the derivative paragraphs of SEIU. But then I'll just give an example, paragraphs 98 and 99 of SEIU, which was Justice Kelley's. I see my red lights on. May I finish?

[00:39:06] **Speaker 5** I have some questions too, Chief. That's okay.

[00:39:10] **Speaker 1** Those weren't strictly necessary to the court's holding on the guidance document issue, but Justice Kennedy talked at length about his view of of rule making at those two paragraphs. So I'm not sure.

[00:39:23] **Speaker 2** If you if you lean more towards one of my colleagues over at the very not at the very end. Let me point out, Justice Hagedorn was the tall guy at the end who might who might see dicta differently than I do. How many would we have to overrule.

[00:39:45] **Speaker 1** Based on justice hagedorn's view of dicta? I would stick with Martinez plus those few paragraphs of SEIU.

[00:39:53] **Speaker 5** I just want to bring you back to the beginning of your argument when you were trying really hard to lay out your three arguments. I just want to make sure we got through all of them. I think we did. I think what your your arguments are by camera is amend presentment. Shared powers, core power. And I think you did have a chance to touch on all of those.

[00:40:13] **Speaker 1** I did. And I just want to I just want to mention quickly that part of the core powers problem is not just the executive branch, it's the judiciary. And if the court looks at the reasons the car can veto a rule under two 2719 for. They are all questions that courts answer are not legislative committees and other courts have pointed out that separation of powers problem as well.

[00:40:35] **Speaker 5** And then I have one more detail question your friends on the other side. On page 40 of their first of their, I guess, first and only brief, they argue that the challenge to the suspension of the conversion therapy rule is moot since that rule is now in effect. And I'm curious as to what your responses to their mootness argument.

[00:40:58] **Speaker 1** So first of all, it's not moot at all because under two 2720 62I am the Jay car can re suspend that rule at any moment it wishes. And second, we think that the importance of these issues would meet the standard for the exceptions to the mootness doctrine.

[00:41:17] **Speaker 7** Counsel, I just wanted to ask you to briefly address sort of the reliance argument on precedent. The legislature makes a case, and I think it's a compelling case that maybe what we have here is a sort of gentlemen's agreement about how we're going to operate with government, right? We go where, you know, we're going to maybe it's not what the contract says, but it's not what the Constitution says. But hey, that's how we've been operating for a long time. And the legislatures passed a lot of laws accepting the framework that's been given. I mean, I think your point and others have said this this case is this case is is consequential for the operation of government is maybe I've seen in my time on the court, admittedly five years, but it's consequential case for how government operates. So could you address that argument along with, you know, they make at least at least some pitch towards a severability kind of argument. Is there anything you'd like to address just on on that? It is there is a real issue because we'd be we'd be overturning a whole bunch that has relied upon what this court said. And even if you're right that that was wrong, that is often a consideration that courts might have when we're thinking about how we deal with these questions.

[00:42:33] **Speaker 1** So they made the same argument in year one, and this court didn't take up and up on it and for good reason. The U.S. Supreme Court has given us two really important rationales why government reliance isn't a valid factor on the starry decisis question. One which the court discussed in Citizens United, is that it prevents the court from saying what the law actually is, even if it requires the court to overrule its own precedents. And the other which the Court discussed in Ramos and Gant, is that the public's interest in discontinuing illegal laws and practices is going to always outweigh the governmental interest or enjoyment in their persistence. And I think this gentlemen's agreement concept, I think that's a really great framing of it. But that kind of just shows how pernicious it is that we're all going to have this deal to to violate the Constitution because it suits the people in power. And one of the things that the Alaska Supreme Court said in a lie, voluntary that I thought was really helpful, was that what these enactments do is say an earlier point in time when the legislature either has the override power or a friendly governor, they can say for the future, we're going to make sure we never have to go back to those people. Right. And so they can they can. They can. And I'll quote the court, They'll do it better than me that the power they possessed at one instant in time for future periods when the legislature might otherwise be incapable of acting because the executive veto. But we know that one legislature can't bind everybody for the future. And that's kind of exactly what this does. And just to hit on your severability point, I'm not aware of any Wisconsin court that's looked at severability across all the statutes. What we do is we look at a particular act and look at those provisions and see whether the legislature have created all those together. And I actually tried to find some scholarly articles, and I can't find courts that are conducting the kind of analysis they they never made an argument as kind of implied, but wouldn't would take that kind of tack with severability.

[00:44:34] **Speaker 4** Counsel have questions for you on a issue that was raised, I believe, in an amicus brief about whether you have standing, whether your clients have standing to raise these claims in the first instance because you work for the attorney general. And typically it's the attorney general's job, as we have recognized, to defend the statutes of Wisconsin, that this court, going back to 1961, said the general rule is that state agencies and public officers cannot question the constitutionality of a statute unless it is their official duty to do so, or they will be personally affected if they fail to do so in the statute is held invalid. And the exceptions that have been recognized by this court don't apply. So do you have standing to be here making these claims?

[00:45:23] **Speaker 1** So Your Honor actually has two questions. The first question is why is the attorney general here? He is not a plaintiff. He's representing governmental entities, but he has authority to be here, which is a separate question under chapter 165, because the governor requested that he bring this case. Now, on the standing question, the case law your Honor's referring to are is the rule that agencies can't challenge the constitutionality of laws that they enforce. And instead what they can do is sort of refuse to apply those statutes and raise it as a defense if the other side sues them later. This is a different matter. This is in the separation of powers cases, that agencies are directly injured because it's their very own power that's challenged. And I'm not aware of any case where courts have said that the executive branch doesn't have standing to bring a separation of powers challenge about. Harm to its own branches.

[00:46:17] **Speaker 4** Powers of the executive branch has challenged the standing of the legislature in past cases to do the same.

[00:46:24] **Speaker 1** Well, I actually I actually disagree with that. I mean, if you look at Palm in Palm, the legislature brought a case where they said our statutory right to review rules isn't being abided by. So we have standing there and we didn't challenge their standing because they actually did have skin in the game there.

[00:46:43] **Speaker 4** There were prior cases. Counsel Since I've been on the court. Mark Klein I want to return to that. Mark Klein One again, shorthand you're suggesting some inconsistency, which suggests to me that you think. Mark Klein one answers a question here. Could you respond to that? Because I don't see any inconsistency in the first principles that I was laying out for you. And their application between this case and the last case, which involves completely different things, right. We're we're dealing with rulemaking here. We didn't deal with that in the first one. We were dealing with the an appropriation that the legislature made. And then the executive branch was trying to carry out the law, as we said in Mark Klein one. So where's the inconsistency, counsel?

[00:47:37] **Speaker 1** So I don't think I use the word inconsistency. I think what I was trying to do was draw an analogy between the court's point at paragraph 17 and 18. And I think this comes up in SEIU two, paragraph 62, where the court talked about the attorney general's powers. That just because the legislature creates an agency doesn't mean it can do whatever it wants to. Once it's created those statutes giving it that power. And I was saying, I think that's analogous. It I'm not arguing that that there's that Mark Klein one or others one already decided the issue.

[00:48:12] **Speaker 5** Attorney.

[00:48:14] **Speaker 2** Go ahead.

[00:48:14] **Speaker 6** Okay. So you did. I know just as an analyst Bradley asked you lead with your right and then lead with the left. That's I got it. And I didn't I don't know if I heard. So I guess I'll ask it a different way. If you couldn't have more than one of these, you've got three choices of how we would if you were writing this. I know. I think I heard you say you would. Your platinum would your platinum. Right. I was going to ask about your platinum button, but not without combining theories, because I think I think what I heard you say is other courts have done both by capitalism, imprisonment and court power, and that might be your platinum. Okay. What's your gold?

[00:48:54] **Speaker 1** Well, I mean, we're comfortable with either I partly we presented the core power series because we do think that is more correct, but we recognize it requires more of a shift for the court. And, you know, basically we're inviting the court to take a fresh look. If that's not where the court's at, that's fine. But we would still ask for the court to decide it on both by cameras in and presentment and shared powers grounds. And we and we you know, we'd like to cover the fact, the constitutional principles as fully as we can. So it's clear to the legislature what they can and cannot do because their enthusiasm for passing new veto statutes may continue beyond this. And I think it's important for them to understand what's possible.

[00:49:36] **Speaker 6** And I think you.

[00:49:37] **Speaker 2** Learned just fine. I'm sorry. Go ahead. Thank you. Let me follow up on that. Former Chief Justice Surely Abrahamsen would often ask the question, if you were going to write this, how would you write this, which refines the I don't mean that it needs refining, but adds on to the question the just asked. If you were writing this, how would you write it?

[00:50:01] **Speaker 1** So if I personally were writing it and it had the votes to do so, I would decided on both by cameral ism and presentment and core powers grounds. And I would also be sure to include the intrusion in judicial power.

[00:50:15] **Speaker 2** Okay. If you exercised a little judicial restraint and job and didn't do the whole ball of wax, how would you write it?

[00:50:26] **Speaker 1** So again, I if if I were a justice, I would be interested in consensus and getting as many people to sign on as possible. And so I would go with what I suggested to Justice Dalot by care, realism and presentment, plus the shared powers analysis.

[00:50:42] **Speaker 2** Okay.

[00:50:43] **Speaker 5** My question is about the facial challenge standard. Your friend on the side cite SEIU on page 21 of their brief, and they say SEIU reaffirmed this court's, quote, clear and long standing, end of quote, facial challenge standard that requires the challenger to show that, quote, all applications and of quote of the challenge law are unconstitutional. And then they go through painstakingly read each subsection of the statute at issue here, and they demonstrate how it would be possible for that rule to be enacted. I just wanted to give you a chance to respond to the facial challenge standard that they propose in their brief.

[00:51:27] **Speaker 1** So their examples are based on an erroneous assumption of law, which is that if they can find examples where the executive branch is in is upset or is happier, that means it's a constitutional application. But that's not the legal test. And that's true even under the shared powers analysis, Right? In Johnny B, we didn't look at whether there were situations where the court would say, Actually, I didn't want to appoint counsel in this chip's case. So thumbs up. I like the statute. Right or instinct left. We didn't ask where courts in some cases would say, I agree. Prosecutor We shouldn't give this person early release. It's the power of the encroaching branch that matters. And so whether the I think in their brief, they talk mostly about, you know, sometimes it's a little shorter and sometimes it's longer. So that would change the, you know, facial standard. It doesn't the legislature always has that power to veto and override whenever they want to.

[00:52:26] **Speaker 3** All right.

[00:52:28] **Speaker 1** Thank you.

[00:52:32] **Speaker 3** Obviously find a little more lenient standard on time limits today, but it's an important case.

[00:52:39] **Speaker 8** So I think, Your Honor should set them for the legislature. Petitioners here bring a remarkable five facial challenges while asking this court to overrule multiple unanimous precedents. Justice Potter say, which I'm going to answer your first question and begin the argument which, with respect my friend, did not answer. Their strongest argument is on the. Permanent suspension of proposed rules. Almost all of their cases from out of state deal with permanent suspensions of a doctor or proposed rules their weakest challenges. And I think there once we dig in, I hope the court will see that insubstantial challenges are to all of the temporary things that either the standing committees GCR can do, which essentially just serve as a grace period, a waiting period for the exercise of by Camilla. Presentment. I don't.

[00:53:35] **Speaker 6** Where does the Constitution say there's a grace period for the exercise of by camels and then presentment?

[00:53:42] **Speaker 8** Well, no. So the way that those provisions operate, Your Honor, is they operate like I don't think there will be any dispute of constitutionality if the statute was as follows. After the agency promulgated a proposed rule, there is then a six month period where that rule does not go into effect and then the legislature can vote. Through by Campbell isn't presentment to the governor to repeal the rule? I think there would be no argument that that kind of statute would be constitutional.

[00:54:11] **Speaker 5** Well, right. Because the legislatures. Right.

[00:54:14] **Speaker 8** That's the main finish. Your Honor's Yeah, it's important. So the only difference in those three provisions that I think are in substantial their challenges is that instead of sitting out the six month period, that will be unchangeable for the legislature to decide whether it wants to repeal the rule. By both parties acting and sending to the governor, it's an option. The JCR can trigger essentially that waiting period because it because all it's doing, all those provisions are doing are in service of the legislature, doing something that I think my friends would agree is no cultural problem, which is ultimately voting in both branches and saying to the governor the decision of whether to stop the rule.

[00:54:59] **Speaker 6** But we see air is not the legislature. It's ten people. Right. The ten people deciding to veto as opposed to both parties, both branches of the of the legislature from being presented with with exercising body cameras on presentment.

[00:55:19] **Speaker 8** So certainly on there, one challenge that I think has some strength on the permanent suspension, those ten people are vetoing four for the other challenge.

[00:55:27] **Speaker 5** It's not ten people, though. I think that I think that's really what's the fewest number. And I'm not sure from the briefing actually if it's 3 or 4, is it 3 or 4?

[00:55:37] **Speaker 8** I don't know. But it is less because so.

[00:55:39] **Speaker 5** It's less so it's about 3% of the elected representatives in the state.

[00:55:43] **Speaker 8** But those the action of those in those legislatures are taking for the temporary provisions are not a legislative veto at all. And again, those provisions are not a legislative veto at all. All they are doing is creating a grace period, no different from a six month grace period where the legislature, the full legislature, can vote whether to.

[00:56:07] **Speaker 5** That is just not right. It is just not right. The point that you are missing is if the whole legislature votes on it, it bicameral ism, it has to go to the assembly, it has to go to the Senate, and then it has to go to the governor who can veto it. That doesn't happen here. It's 3 or 4 people and that dead stop. There's no other branch there. There's no governor. There's no veto. That's it. It's 3 or 4 people. It's that argument.

[00:56:36] **Speaker 2** Come on. You're right. It just doesn't make any.

[00:56:38] **Speaker 8** Sense what you're saying. Absolutely wrong, Your Honor. What happens?

[00:56:43] **Speaker 2** We'll see. We'll see about that. I know you're obviously.

[00:56:47] **Speaker 8** Not correct if the legislature does not adopt that bill blocking the rules and the governor signs it or the governor's veto, it was overruled. The rule goes into effect. Those three putting aside the permanent suspension provision, which I agree their argument is stronger for the others. If Campbell isn't presentment, do not lead to the repeal of the rule. The rule goes into effect just like one of the rules here goes into effect. So it functions exactly as a practical matter, like a grace period. Three months.

[00:57:25] **Speaker 2** Six months. Counsel. Counsel, let me ask you this. Let me ask you this in a more, I guess, broad fashion. I'm assuming that you read the amicus briefs in this matter.

[00:57:33] **Speaker 8** Yes.

[00:57:33] **Speaker 1** The legal scholars.

[00:57:35] **Speaker 3** Really assert that the power of Jack Ra, however it's pronounced, I call it J.A. like Joker. They say that it's really.

[00:57:46] **Speaker 2** A national outlier. The power over the executive branch's rule making that Wisconsin's a national outlier. What do you respond to that?

[00:57:56] **Speaker 8** I mean, I think that the reason the legal scholars are getting that is they're leveraging. The one example that I can see that is is stronger for them. And they're using the existence of that one example, which I grant the permanent suspension usually is done through in other states, is done through joint votes of both branches, both houses of legislature without the governor. That that is an unusual provision. The with the the other provisions here, the other four and especially the three temporary ones, they have almost nothing to say about those. I think for those they say this between 8 and 14 states do something like that. I mean, obviously, each state has structured a little bit a little bit differently. But and I think of the cases they cite, the only one I believe maybe there's one other the only one that actually struck down a temporary 1 or 1 of two was Missouri, where the Constitution specifically empowers agency rulemaking in the text of the Constitution. So almost all of their cases and almost all the examples that the scholars are using are on that on that fifth category, the permanent suspension where justice crops, you're exactly correct there for for the permanent.

[00:59:07] **Speaker 5** So you're calling Can I just I just want to make sure you and I are using the same words. Okay. I think in the briefing that. Two 2719 five DRM. Yes. Is that indefinite objection? Yes. Okay. Hold on. Just hold on in two 2720 62I am is the multiple suspension. But the phrase you're using here today is an indefinite or a permanent suspension. And I'm not I'm not sure which one you're talking about.

[00:59:36] **Speaker 8** Yeah. So I'm talking about when I'm talking about I'm talking about the demand, the indefinite and permanent. I think it's the same.

[00:59:42] **Speaker 5** Objection. Yes. Not the suspension.

[00:59:44] **Speaker 8** Right. Right. So so for that dam one, that's their strongest argument. That's the one that the legal scholars analysis almost entirely deals with.

[00:59:53] **Speaker 7** Counsel, I want to take a step back, and it seems to me that cases like this present us with an interesting sort of fork in the road, as I maybe mentioned to your opposing counsel, the Current. Arrangement in the way government operates is a kind of a gentlemen's agreement. I have not heard any argument from you that if there is, I'm happy to hear it. But that if you look at the original public meaning of the Wisconsin Constitution, that the kind of blending and melding of powers that currently is in place would be consistent with our constitutional structure. And so it feels to me like the argument we have is do we go back to the original public meaning of the Constitution and its structure, or do we say we've kind of blasted for pragmatic or other grounds and just try to do some intermediate line trying? The argument you've made to us is, listen, this has been blessed by this court. You know, 33 years ago, Let's you know, we need to not just disrupt government now. I don't see you making an argument outside of that. That goes to the core of our constitutional structure. And I want to give you an opportunity to do that and give us maybe your insight and how we're supposed to approach approach these things.

[01:01:13] **Speaker 8** Yeah. So I think that if Your Honor's were to go down to the original public meaning of the Constitution, the administrative states got to go. I mean, that's the fundamental problem. The the early cases that that Your Honor pointed to in your POM dissent, you know, those were about agencies having the authority to do things with the internal organization of government and this notion that administrative agencies can create law. And let's be realistic. No law that has so far water under the bridge. And I'm not standing here. Your Honor's saying that this court should throw out the entire administrative state. That is a lot of under under the bridge. But I think it is quite unfair then to the legislature to say, well, where's your original public? Meaning, Well, this whole edifice is built upon the notion that we are allowing the delegation of legislative power to executive agencies. Once we're allowing that no, judge Justice Bradley doesn't doesn't like that. And if you're you know, if Your Honor had.

[01:02:16] **Speaker 4** It's not about not liking a counsel. It's about following what the Constitution says and making sure that the people are governed by the people they chose to govern them. And when we see when the legislature cedes its power to unelected bureaucrats in an administrative agency apparatus under penalty of law, they have to follow those rules and regulations to call that water under the bridge or the dam.

[01:02:40] **Speaker 8** Is I mean, this is I mean, this was kind of a famous dispute between Justice Thomas and Justice Scalia back in the day, where Justice Thomas, his position was, you know, let the government forward as and we're going to enforce the Constitution whole hog. And Justice Scalia said, you know, I'm not going to bring down the whole government. I think he called himself a faint hearted originalist, you know, And so that's you know, there's two ways to approach criticism that way. But just to follow.

[01:03:02] **Speaker 7** Up on that, then, I mean, you know, what's the principal basis for making a decision that it just feels like then we're just trying to figure out the separation of powers. It's not about the balance of powers. It's not about whether there's good checks or the legislature has the right input or not. It's about whether the whether each branch stays in their lane. And so that this that's how I conceive of it. And so now I think the Constitution does. And if so, I don't know what a principle basis is to do line drawing other than go to the structure of the Constitution. If it's just I mean, what's a temporary pause? Not a big deal, maybe permanence too much. I mean, I don't know how to I don't know how to even handle that. If there's no text to work with or structure that I'm pointing to.

[01:03:52] **Speaker 8** If Your Honor, assumes the the administrative state rulemaking is permissible, just grant me that. Obviously, one assumes that's not permissible. Then you've got a lot of got a lot bigger problems, but one assumes that's permissible. Then it must be so that the legislature could pass the following law before an agency adopts any law that any before agency adopts any any regulation. We have a six month grace period where the legislature can choose through by cumbersome presentment to overrule that rule. So that that I think is uncontroversial. Legislature could do that.

[01:04:29] **Speaker 6** Can't the legislature do that anyway? They can always pass a law by by cameras on presentment after an agency passes a rule. Yes, of course. Your examples, correct?

[01:04:39] **Speaker 8** No, no. But my example builds in something further quite important to those three categories of of their facial challenges that I think are quite weak. The law that I'm hypothesizing is not only would legislature pass a law, but the law with a prior law would say that no, no rule that an agency promulgates.

[01:04:56] **Speaker 6** Can take.

[01:04:57] **Speaker 8** Up to six.

[01:04:57] **Speaker 6** Months.

[01:04:58] **Speaker 8** Takes effect for six months. Sure. And so what? When we're talking about the separation of powers, I would respectfully submit that the regimes that are embedded in those three up temporary provisions here are significantly better from the point of view of separation of powers, because let's say the rule has no problems. Let's say the rule is a really good rule that complies with the statutes, complies with everything that anyone would want. Well, maybe there's not a good reason for it to be paused for six months. So rather than putting the legislature to this choice to have this bright line, six month thing. I see nothing in the Constitution that says that we couldn't have an intermediate situation where an agency can essentially trigger or not trigger that a committee can essentially a.

[01:05:50] **Speaker 6** Committee or a committee. So you see nothing in the Constitution where 3% of the body of governing elected that the people have chosen, where 3% gets to make that choice. Don't you don't see the difference between that and what you first said to us? What you first said to us is a law. It went through by cameras of imprisonment. And yes, the legislature has great power here. They can tell they can destroy an agency. They can make an agency wait six months in order to effectuate a rule so that they can meet and they can discuss it, of course. But that is the point. The point is they are acting as the body that was elected.

[01:06:28] **Speaker 2** What this is, this structure.

[01:06:31] **Speaker 6** Is a few people who get all the power to make a decision about what happens to what an agency does with their rulemaking. And so it's absolutely distinct whether it's good or bad or whether we like it better or not, should not be what matters. It's the Constitution.

[01:06:47] **Speaker 8** The legislature, when it rulemaking is being done, is giving away its power to advantage.

[01:06:54] **Speaker 6** You can't sure.

[01:06:55] **Speaker 8** Is giving away its power to the executive agencies. So what that if an x a law a law that says that in giving away that power to you, we we are interposing one of our committees. There is nothing offensive in the separation of powers on that. If one assumes, contrary to Justice Bradley's views, that the giving away of the legislative power to some extent is permissible now.

[01:07:23] **Speaker 6** But just so that I can most of them present.

[01:07:26] **Speaker 8** And I really wanted to you know, when we were when I was before you in Marc line one or it was one where I say you pushed me really hard to give me to give me to give you an intermediate principle so there wouldn't be this all or nothing here and more. Glenn I was disappointed in myself and in and afterwards I couldn't think of a limiting principle here, a limiting principle that would not require overruling unanimous cases. The prior justices of this court have ruled on unanimous cases that multiple justice of this court, including, you know, just justice I'll just crossed you have ruled on is readily apparent, which is a permanent or indefinite objection that's out these temporary ones just like martinis. That's fine. This time we bring to you just briefly a middle ground consistent with everything this court has ever said and and consistent with keeping them keep in the belts and consistent with separation of powers.

[01:08:30] **Speaker 4** Counsel, do you see a principled basis for the distinction that Justice Stallard is drawing between the Legislature's sub delegation of its powers to an unelected administrative state and its sub delegation of its powers to a committee of the legislature that is actually comprised of legislators who were elected.

[01:08:52] **Speaker 8** Yeah, I mean, of course there is no difference there, and I have not heard one from.

[01:08:56] **Speaker 6** Your argument depend on this non delegation theory that's never been adopted. But we're still arguing about. So take away non delegation theory. They have the right to give the power. Once they give the power. So if you take that out, does that take away your argument?

[01:09:10] **Speaker 8** If they can give it to if they can give that power to administrative agencies, they can give a a sliver of that sort of power to GCR.

[01:09:19] **Speaker 7** Let me just push back if I can, or at least test at least this question of whether any kind of rule making is automatically a delegation of legislative power. Sometimes we we think about these things broadly, you know, like declaring that Clean Air Act says keep the air clean, you know, and then you have all these policy choices that are made, as I understand, sort of the thought process behind the idea that there's a bunch of policy choices that are being made their way that looks a little bit more like the kind of thing the legislature supposed to be doing, obviously. Right. But a lot of administrative rules that most of them, I think are much are based upon much more specific statutes, you know, tax product X, and so that the executive branch ordinarily would then just figure out what constitutes X and tax it. And then if the legislature says, but you need to pass rulemaking and tell us how you're going to define what fits into that category. I'm not I'm just I'm not sure analytically why that necessarily falls into kind of delegated legislative power. I mean, it's not the case to me. I don't that that every policy decision is left for the legislature. Lawmaking is given to the legislature, but the executive branch has to use its judgment and and to some extent, policy in interpreting and applying laws that have been passed all the time.

[01:10:43] **Speaker 8** Yeah. I mean, look, my point of view is that when the a body legislature or agency is making rules of conduct prospectively that govern human beings, actions, businesses, freedoms, that is that is legislative power.

[01:11:01] **Speaker 7** Let me just push that then. So if you say you need to tax toy moneys. Okay. I don't know. I thought toy moneys, but I thought of toy box toy bunnies. I don't know. I Electronic toy bunny. You're not going to live like that. I sure thought about this ahead of time, but that's okay. I have no idea.

[01:11:17] **Speaker 2** Well, my God.

[01:11:21] **Speaker 7** But suppose you want to tax toy bunnies, All right? And and so you you have a you have a law that says you need to tax that. I mean, ordinarily speaking, then the executive branch just is going to do that and is going to fulfill and execute that law and tax toy bunnies at the appropriate rate. But let's say the legislature says but but we need to now come up with a rules structure about what fits into the category of toy bunnies or not. Why? It seems like your argument is if there's a rule structure, it becomes delegated legislative power. But if there's not a rule structure, it's totally fine.

[01:12:01] **Speaker 8** I'm saying that's my argument is literally every case this court has ever decided, the only cases that my friends can cite and that were cited in your dissent and Palm involve agency decisions that impact just the internal organization of government as to say who is in what civil service classification or who can appoint whom and things of that sort. So certainly that's everything this court has ever said. If Your Honor thinks that there is some line between, you know, where it gets a little blurry. No, not minimum. It's a it's a mixed power. And in in those circumstances that are core executive power, I mean, there's no case in Wisconsin's history that even arguably suggests that. So I think it's you know, I'm with Justice Rebecca Bradley on that. I think it's is legislative power. But I think the only other possible choice is a mixed power and executive power writ large.

[01:12:50] **Speaker 7** Certainly not in legislative power because because y can you expand on that?

[01:12:56] **Speaker 8** Because you're making decisions that govern the prospective conduct of individuals for their businesses, their lives. That's why.

[01:13:04] **Speaker 7** But but when a, when a law has been passed and it's already the law and you're just executing the law, why wouldn't that why does that necessarily it's not it's not lawmaking. Right. In the constitution says legislature gets to gets to pass laws. That's how it determines what the law is.

[01:13:24] **Speaker 8** But, you know, the agencies are, in fact, lawmaking. I mean, this court I mean, this court's statement in 1928, in the Whitman case, it was praised as just being candid. But like, let's take the toy body example. If the if the if the agency if the statute says choose which kind of products are going to be taxed. That is a policy choice that that in the court to the at the founding is expected to be made by legislature. Given the complexities of modern government or you know you can have you can subscribe for nefarious motives to it. The legislature has decided it cannot practically make all those choices. Well, that will.

[01:14:06] **Speaker 7** That gets to the that gets to maybe the cousin of of of this that that Justice Bradley was talking about. So please tax you know products that will raise a tax dollars might be a non delegation problem in that you don't have a sufficiently specific law that actually makes those policy choices. I think you know earlier cases handled it that way. And then you have this movement that says, all right, fine, we're going to let you pass these laws that don't have real discernible content, and then we're going to allow a bunch of policy choices to be made. But again, a lot of our a lot administrative rules are not based on generic, undecipherable statutes. They're based on very specific statutes.

[01:14:44] **Speaker 8** I mean, the problem with this I mean, this is what's so frustrating about arguing this case and hearing the questions about regional public meaning. So is, yes, if you enforce the non delegation doctrine the correct way, as the founders, you know, back in the 19th century would have envisioned it, all those choices would not be open to agencies. But we are here in the real world where these provisions that the five facial challenges we're facing here are going to operate in the main on the kinds of things that I think the implication your question, our violation, the non delegation doctrine. So in that world, we can't say, well, if the executive branch was properly limited to the things that it actually is not, then you know, you know how many angels will dance on the head of a pin like we are in the world where these contested provisions, these five provisions are in fact governing what under these republic, meaning is legislative lawmaking, in this court's words. And so in that circumstance, you've got to just apply that doctrine fairly.

[01:15:48] **Speaker 5** Mr. Salem, I've heard you say a couple of times today that I just want to make sure I understand you've talked about the infinite I'm calling it the indefinite objection. I think you're calling it a permanent objection suspension. I think he's calling it a permanent objection. I think we're talking about to.

[01:16:08] **Speaker 8** Indefinite objection, I think is.

[01:16:10] **Speaker 5** Yeah. Okay. Indefinite objection. Yeah. I mean, I'm not trying to parse words. I really I'm trying to to I'm not trying to mess you up. I'm trying to make sure you and I are on the same page. Because what I want to ask you and then I have a real life example I want to get to. Are you are you conceding? No. On that we vision.

[01:16:30] **Speaker 8** Well, we said in our papers is our position was that would be constitutional to the extent that a because that provision allows the introduction of a bill thereafter. And if that bill thereafter succeeds, the the the rule goes back and goes back into effect. So what we said in our papers, in this case in the right there were chosen carefully that since this is a facial challenge and we can hypothesize a circumstance where it would in fact be constitutional, that is, the facial challenge would fail. However, under Martinez, I do not have an argument in order presenting one that under Martinez, when you have no end point where by camera presentment must be exercised, then those provisions can survive. Martinez And this is what I mean, you know, just broadly about presenting, taking very, very to heart the statements that were set said at oral argument and Markel about giving this court some middle ground so that we're not in this all or nothing world so that, you know, we don't have you know, one of their two examples here involve indefinite suspension. So if Your Honor goes on that they would win that aspect. You know, it's a rarely used provision, but we don't throw everything out. We don't have this thing where I mean, if you think about it, the statute the Martinez upheld actually seems to in a very intelligent manner. And all these temporary provisions, the three of them in intelligent manner, to address the criticisms that were voiced against actual legislative vetoes. Is this said and the questions that you that I believe you asked me at the more flawed arguments like what are the standards here? One, does it ever end? Well, These statutes provide specific grounds standards and then it says it has an end. And that end point is by cannibalism. Presentment.

[01:18:24] **Speaker 5** Right. I understand that. I mean, here's here's I understand what your argument is, but I think in that I think if you look at a real life example, you start to see I think your argument falls apart. And I and we can use we can use toy electric bunnies. But I see.

[01:18:44] **Speaker 7** There are electric.

[01:18:46] **Speaker 2** Tronic.

[01:18:48] **Speaker 5** I don't I don't I'm sorry I thought that's it's hard.

[01:18:52] **Speaker 7** She's adding to the parser.

[01:18:54] **Speaker 5** All right I want to turn to a you know a way more serious situation, which is the conversion therapy rule. Okay. And so we have an amicus brief from the National Association of Social Workers, and they talk about conversion therapy, if you can even call it therapy. I mean, they referred to it as torture on page 14 of their brief. And I think with good reason, because according to these experts, the goal of the therapy is to cause a patient identifying as lesbian, gay, bisexual, transgender or gender nonconforming LGBT, to abandon that identity and adopt and or exhibit a heterosexual sexual orientation and gender identity consistent with the one assigned to them at birth. And then they go through and they they give us some examples of what conversion therapy is, say, both historically and today. It is it's enforcing rigid gender roles through talk therapy. It's repeating homophobic or transphobic slurs. It's isolation from friends in family. It's it's corrective rape. I didn't I was a sexual assault prosecutor for decades. I had to look up what corrective rape was. And it is it was it is rape perpetuated by a straight man against lesbians in order to correct or to cure their homosexuality. It is basically a punishment for being gay and violating traditional gender presentation. It included or has included exorcism and aversion therapies such as using electrical shock devices or nausea inducing medication to induce a negative response to stimuli associated with being lesbian gay. Bisexual or transgender. I can't believe some of the words I just had to say in this room. This is beyond horrific. In February of 2020, the marriage and family therapy, professional counseling and social Work Examining Board proposed a rule to stop these therapies from excuse me, to stop therapists from torturing their clients. They defined. This is unethical conduct. Employing or promoting any intervention or method with the purpose of attempting to change a person's sexual orientation or gender or identity. Right. That that was a rule that they passed in 2020, between 2020, in April of 2024. There were several pauses in and one of them was the was the the suspension under 2D1 was the promulgation pause under five C, But the sum total of that is that the the rule was shelved for for several, several months. So under your interpretation of the statutes, less than a handful of unchecked legislators can check a rule like this for an eternity. Four people can shove a rule that stops therapists from subjecting children to horrors like corrective rape and exorcism. Do I have that right? Because I can't even begin to wrap my head around that.

[01:22:40] **Speaker 8** So, Your Honor, I'm going to answer that question as a matter of substance. And then as a matter of of the the constitutional theories that will be asked here, certainly in order to decide whether the kind of structure here is constitutional, you know, and if one wants to take into account the impact on real people, Your Honor could, of course, imagine the exact opposite situation, which is that the rule proposed by the agency may be in an administration of your honor know that that was different, would in fact mandate those horrible things, some horrible thing, whether it's that or something else, and then whether the rule of law would be different if the JCR veto provisions were stopping the things that are bad.

[01:23:26] **Speaker 5** My point is that my point is that you are basically saying that it is okay for 3 or 4 members of the legislature to put on hold something to put on hold a rule that literally is saving people's lives. What so and that and that. And I'm not talking about the indefinite suspension here. I mean, this between this the rule was it was it was shelved for months between February 2020 and June 2020 because of the promulgation clause. It was shelved six months between June 2020 and January 21st because of a JCR objection. In between January 21st and March 20th, 22 four month pause because of proposed bills that failed it. Then it took nine wants to take effect. It was in effect for only six weeks before there was a 15 month suspension under two D. And so my point is that you're just saying it's okay, you know, except for the indefinite suspension, everything else should be okay. And I'm saying, no, no, there are like real lives that are at risk here. And we we can't you know, just as Dana said, when do we pause someone's constitutional rights? When do we just say, now we're just going to it's okay. Three months is okay. Six months is okay, 15 months is okay. This is hurting people.

[01:24:54] **Speaker 8** Well, look, in terms of whether it's hurting what's hurting people or not, this these provisions can obviously be used for good or ill, depending on what one's policy purposes or any particular law. But what I would say is what you just described with a concern about stacking these various provisions is exactly the difference between facial and as applied challenges, what this court held in SEIU unanimously, and I believe your Honor joined that, joined that opinion.

[01:25:21] **Speaker 5** Your Honor, wasn't.

[01:25:22] **Speaker 8** Here yet, you know, just as other as other. And while we're actually doing that and I apologize, I was that you know, if one three month pause is fine so six months seems fine, but we're not going to foreclose as applied challenges. So that's what I would take from that. That's a group between a facial and as a charge. Certainly these provisions do not have to operate that way. Ah It was happenstance that the rule was issued when it was in the legislative calendar, so that the 30 day provision, which is what is actually in the text, couldn't operate because the legislature was in regular session. So if your Honor's are concerned about the aspects of the of these provisions or one of the provisions that could lead to delays of many months or years, certainly Your Honor's can. And I think SEIU did leave open the possibility of as applied challenges. But the problem is that using, you know, and obviously they cleverly identified, you know, two very attractive examples for themselves to bring this case. One was the was an indefinite objection at all.

[01:26:32] **Speaker 5** I wouldn't I'm I'm going to you want to use another term than than attractive. I mean this is horrific.

[01:26:38] **Speaker 8** The the other was a circumstance where the happenstance of when the calendar occurred where when the rule was issued and the fact that additional the multiple of these provisions were used led to a longer delay. It is not the way you do facial challenges. To take the example that is the easiest for them. The way that you do it is take the example that's the easiest for the statute, which is it's proposed in 30 days and then the legislature acts right away. Is that unconstitutional? And I think it is clearly that is not unconstitutional. If the legislature could and I think there's common ground could pass a statute that says every single proposed rule, including this one, would be delayed for six months, then certainly a provision that says that you're going to get a 30 day delay based on what your are said for the legislature. R to exercise its constitutional authority. Undisputed here to do by capitalism and presentment. That is clearly constitutional. In my respectful submission. Obviously a different analysis would apply for the for the indefinite.

[01:27:47] **Speaker 4** What is left of the rule of law if this Court makes its decisions based not on the Constitution, not on the law, but on our visceral, personal emotional responses to what policies the legislature may be attempting to enact or resist.

[01:28:05] **Speaker 8** I mean, it's deeply problematic that the the the one could easily imagine a proposed rule that would offend the justices of this court just as much as this as this veto offends offend some justice.

[01:28:22] **Speaker 6** But if that happened, the legislature can meet any time and overrule and exercise, bike human resentment and get rid of the agency rule.

[01:28:33] **Speaker 4** Now I'm talking about what happens when this court makes decisions not based on the law, but on our policy preferences. The legislature then doesn't get to come in or we have a constitutional crisis and say, No, court, you're wrong.

[01:28:46] **Speaker 8** Because what happens in the next case? So that the rule is that and you know, something that the court doesn't like. And so then the martinez's on. Overruled.

[01:28:55] **Speaker 6** I'll make it clear, I don't care what the rule is. The Constitution is the Constitution. If it gets violated for one second or two months or three months or six months, it's a violation. I want to go back to your I had asked you a question and you gave me an answer. And I process that answer. And I want to just be clear what you were saying to me. I asked you if you assume non delegation is not it's not a thing so that the legislature can delegate rulemaking authority to the executive branch agency rulemaking authority. So you need to take that as a presumption. Forget Martinez. You said that the legislature can avoid its constitutional obligation by giving the power to g c r, that they can just if they can delegate it to the executive, they can delegated to g c r. What you're forgetting, I think, is that they it is the legislature that is bound by by cameral isn't presentment not we're not talking about the executive. How does a legislature get to delegate its power to a few people under the Constitution, which requires by cameral ism and presentment.

[01:30:01] **Speaker 8** And under the regime that Martinez upheld unanimous.

[01:30:05] **Speaker 6** Way?

[01:30:05] **Speaker 8** Martinez under the statute that I'm not allowed to mention Martinez upheld unanimously the the by the presentment. The presentment absolutely happens and in a facial challenge we must assume that it happens in 30 days.

[01:30:22] **Speaker 6** Okay. But in 30 days is not what this where does it say in the Constitution that it happens in 30 days? Where does it what does it say that.

[01:30:30] **Speaker 8** By cannibalism so we can look at this to the constitutional text, then what the what the Constitution actually says about by became wisdom and presentment is that section. So Section four, Article four, Section 17 says no law shall be enacted except by bill. The JCR. Your action here is not a law. So Section four, Article four 7 to 17 does not apply. Then Article five, Section ten says Every bill shall be passed by the pass by law shall be presented to the governor, which is your air. It is not a bill. So the entire by cannibalism and presentment objection to this is a misnomer.

[01:31:13] **Speaker 6** Okay, So you're making the assumption that by stopping a rule such as conversion therapy, that that is not changing the law.

[01:31:23] **Speaker 8** It was just the proposed rule. That's true. It's a proposed rule. No law has been changed, just like the legislature could say that that rule will not take effect for six months until we have a chance to do a vote through both houses of the governor to get rid of it. So legislature can say, if a committee says that that that this is objectionable, we're going to in 30 days, we're going to have a bill that does the exact same thing. There is no change in the law at all. The conversion therapy proposed rule was not the law. It was not it was just a proposed rule at that point and in its proposed nature, ended up being extended by bite by a procedure that was adopted in law as part of the legislature's deal, said, If we're going to give you agency this legislative power, then these are the these are the conditions on which you get it. And if you don't want to make the rules or make the rules.

[01:32:23] **Speaker 6** You're back to non delegation, I think. But. So you also don't like cheddar. I assume you don't like the definition of what a law is under cheddar.

[01:32:31] **Speaker 8** Yeah. I mean, the attorney general's now proposed that this court adopt charter in three different cases in Martinez unanimous rejected and SEIU in that provision unanimously rejected including in a decision that Your honor joined in March Klein As just as Justice Scalia put it up, they wrote the charter, the charter bus. And then while they won the case, they got no, no, no citations positively to charter there, as far as I can see. So they've now tried twice for three times, maybe four times the charm. Certainly, as I expressed at the oral argument and mark line one thing, Charter was wrongly decided. I think the dissent by Justice White was the correct approach. This court has taken neither Justice White's nor nor the majority's approach and charter. This court has unanimously done Martinez unanimously, including it in decision. I'm sorry, I know you discuss it in joint, but this is Dallas and this is Bradley did join in SEIU. And so that's what I'm asking this court to stick to, to keep its word to the legislature, because as Justice Hagedorn said, we've been making laws for a long time in reliance on this of this court's unanimous decision in Martinez. It is quite remarkable to tell us that all of the delegations of our power that we have given to the the executive agencies in reliance on Martinez Hey, guess what? Never mind. Used to give away that power, but now you don't have the check on that power. That was be quite a bait and switch on the legislature from with respect this court unanimously told us this was. All right.

[01:34:08] **Speaker 5** Mr. Salem, I want to ask you one question about the standard of review, because I'm not sure I agree with your brief. On page 33 of your brief, you say that this court adhered to the beyond a reasonable doubt standard. And Mark, line one, and I do not believe that's the case. The the majority opinion written by Justice Rebecca Bradley on page eight of Mark Klein said in making a facial challenge, petitioners face a tall task. Then there was a cite to SEIU, and then she wrote, The challenging part must show that the statute cannot be enforced under any circumstances. A search the the main body of the majority opinion and beyond a reasonable doubt doesn't come up at all. It does come up and justice and Walsh Bradley's concurrence in paragraph 42. She writes I emphasize that are beyond a reasonable doubt excuse me, I emphasize that are beyond a reasonable doubt. Standard of review retains vitality. But as presented in the argument before us, I conclude the beyond a reasonable doubt standard is a poor fit in the separation of powers context. Abandoning the standard and the context of separation of powers evens the playing field between the branches while leaving the standard of review for other types of constitutional challenges intact. So. So I don't believe that. I'm sure any one of my colleagues disagree, and it's unfair. I see Justice. Rebecca, I don't know if you're looking at my outline, but it's paragraph eight. I don't know. I don't I don't think that's right. I don't think what you wrote is right as far as that. This Court. Court adhering to that standard. And I.

[01:35:53] **Speaker 8** I mean, I will say, I noticed that point in the reply brief. You know, certainly in other cases, including recent cases, the court has applied that I agree with the reply brief that that what they're actually. We're not asking to overturn that aspect of Martinez and ACLU. They were asking to overturn the aspect that of Martinez, SEIU, Gabler All those cases that say that for a facial challenge, you have to have every single application. So I take the point in the reply brief and. Conceded here.

[01:36:23] **Speaker 2** Okay, please.

[01:36:25] **Speaker 5** No, I just I just wanted to That was it.

[01:36:27] **Speaker 2** You just mentioned overruling cases. I asked your opposing counsel if we would go a route of separation of powers, what cases would have to be overruled. And she gave me. A couple like two, maybe three. You mentioned Whitman before. Whitman was a 1928 case that really established not only for Wisconsin but for the nation. As the first step in defining the role of regulatory agencies and rulemaking. The law was written by Rosen, very good friend of mine in spirit. He's older than I am in 1920. And. So I give you. And he said in that case that it's a legislative power, this rule.

[01:37:20] **Speaker 8** Yes, absolutely, Your Honor.

[01:37:21] **Speaker 2** So what so what cases would we have to overrule if we divined that this is a core executive power.

[01:37:33] **Speaker 8** You'd have to overrule Whitman. Schmidt. Unanimous decision in Martinez. The unanimous aspect of SEIU. That's just the rule, you know? I mean, I found their brief quite jarring. You know, obviously, as was explored last time at the mark on one argument, just with the specifics, I believe certainly we have I have asked. Represent various class to overrule cases from time to time. Always take it really seriously. Always walk through all the factors, the casual nature with which they're briefing in this case. Asked to overrule case after case, there was one time when they were asked to overrule that in a footnote, like a one sentence footnote. It really isn't. You know, my.

[01:38:19] **Speaker 1** Shift from.

[01:38:20] **Speaker 5** That wasn't a bad idea. We ended up doing that about six months later. So that was an Allen Johnson to overrule Chevron. Footnote eight We did that about six months later.

[01:38:31] **Speaker 2** To a vigorous, separate writing.

[01:38:33] **Speaker 8** So I mean, it's certainly not out my understanding of this of this court's approach to starry decisis and certainly not my my understanding of Your Honor's approach in particular to star decisis. You know, I mean, I hope this is not my last time arguing before you, Your Honor, but it may be. And. You know, I've always thought that I'm going to get your vote in an important case where it established us, but I can't imagine a better situation than this one where I've got unanimous precedent after unanimous precedent in my direction. They have no Wisconsin precedents in their direction. Further, I took your your entreaties. So Marshall, I'm very seriously gave your Honor's a middle ground position you know essentially said that one of the statutes, the challenge here is very difficult to defend. You know, it was maybe our last time together. I would think so. But he's pulling out all news out of where we come right down the road, where I could say, though, I got to bring out a dozen Rosen rallies vote.

[01:39:32] **Speaker 7** And so I just want to quickly.

[01:39:34] **Speaker 2** You're not going to have a hand on.

[01:39:36] **Speaker 8** That one that.

[01:39:40] **Speaker 7** You've offered what you say is a middle ground. In some ways, I think your main argument is what? I've offered a middle ground. Yes. Well, what I think you've you you are suggesting to us from a legal basis is to basically affirm Martinez and in which you would say and you know, you think about, you know, when you sit on this side of the bench, think about how to write an opinion. Right. And so I think what you're asking us to say is something like, you know, the administrative state is what it is, the balance is what it is. Martinez strikes a sensible balance between the branches. Maybe we need to maybe we need to draw a few clear lines here and there. But but it's a sensible balance. What how would you describe the legal basis, the principled basis for the middle ground that you're offering? For us.

[01:40:33] **Speaker 8** What I was the way that I would write the opinion to answer question is Martinez is the law of the land. It was decided I would apply the Johnson control factors to Martinez and I would say Martinez provides the governing law. Then, once Martinez provides the governing law, it is very clear that four out of these five easily survive under Martinez. That's the way I would do it. I don't think that, especially in this original action posture, is necessary for this court to spell out the details of of various other principles of of separation of powers to deal with the non delegation doctrine a full some way I would say. Martinez unanimous long you know several decades ago lots of reliance not not on sound and principle etc. etc. plus the Johnson control factors. Once that part of the opinion is written that Martinez is the law of the land, which is and then then then the analysis is easy with respect. And I certainly understand that some for some justice on this court might not love Martinez, but start to say this is no good. What it only applies to cases that that we fully agree with that is hard. It's hard to come up with the example for a more compelling situation to apply starry decisis to a case that maybe you don't fully agree with that a unanimous decision in the separation of Congress context when there's been massive reliance by a co-equal branch of government. Thank your Honor's.

[01:42:02] **Speaker 6** Thank you. Thank you.

[01:42:03] **Speaker 3** Rebuttal.

[01:42:16] **Speaker 1** Okay. Glad to get through. I want to start with bicameral isn't presentment. The premise of Mr. Allen's argument today is that the Constitution offers a grace period. But as you indicated in his response to Justice Gallant, there is no such grace period in the Constitution. And that's quite euphemistic, to say the least. We know that the periods of time during which the law sits amended with no action beyond the decisions of just a few legislature legislators is a very long time, typically until the end of the legislative session for each veto. And as we know, they can stack.

[01:42:53] **Speaker 4** Counsel electronically through just the Constitution. There's also nothing in the Constitution that permits the legislature to sub delegate its powers to the executive branch or to a legislative committee. So when we're talking about the Constitution, you can't have it both ways.

[01:43:07] **Speaker 1** Let's deal with the case we have here, Your Honor. That's my case delegation case and we'll defend it. I'm excited. But it's not before you today. But let me get back to the lack of doctrinal basis for the concession the legislature makes. I've only a few minutes here, and I understand.

[01:43:22] **Speaker 4** And we've given a lot of leeway beyond the red light. But this is the Constitution is not something you can invoke and then just abandon it when it doesn't suit your argument. So if you're going to make an argument based on what is in the text of the Constitution, you can't have it both ways. Either we are going to apply the words of the Constitution, say if it isn't in there, then you can't do it, but then it's not in there for your branch either.

[01:43:50] **Speaker 1** I fundamentally disagree that that's how courts decide cases. We look at the constitutional provision that's in front of us in this case, which is we're talking about bicameral wisdom and presentment. We're not dealing with non delegation right now. I mean, this I talk about we're happy to talk about it, but bicameral isn't presentment. The text does not support the doctrinal distinction they're trying to make. In fact, all they're trying to do is say, well, the hardest case for us, the case we clearly lose on is the two 2719 five deem that's not a doctrinal just difference. That's just conceding on his and his weak point. He also says, well, isn't this better from a public policy perspective than having a statute that would make everybody wait for six months? That's irrelevant. The question is whether each statutory provision is and is constitutional or not. And the five statutes here are not. At the end of his argument, he, for the first time raised the idea that pre promulgation vetoes don't affect bicameral ism and presentment because they don't affect anyone's legal rights and duties. But they do strip the executive branch of part of the authority it previously had to promulgate a rule. And that's what all the cases that have rejected pre promulgation vetoes have said. And that's not just chatter, that's other cases as well. And I wanted to make sure we went back to the misunderstanding the legislature has and the relevant legal question. It's what the legislature has the power to do, not whether how long a veto happens to last or how unhappy the executive branch happens to be in a particular situation. And we we talked before about Joanie being kissed. And the New Jersey Supreme Court has a great quote on this, where they say, we recognize that some applications of the veto would further statutory schemes of cooperation between the branches. But it's not necessary to hypothesize about every conceivable use. The veto provision gives the legislature the potential to disregard it. Will the Constitution constitutional schemes of checks and balances and exercising policymaking power? And that's exactly our point here. I also wanted to return to Justice Hagedorn's question because I've had more time to think about it, about bicameral ism and core power. And I disagree that that that finding for us by cameral ism and presentment here has anything to do with the court making a decision about whether rulemaking is core shared powers for the separation of powers doctrine. Those are two different constitutional doctrines. And agreeing with us on one doesn't mean that you agree with us on the language or meaning of the other.

[01:46:29] **Speaker 6** It's a different.

[01:46:30] **Speaker 7** Why.

[01:46:30] **Speaker 1** Is different?

[01:46:31] **Speaker 6** Can you flesh that out? Why?

[01:46:34] **Speaker 1** Because. Because interpreting the bicameral ism and presentment requirements requires looking at those provisions. Right. And and in Article four, section C 17, what does it mean to to pass a law? Right. That doesn't answer the question of, well, when an agency is given statutory power to make rules, what it what kind of power is it? Is that the power that some of the other states Supreme Courts have said and an executive power or is it is it a shared power between the branches the way Martinez.

[01:47:03] **Speaker 6** Is that because the statute is the thing that gives the the executive the power? In theory.

[01:47:10] **Speaker 1** Yes.

[01:47:11] **Speaker 2** Okay.

[01:47:12] **Speaker 7** I'm just not tracking. And I just want to make sure I understand it because this matters to me. But I don't see you invoking by cannibalism a presentment to see whether the legislature has, in fact, passed a law, which is what bicameral is in presentment. Is your invoking it as a way to say that when the legislature acts in some legally binding way, it has to do so through passing a law, and then you invoke that for that, which really is not a bicameral is presentment argument. It's the argument that it's a structural argument. It's an argument about the legislature's lane is lawmaking. How it does it, fine, But how it does it isn't your argument. It's that it's lawmaking, which is a structural separation of powers argument, I think.

[01:48:05] **Speaker 1** I see. I see. We're our we're, we're communicating. We are taking our view of the that when the legislature alters the legal rights and duties of parties outside the legislative branch, that lawmaking is required is based on our construction of the word law in Article four, section 17. It's not coming from any outside sources of what the executive branch's core duties are in some other in some other constitutional law.

[01:48:33] **Speaker 7** Does that mean, then, that administrative rules are law in the constitutional sense? Is that is out? Is that what you're it doesn't that necessarily follow from your argument?

[01:48:48] **Speaker 1** Well, they could be law for some purposes and not for others, but for purposes of Article four, Section 17, and how we know when the legislature has to comply with by carmella's I mean presentment that what what's what's a legal change is when the legislature takes a rule, the time, the books and pulls it out, it's that JCR veto. That's the law change.

[01:49:09] **Speaker 7** If you're arguing, though, that its actions on administrative rules constitute lawmaking, that requires by cumulative presentment, then you're arguing that any action on administrative rules is exercising legislative power.

[01:49:24] **Speaker 1** I don't think so, Your Honor, because the legal test we're suggesting is that the legislature has to make a law when it changes the legal rights, duties and relations of people outside the legislative branch. That's the definition. And so when it's when it takes away a law or when it strips the agency of part of its lawmaking authority, we think both situations change those legal rights and duties. That doesn't change the characteristic of what those activities, what rulemaking is.

[01:49:54] **Speaker 4** So you're conceding that rulemaking is lawmaking?

[01:49:57] **Speaker 1** We are not.

[01:49:58] **Speaker 4** You just said that.

[01:50:00] **Speaker 1** No, I didn't.

[01:50:00] **Speaker 4** You just characterized rules as lawmaking stripping the executive of lawmaking functions.

[01:50:06] **Speaker 1** You're right. I used the wrong term. That a rulemaking function. I'm sorry. I misspoke. And then I want to get to Mr. Caitlyn's policy arguments that this is a good salutary check on what could be bad rules. So there are legal ways to check agency rulemaking if the if the rule violates the statute or it's unconstitutional. The judiciary can fix that. But if using JCR instead of that process is a dysfunctional process and the Legal Scholars Amicus was super helpful in this in talking about how it is a anti-democratic, anti transparent, anti accountability process, it really discourages, I think the branches from working together, discourages stakeholders and other people from participating in the rulemaking process. And if there are no more questions, we ask this court to overrule Martinez and strike the five challenge statues as unconstitutional. Thank you.

[01:51:04] **Speaker 3** Thank you. Thank you for very interesting oral arguments. The court is adjourned. But if we could meet promptly in conference, that would be great.

[01:51:33] **Speaker 2** Mr.. I'm going to let someone else. You.

[01:52:12] **Speaker 1** Thank you so much.

[01:52:16] **Speaker 8** Sorry to.