No. 2019AP1376-OA

In the Supreme Court of Wisconsin

NANCY BARTLETT, RICHARD BOWERS, JR. AND TED KENEKLIS,

PETITIONERS,

v.

TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN, JOEL BRENNAN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF ADMINISTRATION, WISCONSIN DEPARTMENT OF ADMINISTRATION, CRAIG THOMPSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF TRANSPORTATION, WISCONSIN DEPARTMENT OF TRANSPORTATION, PETER BARCA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF REVENUE, AND WISCONSIN DEPARTMENT OF REVENUE,

RESPONDENTS.

Original Action

PETITIONERS' OPENING BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

ISSUES PRESENTED 2

ORAL ARGUMENT AND PUBLICATION 3

STATEMENT OF THE CASE 3

A. The History of Wisconsin's Partial Veto 3

B. Background on Partial Vetoes Challenged in This Case 15

STANDARD OF REVIEW 21

ARGUMENT 21

I. This Court Should Return Article V, Section 10(1)(b) to its Original Public Meaning 22

A. As Originally Enacted, the Partial Veto Power Authorized the Governor to Approve or Disapprove Legislative Proposals Capable of Separate Enactment 23

B. *Henry* Should Be Overruled 30

C. This Court Should Not Rely on *Stare Decisis* to Retain *Henry* 34

II. Alternatively, Even if this Court Decides Not to Overrule Henry, this Court Should Still Overrule *Kleczka* and Hold That the Governor May Not Exercise the Partial Veto in a Way that Transforms the Meaning and Purpose of a Law into Something Entirely New 36

A. *Kleczka* Erred in Allowing the Governor to Single-Handedly Draft New Laws via Creative Use of the Partial Veto 37

B. The Constitutional Amendments after *Klezcka* Suggest that its Broad Interpretation of the Partial Veto Went Far

Beyond What the People Understood They Originally Enacted 39

C. Traditional Severability Analysis Provides a Workable Test for Determining When Rewriting a Law Using the Partial Veto Goes Too Far 41

D. This Court Should Not Rely on *Stare Decisis* to Retain *Klezcka* 43

III. The Challenged Vetoes Are Unconstitutional 44

IV. Remedy 49

CONCLUSION 50

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 34
Alden v. Maine, 527 U.S. 706 (1999) 39-40
Appling v. Walker, 2014 WI 96, 358 Wis. 2d 132, 853 N.W.2d 888 ..... 7, 23
Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006) 37, 41
Bengzon v. Sec'y of Justice of Philippine Islands, 299 U.S. 410 (1937) 31-32
Black v. City of Milwaukee, 2016 WI 47, 369 Wis. 2d 272, 882 N.W.2d 333 29
Burlington N., Inc. v. City of Superior, 131 Wis. 2d 564, 388 N.W.2d 916 (1986) 37, 41-42, 46, 48
Citizens Util. Bd. v. Klauser, 194 Wis. 2d 484, 534 N.W.2d 608 (1995) 30
Commonwealth v. Dodson, 176 Va. 281, 11 S.E.2d 120 (1940) ... 27
Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408 29
Franchise Tax Bd. of California v. Hyatt, 139 S. Ct. 1485 (2019) 34
Gabler v. Crime Victims Rights Bd., 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384 ..... 37, 44
Johnson Controls, Inc. v. Employers Ins. of Wausau, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257 ..... 34, 43-44
Koschkee v. Taylor, 2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600 ..... 27, 34
League of Women Voters of Wisconsin v. Evers, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209 43
Rock-Koshkonong Lake Dist. v. DNR, 2013 WI 74, 350 Wis. 2d 45, 833 N.W.2d 800 25
Sacotte v. Ideal-Werk Krug & Priester Machinen-Fabrik, 121 Wis. 2d 401, 359 N.W.2d 393 (1984) 41
Schuette v. Van de Hey, 205 Wis. 2d 475, 556 N.W.2d 127 (Ct. App. 1996) 27

State ex rel. Finnegan v. Dammann, 220 Wis. 143, 264 N.W. 622 (1936) 49
State ex rel. Kleczka v. Conta, 82 Wis. 2d 679, 264 N.W.2d 539 (1978) .....*passim*
State ex. rel. Sundby v. Adamany, 71 Wis.2d 118, 237 N.W.2d 910 (1976) 10-11, 49
State ex rel. Wisconsin Senate v. Thompson, 144 Wis. 2d 429, 424 N.W.2d 385 (1988) 13-14, 25, 39-40
State ex rel. Wisconsin Tel. Co. v. Henry, 218 Wis. 302, 260 N.W. 486 (1935) .....*passim*
State v. Cole, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328.... 39
State v. Hamdan, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785 21
State v. Janssen, 219 Wis. 2d 362, 580 N.W.2d 260 (1998)..... 41
State v. Szulczewski, 216 Wis. 2d 495, 574 N.W.2d 660 (1998) .. 26
Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21 43-44

CONSTITUTION AND LEGISLATION

2019 Assembly Bill 56 46
2019 Senate Joint Resolution 1..... 49
2019 Wis. Act 9 .....*passim*
2019 Wis. Act 9, § 55c 16, 45
2019 Wis. Act 9, § 126..... 17-18, 46
2019 Wis. Act 9, § 184s 17-18, 46
2019 Wis. Act 9, § 1095m 17-18, 46
2019 Wis. Act 9, § 1754..... 20, 48
2019 Wis. Act 9, § 1755f 20, 48
2019 Wis. Act 9, § 1757b..... 20, 48
2019 Wis. Act 9, § 1988b..... 19-20, 47
2019 Wis. Act 9, § 9101(2i) 16-17, 45
Drafting Records for 1927 Senate Joint Resolution 35, *microformed and available at* Marquette University Law School Law Library, Milwaukee, WI 4

Drafting Records for 1929 Senate Joint Resolution 40, *microformed and available at* Marquette University Law School Law Library, Milwaukee, WI 5
Wis. Const. art. IV, § 1..... 11, 26-27, 38
Wis. Const. art. V, § 10 .....*passim*
Wis. Const. art. VIII, § 2..... 28, 38
Wis. Const. art. VIII, § 8..... 28, 38
Wis. Const. art. XII, § 1 5
Wis. Stat. § 902.01 7

OTHER SOURCES

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)..... 26
A Proposed Amendment, Wausau Daily Record-Herald, Oct. 28, 1930 6
D. Currie, *The Constitution in the Supreme Court: The First Hundred Years: 1789–1888*, (1985)..... 40
Duncan Tells Need for New Vote Powers, The Capital Times, Oct. 14, 1930 ..... 5-6, 29
Lawrence Barish, Legislative Reference Bureau, *The Use of the Partial Veto in Wisconsin*, Information Bulletin 75–IB-6 (1975)...4
Light Vote Is Expected Next Tuesday, Appleton Post-Crescent, Nov. 1, 1930..... 6-7
Partial Veto Power Fate Up to Voter, Wisconsin State Journal, Oct. 9, 1930.....6
Patrick Marley, *Senate leader calls for overriding budget veto over concerns state money could go to Milwaukee streetcar*, Milwaukee Journal Sentinel (July 18, 2019), https://www.jsonline.com/story/news/politics/2019/07/18/local-governments-get-extra-75-million-transportation/1766807001/..47
Richard A. Champagne, Staci Duros, & Madeline Kasper, Legislative Reference Bureau, *The Wisconsin Governor's Partial Veto* (2019).....*passim*
Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L. Rev. 1171 (1993)..... 33

The Council of State Governments, *The Governors: Powers*, Table 4.4 at 2, The Book of the States 2017, *available at* http://knowledgecenter.csg.org/kc/system/files/4.4.2017.pdf..... 33
The Federalist No. 58 28
The Honorable Fred A. Risser, 80 Wis. Op. Atty. Gen. 327 (1992) 49
Veto Bill Gives Too Much Power Philip Declares, Oshkosh Northwestern, Oct. 30, 1930 6
Veto Rule Better Law Step, Claim, Wisconsin State Journal, Oct. 13, 1930 6
Webster's New International Dictionary (2d ed. 1934) 9, 23-24
Wisconsin Blue Book 1991–1992 14
Wisconsin Blue Book 2009–2010 15

INTRODUCTION

In 1930 the people of Wisconsin amended our state's Constitution granting the governor power to approve appropriation bills "in whole or in part." *See* Wis. Const. art. V, § 10. The need for this "partial veto" was rooted in the legislature's developing practice of enacting omnibus budget bills containing numerous appropriation items. Under prior law, the governor was forced to either approve or veto the entire package. The purpose of the amendment was to allow him to approve or veto each item individually.

Unfortunately, this Court has interpreted this partial veto provision to afford the governor vast authority to affirmatively enact new laws never drafted, approved, or even considered by the legislature. It has at various times permitted the governor to treat the approval of a budget bill as an acrostical puzzle – vetoing individual paragraphs, sentences, words, and letters to construct – and enact – laws not passed – or even dreamt of – by the legislature. Put differently, the Court's partial veto decisions have turned the governor into a one-person legislature in violation of the Wisconsin Constitution's separation of powers.

The most recent example of gubernatorial law-making is a set of partial vetoes by Governor Tony Evers in the 2019-21 biennial budget (2019 Wis. Act 9). The Governor transformed a school bus replacement program into a grant program for

alternative fuels; removed virtually all legislatively-imposed conditions on an appropriation for local road improvements; disrupted a carefully-calibrated registration fee schedule for truck drivers; and redefined and expanded the types of vapor products subject to new taxation. In each case, Governor Evers created a new law never approved by the legislature.

This case presents the Court with the chance to restore the partial veto to its original meaning and to restore the proper balance required by the basic separation of powers set forth in the Wisconsin Constitution. Petitioners ask the Court to declare the four partial vetoes challenged in this case unconstitutional and make clear that in Wisconsin it is the legislature that makes the laws.

ISSUES PRESENTED

1. Whether, in partially approving an appropriation bill pursuant to Article V, § 10 of the Wisconsin Constitution, the governor may strike parts of the bill which are essential, integral, and interdependent parts of those which were approved.

2. Does Article V, § 10's direction that appropriations bills may be approved in whole or in part permit the governor to strike words in a way that transforms the meaning and purpose of the law, changing it into a different law?

ORAL ARGUMENT AND PUBLICATION

Given the important constitutional question involved herein, this case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. The History of Wisconsin's Partial Veto

This case involves the interpretation of the governor's partial veto power, which is set forth in Wis. Const. art. V, § 10. To provide the Court with an understanding of the proper scope of that power, this brief will first review the history of the partial veto's enactment, which is well-documented, *see generally*, *e.g.*, Richard A. Champagne, Staci Duros, & Madeline Kasper, Legislative Reference Bureau, *The Wisconsin Governor's Partial Veto* (2019) [hereinafter *Partial Veto*], as well as the provision's past interpretations by this Court.

1. Proposal, Debate, and Enactment of the Partial Veto

In 1911, the Legislature began "packaging multiple appropriation measures into larger omnibus bills," and at roughly the same time Wisconsin adopted a more comprehensive budgeting process. *Partial Veto* at 3. In 1913, the legislature "waited until late in the session before presenting to the governor a few appropriation bills, which also happened to call for record expenditures." *Id.* This caused an exasperated Governor Francis McGovern to argue that such omnibus bills give the governor only

two unpalatable alternatives: "sign[ing] the[ ] bills" in their entirety, even though certain parts were "defective," or "veto[ing] them as a whole, thus rejecting what I approved as well as what I disapproved." Lawrence Barish, Legislative Reference Bureau, *The Use of the Partial Veto in Wisconsin*, Information Bulletin 75–IB-6, 1 (1975). He concluded "that either the Wisconsin governor must be given the power to veto specific items or the individual items must be reported out as separate appropriation bills." *Partial Veto* at 3-4.

There the matter stood until 1927, when Senator William Titus asked the Legislative Reference Library "to draft a resolution 'to allow the Governor to veto *items* in appropriation bills.'" *Id.* at 6 (emphasis added). A communication from the Library to Senator Titus confirmed the Library's understanding that it was to prepare language "allow[ing] the Governor to veto *items* in appropriation bills." Pet. App. 119. The language it drafted – and which was ultimately adopted – granted the governor the ability to "approve[ ]" appropriation bills "in whole or in part." *Partial Veto* at 6, 8. There is "[n]othing in the drafting record" that expressly "sheds any light on" why the Library ultimately used "the word 'part' as opposed to 'item' in reference to the veto power." *Id.* at 6. But the record consistently supports an inference that "part" is meant to refer to provisions that could have been passed separately but that have been combined in a single omnibus bill.

After passing both houses of the legislature, the proposed amendment was again reintroduced during the 1929 legislative session, *see* Wis. Const. art. XII, § 1, this time by Senator Thomas M. Duncan. *Id.* at 6-7. The drafting file from 1929 again refers to the amendment as "allow[ing] the governor to veto items." Pet. App. 121.

The proposed amendment passed again and was sent to the voters for approval in November of 1930. *Partial Veto* at 7. The proposed amendment was given a new importance and relevance due to the fact that, during the 1929 legislative session, the legislature had passed a "new budgetary procedure" pursuant to which "the governor was made responsible for the budget estimates, which were then incorporated into a single appropriation bill." *Id.* at 7 & n.42.

In the months before the November 1930 vote, "[m]ost discussions on the amendment summarized the proposed power of the governor 'to veto single *items*' in appropriation bills rather than '*parts* of' appropriation bills." *Id.* at 7 (emphases added). An October 1930 Capital Times article, for example, quoted Senator Duncan as saying "[t]he *item* veto is absolutely indispensable" and that it would "merely giv[e] back to the governor the power" he had before the recent adoption of the new "budget system," when "most appropriations were divided into separate bills." *Duncan Tells Need for New Vote Powers*, The Capital Times, Oct. 14, 1930, at 7

(emphasis added), Pet. App. 123. Senator Duncan explained to the public that the new veto power "would not invade the proper sphere of the legislature," *id.*, and was "not revolutionary, but on the contrary [was] in successful operation in 37 states," *Veto Rule Better Law Step, Claim*, Wisconsin State Journal, Oct. 13, 1930, at 7, Pet. App. 127. The League of Women Voters provided an "explanation of the proposal" for the press, describing the amendment as "enabl[ing] the governor to veto single *items* in an appropriations bill without vetoing the entire bill." *A Proposed Amendment*, Wausau Daily Record-Herald, Oct. 28, 1930, at 8 (emphasis added), Pet. App. 125.

Many other newspapers also described the proposed amendment as adopting an item veto. *See*, *e.g.*, *Veto Rule Better Law Step, Claim*, *supra*, at 7 (article subtitled "Governor's Power to Kill Separate *Items* Indispensable, Senator Duncan Declares" (emphasis added)), Pet. App. 127; *Partial Veto Power Fate Up to Voter*, Wisconsin State Journal, Oct. 9, 1930, at 17 (explaining that the governor is currently "unable to disapprove objectionable *items*" (emphasis added)), Pet. App. 129; *Veto Bill Gives Too Much Power Philip Declares*, Oshkosh Northwestern, Oct. 30, 1930, at 3 (comparing the amendment to the Milwaukee mayor's power to "veto *items* in an appropriation bill" (emphasis added)), Pet. App. 133; *Light Vote Is Expected Next Tuesday*, Appleton Post-Crescent, Nov. 1, 1930, at 3 (noting that "a two-thirds legislative majority

would be required to re-enact a vetoed *item*" (emphasis added)), Pet. App. 131.[1]

The amendment was ultimately adopted by the people of Wisconsin on November 4, 1930. *Partial Veto* at 8.

2. Judicial Interpretation of the Partial Veto

The constitutional language relevant here has remained unchanged since it was originally enacted. It provides that "[a]ppropriation bills may be approved in whole or in part by the governor, and the part approved shall become law." Wis. Const. art. V, § 10 (1930); *compare id*. § 10(1)(b) (2019). This Court has interpreted these words in a number of cases since the provision's adoption, but the two most important cases for our purposes are *State ex rel. Wisconsin Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935) and *State ex rel. Kleczka v. Conta,* 82 Wis. 2d 679, 264 N.W.2d 539 (1978).

[1] To the extent the Court believes it necessary, Petitioners request that it take judicial notice of these newspaper articles, which are sources cited to apprise the court of "the ratification campaign that surrounded the voters' passage of the Amendment." *Appling v. Walker*, 2014 WI 96, ¶7, 358 Wis. 2d 132, 853 N.W.2d 888; *see* Wis. Stat. § 902.01(2)(b), (3)-(4).

i. State ex rel. Wisconsin Telephone Co. v. Henry

In its first case interpreting the partial veto, this Court was faced with Governor Philip La Follette's partial veto of a depression-era bill that imposed a tax and then appropriated the funds raised "for immediate emergency relief" in light of "state-wide poverty and unemployment." *Henry*, 260 N.W. at 489. The governor largely approved the bill, but vetoed two subsections setting forth the legislature's purpose and a set of provisions which both created a new agency designed to disburse the funds raised and provided "some specific directions as to the manner and purposes" of the disbursement. *Id.* at 489-90.

The Court considered two questions: (1) whether the governor could "approve [an] appropriation" but veto a "proviso or condition inseparably connected to the appropriation" and (2) whether the governor could "disapprove parts of an appropriation bill that are not an appropriation." *Id.* at 490.

This Court declined to resolve the first issue, concluding that the vetoed parts were not "inseparably connected to the appropriation." *Id.* The Court suggested that "separab[ility]" depends on two things – whether what remains is "a complete, entire, and workable law" and whether the Legislature "would [ ] have enacted the [remaining] part alone," without the vetoed portions. *Id.* at 491–92. Nevertheless, this Court hinted that if

the vetoed provisions *had* been "inseparably connected to the appropriation," the veto would have been unlawful. *Id.* at 490.

In resolving the second question, namely whether the governor could veto non-appropriation text, this Court appeared to hold that governors may veto any portion of a bill, no matter how small. This Court noted that many partial-veto provisions in other states use the language "'items' or 'any item of appropriation,'" whereas Wisconsin's version uses the word "part," without any other "qualifi[cation] or limit[ ]." *Id.* at 490-91. And the meaning of the word "part," according to the Court, was "unambiguous":

> one of the portions, equal or unequal, into which anything is divided, or regarded as divided; something less than a whole; a number, quantity, mass, or the like, regarded as going to make up, with others or another, a large number, quantity, mass, etc., whether actually separate or not; a piece, fragment, fraction, member, or constituent.

Id. at 491 (quoting Webster's New International Dictionary 1781 (2d ed. 1934)). Therefore, the Court concluded, the governor could "pass independently on every separable piece of legislation in an appropriation bill." *Id.* at 492.

Although it was mitigated by the requirement that the remaining law was one the legislature would have enacted, *Henry*'s holding that separability is determined by examination of what remains as opposed to what has been stricken is inconsistent with the text and history of the partial veto. Given the language

of Article V, sec. 10 – which speaks of approval of a part – and the drafters' concern about the new legislative practice of combining laws which could have been passed separately, *Henry* should have asked whether the portion of the law *which was vetoed* would have been a complete and workable law. Had it proceeded in this way, the new partial veto would have remained a "veto" and not a license to build something new. Regardless, *Henry*'s basic framework was left undisturbed for decades. *See, e.g.*, *State ex. rel. Sundby v. Adamany*, 71 Wis.2d 118, 130, 237 N.W.2d 910 (1976) (reaffirming rule). But in a decision handed down less than three years after *Sundby*, this Court abruptly changed course.

ii. Kleczka v. Conta

In *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978), this Court compounded the error it had made in *Henry,* putting the balance of our state's separation of powers even further out of whack. In *Kleczka*, this Court considered a law which would have permitted income tax filers to voluntarily add $1 to their tax liability for deposit into the Wisconsin Election Campaign Fund. *Kleczka*, 82 Wis. 2d at 685. Through clever use of the partial veto, Acting Governor Schreiber edited the provision to provide that taxpayers could instead direct $1 be put into the Fund "from the state general funds," a change that would "result in approximately $600,000 in tax funds being expended directly for political purposes per annum." *Id.* Two legislators filed an original action

challenging the constitutionality of that veto and this Court rejected their claim. *Id.* at 682-83, 716.

Klezcka held that "[s]everability is indeed the test of the Governor's constitutional authority to partially veto a bill," but redefined "the test of severability" as "simply that what remains [is] a complete and workable law," entirely eliminating any consideration of legislative intent as expressed in important conditions and provisos. *Id.* at 707. The Court dismissed language to the contrary in *Henry* and *Sundby* as "dicta only" and as "inconsidered." *Id.* at 712-713.

Shockingly, the Court also declared that the governor's partial veto "authority is coextensive with the authority of the legislature to enact [a] policy initially." *Id.* at 709. Thus, the Court permitted the governor to take the raw material in an appropriations bill – sentences and words and letters – and through clever editing write an entirely different law. It read the power to approve (or not) into the power to transform. Put differently, it conflated an executive veto with the authority to legislate, giving the Governor the power to make law.

Notably, Justice Hansen dissented on the extent of the governor's partial veto authority. "[T]he fundamental concept of art. IV, sec. 1," Justice Hansen explained, "is that the legislative power of this state is confided exclusively to the legislature. . . . At some point [the exercise of the partial veto] constitutes the

enacting of legislation by one person, and at precisely that point the governor invades the exclusive power of the legislature to make laws." *Id.* at 719-20 (Hansen, J., concurring in part, dissenting in part). The Court's prior cases had "recognized that there must be some limitation" on the partial veto, but the majority had "jettison[ed]" not only *Henry*'s limitation but "for all practical purposes, any other limitation on the partial veto power," allowing "one person [to] design his own legislation from the appropriation bills submitted to him." *Id.* at 722, 727.

Justice Hansen argued, instead, that "the partial veto power should be exercised only as to the individual components, capable of separate enactment, which have been joined together by the legislature in an appropriation bill." *Id.* at 726. To operationalize this concept, Justice Hansen proposed requiring that the "portions *stricken* must be able to stand as a complete and workable bill." *Id.* (emphasis added). This standard would be consistent with the purpose of the partial veto, which was "directed toward the legislative practice of uniting in a single bill various proposals," *id.* at 724–26, and would be "capable of even-handed and predictable application" without requiring the court to "mediate policy disagreements between the two other coordinate branches of our government," *id.* at 727.

iii. The Modern Partial Veto

As Justice Hansen predicted, by undercutting the separation of powers and eliminating any meaningful limit on the partial veto power, *Henry* and *Klezcka* cleared the path for governors to run with the veto pen as far as it could take them. And so they did.

In the 1980s, Governors Earl and Thompson pioneered what became known as the "Vanna White" veto, striking individual letters to form new words and sentences. *Partial Veto* at 15–16. Governor Earl, for example, combined letters from a five-sentence, 121-word paragraph into a single 22-word sentence. *Id.*

In 1988, based on this Court's prior partial veto jurisprudence, this Court upheld the Vanna White veto in *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 434, 437, 424 N.W.2d 385 (1988). The Court made clear that its hands were tied because its prior cases, particularly *Klezcka,* dictated the outcome. *See, e.g.*, *id.* at 449 (characterizing *Kleczka* as "significant for our present analysis"). The Court later reiterated, almost apologetically, that "our five earlier decisions . . . have ineluctably led to the decision we reach today." *Id.* at 462.

Three Justices dissented in part, raising textual and separation-of-powers concerns and suggesting that the Court's precedents had perhaps gone too far. *Id.* at 466–75 (Bablitch, J., concurring in part, dissenting in part, joined by Abrahamson and Steinmetz, JJ.).

Circumstances deteriorated further in the 1990s and early 2000s, when Governors Thompson, McCallum, and Doyle developed and "aggressively used" a so-called "Frankenstein veto," patching together words from multiple sentences and paragraphs to form new sentences. *See Partial Veto* at 17. In one notorious example, Governor Doyle transformed a 752-word passage into a new 20-word sentence. *Id*. Such extensive editing allowed Governors "to embark on entirely new policy directions that had not even been considered by the legislature." *Id*. As suggested by the reasoning in *Wisconsin Senate*, these types of actions were made possible by *Kleczka*'s rejection of limitations imposed by prior case law.

Because this Court would not act to restore the separation of powers, the legislature and the people acted to explicitly prohibit two of *Klezcka*'s "ineluctabl[e]" by-products. Immediately following *Wisconsin Senate* (1990), in a first attempt to restore the separation of powers, the people of Wisconsin voted to amend the constitution to prohibit the Vanna White veto. *See* Wis. Const. art. V, § 10(1)(c); Wisconsin Blue Book 1991–1992 at 883. The amendment passed overwhelmingly, 387,068 votes in favor to 252,481 votes against. *Id*. at 884.

That amendment proved to be insufficient to restore the balance, so in 2008, in response to Governor Doyle's use of the Frankenstein veto, the people of Wisconsin again amended the

constitution to abolish it. And again the referendum passed overwhelmingly, 575,582 votes in favor to 239,613 votes against. Wisconsin Blue Book 2009–2010 at 892. The new amendment provided that, in exercising the veto authority, the Governor could not create a new sentence by combining parts of two or more sentences. *Id.*

But as shown by the vetoes in this case, a creative governor, relying upon *Henry* and *Kleczka*, is not prohibited from infringing upon the legislative power by the Vanna White and Frankenstein rules. He may create new sentences by eliminating words within a sentence, or create new paragraphs by eliminating entire sentences. Such actions still result in laws that the legislature did not enact, consider, or may even have rejected during the legislative process.

B. Background on Partial Vetoes Challenged in This Case

The legislature passed the enrolled bill that would become 2019 Wisconsin Act 9 ("Act 9") on June 25 and 26, 2019, and Governor Evers signed it into law, along with various partial vetoes, on July 3, 2019. Pet. App. 105. This action challenges four of the Governor's vetoes. As the particulars of these vetoes are laid out in the Joint Stipulation of Facts filed in this Court, *id.* at 105-115, they will be briefly summarized here.

1. *School Bus Modernization Fund*

Sections 55c and 9101(2i) of the bill sent to the Governor directed the creation of a grant program that would help school boards purchase new, energy-efficient school buses. *Id.* at 106-07. Instead, through a veto, the Governor transformed this limited grant program into a grant program for "alternative fuels." *Id.*

The text below shows the original language of § 55c, with Governor Evers' partial veto indicated by strikethrough:[2]

> 16.047 (4s) of the statutes is created to read:
> 16.047 **(4s)** ~~SCHOOL BUS REPLACEMENT~~ GRANTS. ~~(a) In this subsection: 1. "School board" has the meaning given in s. 115.001 (7). 2. "School bus" has the meaning given in s. 121.51 (4). (b)~~ The department [of administration] shall establish a program to award grants of settlement funds from the appropriation under s. 20.855 (4) (h) ~~to school boards~~ for ~~the replacement of school buses owned and operated by the school boards with school buses that are energy efficient, including school buses that use~~ alternative fuels. ~~Any school board may apply for a grant under the program. (c) As a condition of receiving a grant under this subsection, the school board shall provide matching funds equal to the amount of the grant award. (d) A school board may use settlement funds awarded under this subsection only for the payment of costs incurred by the school board to replace school buses in accordance with the settlement guidelines.~~

Id.

[2] Act 9 uses red text to designate partial vetoes, but that is impractical here.

Subsection (2i) of § 9101, a nonstatutory provision, was vetoed as follows:

> ~~(2i) VOLKSWAGEN SETTLEMENT FUNDS. Of the settlement funds in s. 20.855 (4) (h), during the 2019–21 fiscal biennium, the department of administration shall allocate $3,000,000 for grants under s. 16.047 (4s) for the replacement of school buses.~~

Id. at 107.

In his veto message, the Governor explained that this grant program would be used to purchase electric vehicle charging stations, an idea the Legislature had expressly rejected, in the amount of up to $10 million. *Id.* at 108-09.

2. *Local Roads Improvement Fund*

Sections 126, 184s and 1095m of the enrolled bill appropriated $90,000,000 to municipalities to assist with local road projects. *Id.* at 110-11. The legislature dedicated specific amounts of money to specific types of projects (*e.g.* county trunk highway improvements, town road improvements, and so on) and placed a limit on how much a political subdivision could be reimbursed for project costs. *Id.* at 111. But the Governor vetoed any language tying these funds to road projects and removed all conditions, creating an undefined and unconstrained fund for "local supplement" or "local grant" (whatever those two things mean) that the legislature never contemplated. *Id.* at 110-112.

The partial veto of § 126 (schedule item Wis. Stat. § 20.395(2)(fc)) reads as follows:

> (fc) Local ~~roads improvement discretionary~~ supplement . . . ~~90,000,000~~ [and the Governor inserted 75,000,000 in place of the 90,000,000]

Id. at 110.

The partial veto of § 184s reads as follows:

> 20.395 (2) (fc) of the statutes is created to read: 20.395 (2) (fc) Local ~~roads improvement discretionary~~ supplement. From the general fund, as a continuing appropriation, the amounts in the schedule for ~~the~~ local ~~roads improvement discretionary supplemental~~ grant ~~program under s. 86.31 (3s)~~.

Id.

And the partial veto of § 1095m reads as follows:

> ~~86.31 (3s) of the statutes is created to read: 86.31 (3s) DISCRETIONARY SUPPLEMENTAL GRANTS. (a) Funds provided under s. 20.395 (2) (fc) shall be distributed under this subsection as discretionary grants to reimburse political subdivisions for improvements. The department shall solicit and provide discretionary grants under this subsection until all funds appropriated under s. 20.395 (2) (fc) have been expended. (b) 1. From the appropriation under s. 20.395 (2) (fc), the department shall allocate $32,003,200 in fiscal year 2019–20, to fund county trunk highway improvements. 2. From the appropriation under s. 20.395 (2) (fc), the department shall allocate $35,149,400 in fiscal year 2019–20, to~~

> ~~fund town road improvements. 3. From the appropriation under s. 20.395 (2) (fc), the department shall allocate $22,847,400 in fiscal year 2019–20, to fund municipal street improvement projects. (c) Notwithstanding sub. (4), a political subdivision may apply to the department under this subsection for reimbursement of not more than 90 percent of eligible costs of an improvement.~~

Id. at 111.

3. *Vehicle Fee Schedule*

Section 1988b of the original bill standardized registration fees paid by truck owners at $100. The previous fee schedule was graduated by weight class, so to equalize the fees, the Legislature raised fees on some trucks and lowered fees on others. *Id.* at 112-13. The governor, however, retained the fee increases and vetoed the decreases, creating a fee schedule that is neither graduated nor equalized. *Id.*

Governor Evers partially vetoed § 1988b as follows[3]:

> 341.25 (2) ~~(a) to (cm)~~ of the statutes are amended to read: 341.25 (2) (a) Not more than 4,500 $ *75.00* 100.00 (b) Not more than 6,000 . . . . . *84.00* 100.00 ~~(c) Not more than 8,000 . . . . . *106.00* 100.00 (cm) Not more than 10,000 . . . . . *155.00* 100.00~~

[3] As in Act 9, underlined text designates text added by the legislature. For clarity, however, text *repealed* by the legislature is italicized here rather than struck through as in Act 9.

Id. at 112.

The Governor rejected the Legislature's uniform fee policy choice and replaced it with his own policy preference, explaining that he "object[ed] to owners of lighter vehicles unfairly being charged the same fees as those for heavier trucks." *Id.* at 113.

4. *Tax on Vapor Products*

Finally, section 1754, 1755f, and 1757b in the original bill regulated "vapor products" and established new taxes for such products. *Id.* at 114. The Governor partially vetoed the definition of "vapor product" such that it was expanded to cover items not anticipated by the Legislature, resulting in a much broader tax. *Id.* Specifically, while the Legislature decided to impose a tax on a product with a specific definition – a piece of hardware that produces vapor from the application of a heating element to a liquid – the governor decided to also impose the tax on the liquid that goes inside the device, which is often sold separately. *Id.* at 114-15.

The Governor exercised his partial veto of § 1754 as follows:

> 139.75 (14) of the statutes is created to read: 139.75 (14) "Vapor product" means a noncombustible product that produces vapor or aerosol for inhalation from the application of a heating element ~~to a liquid or other substance that is depleted as the product is used~~, regardless of whether the liquid or other substance contains nicotine.

Id. at 114.

On July 31 and August 19, 2019, Petitioners Nancy Bartlett, Richard Bowers, Jr., and Ted Keneklis filed an original action petition and an amended petition, respectively, before this Court. This Court took jurisdiction of this action on October 16, 2019.

STANDARD OF REVIEW

This case is before the Court as an original action on stipulated facts. Consequently, the Court is not sitting in review of any lower court decision. In this case the Court is asked to interpret provisions of the state constitution and 2019 Wisconsin Act 9. These are questions of law. *See, e.g.*, *State v. Hamdan*, 2003 WI 113, ¶19, 264 Wis. 2d 433, 665 N.W.2d 785.

ARGUMENT

For decades the governor's partial veto power has continued to expand in scope, subsuming more and more of the legislative power into the executive branch in derogation of the state's separation of powers. When given the opportunity, the people of Wisconsin have twice attempted to check the governor's usurpation of legislative power but the executive simply refuses to acknowledge the constitutional check on his authority.

In this case, this Court can and should restore the balance and return Article V, Section 10(1)(b) to its original meaning by overruling *Henry*. Alternately, if it declines to take that step, it should at least overrule *Kleczka* and conclude that a governor may

not exercise the partial veto in a way that transforms the meaning and purpose of a law into something entirely new.

Regardless of which of these two paths this Court chooses, the four challenged vetoes in this case are unconstitutional and thus invalid.

I. This Court Should Return Article V, Section 10(1)(b) to its Original Public Meaning

Under current case law the governor can enact new laws never passed on by even a single legislator. This state of affairs is plainly inconsistent with the basic structure of our constitution, which vests the legislative power in the legislature alone. As originally enacted, Article V, Section 10(1)(b) of the Wisconsin Constitution authorized the governor to approve or disapprove legislative proposals capable of separate enactment but appearing in a single bill, nothing more.

Consequently, this Court can and should overturn *Henry* – the case that first misconstrued the partial veto amendment to depart from our basic constitutional structure and enabled the executive to dramatically expand its power over the years that followed. The Court should restore the balance of legislative and executive power approved by the people of Wisconsin.

A. As Originally Enacted, the Partial Veto Power Authorized the Governor to Approve or Disapprove Legislative Proposals Capable of Separate Enactment

When interpreting the meaning of an amendment to the Wisconsin Constitution, this Court has traditionally relied on three sources: "the plain language of the [amendment]," "the constitutional debates and practices of the time as exemplified during the ratification campaign that surrounded the voters' passage of the Amendment" and, "to the extent probative, the first legislation passed following the Amendment's passage." *Appling v. Walker*, 2014 WI 96, ¶7, 358 Wis. 2d 132, 853 N.W.2d 888. Only the first two sources are relevant here.

The amendment provides that "[a]ppropriation bills may be approved in whole or in part by the governor, and the part approved shall become law." Wis. Const. art. V, § 10. The central question is what the word "part" means. Particularly after *Kleczka* abandoned the requirement that the legislature "would have" passed the remaining law, the *Henry* opinion has meant that the Governor may excise any fragment of an appropriations bill without regard to whether it constitutes a part that could have been separately enacted. In going past the text, history and purpose of the 1930 amendment, *Henry* relied almost exclusively on a single definition of the word "part" from Webster's Dictionary,

which, in the Court's view, established the "well-known meaning and scope of the word 'part.'" *Henry*, 260 N.W. at 491.

But that definition of the word "part" cannot bear the weight the Court gave it. Indeed, as we have seen, it eventually led the Court to conclude that the governor could veto individual words and even individual letters in the text of an appropriations bill.

In reality, the word "part" has multiple meanings, as *Henry*, itself, illustrates. The Webster's definition *Henry* quoted lists four separate definitions separated by semicolons. The fourth definition is undeniably broad, and might support *Henry*'s conclusion that the word "part" "is not . . . qualified or limited": "a piece, fragment, fraction, member, or constituent." *Id*. (quoting Webster's). But the *first* definition quoted is "one of the portions . . . into which anything is divided, or regarded as divided." *Id*. This definition of the word has an implicit limit based on pre-existing subdivisions. In other words, where a thing has natural subdivisions, the word "part" might refer only to those pieces, rather than *any fragment*, no matter how small. For example, no one asked to list "parts" of a car would include scraps of metal or plastic removed to form something new. In this context, the word "part" obviously signifies the commonly-understood subdivisions of the whole, things like carburetors and spark plugs.

Since "part" can thus mean *either* any fragment, no matter how small, *or* "one of the portions . . . into which a thing is divided,"

dictionary definitions beg the question and are of little value, as is often the case. *See, e.g.*, *Rock-Koshkonong Lake Dist. v. DNR,* 2013 WI 74, ¶128, 350 Wis. 2d 45, 833 N.W.2d 800.

Given that dictionary definitions "are not especially helpful" here, *id.*, this Court should turn to other textual clues, and there are at least three important textual indications that the word "part" is indeed limited to the natural divisions in an appropriations bill, which means those portions that the legislature could have enacted in a stand-alone bill.

First, the text of the partial-veto amendment "gives the governor the power to 'approve' and the power to 'veto'," but "does *not* give the governor the power to create." *See Wisconsin Senate*, 144 Wis. 2d at 466 (Bablitch J., concurring in part, dissenting in part, joined by Abrahamson and Steinmetz, JJ.) (emphasis added). The words "approve" and "veto" suggest that the governor gets an up or down vote, nothing more. To interpret the word "approve" to allow the governor "to create" new legislation never considered by the legislature "strains the English language beyond the breaking point." *Id.*

Second, the partial veto is restricted to "appropriations bills" even though the provision could have been written to apply to *all* bills submitted to the governor by the legislature. This is an important contextual clue because the natural assumption must therefore be that the legislature and people of the state believed

that appropriations bills, unlike general bills, presented special problems making a partial veto necessary. And, in fact, appropriations bills are specially distinguished by the long lists of unrelated legislative proposals they present. Given that these are the distinct "parts," the natural components, that appropriations bills are divided into, it makes sense to read the text of Article V, § 10 to refer to them. The ample historical record, including the public discussion leading up to the enactment of the partial veto, *see supra*, fully supports this textual implication.

Finally, and most importantly, under the "harmonious-reading canon," "[t]he provisions of a text" – here, the Wisconsin Constitution – "should be interpreted in a way that renders them compatible, not contradictory." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012); *cf. also, e.g.*, *State v. Szulczewski*, 216 Wis. 2d 495, 503, 574 N.W.2d 660 (1998) ("Under the ordinary rules of statutory interpretation statutes should be reasonably construed to avoid conflict."). But reading the word "part" in the partial veto provision to permit the veto of individual words, phrases, sentences, and the like to create new laws brings that provision into irreconcilable conflict with Article IV, § 1 of the Wisconsin Constitution.

That provision, *which was not amended when the partial veto power was added to the Wisconsin Constitution*, provides that

"[t]he legislative power shall be vested in a senate and assembly." Wis. Const. art. IV, § 1. Given that "[l]egislative power, as distinguished from executive power, is the authority to make laws," *Koschkee v. Taylor*, 2019 WI 76, ¶11, 387 Wis. 2d 552, 929 N.W.2d 600 (quoting *Schuette v. Van de Hey*, 205 Wis. 2d 475, 480-81, 556 N.W.2d 127 (Ct. App. 1996)), it follows that the governor may not, in exercising the partial veto, engage in lawmaking.

The line between a partial veto that results in gubernatorial lawmaking, as opposed to mere approval of laws drafted by the legislature, is a clear one. Where the legislature has "unit[ed] in a single bill various proposals, each of which would have constituted a complete and workable bill in itself," *Kleczka*, 82 Wis. 2d at 724-25 (Hansen, J., concurring in part, dissenting in part), the governor may approve, or not approve, each individual proposal. Removing these "grammatically and structurally distinct" items, *id.* at 726, does not infringe on the legislative power, because (1) the governor could have vetoed such items in whole had they been proposed separately; (2) the items could in fact have been proposed separately; and (3) what remains and becomes law is legislation that the legislature itself approved *in that form*. *Cf. Commonwealth v. Dodson*, 176 Va. 281, 290, 11 S.E.2d 120 (1940) (in permitting governor to veto "items," Virginia Constitution signifies "something which can be lifted bodily from [a bill] rather than cut out. No damage can be done to the surrounding

legislative tissue, nor should any scar tissue result therefrom."). Failing to police this line turns the governor into a one-person legislature, in violation of our state separation of powers.

Similarly, the broad interpretation of the partial veto power conflicts with two other constitutional provisions requiring specific legislative action: Article VIII, § 2 of the Wisconsin Constitution, which provides that "[n]o money shall be paid out of the treasury except in pursuance of an appropriation *by law*" (emphasis added), and Article VIII, § 8 of the Wisconsin Constitution, which provides that "any law which imposes, continues or renews a tax, or creates a debt or charge, or makes, continues or renews an appropriation of public or trust money" requires a quorum of "three–fifths of all the members elected to [the relevant] house." Like the legislative vesting clause, these provisions prevent the executive from arrogating to himself the "power of the purse" – a quintessential legislative power, *see* The Federalist No. 58. Permitting the governor to cause the expenditure of funds without this approval ignores these carefully-imposed limitations.

Moving beyond purely textual indications of the meaning of the word "part," the constitutional debates and history surrounding the adoption of the partial veto, discussed in detail above, also support a limited and more restrictive meaning of the word "part." New budgeting processes led the legislature to send to the governors' desk omnibus bills containing unrelated

proposals, yet the governor was forced to either vote "yes" or "no" on the entire package. The 1930 amendment sought to halt such legislative steamrolling by "confer[ring] upon the Governor . . . the right to pass independently on every separable piece of legislation in an appropriation bill." *Henry*, 218 Wis. at 492.

This is consistent with the relentless references to the partial veto as an "item veto" by the amendment's sponsors, the Legislative Reference Library, and various members of the news media and the public at the time. Even Senator Duncan, the amendment's sponsor, emphasized to the people of Wisconsin that the amendment "merely" restored to the governor the power he possessed when "most appropriations were divided into separate bills." Pet. App. 123.

That the partial veto provision was frequently pitched to voters as an "item veto," *see supra* (citing newspaper articles), is important because constitutional provisions must be "approved by the people" and many voters "consider second-hand explanations and discussion at the time of ratification." *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶116, 295 Wis. 2d 1, 719 N.W.2d 408 (Prosser, J., concurring in part, dissenting in part); *Black v. City of Milwaukee*, 2016 WI 47, ¶¶59–66, 369 Wis. 2d 272, 882 N.W.2d 333 (R.G. Bradley, J., concurring).

Given all this, the correct interpretation of the partial veto provision is what Justice Hansen articulated in *Klezcka*: that the

word "part" refers to the "individual components, capable of separate enactment, which have been joined together by the legislature in an appropriation bill." *Klezcka*, 82 Wis. 2d at 726 (Hansen, J., concurring in part, dissenting in part). Read this way, the rule should be that "the portions stricken must be able to stand as a complete and workable bill." *Id.* This would permit the governor to veto portions that are "grammatically and structurally distinct," nothing more. *Id.*[4]

B. *Henry* Should Be Overruled

Henry was the first case in which this Court had the opportunity to interpret the governor's partial veto power. It adopted an overly broad definition of the word "part" and upheld a partial veto of provisions that were not "able to stand as a complete and workable bill" on their own. In so doing, it enabled the series

[4] Whether this interpretation would require this Court to revisit its conclusion that a governor may "strike a numerical sum appropriated in [a] bill and . . . insert a different, smaller number," *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 488, 534 N.W.2d 608 (1995), is not before the Court as the Petitioners have not challenged any such partial vetoes as unlawful. Since the amendment refers only to appropriations bills in the first instance, the word "part" could additionally be taken to refer a situation in which the governor exercises a partial veto by reducing the amount appropriated, thus taking away "part" of the appropriation without affecting any conditions or indeed any other language at all.

of subsequent cases which steadily undercut the separation of powers. *Henry* was wrongly decided, and the error has had significant implications for the balance of legislative and executive power in this state. This Court should reexamine *Henry* and right the ship by overruling that case.

Henry's holding that governors can partially veto portions of an appropriations bill that could not stand on their own was based largely on three errors.

First, the Court relied on a single definition of the word "part" to conclude that the "meaning of that word" was "unambiguous" and not "limited." *Id.* at 491. Yet, as shown, the word "part" has multiple possible meanings. And when read in context, both textual and historical, the reach of the word "part" *is* limited, indeed, *must be* limited, in order for the provision to make any sense in context.

Second, the Court relied on the contrast between Wisconsin's use of the word "part" and other states' partial-veto provisions' use of the word "item." But there is an obvious explanation for this word choice that does not require a fundamental reconfiguring of the legislative and executive powers. The word "part" is broad enough to include separable proposals in an appropriations bill that are not appropriations, such as revenue-raising measures, whereas the word "item" might not be. *See Bengzon v. Sec'y of Justice of Philippine Islands*, 299 U.S. 410, 415 (1937) ("An item of

an appropriation bill obviously means an item which in itself is a specific appropriation of money, not some general provision of law which happens to be put into an appropriation bill.").

Given that non-appropriation provisions that could have been enacted separately are routinely included in budget bills, it makes sense to interpret Art. V, § 10 to permit veto of these as well. Thus, *Henry* was right to conclude that the partial veto provision "empower[s] the Governor to disapprove parts [of an appropriation bill] that are not an appropriation," *id.* at 490, but wrong to conclude that it needed to give the word "part" the broad sweep it did.

Finally, the Court was comfortable interpreting the constitution the way it did because it thought it was reserving the putatively more difficult question – whether the governor could veto important language "inseparably connected to the appropriation" – for later. *Id.* But it can be difficult to draw the line between language that is "essential" and language that is not "essential." *Id.* at 493. Indeed, after many years of hinting that "there must be some limitation" on the partial veto power, the Court in *Klezcka* eventually abandoned the search for a "[]workable" test for when a partial veto goes too far. *See Klezcka*, 82 Wis. 2d at 721–22 (Hansen, J., concurring in part, dissenting in part). Having allowed the governor to use the partial veto to make "little" policy changes, it was a short jump to the conclusion that

the governor's partial veto "authority is coextensive with the authority of the Legislature to enact the policy initially." *Id.* at 709 (majority op.).

In addition to correcting these errors and returning the legislative power to the legislature, there are two main advantages to overruling *Henry*. First, the test Justice Hansen proposed – that the "portions stricken must be able to stand as a complete and workable bill" – "would be capable of even-handed and predictable application," and would not require this Court "to mediate policy disagreements between the two other coordinate branches of our government." *Id.* at 726-27 (Hansen, J., concurring in part, dissenting in part).

Second, overruling *Henry* would bring Wisconsin into line with practice in the other states (as was suggested would be the case during the partial veto ratification campaign). *See, e.g.*, The Council of State Governments, *The Governors: Powers*, Table 4.4 at 2, The Book of the States 2017, *available at* http://knowledgecenter.csg.org/kc/system/files/4.4.2017.pdf (listing states allowing item veto authority but noting that Wisconsin's partial veto is "broader"); Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L. Rev. 1171, 1185 (1993) (explaining that "[a]n executive-centered approach to the definition of an item . . . is such a departure from the traditional

approach to separation of powers that it has taken root in only one state – Wisconsin").

C. This Court Should Not Rely on *Stare Decisis* to Retain *Henry*

Nor should this Court rely on *stare decisis* to retain *Henry*. While an important principle, *stare decisis* is "not an inexorable command." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶97, 264 Wis. 2d 60, 665 N.W.2d 257. Whether to overrule a precedent depends on multiple factors, including whether the decision is "unsound in principle," "detrimental to coherence and consistency in the law," and "unworkable in practice," and whether "reliance interests are implicated." *Id.* ¶¶98–99.

Especially relevant here, *stare decisis* is "at its weakest when [this Court] interpret[s] the Constitution because [its] interpretation[s] can be altered only by constitutional amendment." *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). Appropriately, then, this Court has recognized it need not "retain constitutional interpretations that were objectively wrong when made." *Koschkee*, 387 Wis. 2d 552, ¶8 n.5. And, as already explained, *Henry*'s interpretation was "objectively wrong when made."

Henry has also proven to be "unworkable in practice." As history has shown, allowing governors to veto portions smaller than distinct items has led them to use "careful and ingenious deletions, to effectively write with [their] eraser." *Kleczka*, 82 Wis. 2d at 720 (Hansen, J., concurring in part, dissenting in part). This has created the difficult problem for this Court to define "precisely that point [at which] the governor invades the exclusive power of the legislature to make laws." *Id*. *Klezcka* eventually abandoned the challenge to find a workable test, but in the process contributed to the separations-of-powers problem Wisconsin faces today. The simplest (and correct) solution is to overrule *Henry* and hold that the "portions stricken must be able to stand as a complete and workable bill." *Id*. at 726. This standard is not only consistent with the original intent, but it would also "be capable of even-handed and predictable application." *Id*. at 727.

Finally, overruling *Henry* will not implicate any significant "reliance interests." If this Court reinterprets the partial veto power in accordance with its original purpose and adopts the straightforward standard Justice Hansen proposed, governors and future legislators will have little trouble adjusting to this new paradigm in future budget cycles.

Current law invites the governor to make law by scrutinizing enrolled bills and playing something akin to a game of Scrabble and requires the legislature to craft law in a way to block the

Governor's ploys. No one "relies" on this. It is an absurdity that one side seeks to exploit and the other endeavors to avoid.

II. Alternatively, Even if this Court Decides Not to Overrule Henry, this Court Should Still Overrule *Kleczka* and Hold That the Governor May Not Exercise the Partial Veto in a Way that Transforms the Meaning and Purpose of a Law into Something Entirely New

Even the *Henry* Court recognized that in order to preserve at least a semblance of separation of powers there had to be some limit on a governor's ability to use the partial veto to write new laws. It strongly hinted that the governor was not permitted to veto "provisos or conditions which were inseparably connected to the appropriation," *Henry*, 260 N.W. at 490, or, more generally, to "dissever or dismember a single piece of legislation which is not severable," *id.* at 492.

Henry's statement of the law was controlling for almost five decades. Then, in 1978, this Court decided, with little explanation, that this prohibition would have to go. *See, Kleczka*, 82 Wis. 2d 679. That ruling opened the door to nearly unfettered gubernatorial lawmaking powers.

Even if this Court determines that the governor may use the partial veto to dissect individual legislative proposals, it should at least overrule *Kleczka* and conclude that the governor may not fundamentally transform the laws given to him by the legislature.

A. *Kleczka* Erred in Allowing the Governor to Single-Handedly Draft New Laws via Creative Use of the Partial Veto

Separation-of-powers principles dictate that there is a point at which executive action impermissibly encroaches into the legislative domain. *See, e.g.*, *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶31, 376 Wis. 2d 147, 897 N.W.2d 384. The issue in this case is where this line is crossed with respect to the exercise of the partial veto.

If this Court declines to overrule *Henry,* it must a least draw a line that, contra *Kleckza,* does not permit the governor to create a law that the legislature has not enacted in some way. Under a rule by which the governor may strip a bill of "unessential" provisions but may not fundamentally transform it, it is at least arguable that the separation of powers has been left intact because the final law adopted remains consistent with legislative intent. *See, e.g.*, *Burlington N., Inc. v. City of Superior*, 131 Wis. 2d 564, 580-81, 388 N.W.2d 916 (1986) (discussing severability analysis). So long as the portions vetoed are not integral to the overall scheme, it can be argued that "the legislature [would] have preferred what is left of its statute to no statute at all. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-31 (2006) (discussing appropriate remedy when a statute contains a "constitutional flaw").

But it is *unreasonable* to allow the governor to veto, not only items, and not only non-essential parts of items, but *any* part of an appropriation bill, including essential aspects of the legislation that the legislature passed and which the governor otherwise approves. This approach conflicts with each of the constitutional provisions discussed in the previous section and for the same reasons (*see* discussion of Wis. Const. art. IV, § 1; art VIII, § 2; art. VIII, § 8, *supra*).

The *Kleczka* Court was wrong to authorize gubernatorial transformation of laws submitted to him. A close look at *Kleczka* reveals why the Court's reasoning was flawed: the Court essentially failed to address the significant separation of powers issue present in the case. The Court summarily observed that "[n]o provision of art. V, sec. 10, of the Constitution limits the Governor's authority to veto appropriations because of any legislatively imposed conditions." *Kleczka*, 82 Wis. 2d at 714. But this fails to see the constitutional forest for the single tree of art V, § 10; as discussed in detail *supra*, the limitation arises by operation of *other* Wisconsin constitutional provisions, such as the vesting of the legislative power in the legislature, as well as from the historical context of the provision's enactment.

For the decision in *Kleczka* to be correct, it would be necessary to make an affirmative case for a unique and extraordinary "veto as rewrite" power in Wisconsin based on text,

context, structure, history, and other available sources. The *Kleczka* Court did not do so.

Kleczka never truly engaged with the separation of powers problem. As a result it was poorly reasoned and wrongly decided.

B. The Constitutional Amendments after *Klezcka* Suggest that its Broad Interpretation of the Partial Veto Went Far Beyond What the People Understood They Originally Enacted

The constitutional amendments adopted after *Klezcka* demonstrate that the people of Wisconsin do not view the partial veto as giving the governor "the power to create" new law through clever editing. *See Wisconsin Senate*, 144 Wis. 2d at 466 (Bablitch, J., concurring in part, dissenting in part).

"[I]ndications of the will of the people are valuable" in interpreting the meaning of constitutional provisions. *See State v. Cole*, 2003 WI 112, ¶44, 264 Wis. 2d 520, 665 N.W.2d 328. Constitutional amendments, in particular, provide a rare glimpse into the "will of the people," given that they must be ratified by popular referendum. Even subsequent constitutional amendments can shed light on the original meaning of constitutional provisions. *See*, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 720–27 (1999) (relying on the history of the Eleventh Amendment to conclude that a prior Supreme Court opinion had misinterpreted other provisions of the Constitution).

Until *Klezcka*, this Court's decisions recognized that "there must be some limitation on the exercise of the partial veto by the governor" to transform a law passed by the Legislature into something else entirely. *See*, *Klezcka*, 82 Wis. 2d at 722 (Hansen, J., concurring in part, dissenting in part). *Klezcka*, however, "finally jettisoned the idea" of a meaningful limit, which led, "ineluctably," to all sorts of abuses of the partial veto, *Wisconsin Senate*, 144 Wis. 2d at 449, 462, such as the "Vanna White" and "Frankenstein" vetoes described above.

But once the people of Wisconsin realized what *Klezcka* had wrought, they voted, not once, but twice, to reject *Klezcka*'s direct by-products, decisively renouncing both the "Vanna White" (387,068 to 252,481) and "Frankenstein" vetoes (575,582 to 239,613). These votes show that the people of Wisconsin do not believe their governor should have the power to "creatively legislate with a few strokes of his pen." *Wisconsin Senate*, 144 Wis. 2d at 466 (Bablitch, J., concurring in part, dissenting in part). Clearly, *Klezcka* did "not capture[ ] the original understanding" of the partial veto provision. *See Alden*, 527 U.S. at 721, 724 (quoting D. Currie, *The Constitution in the Supreme Court: The First Hundred Years: 1789–1888*, 18, n.101 (1985)).

C. Traditional Severability Analysis Provides a Workable Test for Determining When Rewriting a Law Using the Partial Veto Goes Too Far

If this Court retains *Henry*, but overrules *Klezcka*, it still needs a workable test for determining when a partial veto goes too far. In that circumstance, *traditional* severability analysis – not *Klezcka*'s version of severability – provides a test that is workable and consistent with separation-of-powers principles.

The traditional severability doctrine applies when a Court finds a portion of a statutory scheme unconstitutional and must decide whether the remaining portions survive. The key inquiry is one of legislative intent: "Would the legislature have preferred what is left of its statute to no statute at all?" *Ayotte*, 546 U.S. at 330 (2006); *see State v. Janssen*, 219 Wis. 2d 362, ¶¶36–39, 580 N.W.2d 260 (1998); *Burlington Northern*, 131 Wis. 2d at 580.

To answer this question, this Court applies traditional statutory interpretation, looking "first . . . to the language of the statute," including any "express severability clause," and if the text is unclear, to extrinsic aids such as the "scope, history, context, subject matter and object of the statute." *Burlington Northern*, 131 Wis. 2d at 580 (quoting *Sacotte v. Ideal-Werk Krug & Priester Machinen-Fabrik*, 121 Wis. 2d 401, 406, 359 N.W.2d 393 (1984)).

Translated to the partial-veto context, the inquiry would be the same: after a governor's partial vetoes, "[w]ould the legislature have preferred what is left of [the provision it adopted] to no

[provision] at all?" The key here is that what remains must be part of what the legislature actually passed as opposed to something new. If a partial veto so transforms a provision that it becomes something the Legislature had not intended, then the vetoed portions were non-severable and the vetoes are invalid. This approach has the advantage of directly connecting the test for when a partial veto has gone too far to the underlying separation-of-powers concern. The governor would still be able to excise parts that are not essential but could not use the veto power to unilaterally create entirely new laws that run against legislative intent.

Burlington Northern provides a good example of how this would work in practice. The Court in that case held that a certain tax exemption was unconstitutional, but then had to decide "whether the remainder of the tax scheme [was] severable." *Id.* at 568. Severing the exemption while retaining the rest would have *imposed* a tax on the exempted product, "contrary to the manifest intent of the legislature," so the Court held that the exemption was non-severable. *Id.* at 579–85. Similarly, if a governor's partial veto effectively *imposes* a tax the legislature never envisioned, that veto would be invalid.

Importantly, this form of severability analysis is different from *Klezcka*'s version of severability. *Klezcka* held that "[s]everability is indeed the test of the Governor's constitutional

authority to partially veto a bill," but then redefined severability analysis to focus exclusively on whether "the remainder after partial veto [is] a 'complete, entire, and workable law.'" *Kleczka*, 82 Wis. 2d at 705–08. But that is the wrong test. It ignores legislative intent and ignores the importance of what was vetoed. It enables a governor to create new laws without regard to whether that law had ever been adopted or even considered by the legislature. A true severability analysis would look at whether the remaining law is a law that the legislature intended to create and would still have approved even if the vetoed provisions were not part of the law.

D. This Court Should Not Rely on *Stare Decisis* to Retain *Klezcka*

Kleczka is "unsound in principle," as already explained, but there are multiple other reasons to overrule it (in addition to those already mentioned in relation to *Henry* which are relevant here). First, *Kleczka* "has become detrimental to coherence and consistency in the law." *Johnson Controls*, 264 Wis. 2d 60, ¶98. This Court in recent years has shown a renewed commitment to preserving the separation of powers, and *Klezcka*'s open-ended license for governors to create new laws is an increasingly anomalous exception. *See*, *e.g.*, *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶¶29–41, 387 Wis. 2d 511, 929 N.W.2d 209; *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶¶44–48, 382 Wis. 2d 496, 914 N.W.2d 21 (plurality

opinion); *Gabler*, 376 Wis. 2d 147, ¶¶30–50. Furthermore, an unconstrained partial-veto power creates enormous uncertainty about what a budget bill will look like after the governor has finished with it.

Kleczka has also proven to be "unworkable in practice." *Johnson Controls*, 264 Wis. 2d 60, ¶99. It has already required two constitutional amendments to prevent its worst by-products, *supra*, yet governors continue to find ways to engage in gubernatorial lawmaking, as this case illustrates. Furthermore, legislators and their staff must spend significant time thinking through how the governor might use the partial veto to transform the laws they pass, an unnecessary waste of resources.

Finally, *Kleczka* has not "produced a settled body of law." *Id.* at ¶99. Only a handful of partial veto cases have been decided by this Court since *Kleczka*, and the case has been cited in only two reported court of appeals decisions.

III. The Challenged Vetoes Are Unconstitutional

Assuming this Court agrees with Petitioners that the partial veto may only be exercised on "independent proposals capable of separate enactment," *Kleczka*, 82 Wis.2d at 725 (Hansen, J., concurring in part, dissenting in part), this becomes a particularly easy case. In issuing each of the four challenged partial vetoes in this case, Governor Evers stripped pieces away from and thus

modified independent legislative proposals rather than voting up or down on them.

Each of the four challenged partial vetoes involved a distinct legislative proposal capable of separate enactment: a school bus modernization fund, funds for local roads, vehicle registration fees, and vapor product taxes. But in each case, rather than approving or disapproving each distinct proposal, Governor Evers used his veto pen to change them into new proposals the legislature had never envisioned. That unconstitutionally encroaches upon the legislative function and the vetoes are thus invalid.

If, on the other hand, this Court adopts some form of a severability test that retains *Henry* but overrules *Kleczcka*, the four challenged vetoes are still unconstitutional because they transformed provisions into laws the legislature clearly did not intend to create, as shown below. The analysis remains relatively straightforward because the transformations were so fundamental.

1. *School Bus Modernization Fund*

Sections 55c and 9101(2i) of Act 9 allocated $3 million of certain settlement funds for modernizing school buses, with specific conditions as to how that program should operate. Governor Evers transformed this into an open-ended grant "for alternative fuels," with no conditions, and then directed by fiat that the agency in charge spend up to $10 million "for electric

vehicle charging stations." This is so far removed from what the Legislature intended to create that there is no question that the portions Evers' vetoed were non-severable from the portions that remained.

Indeed, with respect to this veto, there is no doubt whatsoever that the "legislature intended the statute to be effective only as an entirety and would not have enacted the [non-vetoed] part by itself," *Burlington Northern*, 131 Wis. 2d at 581, because the Legislature *already rejected* substantially the same program that the Governor created by fiat. The Governor's proposed budget bill allocated Volkswagen settlement funds for charging stations, *see* 2019 Assembly Bill 56, §§ 52–54, but the Joint Committee on Finance rejected the Governor's proposal. Pet. App. 108-09.

2. *Local Roads Improvement Fund*

Sections 126, 184s, and 1095m of Act 9 allocated $90 million for the improvement of local roads, along with specific sub-allocations for county trunk highways, town roads, and municipal streets. Governor Evers used the partial veto to transform this into a $75 million allocation "for local grant [sic]." This veto entirely eliminated the core purpose of the award (local road improvements), instead creating a generic slush fund with no meaningful constraints. The Evers administration even "left open the possibility" that the money could fund Milwaukee's

controversial streetcar. *See, e.g.*, Patrick Marley, *Senate leader calls for overriding budget veto over concerns state money could go to Milwaukee streetcar*, Milwaukee Journal Sentinel (July 18, 2019), https://www.jsonline.com/story/news/politics/2019/07/18/local-governments-get-extra-75-million-transportation/1766807001/. There is no question that the Legislature would not have authorized this spending without tying it to local road improvements. The vetoed portions were therefore "essential" and non-severable, and Governor Evers' veto of the language tying these funds to local road improvements was invalid.

3. *Vehicle Fee Schedule*

Section 1988b of Act 9 set the registration fees for all trucks at $100 regardless of weight class. The prior fee schedule was graduated by weight, so to equalize the fees, the Legislature increased the fees for lighter trucks and decreased the fees for heavier trucks.

Governor Evers accepted the increases and rejected the decreases, creating a new fee schedule that is neither graduated nor equalized. The question, under traditional severability analysis, is whether the Legislature would have intended the fee increases on lighter trucks without the corresponding decreases for heavier trucks. Given that the obvious purpose of the statutory change was to equalize the fee schedule, the answer is no.

4. *Tax on Vapor Products*

Finally, Sections 1754, 1755f, and 1757b of Act 9 imposed a new tax on "vapor products," defined to include the hardware that produces vapor by heating a liquid, but *not* the liquid itself, which is often sold separately. Governor Evers partially vetoed the definition of "vapor products" such that the definition now covers both the hardware and the vapor fluid. In effect, the Governor's veto imposed a new tax on a product (vapor fluid) that the Legislature did not intend to tax. To use a simple analogy, this was like converting an excise tax on cars into a tax on cars *and gasoline*.

The portion that Governor Evers' vetoed is non-severable – and therefore the veto invalid – precisely because vetoing it has the effect of imposing a new tax. This Court addressed a similar situation in *Burlington Northern*: "When the legislature has expressed its intent not to impose a tax, this court must be very reluctant to effect a tax where none previously existed by severing an unconstitutional provision. It is the power of the legislature to tax, not the prerogative of the judiciary." 131 Wis. 2d at 581. Likewise, the governor should not have the power to impose a tax on a previously untaxed product through the partial veto. Put in terms of severability, any language that, if vetoed, would effectively impose a new tax should be treated as non-severable from the rest.

IV. Remedy

Under this Court's prior partial-veto cases, the proper remedy for an invalid partial veto depends on whether a governor's affirmative approval was required for an act to become effective, which, in turn, depends on whether the Legislature had adjourned before the Governor's 6-day window to return the bill. Wis. Const. art. V, § 10(3); *see State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622, 624–25 (1936); The Honorable Fred A. Risser, 80 Wis. Op. Atty. Gen. 327, 330–31 (1992).

In *Finnegan*, the Legislature had adjourned, so the partial veto, even though invalid, meant the Act "never became a law." 264 N.W. at 623, 625. In *Sundby*, on the other hand, where the Legislature had not adjourned, this Court explained that "if, in fact, the partial vetoes are invalid, the secretary of state has a mandatory duty to publish those sections of the enactment as if they had not been vetoed." 71 Wis. 2d at 125. The Legislature here had not adjourned, so under *Finnegan* and *Sundby* the proper remedy is to treat the relevant sections as enacted without the invalid partial vetoes. *See* 2019 Senate Joint Resolution 1, § 1(5) (providing the work schedule for the 2019 legislature and explaining that "[t]he biennial term of the 2019 legislature ends on Monday, January 4, 2021.")

That said, because Petitioners ask this Court to overrule case law upon which the Governor may have relied, this Court may

use its equitable authority to craft an appropriate remedy for this case, remanding to the Governor to allow him to reconsider the relevant sections and either approve them in whole, veto them in whole, or veto them in part consistent with this Court's opinion.

CONCLUSION

For the foregoing reasons, this Court should rule that the partial vetoes challenged herein were invalid.

Dated: December 9, 2019.

Respectfully submitted,
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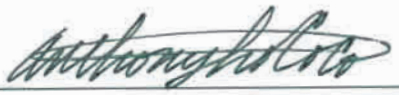

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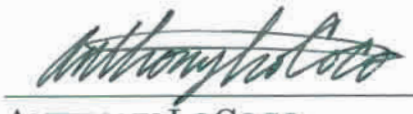
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,979 words.

Dated: December 9, 2019



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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