STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1376-OA

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

RESPONDENTS' BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

MAURA FJ WHELAN
Assistant Attorney General
State Bar #1027974

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6219 (Roth)
(608) 266-3859 (Whelan)
(608) 267-2223 (Fax)
rothct@doj.state.wi.us

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INTRODUCTION

Since the partial-veto power was added to the Wisconsin Constitution in 1930, governors of both parties have exercised their partial-veto power hundreds of times.[1] Governor Walker, for example, did so 309 times.[2] Following in his predecessors' footsteps, Governor Evers also partially vetoed 78 provisions in the 2019–2021 biennial budget, 2019 Wis. Act 9 ("Act 9"). Each veto was clearly authorized by the Constitution's plain text and nearly a century of unbroken precedent from this Court, all of which affirm that Article V, § 10, means exactly what it says: that the Governor may veto an appropriation bill "in whole or in part."

Yet Petitioners boldly ask this Court to effectively amend the Constitution and overturn each of its partial-veto decisions. Petitioners would prefer that the Constitution's text instead allowed only an "item" veto, a term of art used in many other states' constitutions but not Wisconsin's. But the Wisconsin people made a different choice when they ratified a "part" veto rather than an "item" one—as this Court has confirmed over and over again.

As if asking this Court to rewrite Article V, § 10, and reuse all its prior partial-veto decisions were not enough, Petitioners effectively ask it to nullify the two constitutional amendments to Article V, § 10, passed by the Legislature and ratified by the people in 1990 and 2008. Those

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[1] Richard A. Champagne, et al., Wis. Legis. Reference Bureau, *The Wisconsin Governor's Partial Veto*, 22–25 (June 2019), https://docs.legis.wisconsin.gov/misc/lrb/reading_the_constitution/reading_the_constitution_4_1.pdf (hereinafter "*The Partial Veto*").

[2] *Id.* at 25.

amendments expressly barred the Governor from deleting individual letters to create new words and combining multiple sentences to create new ones.

Rewriting Article V, § 10, into an item veto would improperly render those two amendments superfluous. Petitioners' proposed reading of the word "part" in Article V, § 10(1)(b), would itself prohibit the Governor from deleting letters and combining multiple sentences, leaving no independent role for the two amendments. That reading cannot be correct. Through those amendments, the Wisconsin people and Legislature recognized that Article V, § 10, permits all partial-veto techniques absent an express textual limitation. Rather than transform Article V, § 10, into an "item" veto as Petitioners request, these amendments merely ratcheted back the most aggressive uses of the partial veto. The amendments thus ratified the traditional understanding of the partial-veto power.

Moreover, the Legislature has long acquiesced in this Court's correct reading of Article V, § 10. Time and again the Legislature has considered amendments that would have transformed Article V, § 10, into some form of an "item" veto—and time and again, the Legislature has declined to send those proposals to a popular vote. Simply put, if governors from both parties exercising hundreds of partial vetoes over the past several decades all were misinterpreting the Constitution and trampling on the Legislature's rightful prerogatives, it defies belief that the Legislature would not have responded accordingly.

Petitioners thus ask this Court to step in and do what the Legislature and Wisconsin people have never done: transform Wisconsin's partial veto into an item veto. But because the overwhelming weight of legal authority is against them, they can offer only what amounts to a policy brief in support of this transformation. While their policy

arguments may ultimately persuade the Legislature and the people to amend our Constitution, this Court is the wrong forum for their plea.

This Court should declare the four challenged vetoes valid.

ISSUES PRESENTED

1. Do the Constitution's plain terms and this Court's traditional partial-veto doctrine support the four challenged vetoes?

2. Should the Court again hold, as it has done for nearly a century, that Article V, § 10's text allowing the Governor to approve appropriation bills "in whole or in part" does not create an "item" veto?

3. If this Court affirms its unbroken line of cases holding that Article V, § 10, creates a partial veto rather than an item veto, should it also decline to overrule *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978), by replacing it with a new severability test that has no textual support in the Constitution?

4. Does stare decisis favor retaining this Court's partial-veto doctrine rather than demolishing and rebuilding it based on new, difficult-to-administer standards?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are requested.

STATEMENT OF THE CASE

I. This Court, the Legislature, and the people of Wisconsin have consistently interpreted, applied, and affirmed the partial veto since its enactment in 1930.

The partial veto originated in a 1930 constitutional amendment: "Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills." Wis. Const. art. V, § 10 (1930). The Legislature may override a partial veto by a two-thirds vote. *Id.*

"[T]he partial veto authority in this state was adopted in an effort to provide the chief executive with some flexibility in dealing with omnibus appropriation bills submitted by the legislature." *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 454, 424 N.W.2d 385 (1988). It represented "part of [a] complete overhaul of the budget system in this state" which included the first statutes creating the modern budgetary process. *Id.* at 455. Through those statutes, passed by the same Legislature that approved the partial veto, "[t]he legislature itself . . . recognized the governor's legislative role in the budget area by ceding to the governor the initial responsibility for preparing the biennial budget report and requiring him to submit his executive budget bill together with suggestions for the best methods for raising the needed revenues." *Id.* at 454–55. The partial veto was a key element of this overhaul, as it gave the Governor a "tool . . . for controlling his own executive budget bill." *Id.* at 455.

As part of "achieving joint exercise of legislative authority by the governor and the legislature over appropriation bills," *id.* at 454, the partial veto also limited "logrolling"—that is, "the practice of jumbling together in one act inconsistent subjects in order to force a passage by uniting minorities with different interests when the particular provisions could not pass on their separate merits." *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 447–48, 289 N.W. 662 (1940).

Between 1935 and 1988, this Court addressed the partial-veto power six times. *See State ex rel. Wis. Tel. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935); *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622 (1936); *Martin*, 233 Wis. 442; *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 237 N.W.2d 910 (1976); *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978); *Thompson*, 144 Wis. 2d 429. Only *Finnegan* overturned a partial veto, one that improperly affected a non-appropriation bill.

These cases enunciated four pertinent legal principles. First, *Henry* interpreted the constitutional term "part" according to the broad dictionary definition of that word, distinguishing it from the narrower term "item" that other states had chosen for their constitutions. *Henry*, 218 Wis. at 313. Second, *Henry* adopted the "workable law" standard, that a partial veto is constitutional if the parts remaining after the veto constitute "a complete, entire, and workable law." *Henry*, 218 Wis. at 314. Third, *Henry* explained that, in the appropriations context, the Constitution gives the Governor a "coextensive power" with the Legislature and a "quasi-legislative function." *Id.* at 315. Therefore, as long as the "workable law" standard is met, the Constitution authorizes the Governor to use the partial veto to "change[] the legislative program or policy" presented by the Legislature. *Martin*, 233 Wis. at 450; *see also Sundby*,

71 Wis. 2d at 134; *Thompson*, 144 Wis. 2d at 448–49. Fourth, "provisos or conditions" are—like any other language in an appropriation bill—subject to the partial-veto power. *See Kleczka*, 82 Wis. 2d at 714.

After *Thompson* held that Article V, § 10, permitted the Governor to veto individual letters to create new words, the people passed a constitutional amendment in response. In 1990, they amended Article V, § 10, by adding a new subsection (1)(c): "In approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of the enrolled bill." Wis. Const. art. V, § 10(1)(c) (1991–92). The amendment did not alter the partial-veto provision in any other way or abrogate any of this Court's other partial-veto holdings.

This Court again upheld Governor Thompson's use of the veto pen in *Citizens Utilities Board v. Klauser*, 194 Wis. 2d 484, 534 N.W.2d 608 (1995) ("*CUB*"), but two years later in *Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997), rejected an attempt to reduce a monetary figure that was not itself an appropriation.

In 2008, the Legislature and Wisconsin citizens again amended Article V, § 10, this time providing that the Governor "may not create a new sentence by combining parts of 2 or more sentences of the enrolled bill." Wis. Const. art. V, § 10(1)(c) (2007–08). This amendment responded to the so-called "Frankenstein" vetoes, which stitched together words from different sentences in appropriation bills. Just like the 1990 amendment, the 2008 amendment did not alter the language of Article V, § 10(1)(b), and left standing all the caselaw from *Henry* to *Risser*.

II. The Legislature has repeatedly rejected constitutional amendments that would transform the partial veto into something like an item veto.

Five years before passing the 1930 amendment, the Legislature first considered a partial-veto provision, this one phrased in terms of both "parts" and "items": "The governor may disapprove or reduce items or parts of items in any bill appropriating money. So much of such bill as he approves shall upon his signing become law." (R-App. 102 (1925 S.J. Res 23).) The Senate declined to pass the measure. *The Partial Veto*, at 6.

Since passing the 1930 amendment, the Legislature has considered at least ten proposals that would have transformed the partial-veto provision into something like an item veto through constitutional amendment. But the Legislature declined to advance a single one to a popular vote.[3]

The first, in 1977, would have maintained the "part" language of Article V, § 10, but added: "In rejecting a part of an appropriation bill, the governor may not delete from the bill less than a complete dollar amount as shown in the bill or *the treatment of a numbered segment of law as identified in the bill*." (R-App. 106 (1977 S.J. Res. 46).) The proposal

[3] Amending the Wisconsin Constitution is a three-step process. *See* Wis. Const. art. XII, § 1. First, a majority of the members of the Assembly and Senate must agree to a proposed amendment. The approved amendment becomes an "enrolled joint resolution." Second, the members of each chamber in the next legislative session must agree to the joint resolution. Third, the amendment is submitted to the people, who either reject or ratify it. *Id.*

died in the Senate.[4] The same proposal was reintroduced in 1983 and shared the same fate. (R-App. 194 (1983 S.J. Res. 16).)

Two similar efforts followed in 1979. One joint resolution proposed replacing the term "part" with "section," and limiting the Governor's partial-veto power to "complete sections" only. (R-App. 189 (1979 S.J. Res. 16).) The proposal died in the Senate. Another would have abrogated *Henry*, providing that "[i]n rejecting a part of an appropriation bill, the governor may reject the part or parts only if such part or parts, as joined together by the legislature in the bill, would have been capable of separate enactment as a complete and workable bill." (R-App. 130–31 (1979 S.J. Res. 7).) It passed both houses but failed in the Assembly in the next session. (R-App. 127–28 (1979 Enr. J. Res. 42).) This latter attempt was resurrected in the Legislature's 1999–2000 session, but it died in the Assembly. (R-App. 277 (1999 A.J. Res. 119).)

The Legislature tried again in the 1991–1992 session with an "item"–focused proposal: "The governor may disapprove any item or items of an appropriation bill, but only if the remainder of the bill constitutes a complete, entire and workable law . . . ." (R-App. 254 (1991 A.J. Res. 130).) While this passed both houses the first time, it failed during the next session. (R-App. 275 (1991 Enr. J. Res. 16).)

In 2003, the Legislature made its one apparent attempt to address *Kleczka*'s approval of "provisos or conditions" vetoes. It proposed: "In approving an appropriation bill in part, the governor may not approve any law that the legislature did not authorize as part of

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[4] *The Partial Veto* describes the final dispositions of each proposed amendment at pages 25–28. These are matters of public record that are subject to judicial notice.

the enrolled bill." The proposal died in the Assembly. (R-App. 303 (2003 A.J. Res. 77).)

Another "section"–based revision effort occurred in 2005. The original proposal provided: "In approving an appropriation bill in part, the governor may not reject a part of a bill section of the enrolled bill without rejecting the entire bill section." (R-App. 307 (2005 A.J. Res. 68).) As ultimately adopted, the proposal provided instead that the Governor "may not reject any individual word in a sentence of the enrolled bill unless the entire section is rejected." (R-App. 312 (2005 Enr. J. Res. 40).) The enrolled resolution passed but was not reconsidered in the next legislative session.

The original language of the 2005 project was revived and passed in 2010, but on second consideration in 2011 it failed to pass either house. (R-App. 313–14, 318, 320 (2009 S.J. Res. 61; 2011 A.J. Res 114; 2011 S.J. Res. 60; 2009 Enr. J. Res. 40).) The language was resurrected yet again in 2014 but the resolution died in the Assembly. (R-App. 332–33 (2013 A.J. Res. 124).)

III. Petitioners challenge four partial vetoes in the current biennial budget.

Before signing the 2019–2021 biennial budget bill, Governor Evers used his office's traditional authority to approve appropriation bills "in whole or in part" by partially vetoing several provisions.

Four Act 9 vetoes are at issue here (Pet'rs' App. 105–15), each of which Petitioners essentially concede are consistent with this Court's partial-veto doctrine. (Pet'rs' Br. 49–50.) But they argue that this Court's interpretation of the Constitution has been wrong from the beginning and ask it to overrule two of its earlier decisions, *State ex rel. Wisconsin Telephone Company 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). In place of that caselaw, Petitioners propose two new tests, both of which purportedly render the challenged vetoes invalid. (Pet'rs' Br. 44–48.)

ARGUMENT

I. The Constitution's plain text authorizes the partial vetoes challenged in this case.

The Constitution gives the Governor the authority to partially veto appropriation bills. Wis. Const. art. V, § 10(1)(b). It expressly authorizes the Governor to approve such bills "in whole or in *part*." *Id.* The plain meaning of the word "part" is broad and not synonymous with the narrower term "item." *See infra* Argument II.A (comparing the words "part" and "item"). Any "part" is subject to veto, no matter how small.

Within this broad authority, the Constitution imposes only two specific constraints on the Governor. He "may not create a new word by rejecting individual letters . . . , and may not create a new sentence by combining parts of 2 or more sentences." Wis. Const. art. V, § 10(1)(c). The text expresses no other limits on the Governor's partial-veto authority over appropriation bills.

The issue presented here is very simple: Did the partial vetoes at issue here comply with these basic textual rules? The answer is yes. The language stricken in the challenged vetoes constituted "part[s]" of the appropriation bill, and none of the deletions involved individual letters or combined sentences. (*See* Pet'rs' App. 105–15.) Therefore, the vetoes were authorized by the Constitution. Unless two-thirds of the Legislature vote to override those vetoes, Act 9, as signed by the Governor, is law.

II. The Constitution's plain text does not create the item veto that Petitioners seek.

Petitioners' quarrel is ultimately with the Constitution's text, not this Court's caselaw. When the Legislature chose the term "part" for Article V, § 10, rather than the word "item"—a narrower word used in many other state constitutions at the time the amendment was adopted—it permitted the Governor to veto any segment of an appropriation bill.

Petitioners respond with what amounts to an advocacy brief in support of a new constitutional amendment. Their argument boils down to this: Our state government would be better structured if the Governor had an item veto rather than a partial veto. But the only way to improve upon the public policy embedded in our Constitution is to amend it, just as the Legislature and the people removed some of the Governor's partial-veto authority by amendment in 1990 and 2008, and just as the Legislature has declined to create something like an item veto through at least ten rejected amendments.

Rather than take their case to the people, Petitioners ask this Court to impose new atextual limitations on the Governor's partial-veto power. To accomplish this *sub silentio* constitutional amendment, they ask the Court to reinterpret the term "part" in Article V, § 10(1)(b), to mean "item." Even if this were a case of first impression, and even if stare decisis did not overwhelmingly favor adhering to this Court's 85 years of partial-veto precedent, Petitioners should lose.

Three interpretive tools confirm that Article V, § 10, allows the partial vetoes at issue here: first, examining the provision's plain text; second, reading the original constitutional language in concert with the 1990 and 2008

amendments, which cannot be rendered superfluous; and third, considering the multiple rejected amendments that would have revised the Constitution in basically the same way that Petitioners ask. All three sources confirm that this Court got it right in *Henry* and all its subsequent partial-veto decisions—the Governor may excise any words when approving an appropriation bill "in part."

A. The plain text of Article V, § 10, allows the Governor to veto "parts" of appropriation bills, not just entire "items."

Constitutional interpretation begins with the plain text of the relevant provision. "Words or terms used in a constitution, being dependent on ratification by the people, must be understood in the sense most obvious to the common understanding at the time of its adoption." *Payne v. Racine*, 217 Wis. 550, 555, 259 N.W. 437 (1935) (citations omitted). Thus, constitutional language is presumed to "have been used according to [its] plain, natural, and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words of a constitution in order to search for some other conjectured intent." *Id.*; *see also Koschkee v. Taylor*, 2019 WI 76, ¶ 23, 387 Wis. 2d 552, 929 N.W.2d 600 ("[W]e interpret an undefined constitutional term . . . [using] the plain meaning of the term at the time the constitutional provision was adopted."). A standard, respected dictionary may provide a word's generally understood meaning. *See*, *e.g.*, *State v. Sample*, 215 Wis. 2d 487, 499–500, 573 N.W.2d 187 (1998).

Article V, § 10, has always provided that "[a]ppropriation bills may be approved in whole or in part by the governor." To understand the "plain, natural, and usual" understanding of the word "part," *Payne*, 217 Wis. at 555, it is appropriate to examine dictionaries at the time, just as

the *Henry* court looked to the *Webster's New International Dictionary*'s definition:

> 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 larger number, quantity, mass, etc., whether actually separate or not; a piece, fragment, fraction, member or constituent.

Henry, 218 Wis. at 313 (quoting *Part*, Webster's New International Dictionary (2d ed. (1934)). By using the word "part," the Legislature and Wisconsin citizens authorized the Governor to excise things of almost any size from an appropriation bill, from the humble "fragment" to the potentially massive "something less than a whole," and everything in between.

Petitioners respond that the word "part" is capable of multiple meanings and that one more akin to the word "item" is more appropriate here. (Pet'rs' Br. 23–25.) They believe that, by using the word "part," Article V, § 10, means that "the portions stricken must be 'able to stand as a complete and workable bill' on their own." (Pet'rs' Br. 30.)[5] A broad reading of the word "part" errs, in their view, because

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[5] Although Petitioners never expressly request an "item" veto, this proposed test is how an item veto would work. *Compare infra* Argument II.C.1. Leaving aside the test's lack of textual support, it would be hard to administer because it is unclear when stricken language could constitute a stand-alone bill. Take, for example, the challenged vehicle fee schedule vetoes. (Pet'rs' App. 112–13.) Petitioners seem to think that striking fee cuts for two weight classes was impermissible because those provisions cannot stand alone, but why not? Because the Legislature chose to impose fees by weight class, each fee is logically independent from the others. If an independent fee could not be passed as a "complete and workable bill," it is unclear what could.

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." (Pet'rs' Br. 24.) But this amounts to a policy disagreement with the implication of the Legislature's choice of words, not anything that sheds light on what the constitutional text means.

Although Petitioners would prefer that "part" mean something akin to "item," three facts show that the original public meaning of the terms differ.

First, "[a]t the time Wisconsin approved the amendment, thirty-seven other states granted the governor the power to object to single items in appropriation bills, but no other state constitution utilized the word 'part' instead of 'item.'" *CUB*, 194 Wis. 2d at 491.[6] The only conceivable conclusion one can draw from that fact is that, especially in the realm of constitutional veto provisions, "part" has a different original public meaning than "item."

Second, perhaps more telling, the Legislature in 1925 rejected an amendment that would have empowered the Governor to "disapprove or reduce *items or parts of items* in [an appropriation bill]." (R-App. 102 (1925 S.J. Res 23).) By proposing this language, the Legislature demonstrated its understanding that "parts" and "items" are different and, crucially, that a "part" is a smaller subdivision than an "item."

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[6] Petitioners speculate that Wisconsin used the word "part" only because other states' "item" vetoes purportedly do not reach non-appropriation measures within an omnibus appropriation bill. (Pet'rs' Br. 31–32.) But nothing in the only authority they cite, *Bengzon v. Secretary of Justice of Philippine Islands*, 299 U.S. 410 (1937), indicates that the vetoes at issue would have

Third, the contemporaneous understanding of the word "item" differs from "part." The same edition of *Webster's* quoted above defines "item" in pertinent part as: "An article, a separate particular in an enumeration, account, or total; a detail; as, the *items* in a bill." (R-App. 342 (*Item*, Webster's New International Dictionary (2d ed. (1934)).) In other words, an "item" is a coherent entity, a little whole subsumed in a larger whole. "Part" and "item" may overlap, but they are not synonymous. An "item" can sometimes be a "part," i.e., a "member or constituent," but it can never be "a piece, fragment, [or] fraction." *Henry*, 218 Wis. at 313.

The *Henry* court thus posed an apt rhetorical question that explains why Petitioners are wrong:

> [I]f, in conferring partial veto power . . . , it was intended to give the executive such power only in respect to an item or part of an item in an appropriation bill, then why was not some such term as either "item" or "part of an item" embodied in that amendment, as was theretofore done in similar constitutional provisions in so many other states, instead of using the plain and unambiguous terms "part and "part of the bill objected to," without any words qualifying or limiting the well-known meaning and scope of the word "part?"

218 Wis. at 313. Clearly "part" meant something different and broader than "item," as this Court has rightly recognized starting in *Henry* and ever since.

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survived if only the Philippines' veto provision had used the word "part" rather than "item."

B. Amendments to Article V, § 10, confirm this Court's traditional reading of the partial-veto power.

If the Constitution's plain text were not enough to confirm that this Court has correctly interpreted Article V, § 10, the 1990 and 2008 amendments remove any doubt. Again, the 1990 amendment provided that: "In approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of an enrolled bill." Wis. Const. art. V, § 10(1)(c) (1991–92). And the 2008 amendment added that the Governor "may not create a new sentence by combining parts of 2 or more sentences of the enrolled bill." Wis. Const. art. V, § 10(1)(c) (2007–08).

Those amendments provide a crucial interpretive tool for understanding what the word "part" means in Article V, § 10. As Petitioners correctly note, "'indications of the will of the people are valuable' in interpreting the meaning of constitutional provisions." (Pet'rs' Br. 39 (citing *State v. Cole*, 2003 WI 112, ¶ 44, 264 Wis. 2d 520, 665 N.W.2d 328).) And they are right that "[e]ven subsequent constitutional amendments can shed light on the original meaning of constitutional provisions." (Pet'rs' Br. 39 (citing *Alden v. Maine*, 527 U.S. 706, 720–27 (1999).) But those principles backfire on Petitioners for three related reasons.

First, those 1990 and 2008 amendments only make sense if "part" meant what it says and what this Court has long held: any fragment of a bill, not an entire stand-alone item. If, as Petitioners claim, Article V, § 10, only permitted the Governor to veto entire *items* in an appropriation bill, those two amendments would not have been necessary—the Constitution already would have forbidden the Governor from vetoing individual letters and combining sentences. But it is precisely because Article V, § 10, *allowed* such veto

practices (and everything short of them) that the amendments were necessary.

Second, Petitioners' theory improperly renders the 1990 and 2008 amendments superfluous. "[C]onstitutional provisions, should be construed to give effect 'to each and every word, clause and sentence' and 'a construction that would result in any portion of [the constitution] being superfluous should be avoided wherever possible.'" *Wagner v. Milwaukee Cty. Election Comm'n*, 2003 WI 103, ¶ 33, 263 Wis. 2d 709, 666 N.W.2d 816.

If Article V, § 10(1)(b) only permits the Governor to veto entire items, as Petitioners say, then Article V, § 10(1)(c) would have no independent effect. Subsection (b) would already prevent the Governor from "creat[ing] a new word by rejecting individual letters" and "creat[ing] a new sentence by combining parts of 2 or more sentences"—there would be no need for subsection (1)(c)'s express prohibition of those tactics. There is simply no way to harmonize subsection (1)(c) with Petitioners' reading of subsection (1)(b). Only the plain text reading of the word "part"—the one this Court has long recognized—gives effect to all subsections of Article V, § 10.

Third, the 1990 and 2008 amendments show that restrictions on the partial-veto power must be stated expressly and are not implied by the word "part." When the people desired to prevent the Governor from deleting letters in appropriation bills, they expressed their will by adding Article V, § 10(1)(c), to the Constitution. And when the people desired to prevent the Governor from combining multiple sentences, they again expressly said so by amending that subsection. In both cases, the people recognized that the Constitution's existing language did not impose these restrictions, and so new express language was needed to do so.

The same is true here—a new constitutional amendment is necessary to impose the new partial-veto restrictions that Petitioners seek. It simply makes no sense that amendments were needed to prevent the Governor from deleting individual letters and combining sentences, but a comparably specific restriction on his ability to veto individual words can somehow be discovered in the word "part."

At bottom, the 1990 and 2008 amendments demonstrate that Petitioners ultimately have a policy disagreement with the existing constitutional text. The framers of those amendments also believed that the existing constitutional text gave too much power to the Governor. But those framers also recognized what Petitioners miss: modifying the Constitution to conform to one's policy preferences requires a constitutional amendment, not constitutional litigation.

C. The Legislature's repeated decisions not to transform Article V, § 10 into an item veto through constitutional amendment show that it is not an item veto now.

The Legislature's repeated decisions not to amend Article V, § 10, also confirm that transforming it into an item veto would require a constitutional amendment. First, much like the successful 1990 and 2008 amendments, the rejected amendments presuppose that Article V, § 10, permits partial vetoes of individual words. Second, the Legislature's acquiescence in this Court's partial-veto decisions indicates that those decisions were correct.

1. The rejected amendments allow this Court to directly interpret the text of Article V, § 10(1)(b).

This Court has acknowledged that it can infer the meaning of a constitutional provision by examining the content of rejected amendments. In *Wagner*, at issue was Article VII, § 10, which prohibits judges from holding other public offices during their elected terms. 263 Wis. 2d 709. To decide whether the text allowed judges who resigned *during* their elected term to then hold another office, the Court examined a rejected amendment. *Id.* ¶¶ 32–40. Because the rejected amendment "would [have] allow[ed] activity that was previously prohibited"—i.e. it would have allowed judges to immediately assume another office upon resigning—the unamended constitutional text necessarily prohibited that activity. *Id.* ¶ 40. The Court reasoned that "[t]he people voted intelligently upon this proposition, which clearly evidences their intention, and, where such intention appears, the construction and interpretation of the acts must follow accordingly." *Id.* (citation omitted).

The same reasoning applies to the rejected amendments to Article V, § 10. Again, the Legislature has repeatedly declined to amend the provision into something like what Petitioners now request:

- "In rejecting a part of an appropriation bill, the governor may not delete from the bill less than a complete dollar amount as shown in the bill or the treatment of a numbered segment of law as identified in the bill." (R-App. 106 (1977 S.J. Res. 46), 194 (1983 S.J. Res. 16).)
- Replace the term "part" with "section," and limit the Governor's partial-veto power to "complete sections" only. (R-App. 189 (1979 S.J. Res. 16).)

- "In rejecting a part of an appropriation bill, the governor may reject the part or parts only if such part or parts, as joined together by the legislature in the bill, would have been capable of separate enactment as a complete and workable bill." (R-App. 130–31 (1979 S.J. Res. 7); *see also* R-App. 277 (1999 A.J. Res. 119) (materially identical text).)
- "The governor may disapprove any item or items of an appropriation bill, but only if the remainder of the bill constitutes a complete, entire and workable law . . . ." (R-App. 254 (1991 A.J. Res. 130).)
- "In approving an appropriation bill in part, the governor may not approve any law that the legislature did not authorize as part of the enrolled bill." (R-App. 303 (2003 A.J. Res. 77).)
- "In approving an appropriation bill in part, the governor may not reject a part of a bill section of the enrolled bill without rejecting the entire bill section." (R-App. 307 (2005 A.J. Res. 68), 314 (2009 S.J. Res. 61), 318 (2011 A.J. Res 114), 320 (2011 S.J. Res. 60), 332–33 (2013 A.J. Res. 124).)
- The Governor "may not reject any individual word in a sentence of the enrolled bill unless the entire section is rejected." (R-App. 312 (2005 Enr. J. Res. 40).)

None of these proposed amendments make any sense if, as Petitioners say, Article V, § 10, already limits the Governor's power to an item veto.

These rejected proposals thus support the same logical inference that this Court drew in *Wagner*, just in reverse. Whereas in *Wagner* the Court found that the rejected amendment "would allow activity that was previously prohibited" and thus interpreted the unamended constitutional provision as prohibiting that activity,

263 Wis. 2d 709, ¶ 40, here every one of these rejected amendments would have *prohibited* activity that must have been previously *allowed*. Article V, § 10, therefore must be interpreted to allow what the amendments sought to ban: word-by-word vetoes like those at issue here.

2. The rejected amendments indicate legislative acquiescence.

Examined through a slightly different lens, these rejected amendments indicate that the Legislature has acquiesced in the decades of this Court's partial-veto doctrine and governors' partial vetoes.

This Court attaches "great weight . . . to long continued legislative practice and acquiescence as determinative of the proper interpretation of constitutional provisions." *Kleczka*, 82 Wis. 2d at 703. This principle is especially important where the constitutional question concerns the allocation of power between the legislative and executive branches. *Id.* "In issues relating to the relative power of coordinate branches of government, the view of the constitutional allocations of power adopted by the political branches of government will be given great weight by the court when called upon to make an authoritative judicial determination of the scope of authority." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 558, 126 N.W.2d 551 (1964); *see also State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 611, 37 N.W.2d 473 (1949) ("[T]he fact that [a] construction has been acquiesced in by the people and their representatives for sixty years must, in accordance with the established rules for the construction of constitutional provisions, be given great if not controlling weight."). The Court equates legislative acquiescence to "an agreement that the procedures utilized by the [executive] properly interpreted the constitutional provisions." *Kleczka*,

82 Wis. 2d at 703 (citing *Okanogan Indians v. United States*, 279 U.S. 655 (1929)).

The U.S. Supreme Court similarly explained that, although it is the duty of the judiciary "to say what the law is," "it is equally true that the longstanding 'practice of the government' can inform our determination of 'what the law is.'" *National Labor Relations Board v. Noel Canning*, 573 U.S. 513, 525 (2014) (citations omitted). Thus, in *Canning*, the Senate's failure to challenge the President's construction of language in the Recess Appointments Clause for 75 years constituted an endorsement of that construction. Importantly, the Court noted its "reluctan[ce] to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long." *Canning*, 573 U.S. at 516 (citations omitted).

If the Legislature believes that the Constitution assigns too much veto authority to the Governor, the remedy is to amend the Constitution. The Legislature clearly knows how to do this, as it did through the 1990 and 2008 amendments abolishing single-letter and combining-sentence vetoes. But it has never done so by fundamentally transforming the partial veto into an item veto. It has rejected every single such proposal; *none* went to the people for a vote.

Because the Constitution has not been amended,

> It is fantasy to continue to adhere to the notion that the governor's partial veto power is of "items" only. For 60 years this court has asserted and reasserted that art. V, sec. 10 of the Wisconsin Constitution is a veto power in respect to "parts" and not to "items." . . . If the legislature and people wish the governor to have only the power to veto items in an appropriation bill, a constitutional amendment may be desirable. It should, however, be understood that

> this court has no power to toy with the constitutional grant of a partial veto to the governor and to replace it with a veto power that may be more sensible and palatable.

Thompson, 144 Wis. 2d at 464–65.

Indeed, a constitutional amendment in 1990 is precisely how the Legislature responded to *Thompson*. The same thing is required here, especially since the Legislature's acquiescence counsels against "upset[ing] [a] traditional practice where doing so would seriously shrink the authority that [governors] have believed existed and have exercised for so long." *Canning*, 573 U.S. at 549.

D. Plaintiffs' arguments for reinterpreting Article V, § 10(1)(b), as an item veto fail.

Petitioners present a grab-bag of reasons to reinterpret the word "part" to mean "item," none of which can overcome the textual evidence addressed above. First, they cite the separation of powers, but their disagreement lies with the constitutional text's allocation of power. Second, they cite other provisions or words in our Constitution, none of which support transforming the partial veto into an item veto. And third, they cite extrinsic evidence contemporaneous with the original 1930 amendment mentioning "item" vetoes and logrolling, but this kind of equivocal evidence cannot trump the Constitution's plain text.

1. Because the Wisconsin Constitution itself allocates the partial veto power to the Governor, no separation of powers issues arise.

Petitioners' core argument for an item veto is not a textual one, but rather that Wisconsin's traditional application of Article V, § 10, "put[s] the balance of our

state's separation of powers . . . out of whack" by "turn[ing] the governor into a one-person legislature." (Pet'rs' Br. 1, 10.) Vague appeals to the separation of powers do not justify altering the Constitution's long-accepted meaning. "The appropriate balance between the executive and the legislature with respect to the veto power is not . . . to be struck by reference to an abstract principle set forth by Montesquieu, but by reference to the language of the Wisconsin Constitution." *Kleczka*, 82 Wis. 2d at 709 n.3.

Our Constitution envisions a cooperative appropriations process that allows both the Legislature and the Governor to advance their policy goals. The Governor gets the first shot at creating a budget that incorporates his policy aims. *See* Wis. Stat. §§ 16.43–.50. When the Legislature passes its own budget bill, it responds by exercising its own constitutional authority to further or alter the Governor's policy choices. And when the Governor reacts by approving the bill "in whole or in part," he also exercises his constitutional authority to advance policy goals with which the Legislature may or may not agree. If it does not, the Legislature may exercise its constitutional veto override power. The partial veto is thus "part of the constitution's carefully balanced separation of powers between the executive and the legislative branches." *Risser*, 207 Wis. 2d at 183.

Petitioners respond that *Henry* and its progeny conflict with Article IV, § 1, of the Constitution: "The legislative power shall be vested in a senate and assembly." (Pet'rs' Br. 26–27.) In their view, this provision forbids any policy role for the Governor in enacting appropriation bills.

But even before the partial veto, the original presentment clause in Article V, § 10, gave the Governor authority to approve or reject entire bills and thereby shape Wisconsin's public policy. President Eisenhower recognized

"this principle of shared powers . . . when he stated in 1959, 'I am part of the legislative process.'" *Kleczka*, 82 Wis. 2d at 709 n.3. In a two-fold recognition that the Governor should have a greater role in the budget process and that omnibus appropriation bills pose a danger that the original presentment clause could not remedy, Article V, § 10, extended the pre-existing principle of gubernatorial participation in the legislative process by allowing a partial—rather than a complete—veto of appropriation bills. Because Article V, § 10, bakes this allocation of power into our constitution, abstract separation of powers principles provide no interpretive help here.

And even if they did, this blending of appropriations power is consistent with this Court's recognition that "[t]he constitution does not . . . hermetically seal the branches from each other." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 46, 382 Wis. 2d 496, 914 N.W.2d 21. Our Constitution's veto provision is perhaps the paradigmatic example of an express constitutional sharing of power between branches. And it rests on a sound theoretical basis, as it checks the "tendency, in republican forms of government, to the aggrandizement of the legislative branch at the expense of the other branches." *Kleczka*, 82 Wis. 2d at 709 n.3 (citing The Federalist No. 48, at 333 (J. Madison)); *see also* The Federalist No. 73 at 442 (A. Hamilton) (Clinton Rossiter ed., 1961) (noting "[t]he propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments"). "From these clear and indubitable principles, results the propriety of a negative, either absolute or qualified, in the executive upon the acts of the legislative branch." The Federalist No. 73 at 442.

Petitioners' contrary theory that Article IV, § 1, precludes the partial veto proves too much. Even their proposed narrower "item" veto "infringes on the legislative

power," (Pet'rs' Br. 27), as does the presentment clause—yet the Constitution clearly permits them both. Under an "item" veto, the Governor still shapes the state's public policy by picking which items should and should not become part of the budget bill, which again is ultimately a legislative-type decision rather than an executive one. Petitioners try to head off this conceptual problem by drawing an elusive distinction between the "mere approval of laws drafted by the legislature" (supposedly proper) and "gubernatorial lawmaking" (supposedly not proper). (Pet'rs' Br. 27.) But, as Justice Bablitch recognized, "every veto has both a negative and affirmative effect, and some vetoes will inevitably bring about a change in policy." *Thompson*, 144 Wis. 2d at 474 (Bablitch, J., dissenting and concurring in part).[7] *Any* veto power invariably draws the governor into the lawmaking process, and so the text of Article IV, § 1, provides no support for drawing the line where Petitioners do.

That line is instead found in Article V, § 10's plain text, which confirms that the provision grants a "part" veto rather than an "item" one. The implications of that choice are clear: The Governor can act in a "quasi-legislative" capacity when using his partial-veto pen on an appropriation bill. *Henry*, 218 Wis. at 315. "[T]he governor's partial veto authority as mandated by the constitution . . . impel[s] this

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[7] Even Justice Bablitch, on whose partial dissent Petitioners rely heavily, rejected their separation of powers argument. (Pet'rs' Br. 13, 25, 39–40.) While he opposed the Governor's veto of individual letters, he explained that "[a]llowing the governor to veto individual words and digits, while requiring that what remains be germane to the section vetoed, provides the governor with ample discretion to exercise his constitutional prerogatives consistent with the separation of powers doctrine." 144 Wis. 2d at 471–74.

court's rejection of any separation of powers-type argument that the governor cannot affirmatively legislate by the use of the partial veto power." *Thompson*, 144 Wis. 2d at 453. "The governor . . . does have a constitutionally recognized role in legislation" because Article V, § 10, by its very nature, "fully anticipate[s] that the governor's action may alter the policy as written in the bill sent to the governor by the legislature." *Sundby*, 71 Wis. 2d at 134.

Petitioners' strawman that this power "turns the governor into a one-person legislature" (Pet'rs' Br. 1) also does not survive scrutiny, as the Legislature can shield its prerogatives in three ways.

First, "the very section of the Constitution which gives to the Governor the authority to change policy by the exercise of a partial veto also gives the final disposition and resolution of policy matters to the Legislature" through a two-thirds override vote in both houses. *Kleczka*, 82 Wis. 2d at 709; *see* Wis. Const. art. V, § 10(2)(b). Notably, the Legislature has not tried to override any of the four vetoes at issue here.

Second, if the Legislature wants to avoid subjecting its policy measures to the Governor's veto pen "the solution is obvious and simple: Keep the legislature's internally generated initiatives out of the budget bill." *Thompson*, 144 Wis. 2d at 464.

Third, the Legislature could send a constitutional amendment that narrows the Governor's partial-veto power to the voters for passage—but it has declined each of its ten opportunities to do so. *See supra* at Argument II.C.1. Indeed, the Legislature is currently considering yet another amendment to Article V, § 10, but even this one would not prohibit the challenged vetoes. *See* (R-App. 343–44 (2019 A.J. Res. 108 (amendment would provide that partial vetoes

"may not increase state expenditures")).) The Legislature's acquiescence is difficult to square with Petitioners' caricature of a Governor running roughshod over the separation of powers.

Petitioners' quarrel is not with this Court's caselaw, but rather our Constitution. If Petitioners believe the current balance of power is unwise, they should seek a constitutional amendment.

2. Petitioners' appeal to other constitutional text is unhelpful.

Trying to find textual support for their position, Petitioners grasp for Article VIII, §§ 2 and 8, arguing that "[p]ermitting the governor to cause the expenditure of funds without [the Legislature's] approval" conflicts with those provisions. But neither one has any textual relation to the partial veto. (Pet'rs' Br. 28, 38).

Section 2 provides that "[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law." Article V, § 10, states that *after* a partial veto, "the part approved shall become law." In other words, a "law" is precisely what remains after a partial veto. So, section 2 sheds no light on the proper scope of the veto power.

And Section 8 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." That clearly is a limit on the legislature's ability to send a qualifying bill to the governor for his signature or partial veto. Whether and how the governor exercises his partial veto power after receiving such a bill from the legislature is none of Section 8's concern.

Petitioners also cite the words "approve" and "veto" used in Article V, § 10. (Pet'rs' Br. 25–26.) But even Justice Bablitch, whom Petitioners cite for support, did not agree with their argument. He believed that the words "approve" and "veto" simply meant that the Governor could not create new words by deleting individual letters. *See Thompson*, 144 Wis. 2d at 466 (Bablitch J., concurring in part, dissenting in part). Even he "would continue to allow the governor the power to veto individual words in an appropriation bill." *Id.* at 473. Simply put, by allowing the Governor to "approve . . . in part," the Constitution necessarily allows him to *disapprove* in part, which is exactly what word-by-word vetoes accomplish.

3. Nearly century-old extrinsic evidence cannot trump the Constitution's plain meaning.

Petitioners then depart entirely from the constitutional text and cite extrinsic evidence—newspaper articles and legislator statements roughly contemporaneous with the original 1930 amendment. (Pet'rs' Br. 29.) They theorize that the amendment must have created an "item" veto because some of these sources described it as such or discussed the ill of legislative logrolling.

First, this ignores the text of the official ballot question the ratifying voters actually voted on: "Shall the constitutional amendment . . . be ratified so as to authorize the Governor to approve appropriation bills in part and to veto them in part?" (R-App. 335 (Barron County News-Shield, *Official Referendum Ballot* (Oct. 30, 1930).) Accompanying explanatory material stated that "if this amendment is ratified the Governor will be authorized to approve appropriation bills in part and to veto them in part." (R-App. 338 (The Capital Times, *Joint Resolution* (Sept. 26,

1930).) Nothing in this language suggested to voters that they were ratifying an "item" veto. Surely the language the voters actually considered and approved is more revealing of the provision's original public meaning than some newspaper articles and legislator statements they may or may not have known about.

This extrinsic evidence thus cannot trump the Constitution's actual text. "The authoritative, and usually final, indicator of the meaning of a provision is the text—the actual words used." *Coulee Catholic Sch. v. LIRC*, 2009 WI 88, ¶ 57, 320 Wis. 2d 275; *see also Coyne v. Walker*, 2016 WI 38, ¶ 249 n.2, 368 Wis. 2d 444, 879 N.W.2d 520 (Ziegler, J., dissenting) (criticizing reliance on extrinsic evidence when interpreting constitutional provisions). "[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. 'It is the law that governs, not the intent of the lawgiver.'" *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 52, 271 Wis. 2d 633, 681 N.W.2d 110 (citing Antonin Scalia, A Matter of Interpretation, at 17 (Princeton University Press, 1997)). Indeed, "the words rather than the intent survived the procedures of article [XII]." *Id.* ¶ 52 n.9 (citation omitted).

It may be true that some supporters of the 1930 amendment would have preferred to create an item veto akin to that contained in other states' constitutions. Indeed, that is how the rejected 1925 partial-veto amendment phrased the power it would have created. (R-App. 101–02 (1925 S.J. Res. 23).) But one thing is clear: the 1930 amendment ultimately ratified by the people used only the term "part." The people's deliberate textual choice must be given effect.

The same reasons undercut Petitioners' citation of statements suggesting that the partial veto was intended to combat logrolling, whereby the Legislature would combine unrelated initiatives joined in omnibus budget bills. (Pet'rs' Br. 25–26, 29.) *See*, *e.g.*, *Martin*, 233 Wis. at 447. Again, this citation to extrinsic evidence cannot trump the actual words the people ratified.

In any event, considering anti-logrolling provides equivocal interpretive help, at best. Both the traditional partial veto and the item veto work just as well at disaggregating omnibus legislation. Since the Governor can veto parts, he can also veto entire items and thus prevent the Legislature from forcing him to vote up or down on an entire budget bill. Moreover, the traditional partial veto provides an extra incentive against logrolling, in that the Legislature is motivated to keep unrelated initiatives out of the omnibus budget bill to avoid the Governor's partial-veto pen.

And even if purpose could shed light on the provision's meaning, other ones served by the partial veto aside from anti-logrolling favor this Court's traditional interpretation. The partial veto also was meant "to make it easier for the governor to exercise what this court has recognized to be his 'quasi-legislative' role, and to be a pivotal part of the 'omnibus' budget bill process." *Thompson*, 144 Wis. 2d at 446. Recall that the partial veto was enacted contemporaneously with the statutes giving the Governor the first shot at setting the state's budget policy, which indicates that the partial veto is another "tool [the Governor] has for controlling his own executive budget bill." *Id.* at 455. The traditional partial veto serves this purpose well.

* * *

At bottom, Petitioners seek to accomplish by judicial fiat what no Legislature has chosen to pursue at the ballot box: transform Article V, § 10, into an item veto. That result would do violence to the constitutional text by rewriting its plain language and effectively deleting the 1990 and 2008 amendments. Petitioners can obtain such a sweeping constitutional transformation only by taking their case to the people.

III. Petitioners provide no textual basis for overruling *Kleczka* and conjuring a new severability requirement to replace it.

Petitioners alternatively argue that, if the Court declines to rewrite Article V, § 10 into an "item" veto, it should still overrule *Kleczka* and engraft a new severability test onto the provision. (Pet'rs' Br. 36.) But their quarrel again is with the constitutional text, not *Kleczka*. The case gave the Governor no authority the Constitution did not already provide.

Indeed, Petitioners provide no independent textual argument for why this Court could overrule *Kleczka* even after affirming *Henry* and the validity of word-by-word vetoes. And rather than explain where a "traditional severability doctrine" (Pet'rs' Br. 41) could possibly be hiding in the plain text of Article V, § 10, Petitioners reiterate their policy disagreements with consequences of that plain text. First, they again quibble with the authority that the Constitution itself gives to the Governor. Second, they highlight the subsequent amendments that undercut their own position. And third, they offer an unworkable, atextual severability test that they wish the Constitution provided.

None of these arguments can support the drastic revision of the partial-veto power that Petitioners request.

A. *Kleczka* correctly applied the plain constitutional text.

Petitioners act as if *Kleczka* represented a revolution in partial-veto doctrine. It did not. The only arguably novel aspect of *Kleczka* was its recognition of what the constitutional text and *Henry* already indicated: So-called "provisos and conditions" also are "parts" of appropriation bills subject to veto. *Kleczka*, 82 Wis. 2d at 704–08.

The sole possible support for forbidding such vetoes rests on terse dicta from *Henry*. *Id.* at 712. Although the challenged veto there did not involve a proviso or condition, the Court noted that if it had, a single Mississippi case "would afford support for plaintiff's contention." *Henry*, 218 Wis. at 309–10 (citing *State ex rel. Teachers & Officers v. Holder*, 23 So. 643 (Miss. 1898)). Petitioners are brazenly wrong in asserting that this dictum was "controlling law for almost five decades." (Pet'rs' Br. 36.) Only one other case mentioned it in passing, and the issue was not presented there either. *See Sundby*, 71 Wis. 2d at 135.

Not until *Kleczka* did the Court need to answer the question. The Court rightly concluded 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. That observation was indisputably correct, as a matter of plain constitutional text. As for the Mississippi case, it was easily distinguishable because that state's constitution "specifically provides that the legislature has the power to set conditions under which appropriated money is to be paid," a provision "which has no counterpart in the Wisconsin Constitution." *Id.*

B. *Kleczka* accounted for separation of powers principles.

Rather than explain how the constitutional text could support overruling *Kleczka* even if *Henry* survives, Petitioners repeat their complaint that the partial-veto provision gives too much authority to the Governor. (Pet'rs' Br. 37–39.) But Justice Heffernan squarely addressed these separation of powers concerns, thoroughly explaining why the partial veto conforms to separation of powers principles. *Kleczka*, 82 Wis. 2d at 709 n.3. In short, because the Constitution itself assigns the partial-veto authority to the Governor, no separation of powers issues arise. *See supra* Argument II.D.1.

Petitioners again reason backward from their policy preferences, arguing that the constitutional text cannot possibly mean what it says because it allows the Governor to effect policy changes in appropriation bills. But *Kleczka* did not invent this gubernatorial authority, the Constitution did. If Petitioners dislike this allocation of power, the only remedy is to adjust it through a constitutional amendment.

C. Subsequent amendments again undercut Petitioners' position.

Petitioners next point to the 1990 and 2008 amendments but draw precisely the wrong conclusion from them. (Pet'rs' Br. 39.) Most obviously, neither one touched *Kleczka*'s holding and thus effectively ratified it. Even if the veto practices those amendments banned were "by-products" of *Kleczka*—and they were not, as they flowed naturally from the constitutional text—the amendments left in place *Kleczka*'s rule that the Governor may veto "provisos and conditions." And while one amendment the Legislature considered after *Kleczka* would have abrogated this rule, it failed to pass even one house. (R-App. 303 (2003 A.J. Res.

77).) This Court should not step in to solve an alleged problem the Legislature has ignored.

Moreover, the 1990 and 2008 amendments again demonstrate why specific restrictions must be expressly stated in the constitutional text. Since stopping individual-letter and combined-sentence vetoes required constitutional amendments, it makes little sense how the new restrictions Petitioners propose in place of *Kleczka* could be unearthed in the existing text.

D. Petitioners propose an atextual and unworkable severability test.

In place of the plain constitutional text, Petitioners propose a new severability test that would ask, "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?" (Pet'rs' Br. 41–42 (alterations in original).) Nowhere do Petitioners point to one iota of textual support for importing this test, derived from the statutory severability doctrine, into Article V, § 10. That doctrine simply makes no sense in the partial-veto context, as statutory severability is rooted in the judiciary's obligation "not to nullify more of a legislature's work than is necessary" after finding some of it unconstitutional. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). Here, however, the Governor is exercising his constitutional authority to define what becomes law, and so the Legislature's intent is only part of the equation in determining the proper outcome of the budget process.

Leaving aside how no text supports Petitioners' proposal—reason enough to reject it—their severability test would undermine the budget process by fomenting disruptive inter-branch litigation every biennium. Rather than the current clear inquiry into whether a partial veto

leaves in place a complete and workable law, Petitioners offer a malleable, subjective examination of whether "a partial veto so transforms a provision that it becomes something the Legislature had not intended." (Pet'rs' Br. 42.) How could a court possibly discern with any reliability whether the Legislature would have preferred a provision's post-veto form or nothing at all? It would be nearly impossible for either the Governor or the Legislature to predict with any certainty which parts of an appropriation bill are subject to veto under that test, creating perpetual uncertainty over the budget's final form due to cyclical judicial intervention every 24 months.

Recall Governor Walker's 309 partial vetoes over four budgets. Even if Petitioners' proposed test rendered only half subject to reasonable dispute and only half of those were challenged, that would have placed up to 75 partial-veto cases on the judiciary's docket. Significant portions of the state's budget would have been tied up in litigation for months, if not years. That would draw the judiciary—and ultimately this Court—into repeated sharp political disputes over the state's budget, thus delaying critical infrastructure projects and creating significant regulatory uncertainty.

Petitioners' atextual severability test thus could throw the state's budget process into chaos. The whole purpose of the amendment process—passage by two consecutive Legislatures and ratification by the people—is to carefully weigh such risks against any possible benefits before taking the drastic step of changing our Constitution. This case seeks to short-circuit that deliberative process, with little eye toward what may follow.

IV. Stare decisis overwhelmingly disfavors overruling the entire body of this Court's partial-veto doctrine.

Setting aside how the Constitution's plain text creates a partial veto rather than an "item" one, stare decisis disfavors overturning every single partial-veto case this Court has ever decided.[8] Although Petitioners expressly ask this Court only to overrule *Henry* and *Kleczka*, the bedrock principles they attack in both cases underlie each of this Court's partial-veto decisions. In truth, Petitioners ask this Court to discard almost a hundred years of precedent and build a new partial-veto doctrine from scratch.

Avoiding the unintended consequences of constitutional transformations like the one Petitioners request is precisely why stare decisis deserves respect here. This Court follows the doctrine "scrupulously" because "[w]hen existing law is open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results." *State v. Luedtke*, 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 863 N.W.2d 592 (citations omitted). It provides legal certainty so parties—including public officials—can plan their conduct accordingly. *Wilcox v. Wilcox*, 26 Wis. 2d 617, 623, 133 N.W.2d 408 (1965). And it "contributes to the actual and perceived integrity of the judicial process." *Luedtke*, 2015 WI 42, ¶ 40. "[E]ven in constitutional cases, a departure from precedent

[8] Petitioners say that *Klauser* would not need to be overruled (Pet'rs' Br. 30 n.4), but it unclear why their proposed tests would allow vetoes that replace a numerical amount with a smaller figure.

'demands special justification.'" *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019).[9]

Precedent should be discarded only in narrow circumstances: if (1) subsequent changes in the law have undermined its rationale; (2) it must be harmonized with new facts; (3) it "has become detrimental to coherence and consistency in the law"; (4) it is "unsound in principle"; or (5) it is "unworkable in practice." *Luedtke*, 362 Wis. 2d 1, ¶ 40. This Court also considers "whether reliance interests are implicated" and "whether [the decision] has produced a settled body of law." *Johnson Controls, Inc. v. Empls. Ins. of Wausau*, 2003 WI 108, ¶ 99, 264 Wis. 2d 60, 665 N.W.2d 257.

The sweeping constitutional transformation that Petitioners request places an especially heavy burden on them to show that these factors support discarding stare decisis. They come nowhere near carrying that burden.

First, Petitioners do not even address *Luedtke*'s first two factors, implicitly conceding that they both support applying stare decisis. No subsequent legal changes have undermined either *Henry* or *Kleczka*'s rationale, and no new facts are relevant.

Second, *Henry* and its progeny clearly represent a settled body of law, which Petitioners also do not dispute.

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[9] Petitioners cite *Koschkee* for the proposition that stare decisis holds little weight in constitutional cases (Pet'rs' Br. 34), but that case only overruled a single decision from three years earlier that had "no common legal rationale" for its mandate, *Coyne v. Walker*, 368 Wis. 2d 444, 879 N.W.2d 520 (2016). The near century of consistent partial-veto decisions that Petitioners attack are in a different precedential universe than *Coyne*. *See Gamble*, 139 S. Ct. at 1969 ("[T]he strength of the case for adhering to [past] decisions grows in proportion to their 'antiquity.'") (citation omitted).

Each one of this Court's partial-veto cases rests on the same rejection of an item veto that Petitioners request here. Although Petitioners half-heartedly say *Kleczka* is unsettled (Pet'rs' Br. 44), they concede that this Court has since relied on the decision rather than questioning it.

And on top of the unanimous caselaw, the 1990 and 2008 constitutional amendments also are part of the corpus of settled law that must be uprooted if Petitioners win. Again, both amendments presuppose that Article V, § 10(1)(b), empowers the Governor to veto any "part" of an appropriation bill, no matter how small. Reinterpreting that subsection to only allow item vetoes would upend these constitutional amendments.

Third, reversing every partial-veto case would implicate significant reliance interests. Contrary to Petitioners' off-hand disagreement (Pet'rs' Br. 35), both the Governor and the Legislature draft budgets relying on the Constitution's language and the 85-year-old body of partial-veto law that has grown up around it. The institutional give-and-take in the appropriations process is premised on the partial-veto power in its current form—the Governor and Legislature both have crafted budgets for decades in light of the background assumption that individual words are subject to veto. As a result, no Governor has vetoed a budget in its entirety. And more to the point, Governor Evers relied on this Court's partial-veto doctrine when evaluating the 2019–2021 biennial budget—it is altogether unclear what will remain of that budget if Petitioners succeed.

Fourth, the current partial-veto doctrine is workable in practice. The hundreds of partial vetoes exercised in the last 85 years demonstrate as much. *See The Partial Veto*, at 22–25. Despite this great volume, the Legislature has only come to this Court four times to complain, and, when it has, this Court has had no problem drawing a line between

valid and invalid vetoes. The fact that the Legislature must draft its budget in light of this partial-veto power is simply a truism—Petitioners identify no evidence that this task is somehow "unworkable." (Pet'rs' Br. 44.)

Specific to *Kleczka*, Petitioners add that it is "detrimental to coherence and consistency in the law." (Pet'rs' Br. 43 (citation omitted).) But rather than point to any inconsistent partial-veto decisions, they highlight far-afield cases involving internal legislative procedures, deference to administrative agencies, and judicial discipline. In none of those cases did the Constitution's plain text authorize the challenged action, as it does here. And Petitioners' complaint that *Kleczka* creates uncertainty about the content of finished budgets is ironic, given that their proposed replacement would create far more uncertainty. (Pet'rs' Br. 44.)

So, at bottom, Petitioners seek to avoid stare decisis almost entirely based on their position that this Court has simply gotten it "objectively wrong" for almost a century. (Pet'rs' Br. 34.) But those decisions are objectively correct, for all the reasons discussed above. "Part" means "part." That is clear based on the term's plain meaning in the original text of Article V, § 10. That is also clear when the term is read in concert with subsequent constitutional amendments, both those that succeeded and those that failed. Petitioners come nowhere near showing that this Court's decisions are so "objectively wrong" such that partial-veto doctrine must be rebuilt from scratch.

Every stare decisis factor therefore points in a single direction—adhering to this Court's unbroken line of partial-veto precedent. Those decisions are workable, coherent, and Governors and Legislatures of both parties have crafted budgets using them for almost a century. Indeed, stare decisis principles weigh so overwhelmingly in favor of

upholding *Henry* and *Kleczka* that a contrary decision here would undermine the stare decisis doctrine itself. Because this Court's 85 years of partial-veto doctrine have unquestionably become part of our constitutional order, they should not be thrown out just because Petitioners disagree with their policy implications.

CONCLUSION

This Court should declare that the four challenged partial vetoes are constitutional and deny Petitioners any relief.

Dated this 23rd day of January, 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

MAURA FJ WHELAN
Assistant Attorney General
State Bar #1027974

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6219 (Roth)
(608) 266-3859 (Whelan)
(608) 267-2223 (Fax)
rothct@doj.state.wi.us
whelanmf@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,973 words.

Dated this 23rd day of January, 2020.

COLIN T. ROTH
Assistant Attorney General

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 23rd day of January, 2020.

COLIN T. ROTH
Assistant Attorney General

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COLIN T. ROTH
Assistant Attorney General

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COLIN T. ROTH
Assistant Attorney General