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OF WISCONSIN

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' REPLY BRIEF

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INTRODUCTION

Nowhere in their brief do the Respondents dispute that, as a textual matter, Article IV, § 1 of the Wisconsin Constitution vests "[t]he legislative power" in the "senate and assembly" alone, not the governor. Nor do the Respondents dispute that the Article V, § 10 partial veto as currently interpreted permits the governor to go beyond what can reasonably be described as signature or veto (approval or disapproval) and to actually make laws—to exercise the legislative power. They do not explain how the constitutional text or its history supports such an extraordinary departure from well-accepted notions of the separation of powers. The Respondents do not offer a shred of evidence or a single logical reason to believe that the people of Wisconsin ever intended to authorize the Governor to make laws through a bizarre acrostical game in which laws are picked apart and reassembled limited only by the happenstance of which words are available and how clever the Governor and his staff may be in their attempts to create an entirely new and different law. Unsurprisingly, then, the Respondents entirely fail to explain why the current interpretation of Article V should not be reversed given its irreconcilable conflict with Article IV. That simple fact alone should decide this case.

Even when considering the text of the partial veto provision in isolation, the Respondents have not demonstrated that their interpretation is the correct one. They continuously assume one

definition of the word "part" (any fragment of the whole no matter how small and without regard to the context in which it was used) without explaining why that definition, and not another, more reasonable one (the natural subdivisions of the whole), controls. And they barely address the argument that permitting the governor to "approve" a bill in part, as that word is commonly understood, is no license for him to approve the use of random words and then string them together to create something that was never submitted to him for approval in the first place.

Likewise, Respondents dismiss out of hand as "[n]early century-old extrinsic evidence" the abundant historical material the Petitioners provided showing the purpose and public understanding of the partial veto when it was enacted. They do this despite this Court's explicit direction that it relies on precisely this type of historical evidence in interpreting amendments. *See, e.g.*, *Appling v. Walker*, 2014 WI 96, ¶¶7, 27-37, 358 Wis. 2d 132, 853 N.W.2d 888.

Because they cannot win on text, context, structure, or history, the Respondents instead spend much of their brief attempting to convince this Court that the law is "settled"—nothing to see here—despite a virtually continuous chain of original actions (nine), attempted constitutional amendments (almost a dozen), and even successful constitutional amendments (two—no easy task) since the partial veto's enactment. This

endless stream of controversy has arisen because something is rotten in our constitutional order.

Even if the Respondents were right about the law being "settled" (they are not) that does not carry them very far. That the two political branches have adapted to and grown comfortable with a state of affairs under which the governor may unilaterally transform laws—changing a school bus replacement program, say, into one that funds electric vehicle charging stations—is no excuse if the state constitution does not permit it. And, as the Petitioners have established, it does not.

The policy of *stare decisis* plays an important role in our constitutional system. But the time sometimes arrives when this Court must exercise its authority to say "enough." Those conditions are present here in spades.

ARGUMENT

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

The Petitioners argued in their initial brief that *State ex rel. Wisconsin Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935) should be overruled because the text, context, structure, and history of the partial veto provision all demonstrate that the governor is only permitted to approve or disapprove of legislative proposals within an appropriations bill capable of separate enactment.

In response, the Respondents make three sets of arguments: (1) that the text of the partial veto provision is best read to permit the veto of any fragment of a bill; (2) that the Petitioners' reading would nullify the two subsequently-adopted constitutional amendments; and (3) that 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." Resp. Br. 18. The arguments are without merit.

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

The Respondents' entire textual argument rests on a false dichotomy: that the only options available to this Court in interpreting the partial veto provision are to adopt a true item veto or to conclude that the word "part" means "any fragment, no matter how small." But the Respondents get both halves of the dichotomy wrong.

First, as the Respondents ultimately concede in a footnote, the "Petitioners never expressly request an 'item' veto." Resp. Br. 13 n.5. This is so because, as the Petitioners made clear, the word "item" could be read (but need not be) as a term of art referring *solely* to individual appropriations within an appropriations bill (as opposed to all discrete provisions in the bill, including non-appropriation provisions). *See, e.g.*, *Bengzon v. Sec'y of Justice of*

Philippine Islands, 299 U.S. 410, 414-15 (1937) (concluding, at a time roughly contemporaneous with Wisconsin's adoption of the partial veto, that "[a]n 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"). That distinction provides a ready explanation for the Wisconsin Constitution's use of the word "part," which is potentially of "wider application than the words 'item or items." *Id.* at 415. The word "part" permits the veto of non-appropriation provisions in appropriation bills, such as the institution of a tax; but it need not—and indeed cannot—be read to allow the veto of *any* fragment of a bill, be it clauses, words, or letters, especially where the bill as amended by the veto creates a new law never considered or approved by the legislature. The Governor is asked to act upon what the legislature had enacted and presented. In that context, "part" cannot mean whatever piece the Governor can break off. And approval does not mean transformation.

Second, and as just noted, the broad meaning of the word "part" the Respondents would ascribe to the partial veto provision is one of only several possible definitions cited by the *Henry* Court. The Respondents are repeatedly begging the question when they assume without justification that "part" means "any fragment" instead of "the natural subdivisions of the whole." The phrase "computer 'parts'" could mean a shard of glass or a bit of wire, but

it could also mean the parts into which computers are understood to be naturally divided: the keyboard, mouse, processing unit and monitor. In the same way, permitting the governor to veto an appropriations bill "in part" could theoretically permit the excision of a single letter, or it might more naturally be read to refer to separate approval or disapproval of each discrete proposal included in the single bill composed of those proposals.[1]

Thus, it is impossible to determine from the use of the word "part" alone the meaning of the partial veto provision. Reference to context and constitutional structure is necessary. *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (explaining that "[t]he text must be construed as a whole"). As the Petitioners demonstrated in their initial brief, those sources render impossible the Respondents' position.

Most notably, the Respondents have no real answer to the underlying separation of powers problem. They assert that "Article V, § 10, bakes this allocation of power into our constitution." But this is just a conclusory statement. In theory,

[1] The Respondents cite this Court's decision in *Citizens Util. Bd. v. Klauser* for the proposition that as of 1930 "no other state constitution utilized the word 'part' instead of 'item.'" 194 Wis. 2d 484, 492, 534 N.W.2d 608 (1995). This statement is erroneous. *See, e.g.*, *State v. Holder*, 76 Miss. 158, 23 So. 643, 644 (1898).

the drafters of the partial veto *could have* baked such an allocation of power into the constitution. They could have rejected the traditional tripartite division of governmental powers and in particular the assignment of the legislative power to the legislative branch alone. They might have decided that the Governor ought to be able to make new laws by something approximating a game of Mad-Libs. But we would normally expect a clear indication of such an extraordinary intent. We would have expected them to amend the original, exclusive vesting of the legislative power in the legislature, since that exclusivity cannot be reconciled with granting the Governor authority to make entirely new laws. The Governor of Wisconsin simply may not exercise a power committed *exclusively* to the legislature without violating the Constitution.

B. The 1990 and 2008 Amendments to the Partial Veto Provision Are No Bar to Proper Interpretation of the Partial Veto

The Respondents place great emphasis on the 1990 and 2008 amendments to the partial veto provision, which made unconstitutional the Vanna White and Frankenstein vetoes, respectively. This is an unusual argument given that the amendments make clear that the people of Wisconsin have definitively rejected expansive readings of the partial veto provision on the two occasions when they were asked.

The Respondents attempt to spin straw into gold, however, by arguing that those amendments clarify that the meaning of the

word "part" is "any fragment" and that a contrary reading would render the amendments superfluous.

What the Respondents gloss over, however, is that the amendments responded to interpretations of the partial veto *adopted by this Court*. Put differently, the amendments do indeed recognize that the word "part" means "any fragment," but only because this Court has ruled as much and has issued rulings supporting what the people of Wisconsin recognize as abuses of the partial veto. The amendments prove precisely nothing about the *original meaning* of the partial veto provision. Each was an immediate and negative response to the latest way in which the supposed power to break and reassemble laws had been exercised.

Consequently, it is not at all surprising that, were this Court to overrule the decisions that spawned these amendments, the need for the amendments would disappear and the provisions would become superfluous. There is nothing strange about that—Court decisions sometimes have that effect. *See, e.g.*, Wis. Const. art. XIII, § 13 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.").

The Respondents' reference to the canon against surplusage —that "[i]f possible, every word and every provision is to be given effect," Scalia, *supra*, at 174—is thus misplaced. That canon is a guide to what legal drafters meant *at the time they adopted a particular text*, *see id.* at 174-79, not to whether a provision retains

meaning in light of subsequent developments. There is no dispute that at the time they were adopted, the 1990 and 2008 amendments were premised on this Court's understanding of the meaning of the word "part." So the canon against surplusage no more prevents this Court from overruling *Henry* than it would prevent the Court from ruling a particular statute unconstitutional.

C. Failed Amendments Provide Little Support for the Respondents' Interpretation of the Partial Veto

Perhaps aware that the 1990 and 2008 amendments not only do not confirm their interpretation of the partial veto but in fact cut against it, the Respondents turn for support to proposed constitutional amendments that were never even enacted. Their argument comes in two parts.

First, the Respondents argue that the multiple proposed amendments aimed at limiting the governor's partial veto power would not "make any sense" if the Petitioners' understanding of the partial veto were correct. Resp. Br. 20. The response is almost too obvious to state: the proposed amendments, which were considered from 1977 to 2014, reacted not to the text of the partial veto power in isolation, but instead to this Court's repeated, broad interpretations of that text going back to 1935. The proposed amendments must be considered against the backdrop of the partial veto *as interpreted by this Court*; thus viewed, they are best

read not as attempts to *change* the original meaning of the partial veto but to *restore* the original meaning.[2]

Finally, the Respondents flee to every lawyer's last refuge: deference. Repeated failures to fix the Constitution, the argument goes, shows that the legislature has "acquiesced" in this Court's broad interpretation of the partial veto, and this Court should credit the legislature's supposed position that this Court correctly interpreted the partial veto provision. This argument should be given no weight for a number of reasons.

For one thing, as even the Respondents seem to acknowledge, the historical practice of the legislature and executive are at best a guide to this Court in the fulfillment of its responsibility to "say what the law is"; it does not supplant that responsibility. Resp. Br. 22 (quoting *National Labor Relations Board v. Noel Canning*, 573 U.S. 513, 525 (2014)); *see also Noel Canning*, 573 U.S. at 572 (Scalia, J., concurring in the judgment, joined by Roberts, C.J., and Thomas and Alito, JJ.) (observing that in *INS v. Chadha*, 462 U.S. 919 (1983) the Court "did not hesitate to hold the legislative veto unconstitutional even though Congress had enacted, and the President had signed, nearly 300 similar

[2] Regardless, *Wagner* (relied on by the Respondents) is plainly inapposite. Unlike the failed amendments the Respondents cite, the proposed amendment in *Wagner* was submitted to the people for a vote. *Wagner v. Milwaukee Cty. Election Comm'n*, 2003 WI 103, ¶40, 263 Wis. 2d 709, 666 N.W.2d 816.

provisions over the course of 50 years" and said that "the other branches' enthusiasm for the legislative veto 'sharpened rather than blunted' [the Court's] review" (quoting *Chadha*, 462 at 944)).

Regardless, it is impossible to view the succession of failed constitutional amendments, successful constitutional amendments, and original actions in this Court as "legislative acquiescence." This history shows that the meaning of the partial veto provision has been hotly contested since its earliest days.

Even if the failed constitutional amendments are considered in isolation, it is difficult to read more from them than a failure to obtain consensus in that particular legislature at that particular time for reasons unknown to the parties and this Court. The Respondents treat amending the state constitution as though it is some simple undertaking. It is not. And it assumes the legislature has an interest in changing the status quo (which in this case means taking power away from a party, the governor, with whom the legislature must work).

Finally, none of the proposed amendments discussed by the Respondents were submitted to the people. Indeed, the history shows that when limitations to the partial veto *are* submitted to the people, they pass. So the legislature's putative comfort with the current state of affairs is little justification for this Court to shirk its duties to protect the liberty of the people by policing the exercise of power by the political branches.

When it comes to the separation of powers, the legislature cannot acquiesce in the usurpation of its own authority. As was recently observed, each branch must jealously guard its own prerogatives because they are conferred not for the benefit of the men and women who hold them but for the benefit of the people. *See Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶¶44-45, 382 Wis. 2d 496, 914 N.W.2d 21 (plurality opinion).

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

The Respondents' main objection to the Petitioners' alternate proposed severability test is that the test has "no textual basis." Resp. Br. 32. The Respondents are wrong. The test arises from the textual, structural, and historical considerations already discussed. Specifically, even if this Court declines to overrule *Henry*, it still must interpret the partial veto provision in a way that at least arguably preserves the separation of powers.

The right answer in this case is a ruling that the veto cannot result in a law that was not actually passed on by the legislature. But failing that, the severability test meets the separation of powers concern halfway because the final law remains consistent with legislative intent. We are able to say that although the legislature did not actually pass the final law, it would have. That

approach is far more congruent with the separation of powers than the current no-holds-barred approach.

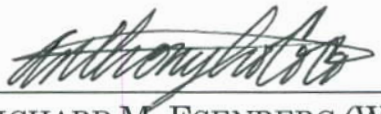
CONCLUSION

The parties in this case have discussed a host of interpretive tools ranging from text to structure to legislative history. But ultimately there is something to be said for common sense. The Respondents ask this Court to believe that the framers of a 1930 amendment intended to give the governor the power to veto a bill by removing the word "not" to produce the opposite effect. The framers of the amendment would no doubt have been shocked by the suggestion—the Respondents provide no evidence that any state at the time permitted a similar veto.

With all due respect to the political branches, the lawmaking process currently in effect in Wisconsin—legislators trying to immunize bills from creative partial vetoes, and governors searching for imaginative ways to completely transform bills—is not a serious one. It's an embarrassment, and the state constitution does not permit it. This Court should restore order.

Dated: February 4, 2020.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Petitioners



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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 2,997 words.

Dated: February 4, 2020

ANTHONY LOCOCO

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

I hereby certify that:

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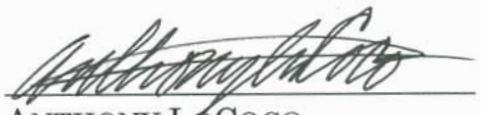

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