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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.

On Petition To The Supreme Court To Take
Jurisdiction Of An Original Action

NON-PARTY BRIEF OF THE LEGISLATURE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTRODUCTION

A "veto" is the authority to "negative" legislation that the legislative branch enacts, "prevent[ing]" it from taking effect. The Federalist Nos. 69, 73 (Alexander Hamilton). Yet, Governors of this State have regularly misused their claimed veto power to rewrite appropriation laws, striking out sentence fragments to create new provisions that the Legislature did not enact. To combat this gubernatorial lawmaking, the Legislature drafts legislation defensively, removing descriptive language that the Governor could turn into operative text, revising language that would contribute to the clarity of law, changing every "may not" to "cannot," and so on. But even these efforts cannot catch every editorial innovation that creative Governors think up, as the Governor's vetoes in this case well demonstrate. So Governors regularly rewrite duly enacted laws, putting into effect statutes that the Legislature never adopted.

The solution to this ongoing assault on the separation of powers lies within the second half of Article V, Section 10's text, text that this Court has not sufficiently analyzed. This Court has correctly interpreted the first aspect of that constitutional text to require that the "part [of the appropriation bill] approved" by the Governor must be a complete and workable law. But this Court has not given sufficient attention to the second relevant aspect, which describes the "rejected part." This Court should hold that the

"rejected part" must also satisfy this Court's test for the meaning of "part approved," thereby ensuring that the "part" of a law that the Governor vetoes must also be capable of being a complete and workable law. Requiring that both the part of the law that the Governor approves and the part of the law that he rejects be complete and workable laws would provide an administrable test that constrains the Governor's ability to create law that the Legislature never enacted.

STATEMENT OF INTEREST

The Constitution "vest[s]" the Legislature with the "legislative power," including the power to enact appropriation bills. Wis. Const. art. IV, § 1. Before an appropriation bill becomes law, the Legislature presents it to the Governor, who may approve it or reject it "in part," through the exercise of his partial-veto power. Wis. Const. art. V, § 10(1)(a)–(b). The Legislature or its members have participated in many of this Court's previous partial-veto cases. *See Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997); *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 534 N.W.2d 608 (1995); *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988); *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978).

ARGUMENT

I. This Court Should Reconcile Its Precedent With The Constitutional Text By Holding That "Part Approved" And "Rejected Part" Must Both Be Capable Of "Becom[ing] Law," Under The Longstanding Complete-And-Workable-Law Test

When precedent does "not even discuss" a critical aspect of the relevant text, *stare decisis* does not require the Court to persist in a prior, deficient interpretation. *State v. Denny*, 2017 WI 17, ¶¶ 67–70, 373 Wis. 2d 390, 891 N.W.2d 144. In the context of Article V, Section 10, this Court has correctly interpreted one portion of the text, reading "part approved becomes law" to mean "a complete, entire, and workable law." *Wisconsin Senate*, 144 Wis. 2d at 437. Yet, this Court has not given attention to another portion of the text, which explains when the "rejected part" "become[s] law." This has created a serious separation-of-powers problem, wherein the Governor can effectively enact law by vetoing sentence fragments. This Court should address this situation by giving "rejected part" the same meaning that this Court has given to "part approved," so that both the part of the law that the Governor approves and the part that he rejects must be complete and workable laws. This would provide an administrable test, drawn from this Court's precedent, while giving consistent meaning to *all* of the constitutional text.

A. Article V, Section 10 provides that "[a]ppropriation bills may be approved in whole or in part by the governor, *and the part approved shall become law*," Wis. Const. art. V,

§ 10(1)(b) (emphasis added); when the Governor *rejects* "part" of an appropriation bill, the "*rejected part* . . . shall be returned" to the Legislature, "and if approved by two-thirds of the members present the *rejected part shall become law*," *id.* § 10(2)(b) (emphasis added). Crucially, Article V, Section 10 repeats the same words and phrase when defining the two halves of a partial veto: the "part approved" and the "rejected part." Both are "part" of an appropriation bill, and both "shall become law" under certain circumstances. For the "part approved," it "shall become law" upon the Governor's approval, while the "rejected part shall become law" once the Governor returns it to the Legislature and two-thirds vote to override the partial veto. *Compare* Wis. Const. art. V, § 10(1)(b), *with id.* § 10(2)(b).

This Court's precedents have correctly held that "part approved" means that, after the Governor's partial veto, this "part" must be "a complete, entire, and workable law." *Wisconsin Senate*, 144 Wis. 2d at 437. This follows from the text because the "part approved" "become[s] law" upon the Governor's approval, so this "part" must be "a distinct and complete act of positive law." *Law*, Black's Law Dictionary (3d ed. 1933).

This Court's precedents have, however, "not even discuss[ed]," *Denny*, 2017 WI 17, ¶ 67, Article V, Section 10's provisions describing the "rejected part," including when it "become[s] law." Indeed, this Court's precedents generally ignore this text, as well as the functionally identical, pre-1990

"part objected to" text. *See Risser*, 207 Wis. 2d at 182–83; *Citizens Util. Bd.*, 194 Wis. 2d at 504–05; *Wis. Senate*, 144 Wis. 2d at 437–38; *Kleczka*, 82 Wis. 2d at 692–94, 699; *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 128–34, 237 N.W.2d 910 (1976); *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 289 N.W.2d 662, 664–65 (1940); *State ex rel. Wis. Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486, 491–93 (1935).

The solution is straightforward: interpret the second aspect of Article V, Section 10—the "rejected part"—to have the same meaning as the first aspect—the "part approved"—thereby creating a readily administrable test. The Constitution repeats the word "part" and the phrase "shall become law" when describing the "part approved" and the "rejected part" of an appropriation bill, and those terms should "carry the same meaning each time." *State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 30, 380 Wis. 2d 354, 909 N.W.2d 114. Under this parallel interpretation, the "rejected part"—like the "part approved"—must "be able to stand as a complete and workable bill" after the Governor exercises his partial-veto authority, just as with the "part approved." *Kleczka*, 82 Wis. 2d at 726 (Hansen, J., concurring in part, dissenting in part). After all, the "rejected part" will "become law" once two-thirds of the Legislature vote to override the Governor's partial veto. Wis. Const. art. V, § 10(2)(b). So, the "rejected part," like the "part approved," must be "a distinct and complete act of positive law." *Law*, Black's, *supra*.

This interpretation would make sense of *all* of the constitutional text, while properly undermining the ability of the Governor to create new law through misuse of the partial veto by eliminating sentence fragments and other such incomplete language. The Governor would no longer be able to "reject[ ]" language that is not, itself, a complete and workable law because the "rejected part" must *also* be able to "become law." Put another way, the constitutional text makes clear that both relevant portions of Article V, Section 10 must be capable of being *standalone* laws, and there is no textual basis for distinguishing between "rejected part" and the "part approved" in this respect.

C. The Governor's arguments for a contrary interpretation are unpersuasive.

First, the Governor focuses solely on the first aspect of Article V, Section 10—"part approved"—while ignoring the second aspect—"rejected part." Resp. Br. 10–15. This is the precise error that this Court has the chance to correct for the first time in decades. *Risser*, 207 Wis. 2d 176.

Second, applying the complete-and-workable-law test to both the "part approved" and the "rejected part" does not transform Article V, Section 10 into a line-item or section-based veto. Resp. Br. 10–15, 18–31. The Governor may still excise language within a coherent, self-contained line-item or section—however those terms are defined—thus approving that line-item or section in part, so long as the "part approved" and the "rejected part" are both complete and workable laws.

Third, the Governor argues that departing from this Court's partial-veto jurisprudence would result in a "hard to administer" test. Resp. Br. 13 n.5. But the complete-and-workable-law test is decades old, and there is no reason it would be harder to apply that well-established test to the "rejected part" than to the "part approved."

Fourth, the Governor argues that requiring the "rejected part" to be a complete and workable law renders "superfluous," Resp. Br. 16–18, two later-enacted amendments that prohibit the Governor from using his partial-veto authority to "create a new sentence by combining parts of 2 or more sentences" or to veto "individual letters" to "create a new word," Wis. Const. art. V, § 10(1)(c). But a Governor could probably find a way to "creative[ly]," *Kleczka*, 82 Wis. 2d at 720, combine two sentences in a manner that nevertheless satisfies the complete-and-workable-law test for both the "part approved" and the "rejected part," meaning that the first amendment retains independent meaning. And while removing an "individual letter" would never satisfy the complete-and-workable-law test for the "rejected part," this superfluity is unproblematic under *State v. Cox*, 2018 WI 67, 382 Wis. 2d 338, 913 N.W.2d 780, which held that adding "fortif[ying]" language to "end[ ]" an "obvious" mistreatment of a clear text—perhaps out of legislative "exasperation"—does not violate the canon against superfluity. *Id.* ¶¶ 19–20. Here, the State added the "individual letters" prohibition "for the obvious purpose of ending" an abusive "practice," thereby

"fortif[ying]" the original text of Article V, Section 10. *Id.* It would disrespect that effort to conclude that this *expanded* the Governor's authority, especially given the difficulty in amending the Constitution. *See* Wis. Const. art. XII, § 1.

Finally, the Governor relies upon certain proposed amendments, Resp. Br. 14, 18–23, but "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation," *Lockhart v. United States*, 546 U.S. 142, 147 (2005) (citation omitted; alteration omitted).

II. Reconciling This Court's Precedent With The Constitution's Text Would Advance Important Separation-Of-Powers Principles

A. Applying the complete-and-workable-law test to the "rejected part" would restore the original understanding of the separation of powers and the meaning of "veto."

By vesting the "legislative power" in the Legislature, Wis. Const. art. IV, § 1, the Constitution grants that body the power to "declare what shall become law," *League of Women Voters of Wis. v. Evers* (*LWV*), 2019 WI 75, ¶ 36, 387 Wis. 2d 511, 929 N.W.2d 209 (citation omitted). This means that the Legislature has the authority to "formulate legislative policies and mandate programs and projects" for the State. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). Article V, Section 10, as relevant here, deals with the hybrid separation-of-powers situation of a partial "veto" of an appropriation bill.

The concept of the "veto" power was the power only to "negative" a proposed law, thus "prevent[ing]" it from taking

effect. The Federalist Nos. 69, 73 (Alexander Hamilton). It is the power to "forbid" a law's passage or to "refus[e] to assent" to it. *Veto*, Black's Law Dictionary (2d ed. 1910); *accord Veto*, Black's Law Dictionary (10th ed. 2014) (same).

Limiting the Governor's partial-veto power to rejecting only complete and workable laws, just as he may accept only complete and workable laws, is fully consistent with these separation-of-powers principles and the core meaning of "veto." This would allow the Governor to prevent the enactment of specific legislative policies, rather than to "affirmatively legislate" by selectively striking sentence fragments. *Wis. Senate* 144 Wis. 2d at 451. It would also preserve the Legislature's role as the policy formulator for the State, with the Governor empowered only to "negative" *actual*, *specific* policy changes, consistent with the original understanding of the separation of powers. *Compare Hill*, 437 U.S. at 194, *with Martin*, 233 Wis. at 450.

This would stand in sharp contrast to the Governor's current and ongoing practice of rewriting the Legislature's appropriations handiwork by deleting sentence fragments, thereby writing, enacting, and then signing new laws that the *majority* of the Legislature (not merely the supermajority needed to override a veto) never adopted.

B. For closely related reasons, applying the complete-and-workable-law test to the "rejected part" furthers the separation of powers by freeing the Legislature from the

Governor "obstructing the performance of" its "constitutional duties." *LWV*, 2019 WI 75, ¶¶ 32, 36.

The Legislature has the "constitutional dut[y]" to develop innovative legislative solutions for the State's needs. *See id.* ¶ 32; *Hill*, 437 U.S. at 194. Yet, current partial-veto precedent requires the Legislature to draft around the "pair of scissors" in the Governor's hand, *see* Frederick B. Wade, *The Origin & Evolution of the Partial Veto Power*, 81:3 Wis. Law. (Mar. 2008) (quoting Tommy G. Thompson, *Power to the People* 48, 129 (1996)),* conditioning the exercise of legislative power on the "outer limits" of the Governor's "imagination," *Kleczka*, 82 Wis. 2d at 720 (Hansen, J, concurring in part, dissenting in part). This hampers the Legislature's ability to innovate, as it cannot "know the effect of [much of] the language it adopts" until after the ink of the Governor's partial-veto pen has dried. *Finley v. United States*, 490 U.S. 545, 556 (1989), *superseded by statute on other grounds*, 545 U.S. 546.

The lengths to which the Legislature regularly goes to avoid abuse of the Governor's claimed partial-veto authority, given this Court's precedent, are telling, and refute the Governor's claims of legislative "acquiescence." Resp. Br. 18. Consider just the Legislature's latest budget bill. The Legislature removed descriptive language regarding

* Available at https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=81&Issue=3&ArticleID=1640.

appropriation accounts to prevent the Governor from disrupting account management. *See* Assembly Amend. 1, to Assembly Subst. Amend. 1, to Assembly Bill 56, at § 148 (June 25, 2019)† (striking "the appropriation accounts under"); *see also id.* §§ 154, 159–60, 162, 164, 166–67, 169, 173, 176–77, 180–82, 184–95. It altered language to prevent the Governor from circumventing appropriations and debt caps. *See id.* § 172 (striking "from the same appropriation accounts" from an appropriation limit for the Lieutenant Governor's security detail); *see also id.* §§ 5, 23–25, 27–34, 39–40, 42–52, 54–55. And, perhaps most tediously, it changed every "may not" to "cannot," *id.* §§ 1, 3, 7, 56, 58–59, 61, 65, 70, 74, 78, 80–84, 90, 92, 94–95, 97–100, 108, 111–12, 114, 137, 141, 152–53, 171, 174–75, 179; *accord* §§ 16, 79, 163, since the Governor could transform "may not" into "may ~~not~~," while "can~~not~~" exceeds his partial-veto authority, Wis. Const. art. V, § 10(1)(c). Yet, even with these efforts, the Legislature cannot possibly catch all of the Governor's editorial changes, as the vetoes in this case show.

Applying the complete-and-workable-law test to the "rejected part" would improve the transparency and clarity of the Wisconsin Statutes, consistent with the best practice of writing statutes "as easy as possible to understand." Legislative Reference Bureau, *Wisconsin Bill Drafting*

† Available at https://docs.legis.wisconsin.gov/2019/related/amendments/ab56/aa1_asa1_ab56.

Manual 2019–2020, § 2.01 (Sept. 2018 rev. ed.); *see Risser*, 207 Wis. 2d at 194 (referencing this manual). Consider one partial veto in this case. Under 2019 Act 9, the Legislature appropriated funds for a grant program to improve "local roads." 2019 Wis. Act 9, § 184s *as presented*. After the Governor's partial veto, this provision now provides: "From the general fund, as a continuing appropriation, the amounts in the schedule for local grant." 2019 Wis. Act 9, § 184s *as partially vetoed*. It is impossible to understand from this text what these funds will be used for, completely obscuring the law's transparency. *Compare* Legislative Reference Bureau, *supra*, § 2.01. By prohibiting the partial veto of such fragments, the complete-and-workable-law test would remove this needless shroud from the appropriations process.

III. The Court's Remedy Should Be Prospective Only

This Court should make clear that the requested decision applying the complete-and-workable-law test to the "rejected part" only applies prospectively, including by not disturbing the vetoes in this case. While this Court's decisions "[n]ormally" apply "retrospectively," purely prospective application—which does not apply a new decision even to the case at hand—is appropriate where retrospective application of a "new principle of law" would "unsettl[e]" reliance interests. *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶¶ 95–101, 312 Wis. 2d 84, 752 N.W.2d 295; *see also Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 109, 280 N.W.2d

757 (1979) (articulating three-factor test). Here, as the Governor correctly points out, "both the Governor and the Legislature" have "rel[ied]" on past partial-veto precedent when "draft[ing] budgets," including in the most recent budget. Resp. Br. 39. "[P]ersons and businesses" have similarly relied on the "actions" in the State's appropriation bills. *Beaver Dam*, 2008 WI 90, ¶ 98. Attempting to undo partial vetoes within those prior enacted and signed bills—disrupting scores of both ongoing and long-completed government programs—would "unsettl[e]" these reliance interests. *Id.* Simply applying the complete-and-workable-law test to future partial vetoes would allow the Legislature and the Governor to adjust to the new status quo, so that both the Legislature's bill drafting and the Governor's veto decisions may take into account that new legal landscape.

CONCLUSION

This Court should hold that the complete-and-workable-law test applies to both halves of Article V, Section 10.

Dated: February 5, 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,991 words.

Dated: February 5, 2020.

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MISHA TSEYTLIN

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

I hereby certify that:

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

I further certify that:

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: February 5, 2020.

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