RECEIVED
02-27-2020
CLERK OF SUPREME COURT
OF WISCONSIN

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 IN RESPONSE TO THE LEGISLATURE'S BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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 (CTR)
(608) 266-3859 (MFJW)
(608) 267-2223 (Fax)
rothct@doj.state.wi.us
whelanmf@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Like Petitioners, the Legislature seeks to evade the required route for transforming our Constitution's partial veto power. Rather than pass an amendment in two consecutive sessions and send it to the people for ratification (as Article XII requires), the Legislature asks this Court to circumvent that process and transform Article V, § 10, into the item veto it has never been. Indeed, the many item-veto amendments the Legislature has rejected over the past 40 years underscore its implicit recognition that only an amendment could achieve the transformation it seeks here.

To justify this shortcut, the Legislature asserts that it has discovered the partial veto's Rosetta Stone in Article V, § 10(2), which simply says that the "rejected part" of an appropriation bill "shall become law" after a legislative override. That text has not somehow been hiding an item veto in plain sight for nearly a century. Rather, Article V, § 10, repeatedly uses the phrase "become law" to describe the various points at which a legislative enactment acquires the force of law. That explains why this Court has not addressed the phrase in its prior cases—it sheds no light on the partial veto power's scope.

Equally important, the Legislature's proposed reverse complete-and-workable-law test would undercut a core purpose of Article V, § 10—preventing logrolling—by preventing the Governor from vetoing new policies created through fragmentary amendments to existing laws. Nor could the Governor any longer ensure budgetary restraint through write-downs of appropriation figures. Such drastic changes to the appropriation process should be undertaken only after careful deliberation by the legislative branch and the people of Wisconsin, not through a constitutional transformation imposed by this Court.

ARGUMENT

I. Article V, § 10, does not create an item veto.

A. The Legislature's textual argument fails.

Under Article V, § 10, both the "part approved" and the "rejected part" of an appropriation bill "shall become law" after the Governor's partial veto and a legislative override. In the Legislature's view, this means that both "parts" must be able to stand alone as complete-and-workable laws. (Leg. Br. 3–8.) This superficial parallel cannot bear the weight of the Legislature's argument, for two main reasons. First, it misinterprets the phrase "shall become law." Second, it mistakes the origin and function of the complete-and-workable-law test.

The phrase "shall become law" simply describes the transformation that occurs when a bill is presented to the Governor for his approval. As Article V, § 10(1), explains, "[e]very bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor," and when he approves it in whole or in part, it "shall become law." Before a bill is presented to the Governor, it does not have the force of law; after his approval in whole or in part, it does. *See State ex rel. Martin v. Zimmerman*, 233 Wis. 16, 20, 288 N.W. 454 (1939) (noting that an act of the Legislature approved by the Governor "becomes a 'law' in the broad sense of prescribing a rule of conduct").

That phrase means the same thing when describing the result of a legislative override. Even if the Governor rejects a bill entirely or in part, it nevertheless "shall become law" under Article V, § 10(2), upon a two-thirds vote of both houses. Again, the phrase simply describes how a rejected bill gains legal force through further legislative action.

The Legislature would instead read "shall become law" as imposing a complete-and-workable-law test wherever the phrase appears. But that makes no sense applied to the rejected part of an appropriation bill. Unlike the part approved—which immediately becomes law under Article V, § 10(1)(b)—the rejected part never needs to function as a stand-alone law. Either it remains rejected and never becomes law, or, upon a successful legislative override, it rejoins the part approved and "the bill as originally passed by the legislature becomes law."[1] Richard A. Champagne & Madeline Kasper, Wis. Legis. Reference Bureau, *The Veto Override Process in Wisconsin*, 1 (August 2019). That key difference between a "part approved" and a "rejected part"—the former must be able to stand alone but the latter never does—explains why the complete-and-workable-law test only applies to the former.

This Court has long recognized why the complete-and-workable-law test only applies to the part approved. As Justice Hansen observed in *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978), "this 'limitation' . . . is . . . implicitly true of every legislative enactment" because "[a]ny enactment, whether passed by the legislature and approved by the governor, or created by use of the partial veto power, will fail if it is fragmentary, patently incomplete, or incapable of execution." That elementary principle is how the test originated in *State ex rel. Wisconsin Telephone Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935), which simply

---

[1] For instance, imagine that the Legislature had overridden the challenged partial veto of 2019 Wis. Act 9, § 55c. (*See* Pet. App. 106–07.) The rejected language would not become law in a separate bill; rather, it would rejoin section 55c and the entire provision would become law.

observed that the partial veto there resulted in a "complete, entire, and workable law."

Subsequent cases underscore that *Henry*'s complete-and-workable-law standard is a severability test that examines what remains *after* a partial veto, not what is *removed* by one. In *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 130, 237 N.W.2d 910 (1976), this Court explained that the test ensures the "portion vetoed is separable." Similarly, in *Kleczka*, it elaborated that "the test of severability has clearly and repeatedly been stated by this court to be simply that what remains be a complete and workable law." 82 Wis. 2d at 707–08; *see also State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 453, 424 N.W.2d 385 (1988) (the Constitution "permit[s] the affirmative use of the partial veto power as long as the parts remaining after the veto are a complete and workable law"); *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 497, 534 N.W.2d 608 (1995) ("[T]he test for severability is met upon a determination that a complete, entire, and workable law remains after the governor's partial veto exercise.").

The Legislature's attempt to repurpose the complete-and-workable-law test for the "rejected part" of an appropriation bill therefore fails. This Court has never described the test as a textual corollary of the phrase "shall become law." Rather, it arose only to ensure that a partially approved appropriation bill can function without the rejected part. Because only the "part approved" and not the "rejected part" could result in a fragmentary law incapable of execution, only the "part approved" need satisfy the functional complete-and-workable-law test.

In effect, the Legislature's reading assumes the conclusion that "part" means "item." If "part" means—as this Court has always correctly held—any part, no matter how small, then the "rejected part" need not constitute a

complete-and-workable law. And if "part" instead means "item," then the Legislature would be right. But that simply brings us back to the core question that this Court settled nearly a century ago: What does Article V, § 10, mean by authorizing the Governor to approve or reject "part" of an appropriation bill? This Court should not depart from the answer it has always given and that the people of Wisconsin ratified through the 1990 and 2008 amendments to Article V, § 10.

B. The Legislature's other counterarguments fail.

The Legislature's non-textual counterarguments also fail.

First, it tries to disguise the sweeping effect of its reverse complete-and-workable-law test, saying that the test would not transform Article V, § 10, into an item veto. (Leg. Br. 6.) But it is difficult to imagine when the test would *not* require the Governor to veto entire sections. Consider the 2019 Wis. Const. Act 9 ("Act 9") provisions that partial vetoes affected here: sections 55c and 9101 (Volkswagen), 126, 184s, and 1095 (local supplement), 1988b (vehicle registration), and 1754 (vapor products). It is not clear that the Governor could veto anything less than these entire sections (or at least entire subsections within them) under a reverse complete-and-workable-law test. And even if the test would not *always* require the Governor to veto entire sections, it would still require this Court to reinterpret the word "part" to mean something completely different, overrule practically all its prior partial veto cases, render two constitutional amendments superfluous, and ignore rejected constitutional amendments that would have accomplished materially identical ends.

Second, even if it were clear which partial vetoes a reverse complete-and-workable-law test would allow and which it would not (Leg. Br. 7), that misses a much bigger problem. That test would undermine a core purpose of Article V, § 10, by allowing the Legislature to veto-proof new policy measures through a simple tactic: drafting new policies as fragmentary amendments to existing statutes. Consider sections 1754 through 1757w of Act 9, which enacted a brand-new tax by simply adding the words "and vapor products" to various existing tax statutes. Because those three words seemingly could not stand alone as a complete-and-workable law, the Governor could not veto that new tax under the Legislature's test.

Appropriation bills often enact significant policy changes through similar fragmentary amendments.[2] But because such wording tweaks typically could not stand alone as complete-and-workable laws, the Governor could no longer unpack policy initiatives that the Legislature has logrolled into an omnibus appropriation bill (which even Petitioners concede he must be able to do). That would be a radical change that takes Wisconsin back to the pre-Article V, § 10, days when the Governor could only veto an entire budget bill if he disliked any individual policies therein.

Relatedly, the Legislature's test would likely bar the Governor from reducing numerical sums in appropriation bills, as approved in *Klauser*. For instance, the Governor reduced Act 9's appropriation of Medicaid funding by $15 million. *See* 2019 Wis. Act 9, § 126 (write-down to s. 20.435(4)(b)). Like fragmentary amendments, a smaller

---

[2] Around 474 of the 788 sections in Act 9 amended existing text; the vast majority of these amendments were fragmentary and could not function as law alone.

dollar figure cannot stand alone and so such a veto would likely fail the Legislature's test. That result would remove a key tool that governors have used for decades to control costs in Wisconsin's budget.

These two would-be fundamental shifts in the budget process underscore why following the deliberative amendment process is so critical when modifying a constitutional power with such far-reaching effects as the partial veto.

Third, the Legislature offers no good reason to ignore how its proposed test would render superfluous the recent amendments to Article V, § 10. It first speculates that the 2008 amendment banning combining two sentences would "probably" retain some effect. (Leg. Br. 7.) But the Legislature does not identify any combined-sentence vetoes that would survive its proposed test (and it is hard to imagine any that could).

As for the 1990 amendment banning individual-letter vetoes, the Legislature concedes that its proposed test would render that amendment useless. (Leg. Br. 7–8.) But to do so would violate the maxim that "constitutional 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 (citation omitted); *see also Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2017 WI 71, ¶ 18, 376 Wis. 2d 528, 898 N.W.2d 70 (interpretations should not render textual provisions "idle and nugatory") (citing Antonin Scalia & Bryan A. Garner, Reading Law 174 (2012)).

In response, the Legislature casually asserts that deleting this constitutional provision is "unproblematic" because it "perhaps" reflected only "legislative 'exasperation'" at partial veto practices that already were invalid. (Leg. Br. 7–8.) That misunderstands the canon against superfluity, which does not require a total absence of competing inferences about a text's meaning—indeed, one like the Legislature's is possible virtually anytime the canon might apply. In these situations, the canon is meant to tip the scales "wherever possible" in favor of an interpretation that avoids superfluity. *Wagner*, 263 Wis. 2d 709, ¶ 33 (citation omitted). Here, the mere chance that the 1990 and 2008 amendments were meant to reinforce a pre-existing ban on certain partial veto practices is not enough to read them out of the Constitution entirely. Instead, the canon instructs a court to conclude if "possible" that the amendments have independent effect, not that they simply duplicate a pre-existing ban.

The only case the Legislature cites to justify ignoring these two constitutional amendments is *State v. Cox*, 2018 WI 67, 382 Wis. 2d 338, 913 N.W.2d 780. (Leg. Br. 7–8.) But *Cox* dealt with a statute, not a constitutional provision. Even if the canon against superfluity can sometimes give way when interpreting a statute, it should be applied more exactingly to constitutional provisions passed by two legislatures and ratified by the people.

Cox also differs because it addressed the rare statutory case in which the Legislature clearly acted because courts were "not doing as they had already been told." *Cox*, 382 Wis. 2d 338, ¶ 20. In *Cox*, Wis. Stat. § 973.045 obviously used the term "shall" in a mandatory (rather than directory) sense eight times, yet many courts were treating it as directory in one of the eight places despite no contextual evidence supporting that approach. *Cox*, 382 Wis. 2d 338,

¶ 20. So, the Legislature added statutory language to emphasize that the "shall" at issue did not leave any discretion. *See* 2013 Wis. Act 20, § 2348.

Here, by contrast, the partial veto practices banned by the 1990 and 2008 amendments were *not* obviously already unconstitutional. Quite the opposite, as they were consistent with Article V, § 10's plain text and this Court's unbroken precedent dating back to 1930. When the Legislature and Wisconsin people enacted the two amendments, the much more persuasive inference—consistent with this constitutional history and the canon against superfluity—is that the amendments barred activity that Article V, § 10, previously allowed.

Last, the Legislature argues that this Court should ignore the many rejected constitutional amendments that would have transformed Article V, § 10, into an item veto (or something just like one). (Leg. Br. 8.) The most persuasive inference from those rejected amendments is that they would have prohibited partial veto techniques that Article V, § 10, allows. That is exactly the sort of inference this Court drew in *Wagner*, 263 Wis. 2d 709, ¶ 40, and it should be drawn here too.

II. The Legislature presents no new separation of powers considerations.

The Legislature also recycles the same abstract separation of powers issues that Petitioners raise, arguing that Wisconsin's traditional partial veto infringes on the Legislature's policy-making prerogative. (Leg. Br. 8–9.) That argument fails again for two reasons.

First, the theoretical separation of powers principles that the Legislature cites do not define the partial veto power in Wisconsin—the text of Article V, § 10, does. That text itself assigns the Governor a policy-making role through

his power to reject entire bills and to partially approve appropriation bills.[3] The Legislature's proposition that it has plenary power over policymaking is thus untrue and provides no help in resolving this case. If the Legislature dislikes how our Constitution allocates power over appropriation bills through the partial veto, Article XII describes its remedy: pass an amendment through both houses in consecutive sessions and seek its ratification by the people. Article XII does not, however, allow the Legislature to revise the Constitution simply by asking this Court to impose different separation of powers principles than those embodied in the current text.

Second, the Legislature's suggestion that the Governor must be limited to "negative" rather than "affirmative" vetoes rests on semantics rather than any consistent principle. Justice Hansen in *Kleczka* explained well the problem with this purported distinction:

> To hold that the exercise of the partial veto power may not have an "affirmative," "positive" or "creative" effect on legislation, or that the veto may not change the "meaning" or "policy" of a bill, as some courts elsewhere have done, would be to involve this court in disingenuous semantic games. While these tests may be appealing in the abstract, they are unworkable in practice. Every veto may be perceived in affirmative or negative terms, and as either conforming to or defying the general legislative intent, depending upon the observer's perspective. These tests are inescapably subjective. Without an objective point of reference, this court

---

[3] Recall also that the Governor gets the first shot at drafting Wisconsin's biennial budget bill. *See* Wis. Stat. §§ 16.46, 16.47. For instance, the current budget originated in 2019 Assembly Bill 56, which Governor Evers' office drafted and the Joint Committee on Finance introduced at his request.

> would be reduced to deciding cases upon its subjective assessment of the respective policies espoused by the legislature and the executive, an unseemly result which would foster uncertainty in the legislative process.

82 Wis. 2d at 721. Simply put, *any* veto power draws the Governor into policymaking.

As for the appropriation bill drafting tweaks that the Legislature highlights (Leg. Br. 9–11), those hardly show a vigorous legislative pushback against the Governor's partial veto power. Rather, they show that the branches have adapted to the traditional balance of power over appropriation bills. These edits pale in comparison to the Legislature's decades-long failure to send even one constitutional amendment to a popular vote that would transform the partial veto into an item veto. That acquiescence underscores how the Governor's partial veto power is settled law.[4]

CONCLUSION

The Court should decline to transform Wisconsin's partial veto into an item veto.

Dated this 27th day of February 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

---

[4] Respondents agree that any decision in Petitioners' favor should only apply prospectively. (Leg. Br. 12–13.)

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 (CTR)
(608) 266-3859 (MFJW)
(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. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2997 words.

Dated this 27th day of February 2020.

COLIN T. ROTH
Assistant Attorney General

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 this 27th day of February 2020.

COLIN T. ROTH
Assistant Attorney General