

FILED
04-30-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2024AP729-OA

JEFFERY A. LEMIEUX and DAVID T. DEVALK,
Petitioners,

v.

TONY EVERS, in his official capacity as Governor
of Wisconsin, SARAH GODLEWSKI, in her official
capacity as Secretary of State of Wisconsin, and
JILL UNDERLY, in her official capacity as
Wisconsin State Superintendent of Public
Instruction,

Respondents.

RESPONSE TO PETITION FOR ORIGINAL ACTION

JOSHUA L. KAUL
Attorney General of Wisconsin

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7636 (Roth)
(608) 957-5218 (Gibson)
(608) 294-2907 (Fax)
rothct1@doj.state.wi.us
gibsoncj@doj.state.wi.us

MEL BARNES
State Bar #1096012

LESLIE A. FREEHILL
State Bar #1095620

Attorneys for Governor Evers

Office of Governor Tony Evers
Post Office Box 7863
Madison, Wisconsin 53707-7863
(608) 266-1212
mel.barnes@wisconsin.gov
leslie.freehill@wisconsin.gov

ISSUE PRESENTED

Should this Court grant the petition for an original action challenging the Governor's longstanding constitutional authority to delete individual words and digits from budget bills, a partial veto practice used by every governor over the past several decades?

STATEMENT OF THE CASE

In June 2023, the Wisconsin Legislature passed the state's budget bill for the 2023–2025 biennium and presented it to the Governor for his consideration. (Pet. ¶¶ 41–43.) The Governor signed the bill subject to several partial vetoes, pursuant to his constitutional authority under article V, § 10(1)(b) to approve appropriations bills “in whole or in part.”¹ The budget bill, as partially vetoed by the Governor, was enacted into law as 2023 Wis. Act 19.

The budget bill passed by the Legislature contained a provision that would have increased school districts' revenue limit by \$325 per student during the 2024–2025 and 2025–2026 school years. (Pet. ¶ 44.) Using his authority to delete both individual words and digits from appropriation bills—as every governor since Governor Thompson has done²—the

¹ See generally https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/295_summary_of_partial_vetoes_of_2023_wisconsin_act_19_7_7_23.

² See 1987 Wis. Act 27, §§ 862ae (Governor Thompson's partial veto of Wis. Stat. § 46.81(1)(c)(5)), 3016 (Governor Thompson's partial veto of nonstatutory subsection (5m)(b)), 3052 (Governor Thompson's partial veto of nonstatutory subsection (1m)); 1999 Wis. Act 9, § 9457 (Governor Thompson's partial veto of nonstatutory subsections (3) and (4)); 2001 Wis. Act 16, § 9344 (Governor McCallum's partial veto of nonstatutory subsection (9m)); 2003 Wis. Act 33, § 9209 (Governor Doyle's partial veto of nonstatutory subsection (1)); 2017 Wis. Act 59, §§ 1641m (Governor Walker's partial veto of Wis. Stat. § 121.91(4)(o)4.), 2265 (Governor Walker's partial veto of amendment to 2013 Wis. Act 229, § 6(1)).

Governor partially vetoed four interrelated provisions to extend this \$325 revenue limit increase until 2425 rather than 2026. (Pet. ¶¶ 45–49.) The Senate voted to override these partial vetoes, but the Assembly did not. (Pet. ¶¶ 51–52.) The vetoes therefore took effect. (Pet. ¶ 53.)

Petitioners filed a Petition for an Original Action arguing that these partial vetoes are invalid for two reasons.³ First, they allege that the vetoes violate article V, § 10(1)(c), which provides that “the governor may not create a new word by rejecting individual letters in the words of the enrolled bill.” (Pet. ¶¶ 55–66.) Second, they allege that the vetoes exceed the Governor’s partial veto power under article V, § 10(1)(b), which provides that “[a]ppropriation bills may be approved in whole or in part by the governor, and the part approved shall become law.” (Pet. ¶¶ 67–79.)

Aside from requesting a declaration invalidating these specific vetoes, Petitioners also seek more general declarations (unannounced in any of this Court’s prior partial veto cases) that the Governor may neither “strik[e] individual digits in an enrolled bill to create a new year” nor “strike language in an enrolled bill to create a larger duration than the one approved by the legislature.” (Pet. ¶ 80(a)–(b).)

³ In addition to the Governor, who actually exercised the challenged partial vetoes (Pet. ¶ 33), Petitioners also named as respondents the Secretary of State and State Superintendent of Public Instruction (Pet. ¶¶ 34–35). Respondents will assume *arguendo* that the latter two officials are proper parties, despite their lack of alleged involvement in the partial veto itself.

ARGUMENT

Although Petitioners are wrong on the merits,⁴ Respondents agree that this case meets the criteria for an original action. Such cases are appropriate when the “questions presented are of such importance as under the circumstances to call for [a] speedy and authoritative determination by this court in the first instance.” *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938). Partial veto cases like this one usually satisfy that criterion, as this Court has recognized by resolving all past partial veto disputes through original actions. (Pet. ¶ 83 (collecting cases).) Likewise, Respondents agree that this case presents pure legal issues and would not involve any fact disputes that might counsel in favor of beginning in the trial court. (Pet. ¶ 90.)

And Petitioners scarcely mention the elephant in the room: the need to clarify this Court’s most recent partial veto decision, *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685 (per curiam). Strikingly, Petitioners act as if that decision did not exist, even though it addressed the core issue presented by their second claim—the scope of the Governor’s power under article V, § 10(1)(b) to approve appropriation bills “in part.” Rather than untangle *Bartlett*, Petitioners skip over it in favor of earlier partial veto cases. (Pet. ¶¶ 67–79.)

⁴ Briefly, Petitioners’ first claim will fail because the plain text of article V, § 10(1)(c) bars the Governor from “creat[ing] a new word by rejecting individual letters,” which is not what he did here: instead, he rejected entire words and individual digits. Their second claim will fail because the Governor’s authority under article V, § 10(1)(b) to approve an appropriation bill “in part” is broad (as this Court has repeatedly recognized), and deleting entire words and individual digits falls well within that power.

That is perhaps unsurprising given how *Bartlett* generated four separate writings, none of which were joined by more than two justices. 393 Wis. 2d 172, ¶¶ 5–8. Due to the case’s fractured nature, “[n]o rationale ha[d] the support of a majority.” *Id.* ¶ 5.

Respondents believe that *Bartlett* therefore has no precedential effect here, but that is yet another question that only this Court can definitively resolve.⁵ And it should do so, especially given how another partial veto challenge was recently filed in circuit court based partly on *Bartlett*’s supposed precedential impact.⁶ Accordingly, the status of *Bartlett* has created significant uncertainty that itself justifies an original action.

⁵ And to the extent that Petitioners develop a theory—which they have not yet done—that *Bartlett* somehow controls the result here, Respondents would also ask this Court to reject whatever holding Petitioners might think can be extracted from that case.

⁶ See *Wis. State Legislature v. DPI*, No. 24-CV-1127 (Wis. Cir. Ct. Dane Cty.).

CONCLUSION

The Court should grant the petition for an original action.

Dated this 30th day of April 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by Colin T. Roth

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7636 (Roth)
(608) 957-5218 (Gibson)
(608) 294-2907 (Fax)
rothctl@doj.state.wi.us
gibsoncj@doj.state.wi.us

MEL BARNES
State Bar #1096012

LESLIE A. FREEHILL
State Bar #1095620

Attorneys for Governor Evers

Office of Governor Tony Evers
Post Office Box 7863
Madison, Wisconsin 53707-7863
(608) 266-1212
mel.barnes@wisconsin.gov
leslie.freehill@wisconsin.gov

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 30th day of April 2024.

Electronically signed by Colin T. Roth

COLIN T. ROTH

Assistant Attorney General