In the Supreme Court of Wisconsin

No. 2024AP729-OA

JEFFERY A. LEMIEUX and DAVID T. DEVALK,

Petitioners,

v.

TONY EVERS, Governor of Wisconsin, SARAH GODLEWSKI, Secretary of State of Wisconsin, and JILL UNDERLY, Wisconsin State Superintendent of Public Instruction,

Respondents.

PETITIONERS' REPLY BRIEF

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I. Item Veto A-1 did not approve a bill in part, so it exceeds Article V, § 10(1)(b) of the Wisconsin Constitution.

A. Item Veto A-1 is unlawful under every aspect of the definition of "part."

Because Item Veto A-1 did not approve "part" of an appropriation bill, it is not "within the purview of powers authorized by Art. V., sec. 10(1)(b)." *See Citizens Util. Bd. (C.U.B.) v. Klauser*, 194 Wis. 2d 484, 505, 534 N.W.2d 608 (1995). "Part" means (1) "one of the portions, equal or unequal, into which anything is divided, or regarded as divided"; (2) "something less than a whole"; (3) "a number, quantity, mass, or the like, regarded as going to make up, with others or another, a large number, quantity, mass, etc., whether actually separate or not"; and (4) "a piece, fragment, fraction, member, or constituent." *State ex rel. Wisconsin Tel. Co. v. Henry*, 218 Wis. 302, 313, 260 N.W. 486 (1935) (citation omitted).

The State concedes *Henry*'s definition of "part" "applies here." (Resp. Br. 19.)

This Court considers the substance, not form, of partial vetoes when applying this definition. *See C.U.B.*, 194 Wis. 2d at 505-07.

Because Item Veto A-1 substantively added 400 years to a two-year duration, this veto fails every aspect of *Henry*'s definition: (1) 402 is not a portion "into which" two can be "divided"; (2) 402 is not "less than" two; (3) 402 is "large[r]" than two, so it cannot combine with other numbers to "make up" two; and (4) 402 is not "a piece, fragment, fraction, member, or constituent" of two. *See Henry*, 218 Wis. at 313 (citation omitted). Simply stated, 402 is not part of two.

Contrary to *C.U.B.*'s instruction to consider substance, the State advances the formalistic theory that Item Veto A-1 approved a bill in part by approving four characters in "2024-25." That reasoning elevates form over substance. In substance, this veto did not approve part of the legislatively adopted two-year duration.

B. The less-than aspect of the definition of "part" applies here.

The State argues the less-than aspect of *Henry*'s definition of "part" "is unnecessary and inapplicable when analyzing traditional deletion vetoes." (Resp. Br. 18.)[1]

That argument ultimately does not matter because Item Veto A-1 fails every aspect of *Henry*'s definition, as just explained. Nevertheless, every aspect applies here.

Item Veto A-1 is not a "traditional deletion veto." Traditionally, a governor could "reduce or eliminate numbers and amounts of appropriations." *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 457, 424 N.W.2d 385 (1988). Less-than logic is unnecessary when reviewing such vetoes because they always result in smaller numbers. But such logic *is necessary* here because Item Veto A-1 undisputedly did not reduce or eliminate a number.

Even if *C.U.B.*'s logic is "special," as the State argues, it applies here. The veto in *C.U.B.* reduced an appropriation. *C.U.B.*, 194 Wis. 2d at 509-10. The veto here is more novel because it *expanded* a two-year duration by 400 years.

C. *Henry*'s definition of "part" is a distinct ground for challenging a veto.

The State contends the "workable law" test is the only analysis under Article V, § 10(1)(b). (Resp. Br. 17.) However, by arguing Item Veto A-1 satisfies *Henry*'s definition of "part," the State implicitly recognizes

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[1] Confusingly, the State argues the *third* aspect of *Henry*'s definition "is only relevant when dealing with a write-in veto," though one page earlier it argues "'less than' logic" applies only to write-in vetoes. (Resp. Br. 18-19.) Less-than logic is the second, not third, aspect of *Henry*'s definition.

Also confusingly, the State baldly asserts that "[d]eletion vetoes like the ones here satisfy at least aspects [2] and [4] of [*Henry*'s] definition (and arguably [1], too)." (Resp. Br. 19.) Which is it? Is the less-than aspect always satisfied with, or never applicable to, deletion vetoes?

Notably, the State implicitly concedes Item Veto A-1 *arguably fails* the first aspect of *Henry*'s definition. If this veto fails an undisputedly applicable aspect of the definition, it didn't approve "part" of a bill.

that this definition is analytically distinct from workability. (Resp. Br. 17-20.)

C.U.B. confirms that workability is separate from *Henry*'s definition of "part." In *C.U.B.*, this Court held first that the disputed veto left a "complete, entire, and workable" law because it reduced a "$350,000 appropriation by $100,000." *C.U.B.*, 194 Wis. 2d at 505. The Court held next that the veto "survive[d] the 'topicality' or 'germaneness' requirement." *Id.* The Court then stated that "[t]he more difficult consideration as to the appropriateness of the governor's partial veto is a determination as to whether $250,000 is 'part' of $350,000." *Id.* To resolve this separate issue, the Court applied *Henry*'s definition of "part." *Id.* at 505-10.

Citing *Thompson*, the State argues that "when a partial veto deletes text, the test under article V, § 10(1)(b) is whether a complete and workable law remains." (Resp. Br. 17.) But *Thompson* recognized other grounds for challenging partial vetoes: it adopted a "germaneness requirement," and it recognized that *Henry* "adopted the dictionary's broadly stated definition of the word 'part.'" *Thompson*, 144 Wis. 2d at 440, 463. *Thompson* left open such challenges by "only determin[ing]" the challenged vetoes there left a "complete and workable law" and by "express[ing] no opinion regarding other specific challenges that might be raised." *Id.* at 462.

The State's hypothetical veto shows why workability is not the only consideration under section 10(1)(b). The State argues Governor Tommy Thompson in *C.U.B.* "could have deleted the digit '3'" in $350,000 "because doing so would have left behind a complete and workable law." (Resp. Br. 18.) But there is another, crucial reason why Governor Thompson could have done so: $50,000 is part of $350,000, as this Court indicated in *C.U.B.*, 194 Wis. 2d at 506.

This Court need not consider workability because LeMieux does not rely on it. (LeMieux's Br. 22 n. 22.)

D. *Bartlett* is inapplicable here.

The State argues *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685, "is not precedent." (Resp. Br. 16.) LeMieux did not cite

Bartlett in his opening brief because that case is inapplicable here. This Court should not decide "a case based on a theory not argued by any party." *Id.* ¶123 (A.W. Bradley, J., concurring/dissenting). Rather, the Court should apply "well-established precedent." *Id.* ¶ 170.

Undisputedly, *Bartlett* did not abrogate *Henry*'s well-established definition of "part." Only Justice Daniel Kelly's opinion expressly called for overruling precedent. *Id.* ¶119. But even that writing acknowledged governors can make dollar figures "smaller, not larger." *Id.* ¶197 (Kelly, J., concurring/dissenting) (citing *C.U.B.*, 194 Wis. 2d at 488). "Presumably, this limit derives from the mathematical principle that $10 is a part of $100." *Id.*

Bartlett preserved this mathematical principle, under which Item Veto A-1 violates Article V, § 10(1)(b).[2]

II. Item Veto A-1 violates Article V, § 10(1)(c) of the Wisconsin Constitution because it is a Vanna White veto.

A. *Risser*, *C.U.B.*, and *Thompson* hurt the State's argument.

According to the State, LeMieux argues Article V, § 10(1)(c) "cover[s] digit vetoes." (Resp. Br. 22.) The State claims that LeMieux's argument would prohibit governors from striking digits to reduce appropriations. (Resp. Br. 31.)

Not so. (LeMieux's Br. 31-39.) Section 10(1)(c) allows the "digit veto," which reduces an appropriation. By banning the Vanna White or pick-a-letter veto, section 10(1)(c) "forbids a governor from creating a new number by rejecting individual digits *in a non-appropriation number*." (LeMieux's Br. 26 (emphasis added).)

The State suggests that only "some people" and "lay discussions" have said the pick-a-letter veto involves striking digits. (Resp. Br. 29.) Apparently, "some people" refers to this Court and the Legislative

[2] Contrary to the State's suggestion (Resp. Br. 16 n.8), this Court has applied the narrowest-ground rule to its own decisions. *State v. Deadwiller*, 2013 WI 75, ¶55, 350 Wis. 2d 138, 834 N.W.2d 362 (Abrahamson, C.J., concurring) (collecting cases). However, because this Court need not address *Bartlett*, it need not address the narrowest-ground rule.

Reference Bureau, which have each defined the pick-a-letter veto this way. (LeMieux's Br. 31-32.)

The State argues *Risser* and *C.U.B.* say a governor may strike digits from appropriation bills. (Resp. Br. 30.) But, as the State's quotes show, *Risser* and *C.U.B.* were simply observing that this Court *had interpreted* section 10(1) as allowing governors to strike digits. (Resp. Br. 30.) *Risser* and *C.U.B.* did not hold that section 10(1)(c) allows all gubernatorial modifications of numbers. Instead, as the State recognizes, this Court has explained that the 1990 amendment "keeps intact" the governor's "authority to 'reduce or eliminate numbers and amounts of appropriations' and exercise a 'partial veto resulting in a reduction in an appropriation.'" (Resp. Br. 31 (quoting *C.U.B.*, 194 Wis. 2d at 501).) Item Veto A-1 did not reduce or eliminate a number.

The State argues *Thompson* specified "both 'digits' and 'letters,'" indicating these words "referred to different things." (Resp. Br. 25.) But this Court has treated vetoes striking digits identically to those striking letters—refusing to distinguish between numerals and numeric words. *Risser v. Klauser*, 207 Wis. 2d 176, 203 n.19, 558 N.W.2d 108 (1997); *C.U.B.*, 194 Wis. 2d at 506 n.13.

The State argues "*Thompson* did not describe 'digit' vetoes as a subset of 'letter' vetoes." (Resp. Br. 29.) Sort of. *Thompson* held a governor may "veto individual words, *letters and digits*, and *also may reduce appropriations by striking digits*." *Thompson*, 144 Wis. 2d at 437 (emphases added). This italicized language shows that *Thompson* recognized a distinction between striking letters and digits and reducing appropriations by striking digits. This Court expounded on that distinction in *C.U.B.*, 194 Wis. 2d at 492. The power to strike digits from appropriations survived the adoption of section 10(1)(c), but the power to strike individual non-appropriation letters and digits did not survive.

The State argues the distinction between appropriation and non-appropriation numbers is "arbitrary" and atextual. (Resp. Br. 31-32.) But this Court drew that distinction in *C.U.B.* and *Risser*, holding a governor may write in smaller appropriation numbers but not other numbers.

Taken to its logical end, the State's argument would overrule *C.U.B.*'s and *Risser*'s decision to limit write-in vetoes to appropriation numbers.

This distinction is well grounded. "[A]n important rationale of the partial veto is clearly linked to expenditure reduction and fiscal balance." *C.U.B.*, 194 Wis. 2d at 509. When voters adopted section 10(1)(c), they did not eliminate this core function of section 10(1)(b).

The State argues *Risser*'s holding stemmed from *C.U.B.*, not the 1990 amendment. (Resp. Br. 33.) But *Risser*'s holding stemmed from both: *C.U.B.* "relied on" and "adopt[ed]" the governor's counsel's argument about "the 1990 amendment." *Risser*, 207 Wis. 2d at 187-88.

The *State's* distinction between deletion vetoes and write-in vetoes is arbitrary and atextual. For example, the State's logic would allow a governor to strike the "1" in "16," even if *Risser* forbade the governor from striking "16" and writing in "5," "7," or even "6."

Ultimately, the State is correct that *Risser* and *C.U.B.* "blessed digit vetoes" (Resp. Br. 34), but Item Veto A-1 is a pick-a-letter veto, not a digit veto (LeMieux's Br. 38-39).

B. A proposed amendment supports LeMieux's argument.

The State argues 1987 Wis. S.J. Res. 75 shows that the legislature "recognized a difference" between digits and letters, reasoning that this proposed amendment would have created a "general rule" that "individual digits may be vetoed." (Resp. Br. 27-28.)

Not quite. More narrowly, this proposed amendment would have generally allowed governors to "reject individual digits in any number *representing an appropriation*." S.J.R. 75, 1987-88 Wis. Legis. (1988), at 2 (emphasis added). The legislature thus recognized that "digit vetoes" (which reduce appropriations) are distinct from "pick-a-letter vetoes" (which strike non-appropriation letters and digits). (LeMieux's Br. 33.)

C. Gubernatorial practice is irrelevant here and does not support the State's arguments.

The State urges this Court to consider "gubernatorial practice (and the Legislature's response) immediately following the adoption of the

[1990 amendment]." (Resp. Br. 37.) But doing so would be like assigning the fox to guard the henhouse. This Court should disavow that approach.

Past executive action does not dictate the legality of subsequent executive action. *See State ex rel. Zignego v. WEC*, 2021 WI 32, ¶32, 396 Wis. 2d 391, 957 N.W.2d 208. "Simply because [the executive branch] took action in the past does not mean its actions were legal…." *Id.*

Legislative inaction also "has no bearing on whether [executive action] was lawful." *Fabick v. Evers*, 2021 WI 28, ¶40, 396 Wis. 2d 231, 956 N.W.2d 856. Legislators' "actions cannot meaningfully inform [this Court's] interpretation of what the constitution means" because their "interpretations might not have been widely held," and they "are capable of misinterpreting the constitution or ignoring its meaning entirely when it is politically expedient." *Wisconsin Just. Initiative, Inc. v. WEC*, 2023 WI 38, ¶110, 407 Wis. 2d 87, 990 N.W.2d 122 (Dallet, J., concurring).

To be sure, this Court has considered governors' "long-standing recognition" of a particular "*limitation* on their partial veto authority." *Thompson*, 144 Wis. 2d at 452 (emphasis added). But considering past instances of governors *exceeding* their authority is different. Repetition cannot cure illegality.

Besides, the State's veto examples do not support its interpretation of Article V, § 10(1)(c). If anything, the examples show that most governors have recognized they cannot perform vetoes like Item Veto A-1.

"Governors Tommy Thompson, Scott McCallum, and James Doyle aggressively used a type of editing veto in ways unimagined by their predecessors…." Richard A. Champagne et al., Legislative Reference Bureau, *The Wisconsin Governor's Partial Veto*, Reading the Constitution (June 2019), at 17.[3] Partial vetoes by Governors Thompson and Doyle even resulted in two constitutional amendments. *Id.* at 17, 21. These three governors' partial vetoes are thus not indicative of constitutionality.

[3] https://docs.legis.wisconsin.gov/misc/lrb/reading_the_constitution/reading_the_constitution_4_1.pdf.

Most of the State's examples are not similar to Item Veto A-1, which added 400 years to a two-year duration. In three examples, Governor Thompson changed "1994" to "1993," changed "1991-93" to "1993" to reduce an appropriation, and reduced "16" to "6." (Resp. Br. 37-39.) In another example, Governor McCallum changed "November 2001" to "November 20" in the 2001-03 budget bill. (Resp. Br. 40.)

The State's only examples closely resembling Item Veto A-1 are two vetoes by Governor Scott Walker. (Resp. Br. 41.) One veto added 60 years to a one-year pause on a tax deduction for bad debt; the other veto added 1,000 years to a one-year pause on a school-funding program. (LeMieux's Br. 14.) The State's reliance on those vetoes is misplaced because they were challenged in this Court, which ultimately rejected the challenge as time barred. (LeMieux's Br. 14.) Two justices argued those vetoes were unlawful, and not a single justice argued otherwise. *See Wisconsin Small Businesses United, Inc. v. Brennan*, 2020 WI 69, 393 Wis. 2d 308, 946 N.W.2d 101.

D. Dictionaries and constitutional text support LeMieux's arguments.

The State correctly defines "word" as a "written or printed character or combination of characters representing a spoken word," but it misapplies this definition. (Resp. Br. 43 (citation omitted).) According to the State, "'ten' represents the 'spoken word' that someone might say out loud—it is a 'word'—while '10' represents the concept of the number ten—it is a 'numeral.'" (Resp. Br. 43.) The State is wrong because numerals represent words. *See, e.g.*, David R. Olson, *Characteristics in Chinese Writing* (noting "the numerals 1, 2, and 3 are understandable across many regions though they represent different words in different languages").[4] So "10" is a combination of characters that represent a spoken word, "ten." Both "ten" and "10" represent the concept of the number ten.

[4] https://www.britannica.com/topic/Chinese-writing/Characteristics (last visited Sept. 16, 2024).

The State next argues that digits are not letters because "a 'letter' both (1) represents a speech sound and (2) is part of a written alphabet." (Resp. Br. 45.) The State misapplies both elements of this definition.

First off, the State misunderstands what "alphabet" means. Tellingly, the State cites no definition of this term, although it is crucial to the State's argument. Given our planet's diversity of language and communication, "alphabet" has an inclusive meaning: "[a] set of symbols, gestures, words, etc., used to represent the letters, *numerals*, and other characters of a written language." *Alphabet*, Oxford English Dictionary (emphasis added).[5] (Reply App. 6.) The digits 0-9—a set of symbols representing the numerals of a written language—are thus an alphabet.

The State tries to dodge this conclusion by appealing to a single Anglo-centric alphabet. The State notes that some dictionary definitions of "letter" refer to "*an* alphabet," but then it argues that digits "are not part of *the* alphabet." (Resp. Br. 44-45 (emphases added).) That shift—from "an" to "the"—is significant. When "alphabet" refers only to "the set of 26 letters from A to Z used to write words in English," the word "alphabet" is preceded "with *the*," a definite article. *Alphabet*, Oxford English Dictionary. (Reply App. 4.) So despite the State's narrow focus, "alphabet" does not refer only to the A-Z Roman alphabet. Although digits are not part of *that* alphabet, they are part of *an* alphabet. For this reason, "letter" "often includ[es] the arabic numbers." (LeMieux's Br. 25 (quoting *Letter*, Webster's Third New International Dictionary (1993)).)

Applying the other element in its definition of "letter," the State overlooks that digits *are* symbols or characters that represent speech sounds. For example, "7" is a symbol or character that represents the speech sounds "seven"—or, rendered in the International Phonetic Alphabet, [sɛvən]. When a person reads "7" aloud, she says "seven."

III. This Court should declare Item Veto A-1 invalid.

Against this Court's precedent, the State argues a bill should not take effect without any invalidated vetoes. (Resp. Br. 49.) Special justification is required for overturning precedent. *Schultz v. Natwick*,

[5] https://www.oed.com/dictionary/alphabet_n?tab=meaning_and_use#6151354 (last visited Sept. 16, 2024).

2002 WI 125, ¶37, 257 Wis. 2d 19, 653 N.W.2d 266. The State identifies none.

Besides, this Court need not consider that issue because it "may remand to the Governor" after invalidating Item Veto A-1. (LeMieux's Br. 40.)

CONCLUSION

This Court should declare Item Veto A-1 invalid.

Dated this 17th day of September 2024.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of the relevant portions of this brief is 2,995 words.

Dated this 17th day of September 2024.

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CERTIFICATE OF E-FILE/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 Supreme Court and Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 17th day of September 2024.

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