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No. 2024AP729-OA

In the Supreme Court of Wisconsin

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.

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR REFORMING GOVERNMENT

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STATEMENT OF INTEREST

The Institute for Reforming Government, as a Wisconsin-based nonprofit, advocates for an efficient and functioning government—to ensure that government is responsive to the will of the people. Be it local, state, or federal governance, the Institute for Reforming Government's mission is to encourage, educate, and inform people about all levels of government, based on what has worked in Wisconsin and in states across the country.

The Institute for Reforming Government takes a keen interest in ensuring that the laws enacted by the legislature and signed by the governor advance the will of Wisconsinites, as expressed via their many elected representatives. The governor's partial veto power shifts some of the power to decide what legislation will say away from the many (the legislature) and assigns it to the one (the governor). Unless this power is carefully monitored and its constitutional limits rigorously enforced, it risks the creation of laws that undermine—rather than advance—the will of the people.

INTRODUCTION

The partial veto power is a tool in the governor's toolbelt, but it has a specific purpose. When it comes to fiscal policy, the partial veto power is a one-way rachet. It empowers the governor to tighten public spending and taxation by eliminating or reducing budgetary items, but it does not permit the reverse. The governor cannot use the partial veto power to increase either appropriations or revenue. That function requires a different tool—legislative power—which is not in the governor's toolbelt.

From the first use of the partial veto power in 1931 until 1988, governors understood this. The first governor to wield the partial veto power expressly acknowledged that he could not use this tool to increase appropriations. And over the next 57 years, no governor tried to use the partial veto power to increase public spending or authorize tax increases. They understood the "one-way" nature of the tool and respected that limitation as an essential ingredient to the separation of powers.

Since 1988, however, governors have misused the partial veto power as a tool to spend and tax without legislative approval. Governors have spent billions that the legislature never appropriated and collected hundreds of millions in taxes the legislature never authorized. Governor Evers' partial veto in this case—increasing revenue limits for 400 years longer than the legislature approved—is the latest example of gubernatorial abuse of the partial veto power. This trend concentrates power in a way not contemplated by the Wisconsin Constitution and undermines the separation of powers. It has also evaded judicial review until this case.

The Institute for Reforming Government respectfully asks this Court to restore the understanding of the governor's partial veto power which prevailed during its first 57 years and declare that Item Veto A-1 of 2023 Wisconsin Act 19 unconstitutionally exceeded the governor's authority. The governor has a great many tools to influence public policy. The power to unilaterally loosen the public purse strings isn't one of them.

ARGUMENT

I. THE HISTORY SURROUNDING THE CREATION OF THE PARTIAL VETO POWER SHOWS THAT GOVERNORS MAY NOT USE THAT POWER TO *INCREASE* PUBLIC SPENDING OR TAXATION.

To understand the scope of the governor's partial veto power, it is helpful to examine the history surrounding the creation of that power. This Court recently explored the value of history to aid constitutional interpretation in *Wisconsin Justice Initiative, Inc. v. Wisconsin Elections Commission*, 2023 WI 38, 407 Wis. 2d 87, 990 N.W.2d 122. Although the justices expressed differing views on the weight that should be ascribed to historical evidence, all justices agreed historical evidence holds some persuasive value when interpreting constitutional provisions. *Id.*, ¶¶21, 32 (Hagedorn, J.); *id.*, ¶94 (Dallet, J., concurring). This court has a long tradition of reviewing history to aid in the interpretation of constitutional provisions. *See, e.g.*, *Jacobs v. Major*, 139 Wis. 2d 492, 512, 407 N.W.2d 832 (1987); *State v. Johnson*, 176 Wis. 107, 114–15, 186 N.W. 729 (1922) (explaining that contemporaneous construction of a constitutional provision "is entitled to great deference").

Here, the historical record paints a clear picture that the governor's partial veto power was originally understood to allow the governor to tighten the public purse strings, but not to loosen them.

A. In 1931, Governor Philip La Follette opined that the newly created veto power did not authorize him to unilaterally increase an appropriation.

In 1930, the Wisconsin people amended Article V, Section 10 of the Wisconsin Constitution to create the following provision: "Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law . . . ."[1] Although other aspects of Article V, Section 10 have changed, this language remains the same today as it was when it was ratified in 1930.

The next year, in 1931, Governor Philip La Follette became the first governor to exercise the partial veto authority, doing so on two occasions.[2] But Governor La Follette's most significant partial veto was the one he never made. In his veto message to that year's budget bill, Governor La Follette noted that the bill reduced the

[1] Richard A. Champagne et al., Legislative Reference Bureau, *The Wisconsin Governor's Partial Veto*, Reading the Constitution, at 8 (June 2019).
[2] *Id.* at 8.

appropriation to the University of Wisconsin from the prior budget.[3] He observed that vetoing the reduced appropriation would have allowed UW's funding to continue at the prior budget's higher level.[4] Governor La Follette authored a thoughtful veto message explaining that using the partial veto power to increase public spending would be unconstitutional.[5] The message is reproduced *in full* below:

> Since both the Executive Budget and Bill No. 107, A., decrease the appropriations for many of the agencies and departments from what they received in 1930–31, it consequently follows that ***the Executive cannot veto these items without increasing the appropriation over that provided in Bill No. 107, A.***
>
> For example, the University of Wisconsin received for operation in 1930–31—$2,990,663. This appropriation continues until and unless changed by the Legislature, and would provide the University, if left unchanged, with $5,981,326 for the coming biennium. Under the Executive Budget recommendations, this particular item was decreased $151,326 for the coming biennium. Bill No. 107, A., increases the Executive Budget recommendations for this item by $80,000.
>
> If the Executive were to disapprove of this item in Bill No. 107, A., he would not restore the University

[3] *Id.* at 9.
[4] *Id.*
[5] *Id.*

> appropriation for operation to that provided in the Executive Budget. The veto of this item in Bill No. 107, A., would instead restore the appropriation to that provided by the Legislature of 1929 and would thereby increase the appropriation by $71,326 over that provided in Bill No. 107, A.
>
> ***In the exercise of the authority to veto parts of appropriation bills, the Executive is therefore confined practically, at the present time, to those items in Bill No. 107, A., where the veto will in fact reduce the total appropriation.***[6]

As observed in the *Leader-Telegram* on April 26, 1931, the legislature "showed no displeasure at the governor's action."[7]

Governor La Follette's veto message captured an essential ingredient of our constitutional separation of powers—the governor cannot spend that which the legislature has not appropriated.

B. From 1931–1987, no governor attempted to use the partial veto power to increase public spending or taxation.

Governor La Follette's veto message was long understood to liquidate the bounds of the governor's partial veto power. For the next 57 years, from 1931 through 1987, no governor challenged

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[6] *Id.* at 9 (quoting another source) (emphasis added) (paragraph divisions added).

[7] *Id.* (quoting another source).

Governor La Follette's position that the partial veto power could not be used to increase an appropriation or, by the same token, to increase taxes.[8]

It makes sense that governors for 57 years respected the precedent Governor La Follette set. "'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'" *Chiafalo v. Washington*, 591 U.S. 578, 592 (2020) (Kagan, J.) (quoting another source). "As James Madison wrote, 'a regular course of practice' can 'liquidate & settle the meaning of' disputed or indeterminate 'terms & phrases.'" *Id.* at 593 (Kagan, J.) (quoting another source). It stands to reason the governors who followed Governor La Follette viewed it as a settled matter that their partial veto power was limited to the act of reduction, not addition.

[8] Frederick B. Wade, *The Origin and Evolution of Partial Veto Power*, 81 Wis. Law 12, 15 & 57 (Mar. 2008).

C. Since 1988, governors have misused the partial veto power to unilaterally increase public spending and taxation.

The settled state of affairs ended in 1988, spurred in part by language in this Court's decision in *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988). In that case, the Court declared, "We hold that a partial veto resulting in a reduction in an appropriation is precisely the sort of partial veto measure the governor of this state is authorized to take pursuant to art. V, sec. 10 Wis. Const." *Id.* at 461.

Unfortunately, governors since appear to have missed the "resulting in a *reduction*" language in the *Thompson* case. (Emphasis added.) In 1991, Governor Thompson used the partial veto power "to create an annual appropriation of $319,305,000 for a school tax credit that led to the spending of more than $1.2 billion that the legislature did not authorize over a period of four years."[9] In 2003, Governor Doyle used the partial veto power "to create an annual appropriation of $703,102,200 for distribution to

[9] Wade, *supra* note 8, at 15.

municipalities."[10] That same year, Governor Doyle also used the partial veto power to "increase the state's bonding authority for major highway projects from $140 million to $1 billion."[11] Taken together, these three partial vetoes authorized $2.7 billion in public spending which the legislature never approved.

It's not just a spending problem either. Since 1988, governors have also used the partial veto power to increase taxes. In 1991, Governor Thompson "used partial vetoes to increase the amount of sales taxes that retailers were required to pay by up to $200 per year."[12] Then, in 1999, Governor Thompson used the partial veto power to alter the property tax rent credit to require "taxpayers to pay an additional $234 million in income taxes that the legislature did not authorize the state to collect."[13]

As Frederick Wade has noted, "The foregoing examples are just the tip of an enormous iceberg."[14] Since 1988, Wisconsin

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[10] *Id.*
[11] *Id.*
[12] *Id.* at 57.
[13] *Id.*
[14] *Id.*

Governors have misused the partial veto power to spend billions and tax millions without legislative approval.

D. The Court should restore the 1931–1987 interpretation and hold that governors cannot use the veto power to unilaterally increase public spending or taxation.

Curiously, the misuse of the partial veto power to increase public spending and taxation evaded judicial scrutiny until this case. Now, however, the Court has a choice—it can either return the partial veto power to the interpretation which prevailed from 1931 through 1987, or it can lend a judicial imprimatur to the executive misuse of that power over the past 36 years.

In the Institute for Reforming Government's view, there is only one correct answer. Governor La Follette correctly understood that his new partial veto power was one of reduction, not addition. The governors that followed also understood this for the next 57 years. The abuse of the partial veto power over the last 36 years was not prompted by any principle of constitutional interpretation—just pure executive ambition. This court should exercise its judicial authority to limit the governor's partial veto

power to its intended and longstanding interpretation. Governors may use the partial veto power to reduce spending and taxation, but they may not unilaterally increase spending or taxation.

II. USING THE PARTIAL VETO POWER TO INCREASE PUBLIC SPENDING OR TAXATION VIOLATES THE SEPARATION OF POWERS.

In the original Latin, "veto" literally means, "I forbid."[15] Consistent with a proper understanding of the gubernatorial and legislative roles, the pre-1988 interpretation of the partial-veto power did not permit governors to use their "forbidding" power to *increase* appropriations or revenue. As Governor La Follette correctly expressed: the "Executive is therefore confined . . . [to] reduce the total appropriation."[16] The reason the governor's veto is "confined" to that scope has to do with the nature of what a veto is. When the governor exercises the veto power, it is a narrowly defined power to say no—to forbid. *See* Federalist No. 73, 440–41 (Hamilton) (C. Rossiter ed. 1961) (explaining that the veto power

[15] Veto, *Merriam-Webster Online Dictionary* (2024), https://www.merriam-webster.com/dictionary/veto.
[16] Richard A. Champagne et al., *supra* note 1, at 9.

"is the qualified negative of the [executive] upon the acts or resolutions of the two houses of the legislature; or, in other words, his power of . . . preventing").

When the governor uses the partial veto power to rewrite a law to create a provision never contemplated or voted on by the legislature, he or she exercises legislative power—not the traditionally understood veto power. That is something the governor shall not do. *Flynn v. DOA*, 216 Wis. 2d 521, 545, 576 N.W.2d 245 (1998) ("Each branch has exclusive core constitutional powers, into which the other branches *may not intrude.*" (emphasis added)).

A. The Wisconsin Constitution is carefully crafted to ensure all public expenditures and taxes are approved by both chambers of the legislature and the governor.

The Wisconsin Constitution gives the "law creating power" to the legislature. Wis. Const. art. IV, § 1 ("The legislative power shall be vested in a senate and assembly."). This Court has described the legislative power as the power "to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved

by the law; [and] to fix the limits within which the law shall operate." *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 59, 158 N.W.2d 306 (1968) (quoted source omitted)). The Wisconsin Legislature exercises its legislative power by drafting and passing bills—*including all appropriation bills*. Wis. Const. art. IV, § 19 ("Any bill may originate in either house of the legislature, and a bill passed by one house may be amended by the other."). However, both houses (assembly and senate) must pass the same appropriation bill containing the same provisions.

Once that legislative process occurs, the appropriation bill heads to the governor's desk for approval or rejection. At that point, the governor can do three things with the appropriation bill: (1) approve in whole; (2) veto in whole; or (3) veto in part. Wis. Const. art. V, § 10. When the governor exercises the veto power, it is a narrowly defined power to say no. *See* Federalist No. 73, 440–41 (Hamilton) (C. Rossiter ed. 1961). Thus, correctly understood, the veto power permits the executive to *stop* or *prevent* a piece of

legislation from becoming law—it does not permit the governor to create new, previously uncontemplated law.

The key take-a-ways from these touchstone principles are:

1. The legislature, not the governor, has the power to "create" law.

2. The governor's veto power only permits the governor to say "no" to the laws passed by the legislature.

Based on these two simple principles, if the governor exercises his veto power in such a manner that his "no" "creates" or "makes" something new that was *not* in the original appropriation bill, the governor unquestionably exercises legislative power. *Schuette v. Van De Hey*, 205 Wis. 2d 475, 480–81, 556 N.W.2d 127 (Ct. App. 1996) ("Legislative power . . . is the authority to make law.").

This Court has long recognized that the power to "make" law is a core constitutional power belonging with the legislature. *State v. Whitman*, 196 Wis. 472, 505, 220 N.W. 929 (1928); *Schmidt*, 39 Wis. 2d at 59; *Schuette*, 205 Wis. 2d at 480–81; *Koschkee v. Taylor*, 2019 WI 76, ¶11, 387 Wis. 2d 552, 929 N.W.2d 600. Hence, if the

governor uses the veto power—which is just the power to say "no"—to "make" law, this engages in a legislative function. This Court has held that this is something the governor may not do. *Flynn*, 216 Wis. 2d at 545; *see also Fiedler v. Wisconsin Senate*, 155 Wis. 2d 94, 100, 454 N.W.2d 770 (1990).

These principles apply to all bills and laws, but they are uniquely essential in the spending and taxation contexts. When Wisconsin spends, its citizens pay for it through increased taxation now or increased borrowing, which leads to increased taxation later. Recognizing the axiomatic link between spending and paying, "it was a maxim that the people ought to hold the purse-strings." Farrand, Max, ed. *The Records of the Federal Convention of 1787*. Rev. ed. 4 vols. New Haven and London: Yale University Press, 1937. That is because the spending power is the "most complete and effectual weapon with which any constitution can arm" the government. Federalist No. 58, at 394 (J. Madison) (J. Cooke ed. 1961); *see also* Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 Ga. L. Rev. 1, 3 (1986).

Thus, in the spending context, this Court should scrutinize the governor's use of the veto power more—not less—to ensure that the governor does not use it to "create" or "make" appropriations or collect money contrary to the legislature's intentions. The governor can say "no" as many or few times as the governor likes, but the governor cannot use his or her ability to say "no" to say "yes" to spending or collecting more public funds than the legislature approved.

B. Governor Evers' 2023 partial veto increasing revenue limits beyond what the legislature approved violates these separation of powers principles.

Applying these principles to this case, the Court can only reach one reasonable conclusion: Item Veto A-1 violates Article V, § 10(1)(c) of the Wisconsin Constitution because, in issuing it, Governor Evers exercised legislative power.

In the 2023–2025 biennium budget bill, the legislature approved a two-year increase to the school district revenue limit. The original legislation set the revenue-limit increase to end after the "2024–25" school year. But with a stroke of his veto pen,

Governor Evers removed the "20" and the en-dash in "2024–25," leaving the year "2425" in its place. Thus, Governor Evers expanded that revenue increase by an additional *400 years*—a period longer than the existence of Wisconsin and the United States. Item Veto A-1 allows school districts to raise property taxes without requiring voter approval through a referendum for 402 years—it robs the legislature of its "power of the purse."

Item Veto A-1 created a revenue limit far beyond what the legislature passed, intended to pass, or even contemplated. It was a blatant exercise of legislative power. *See Schmidt*, 39 Wis. 2d at 59 (explaining that the legislative power is the power "to declare whether or not there shall be a law"). Governor Evers can say yes or no to the "2024–2025" revenue increase, but he cannot run off with the legislature's core constitutional powers, as he did here, and spend more money than the legislature approved. In doing so, Governor Evers "intrude[d]" on the "exclusive core constitutional powers" of the legislature, which is something he "may not" do. *Flynn*, 216 Wis. 2d at 545.

CONCLUSION

The Institute for Reforming Government respectfully asks that the Court declare that Item Veto A-1 of 2023 Wisconsin Act 19 is unconstitutional and invalid.

Dated: September 17, 2024

Respectfully submitted,

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Electronically signed by Caleb R. Gerbitz

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FORM AND LENGTH CERTIFICATION

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

Dated: September 17, 2024.

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