No. 2024AP729

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.

BRIEF OF NON-PARTY WISCONSIN STATE LEGISLATURE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTRODUCTION

The Wisconsin Constitution vests in the Legislature the power to make laws and to appropriate the State's funds through legislation. The constitution also permits the governor to participate in this process through his veto power, which he may exercise either in whole or in part. But the governor has the power only to approve or not approve, in whole or in part, an appropriations bill. He does not have the power to create. That is the Legislature's alone.

At issue here is Governor Evers' use of his partial-veto pen to create a new duration. Specifically, the governor struck numerals and symbols to increase the duration of certain revenue limits from 2 years to 402 years. But the governor's power is limited to approving "part" of a bill, which, as to numbers such as durations, means reducing the number, not increasing it. Separately, as Justice Abrahamson explained, a governor cannot "create new . . . durations" using his partial-veto power. *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 523, 534 N.W.2d 608 (1995) ("*C.U.B.*") (Abrahamson, J., dissenting). Each of these reasons is independently sufficient to declare the partial veto here unlawful. And—contrary to the positions of the parties—once the partial veto is declared unlawful, the only proper remedy is to declare that the challenged sections of the bill as passed by the Legislature are law.

STATEMENT OF INTEREST

The Legislature has an interest in ensuring that the laws of this state are validly enacted. *See* Wis. Stat. § 803.09(2m) (permitting the Legislature to intervene as of right when a case touches on "the

constitutionality of a statute"). More, the Legislature has an interest in preserving its institutional authority; the Legislature or its members have participated in many prior cases before this Court where the governor's partial veto was challenged. *See Wis. Small Business United, Inc. v. Brennan*, 2020 WI 69, 393 Wis. 2d 308, 946 N.W.2d 101; *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685; *Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997); *C.U.B.*, 194 Wis. 2d 484; *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. THE WISCONSIN CONSTITUTION DOES NOT PERMIT THE GOVERNOR TO INCREASE A DURATION OR TO CREATE A NEW DURATION WITH HIS PARTIAL-VETO PEN

The Wisconsin Constitution "'creates three separate coordinate branches of government,' with the understanding that no branch of government can subordinate, control, or exercise the power of another branch." *Evers v. Marklein*, 2024 WI 31, ¶ 9, 412 Wis. 2d 525, 8 N.W.3d 395 (citation omitted). This doctrine of separation of powers is "implicit" in a "tripartite division" of power. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384. It is "not just important, but the central bulwark of our liberty." *Serv. Emps. Int'l Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶ 30, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted).

To separate power into three branches, the Wisconsin Constitution vests a specific core power in each branch. *See id.* ¶ 31. "The

legislative power" is "vested in a senate and assembly." Wis. Const. art. IV, § 1. "The executive power" is "vested in a governor." Wis. Const. art. V, § 1. And "[t]he judicial power" is "vested in a unified court system." Wis. Const. art. VII, § 2. With these specific powers vested to each branch, the "positive delegation of power to one officer or department implies a negation of its exercise by any other office, department[,] or person." *Marklein*, 2024 WI 31, ¶ 9 (citation omitted).

The "legislative power" vested in the "senate and assembly" "is the authority to make laws . . . ." Wis. Const. art. IV, § 1; *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600 (citation omitted). This "legislative power encompasses the ability to determine whether there shall be a law, to what extent the law seeks to accomplish a certain goal, and any limitations on the execution of the law." *Marklein*, 2024 WI 31, ¶ 12 (citation omitted). And "squarely within the legislative power" is the "determination[ ] of how to appropriate the state's funds." *Id.* ¶ 14. The constitution provides "[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law." Wis. Const. art. VIII, § 2. This provision "empower[s] the legislature . . . to make policy decisions regarding . . . spending," *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 540, 576 N.W.2d 245 (1998), and "to spend the state's money by enacting laws," *SEIU*, 2020 WI 67, ¶ 69.

This expansive legislative power is checked by the "procedural requirements" set forth in the constitution: "bicameralism and presentment." *Marklein*, 2024 WI 31, ¶ 13. After a bill "pass[es]

through both the assembly and the senate" it must "then be presented to the governor for his approval or veto." *Id.* (citing Wis. Const. art. V, § 10(1)(a)). These two procedural requirements "serve the same fundamental purpose: to restrict the operation of the legislative power to those policies which meet the approval of three constituencies, or a supermajority of two." *Id.* (citation omitted). After all, when a bill is presented to the governor, that bill will become law if the governor "signs the bill"; "rejects the bill" and both houses pass the bill "by two-thirds of the members present"; or does not return the bill "within 6 days" excepting Sundays when the Legislature does not "prevent[ ] the bill's return" "by final adjournment." Wis. Const. art. V, § 10(1)(a)–(b), (2)(a), (3). Additionally, for "[a]ppropriation[s] bills," the governor may "approve[ ]" the bill "in whole or in part" with the "part approved" becoming law, and the "rejected part" becoming law if approved by "two-thirds of the members present" of both houses. Wis. Const. art. V, § 10(1)(b), (2)(b).

The governor's "power to veto, whether in whole or in part, is legislative in nature; it is a participation in lawmaking." *Bartlett*, 2020 WI 68, ¶ 242 (Hagedorn, J., concurring) (citation omitted). Indeed, the first time this Court addressed the scope of the governor's partial-veto power, it recognized that the governor's "power of partial veto" was an "exercise of his quasi legislative function." *State ex rel. Wis. Telephone Co. v. Henry*, 218 Wis. 302, 260 N.W. 486, 492 (1935). And, since *Henry*, this Court has reaffirmed that the governor's partial veto is an exercise of a quasi-legislative power. *See State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 133–34, 237

N.W.2d 910 (1976); *Kleczka*, 82 Wis. 2d at 709 n.3; *Wis. Senate*, 144 Wis. 2d at 454.

As a departure from our tripartite system of government, the governor's power to participate in lawmaking—a core legislative power—must be understood against this backdrop. Under our constitutional system, the governor is vested with "executive power"—not "legislative power." Wis. Const. art. IV, § 1; *id.*, art. V, § 1; *SEIU*, 2020 WI 67, ¶ 31. His exercise of this "quasi legislative function," *Henry*, 260 N.W. at 492—the power to approve or veto a bill, or do so in part for appropriations bills—cannot be read to permit him to create laws by clever editing, effectively "mak[ing] laws," which is a power left to the Legislature, *Koschkee*, 2019 WI 76, ¶ 11. Accordingly, the governor's partial veto pen can extend only where the Wisconsin Constitution specifically permits—any further, and this eviscerates the Legislature's explicit authority to make law.

For two independent reasons, the governor's partial-veto power does not include the power to increase durations.

First, a larger number is not "part" of the smaller, and thus increasing numbers exceeds the partial-veto power. The Wisconsin Constitution permits the governor only to "approve[ ] in whole or in part" an "[a]ppropriation bill[ ]." Wis. Const. art. V, § 10(1). Since this language was adopted, this Court has recognized that, when it comes to numbers, a "part" is a "quantity, mass, or the like, regarded as going to make up, with others or another, a large number, quantity, mass, etc." *Henry*, 260 N.W. at 491 (citation omitted). Accordingly, this Court has held that the governor has the

"power[ ] *to reduce or eliminate* numbers and amounts of appropriations in the budget bill." *Wis. Senate*, 144 Wis. 2d at 457 (emphasis added); *see also C.U.B.*, 194 Wis. 2d at 505–07 ("[I]t is readily apparent that $250,000 is 'part' of $350,000, because $250,000 is 'something less than' $350,000, and $250,000 goes 'to make up, with others . . . a larger number,' i.e., $350,000."); *id.* at 517–18 (Abrahamson, J., dissenting) (explaining the Court has "parcel[ed] a governor's partial veto power into three categories," including "to reduce or eliminate numbers, and [ ] to reduce or eliminate amounts of appropriations"). This Court has never held, nor could it, that the governor can *increase* numbers, including appropriations amounts: a larger number is not "part" of the smaller number.

Here, by increasing the duration of the revenue limits from 2 years to 402, the governor exceeded his authority under the Constitution. *See* 2023 Wis. Act 19, §§ 402–404, 408. He can only reduce; he cannot increase.

Second, the governor cannot create a new, increased number by combining portions of other numbers. The Wisconsin Constitution prohibits the governor from creating new words or sentences by creatively striking out letters, words, or symbols. "In approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of the enrolled bill, and may not create a new sentence by combining parts of 2 or more sentences of the enrolled bill." Wis. Const. art. V, § 10(1)(c).

This more recent prohibition was added to the Constitution in response to the Court's decision in *Wisconsin Senate*. *See C.U.B.*,

194 Wis. 2d at 501. In *Wisconsin Senate*, a divided Court concluded "that the governor has the authority to veto sections, subsections, paragraphs, sentences, words, parts of words, letters, and digits included in an appropriation bill as long as what remains is a complete and workable law . . . ." 144 Wis. 2d at 462. Justice Bablitch, joined by Justices Abrahamson and Steinmetz, dissented "to that portion of the majority opinion which allows a gubernatorial veto of individual letters." *Id.* at 466 (Bablitch, J., concurring in part, dissenting in part). As the partial dissent explained, the Wisconsin Constitution "gives the governor the power to 'approve' and the power to 'veto.' It does not give the governor the power to create." *Id.* "The veto of single letters can have but one purpose: to create new words." *Id.* Thus, permitting the governor to do so is both an affront to the constitution and "an invitation to terrible abuse." *Id.*

In response, the People amended the constitution to prohibit the practice of vetoing letters to create new words, *C.U.B.*, 194 Wis. 2d at 500–01, and to prohibit the governor from combining multiple sentences to create a new one, Wis. Const. art. V, § 10(1)(c). As Justice Abrahamson repeated when dissenting from the write-in veto allowed in *C.U.B.*, the Wisconsin Constitution does not permit the governor "to create new entities, *dates*, *durations*, percentages, distances[,] and more." 194 Wis. 2d at 522–23 (Abrahamson, J., dissenting) (emphasis added).

Here, the governor's partial veto "create[s] new . . . durations," something that, as Justice Abrahamson has correctly explained, is prohibited. *Id.* at 522–23. The governor does not have the power to create—he has only the power to "approve" or "veto." *Wis. Senate*,

144 Wis. 2d at 466 (Bablitch, J., concurring in part, dissenting in part). And to the extent that the *Wisconsin Senate* decision created any doubt on this score, the People of Wisconsin dispelled it. While the partial-veto power allows the governor some participation in lawmaking, the power to create law still rests properly with the Legislature. *See Koschkee*, 2019 WI 76, ¶ 11.

II. IF THE COURT DETERMINES THAT THE PARTIAL VETOES AT ISSUE HERE ARE UNLAWFUL, THE PROPER REMEDY IS TO DECLARE THE ACT AS PASSED BY THE LEGISLATURE TO BE THE LAW

As explained *supra* p. 8, if the governor does not return any bill, including appropriations bills, within six days after presentment (excepting Sundays) the bill becomes law unless the bill's return is prevented by final adjournment of the Legislature. Wis. Const. art. V, § 10(3); *Brennan*, 2020 WI 69, ¶ 4. The remedy in cases where a governor's partial veto is deemed unlawful thus depends on whether the Legislature adjourned within six days of presentment, preventing the bill's return. *See State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622, 624–25 (1936). When the Legislature does not adjourn within six days after presentment, the Court will treat an unlawfully partially vetoed bill as one that was not returned by the governor within six days, rendering the bill enacted as an operation of law. *Id.* at 625 ("[T]he partial veto being ineffective as a veto and no approval being required, the law is in force."). The Court has consistently afforded this remedy since it was first announced in *Finnegan*. *See Sundby*, 71 Wis. 2d at 125 ("If, in fact, the partial vetoes are invalid" "those sections of the

enactment" must be published "as if they had not been vetoed."); *Bartlett*, 2020 WI 68, ¶ 9 (per curiam) ("Relief is granted such that the portions of the enrolled bills that were vetoed are in full force and effect as drafted by the legislature."); *see also* 80 Op. Att'y Gen. 327, 327 (1992) ("Because the Governor's approval was not necessary for the bill to become law, the invalidity of the partial veto results in the law being enforced as passed by the Legislature.").[1]

This Court applied a different remedy in only one case, *Finnegan*, and only because the day after the act at issue was presented to the governor "the Legislature adjourned sine die." 264 N.W. at 623, 625. This "final adjournment[ ] prevent[ed] the bills' return" to the Legislature meaning "it shall not be law" without affirmative action by the governor. Wis. Const. art. V, § 10(3); *Finnegan*, 264 N.W. at 624–25. Thus, as the Court explained, the "act wholly fail[ed]." *Id.* at 625 (citing cases).

Nevertheless, the *Finnegan* Court recognized that its remedy was the *exception* not the *rule*. *Id.* at 624–25. The Court explained that in the normal course, *i.e.*, when "the act could become a law without the Governor's sanction and approval," "the partial veto being ineffective as a veto and no approval being required, the law is in force." *Id.*

The usual remedy is appropriate here. The Legislature pre-

[1] This Court held a partial veto was "not authorized by the constitution" and "invalid" in only one other case: *Risser*, 207 Wis. 2d at 181. There the Court did not opine on a remedy, and instead simply declared that the "Wisconsin constitution d[id] not authorize the Governor" to exercise the partial veto at issue. *Id.* at 203.

sented 2023 S.B. 70 (which became 2023 Wis. Act 19) to the Governor on June 30, 2023, and did not prevent its return by virtue of final adjournment. *See* Wis. Const. art. V, § 10(3); Senate Journal, 106th Reg. Sess., at 335;[2] 2023 S. J. Res. 1, § 1(1) ("[T]he biennial session period ends at noon on Monday, January 6, 2025.").[3] Rather, 2023 S.B. 70 could have returned to the Legislature after six days (excepting Sundays) and become law; the Governor's approval was not necessary. *See* Wis. Const. art. V, § 10(3); *Brennan*, 2020 WI 69, ¶ 4. Thus, if this Court declares the partial vetoes here unlawful, it should order that the disputed sections of 2023 S.B. 70 as passed by the Legislature are law. *See Finnegan*, 264 N.W. at 624–25; *Sundby*, 71 Wis. 2d at 125; *Bartlett*, 2020 WI 68, ¶ 9; *see also* 80 Op. Att'y Gen. at 327. Affording any different remedy would require overruling the well-settled remedy that dates back nearly 90 years. *See Johnson Controls, Inc. v. Emp'rs. Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257; *see also State v. Lynch*, 2016 WI 66, ¶ 101, 371 Wis. 2d 1, 885 N.W.2d 89 (Abrahamson and A.W. Bradley, JJ., concurring in part, dissenting in part) ("The doctrine [of *stare decisis*] requires fidelity to the rule of law.").

[2] *Available at*, https://docs.legis.wisconsin.gov/2023/related/journals/senate/20230630/_16.

[3] *Available at*, https://docs.legis.wisconsin.gov/2023/related/enrolled/sjr1.pdf.

CONCLUSION

This Court should rule in favor of the Petitioners and declare that the disputed portions of 2023 S.B. 70, as enacted by the Legislature, are law.

Dated: September 17, 2024.

Respectfully submitted,

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WIS. STAT. § 809.19(8g) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (bm) for a brief produced with proportional serif font, as well as this Court's June 17, 2024, order regarding the length of non-party briefs in this case. The length of this brief is 2,791 words.

Dated: September 17, 2024

Electronically signed by Ryan J. Walsh
Ryan J. Walsh

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2024, I caused the foregoing to be filed with the Court's e-filing system, which will send notice to all registered users.

Dated: September 17, 2024

Electronically signed by Ryan J. Walsh
Ryan J. Walsh