IN THE SUPREME COURT OF WISCONSIN

No. 2024AP000729

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.

NON-PARTY BRIEF OF *AMICUS CURIAE* PROFESSOR RICHARD BRIFFAULT

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INTEREST OF *AMICUS*

Amicus Professor Richard Briffault is a legal scholar with nationally recognized expertise in state constitutional law and legislative processes. He has published extensively in this area and wrote the seminal article on partial veto powers nationwide, including Wisconsin's. *See* Richard Briffault, *The Item Veto in State Courts*, 66 Temple L. Rev. 1171 (1993). He has a professional interest in promoting a sound understanding of the constitutional principles implicated here.

INTRODUCTION

Wisconsin's partial veto power stands at a fork in the road. For decades, this Court has been the most permissive in the nation in condoning broad partial vetoes, an outlier even among states with similar constitutional text. But the Court's most recent precedent has rejected creative partial vetoes, albeit without binding reasoning. *See Bartlett v. Evers*, 2020 WI 68, ¶ 4, 393 Wis. 2d 172, 945 N.W.2d 685 (per curiam). As the Court considers the future of this jurisprudence, it should maintain guidelines that uphold the partial veto's founding purpose: facilitating the democracy-promoting system of bicameralism and presentment, not subverting it.

Wisconsinites adopted the partial veto to address a defect of early twentieth century democracy: the "[v]ery definite evils" of legislative malfeasance through "log-rolling" multiple measures that "could not pass on their own merits." *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 447–48, 289 N.W. 662 (1940). As this Court has correctly recognized, the partial veto is a broad

gubernatorial power. *State ex rel. Wis. Tel. Co. v. Henry*, 218 Wis. 302, 314–15, 260 N.W. 486 (1935). By design, it is an affirmative or even "quasi legislative" power. *Id.* at 315. "By putting asunder what the legislature has put together," a partial veto necessarily "results in laws that the legislature never passed." Briffault at 1174.

But the power is not limitless. The governor may only reject "part" of an appropriations bill for the legislature's "reconsideration"—he may not invent entirely novel provisions. Wis. Const. art. V, § 10. Neither the text nor purpose of Wisconsin's partial veto provision establishes a loophole for the governor to act as a unilateral lawmaker. Using the veto to add unforeseen measures cannot be squared with the state constitution's structural commitment to deliberative, accountable lawmaking. Whatever the merits of this or any individual policy dispute, such an unbounded power is corrosive to democracy in the long run.

Line-drawing in partial veto cases is inherently difficult; no state court has avoided close judgment calls. Yet this Court, like every court to consider the question nationwide, has recognized a role for state courts in preventing the partial veto power's misuse. This is an appropriate case in which to resist further expansion. By striking individual digits and words to convert a two-year revenue limit increase to a 402-year increase, the governor here engaged in novel lawmaking that exceeds this Court's prior approvals (at least under the Constitution's current text). Allowing this creativity would further depart from the Constitution's text, history, and structure and its core democratic commitments. And

it would make Wisconsin even more of an outlier among states with partial vetoes.

ARGUMENT

I. Approving the partial veto in this case would move Wisconsin further from the text, history, and structure of the Wisconsin Constitution.

As this Court determines how best to reconcile and apply its partial veto precedents, it should prioritize fidelity to the text, history, and structure of the Wisconsin Constitution. *See, e.g.*, *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶¶ 19, 24, 295 Wis. 2d 1, 719 N.W.2d 408 (considering "plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature" as well as "the general purpose of the whole [instrument]" when construing a constitutional provision). These interpretive guides suggest a fundamental touchstone: The governor has broad authority to disaggregate measures the legislature has put together but not to craft entirely novel provisions.

The breadth of the governor's power follows from the very nature of a partial veto. The governor may alter proposed policies and deviate from the legislature's intent; the partial veto, after all, was designed "to enable the governor to give separate consideration to measures that the legislature preferred to tie together." Briffault at 1194; *see also State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 134, 237 N.W.2d 910 (1976) ("Every veto has both a negative and affirmative ring about it. There is always a change of policy involved."). Indeed, on close questions, the Court

should defer to the political process—the governor's broad veto power and the check of legislative override. *See, e.g.*, *Wash. Fed'n of State Emps. v. State*, 682 P.2d 869, 875 (Wash. 1984).

But the Court should not wholly abandon its role in safeguarding the democratic requirements of lawmaking. Where a partial veto clearly exceeds permissible bounds, the court should step in. Traditional interpretive tools and Wisconsin precedent suggest several indications of an impermissible veto: (1) the approved part does not conceivably fall within measures contemplated by the legislature; (2) the rejected part is not close enough to the bill's original components to be ripe for "reconsideration"; or (3) on the whole, the rejected or approved parts create absurdity that neither the legislature nor voters would have believed plausible. The veto under review exceeds constitutional limits in each of these ways.

A. The text of the partial veto provision indicates that the governor can only disaggregate provisions the legislature has bundled together.

Read in context, the text of the Constitution's partial veto provision indicates that the governor may approve some of a bill's components or provisions, and reject others, but cannot craft novel measures.

The Constitution provides that "Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law." Wis. Const. art. V, § 10(1)(b). "The rejected part" is returned to its house of origin, which can "reconsider the rejected part." *Id.* § 10(2)(b). If two-thirds of that house votes "to approve the rejected part," it is sent to the other

house where "it shall likewise be reconsidered." *Id.* If that house also passes it by a two-thirds vote, "the rejected part shall become law." *Id.*

The words "part," "approved," and "reconsider" all aid understanding of the scope of the governor's partial veto authority. This Court has discussed "part" but has elaborated little on the other terms.

This Court's earliest discussion of "part" came a few years after the partial veto power was enacted. According to *Henry*, the "usual, customary, and accepted meaning" of "part" is "[o]ne of the portions, equal or unequal, into which anything is divided, or regarded as divided; something less than a whole; 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; a piece, fragment, fraction, member, or constituent." 218 Wis. at 313 (citing Webster's New International Dictionary 1781 (2d ed. 1934)). In the partial veto context, *Henry* indicated that "part" referred to "every separable piece of legislation in an appropriation bill." *Id.* at 315.

The governor's power, moreover, is an authority to "approve[]" an appropriation bill in part, not to "originate" a bill as the legislature does. *Compare* Wis. Const. art. V, § 10, *with id.* art. IV, § 19. This suggests that what survives after a partial veto must be a component of what the legislature originally proposed.

The use of the word "reconsider" reinforces this understanding. The governor must send a "rejected part" back to the legislature for "*re*consideration." *Id.* art. V, § 10(2)(b)

(emphasis added). The "rejected part" must therefore be a measure that was logically considered in the original bill, such that the legislature can consider it again. *See Reconsider*, The American Heritage Dictionary 1470 (5th ed. 2011) ("reconsider" is "[t]o consider again"); *see also Return*, The American Heritage Dictionary 1500 ("return" is "[t]o send … back").

Familiar interpretive concepts reinforce this common-sense reading. This Court avoids reading legal texts in absurd ways and construes constitutional text in line with ordinary voters' understanding. *See, e.g.*, *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("statutory language is interpreted … reasonably, to avoid absurd or unreasonable results"); *Dairyland*, 2006 WI ¶¶ 37–44 (considering "voters' intent" and understanding when construing a constitutional amendment). The most common-sense understanding of "approv[ing]" or "reject[ing]" "part" of a bill is that a governor can only pass on components or provisions that are actually in the bill.

In sum, the text of the partial veto provision suggests that the governor may not use the partial veto to enact novel provisions, and ordinary tools of interpretation reveal guideposts to identify that line.

B. History confirms that the partial veto does not authorize the governor to enact novel provisions.

The history of the partial veto provision confirms that it was designed to allow the governor to disaggregate legislatively bundled provisions. As in many states, the partial veto's adoption

in Wisconsin responded to concerns about omnibus appropriation bills with "record expenditures" that forced the governor to agree to objectionable provisions or entirely halt large swaths of funding. Richard A. Champagne, Staci Duros & Madeline Kasper, *The Wisconsin Governor's Partial Veto after* Bartlett v. Evers, Reading the Constitution 4 (2020); Briffault at 1177. The partial veto thus "represent[ed] the coming together of three widespread state constitutional policies: the rejection of legislative logrolling; the imposition of fiscal restrictions on the legislature; and the strengthening of the governor's role in budgetary matters." Briffault at 1177.

The 1930 amendment debates explained that it would restore a meaningful executive veto power and resemble the partial or "item" vetoes adopted in many other states (none of which have ever empowered governors to selectively edit words or characters). *See Bartlett*, 2020 WI ¶¶ 31–37 (Roggensack, C.J., concurring in part, dissenting in part); Champagne, et al., at 5–10; *Seeks Popular Approval Nov. 4*, Iron County News (Oct. 11, 1930); *Vote for Amendment*, The Eau Claire Leader (Nov. 1, 1930). Nothing in these debates or early partial vetoes suggest that voters were ratifying altogether creative gubernatorial inventions. *See Vetoes Parts of Bill Today to Save Fund*, The Rhinelander Daily News (Apr. 21, 1931) (1931 partial vetoes struck fee provision and multiple appropriation items); *Henry*, 218 Wis. at 309 (approving veto of entire provisions).

Decades later, this Court embraced a broader view of the partial veto power. Those decisions, however, were substantially

repudiated by the state's voters. In 1990, voters stripped the governor's ability to "create a new word by rejecting individual letters," largely abrogating this Court's decision in *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988). *See* Champagne, et al., at 14. In 2008, voters prohibited the governor from "creat[ing] a new sentence" from parts of multiple sentences. *Id.* at 23. This amendment took aim at the "Frankenstein" veto governors had used to create new provisions through selective editing. *Id.*

Although the 1990 and 2008 amendments provide specific limits on the partial veto power, their approval "should not be read as green-lighting everything less than the limitations they impose." *Bartlett*, 2020 WI ¶ 255 (Hagedorn, J., concurring). Public advocacy surrounding the 2008 amendment campaign suggested it would entirely ban the "Frankenstein" veto—not just the combination of two sentences into one. *See, e.g.*, Rachel Wittrock, *Andy Jorgenson Seeks to Knock Down Partisan Walls*, Daily Jefferson County Union (July 17, 2008) (implying amendment would stop governor from "cross[ing] out words to make it say something else"); *Big Decisions Deserve Your Vote*, Wisconsin State Journal (Apr. 1, 2008) (framing amendment as a "ban" on the Frankenstein veto). The prevalence of this messaging undercuts the idea that, by amending the Constitution to bar some "Frankenstein" vetoes, voters impliedly accepted the validity of all others.

C. The structure of the Wisconsin Constitution further reinforces this understanding.

The partial veto provision should also be read in harmony with the Constitution's broader structure. *See, e.g.*, *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 729–30 (1967) (constitutional interpretation should consider "the general purpose of the whole [instrument]" and aim "to promote the objects for which [the Constitution] w[as] framed and adopted") (internal quotation marks omitted); *cf. Bartlett*, 2020 WI ¶ 244 (Hagedorn, J., concurring) ("A blind focus on the partial veto power alone … is not constitutional faithfulness."). This means giving effect to the Constitution's fundamental commitment to democratic self-government, particularly as manifested in the requirements of bicameralism and presentment.

The Wisconsin Constitution maintains an unflagging commitment to democratic self-rule. The Declaration of Rights begins by affirming that governments "deriv[e] their just powers from the consent of the governed." Wis. Const. art. I, § 1. The Constitution then divides those powers between three branches and places the people in control of each branch through regular elections. *See* Wis. Const. art. IV, §§ 1, 4, 5 (legislature); art. V, §§ 1, 3 (executive); art. VII, §§ 2, 4(1) (judiciary); art. XIII, § 12 (recall). This separation of powers has long been understood as a mechanism of avoiding "unchecked power." *State v. Washington*, 83 Wis. 2d 808, 826, 266 N.W.2d 597 (1978); *see also* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021).

The requirements of bicameralism and presentment facilitate these democratic commitments by requiring three separately elected entities to pass on a bill before it becomes law. All laws must be enacted "by bill," and all bills must "originate" in the legislature and pass both chambers (bicameralism) before being presented to the governor for signature or veto (presentment). Wis. Const. art. IV, §§ 17, 19; *id.* art. V, § 10. These requirements bring together the people's district-based representatives and "the one institution guaranteed to represent the majority of the voting inhabitants of the state, the Governor," thereby rendering "[b]oth the Governor and the legislature … indispensable parts of the legislative process." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 556–57, 126 N.W.2d 551 (1964). As outlined above, the partial veto power was designed to restore balance in this process—not to subvert it by giving the governor capacious unilateral lawmaking authority.

D. This veto exceeds the bounds of even the properly capacious understanding of the partial veto power.

The veto under review exceeds even the properly broad construction of the veto power. It amounts to the addition of a new measure, not a disaggregation or unbundling of measures adopted by the legislature. And it flouts each of the guideposts that this Court's interpretive traditions suggest.

First, the part "approved" was not a component of the legislature's enactment. The part approved includes a year ("2425") and a 400-year revenue limit increase extension, which neither appeared in the original bill nor could conceivably be

viewed as part of underlying deliberations. *Cf. State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 684, 264 N.W.2d 539 (1978) (veto "restore[d]" a "provision that existed in the original bill").

Similarly, the "rejected part" cannot be viewed as a matter the legislature considered or could "reconsider." The "rejected part" here is not the two-year limit on the revenue limit increase, which the legislature at least arguably could "reconsider." Rather, the veto conjured up a new 2425 sunset. The rejected text—"the 24 school year and the 20– school year"—is not a "part" that the legislature considered or could reconsider.

Finally, the veto here approaches the absurd and exceeds any reasonable understanding of legislative or voter intent in adopting the partial veto or subsequent limits. *See supra* section I.B; *Kayden*, 34 Wis. 2d at 732; *Dairyland*, 2006 WI ¶¶ 37–44. Extending a fixed revenue limit increase into the future for more than twice as long as Wisconsin has been a state is not a result that anyone would ever expect to emerge from the deliberative process of bicameralism and presentment that the Wisconsin Constitution envisions. It also defies the core purposes of the partial veto—namely, to allow the governor to cut back on what the legislature had proposed in order to promote fiscal restraint and combat logrolling. Briffault at 1177–80. Some vetoes—such as striking a condition on an appropriation—may present close cases under this conception, and the Court should defer to the political process in close cases. But the veto here undeniably goes far beyond what the legislature ever proposed or considered.

II. Prior precedent should not be extended to allow the novel veto employed here.

To be sure, the Court is not writing on a blank slate, and it has appropriately described the partial veto power expansively. But its precedents do not compel approval of the veto here, which goes beyond any previously approved vetoes, aside from those that precipitated the 1990 and 2008 amendments. Extending those precedents further would suggest there are no boundaries on the partial veto power.

This Court's early cases confirm that the partial veto was designed to allow the governor to pass on separate provisions and further imply that the governor could not pull apart inseparable components. *Henry*, 218 Wis. at 315 (governor can "pass independently on every separable piece of legislation in an appropriation bill"); *Martin*, 233 Wis. at 447 (describing partial veto as combatting "log-rolling"); *Sundby*, 71 Wis. 2d at 135 (upholding vetoes because they struck "separable provisions, not constituting provisos or conditions to an item of appropriation"). In *Kleczka*, the Court then accepted that the governor could "remov[e] provisos and conditions to an appropriation so long as the net result … is a complete, entire, and workable bill which the legislature itself could have passed in the first instance." 82 Wis. 2d at 715.

But *Kleczka* does not endorse the levels of creativity employed here. The veto at issue converted a provision allowing taxpayers to "add on" $1 of tax liability for a campaign fund into an option to "check[] off" $1 of existing tax liability for the fund. *Id.* at 685. This went further than previously approved vetoes, but it

did not go as far as the veto in this case. The governor's veto message in *Kleczka* explained that he acted "to *restore* the check-off provision that existed in the original bill," and the veto at least arguably separated actual measures the legislature had considered. *Id.* at 684 (emphasis added). Here, the legislature never proposed or even considered a fixed 402-year revenue limit increase, and the governor's veto message did not purport to restore a previously considered measure. Gov. Tony Evers, 2023–25 Veto Message 1 (July 5, 2023) (explaining veto would "*provide* a $325 per pupil revenue limit adjustment in each year from 2023 through 2425" (emphasis added)). Even if the bill's revenue adjustments for 2023-24 and 2024-25 can be regarded as a 2025 sunset, as respondents now argue, the veto did not simply remove that sunset; it selectively struck digits and dashes to contrive a new, never-before-considered 2425 sunset. The veto in *Kleczka* involved no similar sleight of hand.

The only case that accepted this level of creativity was directly repudiated by voters via a 1990 constitutional amendment. *Wis. Senate*, 144 Wis. 2d 429; Champagne, et al., at 22. In light of the 1990 and 2008 amendments to the partial veto provision, *Wisconsin Senate* must be read narrowly, and it does not control the result here. *Cf. State v. Johnson*, 2023 WI 39, ¶ 20, 407 Wis. 2d 195, 990 N.W.2d 174 (recognizing that the law can "change[] in a way that undermines [a] prior decision's rationale"). Notably, while this Court has continued to draw upon *Wisconsin Senate* in cases involving write-in vetoes, *see Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 534 N.W.2d 608 (1995); *Risser v.*

Klauser, 207 Wis. 2d 176, 558 N.W.2d 108 (1997), it has not since 1990 relied upon that ruling to validate creative textual deletions.

This Court's *Bartlett* decision makes it even more inappropriate to resuscitate *Thompson*. *Bartlett* rejected three vetoes that resembled or were even less creative than the veto challenged here. 2020 WI ¶ 4. One converted a school bus replacement fund into an alternative fuels fund; another converted a local road improvement fund into a general local grant fund; and the third rewrote the definition of "vapor product" to include vaping liquid. *Id.* ¶¶ 16, 18, 24 (Roggensack, C.J., concurring in part, dissenting in part). In contrast, the lone surviving veto struck two vehicle fee decreases while approving two fee increases. *Id.* ¶ 22. Unlike the rejected vetoes, the surviving veto did not transform provisions into entirely new measures. Although no single rationale garnered majority support, five of seven justices agreed to strike two vetoes, and four agreed to strike the third. *Id.* ¶ 4. In other words, the Court plainly understands the partial veto power to have some guardrail beyond the bare minimum idea that the remainder be a "workable law." *Wis. Senate*, 144 Wis. 2d at 437. Upholding the creative veto employed here would necessarily remove that guardrail, in conflict with the result in *Bartlett* and the weight of this Court's precedent.

III. No other state has gone as far as Wisconsin in abandoning meaningful guardrails on the partial veto power.

Other state courts have grappled extensively with how to define the scope of the partial veto power. Briffault at 1172–74.

Although approaches vary widely between states, none have opted to abandon all meaningful guardrails.

In the five states with constitutional language allowing the governor to veto "part" of an appropriation bill,[1] none has taken Wisconsin's approach. To the extent that these states interpret "part" differently than "item," they have concluded—as this Court did in 1935, *Henry*, 218 Wis. at 315—that the broader term allows the governor to veto non-appropriation provisions, *see Homan v. Branstad*, 812 N.W.2d 623, 630 (Iowa 2012); *State ex rel. Smith v. Martinez*, 265 P.3d 1276, 1278 (N.M. 2011); *Mgmt. Council of Wyo. Legislature v. Geringer*, 953 P.2d 839, 844 (Wyo. 1998), *abrogation on other grounds recognized by Allred v. Bebout*, 409 P.3d 260 (Wyo. 2018). And they impose various limits on that power, such as barring the governor from vetoing a condition on an appropriation without vetoing the accompanying appropriation, *Homan*, 812 N.W.2d at 630, or requiring the veto to "eliminate the *whole* of an item or part," *Martinez*, 265 P.3d at 1278. *See also id.* (governor cannot "enact or create new legislation by selective deletions"); *Barbour v. Delta Corr. Facility Auth.*, 871 So.2d 703, 711 (Miss. 2004) (governor cannot strike "a condition of an appropriation bill").

Other state constitutions limit the partial veto to "items," and some state courts consequently enforce stricter boundaries—

[1] The Iowa, Kentucky, New Mexico, Mississippi, and Wyoming constitutions most closely track Wisconsin's. *See* Iowa Const. art. III, § 16; Ky. Const. § 88; N.M. Const. art. IV, § 22; Miss. Const. art. IV, § 73; Wyo. Const. art. IV, § 9. The Kentucky Supreme Court has not addressed the bounds of the state's partial veto provision.

but it is not clear that the distinction between "item" and "part" is as stark as this Court has suggested. *See Bartlett*, 2020 WI at ¶¶ 31–37 (Roggensack, C.J., concurring in part, dissenting in part) (discussing interchangeable use of "item" and "part" in 1930 amendment drafting and debates). As in some states that use the term "part," a few states with "item" vetoes allow the governor to veto non-appropriation items within limits. *See, e.g.*, *Henry v. Edwards*, 346 So. 2d 153, 158 (La. 1977) ("line item" veto allows governor to veto "inappropriate provisions" inserted as "riders"); *Op. of the Justs. to the Senate*, 643 N.E.2d 1036, 1206–07 (Mass. 1994) (governor can strike non-appropriation items but "may not disapprove … restrictions [on appropriations] without disapproving the [whole] item"). Other states instead restrict the governor to vetoing only a sum of money and its purpose. *See, e.g.*, *Inter Fac. Org. v. Carlson*, 478 N.W.2d 192, 194 (Minn. 1991); *Wielechowski v. State*, 403 P.3d 1141, 1152 (Alaska 2017); *Brault v. Holleman*, 230 S.E.2d 238, 242 (Va. 1976). And none have wholly abandoned judicial oversight. Even the Washington Supreme Court, which "abandon[ed]" its "affirmative-negative veto test" in favor of the "check" of legislative override, *Wash. Fed'n of State Emps.*, 682 P.2d at 875, still polices the bounds of whether the governor has properly vetoed a "section" or an "appropriation item," *Wash. State Legislature v. Lowry*, 931 P.2d 885, 896 (Wash. 1997).

In sum, no other state court has come close to giving its governor the type of "unilateral law-making" power employed by Wisconsin governors. Briffault at 1185. If this Court sanctions the

veto in this case, it will move even further away from the nationwide conception of this power as one with limits. There is no reason for this Court to write itself out of the separation of powers in this way, or to effectively render the partial veto a nonjusticiable political question.

CONCLUSION

The partial veto power poses dilemmas for adjudication. By "empower[ing] the executive to enact into law a measure that differs from the one the legislature passed," it plainly allows the governor to play a policymaking role. Briffault at 1182. But the bare requirement that a "workable law" be left behind offends rather than supports the Constitution's design. Such an approach "concentrates too much power in one branch of government; indeed, … in the hands of one individual." Briffault at 1195. Consistent with the text, history, and core democracy-promoting purposes of the partial veto, this Court should reject the creative veto employed here.

Dated this 17th day of September, 2024.

Respectfully submitted,

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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, as modified by this Court's June 17 order. Court Order, No. 2024AP729 (June 17, 2024). The length of this brief is 4,251 words.

Dated this 17th day of September, 2024.

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