2024AP1713

In the Wisconsin Court of Appeals

District I

WISCONSIN STATE LEGISLATURE,
Plaintiff-Counterclaim Defendant-Respondent-Cross Appellant,
v.
WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION and TONY EVERS,
Defendants-Counterclaim Plaintiffs-Appellants-Cross Respondents.

On Appeal from the Dane County Circuit Court, the
Honorable Stephen E. Ehlke, Presiding
Case No. 2024-cv-1127

COMBINED BRIEF OF RESPONDENT AND CROSS-APPELLANT

RYAN J. WALSH
Counsel of Record
State Bar No. 1091821
AMY C. MILLER
State Bar No. 1101533
TERESA A. MANION
State Bar No. 1119244
EIMER STAHL LLP
10 East Doty Street
Suite 621
Madison, WI 53703
(608) 620-8346
(312) 692-1718 (fax)
rwalsh@eimerstahl.com
amiller@eimerstahl.com
tmanion@eimerstahl.com

Counsel for Plaintiff-Counterclaim
Defendant-Respondent-Cross Appellant

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INTRODUCTION

For decades, the Wisconsin State Legislature ("Legislature") and Governor (including Governor Evers) have worked together to create and pass budgets that include sums appropriated for the provision of supplemental funding when an agency's appropriation is otherwise insufficient. The process for providing such supplemental funding is cabined by substantive rules: the agency's appropriation must be insufficient because of an unforeseen emergency or otherwise insufficient to accomplish its purposes, an emergency must exist, there must be no funds available for the purpose, and the purpose must already have been approved by the Legislature. And the Joint Committee on Finance ("JCF"), which provides the supplemental funding, must follow myriad procedural requirements, which include participation by the Governor, before authorizing it. This longstanding process, as the circuit court held, fully comports with the Wisconsin Constitution.

Despite their active participation in this process—including over the very sum at issue—Governor Evers and the Department of Public Instruction (collectively, "DPI") now argue that it is unlawful. First, DPI argues that the $50 million that the budget unquestionably appropriated to JCF's supplemental-funding account must be given instead to DPI—and, indeed, should have gone to DPI immediately. This is utter lawlessness. Although the budget clearly does not appropriate this money to DPI, the agency nevertheless claims ownership of it for reasons not entirely clear. (It argued below that a JCF motion, earmarking the sum for literacy programs, required this result, but DPI has since conceded that the motion is not binding law.) DPI argues that the

supplemental-funding statute does not apply here—even though DPI has invoked the statute in its requests for the money—because there is no "emergency" requiring expenditure of these funds. But, if DPI is right, then those funds should remain in JCF's supplemental-funding account until such an emergency arises.

DPI next argues that the supplemental-funding process itself—including the portion of the budget that appropriates money to JCF's supplemental-funding account—is unconstitutional. But DPI's facial attack on the budget fails. First, as DPI must and does admit, spending money is not a core executive function. All three branches can and do spend money. Only when money is appropriated to the executive for a particular purpose does spending that money become a core executive function with which the Legislature may not interfere except by law. Because the money here was appropriated not to the executive, but to JCF, pursuant to a carefully circumscribed set of emergency-funding procedures, there is no separation-of-powers problem. Second, as DPI again must and does admit, JCF does not appropriate funds whenever it provides supplemental funding from its account. The appropriation happened in the budget, when money was placed from the treasury into JCF's supplemental-funding account. JCF then spends the money pursuant to statutes that contain numerous substantive and procedural safeguards. As the circuit court correctly held, this process is entirely constitutional. In any event, even if DPI's constitutional theory were correct, it would mean only that the $50 million appropriated to JCF must return to the treasury—not that it must go to DPI. This Court should affirm.

ISSUES PRESENTED

1. Whether 2023 Wisconsin Act 19's $50 million appropriation to JCF's supplemental-appropriation account under Wis. Stat. § 20.865(4)(a), with the understanding that it would be spent on literacy programs, is subject to the supplemental-funding statute, Wis. Stat. § 13.101.

The circuit court answered yes.

This Court should answer yes.

2. Whether 2023 Wisconsin Act 19, signed by the Governor, is unconstitutional because it allocates money to JCF to fill supplemental-funding requests in accordance with the process set forth in Wis. Stat. § 13.101.

The circuit court answered no.

This Court should answer no.

STATEMENT OF THE CASE

Wisconsin's 2023–25 biennial budget bill, 2023 Wisconsin Act 19 ("Act 19"), was published on July 6, 2023. When the Legislature passed and the Governor signed Act 19, they appropriated over $250 million from the treasury to JCF's supplemental-funding account: Wis. Stat. § 20.865(4). *See* 2023 Wis. Act 19, § 51 (Figure 20.005(3)). Of these funds, JCF earmarked $50 million to support yet-to-be-adopted literacy programs. A–App. 21, ¶ 4; *id.* at 26, ¶ 4.[1] This earmark is reflected in a

[1] *See* 2023 Wis. Act 19, § 51 (Figure 20.005(3)) (appropriating over $250 million to JCF's supplemental fund, Wis. Stat. § 20.865(4), for 2023–25), *available at* https://docs.legis.wisconsin.gov/2023/related/acts/19.pdf; JCF, Motion 103 (June 13, 2023) (earmarking $50 million "GPR in the [JCF] supplemental appropriation for a literacy program" for 2023–24), *available at*

motion that, although not law, accompanies the budget. *See* Richard A. Champagne & Madeline Kasper, Legislative Reference Bureau, *Wisconsin Executive Budget Bills, 1931–2023*, at 2 (2023) (such a motion "capture[s] the intentions of the governor and the legislature in budget deliberations" but is not itself "law").[2]

Separately, Act 19 appropriated other monies directly to DPI to fund various programs. *See* 2023 Wis. Act 19, § 51 (Figure 20.005(3)) (appropriating over $17 billion to DPI from all sources of revenue). These monies were placed in various accounts detailed in Wis. Stat. § 20.255 ("There is appropriated to [DPI] for the following programs . . . .").

Less than two weeks after Act 19 became law, the Legislature passed and the Governor signed the bill that became 2023 Wisconsin Act 20 ("Act 20"). Among other things, Act 20 created two literacy programs. The first program is an early literacy coaching program to be run by the newly formed DPI Office of Literacy, created by the same Act. *See* 2023 Wis. Act 20, § 8 (creating the early literacy coaching programs codified at Wis. Stat. § 115.39); 2023 Wis. Act 20, § 2 (creating the Office of Literacy codified at Wis. Stat. § 15.374(2)); *see also* A–App. 22, ¶ 5; *id.* at 27, ¶ 5. Act 20 empowers the Office of Literacy to contract with individuals "to serve as literacy coaches" assigned to schools and school districts throughout the state. 2023 Wis. Act 20, § 8(2)–(3) (codified at Wis. Stat. § 115.39(2)–(3)). The second program requires DPI to "award

https://docs.legis.wisconsin.gov/misc/lfb/jfcmotions/2023/2023_06_13/001_department_of_public_instruction/motion_103_omnibus_motion. JCF may use the appropriations under Wis. Stat. § 20.865(4) to supplement the appropriation of DPI. *See generally* Wis. Stat. § 13.101.

[2] *Available at* https://docs.legis.wisconsin.gov/misc/lrb/lrb_reports/executive_budget_bills_2023_7_8.pdf.

grants to reimburse school[s]" for adopting approved literacy curricula. *See* 2023 Wis. Act 20, § 12(1m)(c) (codified at Wis. Stat. § 118.015(1m)(c)); *see also* A–App. 22, ¶ 5; *id.* at 27, ¶ 5. Specifically, the program provides grants to "school boards, operators of charter schools, and governing bodies of private schools participating in" certain programs in "an amount equal to one-half of the costs of purchasing the literacy curriculum and instructional materials" from a list of approved programs. 2023 Wis. Act 20 § 12(1m)(c) (codified at Wis. Stat. § 118.015(1m)(c)).

On January 26, 2024, both houses of the Legislature introduced 2023 S.B. 971 and 2023 A.B. 1017 in the respective houses; the Senate bill would become 2023 Wisconsin Act 100 ("Act 100"). This bill created accounts for the two above-described Act 20 programs to which funding could be appropriated or transferred; the bill did not, however, appropriate or transfer any money to those accounts. *See* 2023 S.B. 971; 2023 A.B. 1017 (hereinafter, collectively, the "Bill"); *see also* A–App. 22, ¶¶ 7, 9, 11; *id* at 27, ¶¶ 7, 9, 11. The Bill passed both houses of the Legislature with broad bipartisan support. It was unanimously approved by JCF, the Senate Committee on Education, and the Assembly Committee on Education.[3] A–App. 22, ¶ 10 (unanimous support from JCF); *id.* at 27, ¶ 10 (same). The Senate and Assembly did not put the matter to "yeas and nays," and no such record was entered in the Journal

[3] *See* Senate Journal, 106th Reg. Sess., at 782–83, *available at* https://docs.legis.wisconsin.gov/2023/related/journals/senate/20240207/_119; Assembly Journal, 106th Reg. Sess., at 637–38, *available at* https://docs.legis.wisconsin.gov/2023/related/journals/assembly/20240207/_251; *see also Medlock v. Schmidt*, 29 Wis. 2d 114, 121, 138 N.W.2d 248 (1965) ("The Legislative Journals are properly the subject of judicial notice.").

for either house.

The Legislature presented the Bill to the Governor on February 23, 2024.[4] The Governor purposed to approve the Bill in part and veto it in part. *See* 2023 Wis. Act 100.[5] This purported partial veto is detailed in the Legislature's cross-appellant brief. Relevant to this brief, the partially-vetoed version of Act 100 does not require that DPI use the funds allocated for the literacy coaching program under Wis. Stat. § 115.39 (2023 Wis. Act 20, § 8), the early literacy grants set forth in Wis. Stat. § 118.015(1m)(c) (2023 Wis. Act 20, § 12(1m)(c)), and to offer grants to school boards and charter schools who provide particular professional development training (2023 Wis. Act 20, § 27(2)). *See generally* 2023 Wis. Act 100; A–App. 23, ¶ 12; *id.* at 28, ¶ 12. Instead, any funds allocated under the partially-vetoed version of Act 100 may be treated by DPI as money that can be spent for its Office of Literacy on any "literacy program." A–App. 23, ¶ 13; *id.* at 28, ¶ 13. DPI does not have a specifically titled "literacy program."[6] A–App. 23, ¶ 14; *id.* at 28, ¶ 14.

On March 7, 2024, DPI submitted a request to JCF to release nearly all the $50 million set aside in the biennial budget in JCF's supplemental account for literacy to the accounts created by the partially-vetoed version of Act 100, not the Bill as passed. A–App. 23, ¶ 15; *id.* at 28, ¶ 15; *id.* at 32–36. Although that request seeks in part to fund Act 20

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[4] *See* Senate Journal, 106th Reg. Sess., at 860, *available at* https://docs.legis.wisconsin.gov/2023/related/journals/senate/20240223/_22; *see also Medlock*, 29 Wis. 2d at 121.

[5] The pdf version of Act 100, which better illustrates the partial vetoes, is available at https://docs.legis.wisconsin.gov/2023/related/acts/100.pdf.

[6] The only "literacy program" in the statutes is run by the Department of Health Services ("DHS")—not DPI. *See* Wis. Stat. § 46.248; *see also* Wis. Stat. § 46.011(1e) (defining "Department" in Wis. Stat. ch. 46 as DHS).

programs, it also seeks supplemental funding for a broader and undefined "literacy program," not necessarily the literacy program created by Act 20. *See* A–App. 23, ¶ 16; *id.* at 28, ¶ 16; *id.* at 32–36. JCF has not yet granted the request, having concluded the partially-vetoed version of Act 100 is not law. A–App. 24, ¶ 18; *id.* at 29, ¶ 18.

This was not DPI's first request to JCF to release a portion of the $50 million. On November 22, 2023, before the Legislature passed the Bill that would later become Act 100, DPI submitted a request under Wis. Stat. § 13.101 for the release of budget authority and position approval for a Director of the Office of Literacy. A–App. 33. JCF approved this request, and also supplemented DPI's account with $106,500 for 2024 and $220,900 for 2025 from its supplemental appropriation to support the director position. *Id.*

On April 16, 2024, the Legislature filed suit in the Circuit Court for Dane County, arguing that the Governor's partial veto of the Bill was unconstitutional for various reasons. *See* A–App. 7–20. This challenge is detailed in the cross-appellant brief.

DPI counterclaimed, naming Senator Howard Marklein and Representative Mark Born as additional counterclaim-defendants and seeking a declaration (1) that the $50 million earmarked by JCF (minus a small amount that JCF had already transferred to DPI) "must be credited to DPI's spending appropriation"; (2) that JCF does not, under Wis. Stat. § 13.101(3), have "discretion over whether to release this [money] to DPI upon DPI's request"; and (3) that if Wis. Stat. § 13.101(3) does provide JCF such discretion "such statutory discretion would amount to an unconstitutional legislative veto as applied to those circumstances." A–App. 140, 142, 150.

The parties moved for summary judgment on all claims. R. 33, 38. On August 27, 2024, the circuit court granted summary judgment to DPI on the Legislature's partial-veto claim and to the Legislature, Senator Marklein, and Representative Born on DPI's counterclaims. A–App. 109–28.

In rejecting DPI's counterclaims, the circuit court observed that, although "during the negotiation process everyone understood that $50 million would be going to DPI to fund programs required by Act 20," Act 19 "plain[ly]" "appropriate[d] over $250 million to JCF's supplemental-funding account for the purpose of JCF's providing supplemental funding to governmental units under § 13.101(3)." A–App. 123–24. The circuit court correctly explained that if "the legislature intended to appropriate $50 million directly to DPI it certainly could have done so, as it did with other funding"; thus, the Legislature "clearly did not intend to give $50 million to DPI, but instead knowingly put funds into JCF's supplemental account." A–App. 124.

The circuit court also disposed of DPI's constitutional challenge to JCF's supplemental funding process. The court explained that supplemental funding may be approved only according to processes set forth in Wis. Stat. § 13.101(3) and Wis. Stat. § 13.10. *See* A–App. 125–26. "This detailed set of procedures," the court explained, "circumscribes JCF's discretion and provides for input from the executive branch," keeping the statute within the constitution's boundaries. A–App. 126. The circuit court also distinguished this challenge from *Evers v. Marklein*, explaining that "[u]nlike *Evers*, here the legislature did not define the 'parameters by which those funds may be spent.'" A–App. 126–27 (citing *Evers v. Marklein*, 2024 WI 31, 412 Wis. 2d 525, 8

N.W.3d 395). "Instead, if JCF is called upon to disburse funds it will be circumscribed in its authority by § 13.101(3)." A–App. 127.

At bottom, "DPI's disappointment," the circuit court noted, "is a political, not legal, problem." A–App. 127. "[W]hat occurred here is not unconstitutional under a separation of powers analysis"; rather, "funding for Act 20 needs to be resolved through the give and take of the political process." A–App. 127–28. Indeed, "the Governor chose to approve Act 19 as submitted to him for approval" with this $50 million placed in JCF's supplemental account. A–App. 124.

The same day that the circuit court's opinion issued (August 27, 2024), DPI filed its notice of appeal and docketing statement. R. 57, 58. DPI purported to select District I as the appellate venue, but its docketing statement failed to identify Senator Marklein and Representative Born as parties to the appeal. *See* R. 57. The Legislature moved to strike or dismiss without prejudice and transfer venue of DPI's appeal; DPI opposed this motion. Motion to Strike or Dismiss Without Prejudice and to Transfer Venue, *Wis. State Legislature v. Wis. Dept. of Pub. Instruction*, No. 2024AP1713 (Wis. Ct. App. Aug. 28, 2024); Response to Motion to Strike or Dismiss Without Prejudice and to Transfer Venue, *Wis. State Legislature v. Wis. Dept. of Pub. Instruction*, No. 2024AP1713 (Wis. Ct. App. Aug. 29, 2024).

The Legislature also filed a notice of appeal and docketing statement on August 27, 2024, selecting District II as the appellate venue and explaining that Senator Marklein and Representative Born were not parties to its appeal. R. 59, 60. This Court designated this document as a cross-appeal.

Then, over 40 days later and after the record was transferred to the

court of appeals, on October 9, 2024, DPI filed a proposed final judgment order in the circuit court. Docket, *Wis. State Legislature v. Wis. Dept. of Pub. Instruction*, No. 2024CV1127 (Dane County Circuit Court) (Proposed Order).[7] The next day, the Legislature opposed this request. *Id.* (Letters and Correspondence). The circuit court on October 17, 2024, declined to enter the final judgment, explaining there was "no authority in [the] circuit court to enter [the] order." *Id.* (Proposed Order Declined).

DPI filed in the Wisconsin Supreme Court a petition for bypass on October 29, 2024.

On November 4, 2024, the Court of Appeals denied the Legislature's motion to strike or dismiss without prejudice and transfer venue. In so doing, the Court of Appeals pointed out that "[i]t appears . . . that the order from which both sides appealed is not a final order." Order, *Wis. State Legislature v. Wis. Dept. of Pub. Instruction*, No. 2024AP1713 at 3 (Wis. Ct. App. Nov. 4, 2024). "[I]f the supreme court declines to exercise its jurisdiction by denying the bypass petition," the Court of Appeals noted that it "will take further steps regarding [its] jurisdiction, or lack thereof." *Id.* at 4.

The Legislature filed its response to DPI's petition for bypass on November 12, 2024. And on November 18, 2024, DPI moved to file a reply brief. The petition for bypass is currently still pending before the Wisconsin Supreme Court.

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[7] *Available at* https://wcca.wicourts.gov/caseDetail.html?caseNo=2024CV001127&countyNo=13; *see Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (taking "judicial notice of the CCAP records in [an] action" that were "not in the record").

STANDARD OF REVIEW[8]

This Court reviews de novo a summary-judgment decision, "applying the same methodology as the circuit court." *Quick Charge Kiosk LLC v. Kaul*, 2020 WI 54, ¶ 9, 392 Wis. 2d 35, 944 N.W.2d 598. "Summary judgment is appropriate when there is no genuine issue of material fact and 'the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting Wis. Stat. § 802.08(2)).

DPI's claims raise "issues of constitutional and statutory interpretation, which are question of law that [the] court reviews de novo." *Marklein*, 2024 WI 31, ¶ 8. And, when the constitutionality of a statute is challenged, courts "presume that the statue is constitutional," *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 25, 383 Wis. 2d 1, 914 N.W.2d 678, and the challenger "must prove that the statute is unconstitutional beyond a reasonable doubt," *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 17, 357 Wis. 2d 360, 851 N.W.2d 302.

Constitutional challenges generally come in two flavors: "facial and as-applied." *League of Women Voters*, 2014 WI 97, ¶ 13. As-applied challenges "assess the merits of the challenge by considering the facts of the particular case in front of" the court to determine whether the challenging party has shown "that his or her constitutional rights were actually violated." *Id.* (citation omitted). In contrast, a facial challenge requires "the challenger" to "show that the law cannot be enforced 'under any circumstances.'" *Id.* (citation omitted).[9]

[8] DPI failed to articulate a standard of review in its opening brief.

[9] There are exceptions to this all-applications standard that are not applicable here. *See, e.g.*, *State v. Konrath*, 218 Wis. 2d 290, 305, 577 N.W.2d 601 (1998).

ARGUMENT

I. AS IT HAS FOR ALMOST 50 YEARS, WIS. STAT. § 13.101(3) PERMITS JCF TO GRANT SUPPLEMENTAL-FUNDING REQUESTS WITH MONIES APPROPRIATED TO WIS. STAT. § 20.865(4)(a)

DPI first contends that the $50 million appropriated in the budget to JCF's supplemental-appropriation account, Wis. Stat. § 20.865(4)(a)—with the understanding that it would be spent on literacy programs—is not subject to JCF's supplemental-funding statute, Wis. Stat. § 13.101(3). The two provisions, it says, are simply "inapplicable." Op. Br. 28. That is manifestly false. DPI's half-hearted arguments on this point, taking up only three of its opening brief's 46 pages, do not move the needle.

A. The supplemental-appropriation account, Section 20.865(4)(a), contains, in relevant part, "amounts . . . to be used to supplement appropriations of the general fund which prove insufficient because of unforeseen emergencies or which prove insufficient to accomplish the purposes for which made." Wis. Stat. § 20.865(4)(a). The supplemental-funding statute, in turn, details how JCF may distribute these funds. Wis. Stat. § 13.101. The subsection at issue here, Section 13.101(3), empowers JCF, in its discretion (denoted by "may"[10]), to release funds from § 20.865(4) to supplement other governmental funding when the prior grant of funding "is insufficient because of unforeseen emergencies" *or* when the prior grant of funding is "insufficient to accomplish the purpose for which made"—but only if, in either case, "the committee

[10] *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 32, 339 Wis. 2d 125, 810 N.W.2d 465 ("The word 'may' is ordinarily used to grant permission or to indicate possibility," therefore it is "generally construe[d]" "as permissive.").

finds" that three conditions are met. Wis. Stat. § 13.101(3)(a). These conditions are that (1) "[a]n emergency exists"; (2) "[n]o funds are available for such purposes"; and (3) "[t]he purposes for which a supplemental appropriation is requested have been authorized or directed by the legislature." Wis. Stat. § 13.101(3)(a)1.–3.

The supplemental-funding statute prescribes several procedures that JCF must follow. Wis. Stat. § 13.101(1) (requiring JCF to follow the procedures in Wis. Stat. § 13.10). These procedures set forth when JCF is required to meet, § 13.10(1), and require requests to JCF be in writing and filed, § 13.10(3). Next, the procedures require the Governor to "submit a recommendation on the request" and JCF to hold "a public hearing" on these requests after "giv[ing] public notice of the time and place of such hearing." § 13.10(3). Once JCF acts on a request "by a roll call vote," JCF must send a copy of its minutes to various entities. § 13.10(4). After JCF takes action, the requests go to the Governor, who can approve them "in whole or in part" and "the part objected to shall be returned to [JCF] for reconsideration." *Id.* If JCF wishes to act over the Governor's objection, it must vote by two-thirds majority to "sustain the original action." *Id.* Finally, changes to the appropriation accounts are "reported to the department of administration." § 13.10(5). Thus, moving funds from JCF's supplemental-appropriation account requires action by at least a majority of the members of JCF and the Governor, or two-thirds of the members of JCF if the Governor does not approve. *See* § 13.10(4).

Against the backdrop of these long-established statutes, the Legislature passed and the Governor signed a budget that appropriated over $250 million from the treasury to JCF's supplemental-funding

account, Wis. Stat. § 20.865(4), with over $233 million of that total going into the account at § 20.865(4)(a). *See* 2023 Wis. Act 19, § 51 (Figure 20.005(3)).[11] Consequently, Section 13.101 governs whether and how JCF may authorize further disposition of these funds. So, JCF may release the over $233 million in § 20.865(4)(a), including the $50 million earmarked for literacy, so long as JCF finds that doing so would satisfy the requirements of Wis. Stat. § 13.101(3). It has done likewise for DPI and other agencies, without controversy, for almost 50 years.[12]

B. DPI argues that JCF cannot use Wis. Stat. § 13.101(3) here because Section 13.101(3) (and Wis. Stat. § 20.865(4)(a)) applies only to *unanticipated* emergencies, and this need for funding was anticipated. Op. Br. 28–30. This argument is not only incorrect, but it contradicts the actions taken by both the Governor and DPI here. First, the Governor signed Act 19 knowing that the $50 million would be placed in JCF's supplemental-funding account and subject to the strictures of Section 13.101(3). *See* 2023 Wis. Act 19, § 51 (Figure 20.005(3)); A–App. 124 ("For whatever reason, the Governor chose to approve Act 19 as submitted to him for approval."). Then, DPI submitted requests *under Wis. Stat. § 13.10* to receive these funds pursuant to Section 13.101(3). *See* A–App.

[11] Of that $233 million, JCF earmarked $50 million for a "literacy program." *See supra* n.1; *see also* Richard A. Champagne & Madeline Kasper, *supra*, at 2 (explaining that these earmarks are not law).

[12] Section 13.101(3) was created in 1975. *See* § 8, ch. 39, Laws of 1975. And it has been amended only once since its creation, in 1981. *See* §§ 3h, 3i, ch. 20, Laws of 1981. The 1981 amendments specified the fund from which the supplement draws from, removed "or transfer[ed]" from the third prerequisite, and limited the supplemental appropriation "only for the fiscal biennium during which [JCF] takes the action." *Id.* All told, Wis. Stat. § 13.101(3) is largely unchanged from its creation in 1975. *Compare* Wis. Stat. § 13.101(3) (1975–76) *with* Wis. Stat. § 13.101(3) (2021–22). And, in its nearly 50 years of existence, the Legislature is not aware of any challenge to this process.

23, ¶ 15; *id.* at 28, ¶ 15; *id.* at 32–36. Indeed, DPI's first § 13.10 request was for a new Director of the Office of Literacy position, and requested "the release of $106,500 GPR" for 2024 "and $220,900 GPR" for 2025 "from [JCF's] supplemental appropriation under Wis. Stat. [§] 20.865(4)(a) to support the director position," which JCF approved. A–App. 33. DPI does not appear to argue that its request for and receipt of this funding was unlawful. Nor does it indicate any plans to return this money to JCF as unlawfully obtained. It is bizarre, to say the least, that the Governor and DPI would so actively participate in a process that they insist is unlawful, invoking statutes that they now dismiss as "inapplicable." Op. Br. 28.

In any event, DPI's new position is incorrect. First, Section 13.101(3) provides that JCF "may supplement" from Wis. Stat. § 20.864(4) an appropriation "which is insufficient because of unforeseen emergencies *or* insufficient to accomplish the purpose for which made." Wis. Stat. § 13.101(3)(a) (emphasis added). Section 20.865(4)(a) likewise provides that JCF may use the amounts "to supplement appropriations of the general fund which prove insufficient because of unforeseen emergencies *or* which prove insufficient to accomplish the purposes for which made." Wis. Stat. § 20.865(4)(a) (emphasis added). In other words, at step one, an "unforeseen emergency" is not a prerequisite.

Second, Section 13.101(3) distinguishes between "unforeseen emergencies" and "[a]n emergency" in general. JCF may supplement funding if it finds, at step two, that an (unqualified) "emergency exists," among other things. Wis. Stat. § 13.101(3)(a)1. Section 20.865(4)(a) likewise provides that JCF may use the amounts "to supplement appropriations of the general fund which prove insufficient because of

unforeseen emergencies *or* which prove insufficient to accomplish the purposes for which made." Wis. Stat. § 20.865(4)(a) (emphasis added).

The statute's distinction between "unforeseen emergencies" at step one and a general "emergency" at step two tracks ordinary usage of the word "emergency." According to dictionary definitions, an "emergency" can be *either* "an unforeseen combination of circumstances or the resulting state that calls for immediate action" *or* "an urgent need for assistance or relief." *Emergency*, Merriam–Webster (last visited Dec. 12, 2024);[13] *see also State v. A.L.*, 2019 WI 20, ¶ 16, 385 Wis. 2d 612, 923 N.W.2d 827. To give effect to the word "unforeseen," the word "emergency" in Wis. Stat. § 13.101(3)(a) must mean "an urgent need for assistance or relief." *See State v. Matasek*, 2014 WI 27, ¶ 12, 353 Wis. 2d 601, 846 N.W.2d 811. Thus, "[a]n emergency" in Wis. Stat. § 13.101(3)(a)1. need not be either unforeseen or unanticipated; there need only be "an urgent need" for supplementing funding.

DPI also makes much of the fact that "prove" proceeds "insufficient" in § 20.865(4)(a), though not in § 13.101(3)(a), and asserts that "an appropriation can only 'prove insufficient' based on events that occur after it is initially made." Op. Br. 30. As an initial matter, DPI waived this argument by not raising it to the circuit court. *See* R. 39, 51; *Green Bay Pro. Police Ass'n v. City of Green Bay*, 2021 WI App 73, ¶ 26, 399 Wis. 2d 504, 966 N.W.2d 107, *aff'd*, 2023 WI 33, ¶ 26, 407 Wis. 2d 11, 988 N.W.2d 664 ("[A]rguments raised for the first time on appeal are generally deemed forfeited."). In any event, this argument is a red herring. Section 13.101(3)—not § 20.865(4)(a)—governs when JCF can

[13] *Available at* https://www.merriam-webster.com/dictionary/emergency.

supplement agency funding. *See* Wis. Stat. § 13.101(1) (permitting JCF to take action under § 13.101 while following the procedures of § 13.10); *cf. Immega v. City of Elkhorn*, 253 Wis. 282, 286–87, 34 N.W.2d 101 (1948) (distinguishing the granting of authority to build a courthouse from the making of an appropriation for that purpose). And even if Section 20.865(4)(a) were somehow relevant to the analysis, DPI's distinction between "is" and "proves" is one without a difference. Anything that "proves" to be insufficient "is" insufficient, and anything that "is" insufficient will "prove[ ]" to be insufficient.

DPI concludes that, because this is not an unforeseen emergency, "JCF has no statutory discretion over the $50 million reserved for DPI to carry out Act 20's literacy program." Op. Br. 30. That is patently false. While DPI is free to argue, as it does at length, that the *constitution* forbids what the statute has granted, there can be no argument over what the budget says. Act 19 clearly placed the $50 million in JCF's supplemental account, not in any of DPI's accounts, despite otherwise appropriating more than $17 billion to DPI.[14] *See supra* 9–10. From that account, JCF may supplement, loan, or allocate the funds as otherwise specified by statute. *See* Wis. Stat. §§ 13.101; 20.865(4)(a). Those statutes, as explained, clearly provide JCF discretion over disbursing those funds. *See supra* 18–20.

Finally, DPI asserts without argument or citation to authority that the Governor should be able to "direct that the [$50 million] be transferred to DPI." Op. Br. 30. As an initial matter, this wholly unsupported argument should be ignored as undeveloped. *See State v.*

[14] DPI properly abandoned any argument that JCF's budget motion 103 appropriated $50 million to DPI. *See generally* Op. Br.

Pettit, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). In any event, the Governor cannot "direct" the transfer of the $50 million here. *See* Op. Br. 30. The law—specifically, the budget—has appropriated this money to JCF's supplemental-funding account. *See* 2023 Wis. Act 19, § 51 (Figure 20.005(3)). The Governor has no unilateral authority to move it, and DPI points to none. *See generally* Op. Br. 30. If JCF cannot release these funds because there is not an unforeseen emergency, then (absent the passage of another law affecting these funds) they will stay in JCF's supplemental-appropriation account until they revert back to the general fund. But this would be especially strange given DPI's currently pending request that the $50 million be released through the Section 13.101 process, which it has invoked. A–App. 32–36.

II. THE BUDGET'S APPROPRIATION OF $250 MILLION TO JCF'S SUPPLEMENTAL-FUNDING ACCOUNT IS CONSTITUTIONAL

A. The Legislature has the power "to make policy decisions regarding taxing and spending." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 540, 576 N.W.2d 245 (1998). This power of the purse includes the power to appropriate money from the treasury. Concerning appropriations, the constitution states that "[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law." Wis. Const. art. VIII, § 2. Additionally, the constitution vests the Legislature with "legislative power," Wis. Const. art. IV, § 1, which is "the authority to make law," *Evers*, 2024 WI 31, ¶ 12 (citations omitted); *see also* Wis. Const. art. IV, § 17(2) ("No law shall be enacted except by bill."). Appropriations, therefore, are the province of the Legislature.

Still, "[t]he Wisconsin Constitution does not require that the

legislative power be *exclusively* vested in a bicameral legislature." *Klisurich v. DHSS*, 98 Wis. 2d 274, 279, 296 N.W.2d 742 (1980); *see also Becker v. Dane Cnty.*, 2022 WI 63, ¶ 30, 403 Wis. 2d 424, 977 N.W.2d 390, *reconsideration denied,* 2023 WI 36, ¶ 30, 407 Wis. 2d 45, 989 N.W.2d 606 (emphasis added).[15] Hence the Court does not read it "in a literal sense to bar the delegation of any legislative power"—provided that powers are not "entirely delegated away." *Becker*, 2022 WI 63, ¶ 30 (citing *Klisurich*, 98 Wis. 2d at 279; *In re Constitutionality of § 251.18, Wis. Statutes*, 204 Wis. 501, 503, 326 N.W. 717 (1931)). To discern "whether a legislative grant of authority transgresses this inferred constitutional limitation," courts "examine both the substantive nature of the granted power and the adequacy of attending procedural safeguards against arbitrary exercise of that power." *Id.* ¶ 31 (citing *Klisurich*, 98 Wis. 2d at 279–80). If the delegation "contains an 'ascertainable' purpose and 'procedural safeguards' exist to ensure conformity with that legislative purpose, the grant of authority is constitutional." *Id.* (citing *Klisurich*, 98 Wis. 2d at 280). And "[t]he greater the procedural safeguards, the less critical we are toward the substantive nature of the granted power." *Id.* (citing *Panzer v. Dolye*, 2004 WI 52, ¶ 55, 271 Wis. 2d 295, 680 N.W.2d 666, *abrogated in other respects by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408).

In *State ex rel. La Follette v. Sitt*, for example, the Wisconsin Supreme Court upheld a delegation of authority to (among others) JCF

[15] Paragraphs 29–43 of *Becker* are not the majority opinion of the Wisconsin Supreme Court, but constitute an opinion of Justice Karofsky, joined by Justices Ann Walsh Bradley and Dallet. *See Becker*, 2022 WI 63.

"to implement the purposes of [an] act by issuing operating notes in appropriate amount," implicating the power of the purse. 114 Wis. 2d 358, 379–80, 338 N.W.2d 684 (1983) (per curiam). The act survived, the Court reasoned, because it "contain[ed] sufficient internal safe guards and procedures to [e]nsure that" all the actors, including the governor and JCF, "act[ed] within such legislative purpose." *Id.* at 380. Importantly, the act also provided "sufficient procedural safeguards," such as the issuance of "a plan describing the specific nature of the proposed action" which required "approv[al] by the joint committee on finance." *Id.* at 380–81. *See also Serv. Empls. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶¶ 68–69, 72, 393 Wis. 2d 38, 946 N.W.2d 35 (explaining that the constitution grants the Legislature "the general power to spend the state's money by enacting laws").

As the circuit court correctly concluded, the process used here is entirely lawful. *See* A–App. 122–28. The primary focus of this analysis is "the presence of procedural safeguards that will adequately assure that discretionary power is not exercised unnecessarily or indiscriminately." *Panzer*, 2004 WI 52, ¶ 55 (citation omitted). In fact, the stronger the procedural safeguards, the less emphasis is placed on the substance. *Id.* Procedurally, the statutes challenged here afford strong protections. *See, e.g., Becker*, 2022 WI 63, ¶¶ 40–41. In supplementing, loaning, or allocating funds under Wis. Stat. § 13.101, JCF must comply with the requirements of Wis. Stat. § 13.10. *See* Wis. Stat. §§ 13.10, 13.101(1). As explained above, *supra* 19, Section 13.10 contains myriad procedural requirements, including public hearings, reporting between the branches, and action by at least a majority of the members of JCF and the Governor or two-thirds of the members of JCF if the Governor does

not approve. As the circuit court correctly observed, "[t]his detailed set of procedures circumscribes JCF's discretion and provides for input from the executive branch," "provid[ing] for enough interaction between the executive and legislative branches to pass constitutional muster." A–App 125–26; *see also State ex rel. La Follette*, 114 Wis. 2d at 381 (noting the "sufficient procedural safeguards" made the "delegation of legislative power" proper).

Substantively, "the Legislature has laid down the[ ] fundamentals of a law," *State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 941 (1928),—"the who, what, when, where, why, and how"—such that Wis. Stat. § 13.101(3) "contain[s] an ascertainable purpose," *Becker*, 2022 WI 63, ¶¶ 35–36. The "who" is the "committee"—JCF. Wis. Stat. § 13.101(3)(a). The "what" is the ability to "supplement, from the appropriations under s. 20.865(4)." *Id.* The "when" occurs upon JCF making three findings. § 13.101(3)(a)1.–3. The "where" is "the appropriation of any department, board, commission or agency." § 13.101(3)(a). The "why" is to supplement funding "which is insufficient because of unforeseen emergencies or insufficient to accomplish the purpose for which made." *Id.* And finally, the "how" is "[f]ollowing the procedures under s. 13.10." § 13.101(1). These textual limitations serve to establish an "ascertainable purpose" and leave for JCF only to "fill up the details" of the particular decision to supplement an account. *Whitman*, 220 N.W. 929, 939–40; *Becker*, 2022 WI 63, ¶ 37; *see also supra* 18–19.

B. DPI argues that, if the Legislature's interpretation of Wis. Stat. §§ 13.101(3) and 20.865(4) is correct, then those provisions are unconstitutional. This argument is wrong in several respects.

First, while DPI claims that it is bringing an as-applied challenge to

Wis. Stat. §§ 13.101(3) and 20.865(4), Op. Br. 30, this challenge is, in substance, a facial attack against Act 19's appropriation of over $250 million to JCF's supplemental-funding account. As-applied challenges, after all, concern "the facts of the particular case" whereas facial challenges contest the constitutionality of a statute "under any circumstances." *League of Women Voters*, 2014 WI 97, ¶ 13 (citation omitted). DPI's attack is a facial challenge, rather than an as-applied challenge, because its argument is not specific to the facts of this case (of which none have been found) but instead contests the validity of the entire $250 million appropriation and, indeed, the entire supplemental-funding process. According to DPI, the $250 million appropriation, in other words, cannot lawfully be applied "under any circumstances." *Id.* ¶ 15 (citations omitted). But DPI fails to undertake the "uphill endeavor," *In re Commitment of Dennis H.*, 2002 WI 104, ¶ 5, 255 Wis. 2d 359, 647 N.W.2d 851, necessary to "prove" such a theory, *League of Women Voters*, 2014 WI 97, ¶ 15. Nor does DPI "prove that the statute is unconstitutional beyond a reasonable doubt." *Id.* ¶ 17; *see also Mayo*, 2018 WI 78, ¶ 25 (explaining courts "presume that the statute is constitutional").

Second, DPI argues that, under *Evers v. Marklein*, JCF's authority under Wis. Stat. § 13.101 violates the separation of powers. Op. Br. 35–38. The Court in *Marklein* held that "once [the Legislature] has conferred spending power on the executive, the legislative branch lacks any constitutional authority to reject an executive decision short of exercising its lawmaking power with the full participation of the legislature." 2024 WI 31, ¶ 21. This is because, once funds have been appropriated to the executive to carry out a statutory purpose, spending those funds becomes

part of the "core power of the executive to ensure the laws are faithfully executed." *Id.* ¶ 18. And "the legislature cannot insert itself into the machinery of the executive branch in an attempt to control the executive branch's ability to carry out the law." *Id.* ¶ 23. Thus, the statute there, which allowed JCF to prevent DNR from spending money that had been appropriated to DNR to carry out a statutory purpose, intruded upon the core power of the executive and violated the separation of powers. *Id.* ¶ 24.

Marklein has absolutely no application here. No money has been appropriated to the executive to carry out a statutory purpose, and the Legislature is not attempting to "insert itself into the machinery of the executive branch." *Id.* ¶ 23. Instead, the Legislature has given a unit of the *legislative* branch the spending power—a power that clearly can be delegated—and has provided the contours by which that unit may spend the money. This happens all the time. The Legislature appropriates funds to the judiciary, which is then clearly free to spend those funds. *See, e.g.*, Wis. Stat. §§ 20.625(1)(a) (salaries and expenses of the judges, reporters, and assistant reporters of the circuit court), (1)(b) (reimbursement of permanent reserve judges), (1)(cg) (circuit court costs), (1)(k) (court-interpreter fees); 20.660 (court of appeals functions); 20.665(1)(a) (judicial commission operations); 20.670 (judicial council); 20.680(1)(a) (Supreme Court functions); 20.680(2)(kc) ("administrative and support services for programs administered by the director of state courts"); 2023 Wis. Act 19 § 51 (Figure 20.005(3)). And the Legislature appropriates money to its subunits, which are likewise free to spend those funds. *See, e.g.*, Wis. Stat. §§ 20.765(1)(a) (Assembly), (1)(b) (Senate), (1)(d) (legislative documents), (3)(b) (legislative reference

bureau), (3)(c) (legislative audit bureau), (3)(cm) (legislative human resources), (3)(d) (legislative fiscal bureau), (3)(fm) (WisconsinEye); 2023 Wis. Act 19 § 51 (Figure 20.005(3)).

Indeed, it cannot be the case, as DPI argues, that spending money is *always* a core executive power. Op. Br. 35–36. To the contrary, the Supreme Court has its own constitutional spending authority. *See Flynn*, 216 Wis. 2d at 549 (citing Wis. Const. art. VII, § 3). And, as DPI admits, other branches can and do spend appropriated money. Op. Br. 35; *supra* 29–30. DPI thus does not (and cannot) reconcile its hardline position with the Constitution, or with the necessary functioning of civic government. Instead, the Legislature may "confer" (*i.e.*, delegate) "spending power" to various units of government, including "on the executive." *Marklein*, 2024 WI 31, ¶ 21. When the Legislature does so with sufficient safeguards, such a conferral of power passes constitutional muster. *Supra* 25–27. Here, Sections 13.10 and 13.101(3) contain more than sufficient procedural and substantive safeguards to keep this delegation within constitutional bounds.

Third, DPI argues that JCF is unlawfully appropriating money, Op. Br. 31–35, but this argument is also incorrect. An appropriation occurs when money is paid out of the treasury. *See* Wis. Const. art. VIII, § 2; *Risser v. Klauser*, 207 Wis. 2d 176, 193, 558 N.W.2d 108 (1997); *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622, 624 (1936). Thus, when money is placed into JCF's supplemental-funding account from the treasury, this is an appropriation. By contrast, when JCF supplements, loans, or allocates funding from its supplemental-funding account, it is not appropriating that money from the treasury but is spending money that has been appropriated to it. By way of comparison,

in *Marklein*, DNR, under the Knowles-Nelson Stewardship program, was permitted to "purchase land or disburse state funds to local governments and nonprofit organizations to acquire land." 2024 WI 31, ¶ 3. But no one would (or did) argue that DNR was appropriating money when it "disburse[d] state funds." Instead, the Legislature empowered DNR to spend up to a certain amount for the fiscal year under a particular statutory scheme, *see* Wis. Stat. § 20.866(2)(ta),which is perfectly lawful. The same is true of Section 13.101(3) here.

DPI argues that the definition of appropriation is not when money is paid of the treasury but when "money [is] set aside for a 'specified object' such that 'executive officers' can spend it." Op. Br. 32 (citation omitted). As an initial matter, DPI cannot explain how its definition of an appropriation accounts for money appropriated to anyone not an executive officer, including the judicial and legislative branches. *See* Op. Br. 32 n.23. So the provision of money to the executive is clearly not a *sine qua non* of an appropriation. Nor can it be that every time "money [is] set aside for a 'specified object,'" an appropriation happens. If this were the case, then DNR's disbursements under the program at issue in *Marklein* would have been appropriations. An appropriation, then, must be something else: the spending of money from the treasury. And because JCF does not spend money from the treasury when it supplements funding under Section 13.101(3), it is not appropriating funds.

Even under DPI's flawed definition of an appropriation, JCF's supplemental-funding process is not one. Contrary to DPI's claims, Op. Br. 32, the full Legislature, with the consent of the Governor, determined the purpose of the disputed $50 million (and, indeed, nearly a full $250 million)—to provide supplemental funding when an existing

appropriation "is insufficient because of unforeseen emergencies or insufficient to accomplish the purpose for which made." Wis. Stat. § 13.101(3)(a). JCF does not have unfettered discretion over this supplemental funding, as DPI claims. Op. Br. 32–34. As explained above, *supra* 25–27, the statutes provide numerous substantive and procedural safeguards that limit JCF's use of the supplemental funding. For example, JCF does not decide the purposes for which supplemental funding may be spent. Op. Br. 32, 34. That is a legislative determination, and JCF is bound by it. Wis. Stat. § 13.101(3)(a)3. (JCF must find that "the purposes" of the supplemental funding "have been authorized or directed by the legislature"). Defining in the first instance the purposes for which money can be spent is unquestionably a legislative function, *see Marklein*, 2024 WI 31, ¶ 14, and the Legislature has done so. But once the Legislature has set forth by statute the parameters under which money can be spent, so long as there are sufficient procedural and substantive safeguards, members of the executive, judicial, and legislative branches can spend that money. *See id.* ¶ 21 (presuming that the Legislature can "confer[ ] spending power"). JCF may do so here.

By way of example, the Secretary of the Department of Administration may make funding temporarily available when certain circumstances are present. "All appropriations, special accounts and fund balances within the general fund or any segregated fund may be made temporarily available for" certain situations. Wis. Stat. § 20.002(11)(a). The Secretary has the authority to "approve the use of surplus moneys from the general or segregated funds after consultation with the appropriate state agency head for use by specified accounts or programs." *Id.* The Secretary will then "reallocate" state funds to

whatever account or program has been approved. *Id.* Under DPI's broad reading of the term "appropriation," this statute, too, is unlawful, since it allows the Secretary to allocate funding to accounts that the Secretary has chosen to approve.

Further illustrating the error in DPI's argument, DPI does not (and cannot) explain why, as it argues, JCF can supplement funding with the $267,200 that was not earmarked during the budget process. Op. Br. 29. If JCF's use of its Section 13.101 power is an appropriation because JCF decides what agency and funding string to send the money to, then *all* emergency funding under Section 13.101(3) is an unconstitutional appropriation. As DPI admits, that is not the case. Op. Br. 29. DPI's argument, therefore, cannot be correct.[16]

At the very least, DPI has failed to prove that the statute is unconstitutional beyond a reasonable doubt in every application. *See supra* 28. Indeed, DPI's admission that the $267,200 passes constitutional muster proves that its facial challenge to the supplemental-funding process cannot succeed.

Finally, DPI's out-of-state cases are inapposite. The cases are either distinguishable or support the Legislature. In *State ex rel. Schneider v. Bennet*, 547 P.2d 786 (Kan. 1976), the Kansas Supreme Court upheld as entirely *lawful* a statutory scheme very much like the one at issue here. There the state finance council, which included the Governor and

[16] DPI's argument is also at odds with nearly 100 years of settled practice. As DPI's brief explains in detail, the use of emergency-appropriation funding dates back to 1925 and, during all this time, each and every time the budget appropriated moneys for this emergency account. *See* Op. Br. 13–18. This well-adopted practice has been routinely approved and utilized by legislatures and governors of all persuasion, including Governor Evers when he approved Act 19.

members of the Legislature, could by unanimous vote send emergency funding to governmental units if certain statutory conditions were met. *Id.* at 794, 796. This power was entirely lawful, "as a cooperative effort between the executive department . . . of the state" to be "exercised only for the limited purposes specifically set forth in the statute." *Id.* at 798. By contrast, when the law was essentially standardless, allowing the council to grant excess funding whenever there were "circumstances which could not reasonably have been foreseen," the statute was unlawful. *Id.* at 799. Here, the supplemental-funding authority in Wis. Stat. § 13.101(3) is a "cooperative effort" (the Governor may veto any supplemental funding under Section 13.101(3), *see* Wis. Stat. § 13.10(4); *see also* § 13.101(1)), to be used "only for the limited purposes specifically set forth in the statute," not anytime there is an unforeseeable set of circumstances. *Schneider*, 547 P.2d at 798. Thus, for the same reasons the emergency funding was lawful in *Schneider*, Section 13.101(3) is lawful here.

State ex rel. Judge v. Legislative Finance Committee & Its Members, 543 P.2d 1317 (Mont. 1975), concerned a different legal and factual scenario. The statutes at issue created an interim legislative finance committee and gave that committee the power to approve "budget amendments" "defined as expenditures by state agencies in excess of their appropriations." *Id.* at 1318–19. These laws were "declared invalid as unconstitutional delegations of legislative power" because the funds the committee could release were "public operating funds of state government subject to the appropriation process." *Id.* at 1321. But this is not the power JCF yields under the Wis. Stat. § 13.101 process: JCF may supplement funding *only* from funds already appropriated for this

specific purpose. *See* Wis. Stat. § 13.101(3). The appropriation already occurred. More, the laws at issue in *State ex rel. Judge* did not give the governor a seat at the table; Wis. Stat. § 13.101(3) does. *Compare* 543 P.2d at 1318–19, *with* Wis. Stat. §§ 13.10(4), 13.101(1), (3).

DPI's remaining two cases are also distinguishable. *Advisory Opinion In re Separation of Powers* concerned a statute "with respect to the administration and use of federal block grant funds" which were received, rather than appropriated. 295 S.E.2d 589, 595 (N.C. 1982). And in *McInnish v. Riley*, the challenged statute granted to a legislative oversight committee the authority to approve or deny grant requests based on certain criteria, and distribute the appropriations made for the grant program. 925 So. 2d 174, 176, 188 (Ala. 2005). This more closely mirrors the statutory scheme found unlawful in *Marklein*, then the scheme created by Wis. Stat. § 13.101. *See* 2024 WI 31, ¶¶ 3, 6–7. For the same reasons *Marklein* is not dispositive here, *McInnish* is similarly unpersuasive. *See supra* 28–30.

III. WISCONSIN STAT. § 13.101(7) DOES NOT PROVIDE THAT THE $50 MILLION BE TRANSFERRED TO DPI

Contrary to DPI's assertions, Section 13.101(7) does not provide a mechanism by which it can receive the $50 million if Act 19 or Section 13.101(3) is declared unlawful. That statute provides,

> Whenever in the statutes an appropriation or a portion of an appropriation is available only upon release by the committee, such moneys shall be made available by the committee at such times and in such amounts as the committee may determine to be necessary to adequately provide for the purposes for which they are appropriated, with due regard for the whole amount available for such

> purposes. If the provision relating to release by the committee is invalid, the appropriation or portion of the appropriation which is subject to such release shall not be invalidated but shall be considered to be made without any condition as to time or manner of release.

Wis. Stat. § 13.101(7). There are several statutes that make an appropriation or a portion of an appropriation available only upon release by the committee. *See, e.g.*, Wis. Stat. § 84.014(3) ("[t]he department may not expend from the appropriations under s. 20.395(3)(cr) and (cy) more than $160,643,900 in the 2001–03 fiscal biennium . . . unless the expenditure of more funds is approved or modified and approved by the joint committee on finance"); Wis. Stat. § 95.31(4) ("the department may request the joint committee on finance to release funds appropriated under s. 20.115(2)(b)"). If a statute such as these were held invalid, then the funds would revert directly to the agency.

In arguing for the application of Section 13.101(7) here, DPI block quotes only the *second* sentence of Wis. Stat. § 13.101(7), which states "[i]f the provision relating to release by the committee is invalid, the appropriation or portion of the appropriation which is subject to such release shall not be invalidated but shall be considered to be made without any condition as to time or manner of release." Op. Br. 42 (quoting Wis. Stat. § 13.101(7)). But read as a whole, Wis. Stat. § 13.101(7) is clear: if a "provision relating to release by the committee"—that is, a statute making funds appropriated to the executive available only upon release by JCF—"is invalid," the appropriated funds go directly to the executive as if no release requirement existed. Wis. Stat.

§ 13.101(7); *see State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory language is interpreted in the context in which it is used."). No such statute is at issue here. Instead, money was appropriated directly to JCF—not DPI—for the purpose of supplementing funding, not releasing funds already appropriated to DPI. Section 13.101(7) is therefore inapposite.

In fact, Wis. Stat. § 13.101(3)—the provision at issue here—uses the term "supplement" funding, while Wis. Stat. § 13.101(7) uses the term "release" funding. The Legislature's use of these distinct terms in the same statute further confirms that they have different meaning, and therefore that § 13.101(7) has no application here. *See State ex rel. Dep't of Nat. Res. v. Wis. Ct. of App., Dist. IV*, 2018 WI 25, ¶ 28, 380 Wis. 2d 354, 909 N.W.2d 114 (explaining "'designate' cannot mean 'select'" in the same section of an Act). More to the point, because the $50 million was never appropriated to DPI (even though other amounts were, showing that the Legislature knows the difference), the Court cannot treat it as an "appropriation . . . made without any condition." Wis. Stat. § 13.101(7). To do so would rewrite Act 19.[17]

Nor does Act 19 mandate this $50 million be given to DPI. Act 19, as signed into law by the Governor, clearly placed this money in JCF's supplemental-funding account. *See* 2023 Wis. Act 19, § 51 (Figure 20.005(3)). Act 19 did not appropriate these funds to DPI. Indeed, Act 19 separately approved over $17 billion to DPI from all sources of revenue. *See id.* And JCF's budget motion earmarking these funds for "literacy"

[17] DPI wisely abandons the argument it made below that the Department of Administration ("DOA") can move the remaining portion of the $50 million to DPI because DOA is not a party. *See* R 51:23 (request); R 54:8–9 (explaining DOA is not a party).

does not alter the law.[18] DPI makes no argument that it does. *See generally* Op. Br. There is thus no dispute that the $50 million was never appropriated to DPI.

If DPI is correct on either its statutory or constitutional arguments (it is not), the remedy is that the money remains in JCF's supplemental account—Wis. Stat. § 20.865(4)(a)—until it reverts back to the general fund at the end of the biennium. If DPI wants $50 million in funding appropriated directly to it, this remedy is political, not judicial: it must ask the Legislature to appropriate money from the treasury for these programs.

CONCLUSION

This Court should affirm the circuit court's decision to grant summary judgment on the Governor and DPI's counterclaim in favor of the Legislature (and Senator Marklein and Representative Born).

[18] JCF, Motion 103 (June 13, 2023), *available at* https://docs.legis.wisconsin.gov/misc/lfb/jfcmotions/2023/2023_06_13/001_department_of_public_instruction/motion_103_omnibus_motion.

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 respondent portion of the combined brief is 9,179 words.

Dated: December 13, 2024

Electronically signed by Ryan J. Walsh
RYAN J. WALSH

CROSS-APPELLANT'S BRIEF

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INTRODUCTION

In the many decades since the people of Wisconsin granted the Governor the power to partially veto any "appropriation bill," the constitutional definition of such a bill has been clear. Under the "bright line" test first set forth in *State ex rel. Finnegan v. Dammann*, a proposed law is an "appropriation bill" *only if*, within its "four corners," it "expend[s]" or "set[s] aside" public funds from the treasury. *Risser v. Klauser*, 207 Wis. 2d 176, 193, 202, 558 N.W.2d 108 (1997) (citing *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622 (1936)). The bill's interaction with other laws is irrelevant under this test. Hence a bill is not an appropriation merely because it "contains provisions which set in motion a chain of events such that funds are disbursed without further legislative action." *Id.* at 195. This rule is not "flexible" because it must provide "clear guidance" so that Wisconsin courts avoid "referee[ing] disputes between [the] co-equal branches of government." *Id.* at 202. Of course, this works only if the co-equal branches *follow Finnegan*'s "clear guidance."

Contrary to this guidance, Governor Evers partially vetoed a bill that is clearly not, within its four corners, an "appropriation bill." In early 2024, the Legislature passed the widely supported, bipartisan 2023 Senate Bill 971 (collectively, with 2023 A.B. 1017, "the Bill"), which created two accounts that could be funded (but had not been yet) for use by the Department of Public Instruction ("DPI"), formally placing $0 in the newly created accounts. Although the Bill indisputably did not spend any money, the Governor nevertheless purported to partially veto it, striking out language requiring the money to be used by DPI on *approved* literacy curricula. Under the version of the Bill reflecting the Governor's

edits, money sent to DPI might be spent on any "literacy program" of DPI's own invention. But, under the long-established test, the Bill was not an "appropriation bill" subject to partial veto because it does not "expend" or "set aside" money from the treasury. The Governor's purported partial veto thus exceeded his authority. And even if the Bill had been subject to partial veto somehow, the *manner* in which the Governor exercised that power was also unauthorized. And once the Governor's partial veto is declared unlawful—under either theory—the only proper remedy is to declare that the Bill as passed by the Legislature is law.

In coming to the opposite conclusion, the circuit court improperly ignored *Finnegan*'s "bright line" (and binding) rule, concluding that this binding and on-point precedent was "inappropriate" here. A–App. 119. Instead, the court looked beyond the four corners of the Bill to determine that it was an "appropriation bill." The court held that the Bill, when combined with two other Acts, could be considered an "appropriation." Because this approach flies directly in the face of binding precedent, it must be reversed.

ISSUES PRESENTED

1. Whether the Governor impermissibly used his partial veto on a non-appropriations bill when he partially vetoed 2023 Wis. Act 100.

The circuit court answered no.

This Court should answer yes.

2. Whether, if the Governor could partially veto 2023 Wis. Act 100, his partial veto exceeded his authority under Wis. Const. art. V, § 10.

The circuit court answered no.

This Court should answer yes.

ORAL ARGUMENT AND PUBLICATION

Oral argument and publication may be warranted due to the unique nature of this case.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

Most bills in Wisconsin become law following the same process by which bills in Washington, D.C., do. Originating in the Senate or the Assembly, a bill passed by both houses is "presented to the governor." Wis. Const. art. V, § 10(1)(a); *id.* art. IV, § 19. For most bills, the governor, like the President of the United States, has two options: (1) "sign the whole bill into law" or (2) "veto the whole bill." *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 4, 393 Wis. 2d 308, 946 N.W.2d 101; *see* Wis. Const. art. V, § 10(1)–(2). If the governor does not sign or veto the bill within 6 days, Sundays excepted, the bill becomes law. *See* Wis. Const. art. V, § 10(3); *Brennan*, 2020 WI 69, ¶ 4. And a vetoed bill may still become law if, when returned to the Legislature, it is "approved by two-thirds of both houses." *Brennan*, 2020 WI 69, ¶ 4; *see* Wis. Const. art. V, § 10(2)(a).

In Wisconsin, however, "[a]ppropriation bills" are unique. Wis. Const. art. V, § 10(1). Appropriation bills "involve[ ] an expenditure or setting aside of public funds." *Risser*, 207 Wis. 2d at 193. Only appropriation bills, when enacted, can cause money to be paid out of the treasury. *See* Wis. Const. art. VIII, § 2 ("No money shall be paid out of the treasury except in pursuance of an appropriation by law.").

The Wisconsin Constitution separately prescribes how "appropriation bills" may be enacted into law. Such bills must be passed in both houses by "three-fifths of all the members" "required to constitute

a quorum." Wis. Const. art. VIII, § 8. And when an "appropriation bill" is presented to the governor, he may not only approve it in full or veto it in full but may "sign the bill into law while vetoing parts" and approving parts. *Brennan*, 2020 WI 69, ¶ 4; *see* Wis. Const. art. V, § 10(1)(b), 10(2)(b). This third option is called a "partial veto." *Brennan*, 2020 WI 69, ¶¶ 4–5.

The domain of the partial-veto power is limited. For one, as mentioned, it may be used only on "[a]ppropriation bills" within the meaning of Article V, Section 10 of the Wisconsin Constitution. For the first 40 years after the creation of the partial-veto provision in the constitution, the partial veto was used only, if used at all, in budget bills. *See* Richard A. Champagne, et al., Legislative Reference Bureau, *The Wisconsin Governor's Partial Veto after* Bartlett v. Evers at 2 (2020).[1] Second, the partial veto may not be used to "create a new sentence by combining parts of 2 or more sentences of the enrolled bill" or to "create a new word by rejecting individual letters in the words of the enrolled bill." Wis. Const. art. V, § 10(1)(c). Third, any partial veto must, at a minimum, leave "a complete, consistent, and workable scheme and law." *State ex rel. Wis. Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486, 492 (1935).

When the governor properly exercises his partial-veto power on an appropriation bill, "the part approved" "become[s] law" while the vetoed portion, along with the governor's written objections, returns to the house that originated the bill. Wis. Const. art. V, § 10(1)(b), 10(2)(b). "The legislature can override the veto if two-thirds of both houses agree to

[1] *Available at* https://docs.legis.wisconsin.gov/misc/lrb/reading_the_constitution/governors_partial_veto_5_3.pdf.

approve the rejected part." *Brennan*, 2020 WI 69, ¶ 5 (citing Wis. Const. art. V, § 10(2)(b)). If the Legislature fails to override the partial veto, however, "only parts approved by the governor become law." *Id.*

II. FACTUAL BACKGROUND

Wisconsin's biennial budget bill for the 2023–25 biennium, 2023 Wisconsin Act 19 ("Act 19"), was published on July 6, 2023. Act 19 included an appropriation of over $250 million from the treasury to the Joint Committee on Finance's ("JCF") supplemental-funding account: Wis. Stat. § 20.865(4). *See* 2023 Wis. Act 19, § 51 (Figure 20.005(3)). JCF earmarked $50 million of the $250 million to support yet-to-be-adopted literacy programs. A–App. 21, ¶ 4; *id.* at 26, ¶ 4.[2] This earmark is reflected in a motion that accompanies the budget, but is not law. *See* Richard A. Champagne & Madeline Kasper, Legislative Reference Bureau, *Wisconsin Executive Budget Bills, 1931–2023*, at 2 (2023) (such a motion "capture[s] the intentions of the governor and the legislature in budget deliberations" but is not itself "law").[3]

Shortly after Act 19 became law, the Legislature passed and the Governed signed the bill that became 2023 Wisconsin Act 20 ("Act 20"). Act 20 created two literacy programs relevant here. The first program is an early literacy coaching program that the newly formed DPI Office of

[2] *See* 2023 Wis. Act 19, § 51 (Figure 20.005(3)) (appropriating over $250 million to JCF's supplemental fund, Wis. Stat. § 20.865(4), for 2023–25), *available at* https://docs.legis.wisconsin.gov/2023/related/acts/19.pdf; JCF, Motion 103 (June 13, 2023) (earmarking $50 million "GPR in the [JCF] supplemental appropriation for a literacy program" for 2023–24), *available at* https://docs.legis.wisconsin.gov/misc/lfb/jfcmotions/2023/2023_06_13/001_department_of_public_instruction/motion_103_omnibus_motion. JCF may use the appropriations under Wis. Stat. § 20.865(4) to supplement the appropriation of DPI. *See generally* Wis. Stat. § 13.101.

[3] *Available at* https://docs.legis.wisconsin.gov/misc/lrb/lrb_reports/executive_budget_bills_2023_7_8.pdf.

Literacy, also created by Act 20, was tasked with running. *See* 2023 Wis. Act 20, § 8 (creating the early literacy coaching programs codified at Wis. Stat. § 115.39); 2023 Wis. Act 20, § 2 (creating the Office of Literacy codified at Wis. Stat. § 15.374(2)); *see also* A–App. 22, ¶ 5; *id.* at 27, ¶ 5. Act 20 empowers the Office of Literacy to contract with individuals "to serve as literacy coaches" assigned to schools and school districts throughout the state. 2023 Wis. Act 20, § 8(2)–(3) (codified at Wis. Stat. § 115.39(2)–(3)). The second program requires DPI to "award grants to reimburse school[s]" for adopting approved literacy curricula. *See* 2023 Wis. Act 20, § 12(1m)(c) (codified at Wis. Stat. § 118.015(1m)(c)); *see also* A–App. 22, ¶ 5; *id.* at 27, ¶ 5. This grant program provides grants to "school boards, operators of charter schools, and governing bodies of private schools participating in" certain programs in "an amount equal to one-half of the costs of purchasing the literacy curriculum and instructional materials" from a list of approved programs. 2023 Wis. Act 20, § 12(1m)(c) (codified at Wis. Stat. § 118.015(1m)(c)).

On January 26, 2024, both houses of the Legislature introduced 2023 S.B. 971 and 2023 A.B. 1017 in their respective houses; the Bill would become 2023 Wisconsin Act 100 ("Act 100"). This Bill created accounts for the two above-described Act 20 programs to which funding could be appropriated or transferred; the Bill did not, however, appropriate or transfer any money to those accounts. *See* 2023 S.B. 971; 2023 A.B. 1017; *see also* A–App. 22, ¶¶ 7, 9, 11; *id* at 27, ¶¶ 7, 9, 11. The Bill passed both houses of the Legislature with broad bipartisan support. It was unanimously approved by JCF, the Senate Committee on Education, and

the Assembly Committee on Education.[4] A–App. 22, ¶ 10 (unanimous support from JCF); *id.* at 27, ¶ 10 (same). The Senate and Assembly did not put the matter to "yeas and nays," and no such record was entered in the Journal for either house.

The Legislature presented the Bill to the Governor on February 23, 2024.[5] The Governor purposed to approve the Bill in part and veto it in part. *See* 2023 Wis. Act 100.[6] As relevant here, the Governor purported to partially veto Sections 1, 2, and 4 of the Act. The text below provides the original language of § 1, with the Governor's partial veto indicated by strikethrough:

> 20.005(3) (schedule) of the statutes: at the appropriate place, insert the following amounts for the purposes indicated:
>
> | | | | 2023–24 | 2024–25 |
> |---|---|---|---|---|
> | 20.255 Public instruction, department of | | | | |
> | (1) Educational Leadership | | | | |
> | (fc) Office of literacy; literacy ~~coaching~~ program | GPR | C | -0- | -0- |
> | (2) Aids for Local Educational Programing | | | | |
> | ~~(fc) Early literacy initiatives; support~~ | ~~GPR~~ | ~~B~~ | ~~-0-~~ | ~~-0-~~ |

2023 Wis. Act 100, § 1.

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[4] *See* Senate Journal, 106th Reg. Sess., at 782–83, *available at* https://docs.legis.wisconsin.gov/2023/related/journals/senate/20240207/_119; Assembly Journal, 106th Reg. Sess., at 637–38, *available at* https://docs.legis.wisconsin.gov/2023/related/journals/assembly/20240207/_251; *see also Medlock v. Schmidt*, 29 Wis. 2d 114, 121, 138 N.W.2d 248 (1965) ("The Legislative Journals are properly the subject of judicial notice.").

[5] *See* Senate Journal, 106th Reg. Sess., at 860, *available at* https://docs.legis.wisconsin.gov/2023/related/journals/senate/20240223/_22; *see also Medlock*, 29 Wis. 2d at 121.

[6] The pdf version of Act 100, which better illustrates the partial vetoes, is available at https://docs.legis.wisconsin.gov/2023/related/acts/100.pdf.

The Governor purported to partially veto § 2 as follows:

> 20.255(1)(fc) *Office of literacy; literacy ~~coaching~~ program*. As a continuing appropriation, the amounts in the schedule for the office of literacy and the literacy ~~coaching~~ program ~~under s. 115.39.~~

2023 Wis. Act 100, § 2.

And the Governor struck § 4 in full. That section, without the strikethrough, provided:

> 20.255(2)(fc) *Early literacy initiatives; support*. Biennially, the amounts in the scheduled for grants under s. 118.015(1m)(c) and for financial assistance paid to school boards and charter schools for compliance with 2023 Wisconsin Act 20, section 27(2)(a).

2023 Wis. Act 100, § 4.

The Governor also struck two sections that would have delayed the repeal of § 2 of Act 100 until July 1, 2028. *See* 2023 Wis. Act 100, §§ 3, 5. This delayed repeal mirrored the repeal of Wis. Stat. § 115.39, which is delayed until July 1, 2028. *See* 2023 Wis. Act 20, §§ 9, 29(1).

Finally, the Governor approved § 4m of Act 100 which sets the salary for the director of the office of literacy. *See* 2023 Wis. Act 100, § 4m.

The partially-vetoed version of Act 100 does not require that DPI use the funds allocated for the literacy coaching program under Wis. Stat. § 115.39 (2023 Wis. Act 20, § 8), the early literacy grants set forth in Wis. Stat. § 118.015(1m)(c) (2023 Wis. Act 20, § 12(1m)(c)), and to offer grants to school boards and charter schools who provide particular professional development training (2023 Wis. Act 20, § 27(2)). *See generally* 2023 Wis. Act 100; A–App. 23, ¶ 12; *id.* at 28, ¶ 12. Instead, any funds allocated under the partially-vetoed version of Act 100 may be treated by DPI as money that can be spent for its Office of Literacy on any "literacy

program." A–App. 23, ¶ 13; *id.* at 28, ¶ 13. DPI does not have a specifically titled "literacy program."[7] A–App. 23, ¶ 14; *id.* at 28, ¶ 14.

DPI submitted a request to JCF on March 7, 2024, to release the funds set aside in the biennial budget in accordance with the partially-vetoed version of Act 100, not the Bill as passed. A–App. 23, ¶ 15; *id.* at 28, ¶ 15; *id.* at 32–36. That request seeks in part to fund Act 20 programs, it also asks for supplemental funding for a broader and undefined "literacy program," not necessarily the literacy program created by Act 20. *See* A–App. 23, ¶ 16; *id.* at 28, ¶ 16; *id.* at 32–36. JCF has not yet granted the request because it concluded the partially-vetoed version of Act 100 is not law. A–App. 24, ¶ 18; *id.* at 29, ¶ 18.

On April 16, 2024, the Legislature filed suit in the Circuit Court for Dane County, arguing that the Governor's partial veto of the Bill was unconstitutional. *See* A–App. 7–20. The Legislature sought a declaration that the Governor's partial veto of the Bill was *ultra vires* because the Bill was not an "appropriation bill;" it neither authorized an expenditure of public money nor set aside funds for a particular purpose, and thus the Governor could not partially veto it. A–App. 16–19 (citing Wis. Const. art. V, § 10(1)(b)–(c); *Finnegan*, 264 N.W. at 624; *Risser*, 207 Wis. 2d at 192–93). The Legislature also explained that the Bill did not pass the Senate or the Assembly with a vote of the "yeas and nays" "duly entered on the journal" with "three-fifths of all the members elected" "required to constitute a quorum"—a "mandatory" duty for the passage of all appropriations bills. A–App. 16–17 (quoting Wis. Const. art. VIII, § 8; *State ex rel. Gen. Motors Corp., AC Elecs. Div. v. City of Oak Creek*, 49

[7] The only "literacy program" in the statutes is run by the Department of Health Services ("DHS")—not DPI. *See* Wis. Stat. § 46.248, *see also* Wis. Stat. § 46.011(1e) (defining "Department" in Wis. Stat. ch. 46 as DHS).

Wis. 2d 299, 322, 182 N.W.2d 481 (1971)). Alternatively, the Legislature asserted that the Governor exceeded his partial veto authority if he believed the Bill was an appropriations bill. A–App. 16–19 (citing Wis. Const. art. V, § 10(1)(c); *Henry*, 260 N.W. at 491–92; *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685 (*per curiam*)).

DPI and Governor Evers (collectively, hereinafter, "DPI") counterclaimed, naming Senator Howard Marklein and Representative Mark Born as additional counterclaim-defendants and seeking three declarations. This counterclaim is discussed in the Legislature's response brief.

The parties moved for summary judgment on all claims. R. 33, 38. On August 27, 2024, the circuit court granted summary judgment to DPI on the Legislature's partial-veto claim and to the Legislature, Senator Marklein, and Representative Born on DPI's counterclaims. A–App. 109–28.

Addressing the Legislature's claim, the circuit court stated "that Acts 20, 19, and 100, although passed sequentially, were really part of one piece of legislation." A–App. 119. Notwithstanding "Justice Abrahamson's admonition in *Risser* that courts should generally rely on the clear rules set forth in *Finnegan* (*i.e.* the 'four corners' test), lest courts be involved in endless conflicts between the co-equal branches of government," the court "conclude[d] it is inappropriate to ask whether, standing alone, Act 100 appropriated money. Rather, [the court] view[ed] Act 19 and Act 100 in tandem." A–App. 118–19. Thus, the court reasoned that "Senate Bill 971 is an 'appropriation bill' because it allows for the transfer of money to DPI to fund various programs created under Act 20." A–App. 119. The court further ruled that the requirements for the

passage of bills in "art. VIII, § 8" of the Wisconsin Constitution "do not apply in lockstep" to the requirements of "art. V, § 10" of the Wisconsin Constitution. A–App. 119–20. The court also explained that the "*per curiam*" in *Bartlett* left the pre-*Bartlett* law in place and concluded that "Governor Evers' partial veto of Senate Bill 971 meets" the *Henry* "complete, consistent, and workable scheme and law" "test." A–App. 121–22.

The same day that this opinion issued, DPI filed its notice of appeal and docketing statement and the Legislature also filed a notice of appeal and docketing statement. R. 57, 58, 59, 60. The court of appeals designated the Legislature's documents as a notice of cross-appeal. The Legislature filed a motion to strike or dismiss without prejudice and transfer venue of DPI's appeal on the grounds that DPI's docketing statement failed to identify Senator Marklein and Representative Born as parties to the appeal or explain why they were no longer parties. Motion to Strike or Dismiss Without Prejudice and to Transfer Venue, *Wis. State Legislature v. Wis. Dept. of Pub. Instruction*, No. 2024AP1713 (Wis. Ct. App. Aug. 28, 2024). DPI opposed this motion. Response to Motion to Strike or Dismiss Without Prejudice and to Transfer Venue, *Wis. State Legislature v. Wis. Dept. of Pub. Instruction*, No. 2024AP1713 (Wis. Ct. App. Aug. 29, 2024).

On October 9, 2024, after the record was transferred to the court of appeals, DPI filed a proposed final judgment order along with a letter in the circuit court. Docket, *Wis. State Legislature v. Wis. Dept. of Pub. Instruction*, No. 2024CV1127 (Dane County Circuit Court) (Proposed

Order).[8] The next day, the Legislature opposed this request. *Id.* (Letters and Correspondence). The circuit court on October 17, 2024, declined to enter the final judgment, explaining there was "no authority in [the] circuit court to enter [the] order." *Id.* (Proposed Order Declined).

DPI filed in the Wisconsin Supreme Court a petition for bypass on October 29, 2024.

On November 4, 2024, the Court of Appeals denied the Legislature's motion to strike or dismiss without prejudice and transfer venue. In so doing, the Court of Appeals pointed out that "[i]t appears . . . that the order from which both sides appealed is not a final order." Order, *Wis. State Legislature v. Wis. Dept. of Pub. Instruction*, No. 2024AP1713 at 3 (Wis. Ct. App. Nov. 4, 2024). "[I]f the supreme court declines to exercise its jurisdiction by denying the bypass petition," the Court of Appeals noted that it "will take further steps regarding [its] jurisdiction, or lack thereof." *Id.* at 4.

The Legislature filed its response to DPI's petition for bypass on November 12, 2024. And on November 18, 2024, DPI moved to file a reply brief. The petition for bypass is currently still pending before the Wisconsin Supreme Court.

STANDARD OF REVIEW

This Court reviews "de novo" a summary-judgment decision, "applying the same methodology as the circuit court." *Quick Charge Kiosk LLC v. Kaul*, 2020 WI 54, ¶ 9, 392 Wis. 2d 35, 944 N.W.2d 598. "Summary judgment is appropriate when there is no genuine issue of

[8] *Available at* https://wcca.wicourts.gov/caseDetail.html?caseNo=2024CV001127&countyNo=13; *see Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (taking "judicial notice of the CCAP records in [an] action" that were "not in the record").

material fact and 'the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting Wis. Stat. § 802.08(2)).

This case concerns "interpretation of constitutional and statutory provisions, both of which involve questions of law we review de novo." *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 13, 387 Wis. 2d 511, 929 N.W.2d 209.

ARGUMENT

The Bill that became Act 100 was not an "appropriation bill" as that term is used in the Wisconsin Constitution; thus, the Governor's partial veto of Act 100 was unconstitutional. Even if Act 100 were an appropriation bill (which would mean that it was impermissibly passed without a roll call vote), the Governor's partial veto still exceeded the scope of his partial veto pen under Wis. Const. art. V, § 10(1)(b)–(c). Accordingly, this Court should declare the partially-vetoed version of Act 100 unconstitutional and that 2023 S.B. 971 as passed by the Legislature is law.[9]

I. THE BILL IS NOT AN APPROPRIATION BILL—IT DOES NOT EXPEND OR SET ASIDE PUBLIC FUNDS—THUS IT CANNOT BE PARTIALLY VETOED

A. The Governor may partially veto only "appropriation bill[s]." Wis. Const. art. V, § 10(1)(b)–(c). A bill is an "appropriation bill" within the meaning of the constitution only if, "within [its] four corners," it

[9] The Legislature sought a permanent injunction that ordered the Governor and DPI not to spend public funds as if the partially vetoed version of Act 100 has the force of law. A–App 19; R. 34:23–27. DPI failed to respond to this argument concerning relief, R. 39:29 n.28, and thus concedes it. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 108–09, 279 N.W.2d 493 (Ct. App. 1979). The Legislature maintains that the proper remedy is both a declaration that the Bill as passed by the Legislature is law and a permanent injunction to that effect. *See* R. 34:23–27; 49:10–11.

"expend[s] or set[s] aside . . . public funds." *Risser*, 207 Wis. 2d at 182, 193. Under the Wisconsin Supreme Court's "long-standing definition," "[a]n appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that objection, and no other." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 538–39, 576 N.W.2d 245 (1998) (quoting *Finnegan*, 264 N.W. at 624). Indeed, the circuit court recognized the import of this "bright line rule" to provide clarity and keep the courts from "involv[ement] in endless conflicts between the co-equal branches of government." A–App. 118–19 (quoting *Risser*, 207 Wis. 2d at 198, 201–02). The *sine qua non* of an appropriation is that it spends public funds—*i.e.*, money from the treasury.

The Governor's purported partial veto of the Bill exceeds his constitutional authority—the Bill, on its face, spends no money. In earlier enactments, the Legislature appropriated funds to JCF's supplemental funding account (2023 Wis. Act 19, § 51 (Figure 20.005(3))), and created literacy programs (2023 Wis. Act 20). Then, in the Bill that became Act 100, the Legislature created accounts for two of those literacy programs, to which funding could be appropriated, supplemented, or transferred (2023 Wis. Act 100; 2023 S.B. 971). But the Bill itself did not send any money to those accounts—it simply created them and placed in them an amount of "$0." Accordingly, it is not an appropriation bill, and the Governor's purported partial veto exceeded his authority.

B. The circuit court found that "Acts 20, 19, and 100, although passed sequentially, were really part of one piece of legislation" and thus

"view[ed] Act 19 and Act 100 in tandem." A–App. 119. "Viewed in this manner," the court held, the "Bill [ ] is an 'appropriation bill' because it allows for the transfer of money to DPI to fund various programs created under Act 20." *Id.* But the circuit court's decision is contrary to law.

The circuit court seems to have applied the *in pari materia* canon to the three Acts, rather than the four-corners test. Under the canon of *in pari materia*, courts "read, apply, and construe statutes relating to the same subject matter together." *Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60, ¶ 30 n.6, 381 Wis. 2d 732, 914 N.W.2d 631. But this is a canon of statutory interpretation—it is not the rule to be applied to determine whether a bill is an "appropriation bill" within the meaning of Article V, Section 10 of the Wisconsin Constitution. To make that determination, a court may look only to the "four corners" of the bill at issue. *Risser*, 207 Wis. 2d at 182. This is a "bright line rule"—it is not "flexible." *Id.* at 202.

Indeed, the Supreme Court in *Risser* and *Finnegan* rejected the very kind of analysis that the circuit court undertook here. The bill at issue in *Finnegan* increased the annual permit fees for motor carriers; it amended a statute *containing* an appropriation but did not itself "contain any express appropriation." 264 N.W. at 623. The court held that a bill is *not* an appropriation "merely because its operation and effect in connection with an existing appropriation law has an indirect bearing upon the appropriation of public moneys." *Id.* at 624. Instead, the bill must "*within its four corners* contain an appropriation." *Id.* (emphasis added). The court "reaffirm[ed]" this test in *Risser*, rejecting the governor's request "to find an appropriation by analyzing the complex interrelation of various statutes so that what appears to be an amount

authorizing bonding is actually an appropriation amount." 207 Wis. 2d at 201–03. Instead, courts must analyze only the bill at issue and determine whether, within its "four corners," it contains an appropriation. *Id.*

Because the circuit court looked beyond the four corners of the Bill, its decision violates settled law. When viewing the four-corners of Act 100—standing alone—there is only one conclusion that can be reached: the Bill is not an appropriation bill; thus, the Governor's purported partial veto exceeded his authority.

C. To defend the court's decision below, DPI may assert that a bill can be an appropriation bill if it *either* sets aside public funds for a public purpose *or* if it authorizes the executive to spend money set aside for this purpose. *See* R. 39:17. DPI below rested its entire argument on the second portion: that a bill is an appropriation bill if it "authorizes the executive to spend money set aside for that manner." *Id.* But this either-or articulation of the test, and particularly the second part of the test, is unsupported by case law and would lead to absurd results.

DPI cited *State ex rel. Kleczka v. Conta* to support this argument, but *Kleczka* supports the Legislature. *Kleczka* affirms that a "bill [that] *set[s] apart* a portion of the public funds for a public purpose" is an appropriation. 82 Wis. 2d 688–89, 264 N.W.2d 539 (1978) (emphasis added). Indeed, *Kleczka* did not set out to establish a two-part definition, it states: "An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other." *Id.* at 689 (quoting *Finnegan*, 264 N.W. at 624) (internal quotation marks omitted). And, critically, the

bill at issue in *Kleczka* did not simply "authorize[ ] the executive to spend money [already] set aside." R. 39:17. Instead, it set aside public funds for a public purpose: it appropriated tax revenues for public financing of political campaigns. *Kleczka*, 82 Wis. 2d at 683. Hence, nothing in *Kleczka* supports DPI's argument that laws which simply authorize spending are appropriation bills.

DPI may counter that the bill in *Kleczka* did not "set[ ] aside a specific amount of money" because it "credited no specific amount" of money to its appropriation. R. 39:19. But a bill can "set aside" money without creating a sum-certain appropriation, a specific dollar amount. *See* Legislative Fiscal Bureau, *Informational Paper #78 State Budget Process*, at 26–27 (2023)[10] (explaining that appropriations can be sum-certain *or* be funded by revenue). The *Kleczka* Court concluded that the bill there was an appropriation because it set aside money (*i.e.*, specific revenues)—that it did not specify the exact dollar amount set aside made no difference. *See Kleczka*, 82 Wis. 2d at 690.

Kleczka's conclusion reflects the Legislature's long-established practice. The Legislature can, and does, appropriate funds by setting aside amounts of money that depend on future events. For example, in the 2023, the Legislature appropriated "[a]ll moneys received" "on account of the state fair" "to be used to support the operation, management and development of state fair park." Wis. Stat. § 20.190(1)(h); *see also* Wis. Stat. § 20.370(9)(iq) (revenue earned from future sale of goods); Wis. Stat. § 20.455(2)(gb) (funds gifted to a governmental body). These "[c]ontinuing appropriations" are not "sum

[10] *Available at* https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0078_state_budget_process_informational_paper_78.pdf.

certain" because they include "revenues received during the fiscal year that are directed by law to be credited to the appropriation account." Wis. Stat. § 20.001(3)(c); *see also* Richard A. Champagne, Legislative Reference Bureau, *Bill Drafting Manual 2023–24*, at 209–210 (2022) (explaining the different types of revenue and types of appropriations) (at R. 50:4–9); Legislative Fiscal Bureau, *supra*, at 26–28 (same). Instead of being limited by a specific dollar amount listed in the appropriation bill, spending "under a continuing appropriation other than a sum certain appropriation [is] limited only by the available revenues from which the appropriation is made." Wis. Stat. § 20.001(3)(c). The precise dollar amounts of these appropriations cannot be stated in the appropriations bills, because the precise amounts depend on future events. The money, nevertheless, is still appropriated because the Legislature specified and set aside this amount in detail. Thus, the bill in *Kleczka* was an appropriation bill not because it was an "authoriz[ation for] the executive to spend money," R. 39:17, 19, but because the bill was setting aside public funds, *see Kleczka*, 82 Wis. 2d at 689–89.

Risser supports this reading of *Kleczka*. *Risser* explains that "an appropriation involves an expenditure or setting aside of public funds for a particular purpose." *Risser*, 207 Wis. 2d at 193. The *Risser* Court concluded that "nothing" in the bill at issue "authorizes an expenditure or the setting aside of public funds for a particular purpose," so it was not an appropriation. *Id.* The "or" in these sentences does not, as DPI may suggest, create two entirely different definitions of an appropriation bill but rather indicates that the two clauses are "equivalent" or

"substitutive." *Or*, Merriam-Webster (last visited Dec. 12, 2024).[11] Simply, an "expenditure" is the same as the "setting aside of public funds for a particular purpose." *Risser*, 207 Wis. 2d at 193. Indeed, if DPI were correct, then *Risser* itself would have to come out the other way—the law there authorized the Building Commission to spend the revenues it raised, up to a sum certain—but the *Risser* Court concluded the bill was *not* an appropriation bill. *Id.* at 184, 193.

More, if DPI were correct, every bill that gives a state agency powers or new duties would turn into an appropriation bill, vastly extending the governor's partial-veto power. Under this reading, any bill that specifies how, when, and why a state agency (or even a co-equal branch of government) may spend money would satisfy the second part of DPI's definition of an appropriation bill. The logical extension of this definition would mean that bills mandating the Wisconsin Supreme Court to "purchase sufficient copies of its reports," Wis. Stat. § 751.11(2), and those permitting the Department of Administration to "[a]ppoint such number of police officers as is necessary to safeguard all public property placed by law in the department's charge," Wis. Stat. § 16.84(2), are appropriations bills. By reading appropriation bill this broadly, DPI is really asking to expand the number and types of bills that the governor may partially veto, despite the purposeful limits on this "unique" power. *Brennan*, 2020 WI 69, ¶ 4; *see also* Wis. Const. art. V, § 10(1)(b).

No court has read *Risser* as adopting DPI's new, disjunctive definition. Rather, a year after *Risser* was decided, the Wisconsin Supreme Court reaffirmed that "[a]n appropriation is 'the setting aside from the public revenue of a certain sum of money for a specified object,

[11] *Available at* https://www.merriam-webster.com/dictionary/or.

in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.'" *Flynn*, 216 Wis. 2d at 541–42 (citing *Finnegan*, 264 N.W. at 624). Indeed, no governor, until Governor Evers in briefing filed below, has taken this position, either. If *Risser* did authorize the use of the partial veto pen on all bills that "authorize[ ] the executive to spend money," R. 39:17, surely the governors of the last quarter-century would have partially vetoed a host of bills that authorize executive spending.

And, if DPI was correct that the "authoriz[ing] the executive to spend money" makes a bill an appropriation bill, *id.*, then the Governor partially vetoed the wrong bill—it is Act 20, not Act 100, that authorizes DPI to spend money. *See, e.g.*, 2023 Wis. Act 20, § 16(9) ("From the appropriation under s. 20.255(1)(f) and subject to para. (b), *[DPI] shall pay* a school board or operator of an independent charter school the per pupil cost of each reading readiness assessment required to be administered under sub. (3)(b)."") (emphasis added). Act 100 authorizes no spending and, as explained, sets aside no money. *See supra* 58–59. Therefore, even if DPI is correct about the definition of "appropriation bill," the Governor's partial veto of Act 100 was still unlawful, as it meets neither of DPI's definitions.

The fact that the Bill uses the term "appropriation" and creates sections in Chapter 20 of the Wisconsin Statutes titled "Appropriations and Budget Management" is not dispositive. Although *Risser* notes that "all appropriations" in Wisconsin "are listed in chapter 20 of the statutes," 207 Wis. 2d at 194–95, not everything that is called an "appropriation" or located in Chapter 20 is an "appropriation" within the meaning of the Wisconsin Constitution. *See, e.g.*, Wis. Stat. § 20.001

(setting forth the definitions for Chapter 20). As the Wisconsin Supreme Court has held since nearly the time governor's partial veto was ratified, "[a]n appropriation *in the sense of the constitution* means the setting apart a portion of the public funds for a public purpose." *Finnegan*, 264 N.W. at 624 (quotation marks and citation omitted, emphasis added); *see also Koschkee v. Taylor*, 2019 WI 76, ¶ 23, 387 Wis. 2d 552, 929 N.W.2d 600 (explaining the Wisconsin Supreme Court's early opinions on a new constitutional provision are evidence of that provision's meaning). To deem something an appropriation because of its location in the statutes or the terms used in the enacting legislation would exalt form over substance. The Governor may partially veto only appropriation bills. *See Finnegan*, 264 N.W. at 624 ("the bill . . . must satisfy the constitutional requisites" of an appropriation bill). More, as a formal matter, appropriations can and do occur in "Fiscal changes" sections of bills, without directly amending the schedule in Wis. Stat. ch. 20. *See e.g.*, 2023 Wis. Act 41, § 14(1) ("In the schedule under s. 20.005(3) for the appropriation to the department of revenue under s. 20.566(1)(gi), the dollar amount for fiscal year 2023–24 is increased by $375,000."). Because the Bill here sets aside no "sum of money" and no "portion of the public funds," it is not an "appropriation bill" under Article V, Section 10 of the Wisconsin Constitution.[12]

[12] Additionally, a bill that allocates $0 is not an "appropriation bill" as that term is used in the Wisconsin Constitution because an "appropriation amount," which prior case law held the Governor could adjust downward, *see Risser*, 207 Wis. 2d at 183, must have been an amount over $0, as only such an amount would permit the Governor to adjust the amount downwards. *See id.* at 191. Indeed, in practice, when the Legislature drafts an appropriation bill, it includes the phrase "making an appropriation"—a phrase *not* included in the Bill here. Richard A. Champagne, Legislative Reference Bureau, *Bill Drafting Manual 2023–24*, at 24 (2022) (at R. 35:9–13); *see Risser*, 207 Wis. 2d at 194 (relying on the *Wisconsin Bill Drafting Manual*); *see also* 2023 S.B. 971.

D. Further bolstering the conclusion that the Bill is not an "appropriation bill" is the fact that neither the Legislature nor the Governor called for a yeas and nays vote—a constitutional prerequisite for passing any appropriation bill. When "either house of the legislature" passes "any law which . . . makes, continues or renews an appropriation of public or trust money, . . . the question shall be taken by yeas and nays, which shall be duly entered on the journal" before the bill is presented to the governor. Wis. Const. art. VIII, § 8; *see State v. Wis. Tax Comm'n*, 185 Wis. 525, 201 N.W. 764, 767 (1925). This is a "mandatory" duty to take and "record[ ]" "the yeas and nays" "in the legislative journals." *Gen. Motors Corp.*, 49 Wis. 2d at 322; *see also Integration of Bar Case*, 244 Wis. 8, 27, 11 N.W.2d 604 (1943). An appropriation bill may avoid a yea and nay vote only if it does not appropriate "public or trust money." *Kleczka*, 82 Wis. 2d at 691–92; *see also B.F. Sturtevant Co. v. O'Brien*, 186 Wis. 10, 202 N.W. 324, 328 (1925) (concluding a yea and nay vote was not required because the bill concerned "special funds held by the state treasurer as a mere depositor, and in which the general public has no beneficial interest"). If these constitutionally mandatory procedures are not followed, any resulting Act, whether or not partially vetoed, is "a nullity." *Gen. Motors Corp.*, 49 Wis. 2d at 322.

The Legislature, by not passing the Bill by a roll call vote, determined the Bill was not an appropriation bill. If the Governor nevertheless concluded that the Bill was an appropriation bill, he should have contacted the Senate (the house that originated the Bill) and requested that the Legislature recall the Bill by joint resolution so that the Bill could be properly passed by roll call vote. *See* 2023 Joint Rule 5.[13]

[13] *Available at* https://docs.legis.wisconsin.gov/2023/related/rules/joint/1/5.

Because the Governor did not return the Bill to the Legislature for a roll call vote, the Governor must have concluded that the Bill was not an appropriation bill, which precluded his use of his partial veto on that bill.

Below, the circuit court agreed with DPI's argument that roll call votes are required only when "dollar amounts [are] coming into or leaving the treasury," while the definition of "appropriation bill" in Article V, § 10 is broader. A–App. 119–20 (quoting R. 39:28). But this is incorrect. As the circuit court recognized, a vote of yeas and nays is required when a bill "makes, continues, or renews an appropriation of public [or] trust money." A–App. 119 (quoting Wis. Const. art. VIII, § 8). If, as the circuit court held, the Bill makes an "appropriation" (and is therefore an "appropriation bill"), then that appropriation is of public money, since the money comes from the treasury, which is money "in which 'all the people of the state would have a beneficial interest.'" *Kleczka*, 82 Wis. 2d at 692 (citation omitted). By comparison, in *Sturtevant*, a vote of the yeas and nays was not required because the act concerned "special funds held by the state treasurer as a mere depositor, and in which the general public has no beneficial interest." 202 N.W. at 328.

* * *

At bottom, this Court must follow "*Finnegan*'s bright line rule," which is "especially suitable when the court is called upon, as [it is] in veto cases, to referee disputes between [the] co-equal branches of government." *Risser*, 207 Wis. 2d at 202. *Finnegan* and *Risser* "provide clear guidance to the other two branches to preclude continuing judicial involvement in and the need for frequent judicial resolution of inter-branch disputes." *Id.* That guidance usually gives "the legislature and

the Governor the ability to predict the consequences of their actions and to guide their conduct accordingly without the intercession of the judicial branch." *Id.* Only because that guidance was disregarded does the Court need to intercede again, which can lead to only one conclusion: the Bill is not an appropriation bill because it spends no money.

II. EVEN IF THE BILL WERE SUBJECT TO PARTIAL VETO, THE GOVERNOR'S PARTIAL VETO OF THE BILL EXCEEDED HIS AUTHORITY

Even if the Bill was an appropriation bill (it was not), the Governor's partial veto exceeded his authority under Wis. Const. art. V, § 10(1)(b)–(c). The governor's partial veto power is circumscribed by both the constitution's text and the Wisconsin Supreme Court's case law. The constitution bars him from "creat[ing] a new word by rejecting individual letters in the words of the enrolled bill" and "creat[ing] a new sentence by combining parts of 2 or more sentences of the enrolled bill." Wis. Const. art. V, § 10(1)(c). And, the Wisconsin Supreme Court has explained that when approving an appropriation bill in part, the governor must leave "a complete, consistent, and workable scheme and law," and the parts stricken cannot be "provisos or conditions inseparably connected to the appropriation." *Henry*, 260 N.W. at 490–92. And, more recently, four members of the Court, in two separate writings, explained that the governor may not use his partial veto to, in effect, create new policies. *See Bartlett*, 2020 WI 68, ¶ 217 (Kelly, J., concurring in part, dissenting in part) (joined by R.G. Bradley, J.); *id.* ¶ 264 (Hagedorn, J., concurring) (joined by Ziegler, J.).

In that case, the Court as a whole concluded that the Governor's partial vetoes to "the local roads improvement fund" were unconstitutional. *Id.* ¶¶ 2, 4 (*per curiam*). Using a "trio of vetoes," the

Governor rewrote "an appropriation for local road funding into an appropriation for some other undefined local grant." *Id.* ¶ 272 (Hagedorn, J., concurring). First, the Governor partially vetoed 2019 Wis. Act 9, § 126 (Act 9 is the 2019–20 biennial budget bill) to read "Local ~~roads improvement discretionary~~ supplement." *Id.* Second, the Governor partially vetoed § 184s of Act 9 as follows: "Local ~~roads improvement discretionary~~ supplement. From the general fund, as a continuing appropriation, the amounts in the schedule for the local ~~roads improvement discretionary supplemental~~ grant ~~program under s. 86.31(3s).~~" *Id.* Finally, the Governor struck all of § 1095m of Act 9, which created Wis. Stat. § 86.31(3s), the specific grant program whose reference was removed from § 184s of Act 9. *Id.* at 272 & n.15.

The Governor's partial veto of the Bill here fails under the *per curiam* decision of *Bartlett* because it mirrors the partial veto of the local road improvement fund that the *per curiam* court held invalid. In § 1 of Act 100, the Governor struck the word "coaching" from "Office of literacy; literacy coaching program" to create a "literacy program" and struck the line for "Early literacy initiatives; support." 2023 Wis. Act 100, § 1; *see Bartlett*, 2020 WI 68, ¶ 272 (Hagedorn, J., concurring) (partial veto of Act 9, § 126). The Governor partially vetoed § 2 as follows: "20.255(1)(fc) Office of literacy; literacy ~~coaching~~ program. As a continuing appropriation, the amounts in the schedule for the office of literacy and the literacy ~~coaching~~ program ~~under s. 1115.39~~." 2023 Wis. Act 100, § 2; *see Bartlett*, 2020 WI 68, ¶ 272 (partial veto of Act 9, § 184s). And the Governor completely struck §§ 3–4 and 5, including the provision for "grants under s. 118.015(1m)(c) [for early literacy curricula and instruction materials] and for financial assistance paid to school boards

and charter schools for compliance with 2023 Wisconsin Act 20, section 27(2)(a) [mandatory early reading instruction professional development]." 2023 Wis. Act 100, §§ 3–4, 5; *see Bartlett*, 2020 WI 68, ¶ 272 (veto of Act 9, § 1095m). These partial vetoes mirror the partial vetoes of the local road improvement fund the Court in *Bartlett* found "unconstitutional and invalid." *Bartlett*, 2020 WI 68, ¶ 9 (*per curiam*). Although this holding was announced in a *per curiam* decision, it was announced in a published opinion and thus is still the holding of the Court. This holding at least has persuasive value here, where the same Governor attempted a similar partial veto that he was previously told was unconstitutional. *Cf. Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, ¶ 37, 396 Wis. 2d 434, 957 N.W.2d 261 (Hagedorn, J., concurring) (explaining the prior holdings of the Court must be respected "when a court has told a specific party that certain conduct is unlawful, and that party does the very same thing again under the same circumstances").

More, the Governor's partial veto here creates a "literacy program" from whole cloth, despite the prohibition on doing just this from four Justices in *Bartlett*. *See* 2020 WI 68, ¶ 217 (Kelly, J., concurring in part, dissenting in part); *id.* ¶ 264 (Hagedorn, J., concurring). In the Bill, the Legislature detailed accounts expressly tailored to allow for funding specific programs created in Act 20. A–App. 22, ¶ 11; *id.* at 27, ¶ 11. The Governor used his partial veto to create instead an account for a "literacy program" not tied to the specific statute. *See* 2023 Wis. Act 100; A–App. 23, ¶¶ 12–13; *id.* at 28, ¶¶ 12–13. The result is that the Governor authored a new law "never proposed to him"—"something other than what passed the Legislature." *Bartlett*, 2020 WI 68, ¶ 223 (Kelly, J.,

concurring in part, dissenting in part); *id.* ¶ 273 (Hagedorn, J., concurring). This is not permitted.

DPI may argue, as it did below, that the argument above effectively asks for a *Marks*-type rule. *Marks* instructs, "[w]hen a fragmented [United States Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted); *see e.g.*, *State v. Griep*, 2015 WI 40, ¶¶ 36–38, 361 Wis. 2d 657, 863 N.W.2d 567 (applying the *Marks* narrowest-grounds rule). But the Legislature is not asking this Court to adopt a *Marks*-type rule, so any argument against such a rule can and should be disregarded. Instead, the Legislature is asking the Court to apply the holding of the *per curiam*.

Because the Legislature is not asking for an adoption of a *Marks*-type rule, it additionally need not identify a narrowest common rationale. The Governor's partial veto of the Bill is inconsistent with the *per curiam* decision in *Bartlett* because the partial veto of the Bill mirrors his unconstitutional partial veto of "the local road improvement fund." *Bartlett*, 2020 WI 68, ¶¶ 2, 4 (*per curiam*). The similarities between these partial vetoes compels concluding that the *Bartlett* Court would similarly declare the partial vetoes of the Bill unconstitutional.

The circuit court below noted that a principle must "garner majority support" to create precedent, A–App. 122, but the *Bartlett per curiam* is a majority decision. Indeed, the *per curiam* itself explains that "a majority has reached a conclusion with respect to the constitutionality of each series of vetoes" and that "[f]ive justices" "conclude that the vetoes

to the local roads improvement fund are unconstitutional." 2020 WI 68, ¶ 4 (*per curiam*). The Legislature is asking the Court to apply here the decision from the *per curiam*—that gained the majority support of five Justices—that the partial vetoes to "the local roads improvement fund" are "unconstitutional and invalid." *Id.* ¶¶ 4, 9. That same conclusion applies here because the Governor's veto of Act 100 mirrors his unconstitutional veto of the road improvement fund. *See supra* 70–72. The Governor may not ignore a court order with impunity, which is effectively what he did by failing to conform to the decision in *Bartlett*.

III. PROPER REMEDY IS TO DECLARE THE BILL AS PASSED BY THE LEGISLATURE TO BE LAW

If the governor does not return any bill, including an appropriations bill, within six days (excepting Sundays) after the bill is presented to the governor by the Legislature, the bill "shall be law unless the legislature, by final adjournment, prevents the bill's return, in which case it shall not be law." Wis. Const. art. V, § 10(3); *Brennan*, 2020 WI 69, ¶ 4. Thus, the remedy in cases where a governor's partial veto is unlawful depends on whether the Legislature adjourned within the six days after presenting the bill, and thus prevented the bill's return. *See Finnegan*, 264 N.W. at 624–25.

When the Legislature does not adjourn within six days of presentment, the Wisconsin Supreme Court treats an unlawfully partially vetoed bill as a bill that was not returned by the governor within six days after presentment. *Id.* at 625. Therefore, the bill, as presented by the Legislature, is enacted as an operation of law. *See* Wis. Const. art. V, § 10(3); *Finnegan*, 264 N.W. at 624 ("[T]he partial veto being ineffective as a veto and no approval being required, the law is in

force."). The Wisconsin Supreme Court has consistently afforded this remedy since its initial announcement in *Finnegan*. *See State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 125, 237 N.W.2d 910 (1976) ("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.").[14]

The Wisconsin Supreme Court applied a different remedy only once, because the day after the act at issue was presented to the governor, "the Legislature adjourned sine die." *Finnegan*, 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. Therefore, as the *Finnegan* Court explained, the "act wholly fail[ed]." 264 N.W. at 625 (citing cases).

Despite articulating this different remedy, the *Finnegan* Court recognized that its remedy was the *exception*—not the *rule*. *Id.* at 624–25. The Court set forth the standard rule, consistently applied since its announcement, that in the normal course, when "the act could become a

[14] The Wisconsin Supreme Court in *Risser* held a partial veto was "not authorized by the constitution" and "invalid" but did not opine on a remedy, declaring that the "Wisconsin constitution d[id] not authorize the Governor" to exercise the partial veto at issue. *Risser*, 207 Wis. 2d at 181, 203.

The Court is also currently determining the validity of a partial veto in *LeMieux v. Evers*, No. 2024AP729. If it determines the challenged partial vetoes are unlawful, the Court may provide further guidance on the proper remedy.

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 rule, not the exception, applies here. The Legislature presented the Bill, 2023 S.B. 971, (which became 2023 Wis. Act 100) to the Governor on February 23, 2024. *See* Wis. Const. Art. V, § 10(3); Senate Journal, 106th Reg. Sess., at 860;[15] 2023 Senate Joint Res. 1, § 1(1) ("[T]he biennial session period ends at noon on Monday, January 6, 2025.").[16] The Bill could have been returned to the Legislature after 6 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 must order that the Bill, 2023 S.B. 971, as passed by the Legislature is 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.

DPI will likely argue that, if the Governor's partial veto was unlawful, he should be given a do-over. This is wrong. No court has ever ruled that the Governor gets a second bite at the apple to approve or disapprove a bill that was unlawfully partially vetoed. Rather, the remedy is to conclude that the bill, as passed by the Legislature, becomes law if it could be returned to the Legislature, or that the bill "never became a law" if it could not be returned to the Legislature. *See Finnegan*, 264 N.W. at 624–25.

[15] *Available at* https://docs.legis.wisconsin.gov/2023/related/journals/senate/20240223/_22.

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

CONCLUSION

The Court should reverse the decision of the circuit court denying the Legislature's motion for summary judgment.

Dated: December 13, 2024

Respectfully submitted,

Electronically signed by Ryan J. Walsh
RYAN J. WALSH
Counsel of Record
State Bar No. 1091821
AMY C. MILLER
State Bar No. 1101533
TERESA A. MANION
State Bar No. 1119244
EIMER STAHL LLP
10 East Doty Street
Suite 621
Madison, WI 53703
(608) 620-8346
(312) 692-1718 (fax)
rwalsh@eimerstahl.com
amiller@eimerstahl.com
tmanion@eimerstahl.com

Counsel for Plaintiff-Counterclaim Defendant-Respondent-Cross Appellant

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 cross-appellant portion of the combined brief is 9,086 words.

Dated: December 13, 2024

Electronically signed by Ryan J. Walsh
RYAN J. WALSH

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2024, I caused the foregoing to be filed with the Court's e-filing system, which will send notice to all registered users.

Dated: December 13, 2024

Electronically signed by Ryan J. Walsh
RYAN J. WALSH