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STATE OF WISCONSIN
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DISTRICT I

Case No. 2024AP1713

WISCONSIN STATE LEGISLATURE,

Plaintiff-Counterclaim Defendant-Respondent-Cross Appellant,

v.

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION and TONY EVERS,

Defendants-Counterclaim Plaintiffs-Appellants-Cross Respondents.

APPEAL FROM A FINAL DECISION GRANTING SUMMARY JUDGMENT ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE STEVEN EHLKE, PRESIDING

REPLY BRIEF OF THE DEPARTMENT OF PUBLIC INSTRUCTION AND GOVERNOR EVERS

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INTRODUCTION

The Legislature cannot defend misusing JCF's emergency appropriation power to control $50 million meant to fund Act 20's literacy program. On the statutory text, the Legislature tries to redefine the word "emergency" in Wis. Stat. § 13.101(3)(a) to cover expected agency funding needs. And on the constitution, the Legislature says it may delegate to JCF the power to choose which agencies receive state money and for what purposes. This position has no stopping point: the Legislature could turn over its entire appropriation power to JCF and let that committee control state budgeting.

Unsurprisingly, neither argument comports with the law. "Emergencies" that trigger JCF's statutory discretion must be unexpected, not designed by the Legislature. And JCF cannot receive the Legislature's article VIII, § 2, appropriation power, whatever "safeguards" might exist. Because JCF cannot validly retain control over the disputed $50 million, the money should be transferred where the Legislature undisputedly intended it to go: to DPI, to pay for Act 20.

ARGUMENT

I. The Legislature identifies no valid statutory discretion over this $50 million.

The Legislature acknowledges that it anticipated DPI's need for the disputed $50 million when it enacted Act 19. (Leg. Br. 9.) Yet it insists that Wis. Stat. §§ 13.101(3) and 20.865(4)(a), which only cover "emergencies," nevertheless grant JCF discretion over this expected expense. (Leg. Br. 20–23.) The Legislature's two textual arguments are unpersuasive.

First, the Legislature misconstrues the term "emergency" (a condition for JCF's statutory discretion) in Wis. Stat. § 13.101(3)(a)1. To the Legislature, "emergencies" can be anticipated. (Leg. Br. 22.) Leaving aside common

sense, even the dictionary definition the Legislature cherry-picks[1]—"an urgent need for assistance or relief"—itself implies that something unexpected has occurred. Indeed, in that dictionary's usage example—"the mayor declared a state of *emergency* after the flood"—the "emergency" still resulted from an unexpected event. The Legislature suggests that its odd reading "give[s] effect to the word 'unforeseen'" in Wis. Stat. § 13.101(3)(a), but that gets it backwards—if there is any doubt about whether "emergencies" in subparagraph (3)(a)1. are unexpected, subsection (3)(a)'s reference to "unforeseen emergencies" clears it up. *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.").

Second, JCF is not validly using its Wis. Stat. § 13.101(3)(a) discretion to supplement appropriations that "[are] insufficient to accomplish the purpose for which made." Wis. Stat. § 13.101(3)(a)1. independently requires that an "emergency" exist, which contemplates unexpected expenses. And Wis. Stat. § 20.865(4)(a)—not a "red herring" (Leg. Br. 22), but the cross-referenced source of funding—clarifies that the supplemented appropriations must have "prove[d] insufficient." That can occur only because of subsequent events, which the Legislature never disputes.[2]

And the Legislature argues that if the $50 million falls outside JCF's discretion under Wis. Stat. § 13.101(3), then the money must "stay in JCF's supplemental-appropriation

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[1] *Cf. Emergency*, https://www.merriam-webster.com/dictionary/emergency (last visited Jan. 29, 2025) ("an unforeseen combination of circumstances); *Emergency*, https://www.dictionary.com/browse/emergency (last visited Jan. 29, 2025) ("a state, especially of need for help or relief, created by some unexpected event").

[2] DPI preserved this argument. (R. 39:44, 51:14–16; Leg. Br. 22.)

account until [it] revert[s] back to the general fund." (Leg. Br. 24.) But because this money undisputedly had an anticipated executive branch purpose—funding Act 20—it should never have been placed with JCF at all. And because Wis. Stat. § 13.101(7) expresses a legislative preference to preserve appropriations rather than invalidate them (*see infra* Argument III), that provision favors transferring the money to DPI rather than reverting it to general purpose revenues.

II. JCF cannot constitutionally retain discretion over this $50 million.

A. JCF discretion would violate bicameralism and presentment requirements.

If Wis. Stat. §§ 13.101(3) and 20.865(4)(a) are read to grant JCF discretion over which agencies receive the disputed $50 million and for what purposes, it would violate bicameralism and presentment requirements. (DPI Br. 31–35.)

The Legislature's three main responses—that JCF does not appropriate money, that the Legislature can evade lawmaking procedures simply by "appropriating" money to JCF, or that so-called "safeguards" free JCF from lawmaking requirements—all miss the mark.

1. JCF's discretion is equivalent to the appropriation power.

If JCF can "move any of these funds from its supplemental account to DPI's account, or that of *any other agency*" (R. 34:32 (emphasis added)), that is equivalent to the appropriation power. That is exactly what the Legislature does when it decides through the budget bill which "executive officers" are authorized to spend state money and on what "specified objects"—the two prongs of an appropriation under *Risser v. Klauser*, 207 Wis. 2d 176, 192, 558 N.W.2d 108 (1997).

For one, JCF obviously is not an "executive officer"; instead, JCF gets to *choose* which executive officers receive money. And the Legislature offers only this candidate for the money's "specified purpose": supplementing agency appropriations in an "emergency" where "no funds are available" and the "purpose … [has] been authorized or directed by the legislature." (Leg. Br. 31–32.) In other words, the "specified object" of the $50 million is for JCF to select some *other* authorized purpose. That circular approach gives the term no meaning.

And the Legislature's reading of an "emergency" further underscores the lack of a "specified object." If "emergencies" can include funding deficits baked into the budget or a policy bill, then the Legislature could always gin one up by starving agencies of necessary funding. JCF would have free rein to choose which agencies receive financing and for what.[3] This explains why Wis. Stat. § 13.101(3)—as the Legislature reads it—is more like the statute invalidated in *State ex rel. Schneider v. Bennett*, 547 P.2d 786, 794, 798–99 (Kan. 1976), than the one that *Schneider* upheld. (Leg. Br. 33–34; DPI Br. 39–40.)

The Legislature also responds that *Risser*'s appropriation test is overbroad in two ways, but neither contention has merit.

First, it says the test cannot account for valid appropriations to the judicial and legislative branches. (Leg. Br. 31.) Of course, money can be appropriated to the legislative and judicial branches to spend on operating expenses. *See, e.g.*, Wis. Stat. §§ 20.625(1)(a) (circuit court salaries), 20.765(1)(a) (Assembly expenses). Broader "appropriation" definitions in *Risser* cover those scenarios.

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[3] DPI said only that true emergency uses may comply with the relevant statutes (DPI Br. 29), not that they satisfy bicameralism and presentment requirements. (Leg. Br. 33.)

See 207 Wis. 2d at 192. But when money is allocated to executive officers to spend on executive branch programs (like Act 20), that is an appropriation that the Legislature must accomplish by law—not by JCF.

Second, the Legislature wrongly suggests that DNR's expenditures on Knowles-Nelson projects would trigger this test. (Leg. Br. 30–31.) This misunderstands when state money is "set aside" for a "specified object." When the Legislature decides to place money in DNR's Wis. Stat. § 20.866(2)(ta) account, it sets it aside for a specified object: expenditures by DNR on Knowles-Nelson projects, as authorized by Wis. Stat. § 23.0917. When DNR uses that money, DNR is not "setting it aside" within the treasury but rather *spending* it from the treasury on the specified object.

As for Wis. Stat. § 20.002(11)(a) (Leg. Br. 32–33), that statute authorizes the Department of Administration to "temporarily" borrow cash balances from certain state funds to support state cash-flow obligations elsewhere. These short-term cash transfers differ in kind from JCF's purported power to "supplement" any agency's appropriation for virtually any purpose—JCF's "supplements" permanently assign a new purpose to state money (just like traditional "appropriations") while DOA's short-term cash transfers do not.

2. The Legislature cannot evade lawmaking procedures simply by transferring money to JCF.

The Legislature also offers a semantic argument for why JCF can evade article VIII, § 2's requirement that appropriations occur "by law." In the Legislature's view, that constitutional provision can be triggered only once: "when money is placed into JCF's supplemental-funding account from the treasury." (Leg. Br. 30.) The provision is supposedly agnostic about what happens next because JCF merely "spend[s] money that has been appropriated to it." (Leg. Br. 30.)

By elevating form over substance, this argument creates the slippery slope that the Legislature never addresses. Again, imagine the Legislature passed a law crediting all incoming state revenue to JCF's appropriation. If that is the only time money needs to be "appropriat[ed] by law" under article VIII, § 2, then JCF could turn around and dole out all this state money to whichever agencies it wants, without further action by the full Legislature. This absurd possibility can be avoided only by instead asking a substantive question: when a legislative subunit like JCF transfers money to an agency's appropriation, is it effectively appropriating that money itself? Under *Risser*, the answer is yes.

Moreover, it makes little sense to describe JCF as merely "spending money that has been appropriated to it." (Leg. Br. 30.) When "spending" occurs from an ordinary appropriation—like when DNR pays for Knowles-Nelson projects using Wis. Stat. § 20.866(2)(ta) or when circuit courts pay salaries using Wis. Stat. § 20.625(1)(a)—money leaves the state treasury for authorized purposes. But here JCF transfers money from one place in the treasury to another. Just as the Legislature did not "spend" the $50 million when it credited the money to JCF, so too JCF does not "spend" the money by transferring it to an executive agency. Instead, JCF sets aside the money for a specified purpose—an appropriation that should be done by law.

3. "Safeguards" on JCF's power do not excuse it from lawmaking procedures.

Unable to distinguish JCF's authority from the power to appropriate, the Legislature retreats to an argument that it has delegated some of its legislative power to JCF with sufficient "procedural safeguards." (Leg. Br. 24–27.) This argument has three problems.

First, even if the Legislature could sometimes delegate its generic article IV, § 1, "legislative power" to JCF, this case primarily implicates article VIII, § 2. That more specific constitutional provision requires appropriations to be made "by law." Because JCF cannot enact a "law" appropriating money, article VIII, § 2 prohibits the Legislature from delegating its appropriation power to JCF, safeguards or not.

Second, these so-called "safeguards" are illusory. No judicial review is available of JCF's findings that the so-called limitations in Wis. Stat. § 13.101(3)(a) have been met. The Legislature and JCF can ignore them with impunity, which is exactly what they regularly do. (DPI Br. 15–18.)

Third, nothing in our constitution allows the Legislature to evade lawmaking procedures simply by delegating its article IV, § 1, "legislative power" to a subunit like JCF. That argument proves too much, as the Legislature could then bypass the lawmaking process entirely by enacting statutes empowering JCF (or any other subunit, perhaps even individual legislators) to enact laws outside the bicameralism and presentment process.

No cited cases suggest that the Legislature may delegate its power to enact laws to legislative subunits. Virtually all of them instead analyze whether the legislature has permissibly delegated some of its article IV, § 1, "legislative power" to another branch or level of government. *See Matter of Guardianship of Klisurich*, 98 Wis. 2d 274, 279, 296 N.W.2d 742 (1980) (citation omitted) (analyzing "delegation of legislative power to a subordinate [administrative] agency"); *Becker v. Dane County*, 2022 WI 63, ¶ 33, 403 Wis. 2d 424, 977 N.W.2d 390 (analyzing "local delegations"); *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717, 721 (1931) (examining "delegation . . . to the courts"); *Panzer v. Doyle*, 2004 WI 52, ¶ 55, 271 Wis. 2d 295, 680 N.W.2d 666 (addressing

"nondelegation doctrine with respect to subordinate agencies").

The only arguable exception is *State ex rel. La Follette v. Sitt*, 114 Wis. 2d 358, 379, 338 N.W.2d 684 (1983) (per curiam). But JCF there could merely veto the issuance of certain notes, which did not reflect the "delegat[ion] [of] any authority to … make law." *Id.* A JCF veto power over state borrowing bears little resemblance to JCF's authority here to effectively appropriate money, and so *Sitt* does not mean that a "procedural safeguards" analysis might be relevant here.

B. JCF discretion would violate separation-of-powers principles.

Turning to the separation of powers, JCF's veto power over this $50 million usurps the executive branch's core power to spend appropriated money under *Evers I*. (DPI Br. 35–38.) The Legislature responds that *Evers I* does not apply here because "no money has been appropriated to the executive"; instead, the Legislature has supposedly given JCF spending power akin to other appropriations that empower the legislative and judicial branches to spend money. (Leg. Br. 29.)

But this would enable a trivial evasion of *Evers I*, as the Legislature apparently concedes: the Legislature could recreate the Knowles-Nelson veto simply by parking money bound for DNR with JCF, subject to JCF's unilateral discretion. (DPI Br. 37–38.) Nothing in *Evers I* suggests it can be evaded so simply.

Moreover, the Legislature ignores the key distinction between ordinary legislative and judicial appropriations and JCF's "emergency" appropriation here. In the first scenario, another branch receives money to spend on *its own functions*,

which is obviously not a core executive power.[4] Here, in contrast, JCF has not received the $50 million for *its own* operations—rather, it has received that money to fund *executive branch* operations, whether DPI's Act 20 expenses or, in the Legislature's view, the expenses of "any other agency." (R. 34:32.) Because that money can only be spent by the executive branch, it falls within *Evers I*'s holding that "the power to spend appropriated funds in accordance with the law enacted by the legislature lies solely within the core power of the executive to ensure the laws are faithfully executed." *Evers v. Marklein*, 2024 WI 31, ¶ 18, 412 Wis. 2d 525, 8 N.W.3d 395 ("*Evers I*").

And as for the so-called "safeguards" on JCF's veto power in Wis. Stat. §§ 13.10 and 13.101 (Leg. Br. 30), the Legislature cites no authority for the proposition that "safeguards" can somehow allow JCF to retain authority over the core executive power of spending money appropriated for executive programs. That position conflicts with the basic principle that, when core powers are involved, "any exercise of authority by another branch of government is unconstitutional." *Evers I*, 412 Wis. 2d 525, ¶ 10.

The Legislature also fails to distinguish out-of-state cases. Just as the legislative committee in *McInnish v. Riley*, 925 So. 2d 174, 176, 177 (Ala. 2005), exercised the executive power of selecting grant recipients for appropriated money, so too JCF purportedly selects recipient agencies for appropriated money. (Leg. Br. 35.) And the source of the money over which a legislative committee has authority is irrelevant—choosing recipients for state money is an executive power, whatever the source. *See State ex rel. Judge v. Legislative Finance Committee & Its Members*, 543 P.2d

[4] DPI does not argue that "spending money is *always* a core executive power" (Leg. Br. 30); it recognized these kinds of exceptions. (DPI Br. 32 n.23, 38.)

1317, 1319 (Mont. 1975); *Advisory Opinion In re the Separation of Powers*, 295 S.E.2d 589, 596 (N.C. 1982).

C. This is an as-applied challenge.

The Legislature also mischaracterizes DPI's claim as "a facial attack" on all the money placed in JCF's emergency appropriation. (Leg. Br. 27–28.)

But DPI's counterclaim challenges the Legislature's interpretation of Wis. Stat. §§ 13.101(3)(a) and 20.865(4)(a) "as applied to these circumstances" (R. 20:22), and below, DPI targeted the constitutional problems with JCF's purported authority over the $50 million at issue here (R. 39:35–38). DPI is not seeking to facially invalidate these statutes.

And even if it were, the Legislature does not even try to identify any valid uses of Wis. Stat. § 13.101(3)(a) and 20.865(4)(a) that would defeat a facial challenge.

III. The $50 million should be transferred to DPI under Wis. Stat. § 13.101(7).

DPI explained how Wis. Stat. § 13.101(7) is a saving provision that means the disputed $50 million should be transferred to DPI, consistent with clear legislative intent, if Wis. Stat. §§ 13.101(3) and 20.865(4)(a) grant JCF invalid control over the money. (DPI Br. 41–44.)

The Legislature responds that Wis. Stat. § 13.101(7) covers only appropriations to the executive branch that are conditioned on JCF approval, not "appropriations" directly to JCF. (Leg. Br. 36–37.) But this retreads the Legislature's argument that it can evade *Evers I* by appropriating money bound for executive branch expenditure to JCF rather than to agencies. In substance, Wis. Stat. § 13.101(3) operates as the kind of provision the Legislature says is covered by Wis. Stat. § 13.101(7): "a statute making funds appropriated to the executive available only upon release by JCF." (Leg. Br. 36.)

So, "the appropriated funds go directly to the executive as if no release requirement existed." (Leg. Br. 36.)

As for the different verbs used in Wis. Stat. § 13.101(3) and (7)—"supplement" in the former and "release" in the latter (Leg. Br. 37)—"release" can easily be read as a broader term that includes "supplement." Even the Legislature's brief uses this language interchangeably. (*E.g.,* Leg. Br. 12–13, 18, 20.) Whatever it is called, JCF's veto over this $50 million functions as a "release requirement" under Wis. Stat. § 13.101(7).

At bottom, the Legislature admits that this $50 million was always intended for DPI's Act 20 expenses. (Leg. Br. 9.) Whether under Wis. Stat. § 13.101(7) or equitable remedial principles, once the invalid JCF roadblock is removed, the money should be delivered where the Legislature meant for it to go: to DPI, to pay for Act 20.

CONCLUSION

The part of the circuit court's decision in the Legislature's favor should be reversed. Because the disputed $50 million will lapse into the general fund at the biennium's end, a decision is respectfully requested by June 30.

Dated this 29th day of January 2025.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2986 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 29th day of January 2025.

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INTRODUCTION

The Legislature's briefs cannot disguise the constitutional Frankenstein it seeks to create: a so-called "emergency appropriation" that purportedly gives JCF unlimited discretion over $50 million that the full Legislature intended for DPI's Act 20 literacy program, paired with a bill creating new Act 20-related spending authority for DPI but setting aside no money therein. As relevant to the Legislature's cross-appeal, splitting the $50 million in Act 20 funding from the bill creating new spending authority for DPI does not evade the Governor's partial veto power.

To authorize DPI spending on Act 20's new literacy program, the Legislature created new chapter 20 appropriations for DPI through 2023 Senate Bill 971. DPI needed statutory authority to spend whatever dollars the Legislature set aside for that purpose. Those new appropriations were an appropriation bill under the long-accepted definition of appropriation: a bill that either sets aside money for an agency for a specific purpose (the "in" component), authorizes the agency to spend money for that purpose (the "out" component), or both. Accordingly, the Governor partially vetoed S.B. 971 under article V, § 10 of the Wisconsin Constitution, which authorizes partial vetoes of "appropriation bills."

The Legislature asserts that it could insulate S.B. 971 from the partial veto by routing the dollars set aside for DPI to JCF rather than placing them in a DPI appropriation directly. But that position, based on the premise that an appropriation is solely the setting aside of funds, ignores the supreme court's long-accepted definition of "appropriation" and its decisions in *Kleczka* and *Risser*.

The Legislature also argues that, even if S.B. 971 was an "appropriation bill," the Governor's modest partial vetoes exceeded his power under article V, section 10. But the Legislature concedes that the resulting law, 2023 Act 100, is

a "complete and workable law" under *Henry*, and that ends the analysis. The fractured *Bartlett* decision has no precedential effect. And even if *Bartlett* could control, the Legislature identifies no common rationale among the *Bartlett* writings that would render the vetoes invalid.

ISSUES PRESENTED BY THE LEGISLATURE'S CROSS-APPEAL

1. In considering whether a bill is an "appropriation bill" subject to the Governor's partial veto power under Wis. Const. art. V, section 10, the Wisconsin Supreme Court has described an appropriation as either (1) setting aside from the public revenue a certain sum of money for a specified object or (2) authorizing executive officers to use money for that object. Here, Senate Bill 971 created new appropriation provisions authorizing DPI to spend public money. Did the Governor validly veto S.B. 971 as an "appropriation bill"?

The circuit court answered yes, and this Court should affirm.

2. By partially vetoing S.B. 971, the Governor combined two appropriations that authorized spending on Act 20's literacy program into a single appropriation for the same purpose. Did these partial vetoes comply with article V, § 10?

The circuit court answered yes, and this Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Wisconsin Supreme Court's grant of bypass indicates that both oral argument and publication are warranted.

SUPPLEMENTAL STATEMENT OF THE CASE

The Governor and DPI rely on the statement of the case provided in the opening brief of their own appeal.

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.

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 Governor's partial vetoes to Senate Bill 971 were proper under article V, § 10. First, the bill, which created new spending authority for DPI, was an appropriation bill: the well-established definition of an appropriation includes bills that *either* set aside funds *or* create spending authority, as the Wisconsin Supreme Court decisions in *Kleczka* and *Risser* reflect. Further, the Governor's vetoes fell comfortably within what article V, § 10 allows, whether measured by the governing "complete and workable law" test or *Bartlett*, which has no precedential effect in any event.

I. S.B. 971 was an appropriation bill subject to partial veto.

Senate Bill 971 was an "appropriation bill" under article V, § 10, of the Wisconsin Constitution because it created new appropriation provisions authorizing DPI to spend public money. The Governor and DPI's reading is consistent with the accepted definition of an appropriation and the supreme court's treatment of appropriation bills in *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539

(1978), and *Risser v. Klauser,* 207 Wis. 2d 176, 558 N.W.2d 108 (1997).

The Legislature misreads *Kleczka* and *Risser*, and its other theories are unpersuasive. The Legislature's assertion that bills requiring spending would be "appropriation bills" under the Governor and DPI's approach betrays its lack of understanding not only of court precedent, but also basic principles of state budget law. The Legislature points to the "four corners" rule of *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622 (1936), but the Governor and DPI's reading requires no resort to laws or facts outside the bill. And the procedural roadblocks the Legislature would throw up—the Legislative Reference Bureau's (LRB) drafting manual and article VIII, § 8 of the constitution—do not change the result.

A. Appropriation bills can *either* set aside public money for a specific purpose *or* authorize the executive branch to spend public money, and S.B. 971 did the latter.

The Governor may partially veto "appropriation bills," and case law defines "appropriation" as having two parts: (1) setting aside money for a specific object; and (2) authorizing executive officers of the state to spend it. The Legislature acknowledges that oft-cited two-part definition but then disavows it, arguing that only the first part—setting aside money—yields an "appropriation bill." (Leg. Cross-App. Br. 59–60.) That premise is incorrect: bills that contain either part of an appropriation are appropriation bills within the meaning of article V, § 10.

The Governor's partial veto power under article V, § 10 extends to all "appropriation bills":

> Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills.

To determine the nature of an appropriation bill, courts look to the meaning of an appropriation, which has two parts: an "in" and an "out."

First, an appropriation "set[s] aside from the public revenue . . . a certain sum of money for a specified object"—that is, it places public money "in" a holding place. *Kleczka*, 82 Wis. 2d at 689 (citations omitted). Second, an appropriation does so "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"—that is, it authorizes spending "out" of that holding place. *Id.* (citation omitted); *see also Risser*, 207 Wis. 2d at 192; *Consumer Fin. Prot. Bur. v. Comm. Fin. Ass'n of Am., Ltd.*, 601 U.S. 416, 427 (2024) (describing an appropriation as "a legislative means of authorizing expenditure from a source of public funds for designated purposes").

The "in"—the setting aside component—appears in different statutory locations, depending on the type of funding. General purpose revenue[1] typically is set aside through the so-called "chapter 20 schedule," which designates dollar amounts for each agency's appropriations. *See generally* Wis. Stat. § 20.005(3). Program revenue and segregated revenue[2] may be set aside in either the chapter 20 schedule or other statutes. *See, e.g.*, Wis. Stat. § 100.263 (setting aside program revenue amounts derived from consumer protection actions).

Those "ins" correspond to "outs": spending authorizations in the form of appropriation provisions,

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[1] Often abbreviated as "GPR," general purpose revenue consists of incoming funds like taxes with no pre-assigned purpose. *See generally* Wis. Stat. § 20.001(2)(a) (defining "general purpose revenues").

[2] *See* Wis. Stat. § 20.001(2)(b)–(dm) (defining various types of program and segregated revenues)

generally located in an agency's specific section of Chapter 20, which generally begin with the phrase "[t]here is appropriated to [an agency] for the following programs." *See, e.g.*, Wis. Stat. § 20.255 (appropriating public money to DPI for various purposes).

The Legislative Fiscal Bureau (LFB) describes these two components as the "[s]tatutory [a]ppropriations [s]chedule" (the "in") and the "[s]tatutory [a]ppropriations [l]anguage" (the "out").[3]

For purposes of article V, § 10, then, an appropriation *bill* is a bill that contains either the "in" or "out" (or both): a bill that sets aside public money (through the chapter 20 schedule or elsewhere), or one that authorizes the expenditure of public money by creating spending authority (generally in an agency's section of chapter 20).

Here, S.B. 971 would have created two "outs": two appropriations in chapter 20 authorizing DPI to spend public money on expenses arising from Act 20's new literacy program:

> Section 2. 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.
>
> * * *
>
> Section 4. 20.255(2)(fc) of the statutes is created to read: 20.255(2)(fc) *Early literacy initiatives; support.* Biennially, the amounts in the schedule for grants under s. 118.015(1m)(c) and for financial assistance paid to school boards and charter schools for

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[3] *See* Wis. Legis. Fiscal Bureau, *State Budget Process*, Informational Paper, at 50–51 (Jan. 2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0078_state_budget_process_informational_paper_78.pdf. (All pincites in this brief to PDF documents reference the PDF page number, not any internal page numbering system.)

> compliance with 2023 Wisconsin Act 20, section 27(2)(a).

2023 S.B. 971, §§ 2, 4. Those new provisions represent the second of the two components of an appropriation: authorizations for the executive branch to spend public money for specified purposes.

Both provisions would have been created in Wis. Stat. § 20.255, which, just as LFB describes, prefaces all subsections with the phrase "[t]here is appropriated to [DPI] for the following programs." This explains why the Legislative Council described Act 100 as "creat[ing] an appropriation."[4] Accordingly, sections 2 and 4 rendered S.B. 971 an "appropriation bill" under article V, § 10, that the Governor could validly partially veto.

In arguing that setting aside money is sufficient to yield an appropriation bill, the Legislature recognizes that such a bill need not contain both and "in" and an "out." But if a bill containing just the "in" suffices, so too must a bill with just the "out." The Legislature offers no reasoning for why only its selected part of the definition would count.

B. *Kleczka* and *Risser* show that a provision authorizing spending yields an "appropriation bill".

The Legislature cites no case supporting its proposition that only the setting aside of money yields an appropriation bill for purposes of article V, § 10. To the contrary, *Kleczka* and *Risser* both demonstrate the supreme court's longstanding treatment of appropriation bills and show that a bill containing the second appropriation component—the "out"—is an appropriation bill.

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[4] Wis. Leg. Council, Act Memo, *2023 Wis. Act 100: Office of Literacy* (Mar. 4, 2024), https://docs.legis.wisconsin.gov/2023/related/lcactmemo/act100.pdf.

1. *Kleczka* and *Risser* both treat bills as appropriations if they authorize expenditures.

Kleczka and *Risser* both treated bill provisions as appropriations if they authorized expenditures, even if they set aside no money on their own.

Kleczka considered a bill that would have allowed taxpayers to add a dollar to their tax liability for public campaign financing and created a new continuing appropriation provision in chapter 20 to receive any such voluntary payments. *Kleczka*, 82 Wis. 2d at 685. The "in" component of the bill appeared in its section 51, which would have set aside funds in a new statute containing whatever monies taxpayers chose to contribute to the Wisconsin Election Campaign Fund.[5] *Id.* at 685; *see* 1977 Wis. Act 107, § 51 (creating Wis. Stat. § 71.095(2)). The "out" component appeared in section 47 of the bill; it created a new chapter 20 "continuing appropriation" allowing the executive to spend the moneys set aside "to provide for payments for the candidates under s. 11.50." *Id.* at 690; *see* 1977 Wis. Act 107, § 47 (creating Wis. Stat. § 20.510(1)(q)).

It was the second component—the "out"—that *Kleczka* held created an appropriation bill. The court examined section 47 and, based on that language alone, concluded that "the enrolled bill submitted to the Governor was an appropriation bill within the meaning of art. V, sec. 10 of the Constitution." *Kleczka*, 82 Wis. 2d at 690. The new continuing appropriation in section 47 set aside no money—the set-aside occurred through section 51, which did not feature in the court's analysis.

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[5] That setting aside appeared outside chapter 20 because it involved program or segregated revenue (rather than a fixed amount of general purpose revenue directly from the treasury).

The court's description of the petitioners' claim reinforced its understanding of section 47 as itself yielding an appropriation bill: "[t]he petitioners argue . . . that 'appropriation' as used in art. V, sec. 10, refers only to *an authorization to expend 'public money'* as they believe public money is defined," and that "*legislative directions to disburse special funds* for special purposes do not constitute an appropriation." *Id.* at 690 (emphasis added). That description assumed that an "authorization to expend" yielded an appropriation bill.

Risser further demonstrates the point. *Risser* addressed an appropriation bill containing both a provision permitting borrowing for certain purposes (section 57) and other provisions that allowed the Department of Transportation to spend any amounts such borrowing generated. *Risser*, 207 Wis. 2d at 184, 185 n.7. The question was whether section 57, the borrowing provision, was an "appropriation amount" that the Governor could mark down (not just veto) under Wis. Const. art. V, § 10(1)(c).

Two points in *Risser*'s discussion illustrate that, like in *Kleczka*, spending authorization alone yields an appropriation bill.

First, in concluding that section 57 was not an appropriation amount that could be marked down, the court used the disjunctive to describe the "in" and "out" of an appropriation: "[w]e can find nothing in section 57 that authorizes an expenditure *or* the setting aside of public funds for a particular purpose." *Risser,* 207 Wis. 2d at 193 (emphasis added). By using the disjunctive term "or," the court recognized that those two elements are separate and independent parts of an appropriation.

Second, *Risser* described the provisions authorizing DOT to spend but themselves setting aside no money as "appropriations." The court explained that, once borrowed revenue was deposited in a newly created fund in Wis. Stat.

§ 18.57(1), "[v]arious continuing appropriation provisions *appropriate* the moneys in this fund." *Id.* at 185 n.7 (emphasis added). Those chapter 20 provisions that "appropriate[d]" money—specifically, Wis. Stat. §§ 20.395(3)(br), (4)(a) and (jq), and (6)(as)—authorized DOT to spend money for specific purposes, but they set aside no money themselves. *Id.* (citing, *e.g.*, Wis. Stat. § 20.395(4)(at) ("All moneys received from the fund created under s. 18.57(1) as reimbursement for the temporary financing . . . of projects for transportation administrative facilities."). The *Risser* court thus treated provisions that authorized spending, but did not set aside money, as "appropriations."

Thus, the bills in *Kleczka* and *Risser* each addressed provisions that set aside public money (Wis. Stat. § 71.095 in *Kleczka*, and Wis. Stat. § 18.57 in *Risser*), and other chapter 20 statutes that authorized the agency to expend funds (Wis. Stat. § 20.510(1)(q) in *Kleczka*, and Wis. Stat. § 20.395(4)(at) in *Risser*). Both courts described the spending authorizations—like the chapter 20 spending authorizations that S.B. 971 created—as "appropriations."

2. The Legislature misreads both cases.

The Legislature's brief misreads *Kleczka* and *Risser*.

As to *Kleczka*, the Legislature points out that the bill at issue included "in" and "out" provisions that both set aside money for a public purpose and authorized executive spending. (Leg. Cross-App. Br. 61–62.) That's true, but it is irrelevant to *Kleczka*'s analysis and holding. The court never mentioned the bill's setting aside money as relevant—let alone necessary—to holding that the bill "was an appropriation bill." *Kleczka*, 82 Wis. 2d at 690. Instead, the court cited only section 47's creating a new continuing appropriation in chapter 20. *Id. Kleczka* forecloses the Legislature's claim that a provision setting aside funds is a necessary component of an appropriation bill.

The Legislature also misreads *Risser*, in three ways.

First, the Legislature misdescribes *Risser* as holding that an appropriation involves only setting aside money. (Leg. Cross-App. Br. 63.) But *Risser* plainly recognized both halves of the equation, the second of which the Legislature ignores: that 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." *Risser*, 207 Wis. 2d at 192–93 (citation omitted).

Second, the Legislature tries to reinterpret the word "or" in the court's conclusion that nothing in section 57 of the bill "authorizes an expenditure *or* the setting aside of public funds for a particular purpose." *Risser*, 207 Wis. 2d at 193 (emphasis added). It argues that "or" is "substitutive" rather than disjunctive, meaning that the two components actually mean the same thing. (Leg. Cross-App. Br. 63–64.)

That reading is incorrect. Under state budget law, statutory authorization (often accomplished through chapter 20 appropriation provisions like Wis. Stat. § 20.395(3)(br), as in *Risser*) is a necessary requirement for an agency to expend dollars for a purpose. That requirement is distinct from the Legislature's setting aside of money.

The sentence in *Risser* immediately preceding its conclusion about section 57 reflects that fact: having reviewed the definitions of "appropriation" from older cases, the court summarized, "[u]nder each definition, an appropriation involves an expenditure *or* setting aside of public funds for a particular purpose." 207 Wis. 2d at 193 (emphasis added). That sentence is amenable to no "substitutive" construction: the court treated the elements as distinct and concluded the cases required an appropriation to have one element or the other, not both.

Third, in arguing that the case would have come out differently under the Governor and DPI's interpretation, the Legislature ignores *Risser*'s reasoning. The court specifically held that section 57 did *not* authorize spending. Had the section authorized spending but still created no "appropriation," the court would have said so.[6]

Risser's treatment of the laws that *did* create spending authorizations as appropriations, *id.* at 185 n.7, confirms that the disjunctive reading is correct. The court examined section 57 in isolation because the governor sought to pencil in a different figure there, requiring that section itself to be an "appropriation amount" for purposes of article V, § 10(1)(c). But the court described statutes creating spending authorizations for DOT as "appropriations" even though they set aside no money on their own. *Id.* at 185 n.7.

Kleczka and *Risser* support the Governor and DPI's position. Here, S.B. 971 has the "out" component of appropriation—authorization to spend in chapter 20, including a "continuing appropriation." That yielded an appropriation bill for purposes of article V, § 10.

C. The Legislature's other arguments are unpersuasive.

The Legislature offers a smattering of other unpersuasive rebuttals, some in passing or footnotes. It argues that the Governor and DPI's approach fails *Finnegan*'s

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[6] The Legislature also suggests that *Risser* holds that a bill not containing a dollar amount that can be marked down is definitionally not an appropriation bill. (Leg. Cross-App. Br. 66 n.12.) That is incorrect. The parties in that case agreed, and the court held, that the bill at issue was an "appropriation bill," and the court's ruling said nothing suggesting that an "appropriation bill" must include a dollar amount. *Risser v. Klauser*, 207 Wis. 2d 176, 182, 558 N.W.2d 108 (1997). The Legislature's theory is rebutted by *Kleczka*, which held that a bill containing no dollar amount was an appropriation bill. *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978).

"four corners" test, that their approach would make every bill requiring spending subject to partial veto, and that S.B. 971 is not an appropriation bill because it failed to comport with an LRB drafting manual and article VIII, § 8 of the constitution. None of these arguments changes the result.

1. The vetoes did not violate *Finnegan*'s "four corners" test.

Pointing to the circuit court's reasoning that Acts 19, 20, and 100 were "really part of one piece of legislation" (Leg. Cross-App. 59–60 (quoting A–App. 119)), the Legislature argues that the vetoes here violated the "four corners" rule of *State ex rel. Finnegan*, on the theory that the circuit court looked beyond the four corners of S.B. 971. But the Governor and DPI have always argued that S.B. 971 is an appropriation bill solely due to provisions found in the bill itself, regardless of Acts 19 and 20.

The so-called "four corners" rule arose in *Finnegan*. There, the bill at issue amended a statute that already contained an appropriation, resulting indirectly in higher amounts going into a particular fund. *Finnegan*, 264 N.W. at 624. But the bill itself contained neither component of an appropriation: it did not either aside public money or authorize its spending. The court held that the bill did not qualify as an "appropriation bill" "merely because its operation and effect in connection with an existing appropriation law has an indirect bearing upon the appropriation of public moneys." *Id*. Subsequent courts have interpreted *Finnegan* to require that the language of a bill itself, not the monetary effects it may indirectly cause, must include an appropriation. *Risser*, 207 Wis. 2d at 182.

Finnegan and its progeny may suggest that the circuit court should not have looked beyond S.B. 971 and considered it in conjunction with Acts 19 and 20, but *Finnegan* does not address whether a bill that authorizes spending, as S.B. 971

did, is an "appropriation bill," as *Kleczka* and *Risser* confirm. That component of S.B. 971 suffices to yield an appropriation bill, which satisfies *Finnegan*'s "four corners" rule.

2. The Legislature's slippery slope arguments have no basis.

The Legislature argues that DPI and Governor Evers' position would "turn every bill that gives a state agency power or new duties into an appropriations bill, vastly extending the Governor's partial-veto power." (Leg. Cross-App. 65.) Not true. A bill like S.B. 971 is an appropriation bill because it *authorizes* the spending of specific money by creating new appropriations, usually in Chapter 20. Laws requiring an agency to purchase copies or appoint officers (Leg. Cross-App. 65) may necessarily cost money, but such provisions do not themselves authorize the agencies to spend any sources of public money. The Governor and DPI's argument extends only to bills that create spending authorizations, like the one S.B. 971 created at Wis. Stat. § 20.255(1)(fc).

This also underscores the fallacy in the Legislature's suggestion that the Governor "partially vetoed the wrong bill." (Leg. Cross-App. 65.) The Legislature says the Governor should have partially vetoed Act 20 instead, but the cited provision just proves the Governor and DPI's point. Section 16(9) of Act 20 does not itself authorize spending when it provides that DPI "shall pay" certain costs. As the section's cross-reference reflects, DPI still needed a chapter 20 appropriation provision (Wis. Stat. § 20.255(1)(f)) to do that work.

Indeed, this reflects the core problem the Legislature created by enacting Act 20: Act 20 requires spending for various purposes, but it created neither chapter 20 provisions that authorized spending nor set asides of money. That is why DPI now faces such trouble in implementing its literacy program.

And as for the supposed novelty of the Governor's veto (Leg. Cross-App. 65), that is explained by the Legislature's new drafting practice of splitting elements of appropriations into multiple bills, in what appears to be an effort to evade the Governor's veto power.

3. S.B. 971 did not need to use language from LRB's drafting manual or have been passed using a roll-call vote.

The Legislature also contends that it can manipulate its drafting and bill-passage process to insulate a bill from a partial veto, but discerning an "appropriation bill" ultimately turns on substance, not form and legislative procedure.

The Legislature first cites the absence of the phrase "making an appropriation" in the bill's prefatory language, something it describes as LRB's practice when drafting appropriation bills. (Leg. Cross-App. 66 n.12.) But whether a bill is an appropriation bill is a question of law, not LRB's drafting practice. Nothing in the Wisconsin constitution, case law or statutes says a bill must use the phrase "making an appropriation" to be an appropriation bill. *Risser*, the case the Legislature relies on (Leg. Cross-App. 65 n.12), does not suggest otherwise: it says only that LRB uses a drafting manual to carry out the "statutory directives of Wis. Stat. § 20.003(2)." 207 Wis. 2d at 194. And *Risser* described LRB's interpretation only as a "requirement that appropriations be listed in chapter 20 of the statutes." *Id.* That is where the new spending authorities created by S.B. 971 appear.

Next, the Legislature cites its decision not to pass S.B. 971 using a roll call vote under Wis. Const. art. VIII, § 8, which is required for "any law which . . . makes, continues or renews an appropriation of public or trust money." (Leg. Cross-App. 67–68.) But the roll call vote requirement in article VIII, § 8 is not triggered every time the Legislature passes an "appropriation bill" within the meaning of article V,

§ 10. The two constitutional provisions use different language, and the supreme court has confirmed that they do not apply in lockstep.

To begin, article VIII, § 8, does not use the term "appropriation bills." Rather, it covers a law that "makes, continues, or renews an appropriation of public trust money." That language aligns with bills that accomplish the first appropriation component—as the Legislature puts it, those that spend money. Bills with the "in" component of an appropriation "make an appropriation of public money" because they set aside specific amounts of public money to be spent. But bills containing only the "out" component—those that, like S.B. 971, create spending authority for executive officials—do not (even though they still qualify as "appropriation bills").

The *noscitur a sociis* canon of construction, whereby "a word is known by the company it keeps," *Dubin v. United States*, 599 U.S. 110, 124 (2023), sheds light what it means to "make an appropriation" in this context. In article VIII, § 8, that phrase appears in a list of other legislative acts spending or forgoing public money: the provision also applies to a law that "imposes, continues or renews a tax," "creates a debt or charge," or "releases, discharges or commutes a claim or demand of the state." All those acts directly affect dollar amounts coming into or leaving the state treasury.

Unlike those types of laws, S.B. 971 did not change the dollar amounts coming into or leaving the treasury. It instead authorized executive spending. While that makes it an "appropriation bill" under article V, § 10, the bill did not "make[] . . . an appropriation" of money under article VIII, § 8, because it did not dedicate an amount of state money to be spent.

The supreme court confirmed in *Kleczka* that these two constitutional provisions do not apply in lockstep. The *Kleczka* petitioners argued that if a bill was not subject to roll call

under article VIII, § 8, it necessarily was not subject to a partial veto under article V, § 10. 82 Wis. 2d at 689. The court disagreed: "While . . . it is conceivable that one could argue that a yea and nay vote was not required . . . , it is irrelevant to the determination of whether [the bill] is an appropriation bill." *Id.* at 691. In other words, a bill can be an "appropriation bill" under article V, § 10, and yet not "make[ ] . . . an appropriation" under article VIII, § 8. S.B. 971 was such a bill.

* * *

Senate Bill 971 was an appropriation bill under article V, § 10 because it created new appropriation provisions authorizing DPI to spend public money. The Legislature's contrary position both ignores the accepted two-part definition and misreads how both *Kleczka* and *Risser* viewed spending authorization alone as an appropriation.

II. The Governor's partial veto of Senate Bill 971 did not otherwise violate article V, § 10.

The Legislature contends that these partial vetoes are invalid for a second reason: that they exceed the constitutionally allowed manner of exercising partial vetoes under article V, § 10. This argument fails for three reasons: (1) the Legislature recognizes that *State ex rel. Wis. Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W 486, 491–92 (1935), is the governing standard, and offers no reason why the vetoes failed that test; (2) the Legislature points to the fractured opinions in *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685, but offers no support for extracting a binding holding using a *Marks*-type rule; and (3) the vetoes would comply with all but Justice Kelly's proposed test, in any event.

A. The vetoes pass muster under *Henry*, and the Legislature does not seek to have that case overruled.

First, the Legislature recognizes that *Henry* provides the governing test for compliance with article V, § 10: whether the resulting law is "a complete, consistent, and workable scheme and law." (Leg. Cross-App. Br. 49, 69 (citing *Henry*, 260 N.W at 491–92).) The Legislature concedes that Act 100 meets that standard by never arguing otherwise. Nor could it—Act 100 creates a complete and workable chapter 20 appropriation provision that enables spending on Act 20's literacy program. *See* Wis. Stat. § 20.255(1)(fc). Because the Legislature concedes that *Henry* governs and does not ask for the case to be overruled, that suffices to resolve this issue.

B. *Bartlett* has no precedential value, and the supreme court does not apply the federal *Marks* rule to its own decisions.

Rather than deal with *Henry*, the Legislature instead points to *Bartlett*, a case that lacks precedential effect. In Wisconsin, where "separate opinions give . . . distinct reasons for the result," none with majority support, "none of the opinions . . . has any precedential value." *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 334 n.11, 565 N.W.2d 94 (1997); *see also State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995) (per curiam) ("[A] majority of the participating judges must have agreed on a particular point for it to be considered the opinion of the court."); *Ives v. Coopertools, a Div. of Cooper Indus., Inc.*, 208 Wis. 2d 55, 58, 559 N.W.2d 571, 573 (1997) (per curiam) ("Our division on reasoning simply means that the analyses of the two concurrences have no precedential value."). *Bartlett*'s per curiam decision recognized that "[n]o rationale has the support of a majority," 393 Wis. 2d 172, ¶ 4, and so "none of the opinions . . . has any precedential value." *Doe*, 211 Wis. 2d at 334 n.11.

And although the Wisconsin Supreme Court has sometimes used the rule in *Marks v. United States*, 430 U.S. 188 (1977), to divine the holding of a U.S. Supreme Court decision with fractured opinions, it has not done so for state supreme court cases. And even if it had adopted such a practice, there is no common rationale in the four *Bartlett* opinions that would invalidate the partial vetoes here.

1. The Wisconsin Supreme Court has not applied *Marks* to one of its own cases.

In reading fractured decisions of the U.S. Supreme Court, the Wisconsin Supreme Court has sometimes tried to extract a precedential rule using the approach outlined in *Marks*: "[w]hen a fragmented [U.S. 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." *See, e.g.*, *State v. Griep*, 2015 WI 40, ¶¶ 36–38, 361 Wis. 2d 657, 863 N.W.2d 567 (alteration in original) (applying *Marks* to *Williams v. Illinois*, 567 U.S. 50 (2012)).

But the Wisconsin Supreme Court has never applied *Marks* to extract a precedential rule from one of its own decisions or mandated that lower courts use *Marks* to do so. *See Johnson v. WEC*, 2022 WI 14, ¶ 243, 400 Wis. 2d 626, 971 N.W.2d 402 (R. Bradley, J., dissenting) ("This court has never applied the *Marks* Rule to interpret its own precedent, but only to interpret federal precedent.").[7]

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[7] The only arguable exception of which DPI and Governor Evers are aware is *Vincent v. Voight*, 2000 WI 93, ¶¶ 46–48, 236 Wis. 2d 588, 614 N.W.2d 388 (examining plurality and concurring opinions in *Kukor v. Grover*, 148 Wis. 2d 469, 436 N.W.2d 568 (1989)). But *Vincent* itself was a fractured decision, and a majority of the court did not join the portion of the plurality decision analyzing *Kukor*. Moreover, the plurality decision did not extract a rule of decision from *Kukor*, but rather derived

Indeed, the supreme court has implied that it does not use *Marks* for its own decisions. For instance, days after issuing the split decision in *Estate of Makos by Makos v. Wisconsin Masons Health Care Fund*, 211 Wis. 2d 41, 564 N.W.2d 662 (1997), the court explained that "the only 'majority' holding in [*Makos* was] the mandate" because "three separate opinions [gave] three distinct reasons for the result." *Doe*, 211 Wis.2d at 334 n.11; *see also Tomczak v. Bailey*, 218 Wis. 2d 245, 279, 578 N.W.2d 166 (1998) (Geske, J., concurring) ("[N]one of the four separate opinions in [*Makos*] has precedential value.").

There are good reasons not to adopt a *Marks*-type approach to the state supreme court's non-majority decisions. Even the U.S. Supreme Court has itself expressed unease with *Marks*, calling it "not useful" given how it has "so obviously baffled and divided the lower courts." *Nichols v. United States*, 511 U.S. 738, 745 (1994). Leaving aside those practical difficulties, it also is unsound in principle: it attempts to "construct[ ] consensus where none existed or else tacitly rel[ies] on speculative judgments about what the Justices must have believed." Richard M. Re, *Beyond the Marks Rule*, 132 Harv. L. Rev. 1942, 1997 (2019). This approach "paradoxically ascribes precedential force to minority opinions that all other Justices have declined to join." *Id.* at 1978.

The supreme court has wisely not tried to use a *Marks*-like doctrine to cobble together a rule of law for splintered decisions. And without such a doctrine, the Legislature's reliance on *Bartlett* never leaves the starting block.

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from *Kukor* several broad principles that "laid the foundation for the right that [the court] explain[ed]" in *Vincent*. *Id.* ¶ 48. Lastly, the *Vincent* plurality never purported to mandate the application of *Marks* to fractured decisions of our supreme court. *See id.* ¶ 46 n.18.

2. Even if the supreme court adopted a *Marks* rule, the Legislature has not identified a narrowest common rationale that could be extracted from *Bartlett*.

Even if the supreme court adopted a *Marks* rule, that approach would not yield a precedential rule from *Bartlett*. *Marks*' search for the "position taken by those [justices] who concurred in the judgments on the narrowest grounds," 430 U.S. at 193, can apply "only when one opinion is narrower than the other or is a logical subset of another, broader opinion." *Griep*, 361 Wis. 2d 657, ¶ 36.

In *Bartlett*, a majority of Justices concluded that some of the vetoes exceeded the governor's constitutional power, but they articulated different reasons why that was so. The court issued a short per curiam decision accompanied by four separate writings, none of which was joined by more than two justices. The per curiam decision invalidated several partial vetoes but noted that "[n]o rationale has the support of a majority." *Bartlett*, 393 Wis. 2d 172, ¶ 4. Justice Ann Walsh Bradley noted the lack of a "controlling rationale or test for the future." *Id.* ¶ 109 (Bradley, J., concurring in part and dissenting in part).

By the court's own acknowledgement, *Barlett* produced no common rationale for future courts to use, even under a *Marks* rule. *Marks* would thus not assist the Legislature here.

C. Even taking *Bartlett*'s four opinions individually, as the Legislature proposes, yields no ruling for the Legislature here.

The Legislature implicitly recognizes that it cannot succeed under *Marks*, disclaiming that it seeks such a rule. (Leg. Cross-App. Br. 72.) Instead, it tries to create its own test: that if the vetoes here would fail under different tests espoused by at least four *Bartlett* Justices, those individual

opinions require that the vetoes be rejected. But the Legislature still tries to extract precedential value from a case that lacks any. They cannot disavow *Marks*, implicitly concede that fractured decisions lack precedential value, and yet create a binding result from *Bartlett* based on a novel test that lacks any support in Wisconsin law.

Even aside from that fundamental problem, the Legislature's approach fails on its own terms. The Legislature announces that the vetoes of S.B. 971 "mirror[]" the governor's partial veto of the local road improvement fund invalidated in *Bartlett*. (Leg. Cross-App. Br. 72–73.), But the Legislature never explains what it means for two vetoes to "mirror" each other, let alone why the vetoes here "mirror" the veto in *Bartlett*.

At best, the Legislature says that the partial vetoes of S.B. 971 would have violated the two standards offered in Justice Hagedorn's and Justice Kelly's separate writings on the theory they created "'a literacy program' from whole cloth." (Leg. Cross-App. Br. 71.) But that is simply not the case.

The relevant veto in *Bartlett* would have transformed a local road improvement fund into a "general undirected fund" that had nothing to do with roads. 393 Wis. 2d 172, ¶ 103 (Roggensack, J., concurring). Justice Hagedorn's opinion rejected the veto because the bill had "detailed a grant program for the express purpose of improving local roads," not the "broad and vague appropriation for local grants" that remained after the veto. *Id.* ¶¶ 264–65 (Hagedorn, J., concurring).

Here, in contrast, the new appropriations proposed in S.B. 971 concerned DPI's literacy efforts, just like the resulting appropriation in 2023 Wis. Act 100—the Governor's partial vetoes did not transform S.B. 971's literacy proposals into a "broad and vague appropriation" that had nothing to do with literacy. As the Governor explained in his veto message,

he merely "consolidate[d] . . . all literacy program initiatives in one appropriation" to avoid "overly complicating the allocation of funding."[8] Indeed, when DPI asked JCF to release money into the new Act 100 appropriation (as partially vetoed), DPI made clear that the money would "be used to . . . implement the literacy programs created under 2023 [Wis.] Act 20." R. 42 (McCarthy Decl. Ex. B:1). The vetoes did not alter the Legislature's policy efforts like the one disapproved of by Justice Hagedorn in *Bartlett*.

As to the other *Bartlett* opinions, the Legislature makes no claim that the vetoes would fail under the traditional, pre-*Bartlett* test from *Henry* (reiterated by Justices Ann Walsh Bradley and Dallet, *see* 393 Wis. 2d 172, ¶¶ 161–62), or under Chief Justice Roggensack's test, which required only that the partial veto "not alter the topic or subject matter of the 'whole' bill before the veto." 393 Wis. 2d 172, ¶ 11 (Roggensack, J., concurring). Before the veto, S.B. 971, §§ 2 and 4 created two appropriations for specific literacy programs; after the veto, the law created one appropriation more generally for a "literacy program." The "topic or subject matter" of S.B. 971 was literacy programs, both before and after the veto.[9]

Whether under *Henry*, a future court's adoption of the *Marks* rule, or even the Legislature's "individual opinion" test, the vetoes to S.B. 971 pass constitutional muster.

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[8] Governor's Veto Message, *State of Wis. S. Journal*, Feb. 29, 2024, https://docs.legis.wisconsin.gov/2023/related/journals/senate/20240229.pdf.

[9] That leaves Justice Kelly's most restrictive test, which some of the vetoes admittedly would not survive because the "part[s] of the bill not approved"—i.e. the deleted portions—were not each "one of the proposed laws in the bill's collection." *Bartlett v. Evers*, 2020 WI 68, ¶ 217, 393 Wis. 2d 172, 945 N.W.2d 685 (Kelly, J., concurring). But Justice Kelly's test is plainly not the law, as he observed: "a majority of this court does not favor [this] analysis." *Id.* ¶ 229 (Kelly, J., concurring).

* * *

In sum, S.B. 971 was an "appropriation bill" subject to partial veto, and the Governor's partial vetoes complied with the constitutional limits.

III. If the Court agreed with the Legislature that the vetoes were invalid, Cross-Respondents do not contest that S.B. 971 would go into effect under current precedent, but they disagree that the Legislature has justified an injunction.

If the Legislature's theories about the veto had merit, the Governor and DPI agree that S.B. 971 would become law under prior precedent. *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 125, 237 N.W.2d 910 (1976). They disagree with the Legislature's suggestion, however, that an injunction is warranted under the governing standards or even would make any difference to the remedy they seek.

CONCLUSION

The Governor and DPI ask this Court to affirm the circuit court and hold that the Governor's vetoes of S.B. 971 complied with the constitution.

Dated this 29th day of January 2025.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6934 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 29th day of January 2025.

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