STATE OF WISCONSIN
SUPREME COURT
No. _____

NANCY BARTLETT
915 Tamarack Way
Verona, WI 53593,

RICHARD BOWERS, JR.
4625 Pine Tree Road
Hobart, WI 54155, and

TED KENEKLIS
233 N. Broadway, Suite M
De Pere, WI 54115

Petitioners,

v.

TONY EVERS, in his official capacity as
Governor of the State of Wisconsin
115 East, State Capitol
Madison WI 53702,

JOEL BRENNAN, in his official capacity as
Secretary of the Wisconsin Department of Administration
101 E. Wilson Street, 10th Floor
Madison, WI 53703,

WISCONSIN DEPARTMENT OF ADMINISTRATION
101 E. Wilson Street, 10th Floor
Madison, WI 53703,

CRAIG THOMPSON, in his official capacity as
Secretary of the Wisconsin Department of Transportation
4822 Madison Yards Way
Madison, WI 53707,

WISCONSIN DEPARTMENT OF TRANSPORTATION,
4822 Madison Yards Way
Madison, WI 53707,

PETER BARCA, in his official capacity as
Secretary of the Wisconsin Department of Revenue,
2135 Rimrock Road
Madison, WI 53713, and

WISCONSIN DEPARTMENT OF REVENUE
2135 Rimrock Road
Madison, WI 53713,

Respondents.

MEMORANDUM IN SUPPORT OF PETITION TO THE SUPREME COURT OF WISCONSIN TO TAKE JURISDICTION OF AN ORIGINAL ACTION

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INTRODUCTION

The governor's partial veto authority is set forth in Article V, § 10(1)(b) of the Wisconsin Constitution, which provides that "[a]ppropriation bills may be approved . . . in part by the governor, and the part approved shall become law." This innocuous language – limited to approval of appropriations bills – has become a warrant to use the veto pen as a vehicle not simply to reject (to not "approve") but to rewrite what the legislature has passed; to make new law in a way that is inconsistent with the exclusive vesting of legislative power in the Assembly and Senate.

This is not what the provision's framers intended. The partial veto was created in 1930 for the simple purpose of preventing the legislature from cramming a single appropriations bill with multiple proposals and then forcing the governor to approve or disapprove of the entire package. Allowing the governor to approve appropriation bills in part gave him "the right to pass independently on every separable piece of legislation in an appropriation bill." *State ex rel. Wisconsin Tel. Co. v. Henry*, 218

Wis. 302, 260 N.W. 486, 492 (1935). But the plain meaning of "to pass" in this context is to approve or not approve; not to make up or rewrite.

Yet the ambitions – and ingenious gamesmanship – of the executive branch have enlarged the scope of the governor's ability to approve appropriation bills "in part" such that, over the years, he acquired the authority to veto individual phrases, sentences, words, and digits, among other powers. *See, e.g.*, *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 502, 534 N.W.2d 608 (1995) (footnote omitted). The so-called "Vanna White" veto allowed the governor to create new words by striking individual letters, *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 437, 424 N.W.2d 385 (1988), and was forbidden by constitutional amendment in 1990, *see* Wis. Const. art. V, § 10(1)(c). The "Frankenstein" veto, which involved striking whole sentences, paragraphs and even pages of a law, taking a word or number here and there along the way to assemble an entirely new creature, was also prohibited by constitutional amendment. *See id.*

And we are back again. These old abuses stemmed, in part, from an old and fundamental error – the idea that the governor's partial veto is not simply a way to withhold approval, but to make new law. The technique challenged here is the governor's ability to remove essential conditions from legislation that he otherwise approves and thereby create a new – and different – law enacting a policy that the legislature did not choose. To countenance this conflates "approval" with "transform." It turns lawmaking into a context of semantic wit in which the legislative process is reduced to a game whose outcome turns on whether the legislature or governor proves to be the cleverer in playing what amounts to a game of Scrabble. Nothing in the language or history of Art. V, § 10 comes close to sanctioning such a bizarre state of affairs.

There is no other way to say it: the governor is now drafting and enacting his own set of laws. In this case alone, the governor unilaterally created a grant program to award millions of dollars toward electric vehicle charging stations; unilaterally removed virtually all conditions from the use of 75 million dollars

appropriated by the legislature; unilaterally decided that owners of heavier trucks should have to pay more in annual registration fees than owners of lighter trucks; and unilaterally redefined products subject to new taxes and regulation. This is not the governmental system the framers of the Wisconsin Constitution intended. Indeed, it is a governmental system foreign to the country that values liberty and the rule of law. What becomes law should not be reduced to an acrostic puzzle. The people of Wisconsin enacted a Constitution that contemplated each branch acting as a check on the other; they did not intend to make legislation a game show.

This original action therefore seeks the imposition of a relatively modest check on the governor's partial veto power: although the governor may approve an appropriation bill in part, he may not do so while disapproving of provisions which are "essential, integral, and interdependent parts of those which [he] approved." *Henry*, 260 N.W. at 493.[1]

[1] Although the case law often speaks in terms of "provisos or conditions which [are] inseparably connected to [an] *appropriation*," *State ex rel. Wisconsin Tel.*

An original action is the appropriate vehicle for this case. As discussed in the petition accompanying this memorandum, the constitutional issues involved here are vital to the proper functioning of our state system of government; time is of the essence, with Act 9 already having been published and the illegal expenditure of funds set to take place in short order; partial veto challenges are traditionally reviewed in this Court via original action; and the lower courts are unable to provide the relief requested.

ARGUMENT

I. This Court should take this case to determine whether, in partially approving an appropriation bill pursuant to Article V, § 10 of the Wisconsin Constitution, the governor may disapprove parts of the bill that are "essential, integral, and interdependent parts of those which were approved".

In order to understand why the exercise of the partial veto in this case was unconstitutional, it is necessary to briefly review

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Co. v. Henry, 218 Wis. 302, 260 N.W. 486, 490 (1935) (emphasis added), nothing in Wis. Const. art. V, § 10 requires a distinction between conditions of appropriations and conditions of other items in an appropriation bill, such as revenue-raising measures. Consequently, Petitioners intend to argue that deletion of either type of condition is unconstitutional.

the history of the partial veto, which is well-documented. *See generally*, *e.g.*, Richard A. Champagne, Staci Duros, & Madeline Kasper, Legislative Reference Bureau, *The Wisconsin Governor's Partial Veto*, 4 Reading the Constitution 1 (2019) [hereinafter *Partial Veto*].

A. *Adoption of the Partial Veto*

The adoption of the partial veto stemmed from the coalescence of a number of events occurring in the early 20th century. In 1911, "the Wisconsin Legislature started the practice of packaging multiple appropriation measures into larger omnibus bills," and at roughly the same time Wisconsin adopted a more comprehensive budgeting process. *Id.* at 2. When, in 1913, the legislature "waited until late in the session before presenting to the governor a few appropriation bills, which also happened to call for record expenditures," *id.*, an exasperated Governor Francis McGovern "concluded that either the Wisconsin governor must be given the power to veto specific items or the individual items must be reported out as separate appropriation bills." *Id.* at 2-3. In an

August 1913 message to the legislature, Governor McGovern explained that he had been denied the

> chance . . . to separate the good from the bad . . . . The only alternative presented therefore was to sign the[ ] bills, defective in a number of particulars as I regarded them, or to veto them as a whole, thus rejecting what I approved as well as what I disapproved.

Lawrence Barish, Legislative Reference Bureau, *The Use of the Partial Veto in Wisconsin*, Information Bulletin 75–IB-6, 1 (1975).

In 1927, following failed attempts by other legislators, Senator William Titus asked the Legislative Reference Library "to draft a resolution 'to allow the Governor to veto *items* in appropriation bills.'" *Partial Veto*, *supra*, at 5-6 (emphasis added). The language returned to the Senator (and which was ultimately enshrined into the Wisconsin Constitution) granted the governor the ability to "approve[ ]" appropriation bills "in whole or in *part*." *Id.* at 5-7 (emphasis added). As will be seen, this choice of language proved important to later judicial interpretations of the power.

The proposed amendment passed the legislature twice and was sent to the voters for approval in November of 1930. *Id.* at 6-

7. In the months before the vote, however, and consistent with Senator Titus' request, "[m]ost discussions on the amendment summarized the proposed power of the governor 'to veto single items' in appropriation bills rather than 'parts of' appropriation bills." *Id.* at 7. The amendment was ultimately approved and adopted by the people of Wisconsin. *Id.* at 8. At the time, "some 37 states already granted the executive the authority to veto single items in appropriation bills." Barish, *supra*, at 1.

B. *Early Judicial Interpretation of the Partial Veto*

As mentioned above, the distinction between the words "part" and "item" in the Wisconsin Constitution proved significant. In an early case on the partial veto, *State ex rel. Wisconsin Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935), this Court was faced with Governor Philip La Follette's partial veto of a bill designed to "raise revenues for emergency relief purposes." *Henry*, 260 N.W. at 489 (quoting chapter 15, Laws of 1935). The governor largely approved the bill, including the appropriation, but vetoed two portions setting forth the legislature's purpose and a set of

provisions added to the bill by amendment which created an agency designed to disburse the funds raised. *Id.* at 489-90.

In examining whether the governor could disapprove parts of a bill that do not constitute an appropriation, the Court was required to interpret the phrase "in part." *Id.* at 490. Putting aside whether "approve" can ever mean "change," determining what constitutes a "part" should involve analysis of Wisconsin's separation of powers, including the vesting of the legislative power in the legislature alone. Given the capacious nature of the argument that "approval" in "part" can mean "rewrite," it should include examination of the history of the amendment recounted above. That analysis demonstrates that the partial veto must be "exercised only as to the individual components, *capable of separate enactment*, which have been joined together by the legislature in an appropriation bill." *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 726, 264 N.W.2d 539 (1978) (Hansen, J., concurring in part and dissenting in part) (emphasis added).

But the *Henry* Court went in the wrong direction. In approving the governor's partial vetoes, it did not give the constitutional language its usual and customary meaning, but applied a hyperliteral – and thus overly broad – meaning of the word "part." *See Henry*, 260 N.W. at 491-93; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 355-358 (2012) (discussing "hyperliteral" readings). This interpretation set the stage for later judicial interpretations allowing the governor to veto sentences, words, letters, and digits, *see Citizens Util. Bd.*, 194 Wis. 2d at 502 (footnote omitted), to the detriment of Wisconsin's constitutional order.

But despite this fundamental error, this Court left the door open for a modest, though important, limitation on the use of the partial veto. Specifically, the Court hinted that the governor might not be "empowered to disapprove a proviso or condition in an appropriation bill, which is inseparably connected with the appropriation," and cited a Mississippi case, *State v. Holder*, 76 Miss. 158, 23 So. 643 (1898), as "afford[ing] support for the . . .

contention." *Id.* But the *Henry* Court ultimately declined to decide that question because, it concluded, the provisions at issue in the case were not "inseparably connected to the appropriation" and thus could be severed. *Id.* Nevertheless, the limitation on vetoing essential conditions and provisos was again discussed, with tacit approval, in the 1976 case of *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 130, 135, 237 N.W.2d 910 (1976).

This limitation – the idea that the governor may not disapprove a condition or other proviso inseparably connected with the appropriation that has been enacted and submitted for approval while leaving the appropriation intact – makes sense when considering three available interpretations of the governor's partial veto authority. Under one of the more restrictive interpretations (and the correct one), allowing the governor to partially veto only whole items that make up a bill and which could have been enacted separately by the legislature is consistent with the text of the Constitution and the history recounted above. A "part" is the legislative proposal presented by an appropriation, for

example, and approval requires that it be approved or disapproved, not rewritten by striking words within that proposal. Nor does it encroach on the legislative function because nothing is being enacted which the legislature did not itself approve *in that form*. While our Constitution could certainly be amended in a way that modifies our separation of powers, including the exclusive vesting of legislative power in the legislature, the presumption should be against an interpretation that accomplishes this – without clear textual warrant. Further, the approach is consistent with the text of the Wisconsin Constitution, because a distinct item is certainly a "part" of the bill the legislature approved.

Under a more permissive approach, the one signaled in *Henry* (at least with respect to conditions on appropriations), the governor may veto not only items but parts of items, *so long as those parts are separable rather than essential to the scheme enacted*. Under this interpretation, it is at least arguable that the separation of powers is left intact because the final law adopted remains consistent with legislative intent. *See, e.g.*, *Burlington N.,*

Inc. v. City of Superior, 131 Wis. 2d 564, 580-81, 388 N.W.2d 916 (1986) (discussing severability analysis). That is, so long as the portions vetoed are not integral to the overall scheme, it can perhaps be said with some certainty that "the legislature [would] have preferred what is left of its statute to no statute at all. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006) (discussing appropriate remedy when a statute contains a "constitutional flaw").

But it is *unreasonable* to allow the governor to veto, not only items, and not only non-essential parts of items, but *any* part of an appropriation bill, including, relevant to this case, essential aspects of the legislation that the legislature passed and which the governor otherwise approves. This results in the enactment of a law which was never voted on, considered, or drafted by the legislature and which is at odds with legislative intent. It appropriates money in a way that the legislature never intended. It goes past veto or disapproval to transformation. Unfortunately, this is the approach this Court inexplicably adopted two years

after *Sundby* in *State ex rel. Kleczka v. Conta*, thereby discarding the *Henry* and *Sundby* restriction with little warning.

C. *Kleczka v. Conta*

The 1978 case of *Kleczka v. Conta* featured a law which would have permitted income tax filers to voluntarily add $1 to their tax liability for deposit into the Wisconsin Election Campaign Fund. *Kleczka*, 82 Wis. 2d at 685. Through clever use of the partial veto, Acting Governor Martin J. Schreiber edited the provision to provide that income tax filers could simply designate that $1 be put into the Wisconsin Election Campaign Fund "from the state general funds," a change that would "result in approximately $600,000 in tax funds being expended directly for political purposes per annum." *Id.*

This Court acknowledged that in so doing the governor had "vetoed what is arguably a condition which the Legislature had placed on the appropriation." *Id.* at 715. But it simply dismissed the prohibition of such a veto contemplated by *Henry* and repeated in *Sundby* as "dicta only" and concluded that the governor could

remove provisos and conditions to an appropriation. *Id.* at 712, 715. It said that the governor could not only approve or disapprove, but enact new policy.

The *Kleczka* Court relied largely on the fact that *Holder*, a Mississippi case that *Henry* had referenced as supportive of a limitation on vetoing provisos and conditions, involved different constitutional language than what is present in the Wisconsin Constitution. *Id.* at 712-15. But the ability to distinguish a case does not itself compel a contrary conclusion. It is still necessary to make an affirmative case for a unique and extraordinary "veto as rewrite" power in Wisconsin based on text, context, structure, history, and other available sources.

It is clear that *Kleczka* marked an inflection point. Following that case, the veto power began to expand rapidly, with this Court later approving the governor's ability to "veto individual words, letters and digits," *Wisconsin Senate*, 144 Wis. 2d at 437,[2] and to

[2] Following this case, the partial veto was amended to prevent the governor from vetoing individual letters to make new words. *See* Wis. Const. art. V, § 10(1)(c); *Partial Veto*, *supra*, at 1. The veto was again amended in 2008 to

strike appropriations and write-in smaller figures, *Citizens Util. Bd.*, 194 Wis. 2d at 488. As of 1995 the Court was acknowledging, perhaps sheepishly, that it had, "for better or for worse, broadly interpreted [the partial veto] power." *Id.* at 502.

D. *This Case Shows Why Kleczka v. Conta Should Be Overruled*

As referenced above, there is little doubt that the governor's ability to approve budget items while disapproving indispensable conditions the legislature has set on those items has allowed him to draft his own laws – laws approved by not a single legislator.

The laws challenged in this case and discussed in greater detail in the accompanying petition illustrate this unfortunate state of affairs. Take the legislature's apportionment of Wisconsin's Volkswagen settlement funds. The legislature approved a grant program for the replacement of school buses, *see* 2019 Wis. Act. 9, § 55c, but Governor Evers vetoed the language to create a grant program for alternative fuels, including millions for

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prohibit the governor from combining parts of two or more sentences to create a new sentence. *Id.*

electric vehicle charging statements, *id.*, "as part of an overall strategy to address climate change." Governor Tony Evers, Veto Message 47 (July 3, 2019), *available at* https://content.govdelivery.com/attachments/WIGOV/2019/07/03/file_attachments/1241858/Evers_2019-21%20Veto%20Message.pdf.

Elsewhere in Act 9, tens of millions of dollars were directed by the legislature toward local road improvements. *See* 2019 Wis. Act 9, § 184s. Governor Evers, by his own admission, simply "remove[d] the limitations" the legislature "placed on the use of the general fund monies." Governor Tony Evers, Veto Message 60 (July 3, 2019).

Governor Evers also used the partial veto pen to disrupt carefully-calibrated statutory schemes to serve his personal policy preferences. Where the legislature raised and lowered various vehicle registration fees to achieve parity among certain vehicle weight classes, Governor Evers instead accepted the increases and rejected the decreases. *See* 2019 Wis. Act. 9, § 1988b.

Finally, and perhaps most breathtaking of all, given the executive branch's role in *enforcing* the law, Governor Evers altered the very definition of a product the legislature decided to regulate and tax. *See* 2019 Wis. Act 9, §§ 1754, 1755f, 1757b.

These drastic changes in the law by a single individual violate several provisions of the Wisconsin Constitution. First, and most fundamentally, Article IV, § 1 of the Wisconsin Constitution provides that "[t]he legislative power shall be vested in a senate and assembly." There is little question that the governor has exercised the legislative power in this case. None of the final provisions discussed above received the assent of the legislature, yet all will govern Wisconsinites as law.

What is more, and as is evidenced by the governor's various veto messages explaining to agencies how they should apply the broad provisions he created, the governor's exercise of the partial veto resulted in laws that fail to provide adequate direction to executive branch and, specifically, agency decision-making. This violates the non-delegation doctrine, which forbids the delegation

of pure legislative power to the executive branch. *See Mistretta v. United States*, 488 U.S. 361, 371-372 (1989); *Panzer v. Doyle*, 2004 WI 52, ¶52, 271 N.W.2d 295, 680 N.W.2d 666, *overruled on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408. Put differently, this Court has always said that the partial veto must result in a "complete, entire, and workable law." *Risser v. Klauser*, 207 Wis. 2d 176, 183, 558 N.W.2d 108 (1997) (quoting *Henry*, 218 Wis. at 314). But that law must itself be constitutional. In this context, it must sufficiently direct agency activity, not simply delegate power without any standards. The partial veto is a limited grant of authority to the executive and not a vehicle for the concentration of the executive and legislative power extending beyond exercise of the veto itself.

Second, with respect to those challenged provisions that involve appropriations, the Wisconsin Constitution imposes safeguards on the expenditure of state funds, implicitly reflecting James Madison's characterization of the "power of the purse" as "the most complete and effectual weapon with which any

constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." THE FEDERALIST No. 58 (James Madison).

The Wisconsin Constitution places the State's purse strings firmly in the hands of the legislature, requiring that an "appropriation *by law*" direct any payment out of the treasury, Wis. Const. art. VIII, § 2 (emphasis added), with a three-fifths legislative quorum required for the passage of such a law, Wis. Const. art. VIII, § 8. This quorum requirement also applies to those challenged provisions involving the taxation of funds. *See id.* But those safeguards were circumvented in this case. No quorum authorized the expenditures and taxes in this case. Nor may any "law" truly be said to direct the appropriation of state funds at issue; instead, money is being spent by executive fiat.

Finally, the text of the partial veto provision itself has been violated. None of the laws enacted by Governor Evers are "part" of the bill sent out of the legislature, except under an almost

comically literalist interpretation of the word "part." *Cf., e.g.*, *Wisconsin Carry v. Madison*, 2017 WI 19, ¶19, 373 Wis. 2d 543, 892 N.W.2d 233 ("We are not merely arbiters of word choice. . . . It is, instead, the 'plain *meaning*' of a statute we must apply."). They are, rather, entirely new laws. And as the history recounted above shows, the partial veto was not intended to – and does not, in fact – allow the governor to simply redraft laws the way he has done in this case.

For these and other reasons, *Kleczka* – which only barely engaged with the constitutional issue in the first place – was poorly reasoned. Whatever might be said about this Court's cases allowing the veto of parts of items and even of sentences, phrases, and words, permitting the governor to veto integral conditions and provisos of legislation was a mistake.

Whether a decision is "unsound in principle" is one factor counseling in favor of overruling a decision. *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶99, 264 Wis. 2d 60, 665 N.W.2d 257. But others are present. For example, *Kleczka*

"has become detrimental to coherence and consistency in the law." *Id.* at ¶98. Gone is any sense of certainty with respect to what a budget bill that has passed the legislature will look like after the governor has finished with it. And multiple provisions of the Wisconsin Constitution, as shown above, are now at war with each other.

Additionally, *Kleczka* has not "produced a settled body of law." *Id.* at ¶99. Only a handful of partial veto cases have been decided by this Court since *Kleczka*, and the case has been cited in only two reported court of appeals decisions.

Thus, this Court should accept this case to restore a semblance of order to the lawmaking process. It should reconsider, and overrule, its decision in *Kleczka*. It should strike down the laws challenged and clarify that while the governor may veto whole items in a law, and may even veto non-essential parts of

items as was done in *Henry*,[3] he may not assume the mantle of the legislature.[4]

II. An original action before this Court is the proper vehicle for this matter

The accompanying petition adequately sets forth the reasons why the exercise of this Court's authority to take jurisdiction of this original action is appropriate, so Petitioners will not repeat them in full here. In brief, the constitutional issues raised above are of immense importance to the structure and function of our state government and to the rights of the people of Wisconsin. The lower courts will likely be unable to provide the relief sought in this case as the fundamental doctrinal pronouncements required

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[3] For the reasons already discussed, Petitioners believe that the partial veto is in reality an item veto and that *Henry* should therefore also be overruled. Consequently, were the Court inclined to reconsider *Henry*, Petitioners would be willing to brief that question as well.

[4] Because Petitioners raise the general issue of whether the governor has properly exercised his partial veto authority in this case, should this Court grant this petition, Petitioners hereby preserve their right to make secondary arguments that the governor's partial veto was not permissibly exercised here, such as that the vetoes fail this Court's germaneness test. *See Risser v. Klauser*, 207 Wis. 2d 176, 182-83, 558 N.W.2d 108 (1997) (setting forth principles governing partial veto). *Cf. State v. Weber*, 164 Wis. 2d 788, 790-91, 476 N.W.2d 867 (1991) (denial of motion for reconsideration) ("The petition for review placed the defendant on notice of the issue before the court . . . . Once an issue is raised in a petition for review, any argument addressing the issue may be asserted in the brief of either party or utilized by this court.").

demand changes to this Court's prior case law. Original actions are the traditional means of questioning the governor's exercise of his partial veto authority. And finally, this case demands rapid resolution as the implementation of Act 9 and the unlawful expenditure of funds will begin shortly.

CONCLUSION

For the reasons set forth above and in the accompanying petition, Petitioners respectfully request that this Court take jurisdiction of this original action and rule on the legal matters raised herein.

DATED this 31st day of July, 2019.

Respectfully submitted,

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