

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.

**PETITION TO THE SUPREME COURT OF WISCONSIN
TO TAKE JURISDICTION OF AN ORIGINAL ACTION**

Richard M. Esenberg (WI Bar No. 1005622)
Anthony F. LoCoco (WI Bar No. 1101773)
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INTRODUCTION

“It appears that we have now arrived at a stage where one person can design his own legislation from the appropriation bills submitted to him after they have been approved by the majority of the legislature. The laws thus designed by one person become the law of the sovereign State of Wisconsin unless disapproved by two-thirds of the legislators. I am not persuaded that art. V, sec. 10, was ever intended to produce such a result.”

State ex rel. Kleczka v. Conta, 82 Wis. 2d 679, 727, 264 N.W.2d 539 (1978) (Hansen, J., concurring in part and dissenting in part).

* * *

This is a taxpayer action for a declaratory judgment under Wis. Stat. § 806.04 and for an injunction under Wis. Stat. § 813.02. Petitioners Nancy Bartlett, Richard Bowers, Jr., and Dr. Ted Keneklis respectfully seek this Court’s review of Respondent Governor Tony Evers’ exercise of his partial veto authority with respect to the legislation enacted as the 2019–21 biennial budget, 2019 Wisconsin Act 9 (“Act 9”).

In partially vetoing Act 9 pursuant to Article V, § 10 of the Wisconsin Constitution, Governor Evers extracted from the bill

parts which were “essential, integral, and interdependent parts” of other parts which he approved. *State ex rel. Wisconsin Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486, 493 (1935). In so doing, Governor Evers created new laws never approved by the legislature and thereby upset the Wisconsin Constitution’s “carefully balanced separation of powers between the executive and the legislative branches.” *Risser v. Klauser*, 207 Wis. 2d 176, 183, 558 N.W.2d 108 (1997).

More specifically, Governor Evers violated Article IV, § 1 of the Wisconsin Constitution, which states that “[t]he legislative power shall be vested in a senate and assembly”; Article V, § 10(1)(b) of that document, which states that “[a]ppropriation bills may be approved . . . *in part* by the governor, and the part approved shall become law” (emphasis added); Article VIII, § 2, which states that “[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law”; and Article VIII, § 8, which states that “any law which imposes, continues or renews a tax, or creates a debt or charge, or makes, continues or renews an

appropriation of public or trust money” requires a quorum of “three-fifths of all the members elected to such house.” In sum, Governor Evers illegally assumed the role of a one-person legislature; he “wr[o]te with his eraser,” drafting brand new laws never approved by the legislative branch. *See Kleczka*, 82 Wis. 2d at 720 (Hansen, J., concurring in part and dissenting in part).

Petitioners therefore seek a declaration declaring both the governor’s use of the partial veto and the provisions challenged herein invalid and an injunction prohibiting Respondents from illegally spending taxpayer funds pursuant to the relevant directives contained in Act 9. Given the pressing and significant nature of the questions involved, that only this Court is capable of granting the relief requested, and that this Court traditionally has reviewed partial veto challenges via original action, *see infra*, an original action is the appropriate vehicle for this suit.

STATEMENT OF ISSUE

Whether, in partially approving an appropriation bill pursuant to Article V, § 10 of the Wisconsin Constitution, the

governor may disapprove parts of the bill which are “essential, integral, and interdependent parts of those which were approved.” *Henry*, 260 N.W. at 493.

STATEMENT OF FACTS

PARTIES

1. Petitioner Nancy Bartlett is an adult citizen of the State of Wisconsin residing at 915 Tamarack Way, Verona, WI 53593. She is a Wisconsin taxpayer.

2. Petitioner Richard Bowers, Jr. is an adult citizen of the State of Wisconsin residing at 4625 Pine Tree Road, Hobart, WI 54155. He is a Wisconsin taxpayer.

3. Petitioner Dr. Ted Keneklis is an adult citizen of the State of Wisconsin residing at 233 N. Broadway, Suite M, De Pere, WI 54115. He is a Wisconsin taxpayer.

4. Respondent Tony Evers is the Governor of Wisconsin and partially vetoed the legislation challenged in this suit. Governor Evers’ official address is 115 East, State Capitol, Madison, WI 53702.

5. Respondent Joel Brennan is the Secretary of the Wisconsin Department of Administration (“DOA”), an administrative agency of the State of Wisconsin. Secretary Brennan’s official address is 101 E. Wilson Street, 10th Floor, Madison, WI 53703.

6. Respondent DOA is an administrative agency and is the state agency responsible for administering parts of the legislation challenged in this suit. *See, e.g.*, 2019 Wis. Act 9, §§ 55c, 9101(2i). Its offices and principal place of business are located at 101 E. Wilson Street, 10th Floor, Madison, WI 53703.

7. Respondent Craig Thompson is the Secretary of the Wisconsin Department of Transportation (“DOT”), an administrative agency of the State of Wisconsin. Secretary Thompson’s official address is 4822 Madison Yards Way, Madison, WI 53707.

8. Respondent DOT is an administrative agency and is the state agency responsible for administering parts of the legislation challenged in this suit. *See, e.g.*, 2019 Wis. Act 9, §§

126, 184s, 1095m, 1988b. Its offices and principal place of business are located at 4822 Madison Yards Way, Madison, WI 53707.

9. Respondent Peter Barca is the Secretary of the Wisconsin Department of Revenue (“DOR”), an administrative agency of the State of Wisconsin. Secretary Barca’s official address is 2135 Rimrock Road, Madison, WI 53713.

10. Respondent DOR is an administrative agency and is the state agency responsible for administering parts of the legislation challenged in this suit. *See, e.g.*, 2019 Wis. Act 9, §§ 1754, 1755f, 1757b. Its offices and principal place of business are located at 2135 Rimrock Road, Madison, WI 53713.

CLAIM

11. On June 25 and 26, 2019, the Wisconsin State Assembly and Senate, respectively, passed the legislation constituting the 2019–21 biennial budget. *See* 2019 Assembly Bill 56, *History*, Wisconsin State Legislature, <https://docs.legis.wisconsin.gov/2019/proposals/reg/asm/bill/ab56>. The legislation was then presented to the governor, who signed it

with partial vetoes on July 3, 2019. *Id.* On July 4, 2019, Act 9 was published. *Id.*

12. In multiple instances, Governor Evers exercised his partial veto authority to disapprove portions of Act 9 which were passed by the legislature as indispensable parts of other parts which Governor Evers approved. Put differently, Governor Evers removed from Act 9 essential conditions on the operation of the legislation. The following list of four is illustrative.

13. First, Act 9 directed the use of funds obtained by the state in a litigation settlement with Volkswagen. *See* 2019 Wis. Act. 9, § 55c; *see also id.*, § 292. The text below shows the original language, with Governor Evers' partial veto indicated by strikethrough:¹

16.047 (4s) of the statutes is created to read: 16.047
(4s) SCHOOL BUS REPLACEMENT GRANTS. ~~(a) In this subsection: 1. "School board" has the meaning given in s. 115.001 (7). 2. "School bus" has the meaning given in s. 121.51 (4).~~ (b) The department [of administration] shall establish a program to award grants of settlement funds from the appropriation under s. 20.855 (4) (h) ~~to school boards for the replacement of school buses owned and operated by~~

¹ Act 9 uses red text to designate partial vetoes, but that is impractical here.

~~the school boards with school buses that are energy efficient, including school buses that use alternative fuels. Any school board may apply for a grant under the program. (c) As a condition of receiving a grant under this subsection, the school board shall provide matching funds equal to the amount of the grant award. (d) A school board may use settlement funds awarded under this subsection only for the payment of costs incurred by the school board to replace school buses in accordance with the settlement guidelines.~~

2019 Wis. Act 9, § 55c. Governor Evers also vetoed the following nonstatutory provision in its entirety:

~~(2i) VOLKSWAGEN SETTLEMENT FUNDS. Of the settlement funds in s. 20.855 (4) (h), during the 2019=21 fiscal biennium, the department of administration shall allocate \$3,000,000 for grants under s. 16.047 (4s) for the replacement of school buses.~~

2019 Wis. Act 9, § 9101(2i).

14. The original language of § 16.047(4s) thus provided clear direction to DOA to establish a grant program to provide school boards with funds for replacing old school buses with energy efficient school buses. The provision also provided specific guidelines as to how that program should operate. Governor Evers, however, used his veto to remove most limitations and to

create a brand new grant program, never approved by the legislature, “for alternative fuels.”

15. In the message accompanying his partial vetoes, Governor Evers explained:

I object to the narrow use of Volkswagen settlement funds only for school buses under this provision, given the limited number of school districts to which these provisions would apply. In addition, the state has a responsibility to be a leader in adopting and encouraging the use of alternative fuels as part of an overall strategy to address climate change. . . . I am directing the Department of Administration to allocate up to \$10,000,000 of the settlement funds to this revised grant program for electric vehicle charging stations, and at least \$15,000,000 for the transit capital assistance grant program under s. 16.047 (4m).

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.

16. Second, the original language of Act 9 would have awarded a \$90,000,000 supplement for the improvement of local roads. See 2019 Wis. Act 9, § 126 (schedule item Wis. Stat.

20.395(2)(fc)). After reducing the amount to \$75,000,000,

Governor Evers partially vetoed the relevant language as follows:

20.395 (2) (fc) of the statutes is created to read: 20.395 (2) (fc) Local roads improvement discretionary supplement. From the general fund, as a continuing appropriation, the amounts in the schedule for the local roads improvement discretionary supplemental grant program under s. 86.31 (3s).

2019 Wis. Act 9, § 184s.

17. Governor Evers also vetoed the following language in its entirety:

~~86.31 (3s) of the statutes is created to read: 86.31 (3s) DISCRETIONARY SUPPLEMENTAL GRANTS. (a) Funds provided under s. 20.395 (2) (fc) shall be distributed under this subsection as discretionary grants to reimburse political subdivisions for improvements. The department shall solicit and provide discretionary grants under this subsection until all funds appropriated under s. 20.395 (2) (fc) have been expended. (b) 1. From the appropriation under s. 20.395 (2) (fc), the department shall allocate \$32,003,200 in fiscal year 2019=20, to fund county trunk highway improvements. 2. From the appropriation under s. 20.395 (2) (fc), the department shall allocate \$35,149,400 in fiscal year 2019=20, to fund town road improvements. 3. From the appropriation under s. 20.395 (2) (fc), the department shall allocate \$22,847,400 in fiscal year 2019=20, to fund municipal street improvement projects. (c) Notwithstanding sub. (4), a political subdivision may~~

~~apply to the department under this subsection for reimbursement of not more than 90 percent of eligible costs of an improvement.~~

2019 Wis. Act 9, § 1095m.

18. The effect of these vetoes was to transform a defined program dedicated to specific types of local road improvement projects to what amounts to an undefined rainy day fund to be used for “local grant” [sic].

19. Governor Evers’ veto message explains:

I am . . . partially vetoing these sections to remove the limitations placed on the use of the general fund monies because I object to the restrictions that these constraints place on the department to fund grants to the most needed projects throughout the state. Law enforcement and firefighters across Wisconsin have called on the Legislature to address poor road conditions that are putting Wisconsinites’ safety at risk. The effect of this partial veto will be to allow the department to prioritize the most critical transit and transportation needs.

Governor Tony Evers, Veto Message 60 (July 3, 2019). The distance between the original purpose of the funds as established by the legislature and the new possibilities opened up by Governor Evers’ partial veto is illustrated well by the still-developing

controversy over whether the funds could be used to fund Milwaukee’s controversial streetcar, a purpose never contemplated by the legislature. *See, e.g.,* Patrick Marley, *Senate leader calls for overriding budget veto over concerns state money could go to Milwaukee streetcar*, Milwaukee Journal Sentinel (July 18, 2019), <https://www.jsonline.com/story/news/politics/2019/07/18/local-governments-get-extra-75-million-transportation/1766807001/>.

20. Third, the legislature used Act 9 to adjust registration fees paid by truck owners based on vehicle weight. *See* Wis. Stat. § 341.25(2); 2019 Wis. Act. 9, § 1988b. Following is a chart showing the annual fees before Act 9, the annual fees chosen by the legislature, and the fees finally enacted into law by Governor Evers through use of the partial veto:

Maximum Gross Weight in Pounds	Pre-Act 9 Annual Fee	Annual Fee Approved by Legislature	Annual Fee Chosen by Governor Evers
Not more than 4,500	\$75.00	\$100.00	\$100.00
Not more than 6,000	\$84.00	\$100.00	\$100.00

Not more than 8,000	\$106.00	\$100.00	\$106.00
Not more than 10,000	\$155.00	\$100.00	\$155.00

See id. Thus, although the legislature attempted to equalize fees across the four classes, Governor Evers accepted the two fee increases and rejected the two fee decreases.

21. Governor Evers expressed his view on the provision as follows:

I object to owners of lighter vehicles unfairly being charged the same fees as those for heavier trucks. Heavier trucks do more damage to roadways and therefore should be charged more than lighter trucks.

Governor Tony Evers, Veto Message 60 (July 3, 2019). This was a choice the legislature of course could have made but did not.

22. Fourth, and finally, Act 9 added provisions regulating “vapor products,” including provisions imposing new taxes related to such products. *See, e.g.*, 2019 Wis. Act 9, §§ 1754, 1755f, 1757b. Relevant to this suit, the legislature defined “vapor products” as follows, with Governor Evers’ veto showed by strikethrough:

139.75 (14) of the statutes is created to read: 139.75 (14) “Vapor product” means a noncombustible product that produces vapor or aerosol for inhalation from the application of a heating element ~~to a liquid or other substance that is depleted as the product is used~~ , regardless of whether the liquid or other substance contains nicotine.

2019 Wis. Act 9, § 1754.

23. Governor Evers’ veto message again provided his position:

I object to the ambiguous language in the definition. Specifically, the language could be erroneously construed to exclude liquids or other substances that are used in electronic cigarettes, electronic cigars, electronic pipes or similar devices. Such an interpretation would be contrary to intent. As a result of my partial veto of this definition, the vapor products tax will clearly apply to any device containing vapor fluid and to vapor fluid sold separately.

Governor Tony Evers, Veto Message 59 (July 3, 2019). With a single stroke of his veto pen, Governor Evers thereby unilaterally expanded the scope of a definition of an item of taxation and regulation.

24. Article IV, § 1 of the Wisconsin Constitution provides that “[t]he legislative power shall be vested in a senate and

assembly.” Yet, as shown in all four instances above, Governor Evers used the partial veto to eliminate essential, legislatively-imposed “condition[s]” and “proviso[s],” *see Henry*, 260 N.W. at 491, and to enact sweeping new programs and regulatory schemes never approved, much less drafted, by the legislature – in a word, to legislate. Further, his partial veto left laws that fail to provide adequate direction to agency decision-making, in violation of the non-delegation doctrine, which forbids the delegation of 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.

25. Article V, § 10(1)(b) of the Wisconsin Constitution provides that “[a]ppropriation bills may be approved . . . in part by the governor, and the part approved shall become law.” Yet the new laws enacted by Governor Evers are no “part” of the appropriation bill sent to his desk.

26. Article VIII, § 2 of the Wisconsin Constitution provides that “[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law.” Yet Act 9 directs the expenditure of new funds pursuant to the fiat of a single executive branch official instead of a law duly passed by the legislature.

27. Article VIII, § 8 of the Wisconsin Constitution provides that “any law which imposes, continues or renews a tax, or creates a debt or charge, or makes, continues or renews an appropriation of public or trust money” requires a quorum of “three-fifths of all the members elected to such house.” Yet not a single legislator approved the legislation pursuant to which new funds will be spent or taxed.

28. The provisions challenged are thus quadruply unconstitutional, and Governor Evers’ use of the partial veto was likewise unconstitutional. Any implementation of these provisions by the administrative state would involve an unlawful expenditure of taxpayer funds.

29. Petitioners, as taxpayers, will be harmed by this illegal expenditure of taxpayer funds and will suffer pecuniary losses as a result of the expenditure. *See S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 20–22, 112 N.W.2d 177 (1961).

STATEMENT OF RELIEF SOUGHT

If this Court takes jurisdiction of this action, Petitioners will ask the Court to issue a declaratory judgment that the governor's use of the partial veto and the challenged provisions are invalid and to issue an injunction prohibiting Respondents from illegally spending taxpayer funds pursuant to the relevant directives contained in Act 9.

STATEMENT OF REASONS THIS COURT SHOULD TAKE JURISDICTION

As discussed in more detail in the Memorandum filed herewith, this case involves significant constitutional questions fundamental to the structure and functioning of our state system of government and, in particular, to the state separation of powers.

The issue in this case is whether the governor may use his partial veto authority to accept provisions passed by the legislature while stripping those provisions of all conditions with which the governor may disagree, regardless of how essential those conditions are to the overall law. Permitting the governor to do so renders him a one-person legislature in violation of Wisconsin’s “vest[ing]” of “[t]he legislative power” in the legislature alone. *See* Wis. Const. art. IV, § 1.

Perhaps reflecting the huge importance of such issues and the vast implications their resolution has for this state, cases involving the governor’s partial veto power are virtually always resolved via original action before this Court. *See Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997) (original action); *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 534 N.W.2d 608 (1995) (same); *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988) (same); *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978) (same); *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 237 N.W.2d 910 (1976)

(same); *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 289 N.W. 662 (1940) (same); *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622 (1936) (same); *State ex rel. Wisconsin Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935) (same).²

This Court should also take jurisdiction of this original action because the lower courts will be unable to provide the relief sought. In *State ex rel. Kleczka v. Conta*, this Court rejected the argument that “whenever an appropriation is made on the basis of a legislatively established proviso or condition, the provisos themselves may not be separately vetoed, but the entire appropriation, including the provisos, must be excised by the Governor.” *Kleczka*, 82 Wis. 2d at 711–12. As discussed in the accompanying memorandum, this was a deeply erroneous decision inconsistent with the Wisconsin Constitution in multiple respects. Granting the Petitioners relief in this case will likely require this Court to withdraw language in *Kleczka* and cases like it or to

² This Court has also made clear that taxpayer standing suffices in these types of lawsuits. See *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 433, 436, 424 N.W.2d 385 (1988); *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 121, 124, 237 N.W.2d 910 (1976).

overrule such cases entirely. Given that lower Wisconsin courts are not permitted to take those types of actions, *see, e.g., Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997), it would waste judicial resources to require Petitioners to argue their case in these forums first.

Finally, time is of the essence in this matter. As stated, Act 9—the budget for the 2019–21 biennium—has already been published. If forced to file a complaint in circuit court, by the time this case reaches this Court (again, the only Court able to grant Petitioners relief), administrative agencies will have taken action to implement the challenged budgetary directives, which will involve the illegal expenditure of funds; indeed, the 2022–24 budget could even be in place by then. Unwinding those actions might prove difficult or impossible, and it is preferable to provide the Wisconsin citizenry with certainty before that time about whether the executive branch is acting lawfully.

CONCLUSION

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

DATED this 31st day of July, 2019.

Respectfully submitted,



Richard M. Esenberg (WI Bar No. 1005622)

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