STATE OF WISCONSIN
SUPREME COURT
No. _____

WISCONSIN SMALL BUSINESSES UNITED, INC.
10 W. Mifflin St. Suite 205
Madison, WI 53703,

AMY DAILEY
2100 Minnesota Avenue
Stevens Point, WI 54481,

LARRY GIERACH
W7996 Hwy. 12
Oakland, WI 53538,

DOUG HUSTEDT
1011 West 3rd Street
Nekoosa, WI 54457,

SANDI VANDERVEST
8910 Red Beryl Drive
Middleton, WI 53562, and

TOM VANDERVEST
8910 Red Beryl Drive
Middleton, WI 53562,

Petitioners,

v.

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

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

CAROLYN STANDFORD TAYLOR, in her official capacity
as Acting Wisconsin Superintendent of Public Instruction
125 S. Webster St.
Madison, WI 53703,

Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION

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INTRODUCTION

With the deletion of two numbers and a comma in a section of the enrolled 2017–19 biennial budget bill (the "Budget Bill"), Governor Scott Walker transformed a legislative deadline of "December 31, 2018" into "December 3018," a thousand years later. Making similar strikes in another section of the Budget Bill, the Governor changed the word "July 1, 2018" to "July 1, 2078," six decades from now. These two partial vetoes—in which the Governor rejected individual parts of dates approved by the legislature so as to create new dates that he preferred—exceeded the Governor's constitutional authority to approve appropriations bills "in whole or in part." *See* Wis. Const. art. V, § 10(1)(b) (2019). Accordingly, petitioners Wisconsin Small Businesses United, Inc., Amy Dailey, Larry Gierach, Doug Hustedt, Sandi Vandervest, and Tom Vandervest, request that this Court take original jurisdiction of this case and declare the two vetoes unconstitutional.

This brief, and the accompanying petition, seek to highlight the relevant constitutional issue and to persuade this Court that original jurisdiction is appropriate. A more detailed analysis of the merits will follow if this Court takes the case, as it has done repeatedly and invariably with numerous other partial veto challenges.

The issue presented here is narrow and novel. While this Court has found that the Governor may strike individual digits in monetary figures contained in appropriations bills, it has never held that the Governor may do so with respect to

dates. *See Citizens Utility Board v. Klauser*, 194 Wis. 2d 484, 509, 534 N.W.2d 608 (1995) ("[T]his court has never discussed the conceptual 'reduction' of any other elements of an appropriation bill (i.e. *dates*, times, counties, cities, groups, etc.).") (emphasis added). Nor has this Court ever considered how a critical constitutional amendment in 1990, which diminished the Governor's partial veto powers, applies to dates.

Petitioners are not asking this Court to overrule any precedent. Rather, this case presents an issue this Court has never addressed:

> May the Governor, pursuant to his constitutional authority under article V, section 10 of the Wisconsin Constitution, as amended in 1990, reject individual parts of a date contained in an enrolled bill so as to create a new date that was never approved by the Legislature?

The Court should take this case and answer that question "no."

BACKGROUND

A. A Brief History of the Partial Veto in Wisconsin.

In 1930, the people of Wisconsin ratified a constitutional amendment that gave the Governor partial veto authority with respect to appropriation bills. *See* Richard A. Champagne, Staci Duros & Madeline Kasper, Wis. Legis. Reference Bureau, *The Wisconsin Governor's Partial Veto* 8 (2019). A year later, Governor Phillip LaFollette became the first governor to exercise that authority. *Id.*

Use of the partial veto was limited until the early 1970s. *Citizens Utility Board*, 194 Wis. 2d at 491. Since that time, however, Wisconsin's governors

have used their partial veto power in a variety of creative ways. This Court has, "for better or for worse, broadly interpreted that power." *Id.* at 502.

In 1971, Governor Patrick Lucey invented the "digit veto," a technique involving the deletion of a single digit from an appropriation bill. *Id.* at 492. With the 1973 biennial budget bill, Governor Lucey effectively reduced a $25 million highway bonding authorization to $5 million by striking the digit "2". *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 459, 424 N.W.2d 385 (1988). When the state Attorney General opined that the veto was unconstitutional because article V, section 10 did not give the governor the authority to "alter" an appropriations bill, Governor Lucey backed down and instead vetoed the entire appropriation. *Id.* at 460.

Fifteen years later, however, this Court disagreed with the Attorney General and held that Governor Tommy Thompson's use of the digit veto with respect to a variety of monetary figures in the 1987–89 budget bill was constitutional. *Wis. Senate*, 144 Wis. 2d at 457. In that same budget bill, Governor Thompson also employed the "pick a letter" or "Vanna White" veto, deleting individual letters so as to create new words. This Court approved that approach too. *Id.* at 437.

Within weeks after the *Wisconsin Senate* decision, the Legislature began work on a constitutional amendment to the Governor's partial veto authority.[1]

[1] The legislature understood the effect of *Wisconsin Senate*. As Assembly Speaker Tom Loftus commented at the start of the 1989 Legislative Session, "Unfortunately, we are the first

That amendment passed two successive legislatures in short order and was approved by the state's electorate on April 3, 1990. Champagne, *The Wisconsin Governor's Partial Veto* at 16. The amendment eliminated the "Vanna White" veto. *Id.*

In April 2008, following Governor James Doyle's use of the partial veto in the 2005 biennial budget to create a new sentence by combining parts of two or more sentences, the citizens of Wisconsin approved another constitutional amendment, banning what had been dubbed the "Frankenstein" veto. Champagne, *The Wisconsin Governor's Partial Veto* at 17. By doing away with that practice, the people of Wisconsin once again made clear that their Governor should not have limitless partial veto powers. With the 1990 and 2008 amendments, the relevant veto provision in the state constitution now reads as follows:

> In approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of the enrolled bill, and may not create a new sentence by combining parts of 2 or more sentences of the enrolled bill.

Wis. Const. art. V, § 10(1)(c).

B. A Brief History of This Court's Partial Veto Jurisprudence

This Court has analyzed the governor's partial veto powers in eight decisions, the earliest of which was in 1935 and the most recent of which

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Legislature to serve under the Supreme Court's decision that extended the Governor's partial veto power to the point where the Wisconsin Governor is also a legislature. . . . The Court's majority eviscerated this institution and if we don't adjust in this session, we will have sealed the fate of future legislatures." Remarks by the Speaker, *State of Wis. Assemb. J.*, Jan. 3, 1989, at 7.

occurred in 1997. Champagne, *The Wisconsin Governor's Partial Veto* at 9–10 (citing cases). None of those decisions addressed the type of vetoes present here.

The Court's three most recent decisions are particularly relevant. *Wisconsin Senate*, a 1988 case, involved a challenge to the validity of 37 vetoes exercised by Governor Thompson in the 1987-89 budget bill. The petitioners contended that the governor had "no authority under art. V, sec. 10 of the Wisconsin Constitution to veto individual letters, digits or words, and has no authority to reduce appropriation amounts." *Wis. Senate*, 144 Wis. 2d at 434. In a 4–3 decision, the Court sided with the Governor, concluding that "the governor may, in the exercise of his partial veto authority over appropriation bills, veto individual words, letters and digits, and also may reduce appropriations by striking digits, as long as what remains after veto is a complete, entire, and workable law." *Id.* at 437. The particular "digit" vetoes that the Court examined all involved monetary figures, not dates. *See Wisconsin Senate*, 144 Wis. 2d at 456–57 n.14 (referencing two instances where the governor reduced monetary figures other than appropriations by striking single digits in the text of the budget bill.) And, as noted above, the citizens of this state swiftly repudiated the majority's conclusion, approving a constitutional amendment in 1990 that curtailed the expansive veto powers endorsed in *Wisconsin Senate*.

Seven years after *Wisconsin Senate*, in *Citizens Utility Board*, 194 Wis. 2d 484, this Court addressed a new type of veto, the "write-down" veto. There, Governor Thompson had stricken an appropriation amount in the 1993–95 budget

bill and written in a new, lower amount. *Id.* at 489 (striking an appropriation of $350,000 and writing in $250,000). The petitioners asserted that the governor had no authority to write in new appropriation numbers. In another 4–3 decision, the Court ruled for the governor, finding that:

> [T]he governor, acting within the scope of his powers derived from Art. V, sec. 10 of the Wisconsin Constitution, may strike a numerical sum set forth in an appropriation and insert a different, smaller number as the appropriated sum.

Id. at 504. The Court explained that under a "common sense" reading of the word "part," $250,000 was "part" of $350,000. *Id.* at 505–06. Moreover, the Court asserted that:

> [T]o accept the conclusion that the governor has the authority to strike digits from an appropriation bill, but not the authority to write in smaller digits, elevates form over substance in contravention of common sense and prior case law.

Id. at 507. Finally, the Court made clear that this power extended "only to monetary figures." *Id.* at 510.

The most recent decision from this Court on the governor's partial veto authority is *Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997). In that decision, issued over two decades ago, the Court imposed limits on the "write-down" authority it had blessed in *Citizens Utility Board*. The Court held that the governor's write-down authority was limited to a "monetary figure which is an appropriation amount," and did not extend to non-appropriation amounts. *Id.* at 181.

The partial vetoes at issue here are unlike the vetoes in *Wisconsin Senate*, *Citizens Utility Board*, or *Risser*. Action by the Court is necessary to honor the substance and intent of the 1990 constitutional amendment and to prevent the further encroachment of the executive branch into the Legislature's domain. After 22 years, it is time for this Court to once again review exactly what the governor can and cannot do with his veto pen. Indeed, the Court will already be doing precisely that this term in *Bartlett v. Evers*, No. 2019AP1376-OA, a case it accepted as an original action earlier this month.

ARGUMENT

I. The Court Should Accept this Case as an Original Action.

This is the latest in a long line of cases seeking this Court's guidance on the boundaries of the Governor's partial veto authority under article V, section 10 of the Wisconsin Constitution. Recognizing the significance of these matters to the state's democratic form of government and the balance of power among the three branches, the Court has readily agreed to take jurisdiction of these cases as original actions. *See, e.g.*, *Bartlett*, 2019AP1376-OA (Oct. 16, 2019 order); *Risser*, 207 Wis. 2d 176; *Citizens Utility Board*, 194 Wis. 2d 484; *Wisconsin Senate*, 144 Wis. 2d 429; *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978); *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 237 N.W.2d 910 (1976); *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 289 N.W. 662 (1940); *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622

(1936); *State ex rel. Wisconsin Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935).

The Court should do the same in this instance. As explained further below and in the accompanying petition, the issue raised by this action—involving the limits on the Governor's partial veto authority as it relates to rejecting parts of a date to create a new date—has not been addressed by this Court. Now is the time to decide that issue, as the Governor's two vetoes squarely raise it. Moreover, the issue is particularly salient in light of the 1990 constitutional amendment, which prohibits the Governor from creating new words, as he did here.

A judicially-binding resolution of this issue is needed for a variety of reasons. Taxpayers, school districts and retailers throughout the state are directly impacted by the Governor's vetoes. Their future plans require a conclusive determination on the constitutionality of the Governor's actions. More broadly, if the Court upholds the Governor's tactics, the Legislature may well adopt new drafting conventions to preclude the Governor from transmogrifying its chosen dates into new dates a millennium away. Finally, the people of Wisconsin have long depended on this Court to police and safeguard the borders of the powers the state Constitution allocates to each branch of government. *See Risser*, 207 Wis. 2d at 183 ("the [Court's] role [is] to declare the boundaries which the constitution sets between the other two branches."). The Court should accept that constitutionally derived responsibility once more. *See, e.g.*, *Wis. Senate*, 144 Wis.

2d at 436 ("We deem it to be this court's duty to resolve disputes regarding the constitutional functions of different branches of state government.").

II. The Governor's Two Vetoes are Unconstitutional.

With the two vetoes at issue, the governor purports to have harnessed a power about which physicists can only theorize—time travel. Through the creative use of his veto pen, the governor has rocketed forward statutory dates by six decades in one instance, and a full millennium in the other. But just as the "flux capacitor" in the 1985 classic *Back to the Future* is a cinematic construct, and not an actual time travel device, so too is the governor's newly-minted veto technique.[2] The Court should not give credence to the governor's scheme. Time travel is not yet possible, even for the governor.

A. The Energy Efficiency Revenue Limit Adjustment.

The first of the two vetoes at issue involves Wisconsin's school district revenue limits. *See generally* Wis. Stat. § 121.91. Under Wisconsin law, school districts are limited in the amount of money they may raise from property taxes and other sources. There are several exceptions to these limits, one of which is the "Energy Efficiency Revenue Limit Adjustment." *See* Wis. Stat. § 121.91(4). The adjustment allows a school district to increase its revenue limits by adopting a resolution relating to amounts it has spent "on a project to implement energy

[2] The "Flux Capacitor" is the core component of Dr. Emmett Brown's time-traveling DeLorean in *Back to the Future*. *Back to the Future* (Universal Pictures 1985).

efficiency measures or to purchase energy efficiency products . . . ." *See* Wis. Stat. § 121.91(4)(o).

Section 1641m of the 2017–19 Budget Bill implemented a one-year moratorium on the adjustment, making it unavailable to school districts for 2018:

> 121.91 **(4)** (o) 4. Unless the resolution is adopted before January 1, 2018, subd. 1. applies only to a resolution adopted after December 31, 2018.

The governor exercised a partial veto of this provision, striking two numbers and a comma in order to transform the one-year pause into a one-thousand-and-one-year delay. For all practical purposes, the governor's partial veto eliminated the Energy Efficiency Revenue Limit Adjustment. The veto looked like this:

> 121.91 **(4)** (o) 4. Unless the resolution is adopted before January 1, 2018, subd. 1. applies only to a resolution adopted after December 3~~1, 2~~018.

B. The Private Label Credit Card Bad Debt Deduction.

The second veto concerns the Private Label Credit Card Bad Debt Deduction. Legislation adopted in 2013 Wisconsin Act 229 permitted a retailer to claim a deduction or earn a refund of sales taxes on certain bad debts. Act 229 was originally slated to take effect on July 1, 2015. However, in the budget bill for the 2015-17 biennium, the effective date of Act 229 was pushed back to July 1, 2017. Similarly, with the 2017-19 budget bill, the Legislature again delayed implementation of the bad debt deduction by one year—to July 1, 2018:

> [2013 Wisconsin Act 229] Section 6 (1) This act takes effect on July 1, ~~2017~~ 2018, and first applies to bad debts resulting from sales completed beginning on July 1, ~~2017~~ 2018.

The governor found the one-year delay insufficient and exercised a partial veto to extend that delay all the way until 2078, sixty years later:

> [2013 Wisconsin Act 229] Section 6 (1) This act takes effect on July 1, 20~~1~~7 ~~201~~8 and first applies to bad debts resulting from sales completed beginning on July 1, 20~~1~~7 ~~201~~8.

C. These Vetoes Are Unlike Any Vetoes This Court Has Ever Approved.

In his veto message, the Governor attempted to justify his two partial vetoes as "digit" vetoes. *See* Governor's Veto Message, *State of Wis. Assemb. J.*, Sept. 21, 2017, at 434, 450. That is a predictable strategy in light of the fact that this Court has approved certain "digit" vetoes in the past. What the Governor chose to call his vetoes, however, does not matter.[3] This Court must address the substance of the Governor's vetoes; it is not bound by the labels the Governor employs in an effort to validate them. Substance, not form, controls. *See Citizens Utility Board*, 194 Wis. 2d at 507 ("Simply put, to accept the conclusion that the governor has the authority to strike digits from an appropriation bill, but not the authority to write in smaller digits, *elevates form over substance* in contravention of common sense and prior case law.") (emphasis added); *Kleczka*, 82 Wis. 2d at

[3] Abraham Lincoln summed up this concept aptly with the following question and answer: "How many legs does a dog have if you call his tail a leg? Four. Saying that a tail is a leg doesn't make it a leg." *See* Matthew Algeo, *Abe & Fido: Lincoln's Love of Animals and the Touching Story of his Favorite Canine Companion* 31 (2015); Walter Sinnott-Armstrong & Robert Fogelin, *Understanding Arguments: An Introduction to Informal Logic* 19 (8th ed. 2010).

704 (whether part of an appropriation bill is severable from the rest of the bill "must be determined, *not as a matter of form, but as a matter of substance*.") (emphasis added).

Petitioners readily acknowledge that this Court has found certain "digit" vetoes, involving monetary figures, constitutionally permissible. However, this Court has never addressed whether the Governor may use a "digit" veto on individual portions of dates. *See Citizens Utility Board*, 194 Wis. 2d at 509 ("[T]his court has never discussed the conceptual 'reduction' of any other elements of an appropriation bill (*i.e.*, *dates*, times, counties, cities, groups, etc.).") (emphasis added). As explained below, dollars and dates are different.

1. Dollars and dates are different.

This Court's previous decisions have emphasized that a "digit" veto is permissible – and greater veto authority exists – in the context of monetary figures because article V, section 10 gives the governor the power to reduce appropriations. *Risser*, 207 Wis. 2d at 181 ("We conclude that the Governor's write-in veto authority may be exercised only on a ***monetary figure which is an appropriation amount*** . . . .") (emphasis added); *see also Wis. Senate*, 144 Wis. 2d at 457 ("We conclude, consistent with the broad constitutional power we have recognized the governor possesses with respect to vetoing single letters, words and parts of words in an appropriation bill, that the governor has similar broad powers to ***reduce or eliminate numbers and amounts of appropriations*** in the budget bill.") (emphasis added). Even dissenting opinions have not quarreled

with the governor's authority to veto individual digits so as to reduce an appropriation, finding that authority "properly subsumed within the governor's power to veto 'in part.'" *Citizens Utility Board*, 194 Wis. 2d at 501 (citing *Wis. Senate*, 144 Wis. 2d at 474 (Bablitch, J., dissenting)).

Not one of this Court's decisions, however, has ever addressed the use of a "digit" veto on dates. If and when the Court does look at that issue, the result should be different because dollars and dates are different. A monetary sum represents a quantity of money. That quantity can be reduced by striking one of the digits from the sum. For example, $500 becomes $50 simply by removing one of the zeroes in $500. The remaining $50 is undeniably "part" of the original $500. The same is not true with dates. Striking the "1" from March 21, for example, leaves March 2. March 2 is a different date from March 21 but it is not "part" of the original date in the same way that $50 is part of $500. Stated another way, when the "1" is removed from March 21, March 21 is not "reduced" like $500 is reduced to $50 by striking a "0".

In *Citizens Utility Board*, for example, the Court reasoned that a write-down of an appropriation amount is a valid use of the partial veto authority because the reduced appropriation amount is "part" of the amount originally appropriated in the bill. 194 Wis. 2d at 510 ("[T]he governor has the power to approve part of an appropriation bill by reducing the amount of money appropriated so long as the number is part of the original appropriation. This power stems from the right to reduce appropriations recognized in *Wisconsin*

Senate and extends only to monetary figures and is not applicable in the context of any other aspect of an appropriation."). Both the amount vetoed and the amount approved by the governor were subsumed by the amount adopted by the Legislature. However, here, the partial vetoes purport to create brand-new dates well beyond the scope of the provisions approved by the Legislature.

In short, the fundamental nature of dollars and dates is distinct. With money, each individual dollar is "part" of the whole, such that what remains when some of those dollars are removed is "part" of the original figure. Dates do not work that way. When a digit is removed from a particular date, a new date is created, but that date is not "part" of the original date. Here, the Governor's new dates are 60 years into the future in one instance, and 1,000 years in another. Those new dates are in no way "part" of the dates approved by the Legislature.

2. These vetoes run afoul of the 1990 Amendment.

The 1990 amendment to the state constitution prohibits the governor from "creat[ing] a new word by rejecting individual letters in the words of the enrolled bill." Wis. Const., art. V, § 10(1)(c). Here, the Governor created new words. The words "December 3018" and "July 1, 2078" are nowhere found in the enrolled bill. And, had the Legislature represented the words "December 31, 2018" or "July 1, 2018" entirely in letters (*i.e.* December Thirty-First, Two Thousand Eighteen or July First, Two Thousand Eighteen) rather than in letters *and* numbers, the Governor could not have used a veto to achieve his desired end. It is only because the Legislature has adopted a policy of representing dates in

numerals, and followed that policy here, that the Governor could even attempt these vetoes. *See* Wis. Legis. Reference Bureau, *Wis. Bill Drafting Manual 2019–20,* § 2.10(3) (2018).

Counsel for the Governor recognized this precise dilemma during oral argument in *Citizens Utility Board*. He explained:

> For example, if the legislature passes a bill that says "something shall happen in 15 days" and the governor can cross that out and write in the number "10," we have created a problem because ***if the legislature had written out in script "fifteen" under the new constitutional amendment he could not cross out the letters to get to "ten."***

Risser, 207 Wis. 2d at 188 (citing *Citizens Utility Board* oral argument transcript) (emphasis added).

In other words, the Governor's own attorney acknowledged that the Governor has no authority to modify Legislatively-approved timeframes simply because the Legislature happened to express those timeframes in letters and numbers rather than exclusively with letters. This Court has already said much the same about appropriations. *Risser*, 207 Wis. 2d at 203 n.19 ("It is of no import whether the appropriation amount is expressed in numerals or numeric words.") The Court should make clear, in this case, that the same logic applies to dates. Again, what matters is substance, not form.

At this point, the Governor may try to distance himself from the statements of counsel in *Citizens Utility Board* and take the view that the 1990 constitutional amendment is no bar to these vetoes because, technically, he did not

strike any "letters" in creating the new words "December 3018" and "July 1, 2078." But such a hyperliteral interpretation would do grave injustice to the very purpose of that amendment and should be rejected. *Estate of Miller v. Storey*, 2017 WI 99, ¶ 18, 378 Wis. 2d 358, 903 N.W.2d 759 ("A cardinal rule in interpreting statutes is to favor a construction that will fulfill the purpose of the statute over a construction that defeats the manifest object of the act.") (citation omitted); *see also* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63–65 (2012) (the presumption against ineffectiveness dictates that "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."); *see also id.* at 356 ("Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text. In the words of Learned Hand: 'a sterile literalism . . . loses sight of the forest for the trees."); *see also id.* at 357 ("[t]o read the phrase hyperliterally is to destroy its sense.").

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 that the partial vetoes in Section 1641m and Section 2265 of 2017 Wis. Act 59 are constitutionally invalid.

Dated: October 28, 2019.

GODFREY & KAHN, S.C.

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