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CIRCUIT COURT
DANE COUNTY, WI
2024CV001127

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

WISCONSIN STATE LEGISLATURE,

Plaintiff,

v.

Case No. 24-CV-1127
Code No. 30701

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION,

Hon. Stephen E. Ehlke

and

TONY EVERS, in his official capacity as Governor of the State of Wisconsin,

Defendants.

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

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INTRODUCTION

Ever since the people of Wisconsin delegated to their Governor the power to partially veto any "appropriation bill," the constitutional definition of an "appropriation bill" has been crystal clear. Under the "bright line" rule of *State ex rel. Finnegan v. Dammann*, a proposed law is an "appropriation bill" *only if*, within its "four corners," it "expend[s]" or "set[s] aside" money. *Risser v. Klauser*, 207 Wis. 2d 176, 193, 202, 558 N.W.2d 108 (1997) (citing *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622 (1936)). Critically, the *effects* of a bill's interaction with other statutes are entirely irrelevant under this simple test. Hence a bill is not an appropriation simply because it "contains provisions which set in motion a chain of events such that funds are disbursed without further legislative action." *Risser*, 207 Wis. 2d at 195. Eschewing a more "flexible rule" traditionally favored by whoever is Governor, the principal virtue of *Finnegan*'s "clear guidance"—reaffirmed repeatedly in the intervening 90-plus years—is that it keeps Wisconsin courts mostly out of the business of "referee[ing] disputes between [the] co-equal branches of government." *Id.* at 202. Assuming, of course, that the co-equal branches *actually follow* that guidance.

Recently, however, the Governor has charted a different course. In the most recent biennial budget, the Legislature appropriated $50 million from the general fund to support yet-to-be-adopted literacy programs. Less than two weeks later, the Legislature passed Act 20, which created those literacy

programs, including one that would award grants to schools adopting approved literacy curricula. Next, in early 2024, the Legislature passed the widely supported bipartisan Senate Bill 971 ("the Bill"), creating a mechanism by which the Joint Committee on Finance could deploy the already-appropriated $50 million to support the specific literacy programs created by the prior act and funded by the budget. The Governor, however, purported to partially veto the Bill, including by striking out language requiring the money to be used by the Department of Public Instruction ("DPI") on *approved* literacy curricula. Under the version of the Bill reflecting the Governor's edits, money sent to DPI might be spent on any "literacy program" of DPI's own invention.

Yet, under the long-established, black-and-white constitutional test, the Bill was not an "appropriation bill" subject to partial veto in the first place. The Bill does not "expend" or "set aside" money. In fact, it explicitly spends $0.00. And while the result of the Bill, given its interaction with the budget and Act 20, is that public money will be spent, the Bill does not do this within its "four corners." In other words, the indirect effects of the Bill on spending do not matter. It follows that the Bill is not an appropriation bill within the meaning of the constitution, so the Governor's purported partial veto was *ultra vires*. Not only that: even if the Bill had been subject to partial veto somehow, the *manner* in which the Governor exercised that power here likewise exceeded his constitutional authority.

Given confusion over whether the Legislature's or the Governor's version of the Bill presently carries the force of law and given the need to spend appropriated funds on approved literacy programs as soon as possible, declaratory relief from this Court is urgently needed. In the meantime, pending this case's outcome, the status quo should be preserved. This Court should therefore bar DPI from taking any action (including the spending of funds) predicated on the validity of the partially vetoed version of the Bill, published as 2024 Wisconsin Act 100.

STATEMENT OF THE CASE

A. Legal Background

Most bills in Wisconsin become law in much the same way that bills in Washington, D.C. do. Originating in the Senate or the Assembly, a bill passed by both houses is "presented to the governor." Wis. Const. art. IV, § 19; *id.* art. V, § 10(1)(a). For most bills, the Governor, like the President of the United States, has two options: (1) "sign the whole bill into law" or (2) "veto the whole bill." *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 4, 393 Wis. 2d 308, 946 N.W.2d 101; *see* Wis. Const. art. V, § 10(1)(b)).[1] A vetoed bill may still become law if, when returned to the Legislature, it is "approved by two-thirds of both houses." *Brennan*, 2020 WI 69, ¶ 4; Wis. Const. art. V, § 10(2)(a).

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[1] If the Governor does not sign or veto the bill within 6 days, Sundays excepted, the bill becomes law. *See* Wis. Const. art. 10, § 10(3); *Brennan*, 2020 WI 69, ¶ 4.

In Wisconsin, however, appropriation bills are unique. The state constitution separately prescribes how such bills may be enacted into law. Appropriation bills "involve[ ] an expenditure or setting aside of public funds." *Risser*, 207 Wis. 2d at 193. Only appropriation bills, when enacted, can cause money to be paid out of the treasury. *See* Wis. Const. art. VIII, § 2. They must be passed in both houses "by yeas and nays, which shall be duly entered on the journal" with "three-fifths of all the members elected" "required to constitute a quorum." *Id*. art. VIII, § 8.

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

The domain of the partial-veto power, however, is limited. For one thing, as mentioned, it may be used only on "appropriation bills" within the meaning of Article V, Section 10 of the Wisconsin Constitution. Indeed, for the first 40 years the creation of the partial-veto provision in the constitution, it was only used, if used at all, in budget bills. *See* Richard A. Champagne, et al., Wisc. Legislative Reference Bureau, *The Wisconsin Governor's Partial Veto after* Bartlett v. Evers at 2 (2020). Second, it may not be used to "create a new word by rejecting individual letters in the words of the enrolled bill" or to "create a new sentence by combining parts of 2 or more sentences of the enrolled bill."

Wis. Const. art. V, § 10(1)(c). These prohibitions, added in constitutional amendments ratified in 1990 and 2008, curtailed governors from engaging in this practice. *See* Champagne, *supra* at 2. Third, any partial veto must, at a minimum, leave "a complete, consistent, and workable scheme and law." *State ex rel. Wis. Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W 486, 491–92 (1935).

When the Governor properly exercises the partial-veto power on an appropriation bill, "the part approved" "become[s] law" while the vetoed portion, along with the Governor's written objections, returns to the house that originated the bill. Wis. Const. art. V, § 10(1)(b), § 10(2)(b). "The legislature can override the veto if two-thirds of both houses agree to approve the rejected part." *Brennan*, 2020 WI 69, ¶ 5 (citing Wis. Const. art. V, § 10(2)(b)). If the Legislature fails to override the partial veto, however, "only parts approved by the governor become law." *Id.*

B. Factual Background

On July 6, 2023, the state's 2023–25 biennial budget bill, 2023 Wis. Act 19, was published. Among other appropriations, the budget bill earmarked a $50 million appropriation from the general fund for the Joint Committee on Finance ("JCF") to support yet-to-be-adopted literacy programs. *See* Affidavit of Senator Howard Marklein ("Marklein Aff."), ¶ 4; Affidavit of Representative Mark Born ("Born Aff."), ¶ 4.[2]

[2] *See* 2023 Wis. Act 19, § 51 (table) (appropriating over $200 million to this fund for 2023–24); JCF, Motion 103 (June 13, 2023) (placing $50 million "GPR in the [JCF] supplemental appropriation for a literacy program" for 2023–24), *available at*

Less than two weeks later, on July 19, the Legislature enacted 2023 Wis. Act 20. The Act set the State's policy preference for specific literacy programs, with the aim of increasing early literacy scores across the State. As is relevant here, Act 20 created two literacy programs for which the already-approved budget had appropriated $50 million in funding. One is an early literacy coaching program to be run by the newly formed DPI Office of Literacy, created by the same Act. *See* 2023 Wis. Act 20, § 8 (creating the early literacy coaching program codified at Wis. Stat. § 115.39); 2023 Wis. Act 20, § 2 (creating the Office of Literacy codified at Wis. Stat. § 15.374(2)); *see also* Marklein Aff., ¶ 5; Born Aff., ¶ 5. The Act empowers the Office of Literacy to contract with individuals "to serve as literacy coaches" assigned to schools and school districts throughout the state. 2023 Wis. Act 20, § 8 (codified at § 115.39(2)–(3)).

The second Act 20 program requires DPI to award grants to reimburse schools for adopting approved literacy curricula. *See* 2023 Wis. Act 20, § 12 (codified at Wis. Stat. § 118.015(1m)); *see also* Marklein Aff., ¶ 5; Born Aff., ¶ 5. Specifically, Act 20 provides grants to "school boards, operators of charter schools, and governing bodies of private schools participating" in certain programs in "an amount equal to one-half of the costs of purchasing . . . literacy

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

curriculum and instructional materials" from a list of approved programs. 2023 Wis. Act 20, § 12 (codified at Wis. Stat. § 118.015(1m)(c)).

On January 26, 2024, both houses of the Legislature introduced a bill permitting JCF to deploy the $50 million dollars set aside in the biennial budget for the specific literacy programs created by 2023 Wis. Act 20. *See* 2023 S.B. 971; 2023 A.B. 1017 (hereinafter collectively the "Bill"); *see also* Marklein Aff., ¶¶ 7, 11; Born Aff., ¶¶ 7, 11. The Bill did not allocate any funds for either of these programs. *See* 2023 Wis. Act 100; Marklein Aff., ¶ 9; Born Aff., ¶ 9. Instead, as the Bill plainly states, it grants $0 to the programs. 2023 Wis. Act 100, § 1.

The Bill passed both houses of the Legislature with broad bipartisan support. It was unanimously approved by JCF, the Senate Committee on Education, and the Assembly Committee on Education.[3] Marklein Aff., ¶ 10 (unanimous support from JCF); Born Aff., ¶ 10 (same). The Senate and the Assembly did not put the matter to "yeas and nays," and no such record was entered in the Journal for either house.

As enacted by the Legislature, the Bill empowers JCF to direct funding to DPI for specific literacy programs created in Act 20, including the early literacy

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[3] *See* Senate Journal, 106th Reg. Sess., at 782–83, *available at* https://docs.legis.wisconsin.gov/2023/related/journals/senate/20240207/_119; Assembly Journal, 106th Reg. Sess., at 638, *available at* https://docs.legis.wisconsin.gov/2023/related/journals/assembly/20240207/_251; *see also Medlock v. Schmidt*, 29 Wis. 2d 114, 121, 138 N.W.2d 248 (1965) ("The Legislative Journals are properly the subject of judicial notice.").

coaching program and the grants for early literacy curriculum. *See* 2023 Wis. Act 100, §§ 1–2, 4; Marklein Aff., ¶ 11; Born Aff., ¶ 11.

On February 23, the Legislature presented the Bill to the Governor. The Governor purported to approve the Bill in part and veto the bill in part. *See* 2023 Wis. Act 100. The Governor's purported partial veto of the Sections 1, 2, and 4 of the Act deserve particular attention. The text below provides the original language of § 1, with the Governor's partial veto indicated by strikethrough:[4]

> 20.005(3) (schedule) of the statutes: at the appropriate place, insert the following amounts for the purposes indicated:
>
> | | | | 2023–24 | 2024–25 |
> |---|---|---|---|---|
> | 20.255 Public instruction, department of | | | | |
> | (1) EDUCATIONAL LEADERSHIP | | | | |
> | (fc) Office of literacy; literacy ~~coaching~~ program | GPR | C | -0- | -0- |
> | (2) AIDS FOR LOCAL EDUCATION PROGRAMING | | | | |
> | ~~(fc) Early literacy initiatives; support~~ | ~~GPR~~ | ~~B~~ | ~~-0-~~ | ~~-0-~~ |

2023 Wis. Act 100, § 1.

The Governor purported to partially veto § 2 as follows:

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

2023 Wis. Act 100, § 2.

And, the Governor entirely struck § 4:

[4] Act 100 uses red text to note stricken text.

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

2023 Wis. Act 100, § 4.

Finally, the Governor also struck two sections that would have delayed the repeal of § 2 of Act 100 until July 1, 2028. *See* 2023 Wis. Act 100, §§ 3, 5. This delayed repeal mirrored the delayed repeal of § 115.39 that is also delayed until July 1, 2028. *See* 2023 Wis. Act 20, §§ 9, 29(1). And the Governor approved § 4m of Act 100 which sets the salary for the director of the office of literacy. *See* 2023 Wis. Act 100, § 4m.

Under this partially vetoed version of Act 100, the text of the Act does not require that DPI use the funds allocated for the literacy coaching program under Wis. Stat. § 115.39, the early literacy grants set forth in Wis. Stat. § 118.015(1m)(c), and financial assistance to school boards and charter schools who provide particular professional development training. *See* 2023 Wis. Act 100; Marklein Aff., ¶ 12; Born Aff., ¶ 12. Instead, any funds allocated under the partially vetoed version of Act 100 may be treated by DPI as money that can be spent for its Office of Literacy and any "literacy program" that the office deems worthy of support. Marklein Aff., ¶ 13; Born Aff., ¶ 13. DPI does not have a specifically titled "literacy program."[5] Marklein Aff., ¶ 14; Born Aff., ¶ 14.

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

DPI submitted a request to JCF on March 7, 2024, to release the funds set aside in the biennial budget, but in accordance with the partially vetoed version of 2023 Wis. Act 100, not the Bill as enacted. *See* Marklein Aff., ¶ 15, Ex. A; Born Aff., ¶ 15. Although that request seeks in part to fund Act 20 programs, the request is to supplement funding for a far broader and undefined "literacy program" than envisioned in the Legislature's version of 2023 Wis. Act 100. *See* Marklein Aff., ¶ 15, Ex. A. The partially vetoed version of Act 100 could leave DPI entirely free to expend received funds on literacy programs not created by Act 20. *See* Marklein Aff., ¶ 16; Born Aff., ¶ 16.

Because Act 100 was unconstitutionally partially vetoed, JCF cannot supplement DPI's funding as affected by the partial veto because the partially vetoed version of 2023 Wis. Act 100 is invalid. Marklein Aff., ¶ 18; Born Aff., ¶ 18. If, however, 2023 Wis. Act 100 as enacted by the Legislature is confirmed to be law, JCF would move expeditiously to supplement DPI's funding. Marklein Aff., ¶ 17; Born Aff., ¶ 17.

On March 4, the Legislative Reference Bureau sent Majority Leader Devin LeMahieu a memorandum providing a requested analysis of whether the Governor's purported partial veto of Act 100 was constitutional. The memorandum concludes that the partial veto was unconstitutional because the

Bill was not an "appropriation bill" within the meaning of the state constitution. *See* Affidavit of Ryan Walsh ("Walsh Aff.") ¶ 2, Ex. A.[6]

LEGAL STANDARD

Courts may issue a temporary injunction if (1) "the movant has a reasonable probability of success on the merits"; (2) "the movant is likely to suffer irreparable harm if an injunction is not issued"; (3) "an injunction is necessary to preserve the status quo"; and (4) "the movant has no other adequate remedy at law." *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2023 WI 35, ¶ 17, 989 N.W.2d 561; *see* Wis. Stat. § 813.02.

ARGUMENT

I. PLAINTIFF IS VERY LIKELY TO SUCCEED ON THE MERITS

The partial veto of Act 100 was constitutionally unauthorized, and therefore the Governor's marked-up version of Act 100 is not law. That is because the Bill that became Act 100 was not an appropriation bill and therefore was not subject to partial veto. Regardless, even if it were an appropriation, the Governor's partial veto still was impermissible under *Bartlett v. Evers*, 2020 WI 68, 393 Wis.2d 172, 945 N.W.2d 685 (*per curiam*).

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[6] On April 15, 2024, the Wisconsin Manufacturers & Commerce Litigation Center filed a petition for an original action with the Wisconsin Supreme Court. *See LeMieux v. Evers*, App. No. 2024AP729–OA. The filing of that petition has no bearing on this action.

A. The Bill Is Not an Appropriation Bill—and Therefore Cannot Be Partially Vetoed—Because It Does Not Expend or Set Aside Public Funds

The partial veto here was unconstitutional. The Governor may partially veto only "appropriation bill[s]." Wis. Const. art. V, § 10(1)(b)–(c). Proposed legislation is an "appropriation bill" within the meaning of the constitution only if, within its four corners, it "expend[s]" or "set[s] aside . . . public funds." *Risser*, 207 Wis. 2d at 182, 193. In particular, under the Wisconsin Supreme Court's "long-standing definition," "[a]n appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 538–39, 576 N.W.2d 245 (1998) (quoting *Finnegan*, 264 N.W. at 624). The *sine qua non* of an appropriation, in other words, is that it spends money. The Bill here spends nothing. Accordingly, it is not an appropriation bill, and the Governor's purported partial veto was *ultra vires*.

The Governor might respond that the Bill appropriates because its interaction with the budget and Act 20 has the *effect* of spending money by authorizing JCF's release of already-appropriated public funds to DPI. But since 1891 it has been settled that "[a] necessary relation between the provision in issue and another provision which is an appropriation does not transform the provision in issue into an appropriation." *Risser*, 207 Wis. 2d at 200 (describing the "rule" of *McDonald v. State*, 80 Wis. 407, 50 N.W. 185 (1891)). Forty-five years later, *Finnegan* likewise squarely rejected this "indirect"

effects test in a partial-veto case, holding that a bill is *not* an appropriation "merely because its operation and effect in connection with an existing appropriation law has an indirect bearing upon the appropriation of public moneys." *Finnegan*, 264 N.W. at 624. That case challenged the constitutionality of a partial veto of a bill to increase annual permit fees for motor carriers. *Id.* at 623. The bill itself "did not contain an express appropriation," but it amended a statute *containing* an appropriation. *Id.* The Governor thought this was enough to subject the bill to partial veto. *Id.* at 623, 625. The Court disagreed. It explained that, under the Wisconsin Constitution, all that matters is that the bill "d[id] not *within its four corners* contain an appropriation." *Id.* at 624 (emphasis added); *see also State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 131, 237 N.W.2d 910 (1976) (reiterating *Finnegan*'s "four corners" test); Champagne, *supra*, at 11–12 (2020) (describing *Finnegan* as adopting "the 'four corners' test that later cases would use to determine if a bill is an appropriation bill, subject to partial veto"). To adopt a more sweeping definition of "appropriation," such as the Governor's, "would extend the scope of the constitutional amendment far beyond the evils it was designed to correct." *Finnegan*, 264 N.W. at 624. Applying the "four corners" test here, one must conclude that the Bill lacks an appropriation and therefore cannot be partially vetoed.

Affirming *Finnegan*, the *Risser* case—which is the only other published Wisconsin decision adjudicating what constitutes an "appropriation" for

partial-veto purposes, this time in the context of an "appropriation amount"—also forecloses the Governor's possible counterargument. That case challenged a partial veto of a provision providing: "Revenue obligations issued under this section shall not exceed $1,123,683,100 in principal amount, excluding obligations issued to refund outstanding revenue obligations." 207 Wis. 2d at 184 (quotation marks and citation omitted). The Wisconsin Supreme Court concluded that this portion of the statute did not "authorize[ ] an expenditure or the setting aside of public funds for a particular purpose" but instead "deal[t] with raising revenue and limiting the use to which the revenue may be put." *Id.* at 193. This mattered because, under *Finnegan*, "the fact that a provision generates revenue and affects an appropriation because the amount appropriated is determined by the amount of revenue generated does not convert the bill into an appropriation bill nor the provision into an appropriation." *Id.* at 196. In sum, the partial veto of a bill that "d[id] not within its four corners contain an appropriation" was invalid. *Id.* at 195–96 (quoting *Finnegan*, 264 N.W. at 624).

The Governor may also argue that he could partially veto the Bill because it uses the term "appropriation" and creates sections in Chapter 20 of the Wisconsin Statutes, which is titled "Appropriations and Budget Management." Although, as *Risser* notes, "all appropriations" in Wisconsin "are listed in chapter 20 of the statues," 207 Wis. 2d at 194–95, not everything that is called an "appropriation" or located in Chapter 20 is an "appropriation" within the

meaning of the Wisconsin Constitution. *See, e.g.*, Wis. Stat. § 20.001 (setting forth the definitions for Chapter 20). And, in practice, when the Legislature drafts an appropriation bill, it includes the phrase "making an appropriation"—a phrase *not* included in the Bill here. Richard A. Champagne, Legislative Reference Bureau, *Bill Drafting Manual 2023–2024* at 24 (2022);[7] *see Risser*, 207 Wis. 2d at 194 (relying on the *Wisconsin Bill Drafting Manual*); *see also* 2023 Wis. Act 100. This phrase is used to indicate that the Legislature must follow the requirements of Article VIII, Section 8 of the Wisconsin Constitution when passing the bill, namely, that passage of the bill will require "a roll call vote and a special quorum." *See* Champagne, *Bill Drafting Manual 2023–2024* at 24; *see also* Wis. Const. art. VIII, § 8.

More, as the Wisconsin Supreme Court has held since nearly the time this constitutional language was enacted, "[a]n appropriation *in the sense of the constitution* means the setting apart a portion of the public funds for a public purpose." *Finnegan*, 264 N.W. at 624 (quotation marks and citation omitted, emphasis added); *see also Koschkee v. Taylor*, 2019 WI 76, ¶ 23, 387 Wis. 2d 552, 929 N.W.2d 600 (explaining the Wisconsin Supreme Court's early opinions on a new constitutional provision are indicators of that provision's meaning). To deem something an appropriation simply because of its location in the statutes or the mere terms used in the enacting legislation would be to exalt form over substance. It is the Wisconsin Constitution, not the

[7] The relevant page of the Bill Drafting Manual is attached as Exhibit B to the Walsh Aff. ¶ 3.

Legislature, that defines what the Governor can and cannot partially veto. The Governor can exercise a partial veto over only laws that meet the constitutional definition of an "appropriation"—"the setting aside from the public revenue a certain sum of money." *Finnegan*, 264 N.W. at 624 (quotation marks and citation omitted); *see also id.* ("the bill . . . must satisfy the constitutional requisites" of an appropriation bill). Because the Bill here sets aside no "sum of money" and no "portion of the public funds," it is not an "appropriation bill" under Article V, Section 10 of the Wisconsin Constitution.[8]

Indeed, it seems the Governor must have understood that the Bill was not an appropriation bill, since he presumably believed that the Bill was properly before him and therefore subject to his pen. Had he instead concluded that the Bill was an appropriation, the proper course would have been to request a recall of the Bill for a roll call "yeas and nays" vote, a constitutional prerequisite for passage of any appropriation bill out of the Legislature but that was not satisfied here. Recall that, when "either house of the legislature" passes "any law which . . . makes, continues or renews an appropriation of public or trust money, . . . the question shall be taken by yeas and nays, which shall be duly entered on the journal." Wis. Const. art. VIII, § 8. Any bill that

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[8] As further support that an allocation of $0 is not an "appropriation" as that term is used in the Constitution, an "appropriation amount," which prior case law held the Governor could adjust downward, *see Risser*, 207 Wis. 2d at 183, must have been an amount over $0, as only such an amount would permit the Governor to adjust downward. An amount that the Governor cannot adjust downward cannot, by definition, be an "appropriation amount[ ]." *See id.* at 191 ("the constitution prohibits a write-in veto of monetary figures which are not appropriation amounts").

"makes, continues or renews an appropriation of public or trust money" must, before presentment to the Governor, "pass[ ] in each house by the required majority" and "the yea and nay vote" must be "taken in each house on its final passage and entered on the journals." *State v. Wis. Tax Comm'n*, 185 Wis. 525, 201 N.W. 764, 767 (1925) (quoting Wis. Const. art. VIII, § 8). This is a "mandatory" duty to take and "record[ ]" "the yeas and nays" "in the legislative journals." *State ex rel. Gen. Motors Corp., AC Electronics Div. v. City of Oak Creek*, 49 Wis. 2d 299, 322, 182 N.W.2d 481 (1971); *see also Integration of Bar Case*, 244 Wis. 8, 27, 11 N.W.2d 604 (1943). If these constitutionally mandatory procedures are not followed, any resulting Act, whether or not partially vetoed, is "a nullity." *General Motors Corp.*, 49 Wis. 2d at 322. Thus, if the Governor concluded that the Bill was an appropriation, he should have contacted the Senate (the house that originated the Bill) and requested that the Legislature recall the Bill by joint resolution so that the Bill could be properly passed by roll call vote. *See* 2023 Joint Rule 5.[9]

In sum, although the Governor has long bristled under "*Finnegan*'s bright line rule," the *Risser* Court wisely observed that a "bright line rule is especially suitable when the court is called upon, as we are in veto cases, to referee disputes between our co-equal branches of government." 207 Wis. 2d at 202. Hence *Finnegan* and *Risser* "provide clear guidance to the other two branches to preclude continuing judicial involvement in and the need for frequent

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[9] The joint rules of the Wisconsin Legislature are *available at* https://docs.legis.wisconsin.gov/2023/related/rules/joint.

judicial resolution of inter-branch disputes." *Id.* That guidance usually gives "the legislature and the Governor the ability to predict the consequences of their actions and to guide their conduct accordingly without the intercession of the judicial branch." *Id.* Only because that guidance was disregarded here is judicial intercession again necessary.

B. Even If the Bill Were Subject to Partial Veto, The Governor Exceeded the Constitutionally Prescribed *Manner* of Exercising a Partial Veto

While the Governor may partially veto appropriation bills, he may not make any edit he so desires to such a bill. *See* Wis. Const. art. V, § 10(1)(b)–(c). Rather the constitution bars him from "creat[ing] a new word by rejecting individual letters in the words of the enrolled bill" and "creat[ing] a new sentence by combining parts of 2 or more sentences of the enrolled bill." *Id.* art. V, § 10(1)(c). More, when approving an appropriation bill in part, the Governor must leave "a complete, consistent, and workable scheme and law," and the parts stricken cannot be "provisos or conditions inseparably connected to the appropriation." *Wis. Tel. Co.*, 260 N.W at 490–92.

In *Bartlett*, the Wisconsin Supreme Court concluded that three of the four partial vetoes challenged in the case were unconstitutional. 2020 WI 68, ¶ 4 (*per curiam*). The vetoes to "the local roads improvement fund" are especially relevant here. *Id.* at ¶¶ 2, 4. Using "a trio of vetoes" the Governor rewrote "an appropriation for local road funding into an appropriation for some other undefined local grant." *Id.* at ¶ 272 (Hagedorn, J., concurring). First, the Governor partially vetoed 2019 Wis. Act 9, § 126 (the 2019–20 biennial budget

bill) to read "Local ~~roads improvement discretionary~~ supplement." *Id.* Second, the Governor partially vetoed § 184s of Act 9 as follows: "Local ~~roads improvement discretionary~~ supplement. From the general fund, as a continuing appropriation, the amounts in the schedule for the local ~~roads improvement discretionary supplemental~~ grant ~~program under s. 86.31(3s)~~." *Id.* Finally, the Governor struck all of § 1095m of Act 9, which created Wis. Stat. § 86.31(3s), the specific grant program whose reference was removed from § 184s of Act 9. *Id.* at ¶ 272 & n.15.

Three separate rationales were used by five Justices to conclude the partial vetoes of the local road improvement fund were unconstitutional. *Id.* at ¶ 4. Justice Kelly, joined by Justice Rebecca Bradley, set forth the following test: "After exercising the partial veto, the remaining part of the bill must not only be a 'complete, entire, and workable law,' it must also be a law on which the legislature actually voted; and the part of the bill not approved must be one of the proposed laws in the bill's collection." *Id.* at ¶ 217 (Kelly, J., concurring in part, dissenting in part). Applying this test to the local road improvement fund vetoes, Justice Kelly concluded that "[t]he result of these amendments is that the new idea introduced by the amendment was passed into law without the legislature ever voting for it." *Id.* at ¶ 225. Because the Governor is barred from using the partial veto power to turn a bill "into something other than what passed the legislature" this partial veto was unconstitutional. *Id.* at ¶¶ 223, 225.

Justice Hagedorn, joined by then-Justice Ziegler, explained that "the governor may not . . . selectively edit parts of a bill to create a new policy that was not proposed by the legislature. He may negate separable proposals actually made, but he may not create new proposals not presented in the bill." *Id.* at ¶ 264 (Hagedorn, J., concurring). Justice Hagedorn concluded the local road improvement vetoes failed this test. *Id.* at ¶ 273. The Legislature, in three different sections of the budget bill, "detailed a grant program for the express purpose of improving local roads." *Id.* While the Governor, through his partial veto, "created a new appropriation out of thin air." *Id.* But any "appropriations must originate in the legislature" which is tasked with "enact[ing] such laws in the first instance." *Id.* (citing Wis. Const. art. IV, § 17(2), § 19; *id.* art. VIII, § 2). The Governor is not permitted to "author a new appropriation never proposed to him." *Id.*

Finally, then-Chief Justice Roggensack "conclude[d] that the part approved by the governor, i.e., the consequences of the partial veto, must not alter the topic or subject matter of the 'whole' bill before the veto"—it must not "alter the stated legislative idea that initiated the enrolled bill." *Id.* at ¶ 11 (Roggensack, C.J., concurring in part, dissenting in part). Using this test, Chief Justice Roggensack concluded the vetoes concerning the local road improvement funds also failed. *Id.* at ¶¶ 102–104. These vetoes "violate[d] the topic or subject matter limitation." *Id.* at ¶ 102. The section "vetoed in its entirety" made clear that "[t]he legislative idea was to fund an ongoing road

improvement program." *Id.* at ¶ 103. In contrast, the Governor created a "general undirected fund" that could "be spent on virtually any subject" including "to accomplish goals explicitly rejected by the legislature during its deliberative process." *Id.* at ¶ 103. This was not a permissible use of the partial veto. *Id.* at ¶ 104.

The Governor's partial veto of the Bill here fails under the *per curiam* decision in *Bartlett* because it mirrors the partial veto of the local road improvement fund that the *per curiam* held invalid. In § 1 of Act 100, the Governor struck the word "coaching" from "Office of literacy; literacy coaching program" to create a "literacy program" and struck the line for an "Early literacy initiatives; support." 2023 Wis. Act 100, § 1; *see Bartlett*, 2020 WI 68, ¶ 272 (Hagedorn, J., concurring) (partial veto of Act 9, § 126). The Governor partially vetoed § 2 as follows: "20.255(1)(fc) Office of literacy; literacy ~~coaching~~ program. As a continuing appropriation, the amounts in the schedule for the office of literacy and the literacy ~~coaching~~ program ~~under s. 115.39~~." 2023 Wis. Act 100, § 2; *see Bartlett*, 2020 WI 68, ¶ 272 (partial veto of Act 9, § 184s). And the Governor completely struck §§ 3–4 and 5, including the provision for "grants under s. 118.015(1m)(c) [for early literacy curricula and instruction materials] and for financial assistance paid to school boards and charter schools for compliance with 2023 Wisconsin Act 20, section 27(2)(a) [mandatory early reading instruction professional development]." 2023 Wis. Act 100, §§ 3–4, 5; *see Bartlett*, 2020 WI 68, ¶ 272 (veto of Act 9, § 1095m). These partial

vetoes mirror the partial vetoes of the local road improvement fund the court in *Bartlett* found "unconstitutional and invalid." *Bartlett*, 2020 WI 68, ¶ 9 (*per curiam*). Accordingly, the Governor's partial veto of Act 100 should similarly be deemed "unconstitutional and invalid." *Id.*

More, the Governor's partial veto fails under the three rationales separately set forth in *Bartlett* that deemed the partial veto of the local road improvement fund unconstitutional. First, the partially vetoed version of Act 100 is not "a law on which the legislature actually voted." *Id.* at ¶ 217 (Kelly, J. concurring in part, dissenting in part). The Legislature voted and approved creating a funding structure that requires DPI to use funds specifically for the literacy programs created in Act 20, including the literacy coaching program (Wis. Stat. § 115.39) and the grant program for literacy curriculum (Wis. Stat. § 118.015(1m)(c)). *See* Marklein Aff., ¶ 11; Born Aff., ¶ 11. The Governor, through his partial veto, instead created a funding structure for a "literacy program" not tied to the specific statutory programs the Legislature sought to fund. *See* 2023 Wis. Act 100; Marklein Aff., ¶¶ 12–13; Born Aff., ¶¶ 12–13. The result of these partial vetoes "is that the new idea" introduced by way of partial veto "was passed into law without the legislature ever voting for it." *Bartlett*, 2020 WI 68, ¶ 225. The Governor, through his partial veto, transformed the Bill from directing funding to particular literacy programs created in Act 20 to a Bill directing funding to a nondescript "literacy program" of his own

invention—"something other than what passed the Legislature." *Id.* at ¶ 223. This is not permitted.

Second, the partial vetoes of Act 100 "create a new policy that was not proposed by the legislature." *Id.* at ¶ 264 (Hagedorn, J., concurring). In Act 100, the Legislature detailed a program expressly tailored to allow for funding for specific programs created in Act 20. *See id.* at ¶ 273; Marklein Aff., ¶ 11; Born Aff., ¶ 11. Throughout the Act, the Legislature specified which programs could receive certain funds. *See* Marklein Aff., ¶ 11; Born Aff., ¶ 11. Instead, the Governor used his partial veto to create a new law "out of thin air." *Bartlett*, 2020 WI 68, ¶ 273. Instead of providing for funding for particular, carefully vetted programs, the Governor's partially vetoed version of Act 100 provides for funding for any "literacy program" of DPI's own invention. *See* Marklein Aff., ¶ 13; Born Aff., ¶ 13. The Governor, in effect, authored a new law "never proposed to him." *Bartlett*, 2020 WI 68, ¶ 273. This is not permitted.

Finally, the partially vetoed version of Act 100 "alter[s] the stated legislative idea that initiated the enrolled bill." *Id.* at ¶ 11 (Roggensack, C.J., concurring in part, dissenting in part). The Bill sought to create a funding structure for literacy programs created in Act 20. *See* Marklein Aff., ¶ 11; Born Aff., ¶ 11. Indeed, the partially vetoed sections specified what programs the Legislature sought to fund. *Bartlett*, 2020 WI 68, ¶ 103. Instead, the Governor created an unrestricted fund for a "literacy program," not tied to any program in the statutes, that could be used "to accomplish goals explicitly rejected by

the legislature during its deliberative process." *Id.* The Legislature did not authorize an unrestricted fund to be used on a "literacy program" of DPI's own invention; it authorized funding for specific literacy programs *proven to work*. *See* Marklein Aff., ¶¶ 11–13; Born Aff., ¶¶ 11–13. This change of subject, from a Bill authorizing funding specific programs to a partially vetoed Act funding a "program" of the Governor's or DPI's own invention, is a topic change not permitted in the partial veto process. *Bartlett*, 2020 WI 68, ¶ 102–104.

II. PLAINTIFF IS SUFFERING—AND WILL CONTINUE TO SUFFER—IRREPARABLE HARM

For three independent reasons, the Legislature also satisfies the "irreparable harm" requirement. *Gahl*, 2023 WI 35, ¶ 17.

First, given that the Governor's partial veto power "is legislative in nature; it is a participation in lawmaking." *Bartlett*, 2020 WI 68, ¶ 242 (Hagedorn, J., concurring) (citing *Edwards v. United States*, 286 U.S. 482, 490–91 (1932)). An *ultra vires* partial veto tramples upon the Legislature's constitutional prerogative to originate and enact the laws of the state. Hence, blocking a statute validly passed by the Legislature is "irreparable harm of the first magnitude." *Serv. Emps. Int'l Union, Local 1 v. Vos*, No. 2019AP622, unpublished order at 8 (June 11, 2019) (Walsh Aff. ¶ 4, Ex. C); *see also League of Women Voters v. Evers*, No. 2019AP559, unpublished order at 8 (Apr. 30, 2019) (Walsh Aff. ¶ 5, Ex. D). The Governor's unconstitutional partial veto of Act 100 prevents the Bill, as properly passed by the Legislature, from being enforced. This harm is irreparable.

Second, and more specifically, an unlawful partial veto of a spending bill usurps the Legislature's power of the purse. *See* Wis. Const. art. VIII, § 8. The Wisconsin Constitution "gives the legislature the general power to spend the state's money by enacting laws." *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 69, 393 Wis. 2d 38, 946 N.W.2d 35. Thus, the Legislature "has an institutional interest in the expenditure of state funds." *Id.* Indeed, this interest extends to "justify the authority to approve certain settlements" "where litigation involves requests for the state to pay money to another party." *Id.* More, the Legislature's "inability to enforce its duly enacted plans" is "irreparable harm." *Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018). Here, the Legislature's interest is also in properly deploying already-appropriated funds to certain statutory programs. The continued existence of the partially vetoed version of Act 100 in the statutes harms not only the Legislature's interest in legislating but also its interest in overseeing how the state's money is allocated. *See* Marklein Aff., ¶ 16; Born Aff., ¶ 16.

Third, the Legislature is harmed by the inability to guarantee that the literacy programs in Act 20, which were carefully vetted and selected, are funded. *See Serv. Emps. Int'l Union*, 2020 WI 67, ¶ 69; *Abbott*, 585 U.S. at 602 n.17. The Legislature set aside $50 million in JCF's supplemental appropriation budget to fund these programs. *See* 2023 Wis. Act 19, § 51; JCF, Motion 103 (June 13, 2023); Marklein Aff., ¶ 4; Born Aff., ¶ 4. And, when it created the programs in Act 20, it expressed its specific policy preference for

these literacy programs, over and above any other programs that could be created with the aim of increasing early literacy outcomes statewide. As published reflecting the partial veto, Act 100 provides no assurance that, if JCF supplements an appropriation to DPI, DPI will use the funds to support the particular programs created by Act 20 and articulated in the Bill. *See* 2023 Wis. Act 100; Marklein Aff., ¶ 16; Born Aff., ¶ 16.

III. An Injunction Is Necessary to Preserve the Status Quo

Temporary injunctions are issued where "an injunction is necessary to preserve the status quo."[10] *See Gahl*, 2023 WI 35, ¶ 17. And "the granting of the temporary injunction" against an unconstitutional act "preserve[s], rather than upset[s], the *status quo*." *Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 173, 17 N.W.2d 29 (1964); *see also, e.g.*, *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589–90 (7th Cir. 2012) ("[I]f the moving party establishes a likelihood of success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional."). An injunctive "order does no more than preserve the status quo" when it "does not hinder any legitimate activities of the defendants" and "[t]he only conduct which is enjoined is conduct forbidden by statute or the

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[10] It is not clear that the "necessary to preserve the status quo" factor applies to all requests for a temporary injunction. *See Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263 (citation omitted) (explaining that, "[*a*]*t times*, this court has also noted" that an injunction must be necessary to preserve the status quo) (emphasis added).

common law." *Pure Milk Prod. Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 263, 219 N.W.2d 564 (1974).

Here, the status quo, as of this writing, is that DPI has not *yet* spent funds in accordance with the partially vetoed Act 100 and in violation of the Bill as passed. And while JCF is eager, and expects, to release funds set aside in the biennial budget to DPI to improve literacy in Wisconsin, it fears that the Legislature's pro-literacy directives as set forth in the Bill could be at risk under the unconstitutionally vetoed Act 100. *See* Marklein Aff., ¶¶ 16–17; Born Aff., ¶¶ 16–17. Confirming this, DPI has already made clear its intent to spend funds as if the partially vetoed version of Act 100 (and not the Bill) had the force of law. *See*, *supra*, p. 10 (describing DPI's March 7 letter). Pending the outcome of this litigation, DPI should be ordered to continue to proceed in ways that would not violate the Bill as passed.

IV. Plaintiff Has No Other Adequate Remedy at Law

With respect to constitutional violations, courts generally recognize that there is no adequate remedy at law to rectify any resulting injury. *E.g.*, *Allee v. Medrano*, 416 U.S. 802, 814–15 (1974). Moreover, injunctive relief is appropriate when compensatory damages are unavailable as a remedy. *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 859, 434 N.W. 2d 773 (1989).

Here, the Legislature is damaged because the Governor exceeded his partial-veto powers and because the partially vetoed version of the Act does not require that DPI use any funds allocated for the specific programs

approved by the Legislature. Marklein Aff., ¶ 16; Born Aff., ¶ 16. The Legislature has no avenue to recoup those losses. The Legislature's harm is institutional; no monetary award is adequate.

CONCLUSION

This Court should grant Plaintiff's motion for a temporary injunction, ordering the Governor and DPI (pending the outcome of this litigation) not to spend public funds as if the partially vetoed version of Act 100 has the force of law.

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Respectfully submitted,

Electronically Signed by Ryan J. Walsh
Ryan J. Walsh (WBN 1091821)
Teresa A. Manion (WBN 1119244)
EIMER STAHL LLP
10 East Doty Street, Suite 621
Madison, WI 53703
608-620-8346
312-692-1718 (fax)
rwalsh@eimerstahl.com
tmanion@eimerstahl.com

Attorneys for Plaintiff