

**STATE OF WISCONSIN  
SUPREME COURT  
No. 2019AP001376 OA**

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Nancy Bartlett, Richard Bowers, Jr. and Ted Keneklis,

*Petitioners,*

v.

Tony Evers, in his official capacity as Governor of the State of Wisconsin, Joel Brennan, in his official capacity as Secretary of the Wisconsin Department of Administration, Wisconsin Department of Administration, Craig Thompson, in his official capacity as Secretary of the Wisconsin Department of Transportation, Wisconsin Department of Transportation, Peter Barca, in his official capacity as Secretary of the Wisconsin Department of Revenue, and Wisconsin Department of Revenue,

*Respondents.*

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

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Richard M. Esenberg (WI Bar No. 1005622)  
Anthony F. LoCoco (WI Bar No. 1101773)  
Lucas T. Vebber (WI Bar No. 1067543)  
Luke N. Berg (WI Bar No. 1095644)  
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Attorneys for Petitioners

Petitioners, Nancy Bartlett, Richard Bowers, Jr. and Ted Keneklis, by their attorneys, the Wisconsin Institute for Law & Liberty, hereby allege as follows:

1. This is a taxpayer action for a declaratory judgment under Wis. Stat. § 806.04 and for an injunction under Wis. Stat. § 813.02.

2. 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 portions of the legislation enacted as the 2019–21 biennial budget, 2019 Wisconsin Act 9 ("Act 9").

### **PARTIES**

3. 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.

4. 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.

5. 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.

6. 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. Governor Evers is sued in his official capacity.

7. 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. Secretary Brennan is sued in his official capacity.

8. Respondent DOA is an administrative agency and is the state agency responsible for administering parts of the legislation challenged in this suit. *See* 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.

9. 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. Secretary Thompson is sued in his official capacity.

10. Respondent DOT is an administrative agency and is the state agency responsible for administering parts of the legislation challenged in this suit. *See* 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.

11. 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. Secretary Barca is sued in his official capacity.

12. Respondent DOR is an administrative agency and is the state agency responsible for administering parts of the legislation challenged in this suit. *See* 2019 Wis. Act 9, §§ 1754,

1755f, 1757b. Its offices and principal place of business are located at 2135 Rimrock Road, Madison, WI 53713.

### STATEMENT OF ISSUES

13. Whether, in partially approving an appropriation bill pursuant to Article V, § 10 of the Wisconsin Constitution, the governor may strike parts of the bill which are “essential, integral, and interdependent parts of those which were approved.” *State ex rel. Wisconsin Tel. Co. v. Henry*, 218 Wis. 302, 260 N.W. 486, 493 (1935).<sup>1</sup>

14. Does Art. V, § 10’s direction that appropriations bills may be approved in whole or in part permit the Governor to strike words in a way that transforms the meaning and purpose of the law, changing it into a different law?

### STATEMENT OF FACTS

15. On June 25 and 26, 2019, the Wisconsin State Assembly and Senate, respectively, passed the legislation

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<sup>1</sup> Although, as discussed in detail herein, the partial vetoes challenged in this suit violate multiple provisions of the Wisconsin Constitution, these violations all demonstrate why the answer to this central issue must be “no.”

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>.

16. The budget 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.*

17. Petitioners assert that four of the Governor’s partial vetoes exceeded his partial veto authority and violated the Wisconsin Constitution. In each case, the partial veto authority was exercised 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 parts of Act 9 essential conditions on the operation of the legislation. The four challenged vetoes are as follows:

**1. 2019 Act 9, §§ 55c (creating Wis. Stat. § 16.047(4s)),  
9101(2i)**

*Language and background of partial veto*

18. Two sections of Act 9 directed the use of certain funds obtained by the state in a litigation settlement with Volkswagen

to be used to modernize school buses. *See* 2019 Act 9, §§ 55c, 9101(2i).

19. The text below shows the original language of § 55c, with Governor Evers' partial veto indicated by strikethrough:<sup>2</sup>

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 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 awarded.~~ (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.~~

20. After Governor Evers' partial veto, Wis. Stat. § 16.047(4s) reads: “The department shall establish a program to

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<sup>2</sup> Act 9 uses red text to designate partial vetoes, but that is impractical here.

award grants of settlement funds from the appropriation under s. 20.855 (4) (h) for alternative fuels.”

21. Governor Evers also vetoed subsection (2i) of § 9101, a nonstatutory provision, as follows:

~~(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.~~

22. The original language of § 55c 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 conditions as to how that program should operate, including a provision that participating school boards provide matching funds.

23. Section 9101(2i) further limited the school bus grant program to \$3,000,000.

24. Governor Evers, however, used his partial veto of §§ 55c and 9101(2i) to eliminate the school bus grant program and to create a brand new grant program, never approved by the

Legislature, for “alternative fuels,” with all of the limitations and conditions imposed by the Legislature in §§ 55c and 9101(2i) eliminated.

25. 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](https://content.govdelivery.com/attachments/WIGOV/2019/07/03/file_attachments/1241858/Evers_2019-21%20Veto%20Message.pdf).

26. Thus, the Governor did not simply approve or disapprove a coherent and independent part of the law, he changed a \$3,000,000 legislative appropriation for a school bus

modernization grant program (with conditions and limitations) to a \$10,000,000 grant program for alternative fuels (with no conditions or limitations) and then directed a state agency to use that grant program for electric vehicle charging stations.

27. This use of the partial veto was especially egregious because the Governor originally proposed, and the Legislature rejected, substantively the same program that the Governor created by executive fiat. The Governor's originally-proposed budget bill would have allowed the use of the Volkswagen settlement funds for "the installation of charging stations for vehicles with an electric motor." *See* 2019 Assembly Bill 56, §§ 52, 53, and 54.

28. The Legislature's Joint Committee on Finance rejected the Governor's proposal. *See* Executive Session record for Paper #505 on June 6, 2019 from the Record of Committee Proceedings, 2019 Assembly Bill 56, *available at* <http://docs.legis.wisconsin.gov/2019/related/records/joint/finance/1502194> (The committee considered a motion to adopt the

Governor's plan, as laid out in alternatives A1, B1, C1, and D1 of Paper #505, and the motion failed by a vote of 4 ayes and 12 noes); Legislative Fiscal Bureau, Joint Committee on Finance Budget Paper #505 (June 2019), *available at* [http://docs.legis.wisconsin.gov/misc/lfb/budget/2019\\_21\\_biennial\\_budget/102\\_budget\\_papers/505\\_volkswagen\\_settlement\\_volkswagen\\_settlement.pdf](http://docs.legis.wisconsin.gov/misc/lfb/budget/2019_21_biennial_budget/102_budget_papers/505_volkswagen_settlement_volkswagen_settlement.pdf).

29. The Joint Committee on Finance then adopted its own plan as Motion #129 later that day, by a vote of 12 to 4. *See* record of vote on Motion #129, *id.*; Motion #129, *available at* [https://docs.legis.wisconsin.gov/misc/lfb/jfcmotions/2019/2019\\_06\\_06/008\\_volkswagen\\_settlement/002\\_motion\\_129\\_volkswagen\\_settlement](https://docs.legis.wisconsin.gov/misc/lfb/jfcmotions/2019/2019_06_06/008_volkswagen_settlement/002_motion_129_volkswagen_settlement).

30. The full Legislature then approved the version approved by the Joint Finance Committee (which had expressly rejected the Governor's proposal for a grant program for electric charging stations) and sent that version to the Governor, which was subsequently partially vetoed.

31. Despite this clear rejection, the Governor utilized a creative partial veto to strike all of the conditions on the grant program and then directed the state agency in charge of that program to simply implement his original proposal—the very proposal that the Legislature rejected.

Constitutional provision(s) or doctrine(s) violated by the partial veto of §§ 55c and 9101(2i)

32. Governor Evers’ partial veto of §§ 55c and 9101(2i) is unconstitutional.

33. Governor Evers’ partial veto of §§ 55c and 9101(2i) violates the separation of powers doctrine.

34. Article IV, § 1 of the Wisconsin Constitution provides that “[t]he legislative power shall be vested in a senate and assembly.” Yet Governor Evers used the partial veto to eliminate essential, legislatively-imposed “condition[s]” and “proviso[s]” on the use of the settlement funds, *see Henry*, 260 N.W. at 491, and to enact a new program never approved, much less drafted, by the legislature – in a word, to legislate.

35. Further, a quintessential aspect of the “legislative power” is the “power of the purse.”

36. Through his partial veto of §§ 55c and 9101(2i), Governor Evers arrogated to himself the “power of the purse”—which rightfully belongs to the Legislature—by creating a new \$10,000,000 grant program for alternative fuels that the Legislature never authorized (and, in fact, rejected).

37. Governor Evers’ partial veto of §§ 55c and 9101(2i) also violates the non-delegation doctrine. His partial vetoes left a law that fails 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 Wis. 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. It is utterly unclear what a grant program “for alternative fuels” is or is supposed to achieve; the fundamental policy choices that need to

be made to implement the program are thus left entirely to the administrative state. This goes well beyond the “approval” or disapproval contemplated by Art. V, sec. 10.

38. Governor Evers’ partial veto of §§ 55c and 9101(2i) also violates Article V, § 10(1)(b) of the Wisconsin Constitution, which provides that “[a]ppropriation bills may be approved . . . in part by the governor, and the part approved shall become law.” The \$10,000,000 grant program for electric charging stations created by Governor Evers is no “part” of the appropriation bill sent to his desk. Instead, it is an entirely new program never approved by the Legislature.

39. Governor Evers’ partial veto of §§ 55c and 9101(2i) also violates Article VIII, § 2 of the Wisconsin Constitution, which provides that “[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law.” Act 9 as it exists after Governor Evers’ partial veto directs the expenditure of \$10,000,000 pursuant to the fiat of a single executive branch

official rather than pursuant to an appropriation by law duly passed by the Legislature.

40. Governor Evers' partial veto of §§ 55c and 9101(2i) also violates Article VIII, § 8 of the Wisconsin Constitution, which 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." Not a single legislator approved the legislation pursuant to which \$10,000,000 will be spent on grants for electric charging stations.

*Relief Sought Relating to §§ 55c and 9101(2i)*

41. Petitioners request a declaratory judgment that the Governor's partial veto of §§ 55c and 9101(2i) was invalid and, therefore, of no effect.

42. Petitioners also request an injunction prohibiting the Department of Administration from spending the \$10,000,000 as directed by the Governor for electric charging stations. An injunction action is an action in equity.

43. If this Court grants the declaratory judgment requested by the Petitioners, the result under Article V, § 10 of the Wisconsin Constitution would be as follows: (a) Act 9 was presented to the Governor by the Legislature; (b) the Governor approved Act 9 in part; (c) the Governor's disapproval of §§ 55c and 9101(2i) was not constitutionally valid; and therefore (d) Act 9 became law as approved by the Governor in part except that the Governor's disapproval of §§ 55c and 9101(2i) is stricken from Act 9 in its final form and §§ 55c and 9101(2i) became law as presented to the Governor by the Legislature.

44. However, because the Petitioners seek both legal and equitable relief, when fashioning the relief in this case the Court could consider that Petitioners ask this Court to overturn or modify case law upon which the Governor may have relied and, as a matter of equity, the Court could allow the Governor to reconsider §§ 55c and 9101(2i) and either: (1) approve the provisions as passed by the Legislature; (2) veto the provisions in

whole; or (3) veto them in part without violating the principles this Court establishes in this case.

**2. 2019 Wis. Act 9, §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s (creating Wis. Stat. § 20.395(2)(fc)), and 1095m (creating Wis. Stat. § 86.31(3s))**

*Language and background of partial veto*

45. In 2019 Wis. Act 9, § 126 (schedule item Wis. Stat. § 20.395(2)(fc)), the Legislature awarded \$90,000,000 for the improvement of local roads.

46. Governor Evers partially vetoed this schedule item as follows:

(fc) Local ~~roads improvement discretionary~~ supplement . . . ~~90,000,000~~ [and the Governor inserted 75,000,000 in place of the 90,000,000]

47. The Governor also partially vetoed § 184s 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)~~.

48. After Governor Evers' partial veto, 2019 Wis. Act 9, § 126, schedule item Wis. Stat. § 20.395(2)(fc) reads "Local

supplement . . . 75,000,000” and Wis. Stat. § 20.395(2)(fc) reads “Local supplement. From the general fund, as a continuing appropriation, the amounts in the schedule for local grant [sic].”

49. Governor Evers also vetoed § 1095m as follows:

~~86.31 (3s) of the statutes is created to read: 86.31 (3s) DISCRETIONARY SUPPLEMENTAL GRANTS. (a) Funds provided under s. 20.395 (2) (fe) 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) (fe) have been expended. (b) 1. From the appropriation under s. 20.395 (2) (fe), 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) (fe), 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) (fe), 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.~~

50. The effect of these vetoes was to transform a defined program dedicated to specific types of local road improvement projects (for example, \$32,003,200 for county trunk highway

improvements) and with a specific condition (the political subdivision applying for the grant cannot apply for more than 90% of the eligible costs of an improvement) to a \$75,000,000 open-ended expenditure to be used for “local grant” [sic] (apparently only one) with no conditions.

51. 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).

52. Petitioners do not challenge the Governor’s partial veto to the extent it reduced the award for local road improvements from \$90,000,000 to \$75,000,000. Under current law, such a reduction is within the Governor’s authority to veto part of the appropriation (in this case vetoing \$15,000,000 of the total amount

of \$90,000,000). *See Citizens Utility Board v. Klauser*, 194 Wis. 2d 484, 488, 534 N.W.2d 608.

53. But Petitioners do challenge the Governor's partial veto to the extent it converted the core purpose of the award from a specific grant for local road improvements to a generic and almost meaningless award for "local grant." This struck "an essential, integral and interdependent" part of the law passed by the legislature and transformed its meaning and purpose.

54. The distance between the original purpose of the appropriation as established by the Legislature and the new possibilities opened up by Governor Evers' partial veto is illustrated well by the still-developing dispute 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/.

Constitutional provision(s) or doctrine(s) violated by the partial veto of §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m

55. Governor Evers’ partial veto of §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m is unconstitutional.

56. Governor Evers’ partial veto of §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m violates the separation of powers doctrine.

57. Article IV, § 1 of the Wisconsin Constitution provides that “[t]he legislative power shall be vested in a senate and assembly.” Yet Governor Evers used the partial veto to eliminate essential, legislatively-imposed “condition[s]” and “proviso[s]” on the use of these funds, *see Henry*, 260 N.W. at 491, and to enact a new program never approved, much less drafted, by the legislature – in a word, to legislate.

58. Further, a quintessential aspect of the “legislative power” is the “power of the purse.”

59. Through his partial veto of §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m, Governor Evers arrogated to himself the “power of the purse”—which rightfully belongs to the Legislature—by creating a new \$75,000,000 grant program for something called “local grant” that the Legislature never authorized.

60. Governor Evers’ partial veto of §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m also violates the non-delegation doctrine. His partial vetoes 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*, 488 U.S. at 371-372; *Panzer v. Doyle*, 271 Wis. 2d 295, ¶52, *overruled on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 295 Wis. 2d 1. It is utterly unclear what a grant program for “local grant” is or is supposed to achieve; the fundamental policy choices that need to be made to implement the program are thus left entirely to the

administrative state. This goes well beyond the “approval” or disapproval contemplated by Art. V, sec. 10.

61. Governor Evers’ partial veto of §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m also violates Article V, § 10(1)(b) of the Wisconsin Constitution, which provides that “[a]ppropriation bills may be approved . . . in part by the governor, and the part approved shall become law.” The \$75,000,000 grant program for “local grant” created by Governor Evers is no “part” of the appropriation bill sent to his desk. Instead, it is an entirely new program never approved by the Legislature.

62. Governor Evers’ partial veto of §§ 126 (schedule item Wis. Stat. 20.395(2)(fc)), 184s, and 1095m also violates Article VIII, § 2 of the Wisconsin Constitution, which provides that “[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law.” 2019 Wisconsin Act 9 as it exists after Governor Evers’ partial veto directs the expenditure of \$75,000,000 pursuant to the fiat of a single executive branch

official rather than pursuant to an appropriation by law duly passed by the Legislature.

63. Governor Evers' partial veto of §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m also violates Article VIII, § 8 of the Wisconsin Constitution, which 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.” Not a single legislator approved the legislation pursuant to which \$75,000,000 will be spent on a program for “local grant.”

*Relief Sought Relating to §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m*

64. Petitioners request a declaratory judgment that the Governor's partial veto of §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m was invalid and, therefore, of no effect.

65. Petitioners also request an injunction prohibiting the Department of Transportation from spending the \$75,000,000

directed by the Governor for “local grant.” An injunction action is an action in equity.

66. If this Court grants the declaratory judgment requested by the Petitioners, the result under Article V, § 10 of the Wisconsin Constitution would be as follows: (a) Act 9 was presented to the Governor by the Legislature; (b) the Governor approved Act 9 in part; (c) the Governor’s disapproval of §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m was not constitutionally valid; and therefore (d) Act 9 became law as approved by the Governor in part except that the Governor’s disapproval of §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m is stricken from Act 9 in its final form and §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m became law as presented to the Governor by the Legislature.

67. However, because the Petitioners seek both legal and equitable relief, when fashioning the relief in this case the Court could consider that Petitioners ask this Court to overturn or modify case law upon which the Governor may have relied and, as

a matter of equity, the Court could allow the Governor to reconsider §§ 126 (schedule item Wis. Stat. § 20.395(2)(fc)), 184s, and 1095m and either: (1) approve the provisions as passed by the Legislature; (2) veto the provisions in whole; or (3) veto them in part without violating the principles this Court establishes in this case.

**3. 2019 Wis. Act 9, §1988b (amending Wis. Stat. § 341.25(2))**

*Language and background of partial veto*

68. In 2019 Wis. Act. 9, § 1988b the Legislature adjusted and standardized registration fees paid by truck owners based on vehicle weight.

69. Governor Evers partially vetoed § 1988b as follows<sup>3</sup>:

341.25 (2) ~~(a) to (em)~~ of the statutes are amended to read: 341.25 (2) (a) Not more than 4,500 \$ ~~75.00~~ 100.00  
(b) Not more than 6,000 . . . . . ~~84.00~~ 100.00 ~~(e)~~  
~~Not more than 8,000 . . . . . 106.00~~ 100.00 ~~(em) Not~~  
~~more than 10,000 . . . . . 155.00~~ 100.00

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<sup>3</sup> As in Act 9, underlined text designates text added by the legislature. For clarity, however, text *repealed* by the legislature is italicized here rather than struck through as in Act 9.

70. After Governor Evers’ partial veto, Wis. Stat. § 341.25(2) reads in part “Not more than 4,500 \$ 100.00 (b) Not more than 6,000 . . . . . 100.00 (c) Not more than 8,000 . . . . . 106.00 (cm) Not more than 10,000 . . . . . 155.00.”

71. Putting the partial veto and the pre-existing version of Wis. Stat. § 341.25(2) in context, the following chart shows the annual fees before Act 9, the annual fees chosen by the Legislature in the budget, and the fees finally enacted into law by Governor Evers through use of the partial veto:

<b>Maximum Gross Weight in Pounds</b>	<b>Pre-Act 9 Annual Fee</b>	<b>Annual Fee Approved by Legislature</b>	<b>Annual Fee Chosen by Governor Evers</b>
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

72. As this chart clearly shows, the Legislature intended to equalize fees across the four classes. Nevertheless, Governor

Evers accepted the two fee increases and rejected the two fee decreases, creating a new fee schedule inconsistent with either the policy adopted by the Legislature or the policy in place prior to Act 9.

73. 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).

74. Thus, the Governor transformed the law, which called for uniform fees at a specified level, and substituted his policy choice regarding the appropriate fee schedule for trucks in place of the Legislature's policy choice on that issue, disrupting a unified scheme. He turned a law which raised fees on lighter trucks in association with a reduction in fees for heavier vehicles to one that raised fees on lighter trucks, leaving the fees for heavier trucks. This went beyond approval or disapproval and modified an "essential, integral and interdependent" part of the law.

Constitutional provision(s) or doctrine(s)  
violated by the partial veto of §1988b

75. Governor Evers’ partial veto of §1988b is unconstitutional.

76. Governor Evers’ partial veto of §1988b violates the separation of powers doctrine.

77. Article IV, § 1 of the Wisconsin Constitution provides that “[t]he legislative power shall be vested in a senate and assembly.” Yet Governor Evers used the partial veto to eliminate essential, legislatively-imposed “condition[s]” and “proviso[s]” on the existence of the unified registration fee framework, *see Henry*, 260 N.W. at 491, and to enact a new framework never approved, much less drafted, by the legislature – in a word, to legislate.

78. Governor Evers’ partial veto of § 1988b also violates Article V, § 10(1)(b) of the Wisconsin Constitution, which provides that “[a]ppropriation bills may be approved . . . in part by the governor, and the part approved shall become law.” Governor Evers’ new fee framework was no “part” of the appropriation bill sent to his desk. It was a new law created by the Governor which

was different from and in conflict with the law passed by the Legislature.

79. Governor Evers' partial veto of §1988b also violates Article VIII, § 8 of the Wisconsin Constitution, which 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." Not a single legislator approved the fee schedule that Governor Evers created through his partial veto.

*Relief Sought Relating to § 1988b*

80. Petitioners request a declaratory judgment that the Governor's partial veto of § 1988b was invalid and, therefore, of no effect.

81. Petitioners also request an injunction prohibiting the collection of the new fees. An injunction action is an action in equity.

82. If this Court grants the declaratory judgment requested by the Petitioners, the result under Article V, § 10 of the Wisconsin Constitution would be as follows: (a) Act 9 was presented to the Governor by the Legislature; (b) the Governor approved Act 9 in part; (c) the Governor's disapproval of § 1988b was not constitutionally valid; and therefore (d) Act 9 became law as approved by the Governor in part except that the Governor's disapproval of § 1988b is stricken from Act 9 in its final form and § 1988b became law as presented to the Governor by the Legislature.

83. However, because the Petitioners seek both legal and equitable relief, when fashioning the relief in this case the Court could consider that Petitioners ask this Court to overturn or modify case law upon which the Governor may have relied and, as a matter of equity, the Court could allow the Governor to reconsider § 1988b and either: (1) approve the provisions as passed by the Legislature; (2) veto the provisions in whole; or (3) veto them

in part without violating the principles this Court establishes in this case.

**4. 2019 Wis. Act 9, § 1754 (creating Wis. Stat. § 139.75(14))**

*Language and background of partial veto*

84. In 2019 Act 9 §§ 1754, 1755f, 1757b, the Legislature enacted laws regulating “vapor products,” including provisions imposing new taxes related to such products.

85. The definition of “vapor products” is set forth in § 1754, and §§ 1755f and 1757b impose new taxes on “vapor products” as defined in § 1754.

86. The Governor exercised a partial veto of § 1754 as follows:

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.

87. After Governor Evers' partial veto, Wis. Stat. § 139.75(14) now reads: "Vapor product' means a noncombustible product that produces vapor or aerosol for inhalation from the application of a heating element, regardless of whether the liquid or other substance contains nicotine."

88. 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) (Emphasis added).

89. But the language approved by the legislature is not ambiguous and it is, in any event, the province of the Governor to approve or disapprove discrete legislative provisions, not to rewrite them into something else. In exercising this partial veto,

the Governor changed the meaning of the law. Thus, the Legislature decided to impose a tax on a product with a specific definition (a piece of hardware that produces vapor with the application of a heating element to a liquid) and the Governor decided to impose the tax on two products: (1) a piece of hardware that produces vapor with the application of a heating element to a liquid, *and* (2) the liquid that goes inside the device, which is often sold separately.

90. It is as if the Legislature imposed an excise tax on cars and the governor changed the law to impose an excise tax on cars *and* gasoline.

91. With the stroke of his veto pen, Governor Evers thereby unilaterally imposed a tax on a product (vapor fluid) that the Legislature had not intended to tax. Governor Evers stated that he did so because he best knew the Legislature's intent.

*Constitutional provision(s) or doctrine(s)  
violated by the partial veto of §1754*

92. Governor Evers' partial veto of § 1754 is unconstitutional.

93. Governor Evers' partial veto of § 1754 violates the separation of powers doctrine.

94. Article IV, § 1 of the Wisconsin Constitution provides that “[t]he legislative power shall be vested in a senate and assembly.” Yet Governor Evers used the partial veto to eliminate essential, legislatively-imposed “condition[s]” and “proviso[s]” on the taxation of vapor products, *see Henry*, 260 N.W. at 491, and to enact a new tax never approved, much less drafted, by the legislature – in a word, to legislate.

95. Governor Evers' partial veto of § 1754 also violates Article V, § 10(1)(b) of the Wisconsin Constitution, which provides that “[a]ppropriation bills may be approved . . . in part by the governor, and the part approved shall become law.” The new tax created by the Governor was no “part” of the appropriation bill sent to his desk. It was a new tax on a product not previously taxed by the Legislature.

96. Governor Evers' partial veto of § 1754 also violates Article VIII, § 8 of the Wisconsin Constitution, which 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.” Not a single legislator approved the legislation pursuant to which vapor fluid will be taxed as a “vapor product.”

*Relief Sought Relating to § 1754*

97. Petitioners request a declaratory judgment that the Governor’s partial veto of § 1754 was invalid and, therefore, of no effect.

98. Petitioners also request an injunction prohibiting the Department of Revenue from collecting the taxes as directed by the Governor. An injunction action is an action in equity.

99. If this Court grants the declaratory judgment requested by the Petitioners, the result under Article V, § 10 of the Wisconsin Constitution would be as follows: (a) Act 9 was presented to the Governor by the Legislature; (b) the Governor approved Act 9 in part; (c) the Governor’s disapproval of § 1754

was not constitutionally valid; and therefore (d) Act 9 became law as approved by the Governor in part except that the Governor's disapproval of § 1754 is stricken from Act 9 in its final form and § 1754 became law as presented to the Governor by the Legislature.

100. However, because the Petitioners seek both legal and equitable relief, when fashioning the relief in this case the Court could consider that Petitioners ask this Court to overturn or modify case law upon which the Governor may have relied and, as a matter of equity, the Court could allow the Governor to reconsider § 1754 and either: (1) approve the provisions as passed by the Legislature; (2) veto the provisions in whole; or (3) veto them in part without violating the principles this Court establishes in this case.

#### **STATEMENT OF RELIEF SOUGHT**

101. 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 in the 4 instances described

above was invalid, and therefore, of no effect. Petitioners will also ask this Court to issue an injunction prohibiting Respondents from illegally imposing taxes and collecting fees and illegally spending taxpayer funds pursuant to the relevant directives contained in the sections of Act 9 specifically challenged herein.

102. As discussed above, the effect of the declaratory ruling would be that Act 9 became law as approved by the Governor in part except that the Governor's four partial vetoes set forth above are stricken from Act 9 in its final form and the attendant sections became law as presented to the Governor by the Legislature.

103. However, because the Petitioners seek both legal and equitable relief, when fashioning the relief in this case the Court could consider that Petitioners ask this Court to overturn or modify case law upon which the Governor may have relied and, as a matter of equity, the Court could allow the Governor to reconsider the specific provisions discussed above and either: (1) approve them as passed by the Legislature; (2) veto them in whole;

or (3) veto them in part without violating the principles this Court establishes in this case.

**STATEMENT OF REASONS THIS COURT  
SHOULD TAKE JURISDICTION**

104. 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.

105. In partially vetoing Act 9 as described above, 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).

106. 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).

107. 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 State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 720, 264 N.W.2d 539 (1978) (Hansen, J., concurring in part and dissenting in part).

108. As Justice Hansen stated in *Kleczka*:

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.

*Kleczka v. Conta*, 82 Wis. 2d at 727 (Hansen, J., concurring in part and dissenting in part).

109. Justice Hansen, at least, was “not persuaded that art. V, sec. 10, was ever intended to produce such a result.” *Id.*

110. This Court should take jurisdiction of this original action because the lower courts will be unable to provide the relief sought. In *Kleczka*, 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.” *Klecza*, 82 Wis. 2d at 711–12.

111. As discussed in the accompanying memorandum, this was a deeply erroneous decision inconsistent with the Wisconsin Constitution in multiple respects. Granting Petitioners relief in this case will likely require this Court to withdraw language in *Klecza* and cases like it or to overrule such cases entirely.

112. 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.

113. Further, 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 imposing the illegal fees and taxes and making the illegal expenditure of funds described herein.

114. Unwinding the actions challenged herein would prove difficult or impossible. Neither the government nor the taxpayers would likely be able to recover funds unlawfully spent, and it is preferable to provide the Wisconsin citizenry with certainty before the executive branch takes the illegal actions challenged herein.

115. Given the pressing and significant nature of the questions involved, and given that only this Court is capable of granting the relief requested, and that this Court traditionally has reviewed partial veto challenges via original action, an original action is the appropriate vehicle for this suit. *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).

116. Petitioners, as taxpayers, will be harmed by the imposition of illegal fees and taxes and the illegal expenditure of taxpayer funds resulting from all four partial vetoes at issue in this case.<sup>4</sup>

## 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.

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<sup>4</sup> This Court has made clear that taxpayer standing suffices in original actions challenging partial vetoes. *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).

DATED this 19th day of August, 2019.

Respectfully submitted,



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