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CIRCUIT COURT
DANE COUNTY, WI
2024CV001127

BY THE COURT:

DATE SIGNED: August 27, 2024

Electronically signed by Stephen E Ehlke
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

WISCONSIN STATE LEGISLATURE,

Plaintiff Counterclaim-Defendant

v.

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION and TONY EVERS, in his official capacity as Governor of the State of Wisconsin,

Defendants Counterclaim-Plaintiffs,

v.

SENATOR HOWARD MARKLEIN and REPRESENTATIVE MARK BORN, in their official capacities as chairs of the joint committee on finance,

Counterclaim-Defendants.

DECISION AND ORDER

Case No. 24 CV 1127

Plaintiff Counterclaim-Defendant the Wisconsin State Legislature (hereinafter "the Legislature"), moves for summary judgment seeking a ruling that Senate Bill 971 is not an appropriation bill subject to the Governor's partial veto authority under Wis. Const. art. V, § 10(1)(b).[1] The Legislature contends that because Governor Evers improperly exercised his partial veto authority, the partially vetoed version of 2023 Wis. Act 100 is unconstitutional. The legislature seeks reinstatement of 2023 Wis. Act 100 as originally passed.

[1] Counterclaim-defendants, Senator Howard Marklein and Representative Mark Born, also seek summary judgment. Because they are aligned in interest with the Legislature, and for ease of reference, I simply refer to the Legislature.

Defendants Counterclaim-Plaintiffs, the Wisconsin Department of Public Instruction and Tony Evers (hereinafter "DPI"), move for summary judgment seeking a ruling that Senate Bill 971 is an appropriation bill subject to a partial veto under Wis. Const. art. V, § 10 and that 2023 Wis. Act 100 was constitutionally enacted. On its counterclaim, DPI seeks an order directing the Joint Committee on Finance ("JCF") to release $50 million to it for literacy programs created by 2023 Wis. Act 20.

For the reasons set forth below, I conclude Senate Bill 971 is an appropriation bill subject to Governor Evers' partial veto. I further conclude, however, that DPI is not entitled to a $50 million credit and that the Legislature properly appropriated money to JCF for disbursement under § 13.101(3).

FACTUAL BACKGROUND

On July 6, 2023, the State's 2023–25 biennial budget bill, 2023 Wisconsin Act 19, was published. Among other things, the budget bill appropriated over $200 million from treasury to JCF's supplemental-funding account. *See* Act 19, § 51. Of these funds, JCF earmarked $50 million to support yet-to-be-adopted literacy programs. This earmarking is reflected in budget motion No.103, titled "PUBLIC INSTRUCTION." Item 7 in that motion reads as follows: "Place $50,000,000 GPR in the Joint Finance Committee supplemental appropriation for a literacy program." The Legislative Fiscal Bureau's corresponding summary of the budget bill presented to the Governor, as revised by JCF, included a line item in JCF's emergency appropriation describing an allocation of $50 million to "Public Instruction" for "Literacy."

Two weeks later, on July 20, 2023, Governor Evers signed 2023 Wis. Act 20 ("Act 20"), which created a new statewide childhood literacy program that fundamentally reforms how

reading is taught in Wisconsin schools. To improve child literacy, the law imposes new duties related to literacy curricula and reading and language arts instruction on DPI, school districts, charters, and private choice schools. Among other things, Act 20 created two literacy programs. The first 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)). 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 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)). Specifically, the program 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 curriculum and instructional materials" from a list of approved programs. 2023 Wis. Act 20, § 12 (codified at Wis. Stat. § 118.015(1m)(c)). Despite the fact that these new requirements entail significant new costs for DPI, Act 20 did not create any new authority for DPI to spend public money on literacy programs. Nor did it set aside any funds for the costs associated with these requirements.

On January 26, 2024, both houses of the Legislature introduced the proposed 2023 Wisconsin Act 100. This bill created accounts for the programs mandated by Act 20 to which funding could be appropriated or transferred; the bill did not, however, appropriate or transfer any money to those accounts. *See* 2023 S.B. 971; 2023 A.B. 1017 (the "Bill"); 2023 Wis. Act 100. The Bill passed both houses of the Legislature with bipartisan support. It was unanimously

approved by JCF, the Senate Committee on Education, and the Assembly Committee on Education. Governor Evers partially vetoed the bill, which became 2023 Wis. Act 100 upon his signature.

First, the Governor vetoed all of section 4, which would have created a new DPI spending authority specifically for Act 20's early literacy initiatives:

> ~~Section 4. 20.255 (2) (fc) of the statutes is created to read:~~
>
> ~~20.255 (2) (fc) Early literacy initiatives; support. Biennially, the amounts in the schedule for grants under s. 118.015 (1m) I and for financial assistance paid to school boards and charter schools for compliance with 2023 Wisconsin Act 20, section 27 (2) (a).~~

The Governor explained that he objected "to signing a bill with an apparent error that benefits only private choice schools and independent charter schools."

Second, the Governor vetoed part of section 2, which also created a new spending authority for DPI:

> Section 2. 20.255 (1) (fc) of the statutes is created to read:
>
> 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~~.

The Governor's veto message explained that he objected to "overly complicating the allocation of funding related to literacy programs in Wisconsin by creating multiple appropriations for what could be accomplished with one." Together, his edits to sections 2 and 4 "consolidate[ed] funding into one appropriation," thereby giving DPI "the flexibility necessary to utilize the appropriate amount of funding for various literacy needs based on the needs of Wisconsin schools."

Finally, the Governor vetoed sections 3 and 5 of S.B. 971. Those sections would have sunset the spending authority created in Wis. Stat. § 20.255(1)(fc) on July 1, 2028:

~~SECTION 3. 20.255 (1) (fc) of the statutes, as created by 2023 Wisconsin Act .... (this act), is repealed.~~

~~* * *~~

~~SECTION 5. Effective dates. This act takes effect on the day after publication, except as follows:~~

~~The repeal of s. 20.255 (1) (fc) takes effect on July 1, 2028~~.

The Governor's veto message explained that "removing the July 1, 2028, repeal of the appropriation will create flexibility to invest in literacy programs for as long as the state has funding available and as long as decision makers invest in improving reading instruction in Wisconsin."

STANDARD FOR SUMMARY JUDGMENT

A party is entitled to summary judgment if there is no genuine issue of material fact and that party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). On a motion for summary judgment, the court first determines whether the pleadings set forth a claim for relief. *Bank of New York Mellon P/K/A Bank of New York v. Bronson*, No. 2017AP2301, 2018 WL 3726328, ¶ 17 (Wis. Ct. App. Aug. 2, 2018); see also *Baumeister v. Automated Products, Inc.*, 2004 WI 148, ¶ 12, 227 Wis. 2d 21, 690 N.W.2d 1. If they do, the next step is to examine the moving party's submissions to determine whether they constitute a prima facie case for summary judgment. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶ 9, 324 Wis. 2d 180, 781 N.W.2d 503. The court then examines the opposing party's submissions to determine whether material facts are in dispute entitling the opposing party to a trial. *Id.*

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2); *Schmidt v. N. States Power Co.*, 2007 WI 136, ¶ 24, 305 Wis. 2d 538, 742 N.W.2d

294. "Where, as here, the parties have filed cross-motions for summary judgment, it is generally the equivalent of a stipulation of facts permitting the trial court to determine the case on the legal issues presented." *BMO Harris Bank, N.A. v. European Motor Works*, 2016 WI App 91, ¶ 15, 372 Wis. 2d 656, 889 N.W.2d 165 (citing *Millen v. Thomas*, 201 Wis. 2d 675, 682-83, 550 N.W.2d 134 (Ct. App. 1996)).

DISCUSSION

Bills in Wisconsin become law in the following manner. 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 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). If the Governor does not sign or veto the bill within six days, Sundays excepted, the bill becomes law. *See* Wis. Const. art. 10, § 10(3); *Brennan*, 2020 WI 69, ¶ 4. 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).

The Wisconsin Constitution separately prescribes how "appropriation bills" may be enacted into law. When an "appropriation bill" is presented to the Governor, he or she 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. A governor may exercise the partial veto only on parts of bills that contain appropriations within their four corners. *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622, 624 (1936).

In this case, the fundamental disagreement between the parties is whether Senate Bill 971 is an "appropriation bill" subject to the governor's partial veto. If it is an "appropriation bill," then Governor Evers was within his powers to use a partial veto. If not, then he improperly vetoed portions of the bill. Both the legislature and DPI agree that *Finnegan*, 220 Wis. 143; *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978); and *Risser v. Klauser*, 207 Wis. 2d 176, 588 N.W.2d 108 (1997) control resolution of this issue. They differ, however, about what those cases mean.

The Legislature's basic position is that if no money is allocated within the "four corners" of the bill then it is not an "appropriation bill." Because Senate Bill 971 spends no money it therefore cannot be an "appropriation bill." DPI counters that a bill is an "appropriation bill": if it meets one of two conditions: does the bill (1) set aside public funds for a public purpose, or (2) authorize the executive to spend money set aside in that manner? If either one of these conditions is met, then the bill is an "appropriation bill."

Finnegan involved a bill governing the regulation of motor carriers. 264 N.W. at 622. The bill concerned payment of permit fees; simplification of licensing and insurance requirements; and coordination of state and federal law involving interstate motor carriers. *Id*. at 623. The Governor vetoed certain provisions under the then recently passed 1930 amendment to section 10, art. 5, Const., which allowed for partial vetoes of "appropriation bills." *Id.* The bill in question "concededly did not contain any express appropriation," however it was argued that "since it amends [another section which contains an appropriation], it must be held to be an appropriation bill." *Id*. The Court rejected this position, concluding that a narrow definition, limited to the "four corners" of the bill, was correct:

> [W]e are met with the fact that this bill does not within its four corners contain an appropriation. Does the fact that it indirectly affects continuing revolving fund

> appropriations theretofore enacted by raising the permit fees of various types of carriers, constitute it an appropriation bill? We are convinced that this question must be answered in the negative.
>
> * * *
>
> It seems to us that since the constitutional amendment deals with appropriation bills, the bill itself must satisfy the constitutional requisites, and that it does not do this merely because its operation and effect in connection with an existing appropriation law has an indirect bearing upon the appropriation of public moneys.

Id. at 624.

In *Kleczka*, the governor partially vetoed a bill creating funding for the financing of election campaigns. 82 Wis. 2d at 683. The court described the effect of the partial veto as follows:

> It is conceded that the bill as enrolled would require taxpayers to "add on" to their tax liabilities the sum of $1 if they wished that sum to go to the campaign fund. As changed by the Governor's partial veto, a taxpayer instead elects to designate that the sum of $1 be "checked off" or expended from the state general funds for the purposes of the Election Campaign Fund.

Id. at 685.

Although the bill submitted to the governor did not set aside a specific amount of money, the court nonetheless concluded that it was an "appropriation bill" because it "set apart a portion of the public funds for a public purpose – the financing of election campaigns." *Id.* at 688.

At issue in *Risser* was the governor's partial veto of a section of an omnibus bill setting forth the transportation budget. 207 Wis. 2d at 181. Part of the bill involved granting bonding authority to raise money for transportation facilities and major highway projects. *Id*. at 184. As passed by the legislature, the bonding authority could not exceed $1,123,638,100 in principal amount, with no more than $1,081,341,000 of that amount available for transportation facilities and major highway projects. The governor's partial veto reduced each of these amounts by

$40,000,000. *Id*. One issue in *Risser* was whether the authorized bonding amount was an appropriation. If so, then the governor was authorized to reduce the amount in the bill. If not, he was not authorized to do so. The Court, after considering the definition of "appropriation" adopted in *Finnegan*, concluded the bill was not an appropriation because it involved neither an expenditure nor the setting aside of public funds for a particular purpose:

> We can find nothing in section 57 that authorizes an expenditure or the setting aside of public funds for a particular purpose. Section 57 deals with raising revenue and limiting the use to which the revenue may be put. Sentences one and two provide that revenue obligations may be contracted for under certain conditions and not in excess of a certain amount. The third sentence provides that no more than a stated amount may be used for two specified transportation purposes. Section 57 thus establishes a level of funds that the state is authorized to generate by the sale of bonds and limits the purposes for which the revenue raised may be expended.
>
> Section 57 does not appropriate the funds. The sale of bonds is the commitment of the state to a debtor relation to those who purchase the bonds and is therefore distinguishable from an appropriation. The sale of bonds is revenue raising; revenue raising and appropriation are more nearly antonyms than synonyms. . . Whether the three sentences of section 57 are looked at individually or collectively, increasing a bond authorization and limiting the purposes for which a certain amount of the moneys raised might be used do not constitute an expenditure or setting aside of public funds for a particular purpose.

Id. at 193, citing *Finnegan*, 220 Wis. at 148.

These cases, read together, are not as definitive as the parties suggest. However, *Kleczka* supports DPI's position that a bill need not allocate a specific amount to qualify as an appropriation bill. A simple hypothetical based on the bill in *Kleczka* demonstrates why this is true. Suppose no one in the state ever decided to add on $1 in funds for the Election Campaign Fund? Although improbable, it is certainly possible under the terms of the bill submitted to the governor. If this were to happen, no funds would be allocated. Despite this possibility, the court held that the bill was an "appropriation bill." It follows, as DPI contends, that in determining

whether a bill is an "appropriation bill," a court may consider whether it authorizes the executive branch to spend money in a certain way, not just whether any money was allocated.[2] *Klecka* therefore supports DPI's position that Senate Bill 971 is an "appropriation bill" subject to the governor's partial veto. *Finnegan* and *Risser* are not on point because each of those cases found the bill in question was not an appropriation bill based on the fact money was being raised, not allocated and spent. Although it is certainly true that no money was appropriated in either of those cases, the crux of those decisions was that "taxation and appropriation are more nearly antonyms than synonyms." *Finnegan*, 264 N.W. at 624; *Risser*, 207 Wis. 2d at 193.

I am aware of Justice Abrahamson's admonition in *Risser* that courts should generally rely on the clear rules set forth in *Finnegan* (*i.e.* the "four corners" test), lest courts be involved in endless conflicts between the co-equal branches of government.

> In the 60 years since *Finnegan* we have rarely been called upon to determine whether a provision is an appropriation or a bill is an appropriation bill such that the partial veto is available to a governor. Because Wisconsin bill drafters follow the statutory directive to list appropriations in ch. 20, and because we have the benefit of the clear *Finnegan* rule, we avoid the repeated need to resolve this question. Under the Governor's proposal the courts would be pressed to determine anew in each case whether a provision was an appropriation. This course should be avoided.
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> ***
>
> If a provision authorizing the raising of revenue can be considered an appropriation amount, there would be no discernible distinction, certainly no clearly applicable one, with which to differentiate appropriation bills from all other bills. Much, if not all, legislation would be susceptible to the partial veto, perhaps even to a governor's write-in veto, because much, if not all, legislation can affect and be interrelated with the appropriation of money.
>
> By adopting the Governor's position we would be abandoning *Finnegan* 's bright line rule for determining what is an appropriation and what is an appropriation bill. 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. In such disputes the constitution must have intended that whenever

[2] *Klecka* also refutes the legislature's argument that an allocation of $0 is not an appropriation because it would be impossible for the governor to adjust the figure downward. *See* Dkt. 34 at p. 17 n. 8.

> possible a court provide clear guidance to the other two branches to preclude continuing judicial involvement in and the need for frequent judicial resolution of inter-branch disputes.

Id. at 198, 201-02.

The problem with applying a clear-cut rule in this case is that Acts 20, 19, and 100, although passed sequentially, were really part of one piece of legislation. In my view, the legislature imposes an artificial construct on these three pieces of legislation by treating them as distinct. As noted, Act 20 created a statewide literacy program. Then Act 19 allocated money for the literacy program by depositing $250 million with JCF. Without further legislation the $250 million would very likely have sat there with JCF, unused. Because no one intended this result, Act 100 was passed allowing for the $250 million to be transferred and spent on literacy programs. Under these rather unique circumstances, I conclude it is inappropriate to ask whether, standing alone, Act 100 appropriated money. Rather, I view Act 19 and Act 100 in tandem. Viewed in this manner, Senate Bill 971 is an "appropriation bill" because it allows for the transfer of money to DPI to fund various programs created under Act 20.

The Legislature argues that Senate Bill 971 is not an "appropriation bill" because it was not passed using a roll call vote under Wis. Const. art. VIII, § 8. I disagree. Article VIII, § 8, does not refer to "appropriation bills." Rather, it describes a law that "makes, continues, or renews an appropriation of public trust money." The provision also applies to a law that "imposes, continues or renews a tax"; "creates a debt or charge"; or "releases, discharges or commutes a claim or demand of the state." All those acts directly affect dollar amounts coming into or leaving the state treasury. Any bill doing one of these things must be passed by roll call. It does not follow, however, that a bill not passed by roll call cannot be considered an

"appropriation bill" for purposes of art. V, § 10. Ultimately, I agree with DPI that art. VIII, § 8 and art. V, § 10 do not apply in lockstep.

> S.B. 971 did not change the dollar amounts coming into or leaving the treasury. It instead authorized executive spending. While that makes it an "appropriation bill" under article V, § 10, the bill did not "make an appropriation" under article VIII, § 8, because it did not dedicate an amount of state money to be spent.

Dkt. 39 at. 28.

The Legislature posits that interpreting Senate Bill 971 as an appropriation bill effectively "would turn every bill that gives a state agency powers or new duties into an appropriations bill, vastly extending the Governor's partial-veto power." Although I certainly understand the Legislature's concern, I conclude it is overblown. The only reason Senate Bill 971 is an appropriation bill is that I interpret Acts 19, 20, and 100 in tandem, as part of a unified whole. Turning the Legislature's argument around, to hold otherwise – thereby allowing the legislature to balkanize (or hide) the appropriation bill -- would vastly circumscribe the governor's partial veto power granted under the state constitution.

Finally, relying on *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685, the Legislature argues that, even if Senate Bill 971 is an "appropriation bill," Governor Evers exceeded his partial veto authority. In sum, the legislature argues that Governor Evers' partial vetoes changed the bill into something the legislature never intended, much less passed into law. The Legislature contends the transformation caused by Governor Evers' partial vetoes violates the standards expressed by Chief Justice Roggensack (that the partial veto "not alter the topic or subject matter of the 'whole' bill before the veto"); the standard expressed by Justice Hagedorn and then-Justice Ziegler (the partial veto may not "create a new policy that was not proposed by the legislature," or "create new proposals not presented in the bill"); and the standard adopted by Justice Kelly and Justice Rebecca Bradley ("[a]fter 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"). DPI counters that *Bartlett* is not precedential because no recognized doctrine can be extracted from the fractured *per curiam* decision. Further, even if *Bartlett* applies, three of the four articulated rationales support upholding Governor Evers' partial vetoes.

Bartlett involved partial vetoes of portions of the 2019-21 biennial budget bill. *Id*. at 174. The provisions at issue were (1) the school bus modernization fund; (2) the local roads improvement fund; (3) the vapor products tax; and (4) the vehicle fee schedule. *Id*. Five justices concluded the vetoes involving the school bus modernization fund and the local roads improvement fund were unconstitutional. Four justices concluded the vetoes of the vapor products tax were unconstitutional. And five justices concluded that the vetoes of the vehicle fee schedule were constitutional. *Id*. at 174-75. In its *per curium* opinion the court admitted "[n]o rational has the support of a majority" of the justices. *Id*. The fractured nature of the Court's reasoning was addressed by Justice Ann Walsh Bradley:

> In an important case like this, where the people of Wisconsin need clarity, we instead sow confusion. Evidence of the lack of clarity is highlighted by the very fact that this case has generated four separate writings with various rationales. And not one of them has garnered a majority vote of this court. Thus, we are left with no clear controlling rationale or test for the future.

Id. at 222 (*concurring in part, dissenting in part*).

DPI argues this court should not extract a precedential rule using the approach outlined in *Marks v. United States*, 430 U.S. 188, 193 (1977): "When a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the

judgments on the narrowest grounds." *See, e.g.*, *State v. Griep*, 2015 WI 40, ¶¶ 36–38, 361 Wis. 2d 657, 863 N.W.2d 567 (alteration in original) (applying *Marks* to *Williams v. Illinois*, 567 U.S. 50 (2012)). DPI notes that the Wisconsin Supreme Court has never applied *Marks* to extract a precedential rule from one of its own decisions, let alone mandated that lower courts use *Marks* to do so. *See Johnson v. WEC*, 2022 WI 14, ¶ 243, 400 Wis. 2d 626, 971 N.W.2d 402 (R. Bradley, J., dissenting) ("This court has never applied the Marks Rule to interpret its own precedent, but only to interpret federal precedent."). Further, refusing to apply *Marks* is consistent with the "general principle . . . that a majority must have agreed on a particular point for it to be considered the opinion of the court." *State v. King*, 205 Wis. 2d 81, 88, 555 N.W.2d 189 (Ct. App. 1996)(citing *State v. Dowe*, 120 Wis. 2d 192, 194 352 N.W.2d 660 (1984)). The principle that in Wisconsin only points of law that garner majority support create precedent remains good law. *See, e.g.*, *Koschkee v. Taylor*, 2019 WI 76 ¶5, 387 Wis. 2d 552, 929 N.W.2d 600. For these reasons I decline the Legislature's invitation to apply *Bartlett* based on a *Marks*-type approach. Put differently, because *Bartlett* consists of pluralities and concurrences, it has no precedential effect, leaving pre-*Bartlett* partial veto cases in place. Under prior law a partial veto must leave behind "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). Applying this framework, Governor Evers' partial veto of Senate Bill 971 meets this test, and the legislature does not meaningfully suggest otherwise.

Turning to DPI's counterclaim, DPI requests that it be credited with $50 million, as contemplated during the negotiations of the budget bill, Act 19. DPI argues that this money was intended to be used by it to fund the literacy programs created by 2023 Act 20. DPI contends that only the full legislature, not JCF, has the power to appropriate money. According to DPI,

allowing the money to remain with JCF, subject to its discretionary control, would violate Wis. Const. article VIII, § 2, "[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law."

The Legislature opposes this request. Although the Legislature (seemingly) concedes that everyone anticipated the $50 million (out of the total of $250 million) would be for funding the literacy programs created by 2023 Act 20, it contends that since the full legislature appropriated the full amount, directing that it be deposited into JCF's supplemental-appropriations account, there is no violation of article VIII, § 2, and the funds are now subject to JCF's discretion to disburse funds under Wis. Stat. § 13.101(3).

DPI contends that JCF's budget motion 103 "must be understood as incorporated into Act 19, such that the full Legislature set aside this $50 million for DPI to spend on a literacy program." Dkt. 39 at 34. DPI cites no authority in support of this proposition. Instead, it argues, in essence, that everyone understood during the negotiation process that the $50 million was intended for funding literacy programs. DPI points to LFB interim budget summaries, and LFB's public summary of the final, enacted budget law to support its contention that the $50 million was appropriated to it for such programs. DPI is undoubtedly correct that during the negotiation process everyone understood that $50 million would be going to DPI to fund programs required by Act 20. However, as the legislature correctly observes, interim budget summaries and summary statements are not the law:

> The statutory text governs precisely because it is all that the Legislature adopts and therefore it is the only "law" to be interpreted. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Courts do not read words into the statute, *State v. Lickes*, 2021 WI 60, ¶ 24, 397 Wis. 2d 586, 960 N.W.2d 855, and they resort to extrinsic evidence and legislative history such as budget motions only to confirm a plain-meaning interpretation or to resolve ambiguity, *Kalal*, 2004 WI 60, ¶ 51; *State v. Milwaukee Cnty.*, 2006 WI

> App 229, ¶¶ 28–29, 297 Wis. 2d 339, 724 N.W.2d 916 (using legislative history, including unadopted amendment, to support plain meaning interpretation).

Dkt. 49 at 14-15.

Applied here, Act 19 is plain on its face. It appropriates over $250 million to JCF's supplemental-funding account for the purpose of JCF's providing supplemental funding to governmental units under § 13.101(3). *See* Act 19, § 51. It may be, as DPI points out, that the use of supplemental funding has increased dramatically over the past two decades. However, the increasing use of supplemental appropriations only underscores the fact that the Governor knew – or should have known – about JCF's discretion in distributing money allocated to it, consistent with the provisions of § 13.101(3). For whatever reason, the Governor chose to approve Act 19 as submitted to him for approval.

If, as DPI contends, the legislature intended to appropriate $50 million directly to DPI it certainly could have done so, as it did with other funding. *See* Act 19, § 51 (Figure 20.005(3)) (appropriating funds into DPI's various accounts). The Legislature was well aware of Section 13.101(3) and the discretion it gives JCF to determine where and when to send supplemental funding. *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 40, 316 Wis. 2d 47, 762 N.W.2d 652 (courts "generally presume that when the legislature enacts a statute, it is fully aware of the existing laws"). The Legislature thus clearly did not intend to give $50 million to DPI, but instead knowingly put funds into JCF's supplemental account for JCF to use to supplement funding at its discretion. Accordingly, I reject DPI's request that the $50 million be transferred to its account based on the budget process and JCF's budget motion 103.

DPI argues that allowing JCF discretion in disbursing the $50 million in funds allocated to it as part of Act 19 is an unconstitutional delegation of legislative power. DPI contends that Wis. Const. article VIII, § 2, which provides that "[n]o money shall be paid out of the treasury

except in pursuance of an appropriation by law," is violated by allowing JCF to exercise discretion disbursing funds under Wis. Stat. § 13.101(3). According to DPI, "if the money has been 'appropriated' to JCF—a legislative committee that cannot administer statutory programs—then the full legislature has not set aside the money such that 'the executive officers of the government are authorized to use that money, and no more, for that object, and no other.'" (Citing *Kleczka*, 82 Wis. 2d at 689.) In effect, DPI argues that Section 13.101 itself is unconstitutional, because it grants JCF discretion over where and when to send money.

Although it is somewhat unclear whether DPI mounts an "as applied" or facial constitutional challenge, it appears that its challenge is a facial attack. When faced with a constitutional challenge to a statute, courts "presume that the statute is constitutional," *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 25, 383 Wis. 2d 78, 914 N.W.2d 678, and the challenger "must prove that the statute is unconstitutional beyond a reasonable doubt," *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 17, 357 Wis. 2d 360, 851 N.W.2d 302.

Applied here, I conclude Section 13.101(3) provides for enough interaction between the executive and legislative branches to pass constitutional muster. Section 13.101(3) provides that JCF is permitted to supplement funds only when the funds of an agency are "insufficient because of unforeseen emergencies or insufficient to accomplish the purpose for which made." Wis. Stat. § 13.101(3)(a). JCF must make three findings before supplementing an appropriation: (1) "[a]n emergency exists"; (2) "[n]o funds are available for such purposes;" and (3) "[t]he purposes for which a supplemental appropriation is requested have been authorized or directed by the legislature." *Id*. The ability of JCF to supplement appropriation accounts is limited in time. JCF "may supplement an appropriation only for the fiscal biennium during which [JCF] takes the

action to supplement the appropriation." Wis. Stat. § 13.101(3)(b). Wis. Stat. § 13.101 requires JCF to follow the procedures in Wis. Stat. § 13.10 when taking action under § 13.101. *See* Wis. Stat. § 13.101(1). Section 13.10 sets forth when JCF is required to meet, *id*. § 13.10(1); requires requests to JCF be in writing and filed, *id*. § 13.10(3); requires the governor to "submit a recommendation on the request," *id*. § 13.10(3); and requires JCF to hold "a public hearing" on these requests and to "give public notice of the time and place of such hearing," *id.* § 13.10(3). Once JCF takes action on a request, the action is "determined by a roll call vote;" JCF is required to transmit a copy of its minutes to various other entities; and actions on requests are sent to the governor, who can approve the request "in whole or in part" and "the part objected to shall be returned to the committee for reconsideration." Wis. Stat. § 13.10(4). If JCF wishes to take the original action, over the governor's objection, that requires "two-thirds of the members of [JCF]" to "sustain the original action." *Id.* § 13.10(4). Finally, changes to appropriations are "reported to the department of administration." *Id*. § 13.10(5). This detailed set of procedures circumscribes JCF's discretion and provides for input from the executive branch. As such, the statute does not run afoul of Wis. Const. article VIII, § 2.

DPI contends the Legislature's position that it can appropriate money to JCF subject to disbursement under § 13.10(3) is foreclosed by our Supreme Court's recent decision in *Evers v. Marklein*, 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395. I conclude DPI's interpretation extends *Evers* a bit too far. At issue in *Evers* was a law granting JCF power to "halt expenditures for land conservation measures after the legislature already appropriated the money through the budget process." *Id.* at 531. Under the Knowles-Nelson Stewardship Program ("the program"), the DNR was authorized to acquire land for recreational purposes and to protect environmentally sensitive areas. The law at issue in *Evers* allowed JCF to review certain expenditures under the program

and, if even one committee member on JCF voted to do so, to block any such expenditures until the full committee convened and voted. The full legislature does not review or vote on JCF's decision. *Id.* at 535. After noting the distinction between "core powers" (which are unique to each branch of government) and "shared powers" (which lie at the intersections of core constitutional powers), the Court concluded that the JCF review process was an unconstitutional usurpation of the core executive function to execute laws passed by the legislature:

> We conclude these statutes interfere with the executive branch's core function to carry out the law by permitting a legislative committee, rather than an executive branch agency, to make spending decisions for which the legislature has already appropriated funds and defined the parameters by which those funds may be spent. A statute authorizing the legislative branch to exercise core powers of the executive branch violates the constitutional separation of powers and cannot be enforced under any circumstances.

Id. at 542-43.

This case is different. As set forth above, the legislature appropriated $250 million to JCF's supplemental-funding account for the purpose of JCF's providing supplemental funding to governmental units under § 13.101(3). Unlike *Evers*, here the legislature did not define the "parameters by which those funds may be spent." Instead, if JCF is called upon to disburse funds it will be circumscribed in its authority by § 13.101(3). Doing so will not infringe on any core executive powers.

DPI is clearly disappointed that it has not received the funds it needs to fulfill the requirements of Act 20. But DPI's disappointment is a political, not legal, problem. Although I am sympathetic to DPI's argument that appropriating money to JCF for allocation under § 13.10(3) constitutes an end-run around the normal budget process – creating a mini legislature outside the normal channels of the budget making process – what occurred here is not unconstitutional under a separation of powers analysis. Ultimately, resolution of funding for Act

20 needs to be resolved through the give and take of the political process. The courts simply cannot untangle every mess created by the other branches of government.

CONCLUSION

Summary judgment is granted in favor of DPI on the Legislature's original claim based on my conclusion that Senate Bill 971 is an appropriation bill subject to Governor Evers' partial veto. Summary judgment is granted in favor of the Legislature on DPI's counterclaim based on my conclusion that DPI is not entitled to a $50 million credit because the Legislature properly appropriated money to JCF for disbursement under § 13.101(3).