

FILED
04-16-2024
CIRCUIT COURT
DANE COUNTY, WI
2024CV001127
Honorable Stephen E
Ertke
Branch 15

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH _____

DANE COUNTY

WISCONSIN STATE LEGISLATURE,
State Capitol
2 East Main Street,
Madison, WI 53703,

Plaintiff,

v.

Case No. 24-cv-

Code No. 30701

Case Type: Declaratory Judgment

WISCONSIN DEPARTMENT OF PUBLIC
INSTRUCTION,
125 South Webster Street,
Madison, WI 53703,

and

TONY EVERS, in his official capacity
as Governor of the State of
Wisconsin,
115 East State Capitol,
Madison, WI 53703,

Defendants.

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as the term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the

requirements of the statutes. The answer must be sent or delivered to the court, whose address is **Dane County Clerk of Courts, 215 South Hamilton Street, Room 1000, Madison, WI 53703-3285**, and to Ryan J. Walsh, Plaintiff's attorney, whose address is **10 East Doty Street, Suite 621, Madison, Wisconsin 53703**. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Date: April 16, 2024

Respectfully submitted,

Electronically Signed by Ryan J. Walsh

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COMPLAINT

Plaintiff Wisconsin State Legislature hereby alleges as follows:

INTRODUCTION

1. In February 2024, the Legislature passed a bipartisan bill (the "Bill") that empowers the Joint Committee on Finance ("JCF") to direct funds for specific Department of Public Instruction ("DPI") literacy programs.

2. The Bill did not appropriate any money; instead, it created the framework for JCF to direct the \$50 million it set aside in the biennial budget to specific DPI programs created after the budget bill passed.

3. As enacted by the Legislature, the Bill empowers JCF to fund several programs created (but not yet funded) in 2023 Wis. Act 20, including the literacy coaching program, DPI's Office of Literacy, grants for early literacy curriculum, and financial assistance to school boards and charter schools to provide particular professional development training in early reading instruction.

4. When the Bill reached the Governor's desk, he purported to exercise his partial-veto power to strike some sections of the Bill in full and others in part.

5. But the Governor may partially veto only an "[a]ppropriation bill[]." Wis. Const. art. V, § 10(1)(b).

6. The Bill is not an appropriation bill. It does not expend or set aside any public funds.

7. More, any bill that does appropriate funds must pass both houses of the Legislature with a roll call vote—a vote of the yeas and nays—that is duly recorded in the Journal of each house. *See* Wis. Const. art. VIII, § 8.

8. Neither the Senate nor the Assembly passed the Bill with a roll call vote.

9. If the Governor nevertheless believed the Bill was an appropriation bill, he should have requested the Legislature recall the Bill in order to pass both houses of the Legislature with the proper vote.

10. Because the Governor did not request the Bill be recalled, he must have believed it was not an appropriation bill—otherwise, the Bill was a nullity when it arrived on his desk.

11. And if the Governor believed the Bill was an appropriation bill, his partial veto of Act 100 exceeded the scope of his constitutional authority to partially veto an appropriation bill.

12. Under the Governor's marked-up version of Act 100, DPI is not required to use the funds allocated for the literacy programs created in Act 20.

13. Instead, the partially vetoed version of Act 100 will allow DPI to treat any moneys directed to it as money that can be used by the Office of Literacy for any "literacy program" that office deems fit.

14. DPI, and its Office of Literacy, does not have any specifically titled "literacy program."

15. The unconstitutional partial veto of Act 100 leaves the Legislature in a dilemma: JCF would like to fund the literacy programs created in Act 20, as specified in the Bill, but the partially vetoed version of Act 100 does not ensure that the funds would be used on the literacy programs created by Act 20. Rather, any money directed under the partially vetoed version of Act 100 might (but should not) be treated by DPI as money that can be used by the Office of Literacy for any nondescript "literacy program" of DPI's invention.

PARTIES

16. Plaintiff Wisconsin State Legislature ("Legislature") is the legislature of the State of Wisconsin, in whom the Wisconsin Constitution vests the legislative power. Wis. Const. art. IV, § 1. The Legislature is composed of the Wisconsin State

Senate and the Wisconsin State Assembly. Its mailing address is 2 East Main Street, Madison, Wisconsin.

17. Defendant Wisconsin Department of Public Instruction is a state agency tasked with advancing public education and libraries in the State of Wisconsin. Its mailing address is 125 South Webster Street, Madison, Wisconsin.

18. Defendant Tony Evers (“Governor”) is the 46th Governor of the State of Wisconsin, in whom the Wisconsin Constitution vests the executive power. Wis. Const. art. V, § 1. He is sued in his official capacity as Governor. His mailing address is 115 East State Capitol, Madison, Wisconsin.

JURISDICTION AND VENUE

19. This is an action for declaratory relief under Wis. Stat. § 806.04.

20. Venue in Dane County is proper pursuant to Wis. Stat. § 801.50(2).

STATEMENT OF FACTS

21. On July 6, 2023, the 2023–25 biennial budget bill, 2023 Wis. Act 19, was published. As part of that budget, JCF earmarked a \$50 million appropriation from the general fund to the JCF supplemental appropriation.

22. This \$50 million was earmarked to fund the literacy programs that were later created by 2023 Wis. Act 20, published on July 20, 2023.

23. Act 20, which had bipartisan support, created several programs designed to improve early literacy rates across the state.

24. One of these programs is an early literacy coaching program aimed at improving literacy outcomes in Wisconsin, which is run by the newly formed Office of Literacy in DPI. *See* 2023 Wis. Act 20, § 8 (codified at Wis. Stat. § 115.39).

25. Another program created by Act 20 requires DPI to award grants to reimburse schools that adopt approved literacy curricula. *See* 2023 Wis. Act 20, § 12 (codified at Wis. Stat. § 118.015(1m)(c)).

26. Act 20 did not create an appropriation for DPI to directly fund the programs created by the Act.

27. On January 26, 2024, identical bills were introduced in both the Senate and the Assembly. (The bills are collectively referred to as the “Bill” unless otherwise specified.)¹

28. The Bill allowed JCF to direct the \$50 million it appropriated in the biennial budget bill and earmarked for literacy programs to specific DPI literacy programs created in Act 20.

29. Specifically, the Bill empowers JCF to fund the literacy coaching program, *see* Wis. Stat. § 115.39, DPI’s Office of Literacy, grants for early literacy curriculum, *see* Wis. Stat. § 118.015(1m)(c), and financial assistance to school boards and charter schools who provide particular professional development training in early reading instruction, *see* 2023 Wis. Act 20, § 27(2)(a).

30. The Bill did not itself appropriate any money. Indeed, it indicates \$0 is allocated. *See* 2023 Wis. Act 100, § 1. Rather, it allows JCF to use the \$50 million it

¹ *See* 2023 S.B. 971; 2023 A.B. 1017.

earmarked for literacy programs in the budget bill to fund certain DPI programs created by Act 20.

31. On February 7, 2024, the Senate Committee on Education, the Assembly Committee on Education unanimously recommended passage of the Bill. And on February 7 and February 14, 2024, JCF² unanimously recommended passage of the Bill in the Senate and Assembly, respectively.²

32. On February 13, 2024, the Senate passed 2023 S.B. 971. The Senate did not take a roll-call vote or record yeas and nays on the Bill in the Journal. Instead, the Senate passed the Bill by voice vote.

33. On February 20, 2024, the Assembly concurred in 2023 S.B. 971. The Assembly did not take a roll-call vote on the Bill or record yeas and nays on the Bill in the Journal. Instead, the Assembly passed the Bill by voice vote.

34. On February 23, 2024, the Bill was presented to the Governor.

35. On February 29, 2024, the Governor purported to partially veto the Bill, approving parts and striking out parts.

36. In the Governor's partial veto message of Act 100, he wrote: "I have approved Senate Bill 971 as 2023 Wisconsin Act 100 and have deposited it in the Office of the Secretary of State. I have exercised the partial veto with respect to sections 1 [as it relates to s. 20.255 (1) (fc) and s. [sic] 20.255 (2) (fc)], 2, 3, 4, and 5."

² JCF recommend passage of 2023 S.B. 971 on February 7, 2024, and JCF recommended passage of 2023 A.B. 1017 on February 14, 2024.

In explaining his partial veto of the Bill, the Governor referred to Senate Bill 971 as a “proposed appropriation structure.”³

37. The Governor purported to partially veto § 1 as follows, with the Governor’s partial veto indicated by strikethrough:

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

~~teaching~~ 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.

38. The Governor purported to partially veto § 2 as follows:

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

2023 Wis. Act 100, § 2.

39. And the Governor entirely struck § 4:

~~20.255(2)(fc) *Early literacy initiatives; support.* Biennially, the amounts in the schedule for grants under s. 118.015 (1m) (e) 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, § 4.

³ Veto Message from Governor Tony Evers to the Wisconsin State Senate (Feb. 29, 2024), available at https://docs.legis.wisconsin.gov/2023/related/veto_messages/2023_wisconsin_act_100.pdf.

40. 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).

41. Finally, 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.

42. 2023 Wisconsin Act 100, with the Governor's partial veto, was published on March 1, 2024. *See* Wis. Stat. § 991.11.

43. As partially vetoed by the Governor, Act 100 funds only: the Office of Literacy and a "literacy program." *See* 2023 Wis. Act 100.

44. Neither DPI, nor its Office of Literacy, have a so-titled "literacy program."⁴

45. The purported effect of the Governor's partial veto of Act 100 is that the partially vetoed text does not require that DPI use the funds allocated for the literacy coaching program, *see* Wis. Stat. § 115.39, for the grants for early literacy curriculum, *see* § 118.015(1m)(c), and for financial assistance to school boards and charter schools who provide particular professional development training in early reading instruction, that would be paid out by DPI, *see* 2023 Wis. Act 20, § 27(2)(a). DPI might instead treat any moneys directed to it as funds that can be used for the Office of Literacy and any "literacy program" as the office deems fit, which would be unlawful.

⁴ The only so-titled "literacy program" in the statutes is run by the Department of Health Services. *See* Wis. Stat. §§ 46.248, 46.011(1e).

46. On March 7, 2024, DPI submitted a request to JCF to release the funds set aside in the biennial budget in accordance with the partially vetoed version of Act 100.

47. Although the request seeks to fund in part 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.

48. JCF cannot be assured that the money it would specifically direct to DPI for the literacy programs created in Act 20, including §§ 115.39 and 118.015(1m)(c), will be spent on those programs.

49. Instead, any money directed for that purpose might (but should not) be treated by DPI as well as its Office of Literacy as a blank check to do as it pleases, believing that it is under no statutory obligation to fund either a literacy coaching program or the grant program to offset the cost of purchasing new literacy curriculum.

50. If Act 100 as enacted by the Legislature was regarded as law, JCF would release funds to DPI to fund the literacy programs created in Act 20 with the funds already appropriated in JCF’s supplemental appropriation.

51. Because Act 100 as enacted was unconstitutionally partially vetoed, JCF cannot supplement the new DPI appropriation account affected by the Governor’s partial veto because the partially vetoed version of that act is invalid.

CAUSE OF ACTION: COUNT I — DECLARATORY RELIEF

52. The Legislature incorporates and realleges paragraphs 1 through 51.

53. Under Wisconsin Statute Section 806.04(1), this Court has the “power to declare rights, status, and other legal relations,” including with respect to whether an act is unconstitutional.

54. The Legislature has an interest in ensuring that the legislation passed by the Legislature and not properly partially vetoed by the Governor carries the force of law as enacted.

55. The Legislature has an interest in ensuring that funds earmarked by the biennial budget bill are used as directed.

56. The Governor may exercise the partial veto only for an “appropriation bill.” *See* Wis. Const. art. V, § 10(1)(b)–(c).

57. And, when using the partial veto, the Governor cannot create new words or sentences while exercising the partial veto, and, at a minimum, any partial veto must leave “a complete, consistent, and workable scheme and law.” *See* Wis. Const. art. V, § 10(1)(c); *State ex rel. Wis. Telephone Co. v. Henry*, 218 Wis. 302, 260 N.W. 486, 491–92 (1935); *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685 (per curiam).

58. An appropriation bill must authorize an expenditure of public money or set aside funds for a particular purpose. *See State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622, 624 (1936); *Risser v. Klauser*, 207 Wis. 2d 176, 192–93, 558 N.W.2d 108 (1997).

59. Any appropriation bill must be passed in both the Senate and the Assembly “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.” Wis. Const. art. VIII, § 8. This is a “mandatory” duty; failure to follow it renders any statute wrongfully enacted “a nullity.” *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).

60. Act 100, as passed by the Legislature, empowers JCF to directly fund several DPI programs created by Act 20, with funds already appropriated in the biennial budget bill. This includes literacy coaching program, DPI’s Office of Literacy, grants for early literacy curriculum, and financial assistance to school boards and charter schools who provide particular professional development training in early reading instruction.

61. Act 100, as passed by the Legislature, does not set aside, authorize, or require the expenditure of any funds. Instead, it allows JCF to move the \$50 million appropriated and earmarked in the budget bill to DPI for DPI to use for specifically enumerated purposes.

62. Because Act 100, as passed by the Legislature, does not expend or set aside funds for a particular public purpose, it is not an appropriation bill.

63. Indeed, neither house of the Legislature treated the Bill as an appropriation bill. The Bill did not receive a roll-call vote of yeas or nays in either the Senate or the Assembly. No such vote is recorded in the Journal of either house. Under Article VIII, Section 8 of the Wisconsin Constitution, appropriation bills must be passed in both the Senate and the Assembly with a roll-call vote that records the yeas or nays.

64. Rather than choosing to sign or veto the Bill in its entirety, the Governor purported to “exercise[] the partial veto” with respect to certain sections of the bill despite his recognition that the Bill creates an “appropriation structure” rather than an actual appropriation.⁵

65. Article V, Section 10 of the Wisconsin Constitution provides the Governor with the power to exercise a partial veto only for bills passed by the Legislature that are “[a]ppropriation bills.” No other provision in the Wisconsin Constitution gives the Governor the power to exercise a partial veto.

66. The Governor’s exercise of a partial veto over the Bill, which is not an appropriation bill, is not a constitutional exercise of his veto power.

67. Act 100, as partially vetoed by the Governor, is therefore invalid and unconstitutional. *See Bartlett*, 2020 WI 68, ¶ 9.

68. Act 100, as enacted by the Legislature, should be in full force and effect. *See id.*

69. If the Governor believed the Bill were an appropriation bill, he should have requested that the Legislature recall the Bill. The Bill was not passed with a roll-call vote as required by Article VIII, Section 8 of the Wisconsin Constitution. Failure to comply with this provision renders any bill null. *See Gen. Motors Corp.*, 49 Wis. 2d at 322.

⁵ *Supra* note 3.

70. More, if the Governor believed the Bill was an appropriation bill, the Governor's partial veto of Act 100 exceeded his partial veto authority. *See Bartlett*, 2020 WI 68 (per curiam).

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff requests the following relief:

- A. A declaration that the Governor's partial veto of 2023 Act 100 is *ultra vires* and a nullity.
- B. Alternatively, a declaration that the Governor's partial veto of 2023 Act 100 is unconstitutional because it exceeds the scope of his partial-veto power.
- C. A declaration that 2023 Act 100, as enacted by the Legislature, is law.
- D. Temporary and permanent injunctive relief 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.
- E. Any other relief that this Court deems just and proper.

Dated: April 16, 2024

Respectfully submitted,

Electronically signed by Ryan J. Walsh

Ryan J. Walsh (WBN 1091821)

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