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D I S T R I C T I

Case No. 2024AP1713

WISCONSIN STATE LEGISLATURE,

Plaintiff-Counterclaim Defendant-
Respondent-Cross Appellant,

v.

WISCONSIN DEPARTMENT OF PUBLIC
INSTRUCTION and TONY EVERS,

Defendants-Counterclaim Plaintiffs-
Appellants-Cross Respondents.

APPEAL FROM A FINAL DECISION GRANTING
SUMMARY JUDGMENT ENTERED IN THE DANE
COUNTY CIRCUIT COURT, THE HONORABLE STEVEN
EHLKE, PRESIDING

**OPENING BRIEF OF THE DEPARTMENT OF
PUBLIC INSTRUCTION AND GOVERNOR EVERS**

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TABLE OF CONTENTS

INTRODUCTION	9
ISSUE PRESENTED BY THE GOVERNOR AND DPI'S APPEAL.....	10
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	11
STATEMENT OF THE CASE	11
I. 2023 Wisconsin Act 20 creates a literacy program and imposes responsibilities on DPI and local schools to implement it.	11
II. The Legislature sets aside \$50 million for a literacy program but credits the money to a JCF “emergency” appropriation rather than to DPI.....	12
A. The Legislature appropriates state money, typically through the biennial budget bill.....	13
B. Since at least 1989, the Legislature has increasingly used a JCF “emergency” appropriation to set aside money for anticipated expenses.....	13
1. Until around 1989, the emergency appropriation power is used for emergencies.....	14
2. After 1989, the Legislature begins to use JCF’s emergency appropriation for anticipated expenses.....	15
3. The amounts earmarked in JCF’s emergency appropriation are specified in JCF budget motions, captured in LFB summaries available to the Legislature, and reflected in gubernatorial vetoes.....	18

C.	2023 Wisconsin Act 19 sets aside \$50 million for DPI for purposes of a literacy program.....	20
D.	DPI asks JCF to release the Act 19 funds set aside for a literacy program, but almost all the funds remain held by JCF in its emergency appropriation.....	21
III.	The Legislature passes Senate Bill 971, which created new spending authority for DPI relating to literacy initiatives; Governor Evers partially vetoes the bill, and it is enacted as 2023 Wisconsin Act 100.	23
IV.	The Legislature sues the Governor on his partial veto of Act 100, and the Governor and DPI counterclaim for the \$50 million in literacy funding; the circuit court issues a split decision.....	25
ARGUMENT		27
I.	Wisconsin Stat. §§ 20.865(4)(a) and 13.101(3) do not empower JCF to block the transfer of non-emergency funding.....	28
II.	The Legislature's interpretation of Wis. Stat. §§ 20.865(4) and 13.101(3) would violate bicameralism and presentment principles and the separation of powers.....	30
A.	The Legislature's theory that JCF has discretion over this \$50 million would violate article VIII, § 2.....	31
1.	Only the full Legislature, not a legislative committee, can appropriate public money, and so JCF cannot have discretion over who spends the disputed \$50 million and how they spend it.....	31

2.	The Legislature and circuit court below offered no persuasive reason for why JCF could itself appropriate money.....	33
B.	JCF cannot constitutionally control the expenditure of appropriated money.....	35
1.	Spending appropriated money is a core executive power.	35
2.	Under the Legislature's view, JCF spends appropriated money, which is a core executive function.	36
C.	Out-of-state courts agree that schemes like the Legislature's idea are unconstitutional.....	38
III.	Under Wis. Stat. § 13.101(7), the disputed \$50 million should be transferred to DPI.....	41
CONCLUSION.....		45

TABLE OF AUTHORITIES

Cases

<i>Advisory Opinion In re the Separation of Powers</i> , 295 S.E.2d 589 (NC 1982)	40–41
<i>Bartlett v. Evers</i> , 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685.....	10
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986)	39
<i>Evers v. Marklein</i> , 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395 (“ <i>Evers I</i> ”)	35, <i>passim</i>
<i>J.F. Ahern Co. v. Wis. State Building Comm’n</i> , 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983).....	40
<i>McInnish v. Riley</i> , 925 So. 2d 174 (Ala. 2005)	38–39
<i>Risser v. Klauser</i> , 207 Wis. 2d 176, 558 N.W.2d 108 (1997)	32
<i>Serv. Emps. Int’l Union, Loc. 1 v. Vos</i> , 2020 WI 67, 393 Wis. 2d 38 946 N.W.2d 35.....	31
<i>State ex rel. Judge v. Legislative Finance Committee & Its Members</i> , 543 P.2d 1317 (Mont. 1975)	40
<i>State ex rel. Schneider v. Bennett</i> , 547 P.2d 786 (Kan. 1976).....	39–40

Constitutional Provisions

Wis. Const. art. IV, § 17.....	31
Wis. Const. art. V, § 4.....	35
Wis. Const. art. V, § 10	31
Wis. Const. art. V, § 10(b)(1)	10
Wis. Const. art. VIII, § 2.....	10, 13

Statutes

Wis. Stat. § 13.10	34
Wis. Stat. § 13.101	10
Wis. Stat. § 13.101(3).....	16, <i>passim</i>
Wis. Stat. § 13.101(3)(a)	15, 28, 29, 30
Wis. Stat. § 13.101(3)(a)1.–3.	34
Wis. Stat. § 16.47(1)–(1m).	18
Wis. Stat. § 20.255	24
Wis. Stat. § 20.255(1)(a)	22
Wis. Stat. § 20.255(1)(dw).....	32
Wis. Stat. § 20.255(1)(f)	22
Wis. Stat. § 20.255(1)(fc).....	22, 25, 44
Wis. Stat. § 20.385(1).....	15
Wis. Stat. § 20.625	32
Wis. Stat. § 20.765	32, 38
Wis. Stat. § 20.865(4).....	15, 16
Wis. Stat. § 20.865(4)(a)	9, <i>passim</i>
Wis. Stat. § 115.39(2).....	12
Wis. Stat. § 115.39(2)(a)	12
Wis. Stat. § 115.39(3).....	12
Wis. Stat. § 118.015(1m)(b)	12
Wis. Stat. § 118.015(1m)(c).....	11–12
Wis. Stat. § 118.016(2).....	11
Wis. Stat. § 118.016(3)(a)	11

Wis. Stat. § 118.016(3)(b)	11
Wis. Stat. § 118.016(9)(a)	11
Wis. Stat. § 118.016(9)(c)	11
Wis. Stat. § 118.40(2r)(e)2p.	24

Other Authorities

2023 Senate Bill 70	17
2023 Senate Bill 971	9, 23

INTRODUCTION

This case concerns a novel legislative effort to finance a policy program in a way that purports to grant continuing control over appropriated money to the Joint Committee on Finance (JCF) and evades the Governor’s partial veto power. The Legislature’s effort violates bicameralism and presentment and the separation of powers, and its view that the Governor cannot veto a statute creating an appropriation is unpersuasive.

On the eve of creating a new literacy program through 2023 Wis. Act 20, the Legislature set aside \$50 million in the 2023–25 budget bill (2023 Wis. Act 19) to pay for Act 20’s anticipated costs. But the Legislature did not create a DPI appropriation to authorize this spending and credit the \$50 million there. Instead, the Legislature credited the \$50 million to JCF itself, as part of reserved funds in the committee’s so-called “emergency” appropriation under Wis. Stat. § 20.865(4)(a). Later, in 2023 Wis. Act 100, which the Governor partially vetoed,¹ the Legislature created a new Act 20-related spending appropriation for DPI. But Act 100 left in JCF’s hands the funds dedicated to DPI by the budget act.

Act 20 is now in full swing, requiring DPI and local school districts to identify and implement literacy testing and curricula, develop an office of literacy, recruit dozens of literacy coaches, and undertake early reading instruction professional development. But virtually the entire \$50 million set aside to pay for those costs remains with JCF, purportedly subject to JCF’s unilateral choice about whether to keep the funds, release them, or transfer them elsewhere.

This litigation arises from two features of the Legislature’s interlocking trio of bills.

¹ Technically, the Governor partially vetoed 2023 Senate Bill 971, which, upon its enactment, became 2023 Wis. Act 100. For simplicity, this brief refers to the partially vetoed bill as “Act 100.”

The Legislature sued to challenge the Governor's partial veto of Act 100, arguing that Wis. Const. art. V, § 10(b)(1) did not allow a partial veto because the bill only created a new appropriation but did not credit any money to it; the Legislature separately argued that the Governor's particular vetoes violated *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685 (per curiam).

The Governor and DPI counterclaimed for the \$50 million set aside with JCF for Act 20's new literacy program, arguing that the Legislature may not constitutionally credit money to a legislative committee and then let that committee unilaterally decide how, when, and whether to spend it.

The circuit court issued a split decision, siding with the Governor and DPI on the partial veto claim and the Legislature on the status of the disputed \$50 million. Both parties appealed.

The Governor and DPI's opening brief explains why the Legislature cannot constitutionally put hundreds of millions of dollars in a JCF "emergency" appropriation for JCF to allocate as it wishes. Only the full Legislature appropriates public funds, which it does under Wis. Const. art. VIII, § 2, through bicameral passage and presentment to the Governor. If the funds are treated as appropriated public monies, only the executive branch, not a legislative committee, can determine how to allocate them. The literacy funds must be treated as within DPI's power to spend.

ISSUE PRESENTED BY THE GOVERNOR AND DPI'S APPEAL

Can JCF, consistent with article VIII, § 2, the separation of powers, and Wis. Stat. § 13.101, withhold from DPI the \$50 million set aside for DPI's literacy programs in the budget bill and credited to JCF's "emergency" appropriation?

The circuit court answered yes, and this Court should reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Given the statewide importance of the issues presented, both oral argument and publication would be warranted.

STATEMENT OF THE CASE

I. 2023 Wisconsin Act 20 creates a literacy program and imposes responsibilities on DPI and local schools to implement it.

On July 20, 2023, Governor Evers signed 2023 Wis. Act 20, which created a new statewide childhood literacy program that fundamentally reforms how reading is taught in Wisconsin schools. (A-App. 90, 98 (McCarthy Decl. ¶¶ 2, 28)). 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. (A-App. 91 (McCarthy Decl. ¶ 5)). Four of Act 20's features entail significant new costs.

First, starting with the 2024–25 academic school year, districts and charters must, using two separate screening assessments, assess the early literacy skills of 4K students at least twice each school year (Wis. Stat. § 118.016(2)) and assess the early literacy skills of grade K–3 students at least three times each school year (Wis. Stat. § 118.016(3)(a)). Districts and charters must also, using a diagnostic assessment, further assess students found to be at-risk. Wis. Stat. § 118.016(3)(b); (A-App. 91–92 (McCarthy Decl. ¶ 7)).

DPI must provide—at no cost—districts and charters with the two screening assessments. Wis. Stat. § 118.016(9)(c). And if districts and charters use a diagnostic assessment from a list approved by DPI, DPI must reimburse them for the per pupil cost of each diagnostic assessment. Wis. Stat. § 118.016(9)(a); (A-App. 92 (McCarthy Decl. ¶¶ 8–9)).

Second, Act 20 creates a strong financial incentive for districts, charters and choice schools to adopt literacy

curricula and instructional materials from a curriculum list approved by JCF. Wis. Stat. § 118.015(1m)(b), (c). DPI must reimburse districts, charters and choice schools for up to one-half of the costs of purchasing these materials. Wis. Stat. § 118.015(1m)(c); (A-App. 92–93 (McCarthy Decl. ¶ 10)).

Third, Act 20 requires the creation of an Office of Literacy in DPI to establish and supervise statewide early literacy coaches. Up to 64 qualified literacy coaches will be placed by DPI in districts, charters, and choice schools based on the results of standardized reading tests. Wis. Stat. § 115.39(2), (3). DPI's literacy office must contract with, and provide ongoing training to, these early literacy coaches. Wis. Stat. § 115.39(2)(a); (A-App. 93 (McCarthy Decl. ¶ 11)).

Fourth, Act 20 requires “early reading instruction” professional development by districts and charters for any teacher who teaches K–3; any principal of a school that offers K–3; and any reading specialist. 2023 Wis. Act 20, § 27(2); (A-App. 93 (McCarthy Decl. ¶ 12)). This training must be completed by July 1, 2025. *Id.*

Act 20 created no new authority for DPI to spend public money on the new literacy program and set aside no funds for the costs associated with these requirements.

II. The Legislature sets aside \$50 million for a literacy program but credits the money to a JCF “emergency” appropriation rather than to DPI.

The money ultimately meant to finance Act 20's new literacy program was not given directly to DPI. Instead, in a now-common maneuver, the Legislature instead placed \$50 million for DPI's literacy program in JCF's “emergency” appropriation. At the time, the Legislature's idea was that JCF—at its unilateral discretion—would later release the money to DPI to pay for Act 20. But so far that has not happened.

A. The Legislature appropriates state money, typically through the biennial budget bill.

Because “[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law,” Wis. Const. art. VIII, § 2, the Legislature must appropriate state money so that executive agencies can spend it. Most provisions setting aside money appear in the state’s biennial budget bill. Generally, that bill “sets the level of authorized state expenditures for a certain period of time (in Wisconsin, a fiscal biennium) and the corresponding level of revenues (particularly taxes) projected to be available to finance those expenditures.”²

B. Since at least 1989, the Legislature has increasingly used a JCF “emergency” appropriation to set aside money for anticipated expenses.

The Legislature has long recognized that acute emergencies might arise during the biennium that the budget bill cannot anticipate. So, it has historically assigned to various state entities the task of using small amounts of undesignated money to supplement agency appropriations for such emergencies.

But over the past few decades, the Legislature has increasingly used that appropriation not for emergencies, but rather to fund anticipated expenses through a legislative committee that purports to retain veto power over how the executive branch spends appropriated money.

² Wis. Legis. Fiscal Bureau, *State Budget Process*, Informational Paper, at 7 (Jan. 2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0078_state_budget_process_informational_paper_78.pdf. All pincites in this brief to PDF documents reference the PDF page number, not any internal page numbering system.

1. Until around 1989, the emergency appropriation power is used for emergencies.

Emergency appropriation funds originally rested with the executive branch: from at least 1925, the Governor, secretary of state and state treasurer could, by agreement, make “emergency appropriations” for:

unfor[e]seen emergencies and contingencies as a result of damage or disaster to works, buildings, or other property owned by the state, or as a result of epidemic of disease menacing the life and health of the people, or as a result of the lack of sufficient appropriations for state institutions with which to supply the necessary food, clothing, and necessary medical care.

1925 Wis. Laws ch. 443, § 1.

A few years later, this power shifted to the Emergency Board, made up of the Governor and co-chairs of the Legislature’s finance committee. In 1931, the Emergency Board was given the power to “supplement appropriations which shall prove insufficient because of unforeseen emergencies, or to supplement appropriations which shall prove insufficient to accomplish the purposes for which made.” 1931 Wis. Laws ch. 67, § 143. The provision moved around in chapter 20 before landing in Wis. Stat. § 20.865(4)(a), where it still resides today.

In 1949, in parallel with these chapter 20 provisions, the Legislature placed conditions on how the Emergency Board could exercise this supplemental appropriation power. It could

supplement the appropriation of any department, board, commission or agency which is insufficient because of unforeseen emergencies or insufficient to accomplish the purpose for which made, if the board finds:

- (a) That an emergency exists;
- (b) That no funds are available for such purposes in any appropriation; and
- (c) That the purposes for which a supplemental appropriation is requested have been authorized or directed by the legislature.

1949 Wis. Act 181, § 2 (creating Wis. Stat. § 14.72(2)). Requests for these supplemental appropriations had to be accompanied by a statement describing, among other things, the “nature of the emergency” for which the money was requested. *Id.*, § 3 (creating Wis. Stat. § 14.72(3)).

This power moved to JCF in 1975, where it remains in substantially the same form today in Wis. Stat. § 13.101(3)(a). *See* 1975 Wis. Act 39, § 8. The only meaningful change occurred in 1981, when a cross-reference was added to Wis. Stat. § 20.865(4): “The committee may supplement, *from the appropriations under s. 20.865 (4)*, the appropriation of any department, board, commission or agency, which is insufficient because of unforeseen emergencies or insufficient to accomplish the purpose for which made.” *See* 1981 Wis. Act 20, § 3h (added text in italics).

2. After 1989, the Legislature begins to use JCF’s emergency appropriation for anticipated expenses.

In budgets before 1989, the discretionary power to supplement agency appropriations was limited to “emergency” situations. *See, e.g.*, Wis. Stat. § 20.385(1) (1959–60) (setting aside \$1,000,000 for the 1960–61 biennium); 1987 Wis. Act 27 (setting aside \$920,400 for the 1988–89 biennium); (A-App. 59 (LFB document describing 1988–89 money as set aside to “meet emergency situations”).) But beginning in 1989, the Legislature increasingly began to use the emergency appropriation for anticipated expenses, effectively as a replacement for the ordinary appropriation process.

In this new pattern, the Legislature anticipates the need for specific agency expenses during the biennium and sets money aside. But rather than credit those funds to each agency, the Legislature instead sets aside this money as “reserve” funding credited to JCF’s emergency appropriation under Wis. Stat. § 20.865(4). This tactic purports to prevent the agency for which the money is set aside from spending it, until and unless JCF chooses to release the money under Wis. Stat. § 13.101(3).

Two legislative service agencies have noted how this novel practice contrasts with the historical use of the emergency appropriation. The Legislative Fiscal Bureau (LFB) explains:

During each biennial budget, funding is appropriated to the Committee’s GPR appropriation for emergency supplementation. In addition, the Legislature may also place funding for specific purposes in the Committee’s appropriations for release during the biennium pending Committee approval.³

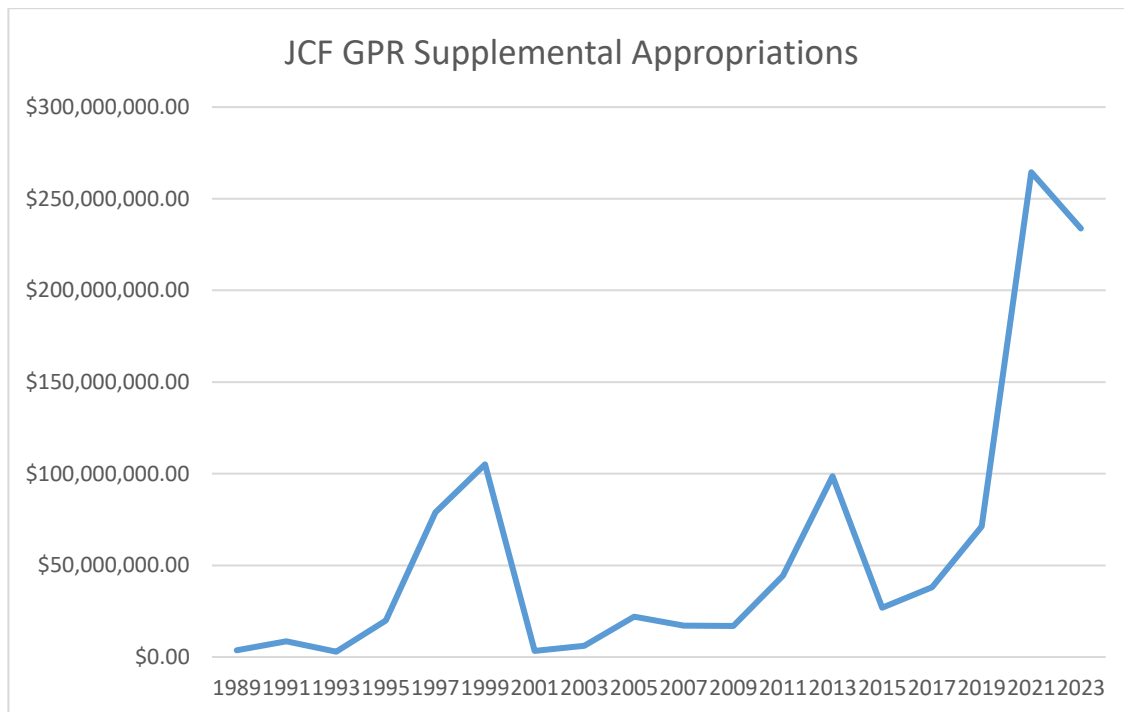
The Legislative Council made a similar observation:

JCF’s statutory authority to transfer or supplement funds was likely originally intended to address unforeseen circumstances necessitating changes to appropriation amounts. However, the Legislature’s recent approach of enacting appropriations and authorizing programs in separate enactments has made requests for such transfers and supplemental funding more routine. Legislative history for those two-step enactments demonstrates that the separate enactments have been introduced with an anticipated need for JCF to approve an agency’s request for transferred or supplemental funds to implement certain programs.

³ Wis. Legis. Fiscal Bureau, *Joint Committee on Finance*, Informational Paper No. 81, at 26 (Jan. 2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0081_joint_committee_on_finance_informational_paper_81.pdf.

(A-App. 77.) Neither legislative service agency identifies any statutory change that authorizes the transition in practice from using the emergency appropriation process as it was “originally intended”—i.e. to “address unforeseen circumstances”—to using it for “anticipated need[s],” as frequently happens now.

This novel use of JCF’s emergency appropriation authority has exploded since it began around the 1989–90 biennium, when the Legislature set aside around \$3.6 million for at least four anticipated purposes (*see* 1989 Wis. Act 31, § 193; A-App. 87–88):



(A-App. 39–50.)

For the 2023–25 biennium, the Governor’s proposed budget bill, 2023 S.B. 70, proposed \$267,200 as unreserved expenditure authority for emergency purposes, credited to JCF’s Wis. Stat. § 20.865(4)(a) emergency appropriation.⁴ But the version of the bill passed by the Legislature and presented

⁴ 2023 Wis. S.B. 70, at 506, <https://docs.legis.wisconsin.gov/2023/related/proposals/sb70.pdf>.

to the Governor for his signature was different: it credited over \$236 million in reserved GPR amounts, designated for 12 different agencies and 23 specific purposes, as well as \$267,200 in unreserved dollars, to that JCF appropriation.⁵

3. The amounts earmarked in JCF's emergency appropriation are specified in JCF budget motions, captured in LFB summaries available to the Legislature, and reflected in gubernatorial vetoes.

The specific purposes and recipient agencies for the money set aside in JCF's emergency appropriation—what the Legislature has called “earmarks” (A-App. 10)—are set out in JCF budget motions passed during the budget process. The details of those JCF motions are reflected in three places: (1) itemized budget summaries prepared by LFB and available to the full Legislature when it votes on the budget bill; (2) the Governor's vetoes of specific items set aside in that emergency appropriation, and (3) a LFB summary of the enacted budget law available to the public.

The biennial budget bill originates with the Governor and, when introduced in the Legislature for its consideration, is immediately referred to JCF. *See* Wis. Stat. § 16.47(1)–(1m). When JCF wants to alter some aspect of the Governor's proposed budget, it prepares a “motion to amend an agency's budget.”⁶ These “motions specifying intended changes are

⁵ *See, e.g.*, Wis. Legis. Fiscal Bureau, 2023–25 Wis. State Budget, *Summary of Provisions* 256–57 (July 2023), https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/102_summary_of_provisions_2023_act_19_july_2023_entire_document.pdf.

⁶ Wis. Legis. Fiscal Bureau, *State Budget Process*, Informational Paper No. 78, at 14 (Jan. 2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0078_state_budget_process_informational_paper_78.pdf.

considered and adopted and then ultimately incorporated into a revised budget bill.”⁷

For JCF’s emergency appropriation, the budget bill itself aggregates the amounts passed in the JCF motions. Before the Legislature’s vote, LFB “updates its summary of the biennial budget by itemizing each of the Committee’s changes to the Governor’s proposed budget on an agency-by-agency basis.”⁸ In the most recent budget bill, \$236 million was set aside in the emergency appropriation, reflecting the sum of amounts designated in JCF motions for specific agencies for specific purposes.⁹ An enumerated list of the items was included in LFB’s summary available while the Legislature was deliberating on the bill.¹⁰

Once the Governor receives the budget bill, he considers JCF’s emergency appropriation as part of his review and can mark down the amount to reflect the deletion or reduction of the money set aside for specific agencies for specific purposes. This practice of vetoing JCF’s “earmarks” dates back at least

⁷ Wis. Legis. Fiscal Bureau, *State Budget Process*, Informational Paper No. 78, at 17 (Jan. 2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0078_state_budget_process_informational_paper_78.pdf

⁸ Wis. Legis. Fiscal Bureau, *State Budget Process*, Informational Paper 78, at 15 (Jan. 2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0078_state_budget_process_informational_paper_78.pdf.

⁹ See generally *Joint Committee on Finance Budget Motions*, Wis. State Legislature, <https://docs.legis.wisconsin.gov/misc/lfb/ifcmotions/2023> (last visited Nov. 8, 2024).

¹⁰ Wis. Legis. Fiscal Bureau, 2023–25 Wis. State Budget, *Comparative Summary of Budget Recommendations*, at 438 (June 2023), https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/401_comparative_summary_of_budget_recommendations_governor_and_joint_committee_on_finance_june_2023_entire_document.pdf.

to 1999.¹¹ In the most recent budget, the Governor marked down the \$236 million by around \$3 million. His veto message reflected that the new total reflected the deletion of funding set aside in a JCF budget motion for the UW System.¹²

Once the budget act is passed, LFB prepares a public summary of the final, enacted budget law. It describes the “earmarks” in JCF’s budget motions—minus those partially vetoed by the Governor—as part of the law.¹³

C. 2023 Wisconsin Act 19 sets aside \$50 million for DPI for purposes of a literacy program.

The \$50 million set aside for DPI to finance Act 20’s new literacy program is one example of the Legislature’s use of the emergency appropriation for non-emergency purposes.

While considering the Governor’s proposed biennial budget bill—which ultimately became 2023 Wis. Act 19—JCF passed budget motion #103, titled “PUBLIC INSTRUCTION.”¹⁴ Item 7 in that motion read “Place \$50,000,000 GPR in the Joint Finance Committee

¹¹ See also, e.g., Wis. Legis. Fiscal Bureau, 1999–2001 Wis. State Budget, *Comparative Summary of Budget Provisions*, at 241 (Jan. 2000), https://docs.legis.wisconsin.gov/misc/lfb/budget/1999_01_biennial_budget/101_comparative_summary_of_budget_provisions_1999_acts_9_and_10_volume_2.

¹² Governor’s Veto Message, *State of Wis. S. J.*, July 25, 2023, https://docs.legis.wisconsin.gov/2023/related/veto_messages/2023_wisconsin_act_19.pdf.

¹³ See, e.g., Wis. Legis. Fiscal Bureau, 2023–25 Wis. State Budget, *Summary of Provisions* 256–57 (July 2023), https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/102_summary_of_provisions_2023_act_19_july_2023_entire_document.pdf.

¹⁴ *Public Instruction: Omnibus Motion*, Wis. State Legislature, https://docs.legis.wisconsin.gov/misc/lfb/jfcmotions/2023/2023_06_13/001_department_of_public_instruction/motion_103_omnibus_motion (last visited Nov. 8, 2024). JCF approved this motion at a June 13, 2023, executive session. 2023 Wis. S.B. 70, J. Comm. on Fin. (June 13, 2023), <https://docs.legis.wisconsin.gov/2023/related/records/joint/finance/1735973.pdf>.

supplemental appropriation for a literacy program.” LFB’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.”¹⁵

On July 5, 2023, the Legislature passed the revised version of the Governor’s proposed budget bill (including JCF’s changes) and sent it to the Governor for his signature. Although the Governor vetoed a different part of the emergency appropriation, he did not reduce the \$50 million set aside for DPI’s literacy program.

After 2023 Wis. Act 19 was enacted into law, LFB produced a summary of the budget act that enumerated all the specific items contained within the remaining \$233 million approved by the Governor, including the \$50 million set aside for the “Public Instruction” agency for the “Purpose” of “Literacy.”¹⁶

D. DPI asks JCF to release the Act 19 funds set aside for a literacy program, but almost all the funds remain held by JCF in its emergency appropriation.

Since Act 20’s enactment, DPI has worked to implement all of the law’s required provisions. But DPI’s ability to do so has been hindered by JCF’s failure to release to DPI most of

¹⁵ Wis. Legis. Fiscal Bureau, 2023–25 Wis. State Budget, *Comparative Summary of Budget Recommendations*, at 438 (June 2023), https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/401_comparative_summary_of_budget_recommendations_governor_and_joint_committee_on_finance_june_2023_entire_document.pdf.

¹⁶ Wis. Legis. Fiscal Bureau, 2023–25 Wis. State Budget, *Summary of Provisions*, at 257 (July 2023), https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/102_summary_of_provisions_2023_act_19_july_2023_entire_document.pdf.

the \$50 million appropriated for this work. (A-App. 94 (McCarthy Decl. ¶ 16).)

On November 22, 2023, DPI asked JCF to release \$327,400 of the \$50 million to fund a new position related to the literacy program. On December 5, 2023, JCF approved that request. (A-App. 94–95 (McCarthy Decl. ¶ 18, Ex. A).)

On March 7, 2024, DPI asked JCF to release the remaining \$49.7 million to DPI. To date, JCF has not released those funds. (A-App. 95 (McCarthy Decl. ¶ 19, Ex. B).)

Although DPI has multiple sources of spending authority, it needs the remaining \$49.7 million set aside in Act 19 to be credited to one of those sources to fund Act 20’s requirements.¹⁷ (A-App. 95–96 (McCarthy Decl. ¶¶ 20–22).)

One critical funding gap relates to Act 20’s early literacy coaches. To date, DPI has been unable to begin securing the 64 required early literacy coaches. These coaches are vitally important to the success of any of Act 20’s goals; without their expertise, the schools with the greatest literacy needs will not have adequate support to impose the needed changes to reading instruction required by Act 20. The longer these funds are withheld, the less time these coaches will have to assist in creating meaningful change at these schools. DPI’s best estimate is that, once it has the funds necessary to pay for these coaches, it will take a minimum of 90–120 days to identify qualified candidates and place the coaches in schools. (A-App. 97 (McCarthy Decl. ¶ 26).)

¹⁷ DPI has spending authority to carry out the literacy program under (1) Wis. Stat. § 20.255(1)(fc), the new spending authority created in 2023 Wis. Act 100; (2) its general authority in Wis. Stat. § 20.255(1)(a), “General program operations,” which allows DPI to spend for “the improvement of curriculum, instruction, and educational resources for local educational agencies and the improvement of library services”; and (3) Wis. Stat. § 20.255(1)(f), for reading-related programs.

In an effort to comply with Act 20's requirements, districts, charters, and choice schools are incurring costs for screeners, assessments, curricula, instructional materials, and professional development. DPI's ability to reimburse them depends on JCF's release of the remaining \$49.7 million. Absent reimbursement, districts, charters and choice schools will have to continue covering these costs using other funding sources, potentially leading to programming or staff cuts, short-term borrowing costs, or other consequences associated with unanticipated lost revenues. (A-App. 97–98 (McCarthy Decl. ¶ 27); *see also* McCarthy Suppl. Decl. ¶¶ 3–6)).

III. The Legislature passes Senate Bill 971, which created new spending authority for DPI relating to literacy initiatives; Governor Evers partially vetoes the bill, and it is enacted as 2023 Wisconsin Act 100.

Seven months after passing Act 20, the Legislature passed Senate Bill 971 ("S.B. 971"), which created new appropriations to authorize DPI spending on Act 20 programs. The Governor partially vetoed the bill, which became 2023 Wis. Act 100 after 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) (fe) of the statutes is created to read:~~

~~20.255 (2) (fe) *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).¹⁸~~

¹⁸ See 2023 Wis. Act 100, <https://docs.legis.wisconsin.gov/2023/related/acts/100>.

The Governor explained that he objected “to signing a bill with an apparent error that benefits only private choice schools and independent charter schools.”¹⁹ The formula that determines per pupil spending for private schools rests on spending authorizations in sub (2) of Wis. Stat. § 20.255. *See* Wis. Stat. § 118.40(2r)(e)2p. Unless exempted, every dollar placed in sub (2) of Wis. Stat. § 20.255, including the vetoed provision, increases the annual per-pupil adjustment for private schools. Section 4, then, would have given such schools a double benefit—eligibility for the new grants, plus an upward per-pupil spending adjustment—that public schools would not have received. The Governor therefore vetoed it.

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

¹⁹ Governor’s Veto Message, *State of Wis. S. J.*, Feb. 29, 2024, https://docs.legis.wisconsin.gov/2023/related/veto_messages/2023_wisconsin_act_100.pdf.

funding for various literacy needs based on the needs of Wisconsin schools.”²⁰

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 decisionmakers invest in improving reading instruction in Wisconsin.”²¹ So, the spending authority under Wis. Stat. § 20.255(1)(fc) (if not necessarily the funding itself) will continue indefinitely, unless a new law eliminates that authority.

IV. The Legislature sues the Governor on his partial veto of Act 100, and the Governor and DPI counterclaim for the \$50 million in literacy funding; the circuit court issues a split decision.

In response to the Governor’s partial veto of Act 100, the Legislature filed a declaratory judgment claim. The Legislature alleged that the partial veto was invalid for two

²⁰ Governor’s Veto Message, *State of Wis. S. J.*, Feb. 29, 2024, <https://docs.legis.wisconsin.gov/2023/related/journals/senate/20240229.pdf>.

²¹ Governor’s Veto Message, *State of Wis. S. J.*, Feb. 29, 2024, <https://docs.legis.wisconsin.gov/2023/related/journals/senate/20240229.pdf>.

reasons: (1) Act 100 supposedly was not an “appropriation bill” subject to partial veto under article V, § 10(1)(b); and (2) even if it was, the partial vetoes exceeded the scope of the Governor’s power under that provision. (A-App. 15–19.) As relief, they sought an order that Act 100 take effect as passed by the Legislature. (A-App. 19.)

The Governor and DPI filed a counterclaim against JCF’s co-chairs in their official capacities. They sought a declaratory judgment that JCF has improperly withheld from DPI the \$50 million that the budget bill set aside for DPI for a literacy program. (A-App. 145–49.) The Governor and DPI sought an order that the \$50 million be credited to DPI’s appropriations without being subjected to a JCF veto. (A-App. 150.)

The circuit court issued a split summary judgment decision.

The court held for the Governor and DPI on the Legislature’s partial veto claim. It rejected the Legislature’s attempt to “balkanize (or hide) the appropriation bill” by splitting into separate bills the new appropriations (in Act 100) and funding for those new appropriations (in Act 19). (A-App. 120.) It agreed that Act 100 was an “appropriation bill” subject to partial veto “because it allows for the transfer of money to DPI to fund various programs created under Act 20.” (A-App. 119.) And it rejected the argument that *Bartlett* prohibited this partial veto, concluding that the case “has no precedential effect” given how it “consists of pluralities and concurrences.” (A-App. 122.)

The court held for the JCF chairs on the Governor and DPI’s counterclaim. Although recognizing that the Legislature has used JCF as a “mini legislature outside the normal channels of the budget making process,” it found no constitutional problem with that fact. (A-App. 127.) Instead, it concluded that the Legislature validly “put funds into JCF’s

supplemental account for JCF to use to supplement funding at its discretion.” (A-App. 124.)

Following this split decision, the Governor and DPI appealed and the Legislature cross-appealed.

ARGUMENT

Through Act 19, the Legislature set aside \$50 million for DPI to fund Act 20’s literacy program, but it credited that money to JCF’s “emergency” appropriation in Wis. Stat. § 20.865(4)(a). The Legislature asserts that JCF now can decide whether to give any of that money to DPI under Wis. Stat. § 13.101(3) or to redirect it to other agencies or purposes. That reading is not supported by the statutes, and if the statutes read as the Legislature wished, they would violate the Wisconsin Constitution. The only way to rectify the constitutional dilemma is to order that the Governor may transfer the remaining funds reserved for DPI to that agency, not subject to a JCF veto.

The Legislature’s position has no stopping point. It would allow the legislative branch to finance programs like Act 20 without ever appropriating money to the agencies charged with administering them. The Legislature could first “appropriate” money to JCF for generic “supplemental funding” purposes, and then JCF could decide whether and how to “supplement” agency funding to administer those programs. Taken to its logical conclusion, this view would allow JCF to appropriate virtually all incoming state revenue outside the lawmaking process and bypass the executive branch’s core power to execute the law. That cannot possibly be correct.

I. Wisconsin Stat. §§ 20.865(4)(a) and 13.101(3) do not empower JCF to block the transfer of non-emergency funding.

The Legislature's argument fails because it relies on inapplicable statutes for JCF's supposed power to withhold the disputed literacy funding from DPI. The Legislature's basic problem is that those statutes—Wis. Stat. §§ 13.101(3) and 20.865(4)(a)—give JCF discretionary power only over funds for unanticipated emergencies. But there is no dispute that DPI's need for this literacy funding was anticipated from the moment Act 19 set the money aside. At bottom, neither provision envisions JCF, at its unilateral discretion, doling out tens of millions of dollars for anticipated purposes.

The text of Wis. Stat. §§ 13.101(3) and 20.865(4)(a) reveal that they work in tandem to address “emergency” situations, not planned uses.

Section 13.101(3) says that JCF “may supplement, from the appropriations under s. 20.865 (4), the appropriation of any department, board, commission or agency, *which is insufficient because of unforeseen emergencies* or insufficient to accomplish the purpose for which made, if the committee finds that,” among other thing “[a]n emergency exists.” Wis. Stat. § 13.101(3)(a). And section 20.865(4)(a) correspondingly says that “[t]here is appropriated to the joint committee on finance” GPR funds “to be used to supplement appropriations of the general fund which prove insufficient *because of unforeseen emergencies* or which prove insufficient to accomplish the purposes for which made.” Wis. Stat. § 20.865(4)(a).

Both statutes relate only to money for unforeseen emergencies, a situation bearing no resemblance to the disputed \$50 million here. From the moment Act 19 set aside this \$50 million for a literacy program, the Legislature anticipated DPI's need for this money. JCF's own co-chairs attested that, during the budget process, they anticipated how

DPI would need this money to pay for “the forthcoming literacy programs created by 2023 Wis. Act 20.” (R. 36:1 ¶ 4; 37:1 ¶ 4.) Moreover, the Legislature was considering Acts 19 and 20 at the same time, and it passed Act 20—which itself contained no appropriations—just weeks after Act 19. There is simply no question that the Legislature knew DPI would need the \$50 million when it passed Acts 19 and 20. Because Wis. Stat. § 13.101(3) grants JCF discretion only over money meant for unanticipated emergencies, it does not apply to the \$50 million at issue here. (R. 39:43–44.)

The de minimis amount the Legislature set aside for true emergency situations provides a helpful contrast. The vast majority of the \$236 million Act 19 set aside in JCF’s emergency appropriation was “reserved” for specific agencies and purposes, like DPI’s \$50 million in literacy funding.²² Act 19 set aside a comparatively small amount—\$267,200—as “unreserved” funding, set aside for no specific agency or purpose. For that exact reason, JCF has statutory discretion over this smaller pool of money. Because that \$267,200 was set aside with no designated purpose, JCF has discretion over whether to use it to supplement agency appropriations in true emergency situations under Wis. Stat. §§ 20.865(4)(a) and 13.101(3). That is consistent with the historical role of JCF and its predecessors to address such emergencies. Asserting discretion over money intentionally set aside for non-emergencies, though, is a recent innovation that finds no statutory support.

Below, the Legislature offered only one counterargument: that the literacy funding falls within the “insufficient to accomplish the purpose for which made” prong

²² Wis. Legis. Fiscal Bureau, 2023–25 Wis. State Budget, *Comparative Summary of Budget Recommendations*, at 438 (June 2023), https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/401_comparative_summary_of_budget_recommendations_governor_and_joint_committee_on_finance_june_2023_entire_document.pdf.

of Wis. Stat. § 13.101(3)(a). But that prong was plainly also designed for unanticipated shortfalls in an agency's appropriation, not ones manufactured (like here) by the Legislature's own choice to create a new policy program but not appropriate money to the agency to pay for it.

The text of both Wis. Stat. §§ 13.101(3)(a) and 20.865(4)(a) make this clear. For one, Wis. Stat. § 13.101(3)(a) always requires that “[a]n emergency exists”: it mandates that the provision’s “insufficient to accomplish the purpose for which made” prong come with a finding that an “emergency exists,” which necessarily does not cover designed shortfalls. And as for Wis. Stat. § 20.865(4)(a), it only covers “appropriations . . . which *prove* insufficient to accomplish the purposes for which made.” When (as here) the verb “prove” is used without an object, it means “to turn out” or “to be found by trial or experience to be.” *Prove*, [dictionary.com/browse/prove](https://www.dictionary.com/browse/prove) (last visited Nov. 11, 2024). So, an appropriation can only “prove insufficient” based on events that occur after it is initially made. Again, that does not cover situations like these, where the Legislature intends an agency’s appropriation to be insufficient from the very beginning by instead placing funding with JCF.

In short, JCF has no statutory discretion over the \$50 million reserved for DPI to carry out Act 20’s literacy program. The Governor should therefore be able to direct that the money be transferred to DPI for that purpose.

II. The Legislature’s interpretation of Wis. Stat. §§ 20.865(4) and 13.101(3) would violate bicameralism and presentment principles and the separation of powers.

If Wis. Stat. §§ 20.865(4) and 13.101(3) were instead read to grant JCF discretion over this literacy funding, the provisions would be unconstitutional as applied here, for two reasons.

First, if JCF can send this \$50 million in its “emergency” appropriation to any agency for any purpose (as the Legislature argues), JCF would be the entity appropriating the money, not the full Legislature. That would violate article VIII, § 2, which provides that appropriations shall be made “by law”—that is, through a law passed by both houses and signed by the Governor.

Second, if this money was appropriated to JCF (again, as the Legislature argues), then JCF cannot then decide how to spend that appropriated money without usurping executive branch authority. With only a few narrow exceptions, it is the executive branch’s job to spend appropriated money like the \$50 million at issue here.

A. The Legislature’s theory that JCF has discretion over this \$50 million would violate article VIII, § 2.

1. Only the full Legislature, not a legislative committee, can appropriate public money, and so JCF cannot have discretion over who spends the disputed \$50 million and how they spend it.

Under article VIII, § 2 of Wisconsin’s constitution, an appropriation can be made only through the enactment of a statute: “[n]o money shall be paid out of the treasury except in pursuance of an appropriation *by law*.” This provision “gives the legislature”—that is, the full Legislature—“the general power to spend the state’s money by enacting laws.” *Serv. Emps. Int’l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶¶ 68–69, 393 Wis. 2d 38, 946 N.W.2d 35. Such laws, like all others, must be passed by both houses of the Legislature and presented to the Governor, before they take effect—the constitutional requirements of bicameralism and presentment. *See* Wis. Const. art. IV, § 17; Wis. Const. art. V, § 10.

In turn, an “appropriation” entails money set aside for a “specified object” such that “executive officers”²³ can spend it. *Risser v. Klauser*, 207 Wis. 2d 176, 192, 558 N.W.2d 108 (1997). In other words, when the Legislature appropriates money, it almost always specifies two things: (1) which executive agency will receive the money; and (2) which of the agency’s appropriations will receive the money (which, in turn, define the purposes for which the money can be spent).

As one illustrative example of a normal appropriation, Act 19 appropriated just over \$30 million to DPI’s appropriation under Wis. Stat. § 20.255(1)(dw) for DPI to finance costs associated with standardized testing for students in fourth grade and above. 2023 Wis. Act 19, § 51 (see chapter 20 schedule for DPI appropriations). That \$30 million received both aspects of an appropriation: the full Legislature gave it a “specified object” (standardized testing) and specified “executive officers” who could spend it (DPI).

Contrast that appropriation with the Legislature’s theory about the \$50 million here. As the Legislature argued below, that money, which now sits in JCF’s appropriation under Wis. Stat. § 20.865(4)(a), “does not belong to any executive agency” and JCF can “move any of these funds from its supplemental account to DPI’s account, or that of *any other agency*.” (R. 34:32 (emphasis added).) In other words, no executive officers can spend this \$50 million sitting in JCF’s appropriation and the money has no legislatively determined purpose.

²³ To be sure, the Legislature sometimes properly appropriates money to the legislative and judicial branches to fund those branches’ operating expenses. See, e.g., Wis. Stat. §§ 20.625 (appropriations to circuit courts for “court operations”), 20.765 (appropriations to Legislature for costs associated with the “enactment of state laws,” “service agencies,” and “capitol offices relocation”). The money at issue here was, undisputedly, not given to JCF to pay for any legislative operating expenses.

Who, then, determines these two key aspects of an appropriation for that money? Not the full Legislature via Act 19, as the Legislature itself argues. It must therefore be JCF, a legislative committee. JCF would be deciding that (1) \$50 million in its emergency appropriation should go to DPI (or some other agency altogether), and (2) that the money should be placed in DPI's Act 20-related appropriation (or some other agency's appropriation, for a totally different purpose). That amount of discretion over the \$50 million is functionally indistinguishable from what happened when, in the example above, the full Legislature decided through enacting Act 19 that roughly \$30 million in general purpose revenue would be placed in DPI's appropriation for standardized testing.

Allowing JCF that kind of discretion over the \$50 million would violate article VIII, § 2. Only the Legislature can make appropriations, and it must do so "by law"—that is, through a law passed through bicameralism and presented to the Governor for his signature or veto. So, only the full Legislature, by law, can pick which agencies receive state money and for what purposes. JCF cannot itself do so by a committee vote, which is exactly what would happen if JCF can determine who receives the disputed \$50 million and for what purpose.

2. The Legislature and circuit court below offered no persuasive reason for why JCF could itself appropriate money

Below, the Legislature and circuit court both homed in on a theory that allowing JCF to dictate both components of an appropriation complied with article VIII, § 2, because Wis. Stat. § 13.101(3) contains so-called "procedural and substantive safeguards." (R. 49:17; *see also* R. 56:17 (finding "enough interaction between the executive and legislative branches to pass constitutional muster").) In effect, the Legislature argued that this scheme survives constitutional

scrutiny because JCF merely “transfer[s] money already appropriated.” (R. 34:38.)

That argument fails because it cannot get around the core problem under article VIII, § 2: even under Wis. Stat. § 13.101(3), JCF still determines both aspects of an appropriation: (1) which agencies receive money and (2) for what purposes. That is clear from the face of the statute itself: it says JCF “may supplement . . . the appropriation of any department, board, commission or agency.” That statutory text places no substantive limitation whatsoever on which agency or which appropriations JCF can choose to “supplement.” That statutory silence results in the kind of discretion that effectively allows JCF to itself appropriate money.

The only “safeguards” that Wis. Stat. § 13.101(3) ostensibly contains are procedural and have nothing to do with the two substantive appropriation components. JCF must find that an “emergency exists,” that “[n]o funds are available for such purposes,” and that “[t]he purposes for which a supplemental appropriation is requested have been authorized or directed by the legislature.” Wis. Stat. § 13.101(3)(a)1.–3. And JCF may “supplement an appropriation only for the fiscal biennium during which the committee takes the action to supplement the appropriation.” Wis. Stat. § 13.101(3)(b). Even if JCF followed all these procedures, it could still give money to any agency for any purpose—that is, determine both components of an appropriation.²⁴

And JCF (enabled by the full Legislature) ignores these procedures, in any event. Act 19 placed over \$236 million in JCF’s “emergency” appropriation for anticipated purposes (including the disputed \$50 million for DPI’s literacy

²⁴ Similarly, Wis. Stat. § 13.10 generally governs JCF procedure and places no substantive limits on its power.

program). None of that \$236 million involves money set aside for JCF to spend on unanticipated emergencies, as Wis. Stat. § 13.101(3) envisions. JCF and the Legislature simply ignore the statute's so-called "safeguards" and instead use JCF's emergency appropriation as a way to allow JCF to function as a "mini-legislature," as even the circuit court recognized. (R. 56:19.)

At bottom, the Legislature's "procedural safeguards" theory finds no support in the constitutional text. Article VIII, § 2, requires appropriations to occur "by law," not through a legislative committee like JCF. No amount of "procedural safeguards" can relax that baseline constitutional requirement.

B. JCF cannot constitutionally control the expenditure of appropriated money.

The Legislature's theory is unconstitutional in a second way. It is the executive branch's core constitutional role to spend appropriated money, leaving aside the narrow context of money appropriated to the legislative and judicial branches for operating expenses. So, even if the Legislature is correct that it appropriated money to JCF which then simply spends the appropriated money on purposes specified by Wis. Stat. § 13.101(3), then that means JCF is usurping the executive power of spending appropriated money.

1. Spending appropriated money is a core executive power.

"Each branch is "'vested' with a specific core governmental power." *Evers v. Marklein*, 2024 WI 31, ¶ 9, 412 Wis. 2d 525, 8 N.W.3d 395 ("*Evers I*") (citation omitted). The legislative branch's core power is "the authority to make laws, but not to enforce them." *Id.* ¶ 12 (citation omitted). By contrast, the executive branch's core power is to "take care that the laws be faithfully executed," Wis. Const. art. V, § 4. Those core powers "are not for sharing," and "any exercise" of

one branch's core power by another "is unconstitutional." *Evers I*, 412 Wis. 2d 525, ¶ 10 (citation omitted).

One core executive power is the power to spend appropriated money. Once the Legislature acts to "[c]ontrol[] the expenditure of state funds through lawmaking," authority passes to the executive branch "to effectuate the policies passed by the legislature." *Evers I*, 412 Wis. 2d 525, ¶¶ 14–15. So, while the "legislature [has] the power to appropriate funds," "the power to spend appropriated funds in accordance with the law enacted by the legislature lies solely within the core power of the executive to ensure the laws are faithfully executed." *Id.* ¶ 18. Accordingly, a legislative committee cannot "make spending decisions for which the legislature has already appropriated funds and defined the parameters by which those funds may be spent." *Id.* ¶ 19.

2. Under the Legislature's view, JCF spends appropriated money, which is a core executive function.

Here, the Legislature has defended JCF's discretion over the disputed \$50 million by arguing that Act 19 "appropriat[ed] over \$250 million to JCF's supplemental-funding account for the purpose of JCF's providing supplemental funding to governmental units under Section 13.101(3)." (R. 49:15.) That is, the Legislature says that DPI is not entitled to the \$50 million because this money was instead appropriated to JCF for the purposes outlined in Wis. Stat. § 13.101(3).

But, if true, that would mean JCF exercises the core executive power to spend appropriated money. Applying the principles from *Evers I*, the only proper legislative role would be twofold: (1) enacting Wis. Stat. § 13.101(3), a statute allowing the supplementing of agency budgets for emergency purposes; and (2) enacting a statute that appropriates money for those purposes. At that point, "the legislative process has

been completed and funds have been appropriated.” *Evers I*, 412 Wis. 2d 525, ¶ 23.

JCF’s role, however, goes beyond those two legislative tasks—JCF then decides how exactly the appropriated money should be allocated under Wis. Stat. § 13.101(3). That represents the “power to spend appropriated funds in accordance with the law” or, put differently, the power to “make spending decisions for which the legislature has already appropriated funds and defined the parameters by which those funds may be spent.” *Evers I*, 412 Wis. 2d 525, ¶¶ 18–19. That is a core executive function, and JCF cannot constitutionally exercise it.

Below, the Legislature tried to evade *Evers I* on the basis that the case involved money appropriated to an executive branch agency (there, DNR) rather than to a legislative committee. (R. 54:2–3.) See *Evers I*, 412 Wis. 2d 525, ¶ 3. In the Legislature’s view, *Evers I* therefore only prevents a legislative committee from blocking the expenditure of money appropriated to executive branch agencies. In essence, then, the Legislature contends that it can avoid *Evers I* simply by appropriating money to JCF (which can then allocate the appropriated funds however it wants), rather than to an executive agency like DNR or DPI.

That parsimonious reading of *Evers I* would allow the legislative branch to assume core executive power through a trivial adjustment: to simply appropriate money to JCF rather than to an executive agency. *Evers I* held that JCF could not veto DNR’s decisions about how to spend money appropriated to DNR to administer the Knowles-Nelson Stewardship Program. 412 Wis. 2d 525, ¶¶ 3–7. If the Legislature is right, it could resurrect the Knowles-Nelson veto by doing exactly what it has done with the disputed \$50 million here: channel all Knowles-Nelson funding through JCF’s emergency appropriation, subject to disbursement to

DNR pursuant to JCF's sole discretion under Wis. Stat. § 13.101(3).

Unsurprisingly, nothing in *Evers I* suggests that this stratagem would be constitutional. The case squarely held that “[o]nce the legislature appropriates funds for a particular purpose, the executive branch possesses the power to dole out those funds in accordance with the purposes outlined by the legislature.” *Evers I*, 412 Wis. 2d 525, ¶ 20. So, while the Legislature could permissibly appropriate money to an executive agency to execute a statute, it cannot appropriate money to a legislative committee to do so. The Legislature cannot hold both the power to appropriate and the power to decide how to spend that appropriation—even if it purports to do so through a statute like Wis. Stat. § 13.101(3).

The sole exception to this principle proves the rule. The Legislature may permissibly appropriate money to itself to fund its own operating expenses and then itself decide how to spend that money on things like staff, technology, and supplies. *See* Wis. Stat. § 20.765 (appropriating money to the Legislature for these purposes). But when the Legislature instead appropriates money to fund executive branch programs—as it did with the disputed \$50 million here—it cannot then also “make spending decisions for which the legislature has already appropriated funds and defined the parameters by which those funds may be spent.” *Evers I*, 412 Wis. 2d 525, ¶ 19.

C. Out-of-state courts agree that schemes like the Legislature's idea are unconstitutional.

Other states' courts have rejected schemes whereby a state legislature “appropriates” money but leaves it to the legislative branch to also decide how to spend that money.

In *McInnish v. Riley*, 925 So. 2d 174, 176, 177 (Ala. 2005), the Alabama high court reviewed a statute that appropriated funds to a legislative committee, from which

that committee could make grants as it chose. The plaintiff argued that “once a legislative body appropriate[s] funds, *its role ends* and it is for the *executive* branch to make the discretionary decisions as to how appropriated funds shall be expended.” *Id.* at 179 (emphasis in original). Alabama’s high court agreed, observing that the committee “exercises discretion and ‘judgment concerning facts that affect the application of the [statute]’” (just as JCF does here under Wis. Stat. § 13.101(3)) and that “[d]ecisions of [this] kind are typically made by officers charged with executing a statute.” *Id.* at 188 (citing *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)). When the process of both appropriating money and deciding how to spend it “begins and ends in the legislature”—as it did both in *McInnish* and with JCF here—that is an improper “encroachment of the executive powers reserved to the executive branch.” *Id.* at 188.

A similar pattern appears in *State ex rel. Schneider v. Bennett*, 547 P.2d 786, 794, 798–99 (Kan. 1976). There, the Kansas supreme court struck down a statute that appropriated money to a legislative committee to give out to executive branch agencies “for unanticipated and unbudgeted needs.” 547 P.2d at 794. Much like Wis. Stat. § 13.101(3), the statute provided “no standards” as to “the amount or the subject matter of the expenditures [the committee] may authorize.”

The court rejected this scheme, holding that it “confer[red] upon the [committee] the power to amend the provisions of appropriation acts and to authorize expenditures by the executive department in excess of limitations specifically fixed by the legislature with no adequate standards or guidelines to control the finance council in the exercise of its discretion.” *Id.* at 799. To be sure, the idea that procedural safeguards could entitle a legislative committee to appropriate money is inconsistent with Wisconsin’s modern, more robust separation of powers

analysis.²⁵ But it is notable that the Kansas statute (which resembles Wis. Stat. § 13.101(3)) flunked even this loose test.²⁶

And in *State ex rel. Judge v. Legislative Finance Committee & Its Members*, 543 P.2d 1317 (Mont. 1975), the Montana Supreme Court considered a statute that empowered a legislative finance committee to authorize spending by state agencies in excess of their appropriations, which is not meaningfully different from JCF's power to "supplement" agency appropriations under Wis. Stat. § 13.101(3). *Id.* at 1318. Montana's governor argued that the statute was unconstitutional: the committee was either spending money from the treasury without an appropriation or was exercising discretion exclusively reserved for the executive branch. *Id.* at 1319. The supreme court agreed, holding that the power to approve such budget amendments "resides in either the entire legislative body while in session, or, if properly delegated, in an executive agency." *Id.* at 1321.

Finally, in *Advisory Opinion In re the Separation of Powers*, 295 S.E.2d 589, 596 (NC 1982), the North Carolina Supreme Court opined on the constitutionality of a statute that empowered a joint legislative committee to determine whether to accept federal block grants and to determine how to spend those monies and distribute them among agencies, among other measures. *Id.* at 595. Granting the committee discretion over how to distribute the block grants—analogueous

²⁵ A case that *Evers I* overruled—*J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983)—cited *Schneider* as support for this kind of faulty functionalist analysis. See *Ahern*, 114 Wis. 2d at 104, 108; *Evers I*, 412 Wis. 2d 525, ¶¶ 26–27.

²⁶ The Legislature has pointed out that *Schneider* upheld a different Kansas statute, which allowed the same committee to authorize expenditures for "extraordinary conditions involving the public health or the protection of persons and property . . . in the event of a major disaster." (R. 49:17–18.) See *Schneider*, 547 P.2d at 798. That is nothing like JCF's control over the \$50 million here, which was set aside for the anticipated purpose of funding Act 20's literacy program.

to JCF's power under Wis. Stat. § 13.101(3)—was unconstitutional for one of two reasons: either “the committee would be exercising legislative functions” outside the lawmaking process or it “would be exercising authority that is executive or administrative in character.” *Id.* at 596. The court recognized that, after the full Legislature exercises its “power to enact a budget” and “appropriate[s] funds,” it is the executive branch’s job to administer that budget. *Id.*

These cases share a common reasoning that underscore the flaws in the Legislature’s theory here: once the legislative branch appropriates public money, a committee cannot allocate those funds because that power lies with solely with the executive branch. Likewise, a legislative committee cannot itself decide how to spend state money outside the lawmaking process. Such schemes violate the constitution in both ways.

* * *

In sum, the Legislature’s view that JCF has discretion over the disputed \$50 million would mean that Wis. Stat. §§ 13.101(3) and 20.865(4)(a) are unconstitutional as applied here in two ways. First, JCF would be choosing which agency receives the money and for what purpose rather than the full Legislature, thereby violating article VIII, § 2. Second, a legislative committee would be performing the core executive task of spending money appropriated by the Legislature. Either way, JCF cannot constitutionally retain discretion over the money.

III. Under Wis. Stat. § 13.101(7), the disputed \$50 million should be transferred to DPI.

Possibly foreseeing the constitutional problems with financing an executive branch program through Wis. Stat. §§ 13.101(3) and 20.865(4)(a), the Legislature enacted Wis. Stat. § 13.101(7), which amounts to a saving provision that favors preserving the underlying appropriation at issue and

delivering it to the executive branch rather than invalidating the appropriation altogether:

If the provision relating to release by the committee is invalid, the appropriation or portion of the appropriation which is subject to such release shall not be invalidated but shall be considered to be made without any condition as to time or manner of release.

Wis. Stat. § 13.101(7).

The “provision relating to release by the committee”—here, Wis. Stat. § 13.101(3)—would be “invalid” as-applied if read to grant JCF discretion over the disputed \$50 million. So, the \$50 million “appropriation” that is “subject to such release” under Wis. Stat. § 13.101(3) “shall be considered to be made without any condition as to time or manner of release.”

The legislative history of Act 19 makes clear where the \$50 million appropriation should be “considered to be made” under this saving provision: to DPI for Act 20’s literacy program. More specifically, the budget motion passed by JCF during the process of drafting and enacting Act 19 specified that this \$50 million was “reserved” for DPI for a literacy program.²⁷ The relevant budget motion here was #103, titled “PUBLIC INSTRUCTION.” It provided that \$50 million was being set aside in JCF’s emergency appropriation for a “literacy program.”²⁸

²⁷ Wis. Legis. Fiscal Bureau, 2023–25 Wis. State Budget, *Comparative Summary of Budget Recommendations*, at 438 (June 2023), https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/401_comparative_summary_of_budget_recommendations_governor_and_joint_committee_on_finance_june_2023_entire_document.pdf.

²⁸ *Public Instruction: Omnibus Motion*, Wis. State Legislature, https://docs.legis.wisconsin.gov/misc/lfb/jfcmotions/2023/2023_06_13/001_department_of_public_instruction/motion_103_omnibus_motion (last visited Nov. 11, 2024).

Wisconsin's budget process treats money reserved for executive branch agencies through JCF budget motions as incorporated into the budget bill. As LFB explains, JCF's "motions specifying intended changes [to the budget] are considered and adopted and then ultimately incorporated into a revised budget bill"²⁹ through LFB's interim budget summaries, which are prepared for the Legislature's consideration while the Legislature deliberates and votes on its proposed budget bill. These motions enumerate each agency and purpose for the money earmarked in the motions, and LFB then describes each amount as "reserved"³⁰ for specified agencies for specified purposes.³¹ And LFB's public summary of the final, enacted budget law describes the contents of the budget motions—minus those partially vetoed by the Governor—as part of the law.

Here, the final summary for Act 19 itemized the reserved amounts in JCF's "emergency" appropriation and explained that "[a]fter the Governor's partial veto, funding under Act 19 is reserved for the following items." That

²⁹ Wis. Legis. Fiscal Bureau, *State Budget Process*, Informational Paper No. 78, at 17 (Jan. 2023), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0078_state_budget_process_informational_paper_78.pdf.

³⁰ Like the term "earmark," "reserved" means "kept or set apart for some particular use or purpose." See <https://www.dictionary.com/browse/reserved>.

³¹ See, e.g., Wis. Legis. Fiscal Bureau, 2023–25 Wis. State Budget, *Comparative Summary of Provisions*, at 698–99 (Aug. 2023), https://docs.legis.wisconsin.gov/misc/lfb/budget/2023_25_biennial_budget/202_comparative_summary_of_provisions_2023_act_19_august_2023_entire_document. In the past, LFB has also described this money similarly as "reserved for release by the Committee at a later date for the purposes and agencies indicated." Wis. Legis. Fiscal Bureau, 1999–2001 Wis. State Budget, *Comparative Summary of Budget Provisions*, at 239 (Jan. 2000), https://docs.legis.wisconsin.gov/misc/lfb/budget/1999_01_biennial_budget/101_comparative_summary_of_budget_provisions_1999Acts9and10Volume2.

summary included the \$50 million that JCF's budget motion #103 set aside for DPI for a literacy program.

The Legislature's Complaint in this case agreed: it described that \$50 million as "earmarked^[32] to fund the literacy programs that were later created by 2023 Wis. Act 20." (R. 3:7 ¶ 22.) Likewise, both of JCF's co-chairs averred that the money was meant for "the forthcoming literacy programs created by 2023 Wis. Act 20." (R. 36:1 ¶ 4; 37:1 ¶ 4.)

Given this clear legislative history, there is no doubt that the disputed \$50 million was meant for DPI to pay for Act 20's literacy program. So, under Wis. Stat. § 13.101(7), that is where it should "be considered to be made," without being subject to JCF's discretion under Wis. Stat. § 13.101(3). This Court should order the transfer of the remaining \$49,672,600 (the \$50 million less the \$327,400 already released by JCF) to DPI's appropriation in Wis. Stat. § 20.255(1)(fc), which authorizes spending on childhood literacy programs.

* * *

The saving provision in Wis. Stat. § 13.101(7) was tailor-made for a situation like this. JCF cannot constitutionally control the \$50 million at issue here, but the Legislature expressed a preference that the remedy is not to eliminate that appropriation altogether. Rather, the money should be delivered where every piece of legislative history indicates it was intended to go: to DPI, to pay for Act 20's literacy program.

³² To "earmark" something means to "set aside for a specific purpose or recipient." *Earmark*, Black's Law Dictionary (11th ed. 2019).

CONCLUSION

The circuit court's decision granting summary judgment to the Legislature on the Governor and DPI's counterclaim should be reversed.

Dated this 11th day of November 2024.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 9827 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 11th day of November 2024.

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