

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

Nancy Bartlett, *et al.*

Petitioners,

v.

Tony Evers, in his official capacity as
Governor of the State of Wisconsin, *et al.*

Respondents.

**JOINT STIPULATION OF FACTS AND JOINT
STATEMENT THAT THERE ARE NO MATERIAL
DISPUTED FACTS**

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

WISCONSIN INSTITUTE
FOR LAW & LIBERTY
330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202
(414) 727-9455
rick@will-law.org

Attorneys for Petitioners

Joshua L. Kaul
Attorney General of Wisconsin
Maura FJ Whelan
Assistant Attorney General
State Bar #1027974
Colin T. Roth
Assistant Attorney General
State Bar #1103985
WISCONSIN DEPARTMENT
OF JUSTICE
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-3859
(608) 267-2223 (Fax)
whelanmf@doj.state.wi.us

Attorneys for Respondents

In its order dated August 5, 2019, this Court ordered the parties to file (1) “a stipulation of all relevant facts”; and (2) “a joint statement or separate statements that specify what factual issues are in dispute and how those disputed factual issues are relevant to the legal issues set forth in the amended petition.” Order 2 (Aug. 5, 2019).

Pursuant to that order, the parties submit the following joint stipulation of facts and joint statement that there are no material disputed facts.

JOINT STIPULATION OF FACTS

PARTIES

1. Petitioner Nancy Bartlett is an adult citizen of the State of Wisconsin residing at 915 Tamarack Way, Verona, WI 53593. She is a Wisconsin taxpayer.

2. Petitioner Richard Bowers, Jr., is an adult citizen of the State of Wisconsin residing at 4625 Pine Tree Road, Hobart, WI 54155. He is a Wisconsin taxpayer.

3. Petitioner Dr. Ted Keneklis is an adult citizen of the State of Wisconsin residing at 233 N. Broadway, Suite M, De Pere, WI 54115. He is a Wisconsin taxpayer.

4. Respondent Tony Evers is the Governor of Wisconsin and partially vetoed the legislation challenged in this suit. Governor Evers' official address is 115 East, State Capitol, Madison, WI 53702. Governor Evers is sued in his official capacity.

5. Respondent Joel Brennan is the Secretary of the Wisconsin Department of Administration ("DOA"), an administrative agency of the State of Wisconsin. Secretary Brennan's official address is 101 E. Wilson Street, 10th Floor, Madison, WI 53703. Secretary Brennan is sued in his official capacity.

6. Respondent DOA is an administrative agency and is the state agency responsible for administering parts of the legislation challenged in this suit. *See* 2019 Wis. Act 9, §§ 55c, 9101(2i). Its offices and principal place of business are located at 101 E. Wilson Street, 10th Floor, Madison, WI 53703.

7. Respondent Craig Thompson is the Secretary of the Wisconsin Department of Transportation (“DOT”), an administrative agency of the State of Wisconsin. Secretary Thompson’s official address is 4822 Madison Yards Way, Madison, WI 53707. Secretary Thompson is sued in his official capacity.

8. Respondent DOT is an administrative agency and is the state agency responsible for administering parts of the legislation challenged in this suit. *See* 2019 Wis. Act 9, §§ 126, 184s, 1095m, 1988b. Its offices and principal place of business are located at 4822 Madison Yards Way, Madison, WI 53707.

9. Respondent Peter Barca is the Secretary of the Wisconsin Department of Revenue (“DOR”), an administrative agency of the State of Wisconsin. Secretary Barca’s official address is 2135 Rimrock Road, Madison, WI 53713. Secretary Barca is sued in his official capacity.

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

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

FACTUAL BACKGROUND

11. On June 25 and 26, 2019, the Wisconsin State Assembly and Senate, respectively, passed the legislation constituting the 2019–21 biennial budget. *See* 2019 Assembly Bill 56, *History*, Wisconsin State Legislature, <https://docs.legis.wisconsin.gov/2019/proposals/reg/asm/bill/ab56>.

12. The budget was then presented to the governor, who signed it with partial vetoes on July 3, 2019. *Id.* On July 4, 2019, Act 9 was published. *Id.*

13. Petitioners assert that four of the Governor’s partial vetoes exceeded his partial veto authority and violated the Wisconsin Constitution. The Respondents assert that the Governor had and has the legal authority for each of the partial vetoes being challenged by the Petitioners.

THE FOUR CHALLENGED VETOES

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

14. On October 25, 2016, the United States District Court for the Northern District of California entered a partial consent decree in *In re Volkswagen*, Case No. 16-cv-295, M.D.L. No. 3:15-2672 CRB (JSC) (N.D. Cal.), 2016 WL 6442227. The partial consent decree created an Environmental Mitigation Trust. See 2016 WL 6442227, *2. The State of Wisconsin is a beneficiary of that trust. See Wis. Stat. § 16.047(1). On May 1, 2018, the State submitted its Wisconsin Beneficiary Mitigation Plan to the Volkswagen Environmental Mitigation Trust as required by the partial consent decree. See 2016 WL 6442227, *106.

15. Two sections of Act 9 directed the use of certain funds obtained by the state in the litigation settlement with Volkswagen. See 2019 Act 9, §§ 55c, 9101(2i).

16. The text below shows the original language of § 55c, with Governor Evers' partial veto indicated by strikethrough:¹

16.047 (4s) of the statutes is created to read:
16.047 (4s) ~~SCHOOL—BUS—REPLACEMENT~~
GRANTS. ~~(a) In this subsection: 1. “School board” has~~
~~the meaning given in s. 115.001 (7). 2. “School bus” has~~
~~the meaning given in s. 121.51 (4).~~ (b) The department

¹ Act 9 uses red text to designate partial vetoes, but that is impractical here.

[of administration] shall establish a program to award grants of settlement funds from the appropriation under s. 20.855 (4) (h) ~~to school boards for the replacement of school buses owned and operated by the school boards with school buses that are energy efficient, including school buses that use alternative fuels. Any school board may apply for a grant under the program. (c) As a condition of receiving a grant under this subsection, the school board shall provide matching funds equal to the amount of the grant award. (d) A school board may use settlement funds awarded under this subsection only for the payment of costs incurred by the school board to replace school buses in accordance with the settlement guidelines.~~

17. After Governor Evers' partial veto, Wis. Stat. § 16.047(4s) reads: "The department shall establish a program to award grants of settlement funds from the appropriation under s. 20.855 (4) (h) for alternative fuels."

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

~~(2i) VOLKSWAGEN SETTLEMENT FUNDS. Of the settlement funds in s. 20.855 (4) (h), during the 2019-21 fiscal biennium, the department of administration shall allocate \$3,000,000 for grants under s. 16.047 (4s) for the replacement of school buses.~~

19. In the message accompanying his partial vetoes, Governor Evers explained:

I object to the narrow use of Volkswagen settlement funds only for school buses under this provision, given the limited number of school districts to which these provisions would apply. In addition, the state has a responsibility to be a leader in adopting and encouraging the use of alternative fuels as part of an overall strategy to address climate change. . . . I am directing the Department of Administration to allocate up to \$10,000,000 of the settlement funds to this revised grant program for electric vehicle charging stations, and at least \$15,000,000 for the transit capital assistance grant program under s. 16.047 (4m).

Governor Tony Evers, Veto Message 15 (July 3, 2019), *available at* <https://doa.wi.gov/budget/2019-21%20Veto%20Message%20.pdf>.

20. The Governor’s originally-proposed budget bill would have allowed the use of the Volkswagen settlement funds for “the installation of charging stations for vehicles with an electric motor.” *See* 2019 Assembly Bill 56, §§ 52, 53, and 54.

21. The Legislature’s Joint Committee on Finance rejected the Governor’s proposal. *See* Executive Session record for Paper #505 on June 6, 2019 from the Record of Committee Proceedings, 2019 Assembly Bill 56, *available at*

<http://docs.legis.wisconsin.gov/2019/related/records/joint/finance/1502194> (The committee considered a motion to adopt the Governor's plan, as laid out in alternatives A1, B1, C1, and D1 of Paper #505, and the motion failed by a vote of 4 ayes and 12 noes); Legislative Fiscal Bureau, Joint Committee on Finance Budget Paper #505 (June 2019), *available at* http://docs.legis.wisconsin.gov/misc/lfb/budget/2019_21_biennial_budget/102_budget_papers/505_volkswagen_settlement_volkswagen_settlement.pdf.

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

23. The full Legislature then approved the version approved by the Joint Finance Committee and sent that version to the Governor, which was subsequently partially vetoed.

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

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

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

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

26. The Governor also partially vetoed § 184s as follows:

20.395 (2) (fc) of the statutes is created to read: 20.395 (2) (fc) Local ~~roads improvement discretionary~~ supplement. From the general fund, as a continuing appropriation, the amounts in the schedule for ~~the local roads improvement discretionary supplemental grant program under s. 86.31(3s).~~

27. After Governor Evers' partial veto, Act 9, § 126, schedule item Wis. Stat. § 20.395(2)(fc) reads "Local supplement . . . 75,000,000" and schedule item Wis. Stat. § 20.395(2)(fc) reads "Local supplement. From the general fund, as a continuing appropriation, the amounts in the schedule for local grant [sic]."

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

~~86.31 (3s) of the statutes is created to read: 86.31 (3s) DISCRETIONARY SUPPLEMENTAL GRANTS. (a) Funds provided under s. 20.395 (2) (fe) shall be distributed under this subsection as discretionary grants to reimburse political subdivisions for improvements. The department shall solicit and provide discretionary grants under this subsection until all funds appropriated under s. 20.395 (2) (fe) have been expended. (b) 1. From the appropriation under s. 20.395 (2) (fe), the department shall allocate \$32,003,200 in fiscal year 2019=20, to fund county trunk highway improvements. 2. From the appropriation under s. 20.395 (2) (fe), the department shall allocate \$35,149,400 in fiscal year 2019=20, to fund town road improvements. 3. From the appropriation under s. 20.395 (2) (fe), the department shall allocate \$22,847,400 in fiscal year 2019=20, to fund municipal street improvement projects. (c) Notwithstanding sub. (4), a political subdivision may apply to the department under this subsection for reimbursement of not more than 90 percent of eligible costs of an improvement.~~

29. Governor Evers' veto message explains:

I am . . . partially vetoing these sections to remove the limitations placed on the use of the general fund monies because I object to the restrictions that these constraints place on the department to fund grants to the most needed projects throughout the state. Law enforcement and firefighters across Wisconsin have called on the Legislature to address poor road conditions that are putting Wisconsinites' safety at risk. The effect of this partial veto will be to allow the

department to prioritize the most critical transit and transportation needs.

Governor Tony Evers, Veto Message 28 (July 3, 2019).

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

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

31. Governor Evers partially vetoed § 1988b as follows²:

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

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

33. Putting the partial veto and the pre-existing version of Wis. Stat. § 341.25(2) in context, the following chart shows the annual fees before Act 9, the annual fees chosen by the Legislature

² As in Act 9, underlined text designates text added by the legislature. For clarity, however, text *repealed* by the legislature is italicized here rather than struck through as in Act 9.

in the budget, and the fees finally enacted into law by Governor Evers through use of the partial veto:

Maximum Gross Weight in Pounds	Pre-Act 9 Annual Fee	Annual Fee Approved by Legislature	Annual Fee Chosen by Governor Evers
Not more than 4,500	\$75.00	\$100.00	\$100.00
Not more than 6,000	\$84.00	\$100.00	\$100.00
Not more than 8,000	\$106.00	\$100.00	\$106.00
Not more than 10,000	\$155.00	\$100.00	\$155.00

34. Governor Evers expressed his view on the provision as follows:

I object to owners of lighter vehicles unfairly being charged the same fees as those for heavier trucks. Heavier trucks do more damage to roadways and therefore should be charged more than lighter trucks.

Governor Tony Evers, Veto Message 28 (July 3, 2019).

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

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

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

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

139.75 (14) of the statutes is created to read: 139.75 (14) “Vapor product” means a noncombustible product that produces vapor or aerosol for inhalation from the application of a heating element ~~to a liquid or other substance that is depleted as the product is used,~~ regardless of whether the liquid or other substance contains nicotine.

2019 Wis. Act 9, § 1754.

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

39. Governor Evers' veto message stated as follows:

I object to the ambiguous language in the definition. Specifically, the language could be erroneously construed to exclude liquids or other substances that are used in electronic cigarettes, electronic cigars, electronic pipes or similar devices. Such an interpretation would be contrary to intent. As a result of my partial veto of this definition, the vapor products tax will clearly apply to any device containing vapor fluid and to vapor fluid sold separately.

Governor Tony Evers, Veto Message 27 (July 3, 2019).

**JOINT STATEMENT THAT THERE ARE NO MATERIAL
DISPUTED FACTS**

Although Petitioners and Respondents strongly differ on the legal conclusions to be derived from the above facts and the legality of the partial vetoes in question, both the Petitioners and the Respondents believe that there are no material facts in dispute.

**JOINT STATEMENT ON PRIOR APPROPRIATIONS ACTS
AND GUBERNATORIAL PARTIAL VETOES**

Petitioners and Respondents agree that publicly available and published materials related to previous legislation, such as prior appropriations legislation and partial vetoes, are undisputed. It is the parties' shared opinion that these materials and

legislation are not “facts” as contemplated by this Court’s order, and that the parties may cite such materials and legislation without including them in this stipulation. While these materials are not disputed, Petitioners do not concede that all such materials are relevant to the constitutionality and legality of the partial vetoes in dispute herein.

RESPONDENTS’ SEPARATE STATEMENT
THAT CERTAIN UNDISPUTED FACTS
ARE IMMATERIAL AND IRRELEVANT

Paragraphs 20–23 of the Joint Stipulation concern certain historical facts about the gubernatorial proposal and legislative consideration of the proposal that would become sections 55c and 3101(2i) of Act 9. Respondents stipulate to the factual accuracy of these paragraphs. However, respondents deny that these facts are relevant or material to the constitutionality and legality of the partial veto discussed in paragraphs 14–23 of the Joint Stipulation.

DATED this 20th day of September, 2019.

Respectfully submitted,



Richard M. Eisenberg

(WI Bar No. 1005622)

Anthony F. LoCoco

(WI Bar No. 1101773)

Lucas T. Vebber


(WI Bar No. 1067543)

Luke N. Berg

(WI Bar No. 1095644)

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330 E. Kilbourn Ave., Ste. 725
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Attorneys for Petitioners



Joshua L. Kaul

Attorney General of Wisconsin

Maura FJ Whelan

Assistant Attorney General

State Bar #1027974

Colin Roth

Assistant Attorney General

State Bar #1103985

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Attorneys for Respondents