No. 19AP559

In The Wisconsin Court of Appeals

DISTRICT III

THE LEAGUE OF WOMEN VOTERS, DISABILITY RIGHTS OF WISCONSIN, INC., BLACK LEADERS ORGANIZING FOR COMMUNITIES, GUILLERMO ACEVES, MICHAEL J. CAIN, JOHN S. GREENE AND MICHAEL DOYLE,
PLAINTIFFS-RESPONDENTS,
v.
TONY EVERS,
DEFENDANT-RESPONDENT,
WISCONSIN LEGISLATURE,
INTERVENING DEFENDANT-APPELLANT.

On Appeal from the Dane County Circuit Court,
The Honorable Richard G. Niess, Presiding,
Case No. 2019CV000084

OPENING BRIEF OF INTERVENING DEFENDANT-APPELLANT WISCONSIN LEGISLATURE

Misha Tseytlin
State Bar No. 1102199
TROUTMAN SANDERS LLP
1 N. Wacker Drive, Ste. 2905
Chicago, IL 60606
Telephone: (608) 999-1240
Facsimile: (312) 759-1939
E-mail: misha.tseytlin@troutman.com

Counsel for the Legislature

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Constitutional Provisions

Other Authorities

STATEMENT OF THE ISSUES

1. Whether the Legislature complied with Article IV, Section 11 of the Wisconsin Constitution when it "m[]et at the seat of government" in January 2017, and did not finally adjourn its 2017–18 biennial session until January 2019.

The Circuit Court largely ignored this issue, but ultimately held that the Legislature violated Article IV, Section 11.

2. Whether the Circuit Court had jurisdiction to consider if the Legislature complied with Section 13.02 of the Wisconsin Statutes when it met in a floor period in December 2018.

The Circuit Court held that it had jurisdiction to decide whether the Legislature complied with Section 13.02.

3. Whether the Legislature, in fact, complied with Section 13.02.

The Circuit Court held that the Legislature did not comply with Section 13.02.

4. Whether the Circuit Court abused its discretion in issuing its temporary injunction.

By issuing a temporary injunction, the Circuit Court held, by implication, that it did not abuse its discretion.

INTRODUCTION

In December 2018, the Wisconsin Legislature used a common, four-decade-old internal operating procedure to convert a previously scheduled committee period into a floor period, known as an extraordinary session, all as part of its continuous 2017–18 legislative session. During this floor period, the Legislature enacted dozens of statutory provisions and confirmed the appointment of eighty-two individuals to government bodies. At all times, the Legislature acted consistent with four decades of previously uncontroversial legislative practice. Yet, the Circuit Court enjoined all of these provisions and appointments as *ultra vires*, after adopting a meritless, unprecedented theory that unconstitutionally interjects courts into matters of internal legislative procedure. The logical consequence of the Circuit Court's decision, if upheld on appeal, is that all of the numerous laws that the Legislature has enacted in extraordinary sessions for four decades—from laws punishing sexual predators to Right to Work to juvenile justice reform, to hundreds of others, stretching to thousands of pages—would be similarly *ultra vires*.

This Court should reverse the Circuit Court's injunction and end this assault on the Legislature's constitutional authority.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court has scheduled oral argument for June 6, 2019. In light of the unprecedented nature of the Circuit Court's decision, publication is warranted.

STATEMENT OF THE CASE

I. Legal Background

A. Article IV, Section 11 of the Wisconsin Constitution provides when the Wisconsin Legislature meets. From 1880 until 1968, Article IV, Section 11 provided: "The legislature shall meet at the seat of government at such time as shall be provided by law, once in two years, and no oftener, unless convened by the governor, in special session . . . ." *Id.*; *see also State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 286, 125 N.W.2d 636 (1964).[1]

During this pre-1968 period, the Legislature would meet for its biennial session, recess the houses of the Legislature for some periods, and then adjourn *sine die* at some point, usually in the middle of the year. This *sine die* adjournment was the moment that the Legislature's "meet[ing]" under Article IV, Section 11 ended. *See State ex rel. Sullivan v. Dammann*, 221 Wis. 551, 559, 267 N.W. 433

[1] As originally enacted, Article IV, Section 11 provided: "The legislature shall meet at the seat of government, at such time as shall be provided by law, once in each year, and no oftener." In 1881, the people amended this provision by deleting "once in each year" and replace this language with "once in two years." *See State ex rel. Hudd v. Timme*, 54 Wis. 318, 333–35, 11 N.W. 785 (1882).

(1936). "As recently as 1951, the Legislature met in Madison for 5 months, every other year," and then adjourned *sine die*. App. 22. "[I]f anything urgent came up after the final adjournment, the governor could always call a special session." *Id.*

In 1968, the people of Wisconsin amended Article IV, Section 11 to the current language, in order to provide for a full time, year-round Legislature: "The legislature shall meet at the seat of government at such time as shall be provided by law, unless convened by the governor in special session . . . ." Contemporary newspapers reported that, under the new amendment, "the Legislature will work year-round with only a summer recess." App. 33.

As expected, since 1968, the Legislature has taken advantage of the flexibility under this amended Article IV, Section 11 to meet continuously through the biennial session, with final adjournment occurring only immediately before the next biennial session begins. For more than four decades, the Legislature has filled every single day of these biennial periods with legislative business, setting out in biennial joint resolutions prescheduled floor periods, prescheduled committee work periods, and other legislative tasks, while acknowledging that the Legislature reserves the right to change one of the periods initially scheduled for non-floor business to a floor period, known as an "extraordinary session." App. 34–92.

Notably, beyond the framework described in Article IV, Section 11, the Wisconsin Constitution leaves the contours of the Legislature's operations during its biennial session entirely to the Legislature's discretion. Under Article IV, Section 8, the State Assembly and State Senate each have the constitutional authority to "determine the rules of its own proceedings." Courts have no jurisdiction to interfere with the Legislature's rules and proceedings. *See McDonald v. State*, 80 Wis. 407, 411–12, 50 N.W. 185 (1891); *Goodland v. Zimmerman*, 243 Wis. 459, 467, 10 N.W.2d 180 (1943); *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 364–65, 338 N.W. 2d 684 (1983); *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 8, 334 Wis. 2d 70, 798 N.W.2d 436.

B. Section 13.02 of Wisconsin Statutes provides the *statutory* framework for legislative sessions in this State, which the Legislature changed significantly in the wake of the 1968 amendments to Article IV, Section 11.

Before the 1968 amendments to Article IV, Section 11, this provision stated, in full: "13.02 REGULAR SESSIONS. (1) The legislature shall convene in the capitol on the first Monday of January in each odd-numbered year, at 2 p.m., to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business. (2) The regular session of the legislature shall commence at 2 p.m. on the first Tuesday after the 15th day of January in each odd-numbered year." 1967 Wis. Ch. 187.

In 1971, the Legislature implemented the 1968 amendment to Article IV, Section 11, by adding Subsection 3, which provides that "[e]arly in each biennial session period, the joint committee on legislative organization shall meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year, to be submitted to the legislature as a joint resolution." *Id.* § 13.02(3); *see* App. 93. The Legislature also added the "unless" clause into the end of Subsection 2 ("unless otherwise provided under sub. (3)"), making it clear that Subsection 2's provisions no longer apply when the Legislature chooses to adopt a superseding work schedule under Subsection 3. The Legislature also added Subsection 4: "Any measures introduced in the regular annual session of the odd-numbered year which do not receive final action shall carry over to the regular annual session held in the even-numbered year."

C. Since the people amended Article IV, Section 11, the Legislature has repeatedly recognized its authority to turn one of its committee periods into a non-prescheduled floor period, known as an "extraordinary session," all as part of the continuous biennial meeting. The Legislature first recognized this authority on February 12, 1971, as part of its work scheduled for the 1971–72 biennial session. App. 34–36. This joint resolution provided: "BIENNIAL SESSION. The regular session of the 1971 legislature shall cover a 2-year period beginning at 2 p.m. on Tuesday, January 19,

1971, and ending at 12 noon on Monday, January 1, 1973." *Id.* The resolution then explained that this continuous, 2-year "regular session" includes prescheduled floor periods, prescheduled interim periods, and that, importantly for this case, "[a] floorperiod may be convened at a date earlier than the date specified in this resolution, or an extraordinary session may be called during one of the interim periods, by a majority of the members of each house." *Id.* The Legislature adopted this joint resolution creating, for the first time, the extraordinary session procedure one month before it enacted Subsection 3 of Section 13.02, which was the first law allowing the Legislature to set a biennial working schedule under the 1968 amendment to Article IV, Section 11.

Then, after the Legislature enacted Subsection 3, the Legislature adopted similar resolutions under Subsection 13.02(3) in 1973, 1975, and 1977, laying out floor periods, committee work periods, and other legislative steps, while noting the extraordinary session option. *See* App. 37–45. Importantly, the substance of what the Legislature did was entirely unchanged from what occurred in 1971: setting a continuous constitutional meeting of the Legislature for the entire two-year period, while allowing itself to change a prescheduled committee period into a non-prescheduled floor period, known as an extraordinary session.

Similarly, every biennial resolution since 1977 has set out prescheduled floor periods, prescheduled committee periods, and other legislative markers, while noting the

Legislature's authority to call non-prescheduled floor periods during the biennial session, under any of the three mechanisms detailed in Joint Rule 81(2). *See* App. 46–92. The reason that these joint resolutions now referenced Joint Rule 81(2) is that, in 1977, the Legislature amended this Rule to permit the calling of a non-prescheduled floor period "at the direction of a majority of the members of the committee on organization in each house, by the passage of a joint resolution on the approval by a majority of the members elected to each house, or by the joint petition of a majority of the members elected to each house." *See* App. 110.

The Legislature has used this extraordinary session procedure with regularity over the last four decades, to enact laws, confirm appointments, and take necessary steps in the constitutional amendment process. The Legislature held extraordinary sessions in January 1980, December 1981, April 1988, May 1988, June 1988, May 1990, April 1992, June 1994, April 1988, May 2000, July 2003, December 2003, March 2004, May 2004, July 2005, April 2006, February 2009, May 2009, June 2009, December 2009, June 2011, July 2011, February 2015, July 2015, November 2015, March 2018, December 2018, and, most recently, in March 2019 (for Governor Evers' budget address). The Legislature has adopted some of the most important laws in this State during such sessions. These include the two-strike laws for child sex offenders, 1997 Wisconsin Act 326; *see State v.*

Radke, 259 Wis.2d 13, 657 N.W.2d 66 (2003) (upholding law against constitutional challenge); a law protecting against prenatal substance abuse, 1997 Wisconsin Act 292; *see Anderson v. Loertscher*, 137 S. Ct. 2328 (2017) (U.S. Supreme Court protecting law with a stay); *Loertscher v. Anderson*, 893 F.3d 386 (7th Cir. 2018) (rejecting constitutional challenge on standing grounds); Right to Work, 2015 Wisconsin Act 1; *see Int'l Ass'n of Machinists District 10 and Its Local Lodge 1061 v. State*, 378 Wis.2d 243, 903 N.W.2d 141 (Ct. App. 2017) (upholding law against constitutional challenge); *Int'l Union of Operating Engineers Local 139 v. Schimel*, 863 F.3d 674 (7th Cir. 2017) (same); authorizing and funding the Milwaukee Bucks arena, 2015 Wisconsin Act 60; adopting juvenile justice reforms in light of the problems at Lincoln Hills, 2017 Wisconsin Act 185. In total, the Legislature has enacted some 300 laws in extraordinary sessions, with a total page length stretching to over 3,000 pages.

D. The Legislature conducted the 2017–18 biennial session consistent with Article IV, Section 11, Section 13.02, and four decades of historical practice. The joint resolution for this session, 2017 Senate Joint Resolution 1 (hereinafter "JR1"), sets out the continuous term of Legislature's biennial session as running from "Tuesday, January 3, 2017," to "Monday, January 7, 2019." *See* App. 123–25. The Legislature adopted a work schedule under Subsection 13.02(3), setting out prescheduled floor periods, committee

work periods, and other prescheduled legislative markers. *Id.* Most relevant here, JR1 provided:

> (3) SCHEDULED FLOORPERIODS AND COMMITTEE WORK PERIODS. (a) *Unreserved days*. Unless reserved under this subsection . . . every day of the biennial session period is designated as a day for committee activity and is available to extend a scheduled floorperiod, convene an extraordinary session, or take senate action on appointments as permitted by joint rule 81.
>
> . . . .
>
> (4) INTERIM PERIOD OF COMMITTEE WORK. Upon the adjournment of the last general-business floorperiod, there shall be an interim period of committee work ending on Monday, January 7, 2019.

Id. The Legislature adopted JR1 with a 33–0 rollcall vote and in the Assembly by voice vote. Nothing about this joint resolution differed in any material respect from the joint resolutions of the last four decades.

Just as JR1 contemplated, the Legislature in late March 2018 convened an extraordinary session to deal with the problems arising from Lincoln Hills, as well as to make certain other necessary changes to law. *See* 2017 Wisconsin Act 143; 2017 Wisconsin Act 185; 2017 Wisconsin Act 235; 2017 Wisconsin Act 327; 2017 Wisconsin Act 367.

Then, most relevant to this case, in December 2018, the Legislature again convened an extraordinary session, and enacted 2017 Wisconsin Act 368, 2017 Wisconsin Act

369, and 2017 Wisconsin Act 370, as well as confirming eighty-two appointments:[2]

Changes to Certain Voting Provisions: Sections 1, 1B, 1C, 1D, 1E, 1F, 1FG, 1FM, 1G, 1GC, 1GD, 1GF, 1H, 1I, 1J, 1JB, 1JS, 1K, 1L, 1M, 1MG, 1MP, 1MQ, 1MS, 1MT, 1MV, 1N, 1NG, and 91–95 of Act 369 enact certain provisions related to Wisconsin's voter ID law; codify preexisting Department of Transportation regulations; expand the statutory window for in-person absentee voting; and loosen regulations for military and overseas electors by giving those voters more options, such as eliminating the requirement that the individual witnessing the ballot be a U.S. citizen and allowing e-mail request and return of such absentee ballots.

Tax Law Changes: Sections 1–16 and 20–21(1) of Act 368 and Sections 84e–85r of Act 369 involve tax law changes and alterations dealing with out-of-state retailers' sales, in response to *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018); make certain adjustments to the taxation of various types of organizations; and eliminate certain verification requirements for tax credit recipients.

Transportation Project Provisions: Sections 17–18 and 21(2) of Act 368 make changes to the use of federal funds in state highway projects and mandate notice to political subdivisions of federally funded highway projects.

---

[2] This list is not intended to be exhaustive and a more complete description can be found at http://docs.legis.wisconsin.gov/misc/lfb/bill_summaries/2017_19/0002_december_2018_extraordinary_session_bills_as_passed_by_the_legislature_12_6_18.pdf.

Provisions Relating to the Conduct of State Litigation: Sections 3, 5, 7–8, 26–30, and 97–103 of Act 369, prohibit the Attorney General from settling away the constitutionality or other basis of validity of a state statute, unless the Attorney General obtains consent from the Legislature, as intervenor, or, if the Legislature has not intervened, without approval from the Joint Committee on Finance, among many other such related provisions.

Guidance Documents Provisions: Sections 31, 38, 65–71 and 96 of Act 369 require that new guidance documents be subjected to notice-and-comment before being finalized and that all extant guidance documents to go through notice-and-comment by July 1, 2019, while allowing court challenges to these documents.

Legislative Oversight Provisions: Sections 16, 39, 64, and 87 of Act 369 and Sections 11–13 of Act 370 create or modify joint legislative committees' authority, consistent with *Martinez v. DILHR*, 165 Wis. 2d 687, 701, 478 N.W.2d 582 (1992), to oversee numerous agency actions.

Miscellaneous Agency-Related Provisions: Sections 20–21, 37 and 85 of Act 369 allocate certain moneys received by the Department of Justice; provide that agencies cannot rely upon federally submitted plans or settlement agreements as an authority to promulgate new rules; extend the authority of the Department of Natural Resources relating to certain flood control projects; and modify certain appointment procedures. Sections 35 and 80 of Act 369

codify the Wisconsin Supreme Court's holding in *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21, eliminating agency deference for statutory interpretation.

Prohibition on Certain Re-Nominations: Section 4 of Act 369 prohibits the Governor or another state officer or agency from re-nominating individuals that the Senate has already refused to confirm.

Codification of Certain Federally-Approved Plans: Sections 14–17 and 38–43 of Act 370 codify certain federally-approved plans into state law.

Codification of Unemployment Insurance Job Search Regulations: Sections 27–38 of Act 370 codify into state law Department of Public Works administrative regulations concerning job search requirements necessary to receive unemployment.

Confirmation of eighty-two appointees: The Legislature also confirmed eighty-two appointments to various State agencies and boards, including the Public Service Commission and the Labor and Industry Review Commission. *See* Senate Journal, Dec. 2018 Extraordinary Session, at 980–83, *available at* https://docs.legis.wisconsin.gov/2017/related/journals/senate/20181204ede8.pdf.

.

II. Procedural Background

On January 10, 2019, Plaintiffs filed their complaint, Doc. 1, in the Dane County Circuit Court. Plaintiffs amended their complaint on January 15, 2019. Doc. 16. The Circuit Court permitted the Legislature to intervene as a defendant, upon stipulation of the parties. Doc. 124. The parties then briefed, as relevant here, the Legislature's motion to dismiss and Plaintiffs' motion for a temporary injunction. Docs. 86, 98, 103, 121, 134.

On March 21, 2019, the Circuit Court issued a temporary injunction that prohibited the Governor and the Legislature from enforcing any legislation enacted or any nominee confirmed during the December 2018 extraordinary session. App. 1–16. In its decision, the Circuit Court concluded that Section 13.02 requires that the Legislature meet only in what the Legislature titles a "regular session." *Id.* at 7–9. The Circuit Court also worried that the Legislature's understanding of its own authority would "swallow much of Article IV, Section 11 whole" because the Legislature could call floor periods that were not prescheduled. *Id.* at 10. Notably, the Circuit Court failed to address the Legislature's core argument: that it was in continuous biennial session from January 2017 until January 2019 and had not adjourned *sine die* by December 2018.

The Legislature filed an appeal as of right to District III, and, on March 27, 2019, this Court stayed the temporary

injunction pending appeal. On April 3, 2019, Plaintiffs petitioned for bypass to the Supreme Court.

On April 9, 2019, this Court denied the Legislature's Motion to enforce the stay issued by this Court.

STANDARD OF REVIEW

This Court reviews the issuance of an injunction by a circuit court to determine whether there was an erroneous exercise of discretion. *Sunnyside Feed Co., Inc. v. City of Portage*, 222 Wis. 2d 461, 468, 588 N.W.2d 278 (Ct. App. 1998). Interpretation of constitutional and statutory provisions involve legal issues subject to *de novo* review. *See League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2013 WI App 77, ¶¶ 26–27, 348 Wis. 2d 714, 834 N.W.2d 393.

SUMMARY OF THE ARGUMENT

I. A. Article IV, Section 11 of the Wisconsin Constitution provides, as relevant here: "The legislature shall meet at the seat of government at such time as shall be provided by law . . . ." The Legislature complied with this provision by meeting at the seat of government in January 2017. The 2017–18 Legislature never took action, through *sine die* adjournment, that would allow an inference that it finally adjourned before January 2019. Instead, the Legislature specifically adopted JR1, which made clear that it would continue its meeting throughout the entire biennial period, with each day devoted to some legislative business,

whether a floor period, a committee period, or some other legislative marker. The Legislature also specifically provided that it could turn any committee day into a non-prescheduled floor day, known as an extraordinary session. Because the December 2018 extraordinary session took place between January 2017 and January 2019, that session complies with Article IV, Section 11. Courts have no authority to go beyond this inquiry, to consider whether this session also complied with statutory requirements.

B. Even if this Court has the jurisdiction to consider whether the Legislature complied with statutes when it convened the December 2018 extraordinary session, the Legislature lawfully acted under Subsection 13.02(3). At the beginning of its biennial session, the Legislature adopted a work schedule, JR1, pursuant to Subsection 13.02(3). This work schedule—consistent with four decades of uniform practice—set out prescheduled floor periods, committee work periods, and other prescheduled legislative markers for every day of the 2017–18 legislative session and specifically provided that "every day of the biennial session period . . . is available to . . . convene an extraordinary session, or take senate action on appointments as permitted by joint rule 81." The Legislature complied with this work schedule in December 2018, and the work schedule itself is specifically authorized by Subsection 13.02(3).

C. Even if the Circuit Court was correct that every floor period must be part of a "regular session," as that term

is used in Subsection 13.02(2), and the Legislature cannot solely act under Subsection 13.02(3), an extraordinary session should be considered part of the Subsection 13.02(2) "regular session." The joint resolution that the 1971 Legislature enacted just a month before it enacted Subsection 13.02(3) and Subsection 13.02(2)'s "unless" clause, specifically stated that an "extraordinary session" would be part of this continuous biennial regular session. Although the Legislature later stopped using the "regular session" in its biennial resolutions, nothing in substance has changed since 1971. Indeed, that Plaintiffs' concerns can be addressed by a simple issue of nomenclature shows that their lawsuit is about labels, not constitutional or even statutory substance.

II. The Circuit Court abused its discretion in issuing a temporary injunction because Plaintiffs failed to show that they had a reasonable probability of success on the merits; that they would suffer an irreparable harm absent injunctive relief; and that the equities, on balance, favored injunctive relief. Indeed, the Circuit Court did not conduct any irreparable harm or public interest analysis for any of the provisions or appointments that it blocked, but merely relied upon its erroneous conclusion that the December 2018 extraordinary session was *ultra vires*.

ARGUMENT

I. The Extraordinary Session Procedure That The Legislature Used In December 2018 Is Entirely Constitutional

The Circuit Court concluded that the laws and appointments that the Legislature enacted and confirmed during the December 2018 extraordinary session were *void ab initio* largely because the Legislature did not specifically title "extraordinary session" as part of the "regular session," under Subsection 13.02(2). App. 6–11. The Circuit Court's decision fails for three independently sufficient reasons: (1) courts only have jurisdiction to consider whether the Legislature complied with the Constitution, not statutes, and the 2017–18 Legislature unquestionably met in January 2017 and did not stop meeting until January 2019; (2) even if Courts can consider statutory compliance, the Legislature lawfully acted under Subsection 13.02(3); and (3) if the Legislature must act under Subsection 13.02(2), the Legislature's actions complied with that provision as well.

A. The Legislature Complied With Article IV, Section 11 By "Meet[ing]" From January 2017 to January 2019, And Courts Lack Jurisdiction To Inquire Further

1. To determine whether an action is constitutional, a court must look to three categories of sources. *See State v. Williams*, 2012 WI 59, ¶ 15, 341 Wis. 2d 191, 814 N.W.2d 460. First—and most importantly—the court must consider "the 'plain meaning of the words [of the Constitution] in the

context used.'" *Id.* (citation omitted). Second, the court should examine "the 'historical analysis of the constitutional debates' relative to the constitutional provision under review; the prevailing practices [ ] when the provision was adopted; and the earliest legislative interpretations of the provision as manifested in the first laws passed that bear on the provision." *Id.* (citations omitted). Lastly, the court should "seek to ascertain what the people understood the purpose of the amendment to be." *Id.* (citation omitted).

Article IV, Section 11's text provides, as relevant here: "The legislature shall meet at the seat of government at such time as shall be provided by law . . . ." To "meet," as relevant here, means "[t]o come face to face; or into the company of," 9 Oxford English Dictionary 561 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989); similarly, "meeting" means "[t]he action of coming together from opposite or different directions into one place or into the presence of each other, of assembling for the transacting of business," *id.* at 563. The Legislature satisfies this constitutional requirement, therefore, when it assembles "at such time as shall be provided by law" at the "seat of government."

Once the Legislature "meet[s] at the seat of government," that constitutional meeting does not end until final adjournment, which ends the biennial legislature. That understanding follows not only from the constitutional text, but also the decisions of the Wisconsin Supreme Court. In *State ex rel. Sullivan v. Dammann*, 221 Wis. 551, 559, 267

N.W. 433, 434 (1936), the Supreme Court held that the Legislature meets in the constitutional sense until it adjourns *sine die*. "When a Legislature adjourns *sine die* it ceases to exist" for constitutional purposes. *Id.* After the Legislature adjourns *sine die*, "[i]ts officers are no longer officers. Their tenure of office ends at the moment of adjournment." *Id.* Temporary adjournment of the houses of the Legislature, on the other hand, does not end the Legislature's constitutional meeting. *See* Wis. Const. art. IV, § 10 (Neither house shall, without consent of the other, adjourn for more than three days); *Dammann*, 267 N.W. at 435. Similarly, as the Supreme Court explained in *Thompson*, in a statutory case that interpreted the pre-1968 version of Article IV, Section 11 and the Supreme Court's decision in *Dammann*, "there is but one biennial 'session' of the legislature" and "one single session may be interrupted by recesses" of the houses of the Legislature without interrupting the Legislature's meeting. *Id.* at 289 n.3, 290.

Put another way, under the constitutional text and Wisconsin Supreme Court precedent, once the Legislature gathers "at such time as shall be provided by law" at the "seat of government," that constitutional meeting does not end until the Legislature takes action making clear that it "ceases to exist." *See Dammann*, 267 N.W. at 437; *accord Thompson*, 22 Wis. 2d at 289–90.

The Court's remaining considerations for determining whether an action is constitutional—prevailing practices at

the time of the amendment's adoption, early legislative interpretations, and the people's understanding at the time of the amendment, *Williams*, 2012 WI 59, ¶ 15—all strongly support understanding of a constitutional meeting lasting from the initial meeting to final adjournment. Prior to its Amendment in 1968, Article IV, Section 11 provided that "[t]he legislature shall meet at the seat of government at such time as shall be provided by law, once in two years, and no oftener, unless convened by the governor, in special session . . . ." Wis. Const. art. IV, § 11 (1967); *see Thompson*, 22 Wis. 2d at 286. During this pre-1968 period, the Legislature would meet for a couple of months a year and eventually would adjourn *sine die*. *See supra*, pp. 3–4.

Contemporary newspaper coverage explained that the 1968 amendment to Article IV, Section 11 was intended to "give the Legislature flexibility in approaching the question of when the Legislature should meet," App. 32, with the expectation that "the Legislature will work year-round with only a summer recess," App. 33. As the people understood, the flexibility provided by the 1968 Amendment would allow a "meeting" of the Legislature to start the beginning of the session and continue until the Legislature finally adjourned.

Contemporary legislative practice also confirms that the Legislature understood the 1968 Amendment to permit the Legislature to hold a single, continuous biennial session, while setting out prescheduled floor periods, prescheduled "interim" non-floor periods, and other prescheduled

legislative markers, and allowing itself to convene in non-prescheduled floor periods, known as extraordinary sessions. *See, e.g.*, App. 34–92. The Legislature set out its continuous biennial session in February 12, 1971, when it adopted the work schedule for the 1971–1972 biennial session, which specifically provided that it had the option to turn one of its prescheduled committee periods into a non-prescheduled floor period, known as an "extraordinary session." The Legislature adopted this work schedule for the 1971–1972 biennial session just a month before it created Subsection 13.02(3), which implemented the 1968 amendment to Article IV, Section 11. *See* App. 32, 34–36, 93. In *every* biennial resolution since, the Legislature has set out a continuous, two-year legislative meeting composed of floor periods, committee periods, and other legislative markers, while recognizing that it may come in for non-prescheduled floor periods, known as extraordinary sessions. *See* App. 37–92. This practice of continuous, year-round meetings is so well-established in Wisconsin that the non-partisan National Conference of State Legislatures explains that, unlike most other States, the Wisconsin "Legislature meets throughout the year." *See* 2018 Legislative Session Calendar (Sep. 19, 2018), *available at* http://www.ncsl.org/Portals/1/Documents/NCSL/2018_Session_Calendar_091918.pdf.

2. Applying the above-described principles makes clear, beyond any doubt, that the Legislature was still

meeting in December 2018, under Article IV, Section 11, when it gathered in extraordinary session and enacted the laws and confirmed the appointments in dispute here.

There is no dispute that the Legislature met in Madison, Wisconsin in January 2017, "as provided by law." Wis. Const. art. IV, § 11; *see* Wis. Stat. § 13.02. It is also undisputed that the Legislature adopted a work schedule, JR1, at the beginning of the 2017–2018 biennial session, that provided that the Legislature would continue to meet at the seat of the Government "from Tuesday, January 3, 2017" until "Monday, January 7, 2019," a period that includes December 2018. In particular, JR1 described the Legislature's work on each day of this continuous biennial session, setting out prescheduled floor periods, committee work periods, and other legislative markers. App. 123–25. Notably, the Legislature's committee work periods, no less than the floor periods, involve important work of the Legislature's constitutional meeting, including the Legislature taking legally binding actions through its committees, such as the key duties performed by the Joint Committee on Finance, Wis. Stat. § 13.10(1), which has ongoing authority under more than 120 different statutory review provisions. *See* Informational Paper No. 76, Wisconsin Legislative Fiscal Bureau, Joint Committee on Finance (Jan. 2019), at http://docs.legis.wisconsin.gov/misc/lfb/informational_paper

s/january_2019/0076_joint_committee_on_finance_informational_paper_76.pdf.

Notably, at the end of each floor period, including the last prescheduled floor period on March 22, 2018, each house of the Legislature made clear that the Legislature was *not* "ceas[ing] to exist," *see Dammann*, 267 N.W. at 437; *accord Thompson*, 22 Wis. 2d at 289–91, but would continue its continuous biennial session, as set out in JR1. In particular, at the end of each floor period, *including the last prescheduled floor period*, each house of the Legislature specifically provided that it "*stand[s] adjourned pursuant to Senate Joint Resolution 1*," or JR1. *See, e.g.*, Assembly Journal, 103rd Reg. Sess., at 908, *available at* https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180322.pdf (adjourning March 13–22, 2018 floor period); Senate Journal, 103rd Reg. Sess., at 871, *available at* https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180322.pdf (same); Assembly Journal, 103rd Reg. Sess., at 866, *available at* https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180222.pdf (adjourning February 13–22, 2018 floor period); Senate Journal, 103rd Reg. Sess., at 787, *available at* https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180222.pdf (same); Assembly Journal, 103rd Reg. Sess., at 556, *available at* https://docs.legis.wisconsin.gov/2017/related/journals/assem

bly/20171109.pdf (adjourning October 31–November 9, 2017 floor period); Senate Journal, 103rd Reg. Sess., at 558, *available at* https://docs.legis.wisconsin.gov/2017/related/journals/senate/20171109.pdf (same); Assembly Journal, 103rd Reg. Sess., at 23, *available at* https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20170119.pdf (adjourning January 17–19, 2017 floor period); Senate Journal, 103rd Reg. Sess., at 46, *available at* https://docs.legis.wisconsin.gov/2017/related/journals/senate/20170119.pdf (same). Thus, consistent with the Wisconsin Supreme Court's decisions in cases like *Dammann* and *Thompson*, *see supra*, p. 20, the houses adjourned their floor periods, while the Legislature itself continued to meet.

Not only did the Legislature continue to take legally binding actions through the work of its committees while its houses stood adjourned pursuant to JR1, *see supra*, p. 23, but the Legislature specifically provided that that "*every day of the biennial session period . . . is available to . . . convene an extraordinary session, or take senate action on appointments as permitted by joint rule 81*." App. 123 (emphasis added). This is consistent with the Legislature's practice for decades and makes clear that the Legislature did not adjourn *sine die* on March 22, 2018 or at any other point before January 2019. *See supra*, pp. 6–9.

Accordingly, when the Legislature convened a non-prescheduled floor period in late March 2018, to enact laws addressing the problems arising from Lincoln Hills, 2017

Wisconsin Act 185, and then, again, in December 2018, to enact the laws and confirm the appointments at issue here, it was still in its continuous "meet[ing]" under Article IV, Section 11. What happened during these times was nothing more than the Legislature changing a prescheduled committee period into a floor period, all as part of the Legislature's continuous meting under Article IV, Section 11.

3. After properly concluding that the Legislature complied with Article IV, Section 11 by "meet[ing]" from January 2017 to January 2019, including in December 2018, the courts' jurisdiction is at an end. Pursuant to Article IV, Section 8 of the Constitution, the Assembly and Senate each have the constitutional authority to "determine the rules of its own proceedings." In light of this provision, courts have no constitutional authority to invalidate the laws that the Legislature enacts for mere violations of statutes in the Legislature's structuring of its internal business. *Ozanne*, 2011 WI 43, ¶¶ 13–15; *accord Stitt*, 114 Wis. 2d at 364–65.

Ozanne is particularly emphatic on this point. In that case, the Supreme Court granted a petition for original jurisdiction and vacated as *void ab initio* all of the orders entered by the circuit court, which had invalidated a duly enacted law for the alleged failure to comply with the statutory requirements of the Open Meetings Law, even though it had been argued that the Open Meetings Law related to Article IV, Section 10, that "[t]he doors of each house shall be kept open except when the public welfare

shall require secrecy." The Supreme Court held that the circuit court had no jurisdiction to decide such questions of mere statutory compliance when it comes to the Legislature structuring how it will enact its own lawmaking, a conclusion that the Court specifically stated was "grounded in separation of powers principles." *Id.* at ¶¶13 –15.

In follows from *Ozanne* that any arguments by Plaintiffs that the Legislature did not comply with the specifics of Section 13.02 during its continuous, biennial session are beyond the jurisdiction of the courts to consider.

4. In its decision, the Circuit Court largely ignored this core argument, not even mentioning the concept of *sine die* adjournment, while attempting to brush off *Ozanne* in a conclusory footnote. App. 9 n.12. That failure is sufficient to require a conclusion that the Circuit Court was wrong on the merits, thereby establishing an abuse of discretion in issuing the injunction. *See infra* __. The points that the Circuit Court made about Article IV, Section 11 do nothing to salvage this fatal defect.

First, the Circuit Court worried that the Legislature's longstanding interpretation of Article IV, Section 11 would "swallow much of Article IV, Section 11 whole," while discussing what was "on the minds of the people in 1848." App. 10; *see also id*. at 8. But the Circuit Court did not cite any decision in this State's history invalidating any legislation as violating Article IV, Section 11, nor explain why that provision should now be weaponized to invalidate

a four-decade-old legislative procedure. And the relevant question is not what was "on the minds of the people in 1848," but whether the Legislature's actions comply with the constitutional text that has governed in this State since 1968. As explained above, the Legislature's actions here are entirely consistent with that statutory text, and all of the other considerations relevant to understanding the meaning of constitutional provisions.

Second, the Circuit Court asserts that Article IV, Section 11 requires "regular sessions pursuant to announced legislative schedules, supplemented by special sessions convened by the Governor on 'extraordinary occasions'". App. 6. The Circuit Court *did not cite any constitutional text* to support its belief that the Constitution includes an unspoken requirement that the Legislature preannounce all floor periods and also label these floor periods "regular sessions."

Finally, the Circuit Court's citation to Article IV, Section 7's quorum requirement for the enactment of legislation, and its invocation of the fact that the December 2018 Extraordinary Session was convened by a joint legislative committee, App. 8, has no independent constitutional relevance. Since the Legislature was still "meet[ing]" under Article IV, Section 11 in December 2018, *see supra*, pp. 22–25, its decision to turn a prescheduled committee period into a floor period, known as an "extraordinary session," is *not* a decision to enact a law,

which must comply with Article IV, Section 7. Rather, this is just the houses of the Legislature using their Article IV, Section 8 authority to "determine the rules of its own proceedings."

B. Even If Courts Have Jurisdiction To Consider Statutory Compliance, The Legislature Lawfully Acted Under Subsection 13.02(3), And That Subsection Does Not Require The Legislature To Give Any Particular Name To Its Floor Periods

1. Even if this Court concludes that it has jurisdiction to consider whether the Legislature complied with statutes when it called its extraordinary session in December 2018, the Legislature complied with Section 13.02 because it lawfully used its broad authority under Subsection 13.02(3) to adopt JR1. JR1, in turn, complies with all of the requirements of Subsection 13.02(3), and specifically authorizes the Legislature to choose to turn one of its committee periods into a floor period, known as an extraordinary session.

In order to understand that the Legislature complied with Section 13.02, it is useful to consider all of the subsections of Section 13.02, as well as the statutory history. See *Cnty. of Dane v. LIRC*, 315 Wis. 2d 293, 312, 759 N.W.2d 571, 580 (2009) ("'A review of statutory history is part of a plain meaning analysis' because it is part of the context in which we interpret statutory terms." (citation omitted)).

- Subsection 13.02(1): The Legislature must convene its biennial session early in January, of each odd-numbered year, "to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business."

- Subsection 13.02(2): There must be a "regular session" on the first Tuesday after the 8th day of January of each year, "unless otherwise provided under" Subsection 13.02(3). The first half of this Subsection comes directly from the pre-1968 version of Section 13.02, first enacted in 1917, see 1917 Wis. Ch. 634 s.4, and then renumbered in 1967, see 1967 Wis. Ch. 187, which governed the pre-1968 regime where the Legislature would meet in regular session and then usually adjourn *sine die* at some point during in the middle of the year. The title of Section 13.02—"Regular sessions"—is similarly a historical vestige of this pre-1968 regime. Soon after the 1968 amendment to Article IV, Section 11, however, the 1971 Legislature adopted the "unless" clause in Section 13.02(2), as well as Subsection 13.02(3). See 1971 Wis. Ch. 15. Under the "unless" clause, the "regular session" as described in Subsection 13.02(2) is irrelevant where the Legislature has adopted a superseding work schedule pursuant to Subsection 13.02(3).

- Subsection 13.02(3): Adopted in 1971, this is the key provision added in the wake of the 1968 amendment to Article IV, Section 11, and requires the Legislature to enact a "work schedule" to govern the Legislature's meeting. The

only limitation on this "work schedule" is that the schedule must involve "at least one meeting" of the houses of the Legislature "in January of each year."

- Subsection 13.02(4): Also added in 1971, this provision provides that any bill introduced during the regular annual session of the odd-number year, carries over to the even-number year.

Putting all of these provisions together yields the following statutory regime. After the Legislature holds the initial meeting required under Subsection 13.02(1), it has the option to adopt any work schedule that it chooses for the biennial session under Subsection 13.02(3), provided that the schedule includes "at least one meeting" of the houses of the Legislature in January of each year, as required by Subsection 13.02(3), and that bills carry over between the two years of the biennial session, as required by Subsection 13.02(4). Nothing in these Subsections governs how the Legislature names its floor periods or requires that all floor periods be prescheduled. The work schedule adopted by the Legislature under Subsection 13.02(3) then governs the contours of the Legislature's biennial session. It is only if the Legislature chooses not to adopt a Subsection 13.02(3) work schedule—a situation that is inapplicable to the instant case—that Subsection 13.02(2) governs.

It is thus clear that the Legislature's actions in December 2018 complied with Section 13.02. The Subsection 13.02(3) work schedule that the Legislature adopted at the

beginning of the 2017–18 biennial session, JR1, set out a continuous legislative session from "Tuesday, January 3, 2017," to "Monday, January 7, 2019," which included prescheduled floor periods, committee periods, and other legislative markers for every day of the 2017–18 legislative session. JR1 then specifically provided that "every day of the biennial session period . . . is available to . . . convene an extraordinary session, or take senate action on appointments as permitted by joint rule 81." In calling the December 2018 extraordinary session, the Legislature acted consistently with the work schedule—JR1—that it adopted pursuant to Subsection 13.02(3).

If any doubt remained that the Legislature acted consistent with the provisions of Section 13.02 in calling the December 2018 extraordinary session, that doubt would be settled by the Legislature's contemporary and longstanding practice. Shortly after the 1968 amendment to Article IV, Section 11, the Legislature adopted the same approach to its work schedule that the Legislature used during the 2017–2018 biennial session: holding a single, continuous biennial session, while setting out prescheduled floor periods, prescheduled "interim" non-floor periods, and other prescheduled legislative markers, and allowing itself to turn a committee period into a non-prescheduled floor period, known as an extraordinary session. *See, e.g.*, App. 34–92. On February 12, 1971, just a month before it enacted Subsection 13.02(3), which is the legislation implementing

the 1968 amendment to Article IV, Section 1, the Legislature adopted its work schedule for the 1971–72 biennial session, recognizing for the first time its authority to convene extraordinary sessions, and has reaffirmed that understanding every two years since. *See supra*, pp. 4–6. And the Legislature has, in fact, held over numerous extraordinary sessions since 1980, which are no different from the one that it held in December 2018. *See supra*, at 6–7.

2. The Circuit Court's contrary conclusion misunderstands the Section 13.02's regime. According to the Circuit Court, the Legislature violated Section 13.02 because "nowhere" does Subsection 13.02(3) "mention[]" "a previously unscheduled meeting of the full Legislature in 'extraordinary session' may be convened by a handful of legislators on two legislative committees." App. 7–8. But Subsection 13.02(3) *specifically authorizes* the Legislature to set out a "work schedule," and places no limitations on how the legislature will determine when its floor periods will take place. Nor does a single word in Subsection 13.02(3) prohibits the Legislature from providing for non-preschedule floor periods, or naming them "extraordinary sessions." The Circuit Court was, in essence, "rewrit[ing] this statute," to add requirements and limitations on the Legislature's broad Subsection 13.02(3) authority that appear nowhere in the text. *See Wis. Dep't of Workforce Dev. v. Wis. Labor & Indus.*

Review Comm'n, 2018 WI 77, ¶ 22, 382 Wis.2d 611, 914 N.W.2d 625.

The Circuit Court also worried that the Legislature did not call the December 2018 floor period a "regular session," as that term is used in Subsection 13.02(2). App. 8. But, as explained above, the Legislature in 1971 specifically added the "unless" clause to Subsection 13.02(2), at the same time as it adopted Subsection 13.02(3), making clear that Subsection 13.02(2) and its reference to "regular session[s]," has no relevance when superseded by work schedule that the Legislature adopts by joint resolution under Subsection 13.02(3).

C. If The Legislature Must Act Consistent With Subsection 13.02(2)'s "Regular Session" Terminology, An Extraordinary Session Is Just Part Of The "Regular Session"

Even if the Circuit Court was correct that every floor period must be part of a "regular session," as that term is used in Subsection 13.02(2), the Circuit Court still erred when it concluded that the Legislature acted unlawfully, especially when viewed the requirement of avoiding a finding of constitutional violation, where possible. *See Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 64, 357 Wis. 2d 469, 851 N.W.2d 262 ("[W]hen [the Court] determine[s] that there is a statutory flaw that may have constitutional significance, [the Court] ascertain[s] whether

the . . . statute[s] can be interpreted in a manner that will avoid a constitutional conflict.").

As the 1971–1972 Legislature—*the Legislature that adopted Subsection 13.02(3), the "unless" clause, and created the extraordinary session procedure*—understood, an "extraordinary session" can properly be understood as simply part of the regular session in Subsection 13.02(2). In its joint resolution enacted just a month before it enacted Subsection 13.02(3) and Subsection 13.02(2)'s "unless" clause, the 1971–1972 Legislature provided: "BIENNIAL SESSION. The regular session of the 1971 legislature shall cover a 2-year period beginning on 2 p.m. on Tuesday, January 19, 1971, and ending at 12 noon on Monday, January 1, 1973," and then *specifically stated that an "extraordinary session" would be part of this continuous biennial regular session*. *See* App. 34–36. Although the Legislature later stopped using the "regular session" terminology in its joint resolutions—for either the prescheduled floor periods or the non-prescheduled floor periods, known as extraordinary sessions—nothing has changed in the Legislature's procedure since 1971. Accordingly, an extraordinary session can, and should, be fairly understood as part of the "regular session," assuming that this Court concludes that this is statutorily relevant.

That Plaintiffs' objections are resolved by simply understanding the extraordinary session as a non-prescheduled floor period within the Subsection 13.02(2) regular session, shows that the lawsuit is not about

constitutional or even statutory substance, but labels. All agree, presumably, that the Legislature could have simply prescheduled every single day from January 3, 2017 to January 7, 2019 as a floor period in JR1 and then cancelled the periods that the Legislature ultimately decided it did not need. Similarly, it seems beyond any serious dispute that even Plaintiffs would have been satisfied if the Legislature specifically re-labeled what it currently calls "extraordinary session" to "non-prescheduled floor period during the regular session." The issues of nomenclature that Plaintiffs have raised in this case, and which animated the Circuit Court's decision, provide no lawful reason to invalidate a common, four-decades-old legislative procedure, invading the "separation of powers." *Ozanne*, 2011 WI 43, ¶ 15.[3]

Finally, the Legislature's specific, statutory recognition of its long-standing extraordinary session practice in *other* statutes further supports the Legislature's interpretation of Subsection 13.02. For example, Wisconsin Statutes Subsection 13.625(1m)(b)1 limits contributions that can be made to a legislator to the "period only if the legislature has concluded its final floorperiod, and is not in

[3] Indeed, the only actual differences Plaintiffs pointed to below as between extraordinary sessions, which Plaintiffs claim are *ultra vires*, and prescheduled floor periods, which Plaintiffs have no objection to, were certain booking entries and the descriptions in certain public documents of these two types of periods. Doc 121, p. 6. Plaintiffs do not purport to explain why such differences matter under Article IV, Section 11, or even Section 13.02. At most, these are matters of internal legislature procedures, which courts have no jurisdiction to review. *See Ozanne*, 2011 WI 43, ¶ 14.

special or extraordinary session." Similarly, Subsection 8.50(4)(d) and Subsection 11.1205(2)(d) refer to "extraordinary floorperiod" and "extraordinary session" in imposing various requirements. The Circuit Court's interpretation, which would invalidate the extraordinary session mechanism under Section 13.02, would render these other statutory provisions superfluous. This violates the well-established "canon against interpreting any statutory provision in a manner that would render another provision superfluous [, which] applies to interpreting any two provisions . . . even when [the Legislature] enacted the provisions at different times." *Bilski v. Kappos*, 561 U.S. 593, 607–608 (2010).

II. The Circuit Court Abused Its Discretion In Issuing A Temporary Injunction

Injunctions are "extraordinary remed[ies]," *Wolf River Lumber Co. v. Pelican Boom Co.*, 83 Wis. 426, 428, 53 N.W. 678 (1892), and "are not to be issued lightly," *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977); *accord Pure Milk Prods. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). "[W]here the parties are in dispute concerning their legal rights, [a temporary injunction] will not ordinarily be granted until the right is established, especially if the legal or equitable claims asserted raise questions of a doubtful or unsettled character." *Mogen David Wine Corp. v. Borenstein*, 267 Wis. 503, 509, 66 N.W.2d 157 (1954) (citation omitted). To obtain

a temporary injunction, the moving party must show: (1) a reasonable probability of success on the merits; (2) lack of adequate remedy at law; (3) irreparable harm absent injunctive relief; and (4) equities, on balance, favoring injunctive relief. *See Pure Milk Prods. Co-op*, 90 Wis. 2d at 800; *Werner*, 80 Wis. 2d at 519–20; *see also* Wis. Stat. § 813.02(1)(a).

As a threshold matter, as explained above, Plaintiffs failed entirely to show that they have *any* probability of success on the merits, let alone a "reasonable" probability. At the very minimum, the Circuit Court abused its discretion because the legal issue that Plaintiffs raised was of "doubtful or unsettled character." *Mogen David*, 267 Wis. at 509.

The Circuit Court also abused its discretion in issuing its temporary injunction because Plaintiffs failed to show that considerations of irreparable harm and the equities favor the issuance of *any* injunctive relief, let alone the sweeping injunctive relief that the Circuit Court issued here. To obtain a temporary injunction, a party must show that it is "likely to suffer irreparable harm if a temporary injunction is not issued." *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154. Even if Plaintiffs can show that they are likely to suffer irreparable harm, any injunction must be "tailored to the necessities of the particular case." *State v. Seigel*, 163 Wis. 2d 871, 890, 472 N.W.2d 584 (Ct. App. 1991); *see Bachowski v. Salamone*, 139 Wis. 2d 397, 414, 407 N.W.2d

533 (1987) ("[T]he injunction is drafted too broadly and is therefore invalid."). Accordingly, an injunction is unlawful if it is "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted); *accord Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury.").

The *only* harm that the Circuit Court found to support a temporary injunction blocking a large number of statutory provisions and eighty-two appointments came was its mistaken conclusion that all extraordinary session laws are unconstitutional. App. 13. Not only was the Circuit Court's legal premise entirely wrong, as explained thoroughly above, but its wholesale invalidation of numerous laws and appointments without even considering whether Plaintiffs had established irreparable harm or a balance of the equities favoring an injunction from *any* of the provisions or appointments is an abuse of discretion in its own right. The Circuit Court also failed even to consider the harm that the people of Wisconsin suffer when deprived of laws that their representatives enacted. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J ., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (citation omitted)); Ord. on Mot. to Stay at 7 (noting importance of "irreparable harm that could result from

enjoining legislative acts and confirmations that may ultimately be found to be valid").

In particular, the "extraordinary remedy" of injunction, *Wolf River*, 83 Wis. at 428, requires a provision-specific showing of harm and a particular balance of the equities, *see Milwaukee Deputy Sheriffs*, 2016 WI App 56, ¶ 20; *Joint Sch. Dist. No. 1, City of Wis. Rapids v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d 292, 311, 234 N.W.2d 289, 300 (1975); *Seigel*, 163 Wis. 2d at 890; *Bachowski*, 139 Wis. 2d at 414. Accordingly, the Circuit Court was required to consider each provision and appointment that Plaintiffs sought to block, determine that it would cause irreparable harm, and determine that the balance of the equities related to that provision or appointment favored a temporary injunction. The Circuit Court completely failed to undertake this analysis. In fact, the Circuit Court did not address that enjoining all of the laws and appointments enacted during the December 2018 extraordinary session would lead to a number of specific harms, both because of the confusion that would result from a temporary injunction and because of the benefit these laws provide to the citizens of Wisconsin. In its injunction order, the Circuit Court blocked every provision in Act 368, 369, and 370, as well as all of the appointments, including:

Tax Law Changes. Sections 1–16 and 20–21(1) of 2017 Wisconsin Act 368, and Sections 84e–85r of 2017 Wisconsin Act 369 change various tax laws relating to out-of-state

retailer sales, taxation of partnerships, limited liability corporations and S corporations, and verification requirements for certain tax credit recipients. An injunction blocking these provisions needlessly introduced uncertainty into the financial plans of individuals and businesses, including in the changing area of interstate taxation of out-of-state retailers, in light of the U.S. Supreme Court's decision in *South Dakota v. Wayfair*. The Circuit Court did not find that these provisions harm Plaintiffs in any way.

Transportation Project Provisions. Sections 17–18 and 21(2) of 2017 Wisconsin Act 368 make several changes in transportation projects, including requiring more federal dollars (and thus less State tax dollars) for highway projects. Enjoining these provisions introduced serious confusion into the legality of certain highway projects. An injunction against these provisions needlessly deprived political subdivisions of information relating to federally funded highway projects coming to their areas, and the Circuit Court did not find any countervailing harms to Plaintiffs.

Changes to Certain Voting Provisions. Sections 1, 1B, 1C, 1D, 1E, 1F, 1FG, 1FM, 1G, 1GC, 1GD, 1GF, 1H, 1I, 1J, 1JB, 1JS, 1K, 1L, 1M, 1MG, 1MP, 1MQ, 1MS, 1MT, 1MV, 1N, 1NG, and 91–95 of 2017 Wisconsin Act 369 codify preexisting regulations relating to Wisconsin's voter ID law, loosen regulations for military and overseas electors, and expand the statutory window for in-person absentee voting. Again, the Circuit Court found no harm to Plaintiffs.

Provisions Relating to the Conduct of State Litigation. Sections 3, 5, 7–8, 26–30, and 97–103 of 2017 Wisconsin Act 369 include, *inter alia*, various provisions that limit the Attorney General's authority to settle away the validity of state law, permit the Legislature to intervene to defend State law, and require the Attorney General to place settlement funds into the general fund, instead of allowing certain discretion to the Attorney General in the expenditure of those funds subject, in select circumstances, to approval by the Joint Committee of Finance. Absent these new laws, the Attorney General can concede away the validity of state law, or refuse to defend state law, potentially leading to the elimination of state statutes—enacted by the Legislature and signed by the Governor—without adversarial litigation. Again, the Circuit Court found no harm to Plaintiffs.

Guidance Documents Provisions. Sections 31, 38, 65–71, and 96 of 2017 Wisconsin Act 369 subject guidance documents to public notice-and-comment and litigation challenges. The people of Wisconsin, including Plaintiffs, will benefit from measures, such as these provisions, that ensure that State's actions comply with the law, using well-established, broadly respected procedures such as notice-and-comment and litigation in Wisconsin courts, consistent with the rest of Chapter 227. See Wis. Stat. § 227.112(1), (6)–(7); *id.* § 227.40(1)–(4). Further, enjoining these provisions harms the public interest because it needlessly cuts short the period of time available for compliance with the statutory July 1, 2019 deadline for publicly noticing

extant guidance documents, should the Legislature prevail in this case. Lastly, any such decision also undermines the Legislature's constitutional authority to "maintain some legislative authority over rule-making," which is "incumbent. . . pursuant to its constitutional grant of legislative power." *Martinez*, 165 Wis. 2d at 701. The Circuit Court did not find that these provisions harm Plaintiffs in any way.

Legislative Oversight Provisions. Sections 10, 16, 18, 23, 39, 64, 87, and 90 of 2017 Wisconsin Act 369 and Sections 11–13 of 2017 Wisconsin Act 370 create additional oversight by legislative committees and the Legislature, over a range of different issues, consistent with the cooperative, interbranch regime that the Wisconsin Supreme Court unanimously upheld in *Martinez*, 165 Wis. 2d 687. Blocking these provisions undermines this cooperative regime, which is at the heart of Wisconsin's system of "shared and merged powers of the branches of government," *Martinez,* 165 Wis. 2d at 696. Again, the Circuit Court did not find that these provisions harm Plaintiffs.

Miscellaneous Agency-Related Provisions. Sections 20–21, 35, 37, 80 and 85 of 2017 Wisconsin Act 369 allocate certain moneys received by the Department of Justice, prohibit agencies from relying upon federally submitted plans or settlement agreements as the basis for promulgating new rules, extend authority of the Department of Natural Resources relating to certain flood control

projects, and codify the holding in *Tetra Tech*, 382 Wis. 2d 496, which eliminated deference to agency interpretations of law. The public suffers harms from blocking these provisions, including the undermining of the authority of the Department of Natural Resources over certain flood control projects. The Circuit Court found no harm to Plaintiffs.

Prohibition on Certain Re-Nominations. Section 4 of 2017 Wisconsin Act 369 prohibits the Governor from re-nominating individuals whom the Senate has already rejected. Enjoining this provision perpetuates a wasteful practice, which benefits no one.

Codification of Unemployment Insurance Job Search Regulations. Sections 27–38 of 2017 Wisconsin Act 370 codify the Department of Public Works administrative regulations concerning job search requirements necessary to receive unemployment. These regulations save taxpayers money and help ensure that unemployment benefits are distributed in a publicly beneficial manner. The Circuit Court did not find that these provisions harm Plaintiffs.

Confirmation of Eighty-Two Appointees. The Circuit Court's injunction has already caused needless chaos in the regular function of numerous important bodies in this State, while taking a human toll on the individuals affected by the order. The Circuit Court did not find that any of these appointments harm Plaintiffs.

CONCLUSION

This Court should vacate the temporary injunction.

Dated: April 10, 2019

TROUTMAN SANDERS LLP
By: 

Misha Tseytlin
State Bar No. 1102199
TROUTMAN SANDERS LLP
1 N. Wacker Drive, Ste. 2905
Chicago, IL 60606
Telephone: (608) 999-1240
Facsimile: (312) 759-1939
E-mail:
misha.tseytlin@troutman.com
Counsel for the Legislature

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,911 words.

Dated this 10th day of April, 2019.

Misha Tseytlin
Troutman Sanders LLP

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of April, 2019.

Misha Tseytlin
Troutman Sanders LLP