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STATE OF WISCONSIN
SUPREME COURT
Case No. 2019AP559

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,

and

WISCONSIN LEGISLATURE,

Intervening Defendant-Appellant.

ON BYPASS APPEAL FROM THE DECISION AND ORDER GRANTING TEMPORARY INJUNCTION DATED MARCH 21, 2019 IN DANE COUNTY CIRCUIT COURT CASE 19CV84, THE HONORABLE RICHARD G. NIESS, PRESIDING

RESPONSE BRIEF OF GOVERNOR TONY EVERS

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ISSUES FOR REVIEW

Defendant-Respondent Governor Tony Evers agrees with the issues for review as presented by the League of Women Voters of Wisconsin and other Plaintiffs-Respondents. He disagrees with their presentation by the Intervening Defendant-Appellant the Wisconsin Legislature.

ORAL ARGUMENT AND PUBLICATION

The Court has scheduled oral arguments for 9:45 a.m. on May 15, 2019. Publication is warranted because a decision from the Court will help develop the law on appellate deference to circuit court discretionary orders granting temporary injunctions when the constitutionality of a legislative act is in question.

STATEMENT OF THE CASE

After the November 2018 election of Democrat Tony Evers to the office of Governor and Democrat Josh Kaul to the office of Attorney General, in December 2018 Republican members of the legislative Committees on Assembly and Senate Organization called for the Legislature to meet in an "Extraordinary Session." During that three-day meeting, members of the Legislature purported to take the following actions: as the Legislature, introduce, consider and pass three Acts (2017 Acts 368, 369 and 370); and as the Senate, confirm 82 appointees to various government bodies. (R. 4, 58, 67, 68.) These facts, forming the foundation of this challenge, are undisputed.

Plaintiff-Respondent The League of Women Voters of Wisconsin and others ("LWV") brought this action for Declaratory Judgment, contending that the Acts and confirmations are null because the December 2018 Extraordinary Session ("Extraordinary Session") itself was convened without legal authority, i.e., *ultra vires*, in violation of Article IV, Section 11 of the Wisconsin Constitution.

LWV further contends that the call to convene issued by the Organizing Committees was similarly without authority, in violation of the quorum requirement in Article IV, Section 7 of the Wisconsin Constitution. (R. 1, 4.) Along with its Complaint, LWV sought a temporary injunction. (R. 6.) This is a procedural challenge to the laws purportedly passed and confirmations purportedly made during the Extraordinary Session—that is, the challenge is to the constitutionality of the Extraordinary Session itself, and therefore to the fruits of that meeting, not the laws and confirmations from a substantive perspective.

Defendant-Respondent Governor Tony Evers ("the Governor" or "Governor Evers"), although a Defendant, agrees with LWV on the merits. By stipulation, the circuit court granted the Wisconsin Legislature permissive intervention as a Defendant. (R. 75.) Much of the Legislature's Statement of the Case is improper argument, to which the Governor will respond in his Argument.

Following briefing on LWV's motion for temporary injunction, including briefs from parties and non-parties alike,

as well as briefing on motions to dismiss (R. 44, 55-57, 59, 64, 71-73, 78, 81, 83), on March 18, 2019, the circuit court, the Honorable Richard G. Niess, presiding, held a two-hour hearing at which the parties presented argument on the pending motions. (B-App 348-458; R. 97.) [1] The circuit court issued a 16-page Decision and Order on March 21, 2019, denying the Legislature's motion to dismiss and granting the LWV's motion for temporary injunction. (L-App 1-16; R. 90.) [2]

On March 22, 2019, the Legislature filed a notice of appeal from the temporary injunction order, as a matter of right (R. 95), and sought a stay of the injunction, which the Court of Appeals granted on March 27, 2019. (B-App 017-025.) LWV filed a Petition for Bypass with this Court on April 3, 2019. On April 15, 2019, the Court granted the bypass petition, issued a briefing schedule and scheduled oral arguments.

[1] "B-App __" refers to the Appendix to LWV's Petition for Bypass.
[2] "L-App __" refers to the Appendix filed with the Legislature's appeal brief.

ARGUMENT

I. The standard of review is erroneous exercise of discretion.

This is an appeal of a circuit court's discretionary decision to grant a temporary injunction. In an appeal from an order granting a temporary injunction, the question before the Supreme Court is narrow: whether the circuit court erroneously exercised its discretion. *Waste Mgmt., Inc. v. Wis. Solid Waste Recycling Auth.*, 84 Wis. 2d 462, 465, 267 N.W.2d 659 (1978); *Joint Sch. v. Wis. Rapids Ed. Asso.*, 70 Wis. 2d 292, 308, 234 N.W.2d 289 (1975); *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 519, 259 N.W.2d 310 (1977); *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).[3]

> A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. The test is not whether this court as an original matter would have denied the motion; it is whether the circuit court abused its discretion in doing so.

[3] Courts and parties used to refer to "erroneous exercise of discretion" as "abuse of discretion," but discontinued this phraseology in 1992 because of the unjustified negative connotations. *City of Brookfield,* 171 Wis. 2d at 423. The standard of review for "abuse of discretion" and "erroneous exercise of discretion" is identical. *Id.*

Schneller v. St. Mary's Hosp. Med. Ctr., 162 Wis. 2d 296, 306, 470 N.W.2d 873 (1991) (citations omitted).

Werner is the leading Wisconsin case stating the standards for granting a temporary injunction:

> Injunctions…are not to be issued lightly. The cause must be substantial. A temporary injunction is not to be issued unless the movant has shown [1] a reasonable probability of ultimate success on the merits. Temporary injunctions are to be issued [2] only when necessary to preserve the status quo. Injunctions are not to be issued without a [3] showing of a lack of adequate remedy at law and irreparable harm, but at the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.

Werner, 80 Wis. 2d at 520 (footnotes omitted) (bracketed numbers added for clarity).

The parties agree that the cause is substantial. As shown in Section III below, the Legislature does not dispute that the LWV and the Governor meet the second and third standards. Thus, the main question in this appeal is under the merits standard. Whether the circuit court erroneously exercised its discretion in granting the motion for a temporary injunction turns primarily on whether the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a

reasonable judge could reach in determining that the LWV and the Governor have shown a reasonable probability of ultimate success on the merits.[4] Section II shows that the circuit court was correct on the merits.

II. The circuit court correctly concluded that LWV and the Governor were likely to succeed on the merits.

The main clause of Article IV, Section 11 of the Wisconsin Constitution states: "The legislature shall meet at the seat of government at such time as shall be provided by law." The essence of the Legislature's argument is that it may, by joint resolution or joint rule (not law), give a handful of its members the authority to call a meeting of the Legislature, including on short or no notice. As recognized by the circuit court, the Legislature's theory would "swallow much of

[4] The Legislature has correctly abandoned its claim below that a presumption of constitutionality applies here. That presumption does not apply when assessing the constitutionality of the process in which legislation was enacted, as opposed to the substance of such enactments. *City of Brookfield v. Milwaukee Metro Sewerage Dist.*, 144 Wis. 2d 896, 912, 426 N.W.2d 591 (1988); *Group Health Co-op of Eau Claire v. Wisconsin Dept. of Revenue*, 229 Wis. 2d 846, 850, n. 1; 601 N.W.2d 1 (Ct. App.), *rev. den.*, 231 Wis. 2d 374, 607 N.W.2d 290 (1999). The procedural requirements at issue here are that (1) the Legislature meet only at a "time...provided by law," and (2) legislative business can only be conducted through a quorum. Wis. Const. Art. IV, Secs. 11, 7.

Article IV, Section 11 whole." (L-App 10.) Indeed, the Legislature's theory reads out most of the language of Article IV, Section 11 and renders the provision as simply "The legislature shall meet." It also obliterates the meanings of the common terms "meet," "provide," "regular," "extraordinary," and "schedule," as well as the legal concept of *sine die* adjournment. The circuit court correctly concluded that the words of the Constitution, allowing the Legislature's meetings to occur only at a specific place—provided directly by the Constitution—and at a specific time—provided by statute—cannot be so ignored.

A. The Extraordinary Session was *ultra vires* because it did not meet at a "time…provided by law."

The December 2018 Extraordinary Session ("Extraordinary Session") was constitutionally invalid because the Legislature did not create the meeting ***by law*** as the Constitution requires. Rather, the statute enacted to govern compliance with Article IV, Section 11 provides only for ***regular*** session meetings of the Legislature.

The Legislature is not at liberty to disregard its Constitutional obligation. Neither the Extraordinary Session, nor an amorphous "continuous" session of which the Legislature claims the Extraordinary Session was part, can exist under Article IV, Section 11.

Moreover, even if extraordinary sessions could be part of a regular session generally, this Extraordinary Session was not part of the 2018 regular session, which was already terminated, along with the Legislature's power to call itself into any session, by adjournment *sine die*.

1. The Constitution requires all meetings of the Legislature to occur at a time *actually* provided by statute.

In interpreting the Constitution, "[t]he authoritative, and usually final, indicator of the meaning of a provision is the text—the actual words used." *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶ 57, 320 Wis. 2d 275, 768 N.W.2d 868. When courts require further indicia of the text's meaning, they also consult "the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest

interpretation of the provision by the legislature as manifested in the first law passed following adoption." *Wagner v. Milwaukee Cty. Election Comm'n*, 2003 WI 103, ¶ 18, 263 Wis. 2d 709, 666 N.W.2d 816 (quotation omitted).

The text to be interpreted "is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *State* ex rel. *Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Constitutional language is to be read, whenever possible, to give reasonable effect to every word, in order to avoid surplusage. *Appling v. Walker*, 2014 WI 96, ¶ 23, 358 Wis. 2d 132, 853 N.W.2d 888.

Here, the plain text is sufficient to interpret the provision. It is straightforward: "The legislature shall meet…at such time as shall be provided by law, unless convened by the governor in special session." Wis. Const. art. IV, § 11. A meeting time is "provided by law" only when a

law directly "supplies," "furnishes," or "makes [it] available."[5]

Moreover, "law," as expressed in Article IV, Section 11, is a bill that passes both houses of the Legislature, signed by the governor (or passed by a supermajority over his veto), and published. Wis. Const. art. IV, § 17; art. V, § 10. The "provision by law" of meetings of the Legislature may only occur through statute, not through joint resolution or rule. Wis. Const. art. IV, § 17; art. V, § 10; *State v. City of Oak Creek*, 2000 WI 9, ¶ 27, 232 Wis. 2d 612, 605 N.W.2d 526. The Legislature admitted below (but continues to ignore) this:

> THE COURT: Let me ask you this: Are either legislative rules or joint resolutions law within the meaning of Article IV, Section 11?
>
> MR TSEYTLIN: No, they're not, Your Honor.

(B-App 407.)

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[5] *See* Merriam-Webster's Online Dictionary, definition of "provide," at https://www.dictionary.com/browse/provide; *Barritt v. Lowe*, 2003 WI App 185, ¶ 10, 266 Wis. 2d 863, 669 N.W.2d 189; *see also Black's Law Dictionary* 1224 (6th ed. 1990), defining "provide" as "[t]o make, procure, or furnish for future use, prepare; To supply; to afford; to contribute," and noting that "provided by law," "when used in a constitution or statute, generally means prescribed or provided by some statute."

2. The "law" provides for meetings of the Legislature's *regular* session, not any extraordinary sessions.

The Legislature has, generally speaking,[6] provided "by law" times for only two kinds of legislative meetings. One is a meeting for the Legislature "to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business." Wis. Stat. § 13.02(1). That organizing meeting is held on the first Monday in January in each odd-numbered year, unless that day falls on January 1 or 2, in which case it is held on January 3 instead. *Id.*

The second meeting time provided "by law" is the regular session. Wis. Stat. § 13.02(2). The regular session "commence[s] at 2 p.m. on the first Tuesday after the 8th day of January in each year unless otherwise provided under sub. (3)." *Id.* Once started, the meeting can stop and restart many times by operation of temporary adjournments. *State* ex rel.

[6] As discussed *infra*, in Section II.B, extraordinary sessions appear to have been provided by law in an extremely narrow set of circumstances not applicable to the Extraordinary Session. Thus, general references in this brief to "extraordinary sessions" intentionally exclude these outlier statutes for clarity and efficiency.

Thompson v. Gibson, 22 Wis. 2d 275, 289–90, 125 N.W.2d 636 (1964).

As a result, and as correctly determined by the circuit court, the only legitimate meetings of the full bodies of the Legislature are the organizing meeting, the regular session, and any special session called by the governor. (L-App 7-8.) The Legislature admits that if there is any authority for extraordinary sessions, it is provided only by joint rule and joint resolution, not statute.[7] (Leg. Br. pp. 6-8, 16, 32.)[8] Because "by law" means by duly-enacted statute, and the Extraordinary Session was not convened under such a statute, the Extraordinary Session ran afoul of Article IV, Section 11.

3. The Extraordinary Session was not part of the Legislature's regular session.

Because the only time provided by law for the Legislature to meet is the regular session, the Extraordinary

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[7] *See* 2017 Senate Joint Res. 1, § 3, which laid out the Legislature's biennial schedule and claimed to reserve the possibility of an extraordinary session being called, and Joint Rule 81, upon which that resolution claimed its authority.

[8] "Leg. Br." refers to the Legislature's April 10, 2019 Opening Brief.

Session's validity depends on it being part of the regular session.[9] For several reasons, it was not.

First, the Extraordinary Session was not made part of the regular session by any law, and the Legislature does not claim otherwise.

Second, extraordinary sessions are distinct from regular sessions because they only occur ***during adjournments of*** the regular session. The Legislature is not perpetually in regular session throughout every minute of its term. Rather, the regular session is only ***actively in session*** during a physical meeting of the Legislature on the floors of the respective houses during a "floorperiod:" a stretch of days pre-scheduled for regular session meetings. *See* 2017 Senate Joint Res. 1, § 1; *Thompson*, 22 Wis. 2d at 289–90.

At the end of each meeting of the regular session, the houses of the Legislature adjourn themselves (and the session) until a pre-determined time for the next regular session meeting. Between meetings of the same floorperiod, the

[9] There is no contention in this case that the Extraordinary Session was part of an organizing meeting or special session called by the governor. Hence, this brief does not further discuss these scenarios.

session is adjourned until the next scheduled meeting of the regular session. At the conclusion of such a meeting, the houses vote that "the [applicable house] stand adjourned until" the next day in that floorperiod on which the house plans to meet. *See, e.g.*, Wis. Senate J., 103rd Reg. Sess., at 755 (Wis. 2018); Wis. Assemb. J., 103rd Reg. Sess., at 825 (Wis. 2018).[10] At the end of the last meeting of a floorperiod, legislators vote that "the [numbered biennium's] Regular Session of the Senate stand adjourned pursuant to Senate Joint Resolution 1." *See, e.g.,* Wis. Senate J., 103rd Reg. Sess., at 786 (Wis. 2018); [11] Wis. Senate J., 103rd Reg. Sess., at 869 (Wis. 2018).[12] That is, the house adjourns itself until the next scheduled meeting of the regular session.

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[10] *Available at* https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180220; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180221. The Senate votes that "the [numbered biennium's] Regular Session of the Senate stands adjourned" until the next scheduled meeting, underscoring that the regular session itself is adjourned upon the particular meeting's closure.

[11] The Assembly's adjournment is similar but omits specific reference to the regular session. *See, e.g.,* Wis. Assemb. J., 103rd Reg. Sess., at 833 (Wis. 2018)

[12] Available at https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180222; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/2018

Therefore, every meeting of the regular session concludes by adjournment until the next scheduled regular session meeting. No regular session meeting may take place during the interim. Because the regular session is adjourned when an extraordinary session takes place, the latter cannot possibly be part of the former.

Third, extraordinary sessions are distinct from regular session meetings and floorperiods not only as a matter of scheduling but substantively as well. They are initiated and closed differently, recorded separately, subject to different rules, and serve narrower purposes. *See, e.g.,* Joint Rule 74(2); Joint Rule 81(2)(c); Senate Rule 93; Assembly Rule 93; Assembly Rule 98(1).

The Legislature mistakenly argues that the Court should confer the legitimacy of regular session floorperiods on extraordinary sessions simply because extraordinary sessions are ***referred to***, along with regular session floorperiods, in a few statutes. (Leg. Br. pp. 36-37.) These

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0222; https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180322.

references only draw attention to the paucity of statutes ***authorizing*** such sessions.[13] Further, they serve not to erase, but to highlight, the distinction ***between*** extraordinary and regular sessions.

The terms "floorperiod" and "extraordinary session" are recognized in statutes as mutually exclusive. Wis. Stat. § 13.625 (1m)(b)1 provides, "A contribution to a candidate for legislative office may be made during [a certain] period only if the legislature has concluded its final floorperiod, and is not in special or extraordinary session." Likewise, Wis. Stat. § 11.1205, which sets the allowable timeframes for distribution of government materials by candidates, treats extraordinary sessions exactly like special sessions, not like regular session floorperiods. Wis. Stat. § 11.1205(2)(c)-(d).

2017 Senate Joint Resolution 1 also recognizes extraordinary sessions as separate events from both scheduled and extended floorperiods. *See* 2017 Senate Joint Res. 1,

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[13] If all extraordinary sessions are illegitimate, this does not impermissibly render this statutory language superfluous ***by interpretation of the language***, as the Legislature posits. (Leg. Br., p. 37). Rather, the references would simply be dormant until another statute properly confers authority. At any rate, as discussed *infra* in Section II.B, extraordinary sessions ***could*** be held at times provided by statute.

§ 1(3)(a). It also provides that extraordinary sessions are adjourned exactly as are special sessions, and ***not*** as are floorperiods. 2017 Senate Joint Res. 1, § 1(5). These same differences are also reflected in Joint Rule 81 and in the rules of the respective houses of the Legislature.[14]

Further, the Legislature—in actual practice—does not treat extraordinary sessions as alterations or additions to the regular session calendar, nor does it call itself back into regular session to hold extraordinary sessions. Journal entries for extraordinary sessions lack the caption for all regular session entries, being titled, for example, "December 2018 Extraordinary Session" instead of "One-Hundred and Third Regular Session." *Compare*, *e.g.*, Wis. Assemb. J., Dec. 2018 Ext. Sess., at 968 (Wis. 2018), Wis. Senate J., Dec. 2018 Ext. Sess., at 978 (Wis. 2018) *with* Wis. Senate J., 103rd Reg. Sess., at 786

[14] Senate Rule 93, Assembly Rule 93, Joint Rule 74, Assembly Rule 98(1) (available at https://docs.legis.wisconsin.gov/2017/related/rules/senate/10/93; https://docs.legis.wisconsin.gov/2017/related/rules/assembly/11/93; http://docs.legis.wisconsin.gov/2015/related/rules/joint/8/74; https://docs.legis.wisconsin.gov/2017/related/rules/assembly/12/98).

(Wis. 2018), Wis. Assemb. J., 103rd Reg. Sess., at 833 (Wis. 2018).[15]

Finally, extraordinary sessions are functionally differentiated from regular session floorperiods because the Legislature may only take up business items specified in the action calling them. Joint Rule 81(2)(b), (c). It cannot resurrect items not passed at the end of the last regular session floorperiod. *Id.*; Wis. Assemb. J., 103rd Reg. Sess., at 908, 917 (Wis. 2018); Wis. Sen. J., 103rd Reg. Sess. at 871, 881 (Wis. 2018). Neither can subsequent regular session floorperiods resurrect bills introduced but not passed in an extraordinary session, even in the same biennial session period. Wis. Assemb. J., 103rd Reg. Sess., at 919 (Wis. 2018).

The Legislature's protest that the distinction is only a matter of "labels" (Leg. Br. pp. 35-36) is disingenuous.

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[15] Available at https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20181203ede8; https://docs.legis.wisconsin.gov/2017/related/journals/senate/20181204ede8; https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180222; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180222.

Extraordinary sessions are distinct from regular session meetings as a matter of substantive law, procedure, and purpose.

4. The Extraordinary Session was not part of any "continuous session" because a continuous session cannot exist.

Given the impossibility of demonstrating that the Extraordinary Session was actually part of the regular session, the Legislature is left to construct its "core argument" around the proposition that it could conduct any meetings its handful of committee leaders pleased to announce throughout the 2017-18 biennium, because the entire period consisted of a "continuous biennial session" and the Constitution only requires it to "meet." (Leg. Br. pp. 14, 19.) This argument does violence to the Constitution and to the English language alike, shortening Section 11 from 50 words to four, and reducing it to the virtually meaningless phase "The legislature shall meet." This is not permissible.

There can be no "continuous" session because the Constitution only allows the Legislature to meet (1) "at the seat of government" (2) "at such time as shall be provided by

law." Art. IV, § 11. No continuous session could meet the time and place requirements of Article IV, Section 11 or the quorum requirement of Article IV, Section 7. The Legislature does not, and cannot, assert that a quorum of legislators remains constantly meeting at the State Capitol throughout each second of the biennial session period. Rather, the "meetings" for which times must be provided by law are actual, physical meetings of the Legislature's members. This is clear from the common meaning of "meeting," provided by the Legislature in its own brief, that requires a physical setting.[16] The Constitution itself imposes a ***specific*** physical setting, requiring the Legislature to meet "***at the seat of government*** at such time" provided by law. Therefore, it is clear that law must provide times for ***actual meetings***, not theoretical, metaphysical constructs which may merely ***contain*** actual meetings.

[16] The Legislature admits that to "meet" means to "come face to face; or into the company of," and that "meeting" means the "action of coming together from opposite or different directions into one place or into the presence of each other, of assembling for the transaction of business." (Leg. Br. p. 19, citing *Oxford English Dictionary*.)

The Legislature's argument that it is always in continuous session also ignores the fact, discussed above, that the Legislature adjourns at the end of every day in which it meets on the floor, officially ending the meeting until the date specified in the adjournment.[17] In fact, as the very joint resolution that the Legislature relies on makes clear, during the vast majority of the biennial session period, the Legislature is ***not*** meeting at the seat of government. *See* 2017 Senate Joint Res. 1.

The concept of a continuous session would also render statutory language—such as the different usages of "regular session" and "biennial session period" in Wis. Stat. § 13.02(2) and (3) and the carry-over provision between the separate ***annual*** sessions under Wis. Stat. § 13.02(4)—impermissible surplusage. *Kalal*, 2004 WI 58 ¶ 45.

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[17] The Legislature cites *Dammann* and *Thompson* for the proposition that "once the Legislature gathers…that constitutional meeting does not end until the Legislature takes action making clear that it 'ceases to exist.'" (Leg. Br. p. 20.) Those cases, which predate the Constitutional and statutory amendments that the Legislature cites as its authority to hold extraordinary sessions, hold nothing of the kind. Instead, they acknowledge that sessions can be halted by adjournment and then reconvene, so long as the reconvening is proper. *Thompson*, 22 Wis. 2d at 90; *accord State ex rel. Sullivan v. Dammann*, 221 Wis. 551, 555, 267 N.W. 433 (1936).

Historical indicia do not support "continuous" sessions either. As the circuit court correctly observed (L-App 6), constitutional provisions such as Article IV, Section 11 were adopted specifically to "avoid legislative overreach and safeguard liberty" by preventing irregular convenings and to ensure "meaningful notice" of meetings for legislators and the public alike. *See* Alan Tarr, *Understanding State Constitutions* 118-26 (1998); Robert Luce, *Legislative Assemblies* 123 (1924).

Given that extraordinary sessions were both unheard of for the vast majority of history and absent a time set by statute are preempted by the Constitution's original "provided by law" clause, the Legislature is left to claim that the 1968 Amendment changed this. That amendment excised only the seven words that followed that phrase: "once in two years, and no oftener." *See Thompson*, 22 Wis. 2d at 289. As the Legislature admits, before the 1968 amendment, the Legislature would recess frequently during the regular session, so the regular session could span many meetings. (Leg. Br. pp. 21-22.) Removing the phrase "once in two years, and no oftener" simply meant that regular sessions could take

place in each year of a biennium. This adjustment did not remove the Constitution's plain text requirement that the Legislature meet only at a specific ***place***, provided by the Constitution, and only at a specific ***time***, provided by statute.

The notion that each moment of the biennial session period is entirely inhabited by a "single, continuous biennial session" is not supported by the "contemporary sources" of the Constitutional amendment that the Legislature cites. (Leg. Br. pp. 21-22.) The 1968 amendment did give the Legislature flexibility in deciding "when [it] should meet" and allowed it "to work year-round," in that floor periods of the regular session could potentially be scheduled throughout the biennial session period and not just, as before the amendment, in a single year of it. But contemporary sources evince no understanding that the Legislature would be continuously in session. In fact, the anticipation that there would at least be "summer recess[es]" (Leg. Br. p. 21) indicates that there would not even be daily session meetings, let alone a single, continuous one.

In fact, contemporaneous sources show that the intent of the Amendment was for the Legislature to conduct its session within a "pre-planned" and "precise schedule" of work periods. Legislative Reference Bureau, *Wisconsin Briefs: Constitutional Amendments to be Submitted to the Wisconsin Electorate,* April 2, 1968, at 8-9 (Mar. 1968). That clearly contravenes the possibility that the regular session would run continuously throughout the entire biennial session period.

The "prevailing practices when the provision was adopted" and "first laws passed that bear on the provision"[18] likewise are unavailing to the Legislature. By the Legislature's own admission, no extraordinary session was held until 12 years after the 1968 Amendment and—more importantly—over 130 years after Article IV, Section 11 was originally drafted. (Leg. Br. p. 33.) Extraordinary sessions therefore cannot be considered prevailing practices contemporary to the operative Constitutional language.

[18] The Legislature's argument on these elements relies only a joint resolution and Wis. Stat. § 13.02(3). The resolution is not a law and thus is not properly part of the analysis, while the statute does not contemplate or authorize extraordinary (or continuous) sessions.

The Legislature's reliance on *post hoc* interpretations of internal operating rules and resolutions is not supported by history, let alone by Constitutional or statutory text.

5. The Legislature misconstrues its obligations and authority under Wis. Stat. § 13.02(2) and (3).

The Legislature argues that Wis. Stat. § 13.02 allows a handful of the Legislature's members to convene any meetings of the Legislature that it wants because sub. (3) allows the Legislature unfettered power through the mechanism of a "work schedule," and because sub. (3) eviscerates sub. (2), allowing total evasion of the requirement of a "regular session." These arguments grossly distort the law, its history, and its logic.

a. Wis. Stat. § 13.02(3) only allows creation of a "work schedule;" it does not provide a meeting time by law or authorize committees to convene a new session.

The Legislature essentially asserts that Wis. Stat. § 13.02(3)[19] allows it to enact anything that it wants via a

[19] This subsection states: "Early in each biennial session period, the joint committee on legislative organization shall meet and develop a work

scheduling joint resolution. (Leg. Br. pp. 31-33.) However, all that this subsection authorizes is a meeting of the joint committee on legislative organization (which is not the Legislature) at which it must develop and submit to the Legislature "a work schedule for the legislative session." The schedule is to be "submitted to the legislature as a joint resolution." The Legislature is not even required to ***pass*** the proposed joint resolution. Thus, subsection (3) does not directly yield any Legislative schedule determinations. Much less, as the circuit court correctly noted (L-App 8-9), does it authorize any new Legislative meetings or allow ***anything*** other than for the committee to create one specific product: a "work schedule." The joint resolution thus may not be used as a Trojan horse through which a committee of legislators can circumvent the Constitution.

Further, a "schedule" is "[a]ny list of planned events to take place on a regular basis such as a train schedule or a schedule of work to be performed in a factory." *Black's Law*

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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."

Dictionary 1344 (6th ed. 1990).[20] Thus, the subsection requires planned event times.

The actual joint resolution resulting from sub. (3) in the 2017-18 biennium provides a work schedule for the floorperiods of the regular session. However, what it provides as far as ***extraordinary*** sessions are concerned is not a "work schedule" because there are no planned event times. To the contrary, the resolution states that an extraordinary session ***may*** be called when ***there is no schedule***. *See* 2017 Senate Joint Res. 1, § 1(3)(a). As the circuit court correctly recognized, an extraordinary session or "'non-prescheduled floor period' is the antithesis of a 'work schedule,' by both definition and force of logic." (L-App 9.)

Neither a work schedule for the Extraordinary Session, nor a mechanism determining the time of its commencement, nor even the general time that it should be held, are provided by Wis. Stat. § 13.02 or any other law. The Extraordinary Session meeting thus violated even an expansive

[20] *See also* https://www.dictionary.com/browse/schedule; https://www.merriam-webster.com/dictionary/schedule.

interpretation of Article IV, Section 11 of the Wisconsin Constitution that would allow any meeting that appears on a joint resolution work schedule.

b. Absent other statutory authority, legislation may only be passed during a regular session.

The Legislature refers to Wis. Stat. § 13.02's requirement of "regular sessions"—found in both sub. (2) and the section title—as an "irrelevant" "historical vestige of [the] pre-1968 regime" to be ignored. (Leg. Br. p. 30.) This brazen denigration of statutory language cannot be supported. To the contrary, the fact that the Legislature left this language intact while amending the statute to add the reference to sub. (3) must be read as a reaffirmation of the regular session concept and reinforcement of its continued validity. *See Cty. of Dane v. Labor & Indus. Review Comm'n*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571. Ignoring the language as surplusage is impermissible. *Kalal*, 2004 WI 58 at ¶ 45. Absent other meeting times provided by law, the statute's requirement of legislating only in regular session must, therefore, be given effect.

The Legislature's argument for ignoring the regular session requirement depends on an implausible, tortured reading of Subsection 2.[21] The Legislature argues that the "unless clause" ("unless otherwise provided under sub. (3)") means that ***nothing*** of Subsection 2 has relevance when the Legislature has adopted a work schedule under Subsection 3. (Leg. Br. p. 30.) However, the "unless" clause cannot reasonably be read to eliminate all of sub. (2), much less § 13.02's overall title, which is not subject to the "unless" clause.

It is vastly more logical that the "unless" clause applies to the language that immediately precedes it, which sets the time and date in January for the regular session's commencement. Because Subsection (3) can only produce a work schedule "which shall include at least one meeting in January of each year," the only thing that can be "otherwise provided" under sub. (3) is a different date and time in January to commence the regular session. Nothing in either

[21] This subsection states: "The regular session of the legislature shall commence at 2 p.m. on the first Tuesday after the 8th day of January in each year unless otherwise provided under sub. (3)."

subsection allows the Legislature to cancel the regular session entirely, begin it later than January, or replace it with any other type of meeting by joint resolution. Finally, if the Legislature is not meeting under sub. (2)—the only law providing a session meeting—then it is not meeting in accordance with the Constitution at all.

6. Even if the Legislature could convene extraordinary sessions generally, it could not legally convene the Extraordinary Session because the regular session had already terminated by adjournment *sine die*.

As shown previously, extraordinary sessions are not part of the Legislature's regular session, and there is no "continuous" session of which they could be part. However, even if extraordinary sessions could generally be included in either, the Extraordinary Session was unlawful because the Legislature had already adjourned *sine die*.

Although other forms of session termination may be possible, "[t]he ordinary form of termination of a session is by *sine die* adjournment." *State* ex rel. *Thompson v. Gibson*, 22 Wis. 2d 275, 290, 125 N.W.2d 636 (1964). *Sine die* means "[w]ithout

day; without assigning a day for a further meeting or hearing. Hence a legislative body adjourns *sine die* when it adjourns without appointing a day on which to appear or assemble again." *Black's Law Dictionary* 1385 (6th ed. 1990).[22]

A textbook s*ine die* adjournment—and, thus, the termination of the entire 2018 session—occurred more than eight months before the Extraordinary Session was suddenly convened, on the day that the Legislature held a scheduled regular session meeting, did not adjourn to a specified date in the future, and after which no further meeting dates were scheduled and held. *Compare Thompson*, 22 Wis. 2d at 289 ("When both houses 'adjourned' on August 6, 1963, it was expressly provided that the adjournment was only until November 4, 1963, and such an adjournment did not operate to dissolve the 76th session of the Wisconsin legislature.");

[22] *See also, e.g.*, Mary E. Burke, *The Wisconsin Partial Veto: Past, Present and Future*, 1989 Wis. L. Rev. 1395, 1432 (1989) ("The legislature adjourns '*sine die*' when it does not specify before adjourning a date on which members will reconvene."); *State* ex rel. *Martin v. Zimmerman*, 233 Wis. 442, 289 N.W. 662, 666 (1940); Wisconsin Assembly Chief Clerk, 1969, *Wisconsin Assembly Manual*, A-45 (first published Assembly manual following last amendment of Wis. Const., art. IV, § 11, providing that the Regular Session continues "until sine die adjournment of such Session.")

with Wis. Senate J., 103rd Reg. Sess., at 869, 895, 905 (Wis. 2018); Wis. Assemb. J., 103rd Reg. Sess., at 902, 937, 943 (Wis. 2018) (simply adjourning "pursuant to Senate Joint Resolution 1" when no further floorperiods were scheduled).[23]

The conclusiveness of that adjournment is confirmed by the Legislature's recognition that all bills that had not been passed by both houses of the Legislature were adversely disposed of at that time. (*See* Wis. Assemb. J., 103rd Reg. Sess., at 908, 917 (Wis. 2018); Wis. Sen. J., 103rd Reg. Sess. at 871, 881 (Wis. 2018).) There was no active, law-provided session from which the Extraordinary Session could spring.

The Legislature claims otherwise only by ignoring the meaning of "*sine die*." It argues that it did not adjourn *sine die*

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[23] *Available at* https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180322; https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180417; https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180508; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180322; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180417; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180508.

until the moment before the next biennial session of the Legislature on Monday, January 7, 2019. (Leg. Br. pp. 4, 19-26.) However, the 2017-2018 Legislature never intended to and did not meet on January 7, 2019; how could it adjourn that day if it was not meeting? Rather, January 7, 2019 was only ever the date upon which the 2017-18 biennial session period ended and the 2019-20 biennial session period began. 2017 Senate Joint Res. 1.

Unable to deny the plain proof of its *sine die* adjournment, the Legislature attacks that proof through misconceived arguments about adjournments. First, the Legislature argues that it is in continuous session until *sine die* adjournment, citing *Dammann*, 221 Wis. 551, and *Thompson*, 22 Wis. 2d 275. (Leg. Br. pp. 19-20.) Those cases do not support the Legislature's claim. Rather, they explicitly acknowledge, and the Legislature admits, that non-*sine die* adjournments take place between daily floor meetings. *See Thompson*, 22 Wis. 2d at 290 ("one single session may be interrupted by recesses, and validly continue after a recess as long as such recesses can reasonably be said to be taken for a

proper legislative purpose"); *Dammann*, 267 N.W. at 437. This itself is enough to prove that there is no continuous session.

Further, the Legislature argues that these two cases stand for the proposition that "the constitutional meeting does not end" until the end of the biennial session period, and the meeting "does not end until the Legislature takes action making clear that it 'ceases to exist.'" (Leg. Br. pp. 19-20.)

This argument gets the law backwards. There is no doctrine described in these or any other cases under which the Legislature should "make clear" that it is terminating the session, let alone a legal endorsement of the idea that it might remain "in meeting" simply by setting the scope of the biennial session period to run from the end of the previous biennium until the start of the next. Rather, the relevant doctrine provides that the end of the constitutional meeting ***follows from*** the *sine die* adjournment.

The Legislature also argues that the ability of various committees to meet year-round is evidence that it could not have adjourned *sine die* before the Extraordinary Session because, if it had, it would have "ceased to exist" under

Dammann and *Thompson*. (Leg. Br. pp. 20, 22-24.) This again is a backward argument: the occurrence of committee meetings does not change the legal implications of any preceding *sine die* adjournment of the Legislature. Committee work does not constitute a meeting ***of the Legislature*** with which Article IV, Section 11 is concerned.[24] *Dammann* and *Thompson* clarify that it is only the Legislature's ***lawmaking authority in session***—not other work functions of legislators—that terminates upon *sine die* adjournment. *Dammann*, 267 N.W. at 437 (it "has no further opportunity to exercise its constitutional right to reconsider a bill"); *Thompson*, 22 Wis. 2d 275 at 290. Even though committees may take some "legally binding actions," as the Legislature argues, these actions are not the core, legislative function with which Article IV is concerned. *See* Art. IV, § 1.[25]

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[24] Even if committee meetings after *sine die* adjournment of the last scheduled regular session meeting were considered meetings "of the Legislature," they would be *ultra vires* themselves under *Dammann* and *Thompson*; this further wrong could not rescue the Extraordinary Session from invalidity.

[25] The Legislature provides no evidence that its members have ever—even pre-1968—ceased to perform functions such as committee work after *sine die* adjournment.

Under Article IV, "the Legislature" is only the full houses of the Legislature. The only meetings it governs are of the houses. *See* Art. IV, §§ 1, 2, 7, 8, 10. If meetings of committees ***were*** considered meetings "of the Legislature," absurdities would ensue. No committee could ever meet because it would never have the requisite quorum. *See* Art. IV, § 7. Committee meetings that take place outside of Madison[26] would be unconstitutional. *See* Art. IV, § 11. Conversely, committees would have incredible powers, such as to "confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe." Art. IV, § 22.

The Legislature's interpretation of the "cease to exist" language is also incompatible with the Constitutionally-provided ability of the Governor to call a Special Session, *see* Art. IV, § 11, as well as the Constitutionally-provided length of legislators' terms, *see* Art. IV, § 5.

[26] Such meetings are regularly conducted, even by the Joint Committee on Finance. *See, e.g.,* https://docs.legis.wisconsin.gov/raw/cid/1377201, https://docs.legis.wisconsin.gov/raw/cid/1377205.

Thus, when the Legislature attempts to minimize its gathering at the Extraordinary Session as "nothing more than the Legislature changing a prescheduled committee period into a floor period" (Leg. Br. p. 26), it ignores the central distinction between the two "periods": the former is ***not*** a meeting of the Legislature—and therefore not regulated by Article IV, Section 11—while the other is. Because the Legislature's only meeting provided by law had terminated before the Extraordinary Session, the session cannot be considered part of that meeting.

7. Nothing excuses the Legislature from this Court's scrutiny.

As demonstrated above, the Legislature cannot defend the validity of the Extraordinary Session without distorting the plain meaning of constitutional and statutory language. It therefore offers two arguments intended to evade scrutiny of its actions. Neither is applicable here.

The Legislature first argues that this Court has no jurisdiction to inquire into whether the Legislature acted "by law" under the Constitution. (Leg. Br. pp. 26-27.) It relies on the freedom the Legislature has over its "internal operating

rules or procedural statutes" under *State* ex rel. *Ozanne v. Fitzgerald*, 2011 WI 43, ¶¶ 13-15, 334 Wis. 2d 70, 798 N.W.2d 436. Based on this, its argument goes, it was at liberty to disregard Wis. Stat. § 13.02 in its entirety.[27] (*Id.*)

The Legislature ignores that *Ozanne* has an "unless clause" which destroys its argument: The Legislature is free to disregard statutes governing its own procedure ***only*** "in the absence of constitutional directives to the contrary." *Ozanne*, 2011 WI 43 ¶ 13 (internal quotation omitted);*see also Milwaukee Journal Sentinel v. Wis. Dep't of Admin.*, 2009 WI 79, ¶¶ 18-20, 319 Wis. 2d 439, 768 N.W.2d 700 ("[E]ven if the statute might otherwise be characterized as a legislative rule of proceeding, we may interpret the statute and apply it to the legislative action to determine whether that action complies with the relevant constitutional mandates.").

In fact, this Court has both a duty to examine whether the Legislature used constitutionally defective procedure to

[27] This argument is also premised on the claim debunked above that the Legislature was "meeting" continuously.

enact laws, and a duty to declare void those laws enacted in violation:

> The courts will take judicial notice of the statute laws of the state, and to this end they will take like notice of the contents of the journals of the two houses of the legislature far enough to determine whether an act published as a law was actually passed by the respective houses in accordance with constitutional requirements.

McDonald v. State, 80 Wis. 407, 50 N.W. 185 (1891). Like the *McDonald* Court, the Court here must look to the legislative journals and other historical facts of the Extraordinary Session in particular, and legislative sessions in general, to evaluate compliance with the Constitution.

As described *supra*, in Section II.A.4., and as recognized by the circuit court, the Constitution's language regarding the time of legislative meetings is meant to be restrictive. (L-App 6.) The Legislature cannot evade that Constitutional restriction simply because the restriction explicitly operates ***through*** statute. It is undisputed that Wis. Stat. § 13.02 is the only statute through which the Legislature complies with Article IV, Section 11 of the Constitution. The language of the former determines whether the Legislature complied with the latter.

The Legislature also seeks to avoid this Court's scrutiny using "the requirement of avoiding a finding of constitutional violation, where possible." (Leg. Br. p.34, citing *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98.) The Legislature misstates the actual canon of constitutional avoidance, which is not applicable here.

That canon favors a reasonable saving construction ***of a statute*** challenged as unconstitutional. *Betthauser v. Med. Protective Co.*, 172 Wis. 2d 141, 150, 493 N.W.2d 40 (1992); *accord Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019). No party is challenging Wis. Stat. § 13.02—the only statute being interpreted here—as unconstitutional. Rather, the Extraordinary Session and therefore its outcomes are claimed to be unconstitutional not because of their ***substance***, but rather by application of the procedures required by the Constitution for the Legislature to take action. However the parties may disagree over the interpretation of those mandated procedures, all recognize them as valid. Therefore, the doctrine does not apply.

Even if it did apply, it would not relieve the Court of its duty to opine on the constitutionality of the Extraordinary Session. The canon of constitutional avoidance limits permissible interpretations to ones that are reasonable and survive the plain language analysis. "[A]voidance of constitutional conflict does not drive our reading of the statute," *In re Commitment of Hager*, 2018 WI 40, ¶ 31, 381 Wis. 2d 74, 911 N.W.2d 17 and "will not be pressed to the point of disingenuous evasion," *State v. Hall*, 207 Wis. 2d 54, 89, 557 N.W.2d 778 (1997) (refusing to apply saving construction adopted by the court of appeals). It "comes into play only if…after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction," *Nielsen*, 139 S. Ct. at 972 (internal quotation omitted), and only when both possible interpretations are reasonable. *State v. Hamdan*, 2003 WI 113, ¶ 27, n. 9, 264 Wis. 2d 433, 665 N.W.2d 785. In other words, it is merely "a tool for choosing between competing plausible interpretations of a provision." *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015) (internal quotation omitted).

There is no reasonable construction of a statute that would render the Extraordinary Session a part of the regular session or avoid eviscerating the meaning of words like "meet," "schedule," and "provide." When the Legislature met at a time not provided in Wis. Stat. §13.02, it violated the Constitution. No Court can turn a blind eye or apply a construction to save it.

8. The Legislature blurs distinctions between different uses of the word "session."

There are meaningful distinctions between the different uses of the word "session," evidenced by the various relevant terms of art: "regular session," "biennial session period," and "extraordinary session." The Legislature's arguments distort these various terms and ignore their meaningful differences.

In particular, the Legislature repeatedly elides the terms "biennial session period," (*see* Wis. Stat. § 13.02(3); 2017 Senate Joint Res. 1) and "regular session" (*see* Wis. Stat. § 13.02(2) and title), likely because the former ***is***, by definition, continuous throughout the biennium, while the latter is not. Similarly, the Legislature created in this litigation the phrase "non-

prescheduled floor period" to use in place of "extraordinary session," likely to mask the fact that the latter term, by logic, common definition, and text, is entirely separate from the "regular session." As the circuit court correctly observed, "non-prescheduled floor period" is nothing but "a *post hoc* fiction crafted to justify the authority the Legislature wrongfully assumed to convene" the Extraordinary Session. (L-App 9.)

In an inconsistent, alternative argument, the Legislature goes so far as to attempt to tie the Extraordinary Session to both "regular" sessions (whose continued existence the Legislature otherwise denies) and "continuous" sessions at the same time, claiming that 1971 Senate Joint Resolution 21 "explicitly explained that an 'extraordinary session' is part of the ***continuous*** biennial ***regular*** session." (Leg. Br. p. 35.) (emphasis added.) This contention is irrelevant as it relies on a joint resolution rather than a law as the Constitution requires.

The contention is also false on two other grounds. First, the 1971 resolution never made the regular session continuous. Rather, it said that "the regular session of the 1971

legislature shall ***cover*** a two-year period. The session shall consist of successive floor periods as further outlined in this resolution." (1971 Senate Joint Res. 21, § 1, L-App 34-35, emphasis added.) Coverage of the period—meaning that the session could meet on any day of the period—does not equate to a continuous meeting throughout the period. Indeed, it ***could not***: the next sentence states that the regular session consists ***only*** of the outlined floorperiods, not any other time during the period. *Id.* Second, the section refers to extraordinary sessions, and explicitly describes them as something ***other*** than the floorperiods of which the regular session consists.

That the Legislature "stopped using the 'regular session' terminology" in favor of "biennial session period" in post-1971 resolutions (Leg. Br. p. 35) signals the Legislature's understanding that these terms have different meanings and the regular session is ***not*** continuous and can***not*** include an extraordinary session. Finally, the Legislature's sole reliance on the history of these joint resolutions underscores the fact that it can point to no "first laws"—or ***any laws***—in support

of its contention and, thus, cannot show that extraordinary session times are provided by law in accordance with the Constitution.

The Legislature argues 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.'" (Leg. Br. at 36.) This relabeling would not solve the Legislature's constitutional violation. "Regular" and "extraordinary" sessions are two different things; the lack of one defines other.[28] And as described *supra* in Section II.A.3, extraordinary sessions are distinct from regular sessions (which are in turn separate from biennial session periods) for a host of reasons apart from their labels. Separate nomenclature for the sessions is simply one more illustration—albeit an exceptionally clear one—that they are different concepts.

[28] See https://www.merriam-webster.com/dictionary/extraordinary, defining "extraordinary" as "going beyond what is usual, regular, or customary."

B. Previous extraordinary sessions and statutory references to extraordinary sessions do not help the Legislature's argument.

The Legislature seeks support from the fact that it has previously conducted extraordinary sessions under similar protocol to the Extraordinary Session. (Leg. Br. pp. 8-9, 33), and that a few references to extraordinary sessions are scattered throughout the statute books. (Leg. Br. pp. 36-37.) As the circuit court aptly recognized, such references are a "non-starter" because "the historical practice of the political branches is, of course, irrelevant when the Constitution is clear." (L-App 10-11 (quoting *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 584 (2014) (Scalia, J., concurring), and citing *Bd. Of Trustees of Lawrence Univ. v. Outagamie Cty.*, 150 Wis. 244 (1912).) *See also Lucia v. SEC*, 138 S. Ct. 2044 (2018); Jeffrey S. Sutton, *What Does – and Does Not – Ail State Constitutional Law*, 59 U. Kan. L. Rev. 687, 714 (2011).

Prior convenings of extraordinary sessions does not negate Article IV, Section 11's requirement that the Legislature's meetings be at a time provided by law except when called by the governor in a special session. This is

particularly so because Article IV, Section 11 predated the first extraordinary session by over 130 years. And most importantly, those previous sessions are not challenged in this action.

Likewise, incidental statutory mentions of extraordinary sessions (Leg. Br. pp. 36-37) are not enabling, do not provide a time for meeting at the seat of government, and so cannot serve to satisfy Article IV, Section 11. Constitutional defects cannot be cured by repetition of either *ultra vires* sessions themselves or the appearance of the term in statute.

These statutory mentions are not necessarily wasted ink, however. On at least two occasions the Legislature ***did*** comply with Constitutional strictures by scheduling extraordinary sessions by law. *See* Wis. Stat. § 196.497(10)(c) (explicitly providing time of "extraordinary sessions" for the purpose of approving certain agreements with federal agencies over the disposal of high-level radioactive waste and transuranic waste); 1987 Act 4 (creating, within a single biennium, an even-year extraordinary budget session under Wis. Stat. § 13.02(3m)). These enactments demonstrate

Legislative prior efforts **and ability** to comply with Constitutional standards—standards which were simply not followed for the Extraordinary Session.

C. The Legislature presents an unworkable theory of law.

If this Court were to accept the Legislature's arguments, it would result in absurd consequences and an unworkable legal doctrine. For example, if, as the Legislature argues, the Extraordinary Session was just a floorperiod that was part of the same "meeting" as other floorperiods of the 2017-18 biennium, then ***any*** campaign contribution from a lobbyist to a legislator before the 2018 election was made in violation of campaign finance law. *See* Wis. Stat. § 13.625(1m)(b)1.[29]

Absurd consequences would also result were the Court to agree with the Legislature's argument that it is continuously in session for every moment of its biennial session period. For instance, all legislators would be

[29] "A contribution to a candidate for legislative office may be made during that period only if the legislature has concluded its final floorperiod, and is not in special or extraordinary session." The Legislature cites this statute (Leg. Br. pp. 36-37), but does not and cannot confront the absurd consequence that its "continuous session" argument would render every donating lobbyist a lawbreaker.

privileged from arrest (except in cases of treason, felony and breach of the peace) and immune to any civil process, for as long as they held office, no matter how many years or decades they serve. Wis. Const. art. IV, § 15.

Similarly, any action or proceeding in any court or commission in which a legislator is a witness, party or an attorney for any party could be continued until the legislator leaves office. Wis. Stat. § 757.13. Even a legislator arguing for a longer continuance under this statute had to concede that the "session" ends on "the last day of the last general business floor period." *State v. Chvala*, 2003 WI App 257, ¶ 7, 268 Wis. 2d 451, 673 N.W.2d 401. There is no support for the Legislature's position that "session" can be extended to include, uninterrupted, the entire two-year biennial session period. Thus, there is no support for the Extraordinary Session in the Constitution.

In sum, the circuit court's determination, that the Plaintiffs' likelihood of success on the merits is exceedingly strong, was a conclusion that a reasonable judge could reach, based on a careful examination of the facts and law, and using

a demonstrated rational process. In contrast, the Legislature's *post hoc* rationale is full of logic contradictions and failures, leading to absurd results when tested.

While any one such failure may not be fatal, together they demonstrate that the Legislature's rationale is simply false. While it may have gotten away with occasional unconstitutional meetings in the past 40 years, the extraordinary effort to expand legislative power during the December 2018 Extraordinary Session was the catalyst sparking awareness of the infirmity of its past practices. *See* Jeffrey S. Sutton, *What Does – and Does Not – Ail State Constitutional Law*, 59 U. Kan. L. Rev. 687, 714 (2011). This Court must take seriously the structural protections that the people built into the Constitution, intended to safeguard against legislative overreach. *See* G. Alan Tarr, *Understanding State Constitutions*, 118-126 (1998).

III. The harms analysis favors the LWV and Governor.

When a circuit court is considering a motion for temporary injunction and the plaintiff has (1) shown reasonable probability of success on the merits, the court next

turns to whether (2) an injunction is necessary to preserve the status quo, and (3) whether plaintiff has shown a lack of adequate remedy at law and irreparable harm. At this stage, the third standard is met by a showing that, without it to preserve the *status quo pendente lite*, the permanent injunction sought would be rendered futile. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 521, 259 N.W.2d 310 (1977).

The Legislature cannot and does not contest that without a temporary injunction to preserve the status quo, an ultimate judgment for the LWV and Governor will be ineffectual. (Leg. Br. p. 38.) As the circuit court recognized, "failing to enjoin the illegal actions of the Legislature would result in substantial changes to Wisconsin government…all occurring pursuant to laws that do not exist." (L-App 13)

The Legislature also makes no assertion that the harms that would befall the LWV and Governor (and the people of the state) from enforcement of non-laws as though they are laws can be remedied at law. They cannot be.

Instead of addressing the standards which it cannot win, the Legislature seeks to change the rules by importing concepts and language from cases that have no bearing here.

First, to support an argument that temporary injunctions should not be granted in cases where the legal issue is of "'doubtful or unsettled character'" (Leg. Br. pp. 37-38), the Legislature cites to *Mogan David Wine Corp. v. Borenstein,* 267 Wis. 2d 503, 508-09, 66 N.W.2d 157 (1954), a case about ***standing***. In that case, the unsettled issue was whether the plaintiff was licensed to transact business in Wisconsin, and therefore whether it could as a matter of law even bring its claim. *Id.* at 505-06.

The Legislature has never raised a serious objection to the LWV's or Governor's standing to pursue this procedural Constitutional challenge,[30] and that is not why it cites *Mogan David*. Rather, it contends that because it has never faced a challenge under Article IV, Sec. 11 before, the challenge is of

[30] It conceded some plaintiffs had taxpayer or other standing, encouraged the circuit court to not rule on its standing objections, and did not dispute the Governor's standing to pursue these claims under the *parens patriae* doctrine, at least. (S-App 293-295, 310-311, 356-359, 370-372; L-App 4-5.)

"doubtful or unsettled character" and consequently the circuit court erroneously exercised its discretion in granting a temporary injunction. *Mogan David* offers no support to this theory.

The fact that the Legislature has not been challenged for enacting "laws" at a meeting that does not comport with Constitutional requirements does not insulate it from temporary injunction. No court should stand idly by while a government violates the Constitutional rights of its people. The Supreme Court rejected similar appeals to sanction legislative evasions of the Constitution in a case challenging legislation for failing to meet the procedural requirements of Art. IV, sec. 18 of the Wisconsin Constitution, *Soo Line R. Co. v. Transportation Dept.,* 101 Wis. 2d 64, 303 N.W.2d 626 (1981):

> This court very early recognized the importance of that limitation upon legislative power, and said that the evident purpose of the framers of the constitution was that it should be given full force and effect, and that **there is no justification for treating it as merely directory or sanctioning evasions of it in any way.**

Id. at 73 (*emphasis added) (quoting Milwaukee County v. Isenring*, 109 Wis. 9, 23, 85 N.W. 131 (1901)).

Moreover, the Legislature should hardly be surprised that a consequence of its actions is an order temporarily

enjoining acts taken arguably in violation of procedural Constitutional requirements. Courts have in the past temporarily enjoined legislative enactments believed to have been passed in violation of procedural requirements in the Constitution, such as those found in Article IV, Secs. 18 and 31, prohibiting certain private or local bills and dictating procedural requirements. *See, e.g., State ex rel. Kuehne v. Burdette*, 2009 WI App 119, ¶24, 320 Wis. 2d 784, 772 N.W.2d 225; *Anderton v. City of Milwaukee*, 82 Wis. 279, 52 N.W. 95 (1892). Indeed, this Court even entered one, to preserve the status quo in connection with changes to the school choice program challenged under Section 18 as well as other theories. *Jackson v. Benson,* 218 Wis. 2d 835, 850, 578 N.W.2d 602 (1998).

There can also be no question that when the people limited legislative power through Constitutional provisions, they meant what they said. Speaking of the limitation in Article IV, Section 18, this Court held 150 years ago: "We have no idea that the framers of the constitution would have incorporated such a provision in that instrument unless they intended that force and effect were to be given to it." *Durkee v.*

City of Janesville, 26 Wis. 697, 700–01 (1870). Such legislative limitations have always been intended to prevent "mischief" on the part of the Legislature. *Id.* at 701.

Second, the Legislature argues that a temporary injunction here should be more limited.[31] In effect, it asks this Court to overlook its potential procedural violation of the Constitution and allow the enforcement and implementation of legislative acts that are challenged as not law pending final resolution on the merits because the LWV and Governor have not shown that they are negatively affected by the *substance* of each and every act taken in the *ultra vires* meeting. That argument misses the mark. As the circuit court recognized, it is the very liberty of the people of Wisconsin that is "imperiled by a Legislature that can meet at will at any time, with little warning and even less of a published agenda." (L-App 10) "Failure…to enjoin the execution of void laws cannot

[31] In support, it cites *Bachowski v. Salamone*, 139 Wis. 2d 397, 414, 407 N.W.2d 533 (1987), applying the harassment injunction statute, which is not applicable here. ("injunctions issued under [Wis. Stat. § 813.125] must be specific to as to the acts and conduct which are enjoined" because violation can result in fines and imprisonment, but as drafted the injunction at issue could proscribe constitutionally protected conduct.)

be seen as anything other than irreparable harm to a constitutional democracy such as ours. The rule of law…cannot…abide enforcement of laws that do not exist." (L-App 13.)

The circuit court was right when it recognized precedent going back to *Marbury* that "a legislative act contrary to the Constitution is not law." *Marbury v. Madison,* 5 U.S. 137 (1803). This rule has remained the bedrock of our legal system. *See,* L-App 14 and cases cited therein, including *State ex rel. Kleist v. Donald,* 164 Wis. 545, 552-53, 160 N.W.2d 1067 (1917) ("An unconstitutional act of the Legislature is not a law;…in legal contemplation it has no existence."). The scope of the temporary injunction issued here "fits the nature and extent of the constitutional violation." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406 (1977). It temporarily enjoins all of those legislative actions that the circuit court determined were taken without Constitutional authority and therefore had no legal effect.

Third, citing a case about ***permanent*** injunctions, *Pure Milk Prod. Co-op. v Nat'l Farmers Org.,* 90 Wis. 2d 781, 800, 280

N.W.2d 691 (1979), the Legislature misstates the standards for a ***temporary*** injunction, importing an additional standard, that the "equities, on balance, favor[] injunctive relief," from the test for permanent injunctions. (Leg. Br. pp. 37-38, 39.) But the standards for temporary and permanent injunctions differ. *Werner*, 80 Wis. 2d at 520. This "balancing of the equities" is not part of the temporary injunction standard, which is primarily concerned with preserving the status quo while the merits are resolved, to prevent irreparable harm. *Compare Werner,* 80 Wis. 2d at 521 (standards for temporary injunction) and *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.,* 216 WI App 56, ¶ 19, 370 Wis. 2d 644, 883 N.W.2d 154 (same); to *Pure Milk Prod. Co-op v. Nat'l Farmers Org,* 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) (standards for permanent injunction).[32]

The Legislature goes on to use this "balancing of equities" concept to argue the wisdom of the substantive acts purportedly passed and confirmations made and claim that the circuit court should have determined whether the

[32] The Legislature also seeks to import this "balancing of the equities" concept from standards governing the issuance of stays. (Leg. Br. p. 39.) That too is inappropriate here.

substance of each act taken during the Extraordinary Session irreparably harmed the LWV. This too misses the mark. This lawsuit does not challenge the substance of the acts and confirmations arising out of the Extraordinary Session. This Court should not be baited into such considerations here. As discussed above, the violation was the Acts enacted and confirmations made during the unlawful Extraordinary Session meeting. The temporary injunction properly enjoined their implementation pending resolution of the merits.

On these remaining temporary injunction factors—status quo, irreparable injury and harm—the circuit court examined the relevant facts and applied a proper standard of law to conclude that a temporary injunction was necessary to preserve the status quo as it existed before the Extraordinary Session meeting. It demonstrated a rational process in its 16-page Decision and Order for concluding that a temporary injunction was needed to prevent irreparable harm that could not be remedied at law, and without which an ultimate ruling for the LWV and Governor would be rendered futile. (L-App 1-16.) Such conclusions are those which a reasonable judge

could reach. Even if this Court would have reached a different conclusion at this preliminary stage, the circuit court's proper exercise of discretion should not be disturbed by this Court. *See Schneller v. St. Mary's Hosp. Med. Ctr.*, 162 Wis. 2d 296, 306, 470 N.W.2d 873 (1991) (citations omitted).

CONCLUSION

For the reasons stated in this brief, the Court should find that the circuit court properly exercised its discretion in issuing the temporary injunction and affirm that order.

Respectfully submitted this 30th day of April, 2019.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,850 words.

I additionally certify pursuant to Wis. Stat. § 809.19(12)(f) that the text of the electronic copy of the brief filed is identical to the text of the paper copy of the brief.

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