No. 19AP559

SUPREME COURT OF WISCONSIN

LEAGUE OF WOMEN VOTERS OF WISCONSIN, DISABILITY RIGHTS WISCONSIN, INC., BLACK LEADERS ORGANIZING FOR COMMUNITIES, GUILLERMO ACEVES, MICHAEL J. CAIN, JOHN S. GREENE AND MICHAEL DOYLE, IN HIS OFFICIAL CAPACITY AS CLERK OF GREEN COUNTY,
PLAINTIFFS-RESPONDENTS,
v.

TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN,
DEFENDANT-RESPONDENT,

WISCONSIN LEGISLATURE,
INTERVENING DEFENDANT-APPELLANT

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

REPLY BRIEF OF INTERVENING DEFENDANT-APPELLANT WISCONSIN LEGISLATURE

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INTRODUCTION

Plaintiffs' brief confirms that this Court would need to accept three radical propositions to agree with their theory. First, this Court would have to hold that Article IV, Section 11, requires the Legislature to ask the Governor's permission, by signing a law, to turn a committee period into a floor period. Second, this Court would have to hold that when the Legislature adopted Subsection 13.02(3) in 1971, it rendered unlawful the work schedule that it had adopted *that same month*. Third, this Court would need to invalidate a four-decade-old procedure because the Legislature did not label this procedure "non-prescheduled floor period within the regular session." These propositions are all wrong, to put it mildly, rendering the injunction indefensible.

ARGUMENT

I. Plaintiffs Cannot Prevail For Three Independently Sufficient Reasons

A. The Constitution Does Not Require The Legislature To Ask The Governor To Sign A Law Before It Can Turn A Committee Period Into A Floor Period

The Legislature complied with Article IV, Section 11, and nothing in that provision requires the Governor to sign

a law authorizing the Legislature to turn a committee period into a floor period. Opening Br. 18–29. The constitutional meeting of the 2017–18 Legislature started in January 2017 (when all agree that the Legislature met "as provided by law") and did not end until January 2019 (when the 2017–18 Legislature finally adjourned). As *State ex rel. Sullivan v. Dammann*, 221 Wis. 551, 267 N.W. 433 (1936), held, the Legislature's constitutional meeting does not end until the Legislature "ceases to exist." 221 Wis. 551 at 559. *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 125 N.W.2d 636 (1964), made the same point: "there is but one biennial 'session' of the legislature," and that "one single session may be interrupted by recesses" of the houses. *Id.* at 289–90. The December 2018 floor period occurred before the 2017–18 Legislature's final adjournment, which ends this case.

Plaintiffs' primary response, joined by *amici* scholars, is to argue that the 1968 amendment to Article IV, Section 11, requires two annual, "regular" legislative sessions. Pls. Br. 17–22. As a threshold matter, even if Article IV, Section 11 required annual meetings, this would do nothing to prohibit the Legislature from turning committee periods into

floor periods during those meetings, rendering this argument irrelevant here. In any event, both the annual meeting concept and the regular session concept appear nowhere in the Constitution. What *amici* scholars call "the constitutionally dubious practice of reconvening in the second year of the biennium under the pretense that they were merely continuing their prior year's meeting" before the 1968 amendment, Scholars Am. 5, was *precisely* the practice that *Thompson* blessed. The 1968 amendment merely "codified" *Thompson*'s understanding, App. 23, approving the Legislature's practice—begun in the 1960s, *id.*,—of not "dissolv[ing] the [biennial] session of the Wisconsin legislature" until the end of the biennium, even when this session included prolonged recesses of the houses and floor periods in both years. 22 Wis. 2d at 289.

The Governor, in turn, claims that the Legislature constitutionally meets anew every time it gathers in a floor period, not in just one biennial meeting (as the Legislature argues), or in two annual meetings (as Plaintiffs claim). Gov. Br. 21–23. *Dammann* and *Thompson* rejected precisely this view, distinguishing between meetings (and recesses) of the

houses of the Legislature, and the Legislature's constitutional meeting (and final adjournment).

Plaintiffs also argue that the Legislature's constitutional meeting ended in March 2018, with Plaintiffs using a colorful "broken" "chain" metaphor. Pls. Br. 23–24; *accord* Gov. Br. 32–39. But *Dammann* explained when the chain of the Legislature's constitutional meeting ends: when the Legislature "ceases to exist," such that "[i]ts officers are no longer officers." *Id.* at 559.[1] Such a final adjournment did not occur in March 2018, when both houses merely stood "adjourned pursuant" to JR1. *See* Assembly Journal, 103rd Reg. Sess., at 908, *available at* https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180322.pdf; Senate Journal, 103rd Reg. Sess., at 871, *available at* https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180322.pdf. JR1 explains what "stand[ing] adjourned" pursuant to JR1 means: a committee period, with the option of turning any part of that period into a floor period. App. 125. The

[1] The Governor articulates a different view of *sine die* adjournment. Gov. Br. 32–33 & n.22. Not only is that view contrary to *Dammann*'s, but it would add an unjustified restraint on the Legislature's Article IV, Section 8 authority, prohibiting turning a committee period into a floor period without any basis in constitutional text.

2017–18 Legislature did not end in March 2018, given that it continued to meet in committees that took legally binding actions *and* unequivocally stated that it could turn any part of the committee period into a floor period.

Plaintiffs try to salvage this argument by noting that in March 2018, the houses of the Legislature disposed of all pending bills, and then asserting that this action "*foreclosed* the adoption of further general-business legislation." Pls. Br. 25 (emphasis added). This is simply wrong: "any proposal that is adversely and finally disposed of for the biennial session may be revived by specific inclusion in the action authorizing an extraordinary session, provided that the proposal had not failed a vote . . . ." Wis. Sen. R. 93(1).

Plaintiffs also claim that recognizing a biennial constitutional meeting would impact certain constitutional and statutory provisions. Pls. Br. 44–45. But *Dammann* and *Thompson* already recognized the Legislature's biennial meeting, meaning that no change would be required to the interpretation of Article IV, Section 15 or any statute. To the extent any provisions use similar or related terms to those in Article IV, Section 11, the import of those

similarities can be decided in an appropriate case. Plaintiffs' invocation of the legislative pay statutes, Pls. Br. 45, undermines their case, as legislators are paid in "equal installments" *throughout the entire biennial session*, *see* Wis. Stat. § 13.121, which would make no sense (and would be contrary to *Dammann*'s "no longer officers" language) if the Legislature ended with the final, prescheduled floor period. Section 13.123 merely discusses *additional* per diems for periods that legislators are in "Madison on legislative business," while also specifically referencing the "biennial session" that Plaintiffs claim does not exist. And Subsection 13.625(1m)(b)1 cuts against Plaintiffs, Pls. Br. 45, as that statute recognizes extraordinary sessions. Subsection 13.625(1m)(b)1's prohibition does not apply after the final, prescheduled floor period, and then starts operating again if the Legislature convenes an extraordinary session.

Plaintiffs ask this Court to focus upon the fact that the Legislature has enacted laws requiring extraordinary sessions twice in 45 years, Pls. Br. 40–41, while imploring it to ignore the far more common practice of calling these

sessions in the way the Legislature did here, Pls. Br. 47–51. The sensible inference is both paths are permissible.

Plaintiffs' half-hearted discussion of Article IV, Section 7, for the first time on page 56 of their brief, only illustrates that this argument is parasitic of Plaintiffs' meritless Article IV, Section 11 point. Requiring the Legislature to have a quorum merely to turn a committee period into a floor period would also violate the Legislature's Article IV, Section 8 authority to organize its operations.

Finally, *amici* scholars do not even discuss *Dammann* or *Thompson*, and fail to grapple with the fact that the Wisconsin Legislature, unlike the legislature of most States, "meets throughout the year." Opening. Br. 22 (citation omitted). What occurs in Wisconsin is different, in-kind, from States where legislatures call themselves back into existence in so-called "extraordinary" or "special" sessions after final adjournment. The Wisconsin Legislature had not finally adjourned here, so its operations were analogous in this respect to those of the U.S. Congress, whose houses regularly recess without a date certain for return but with an explicit "contingent authority to reconvene," which

reconvening often happens after a November election, in a so-called "lame duck" session of Congress. Jane A. Hudiburg, Cong. Research Serv., R45154, Lame Duck Sessions of Congress, 1935–2016 (74th–114th Congresses) (2018), *available at* https://fas.org/sgp/crs/misc/R45154.pdf. That is just the type of contingent reservation that the Wisconsin Legislature made in March 2018.

B. The Legislature Complied With Section 13.02 When It Adopted A Subsection 13.02(3) Joint Resolution That Authorized Non-Prescheduled Floor Periods

If, contrary to *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436, this Court considers whether the Legislature's actions also complied with Section 13.02, the result will be the same: the Legislature acted lawfully in December 2018. As the Legislature explained, Opening. Br. 29–34, the Legislature can lawfully act under Subsection 13.02(3) by setting out a biennial session schedule that permits the Legislature to turn a committee period into a floor period, as the Legislature has for four decades, including in 1971, in the same month that it adopted Subsection 13.02(3) and Subsection 13.02(2)'s

"unless" clause, and first recognized the extraordinary session mechanism. Here, the Legislature adopted JR1 under Subsection 13.02(3), and acted in December 2018 consistent with JR1 and four decades of unbroken practice.

Plaintiffs respond primarily by focusing on their argument that Section 13.02 requires two "separate annual sessions," Pls. Br. 26 (emphasis omitted), without explaining the relevance of this argument to the issues here, Pls. Br. 26–30. Indeed, *everything* Plaintiff say about annual sessions is consistent with the Legislature's statutory argument, JR1, and the longstanding extraordinary session procedure: the Legislature must hold at least one floor period each January, regardless of whether it acts by joint resolution under Subsection 13.02(3) and Subsection 13.02(2)'s "unless" clause or chooses not to adopt a joint resolution and defaults to Subsection 13.02(2)'s pre-1971 regime. That these two annual sessions together form the single, continuous biennial session that *Thompson* discussed is further reflected in Subsection 13.02(4), which provides that bills carry over between the two years of the biennium. Nothing about this structure suggests that turning

prescheduled committee periods into floor periods, labeled extraordinary sessions, is impermissible in any respect.

The Governor makes two different, atextual statutory arguments, both of which would require this Court to conclude that the Legislature in 1971 intended to make unlawful its own actions in authorizing extraordinary sessions. First, the Governor argues that a Subsection 13.02(3) work "schedule" must preschedule every day as either a floor period or a committee period, and can never provide for the later conversion of one to the other. Gov. Br. 28–29. This is found nowhere in the statutory text. A "schedule" is merely a "time-table," 14 Oxford English Dictionary 613 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989); and JR1's "time-table" is no different in any relevant respect from the schedule that the Legislature adopted the very month that it enacted Subsection 13.02(3). Second, the Governor argues that Subsection 13.02(2)'s "unless" clause does not permit the Legislature to schedule the entire biennial meeting under Subsection 13.02(3), as it has for over forty years. Gov. Br. 30–32. By far the better reading of this "unless" clause gives the Legislature the option to act

either under Subsection 13.02(2) or under Subsection 13.02(3), which is how the Legislature has understood this provision since its adoption.

C. All Of Plaintiffs' Objections Are Easily Resolved By Understanding An "Extraordinary Session" To Be Part Of The Statutory "Regular Session"

Plaintiffs' theory is that the Legislature complies with both Article IV, Section 11 and Section 13.02 when it convenes a Section 13.02(2) "regular session" floor period, even when that floor period is specified only in a Subsection 13.02(3) schedule. Plaintiffs do not argue, for example, that the Legislature must enact a new law to authorize every floor period. Thus, if this Court concludes that an "extraordinary session" is a "regular session" floor period—precisely how the Legislature which created the extraordinary session mechanism in 1971 understood it to be—that would easily resolve this case, consistent with principles of constitutional avoidance and each of Plaintiffs' statutory and constitutional arguments. Opening Br. 34–37.

Plaintiffs respond to this case-ending point by hand-waving and word play. Plaintiffs poetically intone that "[t]he

truth" "is in the[] name," adding, more prosaically, that "legislative journals" and other publications "record" extraordinary sessions and prescheduled floor periods "differently," including in "titles" "printed in large letters." Pls. Br. 38–40. This only confirms the Legislature's point that Plaintiffs' lawsuit is about labels, not constitutional or even statutory substance. All of these points would be resolved entirely by the Legislature, in the future, changing these labels and publications, in large or small letters, to read "non-prescheduled floor period within the regular session," instead of "extraordinary session." Plaintiffs' *only* other response is that non-prescheduled floor periods have "specific, limited scope" under the Legislature's internal rules. Pls. Br. 38. But Plaintiffs do not argue that Article IV, Section 11 or Section 13.02 prohibit the Legislature from limiting floor periods' scope by joint resolution or internal rule, using the Legislature's Article IV, Section 8 authority. Indeed, several floor periods in JR1 are "limited-business floor period" and "[v]eto review floorperiod." App. 124–25.

Finally, while Plaintiffs argue that "[t]here is no relevance to Governor Evers giving the 2019 budget address

before an extraordinary session," Pls. Br. 48 n.20, the Governor's address was lawful only if extraordinary sessions are part of the statutory "regular session." Section 16.45 mandates that "[i]n *each regular session* of the legislature, the governor shall deliver the [biennial] budget message." Wis. Stat. § 16.45 (emphasis added). If extraordinary sessions are not part of the biennial "regular session," as Plaintiffs assert, the Governor violated Section 16.45 in one of his first major actions in office.

II. The Circuit Court Abused Its Discretion By Issuing Its Temporary Injunction

The Circuit Court abused its discretion in issuing the temporary injunction, including because Plaintiffs did not even try to show irreparable harm from most provisions and appointments that the Circuit Court enjoined. Opening Br. 37–44. Plaintiffs cite no record evidence suggesting that they suffered harm from the vast majority of these provisions and appointments, instead relying mainly upon their claim that the enactment of any laws in any extraordinary session is "tainted." Pls. Br. 59–60. But injunctions are "extraordinary remed[ies]," *Wolf River*

Lumber Co. v. Pelican Boom Co., 83 Wis. 426, 428, 53 N.W. 678 (1892), and 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). It would violate these principles if a plaintiff could obtain an injunction blocking all of the provisions in an omnibus law, as well as blocking the confirmations of unrelated appointments by the Senate, without showing that most of these provisions or appointments irreparably harm the plaintiff in any respect.

III. Plaintiffs' Nonretroactivity Argument Would Apply To The December 2018 Floor Period

Contrary to their core theory that all actions taken in extraordinary sessions are automatically *ultra vires*, Plaintiffs now seek to step away from their self-created ledge by suggesting that this Court only apply their theory prospectively. Pls. Br. 62–63. While the Legislature strongly opposes any ruling infringing its authority to organize the internal operations as it deems appropriate, under Article IV, Section 8, Plaintiffs' rationale here would clearly require upholding the laws adopted in December 2018, leading to vacatur of the temporary injunction.

All three *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 255 N.W.2d 489 (1979), factors apply to the December 2018 floor period to the same extent that they apply to the prior, procedurally identical extraordinary sessions: (1) the issue is of "first impression," (2) the "prior history of the rule in question" is that the Legislature has been using this procedure for four decades, and (3) invalidation of actions taken using this procedure would have "substantial inequitable results." *Id.* at 109. As this Court explained in declining to apply a decision invalidating a procedure used by a development corporation to "violations prior to the date of the release of this opinion," "issuing an order voiding any actions taken" using an established procedure would be "unduly unsettling to the persons and businesses involved." *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶¶ 98–100, 312 Wis. 2d 84, 752 N.W.2d 295. This rationale applies with *far* greater force here than it did in *Beaver Dam*, given that December 2018 involved laws enacted by a majority of the Legislature and signed by the Governor, using a previously uncontroversial, four-decade-old practice.

Invalidating the laws enacted in December 2018, but refusing to invalidate the actions of prior, procedurally identical floor periods, would create "substantial inequitable results" in another respect. *Kurtz*, 91 Wis. 2d at 109. It is hard to see the sufficient justification for invalidating the purely *civil* laws enacted in December 2018, many of which harm no one—for example, provisions increasing the options for military voters—while denying relief to prisoners serving life sentences, under statutes enacted using the same procedure. *See* 1997 Wis. Act 326.

The only justification anyone has articulated for invalidating the actions taken during the December 2018 floor period, but not those taken in prior, procedurally identical floor periods—recognition of the "time, energy, and resources" that Plaintiffs have expended over a couple of months, Retrospectivity Am. 15—is clearly insufficient here. If Plaintiffs are to be believed, they are offended by the mere use of this procedure, which is why they did not try to show that they suffered irreparable harm flowing from most of the provisions that they asked the Circuit Court to enjoin. *Supra* pp. 13–14. Presumably, then, Plaintiffs will feel that

they have obtained a substantial benefit through a decision that ensures that the Legislature will rename any future "extraordinary sessions" as "non-prescheduled floor period within the regular session," *see* Opening Br. 36, with this new title "printed in large letters," Pls. Br. 38, or make any other adjustments this Court were to deem necessary.

CONCLUSION

This Court should vacate the temporary injunction and make clear that dismissal of this case is mandatory.

Dated: May 7, 2019

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,999 words.

Dated this 7th day of May, 2019.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

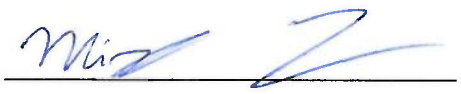
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

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 7th day of May, 2019.



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