STATE OF WISCONSIN CIRCUIT COURT BRANCH 9 DANE COUNTY

The League of Women Voters of Wisconsin, *et al.*, *Plaintiffs,* v. Dean Knudson, *et al.*, *Defendants.*	Case No. 19-cv-84

THE LEGISLATURE'S REPLY BRIEF TO MOTION TO DISMISS

Plaintiffs seek to transform a decades-old, previously-uncontroversial procedure into an unnecessary crisis for the citizens of this State, based upon Plaintiffs' misunderstanding of the basics of legislative practice. For decades, legislators and other elected officials of both major parties have uniformly[1] understood that what the Legislature has labeled "extraordinary sessions" are just non-prescheduled floor periods, which lawfully take place during continuous biennial sessions. Such non-prescheduled floor periods are so common, so uncontroversial that just as the Governor was filing briefs taking Plaintiffs' side, he delivered his flagship budget address during exactly such a non-prescheduled floor period, without anyone batting an eye. *See* https://docs.legis.wisconsin.gov/2019/related/journals/assembly/20190228efe9.pdf.

Plaintiffs cannot escape the scope of the disaster that their novel theory would unleash. The Legislature respectfully submits that if anyone had raised this meritless argument in a less

[1] So far as Legislative Defendants can determine, the Amici Former Legislators who were in the Legislature at the relevant time voted in favor of *every* biennial joint resolution that authorized this mechanism, took part in numerous such non-prescheduled floor periods, and voted in favor of multiple laws during these periods. *See, e.g.*, Supplemental Appendix 28, 107–37 ("Supp. App'x"). These legislators do not cite a single example of them, *or any other legislator*, ever voicing such objections in the decades that this procedure has been in regular use. One wonders how these legislators would now react to a lawsuit seeking to block the use of the Fiserv Forum on Plaintiffs' theory, Supp. App'x 145–58, including for use in political conventions recently scheduled for that venue.

controversial context—as a defense in a garden-variety prosecution brought by a district attorney acting during his 4-year constitutional term, in a second-strike child sex crime case, or in a taxpayer lawsuit to block the juvenile justice reforms that the Legislature unanimously adopted less than a year ago, Supp. App'x 101–04, 206–04—the argument would have been rejected swiftly, probably summarily. Yet if Plaintiffs prevail now, there can be no logical stopping point. For example, every convict in this State has a right to petition for post-conviction relief "at any time," Wis. Stat. § 974.06(2), and no defense attorney could ethically forego filing such a motion to free his client from "ultra vires" confinement, obtained by a district attorney serving an "ultra vires" 4-year term or in prison under the two-strikes regime. Plaintiffs do not identify any "laches, estoppel, reliance, or other equitable principles," Pls. Resp. 25, that could possibly apply to such filings. At minimum, all *current* criminal prosecutions by district attorneys would need to be halted, until the courts could sort all of this out. And, of course, given Wisconsin's capacious taxpayer standing doctrine, any one taxpayer could challenge hundreds of important provisions in a single, omnibus lawsuit, and this Court would have no basis for refusing to grant the same type of judgment that Plaintiffs seek. For this Court's convenience, the Legislature has compiled—as an appendix of judicially noticeable public documents—a limited selection of excerpts of statutory provisions that it has enacted using this procedure; this selection is but a very small fraction of the provisions enacted through this procedure. *See* Supp. App'x A 1–237. A complete document of the relevant laws that the Legislature has so far identified would have stretched to over 3,000 pages.[2]

[2] The Governor half-heartedly suggests an "alternative" theory, which would "only" invalidate many dozens of provisions. *See* Supp. App'x 26–102, 107–10, 200–37. This includes a regime relating to prenatal substance abuse, Supp App'x 54–96, which the U.S. Supreme Court thought important enough to protect with a stay, *see Anderson v. Loertscher*, 137 S. Ct. 2328 (2017). It also includes the juvenile justice reforms adopted less than a year ago. Supp. App'x 206–24. In any event, that alternative argument is based upon a misunderstanding of the basics of *sine die* adjournment, *see infra* 3–4, and is inconsistent with every other merits argument Plaintiffs and the Governor make in support of their position.

ARGUMENT

I. Nothing In Article IV, Section 11, Section 13.02, Or 2017 Enrolled Session Resolution 1, Requires The Legislature To Preschedule All Of Its Floor Periods

Plaintiffs' lawsuit is entirely meritless, which is why no one has ever made this argument before, despite the Legislature's use of this procedure for decades, including to enact many prominent, controversial laws, which have generated numerous lawsuits. *See* MTD 13-21. Article IV, Section 11 gives the Legislature broad discretion as to when it will choose to "meet at the seat of government" by "law." The Legislature enacted a "law" soon after the 1968 amendment to Article IV, Section 11—Wis. Stat. § 13.02(3)—which allows it to determine by "joint resolution" the "work schedule for the legislative session." Then, in January 2017, the Legislature complied with Subsection 13.02(3) by enacting a joint resolution, like every other such resolution for decades, which provided that the Legislature would meet at the seat of Government "from Tuesday, January 3, 2017," to "Monday, January 7, 2019." 2017 Enrolled Sess. Res. 1. This continuous period was composed *every day* of prescheduled floor periods, prescheduled committee work periods, and the like, while giving the Legislature authority to turn some days into floor periods—known as extraordinary sessions—at its option. *Sine die* adjournment did not take place until January 7, 2019, when the biennial session ended.[3] The December 2018 floor period happened before January 7, 2019, meaning that the Legislature complied with Article IV, Section 11.

The contrary arguments raised by Plaintiffs, the Governor, and *amici* are wrong.

First, these parties have no serious answer for the *only* point that matters in this case: the Legislature was lawfully "meet[ing] at the seat of government," *see* Wis. Const. Art IV, Sec. 11, every day "from Tuesday, January 3, 2017," to "Monday, January 7, 2019," *see* 2017 Enrolled

[3] That the Legislature adjourns *sine die* at the end of its biennial session disposes entirely of the Governor's red herring points, contained on page 24 of his Opposition to the Motion to Dismiss.

Sess. Res. 1. Plaintiffs and the Governor claim the Legislature did not meet every day, and also that *sine die* adjournment occurred in mid-March 2018, at the end of last prescheduled floor period. *See* Pls. Resp. 8-9; Gov. Resp. MTD 4, 19-20; Gov. TI Resp. 20-21. Because *sine die* adjournment means the Legislature "ceases to exist," *State ex rel. Sullivan v. Dammann*, 221 Wis. 551, 559, 267 N.W. 433 (1936), their position is that the Legislature stopped existing then. Professors-Amici appear to know this is wrong and describe the post-March 2018 period as a "nominal" meeting. Amicus Br. 10, Dkt No. 118. But the 2017 Enrolled Joint Resolution 1 provides for *actual meetings of the Legislature on every day of the 2017-2018 biennial session, including after March 2018*:

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

These interim committee work periods, including after March 2018, are not "nominal," and none occurred after the Legislature "cease[d] to exist." They are *the "meet[ing]" of the 2017-2018 Legislature*, Wis. Const. art. IV, § 11 (emphasis added), which were incorporated by direct reference to the 2017 Enrolled Joint Resolution 1 into the adjournments of floor periods that Plaintiffs and the Governor cite, *see* Pls. Resp. 8-9; Gov. MTD Resp. 18; Gov. TI Resp. 16-17. They feature, among many other legislative tasks, the key duties performed by the Joint Committee on Finance, Wis. Stat. § 13.10(1), which has ongoing authority under more than 120 different statutory review provisions, *see* Informational Paper No. 76, Wisconsin Legislative Fiscal Bureau, *Joint Committee on Finance* (Jan. 2019), *at* http://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2019/0076_joint_committ

ee_on_finance_informational_paper_76.pdf. The same is true of the ongoing work of the Joint Committee for Review of Administrative Rules. *See* Wis. Stat. § 227.26.[4]

Put another way, when the Legislature convenes what it calls an "extraordinary session," *all it does is replace some of the prescheduled committee work days with non-prescheduled floor days*, all as part of the Legislature's ongoing "meet[ing]" under Article IV, Section 11. The very same source—2017 Enrolled Joint Resolution 1—that provides for prescheduled floor periods and prescheduled committee work periods also provides for the committee periods to be replaced by floor periods. The statutory source for all of this is the same: Wisconsin Statute Subsection 13.02(3). While Plaintiffs assert that "[n]othing in [S]ection 13.02(3) authorizes non-prescheduled floor periods," Pls. Resp. 9, they inadvertently reveal one of their core confusions: Subsection 13.02(3) only calls for a "work schedule," without *any* limitation as to whether any floor periods (or any other type of periods) will be prescheduled or not.

Second, Plaintiffs repeatedly quibble with whether the Legislature was in "regular session" or not in December 2018, Pls. Resp. 3-5; *see also* Gov. MTD Resp. 7-8, 14; Gov. TI Resp. 14-17, demonstrating that their lawsuit is about labels, not constitutional substance. Nothing in the Wisconsin Constitution—the only source that could give the courts the authority to look into the Legislature's procedures, *see State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 364-65, 338 N.W. 2d 684 (1983)—turns on whether the Legislature calls a particular day part of a "regular session." The *only* constitutionally-relevant question is whether the Legislature was "meet[ing]" according to law. Since December 2018 falls between January 3, 2017, and January 7, 2019, it plainly was. Put another way, if the Legislature in its next biennial resolution relabels what it calls now an

[4] That these committee periods are embodied in 2017 Enrolled Joint Resolution 1 and are part of the 2017-2018 legislative session refutes the Governor's half-hearted "alternative" theory: that an extraordinary session held before the last pre-scheduled floor period can be treated differently from one held after that point. *See* Gov. TI Resp. 21-22.

"extraordinary session" as "non-prescheduled floor period within the regular session," this would change nothing about the constitutionality of what it is doing.[5]

For much the same reason, Plaintiffs' exploration of the various other provisions in Section 13.02, including its title, "Regular sessions," *see* Pls. Resp. 3-5; *see also* Gov. TI Resp. 13-15, is irrelevant misdirection, which also fails to account of statutory history, *see Cty. of Dane v. LIRC*, 2009 WI 9, ¶27, 315 Wis. 2d 293, 759 N.W.2d 571 ("'A review of statutory history is part of a plain meaning analysis' because it is part of the context in which we interpret statutory terms." (citation omitted)). These provisions, including the relevant statutory history, are as follows:

- Subsection 13.02(1): The Legislature must convene its biennial session early in January, of each odd-numbered year, "to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business."
- Subsection 13.02(2): There must be a "regular session" on the 8th day of January of each year, "unless otherwise provided under" Subsection 13.02(3). The first half of this Subsection comes directly from the pre-1968 version of Section 13.02, first enacted in 1917, *see* 1917 Wis. Ch. 634 s.4, and then renumbered in 1967, *see* 1967 Wis. Ch. 187, which governed the pre-1968 regime where the Legislature would meet in regular session and then adjourn *sine die* at some point during the year, with only the Governor being able to call the Legislature back into existence, in a special session contemplated by clause at the end of Article IV, Section 11. *See* MTD 3. The title of Section 13.02—"Regular sessions"—is similarly a historical vestige of this pre-1968 regime.[6] Soon after the 1968 amendment to Article IV, Section 11, the

[5] The only practical differences Plaintiffs point to involve certain booking entries and the descriptions in certain public documents. Pls. Resp. 6; *accord* Gov. MTD Resp. 7; Gov. TI Resp. 11-13, 18-19. Plaintiffs do not purport to explain why such differences matter under Article IV, Section 11. At most, these raise the sort of internal legislative issues that courts have no jurisdiction to review. *See Stitt*, 114 Wis. 2d at 364-65.

[6] The 1967 provision stated, in full: "13.02 REGULAR SESSIONS. (1) The legislature shall convene in the capitol on the first Monday of January in each odd-numbered year, at 2 p.m., to take the oath of office, select officers, and do

Legislature in 1971 adopted the "unless" clause in Section 13.02(2), as well as Subsection 13.02(3). *See* 1971 Wis. Ch. 15. Under this "unless" clause (which Plaintiffs and the Governor inexplicably omit multiple times, *see* Pls. Resp. 3-4; Gov. MTD Resp. 6, 11), Subsection 13.02(2)—including its reference to a "regular session"—has no relevance where it has been displaced by a superseding work schedule under Subsection 13.02(3).

- Subsection 13.02(3): Adopted in 1971, this is the key provision added in the wake of the 1968 amendment to Article IV, Section 11, and requires the Legislature to enact a "work schedule" to govern the Legislature's meeting. The *only* limitation on this "work schedule" is that the schedule must involve "at least one meeting in January of each year."
- Subsection 13.02(4): Also added in 1971, this provision provides that any bill introduced during the regular annual session of the odd-number year, carries over to the even-number year.

The clear import of these provisions is that the Legislature can adopt any work schedule for the biennial session that it chooses, after its initial meeting under Subsection 13.02(1), except that this schedule needs to provide for "at least one meeting" in January of each year under Subsection 13.02(3), and the bills carry over between the two years under Subsection 13.02(4). *Nothing in these provisions governs what the Legislature names the periods it sets under Subsection 13.02(3) or requires that all floor periods be prescheduled*. The Legislature is not required to meet every day, although it has chosen to do so in every biennial session for decades.

Notably and fatal to Plaintiffs' case, even if they were correct that Section 13.02 requires the Legislature to set work schedules for two annual "regular sessions," not one biennial session, Pls. Resp. 4-5, this would make no difference here. Whether one views the Subsection 13.02(3) work schedule as for one continuous biennial period or for two annual "regular session[s]," 2017

all other things necessary to organize itself for the conduct of its business. (2) The regular session of the legislature shall commence at 2 p.m. on the first Tuesday after the 15th day of January in each odd-numbered year."

Enrolled Joint Resolution 1 still *actually* provided that the Legislature was "meet[ing]," Wis. Const. Art IV, Sec. 11, every single day of both years, *see supra* 4. Even under their own reading of Section 13.02, therefore, Plaintiffs offer no reason as to why 2017 Enrolled Joint Resolution 1 may lawfully preschedule every single day for legislative business, *see id.*, but cannot also reserve the right later to change a prescheduled interim work period into a floor period.

Finally, Professors-Amici's discussion of certain treatises' treatment of "extraordinary sessions," as that term is used in some other states, misses the mark. Amicus Br. 4. Those treatises appear to reference sessions called *after* the Legislature has adjourned *sine die*, calling itself back into existence. What happens under Wisconsin law is different: the Legislature is in continuous session, and the term "extraordinary session" is only the label given to a non-prescheduled floor period *within* that session. That is why, for example, the laws that the State Assembly and State Senate introduce during non-prescheduled floor periods merely continue the numbering of the bills that they consider during prescheduled floor periods (2017 Senate Bill 883) and do not restart, as is the case with Governor-called special sessions (2018 January Special Session SB 1). The treatises' discussion would be relevant if the Legislature had adjourned *sine die* and then attempted to recall itself, whether for a floor period, or a committee work period, or anything else. But that is simply not what happened here and cannot occur in Wisconsin as a practical matter since our Legislature—unlike the legislature of most states—"meets throughout the year." *See* 2018 State Legislative Session Calendar (Nov. 2, 2018), *available at* http://www.ncsl.org/research/about-state-legislatures/2018-state-legislative-session-calendar.aspx. Indeed, while Professors-Amici (and Plaintiffs) seek to rely upon the practices of other states, they do not cite a single case, from any jurisdiction, holding it unlawful for a legislature to turn a preschedule committee period into non-prescheduled floor period, which is what the present case is about.

II. Although Plaintiffs Failed To Plead Sufficient Standing To Challenge Many Provisions, The Public Interest Would Be Best Served By This Court Simply Issuing An Appealable Judgment That Resolves The Sole Merits Issue In This Case

Plaintiffs fail to answer many of their standing problems. *See* MTD 21-26. They continue to ignore the vast majority of the provisions in Acts 368-370, including expansion of the voting rights of overseas servicemembers, tax laws, prohibitions on certain re-nominations, and so on. And Plaintiffs do not defend their previously claimed harms from provisions such as Section 1K of Act 369, which expands the statutory window for in-person absentee voting under state law, while making no difference to anyone when viewed in light of two extant federal court injunctions. They also make conclusory assertions about other provisions, such as the codification of the Wisconsin Supreme Court's elimination of agency deference, without explaining why the Justices' different routes to the same destination matter for standing purposes. *See* Pls. Resp. 24.

The Governor, meanwhile, asserts that his claimed harms should count for purposes of standing after this Court realigns him as a plaintiff attacking state law. *See* Gov. MTD Resp. 25-31. But the Attorney General is the Wisconsin constitutional officer "elected for the purpose of prosecuting and defending all suits for or against the State," and the Governor only has limited, statutory authority in this area. *Orton v. State*, 12 Wis. 509, 511 (1860). Our Supreme Court has held that even the Attorney General has no authority to attack state law, *see State v. City of Oak Creek*, 232 Wis. 2d 612, 628 n.14, 634-35, 605 N.W.2d 526 (2000), and there is every reason to think that this limitation applies to the Governor as well.

Having said all of that, the Legislature ultimately agrees with Plaintiffs' broader equitable point (if not their legal analysis) that the standing arguments here are not of great moment at this time and that prompt resolution of the sole merits issue is in the paramount public interest. Most statutory provisions cost some money to implement, which is enough under Wisconsin's generous taxpayer standing doctrine. *See Thompson v. Kenosha Cty.*, 64 Wis. 2d 673, 679-80, 221 N.W.2d

845 (1974). So even though Plaintiffs have not pleaded taxpayer standing as to many provisions they challenge—seemingly by their own oversight—other taxpayer plaintiffs can easily make up for this failure for the vast majority of the provisions, in the next case, perhaps as part of an omnibus lawsuit seeking to invalidate every law in the Supplemental Appendix. *See supra* 2.

Accordingly, the Legislature respectfully submits that the best course is for this Court to enter an appealable judgment on the purely legal issue here, without analyzing the provisions that Plaintiffs did or did not sufficiently plead harm them. The Legislature hopes that this judgment will involve dismissal of Plaintiffs' lawsuit. But if this Court agrees with Plaintiffs' merits submission, it should stay the effect of any such judgment pending appeal, or permit the parties to brief *very quickly* the issue of the whether such a stay is appropriate. At the absolute minimum, this Court should issue a temporary stay of any judgment in Plaintiffs' favor, long enough for the Court of Appeals and/or the Supreme Court to have the full opportunity to consider the stay issue, and thereby avoid a harmful situation where the numerous provisions challenge here go out of effect for a couple of days or weeks, just to be put back in place by an appellate court.

CONCLUSION

This Court should grant the Legislature's Motion to Dismiss.

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