No. _____

In The Wisconsin Court of Appeals

DISTRICT III

THE 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,

PLAINTIFFS-RESPONDENTS,

v.

TONY EVERS,

DEFENDANT,

and

THE WISCONSIN LEGISLATURE,

INTERVENING DEFENDANT-APPELLANT

INTERVENING DEFENDANT-APPELLANT WISCONSIN LEGISLATURE'S MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO STAY THE TEMPORARY INJUNCTION AND FOR LEAVE TO APPEAL

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INTRODUCTION

The Circuit Court enjoined a series of laws enacted using a four-decade-old, entirely common legislative procedure, relying upon such implausible objection to this procedure that no legislator, scholar, or litigant appears to have mentioned the objection before this case. This indefensible injunction is already causing serious harm to our State, blocking many dozens of statutory provisions, including voting laws expanding the rights of military and other overseas voters in the middle of an ongoing non-partisan election and numerous provisions operating under Wisconsin law before yesterday. The Circuit Court's injunction also invalidates eighty-two appointments to government bodies, including to the critical Wisconsin Public Service Commission, which cancelled today's meeting just hours after this ruling. There is no telling how the decisions that such bodies or the Governor or Attorney General are already making will be unwound once this meritless lawsuit is rejected on appeal. The injunction will also cause confusion about the lawful status of *four decades* of law adopted using the same procedure, from the two-strike laws for child sex predators, to the right-to-work law, to laws protecting against prenatal substance abuse, to the Milwaukee Bucks arena, to *more than 3,000 pages of other laws*.

Given the chaos that this decision is engendering—including during an ongoing non-partisan election and throughout state government—the Legislature respectfully requests an administrative stay of the Circuit Court's temporary injunction today, March 22, and a stay pending the entirety of the appeal, after expedited briefing, no later than March 29.

BACKGROUND

A. The present case concerns Article IV, Section 11 of the Wisconsin Constitution. WIS. CONST. art. IV, § 11. From 1880 until 1968, Article IV, Section 11 provided: "The legislature shall meet at the seat of government at such time as shall be provided by law, once in two years, and no oftener, unless convened by the governor, in special session . . . ."[1] During this pre-1968 period, the Legislature would meet for its biennial session, recess for periods, and then adjourn *sine die* at some point thereafter. This *sine die* adjournment was the moment that the Legislature's "meet[ing]" under Article IV, Section 11 ended. *See State ex rel. Sullivan v. Dammann*, 221 Wis. 551, 559, 267 N.W. 433 (1936).

In 1968, the people of Wisconsin amended Article IV, Section 11, with the language now providing: "legislature shall meet at the seat of government at such time as shall be provided by law. . . ." WIS. CONST. art. IV, § 11. The 1968 amendment gave the Legislature more flexibility to decide when to meet. App'x 16. As contemporary newspapers reported, under the new amendment "the Legislature will work year-round, with only a summer recess." App'x 17. ***Since the people adopted this Amendment, the Legislature has continuously met throughout the biennial period, not adjourning sine die until just before the next biennial session of the Legislature.*** The Legislature has covered the entirety of this biennial period with legislative business, including every day being set for prescheduled floor periods, prescheduled committee work periods, and other legislative tasks, while

[1] This case does not involve a Governor-called special session, so that clause of this provision has no relevance to the issue here.

acknowledging that the Legislature reserves the right to change one of the periods currently scheduled for floor business to non-prescheduled floor periods, under a procedure known as an "extraordinary session." App'x 18–76.

This case also involves a dispute over the meaning of Section 13.02 of Wisconsin Statutes. *See* WIS. STAT. § 13.02. Before the 1968 amendments to Article IV, Section 11, this provision stated: "13.02 REGULAR SESSIONS. (1) The legislature shall convene in the capitol on the first Monday of January in each odd-numbered year, at 2 p.m., to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business. (2) The regular session of the legislature shall commence at 2 p.m. on the first Tuesday after the 15th day of January in each odd-numbered year." 1967 Wis. Ch. 187. In 1971, the Legislature implemented the 1968 amendments by adding Subsection 3, which provides that "[e]arly in each biennial session period, the joint committee on legislative organization shall meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year, to be submitted to the legislature as a joint resolution." *Id.* § 13.02(3); *see* 1971 Wis. Ch. 15. The Legislature also added an "unless" clause into the end of Subsection 2 ("unless otherwise provided under sub. (3)"), making it clear that Subsection 2's provisions no longer apply when the Legislature adopted a superseding work schedule under Subsection 3. The Legislature also add Subsection 4: "Any measures introduced in the regular annual session of the odd-numbered year which do not receive final action shall carry over to the regular annual session held in the even-numbered year."

B. Since the people amended Article IV, Section 11, the Legislature has repeatedly recognized its authority to turn one of its non-floor days into a non-preschedule floor period, known as an "extraordinary session." The Legislature first recognized this authority on February 12, 1971, as part of its work scheduled for the 1971-72 biennial session. App'x 18–20. This joint resolution provided: "BIENNIAL SESSION. The regular session of the 1971 legislature shall cover a 2-year period beginning on 2 p.m. on Tuesday, January 19, 1971, and ending at 12 noon on Monday, January 1, 1973." *Id.* The resolution then explained that this continuous, 2-year "regular session" will include prescheduled floor periods, prescheduled interim periods, and that, in addition, "[a] floor period may be convened at a date earlier than the date specified in this resolution, or an extraordinary session may be called during one of the interim periods, by a majority of the members of each house." *Id.* The Legislature adopted this joint resolution one month before it created Subsection 3 of Section 13.02, which was the first law requiring the Legislature to establish a biennial working schedule under the 1968 amendment to Article IV, Section 11. After the enactment of Subsection 3, the Legislature adopted similar resolutions in 1973, 1975, and 1977, laying out floor periods, committee work periods, and other legislative steps, but no longer using the term "regular session" because the Legislature understood that terminology was not needed when acting under a Subsection 3 work schedule. *See* App'x 21–29. But, importantly, the substance of what the Legislature did was entirely unchanged: setting a continuous "meeting" of the Legislature for the entire two-year period, while allowing it to change a

prescheduled committee period into a non-prescheduled floor period, known as an extraordinary session. Similarly, every biennial resolution since 1977,[2] has set out prescheduled floor periods, prescheduled committee periods, and other legislative markers, while noting the authority to call non-prescheduled floor periods during the biennial session, under any of the three mechanisms detailed in Joint Rule 81(2). *See* App'x 30–76.

The Legislature has used this extraordinary session procedure with regularity over the last four decades, in January 1980, December 1981, April 1988, May 1988, June 1988, May 1990, April 1992, June 1994, April 1988, May 2000, July 2003, December 2003, March 2004, May 2004, July 2005, April 2006, February 2009, May 2009, June 2009, December 2009, June 2011, July 2011, February 2015, July 2015, November 2015, March 2018, December 2018, and, most recently, in March 2019 (for Governor Evers' budget address). The Legislature has adopted some of the most important laws in this State during such floor periods. These include the two-strike laws for child sex offenders, App'x 199–200; *see State v. Radke*, 259 Wis.2d 13, 657 N.W.2d 66 (2003) (upholding law against constitutional challenge); a law protecting against prenatal substance abuse, App'x 152–94; *see Anderson v. Loertscher*, 137 S. Ct. 2328, 198 L.Ed.2d 756 (2017) (U.S. Supreme Court protecting law with a stay);

[2] In 1977, the Legislature amended its joint rules—in a rule titled Joint Rule 81(2)—to permit the calling of non-prescheduled floor period "at the direction of a majority of the members of the committee on organization in each house, by the passage of a joint resolution on the approval by a majority of the members elected to each house, or by the joint petition of a majority of the members elected to each house." *See* App'x 94.

Loertscher v. Anderson, 893 F.3d 386 (7th Cir. 2018) (rejecting constitutional challenge on standing grounds); Wisconsin's right-to-work law, App'x 227–28; *see Int'l Ass'n of Machinists District 10 and Its Local Lodge 1061 v. State*, 378 Wis.2d 243, 903 N.W.2d 141 (2017) (upholding law against constitutional challenge); *Int'l Ass'n of Machinists District 10 and Its Local Lodge 139 v. Schimel*, 863 F.3d 674 (7th Cir. 2017) (same); authorizing and funding the Milwaukee Bucks arena, App'x 239–52; and adopting juvenile justice reforms in light of the problems at Lincoln Hills, App'x 300–18, to name just a few. In total, the Legislature has enacted some 300 laws in extraordinary sessions, with a total page length stretching to over 3,000 pages. The Legislature has attached a small sample of some of the provisions that the Legislature has adopted in extraordinary session. App'x 110–331.

C. This case concerns the 2017-2018 biennial session. The joint resolution for this session (hereinafter "JR1") sets out the continuous term of Legislature's biennial session as running from "Tuesday, January 3, 2017," to "Monday, January 7, 2019." *See* App'x 107–09. Just as it has done for decades, the Legislature adopted a work schedule under Subsection 13.02(3), setting out prescheduled floor periods, committee work periods, and other prescheduled legislative markers. *Id*. Most relevant here, JR1 provided:

> (3) SCHEDULED FLOORPERIODS AND COMMITTEE WORK PERIODS. (a) *Unreserved days*. Unless reserved under this subsection . . . every day of the biennial session period is designated as a day for committee activity and is available to extend a scheduled floorperiod, convene an extraordinary session, or take senate action on appointments as permitted by joint rule 81.
> . . . .

> (4) INTERIM PERIOD OF COMMITTEE WORK. Upon the adjournment of the last general-business floorperiod, there shall be an interim period of committee work ending on Monday, January 7, 2019.

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

Just as JR1 contemplated, the Legislature in late March 2018 convened an extraordinary session, to deal with the problems arising from Lincoln Hills, as well as to make certain other necessary changes to law. App'x 294–331. Then, most relevant to this case, in December 2018, the Legislature again convened an extraordinary session, and enacted 2017 Wisconsin Act 368, 2017 Wisconsin Act 369, and 2017 Wisconsin Act 370, as well as confirming eighty-two appointments:[3]

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

[3] This list is not intended to be exhaustive and a more complete description can be found at http://docs.legis.wisconsin.gov/misc/lfb/bill_summaries/2017_19/0002_december_2018_extraordinary_session_bills _as_passed_by_the_legislature_12_6_18.pdf

Tax Law Changes: Sections 1–16 and 20–21(1) of Act 368 and Sections 84e–85r of Act 369 involve tax law changes and alternations dealing with out-of-state retailers' sales, in response to *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 201 L.Ed.2d 403 (2018); make certain adjustments to the taxation of various types of organizations; and eliminate certain verification requirements for tax credit recipients.

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

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

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

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

Miscellaneous Agency-Related Provisions: Sections 20–21, 37 and 85 of Act 369 allocate certain moneys received by the Department of Justice; provide that agencies cannot rely upon federally submitted plans or settlement agreements as an authority to promulgate new rules; extend the authority of the Department of Natural Resources relating to certain flood control projects; and modify certain appointment procedures. Sections 35 and 80 of Act 369 codify the Wisconsin Supreme Court's holding in *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 382 Wis. 2d 496, 914 N.W.2d 21 (2018), eliminating the agency deference doctrine.

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

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

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

Confirmation of eighty-two appointees: The Legislature also confirmed numerous appointments to various State agencies and boards. These include appointments to critical boards such as the Public Service Commission and the Labor and Industry Review Commission. *See* S. Journal, Dec. 2017-18 Legis. Sess., 2018 Extra. Sess. (Dec. 4, 2018).

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

Yesterday, March 21, 2019, the Circuit Court denied the Legislature's motion to dismiss and then granted Plaintiffs' motion for a temporary injunction, blocking all of the laws in Acts 368, 369 and 370, as well as all eighty-two appointments. Doc. 150. In its decision, the Circuit Court focused upon Section 13.02 and found that this provision requires that the Legislature meet only in what the Legislature titles "regular session." Doc. 150, pp. 7-–9. The Circuit Court also worried that the Legislature's understanding of its own authority would "swallow much of Article IV, Section 11 whole" because the Legislature could call floor periods that are not prescheduled. *Id.* at 10. The Circuit Court did not even bother to address the Legislature's core argument: that it was in continuous biennial session throughout the entire relevant period and did not adjourn *sine die* until January 2019. The Circuit Court then denied a stay, concluding that it had no authority to stay its judgment those laws are "unconstitutional and, therefore, non-existent." *Id.* at 14–16.

Just hours after the Circuit Court entered its temporary injunction, the Attorney General sought to take action that would not have been permitted under the new laws without the Legislature's input, *see* Document No. 00514882751, *State*

of Texas, et al. v. U.S., et al., No. 19-10011 (5th Cir. March 21, 2019); ECF No. 242, *Texas, et al. v. U.S., et al.*, No. 18-CV-00167-O (N.D. Tex. March 21, 2019); ECF No. 147, *Franciscan Alliance, et al. v. Azar, et al.*, No. 16-CV-00108-O (N.D. Tex. March 21, 2019), and the Public Service Commission cancelled a prescheduled meeting without providing any public reason, *see* http://apps.psc.wi.gov/vs2017/eventscalendar/calendar.aspx. Meanwhile, there is currently an ongoing non-partisan election to be held on April 2, 2019, and all of the new voting provisions—including those expanding the rights of overseas service members—are now enjoined.

ARGUMENT

This Court may stay a circuit court's injunction pending appeal, based upon the following factors: (1) likelihood of movant succeeding on the merits of its appeal; (2) whether movant will suffer irreparable injury absent a stay; (3) that there is no substantial harm to the non-movant; and (4) that a stay would benefit the public interest. *See Leggett v. Leggett*, 134 Wis. 2d 384, 385, 396 N.W.2d 787 (Ct. App. 1986); *see* Wis. Stat. §§ 806.07, 808.07(2), 809.12, 809.14. The movant has the burden to convince this Court to issue a stay but need not satisfy "each of the four" factors. *Scullion v. Wis. Power & Light Co.*, 237 Wis. 2d 498, 516 n.15, 614 N.W.2d 565 (Ct. App. 2000). Rather, the court must balance the factors: "[P]robability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the [movant] will suffer absent the stay. In other words, more of one factor excuses less of the other." *State v. Gudenschwager*, 191 Wis. 2d 431, 441, 529 N.W.2d 225

(1995). Relief may be granted on an administrative, "ex parte" basis when warranted. *See* Wis. Stat. § 809.12; *cf. June Medical Services, L.L.C. v. Gee*, 139 S.Ct. 661, 2019 WL 417217 (2019) (administrative stay to give the Court time to review filings regarding stay); *In re Dept. of Commerce*, 139 S.Ct. 360, 202 L.Ed.2d 258 (2018) (same). For much the same reasons articulated below, leave to appeal should be granted under Section 808.03(2), as immediate appeal here will materially advance the termination of this litigation, protect the Legislature's rights, and clarify issues of great importance to the people of this State.[4]

I. The Legislature Is Exceedingly Likely To Prevail On The Merits

Under the Wisconsin Supreme Court's decision in *Gudenschwager*, because "regularly enacted statutes are presumed to be constitutional, Courts must presume that, for purposes of deciding whether to grant a stay pending appeal, the State has made a strong showing that it is likely to succeed on the merits of its appeal." 191 Wis. 2d at 441 (citation omitted). Given that the Legislature enacted these laws under a procedure that it has regularly used for the last four decades, the statutes here are "regularly enacted" for purposes of *Gudenschwager*'s holding. The Circuit

[4] This appeal is properly venued in District III because the only defendants are state parties. *See State ex rel. Dep't of Nat. Res. v. Wis. Ct. App.*, 380 Wis. 2d 354, 380, 909 N.W.2d 114, 127 (2018); Wis. Stat. §§ 752.21, 801.50(3)(a). The fact that Plaintiffs named multiple state defendants makes no difference under statutes, given that the State is the "real party in interest" in any action where the defendant sues state officials, regardless of how many of those officials are defendants. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1291, 197 L.Ed.2d 631 (2017). This Court took actions consistent with these principles in *International Association of Machinists District 10 and Its Local Lodge 1061 v. State*, 378 Wis.2d 243, 903 N.W.2d 141 (2017), also arising out of Dane County and venued in District III, where multiple State defendants were similarly named.

Court's contrary approach, Doc 150, pp. 14–16, would presume that the Legislature acted unconstitutionally, the opposite of what *Gudenschwager* requires.

In addition and critically, the merits reasons here are *far more* powerful than just the mandatory *Gudenschwager* presumption requires. That is because the Legislature's chances of prevailing are much more than "strong," they are overwhelming to a degree rarely, if ever, so clear in an appeal. Given the entirely indefensible nature of the Circuit Court's decision, this factor overwhelming favors the issuance of a stay.

A. The Legislature's use of the "extraordinary session" mechanism complies with Article IV, Section 11 of the Wisconsin Constitution. In deciding the merits of a question of constitutional interpretation, Wisconsin courts must look at three types of sources. *See State v. Williams*, 341 Wis. 2d 191, 200, 814 N.W.2d 460, 465 (2012). First and most importantly, courts should consider "the plain meaning of the words [of the Constitution] in the context used." *Id.* (citation omitted). *Second*, courts should look to "the historical analysis of the constitutional debates relative to the constitutional provision under review; the prevailing practices [ ] when the provision was adopted; and the earliest legislative interpretations of the provision as manifested in the first laws passed that bear on the provision." *Id.* (citation and internal quotation marks omitted). Finally, courts should "seek to ascertain what the people understood the purpose of the amendment to be." *Id.* All three of these factors strongly favor the constitutionality of the long-standing extraordinary session mechanism.

The Constitutional text dictates the conclusion that the Legislature's use of the extraordinary session tool is entirely constitutional. Article IV, Section 11, as amended in 1968, provides, as relevant here, that "[t]he legislature shall meet at the seat of government at such time as shall be provided by law. . . ." WIS. CONST. art. IV, § 11. It is undisputed that the Legislature did "meet" under Section 13.02 in January 2017. *See* App'x 107–09. Neither Plaintiffs nor the Circuit Court identify *any* date on which this meeting of the Legislature stopped before January 2019. To the exact contrary, the Legislature specifically provided in JR1 that: "the 2017 Wisconsin legislature began on Tuesday, January 3, 2017, and . . . the biennial session period ends at noon on Monday, January 7, 2019." App'x 107. Under JR1's schedule, each day was a preschedule floorperiod, a preschedule period of committee work, or a period for other important legislative business. All that an extraordinary session call did was convert a prescheduled committee work period into non-prescheduled floor period. So far as Article IV, Section 11 is concerned, this change has no constitutional significance. All that matters under Article IV, Section 11 is that the Legislature was "meet[ing]," WIS. CONST. art. IV, § 11, in December 2018, which it clearly was because it had not adjourned *sine die*.

Although the Circuit Court did not address directly the Legislature's core argument that it was in continuous, biennial session, any argument that the Legislature stopped "meet[ing]" under Article IV, Section 11 before January 2019 would be meritless. As the Wisconsin Supreme Court explained in both *State ex rel. Sullivan v. Dammann*, 221 Wis. 551, 267 N.W. 433 (1936), and *State ex rel. Thompson*

v. Gibson, 22 Wis. 2d 275, 125 N.W.2d 636 (1964), the Legislature does not stop meeting for constitutional purposes until it "adjourns *sine die* [when] it ceases to exist," 221 Wis. at 559, including being in constitutional session when the two houses are in recess from floor periods, *see Thompson*, 22 Wis. 2d at 289–90. The calling of an "extraordinary session" merely changes a period of committee work—one type of legislative business—to a floor periods—another type of legislative business. Indeed, when the Legislature is in a committee work period, it is taking important, *legally* binding actions, such as the key duties performed by the Joint Committee on Finance, Wis. Stat. § 13.10(1), which has ongoing authority under more than 120 different statutory review provisions, *see* Informational Paper No. 76, Wisconsin Legislative Fiscal Bureau, *Joint Committee on Finance* (Jan. 2019), *at* http://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2019/0076_joint_committee_on_finance_informational_paper_76.pdf. The Wisconsin Constitution has nothing to say about the Legislature's decision to conduct one type of business over another; all that Article IV, Section 11 considers is whether the Legislature has stopped its "meet[ing]," which does not occur until *sine die* adjournment.

The Circuit Court's concern that the Legislature's understanding of Article IV, Section 11 "swallow much of Article IV, Section 11 whole," Doc. 150, at p. 10; *see also* pp. 6-8, is misplaced. Article IV, Section 11 deals with the type of issues that the Wisconsin Supreme Court discussed in *Dammann* and *Thompson*: when the Legislature ceases to exist by adjourning *sine die*. This provision gives the Legislature a wide berth and does not constrain in any way how the Legislature

structures its legislative business before *sine die* adjournment. That is why for all of the Circuit Court's rhetoric about the central import of Article IV, Section 11—and how, in the Circuit Court's atextual, ahistorical view, that constitutional provision *sub silentio* requires the Legislature to preschedule all of its floor periods at the start of the biennial session—neither Plaintiffs nor the Circuit Court identified a single example of any Wisconsin law ever before being held to violate Article IV, Section 11.

The remaining considerations that the Wisconsin Supreme Court has instructed are relevant to constitutional meaning—prevailing practices at the time of the amendment's adoption, early legislative interpretations, and the people's understanding of the amendment, *Williams*, 341 Wis.2d at 199–200—all lead to the same conclusion. Before the people adopted the 1968 amendment to Article IV, Section 11, it provided that "[t]he legislature shall meet at the seat of government at such time as shall be provided by law, once in two years, and no oftener, unless convened by the governor, in special session . . . ." WIS. CONST. art. IV, § 11 (1967); *see Thompson*, 22 Wis. 2d at 286. During this pre-1968 period, the Legislature would meet for a couple of months a year and eventually would adjourn *sine die*. *See supra* p. 2. As contemporary sources explained, the amendment to Article IV, Section 11 was intended to "give the Legislature flexibility in approaching the question of when the legislature should meet," App'x 16, with the expectation that "the Legislature will work year-round, with only a summer recess," App'x 17. Uniform practice following the 1968 amendment confirms that the Legislature quickly adopted the approach that it eventually used during the 2017-2018 biennial session: hold a single,

continuous biennial session, while setting out prescheduled floor periods, prescheduled "interim" non-floor periods, and other prescheduled legislative markers, and allowing itself to convert committee periods in non-prescheduled floor periods, known as extraordinary sessions. *See supra* pp. 2–6. The Legislature first recognized its authority to gather in non-prescheduled floor periods in February 12, 1971, when it adopted the work schedule for the 1971-1972 biennial session. In every biennial resolution since, the Legislature has set out pre-scheduled floor periods, while recognizing that it may come in for non-prescheduled floor periods, known as extraordinary sessions. *See supra* pp. 2–6. And the Legislature has held over two dozen extraordinary sessions since 1980, enacting thousands of pages of laws. *See supra* pp. 5–6. It is hard to imagine a case with a more robust history confirming the constitutionality of a legislative practice.

B. In its decision, the Circuit Court largely focused upon the fact that, in its view, an "extraordinary session" is not titled a "regular session" under Section 13.02. Doc. 150, pp. 7–9. That fails for three independently sufficient reasons to provide any justification for the Circuit Court's decision.

First, the Circuit Court had no jurisdiction to inquire into the Legislature's internal procedures, beyond assuring itself that the Legislature had not adjourned *sine die* before December 2018. Pursuant to Article IV, Section 8 of the Constitution, the Assembly and Senate each have the constitutional authority to "determine the rules of its own proceedings." The Supreme Court has unambiguously held that this provision means that courts have no constitutional authority to invalidate the laws

that the Legislature enacts for mere violations of statutes. *See State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 364-65, 338 N.W. 2d 684 (1983); *State ex rel. Ozanne v. Fitzgerald*, 334 Wis. 2d 70, 798 N.W.2d 436 (2011).

Given that binding caselaw, the Circuit Court was limited to the constitutional analysis described above: whether the Legislature had adjourned *sine die* before December 2018, which the Legislature clearly had not. Whether the Legislature decided to label any particular period before *sine die* adjournment "regular session," has no constitutional relevance, as Article IV, Section 11 does not mention the term "regular session." Also not constitutionality relevant is whether the legislature prescheduled all of its floor periods, or simply left committee days that it could choose to later designate as floor periods. ***Indeed, Plaintiffs appear to concede that the Legislature would have acted entirely lawfully—under Plaintiffs' own theory—if it has simply prescheduled every single day from January 3, 2017 to January 7, 2019 as a floor period in JR1, and then simply cancelled the periods it later decided were not needed. Plaintiffs also appear to concede that if the Legislature had simply relabeled "extraordinary session" as "non-prescheduled floor period during the regular session" in JR1, that would have avoided all of their claimed constitutional concerns.*** This shows that what Plaintiffs and the Circuit Court are worried about are labels and internal legislative procedures, having nothing to do with the requirements of Article IV, Section 11, which are outside of the courts' jurisdiction.

Second, even if the courts had jurisdiction to review the Legislature's compliance with the minutiae of Section 13.02, the Legislature acted consistently with Section 13.02 in all respects. In particular, the Legislature was permitted to adopt a "work schedule" under Subsection 3, without any limitations on what it labeled the various periods within that work schedule. Indeed, the work schedule it adopted here was in all material respects identical to one that the very Legislature that enacted Subsection 3 of 13.02 adopted. Section 13.02's subsections provide:

- 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. The title of Section 13.02—"Regular sessions"—is similarly a historical vestige of this pre-1968 regime. *See Cnty. of Dane v. LIRC*, 315 Wis. 2d 293, 312, 759 N.W.2d 571, 580 (2009) ("'A review of statutory history is part of a plain meaning analysis' because it is part of the context in which we interpret statutory terms." (citation

omitted)). Soon after the 1968 amendment to Article IV, Section 11, the 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, Subsection 13.02(2)—including its reference to a "regular session"—has no relevance where it has been displaced by a Subsection 13.02(3) work schedule.

- 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.

Accordingly, under these provisions, 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 3 or, contrary to the Circuit Court's apparent view, requires that all floor periods be prescheduled. Subsection 2's "unless" clause makes that Subsection's provisions inapplicable where the Legislature decides to act under Subsection 3. While the Circuit Court took a

different view of these provisions, Doc. 150, pp. 8–9, its reading is not only contrary to the text, but also contrary to the understanding of Section 13.02 that the very Legislature that adopted both Subsection 3 and Subsection 2's unless clause held. *See* App'x 18–20.

Third and finally, even if the Circuit Court was correct that it had jurisdiction to review the Legislature's compliance with all aspects of Section 13.02, and also that every floor period must be part of a "regular session" under Subsection 13.02(2), the Circuit Court was *still* duty-bound to conclude that the Legislature acted lawfully. As noted above, the Legislature first adopted the extraordinary session procedure in 1971, just a month before it adopted Subsection 3 and Subsection 2's "unless" clause, providing in a joint resolution: "BIENNIAL SESSION. The regular session of the 1971 legislature shall cover a 2-year period beginning on 2 p.m. on Tuesday, January 19, 1971, and ending at 12 noon on Monday, January 1, 1973," and then specifically stating that an "extraordinary session" would be part of this continuous biennial session. *See* App'x 18–20. While the Legislature thereafter no longer used the words "regular session" in its biennial joint resolutions to describe what it was doing, there is no constitutional or statutory difference between what the Legislature did in 1971—when it explicitly explained that an "extraordinary session" is part of the continuous, two-year regular session—and what it has done in every biennial joint resolution since that time, which is not use the "regular session" label in its joint resolution for *any* of the floor periods, whether prescheduled or not, while holding a continuous biennial session. As the Legislature explained in its briefing below,

"[e]ven under [Plaintiffs'] own reading of Section 13.02, therefore, Plaintiffs offer no reason as to why [the Legislature] may lawfully preschedule every single day for legislative business, but cannot also reserve the right later to change a prescheduled interim work period into a floor period." Doc. 134, at p. 7.

Notably, at oral argument, Plaintiffs relied heavily upon Wisconsin Statutes Subsection 13.625(1m)(b)1, Doc. 143 (citing the specific provision counsel discussed at argument), but that provisions and other like it only further defeat the Circuit Court's conclusion. Subsection 13.625(1m)(b)1 limits contributions that can be made to a legislative officer to the "period only if the legislature has concluded its final floorperiod, and is not in special or extraordinary session." Similarly, Subsection 8.50(d)(4) and Subsection 11.1205(2)(d) also refer to "extraordinary session" in imposing various requirements. "[T]he canon against interpreting any statutory provision in a manner that would render another provision superfluous . . . applies to interpreting any two provisions . . . even when [the Legislature] enacted the provisions at different times." *Bilski v. Kappos*, 561 U.S. 593, 608 (2010). It plainly follows from these statutory provisions that the Legislature understood Section 13.02 to permit the use of the extraordinary session mechanism through a Subsection 13.02(3) work schedule. Accordingly, the meaning of Section 13.02 must be read to give these other provisions—which all acknowledge the Legislature's use of "extraordinary session"—their obvious meaning. The Circuit Court's interpretation would render these provisions superfluous by no longer permitting the Legislature to use Section 13.02(3)-authorized work schedules to gather in "extraordinary session."

II. A Stay Is Necessary To Prevent Irreparable Harm And To Protect The Public Interest, And Will Cause No Harm To Anyone

The remain stay factors focus upon equitable considerations: whether the movant suffered irreparable harm, whether plaintiffs would suffer harm from a stay, and the impact of a stay on the public interest. *See supra* p. 11. Here, the issue of irreparable harm is established as a matter of law by the injunction against laws that the Legislature has enacted. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J ., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (citation omitted)). Indeed, this Court stayed a circuit court order blocking one law—the right-to-work law—and the order here is far broader. *See Int'l Ass'n of Machinists District 10 and Its Local Lodge 1061 v. State*, No. 2016AP820, May 24, 2016 Stay Order. As to the equities, those strongly favor blocking the Circuit Court's blanket injunction. Notably, Plaintiffs below did not even bother to mention—let alone argue that they suffered harm from—the vast majority of the provisions and appointments that they sought to have blocked, yet the Circuit Court blocked every provision in Act 368, 369 and 370, as well as all of the appointments. It is would be entirely equitable for this Court to stay the Circuit Court's order on the mirror-image basis from the Circuit Court's reasoning: once the laws are found likely to be *lawful*, there is no basis to subject the people to the irreparable harm of having the *any* of the laws that their representatives enacted blocked. Even if this Court were to conduct a more granular analysis, a stay would be required by equitable principles.

Changes to Certain Voting Provisions: These provisions, among other things, codify preexisting regulations relating to Wisconsin's voter ID law and loosen regulations for military and oversee electors. ***The Circuit Court blocked all of these provisions in the middle of a non-partisan election of the State Supreme Court, to be held on April 2, which requires an immediate stay***. *See generally Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). This includes blocking laws that make it easier for military and other overseas servicemembers to vote. Plaintiffs have never even attempted to argue that these provisions imposed any burden on them.

Tax Law Changes: These provisions change various tax laws relating to out-of-state retailer sales, taxation of partnerships and certain corporations, and verification requirements for certain tax credit recipients. Through its injunction, the Circuit Court needlessly introduced uncertainty into the financial plans of individuals and businesses, including in the changing area of interstate taxation of out-of-state retailers, in light of the U.S. Supreme Court's decision in *South Dakota v. Wayfair*. Plaintiffs have never suggested how these provisions cause them any harm, while the Circuit Court's order is harmful to many citizens' and companies' financial planning for this year.

Transportation Project Provisions: These make several changes in transportation projects, including requiring more federal dollars (and thus less State tax dollars) for highway projects. The Circuit Court's injunction will introduce confusion into the highway project process, since provisions that the Circuit Court

has now disabled will go back into effect once the Legislature prevails on appeal. No harm to Plaintiffs could possibly come from avoiding that needless confusion.

Provisions Relating to the Conduct of State Litigation: These include, *inter alia*, various provisions relating to limiting the Attorney General's authority to settle away the validity of state law without the Legislature's input. *See supra* p. 8. As noted above, the Attorney General has already rushed to several federal courts to take action without the Legislature's input, *see supra* pp. 10–11, and more such actions are sure to follow in the coming days and week. Once the laws here are put back into effect after the Legislature prevails on appeal, there will be grave uncertainty as to the continuing effect of the Attorney General's interim actions, including any efforts to settle away or otherwise compromise dually enacted State laws. Meanwhile, Plaintiffs will suffer no harm from the operation of entirely lawful provisions, as any decisions that they like that the Attorney General may make in the coming days and weeks are exceedingly unlikely to survive appellate review.

Guidance Documents Provisions: These provisions subject guidance documents to public notice-and-comment and litigation challenges. By blocking these provisions, the Circuit Court deprived the people of the transparency and accountability that these changes in law will bring, while undermining the Legislature's constitutional authority to "maintain some legislative authority over rule-making," which is "incumbent . . . pursuant to its constitutional grant of legislative power." *Martinez*, 165 Wis. 2d at 701. Further, enjoining these laws undermines agencies' ability to comply with the July 1, 2019 deadline for publicly noticing extant guidance

documents. Plaintiffs will suffer no harm from a stay, as the guidance document provisions will still apply to *every* document once the Legislature prevails on appeal, with just needless time and interim transparency being lost absent a stay.

Legislative Oversight Provisions: These create additional oversight by legislative committees and the Legislature, over a range of different issues, consistent with the cooperative, interbranch regime that the Wisconsin Supreme Court upheld in *Martinez*, 165 Wis. 2d 687. By blocking these provisions, the Circuit Court has undermined this cooperative regime, which is at the heart of Wisconsin's system "of shared and merged powers of the branches of government." *Id*. at 696. Again, Plaintiffs will suffer no harm from a stay, as any interim actions that any administrative agency takes without appropriate legislative oversight will need to be unwounded after this appeal.

Miscellaneous Agency-Related Provisions: These allocate certain moneys received by the Department of Justice, prohibit agencies from relying upon federally submitted plans or settlement agreements as the basis for promulgating new rules, extend authority of the Department of Natural Resources relating to certain flood control projects, and codify the holding in *Tetra Tech*, 382 Wis. 2d 496. These provisions forward cooperative interbranch relations, including allowing the Legislature to have more input in critical policy decisions. Plaintiffs have never attempted to explain how these provisions harm them, other than confusingly claiming that they are somehow harmed by the codification of *Tetra Tech*.

Prohibition on Certain Re-Nominations: Section 4 of Act 369 prohibits the Governor from re-nominating individuals whom the Senate has already rejected. The Circuit Court's injunction perpetuates a wasteful practice, which benefits no one.

Codification of Certain Federally-Approved Plans: These codify into state law a federal waiver for programs for childless adults that was recently approved by the United States Department of Health and Human Services, provide for the implementation the State's reinsurance program for health carriers, and make other similar codifications and changes. Allowing these to remain in effect will forward the public interest in stability in the law. *See Nordlinger v. Hahn*, 505 U.S. 1, 12–13 (1992) (recognizing "continuity[] and stability" as legitimate interests). Plaintiffs will not suffer at all from a stay, since any interim actions that they would prefer on these provisions would be legally ineffective once the Legislature prevails in this appeal.

Codification of Unemployment Insurance Job Search Regulations: These codify the Department of Public Works administrative regulations concerning job search requirements necessary to receive unemployment. As with the provisions mentioned directly above, these provisions forward the interests in stability in "continuity[] and "stability." *Nordlinger v. Hahn*, 505 U.S. 1, 12–13 (1992). Plaintiffs have never even argued how these provisions harm them or the public.

Confirmation of Eighty-Two Appointees: The Circuit Court's injunction causes needless chaos in the regular function of numerous important bodies in this State. Indeed, the critically important Public Service Commission—which regulates our State's utilities—already cancelled its meeting, scheduled for today, in the wake of

the Circuit Court's order. *See supra* pp. 1, 11. There is no telling how many future meetings of important boards will need to be cancelled, and how these eighty-two individuals' lives will be harmed, by the Circuit Court's erroneous order.

Finally and importantly, equity favors an immediate stay here for an addition, particularly powerful reason: the Circuit Court's injunction—if left unstayed—will call into grave doubt the validity of *over three thousand pages of laws enacted over four decades*. As noted above, the Legislature has used the extraordinary session for decades to enact some of the most important laws in this State. These laws protect the public for multiple-time child sex predators, save unborn children from the ravages of prenatal substance abuse, protect workers from being forced to pay unions that they do not wish to support, fund stadiums that are venues for leading basketball teams and future, high-profile political conventions, address critical needs in juvenile prisons, and on and on. The people of Wisconsin deserve immediate assurances that there is no threat to these laws' validity from the Circuit Court's meritless theory.

CONCLUSION

The emergency motion for a stay pending appeal should be granted immediately.

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