

4. Pursuant to Ind. Code § 2-5-1.1-1, the Legislative Council is a 16-member committee of the General Assembly tasked with various responsibilities under the Indiana Code.

5. Pursuant to Ind. Const. Art. 4 § 1 (1851), the Indiana General Assembly (“General Assembly”) is the legislative authority of the State of Indiana.

6. Venue is proper in Marion County under Indiana Trial Rule 75(A)(5).

7. As set forth below, there is a dispute over the rights, status, and legal relationship between the parties to this constitutional controversy, in which Governor Holcomb and the other parties have a substantial present interest in the relief sought.

BACKGROUND

A. OATH OF OFFICE

8. On Inauguration Day in 2017, and again in 2021, Governor Holcomb took an oath, pursuant to the Constitution of the State of Indiana, Article 5 and Article 15, Section 4, where he swore and affirmed the following:

I, Eric J. Holcomb, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Indiana, and that I will faithfully and impartially discharge the duties of the office of *Governor of the State of Indiana*, to the best of my skill and ability, so help me God.

9. Consequently, consistent with and as demanded by his oath, Governor Holcomb has filed this declaratory judgment action in order to support and defend the constitutional right and authority of Indiana governors to call special sessions of the General Assembly.

10. By passing House Enrolled Act 1123, amending Ind. Code § 1-1-1-8.6, § 2-2.1-1-1, § 2-2.1-1-12, § 2-5-1.1-5, § 10-14-3-34, enacting Ind. Code § 2-2.1-1.2, § 2-6-1.5-0.7, § 4-12-18, and repealing Ind. Code § 35-52-10-4 (“HEA 1123”), the General Assembly has impermissibly attempted to give itself the ability to call special sessions, thereby usurping a power given exclusively to the governor under Article 4 § 9 of the Indiana Constitution. Indiana Code § 2-2.1-1-1, § 2-2.1-1.2-2, § 2-2.1-1.2-7 through Ind. Code § 2-2.1-1.2-10, and Ind. Code § 2-5-1.1-5(a)(9),

enacted under Sections 2, 4 and 5 of HEA 1123 (the “Disputed Provisions of HEA 1123”), impermissibly infringe upon and undermine the constitutional power to call special sessions which is vested exclusively with the governor.

11. The ramifications of any use of the Disputed Provisions of HEA 1123 by the General Assembly will be disruptive to the State of Indiana. HEA 1123’s very existence has created uncertainty and confusion. This controversy must be resolved as soon as possible or the consequences could be severe, including disruption to Indiana and the proper functioning of state government – something that concerns every Hoosier.

B. PANDEMIC

12. Beginning in early 2020, a deadly, highly infectious disease called Coronavirus 2019 (“COVID-19”), started spreading across the world, causing an ongoing pandemic which has affected the State of Indiana. COVID-19 is the gravest threat to public health in over a century.

13. As described by the United States Court of Appeals for the Seventh Circuit in *Mays v. Dart*, 974 F.3d 810, 814 (7th Cir. 2020):

At present, COVID-19 requires no introduction: the novel coronavirus causing this disease has spread around the world, resulting in an unprecedented global pandemic that has disrupted every aspect of public life. The virus, SARSCoV-2, causes symptoms ranging from fever to shortness of breath to loss of smell and can lead to serious health effects—including damage to internal organs and, in many cases, death.

14. Over a year ago, on March 6, 2020, Governor Holcomb issued Executive Order 20-02, which declared that a public health emergency existed throughout the State of Indiana as a result of the COVID-19 outbreak in the United States, and a confirmed report that a Hoosier had contracted this virus.

15. On March 11, 2020, the World Health Organization declared COVID-19 to be a global pandemic. Several days later, on March 13, 2020, the President of the United States declared a national emergency with respect to this dangerous virus.

16. Pursuant to Executive Order 21-08, issued by Governor Holcomb on March 31, 2021, the State of Indiana remains in a state of emergency due to COVID-19. To date, more than ten percent (10%) of Hoosiers have contracted this virus, and nearly 13,000 have died from it.

17. Governor Holcomb, Indiana State Department of Health, Indiana Department of Homeland Security, and other state agencies have taken measures during this pandemic – through the governor’s emergency powers and otherwise – to protect the residents of Indiana from COVID-19.

18. Governor Holcomb has acted, and continues to act, under his executive powers, including the Indiana Emergency Management & Disaster Law, Ind. Code § 10-14-3 *et seq.*

19. Since the beginning of the state of emergency, Governor Holcomb has been firmly committed to being open and transparent about his handling of this unprecedented threat to our State, including, but not limited to, holding regular statewide press conference broadcasts and having regular discussions, not only with Speaker Huston and President Bray, but also with community and business leaders, national and local officials, and others.

20. During this pandemic, the State of Indiana has maintained a comprehensive website with significant amounts of data and information available to the public, as well as links to helpful resources, all of which can be accessed at <https://www.coronavirus.in.gov/2393.htm>.

**FACTUAL ALLEGATIONS RELEVANT TO
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

A. INDIANA CONSTITUTIONAL PROVISIONS

21. Indiana has been governed by two constitutions since its founding in 1816: the 1816 Constitution, and the 1851 Constitution.

22. Since its founding, the State of Indiana has always had a part-time legislature that meets in regular session for a portion of the year.

23. What follows is a brief summary of applicable provisions pertaining to legislative sessions contained in both the 1816 and 1851 Constitutions:

a. Article 3 § 25 of the 1816 Indiana Constitution:

This provision sets forth the time for convening the regular session each year: “The first session of the General Assembly shall commence on the first Monday of November next, and forever after, the General Assembly shall meet on the first Monday in December, in every year, and at no other period, unless directed by law, or provided for by this Constitution.”

b. Article 4 § 13 of the 1816 Indiana Constitution:

This provision granted to the governor the exclusive right and authority to call a special session: “[The governor] may, in extraordinary occasions, convene the General Assembly at the seat of Government, or at a different place, if that shall have become, since their last adjournment, dangerous from an enemy, or from contagious disorders, and in case of a disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not beyond the time of their next annual session.”

c. Article 4 § 9 of the 1851 Indiana Constitution:

In 1851, the State of Indiana enacted a new Constitution which set forth the time for convening regular sessions and granted the exclusive right and authority for calling special sessions to the governor, as follows: “The sessions of the General Assembly shall be held biennially at the capital of the State, commencing on the Thursday next after the first Monday of January, in the year one thousand eight hundred and fifty-three, and on the same day of every second year thereafter, unless a different day or place shall have been appointed by law. But if, in the opinion of the Governor, the public welfare shall require it, he may, at any time by proclamation, call a special session.”

d. Article 4 § 29 of the 1851 Indiana Constitution:

This provision sets forth the length of the regular and special sessions: “The members of the General Assembly shall receive for their services, a compensation to be fixed by law; but no increase of compensation shall take effect during the session at which such increase may be made. No session of the General Assembly, except the first under this

Constitution, shall extend beyond the term of sixty-one days, nor any special session beyond the term of forty days.”

e. **1970 Amendment to Article 4 § 9 of the Indiana Constitution:**

This amendment removed the biennial meeting requirement and added the third sentence making clear that the length and frequency of the regular sessions may be fixed by law: “The sessions of the General Assembly shall be held at the capitol of the State, commencing on the Tuesday next after the second Monday in January of each year in which the General Assembly meets unless a different day or place shall have been appointed by law. But if, in the opinion of the Governor, the public welfare shall require it, he may, at any time by proclamation, call a special session. The length and frequency of the sessions of the General Assembly shall be fixed by law.”

24. Notably, what never changed in these constitutional provisions over the years is the sole and exclusive right and authority of the governor to call special sessions. Nowhere in these changes, or in the actual text of the Indiana Constitution itself, was the General Assembly ever given that same right, power, or ability.

25. The 1851 Constitution also contains, in Article 3 § 1, a separation-of-powers principle that is critical to the proper functioning of state government:

The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

26. The separation-of-powers principle makes clear that no department (also known as a “branch”) of state government may exercise any of the functions of another branch, unless expressly permitted by the Indiana Constitution. As such, it protects the independence and integrity of each branch, not only from direct infringement by the other branches, but also from any indirect or even remote influence from those branches.

27. The right and authority to call a special session is clearly, unequivocally, and exclusively a function of the governor. As such, neither the General Assembly nor the Legislative Council can exercise this function since the Indiana Constitution does not expressly allow for it.

28. Article 4 § 9 of the Indiana Constitution, which establishes the governor's sole and exclusive right and authority to call special sessions, must be read and understood in the context of the separation-of-powers principle enshrined in Article 3 § 1 of the Indiana Constitution.

B. LEGISLATIVE SESSIONS AND HEA 1123

29. At the time of the adoption of the 1816 Constitution, the 1851 Constitution, and the 1970 Amendment, the only types of sessions evidenced by the records of those constitutional proceedings are the "regular session" and the "special session." No other type of session is mentioned or authorized.

30. Near the end of the 1850-1851 Constitutional Convention, the leaders prepared an official speech to explain the newly proposed Constitution to the people of Indiana, which included the following: "The regular sessions of the General Assembly are to be held only once every two years; but the Governor, if he thinks the public welfare requires it, may call special sessions."

31. The word "sessions," as used in Article 4 § 9 of the Indiana Constitution, includes only regular sessions and special sessions.

32. There is no authority in the 1851 Constitution (or the 1970 Amendment) that allows or empowers, in any way, the General Assembly to create a new type of legislative session, including, but not limited to, the so-called "emergency session" described in HEA 1123.

33. During the 2021 legislative session, HEA 1123 was introduced in the Indiana House of Representatives as House Bill 1123 (a true and accurate copy of which is attached hereto as **Exhibit A**).

34. The Disputed Provisions of HEA 1123 allow the General Assembly, through its Legislative Council, to call itself into an unconstitutional special session that it has labelled an “emergency session.” Regardless of the name given to it, this “emergency session” is functionally a special session, because they both share the same characteristic of being one-time and non-recurring in nature, as opposed to a regular session that occurs each and every year.

35. In particular, HEA 1123 amends the Indiana Code to allow the General Assembly, through its Legislative Council, to declare an “emergency session” of the General Assembly when a state of emergency has been declared by a governor. (Ex. A). Pursuant to Ind. Code §10-14-3-12(a), the governor has the sole authority to declare a state of emergency by executive order or proclamation “if the governor determines that a disaster has occurred or that the occurrence or threat of a disaster is imminent.”

36. During an unconstitutional HEA 1123 “emergency session,” the General Assembly may enact bills relating to the agenda set by the Legislative Council, as well as adopt concurrent or simple resolutions. (Ex. A).

37. Despite persistent questions about its constitutionality, and several constitutional law experts who testified at a legislative hearing that HEA 1123 is unconstitutional, the legislation nevertheless moved forward in the legislative process and ultimately passed.

38. Several legislators publicly acknowledged these serious questions, as well as the uncertainty and confusion that the proposed Act was creating, but said they would “let the courts decide” its constitutionality. *See e.g.*,

<https://www.indystar.com/story/news/politics/2021/04/05/indiana-covid-mask-mandate-governor-holcomb-emergency-powers-bill/7052905002/>

39. Other legislators indicated that the General Assembly passed HEA 1123 to wrest power away from Governor Holcomb.

40. Notwithstanding these serious questions and concerns, on April 5, 2021, HEA 1123 passed the General Assembly.

41. Governor Holcomb vetoed HEA 1123 on April 9, 2021. (A true and accurate copy of Governor Holcomb’s statement issuing the veto is attached hereto as **Exhibit B**).

42. In his veto statement, Governor Holcomb stated that he “firmly believe[s] a central part of [HEA 1123] is unconstitutional” because the bill “impermissibly attempts to give the General Assembly the ability to call itself into a special session, thereby usurping a power given exclusively to the governor under Article 4, Section 9 of the Indiana Constitution.” (Ex. B).

43. Also in his veto statement, Governor Holcomb made clear that if HEA 1123 becomes law, it “will create significant uncertainty and solidify the controversy over its constitutionality,” and that any legislative actions taken during such an unconstitutional session would be void and thus open and subject to legal challenges to set them aside. For that to occur during a state of emergency would be disruptive to Indiana and the proper functioning of state government.

44. Both chambers of the General Assembly voted to override Governor Holcomb’s veto on April 15, 2021.

45. The General Assembly passed HEA 1123 on an “emergency” basis, making its provisions effective immediately, as opposed to the normal effective date of July 1 each calendar year for typical legislation. Accordingly, HEA 1123 went into effect on April 15, 2021.

46. The General Assembly adjourned its regular session on April 22, 2021.

**COUNT I – DECLARATORY JUDGMENT AND PERMANENT INJUNCTION TO
DECLARE HEA 1123 AN UNCONSTITUTIONAL INFRINGEMENT OF ARTICLE 4 §
9 OF THE INDIANA CONSTITUTION AND ENJOIN ITS ENFORCEMENT**

47. Governor Holcomb incorporates herein by reference all previous allegations.

48. A declaratory judgment action is the proper procedural vehicle to use to contest the constitutionality of a newly-enacted law.

49. This constitutional controversy fits squarely within the very purpose of declaratory judgment actions – to resolve a dispute or uncertainty before it progresses to the point where real harm occurs.

50. Under the 1851 Constitution, only the governor has the right and authority to call a special session of the General Assembly. Ind. Const. Art. 4 § 9 (1851).

51. The Disputed Provisions of HEA 1123 unconstitutionally grant the General Assembly, through its Legislative Council, the right and authority to call a special session, which it labels an “emergency session,” in direct contravention of the Art. 4 § 9 of the Indiana Constitution.

52. In construing constitutional provisions, a rule of general acceptance is that which is express makes that which is silent to cease.

53. The 1851 Constitution expressly grants the right and authority to call a special session to the governor, and the governor alone. There is no express mention of any power or authority of the General Assembly to do likewise. Nowhere in the 1851 Constitution does it expressly provide that the General Assembly, or its Legislative Council, has the right or authority to call a special session.

54. It would be inconsistent with the fundamentals of constitutional interpretation to find that the Indiana Constitution silently vests in the General Assembly (or its Legislative Council), the ability to call special sessions, when that power is exclusively and expressly given to the governor alone. Therefore, pursuant to the 1851 Constitution, neither the General Assembly, nor its Legislative Council, has the right or authority to call a special session, including, but not limited to, the so-called “emergency session” described in HEA 1123.

55. This controversy is ripe for judgment. The General Assembly enacted HEA 1123 on an “emergency” basis, making the law effective immediately upon passing. Indiana remains in a state of emergency wherein an “emergency session” may be called to create a new session of the recently adjourned General Assembly at any time through its Legislative Council. Any delay in addressing the constitutionality of the Disputed Provisions of HEA 1123 could result in severe disruption to Indiana and the proper functioning of state government. The Court should promptly resolve the significant uncertainty and confusion over the constitutional powers of the Executive and Legislative Branches created by HEA 1123, which a declaratory judgment can effectively resolve.

56. A declaratory judgment by which a court of law determines the constitutionality of the Disputed Provisions of HEA 1123 is necessary to resolve an existing dispute and to establish the rights and responsibilities of all parties to this action.

57. For the reasons set forth in Count I, Governor Holcomb respectfully requests that the Court declare that the Disputed Provisions of HEA 1123 represent an unconstitutional encroachment on the governor’s exclusive right and authority to call special sessions, and that all individuals and governmental bodies should be permanently enjoined from enforcing those provisions of HEA 1123.

**COUNT II – DECLARATORY JUDGMENT AND PERMANENT INJUNCTION TO
DECLARE HEA 1123 AN UNCONSTITUTIONAL INFRINGEMENT OF ARTICLE 3 §
1 OF THE INDIANA CONSTITUTION AND ENJOIN ITS ENFORCEMENT**

58. Governor Holcomb incorporates herein by reference all previous allegations.

59. A declaratory judgment action is the proper procedural vehicle to use to contest the constitutionality of a newly-enacted law.

60. This constitutional controversy fits squarely within the very purpose of declaratory judgment actions – to resolve a dispute or uncertainty before it progresses to the point where real harm occurs.

61. The Disputed Provisions of HEA 1123 grant unconstitutional power to the Legislative Branch at the expense of the Executive Branch in violation of the separation-of-powers principle enshrined in Article 3 § 1 of the Indiana Constitution. The new law impermissibly grant the right and authority to call a special session, labelled an “emergency session,” to the General Assembly, through its Legislative Council.

62. The Indiana Constitution makes clear that no branch of government is allowed to exercise any of the functions of another, unless expressly permitted by the Indiana Constitution: “The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; **and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.**” Ind. Const. Art. 3 § 1 (emphasis added).

63. Regardless of the name given to it, this “emergency session” is functionally a special session, because they both share the same characteristic of being one-time and non-recurring in nature, as opposed to a regular session that occurs each and every year.

64. The right and authority to call a special session is clearly, unequivocally, and exclusively a function of the governor and the Executive Branch. As such, neither the General

Assembly nor its Legislative Council can exercise this function since the Indiana Constitution does not expressly allow for it.

65. The separation-of-powers principle exists to protect the independence and integrity of each branch of state government. The Disputed Provisions of HEA 1123 unconstitutionally interfere with that proper separation-of-powers enshrined in the Indiana Constitution.

66. The Indiana Constitution allows only the governor to call special sessions of the General Assembly. Ind. Const. Art. 4 § 9. Granting the General Assembly, through its Legislative Council, the same right and authority to call special sessions would usurp the governor's exclusive power and authority in this regard. Such an attempted infringement by the Legislative Branch on the constitutional power and authority of the Executive Branch would be repugnant to the doctrine of separation-of-powers.

67. This controversy is ripe for judgment. The General Assembly enacted HEA 1123 on an "emergency" basis, making the law effective immediately upon passing. Indiana remains in a state of emergency wherein an "emergency session" may be called to create a new session the recently adjourned General Assembly at any time through its Legislative Council. Any delay in addressing the constitutionality of the Disputed Provisions of HEA 1123 could result in severe disruption to Indiana and the proper functioning of state government. The Court should promptly resolve the significant uncertainty and confusion over the constitutional powers of the Executive and Legislative Branches created by HEA 1123, which a declaratory judgment can effectively resolve.

68. A declaratory judgment by which a court of law determines the constitutionality of the Disputed Provisions of HEA 1123 is necessary to resolve an existing dispute and to establish the rights and responsibilities of all parties to this action.

69. For the reasons set forth in Count II, Governor Holcomb respectfully requests that the Court declare that the Disputed Provisions of HEA 1123 represent an unconstitutional encroachment on the governor's exclusive right and authority to call special sessions, and that all individuals and governmental bodies should be permanently enjoined from enforcing those provisions of HEA 1123.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Eric J. Holcomb, Governor of the State of Indiana, respectfully requests that this honorable Court declare that the Disputed Provisions of HEA 1123, which purport to grant the General Assembly, through its Legislative Council, the right and authority to call an “emergency session” of the General Assembly, are unconstitutional; to permanently enjoin the enforcement of the Disputed Provisions of HEA 1123 by any individuals or governmental bodies; and for all other proper relief in the premises.

Respectfully submitted,

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