STATE OF INDIANA	)	MARION SUPERIOR COURT 12
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D12-2104-PL-014068
	)	
ERIC J. HOLCOMB, GOVERNOR OF THE STATE OF INDIANA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
RODRIC BRAY, ET AL.,	)	
	)	
Defendants.	)	

ENTRY AND ORDERS ON THE PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Asserting violation of two provisions of the Indiana Constitution, the Plaintiff Eric J. Holcomb, Governor of the State of Indiana (the "Governor") challenges HEA 1123, a recently enacted Indiana statute that provides that the Indiana General Assembly may address future emergencies that arise when the General Assembly happens not to be in session. This matter is before this court on Cross Motions for Summary Judgment filed by the Governor and Defendants (the Defendants are hereafter the "General Assembly" or the "Legislature"). This court has reviewed the motions, briefs and voluminous designated evidence submitted by the parties, and held a hearing on September 10, 2021. Having taken the matter under advisement, the court now finds, concludes and orders as set forth herein.

As a preliminary matter, it must be noted that the issues before the court do not include the public policy merits of HEA 1123. Whether HEA 1123 is, or is not,

wise public policy is not a consideration germane to the narrow issues of constitutional law before the court. "[The court's] individual policy preferences are not relevant. In the absence of a constitutional violation, the desirability and efficacy of [HEA 1123] are matters to be resolved through the political process." *Meredith v. Pence*, 984 N.E.2d 1213, 1216 (Ind. 2013).

II. STATEMENT AND FINDINGS OF UNDISPUTED MATERIAL FACT

The parties' designated evidence reveals the following relevant, material and undisputed facts. The COVID-19 pandemic began affecting Indiana in spring 2020. COVID hit Indiana just as the General Assembly was winding up a short session, which meant that the Governor was, by virtue of emergency powers bestowed upon him by the legislature, responsible for addressing the pandemic in the first instance. On March 6, 2020, the Governor issued Executive Order 20-02, which declared a public health emergency for the COVID-19 outbreak and authorized the Indiana State Department of Health to coordinate the emergency response, but it did not impose restrictions on individual mobility or activity. *Def.'s Exhibit 1*, Executive Order 20-02. The following week, on Thursday, March 12, 2020, the legislature concluded its 2020 regular session and adjourned sine die. *Def.'s Exhibit 37*, Journal of the House, 121st General Assembly, Second Regular Session, at 787; *Def.'s Exhibit 40*, Journal of the Senate, 121st General Assembly, Second Regular Session, at 1049. The very next day, the Governor issued a second COVID-related executive order, this one addressing the prospect of COVID-related food shortages: Executive

Order 20-03 waived service hour regulations for motor carriers and drivers of commercial vehicles transporting goods to Indiana businesses. *Def.s' Exhibit 2*, Executive Order 20-03. Over the course of the next week, the Governor issued four more COVID-19 related executive orders that both affected local and state government actions and restrained more individual liberties. Those orders not only provided public aid for pandemic relief and postponed the primary election, but also imposed guidelines for large gatherings, public meetings, and nonessential surgical procedures and temporarily prohibited evictions and foreclosures. *Def.'s Exhibit 3,* Executive Order 20-04; *Def.'s Exhibit 4*, Executive Order 20-05; *Def.'s Exhibit 5*, Executive Order 20-06; *Def.'s Exhibit 6*, Executive Order 20-07. On March 23, 2020, little more than a week after the Legislature had left Indianapolis, the Governor issued an executive order directing all residents of Indiana to stay at home and prohibiting all non-essential gatherings of 10 or more people, including church services. *Def.'s Exhibit 7*, Executive Order 20-08. Over the course of the next year and a half, the Governor issued sixty two (62) additional executive orders setting the State's policy response to the COVID-19 pandemic, including an order on July 24, 2020, that mandated all residents of Indiana wear masks in public places. *Def.'s Exhibit 8*, Executive Order 20-37. Shortly thereafter, several legislators urged the Governor to call a special legislative session so that the legislature as a body could debate and possibly address COVID-related issues. *See Def.'s Designation,* Dan Carden, *Legal Furor Follows Governor's Order for Hoosiers To Wear Masks*, NWI Times, July 23, 2020;

Alexandra Kukulka, *Area Legislators Split on Need for Special Session To Address COVID Response, Voting and Police Reform*, Chi. Trib., Aug. 4, 2020.

The Governor did not call a special legislative session[1]. Instead, the Governor continued to issue executive orders that, (1) renewed the public health emergency, *Def.'s Exhibit 9*, Executive Order 20-38; *Def.'s Exhibit 11*, Executive Order 20-41; *Def.'s Exhibit 14*, Executive Order 20-44; *Def.'s Exhibit 17*, Executive Order 20-47; *Def.'s Exhibit 19*, Executive Order 20-49; *Def.'s Exhibit 22*, Executive Order 20-52, (2) established stages for reopening, *Def.'s Exhibit 10*, Executive Order 20-39; *Def.'s Exhibit 12*, Executive Order 20-42; *Def.'s Exhibit 13*, Executive Order 20-43; *Def.'s Exhibit 16*, Executive Order 20-46, extending prior orders, *Def.'s Exhibit 15*, Executive Order 20-45; *Def.'s Exhibit 21*, Executive Order 20-51, and (3) instituted county based restrictions, *Def.'s Exhibit 18*, Executive Order 20-48; *Def.'s Exhibit 20*, Executive Order 20-50; *Def.'s Exhibit 23*, Executive Order 20-53.

When the General Assembly began its substantive legislation session in January 2021, the House and Senate considered several bills that would have overridden the Governor's emergency orders or otherwise limited the Governor's statutory emergency authority. For instance, Senate Bill 75 would have provided that any executive order that invades the constitutional authority of the legislature is void. *Def.'s Exhibit 38*, Senate Bill 75. House Bill 1244 would have limited the Governor's

[1] The framers of the first version of the Indiana Constitution, ratified in 1816, expressly contemplated the Governor's ability to convene the General Assembly during pandemics. "[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 contagious disorders." *See Plntf.'s Desig.*, Ex A, Ind. Const., Art. 4 sec. 13 (1816).

ability to use his emergency authority to restrict business operations. *Def.'s Exhibit 35*, House Bill 1244. Ultimately, however, the General Assembly declined to pass these bills.

The legislature did, however, enact HEA 1123, which ensures that, unlike with the early stages of the COVID emergency, the General Assembly may address future emergencies that arise when the General Assembly happens not to be in session. The Act authorizes the General Assembly to commence an "emergency session" if the Legislative Council finds that "(1) [t]he governor has declared a state of emergency that the legislative council determines has a statewide impact[,] (2) [i]t is necessary for the general assembly to address the state of emergency with legislative action[, and] (3) [i]t is necessary for the general assembly to convene an emergency session." *Ind. Code* § 2-2.1-1.2-7. The Legislative Council, which has existed since 1978, consists of sixteen members of the General Assembly, including leaders of both parties from both chambers. *Id.* § 25-1.1-1. HEA 1123 passed the General Assembly on April 5, 2021, the Governor vetoed it four days later, and the General Assembly overrode the Governor's veto six days after that. Shortly after the General Assembly overrode his veto, Governor Holcomb filed the instant Complaint that challenged HEA 1123 under Article 4, section 9 and Article 3, section 1 of the Indiana Constitution and requested both a declaratory judgment of the Act's unconstitutionality and a permanent injunction against its enforcement. *Compl.* ¶¶ 47–69.

Since filing this lawsuit, the Governor has issued at least four additional executive orders renewing the public health emergency (which triggers both extraordinary local government powers and gubernatorial authority) and another four extending directives responding to that emergency by, for example, suspending statutes enacted by the legislature that govern licensure of healthcare workers and coverage under the Medical Malpractice Act. *Def.'s Exhibit 24*, Executive Order 21-11; *Def.'s Exhibit 25*, Executive Order 21-12; *Def.'s Exhibit 26*, Executive Order 21-13; *Def.'s Exhibit 27*, Executive Order 21-14; *Def.'s Exhibit 28*, Executive Order 21-15; *Def.'s Exhibit 29*, Executive Order 21-16; *Def.'s Exhibit 30*, Executive Order 21-17; *Def.'s Exhibit 31*, Executive Order 21-18; *Def.'s Exhibit 32*, Executive Order 21-19. On September 30, 2021, the Governor issued Executive Order 21-26, which extended the declared COVID-19 public health emergency through October 31, 2021.

Separately, the Legislature has passed—and the Governor has signed—a bill authorizing the 2021 regular legislative session to extend until mid-November. *Def.'s Exhibit 34*, House Enrolled Act 1372 (codified at *Ind. Code* § 2-2.1-1-2(e)). Under this law, the General Assembly will adjourn sine die no later than November 15, 2021, though it can adjourn sine die earlier if it so chooses. *Id.* And the General Assembly will commence its next regular session on November 16, 2021; the law currently authorizes that session to extend until March 14, 2022. *Ind. Code* § 2-2.1-1-3.

III. BURDEN OF PROOF AND LEGAL STANDARDS

The Governor brought this lawsuit contending that HEA 1123 is unconstitutional on its face. He embraces a heavy burden of proof. "When a party claims that

a statute is unconstitutional on its face, the claimant assumes the burden of demonstrating that there are no set of circumstances under which the statute can be constitutionally applied." *Meredith v. Pence*, 984 N.E.2d at 1218 (*quoting Baldwin v. Reagan*, 715 N.E.2d, 332, 337 (Ind. 1999). In reviewing the constitutionality of a statute, "every statute stands before [courts] clothed with the presumption of constitutionality unless clearly overcome by a contrary showing." *Id.* The burden is on the party challenging the constitutionality of the statute and all doubts are resolved against that party. *Id.*

A court's "deliberations must be guided by the following and well-established rules of statutory and constitutional construction: (1) A statute is presumptively valid and will not be overthrown as unconstitutional if it can be sustained on any reasonable basis; (2) It is the duty of courts to uphold Acts of the Legislature if it is possible to do so within rule of law, and where there is a doubt as to the constitutionality of a statute, it must be upheld; and (3) The burden is on the party attacking the constitutionality of the statute to establish the invalidating facts; and its invalidity must be clearly shown." *Book v. State Office Bldg. Commission*, 149 N.E.2d 273, 280 (Ind. 1958).

IV. CONCLUSIONS OF LAW AND ANALYSIS

A. The Defendants' Non-Merit Based Defenses

The Defendants maintain that there are multiple jurisdictional and procedural bars to the Governor's present lawsuit and his challenge to a law passed by the General Assembly. The Defendants have asserted these jurisdictional and procedural

bars by way of affirmative defenses, and they now move for summary judgment on these affirmative defenses. The court will address each asserted affirmative defense below.

1. Standing and Ripeness

The Defendants assert that the Marion Superior Court "lacks jurisdiction over this case because the claims asserted are not ripe for adjudication", *Def.'s Affirmative Defense* ¶ 2, and that the Governor "lacks standing to bring this case because he has failed to show that he is in immediate danger of suffering a direct injury traceable to [the Defendants] and redressable by a court." *Def.'s Affirmative Defense* ¶ 5.

Standing and ripeness are designed "to ensure the resolution of real issues through vigorous litigation, not to engage in academic debate or mere abstract speculation." *Horner v. Curry*, 125 N.E.3d 584, 589 (Ind. 2019). In the present case, the Governor has sufficiently alleged an actual injury: he claims that General Assembly has passed a law currently in effect that interferes with his exclusive constitutional authority to call special sessions of the General Assembly. That alleged separation-of-powers injury, alone, is enough to invoke standing. *Romer v. Colorado General Assembly*, 810 P.2d 215, 220 (Colo. 1991) ("The governor has alleged a wrong that constitutes an injury in fact to the governor's legally protected interest in his constitutional power.... Therefore, the governor has standing to bring this action."). The Governor also alleges that each day that HEA 1123 remains on the books is an affront to the exclusive and express power of Indiana governors to call special sessions under Article 4 § 9, and a violation of the Indiana Constitution's prohibition, found in Article

3 § 1, against one branch exercising the powers of another without the express authority to do so. That alleged injury is immediate and ongoing, providing more than the "ripening seeds of a controversy" required for this court to rule on the merits.

The Governor's case is ripe. "Ripeness relates to the degree to which the defined issues in a case are based on actual facts rather than on abstract possibilities, and are capable of being adjudicated on an adequately developed record." *Ind. Dept. Environm. Mgmt. v. Chemical Waste Management, Inc.*, 643 N.E.2d 331, 336 (Ind. 1994). It is well-established that Indiana courts will, therefore, not permit "excessive formalism" to prevent necessary judicial involvement. *Id.* "Where an actual controversy exists [courts] will not shirk [their] duty to resolve it." *Id.* *See also* *Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1256 (Ind. 2020) (more than a theoretical dispute is required, but "it's enough that the 'ripening seeds' of a controversy exist and the plaintiff has a 'substantial interest in the relief sought.'")(internal citations omitted); *State ex rel. Branigin v. Morgan Superior Court*, 231 N.E.2d 516, 517 (Ind. 1967)(Indiana Supreme Court decided a constitutional issue that was technically "moot" because it involved "matters of great public interest and one which could well affect the public generally.").

At present Indiana remains in a state of emergency by virtue of the Governor's successive issuance of Executive Orders over the past 20 months. The issues before this court are far from theoretical disputes. This court is presented with an actual controversy capable of being adjudicated on an adequately developed record, *i.e.*, has the General Assembly granted itself the unconstitutional power to call itself into a

special (emergency) session through HEA 1123 (the Governor's position), or has the General Assembly acted constitutionally by virtue of the powers to determine when it will meet, where it will meet, how long it will meet and how frequently it will meet, so long as it does so "by law", as granted to it by the framers under Article 4, section 9 of the Indiana Constitution (the General Assembly's position).

Although the Defendants argue that the offending provisions of HEA 1123 have not yet been acted upon, and may not be for some time, that proposition misses the point. This case is ripe for judicial resolution simply by virtue of the fact that the Governor alleges that the General Assembly has impermissibly assigned to itself a power the Governor claims was allocated expressly by the Indiana Constitution *only* to Indiana governors. To defer ruling on this important constitutional issue now, and instead waiting until the middle of a future crisis to consider HEA 1123's constitutionality, is decidedly *not* the time to address and resolve the constitutional issues raised in this suit. The time to decide the constitutionality of HEA 1123 is now. The Defendants Motions for Summary Judgement on their Affirmative Defenses of Standing and Ripeness are **DENIED**.

2. The Declaratory Judgment Act and TR 57

The Defendants' next procedural argument is that the Governor may not sue for a declaratory judgment because he does not qualify as a "person" under the Declaratory Judgment Act, I. C. § 34-14-1-13. *See* *Def's Affirmative Defenses*, ¶¶ 6, 8. The Defendant's seek summary judgment on this basis.

The Governor's *Complaint* indicates that he has not brought this action under the Declaratory Judgment Act.[2] Because the Governor seeks both (a) a declaration that HEA 1123 is unconstitutional, and (b) affirmative relief (an injunction), his action is appropriately characterized as a declaratory judgment filed under Indiana Trial Rule 57. *Indianapolis City Market Corp. v. MAV, Inc.*, 915 N.E.2d 1013, 1022 (Ind. Ct. App. 2009) ("[N]ot all declaratory judgments are issued pursuant to the Uniform Declaratory Judgment Act .... [U]nder Count I of MAV's complaint, the request for declaratory judgment requests relief that is permissible under Trial Rule 57, but not allowable under the Uniform Declaratory Judgment Act."). *Accord,* Artusi v. City of Mishawaka, 519 N.E.2d 1246, 1250-51 (Ind. Ct. App. 1988). Trial Rule 57 has no definition of "person" similar to the one in the Declaratory Judgment Act upon which the Defendants build their argument. Trial Rule 57 was adopted in 1969, prior to which "courts could only 'declare rights, status, and other legal relation' in declaratory judgment actions under our Declaratory Judgment Act, IND. CODE 34-4-10-1, et seq." *Artusi,* 519 N.E.2d at 1250. Courts could not order "executory or coercive" relief under the Declaratory Judgment Act. *Id.* Upon adoption of Trial Rule 57 in 1969, that rule "now provides in such actions '[a]ffirmative relief shall be allowed ... when the right thereto is established.'" *Id.* (*citing* T.R. 57). Relying on that holding from *Artusi*, the Indiana Court of Appeals held, in *Indpls. City Market*, that in an

[2] In their briefing, the Defendants wrote: "Governor Holcomb's Complaint cites the Declaratory Judgment Act as the exclusive source of authority for his cause of action. Compl. ¶¶ 48, 59." (Defendants' Opening Brief, p. 8). That is not accurate. Governor Holcomb's *Complaint* makes no mention of the Declaratory Judgment Act. *See Inpls. City Market v. MAV, Inc.*, 915 N.E.2d 1013, 1022 (Ind. Ct. App. 2009) ("Our review of the record reveals that MAV never asserted it was bringing an action under the Uniform Declaratory Judgment Act.").

action seeking a declaration and damages, such relief was improper under the Declaratory Judgment Act, but was proper under Trial Rule 57. *Id.*, 915 N.E.2d at 1022. The Court in *Indpls. City Market* held that the plaintiff had obtained a declaration under Trial Rule 57 and had not "invoke[d] the court's authority under the Uniform Declaratory Judgment Act." *Id.*

The Defendants also argue that Trial Rule 57 does not provide a substantive cause of action upon which the Governor can bring this action. That argument fails. Based on Trial Rule 57, *Artusi,* and *Indpls. City Market*, the law in Indiana appears to be that a party may seek a declaratory judgment as well as a request for additional relief (here, an injunction) without relying on the Indiana Declaratory Judgment Act to do so. *See also Wingate v. Flynn,* 249 N.Y.S. 351, 354 (1931)("Public officers should have the right to have their legal duties judicially determined. In this way only can the disastrous results of well-intentioned but illegal acts be avoided with certainty.").

The Governor's declaratory judgment action in the present case, which this court deems to have been filed pursuant to Trial Rule 57, therefore renders the holding in *Ind. Fireworks Distribs. Ass'n v. Boatwright*, 764 N.E.2d 1262 (Ind. 2002) inapplicable. But even if this court assumes that the Governor has brought his claim under the Declaratory Judgment Act, the *Boatwright* case still does not deny the Governor access to Indiana courts to redress the alleged constitutional injury at issue in the present case. First, the plaintiff in *Boatwright* was not a constitutional officer such as Governor Holcomb. The plaintiff in *Boatwright* sued on behalf of a state agency. An Indiana governor is a "person" who has vested constitutional authority.

But he is nonetheless a "person," unlike an Indiana agency, as was the situation in *Boatwright*. Secondly, the plaintiff in *Boatwright* sought a ruling from a court to simply advise his agency about what a law meant. Here, the Governor seeks affirmative relief – an injunction to protect what he alleges is an express constitutional power vested solely with the Governor. That is fundamentally different than seeking what amounted to an advisory opinion as in *Boatwright*.

This court finds the facts before the Indiana Supreme Court in *Tucker v. State*, *supra*, to be persuasive. Notably, the Declaratory Judgment Act was in force at the time of the *Tucker* decision in 1941, and it contained essentially the same definition of "person" that is contained in today's version of that Act.[3] As was the case in *Tucker*, the Governor's primary objective here is to enjoin the enforcement of what he alleges is an unconstitutional law.[4] In *Tucker*, the trial court entered an injunction against unconstitutional laws passed in 1941, and the Indiana Supreme Court took the case and decided the merits thereof. In doing so, our Supreme Court emphasized the importance of separation-of-powers considerations. *See generally* 35 N.E.2d 270. The

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[3] *Compare*, IC § 34-4-10-13 (then-existing in 1941 and repealed in 1998) ("The word 'person' wherever used in this chapter, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever."; *with*, IC § 34-14-1-13 (now in effect) ("The word 'person' wherever used in this chapter, shall be construed to mean any person, partnership, limited liability company, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.").

[4] A declaratory judgment coupled with an injunction regarding the constitutionality of a statute, as is the case here, is the appropriate course of action under these circumstances. *See Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2307 (2016)("[I]f the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is 'proper'.")(quotation omitted); 1 Sutherland Stat. Const. § 2:5 ("The most commonly used direct remedies to achieve relief from invalid legislation are declaratory judgments and injunctions against enforcement.").

Supreme Court eventually affirmed the trial court's injunction. *Id.* at 305. *Tucker* supports the proposition that an Indiana governor has the authority to seek judicial relief of the sort that the Governor is seeking here, whether under a governor's inherent constitutional authority, *supra*, under Trial Rule 57, or under the Declaratory Judgment Act as a "person." For these reasons, the court finds that the Governor has appropriately pursued a declaratory judgment as well as an injunction in the present case. The Defendants' Motion for Summary Judgment on the basis of the Declaratory Judgment Act and TR 57 is **DENIED**.

3. Legislative Immunity

The Defendants next allege that the Governor's lawsuit "is categorically barred by absolute legislative immunity under the common law and the Indiana Constitution." *See Def.'s Affirmative Defense* ¶ 1. The Defendants seek summary judgment on this basis and rely on "legislative immunity" for the proposition that the "Governor's suit amounts to a request for this Court to tell the General Assembly that it cannot as a body debate and vote upon legislation during legislative sessions commenced under HEA 1123." *Def.'s Memorandum*, p. 16. But in this case the Governor is asking this court to declare HEA 1123 unconstitutional and to enjoin its enforcement because he alleges that law directly conflicts with an express constitutional power he claims is vested solely in the executive branch. Indeed, if HEA 1123 is unconstitutional, a gathering of legislators under that Act would not be a gathering of a constitutionally-recognized session of the General Assembly. *Simpson*, 263 P. at 641 ("If the members of the [Oklahoma] Legislature come to the Capitol, they come

as individuals. They can incur no obligation; they can perform no official functions...."). Rather, it would simply be a gathering of individuals who are not vested with any constitutional authority whatsoever to enact laws. Id. at 641. Otherwise stated, Governor Holcomb is not seeking to prevent or interfere with legitimate legislative debate. He is seeking a judicial ruling that establishes that if individuals gather under HEA 1123, they do not have the constitutional authority to do anything at all, and any actions taken would not have the force or effect of law. Cases upon which the Defendants try to build their immunity argument are distinguishable. Those cases deal with situations in which a private plaintiff (*i.e.,* not another branch of government) has sued a legislator for civil liability – damages. Bogan v. Scott-Harris, 523 U.S. 44, 48 (1998)(§1983 claim against legislators); Hansen v. Bennett, 948 F.2d 397 (7th Cir. 1991)(violation of first amendment rights; court *denied* application of absolute legislative immunity); Supreme Court of Va. V. Consumers Union of U.S., Inc., 446 U.S. 719 (1980)(civil rights suit); Empress Casino Joliet Corp. v. Blagojevich, 639 F.3d 519 (7th Cir. 2011)(RICO claim); McCann v. Brady, 909 F.3d 193 (7th Cir. 2018)(§1983 case); Reeder v. Madigan, 780 F.3d 799 (7th Cir. 2015)(§1983 case); Almonte v. City of Long Beach, 478 F.3d 100 (2nd Cir. 2007)(§1983 case); Larsen v. Senate of Pa., 152 F.3d 240 (3d Cir. 1998)(§1983 case); Colon Berrios v. Hernandez Agosto, 716 F.2d 85 (1st Cir. 1983)(civil rights action).

The Defendants' broad view of legislative immunity does not apply in the present case, where the law passed by the General Assembly (HEA 1123) granting itself new power is alleged to have directly harmed not only Governor Holcomb, but also

future governors if not enjoined. In those instances, legislative immunity cannot apply. *See* Order Denying Motion to Strike and for Alternative Relief, ¶ 58 ("Legislative immunity does not apply here, when the central issue involves a separation of powers dispute between two branches of government."). *See also,* Ellingham v. Dye, 99 N.E. 1 (Ind. 1912). The Defendants' Motion for Summary Judgment on the basis of legislative immunity is hereby **DENIED**.

4. The Political Question Doctrine

The Legislature raised the political question doctrine as a bar to the Governor's lawsuit, asserting that scheduling legislative sessions is inherently internal to the legislative branch and is thus an area where courts should not intrude. Specifically, the Legislature argues that the "political question" doctrine bars the present suit because the Governor's case interferes with "the legislature's core function of scheduling sessions to consider proposed legislation." Def.'s Summary Judgment Memorandum, p. 16.

The "political question" doctrine bars lawsuits that interfere with "inherently internal matters of the legislative branch." Berry v. Crawford, 990 N.E.2d 410, 421 (Ind. 2013). In Berry, the Indiana Supreme Court chose not to interfere with the General Assembly's exclusive power to discipline its own members because "disputes arising in the exercise of such functions are inappropriate for judicial resolution." Id.

The constitutionality of HEA 1123 is not an "inherently internal matter of the legislative branch." It is a question of statutory and constitutional interpretation that is properly before the judicial branch. *See* Spencer County Assessor v. AK Steel Corp.,

61 N.E.3d 406, 414 (Ind. Tax Ct. 2016) (questions regarding constitutionality of statutes are "questions of pure law . . . reserved exclusively for judicial determination."). The remedy that the Governor seeks in this case has nothing to do with the internal matters of the legislative branch. As in *Tucker*, *supra*, the Governor seeks a ruling as to whether a law is constitutional or unconstitutional. That relief is allowed and does not run afoul of the political question doctrine. The Legislature's Motion for Summary Judgment based upon the political question doctrine is hereby **DENIED**.

5. The Enrolled Act Doctrine

The Legislature next asserts the bar of the enrolled act doctrine, contending that this lawsuit attempts preemptively and impermissibly to invalidate any future legislation passed at an emergency session called and held pursuant to HEA 1123. Specifically, the Legislature argues that the Governor's lawsuit involves "an inspection of the General Assembly's legislative processes" is misplaced. *Def.'s Summary Judgment Memorandum*, p. 17. The enrolled act doctrine applies to internal legislative procedures regarding a bill that has been *passed*, not a separation-of-powers dispute between two co-equal branches of government about whether the substance of the bill is *valid*. *Roeschlein v. Thomas*, 280 N.E.2d 581 (Ind. 1972); *Evans v. Browne*, 30 Ind. 514 (Ind. 1869); *State v. Wheeler*, 89 N.E.1 (Ind. 1909).

Whether HEA 1123 was properly passed from a procedural perspective is not what this case is about. Rather, this lawsuit is about the constitutionality of the enacted HEA 1123. The Enrolled Act Doctrine has no application here. Accordingly,

the Legislature's Motion for Summary Judgment on the basis of the Enrolled Act Doctrine is **DENIED**.

6. Lack of AG Consent & Invalid Service of Process

To ensure they have preserved their arguments on appeal, the Legislature has re-asserted its arguments that the Governor cannot hire his own private counsel, and that legislative immunity considerations bar this lawsuit. This court adopts and incorporates its prior rulings denying those arguments as if fully re-stated herein, and on that basis, **DENIES** the Defendants' Motion for Summary Judgment on those points.

7. The Governor Can Pursue This Action

As set forth and discussed above, the Defendants maintain that there are multiple procedural reasons why the Governor cannot challenge a law passed by the General Assembly that the Governor claims infringes upon a constitutional power vested in Indiana governors. As the Defendants would have it, under the facts before this court – which are similar to those before the trial court (and Supreme Court) in *Tucker v. State*, 35 N.E.2d 270 (Ind. 1941) – an Indiana governor has no means by which to seek relief from a law passed by the legislature that the Governor genuinely believes impermissibly infringes upon the governor's constitutional powers. Such a result is untenable in our system of government which rests upon the separation-of-powers between three co-equal branches. If one branch is alleged to have infringed upon the powers of another, the proper means of redress is through Indiana's judicial branch.

This court has already held that the Governor's constitutional authority "inherently authorizes Indiana governors to protect the office's constitutional duties and obligations, which includes attempts to usurp those powers by another branch of government." *Order Denying Motion to Strike and For Alternative Relief*, July 3, 2021, ¶ 16 (citations omitted). *Accord, Id.* at ¶ 18. Based on his duty to protect the Indiana Constitution, and based on "the inherent powers vested in him to do so ...," Governor Holcomb is "both authorized, and required, to take actions necessary to protect the Indiana Constitution. Because his veto was overridden, this lawsuit is the only means available for the Governor to do so." *Id.* at ¶¶ 16-19 (emphasis in original, footnote omitted).

This court holds Indiana governors have the inherent constitutional authority to seek redress from Indiana courts if the General Assembly has passed a law that the Governor believes impermissibly infringes upon his or her constitutional authority. No statute passed by the General Assembly, such as the Declaratory Judgment Act, I.C. § 34-14-1 *et seq.*, can divest an Indiana governor of his or her inherent constitutional authority. The judicial branch is the Governor's sole means to seek redress under the circumstances, and this Court finds that Governor Holcomb has properly availed himself of Indiana courts by filing his *Complaint* in this lawsuit.

Having addressed and declined to grant summary judgment on the jurisdictional and procedural defenses raised by the Legislature, the court now turns to the merits of the Governor's claim that HEA 1123 is unconstitutional.

B. HEA 1123 is constitutional

1. HEA 1123 is fully authorized by Article 4, section 9 of the Indiana Constitution

Article 4, section 9 of the Indiana Constitution provides as follows:

> 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.

Article 4, section 9, thus allows the General Assembly to determine where it will meet, when it will meet, how long it will meet, and how frequently it will meet, so long as it does so "by law." *Ind. Const.* art. 4, § 9. The provision sets a default for when and where the General Assembly's sessions will commence—at the State Capitol on the first Tuesday after the second Monday in January each year—but provides that this default applies only until "a different day or place shall have been appointed by law." *Id.* And as to the duration and frequency of the legislature's sessions, this provision expressly says that the "length and frequency of the sessions of the General Assembly shall be fixed by law." *Id.* HEA 1123 is a straightforward exercise of the General Assembly's authority under Article 4, section 9. It appoints by law that a legislative session will commence upon the occurrence of a specific set of circumstances: A session will commence at the "date, time, and place" set by a legislative council resolution that also (1) finds that the governor has declared a state of emergency with a statewide impact that requires the attention of the General Assembly

and (2) lays out the "general assembly's agenda for addressing the state of emergency." *Ind. Code* § 2-2.1-1.2-7.

The Wisconsin Supreme Court recently followed this reasoning in upholding the Wisconsin legislature's similar "extraordinary sessions." *League of Women Voters of Wis. v. Evers*, 929 N.W.2d 209, 213 (Wis. 2019). Much like Article 4, section 9 of the Indiana Constitution, the Wisconsin Constitution requires legislative sessions to occur "'at such time as shall be provided by law, unless convened by the governor in special session.'" *Id.* at 216 (*quoting Wis. Const.* art. 4, § 11). And the Wisconsin Supreme Court has held that this provision "allows the Legislature to constitutionally convene an extraordinary session," explaining that the Wisconsin legislature had adopted a statute authorizing a legislative committee to "meet and develop a work schedule for the legislative session" and had thereby "provided by law" for any sessions called pursuant to the legislative work schedule. *Id.* at 217–18 (internal quotation marks and citation omitted). HEA 1123 is likewise a permissible exercise of the General Assembly's authority to appoint by law when its sessions will commence.

The history of constitutional amendments to the General Assembly's authority over the timing of its sessions confirm that under the current Constitution the General Assembly's authority to schedule its sessions is plenary. The original 1851 Constitution explicitly limited the General Assembly's authority over the timing of its sessions in multiple ways: It limited the General Assembly to biennial sessions, *see Ind. Const.* art. 4, § 9 (1851 Constitution), and limited these sessions to no more than 61 days, art. 4, § 29 (1851 Constitution). In 1970, however, the people of Indiana

amended the Constitution to remove these limitations. *See* Inter-univ. Consortium for Political and Soc. Research, *Referenda and Primary Election Materials* 2 (1994), https://cdn.ballotpedia.org/images/7/7e/Referenda_Elections_for_Indiana_1968-1990.pdf; 1967 Ind. Acts 1387–88, 1969 Ind. Acts 1829–30.

The 1970 amendments also added what is now the final sentence of Article 4, section 9 (that the "length and frequency of the sessions of the General Assembly shall be fixed by law") and added a "schedule" that imposed a single limit on the General Assembly's authority on this score (that "[n]o regular legislative session of the General Assembly may extend beyond the 30th day of April of the year in which it is convened"). *Id.* In 1984, however, the people of Indiana adopted a constitutional amendment that removed the "schedule" and its April-30-adjournment requirement—and thereby eliminated the sole remaining limit on the legislature's control over its sessions. *See* Inter-univ. Consortium for Political and Social Research, *supra*, at 11; 1982 Ind. Acts 1664–65, 1983 Ind. Acts 2212–13.

With this last limitation removed, the General Assembly now has complete authority to set the rules governing the timing of its sessions. It may extend its session indefinitely, or enact measures such as HEA 1123, giving it the ability to commence a session limited to a specified agenda when the legislative council adopts a resolution meeting HEA 1123's narrowly defined circumstances. In short, as the Governor effectively confirmed when he signed HEA 1372 (permitting the 2021 legislative

session to continue until the day before the next session begins), nothing in the Indiana Constitution guarantees a legislative interregnum during which the Governor has exclusive power to decide whether the legislature should be in session.

2. The Special Session Clause does not limit the General Assembly's authority to schedule its sessions under Article 4, section 9

The Governor claims that the Special Sessions Clause of Article 4, section 9 grants him the *exclusive* authority to call any session outside the General Assembly's allotted once-per-year "regular" session. The Governor's argument on this score fails: The General Assembly is not limited to one session per year; the Special Sessions Clause is a grant of limited *legislative* authority to the Governor, not a limitation on the General Assembly's express and inherent legislative authority over the scheduling of its sessions; and there is no constitutional text limiting the General Assembly's authority over its sessions to only "regular" sessions.

First, nothing in Article 4, section 9 limits the General Assembly to one annual "regular" session. Neither the word "annual" nor the word "regular" even appear in Article 4, section 9. On the contrary, the provision applies broadly to all the "sessions of the General Assembly." Ind. Const. art. 4, § 9. And the 1970 amendments eliminated the prior biennial requirement and gave the General Assembly the power to set the "length and frequency" of its sessions. *Id.*

Moreover, that the unqualified reference to "sessions" in Article 4, section 9 refers to *all* legislative sessions is confirmed by the alternative phrasing found in Article 10, section 4, which provides that "[a]n accurate statement of the receipts and

expenditures of the public money, shall be published with the laws of each *regular session* of the General Assembly." Ind. Const. art. 10, § 4 (emphasis added). The use of "regular session" in Article 10, section 4 implies that the unmodified "sessions" to which Article 4, section 9 refers include *all* the legislature's sessions—not just "regular" sessions. Indeed, the Indiana Supreme Court drew precisely this inference in *Woessner v. Bullock*, 93 N.E. 1057, 1058 (Ind. 1911), where it held that the term "session" in the Indiana Constitution is not limited to "regular session" unless expressly so modified.

Judicial precedents also make clear that the Special Sessions Clause affords a limited, necessary grant of *legislative* authority to the Governor. *See id.* at 1059 (explaining that the Special Session Clause provides the Governor "with certain legislative power"); *Tucker v. State*, 35 N.E.2d 270, 286 (Ind. 1941) (enumerating gubernatorial constitutional powers, not including the Special Session Clause, and noting that the Governor's power to convene the General Assembly somewhere other than "the usual meeting place" under Article 5, section 20 "permits the Governor to invade the legislative field").

The Constitution's structure itself confirms this characterization. It divides the legislative, executive, and judicial powers into separate articles, with each power placed in its own article. And the Special Sessions Clause is not found within Article 5 (which lays out the powers of the executive), but in Article 4 (which details the legislature's powers). The Special Sessions Clause also sits between two sentences providing authority to the General Assembly to set the timing, frequency, and length

of legislative sessions. Ind. Const. art. 4, § 9. The Special Sessions Clause is thus one detail among many providing the mechanics for how the legislature may gather to do its business, not an exclusive grant of inherently executive authority to the Governor.

The Governor argues that the phrase "in the opinion of the Governor" in the Special Sessions Clause must operate to restrict the special session authority to the Governor alone, because otherwise the phrase would be superfluous. This phrase, however, does its work by establishing that the Governor's decision to call a special session is not subject to judicial review. *See* United States v. George S. Bush & Co., Inc., 310 U.S. 371, 380 (1940) ("'Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.'" (*quoting* Martin v. Mott, 25 U.S. 19, 31–32 (1827) (Story, J.))). It carries no significance for the legislature's authority over its own sessions.

Longstanding practice further refutes the notion that Article 4, section 9 authorizes the General Assembly to schedule only one "regular" session per year. First, Indiana law has long authorized the General Assembly to call "technical sessions." *See* Ind. Code §§ 2-2.1-1-2.5(b), -3.5(a). Under these technical session statutes, the day for "commencing" such sessions is "appointed by law" because the statutes set out the conditions for convening technical sessions. Ind. Const. art. 4, § 9. And technical sessions occur *after* the General Assembly has concluded a regular session by adjourning sine die, *see* Ind. Code §§ 2-2.1-1-2.5(b), -3.5(a), which means they would fall afoul of the Governor's "one-regular-session-per-year" theory. Second, the Governor's

theory would also require invalidating the longstanding law limiting the length of special sessions called by the Governor. *See* Ind. Code § 2-2.1-1-4. In 1971, right after the 1970 amendments, the legislature enacted a statute that to this day limits the length of special sessions called by the Governor. *See* 1971 Ind. Acts 105–06. This statute reflects the widespread understanding that Article 4, section 9 authorizes the General Assembly to control the duration of *any* of its "sessions," not just "regular" sessions. If "sessions" in Article 4, section 9 means only "regular sessions," the General Assembly could not "fix[] by law" the "length" of special sessions. Ind. Const. art. 4, § 9. No one has ever suggested as much, however, which further undermines the Governor's position. Finally on this point, it bears observing that the Special Sessions Clause was adopted as a relief valve for a Constitution that in its initial form strictly limited the legislature to biennial meetings of a maximum of 61 days. The Special Sessions Clause provides a way to call the legislature into session during what had been lengthy periods of mandatory adjournment. The choice of the Governor for this session-calling role was one of practicality, not one with separation-of-powers significance: The Governor, who of course serves on a full-time basis, was simply the most logical person to call a special session when the legislature as a body could not constitutionally operate. The Special Sessions Clause, however, was never understood to give the Governor any power to tell the legislature when it can or cannot meet.

In sum, constitutional text, historical evidence, judicial decisions, and longstanding practice all foreclose the Governor's theory that the Special Sessions Clause gives him exclusive authority to call any session beyond a purportedly once-

a-year "regular" session. Because HEA 1123 simply provides when a legislative session will commence and does not limit or restrict the Governor's ability to call a special session, it does not violate the Special Sessions Clause.

3. Article 3, section 1 does not support the Governor's theory

The Governor also claims that HEA 1123 violates Article 3, section 1, which states that no branch "shall exercise any of the functions of another, except as in this Constitution expressly provided." *Ind. Const.* art. 3, § 1.[5] [6] This court disagrees.

HEA 1123 executes the General Assembly's constitutional authority to "appoint[] by law" that certain sessions will "commenc[e]." *Ind. Const.* art. 4, § 9. It does not authorize the legislature to exercise the functions of any other branch. The Indiana Supreme Court has long recognized that the power to schedule legislative sessions is inherently *legislative*. *See* *Woessner*, 93 N.E. at 1059; *Tucker*, 35 N.E.2d at 286. The Special Session Clause is merely an exception—as contemplated by Article 3—to the general Article 3 rule separating the functions of the branches. Absent the

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[5] "John Adams was the first to explain clearly to the people why, if they were to institute a republican form of Government, they must keep the three branches of Government, the Legislative, Executive and Judicial, separate and independent." *Book v. State Office Bldg. Commission*, 149 N.E.2d at 295 and fn 18 (internal citations omitted). "[A]s Adams pointed out, any government in which one body (whether King or Legislature) both makes the law and executes them is essentially an arbitrary government. It is the essence of a free republic, on the other hand, that no man or set of men shall ever have the power 'to make the law, to decide whether it has been violated, and to execute judgment on the violator.' To preserve liberty to the people, there must be restraints and balances and separations of powers." *Id.*

[6] Against the current backdrop of unprecedented restraints and constraints on personal liberties under the auspices of federal, state and local emergency powers, claimed to be necessitated by a now 20-month old pandemic, one of Adams' earliest statements on the concept of separation of powers still resonates today: "There is danger from all men. The only maxim of a free government ought to be to trust no man living with power to endanger the public liberty." John Adams, *Notes for an Oration at Braintree*, Spring 1772, The Adams Papers, Diary and Autobiography of John Adams, vol. 2, 1771-1781, ed. L.H. Butterfield. Cambridge, MA: Harvard Univ. Press, 1961, pp. 56-61.

Special Session Clause, the Governor would have no authority whatever over legislative sessions. To turn that narrow exception into a substantive limitation on the General Assembly's authority to schedule legislative sessions would run counter to Article 3's protection of the division between government branches. Because HEA 1123 is authorized by Article 4, section 9, and because its operation is not prohibited by Article 3, section 1, the Governor's claims must fail. The Governor's Motion for Summary Judgment is **DENIED**. The Legislature's Motion for Summary Judgment is **GRANTED**.

V. CONCLUSION

HEA 1123 is fully authorized by the Indiana Constitution and does not run afoul of either the Special Sessions Clause of Article 4 section 9 or the separation of powers clause of Article 3 section 1.

VI. ORDERS

This court, having reviewed the parties' Motions and briefs, and having heard oral argument on the same, now rules and orders as follows:

1. Plaintiff's Motion for Summary Judgment is hereby **DENIED**, and
2. Defendants' Motion for Summary Judgment on the basis of its asserted jurisdictional and procedural bars is hereby **DENIED**, and
3. Defendants' Motion for Summary Judgment on the issue of the constitutionality of HEA 1123 is hereby **GRANTED**.

Date: October 7, 2021

Judge, Marion Superior Court 12