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IN THE
Indiana Supreme Court

No. 21S-PL-00518

ERIC J. HOLCOMB, Governor of the State of Indiana, Appellant, v. RODRIC BRAY, President Pro Tempore of the Indiana State, et al. Appellees.	Appeal from the Marion Superior Court, Trial Court Case No. 49D12-2104-PL-14068 The Honorable Patrick Dietrick, Judge.

BRIEF OF APPELLEES RODRIC BRAY, *ET AL.*

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STATEMENT OF SUPREME COURT JURISDICTION

On April 15, 2021, the General Assembly overrode the Governor's veto to pass House Enrolled Act 1123, which provides for the commencement of an "emergency session" if the Legislative Council finds that it is necessary for the General Assembly to convene to respond to a gubernatorial declaration of a statewide state of emergency. Ind. Code § 2-2.1-1.2-7. On April 27, 2021, Plaintiff-Appellant Governor Eric Holcomb filed this lawsuit against Defendants-Appellees the General Assembly, Senate President Pro Tempore Rodric Bray, Speaker of the House of Representatives Todd Huston, and the Legislative Council, (collectively, "Defendants") seeking to invalidate HEA 1123. On October 7, 2021, the trial court granted summary judgment for Defendants. Governor Holcomb filed a notice of appeal of this final appealable order on October 22, 2021, and filed a motion for immediate transfer to this Court the same day. On November 17, 2021, this Court granted the motion for immediate transfer and accepted jurisdiction over the appeal.

STATEMENT OF ISSUES

The Governor's brief purports to separate his lawsuit into three issues, but merely articulates three ways of conceptualizing a single issue, namely whether HEA 1123 is a lawful exercise of the General Assembly's express constitutional authority to appoint by law the day for commencing its sessions. That said, multiple threshold jurisdictional and procedural issues provide alternative grounds for affirming the judgment below. In full, the issues presented in his appeal are the following:

1. Do the doctrines of standing and ripeness bar the Governor's challenge to a law that has never been invoked and that has no reasonable likelihood of being invoked any time soon?

2. Does the Declaratory Judgment Act bar the Governor's request for declaratory relief under this Court's decision in *Indiana Fireworks Distributors Association v. Boatwright*, 764 N.E.2d 208 (Ind. 2002)?

3. Do the legislative immunity and political question doctrines bar the Governor's request for relief against the General Assembly's internal operations?

4. Does the Governor's failure to obtain the Attorney General's consent to file this case using outside counsel bar the case under relevant statutes conferring exclusive litigation authority on the Attorney General, as applied by this Court's precedents, including *State ex rel. Sendak v. Marion County Superior Court, Room No. 2*, 373 N.E.2d 145 (Ind. 1978)?

5. Is HEA 1123 a lawful exercise of the General Assembly's express constitutional authority to fix and appoint by law the frequency and day for commencing its sessions?

STATEMENT OF THE CASE

Defendants agree with the Governor's Statement of the Case.

STATEMENT OF FACTS

Due to the initial lack of knowledge about COVID-19 and the unprecedented speed at which the disease spread across the world, government responses to the ensuing public health emergency raised complex and controversial questions concerning how best to protect citizens while respecting individual liberty. As the trial court explained below in its Order on the Parties' Cross-Motions for Summary Judgment, "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." Appellant's App. Vol. II at 21.

Pursuant to statutory emergency powers, *see* Ind. Code §§ 10-14-3-11,-12, the Governor has issued dozens of executive orders addressing the COVID-19 pandemic, including, for a time, a statewide mask mandate and a prohibition on all nonessential gatherings of 10 or more people. Appellant's App. Vol. VI at 194–96. His orders understandably provoked considerable controversy, as they unilaterally decided policy questions affecting the day-to-day lives of all Hoosiers. Accordingly, 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. Dan Carden, *Legal Furor Follows Governor's Order for Hoosiers To Wear Masks*, NWI Times, July 23, 2020, https://www.nwitimes.com/news/local/govt-and-politics/legal-furor-follows-governors-order-for-hoosiers-to-wear-masks/article_22aa8511-3c6e-5ac1-89bc-

4f0f14284aff.html; Alexandra Kukulka, *Area Legislators Split on Need for Special Session to Address COVID Response, Voting and Police Reform*, Chi. Trib., Aug. 4, 2020, https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-special-session-st-0804-20200804-d624po5sxna6pdc2neq6mglepq-story.html. The Governor did not do so, however, and when the General Assembly convened in January 2021, it considered—and rejected—"several bills that would have overridden the Governor's emergency orders or otherwise limited the Governor's statutory emergency authority." Appellant's App. Vol. II at 23; *see, e.g.*, *id.* Vol. IV at 115 (House Bill 1244 would have limited Governor's ability to use emergency authority to restrict business operations); *id.* at (Senate Bill 75 would have provided that any executive order that invades the constitutional authority of the legislature is void).

Instead, the General Assembly enacted—over the Governor's veto—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." *Id.* at 24. In particular, HEA 1123 authorizes the General Assembly to commence an "emergency session" if the Legislative Council (which consists of sixteen legislators, including leaders of both major parties from both chambers, Ind. Code § 2-5-1.1-1) 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. HEA 1123 thus provides for the commencement of a legislative session in specified limited circumstances pursuant to the General Assembly's express constitutional authority to "fix[] by law" the "length and frequency of the sessions of the General Assembly" and to "appoint[] by law" the day for "commencing" the "sessions of the General Assembly." Ind. Const. art. 4, § 9. It in no way limits the Governor's separate authority to call a "special session" also conferred by Article 4, Section 9.

Shortly after the General Assembly overrode the Governor's veto and enacted HEA 1123, the Governor, represented by private counsel unauthorized by Indiana law, filed this lawsuit. The Complaint alleges that HEA 1123 violates the Special Session Clause of Article 4, Section 9 and the Separate Functions Clause of Article 3, Section 1. Appellant's App. Vol. II at 56, 59. It seeks a declaratory judgment that the law is unconstitutional and a permanent injunction barring Defendants from taking actions in accordance with the law. *Id.* at 56–61.

Even after filing this lawsuit, the Governor has continued to issue executive orders to address the COVID-19 pandemic, including Executive Order 22-01 (which extends the declaration of the COVID-19 public health emergency through March 4, 2022) and Executive Order 22-02 (which continues some "limited provisions" to address the pandemic). Executive Order 22-01, https://www.in.gov/gov/files/Executive-Order-22-01-Twenty-third-Renewal-of-Emergency-Declaration.pdf; Executive Order 22-02, https://www.in.gov/gov/files/Executive-Order-22-02-Health-Based-Provisions-Continued.pdf. Separately, the General Assembly passed—and the Governor

signed—a bill authorizing the 2021 regular legislative session to extend until November 15, 2021. *See* App. Vol. II at 25; Ind. Code § 2-2.1-1-2(e)(1). The day following adjournment of 2021 session, the General Assembly commenced its next session, which is authorized by law to continue as late as March 14, 2022. *See* Appellant's App. Vol. II at 25; Ind. Code § 2-2.1-1-3.

At summary judgment, the trial court rejected the Governor's challenge to HEA 1123 based on the plain text, history, and structure of the Indiana Constitution. It held that "HEA 1123 is a straightforward exercise of the General Assembly's authority under Article 4, section 9," Appellant's App. Vol. II at 39, which authorizes the General Assembly both to "appoint[] by law" the day for "commencing" the "sessions of the General Assembly" and to "fix[] by law" the "length and frequency of the sessions of the General Assembly," Ind. Const. art. 4, § 9. The trial court explained that HEA 1123 simply "appoints by law that a legislative session will commence upon the occurrence of a specific set of circumstances." Appellant's App. Vol. II at 39.

The trial court rejected the Governor's argument "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," explaining that the General Assembly "is not limited to one session per year," that the Special Session Clause "is a grant of limited *legislative* authority . . . , not a limitation on the General Assembly's express and inherent legislative authority over the scheduling of its sessions," and that "there is no constitutional text limiting the General Assembly's authority over its sessions to only 'regular' sessions." *Id.* at 42. Nor could the Governor

find support in Article 3, Section 1's Separate Functions Clause, the trial court concluded, because 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." *Id.* at 46. "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." *Id.* at 47.

SUMMARY OF ARGUMENT

The Court should affirm judgment for Defendants. This case is a classic example of a political dispute between the Governor and the General Assembly that has spilled into a forum where it does *not* belong—the courts. Multiple independently sufficient constitutional and statutory texts and doctrines bar this case at the outset and provide alternative grounds for affirming the judgment. In any case, as the trial court held, the Governor's claims fail on the merits.

The Governor urges the Court to take his side in what remains an abstract political dispute—in effect, to carry out his overridden veto—by means of an extraordinary order that would both tell legislators how to vote as members of the Legislative Council and prevent the General Assembly from convening. The Court should decline this request to restrain one political branch of government at the request of another.

To start, the Governor has failed to identify a concrete injury to justify invoking the Court's jurisdiction: HEA 1123 in no way limits the Governor's narrow constitutional authority to call a special session. Furthermore, the General Assembly has

been in session since the beginning of this litigation with ample opportunity to address the current public health emergency; it would have no reason to invoke HEA 1123 in the foreseeable future.

Next, the only cause of action cited by the Complaint is the Declaratory Judgment Act, but this Court has already ruled that government officials may not use that act. The trial court could not distinguish those precedents, so it relied instead on Trial Rule 57, which merely provides the procedures for adjudicating a declaratory judgment claim, not an alternate source for a cause of action.

The Governor also seeks equitable relief telling legislators how they must undertake their fundamental constitutional duties—namely, when they can and cannot meet. Such claims, however, are barred by legislative immunity and the aptly named political question doctrine. Both forbid courts from reviewing the inner workings of the General Assembly, just as the validity of the General Assembly's internal lawmaking process are protected on the back end by the Enrolled Act Doctrine.

Given the political nature of the case and the attendant procedural shortcomings (not to mention the lack of substantive legal merit), the Office of Attorney General declined the Governor's request to hire outside counsel to bring the case. The Governor did so anyway, and the trial court refused to strike the pleadings or grant judgment on the grounds that the Governor lacked unilateral authority to bring this suit. The Governor's lack of unilateral litigation authority—long established by statutes and this Court's precedents—remains an alternative ground for affirming the judgment below.

Beyond these independently sufficient procedural bars, the Governor's challenge fails on the merits. The General Assembly enacted HEA 1123 under its broad constitutional authority over the frequency and timing of legislative sessions. The 1970 and 1984 Indiana Constitutional amendments removed prior limitations on the General Assembly's sessions. Article 4, Section 9 now provides that the legislature may "appoint[] by law" any day for "commencing" its sessions, and it may similarly set its sessions' "length and frequency" by law however it wishes. HEA 1123 does just that: Like the common and uncontroversial statutes governing technical legislative sessions, it appoints, by law, a set of circumstances under which a legislative session will commence.

Disagreeing with this straightforward reading of the constitutional text, the Governor vetoed HEA 1123 on constitutional grounds, insisting that it somehow violates the Special Session Clause of Article 4, Section 9, which confers on the Governor a limited legislative power to call—if the legislature is otherwise adjourned—a special session when he determines "the public welfare" requires doing so.

Having lost in the trial court, however, the Governor's argument on appeal is anything but direct. It leads not with arguments over Article 4, Section 9, but instead with an entirely new theory that HEA 1123 (or perhaps the 1970 and 1984 constitutional amendments, or maybe all three) somehow violates the Article 16 procedure for amending the Constitution. To the extent the Governor advances a new constitutional claim on appeal, it is waived. In any event, the Governor ultimately disclaims

any infirmity with the 1970 and 1984 amendments, so Article 16's relevance is unclear. What matters is that HEA 1123 is authorized by Article 4, Section 9; it bears no indicia of an attempt to amend the Indiana Constitution.

In that regard, the Governor advances yet another new (and therefore waived) argument: Because Article 4, Section 9 sets a default starting date for a session "each year" the legislature meets, the legislature may meet only once each year, unless the Governor calls a special session. That is not a contextually plausible, let alone natural, reading of "each year," which, followed by "in which the General Assembly meets," merely coheres with the legislature's authority *not* to meet each year. In any event, the default for when to commence a session "each" meeting year does not override the legislature's express "length and frequency" power. Nothing in the Special Session Clause, moreover, limits the legislature's express constitutional authority to control its schedule—or creates unchecked gubernatorial power during public emergencies.

All agree that the legislature can both reduce the Governor's emergency powers and remain in session year-round—as it did last year under a statute signed by the Governor. The Governor even agrees that the legislature may properly call a new session later in the year if it reserves the right to do so through a concurrent resolution during a "regular" session—as it does with technical sessions. Presumably he does not object to commencement of a "regular" session in November of the same year as a prior "regular" session. Ultimately, then, the Governor seeks not to preclude the legislature from commencing a session whenever it likes, but only from doing so

through the method established by HEA 1123. He would, in short, prevent the General Assembly—a political competitor—from meeting to address a public emergency over a formalistic objection affording no practical separation-of-powers value.

Both the Governor and his amici provide interesting morsels of Indiana constitutional history, but, other than urging the Court to take the unprecedented, unwise, and legally foreclosed step of using ballot questions to override constitutional text, they offer no rationale for ignoring the plain text of amended Article 4, Section 9.

STANDARD OF REVIEW

This Court reviews de novo both summary judgments and pure questions of law, including the procedural defenses and constitutional claims here. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014); *State v. Thakar*, 82 N.E.3d 257, 259 (Ind. 2017). "[E]very statute stands . . . clothed with the presumption of constitutionality unless clearly overcome by a contrary showing." *Baldwin v. Reagan*, 715 N.E.2d 332, 338 (Ind. 1999).

ARGUMENT

I. The Governor Is in No Immediate Danger of Suffering a Direct Injury, Which Means He Lacks Standing and a Ripe Case

Predicated on the "express distribution-of-powers clause" of Article 3, Section 1, standing doctrine fundamentally "implicates the constitutional foundations on which our system of government lies." *Horner v. Curry*, 125 N.E.3d 584, 589 (Ind. 2019). It "limits the judiciary to resolving concrete disputes between private litigants while leaving questions of public policy to the legislature and executive." *Id.* Crucially, standing constitutes a "vital element" of the separation-of-powers structure,

id., "the disregard of which inevitably leads to 'an overjudicialization of the processes of self-governance.'" *Id.* (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 27 Suffolk U.L. Rev. 881, 881 (1983)). The Court's "responsibility lies in preserving these boundaries," *id.* at 589, because, under Article 3 of the Indiana Constitution, "[g]ood fences make good neighbors." *Id.* at 589–90 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995)).

Under Indiana law, "[t]he general rule of standing holds that 'the proper person to invoke the court's power' is limited to those 'who have a personal stake in the outcome of the litigation and *who show that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of-conduct*.'" *Bd. of Comm'rs of Union Cnty. v. McGuinness*, 80 N.E.3d 164, 168 (Ind. 2017) (emphasis added) (quoting *State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 979 (Ind. 2003)). Here, the Governor is not in "immediate danger of suffering a direct injury."

To establish such an "immediate danger," the Governor would need to "allege[] 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute.'" *Hulse v. Ind. State Fair Bd.*, 94 N.E.3d 726, 731 (Ind. Ct. App. 2018) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). The Governor has not identified any action he wishes to take that HEA 1123 burdens. Nor could he: HEA 1123 in no way limits the Governor's authority. It merely permits the Legislative Council to call an emergency legislative

session under specified circumstances. Even at that, the Legislative Council has neither acted nor threatened to act in a manner that would present an immediate danger directly affecting the Governor's constitutional interest.

So, while the Governor continues to perpetuate a state of emergency (one prerequisite of an HEA 1123 emergency session), no threat of an emergency session exists. The General Assembly has been in non-emergency session since it enacted HEA 1123. If the legislature were interested in overriding gubernatorial executive orders relating to the current public health emergency, it would have done so by now, or will yet this session. The legislature has no reason to reconvene this spring, summer, or fall merely to accomplish what it could have accomplished anytime over the past 12–15 months.

Nor would the mere existence of an emergency session itself injure the Governor. For the Governor to be injured, he would need to show that: (1) he called a statewide emergency, (2) while the legislature was not in session, (3) the legislative council decided to invoke its authority under HEA 1123 to call an emergency session—*and* (4) during that emergency session, the legislature passed (over the Governor's veto) a statute that somehow injured the Governor. A mere meeting among a quorum of legislators who convene to debate legislative proposals surely does not, itself, injure the Governor in any cognizable way. Only the unlawful passage of legislation over a veto that restrains the Governor's powers would constitute direct injury. At this point, the Governor has raised nothing more than abstract objection to hypothetical future events, which is a facially deficient basis for standing.

For the same reasons, the Governor's claim fails on ripeness grounds because the suit asserts a speculative injury that has not occurred in a real, concrete fashion. "Ripeness relates to the degree to which the defined issues in a case are based on actual facts rather than on abstract possibilities." *Ind. Dep't of Envtl. Mgmt. v. Chem. Waste Mgmt., Inc.*, 643 N.E.2d 331, 336 (Ind. 1994). "A claim is not ripe for adjudication if it rests upon contingent future events 'that may not occur as anticipated, or . . . may not occur at all.'" *Ind. Family Inst. Inc. v. City of Carmel*, 155 N.E.3d 1209, 1218 (Ind. Ct. App. 2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1988)).

Ripeness depends on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n.*, 461 U.S. 190, 201 (1983) (internal quotation marks and citation omitted). Here, the Governor's claims are not ripe because no HEA 1123 emergency session is in the offing. This suit presents no actual dispute but instead asks this Court to resolve an abstract question of constitutional law properly reserved for the legal professoriate. Accordingly, "withholding court consideration" threatens no real-world hardship to the parties. Expedited proceedings are available if anyone brings a procedurally sound challenge to HEA 1123. *See generally* Ind. Trial Rule 56(I) (allowing the court "[f]or cause" to "alter any time limit set forth"); *id.* 65(A)(3) (requiring "Judge[s] to act promptly" with respect to preliminary injunctions).

Because this Court is constrained to rule on "actual facts rather than [contemplated] abstract possibilities," *Ind. Dep't of Envtl. Mgmt.,* 643 N.E.2d at 336, the Court should affirm the judgment for Defendants.

II. The Governor Is Not a "Person" Authorized to Sue under the Declaratory Judgment Act

The complaint alleges that "[a] declaratory judgment action is the proper procedural vehicle to use to contest the constitutionality of a newly-enacted law." Appellant's App. Vol. II at 57. But a state official cannot sue under the Declaratory Judgment Act, which permits any "person . . . whose rights, status, or other legal relations are affected by a statute" to "have determined any question of . . . validity arising under the . . . statute," Ind. Code § 34-14-1-2, with "person" defined to include only a "person, partnership, limited liability company, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever," *id.* § 34-14-1-13. That is, "person" does *not* include state agencies and state officials.

Two decades ago, this Court confirmed that the Declaratory Judgment Act excludes state officials: "'A state official, acting in his or her official capacity, may not bring a declaratory judgment action pursuant to Indiana Code sections 34-14-1-2 and -13.'" *Ind. Fireworks Distribs. Ass'n v. Boatwright*, 764 N.E.2d 208, 210 (Ind. 2002) (quoting *Ind. Fireworks Distrib. Ass'n v. Boatwright*, 741 N.E.2d 1262, 1265 (Ind. Ct. App. 2001)); *see also Ind. Wholesale Wine & Liquor Co., Inc. v. State ex rel. Ind. Alcoholic Beverage Comm'n*, 695 N.E.2d 99, 103 n.7 (Ind. 1998) (precluding declaratory judgment actions by state agencies).

The trial court permitted this case to proceed on the grounds that Trial Rule 57 constitutes *separate* authority to bring a declaratory judgment action, notwithstanding *Boatwright*. Appellant's App. Vol. II at 33. The only recognized sources for causes of action, however, are the constitution, common law, and statutes. *Blanck v. Ind. Dep't of Corr.*, 829 N.E.2d 505, 511 (Ind. 2005). Trial Rules do not create causes of action. By its express text, Trial Rule 57 merely provides that (1) otherwise permissible declaratory judgment actions must proceed under the trial rules and (2) a court may order affirmative relief in a declaratory action. *See, e.g.*, *Artusi v. City of Mishawaka*, 519 N.E.2d 1246, 1251 (Ind. Ct. App. 1988) (acknowledging that "with the adoption of T.R. 57's 'affirmative relief' provision, trial courts can now grant such relief in declaratory judgment actions").

Trial Rule 57 does not create a cause of action, let alone one that somehow permits state officials and agencies to avert the limits of the Declaratory Judgment Act, and thereby render it (and this Court's decision in *Boatwright*) a dead letter. Defendants are therefore entitled to judgment on the declaratory judgment claim.

III. Injunctive Relief Is Barred by Legislative Immunity and the Political Question Doctrine

Courts generally have inherent authority to rule in equity absent an adequate remedy at law. *See*, *e.g.*, *Dep't of Fin. Insts. v. Holt*, 108 N.E.2d 629, 637 (Ind. 1952). Yet the Governor's claim for injunctive relief must also fail because the relief he seeks—an order preventing legislators from commencing a session pursuant to HEA 1123—is barred by legislative immunity and the political question doctrine. These

doctrines protect legislative procedures on the front end, just as the Enrolled Act Doctrine protects them on the back end. The common thread is that questioning procedural mechanisms used to pass legislation "invade[s] the exclusive province of the legislature and thereby violate[s] the constitution by such invasion." *Roeschlein v. Thomas*, 280 N.E.2d 581, 586 (Ind. 1972).

A. Legislative immunity bars relief

Legislative immunity bars actions such as this, where the Governor seeks to restrain legislators from carrying out their official acts. Because such a suit is unprecedented in Indiana, this Court has not previously been called upon to apply legislative immunity doctrine. The doctrine is well-established elsewhere, however, and ample authority from both federal and state courts demonstrates the applicability of this longstanding doctrine here.

Federal legislative immunity is derived from the text and structure of the Speech or Debate Clause; it extends to any "legislative act," broadly defined as "an act generally done in Congress in relation to the business before it." *United States v. Brewster*, 408 U.S. 501, 512 (1972). Legislative immunity is further anchored in common law: "The principle that legislators are *absolutely* immune from liability for their legislative activities has long been recognized in Anglo-American law." *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998) (emphasis added). "Absolute legislative immunity attaches to *all* actions taken 'in the sphere of legitimate legislative activity.'" *Id.* at 54 (emphasis added) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). At its core, "[t]he purpose of legislative immunity is to 'protect the integrity of the legislative

process by insuring the independence of individual legislators.'" *Hansen v. Bennett*, 948 F.2d 397, 404 (7th Cir. 1991) (quoting *Brewster*, 408 U.S. at 507).

State courts have recognized legislative immunity to protect legislators from suits targeted at statutes. *See Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980) ("[S]tate legislators enjoy common-law immunity from liability for their legislative acts."); *Empress Casino Joliet Corp. v. Blagojevich*, 638 F.3d 519, 527 (7th Cir. 2011) ("[S]tate and local officials are absolutely immune from federal suit for personal damages for their legitimate legislative activities."), *vacated in part*, *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 649 F.3d 799 (7th Cir. 2011) (mem.).

Likewise, federal courts have applied legislative immunity in a range of state-law contexts. *See, e.g.*, *McCann v. Brady*, 909 F.3d 193, 194 (7th Cir. 2018) (affirming dismissal of constitutional claims related to ouster of a caucus member against Illinois Senate Minority Leader on the basis of legislative immunity); *Reeder v. Madigan*, 780 F.3d 799, 800–01 (7th Cir. 2015) (affirming dismissal of various constitutional claims related to a journalist's access against Illinois House Speaker and State Senate President on the basis of legislative immunity); *Almonte v. City of Long Beach*, 478 F.3d 100, 103 (2d Cir. 2007) (applying legislative immunity to city council votes and private discussions and agreements); *Larsen v. Senate of Pa.*, 152 F.3d 240, 251 (3d Cir. 1998) (applying legislative immunity to legislators' impeachment vote of a state supreme court justice); *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85, 89 (1st

Cir. 1983) (applying legislative immunity to public hearings and the gathering of evidence for an investigation).

Given the bedrock principles supporting legislative immunity, "there is no reason to find that [state] legislators . . . are entitled to lesser protection than their peers in Washington." *Reeder*, 780 F.3d at 805. Notably, the Indiana Court of Appeals has employed a similar analysis to the related question of judicial immunity, *see Melton v. Ind. Athletic Trainers Bd.*, 156 N.E.3d 633, 652 (Ind. Ct. App. 2020), and has expressly noted that "a state legislator in Indiana is immune from liability even if he publishes defamatory material with an improper motive and with knowledge of its falsity," *Aafco Heating & Air Conditioning Co. v. Nw. Publ'ns, Inc.*, 321 N.E.2d 580, 583 (Ind. Ct. App. 1974).

Immunity bars this case because scheduling legislative sessions—the target of the Governor's claim for injunctive relief—is a legitimate act of the General Assembly "in relation to the business before it." *Brewster*, 408 U.S. at 512. Even more than other acts protected by legislative immunity, the legislature's act of setting its meetings and agenda—which must occur before lawmaking itself may occur—plainly is an "attribute of [its] sovereignty." *FERC v. Mississippi*, 456 U.S. 742, 785 n.14 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part). 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. Legislative immunity precludes such interference with core legislative functions.

The trial court refused to apply legislative immunity for two reasons. First, it posited that "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." Appellant's App. Vol. II at 33. But that argument is circular and turns the purpose of legislative immunity on its head—the merits question is not the threshold issue, legislative immunity is.

Second, the trial court ruled that legislative immunity applies only to private plaintiffs suing for damages, not in separation-of-powers disputes between government branches including "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." *Id.* at 34–35. Legislative immunity has nothing to do with whether the plaintiff is a worthy adversary and everything to do with preventing judicial interference with legislative affairs. If anything, one would think judicial involvement in legislative matters even less justifiable where the plaintiff is the executive branch. Anyway, the only case cited in support, *Ellingham v. Dye*, 99 N.E. 1, 27 (Ind. 1912), in no way addressed legislative immunity—indeed, no defendant was connected to the legislature. No court has created a "separation of powers" exception for legislative immunity, but precedents *do* apply legislative immunity to protect legislators from all forms of relief. *See, e.g.*¸ *Sup. Ct. of Va.*, 446 U.S. at 726 (applying legislative immunity in suit requesting declaratory and injunctive relief regarding a professional code of conduct rule).

Judgment for Defendants should be affirmed for this reason as well.

B. Political question doctrine bars relief

Separately, this Court has applied the political question doctrine to bar suits that seek relief that would interfere with "inherently internal matters of the legislative branch." *Berry v. Crawford*, 990 N.E.2d 410, 421 (Ind. 2013). The Court in *Berry* rejected a challenge to fines exacted from absent legislators even though relief would have implicated legislative functions only *indirectly*. Because an injunction against executive branch officials in that case would have implicitly limited the "core legislative function" of disciplining members, the suit was "nonjusticiable, and, as a constitutional and prudential matter, it is improper for the judicial branch to entertain consideration of the plaintiffs' requests for relief." *Id.*

Berry applies this Court's long-recognized commitment to avoid interference with political affairs. In *State ex rel. Masariu v. Marion Superior Court No. 1*, the Court refused to review the duties of the Clerk of the Indiana House of Representatives under open records laws because "[h]ow those duties are performed, or any lack of performance of those duties, is an internal matter totally controlled by the House leadership." 621 N.E.2d 1097, 1098 (Ind. 1993). And beyond that, "[c]ourts cannot be authorized to undermine the exclusive constitutional authority of the presiding officers of each house to authenticate all legislation." *Id.* Such concerns are particularly acute here, where the Governor seeks to interfere directly with "internal matters of a coordinate branch of government," *Berry*, 990 N.E.2d at 418, including enactment and authentication of legislation.

The trial court distinguished *Berry* because "[t]he constitutionality of HEA 1123 is not an 'inherently internal matter of the legislative branch'" but instead "a question of statutory and constitutional interpretation that is properly before the judicial branch." Appellant's App. Vol. II at 35 (citing *Spencer Cnty. Assessor v. AK Steel Corp.*, 61 N.E.3d 406, 414 (Ind. Tax Ct. 2016)). *AK Steel* is inapposite, and *Berry* applies the doctrine to matters of statutory and constitutional interpretation. 990 N.E.2d at 418–421. The doctrine applies based on the nature of the relief sought, not the nature of the legal rule of decision. *Id.* at 421 ("The case before us involves such nonjusticiable claims for *relief* on which the judicial branch must decline to pass judgment.") (emphasis added). Here, the relief would interfere with scheduling a legislative session, which is a legislative function. The political question doctrine presents an alternative ground for relief.

IV. The Governor Lacks Unilateral Authority to Sue, Including for Separation of Powers Claims

Each of these procedural hurdles underscores the intramural governmental tensions that inherently arise when one constitutional authority purports to drag another to account before yet a third. Lawsuits are not sport. They are government solutions to injurious disputes between parties of independent standing. Here, each of the parties on both sides of the caption is a constituent part of the same sovereign entity—the State of Indiana. Theoretically, Indiana law *could* permit the state to be at legal war with itself. It *could* guarantee the state's constituent parts the capacity to act with independent standing in court to resolve injurious disagreements.

But perhaps in recognition of all the intractable procedural questions discussed above—What constitutes legal injury between government branches? When can officials challenge state laws they are sworn to execute? What remedies may one branch of government order against another?—the legislature does not carve up the State that way. Instead, Indiana law arranges for centralized reconciliation of legal disagreements among state officials (or at least those involved in this case) through the Attorney General, who is accountable to the voters for his decisions.

Thus, the authority to determine the State's *position in court* on the multiple questions at play here (standing, cause of action, immunity, and the constitutionality of HEA 1123) rests with the Attorney General. To give effect to that authority of the Attorney General, the legislature has provided that the Governor may hire outside counsel to litigate on his behalf *only* with the Attorney General's consent. Ind. Code § 4-6-5-3(a). Here, the Attorney General has *not* consented to such outside representation, and both moved to strike the pleadings of unauthorized counsel and for summary judgment on this basis. Appellant's App. Vol. II at 89; *id.* Vol. III at 127. Judgment for Defendants should be affirmed on the alternative grounds that this lawsuit was unauthorized from the outset.

A. The Attorney General has exclusive authority to represent state officials, who may not be represented by outside counsel without the Attorney General's consent

The General Assembly created the Office of the Attorney General as an elected position "in order to give the State independent legal representation and to establish a general legal policy for State agencies." *State ex rel. Sendak v. Marion Cnty. Super.*

Ct., Room No. 2, 373 N.E.2d 145, 148 (Ind. 1978). To this end, the Attorney General has the authority to "prosecute and defend *all suits instituted by or against the state of Indiana*" and to "defend all suits brought against the state officers in their official relations." Indiana Code § 4-6-2-1(a) (emphasis added). Further, the Attorney General "shall represent the state in any matter involving the rights or interests of the state, including actions in the name of the state, for which provision is not otherwise made by law." Ind. Code § 4-6-1-6; *see also State ex rel. Young v. Niblack*, 99 N.E.2d 839, 842 (Ind. 1951) (acknowledging that the Attorney General alone is charged with "represent[ing] the state of Indiana in any matter involving the rights or interests of the state, including actions in the name of the state of Indiana, for which provision is not otherwise made by law") (internal quotation marks and citation omitted).

Indiana law gives the Attorney General the "exclusive power and right in most instances to represent the State, its agencies and officers," *Banta v. Clark*, 398 N.E.2d 692, 693 (Ind. Ct. App. 1979), *i.e.*, "sole responsibility for the legal representation of the State." *Sendak*, 373 N.E.2d at 149. Such exclusive power ensures that the State will adopt a unified, consistent position on legal issues. *See Ind. State Toll-Bridge Comm'n v. Minor*, 139 N.E.2d 445, 448 (Ind. 1957) ("Before 1943, many of the various boards, bureaus and commissions had been employing their own attorneys, with no effective authority vested in the Attorney General to establish a general legal policy for such agencies, and no responsibility of counsel to the Attorney General.").

To ensure the Attorney General's litigation positions on behalf of the State are not undermined by contrary positions of other state officials, the legislature has provided that the Attorney General "shall have charge of and direct the prosecution of all civil actions that are brought in the name of the state of Indiana or *any state agency*." Ind. Code § 4-6-3-2(a) (emphasis added). Here, critically, "state agency" expressly includes an "office" or "officer." *Id.* § 4-6-3-1. In short, no distinction exists between the State or a state agency and its officers, including the Governor. Consistent with that prime directive, Indiana law also provides that "[n]o agency . . . shall have any right to name . . . or hire any attorney . . . to represent it or perform any legal service in behalf of the agency and the state without the written consent of the attorney general." *Id.* § 4-6-5-3(a); *see also Sendak*, 373 N.E.2d at 148 ("No State agency is permitted to hire another attorney to perform legal services unless the Attorney General renders his written consent.").

As this Court explained in *Sendak*, these statutes create an independent focal point for "a general legal policy for State agencies" and thereby preclude other state officials from taking contrary positions in court, lest they engender chaos and cause "substantial prejudice to the Attorney General's efficacy in defending his statutory client[s]." *Id.* Because the Attorney General is authorized by law with "defending State agencies, officers and employees," he "must, of necessity, direct the defense of the lawsuit in order to fulfill his duty to protect State interests." *Id.* Accordingly, the Governor may not hire counsel to litigate on his behalf without the Attorney General's consent.

B. The trial court erroneously concluded that a combination of Indiana Code section 4-3-1-2 and the Governor's constitutional authority permits him to bring this case without the Attorney General's consent

The trial court, however, rejected Defendants' motion to strike and summary judgment arguments grounded in the Attorney General's exclusive litigation authority. The central theme of the trial court's orders is that, while the Governor may not generally litigate on his own, here the Governor may exercise a combination of statutory authority and constitutional right to challenge a statute on separation of powers grounds. Those conclusions are unsupported by law.

1. First, the trial court relied in part on Indiana Code section 4-3-1-2, which provides that "The governor may employ counsel to protect the interest of the state in any matter of litigation where the same is involved." Appellant's App. Vol. II at 184–85. This Court, however, has already squarely held that Section 4-3-1-2 was impliedly repealed by later statutes (cited above) that concentrated the right to litigate on behalf of the State and its agencies in the Attorney General. *See Sendak*, 373 N.E.2d at 148–49.

The trial court responded to *Sendak* in part by citing the General Assembly's non-substantive 2016 amendment to Section 4-3-1-2. *See* 2016 Ind. Legis. Serv. P.L. 215-2016 (HEA 1173). In the trial court's view, that technical amendment signaled that the General Assembly "wished to maintain the governor's right to retain counsel in cases in which *Sendak* does not apply." Appellant's App. Vol. II at 185. One cannot fairly read the 2016 non-substantive statutory amendment to reinstitute the Gover-

nor's long-nullified prerogative to hire outside counsel. The trial court's order implicitly recognizes as much by limiting the amended statute's application to circumstances "in which *Sendak* does not apply." *Id.*

Where does *Sendak* "not apply"? According to the trial court, "[t]hat situation presents itself here" where "separation of powers is at issue." *Id.* at 185–86. That exception, however, is pure *ipse dixit* unsupported by any statutory or constitutional text, history, or structure. If the Governor's executive authority does not include the right to direct litigation generally—and *Sendak* holds that it does not—"separation of powers" does not supply that authority over a select group of cases.

2. Second, the trial court relied on the Governor's constitutional authority as the State's chief executive, with the power to "take care that the laws be faithfully executed," as a justification for permitting the Governor's unilateral legal attack on a state statute governing legislative sessions.

Citing *Tucker v. State*, 35 N.E.2d 270, 280 (Ind. 1941), the trial court observed that Indiana Governors "have the sole and exclusive jurisdiction and authority to exercise executive powers." Appellant's App. Vol. II at 183. According to the trial court, "[t]hat 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." *Id.* But Indiana precedents do not stand for the proposition that executive power—even to "protect" the Governor's constitutional duties—is unlimited. Presumably even the Governor would not claim the inherent authority to *dissolve* a legislature that convenes an emergency session under HEA 1123.

Authority to litigate likewise plainly lies outside the boundaries of inherent executive power. In 1855, just a few years into the current constitutional era, the legislature conferred on the Attorney General the power to prosecute actions for the State. 1855 Ind. Acts 16. Not even prosecuting attorneys—the most natural constitutional office to claim affirmative litigation authority—had inherent power to displace the Attorney General. *See State v. Schloss*, 92 Ind. 293, 294–95 (Ind. 1883) (concluding that where the Attorney General brought forfeiture action because the prosecuting attorney failed to do so, the prosecutor "ha[d] no authority to do any act without the consent of the Attorney General, which w[ould] defeat the State"). Unsurprisingly, *Sendak* held that statutes conferring exclusive litigation authority on the Attorney General are consistent with Article 5—and *Tucker*. *See Sendak,* 373 N.E.2d at 145, 149.

The trial court attempted to distinguish *Sendak* only by observing that case was about "whether the Governor can hire private counsel to represent a *State agency* without obtaining the consent of the Attorney General," and not about whether the Governor himself can hire counsel to bring a lawsuit challenging a statute on separation of powers grounds. Appellant's App. Vol. II at 191 (emphasis in original) (internal citation omitted).

That passage suggests three possible distinctions—(1) *Sendak* did not involve a question of separation of powers, (2) *Sendak* involved lawsuit *defense* rather than *prosecution*, (3) *Sendak* involved a state agency rather than the Governor himself—but justifies none. Both here and in *Sendak*, the Governor is the one hiring outside

counsel; agency presence has no significance. The statutory text expressly *includes* constitutional officers within the Attorney General's exclusive litigation authority. *See* Ind. Code § 4-6-3-2 ("[t]he attorney general shall have charge of and direct the prosecution of all civil actions that are *brought in the name of the state of Indiana or any state agency*," where "state agency" is defined by Indiana Code section 4-6-3-1 to include "office[s]" and "officer[s]" (emphasis added)); *see also Ritz v. Elsener*, 49C01-1310-PLl-038953 (Marion Sup. Ct. 2013) (reproduced in Appellant's App. Vol. II, at 103) (granting Attorney General's motion to strike the appearance of unauthorized counsel for the Superintendent of Public Instruction against the State Board of Education). And no principled distinction exists between *defending* a lawsuit and *bringing* a lawsuit: The relevant statutes "must be construed as giving the Attorney General the *sole responsibility* for the *legal representation* of the State." *Sendak*, 373 N.E.2d at 149 (emphasis added). "Legal representation" applies to all litigation roles; "defense" of the State's legal interests happens on both sides of the "v."

Nor does any precedent, history, or text support a "separation of powers" carve-out from the Attorney General's authority. The separation of powers exists to protect individual citizens, not officeholders, *see Horner v. Curry*, 125 N.E.3d 584, 612 (Ind. 2019) (Slaughter, J., concurring in the judgment), and laws creating and empowering the Office of the Attorney General prevent state officials from unilaterally invoking judicial power as leverage to resolve inter-branch disputes over constitutional mean-

ing. Indeed, this Court has long recognized that the legislature created an independently elected Attorney General to implement "checks and balances in government." *Minor*, 139 N.E.2d at 448.

The trial court relied heavily on the Indiana Take Care Clause as a source of inherent gubernatorial authority. But Governors do not enforce *all* laws—HEA 1123 being a prime example.

Consistent with that reality, Take Care Clauses arose as a *restraint* on executive authority, not a *grant* of authority. *See, e.g.*, *The Heritage Guide to the Constitution* (2005) at 222 ("The Take Care Clause (also known as the Faithful Execution Clause) is best read as a duty that qualifies the President's executive power."); *id.* ("[i]t is also possible that the clause does nothing more than incorporate the English Bill of Rights provisions that forbade the Crown from dispensing or suspending the law"). In 1838, the Supreme Court "read the [federal] Take Care Clause as embodying this anti-dispensation principle in the Constitution." Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. Pa. L. Rev. 1835, 1850 (2016) (citing *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838)); *see also* Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 Va. L. Rev. 1421, 1425 (1999) (in the Glorious Revolution, the English Bill of Rights "declared illegal certain actions of the crown, including its dispensing with laws"); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 675 (2014) (drawing upon the

"deeply rooted constitutional tradition" underlying the Take Care Clause "that American Presidents, unlike English kings, lack authority to suspend statutes or grant dispensations that prospectively excuse legal violations").

In any event, no precedent connects the Take Care Clause to a right to file a lawsuit—or to any special stand-alone, inherent authority to "protect the Indiana Constitution" by any means. The Governor could not, for example, order the Secretary of State not to enforce securities laws if he thought they were unconstitutional. The question here is whether the Governor's inherent authority extends to directing litigation. This Court has already said it does not. *Sendak*, 373 N.E.2d at 149. Historical precedent confirms the point. If the Governor had inherent authority to hire outside counsel to bring lawsuits, the General Assembly would not have needed to enact statutes in 1852 and 1855 first granting the Governor that authority in limited circumstances and then creating the Office of Attorney General. 1852 Ind. Acts 306–07; 1855 Ind. Acts 16–17; *see also Julian v. State*, 39 N.E. 923, 925 (Ind. 1895) (noting that the Governor's statutory litigation authority "was enacted in 1852, when there was no office of attorney general").

3. Finally, the trial court rejected the Attorney General's exclusive authority to litigate for the Governor based on its misapprehension that the Attorney General would suffer from a conflict of interest in doing so, citing Rule 1.7(a)(1) of the Indiana Rules of Professional Conduct. Appellant's App. Vol. II at 186–87. The Rules of Professional Conduct, however, do not abrogate the statutory authority vested in the

Attorney General. In fact, the Rules expressly state that lawyers under the supervision of the Attorney General "may be authorized to represent several government agencies in intra-governmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. *These Rules do not abrogate any such authority*." Ind. Rules of Pro. Conduct, Scope ¶ 18 (emphasis added).

Indiana law vests the Attorney General with the responsibility to reconcile the competing legal positions of state officials, which means (unless statutes expressly provide otherwise) the Attorney General has the power to bar officials from litigating on their own. That is not a conflict of interest—it is an essential role of an Attorney General. So, while the trial court cited an incidental observation of a former Attorney General in a law review article that consent for outside counsel is one way to resolve a Governor's challenge to a statute, Appellant's App. Vol. II at 186 n.2, that is not the only (or even most obvious) course of action. To carry out the legislature's objective in having an Attorney General in the first place, an Attorney General must sometimes say no. Theodore E. Rokita, *Duty to Defend and the Rule of Law Redux: Why a State Attorney General Should Refuse to Let a Governor Sue the Legislature*, 55 Ind. L. Rev. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4026273.

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In sum, a fundamental legal principle consistently understood and applied over several decades is that Indiana law vests the Attorney General alone with authority to determine the State's position on legal questions. Here, that means the case should

never have advanced beyond the State's motion to strike the unauthorized appearances for the Governor's outside counsel and the complaint. In all events, it provides an alternative ground for affirming judgment in favor of Defendants.

V. HEA 1123 Lawfully Exercises the General Assembly's Express Constitutional Authority Over the Commencement, Length, and Frequency of Its Sessions

Setting aside the many procedural and other threshold defects with this lawsuit, the Governor's case also fails on the merits. The Governor maintains, as he did in the trial court, that HEA 1123 violates Indiana Constitution Article 4, Section 9 (which pertains to the commencement, duration, and frequency of legislative sessions) and Article 3, Section 1 (which provides for the separation of powers). His brief before this Court also raises a new issue, *i.e.*, whether HEA 1123 somehow amounts to an attempt to amend the Constitution outside of Article 16. But these are just different ways of arguing the same thing—that HEA 1123, by providing for the commencement of emergency sessions under specified limited circumstances, somehow exceeds legislative power.

No matter how conceptualized, the Governor's case fails because the text of Article 4, Section 9 expressly authorizes the General Assembly to set the "frequency" of its "sessions" and to "appoint[] by law" the day for commencing its "sessions." Ind. Const. art. 4, § 9. The Special Session Clause does not limit the General Assembly's authority on this score but merely confers on the Governor a limited legislative power to call the legislature into a session if the legislature happens to be adjourned at a time when "the public welfare" requires its attention. *Id.* Indeed, the Special Session

Clause is a textual exception—contemplated by Article 3—to the general rule separating the functions of the branches. To turn that exception into exclusive gubernatorial authority would turn Article 3 upside down.

A. The General Assembly's constitutional authority to determine when it will meet fully authorizes HEA 1123

Under the Constitution, the General Assembly's power to control the date, duration, frequency, and content of its sessions permits it to schedule sessions any time it likes and for any purpose, including the limited-scope emergency sessions contemplated by HEA 1123. Constitutional text, history, and practice all support this understanding of the legislature's authority.

1. The text of Article 4, Section 9 provides the General Assembly control over the timing and frequency of its sessions

Article 4, Section 9 addresses four different questions pertaining to the "sessions of the General Assembly"—where it will meet, when it will meet, how long it will meet, and how frequently it will meet. Section 9 both places principal responsibility for answering these questions with the General Assembly and authorizes the General Assembly to answer these questions however it wishes, so long as it does so "by law." Ind. Const. art. 4, § 9. Section 9 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—unless "a different day or place shall have been appointed by law." *Id.* And as to the duration and frequency of the legislature's sessions, Section 9 says simply that the "length and frequency of the sessions of the General Assembly shall be fixed by law." *Id.*

So, the General Assembly may set "by law" whatever rules it wishes to govern the timing of its sessions—which is precisely what it has done with HEA 1123. This statute "appoint[s] by law" that a session of the General Assembly 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 Governor contends, in a new argument the Court should deem waived, that the Length and Frequency Clause does not mean what is says because Section 9 otherwise imposes an "annual limit . . . to the frequency of regular sessions." Appellant's Br. 32, 45, 47–48. The Governor's entire position thus hinges on whether the constitutional text "frequency of the sessions of the General Assembly shall be fixed by law" can be taken at face value. It can. The Governor cites only "each year" in the first sentence of Section 9, plus the "singular" form of "unless a different day or place shall have been appointed by law." *Id.* at 44. The singularity of "year" and "day," however, cannot plausibly countermand the plenary power bestowed by the Frequency Clause.

The full text of the relevant passages read 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. . . The length

and frequency of the sessions of the General Assembly shall be fixed by law." Ind. Const. art. 4, § 9.

First, far from preempting the legislature's plenary "by law" power over the frequency of its sessions, the "each year in which the General Assembly meets" clause confirms it by implying the General Assembly may choose *not* to meet each year. The default start date is not for "each year," full stop, but for "each year in which the General Assembly meets" because the frequency need *not* be "each year."

Next, while Section 9 establishes a default date for commencing a session "each year" the legislature meets, it also permits the General Assembly to "appoint[] by law" "a different day or place" for commencement—the singular form of which corresponds to singular form of the default commencement day, *i.e.*, "the Tuesday next after the second Monday in January . . . ." *Id.* It would have been counterproductive to establish *multiple* default commencement dates—the singularity of a default date being the whole point. The resulting singular parallelism for the follow-on modification power does not, therefore, carry a hidden one-per-year limit on legislative sessions—particularly given the expressly bestowed frequency *authority*. The text cited by the Governor says only, "here is a default date to start, unless you have a different date in mind." And the rest of Section 9 says, "you can meet however long and whenever you like." The first instruction does not negate the second.

The Governor also argues that the legislature's constitutional authority under Section 9 is confined to merely setting a fixed *date* for its sessions. But nowhere does the constitutional text restrict *how* the General Assembly may "appoint[] by law" a

"different day or place" for the commencement of a session. Accordingly, so long as a "day . . . ha[s] been appointed by law," *id.*, the General Assembly is free to choose whatever date it likes to begin the session. *See League of Women Voters of Wis. v. Evers*, 929 N.W.2d 209, 216–18 (Wis. 2019) (holding that a Wisconsin law authorizing a legislative committee to "meet and develop a work schedule for the legislative session" complied with a similar provision of the Wisconsin Constitution requiring legislative sessions to occur "at such time as shall be provided by law, unless convened by the governor in special session"). That is all the General Assembly did with HEA 1123: It "appointed by law" the specific circumstances under which a session of the General Assembly will commence. *See* Ind. Code § 2-2.1-1.2-7.

For decades Indiana lawmakers have understood Article 4, Section 9 to permit the General Assembly to provide by law for a legislative session that commences on a date that the legislature will later choose—that is, to adopt a statute that does not specify a particular date in advance. The General Assembly has provided for "technical sessions" without specifying a particular date for commencement. *See id.* §§ 2-2.1-1-2.5(b), -3.5(a). The technical sessions statutes provide that "the general assembly may adopt a concurrent resolution to fix a day to convene," and even permits the leaders of each chamber to cancel the session by joint order. *See id.* §§ 2-2.1-1-2.5(b), (e) -3.5(a), (e). By picking a specific commencement date via resolution, the General Assembly fixes its technical session days as a committee of the whole. Concurrent resolutions are not "bills," *see* Rules of the House of Representatives, 122nd General Assembly of Indiana, iga.in.gov/legislative/2022/rules/joint_rules/#, and because not

presented to the Governor, are not "laws." *See generally* 1A Sutherland Statutory Construction § 29:3 (7th ed.).

Under HEA 1123, the Legislative Council functions as a joint committee of both chambers, materially indistinguishable from the committee of the whole under the technical-session statute. HEA 1123 provides that an emergency session will commence when the Legislative Council adopts a resolution making certain findings, including a determination of the date when the houses will convene. Ind. Code § 2-2.1-1.2-7. The constitutionality of HEA 1123 thus follows directly from the constitutionality of the technical-session statute: If the Constitution permits the legislature to use a statute to assign session-commencing authority to a committee of the whole, then it permits it to use a statute to assign such authority to another committee, such as the Legislative Council.

Similarly, the General Assembly does not command a specific date for adjournment by statute. Instead, the statute sets a maximum duration and leaves it to each chamber to decide precisely when to adjourn. *See, e.g., id.* § 2-2.1-1-2(e) ("The first regular session of each term of the general assembly shall adjourn sine die . . . . *Not later* than April 29 . . . ." (emphasis added)). No one would suggest that the legislature thereby fails to "fix[] by law" the "length . . . of the sessions." Ind. Const. art. 4, § 9.

2. Constitutional history confirms that the legislature now has plenary power to decide when to hold its sessions

The history of constitutional amendments to the General Assembly's authority over the timing of its sessions confirms that under the current Constitution the Gen-

eral Assembly's authority on this score is plenary. Notably, the original 1851 Constitution *did* limit 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), limited sessions to 61 days, *id.* art. 4, § 29 (1851), and even limited special sessions to 40 days, *id.*

In 1970, however, the people of Indiana amended the Constitution to remove Section 9's biennial requirement and Section 29's 61- and 40-day limits on sessions. The 1970 amendment also added what is now the final sentence of Article 4, Section 9, which provides that "[t]he length and frequency of the sessions of the General Assembly shall be fixed by law." It also added a "schedule" that imposed a single limit on the General Assembly's authority over sessions—that "No regular legislative session of the General Assembly may extend beyond the 30th day of April of the year in which it is convened." 1967 Ind. Acts 1387–88; 1969 Ind. Acts 1829–30. *Contrast Simpson v. Hill*, 263 P. 635 (Okla. 1927) (addressing constitution with biennium limit and no Length and Frequency Clause).

The Governor suggests the legislature intentionally limited its sessions by eschewing a Study Committee recommendation to add a "special-session" power. Appellant's Br. 38–39. But this meager proposal, which reflected only a few legislators' views, Appellant's App. Vol. VII at 187, was apparently never submitted for a vote. *See* Appellees' Addend. 4–5 (1967 Joint Resolutions Journal Excerpts). Instead, the legislature went big. It proposed, and the voters ratified, new constitutional text wiping out nearly *all* limits on the length and the frequency of legislative sessions, save

for the April 30 adjournment rule. In 1984, Indiana voters removed even that restriction. 1982 Ind. Acts 1664–65; 1983 Ind. Acts 2212–13.

The Governor contends these amendments did not mean what their plain text says because the ballot questions "did not notify [voters] that a fundamental constitutional change was afoot"—but denies "seeking to challenge the outcome of the 1970 and 1984 amendments based on inadequate descriptions on those ballots." Appellants' Br. 36–37. Regardless, allegedly deficient ballot summaries do not negate plain amendment text. *Roeschlein v. Thomas*, 280 N.E.2d 581, 592–95 (Ind. 1972); *Oviatt v. Behme*, 147 N.E.2d 897, 899–900 (Ind. 1958). Ballot summaries merely identify the amendment presented; for content, amendment text governs. Even an "important limitation" included in proposed text but omitted by the summary remains valid once passed. *Roeschlein*, 280 N.E.2d at 593 (describing the holding of *Oviatt*, 147 N.E.2d 897). Here, no text could more clearly bestow plenary authority over the timing, frequency, and duration of legislative sessions that the 1970 and 1984 amendments removing biennial, 61-day, and April-30 limits and adding "length and frequency" authority.

3. Regular, uncontroversial legislative practices demonstrate the General Assembly's plenary control over session frequency

The Governor contends that the practices of the legislature since the 1970 and 1984 amendments demonstrate that the General Assembly has understood that it lacks plenary authority over setting its sessions because "fifty-one (51) years elapsed without a single attempt by the Legislature to call a special session or otherwise claim

it had the authority to do so." Appellant's Br. 39. The historians' amicus brief asserts that "[l]egislators who take it upon themselves to determine where the text of the Constitution confers authority to call a special session have apparently always concluded that the General Assembly had no power to do so." Amicus Br. 30.

Setting aside the artful use of the term "special session," however, these statements ignore technical sessions (described above), which the legislature uses both to pass new bills and to override gubernatorial vetoes. *See, e.g.*, Appellees' Addend. 12 (Journal of the House, 118th General Assembly, Second Regular Technical Session (June 17, 2014) (documenting proceedings whereby HB 1448 was first read, waived by constitutional majority to third reading, and passed)); *id.* at 9 (Journal of the House, 118th General Assembly, First Regular Technical Session (June 12, 2013) (voting to override the veto of HEA 1546, a bill dealing with various tax issues)). They also ignore how the General Assembly always commences a new session in November of the same year it adjourned a prior session. *See, e.g.*, *id.* at 23 (Journal of the House, 121st General Assembly, First Regular Session (Apr. 24, 2019)); *id.* at 25 (Journal of the House, 121st General Assembly, Second Regular Session (Nov. 19, 2019)).

The Governor makes no mention of November meeting days but dismisses technical sessions as mere "extensions of a preceding 'regular session'" whereby the legislature somehow "appoint[s] a date for *resumption* of a regular session" that can only "address . . . bills enacted during the relevant 'regular session.'" Appellant's Br. 51 (citing Ind. Code §§ 2-2.1-1-2.5(c), -3.5(c)). He contends that, because Indiana Code section 1-1-3-3 "states that, for the purposes of an effective date, a '"regular session'

includes a regular technical session," the Legislature never intended technical sessions to "be considered as separate, stand-alone sessions such as a 'special session.'" Appellant's Br. 51. If anything, however, that statute confirms that technical sessions are inherently separate; otherwise, no express provision for an effective date would be necessary for technical-session enactments.

Moreover, technical sessions are distinct, stand-alone sessions for at least four reasons. First, technical sessions are not only termed "sessions" by statute, but they also commence only after adjournment sine die—and not merely following a recess—of a "regular" session. Second, at the beginning of a technical session, each chamber conducts "organization" proceedings, including by initiating formal communications between chambers and with the Governor and by notifying all that the chamber "has met, formed a quorum, and is now prepared to proceed with the legislative business . . . ." Appellees' Addend. 11 (Journal of the House, 118th General Assembly, Second Regular Technical Session (June 17, 2014)); *id.* at 14 (Journal of the Senate, 118th General Assembly, Second Regular Technical Session (June 17, 2014)). Such "organization" is materially identical to that which occurs at the start of both long and short "regular" sessions. *See, e.g.*, *id.* at 25 (Journal of the House, 121st General Assembly, Second Regular Session (Nov. 19, 2019)); *id.* at 27 (Journal of the Senate, 122nd General Assembly, First Regular Session (Nov. 17, 2020)). Third, the chambers pass new bills during technical sessions. *See, e.g.*, *id.* at 12. Fourth, the chambers adjourn technical sessions *sine die* to signal their termination as stand-alone sessions. Ind. Code § 2-2.1-1-2.5(d); *see, e.g.*, Appellees' Addend. 13, 21.

The Governor argues that, notwithstanding these stand-alone-session features, technical sessions constitute transtemporal "resumption" of an adjourned session by virtue of a concurrent resolution, passed during a regular session, authorizing them. Appellant's Br. 51. Even if accepted, however, that fiction would apply equally to HEA 1123 emergency sessions, which, to be valid under the Governor's theory, would need only to be authorized by concurrent resolution each regular session. The Governor's distinction between technical and emergency sessions, therefore, is an empty formalism without practical significance.

B. The Special Session Clause grants the Governor a limited legislative power as an exception contemplated by Article 3, Section 1, but does not limit the General Assembly's authority to set its sessions

When the legislature is adjourned, the Special Session Clause provides a valuable tool for convening the legislature in time of need. In that circumstance, where law does not otherwise provide for a legislative session to commence, the Governor has exclusive authority to call a special session. HEA 1123, meanwhile, provides by law for the commencement of a session under specified circumstances, and thus by definition does not impinge on the special session authority, which exists to enable a legislative session when no law otherwise provides for one. HEA 1123 does not even mention special sessions, so it has no impact on *any* of the Governor's powers or duties.

The Governor argues that the Special Session Clause grants him exclusive authority over all "non-regular" legislative sessions, such that HEA 1123 violates Article 3, Section 1's separation-of-powers provision by allowing the legislature to exercise

exclusive executive power. But to the extent Article 3 is relevant at all, it is by way of its Exceptions Clause, which anticipates (among other things) the Special Session Clause as an exception to exclusive legislative authority over the timing of sessions. The Exceptions Clause of Article 3 confirms that the Special Session Clause does not, by text or implication, exclude the legislature's own authority over its sessions or confer on the Governor a power to prevent the General Assembly from meeting.

1. Structurally, the Special Session Clause is a limited, exceptional bestowal of legislative power on the Governor, not a broad, exclusive grant of executive power

Articles 3 and 4 work together to provide an answer to this case, just not how the Governor thinks. Article 3, Section 1 creates a general barrier between the functions of each branch, but also allows "except[ions]" that the "Constitution expressly provide[s]." Ind. Const. art. 3, § 1. The Special Session Clause provides one such exception.

The Constitution divides legislative, executive, administrative, and judicial authority into separate articles. The Special Session Clause is not found in Article 5, which lays out the powers of the executive, but in Article 4, which details the powers of the legislature. Indeed, the Special Session Clause sits between two sentences in Article 4 § 9 providing authority to the General Assembly to set the timing, frequency, and length of sessions of the General Assembly. These textual and structural features are just some ways Article 4, § 9 differs from Article 5, § 12, invoked by the Governor. *Cf. State ex rel. Branigin v. Morgan Superior Court*, 231 N.E.2d 516 (Ind. 1967).

The Governor argues that the phrase "the opinion of the Governor" in Article 4, Section 9 is evidence of his exclusive authority. Appellant's Br. 46. The "opinion of the governor" text, however, says nothing about what the *legislature* may do. Its function is to make clear that the Governor's decision to call a special session is not subject to judicial review. *See United States v. George S. Bush & Co.*, 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.)).

Thus, the Special Session Clause itself allows the Governor to exercise a particular function of the *legislative* branch. *See Woessner v. Bullock*, 93 N.E. 1057, 1059 (Ind. 1911) (explaining that the Special Session Clause provides the Governor "with certain legislative power"); *cf. Tucker v. State*, 35 N.E.2d 270, 286 (Ind. 1941) (noting that the Governor's ability 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"); *see also* Thomas Jefferson, *V. Jefferson's Opinion on the Constitutionality of the Residence Bill, 15 July 1790*, National Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/01-17-02-0018-0007#document_page (Letter from Thomas Jefferson to George Washington, dated July 15, 1790) ("[e]ach house of Congress possess th[e] natural right of governing itself, and consequently of fixing it's [sic] own times and places of meeting, so far as it has not been abridged by . . . the Constitution.").

The Special Session Clause is but one detail among many providing the legal mechanics for how a diffuse, multi-member governmental body may gather to do its business. Without it, the Governor would have no authority over legislative sessions. Indeed, limited as it is, the Special Session Clause does not permit the Governor to set the legislative agenda. *Woessner*, 93 N.E. at 1058 ("The power of the General Assembly to legislate on any subject when convened in special session is not limited by the Constitution."). The General Assembly already governs the details of special sessions by statute, Ind. Code § 2-2.1-1-4 (limiting the length of special sessions), and could use the Length and Frequency Clause to adjourn a special session without undertaking any business at all.

Other states, to be sure, afford their Governors more power over special sessions. *See, e.g.*, *State v. Scott* 140 P.2d 929, 930–32 (Utah 1943) (noting that the Governor has "complete control" over "'legislative business' that shall be considered" at special sessions and identifying seven other States with similar restrictions (quoting *State v. Tweed,* 22 P. 443, 446 (Utah 1924))) (collecting cases). But even the Governor's supporting amici concede that, for Indiana, the 1851 Constitution "held on to the state's overall weak executive." Amicus Br. 20.

2. Textually, the use of the word "special" does not create an exclusive, constitutional binary with "regular" sessions

The Governor argues that the word "special" in Article 4, Section 9, both denotes a limited grant of authority *and* precludes the legislature from setting by law any "non-regular session which, by its very terms, can never have a fixed and predetermined beginning date." Appellant's Br. 31. This is yet another counterintuitive

theory unsupported by constitutional text, history, or structure. The people of Indiana amended the Constitution in 1970 and again in 1984 to eliminate specific textual limits on the frequency and duration of legislative sessions; it would be odd to conclude that the Special Session Clause implicitly retains restrictions that were explicitly eliminated.

The Governor is left to insist that the Special Session Clause sweeps the field because an "emergency session" contemplated by HEA 1123 "share[s] the same characteristics" and is therefore "the same as a 'special session.'" *Id.* at 32. This formalistic "resemblance" test has no textual or historical support and would leave everyone guessing as to how much resemblance is too much. Indeed, even if some differences were necessary to steer clear of the forbidden "special session" label, the Governor names them for HEA 1123: "An 'emergency session' can only occur when a governor has declared a disaster emergency" while "A 'special session' can occur only when a governor determines 'the public welfare requires it.'" *Id.* at 31–32. Even under the Governor's test, why isn't that enough?

Fundamentally, any similarity between an emergency session and a special session is irrelevant because Article 4, Section 9 does not limit the legislature's authority to a specific category of "sessions." Indeed, the Commencement Clause and the Length and Frequency Clause *include* the authority to set "by law" the length of even special sessions. Ind. Const. art. 4, § 9; Ind. Code § 2-2.1-1-4. The technical session statute allows the legislature, through a concurrent resolution, to call a session *after* a regular session has adjourned. *See* Ind. Code §§ 2-2.1-1-2.5, -3.5. And even new

regular sessions begin during the same calendar that the prior one ended. *Id.* § 2-2.1-1-2; *see, e.g.*, Appellees' Addend. 23 (Journal of the House, 121st General Assembly, First Regular Session (Apr. 24, 2019)); *id.* at 25 (Journal of the House, 121st General Assembly, Second Regular Session (Nov. 19, 2019)). If the Governor is correct that the Constitution permits only a single, rigidly defined "regular" session during the winter and Governor-exclusive "special" sessions at all other times, many enactments over the decades, including entirely new bills and veto overrides, were enacted by legislatures meeting unlawfully in "technical session" or even during organization day in November. *See, e.g.*, *id.* at 7 (Journal of the House, 115th General Assembly, Second Regular Session (Nov. 20, 2007) (passing HB 1010, amending the Indiana Code concerning taxation and to make an appropriation)); *Action List: House Bill 1010*, http://iga.in.gov/legislative/archive/bills/2008/HB/1010/actions.

3. Historically, the Special Session Clause has been understood to provide for narrow relief for a foreseeable contingency, not control over the legislature

Historically, the Special Session Clause was a relief valve for a constitution that strictly limited the length of legislative meetings. Again, the delegates at the 1850 Constitutional Convention hoped to incentivize better legislation in part by restricting the legislature to biennial meetings of a maximum 61 days. *See* 1 H. Fowler, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana*, 95 (1850) ("[I]f the sessions of the Legislature were biennial, with proper limitations and restraints upon their powers, the laws would be

better known and better executed . . . ."); 2 Fowler, *supra*, at 1067 ("One of the prominent causes of the calling of this Convention was the uncertainty of the legislation and the fluctuation of the laws of the State. . . . I wish, for one, to have consistent and permanent laws."). That is, the 1851 Constitution controlled legislative meetings by express constitutional text, not by implied gubernatorial power.

No grounds exist for imputing to the Special Session Clause a measure of exclusive gubernatorial control over legislative meetings. Rather, with legislators in session only a small portion of each biennium, exigencies might arise during mandatory adjournment, necessitating some means to call the legislators back into session. *See id.* at 1069 ("Now what is the purpose of assembling the Legislature in special sessions? A special session is called upon an extraordinary occasion of some great infringement of popular right; some financial disaster, threatened invasion, declaration of war, or some other unforeseen difficulty in the State.").

Remarks about a very similar provision in the federal Constitution confirm the common-sense rationale for such clauses. *Compare* Ind. Const. art. 4, § 9, *with* U.S. Const. art. I, § 4, cl. 2 (setting a minimum requirement and default starting date for meetings of Congress, which applies "unless they shall by Law appoint a different Day"), *and* U.S. Const. art. II, § 3 (allowing the President to convene the houses of Congress "on extraordinary Occasions"). The House of Representatives was originally expected to meet "only two or three months in the year." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 280 (Johnathan Elliot ed., 2d ed. 1836). So, as Joseph Story explained, the President's "power to convene

congress on extraordinary occasions is indispensable to the proper operations, and even safety of the government," as events "in the recess of congress" may require "vigorous measures" to, among other things, "provide adequate means to mitigate, or overcome unexpected calamities." 3 Joseph Story, Commentaries on the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution 413–14 (1833). Yet the President's power to convene Congress on extraordinary occasions does not limit Congress's own power over when to meet.

The Governor observes that the Indiana Constitution has always vested the Governor with the exclusive power to call special sessions of the General Assembly. *See* Appellant's Br. 44–48. But such historical continuity does not answer whether the Special Session Clause limits the *legislature's* power to appoint by law the frequency and commencement of legislative sessions. While the Governor asserts that the 1850 convention delegates understood the Special Session Clause "as a check" on the legislature, *Id.* at 12–13, 46, the stray phrases he quotes, which apparently come from the following passage, suggest nothing of the sort.

> The argument of economy, so eloquently used by gentlemen on this floor, which I admit should be strictly observed at all times, has no great weight upon my mind, as they attempt to apply it to this question.
>
> *By a most decisive vote of the Convention* it has been determined that *the General Assembly shall be regularly convened but once in two years, giving the Governor power to call an extra session in cases of emergency.* It is now further pretty generally understood that all local and special legislation, in this State, is to be prohibited by a constitutional provision; and that hereafter general laws only will be devised for the charter and regulation of all incorporated companies which heretofore

> have taken up much of the time of the Legislature and at great expense to the State.
>
> Thus *the abuses and much expense of legislation* will be avoided *without the necessity of restricting the representative principle.*

Appellant's App. Vol. III at 78 (italicized for reference).

This statement (of a single delegate) is not about the Special Session Clause. It is, rather, an argument against reducing the number of legislators—against "restricting the representative principle." The statement acknowledges the "argument of economy" (fewer legislators means less money for salaries) and that chartering corporations had "taken up much of the time of the Legislature and at great expense to the State," but dismisses those points because "the General Assembly shall be regularly convened but once in two years," and corporate charters were already addressed by the prohibition on special laws. *Id.* The reference to "the Governor['s] power to call an extra session in cases of emergency" is incidental to the biennial meetings point; it hardly suggests the counterintuitive points that a power to call legislators into session is a "check" on legislative abuse or that legislative meetings are somehow anathema to "the representative principle."

Similarly, the Governor's other quotations from the 1850 Convention debates merely reiterate the common-sense understanding that, with the legislature otherwise limited to meeting a few days every-other-year, the Special Session Clause was needed to provide a way to convene an adjourned legislature in exigent circumstances. *See* Appellant's Br. 13 ("when the Governor exercises this extraordinary

power of calling a special session of the Legislature, is it not right to impose a restraint, and throw a proper responsibility upon him by requiring him to show to the people, in his proclamation, the cause and necessity of such call?"); *id.* at 52 ("The object of the provision is to throw the responsibility of the exercise of the executive power in calling the Legislature together, upon the Executive.").

With textual restrictions on legislative meetings repealed in 1970 and 1984, the history of Article 4, Section 9 became one of *expanding* legislative power to schedule sessions by law, confirming that the Special Session Clause is about practicality and efficiency, not separation-of-powers. A full-time Governor is simply the most logical person to call a special session when no law provides for a session, but exigency demands one. That does not translate into a freestanding power to tell the legislature when it *cannot* meet.

***

In short, the Governor's argument for exclusive authority would transform a limited, exceptional—and inherently legislative—power into a sweeping, substantive executive power, all within the confines of the Article 4—the legislative article. The Governor can point to no precedents authorizing such counterintuitive re-working of the structural constitution. The Governor's theories would leave the Court with only an empty formalism that is insufficient to "clearly overcome" the presumed constitutionality of HEA 1123. *Baldwin v. Reagan*, 715 N.E.2d 332, 338 (Ind. 1999).

C. Article 16 is Irrelevant to the General Assembly's Exercise of its Constitutionally Authorized Legislative Power

As noted, the Governor did not raise his Article 16 argument below, so it is waived. Waiver aside, the Governor claims that "HEA-1123 is a 'dangerous' attempt at *de facto* constitutional amendment, which disenfranchises Indiana citizens of their constitutional right to ratify changes to Indiana's organic law." Appellant's Br. 33. But HEA 1123 is just a statute; it creates nothing like the new constitution proposed for ratification struck down in *Ellingham v. Dye*, 99 N.E. 1, 27 (Ind. 1912). The only real constitutional question (if the Court gets that far) is whether HEA 1123 comports with Article 4, Section 9. Article 16 adds nothing to that analysis.

If anything, respect for Article 16 is relevant only to the Governor's arguments over the meaning and validity of the 1970 and 1984 amendments based on their ballot questions. Although the Governor claims that he "is not seeking to challenge the outcome of the 1970 and 1984 amendments," Appellant's Br. at 36, his arguments belie that defensive assertion. Such arguments are precisely the sort that may advance the interests of a single official in a single case, but that harm the State's overall legal interests—the sort an independently elected Attorney General with broad responsibility for the State's legal interests would never advance.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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