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IN THE
INDIANA SUPREME COURT

No. 21S-PL-518

ERIC J. HOLCOMB, Governor of the State of Indiana, Appellant, v. RODRIC BRAY, in his official capacity as President Pro Tempore of the Indiana State Senate and Chairman of the Indiana Legislative Council; TODD HUSTON, in his official capacity as the Speaker of the Indiana House of Representatives and Vice-Chairman of the Indiana Legislative Council; THE INDIANA LEGISLATIVE COUNCIL, as established by Indiana Code § 2-5-1.1-1; and THE INDIANA GENERAL ASSEMBLY, Appellees.	)	Appeal from the Marion Superior Court Trial Court Case No. 49D12-2104-PL-14068 The Honorable Patrick Dietrick, Judge

APPELLANT'S BRIEF

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to its November 17, 2021, Order, and Ind. Appellate Rule 56(A).

STATEMENT OF ISSUES

1. Whether certain provisions of House Enrolled Act 1123, violate Article 4§9 and/or Article 3§1 of the Indiana Constitution (the "Constitution"), by giving the Legislative Council the power to call an "emergency session" (*i.e.,* a "special session") by simple resolution, despite express language in Article 4§9 vesting the power to call "special sessions" exclusively with Indiana governors.

2. Whether House Enrolled Act 1123 is an unconstitutional legislative attempt by the General Assembly to disenfranchise Indiana voters of their constitutional right under Article 16 of the Constitution to vote on proposed constitutional amendments.

3. Whether the trial court's endorsement of the ability of a sixteen-member Legislative Council to convene an emergency (special) session of the General Assembly by resolution only, violates Article 4§9's mandate that certain details of a legislative session be fixed or appointed "by law."[1]

[1] References to "Art.___§___" are shorthand for reference to Ind. Const. Art. __, § __.

STATEMENT OF CASE

This is a dispute between two branches of state government over the scope of their respective constitutional authority, implicating critical separation-of-powers considerations. More specifically, whether certain provisions in House Enrolled Act 1123 are constitutional. Those provisions are Ind.Code§2-2.1-1-1(3)(C), I.C.§§2-2.1-1.2-2,-7,-8,-9,-10, and I.C.§2-5-1.1-5(a)(9)(collectively, "HEA-1123"). Governor Holcomb filed suit to declare HEA-1123 unconstitutional and to enjoin its enforcement because it violates the Indiana Constitution.

Course of Proceedings

On April 27, 2021, Governor Holcomb filed his *Complaint for Declaratory Judgment and Injunctive Relief*. (Appellant's App. ("App") Vol.II,pp.48-62.) Governor Holcomb named the following defendants: (1) the President Pro Tempore of the Indiana Senate and the Speaker of the Indiana House of Representatives in their official capacities, as well as in their capacities as chairman and vice-chairmen of the Legislative Council, as established by I.C.§2-5-1.1-1 (the "Legislative Council"); (2) the Legislative Council; and (3) the Indiana General Assembly (the "Legislature"). (App. Vol.II,pp.48-49.) The defendants below will be collectively referred to as the "Legislative Parties."

The Legislative Parties moved to strike the *Complaint* on April 30, 2021, based on various grounds not the subject of Governor Holcomb's appeal. (App.Vol.II,pp.89-91.) Governor Holcomb opposed that motion. (App.Vol.II,pp.126-156.) After

receiving briefing from both parties, and conducting oral argument, the trial court denied that motion on July 3, 2021. (App.Vol.II,pp.180-198.)

On July 7, 2021, the Legislative Parties sought approval from the trial court to file an interlocutory appeal. (App.Vol.II,pp.201-209.) Governor Holcomb opposed that motion and, on July 20, 2021, the trial court denied it. (App.Vol.II,pp.223-235.) On July 26, 2021, the Legislative Parties sought emergency and permanent *writs of mandamus* from this Court, arguing that the trial court erred in holding they were subject to process while in session. *See State of Indiana ex rel. The Indiana General Assembly, et al. v. Marion Superior Court 12, et al.*, 21S-OR-00354 (Ind. filed Jul. 30, 2021). Governor Holcomb opposed those petitions. *Id.* This Court denied the emergency petition on August 3, 2021, and the permanent petition on August 27, 2021. (App.Vol.III,pp.12;Vol.VIII,p.22.)

On August 6, 2021, Governor Holcomb and the Legislative Parties filed cross-motions for summary judgment. (App.Vol.III,pp.13-14; 127-131.) On August 23, 2021, both parties filed their responses. (App.Vol.VII,pp.27-180.) The trial court heard arguments on September 10, 2021. (App.Vol.II,p.199.) On September 15, 2021, Governor Holcomb filed written answers to questions posed by the trial court at the summary judgment hearing. (App.Vol.VIII,pp.8-18.) On September 17, 2021, the Legislative Parties did likewise. (App.Vol.VIII,pp.19-22.)

Disposition of the Case

On October 7, 2021, the trial court entered its summary judgment order ("Order"). The court rejected the myriad procedural and jurisdictional arguments

advanced by the Legislative Parties, but held that HEA-1123 is constitutional. (App. Vol.II,pp.20-28.) This appeal followed. On November 17, 2021, this Court granted Governor Holcomb's Ind. Appellate Rule 56(A) Motion and accepted this emergency appeal.

STATEMENT OF FACTS

The 1816 Constitution and its aftermath.

The first Indiana Constitution was ratified in 1816 ("1816 Constitution"). Article 3§25 of that Constitution established annual regular sessions of the Legislature. It also granted Indiana governors the exclusive authority to call "extraordinary" sessions:

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

Art. 4§13 (1816).

Regarding separation-of-powers, the 1816 Constitution divided Indiana's government into three "distinct departments": the Legislative, Executive, and Judiciary. Art. II (1816). It also provided that "no person or collection of persons, being of one of those departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." *Id.*

In the 1840's, the Legislature undertook an ambitious program to develop canal and rail systems throughout (and beyond) Indiana. Justin E. Walsh, The

Centennial History of the Indiana General Assembly, 1816-1978, 31-40 (1987). Those efforts were mired in corruption and mismanagement by the Legislature, resulting in Indiana defaulting on its debts. *Id.* Indiana citizens, fed up with these legislators and the mischief they propagated during their annual sessions, and for other reasons, demanded a new constitutional structure. *Id.* at 39 ("As a result, representative government was discredited amidst demands that the power of the legislature so inept be curbed. The state's bankruptcy in the 1840's led inevitably to the call for the Constitutional Convention of 1850-1851.");(*Id.* at 114)(accord).

1851: A New Constitution

Regular and Special Sessions

On October 7, 1850, a constitutional convention was called in Indianapolis "to revise, amend, or alter, the Constitution" (the "1850 Convention"). (App.Vol.III,p.74.) To curtail the ability of the Legislature from "doing mischief," time limits were placed on regular and special sessions. Walsh, *supra*, at 178.

As reflected in the 1851 Debate Report, a governor's power to call special sessions was intended to allow the executive to act as a check on "the abuses and much expense of legislation…without the necessity of restricting the representative principle." (App.Vol.III,p.74.) James Rariden, a delegate from Wayne County, explained:

> 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....If we cannot trust the Governor so far to superintend the affairs of the State as to give warning to the representatives of the people of the difficulties that the State has to encounter,

> and to take upon himself the responsibility of incurring the expense of a special session, we had better abolish the office of the Governor altogether.

(App.Vol.III,p.82.)

That a governor's power to call a special session should not be absolute was also debated:

> And, sir, 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?

(App.Vol.III,p.80.)

The debates culminated in adoption of a new Indiana Constitution in 1851, setting biennial legislative sessions. "By a most decisive vote of the Convention…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." (App.Vol.III,p.78.) The version of Article 4§9 of the Constitution ratified in 1851 stated:

> The sessions of the General Assembly shall be held biennially at the capital of the State, commencing on the Thursday next after the first Monday of January, in the year one thousand eight hundred and fifty-three, and on the same day of every second year thereafter, unless a different day or place shall have been appointed by law. But if, in the opinion of the Governor, the public welfare shall require it, he may, at any time by proclamation, call a special session.

As with the 1816 Constitution, this provision limited a governor's ability to call a special session to "extraordinary occasions," in this instance, when "the public welfare shall require it…." *Id.* Neither the 1816 nor the 1851 Constitutions gave

either the governor or the legislative branch unfettered authority to call sessions whenever they wanted. *Supra.*

The 1851 Constitution limited sessions of the Legislature to sixty-one days, while limiting special sessions to forty days. Art. 4§29 (1851).

Separation-of-powers

Like its predecessor,[2] the 1851 Constitution retained a specific provision regarding separation-of-powers, which has remained unchanged since its ratification in 1851:

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

Art. 3§1.

1851-1912

After passage of the 1851 Constitution, there were multiple attempts over the next several decades to adjust or abandon the biennial schedule. 2 Charles Kettleborough, Constitution Making in Indiana, 15-16 (1916). None were successful. *Id.* at pp. 76;155-56;244;268.

In the latter part of the nineteenth century, it became evident that Indiana's means of amending the Constitution under Article 16 were cumbersome, especially as later interpreted by this Court in *In re Denny*, 156 Ind. 104, 59 N.E. 359 (Ind.1901)

[2] Art.II (1816).

overruled in part *by In re Todd*, 208 Ind. 168, 193 N.E. 856 (Ind.1935). Under the rule in *Denny,* it was not enough that a majority of *votes* were cast in favor of a proposed constitutional amendment. For an amendment to be ratified, a majority of all *voters* (representative of all "electors") had to vote in favor. *Id.* at 360. Further frustrating the ability to amend the Constitution was the provision in then-Article 16§2 preventing the proposal of additional amendments, while a prior proposed amendment's ratification was pending. Art.16§2 (1851).

All of this came to a head in 1911, when then-Governor Thomas Marshall spearheaded an effort to adopt a new constitution by legislation and (hoped for) subsequent approval by the general electorate. *See Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1 (Ind.1912). The proposed new constitution contained, *inter alia,* a provision extending regular legislative sessions to one hundred days. 2 Kettleborough, *supra* at 398. After what became known as the "Marshall Constitution" passed the Legislature in 1911, Indianapolis attorney John Dye filed suit to enjoin the election board from putting the constitutional measure on the 1911 ballot. *Ellingham*, 99 N.E. at 2. The Marion County Circuit Court agreed with Mr. Dye's position, and entered an injunction. *Id*. An appeal to this Court followed.

In 1912, this Court held that "[t]he presence of [Article 16] fights against the contention that the general grant of legislative authority bears…by implication any power to formulate and submit proposed organic law[,] whether in the form of an entire and complete instrument…or single amendment." *Id*. at 8. An amendment must be adopted by strict adherence to the process laid out in Article 16. *Id*.

More constitutional stasis followed. That changed after *In re Todd,* 208 Ind. 168, 193 N.E. 865, 878-79 (Ind.1935), in which this Court ruled that a majority of voters who cast ballots on the proposed amendment could ratify a proposed constitutional amendment. The ability to adopt new amendments to the Constitution was now less onerous, with amendments occurring between 1935 and 1960. Walsh, *supra* at 479.

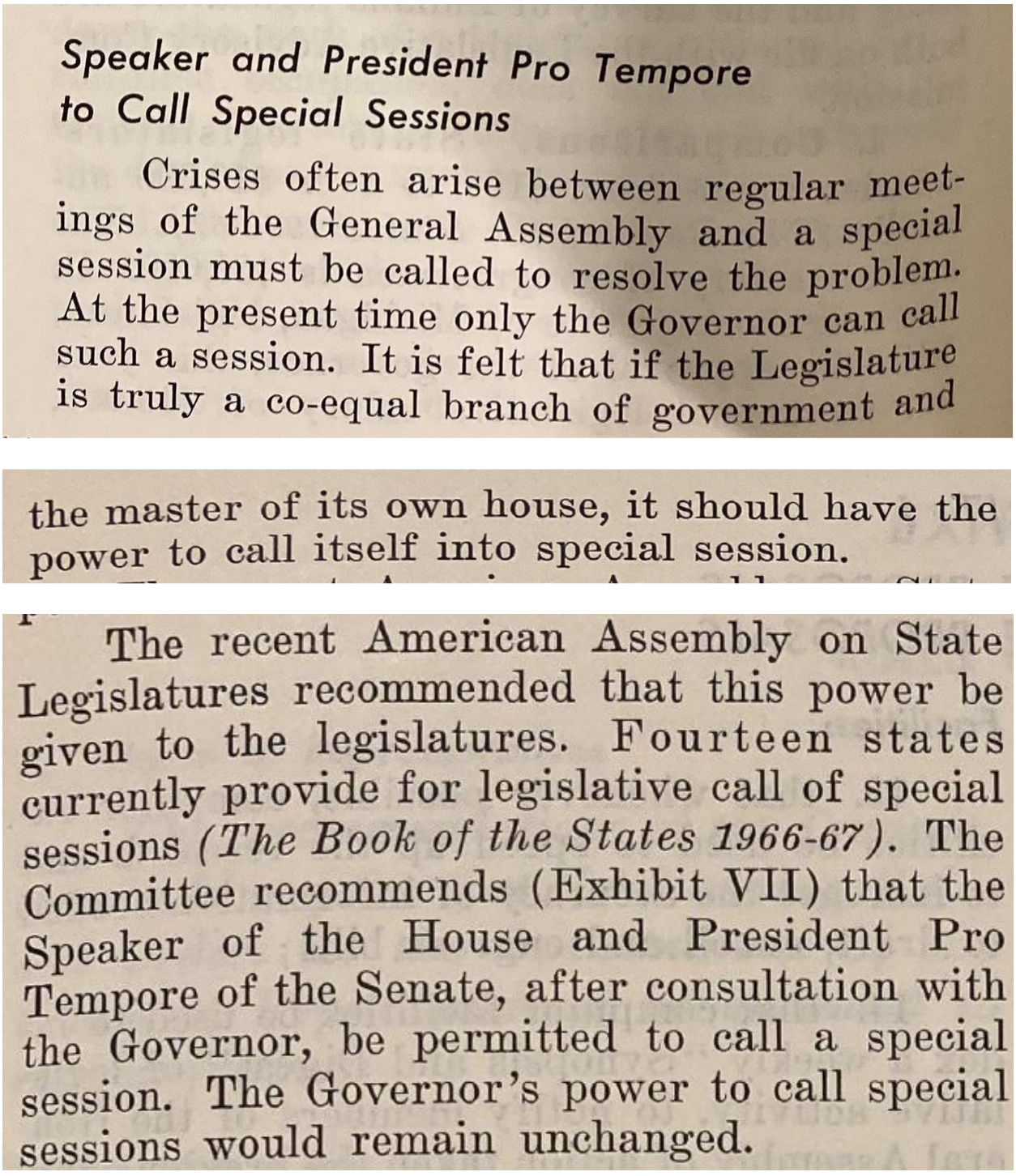
1960's to 1970's

In the 1960's and into the early 1970's, a push to modernize state constitutions spread across the country, with Indiana being no exception. *Id.* pp.492-493.

Legislative Study

In 1965, the Legislature created the "Study Committee on Legislative Operations" (the "Study Committee"), to assess the Legislature's capability to efficiently perform its duties. (App.Vol.VII,p.188.) Among other things, in its *Biennial Report to the Indiana General Assembly 1967* ("1967 Report"), the Committee concluded that the Constitution's restriction of convening "two months out of 24" was "not sufficient time to transact the State's business." (App.Vol.VII,p.192.) Accordingly, the Committee proposed amendments to the Constitution that would require annual sessions. (App.Vol.VII,p.192-93.)

The Committee also recommended adding an express provision granting the Legislature authority to call a "special session," reasoning:



Speaker and President Pro Tempore to Call Special Sessions

Crises often arise between regular meetings of the General Assembly and a special session must be called to resolve the problem. At the present time only the Governor can call such a session. It is felt that if the Legislature is truly a co-equal branch of government and the master of its own house, it should have the power to call itself into special session.

The recent American Assembly on State Legislatures recommended that this power be given to the legislatures. Fourteen states currently provide for legislative call of special sessions *(The Book of the States 1966-67)*. The Committee recommends (Exhibit VII) that the Speaker of the House and President Pro Tempore of the Senate, after consultation with the Governor, be permitted to call a special session. The Governor's power to call special sessions would remain unchanged.

(App.Vol.VII,p.192-193.)

To that end, the Committee's formal recommendation was:

> A JOINT RESOLUTION proposing an amendment to section 9, article 4 of the Constitution of the State of Indiana by changing the frequency of meetings of the General Assembly from biennial to annual and providing a different means for calling special sessions of the General Assembly.
>
> ***
>
> Section 9 of article 4 of the Constitution of the State of Indiana is amended to read as follows: Sec. 9. The sessions of the General Assembly shall be held *annually* at the capitol of the State, commencing on the *first Tuesday* after the first Monday of January, in the year one thousand eight hundred and fifty-three, and on the same day of every*****year thereafter, unless a different day or place shall have been appointed by law. But if, in the opinion of the Governor, the public welfare shall require it, he may, at any time by proclamation, call a special session: *Provided, further, That if, after consultation with the Governor, it is the joint opinion of the Speaker of the House and the President Pro Tempore of the Senate that the public welfare shall require it, the Speaker and President Pro Tempore may, at any time by proclamation, call a special session*.

(App.Vol.VII,p.201.)(italics in original)

The Committee's proposed amendment did not give the Legislature unrestrained discretion to call special sessions; its proposed authority to do so was expressly vested in the "Speaker of the House and the President Pro Tempore of the Senate," to be exercised only when "the public welfare shall require it." (*Id.*) Just like the governor's existing authority. *Supra.*

Legislative Action

The Committee's 1967 proposed text did not pass. Instead, the Legislature agreed upon and passed the following proposed amendments to Article 4§9 in 1967 and 1969:

> The sessions of the General Assembly shall be held ~~biennially~~ at the capital of the State, commencing on the ~~Thursday~~ Tuesday next after the ~~first~~ second Monday of January, in ~~the~~ each year in which the general assembly meets ~~year one thousand eight hundred and fifty-three, and on the same day of every second year thereafter~~, unless a different day or place shall have been appointed by law. But if, in the opinion of the Governor, the public welfare shall require it, he may at any time by proclamation, call a special session. The length and frequency of the sessions of the general assembly shall be fixed by law.

(App.Vol.III,pp.85-89.); *see also* 5 Constitution Making in Indiana, xvi, 222-23, 321-22 (Marcia J. Oddi ed., 2019).

Relatedly, the General Assembly approved changes to Article 4§29, as follows:

> The members of the General Assembly shall receive for their services a compensation to be fixed by law; but no increase of compensation shall take effect during the session at which such increase may be made. ~~No session of the General Assembly, except the first under this Constitution, shall extend beyond the term of sixty-one days, nor any special session beyond the term of forty days.~~

See 5 Oddi, *supra*, xvii;222-23;321-22. The proposed changes to Article 4 §§ 9 and 29 are collectively referred to as the "1970 Amendment."

As a stopgap measure to account for the scheduling of the 1971 legislative session, *discussed infra*, the Legislatures in 1967 and 1969 also attached a "Schedule" to the proposed amendment to Article 4§9, as follows:

"SCHEDULE

If at the time these amendments become effective, the General Assembly has not fixed the length of time in days of the legislative session by law, any regular session of the General Assembly held thereafter and until the length and frequency of such sessions are fixed by law shall begin from the date specified in Section 9 of Article 4 of this Constitution and shall continue for not more than sixty-one (61) session days. A session day is defined as any day in which either House of the General Assembly convenes. The Speaker of the House acting jointly with the President of the Senate, or if there be no President, the President Pro Tem of the Senate, jointly may recess or adjourn a session for any period of time not to exceed twenty-one (21) days, during which time various standing committees of both Houses may meet at the call of the respective committee chairmen. No regular legislative session of the General Assembly may extend beyond the 30th day of April of the year in which it is convened."

(*Id.*)

1970 Ratification

These proposed amendments (and others) were presented to Indiana voters on November 3, 1970. Regarding the proposed amendments to Article 4 §§ 9 and 29, the voters were asked this question:

Question 1.

Shall Article 4, Sections 9 and 29 of the Constitution of the State of Indiana be amended to permit the General Assembly to meet annually instead of biennially, and to establish the length and frequency of its sessions and recesses by law?

(App.Vol.VII,p.225.) "Question 1" was approved with 536,294 "Yes" votes. (*Id.*)

Newspaper articles and legal publications from that period made no mention of the 1970 Amendment changing who could call a "special session" of the Legislature. On the eve of the 1970 election, the *Decatur Daily Democrat* reprinted background information about the constitutional referendums, drafted by dean emeritus of the Indiana University School of Law Bloomington, Leon H. Wallace, for the Indiana Forum, Inc., a "nonpartisan, nonprofit organization." (Appellant's Addend. ("Addend.") p. 3.) As reported in that article, the proposed 1970 Amendment "would eliminate from the state constitution the present restrictions on the length (61 calendar days) and frequency (every two years) of regular legislative sessions." (*Id.*)

Regarding the Schedule, the article explained: "The schedule would be in effect only until the assembly passes a law establishing session length and frequency." (*Id.*) And although the "Background" section noted that "[t]o provide for emergencies, the state constitution gives the governor power to call special sessions…," there is no mention in the article that the proposed 1970 Amendment granted the Legislature the power to call special sessions. (*Id.*).

Other newspapers, and *Res Gestae*, wrote similarly about the 1970 Amendment. (App.Vol.VII,p.212);(Addend.pp.3-8.) State of Indiana publications from this period made no mention of any changes to who could call a special session. (*See, e.g.*, Addend.pp.9-48.)

1971 General Assembly and beyond

1971 Regular Session

In 1969, in anticipation of the 1970 Amendment (and others) being ratified, the Indiana Legislative Process Committee drafted the "Report of the Legislative Process Committee" (1969), "[t]o study the improvements necessary in the legislative process in the event of annual session of the General Assembly." (Addend.p.15.) This report contained recommendations that predated, but led to, passage of the Legislative Sessions and Procedures Law of 1971 (the "LSP Act"). (*see generally* Addend.pp.14-24.) As part of that report, the drafters recognized that "upon the effective date of [the LSP Act], the provisions of the Schedule to the amendment shall cease to be operative and shall be superseded by the provisions of the act." (Addend. p.20.)

The Legislature convened in 1971, presumably under the authority from the Schedule to Article 4§9, that had been approved by the 1970 Amendment. During that 1971 session, the Legislature enacted the LSP Act, I.C.§§2-2.1-1-1 to-13. Through that Act, the Legislature established dates and times for its "regular sessions," commencing on the third Tuesday after the first Monday of November. I.C.§§2-2.1-1-2 and -3. The Act also provided that "special sessions" called by a governor "shall continue for not more than thirty (30) session days nor more than forty (40) calendar days following the day upon which it is commenced." I.C.§§2-2.1-1-4. The Legislature defined "special session" as follows: "[T]hat period of time during which the general assembly is convened in session upon the proclamation and call of

the governor under Article 4, Section 9 of the Constitution of the State of Indiana." I.C.§§2-2.1-1-1(4).

The LSP Act made no mention of the Legislature having the ability, now that the 1970 Amendment had been passed, to likewise call a special session – despite the high likelihood that most of the legislators who passed that law in 1971 also voted on the proposed amendment to Article 4§9 in 1967, and again in 1969.

Through its most recent 2020 edition, the "Book of the States" (an authority relied upon in the 1967 Biennial Report, App.Vol.VII,p.192),[3] has consistently reported that the Legislature did not have the authority to call special sessions. *See* 52 The Council of State Governments, The Book of the States, 29 (2020) available at https://issuu.com/csg.publications/docs/bos_2020_web (last accessed December 11, 2021).

1971-1981

Between 1971 and 1981, legislators continued to debate whether annual sessions were preferable to biennial sessions. (Addend.p.6.) Nothing changed. Several special sessions were called by Indiana governors during that time. (App.Vol.VII, pp.240-241.) The Legislature called none.

[3] Since 1933, this book has been published by the Council of State Governments, a non-profit organization serving state governments. https://www.csg.org/about-us/ (last accessed December 11, 2021).

1984 Amendment

By 1981, it was apparent that several provisions in the Constitution were antiquated, such as myriad references to only "men" throughout.[4] In October 1981, the Legislative Council published its "Report of the Committee to Review Obsolete Provisions Contained in the Indiana Constitution" ("1981 Report"). (Addend.pp.43-48.) One such obsolete provision was the "Schedule" relating to Articles 4 §§ 9 and 29 that was part of the 1970 Amendment. The 1981 Report made clear that "schedules [were] stricken because their purpose was to implement amendments, not to become a part of the Constitution." (*Id.* p. 45);(*Id.,* p. 48 ("The committee believed it necessary to resolve the question of whether the schedules are part of the Constitution.")

Accordingly, on November 6, 1984, Indiana voters were presented with this question on their ballots:

> Shall the Constitution of the State of Indiana be amended by removing or restating certain antiquated language or provisions to reflect today's conditions, practices, or requirements?

[4] *Gallagher v. Ind. State Election Bd.*, 598 N.E.2d 510, 513 n.4 (Ind.1992)("Many of the proposed [1984] amendments…adopted gender-neutral terms or removed all reference to gender.").

(App.Vol.VII,p.234.) The ballot measure was approved. (*Id.*) Removal of the Art.4§9 Schedule in 1984 from the Constitution is referred to herein as the "1984 Amendment."

Contemporaneous accounts of the 1984 Amendment (and other 1984 amendments) make no mention of them having any impact on the ability of the Legislature or a governor to call "special sessions." (Addend.p.49)(describing amendment as one that "does away with archaic language and arcane provisions in the 1851 document.");(*Id.*,p.50)("'Essentially this is an amendment targeted at cleaning up poor grammar, awkward phrases and outdated language in our state constitution' [State Senator Joseph] Corcoran said.").

1985-1995

During this period, Indiana governors, and only Indiana governors, continued to call "special sessions." (App.Vol.VII,pp.243-246.)

In 1995, the Legislature introduced the concept of a "technical session day." Pursuant to this new law, the Legislature could hold a "technical session" for a single day no earlier than thirty (30) days after the prior "regular session" had adjourned *sine die*. I.C.§§2-2.1-1-2.5(b), -3.5(b).[5] A "technical session" cannot occur unless it was authorized prior to the Legislature's adjournment. *Id.* The scope of the technical session was specifically limited to matters relating to bills enacted during the related "regular session." I.C.§§ 2-2.1.1-2.5(c) and -3.5(b).

[5] A "session" of the Legislature under the Indiana Constitution generally must last at least three days, except for an emergency. Ind.Const.Art.4§18.

The Legislature also passed I.C.§1-1-3-3 in 1995. That statute, which addresses the effective date of acts passed during regular and special sessions, states that a "'regular session' includes a regular technical session." *Id.*

1996-2019

Indiana governors, and only Indiana governors, called "special sessions" between 1996-2019. (App.Vol.VII,pp.247-248.)

2020

In early 2020, the world learned about COVID-19. (App.Vol.II,pp.50-51.) By mid-March 2020, much of the world had been "shut down." (*Id.*) On March 11, 2020, the Legislature adjourned *sine die*. (App.Vol.V,p.191;Vol.VII,p.10.) During this same period, Governor Holcomb declared a state of emergency and also issued several emergency orders through his statutory authority to do so. I.C.§10-14-3-0.5 to -34. (App.Vol.III,pp.173-247;Vol.IV,pp.1-93.)

After the 2020 regular session had adjourned, Governor Holcomb asked Speaker Huston and President Pro Tem Bray – as the leaders of their respective chambers – whether they wanted him to call a "special session." (App.Vol.VIII,pp.7-13.) They declined. (*Id.*)

2021: HEA-1123

During the 2021 legislative session, the House introduced HEA-1123. That Act allows the Legislature, through a resolution of its Legislative Council,[6] to convene

[6] The "Legislative Council" is composed of sixteen (16) members of the General Assembly, including the president pro tempore of the Senate and the speaker of the House. I.C.§2-5-1.1-1.

a legislative session during a state of emergency. I.C.§2-2.1-1.2-7. HEA-1123 refers to these as "emergency sessions." I.C.§2-2.1-1.2-2. HEA-1123 also grants the Legislative Council the ability to establish the date, time, and place each chamber of the Legislature will convene, as well an agenda for addressing the state of emergency. I.C.§2-2.1-1.2-7. HEA-1123 also creates a "legislative state of emergency advisory group" that, *inter alia,* "shall review, evaluate, and make recommendations with respect to a state of emergency and any executive orders issued in response to the state of emergency." I.C.§§2-2.1-1.2-1 and -11.

HEA-1123 passed both houses on April 5, 2021. (App.Vol.III,pp.99;122.) Governor Holcomb vetoed HEA-1123 on April 9, 2021. (App.Vol.III,p.126.) The Legislature overrode the veto on April 15, 2021, making HEA-1123 effective immediately. (App.Vol.III,p.97.)

Speaker Huston said the courts would decide whether HEA-1123 is constitutional. (App.Vol.II,p. 55.) Governor Holcomb filed suit. (App.Vol.II,pp.48-62.)

The Legislature kept itself in session for the balance of 2021. (App. Vol.VII,p.60.) Throughout the entirety of its 2021 session, the Legislature did not pass legislation to revoke any of the executive orders that Governor Holcomb issued in 2020 and 2021, nor did it exercise its authority to end the state of emergency. (App. Vol.VII,pp.12-13.)

SUMMARY OF ARGUMENT

This case is not about the COVID-19 pandemic or whether Governor Holcomb's various executive orders were justified factually or legally. This case is about something far more important than transient policy disagreements between elected officials.

This case is about the Legislature's enactment of HEA-1123, which improperly usurped a power exclusively vested in Indiana governors by the Constitution, and by doing so, (a) fundamentally altered the delicate separation-of-powers balance established by the Constitution, and (b) denied Indiana citizens their constitutional right to vote on proposed constitutional amendments.

This case is also not about whether it makes sense for the Legislature to have the ability to call a special session. The constitutions of thirty-five other states clearly and expressly vest that authority in their respective legislatures. (App.Vol.VII,pp.131-145.) Governor Holcomb does *not* suggest that, if an amendment is properly passed under Article 16, the Legislature cannot do likewise. But it is not for the Legislature to make that decision by itself. Under Article 16(c), it is for the sovereign authority of Indiana's organic law – its voting citizenry – to decide by a well-informed vote, whether to ratify a proposed constitutional amendment vesting the Legislature with that authority. That has not happened.

There is no dispute between the parties and the trial court that, prior to the 1970 Amendment, *only* Indiana governors held the constitutional authority to call special sessions. (App.Vol.II,pp.40-41.) The trial court erred when it held that an

unrestrained right of the Legislature to call sessions (special or otherwise) whenever it wants, somehow sprung from the 1970 and 1984 constitutional amendments. (App. Vol.II,pp.42-47.)

Contemporaneous events surrounding both amendments, which is relevant to properly understanding the text of Article 4§9,[7] belie the conclusion that those amendments effectuated such a significant change. Policy considerations debated by the framers of the 1816 and 1851 constitutions also undermine the trial court's ruling, not the least of which is the importance of centralizing the decision about when to call special sessions in one person: the Indiana governor.

Central to this dispute is the meaning of Articles 4§9 and 3§1 of the Constitution. Article 4§9, states:

> 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. (emphasis added).

Article 3§1, states:

> The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another,

[7] *Meredith v. Pence*, 984 N.E.2d 1213, 1218 (Ind.2013)("In order to give life to [the framers'] intended meaning, we examine the language of the text in the context of the history surrounding its drafting and ratification.").

> **except as in this Constitution expressly provided.** (emphasis added).

Together, those provisions mean that when a constitutional power has been expressly vested in one branch of government – here, a governor's authority to call a "special session" – for that power to concurrently exist in another branch, that power must be "expressly provided" for elsewhere in the Constitution. But nowhere in the Constitution is the Legislature vested with the express constitutional authority to call a "special session." HEA-1123 is unconstitutional.

Alternatively, upholding HEA-1123 would lead to significant public policy concerns by allowing the Legislative Council to convene the legislature by a simple resolution, I.C.§2-2.1-1.2-7, when the Constitution requires that certain elements of a legislative session be established "by law." Allowing an express constitutional requirement to be exercised by a non-constitutional body comprised of only sixteen members, sets troubling precedent for Indiana's open and accountable system of government.

ARGUMENT

I. Standard of Review

The meaning of the Indiana Constitution is a question of law for the Court. *Sanchez v. State,* 749 N.E.2d 509, 514 (Ind.2001). The trial court's Order is reviewed *de novo*. *Id.* This Court has explained that an analysis of constitutional meaning involves:

> [A] search for the common understanding of both those who framed it and those who ratified it. Furthermore, the intent of the framers of the Constitution is paramount in determining the meaning of a provision. In order to give

> life to their intended meaning, we examine the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions. In construing the constitution, we look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy. The language of each provision of the Constitution must be treated with particular deference, as though every word had been hammered into place.

Meredith, 984 N.E.2d at 1218 (citations omitted).

II. HEA-1123 authorizes a special session.

HEA-1123 purports to create an "emergency session of the general assembly." I.C.§2-2.1-1-1(3)(C). What HEA-1123 calls an "emergency session" is, in reality, an unconstitutional "special session" not authorized by Article 4§9.

An "emergency session" under HEA-1123 is a non-regular session which, by its very terms, can never have a fixed and predetermined beginning date; rather, an "emergency session" is based on the occurrence of a set of unpredictable circumstances. The same is true for a "special session." As recognized in the Legislature's 1967 Report: "Crises often arise between regular meetings of the General Assembly and a special session must be called to resolve the problem." (App.Vol.VII,p.192.)

An "emergency session" and a "special session" share the same characteristics. Both are predicated on the occurrence of extraordinary and/or unpredictable events. An "emergency session" can only occur when a governor has declared a disaster emergency. A "special session" can occur only when a governor determines "the public

welfare requires it." In other words, there is no practical or constitutional distinction between HEA-1123's "emergency session" and a "special session" under Article 4§9. Both are unpredictable non-regular sessions.

In contrast, a "regular" session of the Legislature is one "fixed" and "appointed" in advance "by law" pursuant to the first and third sentences of Article 4§9. The Legislature "fixed by law" the existence of annual sessions through its enactment of the LSP Act, I.C.§2-2.1-1-2, -3. The date, location, and length of those regular sessions are fixed until the Legislature changes something "by law," as it did when it recently extended its regular session for the duration of 2021. *Supra.*

Because an "emergency session" is the same as a "special session" under Article 4§9, the Legislature must have constitutional authority to call an emergency (special) session. It has none, and so HEA-1123 is unconstitutional.

III. Indiana voters did not amend the Constitution in 1970 or 1984 to give the Legislature the authority to call special sessions.

Upholding HEA-1123 harms the sovereign authority of Indiana's organic law: its citizens. As this Court recognized in *Ellingham v. Dye, supra*, the legislative branch cannot divest Indiana's citizens of their constitutional right to decide whether to amend the Constitution. That constitutional right is protected by *Ellingham's* mandate of strict compliance with Article 16.

As stated previously, both parties and the trial court agree that, prior to 1970, the Legislature did not have the constitutional authority to call a special session:

> Trial court: "The original 1851 Constitution explicitly limited the General Assembly's authority over the timing of its sessions in multiple ways…." (App.Vol.II,p.40.) The 1970 and 1984 amendments removed the "limits" on the

> Legislature, so that the "[Legislature] now has complete authority to set the rules governing the timing of its sessions." (App.Vol.II,pp.40-42.)
>
> Legislative Parties: "[W]hile the 1851 Constitution mandated biennial sessions of no more than 61 days…, those specific textual restrictions have long since been repealed. First, in 1970 the General Assembly gained full control over the length and frequency of its sessions." (App.Vol.VII,p.41.) "Second, a 1984 constitutional amendment removed the one limitation on the legislature's ability to meet that remained: [the Schedule]." (App.Vol.VII,p.42.)

So, for HEA-1123 to be constitutional, during or after 1970, the Constitution must have been amended to vest authority in the Legislature to call special sessions. Otherwise, upholding the constitutionality of HEA-1123 "stiffens" ordinary law into constitutional law without the required constitutional ratification by Indiana citizens, a result this Court described in *Ellingham* as causing "'extreme danger'" to our form of government. *Ellingham*, 99 N.E. at 4 (quoting John A. Jameson, A Treatise on Constitutional Conventions, Its History, Powers, and Mode, 84-86 (4th ed. 1887)).

Quite simply, there has been no amendment to Article 4§9 authorizing the Legislature to call special sessions. As such, HEA-1123 is a "dangerous" attempt at a *de facto* constitutional amendment, which disenfranchises Indiana citizens of their constitutional right to ratify changes to Indiana's organic law.

A. Indiana voters establish and amend organic law: The Constitution.

The importance of properly enacting constitutional amendments is grounded in the difference between Indiana's "fundamental" or "organic" law (*i.e.,* the

Constitution), and its "ordinary laws" (*i.e.,* statutory laws). As explained in *Ellingham,* the Constitution is Indiana's "fundamental" or "organic" law. *Ellingham,* 99 N.E. at 3-14. "A 'state Constitution' has been aptly termed a legislative act by the people themselves in their sovereign capacity, and therefore the paramount law." *Id.* at 4 (quoting Cooley's Constitutional Limitations (7th Ed.), p. 242). A "'Constitution' is designated as a supreme enactment, a fundamental act of legislation by the people of the state." *Id.* "The government so instituted was representative of the creator of it, the people." *Id.* at 3.

Our Legislature, through its members, serves as the "agent" of "the people" by enacting "ordinary laws." *Id.* at 4. "'Ordinary laws are enactments and rules for the government of civil conduct, promulgated by the legislative authority of a state, or deduced from long-established usage. It is an important characteristic of such laws that they are tentatory, occasional, and in the nature of temporary expedients.'" *Id.* (quoting Jameson, *Constitutional Conventions*, pp. 84-86). The "ordinary laws" that the Legislature passes are "'secondary, being commands of the sovereign, having reference to the exigencies of time and place resulting from the ordinary working of the machine.'" *Id.*

The Court in *Ellingham* recognized the danger to our system of government if our Constitution is amended without strict compliance with Article 16. *Ellingham*, *supra* at 3-14. "'[O]rdinary laws are merely temporary expedients or adjustments, and cannot be allowed to stiffen into constitutional provisions without extreme danger to the commonwealth….'" *Id.* at 4 (quoting *Constitutional Conventions,* pp.

84-86). "Power over the Constitution and its change has ever been considered to remain with the people alone, except as they had, in their Constitution, specifically delegated powers and duties to the legislative body relative thereto for the aid of the people only." *Id.* at 8. "There can be little doubt but that the framers of the revised Constitution of 1851 believed that in article 16 they had provided an orderly method for making all the changes in the organic law which might become necessary." *Id.* at 13. "The question is one of power to draft organic law. Of such power the Legislature has only that measure expressly granted to it by the people speaking through the Constitution; and that is to be exercised strictly in the mode provided." *Id.* at 15.

B. Indiana voters have a right to vote on sufficiently identified constitutional amendments.

After the Legislature twice passes resolutions for a proposed constitutional amendment under Article 16, there are requirements applicable to how to describe the proposed amendment to Indiana voters. "[T]he [State Election Board] shall prepare a brief statement on the public question in words *sufficient to clearly designate it* and have the statement printed on the state ballot…." I.C.§3-10-3-2(a).

The meaning of a prior version of I.C.§3-10-3-2 that was in effect for the 1970 election was addressed by this Court in *Roeschlein v. Thomas,* 258 Ind. 16, 280 N.E.2d 16, 36 (Ind.1972)(wording on 1970 ballot regarding constitutional amendments to Article 7 adequately "summariz[ed] the principal features" of the proposed amendment). See also*, Oviatt v. Behme*, 238 Ind. 69, 147 N.E.2d 897, 900 (Ind.1958)(amendment must be "sufficiently identified and…not confused with any other amendments submitted at the time….").

Outside of Indiana, there is a developed body of law on "how" to sufficiently describe constitutional amendments on ballots. *See* 16 Am. Jur. 2d Constitutional Law § 33. Relevant here:

> In order for ballot language describing a proposed constitutional amendment to be valid under a state constitution, the text of the ballot statement must fairly and accurately present the question or issue to be decided in order to assure a free, intelligent and informed vote by the average citizen affected, and ballot language ought to be free from any…omission.
>
> [A] ballot question must at least put voters on notice of the changes being made to the constitution.
>
> When the major effect of a proposed constitutional amendment would be a substantive change in existing law, the ballot should inform the reader of the scope of the change.

Id. (citations omitted).

"The desirability of an informed electorate in passing on changes in the fundamental law of the constitution is disputed by no one, and the practice of informing the voters of the nature of constitutional amendments has been given high priority in judicial decisions." *Id.* (citations omitted).

Governor Holcomb is not seeking to challenge the outcome of the 1970 and 1984 amendments based on inadequate descriptions on those ballots. It is his view that the plain text of those amendments clearly demonstrates that they were not intended to vest the Legislature with the constitutional authority to call a "special session." The point of reciting the law on constitutional ballot descriptions here is to "examine the…text in the context of the history surrounding [the] drafting and

ratification" of the 1970 and 1984 amendments. *Meredith*, 984 N.E.2d at 1218 (citations omitted). "[T]he state of things existing when" the 1970 and 1984 amendments were ratified – including how they were presented to Indiana voters – supports the textual reading of Article 4§9 that was rejected by the trial court.

C. Indiana voters in 1970 and 1984 did not authorize the Legislature to call special sessions.

If an Indiana voter read his or her local newspaper(s) on the eve of the 1970 and 1984 elections, or in the days thereafter, they would have seen no hint that a constitutional amendment was being proposed that allegedly granted the Legislature a new and broad (unrestrained) ability to call special sessions. (Addend.pp.3-5.) Rather, in 1970, those citizens were asked to vote on whether to give the legislature the ability to "meet annually instead of biennially, and to establish the length and frequency of its sessions and recesses by law?" (App.Vol.VII,p.225.) In 1984, they were asked whether the Constitution should be "amended by removing or restating certain antiquated language or provisions to reflect today's conditions, practices, or requirements?" (App.Vol.VII,p.234.)

Those questions did not notify Indiana voters that a fundamental constitutional change was afoot to expand who (the Legislature) and under what circumstances (any and all) the Legislature could call special sessions, because that is not what the plain text of those amendments did. If the aim in 1970 or 1984 was to vest that new authority in the Legislature, it could have been easily, and transparently, accomplished (it was not). For example, in 1980, voters in Oklahoma

were asked this ballot question about a proposed constitutional amendment regarding who could call special sessions:

> Shall a constitutional amendment adding a new Section 27A to Article V of the Oklahoma Constitution, providing that the presiding officers of both Houses of the Legislature shall jointly order the Legislature into special session upon there having been filed with them a written call signed by two-thirds (2/3) of the membership of each House asking that a special session be called; and reserving the Governor's existing right to call special sessions of the Legislature, be approved by the people.

(Addend.p.51.)

Oklahoma's voters knew what they were being asked to amend in 1980. Indiana voters, on the other hand, did not have a similar understanding that in 1970 and/or 1984, they were ratifying a constitutional amendment that granted new power to the Legislature to call special sessions. That is not because of poorly worded ballots; it is because no such amended constitutional power had been passed in the 1967 or 1969 Legislation.

D. Indiana legislators did not believe they had the authority to call special sessions starting in 1970 or 1984.

In 1967, the Legislature knew exactly how to draft language that would have vested it with the express authority to call special sessions. (App.Vol.VII,pp.192-93.) In its 1967 Report, the Study Committee noted that for the Legislature to be the "master of its own house, it should have the power to call itself into special session…," just as fourteen other states could do at that time. (*Id.*) Yet, the Legislature declined to include the Committee's recommended language in the 1967 or 1969 resolutions. 5 Oddi, *supra*,pp.xvi;222-23;321-22.

In 1971, during the first session after ratification of the 1970 Amendment, the Legislature promptly passed the LSP Act, therein properly defining "special session" as one called by Indiana governors "under Article 4, Section 9 of the Constitution…." I.C.§2-2.1-1-1(4). Notably, what the Legislature did *not* do when it drafted and enacted the LSP Act, was authorize itself to call a special session or recognize, in any way, that it now had the power to do so.

Between 1970's amendment to Article 4§9, and HEA-1123's passage in 2021, 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. Twenty-five (25) different Legislatures came and went during those five decades, without one of them asserting the power to call a special session. During that fifty-one (51) year period, Indiana governors, and only Indiana governors, continued to call special sessions.

If the purpose of the 1970 Amendment was to vest authority in the Legislature to call a "special session," it follows that the legislators in 1971 would have immediately established a process to exercise that very power, not wait 50 years to have an epiphany that the power to do so actually existed. If the Legislature's intent was to amend the Constitution in 1970 so it could call a "special session" during a future crisis or emergency – and because crises and emergencies are unpredictable (and potentially life-threatening) by their nature – it makes no sense that it failed to enact a law like HEA-1123 back in 1971, but instead waited 50 years to do so when our state is in the middle of a pandemic.

Ellingham is instructive regarding the constitutional significance of the Legislature's 51-year silence. In *Ellingham,* this Court emphasized that for a period of almost 100 years — from the adoption of Indiana's original 1816 Constitution, through passage of the "Marshall Constitution" in 1911 — no claim had ever been made "that the Legislature had power to draft and submit proposed organic law other than that specifically given by article 16…." *Ellingham,* 99 N.E. 14. That "contemporaneous construction, which ha[d] persisted for nearly a century, [spoke] loudly in harmony with reason and the sound principles of representative democracy against the possession of the power claimed." *Id.*

Otherwise stated, because from 1816 until passage of the 1911 Marshall Constitution, nobody had claimed that the Constitution could be amended through means other than strict compliance with Article 16's dictates, that long silence supported the conclusion that Article 16's requirements were the only means of amendment. The same is true here with respect to who (only a governor) can call a special session under Article 4§9, albeit the period of silence is 50 years, not almost 100.

E. The trial court ignored applicable historical context.

The absence of language on the 1970 and 1984 ballots purporting to grant the Legislature the right to call special sessions, contemporaneous newspaper articles and governmental papers that do not discuss any such right, and the 50-year silence by legislators, are exactly the type of "contemporaneous construction" and historical context that, as in *Ellingham,* should lead this Court to conclude that there were no

changes in who could call special sessions through ratification of the 1970 and 1984 amendments. Although the trial court relied on those amendments as the source of the Legislature's authority to call special sessions, it ignored almost all of the context associated with their ratification that was presented to it. That history, *supra*, fully supports the textual reading of Article 4§9 that follows.

IV. Article 4§9 gives to the Governor alone, not to the Legislature, the power to call special sessions.

Application of well-established interpretive canons establishes that the trial court's interpretation of Article 4§9 is incorrect.

A. Constitutional interpretive canons require that words be given their ordinary meaning, and the express trumps the implied.

It is for this Court to determine the meaning of the Constitution and whether, as of 2021, Indiana governors have the sole and exclusive authority to call special sessions. In the course of doing so: "Words are to be understood in their ordinary, everyday meanings – unless the context indicates that they bear a technical sense." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 69 (1st. ed. 2012). "Words are to be given the meaning that proper grammar and usage would assign them." *Id.* at 140.

Two additional interpretive canons are worth highlighting. The first, applied in both *Ellingham,* 99 N.E. 16-17, and *Tucker v. State,* 218 Ind. 614, 35 N.E.2d 270, 292 (Ind.1941), is that it is improper to "*imply* an intention that conflicts with a definite and expressed intention." *Tucker,* 35 N.E.2d at 292 (emphasis added); *accord, Ellingham,* 99 N.E. at 16 (A "well established" rule of construction is "where

the means by which a power granted shall be exercised as specified, no other or different means for the exercise of the power can be implied even though considered more convenient, or effective, than the means given in the Constitution."); *Id.* at 15 ("[A] canon of constitutional construction forbids the implication of…authority, for it is the rule that where the means by which the power granted shall be exercised as specified, no other or different means for the exercise of such power can be implied….").

The second cannon is *expressio unius est exclusio alterius,* also known as the "negative-implication canon." *See Scalia*, *et al.*, *supra* at 107. Under that doctrine, "that which is express makes that which is silent to cease." *Robinson v. Moser,* 203 Ind. 66, 179 N.E. 270, 272 (Ind.1931)(noting this as a "rule of general acceptance" when interpreting constitutional provisions); *see also A.A. v. Eskanazi Health/Midtown CMHC,* 97 N.E.3d 606, 614 (Ind.2018)(recent application of doctrine). "The doctrine properly applies only when the *unius* (or technically, *unum,* the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved." *See Scalia*, *et al.*, *supra* at 107.

There is no dispute that prior to 1970, only Indiana governors had the power to call a "special session" (*i.e., unum,* the "thing specified"). (App.Vol.II,pp.40-41.) As a result, under both of these doctrines, unless a similar *express* grant of authority to call a special session was added to the Constitution in or after 1970, it means that any power the Legislature may have had to call a special session (a) "ceased" in 1851 and has remained so, and (b) cannot be added by implication.

B. Separation-of-powers means that powers given exclusively to one branch cannot be claimed by another.

Exceeding the importance of the aforementioned common law constitutional interpretative canons, but wholly consistent therewith, is Indiana's express separation-of-powers clause, Article 3§1. The following language in Article 3§1 means that if there is no *express* authority given to the Legislature to call a special session, then none can be *inferred* by any other provision in the Constitution: "[N]o person, charged with official duties under one of these [three] departments **shall exercise any of the functions of another, except as in this Constitution expressly provided.**" (emphasis added). The Court will find nothing in the Constitution, as amended in 1970 and 1984, that "expressly provide[s]" any power or authority for the Legislature to call a "special session." As such, Article 3§1's dictates preclude vesting that authority in the Legislature by implication.

C. The first sentence establishes regular sessions.

> "The sessions of the General Assembly shall be held at the capital of the State, commencing on the Tuesday next after the second Monday of January, in each year in which the general assembly meets, unless a different day or place shall have been appointed by law."

This first sentence establishes the existence of a default date and location for "sessions of the [Legislature]…." It also sets forth a procedure for changing the default date and location, "by law." As explained below, this language cannot apply to anything other than a "regular session," and does not vest the Legislature with the power to create a special session.

As originally written in 1851, this first sentence sets forth the existence and frequency, default location, and default starting day for "sessions of the General Assembly": they were "biennial[ ]," held "at the capital of the State," and were to "commenc[e]" in early January "every second year." The sentence provided flexibility for the starting day and location of biennial sessions, as long as the other day or place was "appointed" in advance "by law." Prior to 1970, however, the sentence provided *no* flexibility for the Legislature to meet outside its biennial session, other than by special session called by a governor.

The 1970 Amendment changed the default January start day and, more significantly, removed the mandate for biennial sessions:

> The sessions of the General Assembly shall be held ~~biennially~~ at the capital of the State, commencing on the ~~Thursday~~ Tuesday next after the ~~first~~ second Monday of January, in ~~the~~ each year in which the general assembly meets ~~year one thousand eight hundred and fifty-three, and on the same day of every second year thereafter~~, unless a different day or place shall have been appointed by law.

The 1970 Amendment removed the word "biennially" and the phrase "and on the same day of every second year thereafter," and instead added the words "*each year* in which the general assembly meets" (emphasis added), making it possible for sessions to be held in "each year" that the legislature desires to hold a session. Beyond these changes, however, the language remained the same as written in 1851.

What did not change in 1970 was the phrase, "unless *a* different *day* or *place* shall have been appointed by law." Art.4§9 (emphasis added). Those words are all in the singular, contemplating *one* distinct "*day*" or "*place*" for "each *year*" sessions. If,

as the Legislative Parties argue, this sentence is part of the authority that vests in the Legislature the ability to call sessions whenever it wants, then the drafters of the 1970 Amendment would have amended this phrase to say, for example, "unless different days or places shall have been appointed by law." That they did not write the amendment that way supports the conclusion that regular sessions cannot be held multiple times in the same year.

Accordingly, as it reads today, this sentence cannot give the Legislature authority to "appoint by law" an additional or special session. Rather, this sentence merely establishes the existence of sessions, sets the default location and day to begin its regular sessions, the procedures to "appoint" *a* different day or location "by law," and the annual limit ("each year") to the frequency of regular sessions.

The trial court's Order renders superfluous the words "each year" in the first sentence, contrary to *Meredith,* 984 N.E.2d at 1218. The trial court concluded that "nothing in Article 4, section 9 limits the [Legislature] to one annual 'regular' session. Neither the word 'annual' nor the word 'regular' even appear in Article 4, section 9." (App.Vol.II,p.42.) The trial court's second sentence is technically correct, but it does not support the legal conclusion in its preceding sentence.

The first sentence of 4§9 contains the words "each year," which the trial court ignored. Those words have meaning. They do not mean "each quarter," "each month," "each week," or "whenever the Legislature wants." The framers of the 1970 Amendment chose those words carefully to mean that regular sessions can only be "each year," although they can be held annually or biennially, depending on which

"frequency" the Legislature "fix[es] by law" with the power given to it in the third sentence, *infra.* That is the understanding upon which the ratifiers of the 1970 Amendment voted, *supra,* not whether sessions could be "annual, biennial, *or multiple times per year*."

In sum, the first sentence deals only with regular sessions, as has been the case since 1851.

D. The second sentence gives only governors the authority to call special sessions.

> "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."

This second sentence, unchanged since 1851, reflects the unpredictable need to call non-regular "special sessions." Use of "[b]ut" at the beginning of the sentence reflects a type of session different than a regular session.

Authority to trigger these non-regular sessions is given to one person, "the Governor," at his discretion: "if, in the opinion of the Governor, the public welfare shall require it, he may...." For logistical reasons, and as a check on the type of legislative "mischief" that led to the writing of the 1851 Constitution in the first place, the framers decided to vest this power in one person alone — a governor — when he/she deems it is in the public's interest. *See supra.* That authority, however, is not unrestrained. It can be exercised only when "the public welfare shall require it…."

The result of the trial court's Order is that the Legislature has *unrestrained* "complete authority to set the rules governing the timing of its sessions" (App. Vol.II,p.41), while, on the other hand, the Governor's authority remains restrained

for only when "the public welfare shall require it" (as the 1851 framers intended, *supra*).

A special session is triggered by the Governor's "call...at any time by proclamation," whereas regular sessions are established or "called" by the Constitutional text itself.[8]

Finally, a "special session" is a term of art different and distinct from a "regular session." *See Woessner v. Bullock*, 176 Ind. 166, 93 NE.1057, 1058 (Ind.1911)(noting that the Court "should, naturally, expect" the framers to distinguish the language they used regarding different types of legislative sessions).

E. The third sentence gives the Legislature discretion regarding regular session length and annual frequency.

> "The length and frequency of the sessions of the General Assembly shall be fixed by law."

The 1970 Amendment deleted the words "biennially," and "on the same day of every second year thereafter," from the first sentence, as well as Article 4§29's textual limits on session lengths. *Supra.* As such, this third sentence was added to give the Legislature discretion to determine how long its sessions would be, and whether they would be annual or biennial. The third sentence does not, however, give authority to create non-regular/special sessions.

This sentence allows the Legislature to set the "length" (duration) of its sessions and, within the boundaries established by the first sentence ("*each year* in which the general assembly meets"), the annual/biennial "frequency" of its sessions—

[8] They are "held" in "each year in which the general assembly meets." Art.4§9.

with no more than one regular session occurring per ("each") year. It must "fix[ ]"[9] these limits and routines "by law."

Of note, however, this sentence does *not* give the Legislature authority to create new sessions, or to fix the "frequency" of non-regular sessions. It is impossible for any branch to "fix" in advance the recurrence of something that by definition is special, non-regular, non-recurring, and unknown until the need arises. The occurrence of special sessions is, instead, dictated by unpredictable circumstances. (*See* App.Vol.VII,p.192). When an unpredictable need arises, and assuming that the Legislature is not presently in session, it cannot legally "fix" a date for itself to return before the start of the next annual session. *Supra.*[10]

F. The trial court's interpretation is wrong.

The trial court improperly concluded that Article 4§9 "allows the [Legislature] to determine where it will meet, when it will meet, how long it will meet, and how frequently it will meet…." (App.Vol.II,pp.39-40.) In reaching that conclusion, the trial court made several interpretive errors beyond the ones noted above, including

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[9] "[B]eing set firmly in position"; "not subject to change or variation." *Webster's II New College Dictionary*, p. 424.

[10] Indiana's elected legislators have no authority to enact laws if they are not together in an official "session" of the Legislature. *See generally* Art. 4. As explained in *Simpson v. Hill*, 263 P. 635, 641 (Okla. 1927), a case in which the Oklahoma Supreme Court was presented with a special session separation-of-powers dispute virtually identical to the one before this Court now (and which is discussed in more detail *infra*), that court noted that if legislators "come to the Capitol" not for a properly called legislative session, they come as individual" and have no authority to pass laws.

its failure to analyze and consider the history and context of the changes to Article 4§9 discussed above.

1. The trial court erroneously gave substantive meaning to the 1984 Amendment.

The trial court's description of the 1984 Amendment ignores the text of the 1970 "Schedule," the text of the 1984 ballot, and other contemporaneous information. The 1970 Schedule's opening sentence makes clear that the terms that follow would have no further import once the Legislature enacted a law establishing future sessions. (App.Vol.VII,pp.205-06; 210); *See also* 5 Oddi, *supra*, xvii;222-23;321-22 (noting the Schedule sets the session(s) "until the length and frequency of such sessions are fixed by law…."). The length of regular and special sessions, and the frequency of regular sessions (but not special sessions), was "fixed by law" in 1971 through the passage of the LSP Act, thereby rendering the Schedule "obsolete" at that time by virtue of its self-executing language.

Through 1981 and 1983 legislative resolutions, which were ratified by the voters in 1984, the "obsolete" Schedule was removed from the Constitution. (Addend.pp.43-48.) The trial court is wrong when it wrote that in 1984 "the people of Indiana adopted a constitutional amendment that removed…[the Schedule's] April-30-adjournment requirement – and thereby eliminated the sole remaining limit on the legislature's control over its sessions." (App.Vol.II,p.39.)

Yes, the Schedule was removed in 1984. But it was already "obsolete" and its removal from the constitutional text did not "eliminate" any remaining constitutional scheduling restrictions on the Legislature. In *Gallagher v. Ind. State Election Bd.*,

598 N.E.2d 510 (Ind.1992), this Court – in the context of analyzing other constitutional provisions impacted by the 1984 Amendment – recognized that the 1984 amendments were primarily "stylistic changes," not substantive. *Id.* at 514 (rejecting argument that the 1984 Amendments to Art. 2§2 were substantive). The trial court's interpretation of the significance of the 1984 Amendment is error.

2. The trial court misapplied the case of League of Women Voters of Wisconsin v. Evers.

The trial court's reliance on *League of Women Voters of Wisconsin v. Evers,* 929 N.W.2d 209 (Wis.2019), is also misplaced. (App.Vol.II,p.40.) That case involved a dispute regarding whether the Wisconsin legislature had adjourned *sine die,* the answer to which impacted whether a subsequent session held after the November 2018 general election was a new session. Whether or not the Indiana Legislature has adjourned *sine die* does not drive the determination of whether HEA-1123 is constitutional. *Evers* does not support the trial court's ruling.

3. The trial court gave improper constitutional significance to technical sessions.

The trial court incorrectly relied on the existence of "technical sessions" for support that past-practice regarding technical sessions since 1995 confirms the Legislature's ability to set more than one session per year. (App.Vol.II,p.44.)

No court has ever addressed the constitutionality of technical sessions since their enactment in 1995. To the extent they can be interpreted to set what would amount to a non-regular (special) session, then those statutes are unconstitutional. But it is not necessary to undertake that analysis, because "technical sessions" are

not independent stand-alone sessions. They are extensions of a preceding "regular session."

At the end of a "regular session," the Legislature adjourns *sine die*; meaning, with no appointed date for resumption. The "technical session" statutes are an exception to adjourning *sine die* by appointing a date for *resumption* of a regular session. Consistent therewith, the only business a "technical session" can address are those bills enacted during the relevant "regular session." I.C.§§2-2.1-1-2.5(c), -3.5(c).

A "technical session" can only last one day. *Id.* at 2.5(d), -3.5(d). However, any constitutionally-authorized "session" of the Legislature must last at least three days. Art.4§18 ("Every bill shall be read, by title, on three several days, in each House; unless, in case of emergency….").

Finally, whether a single-day technical session constitutes an independent, stand-alone session is resolved by I.C.§1-1-3-3. That statute, which addresses the effective date of acts passed during regular and special sessions, unequivocally states that, for the purposes of an effective date, a "'regular session' includes a regular technical session." *Id.* That Act, passed in 1995 along with the addition of the technical session provisions, *supra,* evidences the Legislature's intent in 1995 that these technical sessions not be considered as separate, stand-alone sessions such as a "special session."

A "technical session" is not a "new" and "independent" session called by the Legislature. It is merely an "extension" of a "regular session." The existence of

technical sessions does not support the trial court's conclusion that HEA-1123 is constitutional.

4. A Governor's authority to call a special session is executive.

The trial court makes much of the fact that the "location" of a governor's authority to call a special session is found in the "Legislative" article of the Constitution, (App.Vol.II,pp.43-44), and, generally speaking, the ability to convene a legislature is a "legislative" function (and not an "executive" function). (App.Vol.II,p.43.)

Those conclusions ignore the fact that as of 1967, all but fourteen states vested the authority to call special sessions exclusively with their governors. (App. Vol.VII,p.192.) That a majority of governors possessed that power as of 1967, suggests that the particular power to call "special sessions" has historically been "executive," regardless of its precise placement in the Constitution. That conclusion is supported by statements made by delegate Rariden during the 1851 Debates about this issue: "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." (App. Vol.III,p.82.)(emphasis added)

5. The COVID-19 pandemic does not change the constitutional analysis.

The Legislative Parties emphasized the significance of governmental decisions regarding the pandemic in their various pleadings. (App.Vol.III,pp.136-142.) However, as noted previously, this case is not about the COVID-19 pandemic or transient policy disagreements.

As explained in *Ellingham*, "'in construing Constitutions, courts have nothing to do with the argument *ab inconvenienti*, and should not 'bend the Constitution to suit the law of the hour.'" 99 N.E. at 17 (quoting Cooley's Constitutional Limitations (7th Ed.), p. 131)(citation omitted). In fact, the Court in *Ellingham* anticipated this very scenario: "If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the Legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the Constitution which nothing can heal." *Id.* (quoting entirely Cooley's Constitutional Limitations (7th Ed.), p. 131)(citation omitted).

The answer to the constitutional question before this Court does not depend on the present factual context in which it arises.

V. HEA-1123 violates Article 3§1.

HEA-1123 also harms Indiana's form of government in another way: It unconstitutionally commingles constitutional powers that have been expressly separated. This commingling is contrary to the express provisions of Article 3§1 that "no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." "The object of the separation of powers is to preclude a commingling of three essentially different powers in the same hands in the sense that the acts of each shall never be controlled by or subjected directly or indirectly to the coercive influence of either of the others." *Rush v. Carter*, 468 N.E.2d 236, 238 (Ind.Ct.App.1984); *See also State v. Monfort*, 723 N.E.2d 407, 413 (Ind.2000)("The separation of powers

provision exists not only to protect the integrity of each branch of government, but also to permit each branch to serve as an effective check on the other two.").

This Court has previously recognized Article 3§1 as "the keystone of our form of government" and, therefore, "its provisions will be strictly construed." *Monfort*, 723 N.E.2d at 411 (quotation omitted). "The true interpretation of this [separation of powers principle] is that any one department of the government may not be controlled or even embarrassed by another department, unless so ordained in the Constitution." *Id.* at 411(quotation omitted).

One "official duty" vested in Indiana governors under Article 4§9 is the authority to "call a special session" if, in the opinion of a governor, the "public welfare shall require it…." Under Article 3§1's separation-of-powers mandate, the only way for this Court to conclude that the Legislature *also* has the authority to "call a special session" is if that power is "expressly provided" elsewhere in the Constitution.

The trial court's Order points to no such express language. Indeed, the trial court's Order rests on language found in the first and third sentences of Article 4§9, neither of which contain the words "special session." Indiana's Constitution and constitutional precedent rejects that conclusion, as do cases from other jurisdictions that have taken up this issue.

A. Indiana separation-of-powers cases.

Since the seminal case of *Ellingham,* this Court has spoken on the importance of separation-of-powers principles in the context of the legislative and executive branches in at least two analogous cases.

1. Tucker v. State

In November 1940, Indiana voters elected Governor Henry F. Schricker, a Democrat. Republicans won 64 of 100 seats in the house, and 31 of 50 in the senate. (App.Vol.III,p.43.) In the spring of 1941, the General Assembly enacted a series of bills that removed all state agency heads and replaced them with three-member boards. (App.Vol.III,p.43-44.) The three members of each board were two Republicans, along with Democratic Governor Schricker. (*Id.*) As such, Governor Schricker could be outvoted on those boards and have no ability to appoint executive branch leadership. (*Id.*)

Governor Schricker vetoed these bills, but his vetoes were overridden by the Legislature. (App.Vol.III,pp.44-45.) The bills became law. He then filed suit and obtained an injunction from the trial court. (App.Vol.III,p.45.) The case ended up before this Court, which ruled these bills were an unconstitutional infringement of an Indiana governor's executive authority that was exclusively vested in him by the Constitution. *Tucker,* 35 N.E.2d at 304-305.

Emphasizing the need for express authority in the Constitution to conclude that a governor's authority is limited, the Court went on to write: "If inconsistent intention must be avoided in construing the *express* provisions of the Constitution, surely it is not permitted to *imply* an intention that conflicts with a definite and expressed intention." *Id.* at 292 (emphasis added). The Court explained:

> **To write into the Constitution by implication** authority for the Legislature in its discretion to strike down the express grant of all executive powers to the Governor, and to vest ministerial secretaries, auditors, and

> treasurers with functions that are everywhere recognized as belonging to the Governor and to the executive power, **would do violence to every known rule of construction.**

Id. at 292 (emphasis added).

2. Branigin v. Morgan Superior Court.

Article 5§12 of the Constitution confers upon an Indiana governor the power and discretion to "call out such forces (military and naval forces), to execute the laws, or to suppress insurrection, or to repel invasion." A provision in the 1967 version of the Indiana National Guard Act (the "Act"), prohibited "a muster or an assembly for instruction, review, or parade" by the National Guard from occurring on an election day. I.C.§10-16-7-16(a). Any officer who ordered a muster or assembly on election day was subject to a penalty. I.C.§10-16-7-16(a).

In *Branigin*, a lawsuit was filed on the eve of the 1967 election by a private citizen to enjoin Governor Branigin from calling out the National Guard on election day, based upon the plaintiff's belief the Governor was going to call out the National Guard because of unrest in Gary, Indiana. *State ex rel. Branigin v. Morgan Superior Court*, 249 Ind. 220, 231 N.E.2d 516, 517 (1967). The Court held that the Act precluded *officers* in the Guard from calling up the National Guard on election day, but not the Governor.

A governor's authority to call up the National Guard is vested in him by the Constitution, and it cannot be taken away by legislation passed by the Legislature: "Such an attempted infringement by the legislative branch of government on the

constitutional power of the executive would be repugnant to the doctrine of separation of powers as stated in Article 3 § 1 of the Indiana Constitution…." *Id.* at 519.

Based on *Tucker* and *Branigin*, HEA-1123 is a similar infringement by the legislative branch on a constitutional power vested exclusively with Indiana governors. HEA-112 is repugnant to Article 3§1, and, in that way, does harm to our constitutional system of government.

B. Separation-of-powers cases from other jurisdictions support the conclusion that only Indiana governors can call special sessions.

> Under a constitutional provision authorizing the governor to call an extraordinary session, that power rests solely with the governor; it may not be exercised by the legislature, nor may the governor be divested of this power except by a constitutional amendment. 72 Am. Jur. 2d States, Etc., § 46.

Although there are no Indiana cases directly on point, there are a few from other jurisdictions squarely addressing this issue. The decisions in those cases undermine the trial court's Order. Despite extensive briefing about those cases by Governor Holcomb, there is no attempt to distinguish them in the trial court's Order. Both *American Jurisprudence 2d* and *Sutherland on Statutory Construction* have relied on these cases for broad propositions that line-up exactly with Governor Holcomb's analysis of the Indiana Constitution. *See* 72 Am. Jur. 2d States, Etc., § 46; 1 Sutherland Stat. Const. § 5:1 ("Unless specifically authorized by constitutional provision, a legislature has no authority to convene itself in special session, and its actions under an attempt to do so are void.").

The most direct case on point is *Simpson v. Hill,* 263 P.635 (Okla. 1927). In *Simpson,* the legislature called itself into what is tantamount to a special session, the efficacy of which was then challenged. Not surprisingly, the dispute reached the Oklahoma Supreme Court. That Court characterized Oklahoma's separation-of-powers language (which in 1927 was similar to Indiana's Article 3§1), as follows:

> The last clause [in Article 4], "and neither shall exercise the powers properly belonging to either of the others," **is an inhibition**. It is found in the said article and **is strong language**, and used **to prevent** one of the said branches of state government from undertaking to do what the organic law of the state directs shall or may be done by another.

Id. at 638 (emphasis added). It went on to conclude:

> The Constitution made plain, by said section, that the Governor possessed the power to convoke the Legislature in extraordinary session. This being true, the said inhibition in the last sentence of said Article 4 expressly forbids the legislative branch, or any part thereof, from exercising this power. We reach this conclusion not by an independent interpretation of our constitutional provisions, although they are so clear there is no room for confusion, unless confusion be the object and aim.

Id. at 639. Around fifty years earlier, the Nebraska Supreme Court undertook a similar analysis when confronted with its legislature's attempt to call itself into an extra-constitutional legislative session, reaching the same result as the Court in *Simpson*. *People v. Parker*, 3 Neb. 409, 1872 WL 6043 (1872); *see also Walker v. Baker,* 196 S.W.2d 324, 330 (Tex. 1946).

HEA-1123 is a direct violation of Article 3§1's "inhibition" against commingling powers that have been expressly separated in the Constitution. The only way the trial court could conclude that Article 4§9 vested the authority in the Legislature to call special sessions was by implication. That result cannot stand, and this Court should rule that HEA-1123 is unconstitutional.

VI. HEA-1123 fails to set the date, time, and place for emergency (special) sessions "by law."

Finally, and also importantly, the trial court's Order, in upholding HEA-1123, allows the Legislature to convene an emergency (special) session without doing so "by law" as required by Art. 4§9. Both the first and third sentences of Article 4§9 require that if certain changes to session details are made by the Legislature, they must be done "by law." Requiring a change to be established "by law" – versus by resolution or otherwise[11] – is a constitutional limitation on how those session changes can be made.[12] Thus, the date, place, frequency, and length of emergency (special) sessions must be set or fixed "by law."

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[11] *See Rice v. State,* 95 Ind. 33, 46 (Ind.1884)(noting a typical chamber resolution "is inferior in efficiency to both a concurrent and a joint resolution, each of which is, in its turn, less effective, as the expression of the legislative will, than a bill where enacted into law.")(citing *May v. Rice,* 91 Ind. 546 (Ind.1883).

[12] The framers knew how to differentiate between "laws," *e.g.,* Art. 4§9, "resolutions," and when they wanted to establish a constitutional "council." *See* Art. 4§§18, 20, 25 (resolutions); Art. 6§7 (resolution); Art. 10§7 (resolution); *see* Art. 5§17 (the framers vested in the Legislature the ability, "by law, [to] constitute a council composed of officers of the State, without whose advice and consent the Governor may not grant pardons, in any case, except for those left to his sole power by law.").

The object of the constitutional power to be set or fixed "by law" must be done by statute. *See, e.g.*, *Noble Cty. Council v. State ex rel. Fifer*, 234 Ind. 172, 125 N.E.2d 709, 713 (Ind. 1955)(discussing *Benton County Council of Benton County v. State ex rel. Sparks*, 224 Ind. 114, 65 N.E.2d 116 (Ind. 1946))("the legislature may delegate the fixing of a reasonable salary of a state official (county superintendent) to related administrative bodies, unless it is expressly provided in the Constitution that such salary be 'fixed by law' (legislative enactment)"); *see also Ellingham*, 99 N.E. at 3 (""The legislative power we understand to be the authority, *under the Constitution*, to make laws, and to alter and repeal them. 'Laws,' in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has prescribed.'" (quoting Cooley's Constitutional Limitations (7th Ed.), p. 131)).

The only constitutionally-required element set "by law" in HEA-1123 is the length of an emergency session (40 days). I.C.§2-2.1-1-9. Rather than also setting "by law" the date, time, and place for convening an emergency (special) session, HEA-1123 instead purports to grant that authority to the statutorily-created sixteen-member Legislative Council, by resolution. I.C.§2-2.1-1.2-7, and -8 ("The presiding officers shall convene their respective houses in session on the date, time, and place specified in the legislative council's resolution.").

A "resolution" is not a "law." Article 4§1 makes clear that "no law shall be enacted, except by bill." In *May v. Rice,* 91 Ind. 546 (Ind.1883), this Court had occasion to consider the distinction between the legal efficacy of a "resolution" passed by the Legislature, compared with a "bill" (*i.e.* a "law"). The two are not the same.

In *May*, both chambers of the Legislature passed a resolution for the State Auditor to pay Mrs. Sarah May, the wife of the late architect of the State House, the sum of $10,000. The State Auditor could only pay that amount to Mrs. May if the appropriation had been made "by law." The Court in *May* held that a resolution is "widely different" than a "bill" passed under Article 4§1. *Id.* at 551 ("Their functions are altogether different."). The Court held that the "resolution" to pay Mrs. May "is not a law…." *Id.* at 556.

In reaching that ruling, the Court in *May* evaluated what the consequences could be if it ruled that a "resolution" was an appropriations "law." *Id.* at 552. For example: "Why may [the Legislature] not, by such resolution, repeal the whole body of laws now in force?" *Id.* at 552. The consequence of finding that a less significant resolution under HEA-1123[13] is "fixing" or "appoint[ing]" session details "by law" pursuant to Article 4§9, should give similar pause to this Court.

A review of the more than thirty "by law" provisions contained in the Constitution,[14] reveals that the framers could not have intended the restriction to establish/fix/appoint something "by law" to be satisfied by a "resolution" of a majority of a sixteen-member Legislative Council. Substituting, for example, the words "by resolution of the Legislative Council" where the words "by law" appear in various

[13] A resolution that is passed by a majority of a sixteen-member Legislative Council, not by a majority of both legislative chambers as in *May*.

[14] Art. 1 §§ 13, 21, 34; Art. 2 § 14; Art. 4 §§ 4, 5, 29; Art. 5 §§ 6, 10, 27; Art. 6 §§ 1, 2, 3, 6, 8, 9; Art. 7 §§ 3, 5, 8, 12, 13; Art. 8 §§ 1, 4, 8; Art. 9 § 1; Art. 10 §§ 1, 3, 8; Art. 11 § 9, 12, 14; Art. 12 § 1; Art. 15 §§ 1, 2).

constitutional clauses, reveals the danger to our open and transparent system of government. A few examples on taxation:

> Art. 10§1(a): "Subject to this section, the General Assembly shall provide, [by resolution of the Legislative Council], for a uniform and equal rate of property assessment and taxation…."
>
> Art. 10§8: "The general assembly may levy and collect a tax upon income, from whatever source derived, at such rates, in such manner, and with such exemptions as may be prescribed [by resolution of the Legislative Council]."

To uphold the trial court's reading of "by law" would endorse, for example, the Legislature passing a statute that vests taxing authority in the Legislative Council. That Council could, by itself and by resolution, set Indiana's "property assessment and taxation" under Article 10§1(a), and Indiana's income tax exemptions under Article 10§8. That result is contrary to all aspects of open, transparent, and accountable governance in Indiana.[15]

Indiana has not spoken definitively on the meaning of "by law" in this precise context. But if this Court concludes that the Legislature does have the authority to

[15] The concerns of a slippery slope envisioned by the Court in *May* are not idle speculation. It is the position of the Legislative Parties that "[t]he constitutionality of HEA 1123 follows directly from the constitutionality of the technical session statutes: 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." (App.Vol.III,p.163.) Following similar logic, if the Constitution allows the "by law" requirement for convening a legislative session to be met by a committee resolution, then it permits it in other contexts, such as setting tax rates.

call special sessions, then that power cannot be wielded by a "resolution" passed by the Legislative Council.

If legislators are to have the authority to call themselves into session at any time, as the Legislative Parties have argued, then they must do so "by law." They must publicly debate and vote on all changes to legislative sessions as an entire Indiana legislative body, not through a simple resolution of a sub-set thereof.

CONCLUSION

If certain legislators believe it will improve Indiana state government to vest authority in the Legislature to call a special session, then the Legislature should have a full and open debate about that potential change to the Constitution. If the result of that debate supports such a fundamental change in how Indiana state government has worked since 1816, the Legislature should pass resolutions in two successive general assemblies, and then submit a proposed constitutional amendment to Indiana voters for their consideration. But it has not yet done so. It cannot, and should not be allowed to, short-circuit that process for political expediency. The trial court's Order unconstitutionally allows the Legislature to do just that, and therefore that Order should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 5, 2022, I electronically filed the foregoing document using the Indiana E-filing System ("IEFS"). I also certify that on the same date the foregoing document was served upon the following person(s) via IEFS:

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