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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 REPLY BRIEF

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SUMMARY OF ARGUMENT

If one branch of government infringes upon the constitutional authority of another branch, there is fundamental harm to Indiana's very form of government. Just because the Legislative Parties[1] believe there is no *practical* harm in granting themselves the power to call emergency ("special") sessions, does not mean that there is no *foundational* harm to our constitutional government. There is no "harmless error" when it comes to the infringement of a constitutional power.

As succinctly recognized by this Court in *Ellingham v. Dye,* 178 Ind. 336, 99 N.E.1, 4 (Ind.1912), "'ordinary laws are merely temporary expedients or adjustments, and cannot be allowed to stiffen into constitutional provisions *without extreme danger to the commonwealth*…." (quoting John A. Jameson, A Treatise on Constitutional Conventions, Its History, Powers, and Mode, 84-86 (4th ed. 1887)). Article 16 provides the Legislature with the means by which to properly give itself the power to call "special sessions," a route the Legislature chose not to take.

In an attempt to defend that approach, the Legislative Parties advance procedural arguments that can be summarized as trying to prevent: (1) an Indiana governor from bringing this type of constitutional challenge; and (2) this Court from deciding it.

A sitting Indiana governor should not have to obtain the permission of a statutorily-created officer, here the attorney general, to exercise the governor's

[1] Governor Holcomb uses the same definitional terms in this Reply as he did in his Appellant's Brief. Citations to the Appellee's Brief are to "Opp.,p.__."

constitutional duty to protect the powers vested in him/her by the Constitution from infringement by the Legislature. Governor Holcomb's power to file this lawsuit is inherent in his constitutional executive authority, and also statutorily-granted to him. To hold otherwise would elevate the authority of a statutory officer created by ordinary legislation, above a governor's constitutionally-granted executive powers. That result has its own separation-of-powers problem, although it is not necessary to reach that here.

Long-ago recognizing the need for governors to hire counsel in certain situations, the Legislature passed a statute acknowledging their right to do so, Ind. Code§4-3-1-2. The fact that Attorney General Rokita entered appearances before the trial court for the Legislative Parties *and* Governor Holcomb demonstrates the need for a governor, in situations like this, to be able to hire his own counsel. An attorney general's authority over certain litigation in Indiana does not encompass an ability to prevent a sitting governor from being able to have the judicial branch resolve a separation-of-powers dispute.

The Legislative Parties' other attempts at procedural roadblocks all fail, as the trial court correctly concluded. If HEA-1123 is unconstitutional, every day that statute is on the books does damage to our carefully-designed form of government. That is injury enough for this Court to proceed on the merits. Governor Holcomb did not file this case under the Declaratory Judgment Act, but even if he did, he is a "constitutional officer," not a "state agency."

There is no legislative immunity here because Governor Holcomb is not suing individual legislators in a civil action for a specific remedy. The Legislative Parties do not even advance an argument that the General Assembly and the Legislative Council are somehow protected by legislative immunity. They are not, and so this case should proceed. The political question doctrine has no application because *whether* HEA-1123 is constitutional is a question for this Court. This case does not involve the internal dealings of the Legislature.

HEA-1123 is unconstitutional. It is a legislative usurpation of an express duty vested exclusively in Indiana governors. The text of the Constitution (*e.g.,* Art.3§1), landmark Indiana constitutional cases, interpretive canons, and contemporaneous constitutional history, all confirm the proposition that an Indiana governor's *express* and *exclusive* constitutional authority to call a "special session" was not changed in 1970 or 1984.

One thing that the parties and the trial court all agreed upon is that prior to 1970, the Legislature did not have the power to call "special sessions." The Legislative Parties avoid the undisputed constitutional history surrounding the 1970 and 1984 amendments, and for good reason. It is all consistent with Governor Holcomb's interpretation of Art.4§9. The Legislative Parties also do not address key interpretive canons, all of which lead to the conclusion that an Indiana governor's express constitutional authority to call a "special session" cannot be usurped by implication.

Article 4§9 expressly vests the authority in Indiana governors to call "special sessions," so the Legislature cannot do likewise unless it too has been "expressly provided" that same authority. There is no implied "legislative function" exception to that constitutional requirement. The first and third sentences of Art.4§9 do not "expressly provide" the Legislature the authority to call a "special session," which is a unique type of session with distinct characteristics different than the annual or biennial "regular sessions" which the Legislature can "fix[] by law."

HEA-1123 is a "special session" by another name, and it is unconstitutional. The technical session statute does not change that conclusion. Those sessions are extensions of a regular session, not new stand-alone sessions. Moreover, the constitutionality of the technical session statute is not before this Court. Even so, it is for this Court, not the Legislature, to determine the meaning and application of the Constitution.

The trial court's ruling that HEA-1123 is constitutional should be reversed.

ARGUMENT

I. HEA-1123 inflicts foundational constitutional harm.

Article 16 sets forth the proper means for the people of Indiana to amend the Constitution. As noted previously, Governor Holcomb takes no position on whether it is good government to have the Legislature share the power to call "special sessions" with an Indiana governor. Unlike Indiana, Kentucky's legislature put just such a constitutional amendment before its citizenry for proposed ratification in 2022.

See Cameron v. Beshear, 628 S.W.3d 61, 80 n.24 (Ky.2021)(Hughes, J., concurring). HEA-1123 is an end-run around Article 16's requirement to do likewise.

The Legislative Parties' position seeks to crystallize ordinary statutory law into original law, something this Court recognized as risking "extreme danger" to Indiana's form of government. *Ellingham,* 99 N.E. at 4. Their argument that there is no "harm" because HEA-1123 does not prevent Indiana governors from calling special sessions misses the point. That argument rests on a claim of no "practical" harm. That is not the harm at the center of this case.

The harm here is to our carefully-designed form of government. Indeed, it is a harm to the constitutional foundation of Indiana government. There is no "harmless error doctrine" for this type of infringement.

II. Governor Holcomb can pursue this case.

There is a real issue concerning separation-of-powers here; the parties are vigorously litigating it; and the possibility of a constitutional crisis over the validity of HEA-1123 *during a future emergency* is anything but an "academic debate or mere abstract speculation." *Horner v. Curry,* 125 N.E.3d 584, 589 (Ind.2019). Waiting to engage in emergency injunctive litigation in the midst of a future crisis, as the Legislative Parties suggest, is neither prudent nor legally required.

A. Governor Holcomb has standing.

The trial court correctly concluded that Governor Holcomb has alleged an actual injury in this case: a law passed by the Legislature currently in effect (HEA-1123) interferes with his exclusive constitutional authority to call "special sessions."

(App.Vol.II,p.27). According the trial court, "[t]hat alleged separation-of-powers injury, alone, is enough to invoke standing." (*Id.*).

Relying on *Hulse v. Ind. State Fair Bd.*, 94 N.E.3d 726, 731 (Ind.Ct.App.2018), the Legislative Parties argue that in order to have standing, Governor Holcomb must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute." (Opp.,p.22). But that standard only applies if Governor Holcomb is alleging solely a "potential future injury." *Hulse*, 94 N.E.3d at 731.

In this case, Governor Holcomb's injury has already occurred and is ongoing. Every day HEA-1123 remains on the books is an affront to the exclusive and express power of Indiana governors to call "special sessions" under Art.4§9. That alleged separation-of-powers injury alone is enough to give Governor Holcomb standing. *Romer v. Colo. Gen. Assembly*, 810 P.2d 215, 220 (Colo.1991)("The governor has alleged a wrong that constitutes an injury in fact to the governor's legally protected interest in his constitutional power to veto provisions of an appropriations bill. Therefore, the governor has standing to bring this action."); *Cameron*, 628 S.W.3d at 71("Whether the Governor's emergency power in this situation is statutorily or constitutionally derived is at the heart of the Governor's Complaint and thus presents a justiciable case or controversy.").

Although the Legislature has kept itself in regular session since it enacted HEA-1123, that does not serve as justification for this Court to decline to address HEA-1123's constitutionality. This Court has noted the critical importance of

separation-of-powers, and the importance of deciding issues relating to constitutional and statutory construction, even if (unlike here) there is no danger of imminent harm. In *State ex rel. Branigin v. Morgan Superior Court*, 249 Ind. 220, 231 N.E.2d 516, 517 (Ind.1967), for example, this Court decided a constitutional issue involving a governor that was technically "moot," because it involved "matters of great public interest and one which could well affect the public generally." The same is true here.

Ruling upon HEA-1123 now rather than during a future emergency is critically important to the proper functioning of Indiana government, even if the Legislature remains in session.

Governor Holcomb has standing.

B. This case is ripe for adjudication.

Similar to standing, ripeness concerns "the degree to which the defined issues in a case are based on actual facts rather than on abstract possibilities, and are capable of being adjudicated on an adequately developed record." *Ind. Dep't of Envtl. Mgmt. v. Chem. Waste Mgmt. Inc.*, 643 N.E.2d 331, 336 (Ind.1994). However, "excessive formalism" will not prevent necessary judicial involvement. *Id.* "Where an actual controversy exists [courts] will not shirk [their] duty to resolve it." *Id.*; *See also Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1256 (Ind.2020)("[I]t's enough that the 'ripening seeds' of a controversy exist and the plaintiff has a 'substantial interest in the relief sought.'")(internal citations omitted); *Branigin*, 231 N.E.2d at 517.

The Legislative Parties contend that Governor Holcomb's claims are not ripe "because no HEA-1123 emergency session is in the offing." (Opp.,p.24). An HEA-1123 emergency session does not need to be called for Governor Holcomb's claim to be ripe. An actual controversy already exists because of that law's infringement upon a governor's exclusive constitutional authority to call "special sessions." This Court should resolve that actual and ongoing controversy now. At least at one point, one of the Appellees agreed. (App.Vol.VII,pp.38-39)(Speaker Huston: "We'll let the courts decide. We'll have an answer moving forward.").

Finally, the Legislative Parties contend that in the event of a future emergency, "[e]xpedited proceedings are available" to resolve HEA-1123's constitutionality at that time. Beyond the fact that such an approach is not good government, it ignores that any delay in resolving this constitutional issue until our state is in the midst of an as-yet undetermined future emergency could cost lives and cause serious damage. Finally, courts do not need to decide important constitutional issues like this under intense time pressure, and neither do the parties. What the parties have taken almost a year to litigate could not have been done quickly and thoroughly in an emergency (rushed) injunctive setting.

The constitutional dispute at the heart of this case is ripe for adjudication.

C. Seeking a declaratory judgment and injunction is the proper means for Governor Holcomb to challenge HEA-1123.

The Legislative Parties also argue that Governor Holcomb has no right to obtain a declaratory judgment that HEA-1123 is unconstitutional, and a related

injunction. The trial court correctly concluded that relief is available to Indiana governors in this context. (App.Vol.II,pp.29-33).

Under the Declaratory Judgment Act ("DJA"), only a "person" may obtain a declaratory judgment. I.C.§34-14-1-2. The Legislative Parties argue that an Indiana governor is not such a "person," relying primarily on this Court's decision in *Ind. Fireworks Distrbs. Ass'n v. Boatwright*, 764 N.E.2d 208, 210 (Ind.2002). (Opp., p.25). *Boatwright* is inapplicable to an Indiana governor, especially under these circumstances.

The rule promulgated in *Boatwright* only applies to "state official[s]." *Id.* An Indiana governor, however, is not a "state official." He is a "constitutional officer." *See City of Bloomington*, 158 N.E.3d at 1260. Neither this Court nor the court of appeals in *Boatwright* held that a "constitutional officer" is prohibited from filing a declaratory judgment action. Therefore, while a "state official" might not be a "person," a "constitutional officer" (like the Governor) is. That interpretation is consistent with other jurisdictions that have allowed their governors or other constitutional officers to pursue similar actions. *See, e.g., Romer*, 810 P.2d 215; *Williams v. State Legislature of Idaho*, 722 P.2d 465 (Idaho 1986).

Additionally, *Boatwright* involved policy consideration that have no application here. Governor Holcomb is not asking for this Court for an advisory opinion on the meaning of a statute, as was essentially the relief sought in *Boatwright,* 764 N.E.2d at 210. Rather, he is asking this Court for relief after an unconstitutional attack on his exclusive constitutional authority. A court's

declaration that a law is unconstitutional (along with an injunction against that law's enforcement) is the only proper method for Governor Holcomb to protect his office's constitutional authority. *See Whole Woman's Health v. Hellerstedt,* 579 U.S. 582, 195 L.Ed.2d 665, 136 S.Ct. 2292, 2307 (2016)("[I]f the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is 'proper'.")(quotation omitted).

Even if an Indiana governor is not a "person" under the DJA, Ind. Trial Rule 57 provides additional authority to bring a declaratory judgment action outside that Act. (App.Vol.II,pp.29-33). Prior to the adoption of T.R. 57, Indiana courts could only declare rights and other legal relations in declaratory actions under the DJA. *Artusi v. City of Mishawaka*, 519 N.E.2d 1246, 1250-51 (Ind.Ct.App.1988). Other relief, such as an injunction, could not be granted. *Id.*

Trial Rule 57 is broader than the DJA. It allows for "[a]ffirmative relief...when the right thereto is established." T.R.57. As the trial court correctly held, Governor Holcomb's Complaint falls under T.R. 57 because of the additional relief sought by enjoining the enforcement of HEA-1123. This is especially true considering his Complaint did not specify the procedural method sought to obtain the declaration. (App.Vol.II,pp.48-74); *Indpls. City Market Corp. v. MAV, Inc.*, 915 N.E.2d 1013, 1022 (Ind.Ct.App.2009)(complaint that was silent on "what type" of declaratory judgment action was filed deemed to have been filed under Trial Rule 57 because plaintiff sought a remedy in addition to a declaration).

The Legislative Parties argue otherwise by citing *Blanck v. Ind. Dep't of Corr.*, 829 N.E.2d 505, 511 (Ind.2005), to support the assertion that the Trial Rules cannot provide the source for a cause of action. (Opp.,p.26). That argument is incorrect. *Blanck* addresses a claim by a prisoner in relation to the Open Courts Clause (Ind.Const.Art.1§12), not that a declaratory judgment under T.R.57 is not permitted in this situation. *Blanck*, 829 N.E.2d at 511. *Artusi* and *Indpls. City Market*, both support the trial court's reliance on T.R.57 to allow this case to proceed on its merits. And as explained *infra*, a governor has inherent authority to seek the remedy of a declaration and injunction in this situation.

Whether as a "person" under the DJA or through T.R.57, Governor Holcomb may seek a declaratory judgment in this case declaring HEA-1123 unconstitutional and enjoining its enforcement.

D. Legislative immunity does not apply.

The Legislative Parties' legislative immunity arguments rest on the incorrect statement that Governor Holcomb seeks "an order preventing legislators from commencing a session pursuant to HEA-1123." (Opp.,p.26). That is not the relief he seeks, as the trial court properly recognized. (App.Vol.II,p.34). He seeks to declare HEA-1123 unconstitutional, because that statute invades an express constitutional function vested only in Indiana governors. In that way, it is no different than separation-of-powers decisions reached by this Court previously, such as *Tucker v. State*, 35 N.E.2d 270 (Ind.1941).

The Legislative Parties do not address the fact that, although the Complaint names Speaker Huston and Senate President Bray, it also names the General Assembly and the Legislative Council, neither of which have immunity by the express terms of Art.4§8. (App.Vol.II,p197); *See also Maron v. Silver*, 925 N.E.2d 899, 912 (N.Y.2010)(New York speech and debate clause "does not apply to the Assembly or the Senate.").

Regarding application of Art.4§8 to Speaker Huston and Senate President Bray, there is no support in any of the caselaw cited by the Legislative Parties in which legislative immunity has been applied in a separation-of-powers dispute like this. To the contrary, the cases they rely upon (Opp.,pp.28-29), involve lawsuits by private plaintiffs suing legislators for civil remedies, as the trial court correctly noted. (App.Vol.II,p.34). The same is true of *Melton v. Ind. Athletic Trainers Bd.,* 156 N.E.3d 633 (Ind.Ct.App.2020), which involved judicial immunity.

In addition, the trial court correctly concluded that because this case involves a separation-of-powers dispute, legislative immunity does not apply. (App.Vol.II,p.35). Federal courts have identified separation-of-powers considerations as informing how and when to apply federal legislative immunity. *U.S. v. Brewster*, 408 U.S. 501, 508 (1972)("Our task, therefore, is to apply the Clause in such a way as to ensure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.")(emphasis added); *Tenney v. Brandhove*, 71 S.Ct. 783, 95 L.Ed. 1019, 341 U.S. 367, 376 (1951)("This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside

its legislative role."). *See also Hansen v. Bennett*, 948 F.2d 397, 404 (7th Cir.1991)(legislative immunity does not create "a broad, per se rule which eliminates all immunity for" the legislative branch of a government.).

Legislative immunity is intended only to protect legislators from liability for their conduct in the House/Senate, not as a shield to prevent judicial review of the ultimately-passed legislation. *See Gravel v. U.S.*, 92 S.Ct. 2614, 33 L.Ed.2d 583, 408 U.S. 606, 624 (1972)(providing that although conduct during committee hearings may be protected, the "legislation itself" may be "subject to judicial review in various circumstances[.]").

Governor Holcomb is not asking this Court to interfere with "scheduling legislative sessions," but rather to review the constitutionality of a law giving the Legislative Council the ability to call emergency ("special") sessions. Legislative immunity does not apply to shield laws from judicial review simply because the Legislature or its members are defendants.

E. The political question doctrine does not apply.

Governor Holcomb's suit does not seek to interfere with "'inherently internal matters of the legislative branch'" as the Legislative Parties contend. (Opp.,p.31)(quoting *Berry v. Crawford*, 990 N.E.2d 410, 421 (Ind.2013)). Governor Holcomb's case instead seeks review of an unconstitutional statute, something within the purview of the judiciary. *Spencer County Assessor v. AK Steel Corp.*, 61 N.E.3d 406, 414 (Ind.TaxCt.2016)(questions regarding constitutionality of statutes are

"questions of pure law . . . reserved exclusively for judicial determination."). This case does not "interfere with scheduling a legislative session."

The case of *State ex rel. Masariu v. Marion Superior Court 1*, 621 N.E.2d 1097 (Ind.1993), makes that point clear. In *Masariu*, this Court was asked to review the performance of the Clerk of the House of Representatives, whose "duties are controlled totally by the leadership of the House" and is "answerable only to them for her actions in the performance of her duties." *Id*. at 1098. This Court declined to do so, noting that "[a]lthough it is the duty of the Courts to determine the constitutionality of statutory law, this Court has held repeatedly that courts should not intermeddle with the internal functions of either the Executive or Legislative branches of Government." *Id.*

If Governor Holcomb had asked this Court to enjoin the Legislature from passing HEA-1123, then that would implicate the "internal functions" of the Legislature. But that did not occur here. Governor Holcomb is instead asking the Court to "determine the constitutionality of statutory law," in this case, HEA-1123.

That distinction also makes *Berry v. Crawford*, *supra*, inapplicable. In *Berry*, although the Court did address the Indiana Wage Payment Statutes, those statutes were not the central issue in the case. *Berry* was about the internal discipline of members of the Legislature. *Berry*, 990 N.E.2d at 421. Moreover, the Legislature's constitutional authority to discipline its members was "expressly delegated to the legislature by our Constitution *without any express constitutional limitation or qualification*…." *Id.* at 421 (emphasis added). In contrast, and as explained in more

detail *infra,* the Legislature's authority to commence a session is not plenary, and there are express limits on its ability to do so in the text of Art.4§9.

F. An attorney general cannot block a governor's attempt to protect his constitutional authority.

The Legislative Parties, represented by Attorney General Rokita, argue that only the attorney general may decide whether an Indiana governor can protect his or her express constitutional authority in court. The attorney general, a statutorily-created position, should not have that type of authority over a "constitutional officer."

1. An attorney general's statutory authority.

The Legislative Parties primarily rely on three statutes to argue that the attorney general has complete control over the State's litigation, albeit with some admitted exceptions that undermine this premise. Those statutes do not provide an attorney general with such broad power.

a. I.C.§4-6-2-1.

Indiana Code§4-6-2-1 provides: "The attorney general shall prosecute and defend all suits instituted by or against the state of Indiana the prosecution or defense of which is not otherwise provided for by law,...and shall defend all suits brought against the state officers in their official relations, except suits brought against them by the state[.]"

The Legislative Parties rely upon this statute to argue the attorney general must represent all state officers in their official relations regardless of whether the officer initiates the case. (Opp.,pp.34-35). That is incorrect. The statute's plain language clearly provides that duty related to initiated suits applies only to suits "by

or against *the state of Indiana*[.]" I.C.§4-6-2-1(a)(emphasis added). The State is not a party to this inter-branch dispute.

To the extent the Legislative Parties interpret the "state of Indiana" to include actions initiated by its officers, that interpretation is undone by the next sentence of the statute that distinguishes the "state" from its "officers." *Id.* ("shall defend all suits brought against the state officers in their official relations, *except suits brought against them by the state*[.]")(emphasis added). The attorney general is only required to *defend* state officers in suits brought *against* them in their official capacities. *Id.* That statute does not give him similar authority to represent Governor Holcomb here. Governor Holcomb is not "defending" this case, he initiated it.

Dissatisfied with the plain statutory language, the Legislative Parties rely on a line from *State ex rel. Sendak v. Marion County Superior Court, Room No. 2*, 268 Ind. 3, 373 N.E.2d 145 (Ind.1978), to argue that an attorney general has the "sole responsibility for the legal representation of the State." *Id.* at 147. According to the Legislative Parties, that authority for "sole responsibility for the legal representation of the State" means the attorney general must involve himself in "all litigation roles." (Opp.,p.39).

Sendak does not apply that broadly. It concerned the defense of "State agencies, officers, and employees," not a case initiated by a "constitutional officer." *Sendak*, 373 N.E.2d at 148-49. To the extent that the "sole responsibility" language could be read to confer that type of authority, it is *dicta.* No statute within Article 6

of Title 4 bestows upon the attorney general this "sole responsibility" for the State's legal position.

The plain language of I.C.§4-6-2-1(a) does not give the attorney general exclusive authority to initiate suits on behalf of state officers, only to defend them. To read otherwise would greatly expand the scope of the attorney general's authority beyond the office's statutory limitations.

b. I.C.§4-6-3-2(a).

Indiana Code §4-6-3-2(a) provides: "The attorney general shall have charge of and direct the prosecution of all civil actions that are brought in the name of the state of Indiana or any state agency." As discussed, *supra*, Governor Holcomb is a "constitutional officer," not a state agency, making this statute inapplicable.

The Legislative Parties contend that, despite Governor Holcomb's status as a "constitutional officer," the definition of "state agency" includes him. (Opp.,p.35). Indiana Code §4-6-3-1 does provide a definition of "state agency" that includes "office, officer . . . or other similar body of state government created or established pursuant to law." However, a statute that simply refers to an "officer" cannot be interpreted to apply to the Indiana governor unless it specifically states it is applicable to an "Indiana governor" or a "constitutional officer." *See Franklin v. Massachusetts*, 112 S.Ct. 2767, 120 L.Ed.2d 636, 505 U.S. 788, 791 (1992).

The United States Supreme Court's opinion in *Franklin* is instructive. In that case, the Supreme Court considered whether the Administrative Procedures Act ("APA"), which allows the judicial branch to review "agency actions," applied to

decisions made by the President, a constitutional officer. *Franklin*, 505 U.S. at 791. The APA defines "agency," but that definition does not specifically refer to the President. *Id.* The Supreme Court assessed whether the term "agency" included the chief executive as a constitutional officer. It ruled that for a statute to apply to a "constitutional officer" such as the President, it must specifically refer to the President. *Id.* at 800-01.

Like the APA, the statute upon which Attorney General Rokita relies for the broad authority he seeks here — I.C.§4-6-3-2 — has a definition of "agency" that contains no express mention of Indiana governors. Accordingly, like the Supreme Court in *Franklin*, this Court should find that I.C.§4-6-3-2 does not apply to Indiana governors.

c. I.C.§4-6-5-3(a)

Indiana Code §4-6-5-3(a) provides: "No agency, except as provided in this chapter, shall have any right to name, appoint, employ, or hire any attorney or special or general counsel to represent it or perform any legal service in behalf of the agency and the state without the written consent of the attorney general."

The Legislative Parties rely upon this statute, combined with this Court's decision in *Sendak*, to argue that Indiana governors require written permission from an attorney general to hire outside counsel. As previously discussed, the term "agency" does not include the Indiana governor, making it inapplicable here. Instead, the governor has statutory authority to hire counsel on his or her own behalf under I.C§4-3-1-2 ("The governor may employ counsel to protect the interest of the state in

any matter of litigation where the same is involved"). A governor also has inherent constitutional authority to seek relief from the judiciary in matters involving the scope of his or her executive authority. *See infra.*

The Legislative Parties argue that I.C.§4-3-1-2 was "impliedly repealed" by *Sendak*. (Opp.,p.36). That misses the key issue before this Court in *Sendak*. Unlike the present case, the governor in *Sendak* attempted to rely upon I.C.§4-3-1-2 to hire outside counsel on behalf of a *state agency* — the Indiana Alcoholic Beverage Commission. *Sendak*, 373 N.E.2d at 147. Because the action concerned representation of a state agency, the attorney general statute controlled. *Id.* at 149. But nothing about *Sendak* indicated any intent to repeal the governor's statute, I.C.§4-3-1-2. Indeed, the Court held that I.C.§4-3-1-2 does not apply when it "is inconsistent with the attorney general's duties as prescribed by law." *Id.*[2] In *Sendak*, representing an agency concerned the attorney general's duties under I.C.§4-6-5-3(a) and §4-6-3-2, and therefore the governor's statute could not apply.

Governor Holcomb is not relying upon I.C.§4-3-1-2 to hire counsel on behalf of an agency, but rather to hire counsel to represent himself. That key distinction makes *Sendak* inapplicable. A governor's statutory authority under I.C.§4-3-1-2 is not inconsistent with an attorney general's statutory duties, because Governor Holcomb is seeking to hire counsel on his own behalf to initiate a suit to protect his

[2] I.C.§4-3-1-2 was amended by the Legislature in 2016, although not substantively. 2016 Ind.Legis.Serv.P.L.215-2016 (HEA 1173). Retention of that statute after *Sendak* supports the conclusion that a governor can retain counsel when circumstances unlike those in *Sendak* present themselves.

constitutional authority from legislative overreach. The attorney general, whose very position could be eliminated by ordinary legislation, cannot prevent that action by a governor, a "constitutional officer."

2. Indiana Governors' inherent constitutional authority.

Regardless of the attorney general's perceived statutory authority, Indiana governors must still have the opportunity to protect the executive branch's independence and exclusive authority from attempted usurpation by the legislative branch. The trial court recognized that authority because of the unique circumstances presented by this case. (App.Vol.II,p.186).

Indiana governors are vested with the authority to exercise executive powers, including those inherently necessary to carry out those executive functions. *Tucker,* 35 N.E.2d at 280. An Indiana governor – as a "constitutional officer" – has the inherent authority to protect constitutional duties and obligations assigned exclusively to his office from being usurped by another branch of government. *Id.* It is the judicial branch's role to determine if such usurpation has occurred. *Id.* The governor must therefore have the ability to file suit in order to bring that issue before the judiciary.

The inherent requirement for a governor to defend his constitutional authority from usurpation is a direct result of Indiana's three-branch form of government, expressly provided in Art.3§1. "The purpose of the separation of powers provision is to rid each separate department of government from any influence or control by the other department." *A.B. v. State*, 949 N.E.2d 1204, 1212 (Ind.2011). This Court

noted, for example, that "[i]f the legislature should pass a law depriving the governor of an executive function conferred by the constitution, that law would be void." *Tucker*, 35 N.E.2d at 283. Combined with a governor's obligation to uphold the law, Art.5§16,[3] the authority to challenge a statute that unconstitutionally infringes upon a governor's duties is an inherent power necessary for him to carry out his express constitutional duties.

The Legislative Parties attempt to rebut this inherent authority by citing to a forthcoming law review article written by their own counsel. Because it was written while this litigation is pending, it is tantamount to simply more words of the Legislative Parties' Brief. To the extent this Court finds an attorney general's opinion informative, previous Attorney General Greg Zoeller's opinion, not made in direct response to ongoing litigation, is more persuasive. Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 Ind.L.J. 513, 541 (2015).

The Legislative Parties proceed to argue that "Indiana law vests the Attorney General alone with authority to determine the State's position on legal questions." (Opp.,p.42). That position, however, serves to expand the statutorily-created attorney general's authority at the expense of a governor's, a "constitutional officer." When a governor's constitutional powers are usurped by the Legislature, the attorney general cannot essentially dictate the outcome by simply telling a governor "no" to a

[3] "'He shall take care that the laws be faithfully executed' are sweeping words." *Tucker,* 35 N.E.2d at 288 (quoting Art.5§16).

request that the attorney general file suit on the governor's behalf and/or authorize a governor to hire outside counsel.

G. Rules of Professional Conduct

The trial court held: "It is black-letter law that one lawyer cannot represent two opposing parties in the same lawsuit." (App.Vol.II,pp.186-87). Yet, that is what Attorney General Rokita did here. He entered his appearance for Governor Holcomb without his approval. (App.Vol.II,pp.83-88). It was only after Governor Holcomb filed his own Motion to Strike that the Attorney General Rokita withdrew that appearance. (App.Vol.II,pp.213-217;239-241). The trial court got it right: There is no applicable "attorney general" exception to Ind. Professional Conduct Rule.1.7(a)(1) in this case.

The Rules of Professional Conduct do not "abrogate the statutory authority vested in the Attorney General…." (Opp.,pp.41-42). Under the circumstances here, Rule 1.7 applies with full force to Attorney General Rokita. Prof.Cond.R.1.11(d)(1)("a lawyer currently serving as a public officer or employee . . . is subject to Rules 1.7 and 1.9[.]"); *see also Matter of Hill*, 144 N.E.3d 184, 192 (Ind.2020)(applying the Rules of Professional Conduct to the Attorney General); *State v. Evans,* 810 N.E.2d 335, 338 n.1 (Ind.2004)(Implying applicability of Rule 1.7 to the then-attorney general, and that "full disclosure or the hiring of private counsel might resolve the Attorney General's ethical dilemma….").

In an effort to overcome the consequences of the text of the Rules, the Legislative Parties refer to commentary contained in those rules which provides that

lawyers under the attorney general's supervision "may be authorized to represent several government agencies in intra-governmental legal controversies[.]" Prof.Cond.R.,Scope,¶18. Once again, however, the Governor is not an "agency;" he is a constitutional officer who leads one of our three branches of government. Even if this commentary were to apply to a governor, the trial court correctly noted that it could not apply when Attorney General Rokita publicly opined that HEA-1123 is constitutional. (App.Vol.II,p.187).

Attorney General Rokita cannot prevent Governor Holcomb from defending his executive powers simply because the Attorney General disagrees with the Governor's position. To interpret the Rules in such a way would create greater authority in an attorney general, a statutorily-created position, than possessed by a governor, a "constitutional officer."

In sum, the constitutionality of HEA-1123 cannot rest on the legal opinion of a statutorily-created attorney general. The stability and structure of our carefully-designed governmental system cannot balance on the unappealable legal opinion of one person who is not part of the judiciary. It properly rests on the judgment of this Court, not that of Attorney General Rokita.

III. HEA-1123 is unconstitutional.

Considering the relevant facts and applicable law, the Court should reject the Legislative Parties' arguments and conclude that HEA-1123 is unconstitutional. The Legislative Parties' response is remarkable for what it glosses over (historical context, and applicable law), and for what it injects (politics). Additionally, there is no support

for their position that Art3§1's prohibition against one governmental department exercising the "function" of another (unless "expressly provided") does not apply to them. The Legislature's so-called inherent "legislative function" does not empower the Legislature with the ability to call all types of legislative sessions, as frequently as it wants. No such *carte blanche* authority sprung to life in 1970. The Legislative Parties' textual reading of Art.4§9 fails because it would require the Court to ignore words in that provision. Finally, the Legislative Parties do not address the consequences of a ruling from this Court allowing a statutorily-created body – such as the 16-member Legislative Council – to satisfy the limiting "by law" language in Art.4§9.

A. The Legislative Parties do not address key facts and law.

The first important legal concept the Legislative Parties fail to address is the standard applicable to this Court's analysis of HEA-1123. Relevant here, "to give life to [the framers'] intended meaning, [the Court] examine[s] the language of the text *in the context of the history surrounding its drafting and ratification*, the purpose and structure of our constitution, and *the case law interpreting the specific provisions.*" *Meredith v. Pence,* 984 N.E.2d 1213, 1218 (Ind.2013)(emphasis added).

1. The Legislative Parties' Statement of Facts.

Instead of addressing historical facts important under *Meredith,* the Legislative Parties spend pages reciting the emergency orders issued by Governor Holcomb, cite news articles that purport to take exception to those orders, and couch the Governor's actions as arising in the context of "how best to protect citizens while

respecting individual liberties." (Opp.,p.13). As the trial court correctly noted, "the issues before the court do not include the public policy merits of HEA-1123." (App.Vol.II,p.20). This case is about whether HEA-1123 is unconstitutional, not whether the political motivations for its passage are meritorious.

Several historical facts the Legislative Parties ignore or summarily dismiss are key to "giving life" to the text of the 1970 and 1984 Amendments, as follows:

1. The Legislative Parties fail to ascribe any significance to the failed 1967 recommendation to add express provisions in the Constitution granting the Legislature authority to call "special sessions." The Legislative Parties characterize this recommendation as a "meager proposal, which reflected only a few legislators' views…." (Opp.,p.49). That is an interesting characterization, considering the author of the 1967 Report was a Committee impaneled by a predecessor to the Legislative Council – an Appellee here. (Amicus,p.24,n.7). Later in their Brief, the Legislative Parties characterize the Legislative Council "as a joint committee of both chambers, materially indistinguishable from the committee of the whole under the technical-session statute." (Opp.,p.48). In fact, the Legislative Council is a statutorily-created body that has no inherent constitutional power. I.C.§2-5-1.1-1. It is a 16-member body that is certainly not a "committee of the whole" legislative body. *Id.*

The 1967 Report is an important document because it was the result of a two-year study undertaken to evaluate changes to the Indiana Constitution. That the recommendation to include express language granting constitutional authority to the Legislature to call a "special session" failed is material to understanding that the

framers' intent in 1967 and 1969 was *not* to grant the Legislature that power, expressly or implicitly, but to leave it solely with Indiana governors.

2. The Legislative Parties cannot explain away the historical context relating to the "Schedule" to the 1970 Amendment; passage, in 1971, of the Legislative Sessions and Procedures Law, Ind. Code§2-2.1-1-1 to -13, which rendered the "Schedule" obsolete; and the 1984 Amendment's clear purpose of simply getting rid of "obsolete" provisions such as the "Schedule," and this Court's opinion confirming as much. *Gallagher v. Ind. State Election Bd.*, 598 N.E.2d 510, 514 (Ind.1992). The Legislative Parties do not mention, let alone distinguish, that in 1981 the Legislative Council specifically wrote that removal of the Art.4§29 Schedule (and others) to which the Legislative Parties and the trial court ascribe such significance, was done "because their purpose was to implement amendments, not to become a part of the Constitution.'" (Addend.pp.45).

3. The Legislative Parties do not mention the 1960's and 1970's movement in which, after 1967, twenty-one more states added express provisions to their constitutions that granted their respective legislatures the ability to call special sessions.[4] Indiana chose not to do so, and the Legislative Parties do not cite a single example of a state in which a legislature's ability to call a special or extraordinary session is authorized by implication.

4. The Legislative Parties' discussion of constitutional history is also significant for its brevity and omissions. They ignore almost all of the depth and

[4] (App.Vol.VII,p.193).

extent of constitutional history set forth by Governor Holcomb and the esteemed *amici*. Contrary to the weight of that authority, the Legislative Parties suggest that the Legislature "went big" in 1970 and gave itself the authority to call a session whenever it wanted. "It proposed, and the voters ratified, new constitutional text wiping out nearly *all* limits on the length and frequency of legislative sessions, save for the April 30 adjournment rule." (Opp.,pp.49-50).

If the Legislature "went big" in 1970, no contemporaneous assessments of that large scale act were apparent. Nor did the Legislature follow up its "big" decision when, in 1971, it could have easily passed something similar to HEA-1123 so that it would not have to take that step 50 years later in the midst of a pandemic. If, in 1970, the Legislature was given plenary power to set any type of session at any time it wanted, then it was negligent in not promptly passing something similar to HEA-1123 in 1971. That it did not do so, and made no mention of any claim to such constitutional authority for over 50 years, brings back into focus *Ellingham's* teaching about the meaning of prolonged periods of the absence of claims to a particular constitutional authority – which supports Governor Holcomb's position here. *Ellingham*, 99 N.E. at 7.

The Legislative Parties' attempt to characterize the Governor's reference to the text of the questions submitted to voters in 1970 and 1984 as a challenge to the efficacy of those amendments is inaccurate. Those questions were cited and discussed to establish the important "context" of the 1970 and 1984 amendments the Legislative Parties avoid meaningfully analyzing (and for good reason). The cases of *Roeschlein*

v. Thomas, 258 Ind. 16, 280 N.E.2d 581, 592-95 (Ind.1972), and *Oviatt v. Behme,* 238 Ind. 69, 147 N.E.2d 897, 899-900 (Ind.1958), both confirm that when the 1970 and 1984 amendments were submitted to voters, it was the job of the "state election board" to draft a "brief statement" about amendments "in words sufficient to clearly designate the same…."

In both 1970 and 1984, the state election board's "brief statements" about those amendments are consistent with Governor Holcomb's interpretation of Art.4§9, and all of the contemporaneous interpretations of the 1970 and 1984 amendments. If the Legislative Parties are correct, then Indiana's source of original law – the voters – had no idea they were making "big" changes to how frequently (*e.g.,* multiple times per year), and what types of sessions ("special" and "regular") the Legislature could now call.[5]

To determine whether the 1970 and/or 1984 amendments vested unbridled constitutional power in the Legislature *requires* consideration of all those facts (and more) that the Legislative Parties either ignore or summarily dismiss. Such an approach is contrary to the standard of review applicable to this case.

[5] Because this point was made at the summary judgment hearing, this line of argument was presented to the trial court and is not waived. (Tr.Vol.II,pp.19:20-20:6)("But one thing that it [the ballot] certainly did not do, and if it did, it would be news to the voters back then, would be give the General Assembly the authority to call a special session.").

2. The Legislative Parties do not distinguish relevant legal principles.

Nowhere do the Legislative Parties try to distinguish the clearly applicable interpretive canons cited by Governor Holcomb. The Legislative Parties wholly fail to explain how they can overcome the prohibition against "impl[ying] an intention that conflicts with a definite and expressed intention." *Tucker*, 35 N.E.2d at 292. *accord Ellingham,* 99 N.E. at 16. They make no mention of the clear conclusion from application of the negative implication doctrine, *expressio unius est exclusio alterius,* that because governors have an "express" authority to call "special sessions," that "ceases" any implied power the Legislature may otherwise have had to do likewise. Those canons are found in this Court's jurisprudence generally, but also in landmark cases that have interpreted the meaning of Art.3§1. This Court's decisions in *Ellingham v. Dye, Tucker v. State,* and *Branigin v. Morgan Superior Court,* are all the types of relevant cases that have "interpret[ed] the specific [constitutional] provision[]" at issue here (Art.3§1), but which receive no meaningful substantive mention by the Legislative Parties.

The Legislative Parties' attempt to distinguish *Simpson v. Hill*, 263 P.635 (Okla.1927), on the grounds that Oklahoma's then-constitution had no "length and frequency clause" misses the point of that case. *Simpson* stands for the proposition that a separation-of-powers clause is an "inhibition" that "forbids the legislative branch, or any part thereof, from exercising" the power to call a special session unless otherwise expressly provided in a constitution. *Id.* at 639. The third sentence of Art.4§9 does not "expressly provide" for the Legislature to call a "special session,"

unless one concludes that there is no difference between a "special" and "regular" session (which there clearly is).

B. A "special session" is distinct from a "regular session."

The Legislative Parties argue that "any similarity between an emergency session and a special session is irrelevant because Article 4, Section 9 does not limit the legislature's authority to a specific category of 'session'." (Opp.,p.57). For the Legislative Parties' argument to prevail, this Court must conclude that a "special session" is subsumed within the meaning of the word "sessions" contained in the first and third sentences of Art.4§9. Otherwise, the source of the so-called "legislative function" power in those sentences is limited to "sessions," a term that does not include "special sessions."

Both the 1851 and 1970 framers recognized a distinction between a "regular session" and a "special session." A "special session" has consistently been defined as one that needs to be called to address an unpredictable event impacting the "public welfare." At the same time, the 1851 framers did not want a permanent legislature (or one that met too frequently and caused mischief), and so they textually limited the length of regular sessions, and frequency of regular sessions to biennially. Art.4§§9, 29(1851).

With respect to sessions that may be needed between biennial sessions, the 1851 framers chose to add the word "special" before the word "session" when granting that power to Indiana governors. The word "special" has meaning: "(Of powers, etc.)

unusual; extraordinary." Black's Law Dictionary, 1612 (10th ed. 2014).[6] If there was no distinct meaning to the term "special session," the framers could have excluded the word "special" and left the second sentence as follows: "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." Instead, to reflect the narrow and unique nature of that type of session, they chose to refer to it as a "special session."

Confirming that a "special session" is not the same as a "regular session," the framers have used the two terms distinctly in other provisions in the Constitution. In the Governor's veto provision, Art.5§14(a)(2)(C), the Legislature "shall reconsider and vote upon the approval of the bill before the final adjournment of the next *regular session* of the Legislature that follows the *regular* or[7] *special session* in which the bill was originally passed."[8] (Emphasis added). *See also* Art.5§10 ("If the General Assembly is not in session, the Governor shall call it into *special session* to receive and act upon the Governor's nomination.")(emphasis added); Art.10§4("An accurate

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[6] Black's Law Dictionary also provides distinct definitions of "regular session" and "special session" that are consistent with the Governor's position. "**[S]pecial session**. **1.** A legislative session, usu. called by the executive, that meets outside its regular term to consider a specific issue or to reduce backlog. – Also termed *extra session; extraordinary session*." *Id.* at 1580. "**[R]egular session.** A session that takes place at *fixed* intervals or specified times." *Id.* (italics added).

[7] Use of "or" reflects a disjunctive list. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (1st. ed. 2012).

[8] The words "regular or special session" in Art.5§14 were added in 1990, long after the 1970 Amendment supposedly made inconsequential any specific category of session, *supra.* 7 Constitution Making in Indiana, xxv-xxvi (Marcia J. Oddi ed., 2020).

statement of the receipts and expenditures of the public money, shall be published with the laws of each *regular* session of the General Assembly.")(emphasis added).

Clearly, a "special session" refers to a particular type of session that arises in unpredictable circumstances. In contrast, by constitutional text, *supra,* and subsequent legislation consistent therewith,[9] the term "session" in the first and third sentences of Art.4§9 is synonymous with a "regular session" that is "fixed by law." *See* Scalia et al., *supra* at 170 ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggest a variation in meaning.").

As such, had the 1967/1969 legislatures (the "1970 framers") intended to give the Legislature the power to call this type of unique session, Art.3§1 required that it do so "expressly," something the 1967 Study Committee recognized when it proposed its failed language in the 1967 Report. (App.Vol.VII,p.193). Because there is no such "express" authority for the Legislature to call a "special session" contained in Art.4§9, the Legislature has no such authority.

C. Inherent legislative authority does not take precedence over an express constitutional power.

HEA-1123 is unconstitutional because Art.4§9 "expressly" grants to a governor the executive function of calling a "special session" that is not also "expressly

[9] *See* I.C.§2-2.1-1-1(3)(A)("Session" refers to any of the following: (A) A regular session of the general assembly…."). *Contrast Id.* at (4)("'Special session' means that 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….").

provided" to "another" "person, charged with official duties under one of [the three] departments…." Art.3§1. Therefore, under the plain text of Article 3§1, no other governmental branch "shall exercise" that function "except as in this Constitution expressly provided." There is no dispute that the Legislature did not have the authority to call a "special session" prior to 1970, and nothing in the 1970 or 1984 Amendments "expressly provided" that it could call a "special session."

Interestingly, the Legislative Parties argue that the Governor's analysis of Art.3§1 is backwards: Because calling a legislative session is inherently a legislative branch function, the second sentence of Art.4§9 granting Indiana governors the authority to call "special sessions" is exactly the type of language contemplated and required by Art.3§1. (Opp.,pp.54-55). They posit that the 1970 Amendment removed the original textual limitations on the Legislature's ability to meet as frequently as it wants, such that now the Legislature and Indiana governors both have the power to call "special sessions." But to reach that conclusion would be to create an "implied legislative function" exception to the requirement that for more than one branch of the government to have the same power, it must be "expressly provided" in the text of the Constitution per Art.3§1. That is not the law.

1. Calling a special session is an executive function.

If is far from settled that the act of "calling" any type of legislative session is a "legislative function," although resolution of that question is not dispositive. Indeed, there is a difference in the nature of the authority to call a "special session" (which is an "executive" function), and a "regular session" (which *can be* a "legislative function"

if constitutionally authorized). The Legislative Parties gloss over any such distinction.

For the proposition that the power to call any type of session is a "legislative function," including a "special session," the Legislative Parties cite two Indiana cases, *Woessner v. Bullock*, 176 Ind. 166, 93 N.E. 1057, 1059 (Ind.1911), and *Tucker*, cited *supra*. (Opp.,p.55). The phrase they quote from *Woessner* is *dicta,* and it is unclear if it relates to a governor's ability to call a "special session," or his/her ability to veto legislation. *Woessner,* 93 N.E. at 1059.

The Legislative Parties also point to the portion of *Tucker* in which the Court examines constitutional provisions that grant power to a governor, as distinguished from "directions or mandates as to the manner in which executive power is to be exercised, or limitation upon power or delegation of power which is not in essence executive." *Id.* at 657. Through that analysis, the Court does note that Art.5§20 is an "invasion" of the legislative field. But a governor's authority in Art.5§20 is an exception to the express authority granted to the Legislature in the pre-1970 first sentence of Art.4§9 to change the "place" of the meeting. The "location" of a session is only necessary if a session has been "called" in the first place. Until 1970, the Legislature had no authority to call a session.

In contrast, a governor's authority to call a "special session" was, until 1970, the only express power in the Constitution authorizing any branch to initiate and authorize a legislative session of any type. Notably, at least one 1851 framer described that power as "executive." (App.Vol.III,p.82). The weight of authority is

that it is *not* a "legislative function" to call a non-regular "special session." It is an executive function.[10] That being the case, the Legislature has no "implied" constitutional authority to call a "special session" because *calling* that type of unpredictable session is not inherently a "legislative function," as the Legislative Parties suggest.

In 1907, the Pennsylvania Supreme Court ruled that "[w]hether the general assembly ought to be called together in extraordinary session is always a matter for the executive alone. How it shall be called, and what notice of the call is to be given, are also for him alone." *In re City of Pittsburg,* 217 Pa. 227, 120 Am.St.Rep.845, 66 A. 348, 349 (Pa.1907). *Accord Walker v. Baker,* 145 Tex. 121, 196 S.W.2d 324, 328 (Tex.1946); *Application of Lamb,* 67 N.J.Super.39, 169 A.2d 822, 831 (N.J.Super.1961).

The point is, there are two types of sessions that can be called, each with different characteristics and constitutional significance. Calling a "special session" is "executive" in nature because the calling of it does not require the passage of any "legislation" authorizing it. The need for one is unpredictable and cannot "fixed by law" in advance. In contrast, calling a predictable "regular" "fixed" session is an implied "legislative function" if a constitution authorizes it to be done by a legislature "by law." *Ellingham,* 99 N.E. at 4 ("The words 'legislative power,' in a constitutional delegation of general legislative authority, 'mean the power or authority, under the

[10] The power to call "extraordinary" sessions in the 1816 Constitution was placed in the "executive" Article. Art.4§13.

Constitution or frame of government, to *make, alter, or repeal laws*.'")(emphasis added, citation omitted). Since 1970, the power to call a "regular session" has rested with the Legislature, but it is a fundamentally different legislative ("by law") power over a fundamentally different "fixed" type of "regular session."

2. There is no "legislative function" exception to Art.3§1.

Even assuming the power to call a "special session" is an inherent Article 4 "legislative function," the 1851 framers expressly provided a limit on that power. Just like there are limits on a governor's executive power found in Article 5. *Tucker,* 35 N.E.2d at 649. *E.g.,* Art.5§17 (legislative right to "advise and consent" on pardons).

The three branches are "independent of each other *except to the extent that the action of one was made to constitute a restraint* to keep the others within proper bounds, and to prevent hasty and improvident action." *Ellingham,* 99 N.E. at 3 (emphasis added). *If* the power to call a "special session" is inherently legislative, the second sentence of Art.4§9 is an express restraint on that power that was not undone in 1970.

Beyond the interpretive canons endorsed by this Court in *Ellingham* and *Tucker,* and not substantively addressed by the Legislative Parties and the trial court, it has long been recognized that even such inherent constitutional powers have limits. They exist "'except'" as "such are expressly or impliedly withheld by the state constitution from the state legislature.'" *State ex. rel. Smith v. McLellan,* 138 Ind. 395, 37 N.E. 799, 801 (Ind.1894)(quoting Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of

the American Union, 5th Ed. (1883)). For example, although the Legislature has broad power to tax, its discretion to do so is not unfettered. *Majestic Star Casino, LLC v. Blumenburg,* 817 N.E.2d 322, 327 (Ind.Tax.Ct.2004)(collecting cases). It is limited by Art.10§1, much in the same way its authority (if it exists as an implied "legislative function," which it does not) to call a "special session" is textually limited by the second sentence of Art.4§9.

In short, an implied constitutional authority cannot "trump" an express restraint on that authority, unless the framers have expressly so provided. Here, the "express" power to call a "special session" was not "expressly provided" to the Legislature, and so even if it has the inherent power to call that type of session, that authority remains restrained by the second sentence of Art.4§9. "[I]t is the rule that where the means by which the power granted shall be exercised are specified, no other or different means for the exercise of such power shall be implied…." *Ellingham,* 99 N.E. at 15.

There is no "implied legislative function" exception to Article 3§1, and Governor Holcomb's application of that constitutional provision is correct.

D. It is impossible to "fix" an "emergency session" "by law."

The Legislative Parties' argument that Art.4§9 authorizes the Legislature to "provide by law for a legislative session that commences on a date that the legislature will later choose…," fails to give proper meaning and import to the constitutional requirement that the "frequency" of a regular session must be "fixed by law" by the Legislature. (Opp.,pp.47-48).

1. The "frequency" of an "emergency session" must be "fixed by law" to be constitutional.

The 1851 framers gave no leeway when (biennially) and for how long (Art.4§29) the Legislature could meet. They did, however, allow the Legislature to change two things: The start date (if not the default date), and the location (if not the capitol). Art.4§9(1851). But to do so, they had to "appoint" those changes "by law." And the way in which the Legislature could change the "day" and "place" remained unchanged by the 1970 framers, even though the sessions no longer needed to be biennial. Art.4§9.

When it came time for the 1970 framers to decide how to word the newly-granted power of the Legislature to decide whether to meet annually or biennially (*i.e.,* the "frequency"), they similarly chose the requirement that it be done "by law." Art.4§9. But they chose a new qualifier for those words. Instead of "appointed by law," they chose the more rigid "*fixed* by law." *Id.*(emphasis added). Fix means "being set firmly in position…," "not subject to change or variation." Webster's II New College Dictionary, p. 424 (2005). Use of the word "fixed" undermines the Legislative Parties' argument.

First, use of "fixed" (and not "appointed") is further interpretive evidence of the distinction between a "regular session" that can be so "fixed," and a "special session" that cannot. Second, because the date of an emergency ("special") session cannot be "fixed by law," it is tantamount to the unique "special session" that only Indiana governors have the power to call.

2. The technical session statute does not mean HEA1123 is constitutional.

That a precise date for the beginning of a technical session is not expressly set forth by statute does not support the Legislative Parties' position that the Legislature does not have to "fix by law" the date of an emergency ("special") session. As an initial note, the constitutionality of technical sessions is not before the Court. Regardless, the Legislature does not decide the meaning of the Constitution, this Court does. "[T]he Legislature did not enact the Constitution, and a legislative intention as to how the Constitution is to operate is of little value in determining the intention of the drafters of the Constitution, especially where the legislative interpretation involves the usurpation of powers which the Constitution vests in other departments of government." *Tucker,* 35 N.E.2d at 293. Otherwise stated, how the Legislature enacted and then acted under the technical session statute does not inform whether that statute complies with the Constitution. *Id.*

Regardless, a technical session is not a new, or stand-alone session. (App.Brief,pp.50-52). The Constitution does not contain the words "*sine die*," but it does use the words "final adjournment" in Art.5§14(a)(2)(C) and –(D), which reflects the existence and efficacy of other types of adjournments, such as one to accommodate a technical session that follows a non-"final" adjournment of the "regular session" to which the technical session is statutorily-tethered. As such, the first date of a

technical session is not the "commencement" of a new constitutional session that is required to be set "by law."[11]

The Legislative Parties' other arguments relating to technical sessions all fail. The technical session statute establishes that the start date of a such a session is set by a "concurrent resolution" of the entire "general assembly." I.C.§2-2.1-1-2.5(b),-3.5(b). The Legislative Parties suggest, however, that a technical session concurrent resolution is substantively the same as the resolution of the 16-member Legislative Council that authorizes an emergency ("special") session under HEA-1123. Not so.

When a concurrent resolution is made to set a technical session, the entire Legislature is in a constitutional "regular session." The rules that the Legislature has adopted, and to which the Legislative Parties cite, give the "concurrent" resolution meaning *during the session to which the rules apply*. I.C.§2-2.1-1-2.5(a),-3.5(a)(concurrent resolution must be adopted "[b]efore the [] regular session adjourns[.]"). In contrast, when the 16-member Legislative Council adopts its "resolution" to call an emergency ("special") session, it does so outside of any active session, regular or special.

The Legislature cannot delegate away its constitutional lawmaking authority to a 16-member statutory body that meets outside of a constitutionally recognized "session." *City of Carmel v. Martin Marietta Materials, Inc.,* 883 N.E.2d 781, 788 (Ind.2008)("the legislature cannot delegate the power to make a law."); *Simpson v.*

[11] Reference to the House and Senate Journals confirms the point. The conclusion of the 2014 "Second Regular Technical Session" is described as being an adjournment of the "Session of the 118th Indiana General Assembly." (Appellees' Addend.,p.13).

Hill, 263 P. at 641(noting that if legislators gather outside a constitutional session, they are not cloaked with any lawmaking authority). This is especially so because the framers "hammered" the words "by law" into the first and third sentences of Art.4§9.

Similarly, a technical session can be cancelled by the House Speaker and President Pro Tempore of the Senate, I.C.§2-2.1-1-2.5(e), -3.5(e), but *only if* the original concurrent (joint) resolution "provided" them with that authority during the "regular session." *Id.* That decision was made by the entire Legislature, not by a 16-member statutorily-created Legislative Council meeting outside of a "regular session."

The Legislative Parties similarly suggest that because a regular session could be adjourned by resolution before the statutory "end date" of a regular session, I.C.§2-2.1-1-2(e), that means the Legislature can "fix" end dates other than through statute. (Opp.,p.48). The Constitution gives express textual authority to the Legislature to decide when to adjourn, Art.4§§11,12, which connotes a different meaning than the "length" of sessions that must be "fixed by law" in Art.4§9. Otherwise stated, Art.4§9 requires that the original (not to exceed) "length" of a session be "fixed by law," but Art.4§§11,12 separately (but not inconsistently) allows the Legislature to "adjourn" those sessions early if circumstances so require.

The Legislative Parties also point to the Legislature holding a technical session and passing a "new bill" during that session as evidence of the Legislature's "plenary control over session frequency." (Opp.,p.51). But that argument ignores the

interpretive distinction between action/inaction relating to a constitutional power, as compared to action/inaction relating to a statutory power. *If* the Legislature passes a new bill in a technical session, that action would be contrary to the text of the technical session statute, I.C.§2-2.1-1-2.5(c), -3.5(b), not the text of the Constitution itself. That is an important interpretive distinction. *Tucker, supra.*

Finally, setting the date of an emergency ("special") session under HEA-1123 by "concurrent resolution each regular session" would not save that statute's constitutionality, as the Legislative Parties suggest. (Opp.,p.53). In fact, that proposition highlights the distinction between an emergency ("special") session and a technical session. Because of the unknowable nature of the need to call a "special session," the Legislature cannot pass a "concurrent resolution" before the end of a regular session "fixing" the start date of an emergency ("special") session, in the same way the Legislature does for a technical session.

The Legislative Parties place too much interpretive significance in the Legislature's ability under the technical session statute to "adopt a statute that does not specify a particular date in advance." (Opp.,p.47). Constitutional text expressly states that the Legislature is to "fix by law" the "frequency" of a session, and HEA-1123 fails to do so.

E. An "emergency session" is a "special session."

To circumvent the clear application of Art.3§1, the Legislative Parties suggest that a statutory "emergency session" is not the same as a constitutional "special session." They argue that the Governor is advancing a "formulistic 'resemblance'

test" that "would leave everyone guessing as to how much resemblance is too much." (Opp.,p.57). Governor Holcomb's position, borrowing from a federal appellate court, is best described by the "Duck Test": "The *Duck Test* holds that if it walks like a duck, swims like a duck, and quacks like a duck, it's a duck." *Lake v. Neal,* 585 F.3d 1059, 1059 (7th Cir. 2009). Here, as with the plaintiff in *Lake,* HEA-1123 "flunks the Duck Test." *Id.*

The Legislature cannot avoid trampling on the constitutional power of another branch by artfully describing a duck as a dog. If a statute is enacted that has all the characteristics of an express and exclusive constitutional power that is held by another branch, but creatively calls that power something else, it is nonetheless unconstitutional. Period. And as explained by Governor Holcomb in his Appellant's Brief, what the Legislature labels an "emergency session" has all of the hallmarks of a constitutional "special session." They are substantively one-in-the same.

F. The Legislature cannot hold multiple regular sessions in a year.

If a wholesale change in the Legislature's ability to call sessions "whenever it wanted" was intended in 1970 (it was not), the Legislature would have removed any reference to concepts of frequency when it made changes to Art.4§9's first sentence. But it did the exact opposite. The 1970 Amendment *added* the words "each year" to the text of the first sentence, replacing the prior mandate of sessions to be held "every second year…." Art.4§9(1851).

If the 1970 framers intended not to limit how many sessions could be held annually, the words "each year" they added in 1970 are surplusage.[12] Indeed, if the intent in 1970 was to allow the Legislature *carte blanche* frequency authority as long as it exercised that power "by law," as the Legislative Parties' argue, then Art.4§9's first and third sentences could have easily been combined into one: "The commencement dates, places, lengths, and frequencies of the sessions of the general assembly shall be fixed by law." But the 1970 framers did not do so, instead leaving in the singular forms of "day," and "place," adding in the singular forms of "length," and "frequency," and adding "each year."[13]

"Giving life" to the meaning of the added words "each year" is the historical context surrounding passage of the 1970 Amendments, including the 1970 ballot question: "Shall Article 4, Sections 9 and 29 of the Constitution of the State of Indiana be amended to permit the [Legislature] to meet annually instead of biennially, *and*[14] to establish the lengthy and frequency of its sessions and recesses by law?" (App.Vol.VII.p.225)(emphasis added).

If the third sentence of Art.4§9 gives the Legislature the power to set legislative sessions whenever it wants, there would be no basis for the first clause in

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[12] This argument has not been waived. It was made in response to the trial court's erroneous assertion that "nothing in Article 4, section 9 limits the [Legislature] to one annual 'regular' session." (App.Vol.II,p.42).

[13] There is no requirement that an "each year" session occur in the same "calendar year," thereby undermining the Legislative Parties' suggestion that the Governor's argument ignored any import of the November meetings.

[14] "Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives." Scalia et al., *supra,* p. 116.

that ballot question. Adopting the Legislative Parties' position, the question should have been: "Shall Article 4, Sections 9 and 29 of the Constitution…be amended to permit the [Legislature] to establish the length and frequency of its sessions and recesses by law?" But that was *not* the question precisely *because* it was the 1970 framers' addition of the words "each year" in the first sentence that allowed (and limited) the Legislature "to meet annually instead of biennially…," as long as it set that "frequency" "by law" under the new language in Art.4§9's third sentence.

The Legislative Parties are wrong when they claim the "text cited by the Governor says only, 'here is a default date to start, unless you have a different date in mind.' And the rest of Section 9 says, 'you can meet however long and whenever you like.' The first instruction does not negate the second." (Opp.,p.46). This position misconstrues the meaning of the words "each year," as it must.

Governor Holcomb's position, and the text he relies upon for it, means that (per the first sentence of Art.4§9) there is a default start date and place for an "each year" session which can be changed if "appointed by law," and (per the third sentence of Art.4§9) whether there is a session "annually or biennially" (and for how long) is determined by a law passed by the Legislature that "fixes" that (frequency) decision. That is how to read these clauses in harmony without ignoring their grammar and the words (especially "each year") hammered into Art.4§9 back in 1970.

G. "By law" has constitutional significance.

The Legislative Parties are wrong to state that "nowhere does the constitutional text restrict *how* the Legislature may 'appoint[] by law' a 'different day

or place' for the commencement of a session." (Opp.,pp.46-47). Building upon that error, the Legislative Parties argue that "all the [Legislature] did with HEA-1123" was to "'appoint[] by law' the specific *circumstances* under which a session of the [Legislature] will commence." (Opp.,p.47)(emphasis added). Ignoring for the moment that the text of Art.4§9 uses the words "different day or place" and not "circumstances," the words "by law" have constitutional significance.

As explained in Governor Holcomb's Appellant's Brief (pp.59-63), "by law" is an express constitutional limitation on how the Legislature may set or change the details of its sessions under Art.4§9. When the framers required something to be set "by law," they did not mean by "resolution" approved by a 16-member statutorily-created body outside the purview of a constitutionally authorized session. They knew how and when to use "by law," and how and when to use by "resolution." (App.Brief,p.59n.12).

If, as the Legislative Parties urge, a majority of 16-legislators can satisfy the Art.4§9 constitutional "by law" requirement, then as Governor Holcomb explained (and the Legislative Parties ignored), our system of open and transparent government will be significantly upended. (App.Brief,pp.61-63). But that is not how Art.4§9 works, or the other "by law" provisions in our Constitution. (*Id.*). By inserting the words "appointed by law" and "fixed by law" in Art.4§9, the framers required more than the majority of a 16-member body to commence a new legislative session, and HEA-1123 fails to satisfy that constitutional requirement.

H. This case is not about control over the legislature by a governor.

Governor Holcomb is not suggesting that his exclusive authority to call a "special session" is broader than the constitutional text of Art.4§9. He is not seeking to expand the scope of that power to exercise "a measure of exclusive gubernatorial control over legislative meetings." (Opp.,p.59). Nor does this case involve Governor Holcomb suggesting he has a "freestanding power to tell the legislature when it *cannot* meet." (Opp.,p.62)(emphasis added). It is his view that unless the Constitution is properly amended, the Legislature cannot call a "special session." Nothing more.

Finally, it is inappropriate to suggest that what Governor Holcomb is doing here is trying to "advance the interests of a single official in a single case." (Opp.,p.63). *See also* Theodore E. Rokita, *Duty to Defend and the Rule of Law Redux: Why a State Attorney General Should Refuse to Let a Governor Sue the Legislature*, 55 Ind. L. Rev. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4026273, p.31 ("The Governor may not, however, use the courts as a tool to gain political leverage over the General Assembly.").

There was no political gain for Governor Holcomb to be had by filing and advancing this case.[15] There was no constituency clamoring for him to file this lawsuit. It was filed because he takes his oath and duty to uphold the Constitution seriously. Any claims to the contrary should be soundly rejected.

[15] Recall, Governor Holcomb asked Senate President Bray and Speaker Huston if they wanted him to call a special session and they declined. (App.Vol.VIII,pp.8-18).

CONCLUSION

The trial court's ruling should be reversed. HEA-1123 is unconstitutional and it should be enjoined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 22, 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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