STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

THE LEAGUE OF WOMEN VOTERS OF WISCONSIN, DISABILITY RIGHTS OF WISCONSIN, INC., BLACK LEADERS ORGANIZING FOR COMMUNITIES, GUILLERMO ACEVES, MICHAEL J. CAIN, JOHN S. GREENE, and MICHAEL DOYLE,

FILED
MAR 21 2019
DANE COUNTY CIRCUIT COURT

Plaintiffs,

v. Case No. 19 CV 84

DEAN KNUDSON, JODI JENSON, JULIA M. GLANCEY, BEVERLY GILL, ANN S. JACOBS, MARK L. THOMSEN, MEAGAN WOLFE, and TONY EVERS,

Defendants,

and

THE WISCONSIN LEGISLATURE,

Intervening Defendant.

DECISION AND ORDER DENYING MOTION TO DISMISS, GRANTING TEMPORARY INJUNCTION, AND DENYING STAY OF TEMPORARY INJUNCTION

STATEMENT OF THE CASE

Article IV, Section 11 of the Wisconsin Constitution controls when the Legislature may meet:

> **11. Meeting of legislature**
>
> Section 11. The legislature shall meet at the seat of government at such time as shall be provided by law, unless convened by the governor in special

> session, and when so convened no business shall be transacted except as shall be necessary to accomplish the special purposes for which it was convened.

"Provided by law" means provided by duly-enacted statute.[1] Accordingly, except for special sessions convened by the Governor, the Wisconsin Constitution permits the Legislature to meet only at such time as provided by statute.

The sole statute enacted to implement Article IV, Section 11 is § 13.02, Stats., which provides:

> **13.02. Regular sessions**
>
> The legislature shall meet annually.
>
> (1) The legislature shall convene in the capitol on the first Monday of January in each odd-numbered year, at 2 p.m., to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business, but if the first Monday of January falls on January 1 or 2, the actions here required shall be taken on January 3.
>
> (2) The regular session of the legislature shall commence at 2 p.m. on the first Tuesday after the 8th day of January in each year unless otherwise provided under sub. (3).
>
> (3) Early in each biennial session period, the joint committee on legislative organization shall meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year, to be submitted to the legislature as a joint resolution.
>
> (4) Any measures introduced in the regular annual session of the odd-numbered year which do not receive final action shall carry over to the regular annual session held in the even-numbered year.

Months after final adjournment of its regular session in 2018 during the 2017-19 biennium, the Legislature met in a December 2018 "Extraordinary Session" convened, not as a special session by the Governor (or even by a quorum of either the senate and assembly), but by a majority of two committees

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> **§ 17. Enactment of laws**
> Section 17. (1) The style of all laws of the state shall be "The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:".
> (2) No law shall be enacted except by bill. No law shall be in force until published.
> (3) The legislature shall provide by law for the speedy publication of all laws.

Wis. Const. art. IV, § 17. *See also* Wis. Const. art. V, § 10 and *State v. City of Oak Creek*, 232 Wis. 2d 612, 629 (2000) ("the drafters meant statutory law when they used the phrase, 'provided by law.'")

of the Legislature.[2] During the "Extraordinary Session," three bills were adopted by the Legislature[3] that were then enacted by the Governor's signature in short order.[4] Additionally, 82 nominees were confirmed for positions on various State of Wisconsin authorities, boards, councils, and commissions.

Plaintiffs[5] file this action under § 806.04, Stats., for a judgment declaring that the December 2018 "Extraordinary Session" violated § 13.02, Stats. and therefore was unconstitutional under Article IV, Section 11 of the Wisconsin Constitution because the Legislature did not meet "at such time as... provided by law." Arguing that bills adopted by the Legislature during meetings convened in violation of the Wisconsin Constitution are *ultra vires* and void *ab initio*, Plaintiffs additionally seek an injunction barring further application, enforcement or implementation of Acts 368, 369, 370, and the confirmation of the 82 nominees.

Currently before the Court are the following motions[6]:

(1) The Legislature's motion to dismiss Plaintiffs' Amended Complaint under § 802.06 (2)(a)(6), Stats., for failure to state a claim upon which relief may be granted;

(2) The Plaintiffs' motion for temporary injunction (joined by Defendant Governor Evers);

(3) The Legislature's alternative motion to stay any temporary injunction ordered by this Court.

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[2] The Assembly Committee on Assembly Organization and the Senate Committee on Senate Organization.

[3] 2017 Wisconsin Act 368, 2017 Wisconsin Act 369, and 2017 Wisconsin Act 370.

[4] The "Extraordinary Session" was called by the two legislative committees on Friday November 30, 2018, the Legislature met in "Extraordinary Session" on Monday December 3, 2018, and adjourned with its business complete on December 5, 2018. Governor Walker's signatures followed a week later on Thursday, December 13, 2018.

[5] Plaintiffs are alleged to be a mix of not-for-profit, non-partisan, non-stock advocacy corporations (The League of Women Voters of Wisconsin and Disability Rights Wisconsin, Inc.), an unincorporated community organizer/voter advocacy project (Black Leaders Organizing for Communities), individual taxpayers/citizen advocates (Guillermo Aceves, Michael J. Cain and John S.Greene), and a county clerk suing in his official capacity (Green County Clerk Michael Doyle).

[6] The Court previously ordered the Legislature's permissive intervention as a party defendant based upon stipulation of the parties. Furthermore, after oral argument, upon stipulated terms of the parties, the Court dismissed the Plaintiffs' Amended Complaint without prejudice against the Wisconsin Elections Commission officials, Defendants Dean Knudson, Jodi Jenson, Julia M. Glancey, Beverly Gill, Ann S. Jacobs, Mark L. Thomsen and Meagan Wolfe.

The motions have been fully and expertly briefed by the parties and the twelve *amici curiae* law professors. All concur that there are no disputed material factual issues requiring an evidentiary hearing on the motion for temporary injunction. Instead, they agree, as does the Court, that the issues presented by the pending motions are purely legal issues ripe for decision.

For the following reasons, the Court DENIES the remaining motion to dismiss, GRANTS the temporary injunction, and DENIES the motion for a stay of the temporary injunction.

THE LEGISLATURE'S MOTION TO DISMISS

Recent amendments to the Wisconsin Rules of Civil Procedure require this Court to decide the Legislature's motion to dismiss before considering the motion for temporary injunction:

> (b) **Upon the filing of a motion to dismiss under sub. (2)(a)6.,** a motion for judgment on the pleadings under sub. (3), or a motion for more definite statement under sub. (5), **all discovery and other proceedings shall be stayed for a period of 180 days after the filing of the motion or until the ruling of the court on the motion, whichever is sooner,** unless the court finds good cause upon the motion of any party that particularized discovery is necessary.

§ 802.06(1)(b), Stats., (boldface added.)

The Legislature moves for dismissal under §802.06(2)(a)6., claiming the Amended Complaint fails to state a claim for which relief may be granted. The motion is DENIED because, as will be seen below, not only does the Amended Complaint state a valid claim for relief, but a successful one.

In its briefing, the Legislature perches its dismissal motion on the doctrine of standing, although the motion to dismiss itself does not. Presuming without deciding that standing is necessarily placed at issue in §802.06(2)(a)6 motions, the Legislature's dismissal motion must still be denied.[7] This is because the

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[7] Beyond all of this discussion on standing and failure to state a claim lurks a more fundamental procedural inquiry regarding whether the Legislature, as an intervening party defendant, may move to dismiss a claim against an entirely separate defendant where that separate defendant does not seek dismissal of the claim. In what other action may one defendant seek an order materially affecting another defendant's case over that other defendant's objection? While permitted to intervene, the Legislature must play by the same rules as any other party. Certainly it may seek dismissal of this action against itself, which would likely be granted without objection, but then, why intervene in the first place?

The upshot is that a motion to dismiss is the wrong tool for the job here because a successful motion to dismiss can only place the Legislature back into the position of sideline spectator watching the case proceed against the other defendants, the position it occupied before it intervened. Dismissing the Legislature cannot yield the result the Legislature seeks, i.e., a declaration that its December 2018 meeting was constitutional.

Court need not decide, at the temporary injunction stage, whether some or even all of the Plaintiffs lack standing[8], because Governor Evers has adopted and incorporated their positions as his own, and his standing to pursue the declaratory and injunctive relief requested here cannot be reasonably questioned.[9] This is true for at least three reasons.

First, the doctrine of *parens patriae* [as most succinctly encapsulated in §14.11(1), Stats.[10]], provides the Governor standing to institute and prosecute actions to protect the rights, interests or property of the state. *See also State ex rel. Reynolds v. Smith*, 19 Wis. 2d 577, 584 (1963).

Second, the Governor's own authority and powers are directly affected by many of the allegedly unconstitutional confirmations and legislative acts that resulted from the December 2018 "Extraordinary Session."

Third, on these facts, it would be perverse for this Court to grant the Legislature permissive intervention to participate as a party to this lawsuit, and not grant the same opportunity to the Governor.

PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

The standards governing this Court's discretionary decision to grant a temporary injunction are well entrenched in Wisconsin law and summarized by the Supreme Court in *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 519-21 (1977) (footnotes omitted):

> As to the exercise of such discretion, *520 this court has stated the following guidelines: Injunctions, whether temporary or permanent, are not to be

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[8] In its final brief and oral argument, the Legislature conceded that some of the Plaintiffs had standing for some of the claims. Since the challenge by plaintiffs here attacks the procedure by which all the December 2018 laws were passed, any standing by plaintiffs appears sufficient to allow this case to proceed.

[9] The Legislature's reliance on *State v. City of Oak Creek*, 232 Wis. 2d 612, 626 (2000) is misplaced, because Oak Creek dealt exclusively with the Attorney General's standing under constitutional and statutory law applicable only to that office.

[10]**(1) State property; legal protection of.** The governor, whenever in the governor's opinion the rights, interests or property of the state have been or are liable to be injuriously affected, may require the attorney general to institute and prosecute any proper action or proceeding for the redress or prevention thereof; and whenever the governor receives notice of any action or proceeding between other parties by which the rights, interests or property of the state are liable to be injuriously affected, the governor shall inform the attorney general thereof and require the attorney general to take such steps as may be necessary to protect such rights, interests, or property.

§ 14.11(1), Stats.

> issued lightly.[3] The cause must be substantial.[4] A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits.[5] Temporary injunctions are to **314 be issued only when necessary to preserve the status quo.[6] Injunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm,[7] but at the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.[8]
> *521 While standards for the granting of temporary and permanent injunctive relief differ,[9] the presence of irreparable injury and inadequate remedy at law are relevant factors to consider in granting either temporary or permanent injunctions for the reason that, "(I)f it appears . . . that the plaintiff is not entitled to the permanent injunction which his complaint demands, the court ought not to give him the same relief temporarily."[10] Thus, a showing of irreparable injury and inadequate remedy at law is required for a temporary as well as for a permanent injunction.

Thus, this Court may exercise its discretion here to grant the extraordinary remedy of a temporary injunction only if Plaintiffs (or Governor Evers) have demonstrated (1) they have a reasonable likelihood of success on the merits of their claims; (2) that an injunction is needed to preserve the status quo; (3) that they have no adequate remedy at law, such as damages; and (4) irreparable harm will occur if an injunction is not entered. As will be seen in what follows, Plaintiffs and Governor Evers satisfy all four criteria for entry of a temporary injunction.

I. Substantial Likelihood of Success on the Merits

Article IV, Section 11 was initially adopted into the Constitution by the people of Wisconsin in 1848, and subsequently amended in 1881 and 1968, as part of an overall constitutional package specifically designed to constrain legislative overreach and safeguard the people's liberty from irregular, capricious, precipitous, and unpredictable meetings of the Legislature. As *amici curiae* law professors demonstrate without dispute in this record, irregular legislative sessions and nationwide legislative malfeasance, even corruption, were very real grievances with the colonists before statehood. The people of Wisconsin sought to avoid a continuation of these colonial-era abuses involving irregular meetings of the Legislature by, among other things, adopting Article IV, Section 11 as a check on the Legislature's otherwise unfettered discretion.

In requiring regular sessions pursuant to announced legislative schedules, supplemented by special sessions convened by the Governor on "extraordinary occasions," Article IV, Section 11 and Article V, Section 10 were designed specifically to foster the people's rights to attend legislative sessions, petition, lobby, and keep apprized of legislative activity. At the same time, these constitutional provisions provided ample flexibility to the Legislature to conduct its

business by enacting statutes – available for all the people to see - setting times for the Legislature to meet.

The bottom line in this case is that the Legislature did not lawfully meet during its December 2018 "Extraordinary Session," which therefore proceeded in violation of both Article IV, Section 11 of the Wisconsin Constitution and its sole implementing statute § 13.02, Stats. The former constrains the Legislature from meeting except in two circumstances: (1) "at such time as shall be provided by law," i.e., by statute, (2) "unless convened by the governor in special session."

Neither circumstance occurred with the December 2018 "Extraordinary Session." For whatever reason, Governor Walker did not exercise his constitutional authority to call a special session. And Section 13.02 does not set any "time" for an extraordinary session, as required by Article IV, Section 11. Indeed, nothing in § 13.02, Stats., authorizes the Legislature to self-convene and meet, as it did last December, upon mere committee vote months after final adjournment of its 2018 regular session.

Again, § 13.02, Stats., provides:

13.02. Regular sessions

> The legislature shall meet annually.
>
> (1) The legislature shall convene in the capitol on the first Monday of January in each odd-numbered year, at 2 p.m., to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business, but if the first Monday of January falls on January 1 or 2, the actions here required shall be taken on January 3.
>
> (2) The regular session of the legislature shall commence at 2 p.m. on the first Tuesday after the 8th day of January in each year unless otherwise provided under sub. (3).
>
> (3) Early in each biennial session period, the joint committee on legislative organization shall meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year, to be submitted to the legislature as a joint resolution.
>
> (4) Any measures introduced in the regular annual session of the odd-numbered year which do not receive final action shall carry over to the regular annual session held in the even-numbered year.

This Court must apply § 13.02, Stats., as written.

The statute nowhere mentions, even indirectly, that a previously unscheduled meeting of the full Legislature in "extraordinary session" may be

convened by a handful of legislators on two legislative committees[11]. Indeed, the term "extraordinary session" is not found in § 13.02.

Even if such "extraordinary sessions" were contemplated by §13.02, the statute sets no time for convening such as expressly required by Article IV, Section 11. This statutory omission is alone fatal to the Legislature's position here, which, in effect, demotes the controlling language in Article IV, Section 11 ("the legislature shall meet...at such time as shall be provided by law") to the status of mere surplusage, i.e., non-essential language. Our Supreme Court cautions, however, that constitutional language is to be read, wherever possible, to give reasonable effect to every word, in order to avoid surplusage. *Appling v. Walker*, 358 Wis. 2d 132, 155 (2014).

In contrast to its silence on "extraordinary sessions," §13.02 expressly addresses regular sessions in multiple sections. The statute itself is entitled "Regular sessions" which, while alone not dispositive, nonetheless is "persuasive evidence of a statutory interpretation." *Mireles v. Labor and Industrial Review Commission*, 237 Wis. 2d 69, 93, n.13 (2000).

Subsections (2) and (4) of § 13.02 concern only "regular" sessions, while subsection (1) authorizes only a single organizational convening for the Legislature "to organize itself for the conduct of its business" at the outset of the biennium. Finally, subsection (3) orders the joint committee on legislative organization ("JCLO") to meet early in the "biennial session period" and develop a work schedule for the legislative session, to be submitted to the Legislature as a joint resolution.

In short, where it expressly addresses meetings of the full Legislature, §13.02 is written specifically to implement the temporal commands of Article IV, Section 11.

So, applying the statute as written, where is the constitutionally-required language that authorized the eight legislators on the Assembly Committee on Assembly Organization and the Senate Committee on Senate Organization to convene a meeting of the full Legislature in the December 2018?

The Legislature argues that subsection (3) empowers the JCLO to develop a joint resolution that would permit these two legislative committees, on majority vote, to convene the full Legislature for a surprise meeting *at any time* during the biennial period when it is not otherwise in regular session. In other words, contrary to its unequivocal constitutional mandate, the Legislature interprets subsection (3) as permitting the Legislature to meet other than "at such time as provided by law."

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[11] Only 5 assembly representatives (out of 99 total) and 3 senators (out of 33 total) voted to convene the December 2018 meeting of the entire Legislature within one working day.

But § 13.02 (3) does not say this, or anything close. It merely directs the JCLO to develop a work schedule early in the biennium to submit to the Legislature by joint resolution. Developing a work schedule is a far cry from granting two legislative committees the power to convene previously unscheduled meetings of the full Legislature such as what occurred in December 2018. Indeed – to repeat – the people's primary purpose in adopting Article IV, Section 11 was to prevent such a happening.

The Legislature doubles down on its theory by referencing 2017 Senate Joint Resolution 1, which it contends specifically authorized "extraordinary sessions" in the form of "non-prescheduled floor periods." However, such an attenuated theory neither satisfies § 13.02 (3), nor provides justification for the Legislature's December 2018 meeting. This is true for several reasons.

First, § 13.02 (3) only authorizes the JCLO to develop a "work schedule for the legislative session." A "non-prescheduled floor period" is the antithesis of a "work schedule," by both definition and force of logic.

Second, the words "non-prescheduled floor period" do not appear anywhere in the Constitution, the statute, or even the joint resolution. The concept is a *post hoc* fiction crafted to justify the authority the Legislature wrongfully assumed to convene and meet in its December 2018 "Extraordinary Session."

Third, and most importantly, Article IV, Section 11 only authorizes meetings of the Legislature "at such times as allowed by law," i.e., statute. A non-prescheduled floor period, by its very nature, is not a meeting "at such time as allowed by law."

Moreover, even if it had set a time for the Legislature to meet in "extraordinary session" (again, it did not), 2017 Senate Joint Resolution 1 is not "law." See Article IV, Section 17 of the Wisconsin Constitution. Legislative rules are always subject to judicial review to ensure their compliance with the Constitution. *See State ex rel. Ozanne v. Fitzgerald,* 334 Wis. 2d 70 (2011) (Prosser, J., concurring).[12]

This Court cannot uphold the December 2018 "Extraordinary Session" and remain true to Article IV, Section 11 of the Wisconsin Constitution and § 13.02, Stats., as they were written. Through coiled reasoning, the Legislature essentially adds language and meaning into the Constitution that the people of Wisconsin did not approve.

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[12] Here, the Legislature's contention, pressed at oral argument, that this Court lacks jurisdiction in this case is simply wrong, not only under *Ozanne*, but under express constitutional language itself. *See* Article VII, Section 8. *Cf. State v. Chvala*, 271 Wis. 2d 115, ¶ 49, 149 (Ct. App. 2004), *aff'd,* 279 Wis. 2d 216 (2005).

The Legislature's argument, if accepted, would swallow much of Article IV, Section 11 whole. By allowing the Legislature to create its own authority to meet in previously unscheduled sessions, not at a time set by law as the Constitution commands, but any time at all through mere joint resolutions approved by just a few legislators on short notice – indeed, even with no notice at all – much of Article IV, Section 11 essentially disappears.

So too would the protections guaranteed by Article IV, Section 11, which were no trifling matters for the state's founders when the Wisconsin Constitution was adopted. That the people's liberty is imperiled by a Legislature that can meet at will at any time, with little warning and even less of a published agenda, was a genuine threat on the minds of the people in 1848.

The adverse consequences for the people flowing from the Legislature's *ultra vires* act here are even more insidious than apparent at first glance. Consider: in carving out a special session exception for the Governor, the people expressly constrained the scope of such a special session by adopting the following language in Article VI, Section 11: "when so convened no business shall be transacted except as shall be necessary to accomplish the special purposes for which it was convened."

No such limitation would restrain the Legislature's self-convened meetings in "extraordinary sessions." The upshot is a perverse application of the people's will expressed in Article IV, Section 11, and an end-run around regular sessions. Express authority granted to the Governor to call special sessions would be tightly constrained, while fabricated "extraordinary sessions" convened at will and on short notice by a few lawmakers at any time during the biennium would be wide-open affairs.

Consider further: why would the people expressly grant the Governor authority to call the Legislature into session on "extraordinary occasions"[13] but not expressly grant the same authority to the Legislature if that was in fact the people's intent in adopting Article IV, Section 11?

The Legislature's argument is a non-starter where it posits that the December 2018 "Extraordinary Session" must be constitutional because extraordinary sessions have been repeatedly used in the past without objection. As United States Supreme Court Justice Antonin Scalia noted in reference to the United States Constitution, "t]he historical practice of the political branches is, of course, irrelevant when the Constitution is clear." *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 584 (2014), (Scalia, J., concurring). Wisconsin is in accord:

> 'A customary violation of the plain language of the law gives no authority for continuing such violation.' *State ex rel. Raymer v. Cunningham*, 82 Wis. 39, 50

[13] Article V, Section 4 of the Wisconsin Constitution.

> [51 N. W. 1133]; Suth. Stat. Const. § 308; *State ex rel. Weiss v. District Board of School District*, 76 Wis. 177 [44 N. W. 967, 7 L. R. A. 330, 20 Am. St. Rep. 41]." "Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution and appointed judicial tribunals to enforce it." Cooley's Const. Lim. (7th Ed.) c. 4, pp. 106, 107.

Bd. of Trustees of Lawrence Univ. v. Outagamie Cty., 150 Wis. 244 (1912).

The question becomes, so what if the procedure used to enact the laws was constitutionally defective? Do procedural illegalities that produced the legislation doom the legislation itself? After all, after the Legislature self-convened on one business day's notice, the full Legislature passed the legislation and confirmations, which were then enacted by the Governor's signature and publication by the Secretary of State.

The answer, as conceded by the Legislature at oral argument, is this: the Legislature's failure to comply with constitutional procedural requirements for legislative action invalidates the action. *Wisconsin Prof'l Police Ass'n, Inc. v. Lightbourn*, 243 Wis. 2d 512, 561 (2001). *See also State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 366 (1983).

> An unconstitutional act of the Legislature is not a law; it confers no rights, it imposes no penalties, it affords no protection, and is not operative; and in legal contemplation it has no existence.

State ex rel. Kleist v. Donald, 164 Wis. 545, 552-53 (1917) [quoted with approval in *Hunter v. School Dist. of Gale-Ettrick-Trempealeau,* 97 Wis. 2d 435, 444 (1980)].

Thus, the unconstitutional December 2018 "Extraordinary Session" cannot be considered just an instance of "no harm, no foul." The foul is revealed above; the harm inheres in the people's loss of the protections they embraced in adopting Article IV, Article 11 in the first place.

II. Preserving the Status Quo

> The function of the injunction pendente lite under our practice has been largely discussed in several recent cases; notably *Valley Iron Co. v. Goodrick*, 103 Wis. 436, 78 N. W. 1096, *Milwaukee Electric R. & Light Co. v. Bradley*, 108 Wis. 467, 84 N. W. 870, and *Bartlett v. Bartlett*, 116 Wis. 450, 460, 93 N. W. 473, with the result of declaring generally that, where the complaint states a cause of action, and the motion papers disclose a reasonable probability of plaintiff's ultimate success, it is well–nigh an imperative duty of the court to preserve the status quo by temporary injunction, if its disturbance pendente lite will render futile in considerable degree the judgment sought, or cause serious and irreparable injury to one party; especially if injury to the other is

> slight, or of character easily compensable in money; and that the discretion vested in the court is largely over the question of terms of the restraint and the protection of rights by bonds from one party to the other. "Not only does the discretionary power exist to protect a party against such danger, but the duty exists to exercise it by making some reasonable provision to prevent such injury." *Milwaukee Electric R. & Light Co. v. Bradley*, 108 Wis. 486, 84 N. W. 877. This view is supported by section 2774, Rev. St. Wis. 1898, which confessedly was intended to enlarge the duty of the court as it existed under former chancery practice. Trustees v. Hoessli, 13 Wis. 348.

De Pauw v. Oxley, 122 Wis. 656 (1904).

To decide whether an injunction is necessary to preserve the status quo during the pendency of this action, this Court must first determine what is meant by "status quo." After all, many of the fruits of the Legislature's unconstitutional December 2018 meeting have been or are being implemented, the limited federal court injunction notwithstanding.

Wisconsin law appears silent on this question, although other courts are not.

> But the courts define "status quo" as the last peaceable, uncontested status of the parties which preceded the actions giving rise to the issue in controversy. *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir.1958). As the Fifth Circuit has stated:
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> > It must not be thought, however, that there is any particular magic in the phrase 'status quo.' The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.
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> *Canal Authority v. Callaway*, 489 F.2d 567, 576 (5th Cir.1974) (citations omitted). Thus, in *American Can Co. v. A.B. Dick*, No. 83 Civ. 5435–CLB, 1983 WL 2198, at *13 (S.D.N.Y.1983) Bus. Franchise Guide (CCH) ¶ 8097, the court declined to grant a preliminary injunction in part on the ground that, "[c]learly, the 'last uncontested status' of the parties in the instant case

> existed prior to American Can's assignment by subterfuge or restructure, of its duties under the Distribution Agreement to ATI." Just as clearly, the last uncontested status of the parties in this case is that which existed before Praefke was terminated as an ASD, rather than a status that existed after it was terminated without notice.

Praefke Auto Elec. & Battery Co. v. Tecumseh Prod. Co., 123 F. Supp. 2d 470, 473 (E.D. Wis. 2000).

Applying these considerations, the status quo in this case is the state of the law before the Legislature unconstitutionally acted in December 2018. Failing to enjoin the illegal actions of the Legislature would result in substantial changes to Wisconsin government, the administration of federal benefits and programs, election administration and transportation projects – all occurring pursuant to laws that do not exist.

A temporary injunction here is thus necessary to preserve the status quo.

III. No Adequate Remedy at Law

None of the parties argues that an adequate remedy at law exists on these facts, and the Court is unable to envision one.

IV. Irreparable Harm

The parties' briefs debate at length the specific, irreparable harms caused by the laws enacted during the illegal December 2018 "Extraordinary Session." For this Court, however, these arguments miss the mark, which is this. Failure by this Court to enjoin the execution of void laws cannot be seen as anything other than irreparable harm to a constitutional democracy such as ours. The rule of law – the very bedrock of the Wisconsin Constitution – cannot, in any respect, abide enforcement of laws that do not exist.

CONCLUSION AND ORDER FOR TEMPORARY INJUNCTION

Two immutable principles of our constitutional democracy command the result in this case: (1) the Wisconsin Constitution is the supreme law in Wisconsin on state matters, and (2) both the Constitution and state statutes must be construed as written, not how the Legislature now wishes they had been written.

The Legislature's December 2018 "Extraordinary Session" transgresses both principles. By meeting in the December 2018 "Extraordinary Session" without statutory authority, the Legislature has thwarted the peoples' constitutional constraints on legislative action, the results of which cannot stand.

> The Constitution is either a superior, paramount law, unchangeable by ordinary **703 means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

> Marbury, 5 U.S. (1 Cranch) at 177. Judicial respect for its co-equal branch, the legislature, cannot amount to surrender of judicial power or abdication of judicial duty.

Mayo v. Wisconsin Injured Patients & Families Comp. Fund, 383 Wis. 2d 1, 52 (2018) (Bradley, R.J., concurring).

The Court orders a temporary injunction forthwith prohibiting Defendants from enforcing any provision of 2017 Wisconsin Act 368, 2017 Wisconsin Act 369, and 2017 Wisconsin Act 370. Defendants are further enjoined from enforcing the confirmation of the 82 nominees/appointees to the various State authorities, boards, councils, and commissions that occurred during the December 2018 "Extraordinary Session". The appointments are ordered temporarily vacated as a necessary consequence of this temporary injunction.

THE LEGISLATURE'S MOTION TO STAY THE TEMPORARY INJUNCTION

The Legislature alternatively moves for an order staying the temporary injunction while it pursues its statutory appellate rights. The motion to stay is DENIED.

An unconstitutional law is void *ab initio*. It is as if it never existed; it is no law at all.

On this point, the Wisconsin Supreme Court has been unequivocal and unwavering. "An unconstitutional act of the Legislature is not a law; it confers no rights, it imposes no penalties, it affords no protection, and is not operative; and in legal contemplation it has no existence." *State ex rel. Kleist v. Donald*, 164 Wis. 545, 552-53, 160 N.W. 1067 (1917) (quoted with approval in *Hunter v. School Dist. of Gale-Ettrick-Trempealeau*, 97 Wis.2d 435, 444, 293 N.W.2d 515 (1980)). *See also Berlowitz v. Roach*, 252 Wis. 61, 64, 30 N.W.2d 256 (1947) (quoting *Kleist*); *State ex rel. Martin v. Zimmerman*, 233 Wis. 16, 288 N.W. 454, 457 (1939) ("with respect to an unconstitutional law ... the matter stands as if the law had not been passed"); *John F. Jelke Co. v. Hill*, 208 Wis. 650, 661, 242 N.W. 576 (1932) (an unconstitutional act is not a law); *Bonnett v. Vallier*, 136 Wis. 193, 200, 116 N.W. 885 (1908) (an unconstitutional legislative enactment is no law at all).

Therefore, there can be no justification for enforcement of the unconstitutional legislative actions emanating from the December 2018 "Extraordinary Session" that is consistent with the rule of law.

How could it be otherwise? All Wisconsin judges bind themselves by solemn oath to uphold and support the Wisconsin Constitution. In what way is that oath honored when a court enforces – indeed, countenances at all – laws that violate the Constitution and, by that fact, do not even exist?

The parties debate the four *Gudenshwager* factors on this point. This Court doubts *Gudenshwager*'s applicability here because it is pure nonsense to suggest that any court may ever endorse the continued viability of unconstitutional and non-existent laws. That said, even if we apply the four factors to the temporary injunction ordered here, the stay must be denied, because none of the factors supports the Legislature's motion.

Gudenshwager holds:

> A stay pending appeal is appropriate where the moving party:
> (1) makes a strong showing that it is likely to succeed on the merits of the appeal;
> (2) shows that, unless a stay is granted, it will suffer irreparable injury;
> (3) shows that no substantial harm will come to other interested parties; and
> (4) shows that a stay will do no harm to the public interest.

State v. Gudenschwager, 191 Wis. 2d 431, 440 (1995), *holding modified by State v. Scott*, 382 Wis. 2d 476 (2018).

The Legislature has shown no likelihood of success on the merits, as seen in the analysis above.

Moreover, as for irreparable injury, the Legislature suffers none as a consequence of this Court's refusing enforcement of its unconstitutional actions. No law prevents the Legislature from promptly reintroducing and passing the laws proposed in Acts 368, 369, and 370 during scheduled regular sessions in the current biennial period.

The Legislature attempts to scare this Court into abandoning its duty to vacate unconstitutional laws by urging an alarmist domino-theory collapse of laws previously produced by "extraordinary sessions." The theory is unsupported by either law or facts in this record, is pure speculation, and, most importantly, not at issue under this Court's temporary injunction, which is expressly limited to

the laws enacted in December 2018.[14] In contrast, our Supreme Court has admonished:

> All must understand that we live under a constitutional government. There is no absolute freedom of action in any branch of it. The limitations upon the legislative branch are numerous and of the highest importance. The legislature may go through the form of making any kind of a law, but unless the result stand the test of those wise limitations which wisdom dictated in our constitution, it must fail, regardless of the consequences. All the mischiefs that flow from unconstitutional enactments lie at the doors of those who are charged with the duty to make laws. The benefits of the system which leads to that—and they are supposed to be of inestimable value—will be in great part lost by any hesitation in condemning a law as void that is manifestly so, by that branch of the government which is charged with that duty.

Milwaukee Cty. v. Isenring, 109 Wis. 9 (1901).

Finally, substantial harm to the parties and the public interest by granting the stay would be undeniable, and can be succinctly summed up thus: is there anything more destructive to Wisconsin's constitutional democracy than for courts to abdicate their constitutional responsibilities by knowingly enforcing unconstitutional and, therefore, non-existent laws?

Dated this 21st day of March, 2019.

BY THE COURT:

Richard G. Niess
Circuit Judge

cc: Counsel of record

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[14] Thus, the Legislature's hyperbole notwithstanding, no criminal conviction or chapter 980 sex predator commitment is jeopardized by this Court's temporary injunction. The three acts enjoined have nothing to do with past criminal convictions or chapter 980 commitments.