

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

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Case No. 11A00011-LV  
Dane County Circuit Court Case No. 11-CV-1244

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STATE OF WISCONSIN EX REL.  
ISMAEL R. OZANNE,

Plaintiff-Respondent,

v.

JEFF FITZGERALD, SCOTT FITZGERALD,  
MICHAEL ELLIS, AND SCOTT SUDER,

Defendants,

and

DOUGLAS LAFOLLETTE,

Defendant-Petitioner-Movant.

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MOTION FOR EX PARTE TEMPORARY RELIEF,  
PETITION FOR LEAVE TO APPEAL NON-FINAL ORDER,  
MOTION FOR RELIEF PENDING APPEAL,  
AND SUPPORTING MEMORANDUM

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FILED  
MAR 9 2011  
CLERK OF COURT OF APPEALS  
OF WISCONSIN

Defendant-Petitioner-Movant Douglas La Follette<sup>1</sup> (“Secretary La Follette”) by his undersigned counsel, respectfully requests the following relief from this Court:

1. An ex parte order granting temporary relief staying the non-final order entered by the Dane County Circuit Court, the Honorable Maryann Sumi (“Judge Sumi”) presiding, on March 18, 2011, granting a temporary restraining order (the “TRO”) enjoining Secretary La Follette from publishing January 2011 Special Session Act 10 (“Act 10”).
2. Leave to appeal Judge Sumi’s March 18, 2011, non-final order granting the TRO, or, in the alternative, certification of this petition for leave to appeal a non-final order to the Wisconsin Supreme Court.
3. Relief pending final disposition of this petition for leave to appeal the TRO (the “Petition”), consisting of an order staying the TRO.

The bases for these requests are as follows.

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<sup>1</sup>Secretary La Follette’s last name is spelled incorrectly in the Complaint.

## INTRODUCTION

This matter involves the lawsuit filed by Dane County District Attorney Ismael Ozanne (“District Attorney Ozanne”) alleging Open Meetings Law violations in connection with enactment of Act 10, also known as the “Budget Repair Bill;” seeking a judgment declaring Act 10 void; and enjoining Secretary La Follette from publishing Act 10. (Pet-Ap. 103-41). District Attorney Ozanne moved for a temporary restraining order restraining Secretary La Follette from publishing Act 10, pending hearing on his motion for a temporary injunction seeking the same remedy. (Pet-Ap. 142-54).

Dane County Circuit Court Judge Sumi conducted a hearing on the motion for temporary restraining order on March 18, 2011. At the conclusion of that hearing, Judge Sumi granted the TRO (Pet-Ap. 168 ) pending a temporary injunction hearing to be conducted March 29 and April 1, 2011, after she returns from a previously scheduled family obligation. Judge Sumi declined to stay the TRO pending appeal or to temporarily stay the TRO to allow Secretary La Follette to seek relief from this Court. A written Decision was issued later that afternoon. (Pet-Ap. 169-76).

Pursuant to Wis. Stat. § 809.50, the defendants now petition this Court for leave to appeal the non-final TRO. Pursuant to Wis. Stat. § 809.52, to prevent irreparable injury during the pendency of this petition and any further appellate proceedings, the defendants also request an immediate ex parte order granting the temporary relief of staying the TRO, and further request relief pursuant to Wis. Stat. §§ 808.07 and 809.12 in the form of an order staying the TRO pending final disposition of their petition for leave to appeal the non-final TRO.

#### STATEMENT OF ISSUES PRESENTED

1. The Constitution provides for immunity from civil process to all legislators while they are in session and for a time before and after such session. The Constitution further provides that the State and its officers may not be sued without the express consent of the State under the doctrine of sovereign immunity. Under these immunities, the judiciary lacks personal jurisdiction. In the instant case, did the trial court lack personal jurisdiction over the defendant legislators under legislative immunity and lack personal jurisdiction over the Secretary of State under sovereign immunity?

2. The Constitution provides that a bill becomes law when it is passed by both houses, signed by the Governor, and published. While courts may assess the constitutionality of a published law in the context of a case, may a court enjoin the legislative process to in effect prevent the exercise of constitutionally specified lawmaking prerogatives which are not assigned to the judicial branch?

3. The Supreme Court has repeatedly held that a court may not void any act of the Legislature for alleged failure to follow a non-constitutional rule of legislative process, whether the rules are contained in statute or rule. As applied to legislative acts, the Open Meetings Law is such a rule of process. May a court enjoin the publication of a law based on an alleged violation of the Open Meetings Law where the court lacks authority to declare the law void were it to be published as a permanent remedy even if an Open Meetings Law violation occurred.

4. The Open Meetings Law provides that conflicting legislative rules take precedence over the statute. There are such conflicting rules here. May a court enforce the Open Meetings Law where such a conflict exists?

5. Irreparable harm to the party bringing suit must be considered when deciding whether a TRO should be granted. Here the party at issue is the State. Did the trial court fail to consider the irreparable harm to the State?

6. Whether immediate relief from the TRO in the form of an ex parte order staying the TRO is appropriate.

7. Whether relief pending appeal in the form of an order staying the TRO until the conclusion of all appellate proceedings on and following this Petition is appropriate.

#### STATEMENT OF FACTS NECESSARY TO AN UNDERSTANDING OF THE ISSUES

The following facts are drawn from the Complaint filed by District Attorney Ozanne in the circuit court; there was no evidence accepted by the trial court.

January 2011 Special Session Assembly Bill 11 (“AB 11”) was introduced in the Wisconsin Assembly on February 15, 2011, at the request of Governor Scott Walker. (Pet-Ap. 105, ¶ 15). The Assembly passed AB 11 on February 25, 2011, and messaged it to the Wisconsin Senate. (Pet-Ap. 106, ¶ 16).

The Senate read AB 11 a first time, referred it to, and withdrew it from committee, read it a second time, and read it a third time. (*Id.*, ¶ 17). On the afternoon of March 9, 2011, the Senate requested a Committee of Conference and appointed defendant Scott Fitzgerald (“Senator Fitzgerald”), defendant Michael Ellis (“Senator Ellis”), and Senator Mark Miller (“Senator Miller”) as its conferees. (*Id.*, ¶ 18). The Assembly agreed to a Committee of Conference and appointed defendant Jeff Fitzgerald (“Representative Fitzgerald”), defendant Scott Suder (“Representative Suder”), and Representative Peter Barca (“Representative Barca”) as its conferees. (*Id.*, ¶ 19). Notice of the meeting was posted shortly after 4:00 p.m. that afternoon. (*Id.*, ¶ 21).<sup>2</sup>

The Joint Committee of Conference met at approximately 6:00 p.m. on March 9, 2011, in the Senate Parlor located in the State Capitol. (Pet-Ap. 107, ¶ 31 and 108, ¶ 38). Senator Fitzgerald, Senator Ellis, Representative Fitzgerald, Representative Suder, and Representative Barca attended the meeting. (Pet-Ap. 106, ¶ 22). The Joint Committee of Conference voted to adopt and concur in AB 11 as amended by Conference

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<sup>2</sup>There is a dispute as to the exact time the notice was posted on the bulletin board. Neither testimony nor evidence was presented at the TRO hearing.

Substitute Amendment 1. (*Id.*, ¶ 25). The Joint Committee offered AB 11, as so amended, to the Senate and the Assembly. (*Id.*) During the meeting, of the Joint Conference of Committee, Representative Barca objected to the meeting on grounds that it violated the Open Meetings Law.<sup>3</sup> (Pet-Ap. 108, ¶ 40). The meeting proceeded despite Representative Barca's objections. (*Id.*)

The Senate passed AB 11, as amended by Conference Substitute Amendment 1, later on March 9. (*Id.*, ¶ 42). The Assembly passed it on March 10. (*Id.*) The bill was enrolled, and signed by Governor Walker on March 11. (Pet-Ap. 109, ¶ 43).

Pursuant to the Wisconsin Constitution, a law enacted by the Legislature must be published to take effect. Wis. Const. art. IV, § 17(2). The Secretary of State must designate a date of publication for an act passed by the Legislature and approved by the Governor within ten working days of enactment. Wis. Stat. § 35.095(3)(b). Secretary La Follette announced his intent to publish Act 10 on the 10th working day, which is this Friday, March 25, 2011. (*Id.*, ¶ 45)

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<sup>3</sup>The "Open Meetings Law" refers to Wis. Stat. subch. V, §§ 19.81-19.98. A copy of the statutes in question are attached to the Complaint. (Pet-Ap. 111-15).

Verified complaints were filed with District Attorney Ozanne's office by Representative Barca, Dane County Executive Kathleen Falk, Martin Biel, and Madison Mayor Dave Cieslewicz, each alleging violations of the Wisconsin Open Meetings Law by Senator Fitzgerald, Senator Ellis, Representative Fitzgerald, and/or Representative Suder on March 9, 2011. (Pet-Ap. 104-05, ¶¶ 8-11).

The following facts summarize relevant events transpiring in the circuit court, upon which this Petition is based.

District Attorney Ozanne filed a complaint (the "Complaint") against Senator Fitzgerald, Senator Ellis, Representative Fitzgerald, Representative Suder, and Secretary La Follette on March 16, 2011. (Pet-Ap. 103-04). The Complaint requests temporary and permanent injunctions enjoining Secretary La Follette from publishing Act 10. The Complaint further requests judgment:

- Against Senator Fitzgerald, Senator Ellis, Representative Fitzgerald, and Representative Suder for alleged violation of the Open Meetings Law.

- Declaring that the actions taken by the Joint Committee of Conference allegedly violate the provisions of Wis. Const. art. I, § 4, and Wis. Const. art. IV, § 10.
- Declaring that the actions taken by the Joint Committee of Conference are allegedly void pursuant to Wis. Stat. § 19.97(3) on alleged grounds that the public interest in enforcement of the Open Meetings Law outweighs the public interest in maintaining the validity of those actions.
- Declaring Act 10 void as the result of allegedly voidable actions by the Joint Committee of Conference.

Finally, the Complaint requests forfeitures against Senator Fitzgerald, Senator Ellis, Representative Fitzgerald, and Representative Suder; court costs; attorneys' fees; and any further relief that the court deems equitable and just.

With the Complaint, District Attorney Ozanne filed a motion for temporary restraining order pending hearing on his motion for temporary injunction and an affidavit authenticating certain documents submitted in support of that motion. On March 17, 2011, District Attorney Ozanne filed an amended motion for a temporary restraining order pending hearing on

his motion for temporary injunction (the “TRO Motion”). (Pet-Ap. 142-54).

A certificate of service on Secretary La Follette also was filed on March 17, 2011.

The case, docketed as Dane County Case No. 11-CV-1244, was assigned to Judge Sumi. Judge Sumi convened a short status conference on March 17, at which she scheduled a hearing on the TRO motion for the morning of March 18, 2011. At the March 17 hearing, Judge Sumi informed the parties that she would be unavailable the week of March 21 due to a previous family commitment and would be unable to conduct a temporary injunction hearing or resolve the substantive issues presented by the Complaint until after her return on March 28, 2011.

At the March 18 hearing, after only hearing brief opening statements, Judge Sumi granted the TRO on grounds that the State, as represented by District Attorney Ozanne, had shown probability of success on the merits that an Open Meetings violation had occurred, the likelihood of irreparable harm if the TRO was not issued, lack of an adequate remedy at law, and necessity of preserving the status quo. (Pet-Ap. 168). Judge Sumi declined to stay the TRO to allow Secretary La Follette to seek

leave to appeal her order, either temporarily or for the duration of appellate proceedings.

An expedited transcript of the entire March 18, 2011, hearing has been attached to the Appendix. (Pet-Ap. 177-240).

Judge Sumi has scheduled a temporary injunction hearing for March 29 and April 1, 2011, with the TRO to stay in effect until that time.

#### ARGUMENT

- I. GRANTING LEAVE TO APPEAL THE NON-FINAL TRO WILL MATERIALLY ADVANCE THE LITIGATION, CLARIFY FURTHER PROCEEDINGS IN THE LITIGATION, PREVENT IRREPARABLE INJURY TO THE PEOPLE OF WISCONSIN AND CLARIFY AN IMPORTANT ISSUE IN THE ADMINISTRATION OF JUSTICE.

The decision to grant a permissive appeal under Wis. Stat. § 808.03 rests within the sound discretion of the court of appeals. *State v. Jenich*, 94 Wis. 2d 74, 97, 288 N.W.2d 114 (1980). Appeal from a non-final order is appropriate when the appeal will protect the petitioner from irreparable injury; clarify an issue of general importance in the administration of justice; or materially advance termination of the litigation or materially clarify further proceedings in the litigation. Wis. Stat. § 808.03(2). Granting the instant Petition will accomplish all those objectives, but

especially prevent irreparable injury. The plaintiff-respondent's clear inability to obtain the ultimate relief requested - nullification of Act 10—reinforces appropriateness of authorizing appeal of the non-final TRO issued in this case.

A temporary restraining order is a species of injunction. *Laundry, Dry Cleaning, Dye House Workers Union, Local 3008 v. Laundry Workers Int'l Union*, 4 Wis. 2d 542, 553-54, 91 N.W.2d 320 (1958). The function of a temporary restraining order is to maintain the status quo, not to change the positions of the parties or compel the going of acts that constitute some or all of the ultimate relief sought. *Codept, Inc. v. More-Way North Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964).

Whether to grant or deny a temporary injunction is a matter of circuit court discretion, reviewed for erroneous exercise of discretion. *School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997). A court erroneously exercises its discretion if it exercises discretion based on an error of law. *See State v. Hutnik*, 39 Wis. 2d 754, 763, 159 N.W.2d 733 (1968). If a complaint fails to state a cognizable claim upon which permanent relief may be granted, a court erroneously exercises its

discretion in giving the same relief temporarily. *School Dist. of Slinger*, 210 Wis. 2d at 374. A court also erroneously exercises its discretion when it fails to make a record of factors relevant to its discretionary determination, considers clearly improper or irrelevant factors, or clearly gives too much weight to one factor. *Browne v. Milwaukee Board of School Directors*, 83 Wis. 2d 316, 336, 265 N.W.2d 559 (1978).

Judge Sumi erroneously exercised her discretion in granting the TRO. In so doing, she impermissibly altered the status quo which was Secretary La Follette's intended ministerial act of publication of Act 10 on March 25, 2011, and in so doing provided a substantial portion of the ultimate relief sought by the Petition.

To grant petitioner's claim, this Court does not need to determine whether the Open Meetings Law was violated. Instead, it must only assess whether a court may issue an injunction against a party over whom it has no personal jurisdiction, whether a court may issue an injunction to interfere with the constitutional power of the Legislature to declare what shall become law, and whether a court may issue an injunction to suspend publication of a law on a legal basis that does not provide the court with the

authority to declare the law void. If the court lacks any of these powers, the TRO must be promptly vacated.

A. The Trial Court Lacks Personal Jurisdiction  
Over all Defendants.

Article IV, § 15 of the Wisconsin Constitution unequivocally states that legislators are not “subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.” This Court may take judicial notice that the special session of the Legislature concluded on March 15, 2011, and the regular session is set to recommence on April 5, 2011.<sup>4</sup> (Pet-Ap. 152-53). Accordingly, the four legislator defendants enjoy, and continue to enjoy, legislative immunity through fifteen days after the end of the regular session.<sup>5</sup>

Moreover, “[t]he requirement that a court have personal jurisdiction over a defendant in order to render a judgment in a civil lawsuit is grounded in constitutional requirements of due process.” *Haselow v. Gauthier*,

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<sup>4</sup>Plaintiff-Respondent makes different allegations about the dates of the special session, but the disagreement is not significant to the legislators’ assertion of immunity.

<sup>5</sup>The Dane County District Attorney concedes that these four defendants are not subject to civil process and has not served them. (*Id.*) The trial court also recognized the legislators’ immunity. (Decision at 2, Pet-Ap. 170).

212 Wis. 2d 580, 586, 569 N.W.2d 97 (Ct. App. 1997); *Johnson v. Cintas Corp. No. 2*, 2011 WI App 5, ¶ 9, 2010 WL 4630329, \*3 (Ct. App. 2010); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, (1950). Therefore, an action has not been commenced against the defendant legislators,<sup>6</sup> and the trial court lacks personal jurisdiction over them until they are served. *See* Wis. Stat. § 802.06(2)3.

Legislative immunity does not prevent the trial court from ever considering the civil action commenced by the Plaintiff-Respondent. It does, however, prevent the trial court from doing so right now. Nevertheless, despite these constitutional protections, the trial court granted a TRO, not addressing the alleged Open Meetings Law, but rather preventing a duly enacted law from being in force. Despite acknowledging legislative immunity as to the defendant legislators, the trial court certainly acted quite to the contrary.

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<sup>6</sup>A civil action is not commenced against a defendant until a summons and complaint, filed with the court, has been properly served upon him. The Plaintiff-Respondent has 90 days from the date of filing to so serve the defendant legislators. Wis. Stat. § 801.02(1).

The trial court also lacks jurisdiction over the Secretary of State because the Legislature has not authorized a state officer who is not a member of a governmental body to be subject to an Open Meetings complaint. Secretary La Follette thus enjoys sovereign immunity<sup>7</sup>.

Article IV, § 27 of the Wisconsin Constitution provides: “The legislature shall direct by law in what manner and in what courts suits may be brought against the state.”

As early as 1881, the Wisconsin Supreme Court acknowledged that “[t]he mandate . . . is to the legislature . . .” and not the courts “to direct by law how and in what courts suits may be brought against the state.” *See Chicago, M. & St. P. R. Co. v. State*, 53 Wis. 509, 513, 10 N.W. 560 (1881). “[T]he courts have no right to preempt this legislative function.” *Erickson Oil Products, Inc. v. State*, 184 Wis. 2d 36, 51, 516 N.W.2d 755

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<sup>7</sup> The Open Meetings Law does not waive sovereign immunity as to any state official who is not alleged to have violated the law, because it does not do so expressly. *See Kegonsa Joint Sanitary Dist. v. City of Stoughton*, 87 Wis. 2d 131, 144, 274 N.W.2d 598 (1979) (“[I]n the absence of *express legislative authorization* the state may not be subjected to suit.”) (emphasis added).

(Ct. App. 1994). “The secretary of state is an agent of the state and suits against him are subject to the defense of sovereign immunity.” *City of Kenosha v. State*, 35 Wis. 2d 317, 324, 151 N.W.2d 36 (1967). Where, as here, “the legislature has not specifically consented to the suit, then sovereign immunity deprives the court of personal jurisdiction over the State” and state officers. *PRN Assocs. LLC v. Dept. of Admin.*, 2009 WI 53, ¶ 51, 317 Wis. 2d 656, 766 N.W.2d 559. Thus, in order to overcome the State’s sovereign immunity and maintain this action, Plaintiff-Respondent must point to a legislative enactment authorizing suit against the State. *See Chart v. Gutmann*, 44 Wis. 2d 421, 426, 171 N.W.2d 331 (1969); *Turkow v. Wisconsin Dept. of Natural Resources*, 216 Wis. 2d 273, 281, 576 N.W.2d 288 (Ct. App. 1998).

Plaintiff-Respondent is suing Secretary La Follette in his official capacity.<sup>3</sup> He is not named as an alleged violator of the Open Meetings Law. Nor could he be, as the Open Meetings Law applies only to governmental bodies and their members, Wis. Stat. § 19.83, and Secretary La Follette is not a member of the governmental body (the Joint Committee

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<sup>3</sup> At the very start of the TRO hearing, the trial court ruled that Secretary La Follette was being sued in his official capacity and was, thus, appropriately represented by the Attorney General and not by a private attorney.

on Conference) that is alleged to have violated the Open Meetings Law. Only members of governmental bodies alleged to have violated the Open Meetings Law are proper defendants in actions to enforce the law. *See* Wis. Stat. § 19.96.

The sole purpose for his presence in the action is to restrain him from the performance of a purely ministerial statutory duty, in this instance, publishing Act 10. But Petitioner is not aware of any statute—and neither the circuit court nor the respondent has cited one—that allows an officer of the State to be sued for the purposes of relief only. Moreover, the Secretary’s duty to publish is non-discretionary. Wis. Stat. § 35.095(3)(b); *Goodland v. Zimmerman*, 243 Wis. 459, 458, 10 N.W.2d 180 (1943) (“it [is] the clear statutory duty of the secretary of state to publish a bill . . . there [is] no duty imposed upon him to examine the procedure by which it was adopted or whether it was a valid enactment under the constitution[.]”). Thus, the Secretary of State is not able himself to determine whether proper procedures were followed, because “[t]he statute is mandatory and imposes upon him the duty to publish which is a purely ministerial function.” *State ex rel. Martin v. Zimmerman*, 233 Wis. 16, 20, 288 N.W. 454 (1939); *West Park Realty Co. v. Porth*, 192 Wis. 307, 212 N.W. 651 (1927). The

Secretary of State's duties are not dependant on whether the Open Meetings Law was followed, and thus there is not even an implicit waiver of sovereign immunity in the Open Meetings Law.

A state agent loses the protection of the sovereign immunity defense only if he acts "beyond [his] constitutional or jurisdictional authority." *City of Kenosha*, 35 Wis. 2d at 323. Here, there is no allegation that the Secretary of State exceeded his authority—only a prayer for relief asking the court to order him not to perform a ministerial duty. Sovereign immunity is not waived under such circumstances.

Accordingly, the trial court lacks personal jurisdiction over *any* defendant in this case. The Court should, therefore, take this appeal in order to materially advance termination, or at least suspension, of the litigation solely upon this ground. However, other significant constitutional grounds exist upon which this Petition should be granted.

B. The Judicial Branch Has No Jurisdiction to Enjoin the Secretary of State from Publishing an Act.

Contrary to established case law, the trial court injected itself into the legislative process and enjoined a legislative act. There is absolutely no authority for the broad, overreaching step taken. In the interests of the administration of justice, it is necessary—nay, it is imperative—that this Court step forward and undo this inappropriate act.

In just such another case—cited to the trial court during the TRO hearing—the State Supreme Court admonished courts from *ever* enjoining the Secretary of State from the publication of an act of the Legislature. In *Goodland*, 243 Wis. at 468, the court cautioned trial courts:

If a court can intervene and prohibit the publication of an act, the court determines what shall be law and not the legislature. If the court does that, it does not in terms legislate but it invades the constitutional power of the legislature to declare what shall become law. *This it may not do.*

(Emphasis added). Moreover, the *Goodland* court continued and noted that “**no court has jurisdiction** to enjoin the legislative process at any point.” *Id.* (emphasis added). It is only “[w]hen the legislative process has been

completed, [that] a court may then in a proper case consider whether the power of the legislature has been constitutionally exercised or whether the law enacted in the exercise of its power is valid. **This is fundamental law.**” *Id.*, 243 Wis. at 469 (emphasis added).

An act—such as Act 10—“becomes law only after it has been published in the official state paper,” and “[t]here is no such thing known to the law as an unconstitutional bill.” *Id.*, 243 Wis. at 466. Accordingly, and aside from the jurisdictional defects mentioned above, the trial court was without jurisdiction to hear this case. *Id.*, 243 Wis. at 467 (“[t]he judicial department has no jurisdiction or right to interfere with the legislative process.”). This lack of jurisdiction is fundamental to the separation of powers that is engrained in the “American constitutional system.” *Id.*, 243 Wis. at 466, and to the respect to be given by each co-equal branch of government to each other.

The trial court did not have the jurisdiction to interfere with the legislative process. It is only *after* the ministerial, non-discretionary act of publication of an act—that is, after the law is in force—that a trial court may visit the issue of the constitutionality of that law.

And in any event, in this case no court could invalidate or nullify the Act because there are no allegations of any constitutionally procedural defect in its passage through the Legislature. District Attorney Ozanne also purported to bring a constitutional claim against the defendants under Wis. Const. art. IV, sec. 10 (“the doors of each house shall be kept open except when the public welfare shall require secrecy”), but the district attorney does not have statutory authority to bring such a claim, *see* Wis. Stat. § 978.05, especially insofar as the District Attorney seeks to nullify actions of the Legislature on constitutional grounds, *cf. State v. City of Oak Creek*, 2000 WI 9, ¶¶ 1, 33, 232 Wis. 2d 612, 616-617, 634, 605 N.W.2d 526.

At most, a conference committee vote could be declared void under the Open Meetings Law, but such a declaration by the trial court would not nullify the Act itself.

Not only will an immediate appeal by this Court clarify an issue of general importance in the administration of justice, by affirming the core of our democratic principals, but it will materially advance the termination of the ultimate relief sought in the underlying litigation and, without doubt, clarify further proceedings in this matter.

C. Separation of Powers and Comity Prevent Courts from Invalidating Legislative Act.

Wisconsin has long held that the courts of this State will not strike down an Act passed by the Legislature due to a failure to follow a rule of legislative procedure unless that Act was passed in violation of a constitutional provision. The Wisconsin Supreme Court thoroughly explained this doctrine in *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 364-68, 338 N.W.2d 684 (1983). After explaining the importance of comity between the co-equal branches of the government, the Court declared that courts will not “review legislative conduct to ensure the legislature complied with its own procedural rules *or statutes* in enacting legislation” and “will not intervene to declare the legislation invalid.” *Id.* at 364, 365. *See also Milwaukee Journal Sentinel v. Wisconsin Dept. of Admin.* 2009 WI 79, ¶ 18, 319 Wis. 2d 439, 768 N.W.2d 700 (“[C]ourts will not intermeddle in purely internal legislative proceedings, even when the proceedings at issue are contained in a statute.”)

The rule in *Stitt* applies here. The Open Meetings Law is a rule of process prescribing the manner in which meetings of governmental bodies are to be noticed and conducted. Wis. Stat. §§ 19.81, *et seq.* The law does not control substantive outcomes. As applied to the Legislature, it is a rule

of legislative process, a conclusion implicit in the *Stitt* decision. *Stitt*, 114 Wis. 2d at 368-69. While *Stitt* did not involve a challenge to the Open Meetings Law, it held that its ruling “is consistent with this court’s decision in *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W.2d 313 (1976),” a case addressing the enforceability of the Open Meetings Law against legislators. *Id.* at 368-69. The *Stitt* Court explained that *Lynch* addressed whether legislators alleged to have violated the Open Meetings Law were subject to forfeitures and *Lynch* “did not present the questions of the voidability of legislative actions taken in violation of the open meeting law.” *Stitt*, 114 Wis. 2d at 369. In the very next sentence reconciling its holding with *Lynch*, the *Stitt* Court held that the Court would “not invalidate a legislative action unless the legislative procedures or statute itself constitutes a deprivation of constitutionally guaranteed rights.” *Id.* at 369. The Open Meetings Law does not create constitutionally protected rights.<sup>9</sup> Thus, while the Open Meetings Law may apply to the Legislature,

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<sup>9</sup> The Court cannot help but conclude that the law is purely procedural and grants no substantive rights protected by the due process clause. The declared policy of the law is that “the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of government business.” § 19.81(1). However, such “entitlement” language does not lead to the conclusion that some property right is granted. The context shows that

legislative acts passed in contravention of the Open Meetings Law may not be voided. And, that is precisely why the trial court erred in granting the TRO: if you cannot void the law, how can the publication of the law be enjoined?

Wisconsin courts have consistently refused to do what the trial court has done here: invalidate (by injunction during the midst of the legislative procedure) a legislative act:

“The courts will take judicial notice of the statute laws of the state, and to this end they will take like notice of the contents of the journals of the two houses of the legislature far enough to determine whether an act published as a law was actually passed by the respective houses in accordance with constitutional requirements. Further than this the courts will not go. When it appears that an act was so passed, no inquiry will be permitted to ascertain whether the two houses have or have not complied strictly with their own rules in their procedure upon the bill, intermediate its introduction and final passage. The presumption is conclusive that they have done so. We think no court has ever declared an act of the legislature void for non-compliance with the rules of procedure made by itself, or the respective branches thereof, and which it or they may change or suspend at will.”

*McDonald v. State*, 80 Wis. 407, 411-412, 50 N.W. 185 (1891). *See also State v. P. Lorillard Co.*, 181 Wis. 347, 372, 193 N.W. 613 (1923); *State ex rel. Hunsicker v. Board of Regents*, 209 Wis. 83, 86, 244 N.W. 618 (1932);

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the law is designed merely to specify how governmental business is to be conducted, and this case shows the absurdity of constitutionalizing state procedures . . .

and *Outagamie County v. Smith*, 28 Wis. 2d 24, 41, 155 N.W.2d 639 (1968).

This concept is not unique to Wisconsin; it is based upon federal constitutional law. *U.S. v. Ballin*, 144 U.S. 1 (1892).<sup>17</sup>

The rationales upon which the court in *Stitt* declined to intervene are the concepts of separation of powers and comity, the “need for finality and certainty regarding the status of a statute” and “that the failure [of the legislature] to follow such procedural rules amounts to an implied *ad hoc* repeal of such rules” by the legislature. *Stitt*, 114 Wis. 2d at 365. Were this not the rule, then one legislature would be able to impose upon future legislatures through rules or statutes extra-constitutional legislative procedures. But the Constitution, not rules or statutes, provides the only enforceable procedures and limitations on how a bill becomes a law.

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<sup>17</sup> *Ballin* states:

“The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.”

“Accordingly, courts will not intermeddle in purely internal legislative proceedings, even when the proceedings at issue are contained in a statute.” *Milwaukee Journal Sentinel v. Wisconsin Dept. of Admin.* 2009 WI 79, ¶ 18, 319 Wis. 2d 439, 768 N.W.2d 700. In summary, notwithstanding the Open Meetings Law, the trial court does not have the authority to intermeddle in the Legislature’s internal proceedings. That is precisely what happened here. And, it is of such great import that it is precisely why the Court should accept this Petition and promptly hear this appeal.

D. Legislative Rules Conflicted with the Open Meetings Law, Thus Preventing a Violation.

The significant legal concerns above are dispositive of the question of whether the injunction should be lifted, regardless of whether a violation of the Open Meetings Law occurred. However, District Attorney Ozanne did not establish that the Open Meetings Law was violated. The Plaintiff-Respondent and the trial court conceded that there is an exception built into the Open Meetings Law: “No provision of this subchapter which conflicts with a rule of the senate or assembly or joint rule of the legislature shall apply to a meeting conducted in compliance with such rule.” Wis. Stat. § 19.87(2). Despite mention by the Petitioner during the very short hearing,

the trial court contends that “[n]either party has cited any rule that would have overridden the clear provisions of the notice requirement in §19.84.” (Decision, Pet-Ap. 171). Respectfully, that is just incorrect. Reference by counsel at the TRO hearing was made (Pet-Ap. 208-09)—albeit briefly—to Senate Rules 93<sup>41</sup> (Pet-Ap. 125) and 25, Assembly Rule 93 and newly enacted Joint Rule 75. These Rules are in conflict with the generally applicable notice requirements of the Open Meetings Law, and thus are not subject to those generally applicable rules. *See* Wis. Stat. § 19.87(2). The District Attorney’s Complaint does not allege facts indicating that the rules relating to special sessions—and the action of the Joint Committee on Conference was in a special session—were violated.

And even had there been a violation of the Open Meetings Law by the Joint Committee, the remedy available would be to void the action of

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<sup>41</sup> Senate Rule 93 provides, in relevant part:

**Special or extraordinary sessions.** Unless otherwise provided by the senate for a specific special or extraordinary session, the rules of the senate adopted for the biennial session, with the following modifications, apply to each special session called by the governor and to each extraordinary session called by the senate and assembly organization committees or called by a joint resolution approved by both houses:

(2) A notice of a committee meeting is not required other than posting on the legislative board, and a bulletin of committee hearings may not be published.

that Committee; there is absolutely no legal basis to void the subsequent actions taken by the Legislature. Thus, the Act cannot be voided, and this Appeal should be taken.

E. Irreparable Harm will Befall the State.

Finally, and perhaps most significantly, irreparable harm will befall the State—the party on whose behalf this action was brought and the *sole* party outside of the five defendants in their official capacities whose interests and harms thereto should have been considered by the trial court.<sup>12</sup> The publication of this Act will allow the State to save significant money<sup>13</sup>—evidence of which the trial court did not allow presented and did not appear to consider are the cost savings identified by the Legislative Fiscal Bureau which require, of course, publication. Thus, it is vitally important that this Court act before March 25, 2011—the last possible publication date provided by law—so as to not harm the State.

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<sup>12</sup> The plaintiff-respondent appeared to not realize that, pursuant to Wis. Stat. § 19.97(1), the action was brought “*ex rel.*” the State of Wisconsin, and thus, it is the State whose interests are at issue. Indeed, the failure to bring an open meetings action in the name of the State as the party in interest is fatal to an open meetings complaint. *Fabyan v. Achtenhagen*, 2002 WI App 214, 257 Wis. 2d 310, 652 N.W.2d 649. It is thus the State’s harm which must be assessed.

<sup>13</sup> The 2010-2011 general fund fiscal impacts (of approximately \$37.5 million) are set forth in the Legislative Fiscal Bureau’s March 10, 2011 Memorandum to the Legislature, at page 2. See [http://legis.wisconsin.gov/lfb/2011-13Bills/2011\\_03\\_10\\_WILeg\\_CC.pdf](http://legis.wisconsin.gov/lfb/2011-13Bills/2011_03_10_WILeg_CC.pdf).

However, aside from the fiscal impact of millions of dollars of harm to the State should this Act not be published, there is the more immediate and irrevocable harm caused by the trial court's intrusion into the lawmaking process and trespass upon the Legislature's lawmaking powers; the ability of the State, through its elected representatives, to enact laws through the constitutionally prescribed legislative process.

It is the Legislature, not the courts, who have the constitutional power to determine what should become law. *Goodland*, 243 Wis. at 468. The significance of this harm cannot be overstated, as the circuit court's order is a challenge to the very fabric of our constitutional foundation. The Constitution clearly vests the lawmaking power in the Legislature, and only the Governor is given the authority to veto legislation. While the judiciary may evaluate the constitutionality of a law once the legislative process is complete, it may not stop the legislative process in its tracks. The deprivation of legislative power by any other branch is an irreparable, irrevocable harm. No amount of money can ever make the State whole, even for a temporary suspension of the lawmaking function.

This harm can only be avoided if this Court acts dispositively act in time to publish the bill on March 25, the date by which the bill must be

published by operation of law. Only by expeditiously acting will courts be discouraged from interfering with the legislative process in the future. Based upon these grounds, petitioner has established why this Court should exercise its discretion, take an immediate appeal, and grant temporary relief to allow the bill to be published as the appeal proceeds.

II. ALTERNATIVELY, CERTIFICATION TO THE WISCONSIN SUPREME COURT IS NECESSARY TO PROTECT THE EXTRAORDINARY PUBLIC INTERESTS IMPLICATED IN THIS MATTER.

In unusual circumstances of extraordinary public significance, this Court may certify a petition for leave to appeal a non-final order to the Wisconsin Supreme Court. *Cf. In the Interest of J.S.R.*, 111 Wis. 2d 261, 330 N.W.2d 217 (1983).

This is such a case. No one on any side of this matter will dispute that the public interest and attention to Act 10 has been “extraordinary.” This case is also, however, a case of extraordinary legal significance.

The trial court’s order raises a fundamental challenge to Wisconsin’s democratic process and the Legislature’s power to declare what the law should be more than any other judicial action since the circuit court action reversed by the Wisconsin Supreme Court over sixty years ago in *Goodland*. Clearly, this is an unusual case of extraordinary public

significance. No matter could be more entitled to immediate attention and just as immediate remedy.

Based upon the character and nature of the action, arising as it does from the principles of separation of powers, comity and the respect due to the co-equal branches of government, this appeal is one that should be addressed at the earliest possible time—and certainly before March 25, 2011—by the State’s highest Court.

Therefore, in the alternative, to granting this Petition, the Department of Justice, representing the Secretary of State in his official capacity, requests that this Court certify this Petition to the Wisconsin Supreme Court for resolution of the extraordinary public interests involved.

III. AN IMMEDIATE EX PARTE ORDER GRANTING TEMPORARY RELIEF FROM THE TRO IS NECESSARY TO PRESERVE THE STATUS QUO AND PREVENT IRREPARABLE INJURY.

This Court may grant temporary relief pending disposition of the Petition pursuant to Wis. Stat. § 809.52. Judge Sumi’s order granting the TRO disrupted the status quo, which was Secretary La Follette’s intent to perform his ministerial duty and publish Act 10 on March 25, 2011. No further circuit court proceedings are scheduled until March 29, when Judge Sumi will commence a temporary injunction hearing.

Wisconsin Stats. § 809.52 does not identify specific standards for the Court to apply in determining whether to grant temporary relief pending disposition of a petition for leave to appeal a non-final order. Secretary La Follette submits that the established factors governing a stay of proceedings pending appeal provide an appropriate analytic framework for this analogous situation.

Stay pending appeal is appropriate when the moving party makes a strong showing that it is likely to succeed on the merits of the appeal; shows that, unless a stay is granted, it will suffer irreparable injury; shows that a stay will not harm the public interest; and shows that no substantial harm will come to other interested parties. These factors are interrelated considerations that must be balanced together, not prerequisites. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). More of one factor excuses less of another, especially when there is high probability of success on the merits. *Gudenschwager*, 191 Wis. 2d at 440.

Irreparable injury is evaluated in terms of its substantiality, likelihood of occurrence, and proof provided by the movant. *Gudenschwager*, 191 Wis. 2d at 441-42.

A trial court's discretionary decision to grant or deny relief pending appeal is reviewed for erroneous exercise of discretion. Under that standard, a discretionary decision will not be sustained if the trial court did not examine the relevant facts; apply proper standards of law; or using a demonstrated rational process, reach a conclusion that a reasonable judge could reach. *Gudenschwager*, 191 Wis. 2d at 339-40.

Here, Judge Sumi erroneously exercised her discretion in denying Secretary La Follette's request that the TRO be stayed pending efforts to obtain appellate relief.

The trial court acted at a time when it knew the TRO decision could not be more fully reviewed and evidence (and not mere "short introductory statements") taken by the court until *after* March 28, 2011—when the court was back on the bench. The TRO interferes —nay impermissibly impedes— the legislative process and bars the Secretary of State from publishing Act 10 on its statutorily prescribed date of March 25, 2011.

By ruling and then refusing (twice) to grant a stay pending appeal (Pet-Ap. 236-37), the trial court has made it impossible for Secretary of State La Follette to perform his constitutionally-mandated, purely ministerial, non-discretionary duties of publication on the noted date. Thus,

a stay until this Court considers the Petition is not only appropriate, it is necessary.

Relief pending appeal in the form of an order staying the TRO is necessary to preserve the status quo, materially advance the litigation, clarify further proceedings in the litigation, and prevent irreparable injury.

As noted above, this Court may grant temporary relief pending disposition of the Petition pursuant to Wis. Stat. § 809.52 pursuant to the same analysis authorizing relief pending appeal pursuant to Wis. Stat. §§ 808.07 and 809.12. Rather than repeat here the same analysis as to why the TRO should be stayed during the entire pendency of proceedings on this Petition and any ensuing appellate proceedings, Secretary La Follette respectfully refers the Court to the analysis set forth in Section III above and incorporated here by reference.

#### CONCLUSION

For the reasons stated above, Secretary La Follette respectfully requests:

1. An ex parte order granting temporary relief from the TRO entered by Judge Sumi on March 18, 2011, by staying the TRO until such time

as the Court acts on the request for a stay pending disposition of this Petition or appeal of the TRO.

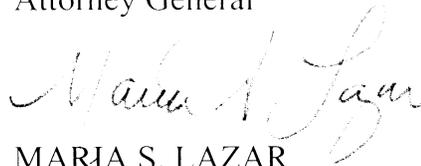
2. Leave to appeal the non-final TRO, or, in the alternative, certification of this Petition to the Wisconsin Supreme Court.
3. Relief pending final disposition of this Petition and any ensuing appeal, by staying the TRO until the conclusion of any such proceedings.

4. Immediate facsimile transmission of any responsive orders issued by this Court to Assistant Attorneys General Maria Lazar and Steven Kilpatrick at (608) 267-2223.

Dated this 21<sup>st</sup> day of March, 2011.

Respectfully submitted,

J.B. VAN HOLLEN  
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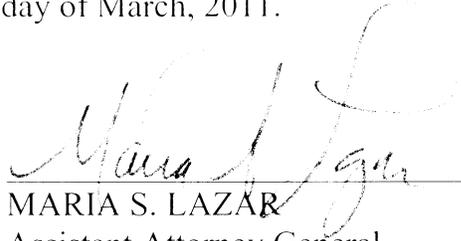
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CERTIFICATION

I hereby certify that this petition was produced with a proportional serif font and conforms to the rules contained in Wis. Stat. § 809.50(1) for a petition produced with a proportional serif font. The length of this petition is 7,650 words.

Dated this 21<sup>st</sup> day of March, 2011.

A handwritten signature in cursive script, appearing to read "Maria S. Lazar", written over a horizontal line.

MARIA S. LAZAR  
Assistant Attorney General  
State Bar #1017150