IN THE
INDIANA SUPREME COURT

No. _____

STATE OF INDIANA ex rel. the INDIANA GENERAL ASSEMBLY, RODRIC BRAY, in his official capacities as Senator and Senate President Pro Tempore, TODD HUSTON, in his official capacities as Representative and Speaker of the House of Representatives, and the LEGISLATIVE COUNCIL,
Relators,

v.

MARION SUPERIOR COURT 12, and the HON. PATRICK J. DIETRICK, as Judge Thereof,
Respondents.

RELATORS' VERIFIED BRIEF IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION

The State of Indiana, on relation of the General Assembly, Senate President Pro Tempore Rodric Bray, Speaker of the House of Representatives Todd Huston, and the Legislative Council,[1] respectfully petition this Court for emergency writs of mandamus and prohibition directed to respondents, the Marion Superior Court 12 and the Honorable Patrick J. Dietrick, as judge thereof, that would require Respondents to cease all proceedings in *Holcomb v. Bray*, No. 49D12-2104-PL-14068

[1] The Legislative Council is a body of the General Assembly comprised of 16 legislators. I.C. 2-5-1.1-1. President Pro Tempore Bray is its current chair and Speaker Huston its current vice-chair. I.C. 1-5-1.1-2.

immediately. Relators are named defendants in that civil suit despite the General Assembly presently being in session and the Indiana Constitution providing that "Senators and Representatives … shall not be subject to any civil process, during the session of the General Assembly." Ind. Const. art. 4, § 8. Moreover, courts are statutorily required to grant a continuance to members of the General Assembly during an ongoing session when they are named parties in litigation. Ind. Code 2-3-5-1.

Despite those unambiguous and non-discretionary provisions, the trial court denied Relators' motion to continue, denied Relators' motion for interlocutory appeal under Appellate Rule 14, denied Relators' motion to stay proceedings pending either interlocutory appeal or an original action (resulting in a current deadline of July 27 for Relators to file a responsive pleading), ordered the parties to file dispositive motions by August 6, 2021, and set September 10 as the date for hearing on those dispositive motions.

The trial court's refusal to continue all proceedings in this case until at least 30 days after the legislature adjourns sine die is unconstitutional, contrary to a non-discretionary statutory directive, and exceeds the trial court's jurisdiction over a co-ordinate branch of government. By refusing to certify its order for appeal or stay the proceedings, the trial court's decisions threaten to nullify these provisions while depriving Relators of appellate review. These provisions are supposed to prevent legislators from being subject to judicial proceedings while the General Assembly is in session, which means once these proceedings have occurred the damage will have

been done, no effective relief will be available, and the provisions cannot be vindicated in an appeal of a final judgment. This Court should immediately issue an emergency writ of mandamus and prohibition to stay all proceedings in case number 49D12-2104-PL-14068, and then after full briefing, issue a permanent writ that directs the trial court to grant the continuance mandated by Indiana law.

BACKGROUND

On April 15, 2021, the General Assembly enacted HEA 1123 over the Governor's veto in part to authorize the Legislative Council to convene an emergency session of the General Assembly when the Governor declares a state of emergency under the Emergency Management and Disaster Law[2] and the Council finds that it is necessary to address the state of emergency with legislative action. I.C. 2-2.1-1.2; *see also* Pub. L. No. 64-2021 §§ 2, 4, 5, 2021 Ind. Acts 731–38.[3] On April 27, 2021, the Governor, acting in his official capacity but without the consent of the Attorney General, retained private counsel and filed suit against the legislative branch of government by naming President Pro Tempore Bray, Speaker Huston, the Legislative Council, and the General Assembly. R.12. The Governor's complaint seeks declaratory and injunctive relief, alleging that HEA 1123 unconstitutionally violates the Governor's authority to call special sessions of the General Assembly and the

[2] I.C. 10-14-3

[3] HEA 1123 also dealt with other topics related to emergency operations of government, such as provisions relating to federal economic stimulus funds and a change to the offense level for violations of the Emergency Management and Disaster Law. *See* Pub. L. No. 64-2021 §§ 7, 8.

distribution of powers. R.20–26; *see also* Ind. Const. art. 3, § 1, art. 4, § 9. That lawsuit is pending in Marion Superior Court 12 before Judge Dietrick in *Holcomb v. Bray*, No. 49D12-2104-PL-14068.

The Office of the Attorney General appeared on behalf of the State of Indiana, including all parties named in their official capacities, and moved to strike the unauthorized appearances and filings of the Governor's private counsel because the Governor did not have the consent of the Attorney General to retain counsel and file suit against the legislative branch as required by Indiana law. R.39–41. In the alternative, the motion requested a continuance of all proceedings until 30 days following the adjournment of the General Assembly session in accordance with Article 4, Section 8 of the Indiana Constitution and Indiana Code section 2-3-5-1. *Id.*

Those provisions preclude the trial court's ongoing proceedings against Relators because the First Regular Session of the 122nd General Assembly is still in session through no later than November 15, 2021. I.C. 1-2.1-1-2(e)(1) (eff. Apr. 26, 2021). While a General Assembly's first regular session typically concludes no later than April 29, the current session was extended until no later than November 15, 2021, owing to the pandemic-delayed results of the 2020 Census, which in turn has delayed the ability of the General Assembly to pass redistricting legislation until late summer and early fall. I.C. 2-2.1-1-2(e)(1); *see also* Pub. L. No. 133-2021 (HEA 1372), 2021 Ind. Acts 1270–78; "Indiana Lawmakers Plan Redistricting Session

Later This Year," https://apnews.com/article/indiana-redistricting-elections-census-2020-f8457fd8a34122206e21359cd589b2cd (Assoc. Press April 17, 2021).[4]

The trial court denied the motion on July 3, 2021, in an order that was identical to the Governor's proposed order. R.129–47. The trial court concluded that Article 4, Section 8 of the Constitution conflicts with Article 5, Section 16, which provides that "The Governor shall take care that the laws are faithfully executed," and therefore was required to reconcile them to "avoid absurd results." R.144. One such "absurd" circumstance, in the trial court's view, is if a governor's lawsuit against the legislative branch for interfering with his duty to faithfully execute the laws were to be frustrated by delay. *Id.* To hold otherwise, the trial court explained, would lead to "legislative supremacy" and "alter the balance of Indiana's three co-equal branches." R.145. The trial court further concluded that legislative immunity in this instance would not serve the intent of the Speech and Debate Clause of the Constitution because while the General Assembly "is still technically in session," it is, in the trial court's view, "not currently engaged in any legislative activity." R.145–46. Finally, the trial court held that the constitutional protection did not extend to the Legislative Council. R.146.

The court did not address the mandatory continuance required by Indiana Code section 2-3-5-1. R.146–147.

[4] Redistricting is constitutionally required for congressional districts every ten years, U.S. Const. art. I, § 2, and for state legislative districts approximately as frequently, *Reynolds v. Sims*, 377 U.S. 533, 583–84 (1964).

Three days later, on July 6, 2021, Relators moved to certify the order for interlocutory appeal under Appellate Rule 14(B). R.150. Relators also moved the court to stay all trial court proceedings pending a resulting interlocutory appeal or original action that would likely be filed absent Rule 14(B) certification. On July 20, 2021, the trial court, without explanation, denied both the motion to certify the case for interlocutory appeal and to stay proceedings. R.180, 182. As a result, Relators' answer to the complaint is currently due on July 27, 2021, R.180, which is the latest date to which the Governor would agree. On July 23, 2021, Relators filed a motion for an extension of an additional 30 days to file a responsive pleading so that this Court could adjudicate this mandamus petition without the need for an emergency writ; the Governor has indicated his objection to that motion. R.184.

Relators now petition this Court for a writ of mandamus directing the trial court to continue proceedings until at least 30 days after the General Assembly is no longer in session as required by the laws and Constitution of the State of Indiana.

AUTHORITIES RELIED UPON

Pursuant to Original Action Rule 3(B), Relators list the following verbatim authorities upon which they rely:

Indiana Constitution Article 4, Section 8

> Senators and Representatives, in all cases except treason, felony, and breach of the peace, shall be privileged from arrest, during the session of the General Assembly, and in going to and returning from the same; and shall not be subject to any civil process, during the session of the

General Assembly, nor during the fifteen days next before the commencement thereof. For any speech or debate in either House, a member shall not be questioned in any other place.

Indiana Constitution Article 4, Section 9

The sessions of the General Assembly shall be held at the capitol of the State, commencing on the Tuesday next after the second Monday in January of each year in which the General Assembly meets unless a different day or place shall have been appointed by law. But if, in the opinion of the Governor, the public welfare shall require it, he may, at any time by proclamation, call a special session. The length and frequency of the sessions of the General Assembly shall be fixed by law.

Indiana Code § 2-3-5-1

Whenever a:

(1) party to a civil action;
(2) defendant in a criminal action; or
(3) party in an administrative adjudication before a state or local governmental entity;

shall, in person or by attorney, move the court or other governmental entity before which such action is pending for a continuance on the grounds that said party or defendant, or his or her attorney, is a member of the general assembly of the state of Indiana, the court or other governmental entity shall grant such motion for a continuance to a date not sooner than thirty (30) days following the date of adjournment of the session of the general assembly during which such cause of action has been set or rule has been made returnable.

Indiana Code § 2-2.1-1-2(e)(1)

The first regular session of each term of the general assembly shall adjourn sine die as follows: (1) Not later than November 15 in calendar year 2021.

***Ratliff v. Cohn*, 693 N.E.2d 530, 536 (Ind. 1998)**

> Noticeably absent from the text of Article 9, Section 2 is any adjective designating inclusivity, such as "*all* juvenile offenders," "*every* juvenile offender," "*any* juvenile offender," or "*each* juvenile offender." This absence despite the fact that such adjectives were employed in many, if not most, other constitutional provisions.

***Price v. Indiana Dep't of Child Services*, 80 N.E.3d 170, 175 (Ind. 2017) (citations omitted).**

> Judicial mandate is appropriate only when two elements are present: (1) the defendant bears an imperative legal duty to perform the ministerial act or function demanded and (2) the plaintiff "has clear legal right to compel the performance of [that] specific duty."

***KS&E Sports v. Runnels*, 72 N.E.3d 892, 898–99 (Ind. 2017) (citations omitted)**

> If a statute is clear and unambiguous, we put aside various canons of statutory construction and simply "require that words and phrases be taken in their plain, ordinary, and usual sense." Indeed, "[c]lear and unambiguous statutes leave no room for judicial construction." We will find a statute ambiguous and open to judicial construction only if it is subject to more than one reasonable interpretation.

ARGUMENT

The trial court has exceeded its jurisdiction by refusing to continue legal proceedings against legislators during a session of the General Assembly. The Constitution privileges sitting legislators against all civil process while the General Assembly is in session. There is no textual or historical basis for the trial court's conclusion that claims brought by the Governor are excluded from this unambiguous constitutional mandate. Nor can the trial court ignore the statutory enactment of

that immunity in Indiana Code section 2-3-5-1, which requires the court to continue all proceedings until not less than 30 days after the General Assembly adjourns.

A. The Trial Court Must Grant the Legislators a Continuance

Indiana law gives the trial court no discretion to deny the Legislators a continuance. The Indiana Constitution provides that neither Senators nor Representatives shall be subject "to any civil process" during the session of the General Assembly and the 15 days prior except for cases of "treason, felony, and breach of the peace." Ind. Const. art. 4, § 8. This grant of temporary immunity precludes Indiana's courts from exercising jurisdiction over members of the General Assembly while it is in session. The General Assembly further solidified the Constitution's grant of immunity when it provided for a mandatory continuance of any judicial or administrative proceeding until 30 days following the adjournment of the session of the General Assembly when a party or their counsel is a member of the General Assembly. I.C. 2-3-5-1. Neither law gives the trial court any discretion; rather their plain text requires the trial court to apply them as written.

There is no support in the history or the text of the Constitution for the trial court's conclusion that cases implicating separation of powers are excluded from the reach of the Constitution's grant of immunity to legislators while the Legislature is in session. To the contrary, Article 4, Section 8 expressly applies to "any civil process" and "in all [criminal] cases except treason, felony, and breach of the peace." These express and narrow limitations on the reach of immunity show how there is

no textual support for the trial court's limitation on "any civil process" also to exclude, somehow, claims between the executive and legislative branches of government, even in constitutional disputes. *See Ratliff v. Cohn*, 693 N.E.2d 530, 536–37 & n.8 (Ind. 1998) (noting the significance in adjectives denoting inclusivity for purposes of interpreting the Indiana Constitution). If Article 4, Section 8 immunity were intended to be so limited, then the Constitution would expressly say so. Indeed, in the same provision, the privilege against arrest is limited to claims that do not involve treason, felony, or breach of the peace. The absence of a similar restriction on civil process confirms the immunity reaches "any civil process," including the Governor's claims.

B. The Legislators' Rights Do Not Conflict with the Governor's Duty

The trial court concluded that it could set aside the legislators' rights under Article 4, Section 8 because they supposedly conflict with the Governor's duty under Article 5, Section 16 to "take care that the laws are faithfully executed." R.144. In the trial court's view, courts must have the power to realign the Constitution's provisions to "avoid absurd results." R.144. But there is no ambiguity, conflict, or tension between a grant of temporary immunity from civil process to legislators while the Legislature is in session and a command to the Governor to faithfully execute the laws passed by the Legislature. The Governor's duty to execute the laws faithfully is not impaired in any conceivable way if his lawsuit is postponed for several months.

First, whatever level of gubernatorial authority is implied in the Take Care Clause, there is no precedent for the proposition that it includes any sort of right to litigate, let alone to sue to enjoin the General Assembly from meeting, much less to sue *while the General Assembly is still in session.*

Second, the "absurd results" doctrine is not a rule for courts to disregard constitutional provisions that are inconvenient to a party or make an unsatisfying result. The more appropriate canon of construction—to the extent one is appropriate where the text is unambiguous as here, *see KS&E Sports v. Runnels*, 72 N.E.3d 892, 898–99 (Ind. 2017)—is the canon that the specific controls the general. So even if a governor has a general Take Care Clause right to sue the legislature to enforce the Constitution, the legislature has a much more specific right to temporary immunity from service of process and litigation while it is in session. "Absurd results"—which cannot be found here in any event—has nothing to do with it.

Third, HEA 1123 is irrelevant to the governance of the state while the General Assembly is in session, which also happens to be the parameter of the constitutional immunity from service and the statutory right of continuance being advanced here. Again, the underlying dispute is about whether the General Assembly can call an emergency session in limited circumstances or whether only the Governor has the exclusive power to call the legislature into sessions between regular sessions. But under HEA 1123, emergency sessions cannot be called unless (1) the legislature is out of session, and (2) the Governor declares a state of emergency. So whatever

theoretical harm HEA 1123 might do to the Governor, it cannot possibly occur during the same time that the legislators are entitled to their continuance. So to underscore the point, there is no "absurd result"—let alone a compelling judicial need to alter the plain terms of the Constitution—while the General Assembly remains in session.

Finally, even when the General Assembly has adjourned sine die, the theoretical harm to the Governor by the General Assembly being able to call itself into session to address a state of emergency could not actually occur until the Governor declared a state of emergency *and* the Legislative Council deemed it necessary to call an emergency session. Yet the General Assembly is still in session, its next session will begin in the middle of November 2021, and it is scheduled to adjourn sine die from that session no later than March 14, 2022. I.C. 2-2.1-1-3. No extraordinary need exists for the trial court to adjudicate the Governor's lawsuit while the General Assembly is in session; there is no risk of even theoretical infringement on the Governor's authority until after the Legislature adjourns, at which time the immunity from civil process ends.

C. The Trial Court Misapprehends the Purpose of Article 4, Section 8

Nor is there any support for the trial court's conclusion that the grant of immunity applies only to those claims raised against legislators in their individual capacities. R.146. Article 4, Section 8 plainly applies to "any civil process," and nothing in the text creates or even implies a limitation to claims against legislators in their individual capacities. Inferring such a limit would leave the General Assembly

and its legislators open to suit by anyone while the General Assembly is in session. And in all events, the statutorily mandated continuance applies when a legislator is either a party to the suit *or* counsel to a party, I.C. 2-3-5-1, which further confirms that it does not depend on the capacity in which the Legislator is sued.

Relators will suffer extreme hardship if writs of mandamus and prohibition are not granted. The immunity granted by Article 4, Section 8 protects the Legislature from all civil process while it is in session. But that immunity is lost when a trial court refuses to continue its proceedings and requires members of the Legislature to attend to litigation while the Legislature remains in session.

Article 4, Section 8's grant of immunity applies for the duration of the General Assembly's session—however long that session may be. The 1970 amendment to Article 4, Section 9 empowered the General Assembly to determine "[t]he length and frequency" of its session by law where previously that section allowed only biennial sessions. And at the same time, the people amended Article 4, Section 29 to eliminate the duration limitations of legislative sessions. Yet while the people have authorized the General Assembly to set the length of its sessions, they have not amended Section 8 to remove the General Assembly's immunity from civil process while it remains in session. Article 4, Section 8's immunity applies so long as the General Assembly is in session, and it is up to the people to amend the Constitution to achieve another result.

Applying the plain text of Article 4, Section 8 serves its intended end. The General Assembly is in session and can consider bills at any time. The entire purpose of the session extension bill, HEA 1372, signed into law by the Governor on April 26, 2021 (just a day before he filed the underlying lawsuit), was to allow the General Assembly to undertake the lengthy process of legislative redistricting in later summer and early fall. "Legislators Invite Public to Statewide Redistricting Meetings Aug. 6-7, Aug. 11," https://www.indianasenaterepublicans.com/legislators-invite-public-to-statewide-redistricting-meetings-aug-6-7-aug-11 (July 22, 2021). The public hearings begin on August 6, the same day that the trial court has ordered the parties file motions for summary judgment, R.148, which means that the redistricting work will occur throughout the same timeframe as the merits of the underlying suit are litigated below. R.148. The trial court's order improperly permits disruptive lawsuits in the face of such core legislative activities based on a judicial assessment of whether the members of the General Assembly will be doing anything worthwhile during this litigation. The General Assembly indisputably is empowered by the Constitution to set "the length and frequency of its sessions," *see* Ind. Const. Art. 4, §9, so the judiciary should not hinge its enforcement of any legislator's rights on a judge's subjective view of how busy the legislative schedule is or will be.

The Constitution does not permit the courts to supervise the work of legislators, nor does it require a legislator to justify the General Assembly's work to anyone before enjoying the protection of Article 4, Section 8. The trial court erred by

discounting the work of a co-equal branch of government and exceeded its jurisdiction in refusing to apply the unambiguous and plain language of the Indiana Constitution.

D. Granting a Continuance Does Not Create "Legislative Supremacy"

The overarching concern of the trial court was that honoring the legislative immunity in this case would result in "legislative supremacy." The Constitution accomplishes equality among the branches of government by distributing rights, duties, obligations, and privileges among the three branches. Article 4, Section 8 is one of those rights afforded to the legislature precisely to keep that branch independent from the other two. The Legislators here merely ask for their constitutional right to be honored in an equal and neutral fashion. Yet the trial court concluded that the governor's decision about how to carry out his duties takes precedence over the legislator's constitutional right to be temporarily free from civil process while it is in session performing its constitutional responsibilities. That approach does not guarantee *co-equal* branches; it makes the legislative branch subservient to the other two on those branches' own terms. Only a straightforward application of Article 4, Section 8 ensures that the legislature's equality is honored in this case and others.

E. Indiana Code § 2-3-5-1 Separately Requires a Continuance

Distinct from the application of Article 4, Section 8, Indiana law provides for a mandatory continuance when a party is or is represented by a member of the General Assembly. I.C. 2-3-5-1. The trial court did not address the statute in its order

even though it was straightforwardly raised and argued by Relators. This is surprising given the statute's imposition of a non-discretionary duty on the trial court to protect the legislature's interests by granting a continuance even if otherwise inconvenient for another party or the court itself.

This statute creates both a mandatory legal duty on Indiana's trial courts and creates an unambiguous legal right in certain persons to compel trial courts to perform that duty. *See Price v. Ind. Dep't of Child Servs.*, 80 N.E.3d 170, 175 (Ind. 2017). First, Indiana's trial courts "shall grant" a continuance until at least 30 days after the adjournment of the session of the General Assembly on the motion of a qualifying party. This imposes a legal obligation on the trial court to perform the specific ministerial act of continuing proceedings until 30 days after the adjournment of the General Assembly. Second, the statute creates a legal right in certain persons to compel the trial court perform this duty.

The statute applies "whenever" a party to a civil proceeding is, or is represented by, a member of the General Assembly. I.C. 2-3-5-1. If a qualifying party moves for a continuance, the court "shall grant such motion for continuance" to a date no earlier than 30 days after the session of the General Assembly in which the cause of action "has been set or rule has been made returnable" is adjourned. *Id.* In the underlying case, both of these conditions have been met, yet the trial court failed to act on its duty to grant the motion to continue. This Court should issue a writ of mandamus and prohibition directing the trial court to grant the legislators a

continuance until at least 30 days after the General Assembly is no longer in session.

* * *

Relators are defendants in the Governor's suit and are members of the General Assembly. The General Assembly is still in session. Both the Constitution and statute bar the trial court from exercising jurisdiction over Relators until at least 30 days after the General Assembly's session adjourns. *Id.* There is no other effective relief available; a writ of mandamus and prohibition should issue.

CONCLUSION

This Court should issue emergency and permanent writs of mandamus and prohibition as requested by the petition.

Respectfully submitted,

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Dated: July 26, 2021

VERIFICATION

I verify under penalties of perjury that foregoing statements are true.

/s/ *Thomas M. Fisher*
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CERTIFICATE OF WORD COUNT

I verify that the foregoing document contains less than 4,200 words

/s/ *Thomas M. Fisher*
Thomas M. Fisher

CERTIFICATE OF SERVICE

I certify that on July 26, 2021, the foregoing document was electronically filed using the Indiana E-Filing System. I certify that this document was also served on Supreme Court Services as required by Orig. Act. R. 2(B)(2). I also certify that on July 26, 2021, the following persons were contemporaneously served with the foregoing document through the IEFS:

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