STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D12-2104-PL-014068

ERIC J. HOLCOMB, GOVERNOR OF THE STATE OF INDIANA,

Plaintiff,

vs.

RODRIC BRAY, in his official capacity as the President Pro Tempore of the Indiana State Senate, and chairman of the Indiana Legislative Council, TODD HUSTON, in his official capacity as the Speaker of the Indiana State House of Representatives, and vice-chairman of the Indiana Legislative Council, THE LEGISLATIVE COUNCIL, as established by Indiana Code § 2-5-1.1-1, and THE INDIANA GENERAL ASSEMBLY,

Defendants.

ORDER DENYING MOTION TO STRIKE AND FOR ALTERNATIVE RELIEF

This action, having come before the Court on Defendants' Motion to Strike and for Alternative Relief ("Motion"), and the Court, having been fully advised, now DENIES the Defendants' Motion for the reasons that follow:

PROCEDURAL BACKGROUND AND PARTIES

1. On April 27, 2021, Governor Eric J. Holcomb ("Governor Holcomb") filed a Complaint for Declaratory Judgment and Permanent Injunction (the "Complaint") asking this Court to declare House Enrolled Act 1123 ("HEA 1123") unconstitutional, and to permanently enjoin its enforcement.

2. Attorneys from Lewis Wagner, LLP ("Lewis Wagner") entered their appearance and filed the Complaint on behalf of Governor Holcomb.

3. On April 30, 2021, Attorney General Todd Rokita ("Attorney General Rokita") and members of his office entered their appearance on behalf of both Governor Holcomb and the Defendants.

4. Attorney General Rokita then filed this Motion seeking to strike the appearances of counsel from Lewis Wagner, and the Complaint.

5. Counsel from Lewis Wagner responded on May 17, 2021.

6. Attorney General Rokita replied on May 24, 2021.

7. The Court set the matter for oral argument on June 16, 2021, at which time the Court heard arguments from the parties' counsel.

FACTUAL BACKGROUND

8. During the 2021 legislative session, HEA 1123 was introduced in the Indiana House of Representatives. (Complaint, ¶ 33).

9. Under HEA 1123, the General Assembly, through its Legislative Council, may call itself into an "emergency" session during a state of emergency and enact bills, as well as adopt concurrent or simple resolutions. (Complaint, ¶¶ 34-36).

10. During the legislative process, House Speaker Todd Huston (a defendant in his official capacity in this case), was reported as saying the following about HEA 1123:

> "I want to be clear, we have a great working relationship between the administration and the two bodies, " said Huston, a Fishers Republican. "It's just a disagreement. **We'll let the courts decide. We'll have an answer moving forward**."

https://www.indystar.com/story/news/politics/2021/04/05/indiana-covid-mask-mandate-governor-holcomb-emergency-powers-bill/7052905002/ (emphasis added).

11. On April 5, 2021, HEA 1123 passed the General Assembly. (Complaint, ¶ 40).

12. Governor Holcomb vetoed the bill on April 9, 2021. (Complaint, ¶ 41).

13. Both chambers of the General Assembly overrode Governor Holcomb's veto on April 15, 2021. (Complaint, ¶ 45).

ISSUES

14. The Motion before this Court raises two legal questions of first impression:

(1) Whether an Indiana Attorney General has the legal authority to prevent a sitting governor from hiring counsel to represent the governor in a challenge of a law that the governor contends infringes upon his or her Constitutionally-granted powers where the Attorney General does not wish to challenge the law (here, "HEA 1123"). Otherwise stated, does an Indiana governor have a right to hire his/her own counsel in this situation?

(2) Does legislative immunity preclude a sitting governor from suing Indiana legislators in their official capacities, the General Assembly generally, and/or a statutorily created body – the "Legislative Council" – where the sitting governor's suit alleges that the legislature has unconstitutionally violated the separation of powers clause of the Indiana Constitution?

THE GOVERNOR CAN BE REPRESENTED BY INDEPENDENT COUNSEL

- *Indiana Governors Have An Obligation To Protect Indiana's Constitution*

15. The Indiana Constitution requires Indiana governors to protect the Indiana Constitution. Ind. Const. Art. 5 § 16 ("The Governor shall take care that the laws are faithfully executed."). *Accord,* (Complaint, ¶8)(Governor Holcomb's oath of office). Governor Holcomb contends that this obligation is triggered in this case, in which one branch of Indiana government has alleged that another branch of Indiana government has encroached upon its rights in violation of the Indiana Constitution's separation of powers; *to wit*: The General Assembly's alleged encroachment upon the exclusive right of Indiana governors to call a special session of the General Assembly under Article 4 § 9 of the Indiana Constitution.

16. Indiana governors also have the sole and exclusive jurisdiction and authority to exercise executive powers. *Tucker v. State*, 35 N.E.2d 270, 280 (Ind. 1941). That authority inherently authorizes Indiana governors to protect the office's constitutional duties and obligations, which includes attempts to usurp those powers by another branch of government. *Id.* at 284-85 (providing that the Indiana Constitution vests with the governor "the general executive power of the state"); *Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1260 (Ind. 2020) (the governor has "broad, general provisions of authority and obligation").

17. Like the executive branch, the judiciary has the constitutional authority to take all actions necessary to administer justice judicially. *See, e.g., Knox Cty. Council v. State ex rel. McCormick*, 29 N.E.2d 405, 407-408 (Ind. 1940)("The Constitution of this state vests the judicial power in the courts. The judiciary is an independent and equal coordinate branch of the government. Courts were established for the purpose of administering justice judicially, and it has been said that their powers are coequal with their duties. In other words, they have inherent power to do everything that is necessary to carry out the purpose of their creation.").

18. Governor Holcomb has the inherent power necessary to carry out the express powers granted to him by the Indiana Constitution.

19. In light of Governor Holcomb's duty to protect the Indiana Constitution, and the inherent powers vested in him to do so, *supra,* Governor Holcomb is both authorized, and required, to take actions necessary to protect the Indiana Constitution. Because his veto was overridden, this lawsuit is the only means available for the Governor to do so.[1]

[1] The Court does not agree that Governor Holcomb's veto power is his exclusive means of contesting a law. That may be true when a routine law is passed that does not infringe upon a right exclusively given to Indiana governors by the Indiana Constitution. But that is not what is before the Court. This is a separation of powers case. When, as here, a law is alleged to be an infringement by the legislative branch on powers vested in the executive branch, the veto power

20. Attorney General Rokita, as the officeholder of the statutorily created position (*i.e.*, not a position contained in the Indiana Constitution) of Attorney General, cannot unilaterally block a constitutionally created officer (the sitting Governor) from taking those actions ascribed to him/her by the Indiana Constitution.

21. Nor do Indiana governors have to rely on taxpayers to vindicate their constitutional rights, as Attorney General Rokita suggests. A sitting governor is sworn to uphold the Indiana Constitution. He or she cannot abdicate that duty to private citizens. Nothing in the Indiana Constitution suggests otherwise.

22. Similarly, Ind. Code § 4-3-1-2 does not mention taxpayer lawsuits, or otherwise condition Indiana governors' right to hire counsel to situations in which a taxpayer lawsuit is, or is not, filed.

- *The Indiana Legislature Passed A Statute Authorizing Indiana Governors To Hire Outside Counsel*

23. Pursuant to Ind. Code § 4-3-1-2, Indiana governors also have the statutory authority to hire independent counsel:

> The governor may employ counsel to protect the interest of the state in any matter of litigation where the same is involved; and the expenses incurred under this section, and recapturing fugitives from justice, may be allowed by the governor and paid out of any money appropriated for that purpose.

24. This statute was enacted prior to the creation of the office of the attorney general. *See State ex rel. Sendak v. Marion County Superior Court, Room No. 2*, 373 N.E.2d 145, 148-49 (Ind. 1978).

---

is not the exclusive means available to the Governor. *See supra,* ¶¶15-18. Otherwise, a legislature hostile to a governor could repeatedly pass laws that diminish a governor's constitutional powers; override repeated vetoes; and by doing so, indirectly amend the Indiana Constitution in a way contrary to the express means in the Indiana Constitution for proper amendments. *See* Ind. Const. Art. 15 § 1 ("Amendments").

25. In 2016, Ind. Code § 4-3-1-2 was amended by the General Assembly, although not substantively. *See* 2016 Ind. Legis. Serv. P.L. 215-2016 (HEA 1173). The General Assembly's retention of that statute infers that it wished to maintain the governor's right to retain counsel in cases in which *Sendak* does not apply. That situation presents itself here.

- *Indiana Attorneys General Have A Duty To Defend Indiana Statutes*

26. Attorney General Rokita has a duty to defend laws passed by the Indiana legislature. *See* Ind. Code § 4-6-2-1 (providing the attorney general "shall defend all suits brought against the state officers in their official relations . . . .").

27. At the same time, Attorney General Rokita claims that he has the discretion to determine whether Governor Holcomb may retain outside counsel when the constitutionality of a law involving a governor's powers is in dispute. That power, he claims, emanates from Ind. Code § 4-6-5-3(a).

28. That statute provides, in relevant part:

> No agency, except as provided in this chapter, shall have any right to name, appoint, employ, or hire any attorney or special general counsel to represent it or perform any legal service in behalf of the agency and the state without the written consent of the attorney general.

29. A previous Attorney General, Greg Zoeller, noted that the Indiana Constitution was not designed to prevent a governor from bringing a case such as the one brought here by Governor Holcomb:

> At the state level, the divided executive structure largely mitigates these concerns because the governor or another enforcement officer could challenge a statute that infringes on his office's powers while the attorney general simultaneously defends the statute. In that situation, the court will still be presented with arguments for and against the statute's constitutionality and will be able to determine whether the statute is constitutional.

Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 541 (2015). *See also Id.* ("At the federal level, the attorney general has developed the well-accepted tradition of not defending statutes that erode executive power. The President has a constitutional duty to ensure that other branches do not encroach upon the powers granted to the President by the constitution.... By challenging instead of defending the statute, the President is able to protect against infringement by other branches those duties that have been constitutionally reserved to his office.")(citations omitted).[2]

30. The Court is persuaded by the view taken by Attorney General Zoeller and Governor Holcomb. When separation of powers is at issue – as it is here – the Attorney General's powers do not grant him the authority or ability to prevent a sitting Indiana governor from exercising his or her inherent right to defend the constitutional office of governor by hiring his or her own counsel to do so.

- *The Rules of Professional Conduct Apply To Attorney General Rokita*

31. Attorney General Rokita has entered his appearance for Governor Holcomb, contrary to the wishes of Governor Holcomb. Governor Holcomb has hired Lewis Wagner to represent him, and lawyers from that Firm entered their formal appearances for the Governor when this lawsuit was filed.

32. Absent a compelling legal reason – and there is not one, as explained below – it is black letter law that one lawyer cannot represent two opposing parties in the same lawsuit. Ind.

---

[2] In addition to providing legal insight into the issue before the Court, Attorney General Zoeller's article makes clear that Indiana Attorneys General can have different views on legal issues. The Court does not believe that whether an Indiana governor can access courts should hinge on the legal judgment of an Attorney General which, as evidenced by Attorney General Zoeller's article and Attorney General Rokita's position in this case – can change from one Attorney General to the next.

Rule Prof. Conduct 1.7(a)(1). Here, Attorney General Rokita purports to represent the plaintiff, Governor Holcomb, *and* all named Defendants.

33. The Indiana Rules of Professional Conduct apply with full force to Attorney General Rokita. Ind. Rule Prof. Conduct 1.11(d)(1) ("a lawyer currently serving as a public officer or employee . . . is subject to Rules 1.7 and 1.9[.]"); *see also Matter of Hill*, 144 N.E.3d 184, 192 (Ind. 2020) (applying the Rules of Professional Conduct to the Attorney General); *State v. Evans,* 810 N.E.2d 335, 338 n.1 (Ind. 2004)(Noting applicability of Rule 1.7 to the then-Attorney General, and that "full disclosure or the hiring of private counsel might resolve the Attorney General's ethical dilemma....").

34. In this situation, Attorney General Rokita has an irreconcilable conflict of interest.

35. Attorney General Rokita has opined that HEA 1123 is constitutional: "[Attorney General Rokita] supports the position of the General Assembly, which is taking the position it's allowed to call an emergency session. Rokita says the bill is constitutional." https://www.indystar.com/story/news/politics/2021/05/28/governor-holcomb-todd-rokita-dispute-house-bill-1123-challenged-court/7445212002/

36. The Governor takes the opposite view. *See generally, Complaint.* Who is correct is yet to be determined. Until that time, and while this case is pending, Attorney General Rokita cannot represent Governor Holcomb.

37. This is not a situation, as advocated by the Attorney General at oral argument, in which the general counsel of General Motors tries to reconcile an internal dispute between Chevrolet and Buick. That is permissible. But if that inter-company dispute led to litigation, it would be plainly impermissible for the general counsel of General Motors to elect to represent

Chevrolet in a lawsuit against Buick. By picking a side between two of his clients in litigation, he or she would have a clear conflict of interest, as does the Attorney General here.

38. The Court takes no position on whether Attorney General Rokita's conflict requires him to completely recuse himself and his office from continuing to represent the Defendants in this case.

- *The Attorney General's Reliance On Indiana Legal Authority Is Misplaced*

39. No Indiana case has addressed the separation of powers issue confronting this Court.

40. Under Attorney General Rokita's interpretation, in instances where a governor has sustained an injury to his constitutional powers through legislative action, the governor must rely upon the attorney general to either challenge the legislative action or "consent" to the governor's retention of outside counsel. If the attorney general does not give that consent, then the sitting Indiana governor is simply left without recourse.

41. That interpretation would grant the attorney general (a legislatively created position) greater authority than the governor (a constitutional officer and head of a branch of government) to determine whether the governor has sustained an injury to his constitutional powers, and whether the governor may seek legal action to defend those powers.

42. This is an absurd result that could not have been intended by either the drafters of Indiana's Constitution, or the General Assembly; *to wit*: the very legislators who passed HEA 1123 recognized that whether it was constitutional should be decided by the *courts,* not Attorney General Rokita. *Supra. See also Estabrook v. Mazak Corporation*, 140 N.E.3d 830, 834 (Ind. 2020) (invoking the "absurdity doctrine" to give a statute "its obvious intended effect" when applying a statute's plain meaning "imposes an outcome that no reasonable person could intend."); *Snyder v.*

King, 958 N.E.2d 764, 772 n. 3 (Ind. 2011) ("we will not interpret the Constitution to lead to an absurd result . . . ."); *State v. Evans,* 810 N.E.2d 335, 338 (Ind. 2004)("Requiring the Attorney General to finance both sides of this suit is akin to the dog chasing its own tail and an absurdity that the General Assembly could not have intended.").

43. Attorney General Rokita's arguments primarily rest on the following legal authorities: Ind. Code § 4-6-5-3; *State ex rel. Young v. Niblack*, 99 N.E.2d 839 (Ind. 1951); *State ex rel. Sendak v. Marion County Superior Court, Room No. 2*, 373 N.E.2d 145 (Ind. 1978); and *Ritz, et al. v. Elsener, et al.*, Cause No. 49C01-1310-PL-038953 (Marion Cir. Ct. 2013). The Attorney General's reliance on those cases is misplaced.

44. Indiana Code § 4-6-5-3(a) provides that no "agency" shall retain outside counsel without the attorney general's consent. "Agency" is defined as "any board, bureau, commission, department, agency, or instrumentality of the state of Indiana[.]" Ind. Code § 4-6-5-6(b). That definition of "agency" does not include the Governor. Governor Holcomb is a constitutional officer, not an "agency." *See generally, Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1260 (Ind. 2020).

45. For statutes like Ind. Code § 4-6-5-3 and Ind. Code § 4-6-5-6 to apply to the governor, they must specifically name the office of the governor as being within their scope. *See Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992). In *Franklin,* the United States Supreme Court considered whether the President was an "agency" within the meaning of the Administrative Procedures Act ("APA"). *Id.* at 709. The Supreme Court ruled that for a statute to apply to a "constitutional officer" like the President, there must be "an express statement by Congress" to that end. *Id.* at 800-801. Because there was no such express mention of the President in the APA, the President did not fall within the definition of "agency" in that statute. The same result follows

here. Because there is no express mention of Indiana governors as being "agencies" within the meaning of Indiana Code § 4-6-5-3, Governor Holcomb is not within the scope of that definition, or that law.

46. Next, the *Niblack* case relied upon by the Attorney General, 99 N.E.2d 839 (Ind. 1951), is readily distinguishable. *Niblack* did not involve a dispute between a governor and the legislature over an alleged attempt to usurp the governor's constitutional powers. *Niblack* involved a dispute between certain school corporations, the State Superintendent of Public Instruction ("Superintendent"), and others. The plaintiff filed a declaratory judgment action regarding the legality of certain legislation. The Superintendent hired his own counsel and sought a change of venue. The Attorney General intervened and objected to the Superintendent hiring his own counsel. The Superintendent argued he had a right to hire his own counsel.

47. In analyzing the issue, the Indiana Supreme Court noted that the Superintendent's office was created by the Indiana Constitution, *but*, that the Constitution "does not give him any right, powers, or duties." *Niblack,* 99 N.E.2d at 602. Any powers the Superintendent possessed arose from laws passed by the General Assembly, not the Constitution itself. *Id.* at 602-604. The Supreme Court further noted that the Superintendent did not have "any statute giving the Superintendent of Public Instruction any right, power or duty to employ his own counsel . . . ." *Id.* at 603.

48. Here, Governor Holcomb's rights, powers, and duties are provided for in an entire Article of the Indiana Constitution. *See* Ind. Const. Art. 5. His powers are not wholly dependent on the General Assembly, as was the case of the Superintendent. So, although the Superintendent is a constitutionally created office, any powers he has are derived, not from the Constitution itself, but from the Legislature. Additionally, unlike the Superintendent in *Niblack,* Indiana governors

have a statute giving governors the right, power, and duty to appoint their own counsel. Ind. Code § 4-3-1-2. And most importantly, *Niblack* did *not* involve a dispute between two branches of government over an alleged constitutional infringement. *Niblack* does not control the outcome of this case.

49. However, *Niblack* does provide support for the Court's conclusion that Attorney General Rokita is conflicted from representing Governor Holcomb in this case. At page 605 of the *Niblack* opinion, the Supreme Court noted that because "[t]here is nothing in the statutes authorizing or empowering the Attorney General to represent the school corporations of the state in this sort of an action, the Attorney General's duty to represent the superintendent along with other state officials *creates no conflict of interests as an attorney.*" (Emphasis added). Here, if Attorney General Rokita's position is correct – that he represents the Governor as an "agency" under Ind. Code § 4-6-5-3 – then he has the very type of conflict that the Supreme Court in *Niblack* recognized could arise.

50. The next case relied upon by the Attorney General – *Sendak ex rel. Sendak v. Marion County Superior Court, Room No. 2*, 373 N.E.2d 145 (Ind. 1978) – is also distinguishable from this separation of powers case. In *Sendak*, the then-Indiana governor attempted to hire counsel on behalf of the Indiana Alcoholic Beverage Commission ("IABC") after the attorney general had entered his appearance on behalf of the same agency. *Id.* at 147. The attorney general moved to strike the appearances of counsel appointed by the governor. *Id.*

51. The Indiana Supreme Court framed the narrow question presented in *Sendak* as follows: "The question of law upon which the issuance of a permanent writ lies is whether the Governor can hire private counsel to represent a *State agency* without obtaining the consent of the Attorney General." *Id.* (emphasis added). That is not the question here. Instead, Governor

Holcomb has attempted to hire counsel to represent him, not defend him, in a claim against another co-equal branch of government – the legislature. Finally, although *Sendak* addresses the scope of Ind. Code § 4-3-1-2, it does so within the context of the governor's ability to appoint counsel for a state agency (the IABC), not for himself in his official capacity. *Sendak* does not apply to this case of first impression.

52. Attorney General Rokita's reliance upon *Ritz* is misplaced for multiple reasons. First, *Ritz* is a case from the Marion County Circuit Court and offers no precedential authority here. *Indiana Dept. of Natural Resources v. United Minerals, Inc.*, 686 N.E.2d 851, 857 (Ind. Ct. App. 1997) ("the decision of one trial court is not binding upon another trial court."). Second, like *Niblack*, the *Ritz* case concerned the office of the Superintendent of Public Schools, which is an office that does not have constitutionally vested rights as does an Indiana governor. As such, *Ritz's* application to this case suffers the same fate as *Niblack.* Finally, the attorney general in *Ritz* did not enter an appearance on behalf of both parties. *Ritz* offers no guidance here.

- *The Attorney General Overstates His Role*

53. In reliance on a line in *Sendak,* Attorney General Rokita maintains that he, and he alone, can set the "general legal policy for State agencies," (quoting *Sendak*) which "thereby *excludes* other state officials from taking contrary positions on behalf of the State." (Attorney General Rokita's Memorandum in Support of Motion, p.3)(emphasis in original). Attorney General Rokita reads too much into that line from *Sendak.*

54. First, setting a "general legal policy for State agencies" is different than dictating the outcome of a dispute. But that is what Attorney General Rokita seeks to do here. Based on his legal judgment that HEA 1123 is constitutional, he seeks to block Governor Holcomb from obtaining a judicial interpretation of HEA 1123. In *Sendak,* the attorney general's position was

not dispositive of the outcome of the case. It merely meant that the governor could not hire counsel in that case; the agency would be represented by the attorney general. The case would be decided on its merits, albeit with counsel not of the governor's choosing. Here, if the Attorney General is correct, the case will be dismissed and Governor Holcomb – and those governors elected in the future – has no recourse for alleged constitutional violations by the legislature.[3] *Sendak, Niblack,* and *Ritz* do not go that far. And as noted above, there is nothing in the Indiana Constitution that suggests that an Indiana governor must rely on taxpayers to vindicate his/her constitutional rights. It may be that taxpayers do not want to spend the time and money to do so. Indiana's Constitution does not rest on such tenuous grounds.

55. Second, the fact that other state entities – for example, state universities – do not have to rely on Attorney General Rokita to represent them, undermines Attorney General Rokita as being the end-all-be-all for Indiana's "unifying legal position." He claims that "the State is the State is the State." But if that is the case, then Attorney General Rokita would be authorized to exclusively represent *all* state entities, not just *some* state entities. There are numerous examples of state agencies and quasi-agencies that have authority to hire independent counsel without the attorney general's consent. *See* Ind. Code § 5-28-5-3(a) (the Indiana Economic Development Corporation "may, without the approval of the attorney general, employ legal counsel[.]"); Ind. Code § 5-1.2-3-8(a) (the Indiana Finance Authority "may, without the approval of the attorney general or any other state officer, employ bond counsel [or] other legal counsel[.]"); Ind. Code § 5-1.5-3-2(8) (the Indiana Bond Bank may "appoint and employ general or special counsel[.]");

[3] This distinction was expressly recognized by the court in *Sendak. See id.* at 149 ("However we see no relationship between the execution of executive power and the legal defense of a lawsuit against the State. In defending a lawsuit, the Attorney General is not dictating policy or directing the State, but is merely defending the State.").

Ind. Code § 21-9-4-7(3)(F) (Board of Directors of the Indiana Education Savings Program); Ind. Code § 5-20-1-4(a) (Indiana Housing and Community Development Authority); Ind. Code § 5-10.5-4-1 (Board of Trustees of the Indiana public retirement system).

56. Most tellingly, the General Assembly has the right to hire its own counsel without the consent of an attorney general. Ind. Code § 2-3-8-1. As the body that passes laws, the legislature has the right to hire counsel to take a position different than Attorney General Rokita. It could do so in this very case if it wanted to. *Id.* In conclusion, although the Attorney General has *some* authority to take positions in litigation involving *some* state "agencies," that authority is not as extensive or vast as the Attorney General claims. That authority does not extend to controlling litigation regarding separation of powers disputes involving two separate branches of government, as is the case here.

- *The Governor Can Retain Outside Counsel*

57. Reconciling all of the principles and authority discussed above, the Court concludes that Governor Holcomb has the statutory authority to hire his own counsel, Ind. Code § 4-3-1-2, as well as the inherent constitutional authority to do so. *Supra.*

LEGISLATIVE IMMUNITY DOES NOT APPLY

58. The Defendants contend that Governor Holcomb may not continue this action because they are protected by "legislative immunity" under Article 4 § 8 of the Indiana Constitution. Legislative immunity does not apply here, when the central issue involves a separation of powers dispute between two branches of government.

59. Article 4 § 8 of the Indiana Constitution, also known as the "Speech and Debate Clause," provides that "Senators and Representatives . . . 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."

60. That portion of the Indiana Constitution, modeled after the United States Constitution, was designed to "preserve legislative independence, not [its] supremacy." *U.S. v. Brewster*, 408 U.S. 501, 508 (1972) (interpreting the federal clause). Accordingly, courts interpret the federal Speech and Debate Clause "in such a way as to ensure the independence of the legislature without altering the historic balance of the three co-equal branches of Government." *Id.*

61. Conferring legislative immunity upon the Defendants in this case would alter the balance of Indiana's three co-equal branches.

62. The Court is called upon here to reconcile two conflicting provisions of the Indiana Constitution: Ind. Const. Art. 5 § 16 ("The Governor shall take care that the laws are faithfully executed."); and Ind. Const. Art. 4 § 8 (the "Speech and Debate Clause"). Under the facts of this case, this too is an issue of first impression. A court should reconcile conflicting provisions when possible, and avoid absurd results. *Snyder*, 958 N.E.2d at 772 n. 3 (Ind. 2011) ("we will not interpret the Constitution to lead to an absurd result . . . .").

63. Under the unique facts of this case, this Court concludes that Indiana governors must have the ability to access courts in order to advance their position that constitutional powers have been infringed by the Indiana legislature. To hold otherwise would be to elevate the Indiana legislature – via the Speech and Debate Clause – above the Governor's constitutional duty to make sure the Indiana Constitution is faithfully executed.

64. Indiana typically has a part-time legislature. *See* Ind. Const. Art. 4 § 9. However, the current General Assembly may adjourn *sine die*[4] no later than November 15, 2021. Ind. Code § 2-2.1-1-2(e)(1). According to the Defendants, this means that they will have legislative immunity up to and including November 30, 2021, by which point legislative immunity for the next session will have already begun. Ind. Const. Art. 4 § 8; Ind. Code § 2-2.1-1-2(a). This is the first time in 160 years that the Legislature has taken such a drastic action.[5]

65. However, with the newly granted ability to call "emergency" sessions under HEA 1123, the General Assembly could keep themselves in session to indefinitely shield themselves from immunity in this and any other case. Under the Defendants' theory, this would allow the General Assembly to take any action it deems constitutional without challenge or recourse from the other two co-equal branches.

66. Granting the Defendants that type of immunity would create legislative supremacy, not preserve its independence.

67. Additionally, the intent of the Speech and Debate Clause would not be served by finding legislative immunity. Other states with similar "Speech and Debate Clauses" have noted that such constitutional provisions were enacted to grant immunity "to protect the legislators from distraction during the stated periods of time" in which the legislature was in session. *Seams v. Walgren*, 514 P.2d 166, 168 (Wash. 1973); *see also Auditor General v. Wayne Circuit Judge*, 208 N.W. 696, 697 (Mich. 1926) ("The idea back of the constitutional provision was to protect the

---

[4] "Sine die" means "without any future date being designated (as for resumption)," or "indefinitely."

[5] Prior to this year, Ind. Code § 2-2.1-1-2(e) did not allow for the General Assembly to adjourn *sine die* beyond April 30, 2021. *See* 2021 Ind. Legis. Serv. P.L. 133-2021 (H.E.A. 1372). The unprecedented nature of this year's November 15, 2021 *sine die* deadline was only statutorily possible following this year's legislative session. *Id.*

legislators from the trouble, worry and inconvenience of court proceedings during the session . . . so the State could have their undivided time and attention in public affairs.").

68. Although the General Assembly is still technically in session, the Defendants are not currently engaged in any legislative activity. This lawsuit does not interfere with the Defendants' ability to conduct State business, as was the intent of the Speech and Debate Clause.

69. At the federal level – which has similar separation of powers between its three branches of government – courts have concluded that federal "legislative immunity" applies to claims against legislators in their "individual capacities." *U.S. v. Brewster,* 408 U.S. 501, 507 (1972). The clause is designed to "preserve legislative independence, not [its] supremacy." *Id.* If the Court adopts the position advanced by Attorney General Rokita, then the Court will be elevating the authority of the Indiana legislature above that of Indiana governors (or the courts themselves). That result is anathema to separation of powers principles, and to the Indiana Constitutional authority vested in Indiana governors.

70. It is also noteworthy that the General Assembly vested a "Legislative Council" as having the authority to act under HEA 1123. Ind. Code § 2-2.1-2-1.2(7)(a) (enacted pursuant to HEA 1123). The ability to call a special session is vested in that "Council," not any individual legislators. *Id.* Members of the Legislative Council can change from time to time. Ind. Code § 2-5-1.1-1. Nothing in the Indiana Constitution protects a statutorily created "Legislative Council" that is made up of differing legislators, from being served with civil process in a separation of powers dispute.

71. In order to protect the separation of powers, and to ensure that the Indiana legislature's powers are not elevated above those of the executive branch, the Court concludes that in these narrow factual circumstances, the defendant Indiana legislators in their official capacities;

the General Assembly generally; and the Legislative Council, are not immune from having to defend this case.

72. For these reasons, the protections in Article 4 § 8 of the Indiana Constitution do not apply in the present action. This case may proceed against all Defendants.

SO ORDERED this 3rd day of July, 2021.

JUDGE, MARION COUNTY SUPERIOR COURT

Distribution: All Counsel of Record.