STATE OF WISCONSIN
SUPREME COURT
Appeal No. 19AP559

The League of Women Voters, Disability Rights of Wisconsin, Inc., Black Leaders Organizing for Communities, Guillermo Aceves, Michael J. Cain, John S. Greene and Michael Doyle,

Plaintiffs-Respondents,

v.

Tony Evers,

Defendant-Respondent, and

Wisconsin Legislature,

Intervening Defendant-Appellant.

ON APPEAL FROM THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE RICHARD G. NIESS, PRESIDING,
CASE NO. 2019CV84

NONPARTY BRIEF OF *AMICI CURIAE,* FORMER LIEUTENANT GOVERNOR MARGARET FARROW, SPEAKER OF THE ASSEMBLY SCOTT JENSEN, STATE SENATORS TERRY MOULTON AND LEAH VUKMIR, AND REPRESENTATIVES TO THE ASSEMBLY GAREY BIES, ADAM JARCHOW, AND JESSE KREMER

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INTEREST OF AMICI

Amici are former state officials who, in combination, have served Wisconsin for more than 70 years. As former state officials, *amici* understand the importance and value of extraordinary sessions and have a unique and valuable perspective to offer.

Margaret Farrow served as the 42nd Lieutenant Governor of Wisconsin from May, 2001 until January 2003. Prior to serving as Lieutenant Governor, Farrow served as a Representative to the Assembly from 1986-89, and as a State Senator from 1989 until 2001. During her time in state service Farrow participated in a number of extraordinary sessions.

Scott Jensen served as a Representative to the Assembly for more than a decade. First elected in a 1992 special election, Jensen was re-elected every two years until stepping down in March, 2006. Jensen served as Majority Leader from 1995-1997, and was elected Speaker of the Assembly in 1997, serving in that role until 2003. As a Representative, Jensen participated in

several extraordinary sessions and as Speaker he organized and oversaw two of them.

Terry Moulton and Leah Vukmir served as both Representatives to the Assembly and State Senators. Moulton was first elected to the State Assembly in 2004 serving through 2008, he was elected to the State Senate in 2010 serving through 2018. Vukmir was first elected to the State Assembly in 2002 and was subsequently re-elected every two years until she was elected to the State Senate in 2010 serving through 2018. Vukmir served as Assistant Majority Leader from late 2015 through 2018. Both Moulton and Vukmir participated in several extraordinary sessions during their legislative service, including the extraordinary session that is the subject of this litigation. Vukmir also served on the Senate leadership team that organized and administered that extraordinary session.

Garey Bies, Adam Jarchow and Jesse Kremer all served as Representatives to the Assembly. Bies was first elected in 2000 and served through 2014. Jarchow and Kremer were both first

elected in 2014 and served through 2018. Bies, Jarchow and Kremer all participated in several extraordinary sessions during their legislative service. Jarchow and Kremer participated in the extraordinary session that is the subject of this litigation.

SUMMARY OF ARGUMENT

The Legislature's extraordinary session process is a lawful exercise of its constitutional authority. Until the December, 2018 extraordinary session, that authority has been exercised, without issue or question, for decades by legislative majorities on both sides of the political aisle. There is nothing that distinguishes the December, 2018 extraordinary session from any other in a legally relevant way. Whatever one thinks about an extraordinary session held at the end of the term of an outgoing governor, nothing in the circuit court's decision turns on the "lame duck" nature of the session. Its rationale – and the arguments advanced by the plaintiffs here – would render any such session held at any time under any circumstance improper and would invalidate each and every law passed in them.

ARGUMENT

This case presents two issues: (1) whether the extraordinary session was convened "as provided by law"; and (2) whether the method of convening the session violated the legislative quorum requirement. *Amici*, for the reasons below, request this court answer these questions the same way that everyone in Wisconsin has answered them for years: that extraordinary sessions are lawful exercises of vested constitutional authority, and that the December, 2018 extraordinary session, like so many before it, called in precisely the same way, was a lawful exercise of that authority.

I. EXTRAORDINARY SESSIONS GENERALLY ARE A LAWFUL EXERCISE OF THE LEGISLATURE'S VESTED CONSTITUTIONAL AUTHORITY

This case presents a critical question of constitutional authority to this Court. Our state constitution vests the legislative power in a Senate and Assembly. Wis. Const. Art. IV, § 1. In exercising that vested authority, "[e]ach house may determine the rules of its own proceedings." Wis. Const. Art. IV, §

8. Further, the state constitution requires the Legislature to "meet at the seat of government at such time as shall be provided by law." Wis. Const. Art. IV, § 11. In light of these clear constitutional directives, and the logic of our separation of powers, this Court has long held that the "judicial department has no jurisdiction or right to interfere with the legislative process. That is something committed by the constitution entirely to the legislature itself. It makes its own rules, prescribes its own procedure, subject only to the provisions of the constitution . . . ." *Goodland v. Zimmerman*, 243 Wis. 459, 467, 10 N.W.2d 180 (1943).

A. When the Legislature meets in extraordinary session it does so pursuant to law

Amici, as elected officials sworn to uphold the state constitution, participated in many extraordinary sessions (including some *amici* who participated in the December, 2018 extraordinary session) without any question or hesitation as to whether those sessions were held at a time "provided by law" as required by the state constitution.

The circuit court in this case stated – without explanation or analysis – that "'[p]rovided by law' means provided by duly-enacted statute." *The League of Women Voters of Wisconsin v. Knudson*, No. 19-CV-84, at *2 (Wis. Cir. Ct. Mar. 21, 2019). This "must be so" assertion is in direct conflict with this Court's recent holding in *Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶24, 374 Wis. 2d 513, 893 N.W.2d 212 (concluding that the phrase "prescribed by law" as used in a particular constitutional provision was "not restricted to statutory law").

"Prescribed by law" cannot be conflated with "prescribed by statute." It can refer to some other source of legal authority. Invoking the interpretative rule of thumb that where different words are used, different meanings are presumed, the *Parsons* Court noted, among other things, that the Wisconsin Constitution referred elsewhere to items being provided "by statute." *Parsons*, 374 Wis. 2d 513, ¶26. Put differently, where the people of Wisconsin wanted to restrict the trigger for a constitutional provision to statute, they can and have used that specific word.

But where the broader word "law" is used, courts should be on the lookout for a potentially more sweeping meaning, whether one including administrative rules, common law, judicial precedent, or some other part of the "the body of authoritative grounds of judicial and administrative action." LAW, Black's Law Dictionary (10th ed. 2014); *see Parsons*, 374 Wis. 2d 513, ¶25, 30.[1]

In this case, the Court need not look far to see that "prescribed by law" does not mean "prescribed by statute." Indeed, it need look no further than the Constitution itself. While Art. IV, § 1 requires that legislative sessions be established by law, Art. IV, § 8 gives the legislature the power to determine how it will proceed. Pursuant to that express constitutional authorization, the legislature has provided for extraordinary sessions in its own joint rules for decades. *See* Wisconsin Legislature, Joint Rule 81.

[1] Sometimes prescribed by law does mean prescribed by statute as, for example, when a constitutional officer has only that power that the legislature prescribes. *See Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶24, 374 Wis. 2d 513, 893 N.W.2d 212 (attorney general).

That the legislature is the master of when it meets is consistent with the vesting of the legislative power exclusively in it. To say that the legislature can only meet when permitted by a duly enacted statute would place the Governor in control of the time and place of its meeting. He could, in effect, veto the desire of the people's representatives to meet. The plaintiffs in this case have "a very heavy burden in overcoming the presumption of constitutionality," and must prove unconstitutionality "beyond a reasonable doubt." *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶17, 357 Wis. 2d 360, 851 N.W.2d 302. To say that the legislature may meet only at a time that has been approved by the Governor by calling a session or signing meeting times into law (even if a supermajority could override a veto) and that all laws passed in sessions called by rule are unlawful requires much clearer constitutional support than is available here.

B. Even if the state constitution required the legislature to authorize extraordinary sessions by statute, it has done so

The Circuit Court's unexplained assumption that the requirement that the legislature meet "as provided by law" means as "provided by duly-enacted statute," *League of Women Voters*, No. 19-CV-84, at *2, is wrong. But even if one accepts the circuit court's *ipse dixit*, the extraordinary session was lawful because it was provided for by "duly-enacted statute."

The Legislature enacted Wis. Stat. § 13.02(3) in order to authorize a biennial schedule under Art. IV, § 11. Pursuant to that statutory command, like many Legislatures before them that *amici* served in, the 2017-18 Legislature adopted a joint resolution, 2017 Senate Joint Resolution 1, in which it: (1) "declare[d] that the biennial session period of the 2017 Wisconsin legislature began on Tuesday, January 3, 2017, and that the biennial session period ends at noon on Monday, January 7, 2019"; and (2) explained that "[u]nreserved days" were "available to . . . convene an extraordinary session, or take senate action on appointments as permitted by joint rule 81." 2017 Senate Joint Resolution 1 (emphasis removed).

In other words, the Legislature "duly enacted" a statute authorizing itself to set its own schedule. Wis. Stat. § 13.02(3). Pursuant to that statute, the Legislature has established such a schedule, expressly noting in that schedule that it might convene in an extraordinary session during the session period. Therefore, when the Legislature established the questioned extraordinary session in this case, they did so pursuant to law.

The circuit court's decision requires the Legislature to instead schedule *all* sessions in advance (and to do it by statute), eliminating the Legislature's ability to ever have its own unplanned session. That interpretation is in direct conflict with the Legislature's own authority to "determine the rules of its proceedings," under Art. IV, § 8 of the Wisconsin Constitution, and simply cannot be allowed to stand. It is an extraordinary judicial intrusion into the legislature's powers and prerogatives under Art. IV, §§ 1 and 8.

C. The procedure for calling extraordinary sessions does not violate Art. IV, § 7

The Legislature's procedure for calling the December, 2018 session did not violate the Art. IV, § 7 quorum requirements defining a majority of each house as a quorum for conducting business. There is a clear distinction between conducting "business" of the Legislature (i.e., voting to advance legislation) and other tasks necessary to the Legislative process that do not require a majority of all members, such as organizing a session. The Legislature regularly relies upon *less* than a majority of members in order to do all sorts of tasks necessary for legislating. For example, the Legislature relies upon committees made up of varying numbers of members to hear public input on legislation, develop amendments, and to make recommendations to the full house. Further, even when the Legislature meets in *regular* session, the legislative calendar for each house is established by less than a quorum of the members.[2] That too is a constitutional exercise of the Legislature's authority. Even were this not so, Art.

[2] *See* Senate Rule 18 ("The committee on senate organization shall establish a calendar at least 18 hours prior to the commencement of the session to which the calendar applies . . . ."); *see also* Assembly Rule 29 ("The assembly's calendars shall be prepared by the chief clerk under the supervision of the committee on rules.").

IV, § 8 empowers each house of the legislature to "determine the rules of its proceedings." The Legislature, with a quorum present, adopted Joint Rule 81 governing the call of extraordinary sessions. That rule allows such a session to be called: (1) at the direction of a majority of the members of each house's organization committee; (2) by the adoption and concurrence in a joint resolution on the approval of a majority of the members elected to each house; or (3) by a majority of the members of each house submitting a written petition to the clerks of each house. When the Legislature chose to utilize the first option to convene the December, 2018 extraordinary session, this was done pursuant to the legislature's own duly enacted rules as well as § 13.02(3).

II. THE LEGISLATURE HAS A LONG HISTORY OF USING EXTRAORDINARY SESSIONS AND THE CIRCUIT COURT'S DECISION CALLS ALL OF THOSE ACTIONS INTO QUESTION

As former state lawmakers whose service to Wisconsin spans several decades, *amici* have personally participated in a number of lawful extraordinary sessions. *Amicus* Scott Jensen,

during his time as Speaker of the Assembly, went even further and has been directly involved with organizing and executing that house's activities during an extraordinary session. *Amici* understand the importance of protecting the use of extraordinary sessions as an important tool for the lawful exercise of the Legislature's constitutionally vested authority. The circuit court's decision on these issues calls nearly 50 years of lawful actions in extraordinary sessions into question and casts a cloud of doubt and uncertainty over decades of legislative actions.

In fact, just during the last biennium, the Legislature also utilized an extraordinary session in March, 2018, only 9 months before the extraordinary session that is the subject of this litigation. During the March, 2018 extraordinary session the Legislature approved 2017 Assembly Bill 843, which the Governor signed into law as 2017 Wisconsin Act 143.[3] This legislation created an "Office of School Safety" within the Department of Justice and created school safety grants to

[3] *See* 2017 Assembly Bill 843, History, *available at* ttps://docs.legis.wisconsin.gov/2017/proposals/ab843.

improve school safety.[4] The Legislature appropriated $100 million in funding for those grants, and virtually all of it has been dispersed already[5]. If, as the plaintiffs in the case have alleged, the general use of extraordinary sessions is unconstitutional, then all of those grants could potentially be in question threatening the integrity of school budgets throughout Wisconsin.

But school security grants are not the only state spending at risk if extraordinary sessions are found to be unconstitutional. In 2015, the Legislature approved 2015 Senate Bill 209 which the Governor signed into law as 2015 Wisconsin Act 60.[6] That act provided the framework and financing for the arena in Milwaukee now known as Fiserv Forum, home of the Milwaukee

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[4] *See* Wisconsin Legislative Council Act Memo, 2017 Wisconsin Act 143, *available at* https://docs.legis.wisconsin.gov/2017/related/lcactmemo/act143.pdf.

[5] *See* Amanda Quintana, *DOJ awards $45 million in final school safety grants, focuses on mental health*, Channel 3000 (October 22, 2018), *available at* https://www.channel3000.com/news/doj-awards-45-million-in-final-school-safety-grants-focuses-on-mental-health/818412143.

[6] *See* 2015 Senate Bill 209, History, *available at* https://docs.legis.wisconsin.gov/2015/proposals/sb209.

Bucks and upcoming host of the 2020 Democratic National Convention.[7]

Going back further, in July, 2011, the Legislature met in extraordinary session to consider, among other things, 2011 Senate Bill 148, related to legislative redistricting.[8] Interestingly for this case, on that same day and in the same extraordinary session, the Senate also confirmed Ellen Nowak for an appointment to the Public Service Commission,[9] the same position that she was appointed to late last year and confirmed for by the Senate during the December, 2018 extraordinary session that is the subject of this litigation.

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[7] *See* Wisconsin Legislative Council, Act Memo, 2015 Wisconsin Act 60, *available at* https://docs.legis.wisconsin.gov/2015/related/lcactmemo/act060.pdf; *see also* Bill Glauber and Mary Spicuzza, *Milwaukee wins tight race to host the 2020 Democratic National Convention*, Milwaukee Journal Sentinel (March 11, 2019), *available at* https://www.jsonline.com/story/news/politics/2019/03/11/dnc-milwaukee-picked-host-2020-democratic-national-convention/2836684002/.

[8] *See* Senate Calendar, July 2011 Extraordinary Session, Tuesday, July 19, 2011, *available at* https://docs.legis.wisconsin.gov/2011/related/calendars/senate/20110719_ex.pdf; *see also* Assembly Calendar, July 2011 Extraordinary Session, Wednesday, July 20, 2011, *available at* https://docs.legis.wisconsin.gov/2011/related/calendars/assembly/20110720.pdf.

[9] *See* Senate Journal, July 19, 2011, *available at* https://docs.legis.wisconsin.gov/2011/related/journals/senate/20110719ex.

Extraordinary sessions have been utilized by both Republican and Democratic majorities in the legislature, and extraordinary session legislation has been signed into law by Governors of both parties. In February, 2009, a Democrat-controlled legislature met in extraordinary session[10] to pass a budget repair bill, 2009 Senate Bill 62, which raised taxes by hundreds of millions of dollars in order to help close a projected deficit.[11] That bill was subsequently signed into law by then Governor Doyle as 2009 Wisconsin Act 2.[12]

We could go on. The following laws are just a few that have been enacted in extraordinary sessions and could be called into question by the circuit court's reasoning:

- 2015 Wisconsin Act 57 (ratifying the collective bargaining agreement negotiated between the State of Wisconsin and the Wisconsin Law Enforcement Association, for the 2013-15 biennium);

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[10] *See* Senate Journal, February 17, 2009, *available at* https://docs.legis.wisconsin.gov/2009/related/journals/senate/20090217ex/_5.

[11] *See* Legislative Fiscal Bureau, *Summary of Budget Adjustment Provisions: 2009 Wisconsin Act 2* (February 23, 2009), *available at* https://docs.legis.wisconsin.gov/misc/lfb/budget/2007_budget_adjustment/summary_of_budget_adjustment_provisions_2009_act_2_february_23_2009.

[12] *See* 2009 Senate Bill 62, History, *available at* https://docs.legis.wisconsin.gov/2009/proposals/sb62.

- 2015 Wisconsin Act 55 (the biennial state budget for 2015-17);
- 2015 Wisconsin Act 1 (commonly referred to as "Right to Work");
- 2011 Wisconsin Act 32 (the biennial state budget for 2011-13);
- 2005 Wisconsin Act 467 (various election law reforms);
- 2005 Wisconsin Act 431 (relating to sex offender placement and the requirement of GPS monitoring for certain sex offenders);
- 2003 Wisconsin Act 118 (a major regulatory reform package).

Extraordinary sessions have been used to take action on any number of different topics by legislators of both parties with the agreement of governors of both parties. This is how it should be. The people's representatives need to have the ability to meet when events and the needs of the state require – even if that need was not anticipated at the beginning of the biennium and even if the Governor does not agree. Article IV gives it that power, as did, in this case, Wis. Stat. § 13.02(3), 2017 Senate Joint Resolution 1, and Joint Rule 81.

CONCLUSION

For the reasons stated herein *amici* respectfully request that this Court determine that the December, 2018 extraordinary session was convened "as provided by law" and that the procedure used to call it did not violate the constitution's quorum requirements.

DATED this 23rd Day of April, 2019,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this non-party brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 2,969 words, calculated using Microsoft Word.

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I, Richard M. Esenberg, attorney for *Amicus Curiae*, hereby certify that on the 23rd day of April, 2019, I caused three (3) true and correct copies of the foregoing non-party brief to be served upon counsel of record by placing the same in the U.S. Mail, first-class postage, as follows:

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