STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

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

Plaintiffs,

Case No. 19-CV-0084

v.

Case Code: 30701 & 30704

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

Defendants.

NON-PARTY BRIEF OF LEGAL SCHOLARS AS AMICI IN SUPPORT OF PLAINTIFFS

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INTEREST OF *AMICI CURIAE*

Amici are noted academic experts in the area of state constitutional law and governance, including the authors of leading casebooks on the subject. Their names are below, with institutional affiliations listed for identification purposes only. An appendix provides additional biographical and publication information. *Amici* have a professional interest in ensuring that state constitutions are properly construed in accordance with text, history, and purpose, and with awareness of the practice and precedent of other states.

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INTRODUCTION

This litigation concerns the constitutionality of the Wisconsin Legislature's December 2018 Extraordinary Session. The term "extraordinary" is apt. The Assembly and Senate Committees on Organization called the lame-duck session months after the Legislature adjourned the last meeting on its regular session calendar. The agenda included a litany of controversial measures designed to limit the authority of the State's newly elected governor and other executive branch officials.

Whatever one thinks of the legislation that emerged from the December 2018 session, there is an underlying problem: The session was not lawfully convened. This conclusion rests on neutral legal principles that transcend the politics of the day—principles that equally bind lawmakers on both sides of the aisle.

In order to safeguard liberty and promote responsible lawmaking, the Wisconsin Constitution imposes structural constraints on the Legislature, including limits on its convening power. By its terms, the Constitution requires the Legislature to meet on a regular schedule provided by law. It does not give the Legislature—much less two legislative committees—license to convene at whim. History confirms that, from the beginning, the people of this State have sought to prevent precisely the type of irregular lawmaking process that occurred here.

The law and practice of other states underscore the unconstitutionality of the December 2018 Extraordinary Session. From coast to coast, the prevailing view is that legislatures cannot convene extraordinary sessions on their own terms. In recent decades, many states have given their legislatures some leeway to call such sessions, but they have done so almost exclusively by amending their constitutions to confer and cabin that authority expressly. Wisconsin has adopted no such provision, yet the Legislature has claimed the power anyway. No other state handles

extraordinary sessions in this manner, and no court has ever endorsed a convening practice akin to the one at issue here. In the end, the most extraordinary thing about the December 2018 Extraordinary Session is that it happened at all.

ARGUMENT

I. THE LEGISLATURE HAD NO AUTHORITY TO CALL THE DECEMBER 2018 EXTRAORDINARY SESSION.

A. By their plain terms, the relevant constitutional and statutory provisions preclude the Legislature from self-convening as it did.

After vesting the "legislative power" in a Senate and Assembly, Wis. Const. art. IV, § 1, the Constitution channels and constrains that power in numerous respects. Most relevant here, Article IV, § 11 specifies when the Legislature is to meet—namely, "at such time as shall be provided by law, unless convened by the governor in special session." Contrary to this provision, the Legislature did not convene the December 2018 Extraordinary Session by law or gubernatorial call, but instead by internal legislative rule. *See* Joint Rule 81(2)(a). No statute authorizes the Legislature—much less two legislative committees—to convene such a session. And, more fundamentally, no statute could authorize it. The best reading of the Constitution's text, particularly in light of its history and purpose, is that the power to convene the Legislature outside the normal course belongs exclusively to the Governor.

To provide for something "by law," the Legislature must enact a statute, not a mere internal rule. Article IV is explicit about this, declaring that "no law shall be enacted except by bill." Wis. Const. art. IV, § 17(2).[1] The Constitution's text would be unambiguous even without that express guidance about what "law" means. Directing legislators to act "by law" has long

[1] *See also* Wis. Const. art. V, § 10(1)(a) ("Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor."); *Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin.*, 2009 WI 79, ¶ 18, 319 Wis. 2d 439, 768 N.W.2d 700 ("[I]n order for the legislature to create a law, the proposed law must be enacted by bill.").

been how the drafters of constitutional provisions call for statutory implementation.[2] As the Wisconsin Supreme Court put it after analyzing several other constitutional provisions, "the drafters meant statutory law when they used the phrase, 'provided by law.'" *State v. City of Oak Creek*, 2000 WI 9, ¶ 27, 232 Wis. 2d 612, 605 N.W.2d 526.[3]

Consistent with this understanding, the Legislature appears to accept that extraordinary sessions are *ultra vires* unless statutorily authorized. But contrary to the Legislature's assertions, no such authorization exists. The sole statute to authorize legislative sessions addresses convenings in the normal course, as its title—"Regular sessions"—makes clear. Wis. Stat. § 13.02. After first requiring the Legislature to convene at the start of each odd-numbered year "to organize itself for the conduct of its business," the statute directs the Legislature to "meet annually" in "regular session." *Id*. § 13.02(1), (2). It specifies when each regular annual session

[2] *See, e.g.*, *Scott v. Coachman*, 73 So. 3d 607, 613 (Ala. 2011) ("[T]he phrase 'provided by law' … 'when used in a constitution or statute generally means prescribed or provided by some statute.'") (quoting *Black's Law Dictionary* 1224 (6th ed. 1990)); *State v. Rodrigues*, 629 P.2d 1111, 1114 (Haw. 1981) ("The phrase 'as provided by law' in the context of other state constitutional provisions has been construed as a direction to the legislature to enact implementing legislation."); *Wann v. Reorganized Sch. Dist. No. 6 of St. Francois Cty.*, 293 S.W.2d 408, 411 (Mo. 1956) (explaining that "'as provided by law' … , when used in constitutions, has been held to meet as prescribed or provided by statute" or by "other provisions of the constitution"); *D.C. v. Georgetown & T. Ry. Co.*, 41 F.2d 424, 426 (D.C. Ct. App. 1930) ("'Prescribed by law,' when used in Constitutions, generally means prescribed by statutes."); *Fountain v. State*, 101 S.E. 294, 295–96 (Ga. 1919) ("We assume that no one will question that the term 'provided by law' means provided by statute law."); *Lawson v. Kanawha Cty. Court*, 92 S.E. 786, 789 (W. Va. 1917) ("The phrases, 'prescribed by law' and 'provided by law,' when used in Constitutions, generally mean prescribed or provided by statutes."); *Brinckerhoff v. Bostwick*, 99 N.Y. 185, 190–91 (N.Y. 1885) ("Such expressions as 'required by law,' 'regulated by law,' 'allowed by law,' 'made by law,' 'limited by law,' 'as prescribed by law,' 'a law of the state,' are of frequent occurrence in the codes and other legislative enactments; and they are always used as referring to statutory provisions only."); *Union Iron Co. v. Pierce*, 24 F. Cas. 583, 586 (C.C.D. Ind. 1869) (explaining that, by providing for certain corporate dues to be secured "as may be prescribed by law," the Indiana Constitution "evidently requires legislation on the subject to which it relates"); *Exline v. Smith*, 5 Cal. 112, 113 (1855) ("The words 'prescribed by law,' look to actual legislation upon the subject[.]").

[3] *City of Oak Creek* involved Article VI, § 3 of the Constitution, which calls for the powers of the attorney general and treasurer to be "prescribed by law." *See* 2000 WI 9, ¶ 19, 232 Wis. 2d 612, 605 N.W.2d 526 ("This court has consistently stated that the phrase 'prescribed by law' in art. VI, § 3 plainly means prescribed by statutory law."). But the Court's historical analysis of the phrase "by law" extended beyond that specific provision. *See id*. ¶¶ 27–28. In only one unusual situation has the Supreme Court construed "by law" in the Constitution to encompass more than statutory law. In *Parsons v. Associated Banc-Corp*, the Court concluded that a unique combination of textual, historical, and precedential factors indicated that Article I, § 5, which allows jury trial waivers "in the manner prescribed by law," does not require the waiver to be pursuant to a statute. 2017 WI 37, ¶¶ 23–30, 374 Wis. 2d 513, 893 N.W.2d 212. That jury provision differs in kind from Article IV, § 11, Article VI, § 3, and other provisions that direct the legislature to provide "by law" for the structuring of government institutions.

"shall commence," and it instructs the Legislature, "[e]arly in each biennial session period," to provide further specificity and predictability by memorializing a "work schedule" in a joint resolution. *Id*. § 13.02(2), (3). Nothing in this section remotely authorizes the Legislature, at the whim of its organizational committees, to initiate irregular, unscheduled special-purpose convenings. Indeed, such convenings flout the orderly legislative process that § 13.02 envisions.

Although the lack of statutory authority for extraordinary sessions suffices to resolve this case, there is a deeper problem. Even if a statute purported to allow the Legislature to self-convene as it did in December 2018, the Constitution precludes it. As the leading treatises to address the subject recognize, a legislature "has no inherent power to convene itself in extraordinary session." 81A Corpus Juris Secundum States § 112. The power exists only to the extent "specifically authorized by constitutional provision." 1 Sutherland Statutory Construction § 5:1 (7th ed., Nov. 2018 update). Without such a provision, "a legislature has no authority to convene itself in special session, and its actions under an attempt to do so are void." *Id.*[4]

Nothing in the Wisconsin Constitution affirmatively provides for legislatively initiated extraordinary convenings. Instead, the Constitution's text affirmatively constrains the Legislature in a manner inconsistent with such convening power. Article IV, § 11 does not merely direct the Legislature to meet as "provided by law." It states that the Legislature is to "meet … *at such time* as shall be provided by law, *unless* convened by the governor in special session." Wis. Const. art. IV, § 11 (emphasis added). This is a call for temporal regularity. Under § 11, the Legislature must commit by law to meet at periodic intervals. This is why, since

[4] *See also* 81A Corpus Juris Secundum States § 112 (explaining that when "authority [to convene in extraordinary session] is granted by the constitution, it must be exercised strictly in accord with the stipulations of the organic grant"); 72 Am. Jur. 2d States, Etc. § 43 ("In the absence of a constitutional provision authorizing a state legislature to convene itself, it may not do so, and any acts or intended acts of members, if so assembled, are without authority of law, whether the act is for legislative or inquisitorial purposes.").

the State's early days, statutes have provided for "regular sessions." Section 11 does not allow the Legislature to give itself carte blanche to convene at times that are not legally prescribed.

The "unless" clause of § 11, together with Article V, § 4, powerfully reinforces this understanding. These provisions express a deliberate constitutional choice to vest the governor—and *not* legislative actors—with the power to convene the Legislature outside the ordinary course. *See* Wis. Const. art. V, § 4 ("The governor … shall have the power to convene the legislature on extraordinary occasions."). By attempting to call itself into extraordinary session, the Legislature usurps this gubernatorial prerogative. *See* 72 Am. Jur. 2d States, Etc. § 43 ("Under a constitutional provision authorizing the governor to call an extraordinary session, that power rests solely with the governor; it may not be exercised by the legislature[.]"); *see also State v. Hastings*, 10 Wis. 525, 531 (1860) ("[W]hen the people have declared by [the Constitution] that certain powers shall be possessed and duties performed by a particular officer or department, their exercise and discharge by any other officer or department, are forbidden by a necessary and unavoidable implication.").

B. History and past practice confirm that the Legislature exceeded its authority.

The Constitution's history bolsters the conclusion that the Legislature may not call itself into extraordinary session even with statutory authorization, much less without it. As originally enacted in 1848, Article IV, § 11 declared: "The legislature shall meet at the seat of government, at such time as shall be provided by law, once in each year, and not oftener, unless convened by the governor." Like the present version of Section 11, the 1848 version specified two—and only two—ways to convene (as provided by law, or by gubernatorial call). It also precluded the Legislature from convening itself more than once annually.

As the State's first legislators recognized, Section 11's directive to act "by law" required

an implementing statute, and they immediately passed one to provide for a "regular annual session"—the nineteenth century version of § 13.02. *See* Wis. Stat. tit. III, ch. 8, § 1 (1849). No one suggested that an internal rule would have sufficed. And neither those first legislators nor any of their successors for the next century-plus claimed the power to self-convene special or extraordinary sessions. Instead, they all accepted that the Governor alone had the "power to convene the legislature on extraordinary occasions." Wis. Const. art. V. § 4.

The Constitution's drafters had good reason to require lawmakers to meet within defined legal parameters, rather than giving them unbounded convening authority. Partly, it was a matter of logistics. Legislators of the day were true part-timers who had other occupations and often resided far from the capitol. It was vital for them to know, clearly and predictably, when they would need to meet in Madison. It was likewise important for citizens to have meaningful notice of those meetings so they could attend, petition, lobby, and keep apprised of legislative activity. Beyond this, Wisconsin's constitutional deliberations occurred in the midst of highly publicized incidents of legislative mismanagement, incompetence, and corruption across the country. *See* G. Alan Tarr, *Understanding State Constitutions* 118–26 (1998). Those events produced widespread distrust of state legislative power and reinforced the desire to avoid a repeat of colonial-era abuses involving irregular convenings. *See* Robert Luce, *Legislative Assemblies* 123 (1924) (noting that, during the Colonial period, "the irregularity of sessions was a bitter grievance with the colonists"). In an effort to minimize legislative overreach and safeguard liberty, state constitutions of this era, including Wisconsin's, incorporated an array of features to constrain and regularize the lawmaking process, including limits on when and how the Legislature could meet. *See* Tarr, *supra*.

Since 1848, Article IV, § 11, has been amended twice, but neither revision transferred special convening authority to the Legislature. An 1881 amendment imposed two new constraints. First, it limited legislative meetings to "once in two years, and no oftener," which forced the Legislature to abandon its regular annual session and meet biennially instead. Wis. Const. art. IV, § 11 (1881). Many states similarly shifted to biennial sessions during this period in response to continued concerns about "widespread corruption of state legislatures and the expense of annual sessions." Belle Zeller, *American State Legislatures* 89 (1954). Second, the 1881 amendment clarified that, when the Governor called a special session, the Legislature could not conduct any business "except as shall be necessary to accomplish the special purposes for which it was convened." Wis. Const. art. IV, § 11 (1881). This amendment solidified gubernatorial control over special sessions. As a Wisconsin Attorney General Opinion put it, "The constitution has vested the governor with the sole determination of whether or not a session shall be held at all, and with that the sole determination in case a special session is called on the special purposes of such special session." 15 Atty. Gen. Op. 163, 165 (1926).[5] A mid-twentieth century survey of states' special convening rules placed Wisconsin among the states that "leave the calling of special sessions entirely to the governor." Zeller, *supra*, at 91.

The only other amendment to Section 11 occurred in 1968. It struck seven words (and three commas) from the 1881 version to create Section 11 as it exists today:

> The legislature shall meet at the seat of the government at such time as shall be provided by law, ~~once in two years, and no oftener,~~ unless convened by the governor~~,~~ in special session, and when so convened no business shall be transacted except as shall be necessary to accomplish the special purposes for which it was convened.

[5] *See also* 17 Atty. Gen. Op. 171, 173 (1928) ("The governor is thus invested with extraordinary powers; he alone is to determine when there is an extraordinary occasion for convening the legislature; and he alone is to designate the business which the legislature is to transact when thus convened.") (quoting *In re Governor's Proclamation*, 35 P. 530, 531 (Colo. 1894)).

The purpose and effect of this change are evident from its history. As state government grew in size and complexity, many legislators came to see biennial sessions as inadequate. Deleting the "once in two years" limitation gave lawmakers the option to return to regular annual sessions. Accordingly, the official ballot explanation given to the State's voters described the "[e]ffect of ratification" as follows:

> At present, the Wisconsin Constitution states that the legislature shall meet at such time as shall be provided by law once in two years unless convened by the governor in special session for special purposes. If a majority of the electors voting on this question approve the amendment, the legislature would be permitted to meet *in regular session* more often than once in two years.

Official Ballot, Wis. State J., Mar. 25, 1968, at 6, § 2 (emphasis added). The official ballot question read: "Shall Article IV, Section 11 of the Constitution be amended to permit the legislature to meet *in regular session* oftener than once in two years?" *Id*. (emphasis added).

The prominent "regular session" references in the 1968 amendment materials are instructive, as is the recognition that the power to convene for special purposes belongs to the governor.[6] The voters who approved the amendment voted merely to authorize the Legislature to meet in *regular* session more frequently than the prior version of Article IV, § 11 allowed. Indeed, public discussion of the amendment repeatedly characterized it as a measure to allow the Legislature to shift from a biennial regular session to an annual one.[7]

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[6] *See, e.g.*, *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 37, 295 Wis. 2d 1, 719 N.W.2d 408 ("[T]he information used to educate the voters during the ratification campaign provides evidence of the voters' intent…. '[W]here such intention appears, the construction and interpretation of the acts must follow accordingly.'") (quoting *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 192–94, 204 N.W. 803 (1925)); *see also* Robert F. Williams, *The Law of American State Constitutions* 317, 333–34 (2009) (discussing state courts' use of extrinsic sources such as "official ballot pamphlets" and "newspaper coverage of the constitutional issue to be voted on").

[7] Robert Meloon, *State Voters OK Annual Sessions of Legislature*, Capital Times, at 4 (Apr. 3, 1968) ("In approving annual sessions, the voters reversed the action taken in a statewide referendum in 1882. Then the voters decided the Legislature should meet biennially instead of annually."); *Parties Favor Annual Legislative Sessions*, Appleton Post-Crescent, at B8 (Mar. 21, 1968) (reporting on joint statement from county party leaders in "support of a referendum question on the April 2 ballot to allow annual state legislative sessions"); John Wyngaard, *Full-Time Service, More Pay*, Sheboygan Press (Mar. 4, 1968) ("On the April constitutional referendum ballot will be the question of repealing the requirement for biennial and making possible an annual session such as is employed in about half of the states of the country."); *Taxpayer Group Lashes Annual Session Proposal*, Capital Times, at 11 (Feb. 24, 1968)

Strikingly absent from the official ballot materials, and from the surrounding public discourse, is any reference whatsoever to legislatively-convened extraordinary sessions. That silence is deafening—and unsurprising. By voting to let the Legislature provide by law for more frequent regular sessions, the electorate endorsed a system that ought to have made ad hoc extraordinary convenings less necessary. According to the Legislative Reference Bureau's description, the amendment aimed to make the legislative process more orderly and predictable by permitting lawmakers "to establish, by law, a precise schedule around which each legislative session can be planned." Legislative Reference Bureau, *Wisconsin Briefs: Constitutional Amendments to be Submitted to the Wisconsin Electorate, Apr. 2, 1968*, at 9 (Mar. 1968); *see also id*. at 8–9 (anticipating that lawmakers would "put legislative deliberations on a pre-planned schedule" with specified "work periods" and "a series of deadlines by which certain stages of the legislative process must be completed"). Voters surely did not, as part of this change, *sub silentio* authorize the Legislature to self-convene additional irregular sessions by internal rule.[8]

C. The Legislature's arguments are unsound.

Given these textual and contextual realities, the Legislature's account of its purported authority to call extraordinary sessions does not withstand scrutiny. According to the Legislature, the December 2018 Extraordinary Session is properly rooted in § 13.02 and thus qualifies as a meeting "provided by law." *See* Legislature's Brief in Support of its Provisional

(describing the amendment as one that "would allow the State Legislature to hold annual sessions"); Editorial, *On the Ballot…*, Monroe Evening Times, at 2 (Feb. 8, 1968) ("We would be inclined to favor the change to an annual session, since many matters under the present setup are certainly not given adequate study, preparation or debate before a vote is taken."); *Annual or Biennial?*, Oshkosh Daily Northwestern, at 6 (Feb. 7, 1968) (referring to the measure as "an annual session amendment").

[8] *Cf. State v. Williams*, 2012 WI 59, ¶ 15, 341 Wis. 2d 191, 814 N.W.2d 460 (discussing the need "to ascertain what the people understood the purpose of the amendment to be" and to "give effect to the apparent understanding of the drafters and the people who adopted the constitutional provision under consideration"); *Appling v. Walker*, 2014 WI 96, ¶ 29, 358 Wis. 2d 132, 853 N.W.2d 888 ("We therefore examine the relevant public statements made by the Amendment's framers and other proponents that were intended to persuade voters during the ratification process.").

Motion to Dismiss and its Provisional Response to Plaintiffs' Motion for a Temporary Injunction, at 13–21 [hereinafter "Leg. Br."]. The Legislature's statutory analysis is convoluted to say the least. Section 13.02(3), it observes, requires the Legislature to establish, by joint resolution, a "work schedule" for the "biennial session period." The relevant joint resolution, in turn, "declare[d] that the biennial session period of the 2017 Wisconsin legislature" would run from January 3, 2017 to January 7, 2019. 2017 Sen. J. Res. 1, § 1(1). The Legislature takes this to mean that the Legislature met continuously during this two-year window, at least in a nominal sense. Leg. Br. at 21. The joint resolution then listed "scheduled floorperiods" when the actual business of legislating would occur, and—highly significant in the Legislature's view—it stated that days not "part of a scheduled floorperiod" would be available to "convene an extraordinary session … as permitted by joint rule 81." 2017 Sen. J. Res. 1, § 1(3). Thus, on the Legislature's telling, the December 2018 Extraordinary Session was merely a "non-prescheduled floor period" within the bounds of a continuous biennial session. Leg. Br. at 20. In other words, the Legislature satisfied the constitutional requirement that it meet "at such time as shall be provided by law" because, pursuant to a statute requiring it to set the schedule for its regular session meetings, it passed a joint resolution allowing for unscheduled extraordinary sessions, as provided for in a cross-referenced internal procedural rule (Joint Rule 81(2)) that vests extraordinary convening authority in the Senate and Assembly organizational committees.

This is hardly a "simple path" from the Constitution to the extraordinary session (*cf.* Leg. Br. 17). It is a labyrinth with only dead ends. First and foremost, the Legislature simply has no license under § 13.02(3) to reserve for itself the power to convene extraordinary sessions. Section 13.02(3) instructs the Legislature to set its "work schedule" by joint resolution "[e]arly in each biennial session period." A joint resolution cannot, consistent with that instruction, give

the Legislature's organizational committees a blank check to decide, later in the biennial session period, to call additional, unscheduled proceedings.

Second, Joint Resolution 1 never describes the biennial session period as a single continuous meeting, and neither text nor logic supports treating it that way. Instead, § 13.02 contemplates that the Legislature will meet in regular session multiple times during the biennium. *See* Wis. Stat. § 13.02(3) (requiring "at least one meeting in January of each year" of the "biennial session period"); *see also id.* § 13.02(1) (providing for an additional organizational meeting at the start of the biennium). Accordingly, Joint Resolution 1 scheduled a number of discrete floor periods during the 2017–18 biennium when lawmakers would gather in regular session to conduct legislative business. In every way that matters, the December 2018 Extraordinary Session was an additional convening, outside the regular session calendar, meant to facilitate lawmaking at a time when it would not otherwise occur.

Third, even if a continuous biennial regular session were lurking in the background, extraordinary sessions are not merely "non-prescheduled floor periods" within the regular session. *Cf.* Leg. Br. at 20–21. Instead, they are separate convenings that stand apart from the regular session both conceptually and practically. Consequently, they require separate authorization—authorization that cannot come solely from the Legislature's own internal rules.[9]

While the Legislature now seeks to diminish the status of extraordinary sessions, it has always regarded them as akin to gubernatorially convened special sessions. Special sessions may occur alongside or atop the regular session, but no one doubts that they are distinctive. *See State ex rel. Groppi v. Leslie*, 44 Wis. 2d 282, 300, 171 N.W.2d 192 (1968) (holding that the

[9] The Legislature makes the puzzling assertion that Joint Rule 81 is "a legally irrelevant distraction," Leg. Br. at 19, even though that rule is the sole source of the organizational committees' asserted authority to call extraordinary sessions. *See* Senate Journal, Dec. 3, 2018 (declaring that the Senate and Assembly organizational committees convened the December 2018 Extraordinary Session "[i]n accordance with Joint Rule 81(2).").

Governor may call a special session even "while the legislature is in general session"). So, too, with extraordinary sessions. The Legislative Reference Bureau put it this way:

> As the names suggest, 'special' and 'extraordinary' sessions of the Wisconsin Legislature differ from regular sessions in their purposes and procedures. They are similar to each other in that they are called solely to consider one or more specified topics or pieces of legislation. Their chief difference is that a special session is called by the governor and an extraordinary session is initiated by the Legislature.

Legislative Reference Bureau, *Special and Extraordinary Sessions of the Wisconsin Legislature*, Information Bulletin 14-2 (Aug. 2014). Consistent with this understanding, the Legislature's own rules repeatedly address special and extraordinary sessions together and distinguish them from regular sessions.[10] The same is true of Joint Resolution 1 itself. It discusses (a) the "final adjournment" of special and extraordinary sessions (indicating that they are indeed separate meetings), (b) the submission of special or extraordinary session bills to the Governor, and (c) the possibility of reconvening a special or extraordinary session to consider a veto override. 2017 Sen. J. Res. 1, § 1(5). In short, the Legislature's position boils down to an assertion that the December 2018 Extraordinary Session was neither extraordinary nor a session. In fact, it was both. And it was unlawful.

[10] *See, e.g.*, Joint Rule 74(2) ("The journals of regular, extraordinary, and special sessions may be bound together in the same volumes if the extraordinary or special session is called before the journals of the regular sessions have been bound; if not so bound the journals of both houses for the extraordinary or special session shall be bound together."); Joint Rule 81(2)(c) ("Following the official call of any special or extraordinary session, [designated committees] may introduce or offer proposals germane to the call, and such proposals by be numbered, referred to committee, or reproduced in advance of the special or extraordinary session under the customary procedures of each house."); Senate Rule 93 ("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: (1) … a proposal or amendment may not be considered unless it accomplishes the special purposes for which the special session was convened or the business specified in the action authorizing the extraordinary session[.]"); Assembly Rule 93 (similar); Assembly Rule 98(1) ("A member may not schedule, hold, attend or contribute money for or at fundraising event in Dane County during a floorperiod of the legislature or during a special or extraordinary session[.]").

Separately, the Legislature suggests (at 1, 21) that the constitutionality of extraordinary sessions should be inferred from the fact that they have gone unchallenged until now. That this issue was not raised sooner does not make extraordinary sessions any less constitutionally problematic. Legal defects, especially ones involving unglamorous matters of state constitutional structure, often escape notice until a catalyzing event occurs. *See* Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. Kan. L. Rev. 687, 714 (2011) (lamenting "the all-too-frequent neglect of state constitutional law"). The December 2018 extraordinary session was just such a catalyst. It generated unprecedented attention, including scrutiny of the session's legal foundations. Even at the federal level, where governmental actions are under a microscope, structural defects are sometimes long overlooked. Just last year, the U.S. Supreme Court held that a federal agency's half-century-old system for appointing administrative law judges violated the U.S. Constitution's Appointments Clause. *See Lucia v. SEC*, 138 S. Ct. 2044 (2018). As Justice Scalia once observed, structural constraints on government "tend to be undervalued or even forgotten," despite being "central to liberty." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 707 (2012) (Scalia, J., dissenting). It is the judiciary's responsibility, he maintained, to take structural protections seriously. *Id.* That is what the Court is called upon to do here.

II. THE PRECEDENT AND PRACTICE OF OTHER STATES UNDERSCORE THE EXTRAORDINARY SESSION'S ILLEGALITY.

When presented with questions of first impression, Wisconsin courts routinely consider "the practices and interpretations of other states." *State v. Cole*, 2003 WI 112, ¶ 39, 264 Wis. 2d 520, 665 N.W.2d 328. Here, a view across state lines highlights the illegality of the December 2018 Extraordinary Session. The Wisconsin Legislature's approach to extraordinary sessions

makes it a national outlier. No other state legislature exercises an analogous authority to self-convene by internal rule, and no court has endorsed a comparable practice.

Historically, most states gave the governor sole authority to convene the legislature outside the normal course. As of 1954, only a handful of states (Wisconsin not among them) allowed the legislature to call itself into special or extraordinary session. *See* Zeller, *supra*, at 91. Today, more than 30 states do. This shift occurred as state after state did something Wisconsin has not done—namely, amend their constitutions to authorize the practice expressly. These constitutional provisions typically spell out what legislators must do to convene such sessions, with some states requiring supermajority approval, others majority approval, and still others leaving the decision to the legislature's presiding officers.[11]

Lawmakers pursued constitutional reform because they understood that sub-constitutional changes to internal rules or even statutes would not suffice. As the Florida Supreme Court put it, "[a] legislative body has no inherent power to convene itself in special or extraordinary session for any purpose. It enjoys such power only when so endowed by the organic law." *Advisory*

[11] *See, e.g.*, Alaska Const. art. II, § 9 ("Special sessions may be called by the governor or by vote of two-thirds of the legislature."); Colo. Const. art. V, § 7 ("The general assembly shall meet at other times when convened in special session by the governor … or by written request of two-thirds of the members of each house to the presiding officer of each house to consider only those subjects specified in such request."); Del. Const. art. II, § 4 ("The General Assembly shall convene on the second Tuesday of January of each calendar year unless otherwise convened by the Governor, or by mutual call of the presiding officers of both Houses."); La. Const. art. III, § 2(B) ("The legislature may be convened at other times by the governor and shall be convened by the presiding officers of both houses upon written petition by a majority of the elected members of each house."); N.J. Const. art. IV, § 1(4) ("Special session of the Legislature shall be called by the Governor upon petition of a majority of all members of each house, and maybe called by the Governor whenever in his opinion the public interest shall require."); Ohio Const. art. II, § 8 ("Either the governor, or the presiding officers of the general assembly chosen by the members thereof, acting jointly, may convene the general assembly in special session by a proclamation which may limit the purpose of the session."); Penn. Const. art. II, § 4 ("Special sessions may be called by the Governor on petition of a majority of the members elected to each House or may be called by the Governor whenever in his opinion the public interest requires."). Just last year, Utah became the latest state to amend its constitution in this manner. *See* Utah Const. art. VI, § 2(3). Utah lawmakers recognized that, without such an amendment, they lacked any extraordinary convening authority. *See* Utah Constitutional Amendment C – Ballot Title and Impartial Analysis, https://elections.utah.gov/Media/Default/2018%20Election/Issues%20on%20the%20Ballot/Amendment%20C%20-%20Ballot%20Title%20and%20Impartial%20Analysis.pdf (2018) ("Other than the annual general session and a session convened by the Governor, the Utah Constitution does not provide for the convening of the Legislature into session.").

Opinion to the Governor, 95 So. 2d 603, 605 (Fla. 1957).[12] Accordingly, in states (like Wisconsin) that have not amended their constitutions to authorize the legislature to call special or extraordinary sessions, such sessions generally do not occur. Officials in these states have accepted that they simply lack the sort of extraordinary convening power that the Legislature tried to exercise here.[13]

Consider the contrasting experiences of Wisconsin and two of its next-door neighbors—Iowa and Illinois. In 1968, the same year Wisconsin amended Article IV, § 11 to shift from biennial to annual sessions, Iowa made a nearly identical change.[14] As Iowans understood, this revision did not give their Legislature any new extraordinary convening authority. According to the state's Attorney General, there remained "only two kinds of sessions known to the constitution, regular sessions and special or extra sessions," with those latter sessions "convened by proclamation of the governor," "now as formerly." Iowa Att'y Gen. Op. No. 69-3-16, 1969 WL 181544, at *2 (Mar. 24, 1969). Iowa then went on to make a further constitutional change. In 1974, it added a new sentence to its session provision: "Upon written request to the presiding officer of each house of the general assembly by two-thirds of the members of each house, the

[12] *See also Dyer v. Shaw*, 281 P. 776 (Okla. 1929) ("[T]he Legislature is possessed of no inherent power to convene itself in extraordinary session for any purpose, for the reason that by the Constitution … such power is vested in the Governor."); *In re City of Pittsburg*, 66 A. 348 (Pa. 1907) ("Whether the general assembly ought to be called together in extraordinary session is always a matter for the executive alone.").

[13] *See, e.g.*, *Terrazas v. Ramirez*, 829 S.W.2d 712, 729 (Tex. 1991) ("The legislature cannot call itself in session."); *Geveden v. Commonwealth*, 142 S.W.3d 170, 172 (Ky. Ct. App. 2004) ("Whether to summon an Extraordinary Session of the General Assembly and what matters are to be addressed at such a session are questions entrusted to the discretion of the Governor under Section 80 of our state constitution."); Ala. Atty. Gen. Op. No. 81-00433 (June 22, 1981) ("The Legislature cannot convene itself into special session. The special session can only be convened upon a proclamation by the Governor." "I cannot find any authorization in the State Constitution or laws of this state for the Legislature to convene or call itself into special session if the Governor does not issue a proclamation calling a special session."); Ark. Atty. Gen. Op. No. 98-019 (Feb. 24, 1998) ("[T]he Governor is given the sole authority under the Arkansas Constitution of calling extraordinary sessions of the legislature.").

[14] Prior to 1968, Iowa's Constitution stated that "[t]he sessions of the General Assembly shall be biennial, and shall commence on the second Monday in January next ensuing the election of its members." Iowa Const. art. III, § 2. The 1968 amendment provided that "[t]he general assembly shall meet in session on the second Monday of January each year."

general assembly shall convene in special session." Iowa Const. art. III, § 2. It was this amendment that ultimately permitted the Iowa Legislature to convene itself outside the ordinary course, and, notably, the amendment circumscribes that power, requiring supermajority consent. The Wisconsin Constitution contains no such provision. Yet the Legislature maintains that it nevertheless possesses an even more expansive power to call itself into extraordinary session whenever its organizational committees so choose. That simply cannot be.

The Illinois Constitution, meanwhile, provides that the Legislature "shall convene each year" in January and "shall be a continuous body during the term for which members of the House of Representatives are elected." Ill. Const. art. IV, § 5. The drafters, however, did not regard this language as sufficient to authorize the Legislature to meet outside the ordinary course. They went on to provide specifically that "special sessions" may "be convened by joint proclamation of the presiding officers of both houses, issued as provided by law." *Id.* Significantly this language was adopted in 1970—nearly the same time that Wisconsin amended Article IV, § 11 without making such a change. The Illinois Legislature, in turn, adopted a statute—not an internal rule—to implement this specific special session authorization. *See* 25 Ill. Comp. Stat. § 15/1–2.

In all, there are just three states—Connecticut, Massachusetts, and Nebraska—where the legislature's authority to call special or extraordinary sessions rests on anything other than a highly specific constitutional foundation. And a look at these states ultimately buttresses the conclusion that the Wisconsin Legislature lacks the convening power it purports to possess.

First, although these states do not specifically authorize legislatively convened special or extraordinary sessions, their constitutions all authorize legislative meetings in more expansive terms than the Wisconsin Constitution. Connecticut and Massachusetts provide that the

legislature may, beyond its usual meetings, convene "at such other times as [it] shall judge necessary." Conn. Const. art. III, § 2; Mass. Const., part II, ch. 1, § 1, art. 1. Nebraska provides that legislative sessions "shall be annual except … as may be otherwise provided by law," which arguably contemplates meetings beyond the standard annual session. Neb. Const. art. III, § 6.

Second, unlike Wisconsin, Connecticut and Nebraska both have statutes that squarely authorize the legislature to call special sessions. Conn. Stat. § 2-6; Neb. Rev. Stat. § 50-125.[15] Only Massachusetts delineates the authority in a legislative rule. *See* Joint Leg. R. 26A. But unlike Wisconsin, Massachusetts simply does not require legislative meetings to occur at times "provided by law."

Third, a mere committee vote—the method used to convene the December 2018 Extraordinary Session—does not suffice in any of these states. Precedent in Connecticut and Massachusetts holds that, despite the breadth of the relevant state constitutional language, the legislature cannot call itself into special session unless a majority of members approve. *See In re Opinion of the Justices*, 3 N.E.2d 218, 220 (Mass. 1936) (requiring consent from "a majority of the members of each branch"); Conn. Atty. Gen. Op. No. 86-050, 1986 WL 289088 (June 12, 1986) ("[T]he legislature cannot constitutionally convene a special session by less than a vote of a majority of the membership of each chamber."). This limitation derives from the majority quorum requirement in the constitutions of these states—a requirement that Wisconsin shares. *See* Wis. Const. art IV, § 7 ("a majority of each [house] shall constitute a quorum to do

[15] Nebraska's statute has never been tested in court, and it is uncertain whether it would pass muster. While the Nebraska Constitution uses more expansive language than the Wisconsin Constitution, it is not as capacious as the Constitutions of Connecticut and Massachusetts. And a nineteenth century precedent indicates that the power to convene in special circumstances belongs to the governor. *See People v. Parker*, 3 Neb. 409, 422 (1872) ("The constitution provides for the regular sessions of the legislature…. But the necessity and propriety of their assembling oftener than at these stated periods, is left by the constitution entirely to executive discretion. This discretion is wisely lodged in the governor of the state, who is presumed to be well advised when an extraordinary occasion has arisen which demands prompt legislative action.").

business"). Nebraska's statute, meanwhile, requires two-thirds of lawmakers to support the session call. Neb. Rev. Stat. § 50-125. Thus, even in the few states with extraordinary session practices that might initially appear to bear a passing resemblance to Wisconsin's, the December 2018 Extraordinary Session would have been unlawful.

CONCLUSION

For the foregoing reasons, the Court should deny the Legislature's motion to dismiss and hold, with respect to the temporary injunction motion, that Plaintiffs' challenge to the December 2018 Extraordinary Session is likely to succeed on the merits.

Respectfully submitted,

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APPENDIX – BIOGRAPHICAL INFORMATION ON *AMICI CURIAE*

Richard Briffault is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School. His research, writing, and teaching focus on state and local government law, legislation, the law of the political process, government ethics, and property. He is co-author of the textbook, *State and Local Government Law* (8th ed. 2016); and author of *Balancing Acts: The Reality Behind State Balanced Budget Requirements* (1996). He has also written more than 75 law review articles. He has served as a member of, or consultant to, several city and state commissions in New York dealing with state and local governance, including the Temporary New York Commission on Constitutional Revision (1993–95).

Nestor M. Davidson joined the faculty of Fordham Law School in 2011 and was named the Albert A. Walsh Chair in Real Estate, Land Use and Property Law in 2017. His research and teaching focus on state and local government law, property law, and affordable housing law and policy, and his articles routinely appear in the nation's top law journals. Professor Davidson previously practiced with the firm of Latham and Watkins and served as Deputy General Counsel in the U.S. Department of Housing and Urban Development.

Lawrence Friedman is a professor of law at New England Law | Boston, where he teaches courses in constitutional law and state constitutional law. He is the coauthor of *State Constitutional Law: Cases and Materials* (5th ed. 2015), the series editor of the Oxford Commentaries on the State Constitutions of the United States, and the author of volumes in that series on the New Hampshire and Massachusetts Constitutions.

James A. Gardner is Bridget and Thomas Black SUNY Distinguished Professor at the State University of New York, University at Buffalo School of Law. He is nationally recognized as an expert in American state constitutional law. He is the author of *Interpreting State Constitutions* (2005), co-editor of *New Frontiers in State Constitutional Law: Dual Enforcement of Norms* (2011), and the author of more than thirty articles on the subject of state constitutional law and federalism. He is currently the Director of the Edwin F. Jaeckle Center for Law, Democracy, and Governance, and from 2014 to 2017 served as Interim Dean of the University at Buffalo School of Law.

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Kirsten Nussbaumer joined Rutgers University in 2016 as an assistant professor with a joint appointment in the Department of Political Science and the Law School. She also serves as associate director of Rutgers's Center for State Constitutional Studies. Her scholarship focuses on U.S. and comparative election law, constitutional history and design, federalism, and democratic equality, including an article published in the federalism journal *Publius*, and a book manuscript, *Our Eighteenth Century Election Law*. Before joining Rutgers, Nussbaumer provided legislative drafting for federal and state elected officials and nonprofit organizations.

Kate Shaw is a Professor of Law and the Co-Director of the Floersheimer Center for Constitutional Democracy at the Benjamin N. Cardozo School of Law. Before joining Cardozo, she served in the White House Counsel's Office as a Special Assistant to the President and Associate Counsel to the President. Professor Shaw's primary research interests are in constitutional law, administrative law, and legislation, with a focus on executive power, in both states and the federal system. Her work has appeared in the *Northwestern University Law Review*, the *Columbia Law Review*, the *Cornell Law Review*, the *Georgetown Law Journal*, and the *Texas Law Review*.

Alan Tarr is Board of Governors Professor Emeritus and the founder and former Director of the Center for State Constitutional Studies at Rutgers University in Camden, New Jersey. He is the author or editor of several books, including *Without Fear or Favor: Judicial Independence and Accountability in the States* (2012), *Constitutional Dynamics in Federal Systems: Subnational Perspectives* (2012), and *Understanding State Constitutions* (1998). He also has contributed more than 50 articles to law reviews and other academic publications. Professor Tarr has lectured in Africa, Asia, Europe, and South America on constitutionalism and federalism, most recently for the U.S. Department of State in Cyprus in 2016.

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Robert F. Williams is Distinguished Professor of Law and an expert in state constitutional law and is the Director of the Center for State Constitutional Studies at Rutgers. He has authored numerous articles and books, participated in a wide range of litigation, and lectured to state judges and lawyers on subjects involving state constitutional law. He is the author of the *Law of American State Constitutions* (2009) and coauthor of *State Constitutional Law: Cases and Materials* (5th ed. 2015).

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