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STATE OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN and
STATE EX REL. MICHAEL D. HUEBSCH,
Secretary of the Wisconsin Department of Administration,

Petitioners,

v.

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

CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE MARYANN SUMI, Presiding,

ISMAEL R. OZANNE,
District Attorney for Dane County,

and,

JEFF FITZGERALD, SCOTT FITZGERALD,
MICHAEL ELLIS, SCOTT SUDER, MARK MILLER,
PETER BARCA, DOUGLAS LA FOLLETTE,
JOINT COMMITTEE ON CONFERENCE,
WISCONSIN STATE SENATE and
WISCONSIN STATE ASSEMBLY,

Respondents.

**PETITION FOR SUPERVISORY WRIT
PURSUANT TO WIS. STAT. § 809.71 AND
FOR IMMEDIATE TEMPORARY RELIEF
PURSUANT TO WIS. STAT. § 809.52**

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Petitioners State of Wisconsin and Michael D. Huebsch, Secretary of the Wisconsin Department of Administration (“Petitioner”) respectfully petition the Wisconsin Supreme Court pursuant to Wis. Stat. § 809.71 to

exercise its supervisory jurisdiction, make the following declarations, and issue a Writ of Mandamus directing the Circuit Court for Dane County, the Honorable Maryann Sumi, presiding, to take the actions specified below.

INTRODUCTION

This Petition for Supervisory Writ presents matters of great public concern that go to the very heart of our constitutional system of government. In particular, the matters addressed herein concern critical issues related to the separation of powers and the proper role of the judiciary with respect to actions taken by the other branches of state government.

These matters involve Dane County Circuit Court Case No. 11-CV-1244, entitled State ex rel. Ozanne v. Fitzgerald, et al. (“Ozanne Action”). In that action, the Dane County District Attorney, Ismael R. Ozanne (“DA”), seeks to enjoin and invalidate an act of the Legislature, 2011 Wisconsin Act 10 (“Act 10”)¹ based on an alleged violation of the Open Meetings Law. The Circuit Court has granted a temporary restraining order regarding Act 10, which purports to enjoin the completion of the legislative process and declares that Act 10 is not in effect.

The Wisconsin Constitution clearly does not allow such actions by the judicial branch. A court *may not* invalidate an act of the Legislature on the basis of an alleged failure to follow a rule of legislative procedure. Moreover, a court *may not* enjoin the legislative process in order to

¹ Act 10 is commonly referred to as the Budget Repair Bill.

prevent a legislative act from becoming law. When a court takes such actions it violates fundamental principles of separation of powers and does serious and irreparable harm to our constitutional system of government. Such actions by the Circuit Court in the Ozanne Action must be squarely rejected and immediately halted by this Court.

This Court should grant the following relief: 1) declare that a claim under the Open Meetings Law does not allow for the invalidation of an act of the State Legislature; 2) direct the Circuit Court to conduct further proceedings in the Ozanne Action consistent with that declaration; 3) declare that a court may not enjoin the legislative process by restraining actions necessary for a legislative act to become law; and 4) direct the Circuit Court to vacate its TRO in the Ozanne Action.

Petitioners also seek immediate temporary relief pursuant to Wis. Stat. § 809.52, staying the March 31 TRO along with any and all further proceedings in the Circuit Court pending resolution of this Petition.

Petitioner State of Wisconsin has a clear interest in this matter. Act 10 has a dramatic impact upon nearly every state and municipal entity in the state. Act 10 produces nearly \$30 million in savings for the state in this fiscal year. An additional \$300 million in all funds savings related to employee compensation changes will be achieved in the 2011-2013 Budget as a result of Act 10. Further delay negatively impacts the State's fiscal health by not achieving these savings.

The uncertainty resulting from the Circuit Court's actions creates a budget and implementation nightmare for

state and local governments. State aid reductions proposed in the 2011-13 Executive Budget are dramatic, and Act 10 provides tools needed to manage those reductions. While the uncertainty continues, state agencies, the University of Wisconsin System, local governments, and school districts cannot responsibly plan for those reductions. Continued delay also jeopardizes the implementation of administrative rules related to Medical Assistance program and administrative changes by the Department of Health Services.

Petitioner Michael D. Huebsch is Secretary of the Wisconsin Department of Administration. In his official capacity, Petitioner is charged with the various statutory duties set forth in Wis. Stat. ch. 16, including functions related to the implementation of Act 10. As such, Petitioner has a distinct legal interest in the matters presented in this Petition and, in the absence of the relief sought herein, will be unable to fulfill his legal duties.

Petitioners have not first filed this Petition with the Court of Appeals pursuant to Wis. Stat. § 809.51 but instead seek a supervisory writ from this Court in the first instance pursuant to Wis. Stat. § 809.71. In the Ozanne Action, one of the Defendants, Secretary of State Douglas LaFollette, previously filed a Petition for Leave to Appeal Non-Final Order with the Court of Appeals on March 21, 2011. In the Petition for Leave to Appeal, the Secretary of State raised many of the same issues that are addressed in this Petition. Given the significant constitutional issues presented in the Petition for Leave to Appeal, the Court of Appeals promptly issued an order certifying the case for review by this Court.

(Ct. App. Certification Order, March 24, 2011, Appeal No. 2011AP613-LV) (APP.-170-178). Given that certification order, and the importance of having these matters resolved promptly so as to allow Secretary Huebsch to perform his lawful duties and the other branches of state and local government to conduct their business without improper interference from the judicial branch, it is impractical to first file this Petition with the Court of Appeals.

STATEMENT OF THE ISSUES

1. Whether a court may void an act of the Legislature on the basis of an alleged violation of the Open Meetings Law.

2. Whether a court may enjoin the legislative process by purporting to restrain actions necessary for laws to become effective under Article IV, §17 ¶(2) of the Wisconsin Constitution.

3. Whether a court may issue a Temporary Restraining Order pursuant to Wis. Stat. § 813.02(1)(a) which does not restrain some act, but which constitutes a declaration of law.

STATEMENT OF THE FACTS

On March 9, 2011, the Legislature convened a meeting of its Joint Committee of Conference (“Committee”) for the purpose of amending January 2011 Special Session Assembly Bill 11. (APP.-52 ¶¶ 23-25). The Committee voted to amend Assembly Bill 11, which was immediately offered to the Senate and Assembly. (APP.-50-52 ¶¶ 10, 27, 30). The Senate then approved the amended bill. (APP.-54 ¶ 47). On

March 10, 2011, the Assembly approved the amended bill and on March 11, 2011, Governor Walker signed Act 10. (Am. Compl. ¶¶ 47-48).

On March 15, 2011, Secretary of State Douglas LaFollette notified the Legislative Reference Bureau (“LRB”) that Act 10 had been enacted on March 11, 2011 and that the designated date of publication of Act 10 is March 25, 2011. (APP.-2-3).

On March 16, 2011, the DA filed the Ozanne Action seeking enforcement of the Open Meetings Law against four of the five legislators (Representative Jeff Fitzgerald, Senator Scott Fitzgerald, Senator Michael Ellis and Representative Scott Suder) who had participated in the March 9, 2011 Committee meeting, alleging that the meeting was held without proper advance notice to the public. (APP.7-14). As relief, the DA sought the following:

- i) a judgment declaring the four legislator-defendants violated the Open Meetings Law with forfeitures in the amount of \$300 each;
- ii) a declaration that the actions taken by the Committee are void;
- iii) a declaration that the actions taken by the Committee violate Art. I, § 4 and Art. IV, § 10 of the Wisconsin Constitution;
- iv) a declaration that Act 10 is void; and
- v) an injunction to enjoin the Secretary of State from publishing Act 10.

(APP.-13-14).

On March 18, 2011, the Circuit Court conducted a hearing on the TRO motion. The Department of Justice informed the Circuit Court that the four legislator defendants had not waived and were not waiving their constitutional right to legislative immunity. The Circuit Court acknowledged that it lacks personal jurisdiction over those four legislators and cannot require them to relinquish that immunity. (APP.-128-129). At the conclusion of the hearing, the Circuit Court issued a decision granting the motion in which it held, “I do, therefore, restrain and enjoin the further implementation of 2011 Wisconsin Act 10.” (APP.-103). The Circuit Court also entered an order “enjoining defendant Secretary of State Douglas LaFollette, in his official capacity, from publishing 2011 Wisconsin Act 10, until further order of the Court.” (APP.-95). The Circuit Court set a temporary injunction hearing to be held March 29 and April 1, 2011.

Immediately following the Circuit Court’s March 18 ruling, Secretary LaFollette wrote Mike Barman at the LRB in an effort to “rescind [his] instructions setting March 25th as the publication date for [Act 10].” (APP.-104). Secretary LaFollette further “instruct[ed Mr. Barman] to remove all reference to March 25, 2011 as the publication date” and instructed him “not to proceed with publication” until Secretary LaFollette provided “a new publication date.” (APP.-104).

On March 21, 2011, Secretary LaFollette moved the court of appeals for temporary relief in the form of a stay of the Circuit Court’s TRO as well as leave to appeal the court’s non-final order granting the restraining order. (APP.-170-

171). On March 24, 2011, the Court of Appeals certified Secretary LaFollette's request to this Court. (APP.-170-178). That certification is still pending.

The DA then filed an amended complaint on March 23, 2011. In addition to the five original defendants, the amended complaint named two additional legislator defendants, Senator Mark Miller and Representative Peter Barca, along with the Committee, the Senate and the Assembly. (APP.-48-57). The amended complaint contains no allegations that either Senator Miller or Representative Barca violated the Open Meetings Law. In addition to the relief originally sought, the DA requested a declaration that "it is in excess of the authority of the Secretary of State to publish 2011 Wisconsin Act 10." (APP.-56 ¶ 6).

On March 25, 2011, LRB published Act 10 pursuant to its statutorily-prescribed, ministerial duty set forth in Wis. Stat. § 35.095(3)(a). (APP.-179-224).

On March 28, 2011, Secretary LaFollette moved the Circuit Court to vacate the TRO. (APP.-225-80). That same day, the DA moved the Circuit Court for various forms of injunctive and declaratory relief. (APP.-281-283).

On March 29, 2011, the Circuit Court began the scheduled injunction hearing and took testimony. The hearing did not conclude that day, but was held over to April 1, 2011, as originally scheduled. (APP.-514-515). At the end of the first day of testimony, the Circuit Court ordered that "Secretary of State Douglass (sic) LaFollette, in his official capacity, is hereby ENJOINED from designating the date of publication for 2011 Wisconsin Act 10, or any further

implementation of 2011 Wisconsin Act 10 . . . until further order of the Court.” (APP.-284-285). The Circuit Court declined to enter a further order proposed by the DA declaring that Act 10 had not been published. The Circuit Court crossed out that portion of the proposed order and stated: “I have not taken the additional step at this point that would make the declaration that [Act 10 has not been published]. That is yet to be determined. I hesitate to do that at this point because testimony is not closed and argument is not closed.” (APP.-513).

While both the March 18 TRO and the March 29 Amended TRO only restrained the Secretary of State, not the LRB or any other person or entity with lawful authority relative to the publication or implementation of Act 10, the Circuit Court then expressed concern that the language of the March 18 TRO had been misunderstood stating that “what I said was the further implementation of 2011 Wisconsin Act 10 is enjoined.” (APP.-513). The Circuit Court then issued a warning “that those who act in willful and open defiance of a court order place not only themselves at peril of sanctions. They also jeopardize the financial and the governmental stability of the State of Wisconsin.” (APP.-515).²

² These statements by the Circuit Court are troubling in that they suggest that persons or entities who are not parties to the Ozanne Action and who are not subject to the court’s injunction (only the Secretary of State was enjoined) may be subject to sanctions if they exercise their lawful duties and obligations with respect to the publication and implementation of Act 10. Certainly, a person or entity over whom a court does not have jurisdiction cannot be sanctioned for disregarding an order in a case to which it is not a party. Yet, the Circuit Court’s statements imply the power to enjoin all of state government under threat of sanctions.

Curiously, on March 31, 2011, the Circuit Court, *sua sponte* and without having received any further testimony, issued an “Amended Order Granting Motion for Temporary Restraining Order,” which restated the substance of the court’s March 29 order but also went further and “DECLARED that 2011 Wisconsin Act 10 has not been published within the meaning of Wis. Stats. §§ 991.11, 35.095(1)(b) and 35.095(3)(b), and is therefore not in effect.” (APP.-518-519).

On April 1, 2011, the Circuit Court resumed the hearing and took additional testimony. At the end of the day the Circuit Court adjourned the hearing without concluding it and without scheduling a future hearing date. (APP.-710-712, 715). The Circuit Court noted that the March 31 TRO would remain in effect indefinitely, and requested the parties to provide briefs on three legal issues.³ (APP.-715-717). Thus, the Circuit Court has in the form of a TRO declared that Act 10 is not in effect and has enjoined actions purportedly required in order for Act 10 to become effective.

The TRO is thus in effect indefinitely. Yet, at no time did the Circuit Court complete an evidentiary hearing assessing the probability of success of the DA’s claims. More importantly, at no time did the Circuit Court address such weighty issues as its own jurisdiction and power to act.

³ The issues are: (1) whether an officer’s immunity from liability for damages affects his amenability to suit for declaratory and injunctive relief; (2) whether the court may proceed to judgment in the absence of indispensable parties pursuant to Wis. Stat. § 803.03(3); and (3) whether the time limits for service of summons and complaint are tolled during the period of immunity.

**REASONS THIS COURT SHOULD
TAKE JURISDICTION**

**I. THIS COURT SHOULD DECLARE THAT
COURTS MAY NOT INVALIDATE A
LEGISLATIVE ACT UNDER THE OPEN
MEETINGS LAW.**

The principal claims in the Ozanne Action must be dismissed. First, the principal remedy sought by the DA, namely voiding an act of the Legislature, is not available under the Open Meetings Law. Second, district attorneys do not have the authority to bring actions seeking to challenge the constitutionality of statutes on other grounds.

The Court may also wish to address the remaining remedy sought by the DA, namely the imposition of forfeitures against legislators who participated in what was alleged to be an improperly noticed meeting. As to such claims, there are no defendants subject to civil process who are alleged to have violated the Open Meetings Law. Accordingly, those claims are not justiciable.

**A. Courts May Not Strike Down An Act Of The
Legislature On The Basis Of An Alleged
Violation Of The Open Meetings Law.**

Pursuant to the Wisconsin Constitution, the legislative power is vested in the Legislature, comprised of the Senate and the Assembly. Wis. Const. art. IV, sec. 1. The Legislature cannot divest itself of that power, nor can it delegate that power to other branches of government. *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 291, 221 N.W. 860 (1928). The exercise of legislative power is subject only to the limits imposed by the Wisconsin Constitution and

“recourse against legislative errors, nonfeasance or questionable procedure is by political action only.” *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 367, 338 N.W.2d 684 (1983) (quoting *Outagamie County v. Smith*, 38 Wis. 2d 24, 41, 155 N.W.2d 639 (1968) (courts will invalidate legislation only for constitutional violations). Indeed, one legislature cannot bind or limit future legislatures in the exercise of its legislative power. *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 450, 208 N.W.2d 780 (1973). Finally, an act of the Legislature enjoys the highest legal presumption of constitutional validity, which presumption can only be overcome by a showing that the act is unconstitutional beyond a reasonable doubt. *Aicher v. Wisconsin Patients Compensation Fund*, 2000 WI 98, ¶¶ 18-19, 237 Wis. 2d 99, 613 N.W.2d 849; *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 506, 261 N.W.2d 434 (1978) (citing *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973)).

Consistent with fundamental principals of constitutional law, this Court has long adhered to the doctrine that the courts of this State may not strike down an act passed by the Legislature on the basis of an alleged failure to follow a rule of legislative procedure where such rule is not mandated by the Constitution. The Court clearly explained this doctrine in *Stitt*, 114 Wis. 2d at 364-68. In that case, the Court declared that courts will not “review legislative conduct to ensure the legislature complied with its own procedural rules or statutes in enacting legislation” and “will not intervene to declare the legislation invalid.” *Id.* at 364, 365.

See also Milwaukee Journal Sentinel v. Wisconsin Dept. of Admin., 2009 WI 79, ¶ 18, 319 Wis. 2d 439, 768 NW2d 700 (“[C]ourts will not intermeddle in purely internal legislative proceedings, even when the proceedings at issue are contained in a statute.”)

To put a finer point on it, this Court held “that it would not declare a law invalid because of the legislature’s failure to comply with its own rules of procedure *so long as the constitutional requirements for the enactment of legislation had been followed.*” *Stitt*, at 366 (citing *McDonald v. State*, 80 Wis. 407, 411-12 (1891)) (emphasis added.) This holding in *Stitt* is of critical significance in this matter because it underscores the fundamental flaw with the principal remedy sought by the DA in the Ozanne Action – namely voiding Act 10 on grounds of an alleged violation of the Open Meetings Law. It also underscores the clear error of the Circuit Court in allowing that claim to proceed, let alone seeking to enjoin the effectiveness of Act 10 through a TRO. The Court in *Stitt* made this point abundantly clear. Where the constitutional requirements for enacting legislation have been followed, a court may not invalidate an act based on the violation of procedural rules. *Id.* at 368-69; *McDonald*, 80 Wis. at 411-12; *State v. P. Lorillard Co.*, 181 Wis. 347, 372, 193 NW 613 (1923); *State ex rel. Hunsicker v. Board of Regents*, 209 Wis. 83, 244 NW 618 (1932); *Outagamie County v. Smith*, 28 Wis. 2d 24, 41, 155 NW2d 639 (1968).

The rule in *Stitt* clearly applies here.

The Open Meetings Law is a rule of process prescribing the manner in which meetings of governmental

bodies are to be noticed and conducted. It declares an important public policy of the state “that the public is entitled to the fullest and most complete information” regarding the affairs of government as is compatible with the conduct of government business.” Wis. Stat. § 19.81(1). It applies to “meetings of all state and local governmental bodies.” Wis. Stat. §§ 19.81(2), 19.82(1). Finally, it imposes sanctions for certain violations, including the imposition of forfeitures, and provides that actions taken at meetings conducted in violation of the Open Meetings Law may be voidable. Wis. Stat. §§ 19.96; 19.97(3).

The Open Meetings Law applies to the Legislature. Wis. Stat. § 19.81(3). However, the Legislature is a constitutional branch of state government and application of the Open Meetings Law to the Legislature must be understood in that context. The Court in *Stitt* clearly recognized the constitutional limits presented under these circumstances. *Stitt*, 114 Wis. 2d at 368-69. While *Stitt* did not involve a challenge under the Open Meetings Law, the Court held that its ruling in that case “is consistent with this court’s decision in *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 NW2d 313 (1976),” a case addressing the enforceability of the Open Meetings Law against legislators. *Id.* at 368-69. In *Stitt*, this Court explained that *Lynch* addressed whether legislators alleged to have violated the Open Meetings Law were subject to forfeitures and that *Lynch* “did not present the questions of the voidability of legislative actions taken in violation of the open meetings law.” *Id.* at 369. In the very next sentence, reconciling its

holding with *Lynch*, the Court held that it would “not invalidate a legislative action unless the legislative procedure or statute itself constitutes a deprivation of constitutionally guaranteed rights.” *Id.* As this Court stated in *Lynch*, “[t]he case is accepted, as not contrary to separation of powers, in that it concerns application of the forfeiture penalty to members of a body, not to the branch of government itself.” 71 Wis. 2d at 700. In other words, an alleged violation of the Open Meetings Law – a statute establishing rules of procedure – cannot form the basis for invalidating an Act of the Legislature.

The Open Meetings Law does not, and cannot create constitutionally protected rights. Were it otherwise, the Open Meetings Law – a statute enacted by the Legislature – would be elevated to Constitutional status and amount to constitutional amendment.⁴ By such logic, one legislature would have the power to impose on future legislatures through rules or statutes extra-constitutional legislative procedures that could not be changed. The law does not allow for such a result. *Nusbaum*, 59 Wis. 2d at 450. Moreover, to construe the Open Meetings Law as a means to invalidate an act of the Legislature would render that statute an unconstitutional delegation of the legislative power to district attorneys and courts. *Zilisch*, 197 Wis. at 291. The Court should avoid a construction of the Open Meetings Law that would render it unconstitutional in that regard. *American*

⁴ Amendment of the Wisconsin Constitution is subject to the requirements of Wis. Const., art. XII, § 1.

Family Mut. Ins. Co. v. Department of Revenue, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998); *see also State v. Langlade County Creamery Co.*, 193 Wis. 113, 116, 212 N.W.2d 664 (1927) (“it is the duty of the court to give the acts of the Legislature a construction that will bring them into harmony with the provisions of the Constitution, and not into conflict with the fundamental law”); *State ex rel. Harvey v. Morgan*, 30 Wis. 2d 1, 13, 139 N.W.2d 585 (1966).

As noted above, a remedy available under the Open Meetings Law is the voiding of an action taken at an improper meeting and the attorney general or the district attorney may seek a declaratory judgment providing such a remedy. Wis. Stat. § 19.97(2). Yet, the statute itself provides that such a remedy is available “as may be appropriate under the circumstances.” *Id.* In light of the clear constitutional impediments to applying this remedy to an act of the Legislature, this Court should hold that this remedy is *not* appropriate under such circumstances.⁵

Finally, the rationales upon which the Court in *Stitt* declined to intervene, in addition to the doctrines of separation of powers and comity, are the “need for finality and certainty regarding the status of a statute” and “that the failure [of the legislature] to follow such procedural rules amounts to an implied *ad hoc* repeal of such rules” by the legislature. *Stitt*, 114 Wis. 2d at 365. Thus, the Constitution,

⁵ Even apart from these clear constitutional concerns, the DA is not alleging a violation of the Open Meetings Law by the Senate or Assembly, the bodies that passed Act 10. Yet, the remedy in Wis. Stat. § 19.97(3) applies only to actions taken at meetings alleged to violate the statute, here the Committee.

not rules or statutes, provides the only judicially enforceable requirements for determining if legislation has been properly enacted.

B. A District Attorney Lacks The Authority To Sue To Invalidate A Statute.

In the Ozanne Action, the DA has purportedly brought a declaratory judgment claim challenging the constitutionality of Act 10 under Wis. Const. art IV, sec. 10, which states that “the doors of each house shall be kept open except when the public welfare shall require secrecy.” The Circuit Court’s March 18, 2011 decision makes reference to this provision and appears to conclude that a challenge on these grounds may somehow be permissible in an Open Meetings Law action brought by a district attorney. (APP.-96). The law does not support such a conclusion.

A district attorney lacks the authority to sue to invalidate a statute on grounds that it is unconstitutional. *State v. City of Oak Creek*, 2000 WI 9, ¶¶ 1, 33, 34, 232 Wis. 2d 612, 616-617, 634, 605 N.W.2d 526. In *Oak Creek*, this Court held that the Wisconsin Attorney General lacks standing to challenge the constitutionality of a statute. *Id.* The Court based its decision in large part on grounds that the duties of the Attorney General are prescribed by statute and challenging the constitutionality of a statute does not fall within the scope of those duties. *Id.*, ¶ 4.

This Court has also concluded that a district attorney lacks any inherent powers, but rather is “answerable to specific directions of the legislature ... [and] subject to the enactments of the legislature.” *State ex rel. Kurkierewicz v.*

Cannon, 42 Wis. 2d 368, 380, 166 N.W.2d 255 (1969). Like the Attorney General, the duties of district attorneys in Wisconsin are prescribed by statute. See Wis. Stat. § 978.05. Such duties do not include bringing an action to challenge the constitutionality of a statute. Yet, even if that were in doubt, it is clear that a party has standing to challenge the constitutionality of a statute only where that party's rights are impaired. Thus, while a district attorney has authority to bring enforcement actions under the Open Meetings Law, Wis. Stat. § 19.97, and pursue available remedies in such actions, a district attorney does not have the authority to bring an action seeking to invalidate an act of the Legislature on constitutional grounds. In the Ozanne Action, the DA may not seek to invalidate Act 10 on grounds that Wis. Const. art IV, sec. 10 was allegedly violated.

C. There Is No Justiciable Claim Pending Against Any Of The Parties Named In The Ozanne Action.

What remains of the Ozanne Action are forfeiture claims against legislators alleged to have knowingly attended a meeting held in violation of the Open Meetings Law. However, each of those legislators is immune from civil process and the Circuit Court lacks personal jurisdiction over those legislators.

Article IV, § 15 of the Wisconsin Constitution states that legislators are not “subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.” This Court may take judicial notice that the Legislature is in

session. Wis. Stat. § 902.01(2)(b). The legislator defendants enjoy, and will continue to enjoy legislative immunity during the forthcoming regular session plus fifteen days. According to the current legislative calendar, that period of immunity will not expire prior to May 2012.

The legislator defendants against whom forfeitures are sought have not waived their legislative immunity. Indeed, the DA concedes as much and the Circuit Court has agreed. (APP.-13 ¶ 46; APP.-97). Thus, the only claims remaining in the action concern defendants who are immune from civil process, thereby depriving the Circuit Court of personal jurisdiction.⁶

The “requirement that a court have personal jurisdiction over a defendant in order to render a judgment in a civil lawsuit is grounded in constitutional requirements of due process.” *Haselow v. Gauthier*, 212 Wis. 2d 580, 586, 569, N.W.2d 97 (Ct. App. 1997); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). A court lacks personal jurisdiction over a defendant until the defendant is served. See Wis. Stat. § 802.06(2)(a)3.

In order for a justiciable claim to exist, there must be “a controversy in which a claim of right is asserted against one who has an interest in contesting it.” *Hancock v. Regents of University of Wisconsin*, 61 Wis. 2d 484, 492, 213 N.W.2d 45 (1973) No defendant has appeared in the Ozanne Action who has an interest in contesting any pending claim and the Circuit Court may not proceed.

⁶ No claims are asserted against Representatives Barca or Senator Miller.

D. Requested Relief

This Court should issue a writ of mandamus directing the Circuit Court to dismiss those claims in the Ozanne Action which seek to void or invalidate Act 10. Such a writ is proper where there is a clear legal right to the requested relief, there is a plain legal duty, substantial injury will occur if the relief is not granted, and there is no other adequate remedy at law. *Law Enforcement Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89 (1981).

For the reasons set forth above, the law is clear. The Circuit Court may not invalidate Act 10 on the basis of the claims pending in the Ozanne Action. Those claims must be dismissed. Moreover, the constitutional significance of these matters cannot be overstated. The State of Wisconsin has a clear interest in ensuring the proper functioning of our constitutional system of government. Secretary Huebsch has a clear legal interest in performing his lawful duties concerning the implementation of Act 10.

The remedies sought in the Ozanne Action are unlawful and, if such claims are not dismissed, will do irreparable harm to the Constitution and Petitioners' interests. Immediate dismissal of those claims is essential to prevent further unconstitutional interference with these interests by the judicial branch.

II. THE COURT SHOULD DIRECT THE CIRCUIT COURT TO VACATE THE MARCH 31 TRO ENTERED IN THE OZANNE ACTION.

While dismissal of the above claims in the Ozanne Action will have the effect of nullifying the TRO orders entered by the Circuit Court, the issues presented here are of such importance that this Court should address them and declare those orders to be legally invalid. The Court should direct the Circuit Court to vacate its March 31 TRO. First, the judicial branch has no jurisdiction to interfere with and enjoin actions taken as part of the legislative process by halting publication of an act. Second, the March 31 TRO is ineffective to enjoin publication of Act 10 because Act 10 has already been published and is in effect. Finally, the March 31 TRO contains a declaration of law, which is not a proper subject of a temporary injunction.

A. Courts May Not Enjoin An Act Of The Legislature From Taking Effect.

This Court's jurisprudence clearly holds that the judicial branch has no jurisdiction to interfere with the legislative process or enjoin an act of the Legislature from taking effect. Again, rooted in the constitutional principle of separation of powers, the Court in *Goodland v. Zimmerman*, 243 Wis. 459, 10 N.W.2d 180 (1943), admonished courts from ever enjoining the publication of a legislative enactment. In *Goodland*, this Court noted,

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

Goodland, 243 Wis. at 468 (emphasis added). The Court went further holding that “no court has jurisdiction to enjoin the legislative process at any point.” *Id.* It is only “[w]hen the legislative process has been completed, [that] a court may then in a proper case consider whether the power of the legislature has been constitutionally exercised or whether the law enacted in the exercise of its power is valid. *This is fundamental law.*” *Id.* at 469 (emphasis added).

The *Goodland* Court noted that an act of the Legislature “becomes law only after it has been published[,]” and “[t]here is no such thing known to the law as an unconstitutional bill.” *Id.* Pursuant to Wis. Const., art. IV, §17 ¶(2), “No law shall be in force until published.” Pursuant to Wis. Const. art. IV, § 17(3), state statutes provide for process by which an act is published. Until that process is complete, and a law is “in force,” the courts are without jurisdiction to address any matter concerning the validity of that law.

Contrary to this clear precedent, and in derogation of fundamental constitutional principles, the Circuit Court injected itself into the legislative process and issued three separate TROs enjoining the publication of Act 10. (APP.-95; APP.-284-285; APP.-518-519). There is absolutely no authority for such action. Indeed, if a court were permitted to enjoin publication of an act – a step in the legislative process – one wonders what the limits of a court’s authority would be. In the Ozanne Action, the alleged violation of the Open Meetings Law occurred in connection with a committee

meeting. On the basis of such an alleged violation, could a court enjoin the Senate or Assembly from taking action on the matter addressed at the committee meeting? Such an idea sounds preposterous, yet it is no different in a constitutional sense from what the Circuit Court has done.⁷ Once a court intermeddles in legislative affairs prior to the completion of the legislative process, it has clearly exceeded its constitutional authority. This Court should reaffirm the constitutional principles clearly articulated in *Goodland* and hold that the Circuit Court's order enjoining publication of Act 10 was constitutionally invalid.

B. The Circuit Court's Effort To Enjoin Publication of Act 10 Was Legally Ineffective And Act 10 Is Now In Force.

The Wisconsin Constitution states that “[t]he legislature shall provide by law for the speedy publication of all laws.” Wis. Const. art. IV, § 17(3). Furthermore, “the legislative branch, which has been vested with the legislative power under the Wisconsin Constitution, has discretion in choosing how to comply with the publication requirement.” *Milwaukee Journal Sentinel v. Wisconsin Dept. of Admin.*, 2009 WI 79, ¶ 33, 319 Wis. 2d 439, 768 N.W.2d 700.

⁷ If a court can issue an injunction preventing an act from becoming effective, there is no logical distinction between the Circuit Court's TROs purportedly enjoining the Secretary of State from publishing Act 10 and an injunction directed at the Governor enjoining him from signing the underlying bill in the first instance.

Importantly, the Secretary of State has no constitutional role in the publication of laws. Wis. Const. art. VI, § 2.⁸

Pursuant to Wis. Const. art. IV, § 17(3), the Legislature has enacted statutes providing for the publication of laws. Those statutes require LRB, not the Secretary of State, to publish laws adopted by the Legislature and signed by the Governor. See Wis. Stat. §§ 13.92(1)(b)6.; 35.095(3)(a). Pursuant to Wis. Stat. § 35.095(3)(a),

(a) The legislative reference bureau *shall publish* every act and every portion of an act which is enacted by the legislature over the governor's partial veto *within 10 working days after its date of enactment.*

(Emphasis added). This section imposes a non-discretionary, ministerial duty on LRB to publish every act within 10 working days after its date of enactment.

The Legislature has also imposed certain ministerial duties on the Secretary of State that relate to, but do not constitute publication of an act. Wis. Stat. §§ 14.38(10)(a); 35.095(3)(b). Pursuant to Wis. Stat. § 14.38(10)(a),

⁸ An injunction against the Secretary of State is improper in the first instance on grounds of sovereign immunity. The State's sovereign immunity applies to the Secretary of State. See *Appel v. Halverson*, 50 Wis. 2d 230, 235, 184 N.W.2d 99, 102 (1971) (proceeding against a state officer in his official capacity is a suit against the state, governed by Art. IV, § 27 of the Wisconsin Constitution); *City of Kenosha*, 35 Wis. 2d at 324 (“[T]he secretary of state is also immune from suit under the principle of sovereign immunity. The secretary of state is an agent of the state and suits against him are subject to the defense of sovereign immunity.”) The Secretary of State lacks the authority to waive sovereign immunity as state officers “may not waive the state's immunity from suit unless specifically authorized to do so.” *Lister v. Board of Regents*, 72 Wis. 2d 282, 294, 240 N.W.2d 610 (1976). The Circuit Court's TROs should be vacated on this basis alone.

(a) No later than the next working day following the deposit of an act in his or her office, *provide written notice to the legislative reference bureau* of the act number and date of enactment, *and the designated date of publication of the act* under s. 35.095.

(Emphasis added). Wis. Stat. § 35.095(3)(b) provides,

The secretary of state shall *designate a date of publication* for each act and every portion of an act which is enacted by the legislature over the governor's partial veto. The date of publication may not be more than 10 working days after the date of enactment.

(Emphasis added).

Importantly, the language of Wis. Stat. § 35.095(3)(a) imposing the duty on LRB to publish every act “within 10 working days after its date of enactment” is not dependent upon any action to be taken by the Secretary of State. LRB’s duty is independent and non-discretionary and flows from the date of enactment. The Secretary of State’s fulfillment of his duty to “designate a date of publication” in Wis. Stat. § 35.095(3)(b), although designed to ensure an orderly process leading up to publication, is not required to trigger LRB’s duty to publish.

Yet, even if there were doubt about that point, it is not relevant in the Ozanne Case. Following the passage of Act 10 by the Legislature, and the signing of said act by the Governor on March 11, 2011, the Secretary of State exercised his duty under Wis. Stat. § 35.095(3)(b) and set March 25, 2011 as the date of publication. (APP.-1-3). Furthermore, in compliance with his duty under Wis. Stat. § 14.38(10)(a), the Secretary of State notified LRB of the publication date on March 15, 2011. The Secretary of State set the date of publication prior to the Circuit Court’s March 18 TRO which

purportedly enjoined Secretary LaFollette from publishing Act 10. Thus, the March 18 TRO was ineffective to enjoin any action on the part of the Secretary of State that could even arguably affect publication of Act 10 by LRB.

As noted above, following the issuance of the March 18 TRO, Secretary LaFollette attempted to rescind his earlier designation of March 25, 2011 as the publication date and purported to instruct LRB not to publish Act 10. (APP.-104). However, there is no authority to support the proposition that the Secretary of State can “rescind” a publication date already designated, nor does he have the authority to direct LRB to refrain from performing its non-discretionary duty of publication.

More importantly, on March 25, 2011, LRB published Act 10 pursuant to its duty under Wis. Stat. § 35.095(3)(a). (APP.-179). This completed the process by which Act 10 became effective or “in force” pursuant to Wis. Const. art. IV, § 17(2) and, pursuant to Wis. Stat. § 991.11, Act 10 became effective on March 26, 2011. Section 991.11 provides that “[e]very act ... which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated under s. 35.095(3)(b).” Act 10 does not expressly provide a time it is to take effect and, as noted by LRB in the published version of Act 10, “[p]ursuant to section 35.095(3)(b), Wis. Stats., the secretary of state designated March 25, 2011, as the date of publication for this act.” (APP.-179).

Realizing that the Circuit Court had not enjoined the party with authority to publish an act, the DA sought and

obtained an Amended TRO, which purported to further enjoin Secretary LaFollette “from designating the date of publication for 2011 Wisconsin Act 10, or any further implementation of 2011 Wisconsin Act 10, including but without limitation publishing in the official state newspaper, pursuant to Wis. Stat. § 14.38(10)(c), until further order of the Court.” (APP.-284). The Circuit Court issued the Amended TRO despite the fact that the Secretary of State had already designated the date of publication. The Amended TRO was issued despite the fact that the Secretary of State’s only remaining duty under Wis. Stat. § 14.38(10)(c) is to publish a *notice* in the official state newspaper that an act has *already been published*. Such notice of publication is to occur “within 10 days after the date of publication of an act[.]” In other words, such notice does not constitute the publication of an act, something which has already occurred up to 10 days earlier.

Two days later, on March 31, 2011, the Circuit Court issued its Second Amended TRO *sua sponte*. In the March 31 TRO, the Circuit Court proceeded to declare as a matter of law that “2011 Wisconsin Act 10 has not been published within the meaning of Wis. Stat. §§ 991.11, 35.095(1)(b) and 35.095(3)(b), and is therefore not in effect.” (App.-519). In addition to the other reasons discussed herein, such an order is improper because a court has no authority to issue a *declaration of law* in a temporary injunction order.

A court’s authority to issue a temporary injunction is found in Wis. Stat. 813.02(1)(a), which provides:

(a) When it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of

which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, *a temporary injunction may be granted to restrain such act.*

(Emphasis added.) The purpose of a temporary injunction is to maintain the status quo, not to change the position of the parties, compel acts that constitute the ultimate relief sought, or craft a remedy that the court believes to be equitable. *School District of Slinger v. WIAA*, 210 Wis. 2d 365, 563 N.W.2d 585 (Ct. App. 1997); *Codept, Inc. v. More-Way North Corp.*, 23 Wis. 2d 165, 172, 127 N.W.2d 29 (1964).

Declaring that “Act 10 has not been published ... and is therefore not in effect” exceeds the scope of the Circuit Court’s authority under Wis. Stat. § 813.02(1)(a) as it does not restrain an act.⁹

C. Requested Relief

The Court should issue a Writ of Mandamus directing the Circuit Court to vacate its March 31 TRO. The March 31 TRO, as well as the two prior TROs, clearly exceed the Circuit Court’s authority and directly interfere with the Legislature’s constitutional power and duty to perform the

⁹ There are numerous other problems with the Circuit Court’s March 31 TRO. First, it is a TRO entered for an indefinite period of time. The Circuit Court adjourned the temporary injunction hearing without first determining whether it has jurisdiction to proceed with the claims. Instead the Circuit Court set a briefing schedule on certain threshold issues, including whether the case can continue without indispensable parties. The Circuit Court issued an injunction without having jurisdiction over any party alleged to have violated the Open Meetings Law. Additionally, the Circuit Court has not imposed any bond against the harm that will result from the inability to implement Act 10.

legislative function. The Court should reaffirm its prior jurisprudence and hold that courts in this state lack the authority to enjoin the legislative process.

In addition to the clear legal duty at issue, the grounds supporting the relief requested in § I.D., above, apply with equal force here. The Court should exercise its supervisory jurisdiction to ensure that these matters are resolved properly and expeditiously so as not to thwart the proper functioning of our constitutional system of government.

**MOTION FOR IMMEDIATE TEMPORARY RELIEF
PURSUANT TO WIS. STAT. § 809.52**

Pursuant to Wis. Stat. § 809.52, this Court has the authority to grant temporary relief pending disposition of this Petition.¹⁰ For the reasons discussed above, the Circuit Court's TROs have improperly interfered with the legislative process and have created uncertainty concerning the effect of Act 10 by erroneously declaring that Act 10 has not been published and is not in effect. This Court should enter an immediate order staying the March 31 TRO, as well as all further proceedings in the Ozanne Action, pending further review of this Petition.

A stay pending appeal is proper when the moving party makes a strong showing it is likely to succeed on the merits; shows it will suffer irreparable injury in the absence

¹⁰ Wis. Stat. § 809.52 provides for relief pending review of a petition for supervisory writ filed with the Court of Appeals pursuant to Wis. Stat. § 809.51. The rules and procedures for filing a writ under Wis. Stat. § 809.51 are incorporated into Wis. Stat. § 809.71, which provides for the filing of petition in this Court. Accordingly, Wis. Stat. § 809.52 also applies here.

of a stay; shows a stay will not harm the public interest; and shows no substantial harm will come to other interested parties. These factors are interrelated considerations that must be balanced together; each is not prerequisite in order for a stay to be granted. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). More of one factor excuses less of another, especially when there is a high probability of success on the merits. *Id.*

It is unnecessary to restate the arguments set forth above, which go the merits and the likelihood that Petitioners' request for a supervisory writ will be granted. On the basis of those arguments, we would respectfully submit that the matters presented herein are not close questions. There is a very high likelihood that Petitioners will succeed on the merits of his Petition.

With respect to the issue of irreparable injury and the balance of harms, we would respectfully submit that the Circuit Court's TROs do serious damage to the constitutional framework that undergirds our system of government. Allowing the judicial branch to intrude upon matters which are solely within the province of the legislative branch does serious and irreparable harm to the separation of powers doctrine and prevents the legislative branch from exercising its constitutional powers. While the public has an interest in the enforcement of state statutes, including the Open Meetings Law in the proper case, such statutes are subordinate to the Constitution. The public has a much stronger interest in the enforcement of fundamental

constitutional principles and the proper application of the law consistent with those principles.

For these reasons, this Court should enter an immediate order staying the March 31 TRO and all further proceedings in the Ozanne Action, pending review and disposition of this Petition.

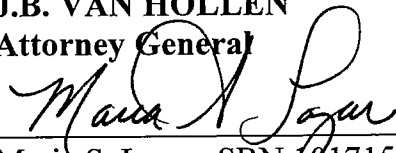
CONCLUSION

On the basis of the foregoing arguments and authorities, the Petitioners respectfully request that this Court exercise its supervisory jurisdiction and issue a Writ of Mandamus directing the Circuit Court to take actions consistent with this Court's holdings.

Petitioners also request an immediate stay of the March 31 TRO and all further proceedings in the Ozanne Action, pending review and disposition of this Petition.

Respectfully submitted this 7th day of April, 2011.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.51 for a petition and memorandum produced with a proportional serif font. The length of this brief is 7,867 words.

Dated this 7th day of April, 2011.

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