IN THE
INDIANA SUPREME COURT

No. _____

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

v.

MARION SUPERIOR COURT 12, and the HONORABLE PATRICK J. DIETRICK, as Judge thereof,
Respondents.

VERIFIED PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

Relators respectfully petition this Court for a writ of mandamus and prohibition directed to respondents, the Marion Superior Court 12 and the Honorable Patrick J. Dietrick, as judge thereof, ordering the respondents to continue all proceedings in *Holcomb v. Bray*, No. 49D12-2104-PL-14068, as required by Article 4, Section 8 of the Indiana Constitution and Indiana Code section 2-3-5-1, which prohibit the respondents from forcing legislators to defend that lawsuit during the current ongoing session of the General Assembly. Relators also separately request an emergency writ that directs the respondents to stay all proceedings in the underlying case until this Court rules on the Relator's petition for a permanent writ.

1. This Court has jurisdiction over this petition as an original action under Article 7, Section 4 of the Indiana Constitution, Appellate Rule 4(B)(3), and Original Action Rule 1(A), which grant this Court exclusive, original jurisdiction to supervise the exercise of jurisdiction of all inferior courts. Respondent Marion Superior Court 12 is an inferior court, and respondent the Honorable Patrick J. Dietrick is the judge thereof.

2. Relators are the named Defendants in *Holcomb v. Bray*, No. 49D12-2104-PL-14068: the Indiana General Assembly, Senate President Pro Tempore Rodric Bray, Speaker of the House of Representatives Todd Huston, and the Legislative Council.[1]

3. The party opposing the Relators in the respondent court in the underlying lawsuit is the Plaintiff, Governor Eric Holcomb.

4. This petition is being made expeditiously after the jurisdiction of the respondent court was placed in issue, the respondent court denied relief, and then later denied Relator's motion to certify that order for an interlocutory appeal under Appellate Rule 14(B).

5. On April 27, 2021, Eric J. Holcomb, acting in his official capacity of Governor of the State of Indiana, while represented by private counsel, filed suit in Marion Superior Court 12 against the Relators. R.12. Governor Holcomb seeks declaratory relief that House Enrolled Act 1123 was unconstitutional infringement on

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

the separation of powers, and a permanent injunction barring the Relators from enforcing it. R.20–26.

6. House Enrolled Act 1123, in pertinent part, authorizes the Legislative Council to convene an emergency session of the General Assembly when the Governor declares a state of emergency under the Emergency Management and Disaster Law, I.C. 10-14-3, and the Council finds that it is necessary to address the state of emergency with legislative action. I.C. 2-2.1-1.2; *see also* Pub. L. No. 64-2021 §§ 2, 4, 5, 2021 Ind. Acts 731–38.

7. The First Regular Session of the 122nd General Assembly is still ongoing. The General Assembly extended the session until "[n]ot later than November 15," 2021, I.C. 2-2.1-1-2(e)(1), in order for it to undertake redistricting legislation which cannot be completed until after the federal government reports data from the 2020 decennial census. The initial data will not be available until sometime this August, with complete data following by the end of September. The General Assembly has scheduled the first public hearings on redistricting legislation at locations around the State on August 6, 7, and 11. *See* "Lawmakers Announce Statewide Hearings for Restricting Feedback," https://www.wfyi.org/news/articles/lawmakers-announce-statewide-hearings-for-redistricting-feedback (WFYI, July 22, 2021).

8. On April 30, 2021, the Attorney General appeared on behalf of the State of Indiana, including Governor Holcomb and all Relators, and moved the respondent court to strike the pleadings as unauthorized filings[2] and in the alternative moved on behalf of the Relators to continue all proceedings until 30 days after the adjournment of the General Assembly in accordance with Article 4, Section 8 of the Indiana Constitution and Indiana Code section 2-3-5-1, which provide for immunity from service of process and civil suit while the General Assembly is in session. R.39–41.

9. After a hearing, the respondent court denied the State's motion to strike and the request for a continuance for the Realtors on July 3, 2021. R.9, 129–47. The court reasoned that the Legislature's immunity from civil process conflicted with the Governor's duty to faithfully execute the laws, Ind. Const. art. 5, § 16, and immunity would elevate the Legislature above the executive and judicial branches of government. R.143–45. The court also reasoned that while the Legislature "is still technically in session," the lawsuit would not interfere with the General Assembly's or any individual legislator's ability to conduct state business because they were "not currently engaged in legislative activity." R.145–46. Last, Respondent concluded that the immunity did not apply because HEA 1123 vested authority to call

[2] The Attorney General argued that pursuant to *State ex rel. Sendak v. Marion Cty. Superior Ct., Room No. 2*, 268 Ind. 3, 6, 373 N.E.2d 145, 148 (1978) (holding that state law prohibits state agencies from engaging private counsel without the approval of the Attorney General), the Governor's filings should be stricken because the Attorney General had declined to authorize private counsel in this matter. Relators do not raise that issue in this mandamus petition.

emergency sessions in the Legislative Council, even though that body is a joint committee of the General Assembly comprised entirely of legislators. R.146.

10. The State promptly moved the trial court stay proceedings and certify its orders for interlocutory appeal, R.150, which were denied without explanation on July 20, 2021, R.180, 182.

11. The respondent court has scheduled the following proceedings to occur before the end of the current legislative session:

July 27: Relators' responsive pleadings are due

August 6: All parties' summary judgment motions are due

September 10: Hearing on summary judgment motions

R. 148–49, 162. Under this schedule, it is most likely that the respondent court intends to issue final judgment while the current legislative session is ongoing and at least any briefing in an appeal from that judgment would likely occur during the next legislative session, which is scheduled to conclude no later than March 14, 2022. I.C. 2-2.1-1-3(b).

12. The Respondent Court has exceeded its jurisdiction by failing to comply with a clear and absolute duty to act. Article 4, Section 8 of the Indiana Constitution provides that Senators and Representatives "shall not be subject to any civil process, during the session of the General Assembly, nor during the fifteen days next before the commencement thereof," and Indiana Code section 2-3-5-1 requires a trial court grant a continuance to a date not sooner than 30 days following the date of the adjournment of the session of the General Assembly upon a motion when

a party or counsel is a member of the General Assembly. The defendants in the underlying proceeding are the General Assembly, the Senate President Pro Tempore, the Speaker of the House of Representatives, and the Legislative Council, which is comprised of members of the General Assembly. And the General Assembly is still in session. The Respondent Court does not have discretion to subject members of the General Assembly to civil process and refuse a continuance while the General Assembly remains in session. Relator has advised the Respondent Court of its duty to act, and the Respondent Court has refused to comply with this duty or certify its orders for interlocutory appeal.

13. The denial of this petition will result in extreme hardship on Relators. Members of the General Assembly are immune from civil process and have a lawful right to a continuance until the adjournment of the session of the General Assembly. If the Respondent Court allows this case to proceed, the Indiana Constitution's grant of immunity will be lost forever as the General Assembly and its members are subjected to suit while they remain in session.

14. A remedy by appeal after final judgment is wholly inadequate, and Relators will be subject to extreme hardship if relief is not granted. As Respondent Court has refused to certify its order denying the Relator's motion for interlocutory appeal, the Legislature's immunity from process and suit will be forever lost if this case is allowed to proceed through litigation while the General Assembly remains in session. A reversal after final judgment cannot cure that injury. Moreover, Relators will be forced to abandon their constitutional right as legislators to be free from civil

suits during the ongoing session while they are engaged with redistricting legislation and also for the entire upcoming second regular session.

15. The Plaintiff in the underlying litigation, however, will not be harmed in any way by the constitutionally and statutorily required continuance period because HEA 1123 will have no possible effect until the General Assembly ceases to be in session *and* a state of emergency exists that necessitates possible legislative action to address the emergency. In other words, so long as the General Assembly remains in a regular session, the Governor is not possibly harmed by HEA 1123 or any delay in final resolution of his lawsuit.

16. The only remedy available to Relator is for this Court to issue a writ of mandamus and prohibition directing the respondents to grant Relators continuances in *Holcomb v. Bray*, No. 49D12-2104-PL-14068, according to Article 4, Section 8 of the Indiana Constitution and Indiana Code section 2-3-5-1, and refrain from conducting proceedings during the time of the necessary continuances.

WHEREFORE, Relators respectfully requests that the Court grant a permanent writ of mandamus and prohibition that directs the Respondent Court continue all proceedings as required by Article 4, Section 8 of the Indiana Constitution and Indiana Code section 2-3-5-1.

Respectfully submitted,

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Dated: July 26, 2021

VERIFICATION

I verify under penalties of perjury that the documents attached to this motion are accurate copies of parts of the record on appeal.

/s/Thomas M. Fisher
Thomas M. Fisher

CERTIFICATE OF SERVICE

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

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