

# Indiana Law Review

Volume 55

2022

Number 1

## ARTICLES

### **DUTY TO DEFEND AND THE RULE OF LAW REDUX: WHY A STATE ATTORNEY GENERAL SHOULD REFUSE TO LET A GOVERNOR SUE THE LEGISLATURE**

THEODORE E. ROKITA, ATTORNEY GENERAL OF INDIANA\*

#### INTRODUCTION

In 2015, former Indiana Attorney General Greg Zoeller, amidst his insightful and correct defense of a state attorney general's duty to defend state statutes from constitutional attack, conveyed his view that, where necessary, an attorney general might properly authorize another state official to hire outside counsel to attack a state statute in court, even as the attorney general defends that statute.<sup>1</sup> Now, in 2021, the improbable forces of a global pandemic and an intramural political dispute have conspired to put the wisdom of that assertion to the test.

In response to the threat posed by COVID-19, Indiana Governor Eric Holcomb, using statutory power, issued a series of executive orders declaring public emergencies and restricting the liberties of individual citizens, businesses, and even churches in extraordinary ways. Many citizens and public officials, including legislators, criticized those orders as excessive restraints on individual liberty, including religious exercise. But because Governor Holcomb issued many of those orders during months when the Indiana General Assembly was not in session, the legislature was not immediately available to serve as a check on the Governor's authority. Many public officials, including former Indiana Attorney General Curtis Hill, urged the Governor to call a special legislative session so that the General Assembly could participate in the formulation of public policy in response to the pandemic. The Governor refused to do so. When the General Assembly reconvened for a new session, the pandemic remained, and many executive orders continued in place, albeit in modified form. Rather than override any aspect of the Governor's existing executive orders, however, the legislature instead enacted a statute conferring upon the Legislative Council the authority to call an "emergency" legislative session in the event of a gubernatorial declaration of public emergency. The Governor vetoed the bill on the ground that, in his

---

\* The author wishes to thank Solicitor General Thomas Fisher, Deputy Attorneys General Melinda Holmes, Julia Payne, Kian Hudson, Jefferson Garn, and Patricia Erdmann, and law clerks Michael Froedge, George Sorrells, Jack Robinson, Ian Jongewaard and Rogan Feng, for their assistance researching, drafting, and editing this article.

1. Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513 (2015).

view, an emergency session called by the legislature would vitiate his exclusive constitutional authority to call special legislative sessions under Article 4, section 9 of the Indiana Constitution. The legislature overrode the veto, and HEA 1123 became law.

After his veto proved unsuccessful, the Governor decided to sue the General Assembly over the hypothetical possibility that, in some future emergency, the Legislative Council may one day call an emergency session and then pass some now-unknown legislation in response to an unspecified gubernatorial order. Notwithstanding the lack of any concrete dispute in need of resolution and knowing that the attorney general was institutionally committed to defending the statute, he asked consent to hire outside counsel to sue the legislature. When that consent was refused, he sued anyway.

The issue whether the Governor has the inherent constitutional power to bring such a suit remains pending in the Indiana courts, and while the relevant Indiana statutes and precedents favor the position that the Governor has no such authority, one can rarely predict the course of judicial lawmaking. For purposes of this Article, however, the remarkable point is that, in the litigation of that issue, attorneys, commentators, and now at least one judge have cited former Attorney General Zoeller's 2015 article as authority for the Attorney General's *duty* to authorize outside counsel in this situation.<sup>2</sup> As a matter of good governance and a coherent view of constitutional law and democratic accountability, however, acceding to outside counsel in this case would have been profoundly mistaken. This Article explains why.

#### I. THE VIEW PUT FORTH BY FORMER ATTORNEY GENERAL ZOELLER

Former Attorney General Greg Zoeller wrote his 2015 article, *Duty to Defend and the Rule of Law*, in response to then-U.S. Attorney General Eric Holder's decision not to defend the federal Defense of Marriage Act in court, as well as the similar decisions of several state attorneys general not to defend their states' traditional marriage laws.<sup>3</sup> In the article, he argues that "an attorney general owes the state and its citizens, as sovereign, a duty to defend its statutes against constitutional attack except when controlling precedent so overwhelmingly shows that the statute is unconstitutional that no good-faith argument can be made in its defense."<sup>4</sup> In support of that argument, he provides a historical analysis of the

---

2. Order Denying Motion to Strike and for Alternate Relief ¶¶ 29-30, *Holcomb v. Bray*, No. 49D12-2104-PL-014068 (Marion Cnty. Super. Ct. July 3, 2021) (hereinafter "Trial Court Order"). Notably, Zoeller was recently quoted as saying, "I think there's a good argument to say the governor can't go to court without the consent of the attorney general." Niki Kelly, *Powers Bill Sets Up Legal Struggle*, J. GAZETTE (Apr. 11, 2021, 1:00 AM), <https://www.journalgazette.net/news/local/indiana/statehouse/20210411/powers-bill-sets-up-legal-struggle> [<https://perma.cc/A7KZ-6RWT>].

3. Zoeller, *supra* note 1, at 513-14.

4. *Id.* at 515.

duty to defend.<sup>5</sup> He then argues that Federal Rule of Civil Procedure 11 provides a framework for determining when defense of a state statute is so frivolous that it must be abandoned.<sup>6</sup> Applying this framework to state marriage laws, Zoeller concluded that state attorneys general have a duty to defend such laws, regardless of their personal beliefs, because non-frivolous arguments exist for their constitutionality.<sup>7</sup>

While the authorization of outside counsel is not the main thesis of the article, Zoeller does mention it briefly in his discussion about how abandonment of the duty to defend erodes the rule of law.<sup>8</sup> And notably, under the view Zoeller outlines in the article, the attorney general is never *required* to authorize outside counsel.

Governor Holcomb's citation of Zoeller's article to support the contrary proposition that an attorney general *must* grant a governor consent to hire outside counsel relies—and misunderstands—a single sentence of the article: “At the state level, the divided executive structure largely mitigates [conflict of interest] concerns because the governor or another enforcement officer could challenge a statute that infringes on his office's powers while the attorney general simultaneously defends the statute.”<sup>9</sup> Zoeller's point here is that in a divided executive structure (such as Indiana's), the attorney general does not have a conflict of interest in defending a statute that arguably infringes on the governor's power.

Nothing about this is groundbreaking. Zoeller's equivocal statement about what a governor “could” do under some conceivable state of facts neither expresses a view of the governor's purported inherent authority to litigate nor makes an assertion that the attorney general *must* consent to outside counsel in any given circumstance where a statute arguably erodes gubernatorial power. Zoeller at most implies that the attorney general *may* authorize outside counsel to represent the governor's view in such a situation; he nowhere states that such authorization is mandatory, or that a governor may proceed regardless of such authorization.

Indeed, later in the article Zoeller states affirmatively that in Indiana “none of the attorney general's client agencies may hire outside counsel without the consent of the attorney general.”<sup>10</sup> And he further explains that “[t]his distribution of power sometimes frustrates our clients, but it has the fundamental effect of

---

5. *Id.* at 515-42.

6. *Id.* at 542-44.

7. *Id.* at 546-51.

8. *Id.* at 536-37 (“The enforcement agencies and the governor may both believe a challenged statute is constitutional but will be unable to maintain a defense if the attorney general believes it is unconstitutional and refuses to exercise the duty to defend—particularly in states such as Indiana, where other government officials need the attorney general's permission to represent themselves in court.” (citing *State ex rel. Sendak v. Marion Cnty. Superior Court*, 373 N.E.2d 145, 148 (Ind. 1978))).

9. *Id.* at 541.

10. *Id.* at 552.

carrying out the principal justification for having a separately elected attorney general: to vest one politically accountable official with the responsibility of determining legal policy for all (or nearly all) of state government.”<sup>11</sup> Tellingly, Zoeller concludes that the authorization of outside counsel does not vitiate an attorney general’s duty to defend the constitutionality of a state statute because “the attorney general, as chief law officer of the State, remains accountable for maintaining a nonfrivolous defense to the plaintiff’s lawyer’s lawsuit.”<sup>12</sup>

Accordingly, the attorney general’s duty to defend state statutes, as outlined by Zoeller’s article, does not imply an obligation to authorize outside counsel every time a governor believes a state law unduly infringes his authority. Instead, in such situations the attorney general is duty-bound to consider carefully how the governor’s proposed lawsuit might affect the State’s legal interests and deny consent when the lawsuit would seriously undermine those interests. This Article expands on Zoeller’s work and explains why in this instance it was correct to refuse to authorize the Governor to hire outside counsel to sue the Indiana General Assembly over HEA 1123.

## II. HEA 1123 AND THE GOVERNOR’S LAWSUIT

Due to the general lack of knowledge about COVID-19 and the unprecedented speed with which the disease spread across the world, government responses to the ensuing public health emergency raised complex and controversial questions concerning how best to protect citizens while respecting individual liberty. COVID-19 hit Indiana just as the General Assembly was winding up a short session, which meant that Governor Holcomb was, by virtue of the emergency powers bestowed upon him by the legislature, responsible for addressing the pandemic in the first instance. On March 6, 2020, Governor Eric Holcomb issued Executive Order 20-02. This Order declared a public health emergency for the COVID-19 outbreak and authorized the Indiana State Department of Health to coordinate the emergency response, but it did not impose restrictions on individual mobility or activity.<sup>13</sup> The following week, on Thursday, March 12, 2020, the legislature concluded its 2020 regular session and adjourned sine die.<sup>14</sup>

The next day, Governor Holcomb issued a second COVID-19-related executive order, this one taking aim at the prospect of COVID-19-related food shortages.<sup>15</sup> Executive Order 20-03 waived service hour regulations for motor

---

11. *Id.*

12. *Id.* at 553.

13. Ind. Exec. Order 20-02 (Mar. 6, 2020), [https://www.in.gov/gov/files/20-02ExecutiveOrder\(DeclarationofPublicHealthEmergencyforCOVID-19\)FINAL.pdf](https://www.in.gov/gov/files/20-02ExecutiveOrder(DeclarationofPublicHealthEmergencyforCOVID-19)FINAL.pdf) [<https://perma.cc/878H-EZH6>].

14. IND. H. JOURNAL, 121st Gen. Assemb., 2d Reg. Sess. 787 (2020); IND. S. JOURNAL, 121st Gen. Assemb., 2d Reg. Sess. 1049 (2020).

15. Ind. Exec. Order 20-03 (Mar. 13, 2020), <https://www.in.gov/gov/files/Executive-Order-20-03-Waiver-of-Motor-Carrier-Hours-due-to-Public-Health-Emergency.pdf>

carriers and drivers of commercial vehicles transporting goods to Indiana businesses.<sup>16</sup>

The following week, the Governor issued four more pandemic-related executive orders that affected local and state government actions and restrained individual liberties. Those orders provided public aid for pandemic relief,<sup>17</sup> postponed the primary election,<sup>18</sup> imposed guidelines for large gatherings, public meetings, and non-essential surgical procedures,<sup>19</sup> and temporarily prohibited evictions and foreclosures.<sup>20</sup> Then, little more than a week after the legislature left town, Governor Holcomb issued an executive order directing all Hoosiers to stay at home and prohibiting all non-essential gatherings of ten or more people, including church services.<sup>21</sup>

Over the course of the next year and a half, the Governor issued sixty-two additional executive orders establishing the State's policy response to the COVID-19 pandemic, including an order on July 24, 2020, that mandated all Hoosiers wear masks in public places.<sup>22</sup> Attorney General Hill and several legislators (though not legislative leadership) urged the Governor to call a special legislative session to address COVID-19-related issues.<sup>23</sup> The Governor did not do so, however, and continued to issue executive orders renewing the public health emergency,<sup>24</sup> establishing stages for reopening,<sup>25</sup> extending prior orders,<sup>26</sup>

---

[<https://perma.cc/GZZ2-LY4E>].

16. *Id.*

17. *Id.* No. Order 20-05 (Mar. 19, 2020), [https://www.in.gov/gov/files/EO\\_20-05.pdf](https://www.in.gov/gov/files/EO_20-05.pdf) [<https://perma.cc/5G6X-B8ZX>].

18. *Id.* No. 20-07 (Mar. 20, 2020), [https://www.in.gov/gov/files/EO\\_20-07\\_Rescheduling\\_Primary.pdf](https://www.in.gov/gov/files/EO_20-07_Rescheduling_Primary.pdf) [<https://perma.cc/CR7K-369K>].

19. *Id.* No. 20-04 (Mar. 16, 2020), <https://www.in.gov/gov/files/ExecutiveOrder20-04FurtherOrdersforPublicHealthEmergency.pdf> [<https://perma.cc/H2UC-LXVW>].

20. *Id.* No. 20-06 (Mar. 19, 2020), [https://www.in.gov/gov/files/EO\\_20-06.pdf](https://www.in.gov/gov/files/EO_20-06.pdf) [<https://perma.cc/FG89-R38B>].

21. *Id.* 20-08 (Mar. 23, 2020), [https://www.in.gov/gov/files/Executive\\_Order\\_20-08\\_Stay\\_at\\_Home.pdf](https://www.in.gov/gov/files/Executive_Order_20-08_Stay_at_Home.pdf) [<https://perma.cc/FKF4-LUC7>].

22. *Id.* No. 20-37 (July 24, 2020), <https://www.in.gov/gov/files/Executive-Order-20-37-Face-Covering-Requirement.pdf> [<https://perma.cc/W47K-6X3S>].

23. Dan Carden, *Legal Furor Follows Governor's Order for Hoosiers to Wear Masks*, [www.NWI.COM](http://www.NWI.COM) (July 23, 2020), [https://www.nwitimes.com/news/local/govt-and-politics/legal-furor-follows-governors-order-for-hoosiers-to-wear-masks/article\\_22aa8511-3c6e-5ac1-89bc-4f0f14284aff.html](https://www.nwitimes.com/news/local/govt-and-politics/legal-furor-follows-governors-order-for-hoosiers-to-wear-masks/article_22aa8511-3c6e-5ac1-89bc-4f0f14284aff.html) [<https://perma.cc/R74A-F39M>]; Alexandra Kukulka, *Area Legislators Split on Need for Special Session to Address COVID Response, Voting and Police Reform*, [CHI.TRIB.](http://CHI.TRIB.) (Aug. 4, 2020), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-special-session-st-0804-20200804-d624po5sxna6pdc2neq6mglepq-story.html> [<https://perma.cc/BW8G-B8B6>]; Casey Smith, *Indiana Top Attorney Calls for Special Legislative Session*, [ASSOCIATED PRESS](http://ASSOCIATED PRESS) (Aug. 14, 2020), <https://apnews.com/article/health-indiana-eric-holcomb-virus-outbreak-5df38327d1afbeff40e15a7019d7abdc> [<https://perma.cc/55PX-WHZ6>].

24. *Ind. Exec. Order 21-28* (Oct. 29, 2021), <https://www.in.gov/gov/files/EO-21-28.pdf> [<https://perma.cc/S4M6-4AHG>] (titled "Twentieth Renewal of the Public Health Emergency

and instituting county-based restrictions.<sup>27</sup>

When the General Assembly began discussing legislative proposals in January 2021, the House and Senate considered several bills that would have overridden the Governor's emergency orders or otherwise limited the Governor's statutory emergency authority. For instance, Senate Bill 75 would have provided that any executive order that invades the constitutional authority of the legislature is void,<sup>28</sup> and House Bill 1244 would have limited the Governor's ability to use his emergency authority to restrict business operations.<sup>29</sup> Ultimately, however, the General Assembly did not pass these bills.

The legislature did, however, enact House Enrolled Act 1123.<sup>30</sup> HEA 1123 ensures that the General Assembly may address future emergencies that arise when the General Assembly happens not to be in session—which was the situation during the early stages of the COVID-19 emergency.<sup>31</sup> The Act authorizes the General Assembly to commence an “emergency session” if the Legislative Council finds that (1) “[t]he governor has declared a state of emergency that the legislative council determines has a statewide impact,” (2) “[i]t is necessary for the general assembly to address the state of emergency with legislative action,” and (3) “[i]t is necessary for the general assembly to convene an emergency session.”<sup>32</sup> The Legislative Counsel, which has existed since 1978, consists of sixteen members of the General Assembly, including leaders of both parties from both chambers.<sup>33</sup>

HEA 1123 passed the General Assembly on April 5, 2021. Four days later, the Governor vetoed it. The General Assembly then overrode his veto. Shortly after the General Assembly overrode his veto, Governor Holcomb announced his intention to sue the legislature to challenge the constitutionality of HEA 1123 under the Indiana Constitution and requested authorization from the Attorney General (who he understood would have a duty to defend the constitutionality of the statute) to hire outside counsel. Exercising the authority to set a unified legal

---

Declaration for the COVID-19 Outbreak”).

25. *Id.* No. 20-43 (Sept. 24, 2020), <https://www.in.gov/gov/files/Executive-Order-20-43-Stage-5-The-New-Normal-w-Mask-Mandate.pdf> [<https://perma.cc/9VCC-89H8>].

26. *Id.* No. 20-45 (Sept. 29, 2020), <https://www.in.gov/gov/files/Executive-Order-20-45-Renewal-and-Rescission-of-Certain-Directives.pdf> [<https://perma.cc/2TLA-R59Z>]; *id.* No. 20-51 (Dec. 22, 2020), [https://www.in.gov/gov/files/Executive\\_Order\\_20-51\\_New\\_Directives-Renewal\\_of\\_Other\\_Directives.pdf](https://www.in.gov/gov/files/Executive_Order_20-51_New_Directives-Renewal_of_Other_Directives.pdf) [<https://perma.cc/JQZ2-XQQY>].

27. *Id.* No. 20-48 (Nov. 13, 2020), [https://www.in.gov/gov/files/Executive\\_Order\\_20-48\\_Color-Coded\\_County\\_Assessments.pdf](https://www.in.gov/gov/files/Executive_Order_20-48_Color-Coded_County_Assessments.pdf) [<https://perma.cc/LYE5-3V6P>]; *id.* No. 21-12, <https://www.in.gov/gov/files/Executive-Order-21-12-Continuation-of-Modified-County-Based-Restrictions.pdf> [<https://perma.cc/553U-5KLW>].

28. S. 75, 122nd Gen. Assemb., Reg. Sess. (Ind. 2021).

29. H. R. 1244, 122nd Gen. Assemb., Reg. Sess. (Ind. 2021).

30. *See* IND. CODE § 2-2.1-1.2-7 (2021).

31. *Id.*

32. *Id.*

33. *Id.* § 2-5-1.1-1.

position for the State, I, as Attorney General, denied that request. Governor Holcomb nevertheless hired outside counsel and filed a state court complaint seeking a declaratory judgment that the Act was unconstitutional as well as a permanent injunction against its enforcement.<sup>34</sup> His complaint alleged that HEA 1123 violates Article 4, Section 9 of the Indiana Constitution<sup>35</sup> (on the theory that only the Governor has authority to call a special session) and violates Article 3, Section 1 of the Indiana Constitution<sup>36</sup> (on the theory that HEA 1123 encroaches on the power of the executive branch).

The Office of Attorney General filed a motion to strike the appearances of the unauthorized counsel. The motion argued that the Governor does not have the authority to hire outside counsel to bring suit without the attorney general's consent. In the alternative, the motion asked that the court continue all proceedings until the legislature was out of session. The Governor opposed that motion, citing Zoeller's 2015 article as support.<sup>37</sup> The Marion Superior Court denied the motion on both questions raised. First, citing the 2015 Zoeller article, the court ruled that, in this case at least, the Governor can be represented by outside counsel without the Attorney General's permission based on a combination of statutory authority,<sup>38</sup> and inherent constitutional authority,<sup>39</sup> even though the Indiana Supreme Court has previously rejected both propositions.<sup>40</sup> Second, the court held that in the "narrow factual circumstance[]" of a "constitutional conflict" between the Executive and Legislative branches, the legislative immunity of Article 4 § 8 of the Indiana Constitution "does not apply."<sup>41</sup> As of the submission of this Article, the trial court has upheld the statute.

---

34. Trial Court Order, *supra* note 2, ¶¶ 1-2.

35. IND. CONST. art. 4, § 9 ("[I]f, in the opinion of the Governor, the public welfare shall require it, he may, at any time by proclamation, call a special session.").

36. *Id.* art. 3, § 1 ("The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.").

37. Governor Holcomb's Response in Opposition to Motion to Strike and for Alternative Relief at 18, *Holcomb v. Bray*, No. 49D12-2104-PL-014068 (Marion Cnty. Super. Ct. May 18, 2021).

38. IND. CODE § 4-3-1-2 (2021).

39. IND. CONST. art. 5 § 16.

40. Trial Court Order, *supra* note 2, ¶ 57; *see State ex rel. Sendak v. Marion Cnty. Superior Ct.*, Room No. 2, 373 N.E.2d 145, 149 (Ind. 1978) ("[T]o the extent that IC § 4-3-1-2 is inconsistent with the Attorney General's duties as prescribed by law, it must be disregarded. . . . [W]e see no relationship between the execution of executive power and the legal defense of a lawsuit against the State.").

41. Trial Court Order, *supra* note 2, ¶ 58.

### III. SEVERAL GROUNDS JUSTIFY REFUSING AUTHORITY FOR THE GOVERNOR TO SUE THE LEGISLATURE OVER HEA 1123

The Governor's suit challenging HEA 1123 threatens to undermine several foundational legal doctrines, and it is in the State's interest to preserve those doctrines. Refusing the Governor's request to authorize outside counsel was necessary to maintain uniform state legal policy as to these doctrines.

#### *A. One Principal Role of an Attorney General is to Unify to the Extent Possible the Legal Positions the State and its Officials Will Take in Court*

Why do states have attorneys general? One can certainly imagine a world without them. There, every state agency would have its own lawyers dedicated and loyal to the responsible agency leader or elected official. Legal defenses would be asserted by an agency without regard to whether they serve the interests of the State as a whole. Of course, in such a world litigation could run amuck, with lawyers for one agency even filing suit against other agencies if disagreements arose.

That world, however, is what a State chooses to avoid by having an attorney general. As the Indiana Supreme Court recognized in the *Sendak* decision, "[t]he office of the Attorney General was [created] . . . to give the State *independent* legal representation and to establish a general legal policy for State agencies."<sup>42</sup> Because the Attorney General has the statutory "responsibility of defending the State and its officers and employees when sued in their official capacities," no state agency—regardless of disagreement with the Attorney General—"is permitted to hire another attorney to perform legal services unless the Attorney General renders his written consent."<sup>43</sup> This statutory arrangement *requires* the Attorney General to direct the defense of a lawsuit—a hallmark feature of his "duty to protect the State's interests."<sup>44</sup>

The institution of an attorney general as the chief legal officer of the state rejects the every-man-for-himself model of government legal representation in favor of a single elected official establishing a unified legal policy for the State.<sup>45</sup> As the Supreme Judicial Court of Massachusetts has observed, an attorney general ensures that the State maintains consistent legal positions, both within a single case and across all state litigation, and in that way is "markedly different" from the functions of other administrative officials.<sup>46</sup> Consolidating this authority

---

42. *Sendak*, 373 N.E.2d at 148 (emphasis added).

43. *Id.*

44. *Id.*

45. *See, e.g., id.* ("The office of the Attorney General was re-created by the Indiana Legislature in 1943, in order to give the State independent legal representation and to establish a general legal policy for State agencies."); *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266 (Mass. 1977) ("The role of the Attorney General when he represents the Commonwealth and State officers in legal matters is markedly different from the function of the administrative officials for whom he appears.").

46. *Feeney*, 373 Mass. at 365-66 ("To permit [a state agency and its administrator], who



within the Office of the Attorney General ensures that the larger public interest is considered when the State makes legal policy decisions,<sup>47</sup> including decisions about whether to advance legal positions in certain cases with an eye toward the development of binding precedent that will serve the State's interests in future litigation. Thus, when an agency recommends a course of action—one likely limited to its *own* interests—the Attorney General must consider the consequences of that action and how it interacts with the public interest: Any “fail[ure] to do so would be an abdication of official responsibility.”<sup>48</sup>

Courts, furthermore, are better able to treat like cases alike when presented with a single, discernible position taken by the State. This ancient, venerable feature of the rule of law has existed in many theories of justice.<sup>49</sup> It rejects arbitrary decisions and contributes to legal stability.<sup>50</sup> So, by saving courts from having to consider multiple—and sometimes *conflicting*—state positions, the Attorney General not only distills the broader public interest into a coherent position, but also assists courts in ensuring fair treatment for all who come before them.

The existence of some state bodies that may pursue litigation without the Attorney General's involvement does not negate the Attorney General's unifying role. At various times, the Indiana General Assembly created multiple special-purpose state entities, including public universities, economic development commissions, and debt-acquisition authorities, that may advance their own legal interests apart from the Attorney General.<sup>51</sup> Even the legislature itself may employ outside counsel.<sup>52</sup> But such exceptions hardly countenance the complete deterioration of the Attorney General's role in unifying the State's legal positions. Even if the Attorney General does not exercise legal policy authority over 100% of the state-government universe, he still is responsible for maintaining a unified

---

represent a specialized branch of the public interest, to dictate a course of conduct to the Attorney General would effectively prevent the Attorney General from establishing and sustaining a uniform and consistent legal policy for the Commonwealth.”).

47. See Scott M. Matheson, *Constitutional Status and Role of the State Attorney General*, 6 UNIV. FLA. J.L. & PUB. POL'Y 1, 12 (1993) (“Perhaps a more workable dichotomy than representation of the state or the public is to view the attorney general's role as combining loyalty to the executive with loyalty to the law. The attorney general, appointed or elected, fulfills responsibilities to the executive and the public by maintaining the obligation to respect and follow the law.”).

48. *Feeney*, 373 Mass. at 365.

49. David A. Strauss, *Must Like Cases Be Treated Alike?* 1 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory, Working Paper No. 24, 2002), [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1197&context=public\\_law\\_and\\_legal\\_theory](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1197&context=public_law_and_legal_theory) [<https://perma.cc/JKB5-RW52>].

50. *Id.* at 12.

51. See, e.g., IND. CODE § 5-28-5-3(a) (2021); see also, e.g., *id.* § 5-1.2-3-8(a) (“The [Indiana Finance Authority] may, without the approval of the attorney general or any other state officer, employ bond counsel . . . [or] other legal counsel . . .”).

52. *Id.* §§ 2-3-9-2 to 3.

legal position for those agencies that do fall within his ambit. And this responsibility includes setting legal policy while considering the long-term legal interests of the State as a whole.

*B. The Governor's Challenge to HEA 1123 Threatens Many Important Legal Doctrines That Benefit the State's Larger Interests*

Here, the Governor's lawsuit challenging HEA 1123 threatens to upend many procedural and substantive legal rules that the public has a strong interest in preserving. The Governor's position runs contrary to foundational rules of justiciability such as standing and ripeness, the political question doctrine, limitations on declaratory judgment actions, and rules protecting the legislative process, including the enrolled act doctrine and legislative immunity under the Indiana Constitution or the common law. As noted, the Attorney General's role is to unify the State's legal policy in these important areas, especially where they touch on the separation of powers.

*1. The Governor Lacks Standing and Presents Unripe Claims.*—The State has an interest in maintaining the foundational rules of standing and ripeness, and the Governor's suit violates those rules. Under Indiana law,

The general rule of standing holds that 'the proper person to invoke the court's power' is limited to those 'who have a personal stake in the outcome of the litigation and who show that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of-conduct.'<sup>53</sup>

Where a plaintiff is not in immediate danger of suffering a direct, cognizable injury, he cannot invoke the courts' authority.

As the Indiana Supreme Court recently explained, "[t]he purpose of standing—along with the corollary doctrines of mootness and ripeness—is to ensure the resolution of real issues through vigorous litigation, not to engage in academic debate or mere abstract speculation."<sup>54</sup> And on "a more fundamental level, standing implicates the constitutional foundations on which our system of government lies. By requiring a party to show a specific injury, the doctrine limits the judiciary to resolving concrete disputes between private litigants while leaving questions of public policy to the legislature and the executive."<sup>55</sup> Standing rules are thus essential to preserving the constitutional separation of powers, for it "precludes courts from becoming involved . . . too far into the provinces of the other branches,"<sup>56</sup> and prevents "an overjudicialization of the processes of self-

---

53. Bd. of Comm'rs of Union Cty. v. McGuinness, 80 N.E.3d 164, 168 (Ind. 2017) (quoting State ex rel. Cittadine v. Ind. Dep't of Transp., 790 N.E.2d 978, 979 (Ind. 2003)).

54. Homer v. Curry, 125 N.E.3d 584, 589 (Ind. 2019).

55. *Id.*

56. *Id.* (quoting Jon Laramore, *Indiana Constitutional Developments*, 37 IND. L. REV. 929, 930 (2004)).

governance.”<sup>57</sup>

In the Governor’s challenge to HEA 1123, to identify an immediate danger of a direct injury—and to thereby establish his standing to sue—the Governor would need to allege “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute.”<sup>58</sup> Crucially, however, the Legislative Council has neither acted nor threatened to act in a manner that would present an immediate danger directly affecting the Governor’s constitutional interest. HEA 1123 in no way limits the Governor’s constitutional (or even statutory) authority. So, even as the Governor continues to perpetuate a state of emergency (one prerequisite of an HEA 1123 emergency session), no threat of an actual *emergency* session exists because the General Assembly has maintained itself in non-emergency session and will likely continue to do so throughout the remainder of 2021 and into March 2022,<sup>59</sup> which eliminates any realistic prospect of an HEA-1123-authorized emergency session that could plausibly injure the Governor.

Further, the mere *existence* of an emergency session itself would not injure the Governor. For the Governor to be injured, he would need to show that: (1) he called a statewide emergency, (2) the legislature was not in session, (3) the legislative council decided to invoke its authority under HEA 1123 to call an emergency, *and* (4) during that emergency session, the legislature passed (over the Governor’s veto) a statute that somehow injured the Governor. Whether such a scenario will ever occur is rank speculation and is altogether facially deficient to establish proper standing to challenge HEA 1123 at this point.

The Governor’s suit also undermines the longstanding requirement of ripeness. “Ripeness relates to the degree to which the defined issues in a case are based on *actual facts* rather than on abstract possibilities . . . .”<sup>60</sup> And, “[a] claim is not ripe for adjudication if it rests upon contingent future events ‘that may not occur as anticipated, or . . . may not occur at all.’”<sup>61</sup> Accordingly, a claim must be “ripe for consideration or [the court] will not review it.”<sup>62</sup> Here, the Governor’s claims are not “ripe for consideration” because the General Assembly has not called—and will not soon call—an emergency session under HEA 1123. As noted, the General Assembly is already operating in session and will likely continue to do so in both the current and the following sessions.

The Governor has responded to these assertions about standing and ripeness

57. *Id.* (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 27 SUFFOLK U. L. REV. 881, 881 (1983)).

58. *Hulse v. Ind. State Fair Bd.*, 94 N.E.3d 726, 731 (Ind. Ct. App. 2018) (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)).

59. *See* IND. CODE § 2-2.1-1-2(e) to -3 (2021).

60. *Ind. Dep’t of Env’t. Mgmt. v. Chem. Waste Mgmt., Inc.*, 643 N.E.2d 331, 336 (Ind. 1994) (emphasis added).

61. *Ind. Fam. Inst. Inc. v. City of Carmel*, 155 N.E.3d 1209, 1218 (Ind. Ct. App. 2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1988)).

62. *Id.* (citing *Garau Germano, P.C. v. Robertson*, 133 N.E.3d 161, 167 (Ind. Ct. App. 2019), *trans. denied*).

principally by arguing that the courts should address his constitutional claims now, despite the lack of any plausible use of HEA 1123 in the near term, so they can avoid doing so during an actual emergency session.<sup>63</sup> The theory seems to be that, in the hurly-burly of an actual emergency session and its aftermath, the courts will be unable to adjudicate a claim that the session (and any laws enacted during it) are invalid. Indiana courts, however, are fully capable of adjudicating claims during a crisis. The rules of procedure and equity provide tools for courts to deal with fast-moving situations that present serious challenges to statutes—namely temporary restraining orders and preliminary injunctions.<sup>64</sup> Courts possess inherent powers to expedite legal proceedings (indeed the trial court has already done so in *Holcomb v. Bray*) to arrive at decisions in a timely way.<sup>65</sup> More fundamentally, the Governor’s argument on this point is not an answer to the jurisdictional requirement that courts may only adjudicate claims brought by injured parties with ripe disputes.<sup>66</sup> If anything, the argument is an objection to standing doctrine itself, and as such it has no grounding in Indiana law.

An attorney general is not compelled to permit clients to bring jurisdictionally deficient cases. Rather, an Attorney General has responsibilities not only to the Governor, but to all institutional clients—other officials and agencies, the courts, and ultimately the people of Indiana.<sup>67</sup> These responsibilities encompass the duty to safeguard the Constitution’s separation of powers, including by helping ensure that the judicial process is reserved for jurisdictionally appropriate cases. Even if others disagree, the role of the Attorney General is to decide where the State of Indiana will stand, in court, on the legal question—and the Governor *is* the State of Indiana (or at least a part of it).<sup>68</sup> So, part of the reason I refused the Governor’s request for outside counsel is that his case sought to invoke the power of the judiciary to resolve an abstract political disagreement, not a concrete legal dispute. The people of Indiana have a strong interest in preventing state officials—including the Governor—from taking positions on behalf of the State that undermine this important separation-of-powers rule.

---

63. Complaint for Declaratory Judgment and Injunctive Relief ¶¶ 55, 67-68, *Holcomb v. Bray*, No. 49D12-2104-PL-014068 (Marion Cnty. Super. Ct. Apr. 27, 2021) [hereinafter Complaint].

64. See e.g., *Abercrombie and Fitch Stores, Inc., v. Simon Prop. Grp, L.P.*, 160 N.E.3d 1103, 1108-09 (Ind. Ct. App. 2020) (holding that a preliminary injunction was appropriate to “maintain the status quo” in response to a sudden business dispute stemming from the “COVID-19 crisis”).

65. Order Setting Briefing Schedule, *Holcomb v. Bray*, No. 49D12-2104-PL-014068 (Marion Cnty. Super. Ct. July 3, 2021).

66. See Complaint, *supra* note 57, ¶¶ 55, at 67-68.

67. See Zoeller, *supra* note 1, at 540-41.

68. See Memorandum in Support of Motion to Strike and for Alternative Relief at 3-6, *Holcomb v. Bray*, No. 49D12-2104-PL-014068 (Marion Cnty. Super. Ct. Apr. 30, 2021) (hereinafter “Defendant’s Brief”) (collecting cases on the “multiple occasions spanning decades, state and federal courts have consistently struck other appearances for state officials who were not properly represented by the Attorney General”).

2. *The Declaratory Judgment Act Does Not Authorize the Governor's Request for Declaratory Relief.*—Another reason weighing against authorizing the Governor to hire outside counsel to bring this suit is that the suit seeks to undermine the Declaratory Judgment Act's bar on state officials using declaratory-judgment actions to draw courts into abstract legal disputes.

The Declaratory Judgment Act permits any “person . . . whose rights, status, or other legal relations are affected by a statute” to “have determined any question of . . . validity arising under the . . . statute.”<sup>69</sup> Crucially, however, the Act's definition of “person” excludes state agencies and state officials.<sup>70</sup>

Indeed, the Indiana Supreme Court has expressly ruled that “[a] state official, acting in his or her official capacity, may not bring a declaratory judgment action pursuant to Indiana Code sections 34-14-1-2 and -13.”<sup>71</sup> Accordingly, the Declaratory Judgment Act does not permit the Governor to bring this suit.

Although it may serve the Governor's interests here to claim that he may bring a declaratory judgment claim, that legal position does not serve the State's interests as a whole. The Attorney General is legally empowered to make that call—for good reason.<sup>72</sup> The Attorney General handles all suits for state officials and agencies and sees the mischief that can occur if courts begin to recognize instances where officials *can* seek declaratory relief.<sup>73</sup> In rejecting the position the Governor seeks to take here, the Indiana Supreme Court and Indiana Court of Appeals both took the view that allowing “state agencies to resort to the judicial system for review of every statute passed in the state would foster legislative irresponsibility and unnecessarily overburden the courts into issuing essentially advisory opinions.”<sup>74</sup> The State's legal interests lie squarely with avoiding such consequences.

3. *Legislative Immunity Bars the Governor's Suit.*—Beyond undermining the express terms of the Declaratory Judgment Act, the Governor's suit also seeks to eviscerate the doctrine of legislative immunity, which is yet another separation-of-powers principle the people of Indiana have an interest in preserving—and yet another reason for declining to authorize the Governor's suit. In particular, the Governor seeks to enjoin legislators from enforcing or implementing HEA 1123, and legislative immunity places such an injunction beyond the power of the courts.<sup>75</sup>

The U.S. Supreme Court has explained in *United States v. Brewster* that the constitutional source of legislative immunity is derived, in part, from the text and

69. IND. CODE § 34-14-1-2 (2021).

70. *Id.* § 34-14-1-13 (defining “person” as a “person, partnership, limited liability company, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever”).

71. *Ind. Fireworks Distrib. Ass'n v. Boatwright*, 764 N.E.2d 208, 210 (Ind. 2002).

72. *See* Defendant's Brief, *supra* note 62, at 2.

73. *Id.* at 3.

74. *Ind. Fireworks Distrib. Ass'n v. Boatwright*, 741 N.E.2d 1262, 1264-65 (Ind. Ct. App. 2001), *aff'd*, *Ind. Fireworks Distrib. Ass'n*, 764 N.E.2d at 209.

75. *See* Complaint, *supra* note 57, ¶¶ 47-57; *see* Defendant's Brief, *supra* note 62, at 6-7.

structure of the Speech or Debate Clause<sup>76</sup>—which provides that “for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place”<sup>77</sup>—and extends to “legislative acts,” defined expansively by the Court, as any “act generally done in Congress in relation to the business before it.”<sup>78</sup> The Supreme Court has consistently affirmed “[t]he principle that legislators are *absolutely* immune from liability for their legislative activities,” which “has long been recognized in Anglo-American law.”<sup>79</sup> And this absolute privilege has been likewise recognized by the Court to “attach[] to *all actions* taken ‘in the sphere of legitimate legislative activity.’”<sup>80</sup>

Several federal courts have similarly applied the legislative immunity doctrine in a range of state-law contexts, acknowledging that “state legislators enjoy common-law immunity from liability for their legislative acts.”<sup>81</sup> Indeed, the Indiana Court of Appeals invoked one aspect of legislative immunity long ago when it ruled that “a state legislator in Indiana is immune from liability even if he publishes defamatory material with an improper motive and with knowledge of its falsity.”<sup>82</sup> And when applying the general “legislative acts” analysis here,

76. U.S. CONST. art I, § 6, cl. 1.

77. *Id.*

78. 408 U.S. 501, 512 (1972).

79. *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998) (emphasis added). Historically, the “privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.” *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *see also* Steven F. Huefner, *The Neglected Value of Legislative Privilege in State Legislatures*, 45 WILLIAM & MARY L. REV. 224, 229 (2003). The framers made sure to codify the English common law principle in both the Articles of Confederation and federal Constitution. Hence, the purpose of legislative was indeed clear from the outset of the American founding: “[T]o enable and encourage a representative of the public to discharge [the] public trust with firmness and success . . . .” *Tenney*, 341 U.S. at 376 (quoting WORKS OF JAMES WILSON VOL. 2 38 (Andrews ed. 1896)).

80. *Bogan*, 523 U.S. at 54 (quoting *Tenney*, 341 U.S. at 376) (emphasis added).

81. *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980); *see, e.g.*, *Reeder v. Madigan*, 780 F.3d 799 (7th Cir. 2015) (affirming dismissal of First Amendment, due process, and equal protection claims related to journalist’s access against Illinois House Speaker and State Senate President on the basis of legislative immunity); *McCann v. Brady*, 909 F.3d 193, 194 (7th Cir. 2018) (affirming dismissal of First Amendment and equal protection claims related to ouster of caucus member against Illinois Senate Minority Leader on the basis of legislative immunity); *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85, 89 (1st Cir. 1983) (legislators’ public hearings and the gathering of evidence for an investigation); *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) (city council votes, discussions, and agreements in private); *Larsen v. Senate of Pa.*, 152 F.3d 240, 249 (3d Cir. 1998) (legislators’ impeachment vote of state supreme court justice); *Empress Casino Joliet Corp. v. Blagojevich*, 638 F.3d 519, 527 (7th Cir. 2011) (“[S]tate and local officials are absolutely immune from federal suit for personal damages for their legitimate legislative activities.”).

82. *Aafco Heating & Air Conditioning Co. v. Nw. Publ’ns, Inc.*, 321 N.E.2d 580, 583 (Ind. Ct. App. 1974).

scheduling legislative sessions fits squarely within the ambit of legitimate legislative activity to be performed by the General Assembly “in relation to the business before it.”<sup>83</sup> The General Assembly’s act of setting its legislative agenda is indeed a crucial “attribute of [its] sovereignty;”<sup>84</sup> it is a condition that must be met before other laws are subsequently passed. Indeed, at the heart of scheduling a session is the legislature’s capacity to *pass new laws*.

In addition to this common law immunity, states have established their own doctrines of legislative immunity. The Indiana Constitution enshrined a protection for legislators while they are in session, providing that “Senators and Representatives, in all cases except treason, felony, and breach of the peace . . . shall not be subject to any civil process, during the session of the General Assembly.”<sup>85</sup> This provision is known as the “Civil Process Clause.” The General Assembly codified this principle to provide specific direction to courts under Indiana Code section 2-3-5-1: “Whenever a party to a civil action . . . is a member of the general assembly of the state of Indiana, the court . . . shall grant such motion for a continuance to a date not sooner than thirty (30) days following the date of adjournment of the session of the general assembly.”

This immunity applies regardless of subject matter, and there are numerous reasons cautioning against allowing suits involving the separation of powers to proceed as an exception to legislative immunity. Most importantly, such an exception finds no basis in the text of the Indiana Constitution. The Civil Process Clause clearly establishes immunity from service of process with the only exceptions being in cases of “treason, felony, and breach of the peace.”<sup>86</sup> Further, legislative immunity serves to “protect the integrity of the legislative process by insuring the independence of individual legislators.”<sup>87</sup> Obviously, an exception permitting the Governor to resist laws he does not like by suing legislators would undermine this goal of legislative independence.

The Governor may, of course, pursue recourse other than litigation to promote his view of the law. The separation of powers, however, bars the Governor from haling legislators into court in order to contest laws he does not like. The Indiana Constitution established the separation of powers among the branches for the benefit of the People, not the officeholders. Indeed, “the principal reason for separating governmental power was to protect liberty and avoid tyranny.”<sup>88</sup> Legislative immunity exists not for the individual benefit of legislators but for the benefit of all Hoosiers: “The purpose of legislative immunity is to ‘protect the integrity of the legislative process by insuring the

---

83. *Brewster*, 408 U.S. at 512.

84. *Fed. Energy Regul. Comm’n v. Mississippi*, 456 U.S. 742, 785 n.14 (1982) (O’Connor, J., concurring in part).

85. IND. CONST. art. 4, § 8.

86. *Id.* The interpretive canon *expressio unius* holds that the expression of one thing means the exclusion of others. *See NLRB v. Sw. Gen., Inc.*, 137, S. Ct. 929, 933 (2017).

87. *Hanson v. Bennett*, 948 F.2d 397, 404 (7th Cir. 1991) (quoting *Brewster*, 408 U.S. at 507).

88. *Horner v. Curry*, 125 N.E.3d 584, 612 (Ind. 2019) (Slaughter, J., concurring).

independence of individual legislators.”<sup>89</sup>

As explained *supra* in Section III.A, the Constitution sets up a careful balance of powers, with specific checks establishing a give-and-take balance. The General Assembly enacts legislation and presents it to the Governor; the Governor may veto that legislation; and the General Assembly may then override that veto.<sup>90</sup> These are the prescribed mechanisms by which each branch acts according to grants of authority under the Constitution.

The Governor is constitutionally empowered to veto legislation with which he disagrees and politically empowered to place public pressure on the legislature to act in the way he thinks is correct. The Governor may even refrain from enforcing or carrying out a statute he deems contrary to the Constitution. Suing the legislature, however, is not one of the Governor’s checks on the legislature’s power.<sup>91</sup> It would be extraordinary for the officials of one branch to be empowered to drag another branch of government to account before the judiciary. Nor is it within his power or responsibility to prevent legislative encroachment on the executive power. Rather, the Constitution confers on the Governor the power to *execute* the laws, and the power of executing the laws does not include litigating civil cases—particularly against the legislature while it is in session.<sup>92</sup>

*4. The Political Question Doctrine and the Enrolled Act Doctrine Foreclose the Governor’s Claims.*—Beyond legislative immunity doctrines, the Governor’s suit further undermines the legislature’s independence by seeking to weaken additional procedural protections under the political question doctrine and the enrolled act doctrine.

*a. Political question doctrine.*—The Indiana Constitution squarely establishes how the legislative and executive branches interact in the lawmaking process. In unequivocally clear terms, the General Assembly is vested with “[t]he Legislative authority of the State.”<sup>93</sup> The Indiana Constitution further provides that “no law shall be enacted, except by bill,”<sup>94</sup> and that “[e]ach House [of the General Assembly] shall have all powers, necessary for a branch of the Legislative department of a free and independent State.”<sup>95</sup> As the Indiana Supreme Court has ruled, “where a particular function has been expressly delegated to the legislature by our Constitution without any express constitutional limitation or qualification, disputes arising in the exercise of such functions are inappropriate for judicial

---

89. *Hansen*, 948 F.2d at 404 (quoting *Brewster*, 408 U.S. at 507).

90. IND. CONST. art. 4, § 25; *id.* art. 5, § 14.

91. In contrast, a private person may properly bring a separation-of-powers challenge. Indeed, a private citizen filed a lawsuit challenging the same provision of HEA 1123. *See* Complaint for Declaratory and Injunctive Relief, *Whitaker v. Bray*, No. 49D02-2104-PL-014586 (Marion Cnty. Super. Ct. Apr. 30, 2021).

92. *See State ex rel. Sendak v. Marion Cnty. Superior Ct., Room No. 2*, 373 N.E.2d 145, 149 (Ind. 1978) (rejecting the notion that the Governor’s “executive power” prevents the legislature from “vest[ing] the responsibility for the legal representation of the State in the Attorney General”).

93. IND. CONST. art. 4, § 1.

94. *Id.*

95. *Id.* § 16.



resolution.”<sup>96</sup>

The scheduling of legislative sessions is a hallmark of legislative authority. Indeed, the Supreme Court has described a legislature’s ability to set its own agenda and schedule as nothing less than an “attribute of [its] sovereignty.”<sup>97</sup> Furthermore, the 1970 amendment to Article 4, section 9 of the Indiana Constitution provides no room to misunderstand the legislature’s ability to set its own schedule by adding the sentence: “The length and frequency of the sessions of the General Assembly shall be fixed by law.” “Fixed by law,” of course, refers to the enactment of laws through the legislative process—the very process completely committed to the legislative branch under the Indiana Constitution.<sup>98</sup>

By contrast, Indiana governors play a far more limited role in the legislative process: For example, Article 5, Section 14 defines the scope of the executive function in the presentment process—namely, the power to veto bills passed by the General Assembly. Of course, the General Assembly can override the Governor’s veto if the returned act is approved by a majority vote of both Houses.<sup>99</sup> Therefore, by the relevant terms of the Indiana Constitution, a Governor who vetoes (or signs) a bill passed by the General Assembly has *already* participated in the legislative process to the extent the Constitution expressly authorizes.

Accordingly, a suit by the Governor against the General Assembly challenging the validity of a statute it has enacted over his veto amounts to another bite at the veto apple—inviting the judiciary to resolve a nonjusticiable political question.

To the extent that the Governor is arguing that the availability of an emergency session somehow impacts the potency of his statutory emergency authority, such a result is part of the political give and take that the Indiana Constitution contemplates. The Governor may not, however, use the courts as a tool to gain political leverage over the General Assembly. It would be one thing if the Governor’s constitutional authority to call a special session of the General Assembly, Ind. Const. art. 4, § 9, allowed him to set the legislative agenda during a special session, like in some other States.<sup>100</sup> But in Indiana, “[t]he power of the General Assembly to legislate on any subject when convened in special session is not limited by the Constitution”—and no one contends otherwise.<sup>101</sup> Accordingly, since no constitutional distinctions between types of legislative sessions exist, a court has nothing to review besides the political question of when

96. *Berry v. Crawford*, 990 N.E.2d 410, 421 (Ind. 2013).

97. *Fed. Energy Regul. Comm’n v. Mississippi*, 456 U.S. 742, 785 n.14 (1982) (O’Connor, J., concurring in part).

98. *See Benton Cnty. Council v. State ex rel. Sparks*, 65 N.E.2d 116, 118-19 (1946) (interpreting the meaning of “fixed by law”).

99. IND. CONST. art. 5, § 14.

100. *See State v. Scott*, 140 P.2d 929, 930-32 (Utah 1943) (holding that the Governor has “complete control over legislative business that shall be conducted at special sessions” and identifying seven other States with similar restrictions) (collecting cases).

101. *Woessner v. Bullock*, 93 N.E. 1057, 1058 (Ind. 1911).

the legislature may meet.

Indeed, the Indiana Supreme Court has applied the political question doctrine to bar similar suits on similar grounds because they sought relief that would interfere with “inherently internal matters of the legislative branch.”<sup>102</sup> Even an indirect interference with legislative function will not stand. In *Berry v. Crawford*, for example, the Indiana Supreme Court held that the imposition of fines and the manner of collecting such fines against absent legislators would limit the legislature’s “core legislative function” of disciplining members.<sup>103</sup> Thus, the suit was “nonjusticiable.”<sup>104</sup> The court observed that, “as a constitutional and prudential matter, it is improper for the judicial branch to entertain consideration of the plaintiffs’ requests for relief.”<sup>105</sup>

The Governor’s case similarly seeks to disrupt “internal matters of a coordinate branch of government”<sup>106</sup> by challenging the legislature’s core function of scheduling legislative sessions. For this reason, the political question doctrine bars the Governor’s suit in this case. And the people of Indiana have a strong interest in avoiding the erosion of the political question doctrine the Governor’s suit seeks to create.

*b. Enrolled act doctrine.*—The Governor’s lawsuit also implicates the enrolled act doctrine. The enrolled act doctrine has been a key feature of the General Assembly’s lawmaking authority since first established by the Indiana Supreme Court more than 150 years ago in *Evans v. Browne*.<sup>107</sup> The doctrine provides that, “when an enrolled act is authenticated by the signatures of the presiding officers of the two houses, it will be conclusively presumed that the same was enacted in conformity with all the requirements of the Constitution.”<sup>108</sup> Questioning the procedural mechanisms used to pass legislation “invade[s] the exclusive province of the legislature and thereby violate[s] the constitution by such invasion.”<sup>109</sup> Thus, if an act has been authenticated by the relevant signatures, “it is not allowable to look to the journals of the two houses or to other extrinsic sources for the purpose of attacking its validity or the manner of its enactment.”<sup>110</sup>

Again, the Governor’s challenge to HEA 1123 provides an apt example. Because the Act only creates an additional opportunity, via an emergency session, for future legislation to be enacted, its review axiomatically entails an inspection of the General Assembly’s legislative processes. Such review works against the underlying rationale of the enrolled act doctrine—judicial deference to the General Assembly’s authority to command the legislative process. For example,

---

102. *Berry v. Crawford*, 990 N.E.2d 410, 421 (Ind. 2013).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. 30 Ind. 514 (1869).

108. *State v. Wheeler*, 89 N.E. 1, 2 (Ind. 1909).

109. *Roeschlein v. Thomas*, 280 N.E.2d 581, 586 (1972).

110. *Id.* (citing to *Wheeler*, 89 N.E. at 2).

in *Roeschlein v. Thomas*, the Indiana Supreme Court refused to weigh in on an alleged “imperfection” during the legislative process because that “is a legislative function exclusively within the sphere of the legislature.”<sup>111</sup> That is precisely the scenario here. Since any future legislation passed under the ambit of HEA 1123 is not open to attack stemming from the constitutionality of its enactment, attacking HEA 1123 now is preemptively making an argument that the enrolled act doctrine forecloses in the future.

Permitting the Governor to proceed now with a suit challenging the constitutionality of HEA 1123 sidesteps the enrolled act doctrine. At present, the legislative process is immune from challenge once authenticated by the signatures of the presiding officers of each house.<sup>112</sup> But if the Governor’s suit is allowed to go forward, it would mark the ability of courts to inspect the validity of the legislative process—a task that, via the enrolled act doctrine, Indiana courts have long forsworn. That decision could open the flood gates of judicial scrutiny towards the legislative process. Because the Governor’s suit would result in such harm to State interests, I refused to authorize outside counsel to take this position on behalf of the State.

### *C. The Governor is Wrong on the Merits; HEA 1123 is Constitutional*

The merits of the Governor’s case further justify the decision to refuse outside counsel in this case. As the analysis below shows, this is not a close case; the text, history, precedent, and longstanding practice are overwhelmingly against the Governor’s position. That said, the point is not that the Attorney General has authority to decide constitutional disputes. The point is that the Attorney General has the authority and responsibility to decide what the position of the State of Indiana and its officials will be in court as to constitutional disputes. The Attorney General certainly has no duty to authorize outside counsel so that state officials may challenge his legal policy positions in court.

*1. Article 4, Section 9 of the Indiana Constitution Authorizes HEA 1123.*—Article 4, section 9 of the Indiana Constitution provides that “[t]he sessions of the General Assembly shall be held at the capitol of the state, commencing on the Tuesday next after the second Monday in January of each year in which the General Assembly meets unless a different day or place shall have been appointed by law.” It further provides that “[t]he length and frequency of the sessions of the General Assembly shall be fixed by law.”<sup>113</sup> Thus, the Indiana Constitution allows the General Assembly to determine where it will meet, when it will meet, how long it will meet, and how frequently it will meet, so long as it does so “by law.”<sup>114</sup>

The General Assembly exercised its power to schedule its sessions when it passed HEA 1123. It appoints by law that a legislative session will commence

---

111. *Id.* at 589; see also *Wheeler*, 89 N.E. at 2 (collecting cases).

112. *Wheeler*, 89 N.E. at 2.

113. IND. CONST. art. 4, § 9.

114. *Id.*

upon the occurrence of a specific set of circumstances: A session will commence at the “date, time, and place” set by a legislative council resolution that (1) finds that the Governor has declared a state of emergency with a statewide impact that requires the attention of the General Assembly and (2) lays out the “general assembly’s agenda for addressing the state of emergency.”<sup>115</sup> Nothing in this law exceeds the legislature’s constitutional power to schedule its own legislative sessions under Article 4, section 9.

The history of constitutional amendments to the General Assembly’s authority over the timing of its sessions confirms that its power to schedule its sessions is plenary. The original 1851 Constitution limited the General Assembly to biennial sessions of no more than 61 days.<sup>116</sup> In 1970, the people of Indiana amended the Constitution to remove these limitations. The 1970 amendments added that the “length and frequency of the sessions of the General Assembly shall be fixed by law.”<sup>117</sup> It also added a “schedule” stating that “[n]o regular legislative session of the General Assembly may extend beyond the 30<sup>th</sup> day of April of the year in which it is convened.”<sup>118</sup> In 1984, the people of Indiana again amended the Constitution, removing the “schedule” and the April 30<sup>th</sup> adjournment.<sup>119</sup> Now, the General Assembly has complete authority to set the rules governing the timing of its sessions.

2. *The Special Session Clause Does Not Limit the General Assembly’s Authority to Schedule its Sessions under Article 4, Section 9.*—The Special Sessions Clause does not undermine the General Assembly’s plenary power to schedule its own sessions. Article 4, section 9 empowers the Governor to call “special sessions” under certain circumstances: “[I]f, in the opinion of the Governor, the public welfare shall require it, he may, at any time by proclamation, call a special session.”<sup>120</sup> This clause grants limited legislative authority to the Governor; it does not limit the General Assembly’s express and inherent legislative authority over the scheduling of its sessions.<sup>121</sup>

The text makes this clear. Article 4, section 9 refers to the General Assembly’s power to schedule “sessions,” while Article 10, section 4 provides that “[a]n accurate statement of the receipts and expenditures of the public money, shall be published with the laws of each *regular session* of the General Assembly.”<sup>122</sup> This use of “regular session” elsewhere in the Indiana Constitution implies that the unmodified “sessions” in Article 4, section 9 refers to something encompassing more than just regular sessions. The Indiana Supreme Court drew this inference in *Woessner v. Bullock*, where it held that the term “session” in the

---

115. IND. CODE § 2-2.1-1.2-7 (2021).

116. IND. CONST. art. 4, §§ 9, 29 (1851 Constitution).

117. 1967 Ind. Acts 1387-88, 1969 Ind. Acts 1829-30.

118. *Id.*

119. IND. CONST. art. 4, § 9 (1984 Constitution).

120. IND. CONST. art. 4, § 9.

121. *See Woessner v. Bullock*, 93 N.E. 1057, 1059 (Ind. 1911) (explaining that the Special Session Clause provides the Governor “with certain legislative power”).

122. IND. CONST. art. 4, § 10.

Indiana Constitution is not limited to “regular session” unless expressly modified.<sup>123</sup>

The Constitution’s structure further demonstrates that the Special Sessions Clause does not impose a limitation on the General Assembly. The clause is found in Article 4, which details the legislature’s powers, as opposed to Article 5, which explains the executive powers. The clause also sits between two sentences granting the General Assembly the authority to set the timing, frequency, and length of legislative sessions.<sup>124</sup> Thus, the text of the Special Sessions Clause does not describe an exclusive grant of executive power to the Governor; it merely grants the Governor a limited legislative power that is defined in nature and scope.

Longstanding practice confirms this division of authority. Indiana law has long authorized the General Assembly to call “technical sessions.” Under these technical session statutes, the day for “commencing” such sessions is “appointed by law” because the statutes set out the conditions for convening technical sessions.<sup>125</sup> Moreover, technical sessions occur after the General Assembly has concluded a regular session by adjourning sine die.<sup>126</sup> The Governor’s position that the General Assembly is constitutionally limited to one regular session per year clearly contradicts these long-established laws. Because HEA 1123 simply provides when a legislative session will commence and does not limit the Governor’s ability to call a special session, it does not violate the Special Sessions Clause.

*3. HEA 1123 Does Not Violate Article 3, Section 1.*—The Governor is also wrong to suggest that HEA 1123 violates the separation of powers provision of the Indiana Constitution by encroaching on an exclusive gubernatorial power. Article 3, section 1 provides that no branch “shall exercise any of the functions of another, except as in this Constitution expressly provided.”<sup>127</sup> As stated above, HEA 1123 exercises the General Assembly’s authority to “appoint[] by law” when certain sessions will “commenc[e].” It does not authorize the legislature to exercise the functions of the executive branch.

As the Indiana Supreme Court has long held, the power to schedule legislative sessions is inherently legislative, not executive.<sup>128</sup> Although the Governor argues that the Special Session Clause empowers him with an exclusive gubernatorial authority, that clause is simply a narrow grant of legislative authority to the Governor. The clause does not “expressly provide[]” any limitation on the legislature’s session-scheduling authority, so Article 3, section 1 forecloses the Governor’s attempt to prevent the General Assembly from convening under HEA 1123.

Article 4, section 9 expressly authorizes the General Assembly to commence

---

123. 93 N.E. 1057, 1058 (Ind. 1911).

124. *See* IND. CONST. art. 4, § 9.

125. IND. CODE §§ 2-2.1-1-2.5(b), -3.5(a) (2021).

126. *Id.*

127. IND. CONST. art. 3, § 1.

128. *See* Woessner v. Bullock, 93 N.E. 1057, 1058-59 (Ind. 1911).

its sessions any day that the legislature has “appointed by law.”<sup>129</sup> This provision, standing alone, would preclude the Governor from commencing a session of the General Assembly under Article 3, and the Special Session Clause of Article 4, section 9 is merely an exception. Absent the clause, the Governor would have no authority over legislative sessions. Allowing that narrow exception to become a substantive limitation on the General Assembly’s authority to commence legislative sessions would completely undermine Article 3’s protection. Thus, HEA 1123 does not violate the separation of powers enshrined in the Indiana Constitution. In fact, it is the *Governor’s* argument, which attempts to usurp the legislature’s constitutional power, that fundamentally violates the separation of powers scheme defined in Article 3, Section 1.

#### IV. THE GOVERNOR’S COUNTERARGUMENTS FAIL

##### *A. An Attorney General Suffers No Conflict of Interest Resolving Disputes Among Clients*

Notwithstanding all these problems with his lawsuit, the Governor claims that the Attorney General was obligated to authorize outside counsel on the theory that his case presents a conflict-of-interest problem. But this is mistaken. The decision whether to authorize outside counsel rests solely with the Attorney General, even in situations where two or more state officers or agencies disagree on legal policy. As the Court recognized in *Sendak*, the statutes delineating the authority of the Attorney General “must be construed as giving the Attorney General the sole responsibility for the legal representation of the State.”<sup>130</sup>

More foundationally, there was no case in existence at the time of the Governor’s request for outside counsel to create a conflict. As noted, it is well settled that disagreement among state officials neither creates a conflict of interest nor necessitates hiring outside counsel.<sup>131</sup> Indeed, the very purpose of the Office of Attorney General is to reconcile state officials’ competing legal positions and set a single legal policy for the State as a whole.<sup>132</sup>

In *Holcomb v. Bray*, the trial court compared the Attorney General’s role to that the general counsel of Company A electing to represent both Company A and Company B in a lawsuit that pits the two companies against each other.<sup>133</sup> State

---

129. IND. CONST. art. 4, § 9.

130. State *ex rel.* *Sendak v. Marion Cnty.* Superior Ct., Room No. 2, 373 N.E.2d 145, 149 (Ind. 1978); IND. CODE § 4-6-5-3 (“No agency . . . shall have any right to . . . hire any attorney . . . without the written consent of the attorney general.”).

131. Zoeller, *supra* note 1, at 556 n.258; see also Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers’ General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 46 (2003) (explaining the greater latitude granted to state attorneys general than private attorneys).

132. *Sendak*, 373 N.E.2d at 148; see also Berenson, *supra* note 126, at 46-51 (collecting cases where a State Attorney General concurrently represented opposing state agencies in litigation).

133. Trial Court Order, *supra* note 2, ¶ 37.

agencies, however, are not mutually unrelated companies. They are part of one state government and hold to a set of common rules. If state agencies must be analogized to the private sector, they are more like separate divisions of a unified corporate entity. No one would argue, for example, that the General Counsel of General Motors suffers a conflict of interest when Buick claims a legal dispute against Cadillac such that he must authorize one or the other to hire outside counsel. Indeed, everyone would agree that his job as General Counsel is to decide whose legal position will prevail. The same is true for the Attorney General. Far from being conflicted out of resolving legal disputes among institutional clients, it is the very purpose of the Attorney General to unify, harmonize and resolve such disputes.

In *Feeney v. Commonwealth*, for example, the Supreme Judicial Court of Massachusetts upheld the Attorney General's decision to appeal a case without the consent of the agency clients he represented.<sup>134</sup> The court explained that "[t]he authority of the Attorney General, as chief law officer, to assume primary control over the conduct of litigation which involves the interests of the Commonwealth has the concomitant effect of creating a relationship with the State officers he represents that is not constrained by the parameters of the traditional attorney-client relationship."<sup>135</sup> *People ex rel. Sklodowski v. State* provides another example.<sup>136</sup> There, the Illinois Supreme Court acknowledged that the Attorney General "may represent opposing State agencies in a legal dispute . . . because the Attorney General serves the broader interests of the State rather than the particular interest of any agency."<sup>137</sup>

In fact, recognizing the unique public interest considerations implicated here, Indiana ethics rules give the Attorney General broader permission than private lawyers to represent multiple clients. The Rules of Professional Conduct expressly recognize the unique position of the Attorney General in representing multiple state entities, providing that lawyers under the Attorney General's supervision "may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority."<sup>138</sup>

The upshot is that the Attorney General's exclusive right to litigate sometimes permits him to functionally mediate intra-governmental disputes.<sup>139</sup> The agencies, lacking power to go straight to court, instead channel legal disputes

---

134. *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1267-68 (Mass. 1977).

135. *Id.* at 1266.

136. 642 N.E.2d 1180 (Ill. 1994).

137. *Id.* at 1184 (citation omitted); *see also* *EPA v. Pollution Control Bd.*, 372 N.E.2d 50, 52-53 (Ill. 1977) (explaining that a "centralized legal advisory system" under the state attorney general serves the state's interests in reducing cost to the state and ensures that the public interest would be best served by maintaining a consistent legal policy).

138. IND. RULES OF PROF'L CONDUCT ¶ 18 (2021).

139. *See* IND. CODE § 4-6-5-3 (giving the Attorney General—and not any other government agency—the right to litigate on behalf of the state).

through the Attorney General's office, which avoids costly and unnecessary litigation.<sup>140</sup> But when state officials take matters into their own hands and employ outside counsel—as the Governor recently did—the role of the Attorney General in harmonizing the legal stance of the various government agencies is undermined. The Attorney General can and should request that the unauthorized counsel be withdrawn, and Indiana law empowers the Attorney General to act in that regard.<sup>141</sup> In so doing, the Attorney General makes the lawsuit a nullity with no need for him to represent both parties at trial simultaneously. Only when courts refuse to grant the Attorney General's motion to strike unauthorized counsel is the Attorney General put in the impossible position of having to litigate for clients on opposite sides. When that happened in *Holcomb v. Bray*, we preserved the issue for appeal, but withdrew our appearances for the Governor to resolve the conflict in the litigation as it proceeded. But to be clear, we were never under a conflict of interest that required authorization of outside counsel for the Governor at the outset.

*B. Neither “Emergency” nor “Separation of Powers” Principles Excuse the Governor from Complying with Foundational Rules Governing Justiciability*

By instituting this suit contrary to foundational doctrines of standing, causes of action, and judicial authority, the Governor has requested an executive exception to those doctrines in an “emergency” or when the issue involves the separation of powers. Such requested exceptions have no basis in law or practice.

The Governor has said that the current COVID-19 emergency or the possibility of a future emergency excuse him from complying with the ordinary rules of procedure.<sup>142</sup> Common-sense weighs against permitting a Governor wholesale power to overcome procedural barriers to litigation during a declared emergency. The legislature has vested the governor with emergency powers to cope with emergency conditions.<sup>143</sup> Unsurprisingly, none of those statutory

---

140. See Zoeller, *supra* note 1, at 556 n.258 (“[A]ttorneys general play an important role in the formulating and synthesizing of legal policy for all agency clients and impose an important public check on the ability of an agency to impose its will through the courts.”). In this case, the taxpayer costs for hiring outside counsel are quantifiable: Governor Holcomb's office has signed a contract paying a law firm up to \$200,000 for challenging the constitutionality of HEA 1123. See Associated Press, *Indiana Governor's Lawyers Could Bill Nearly 200k for Suit*, U.S. NEWS (Sept. 14, 2021), <https://www.usnews.com/news/best-states/indiana/articles/2021-09-14/indiana-governors-lawyers-could-bill-nearly-200k-for-suit>.

141. See *State ex rel. Sendak v. Marion Cnty. Superior Ct.*, Room No. 2, 373 N.E.2d 145, 149 (Ind. 1978) (upholding the Attorney General's exclusive right to litigation).

142. Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment at 36, *Holcomb v. Bray*, No. 49D12-2104-PL-014068 (Marion Cnty. Super. Ct. Aug. 23, 2021). (“[T]he possibility of a constitutional crisis over the validity of HEA 1123 *during this emergency or a future emergency* is anything but ‘an academic debate or mere abstract speculation.’” (quoting *Horner v. Curry*, 125 N.E.3d 584, 589 (Ind. 2019))).

143. See, e.g., IND. CODE § 10-14-3-12(a) (2021) (providing that a state of emergency shall



powers has anything to do with litigation. When one thinks of the need for quick executive action during an emergency, one does not think in terms of the governor going to court for permission to do something.

Nor does invoking the separation of powers allow the Governor to avoid complying with doctrines that apply to everyone, including the Governor, in all other cases. The Indiana Constitution enshrines the separation of powers as a core value,<sup>144</sup> and indeed the many doctrines cited above exist precisely to protect separation of powers and interbranch comity by keeping courts out of the middle of what are essentially political disputes. No gubernatorial power permits the Governor to seek an advisory opinion from the Indiana judiciary or an injunction against another branch of government. Even assuming that the Governor is correct on the merits of his legal objection to HEA 1123, that does not entitle him to litigate in ways that other parties cannot. The theory that a separation of powers claim obviates any of the objections discussed above ultimately proves too much, as it demands that courts suspend all barriers to suit for the purpose of resolving a single disputed claim about governmental power. And that claim is not even whether the Governor has the power to do something, but whether his acknowledged power is exclusive. Nothing about that claim, or the separation of powers concerns underlying it, answers the standing, cause of action, immunity, or other standard barriers to litigation.

#### CONCLUSION

The General Assembly gave the Attorney General the statutory authority and responsibility to represent the State and its agencies in all litigation and establish a unified legal policy for the State. Included in that authority is the power to authorize outside counsel to represent an agency or official.

When the Governor requests authorization of outside counsel, comity between the Attorney General and the Governor is permissible but not required. As former Attorney General Zoeller explained, the Attorney General might authorize counsel in the appropriate case.<sup>145</sup> For example, the Attorney General may consider whether “the case falls outside of the office’s expertise” or whether the Attorney General has “previously issued an advisory opinion regarding the

---

continue until the Governor “(1) determines that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist;” and “(2) terminates the state of disaster emergency by executive order or proclamation”); *id.* § 10-14-3-12(c) (“During the continuance of any state of disaster emergency, the governor is commander-in-chief of the organized and unorganized militia and of all other forces available for emergency duty.”); *id.* § 10-14-3-12(d)(1) (providing that the Governor may “[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency if strict compliance with any of these provisions would in any way prevent, hinder, or delay necessary action in coping with the emergency”).

144. IND. CONST. art. 3, § 1.

145. Zoeller, *supra* note 1, at 551-56.

statute that could complicate its defense.”<sup>146</sup> Neither situation is presented here, of course, and regardless, Zoeller did not contend that the Attorney General is ever *required* to accede to the Governor’s demand for outside counsel. And given an Attorney General’s duties to protect the public interest and ensure a consistent State presentation of the law in court, consent for outside counsel would be especially odd when the Governor wishes to take legal positions that run contrary to the State’s legal interests.

The Governor’s challenge to HEA 1123 was not an appropriate case for the Attorney General to authorize outside counsel. The Governor’s suit against the legislature threatens foundational legal doctrines that the State has a strong interest in preserving, including standing and ripeness, legislative immunity, declaratory judgment actions, the political question doctrine, and the enrolled act doctrine, all of which protect the separation of powers. Where the Governor seeks to advance legal positions that would undermine the State’s broader legal interests, the Attorney General is fully justified by his duty to defend state interests in refusing to permit the Governor to do so. Such was the case with Governor Holcomb’s challenge to HEA 1123, which is why I refused consent for outside counsel to proceed with his challenge in court.

---

146. *Id.* at 551.