IN THE CIRCUIT COURT OF SANGAMON COUNTY, ILLINOIS
SEVENTH JUDICIAL CIRCUIT

ROD BLAGOJEVICH, Governor of the State of Illinois, in his official capacity,	)	
Plaintiff,	)	
	)	**No. 2007 MR 473**
vs.	)	
	)	**Honorable Leo Zappa**
MICHAEL J. MADIGAN, Speaker of the Illinois House of Representatives, in his official capacity,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT MICHAEL J. MADIGAN'S MOTION TO DISMISS

Defendant Michael J. Madigan, Speaker of the Illinois House of Representatives (the "Speaker"), by his undersigned attorney, Special Assistant Attorney General David W. Ellis, moves for dismissal of this action under Section 2-619.1 of the Code of Civil Procedure, providing for combined motions for dismissal under Sections 2-615 and 2-619 of the Code. In support thereof, the Speaker states as follows:

INTRODUCTION

In an unprecedented misuse of executive authority, the Governor has called the General Assembly into repeated, overlapping special sessions in the summer of 2007, often on only a few hours' notice or less, and deliberately choosing inconvenient times for such sessions, all for the apparent purpose of doing nothing more than punishing lawmakers who refused to pass his preferred legislation. The Governor took such actions despite the fact that the General Assembly was already in session on a weekly basis; despite the fact that by calling special sessions, the Governor forced the State's taxpayers to foot nearly $1 million in

per diem payments to lawmakers; and despite the fact that during all this time, the Governor never proposed any legislation of his own for any of these sessions.

Worse yet, the Governor now seeks to embroil the judiciary in his political squabbling, seeking a judicial determination that a house of the General Assembly somehow violated the Constitution by assembling a handful of hours *earlier* than he preferred during two weekend special sessions—one of which he called on only three hours' notice. The Governor also attempts to invent a fictional "duty" on the part of the Speaker to literally force a quorum of the 118 members to appear for these sessions (which 60 members, he does not say), though the Constitution does not impose any such duty on the Speaker.

If the Governor's position is correct, then this lawsuit will be just the first of an endless line. Every special session will be accompanied by a lawsuit, with a circuit judge telling both the Speaker of the House and the President of the Senate whether it was constitutionally permissible to begin a special session five minutes later than the time requested by the Governor, or two minutes earlier. This is not mere speculation. This Governor has called for 33 special sessions in five years, compared to 89 special sessions called by all other Governors who preceded him since 1818, and now he sues because, on one Saturday, the House started on his stated business too *soon*. It requires no imagination to see that the Governor is using special sessions as retributive, political tools, and that he will freely avail himself of the judicial process for that same purpose. If the Governor's position here is adopted, the judiciary will become a *de facto* supervisor of the General Assembly's procedural minutiae. It is not a role contemplated by the framers of the Constitution, and it is not a role this Court should embrace.

The Governor's mockery of governmental process notwithstanding, the Speaker is entitled to dismissal on each count of the Complaint based on justiciability grounds and on the merits. Based on the doctrines of separation of powers, mootness, and legislative immunity, this Court should decline to exercise jurisdiction over this suit. Regardless, the Complaint is completely void of merit, as the Constitution vests exclusive authority in the General Assembly to decide when to assemble, and the Constitution clearly does not impose a duty on the Speaker to force members to attend a session of the House.

RELEVANT HOUSE RULES AND PROCEDURES

The Illinois House of Representatives for the 95th General Assembly is given authority by the Illinois Constitution to "determine the rules of its proceedings." Ill. Const. 1970, Art. IV, § 6(d). Pursuant to this exclusive constitutional authority, the House has adopted Rule 29, which provides that special sessions shall be assembled at the hour of 12:30 pm on the first day of each week that the House assembles and at the hour of noon on all other days, unless otherwise ordered by the Speaker. ILL. H. RULE 29, 95TH GEN. ASSEMBLY.

Under House Rule 32(a), when a session lacks a quorum of members, the *discretion*, not obligation, lies with either the present members of the House (by majority vote) or with the Speaker to compel absent members' attendance: "a smaller number *may* … compel the attendance of absent members. The attendance of absent members *may* also be compelled by order of the Speaker." ILL. H. RULE 32(a), 95TH GEN. ASSEMBLY (emphasis supplied).

Under House Rule 51(i), a member of the House may be absent from a House session for any one of three independent reasons: if "he or she has leave or is sick or his or her absence is unavoidable." ILL. H. RULE 51(i), 95TH GEN. ASSEMBLY. The Rule does not specify who shall grant "leave" to the members (as explained below, each caucus does so; thus the

Republican Minority Leader would make such determinations for House Republicans). Nor does the Rule elaborate on what absences are considered "unavoidable." Additionally, as demonstrated below, when a leader from each side of the aisle announces absences for a given session, he or she does not distinguish among the various reasons for members' absences but simply announces them as "excused" in a general manner.[1]

FACTUAL AND LEGAL BACKGROUND

The Illinois House, which was scheduled to adjourn on May 31, 2007, proceeded into overtime session in June, 2007, as it considered and debated several issues, including comprehensive electricity rate relief, mass-transit funding, and of course the state budget. On Friday, June 29, 2007, Governor Rod Blagojevich issued a proclamation for a special session, which was documented by the Secretary of State Index Department as Proclamation 2007-228 ("Sp. Sess. Procl. 2007-228"), requesting that the General Assembly assemble on July 5, 2007 at 12:00 pm. In concert with that issuance, the Governor announced publicly that he would be forcing the General Assembly to remain in the state capital, on a daily basis, until the state's budget was passed.

The Initial Special Sessions

The first special session proclamation was surprising in at least three respects—all of which, as shown below, would become a consistent pattern. First, though the Governor was undoubtedly aware of House Rule 29, he requested a different time for the House to assemble. Second, the Governor did not propose or identify any legislation of his own for a budget. Third and even more curiously, this proclamation did *not* call on the General Assembly to pass a state budget. Rather, it called on the General Assembly "to consider any

[1] The Illinois Senate likewise gives the President discretion to compel absent members' attendance. ILL SEN. RULE 4-5 (a), 95TH GEN ASSEMBLY.

legislation, new or pending, which will address the *pension crisis*." (Sp. Sess. Procl. 2007-228, Group Exhibit A (emphasis added).) The Governor, obviously aware of the Illinois Constitution's provision regarding special sessions, presumably understood that he had to identify the purpose of that session and that "only business encompassed by such purpose … shall be transacted" during that special session. Ill. Const. 1970, Art. IV, § 5(b). Ironically, by focusing on only one piece of a budgetary issue—pension issues—the proclamation *prevented* the consideration of comprehensive budget legislation during that special session.

Regardless, Speaker Madigan called the First Special Session to order at 12:22 pm on Thursday, July 5, 2007; it was later adjourned until the following day. (Exh. A, p. 4.) That Thursday, the Governor issued a proclamation calling for a Second Special Session (Sp. Sess. Procl. 2007-229) for the following day, Friday, July 6, at 2:00 pm. (Exh. B.) Again, for no apparent reason, the time specified conflicted with the House's standing Rule 29. Oddly enough, this proclamation asked the General Assembly "to consider and discuss House Joint Resolution 1 of the 1st Special Session of the 95th General Assembly and/or Senate Joint Resolution 1 of the 1st Special Session of the 95th General Assembly." (Exh. B, pp. 1-2.) A resolution is not binding like a bill, nor did House Joint Resolution 1 purport to do anything other than declare that "a solution to this (pension) crisis must be adopted prior to adjournment of the 2007 Spring Session." (HJR 1, Ex. B, pp. 5-7.) The Governor, thus, was declaring the urgent need for the House to assemble for the sole purpose of passing a non-binding resolution. The House would have been prohibited by the Constitution from enacting comprehensive budget legislation (or for that matter, *any* legislation) during this Second Special Session. The House, after first re-assembling the First Special Session,

assembled the Second Special Session on Friday, July 6 at 4:18 pm. (Ex. B, p. 4.) Each special session was adjourned until the following day.

That same Friday, the Governor called for a Third Special Session (Sp. Sess. Procl. 2007-230) for the next day, Saturday, July 7, at 2:00 pm. (Ex. C.) This proclamation asked the legislature to "consider any legislation, new or pending, which will address the funding of the State Employees' Retirement System of Illinois." (Ex. C, p. 1.) Once more, the Governor ignored House Rule 29, offered no legislation of his own, and by the specificity of his proclamation prevented any consideration of a comprehensive budget during that session.

The Weekend of July 7-8, 2007: The Third, Fourth and Fifth Special Sessions

The House now having before it three distinct special sessions, all scheduled to be assembled or re-assembled on Saturday, July 7, Speaker Madigan exercised his discretion under House Rule 29 to assemble the House at the hour of 10:00 am on Saturday and to proceed, in sequential order, with each special session called. The Speaker made no secret of this decision. In fact, the Speaker sent a letter to the Governor, notifying him of the time of special session and inviting both the Governor and the Executive Secretary of the State Employees' Retirement System ("SERS")—the subject of the Third Special Session—to testify before the full House in a rare Committee of the Whole, so that the entire House could consider the issue in an expedited manner. (Ex. D.) The Speaker also promised the Governor that the House would "take a roll call vote on any legislation relevant to the purpose of Saturday's special session that [the Governor] would like to offer." (*Id*.)

Later, after the Governor complained of the Speaker's scheduling decision, the Speaker would explain on the House floor that, among the factors that entered into his scheduling decision was the uniqueness of a weekend schedule:

> I believe that Members should have the opportunity to return to their districts and their families and constituents at a reasonable time on Saturday and for a portion of the day on Sunday for as many members who wish to attend religious services with their families on Saturday evening or Sunday morning. Second, members should have at least this minimal opportunity to meet with constituents to discuss the state of the budget and other Special Session matters. Finally, while we are willing to meet on a daily basis to consider Special Session issues, it is possible to do so while still giving Members a brief window of time on the weekend to see their families and to attend to their affairs at home.

(Ex. E, Tr. 7/12/07, H. Rep., 95th Gen. Assembly at p. 9 (statement of Speaker Madigan).)

On that Saturday, July 7, consistent with his letter to the Governor from the previous day, after assembling and adjourning the First and Second Special Sessions, the Speaker called to order the Third Special Session at the hour of 10:17 am. (Ex. C, p. 3.) The Governor's floor leader, Rep. Jay Hoffman, objected to the assembling of the special session at that time, rather than at 2:00 pm. (Ex. F, Tr. 7/7/07, House of Rep., 95th Gen. Assembly, at pp. 1-2 (statement of Rep. Hoffman).) Rep. Hoffman raised the specter that House members might be made to remain in the capital by force:

> I don't believe us doing this today [assembling the session earlier than 2:00 pm] will end this issue at 10:00 this morning. So, you may not like me for saying this, but think about sticking around.

(*Id*. at p. 5.) Representative Hoffman was joined by absolutely no other representative on this point of order. To the contrary, a number of members rose to oppose Rep. Hoffman, at least one of whom took his comments as a threat to use the State Police to forcibly hold the members in the capitol building. (*Id*. at pp. 13, 17 (statements of Rep. Lang).) Following Representative Hoffman's comments, and at the request of several House members, the Speaker later asked the House Parliamentarian to comment on the Governor's authority to use the State Police to forcibly detain members of the General Assembly. (Ex. F, p. 68.)

Notably, the Governor declined the Speaker's invitation to testify before the full House on SERS funding that Saturday. Nor did he present his Executive Secretary as requested; in fact, members of the House were advised that the Governor had ordered the Secretary and other staff *not* to attend the Third Special Session at 10:00 am. (*Id*. at pp. 24-25 (statement of Speaker Madigan), 29 (statement of Rep. Lang), 38 (statement of Rep. Black).) Nor did the Governor offer any legislation at that special session, despite the Speaker's offer to consider it immediately and call it for a vote.

The Governor did find time that morning, however, to issue yet another proclamation for that same day. At the hour of 11:00 am, while the House was in the midst of the third and final special session, the House received a call for a Fourth Special Session (Sp. Sess. Procl. 2007-232) *that very same day*, for the hour of 2:30 pm. The Governor proclaimed the need for the General Assembly, on just three hours' notice, to consider the issue of "the budget of the Department of Healthcare and Family Services for the Child Support Administrative Fund for fiscal year 2008." (Ex. G.) The Governor offered no witnesses, no legislation, and no reason for this incredibly short notice. He did not explain, for example, why he chose 2:30 pm for that special session when he knew the House was in session at the time he issued the proclamation—in other words, he did not explain why it was urgent enough a matter to be scheduled for 2:30 pm but not so urgent to be considered immediately.[2]

Members of the House indicated that they had no intention of staying in the capital to attend the Fourth Special Session at the time requested by the Governor, 2:30 pm. (Ex. F at

[2] Rep. Jerry Mitchell informed the body that the Governor's staff was poised outside the House chamber with copies of the Fourth Special Session proclamation. He related that, having just left the chamber momentarily—with "no intention of jumping in my car and racing out of the city as the Governor's staff thought I was going to"—he was stopped by a member of the Governor's staff and handed a copy of the Fourth Special Session proclamation. (Ex. F, Tr. 7/7/07, House of Rep., 95th Gen. Assembly, at p. 19 (statements of Rep. J. Mitchell).)

pp. 29 (statement of Rep. Mulligan), 37 (statement of Rep. Black).) Having had practically no lead time whatsoever, no proffered legislation, no known witnesses to supply any information to the House on this subject, and the clear likelihood that representatives would not stay until 2:30 pm on Saturday for what could only be described, under the circumstances, as a meaningless exercise, the Speaker again employed his discretion to call the Fourth Special Session to order immediately after adjourning the Third, at the hour of 11:36 am. (Ex. G, p. 3.) The House adjourned the Fourth Special Session at 11:50 am, with the Speaker directing the House to re-assemble at the hour of 5:00 pm on Sunday, July 8, for all existing special sessions and any new ones the Governor might call. (Ex. F, p. 68.)

That next day, Sunday, July 8—the day the House was scheduled to re-assemble all existing special sessions at 5:00 pm—the House Clerk received notice at 3:45 pm of a Fifth Special Session (Sp. Sess. Procl. 2007-234) that called for the House to assemble at *4:00 pm* on Sunday—only *15 minutes later*. This proclamation called for consideration of "the funding of the Teachers' Retirement System and the Judges' Retirement System." (Ex. H.) At the risk of gross repetition, it is notable again that the Governor offered no legislation of his own, ignored House Rule 29, and actually *prevented* consideration of comprehensive budget legislation by focusing on micro-issues. Nor did the Governor explain what purpose it served to consciously select a time for special session that he knew was one hour *earlier* than the time the Speaker had already set for meeting on the current special sessions, and which the House received on Sunday with only 15 minutes' lead time.

The House came to order on Sunday, July 8 at 5:05 pm, calling each special session in sequential order and assembling the Fifth Special Session at the hour of 5:19 pm. (Ex. H, p. 5.) That Sunday evening, at 4:30 pm, the House received notice of the Governor's call for

a Sixth Special Session (Sp. Sess. Procl. 2007-235) for the next day, Monday, July 9 at 1:00 pm. (Ex. I.) That proclamation requested consideration of "funding of the State University Retirement System as well as funding for the remainder of Fiscal Year 2008 for grants administered by the Department of Healthcare and Family Services to provide assistance to sexual assault victims and for sexual assault prevention activities." (*Id*.)

The Sixth, Seventh and Eighth Special Sessions

After first re-assembling and adjourning the first five special sessions, the House called the Sixth Special Session to order at 12:58 pm on Monday, July 9, 2007. (Ex. I, p. 4.) At 3:30 pm that day, the House received notice of the Seventh Special Session (Sp. Sess. Procl. 2007-236) for the next day, Tuesday, July 10, at 1:00 pm to address "the budget of the Department of Healthcare and Family Services for the Supporting Living Program for Fiscal Year 2008." (Ex. J.) On that Tuesday, July 10, after re-assembling the First through Sixth Special Sessions—which included a Committee of the Whole hearing regarding the Sixth Special Session—the Speaker called the Seventh Special Session to order at 3:11 pm. (Ex. J, p. 4.) That same day, the House received a proclamation for the Eighth Special Session (Sp. Sess. Procl. 2007-237) for the next day, Wednesday, July 11, at 2:00 pm. Notably, that proclamation *did not relate, in any way, to budgetary concerns*—it called for consideration of Senate Bill 1007, which banned certain ammunition feeding devices in assault weapons. (Ex. K.) In an effort to give this proclamation the appearance of being budget-related, rather than a mere strong-arm tactic to keep legislators in Springfield, the proclamation, sounding more like a call for a discussion group than an assembly of legislators, called on the legislature "to consider and discuss Senate Bill 1007 as well as the impact of assault weapons violence on the State's health care expenditures and general fiscal health." (*Id*.) On that

Wednesday, the House, after re-assembling the first seven special sessions, assembled for the Eighth Special Session at 3:52 pm. (Ex. K, p. 5.)

The Ninth and Tenth Special Sessions

The House re-assembled all eight existing special sessions over the ensuing days, from Thursday, July 12 through Saturday, July 14; from Monday, July 16 through Friday, July 20; and from Monday, July 23 through Saturday, July 28. At no time during this period did the Governor proffer any legislation relating to any of these special sessions.

In the last week of July, the four legislative leaders made considerable progress toward a full-year budget for Fiscal Year 2008. The Governor, obviously resistant to this development, issued a proclamation for the Ninth Special Session (Sp. Sess. Procl. 2007-243) for Saturday, July 28, at 9:00 am to consider a "*temporary, one-month budget* to provide spending authority to State departments, authorities, and public agencies through August 31, 2007." (Ex. L (emphasis supplied).) Though the House was poised, only days later, to pass a bill to the Senate for the full-year budget, the House assembled the Ninth Special Session—after first re-assembling the other eight—on Saturday, July 28 at 9:15 am. (Ex. L, p. 4.) That same Saturday, the Governor then called for a Tenth Special Session (Sp. Sess. Procl. 2007-259) for Monday, July 30, at 2:00 pm on an almost identical subject matter as the Ninth—a one-month budget—but to make it appear non-repetitive, it included the additional language "to consider any legislation, new or pending, which will address funding for the Department of Healthcare and Family Services' State Hemophilia Program." (Ex. M.) The House assembled the Tenth Special Session that Monday at 2:01 pm and lacked a quorum. (Ex. M, p. 3.) After re-assembling the other nine special sessions, the House again called to order the

Tenth, this time with a quorum. (*Id*.) The House re-assembled all ten special sessions on July 31 as well.

The House and Senate Pass A Full-Year Budget;
The Governor Continues Calls For One-Month Budgets

On August 1, 2007, as part of an agreement struck between the House and Senate, the House passed House Bill 3866 as a "vehicle bill" for use by the Senate. The bill was read by title for the first time in the Senate on August 1 and for a second time on August 2. The bill was moved to third reading in the Senate on August 3, 2007.[3] On that day, the Governor tried again, calling for the Eleventh Special Session (Sp. Sess. Procl. 2007-260) for Saturday, August 4, 2007 at 9:00 am. (Ex. N.) Like the Ninth and Tenth, the Eleventh's proclamation used the identical "one-month budget" language but with additional wording to make it appear non-redundant, this time calling for consideration of "funding for the Department of Healthcare and Family Services' State Chronic Renal Disease Program." (*Id*.) He also issued a call for a Twelfth Special Session (Sp. Sess. Procl. 2007-261) for Sunday, August 5, 2007, again calling for a "one-month budget" and adding consideration of "funding for the Department of Healthcare and Family Services' Home Health Agency services." (Ex. O.)

On Saturday, August 4, the House re-assembled the First through Tenth Special Sessions and then the Eleventh. (Ex. N.) The House counted 54 members present, short of the 60-person quorum. (*Id*., p. 3.) On Sunday, August 5, the House re-assembled all eleven existing special sessions and then the Twelfth, with 47 members present. (Ex. O, p. 5.) The House re-assembled all twelve special sessions on Monday, August 6, with a quorum of 99

[3] *See* the General Assembly website, Bill Status of House Bill 3866, at: http://www.ilga.gov/legislation/billstatus.asp?DocNum=3866&GAID=9&GA=95&DocTypeID=HB&LegID=32916&SessionID=51.

members for each one, and continued to meet that week on all special sessions on a daily basis, through Friday, August 10.

On that Friday, August 10, the Senate passed House Bill 3866 back to the House with the agreed-upon budget language contained therein. That same day, the House adopted the Senate's changes to House Bill 3866, sending a full-year budget to the Governor.[4]

Notwithstanding the passage of a full-year budget by both houses, the Governor, that Friday, called for a Thirteenth Special Session (Sp. Sess. Procl. 2007-264) for the next day, Saturday, August 11, at 9:00 am, for the *fifth time* asking for a "one-month budget" and this time adding a request to consider "funding for the Department of Public Health's Community Health Centers." (Ex. P.) The Governor also issued a call for a Fourteenth Special Session (Sp. Sess. Procl. 2007-265) for Sunday, August 12 at 5:00 pm for the "one-month budget" and an additional request for "funding for the Local Health Protection Grant Program within the Department of Public Health." (Ex. Q.)

The Speaker, on the House floor on Friday, August 10, told the members that, in his opinion, there was "no need to work on a 30-day budget" because the House and Senate had already passed a full-year budget. The Speaker further stated that his "*advice*" to members was that they did not need to attend these special sessions. (Ex. R, Tr. 8/10/07, House of Rep., 95th Gen. Assembly, at 41 (statement of Speaker Madigan) (emphasis supplied).) He assured the members that the House would, in fact, assemble for those weekend special sessions, which would be presided over by Assistant Majority Leader Gary Hannig. (*Id*.) The Saturday, August 11 special sessions (all existing special sessions and the new Thirteenth) were attended by 14 representatives; the Sunday sessions (including the new

[4] *See* the General Assembly website, Bill Status of House Bill 3866, at: http://www.ilga.gov/legislation/billstatus.asp?DocNum=3866&GAID=9&GA=95&DocTypeID=HB&LegID=32916&SessionID=51.

Fourteenth) by six. (Ex. P, p.3; Ex. Q, p. 3.) Despite the fact that House Rule 32(a) permits the members present the discretion to move the body to compel the attendance of absent members, none of the present representatives—including the Governor's floor leader, Rep. Hoffman—made such a motion. (Ex. P, pp. 4-7; Ex. Q, pp. 4-6.)

The Governor was not done, however. On Sunday, August 12, at 4:30 pm, the House Clerk received notice that the Governor had issued yet another proclamation, for a Fifteenth Special Session (Sp. Sess. Procl. 2007-266), that was to take place *forty-five minutes later*, at 5:15 pm on Sunday. This proclamation requested that the legislature "consider funding for the Regional Transportation Authority, the Chicago Transit Authority, and downstate public transportation." (Ex. S.) On forty-five minutes' notice, the House assembled the Fifteenth Special Session, though it lacked a quorum with only six members. (Ex. S.) On Monday, August 13, at 8:35 am, the House received notice of another, duplicative proclamation for the Sixteenth Special Session (Sp. Sess. Procl. 2007-267) to "consider funding for the CTA." (Ex. T.) The House received less than six hours' notice of this proclamation, which asked the legislature to assemble at 2:15 pm that same day. (*Id.*) The House assembled all sixteen special sessions that afternoon, including the Sixteenth at 2:21 pm, with only six representatives in attendance. (*Id.*, p. 3.) Again, neither the Governor's floor leader nor any other present representative moved, under House Rule 32(a), to compel absent members.

On Tuesday, September 4, 2007, the House assembled all special sessions with a quorum, including the Thirteenth through Sixteenth Special Sessions, which had a quorum for the first time. (Ex. U.) During regular session that day, the House called Senate Bill 572, regarding mass-transit funding for the RTA, CTA, and downstate transit districts, though the bill failed to achieve a supermajority. (Ex. U.) Thus, as of that date, *all special sessions had*

been assembled with a quorum. Moreover, the House, to this day, continues to meet in perfunctory session for each of these special sessions on every weekday.[5]

ARGUMENT

Despite all of the accommodations the House has made for the Governor's special session calls, none of which could have resulted in the passage of a comprehensive budget bill, many of which were duplicative, many of which were received with only a few hours' notice (in two instances less than an hour), and for none of which did the Governor sponsor any legislation of his own, the Governor now sues the Speaker because the House started two of the special sessions a few hours *earlier* than the Governor would prefer. The Governor is actually taking up this Court's time with a complaint that the House acted on his supposedly urgent business *too urgently*.

As an initial matter, the Complaint should be dismissed for failure to name a necessary party to this suit—the Illinois Senate President. The Senate would be equally affected by the disposition of this lawsuit, and any order entered in the absence of the Senate President would be void. Moreover, on several different grounds, this matter is not justiciable. First, under the "political question" doctrine, the Court should decline to intervene in legislative decisions regarding the scheduling of sessions and the compelling of members' attendance out of respect for a co-equal branch of government and because the Court lacks any manageable standards for reviewing these procedural decisions. In addition, the Illinois Constitution provides the Speaker with absolute legislative immunity here, in that his challenged actions took place in the scope of legitimate legislative business. Finally, this matter is moot. The session that the Governor claims was assembled "too early" occurred

[5] As a demonstrative exhibit, attached to this Memorandum is a calendar of special sessions in 2007, including when they were called and when they were assembled in the House.

over two months ago, and the House has continuously scheduled that special session since that time. And every special session the Governor has called has been assembled with a quorum, which the Governor mistakenly claims is constitutionally required. The Court would be issuing nothing but an advisory opinion.

In any event, the Governor is wrong on the merits. The Constitution, which mandates the separation of powers among the three branches of government, provides the House with the exclusive prerogative to determine its own procedural rules. The Constitution says nothing about gubernatorial authority to dictate the precise timing of a special session. Neither does the state's Special Session Act; and even if it did, a *statutory* requirement could not override the House's *constitutional* authority to set its own procedural rules. Nor is there any merit whatsoever in the Governor's claim that the Constitution requires the House to assemble its special sessions with a quorum of its members. The Constitution does not remotely hint at such a requirement, a procedural detail assigned to the House's exclusive prerogative. Moreover, under parliamentary authority relied upon by the Supreme Court, the House "convenes" whenever it is called to order, irrespective of whether a quorum is present.

This Court should dismiss the Complaint for failing to include the Senate President, decline jurisdiction over this action for the reasons given, and in any event, dismiss the matter with prejudice on the merits.

Motion For Dismissal Pursuant To Section 2-615

The Complaint Should Be Dismissed For Failure to Name All Necessary Parties.

For whatever reason, the Governor, in seeking a declaration of the constitutional boundaries between the Governor and the General Assembly, has sued only *one-half* of the General Assembly. The Senate President is a necessary party-defendant to this lawsuit.

The Governor, like any other plaintiff in Illinois, is required to name all necessary and indispensable parties to a lawsuit, and any order entered by a court in the absence of a necessary party is without jurisdiction and, therefore, null and void. *Lain v. Hancock Mut. Life Ins. Co.*, 79 Ill. App. 3d 264, 269, 398 N.E.2d 278, 283 (1st Dist. 1979). Here, the Governor seeks an adjudication of his constitutional authority to compel the General Assembly to schedule special sessions at the time he dictates, and to do so with a quorum of its members present. The General Assembly obviously includes not only the House but the Senate, a co-equal chamber of the General Assembly. Ill. Const. 1970, Art. IV, § 1. Any judgment by this Court, adjudicating the constitutional boundaries between the Governor and the legislature, will obviously impact the Senate as much as the House. Because the Senate President is a necessary party to this lawsuit, and any order entered in his absence would be void, the Complaint should be dismissed.

A necessary party is one whose presence is required for any one of the following reasons: (1) to protect an interest in the subject matter of the controversy which would be materially affected by a judgment entered in his or her absence; (2) to reach a decision which will protect the interests of those before the court; *or* (3) to enable the court to make a complete determination of the controversy. 735 ILCS 5/2-405; *Elliott v. Chicago Title Ins. Co.*, 123 Ill. App. 3d 226, 231, 462 N.E.2d 640, 644 (1st Dist. 1984). In other words, "persons whose interests will necessarily be affected by any decree that may be rendered are necessary and indispensable parties." *Lain*, 79 Ill. App. 3d at 269, 398 N.E.2d at 283. Though only one of the three requirements need be satisfied, here the Senate President is a necessary party under any of the three tests.

First, the Senate President's interests would be materially and necessarily affected by this Court's ruling. One issue presented here is whether the power to set the special session schedule for the General Assembly rests with the Governor or the General Assembly. Needless to say, there is no constitutional, legal or logical basis to differentiate the House from the Senate regarding this power. Nor is the so-called "duty" to assemble a quorum of members an allegation that would be unique to the House; it would obviously apply to the Senate as well. Indeed, on each of the days that the Governor complains the House lacked a quorum, *the Senate lacked a quorum as well.* As a result, the Senate President has an interest that will be materially affected by the Court's judgment. The first basis for requiring the Senate is satisfied, which is all this Court requires.[6]

The second and third requirements are likewise met. The interests of the House are intertwined with those of the Senate. A complete determination of this controversy—the constitutional boundaries between the Governor and the General Assembly—would be simply impossible when one-half of the General Assembly is absent. Requiring the Senate President's inclusion is therefore necessary both for a complete determination of the matter and to protect the House's interests, which are in fact those of the Senate, too. The Complaint should be dismissed for failing to name the Senate President as a defendant.

Motion for Dismissal Under Section 2-619

I. THIS CASE IS NOT JUSTICIABLE

A. The Case Presents Nonjusticiable Political Questions.

The Illinois Constitution requires a separation of powers among the three branches of government. Ill. Const. 1970, Art. II, § 1. Arising out of the separation of powers principle

[6] On the days the House lacked a quorum, so too did the Senate. *See* Ex. W, Certification from Secretary of the Senate.

is the "political question" doctrine, under which Illinois courts will refrain from exercising jurisdiction in cases where the court lacks "judicially discoverable and manageable standards for resolving the question" or where, for policy reasons, the judiciary commits the issue to the other branches of government. *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 28, 672 N.E.2d 1178, 1191 (1996) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). A related basis for declining jurisdiction in such instances is "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. Whether expressed as a lack of judicially manageable standards or the importance of respecting a coordinate branch of government, both of which apply here, the political question doctrine bars this lawsuit, where the Governor challenges the Speaker's discretionary actions in scheduling special sessions and in deciding whether to compel absent House members to attend session to secure a quorum.

The Illinois Constitution provides that each house of the General Assembly has the exclusive right "to determine the rules of its proceedings." Ill. Const. 1970, Art. IV, § 6(d). Each of the Speaker's challenged actions were undertaken pursuant to authority granted him by the Rules of the Illinois House of Representatives for the 95th General Assembly. Namely, House Rule 29 gives the Speaker discretion to alter the time for scheduling special sessions, which shall convene at 12:30 pm on the first day of the week and at noon on every day "[u]nless otherwise ordered by the Speaker." ILL. H. RULE 29, 95TH GEN. ASSEMBLY. House Rules 32(a) and 51(i) grant the Speaker the *discretion*, not the obligation, to compel members to attend session in the absence of a quorum and to grant members leave to be absent. ILL. H. RULE 32(a), 51(i), 95TH GEN. ASSEMBLY.

By this action, the Governor asks the judiciary to intervene in the internal affairs of the Illinois House (and Senate) and to direct legislative leaders in the details of their bodies' legislative business. This Court should decline to do so, as it lacks manageable standards for judging the leaders' exercise of discretion and because doing so would trample on an area reserved exclusively to the legislative prerogative by the Constitution.

In *Edgar*, the Illinois Supreme Court declined to hear a dispute over the guarantee of a "high quality" education under the Illinois Constitution because it had no reliable criteria for doing so and because public policy dictated that such decisions be left to the legislative branch. *Edgar*, 174 Ill. 2d at 26-27, 672 N.E.2d at 1190. Thus, though a constitutional right was at stake, the Court declined to enter into the political thicket of defining and balancing the various factors that would render an education "high quality." That sentiment applies with even greater force here, where the Governor asks this Court to sit as a micro-manager of legislative procedure.

In other contexts, as well, the Supreme Court has declined to review or compel legislative actions, based on the doctrine of separation of powers, *even where it was undisputed that the General Assembly had violated an express constitutional mandate*. For example, the Supreme Court has repeatedly held that it would not consider challenges to legislation that was not "read by title on three different days in each house," as required by the Illinois Constitution. *See* Ill. Const. 1970, Art. IV, § 8(d). The Court reasoned that whether or not a bill has been read by title three times "seems fairly characterized as a procedural matter, the determination of which was deliberately left to the presiding officers of the two Houses of the General Assembly." *Fuehrmeyer v. City of Chicago*, 57 Ill. 2d 193, 198, 311 N.E.2d 116, 119 (1974). Even when it was *conceded* that the General Assembly

had violated the three-readings rule, the Court refused to recede from this position because "the doctrine of separation of powers [was] more compelling" than the need to correct the violation. *Geja's Café v. Metropolitan Pier and Exposition Authority*, 153 Ill. 2d 239, 260, 606 N.E.2d 1212, 1221 (1992). *See also Cutinello v. Whitley*, 161 Ill. 2d 409, 425, 641 N.E.2d 360, 367 (1994) (declining to review a three-readings violation because "judicial review of legislative procedure would raise a substantial separation of powers concern"). The Court has made clear that it will not review any procedural mandates to be performed by the General Assembly, as opposed to substantive limitations such as the single-subject provision. *Benjamin v. Devon Bank*, 68 Ill. 2d 142, 146-47, 368 N.E.2d 878, 880 (1977). It is difficult to imagine any task more "procedural" in nature than determining when to schedule a session, or whether to compel absent members to attend session to obtain a quorum.

Consistent with these cases, the Illinois Supreme Court's reasoning in *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208, 390 N.E.2d 847 (1979), explained the difference in judicial review between *substantive limitations* on legislative power versus *procedural mandates*:

> Under traditional constitutional theory, the basic sovereign power of the State resides in the legislature. Therefore, there is no need to grant power to the legislature. All that needs to be done is to pass such limitations as are desired on the legislature's otherwise unlimited power. Thus, limitations written into the Constitution are restrictions on legislative power and are enforceable by the courts. On the other hand, *constitutional directives to the legislature are considered as mandates to the legislature to act, and it is generally held that the courts are powerless to enforce them*.

Id. at 215, 390 N.E.2d at 850 (emphasis supplied). Obvious examples of constitutional limitations on legislative power, subject to judicial review, include provisions protecting freedom of speech or religion, *see* Ill. Const. 1970, Art. I, §§ 3, 4, or, as held in *Benjamin*, the

provision that appropriations bills may not contain any non-appropriations language. *See Benjamin*, 68 Ill. 2d at 147, 368 N.E.2d at 880-81 (holding that the constitutional provision regarding appropriations bills "is not a procedural requirement, but a constitutional limitation subject to judicial review.") (emphasis supplied). Though there is nothing in the Constitution that remotely hints that the General Assembly must meet in special session at the precise time called for by the Governor, nor is there any constitutional provision requiring that it must do so with a quorum present, there can be no question that any such "requirement" would have to be viewed as a procedural directive, and not a substantive limitation on legislative power. Thus, even if such "requirements" existed, they would not be subject to judicial review out of respect for the separation of powers.

Similarly, in *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557 (1923), the Illinois Supreme Court refused to compel the General Assembly to assemble for the purpose of passing a legislative redistricting law, despite the fact that twenty years had passed since the previous enactment and notwithstanding the clear *violation* of an explicit constitutional command that "[t]he General Assembly shall apportion the state every ten years." Ill. Const. 1870, Art. IV, § 6. Based on the principle of separation of powers, the Court was unwilling to compel the General Assembly to act even when that legislative body had a clear constitutional obligation to do so, because the Constitution left that obligation solely to the General Assembly. Similarly, here the Governor seeks to compel the House to assemble session in concert (or so he claims) with a constitutional provision. As in *Fergus*, this Court should decline to enter

into the legislative procedural arena, regardless of whether a constitutional provision has been breached.[7]

A number of other courts, applying the political question doctrine, have refused to review challenges to the internal operations of a state legislature. The Arizona Supreme Court refused to review the state Senate's procedures and scheduling of impeachment proceedings: "We will not tell the legislature when to meet, what its agenda should be, what it should submit to the people, what bills it may draft or what language it may use." *Mecham v. Gordon*, 751 P.2d 957, 962 (Ariz. 1988). Alaska's Supreme Court, declining to review the House Speaker's claim that he was removed from his position in violation of the constitution and statutes, wrote: "we can think of few actions which would be more intrusive into the legislative process than for a court to function as a sort of super parliamentarian to decide the varied and often obscure points of parliamentary law which may be raised in the course of a legislative day." *Malone v. Meekins*, 650 P.2d 351, 359 (Alaska 1983).

A Tennessee court refused to review its legislature's decision to close its session to the public, finding a political question because the judiciary was singularly unqualified, and lacking in manageable standards, to do so. *Mayhew v. Wilder*, 46 S.W.3d 760, 774 (Tenn. App. 2001). Refusing to act as a "super senate," a Louisiana court would not entertain a constitutional challenge to the Louisiana Senate President's ruling that certain pre-filed legislation was ineligible for passage. *Brinkhaus v. Senate*, 655 So. 2d 394, 398 (La. App. 1995). Similarly, the Florida Supreme Court refused to review a claim that its legislature's secret meetings violated both the Florida Constitution and the House and Senate's own internal rules requiring open meetings: "Just as the legislature may not invade our province

[7] While *Fergus* construed the 1870 Constitution, the Supreme Court has relied on that case in interpreting the 1970 Constitution, which incorporated these same separation-of-powers principles. *People ex rel. Hansen v. Phelan*, 158 Ill.2d 445, 451, 634 N.E.2d 739, 742 (1994).

of procedural rulemaking for the court system, we may not invade the legislature's province of internal procedural rulemaking." *Moffit v. Willis*, 459 So. 2d 1018, 1022 (Fla. 1984). The Ohio Supreme Court held that a challenge to the Ohio House Speaker's interpretation of procedural rules, allegedly in violation of the constitution, was not justiciable because procedural rules were committed to the legislature's discretion. *State v. Davidson*, 716 N.E.2d 704, 709 (Ohio 1999).

In another case with particularly apt reasoning, a federal court considered a challenge to the Arizona House Speaker's stacking of committees with members of his own political party. *Davids v. Akers*, 549 F.2d 120 (9th Cir. 1977). Plaintiffs claimed that the disproportionate assignment of one political party to the committees violated one-person, one-vote principles and the First Amendment. The court ruled that a "judicially discoverable and manageable standard cannot be found," *id*. at 125, adding:

> To us, the picture of a Federal Judge undertaking to tell the Speaker of the Arizona House of Representatives how many Democrats, and perhaps even which Democrats, he is to appoint to the standing committees, and perhaps to each such committee, of the House is startlingly unattractive. *** The principle that such procedures are for the House itself to decide is as old as the British Parliament. *** It is embodied in the Constitution of Arizona: "Each house to determine rules of its proceedings."

Id. at 123.

Here, this Court is asked to supervise the Speaker's determinations of (1) when to schedule special sessions and (2) whether to compel a 60-member quorum for special sessions. Putting aside that the Constitution imposes no requirement on the Speaker with regard to either of these procedural tasks, and in fact specifically confers exclusive jurisdiction in the House as to each matter, the fact remains that forcing this Court to police

the Speaker's decisions would not only show remarkable disrespect for the legislative branch but would entangle the judiciary in the minutiae of legislative procedure.

Regarding the so-called "duty" to assemble a quorum, to paraphrase the court in *Davids* above, this Court should find it "startlingly unattractive" to tell the Speaker "how many Democrats, and perhaps even which Democrats," as well as how many Republicans and which Republicans, he should compel for the purpose of reaching a quorum of sixty representatives, and which he should determine are eligible to be absent, pursuant to House Rules 32(a) and 51(i). *Davids*, 549 F.2d at 123. Must the Speaker try for an even split among Democrats and Republicans? Should the Speaker try to pick and choose among members to ensure representation from all parts of the state? Should he compel members who live closer to the capital but not those from the far north and south? What would be an excusable reason for a member's absence? Important business? Chemotherapy? Religious observation? Inclement weather? Car trouble? What if members are "sick" or "unavailable," which are bases for absence from session under House Rule 51(i)? Will a judge second-guess the Speaker over whether a member is "sick enough?" Will a judge tell the Speaker and Minority Leader how to interpret the word "unavailable?" A court would have no manageable standards to review legislative discretion with regard to the individual circumstances of 118 different State Representatives, nor should this Court willingly enter into such a political thicket out of respect for a coordinate branch of government.

Still further complicating matters is the fact that House Rule 32(a) gives not only the Speaker, but also the House as a body, the authority to compel absent members' attendance. When a quorum is lacking for a session of the House, the present members have the discretion to move the body to compel the attendance of absent members, independently of

any action the Speaker might take. ILL. H. RULE 32(a), 95TH GEN. ASSEMBLY. Thus, if this Court were to determine that a "duty" existed to establish a quorum for special sessions, there is no logical reason why that "obligation" should not reside equally with each member present at such a session, any one of whom may make a motion asking the body to compel absent members. The notion of a circuit judge hauling into court dozens of legislators, quizzing each of them on the reason they chose *not* to move to compel absent members (or why they voted against such a motion), or issuing an injunction ordering them to do so, should strike even the Governor as a violent intrusion into the legislative sphere.

Moreover, it has long been the custom and practice of the House that each caucus is responsible for announcing attendance for its respective members. The Speaker has delegated the authority over Republican attendance under Rule 51(i) to the House Republicans. In each session of the House, including special sessions, one of the first orders of business is to hear from one Democrat (typically Majority Leader Barbara Flynn Currie) and one Republican (typically Rep. Michael Bost) to announce which members will be excused. (*See, e.g.*, Ex. O, p. 6.) And when the respective leaders make such announcements, they do not break out absences into the categories of absence due to "leave," absence due to "sickness," or otherwise "unavoidable" absences; rather, they simply announce these members as "excused." (*Id*.) This Court, in determining whether the House has properly exercised its discretion with regard to absent members, therefore would have to review the actions of leaders from both caucuses with regard to all three categories of basis for absence. Among many other dilemmas, one wonders how a circuit judge would divide up the proportion of absent members between the two political parties in order to reach a 60-member quorum. Would Minority Leader Cross be responsible for half the members needed

for a quorum, and Speaker Madigan for the other half? How would a court prioritize between "sick" members and those granted leave for other reasons?

The Court would find itself in equally murky waters regarding the supposed "duty" to comply with the Governor's desired time for special sessions. The more difficult question facing this Court (and an endless number of courts in the future, if the Governor has his way) is what would constitute "compliance" with the Governor's proclamation. Surely not even the Governor would argue that the Constitution is violated unless the House meets at the *precise* minute and second specified in a proclamation; no body of 118 legislators could be assembled with such surgical precision. Judges forevermore would have to decide what deviation from the precise minute and time stated in the proclamation would be "close enough" to avoid a constitutional violation. Must the House meet within five minutes of the Governor's requested time? Five hours? Some time that same day? A reasonably proximate time? Must the House make a good-faith effort? Substantially comply? Is it acceptable to meet eight hours later than the time requested but not three hours *earlier*?

And what if the House has only received the proclamation with less than one hour's notice (as happened with the Fifth and Fifteenth Special Session proclamations here)? How much notice is sufficient to then hold the House liable for not complying with the Governor's requested time? Is three hours' notice enough? One day? Will it depend on whether the legislators are currently in town or in summer recess when the proclamation is issued?

There are obviously a myriad of concerns that necessarily factor into the scheduling and ultimate assembling of a body of 118 State Representatives. The Speaker might choose to assemble a session based on how quickly he believes he can obtain a quorum. The Speaker could choose, as he did on Saturday, July 7, to start a special session a few hours

early because he already had a quorum assembled on other business and, on a Saturday morning, feared that he would lose his quorum if he made them wait for several hours for the special session's requested hour. The Speaker might reason that, in light of a very short notice of Special Session (such as the three-hour notice of the Fourth Special Session on Saturday, July 7), no legislation drafted, and no witnesses scheduled for any testimony, that meeting at the Governor's requested time would be a functionally meaningless exercise. Indeed, the notice of the special session could be so short that the Speaker does not even *know* of it in time, in which case it might not even be *possible* to schedule the special session consistent with the Governor's requested time. Similarly, a special session proclamation could be issued while the members are away on adjournment (as happened here), and it is literally impossible for them to return in time. And this is to say nothing of the difficulty in scheduling where, as here, the Governor has piled one special session on top of another, forcing the House to juggle a docket that grows by the day. All of this, plus the individual circumstances of 118 legislators, are only the beginning of an endless list of scenarios.

This is not hyperbole or fantasy. It requires little creativity, considering the facts of this case, to believe that the Governor will play games with his proclamations for no reason other than to entrap the Speaker into a constitutional controversy. The House received one special session proclamation on 15 minutes' notice (the Fifth), one on 45 minutes' notice (the Fifteenth), one on three hours' notice (the Fourth), one on less than six hours (the Sixteenth), and virtually all of them on only one-day notice. On Saturday, July 7, while the House was assembled in the Third Special Session and about to adjourn for the day, the Governor suddenly discovered the urgent need for *another* special session that same day—not while the House was already in session at that time (11:00 am), but over three hours later, at 2:30

pm. It was urgent but, apparently, not *that* urgent; it could wait a few hours. Putting aside whether an emergency had suddenly arisen that morning, what was so magical about 2:30 pm? Absolutely nothing. The Governor knew the House was about to adjourn, and he wanted to force a confrontation by giving the Speaker the choice of (1) common sense, which would dictate calling that new special session right away, while the members were present, or (2) the entirely ridiculous decision to make over a hundred legislators sit around for three more hours so that they could call that new special session, even though the Governor had no legislation to review, and the members no opportunity to prepare. And again that weekend, knowing full well that the House members had adjourned and left town on Saturday with plans to re-assemble at 5:00 pm on Sunday, the Governor found an urgent need for a new special session but scheduled it for one hour *earlier*, 4:00 pm, confident in the fact that the House would not meet that time.

If this Court were to find the matter justiciable and determine that the General Assembly is, in fact, required to "comply" with the date and time specified by the Governor, then the General Assembly and the Governor will be parties before a circuit judge every time the Governor calls a special session, litigating over whether the assembly of the House (or Senate) five minutes after the Governor's call constituted compliance, or whether 45 minutes' notice of a special session was sufficient to force the legislature into compliance. The first stop for the Speaker and Senate President, after issuance of a special session proclamation, will be the courthouse, where a circuit judge will direct them on how to run the internal affairs of their legislative bodies. This is not a role the judiciary should embrace. Out of respect for separation of powers, and because no manageable standards exist for judicial enforcement, this matter is not justiciable and should be dismissed with prejudice.

B. This Action Is Barred By The Doctrine Of Legislative Immunity.

Both Article IV, Section 12 of the Illinois Constitution, and the common-law doctrine of legislative immunity, preclude this lawsuit against the Speaker of the House. Article IV, Section 12 dictates that "[a] member shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house." Ill. Const.1970, Art. IV, § 12. Although this provision has received little attention in Illinois, other state and federal courts, construing these provisions in the U.S. and state constitutions, have universally interpreted these provisions in an expansive manner to afford immunity for "not only 'words spoken in debate,' but anything 'generally done in a session of the House by one of its members in relation to the business before it.'" *U.S. v. Johnson*, 383 U.S. 169, 179 (1966) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)). Simply put, if the actions of the legislator fall "within the sphere of legitimate legislative activity," the legislator is absolutely immune from suit. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975).[8]

The purposes of legislative immunity are to preserve the independence of the legislature; to reinforce the separation of powers among the coordinate branches of government; and to protect legislators not only from the threat of legal liability, but from the distraction of defending themselves before any tribunal for actions related to their legislative business. *Id*. at 502-03. Indeed, legislative immunity is intended in large part to "prevent intimidation by the *executive*" branch. *Johnson*, 383 U.S. at 181 (emphasis supplied). Even where not specifically provided for in a state constitution, common-law legislative immunity applies equally, and with the same standards, to "federal, state, and local legislative bodies." *Whitener v. McWatters*, 112 F.3d 740, 742 (4th Cir. 1997); *see Tenney v. Brandhove*, 341

[8] Similar to the Illinois provision, Article I, Section 6 of the U.S. Constitution states, "For any speech or debate in either house, (the members) shall not be questioned in any other place." U.S. Const., Art. I, § 6.

U.S. 367, 376 (1951) (state legislators protected by absolute legislative immunity); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 (1979) (local legislative body covered by legislative immunity).

Absolute legislative immunity is particularly appropriate where, as here, the legislator acts pursuant to validly adopted rules of a legislative body. "When a legislative body adopts a rule, not invidiously discriminatory on its face, which bears upon the conduct of legislative business, a legislator is merely carrying out the will of the body by enforcing that rule and shall be covered by legislative immunity." *Nat'l Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 631 (1st Cir.1995) (interpreting Rhode Island's legislative immunity provision).

Thus, the decision by the Speaker of the New Hampshire House to arrest individual legislators to secure a quorum was immune from suit. Because the Speaker there "was acting in the performance of official duties in relation to the business before the House, he must be protected not only from the consequences of litigation's results but also from the burden of defending himself." *Keefe v. Roberts*, 355 A.2d 824, 827 (N.H. 1975). Similarly, the Alaska Senate President was immune for his actions in compelling members to a joint session to establish a quorum. *Schultz v. Sundberg*, 577 F.Supp. 1491, 1495 (D. Alaska 1984). In fact, the U.S. Supreme Court held that the U.S. House Speaker enjoyed legislative immunity when he authorized the arrest of a private citizen, even though he had no lawful right to order that arrest. *Kilbourn*, 103 U.S. at 189, 204.

Rhode Island's House Speaker was immune from suit for enforcing a House rule banning private lobbyists from the House floor while permitting governmental lobbyists access. *Harwood*, 69 F.3d at 632 ("We think it is beyond serious dispute that enforcing a duly enacted legislative rule … is well within the legislative sphere."). The Arizona House

Speaker was immune for his assignment of legislators to various committees pursuant to internal House rules. *Davids*, 549 F.2d at 123. A local county board's discipline of a fellow member was entitled to immunity. *Whitener*, 112 F.3d at 744. Legislative immunity foreclosed a suit against the U.S. House and Senate for their enforcement of press-access rules. *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1350-51 (D.C. Cir. 1975).

It is critical to note that legislative immunity applies regardless of whether plaintiff could otherwise establish liability against the legislator and regardless of the legislator's motives. *Eastland*, 421 U.S. at 509-10 (to allow such lawsuits if the plaintiff could establish liability would be to "ignore[] the absolute nature of the speech or debate protection and our cases which have broadly construed that protection"). It was irrelevant that a state senator's reason for compelling plaintiff to testify before the Senate was for the purpose of chilling his First Amendment rights. *Tenney*, 341 U.S. at 377 ("The claim of an unworthy purpose does not destroy the privilege"). It was irrelevant that the U.S. House Speaker lacked authority to arrest private citizens. *Kilbourn*, 103 U.S. at 189, 204. Likewise, it was of no import whether Rhode Island's ban on private lobbyist access to the House floor violated the First Amendment. *Harwood*, 69 F.3d at 634. Nor did the fact that congressmen relied on stolen documents, in breach of the attorney-client privilege, affect those legislators' immunity. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 418 (D.C. Cir. 1995).

Finally, legislative immunity would unquestionably protect the Speaker, or any legislator, from being compelled to *testify* to explain his actions regarding the scheduling of special sessions or the exercise of discretion to compel members to obtain a quorum. The testimonial aspect of legislative immunity is squarely found in the Constitution: a legislator

"shall not be held to answer before any other tribunal" for his legislative actions. Ill. Const.1970, Art. IV, § 12. The testimonial privilege is at least as broad as immunity from suit. *See Brown & Williamson*, 62 F.3d at 418; *Gravel v. U.S.*, 408 U.S. 606, 615 (1972); *Miller v. Transamerican Press, Inc*., 709 F.2d 524, 528-29 (9th Cir. 1983). Thus, if the Court were to exercise jurisdiction here, the Speaker would be placed in the unenviable posture of having to choose between fully defending his decisions and enjoying his constitutional protection of legislative immunity. How could a court judge the reasonableness of the Speaker's decisions on scheduling special session, or permitting a member to be absent, when the court could not force the Speaker or any other legislator to testify? This only highlights the impropriety of this Court exercising jurisdiction over political questions.

It is "beyond serious dispute" that the Speaker's interpretation and exercise of procedural House rules to schedule special sessions, and to decide whether to compel absent members' attendance, "is well within the legislative sphere." *Harwood*, 69 F.3d at 632. This lawsuit, therefore, is barred by the constitutional protection of legislative immunity.

C. This Case Is Moot.

Independent of the doctrines of political question and legislative immunity, this Court lacks subject matter jurisdiction because this case is moot. It is well-settled that mootness exists where the question presents no actual controversy, interest or rights of the parties, or where the issues have ceased to exist. *People v. Redlich*, 402 Ill. 270, 279, 83 N.E.2d 736, 741 (1949). A case becomes moot when "events occur which render it impossible for the reviewing court to grant effectual relief to either party." *Bluthardt v. Breslin*, 74 Ill. 2d 246, 250, 384 N.E.2d 1309, 1311 (1979).

In *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 131 Ill. App. 3d 376, 475 N.E.2d 635 (4th Dist. 1985), the Fourth District Appellate Court affirmed the dismissal, based on mootness, of a matter with facts very similar to the present case. Plaintiff sued the ICC for violating the Open Meetings Act by holding closed-door meetings on the construction of a nuclear power plant and announcing that it would not hold any public meetings on the subject. Subsequently, however, the ICC reversed its decision and held public meetings on the subject. Similar to this case, the complaint sought (1) declaratory judgments that the ICC had violated the Open Meetings Act with its closed-door meetings; (2) a writ of mandamus ordering the ICC to publicly consider all information gathered in closed doors; and (3) an injunction prohibiting the ICC from holding future meetings in violation of the Open Meetings Act. *Id*. at 377, 475 N.E.2d at 637.

The appellate court agreed that the entire matter was moot. As to the closed-door meetings, the court found that, even if a violation of the Open Meetings Act occurred, the ICC "effectively remedied the violation" by subsequently deciding to hold public meetings. *Id*. at 378, 475 N.E.2d at 638. Likewise, the mandamus claim, while it could conceivably provide relief, would not grant "*effectual* relief" because "the subsequent actions of the [ICC] provided the relief" sought in the complaint. *Id*. at 379, 475 N.E.2d at 638 (emphasis in original). The court held that the injunction prohibiting the holding of future meetings in violation of the Open Meetings Act was "particularly inappropriate," *id*. at 379, 475 N.E.2d at 637, reasoning as follows:

> The foundation stone of the mootness doctrine is that a court should not resolve a question merely for the sake of setting a precedent or to govern future cases. The injunction sought [by plaintiff] would be for the sole purpose of governing future litigation. Moreover, it would be simply impractical for a trial court to draft an injunction which is completely divorced from either an existing or supposed state of facts.

Id. at 379, 475 N.E.2d at 637.

That reasoning applies with equal force here. Count I, concerning whether the House properly assembled three hours earlier than the time requested by the Governor, was a singular event that took place over two months ago. Those sessions—the Third and Fourth Special Sessions—have met dozens of times since then and are still ongoing. A declaration on when they should have *first begun* will not remotely impact the parties' rights at this juncture. Counts II and III, relating to the House's so-called "duty" to assemble a quorum, are moot because, even if the House owed such a "duty," it has effectively remedied the "violation" in that all sixteen special sessions have now been assembled with a quorum. Finally, Count IV, a mandamus action to compel the Speaker to assemble a quorum of legislators, at the Governor's requested date and time, for all *future* sessions, is "particularly inappropriate" because it serves no other purpose than to govern future litigation. Moreover, as *Hartigan* observed, it would be a practical nightmare to draft a writ of mandamus that was divorced from the attendant facts (e.g. what time the House assembled vis-à-vis the Governor's requested time; how much advance notice was given; how many members were absent and for what reasons).

The fact that the underlying legal issues may concern important constitutional questions does not revive an otherwise moot case. The Supreme Court dismissed as moot a critical separation-of-powers claim concerning whether the Governor could withhold funds that the General Assembly had appropriated for a particular drug program, because the unspent appropriation had lapsed with the end of the relevant fiscal year and there was no remedy that would affect the parties' rights. *West Side Org. Health Serv's Corp. v. Thompson*, 79 Ill. 2d 503, 507, 404 N.E.2d 208, 210 (1980). A State Representative's

declaratory judgment claim that she had been validly appointed under the Illinois Constitution to her seat in the 80th General Assembly, which also included a constitutional challenge to a state election law, was moot when the 80th General Assembly expired and the 81st began. *Bluthardt*, 74 Ill. 2d 246, 384 N.E.2d 1309. Each of these matters concerned matters of great constitutional import, quite capable of recurring, but subsequent events had rendered any possible judicial relief ineffectual.

What the Governor really seeks is an opinion from this Court that the Speaker should have taken certain actions but did not. Because events have occurred which render it impossible to grant effectual relief, the Court should not issue an advisory opinion to govern potential future cases but, instead, dismiss the matter as moot.

II. ON THE MERITS, COUNT I SHOULD BE DISMISSED BECAUSE THE GENERAL ASSEMBLY HAS THE EXCLUSIVE AUTHORITY TO DETERMINE WHEN IT ASSEMBLES SPECIAL SESSION.

For several independent reasons, the Governor is mistaken in arguing that he has the authority to mandate the date and time that the General Assembly initially assembles for special sessions. First, the plain language of the Constitution makes no mention of any mandate as to date and time. Second, read as a whole, the Constitution plainly reserves such procedural decisions to the exclusive discretion of each chamber of the General Assembly. Third, the Special Sessions Act, relied upon by the Governor, does not give the Governor authority to dictate the date and time, much less mandate that the legislature adhere to it. Regardless, a *statute* cannot trump each house's *constitutional* authority to determine its own rules. Finally, as a practical matter, it would make no sense at all that the framers of the Constitution would have intended to impose a judicially enforceable mandate on the General Assembly regarding the *beginning* of a special session, when every single thing that takes

place after that session has begun—including adjournment and re-assembling to another day—is exclusively within each house's control. The General Assembly, in other words, will ultimately control the timing of any actions it takes, anyway, which is why it would be nonsensical that the General Assembly could not decide when that session began as well. For all of these reasons, Count I should be dismissed with prejudice.

A. The Relevant Constitutional Provisions, Read Together, Compel The Conclusion That The House Possesses The Exclusive Authority To Decide When To Assemble As A Body.

Article II, Section 1 of the Constitution provides for the separation of powers among the branches of government. Ill. Const. 1970, Art. II, §1. Article IV, Section 6(d) of the Constitution provides that "[e]ach house shall determine the rules of its proceedings . . . ." Ill. Const. 1970, Art. IV, § 6(d). It is indisputable that part of the authority to determine its rules of proceedings is the exclusive prerogative of each house of the General Assembly to schedule its legislative sessions. The House has adopted House Rule 29, which sets a specific time for the assembling of special sessions but grants the Speaker the authority to dictate otherwise. ILL. H. RULE 29, 95TH GEN. ASSEMBLY. Section 6(d)'s reservation of this authority to the General Assembly, coupled with the clear language calling for the separation of the legislative, executive and judicial branches, should leave this Court reluctant to find an intrusion by the executive on the legislative prerogative to conduct its own affairs. *See Rock v. Thompson*, 85 Ill. 2d 410, 429, 426 N.E.2d 891, 902 (1981) (narrowly construing Governor's power over the inaugural Senate session to elect a president and holding that his authority to "convene" the Senate did not include the authority to determine the existence of a quorum because no Senate rule or constitutional text so authorized).

The legislative power to "determine the rules of its proceedings" is not unique to the Illinois Constitution. Other jurisdictions have consistently viewed this language very broadly. "The words in which the grant of power … is couched are about as broad and comprehensive as the English language contains." *Des Moines Register and Tribune Co. v. Dwyer*, 542 N.W.2d 491, 498 (Iowa 1996) (quoting *Witherspoon v. State*, 103 So. 134, 138 (Miss. 1925)). As interpreted in other jurisdictions:

> The provision that each House 'shall determine the rules of its proceedings' does not restrict the power … to the mere formulation of standing rules, or the proceedings of the body in ordinary legislative matters; but in the absence of constitutional restraints, … such authority extends to the determination of the propriety and effect of any action … taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the Constitution.

Des Moines, 542 N.W.2d at 498 (quoting *State v. Hagemeister*, 73 N.W.2d 625, 629 (Neb. 1955) and *Crawford v. Gilchrist*, 59 So. 963, 968 (Fla. 1912)).

Balanced against the separation-of-powers provision, and Section 6(d)'s broad language reserving to each house the exclusive right to control its own proceedings, is Article IV, Section 5(b), regarding special sessions. That provision states that "[t]he Governor may convene the General Assembly … in special session by a proclamation stating the purpose of the session; and only business encompassed by such purpose … shall be transacted." Ill. Const. 1970, Art. IV, § 5(b). The plain meaning of "convene" is "to cause to assemble or meet together," WEBSTER'S NEW WORLD DICTIONARY 310 (2d ed. 1974), or "[t]o cause to come together formally." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006). Thus, when the Constitution provides that "the Governor shall convene the General Assembly in special session," the Constitution is authorizing the Governor to cause the General Assembly to assemble for a specific purpose. Causing the General Assembly to

assemble for a specified purpose, however, is distinct from dictating the *timing* of that assembly. The Constitution specifies two and only two intrusions into the legislative sphere: to cause the General Assembly to assemble, and to dictate the subject matter of that special meeting. To read anything beyond that would be to read into the Constitution a power that is not explicitly provided—and which is expressly reserved to the General Assembly.

As discussed earlier, "the basic sovereign power of the State resides in the legislature" and, "[t]herefore, there is no need to grant power to the legislature." *Client Follow-Up*, 75 Ill. 2d at 215, 390 N.E.2d at 850. The General Assembly, in other words, has the authority to schedule its own sessions unless something in the Constitution explicitly dictates otherwise. Here, the Constitution *explicitly* reserves that right to the General Assembly and does not even hint at the Governor's authority to so dictate. It would defy logic, and two distinct constitutional provisions, to infer, from the Governor's authority to "convene" the General Assembly for special session, a separate and distinct authority to dictate the timing of that assembly. The separation of powers should not be so lightly disregarded as to permit an encroachment on the legislative sphere by inference.

While the Governor is certainly free to suggest a time in his special session proclamations, it should be noted that the Governor is not required to do so. The Governor would be clearly within his constitutional authority, then, to call for a special session without identifying a specific time. Governor Oglesby, for example, issued a proclamation for a special session for the 25th General Assembly that included only the date, not the time. (Ex. V, Special Session Proclamation to the 25th Gen. Assembly, June 11, 1867.) Surely no one would argue that this proclamation was invalid for failing to specify a time. Nor would a proclamation be invalid if it failed to specify a date, because the Constitution does not require

the Governor to provide one. But if the Governor is not required to specify a date or time in the proclamation, it is difficult to see how the Constitution would *require* the House to follow a specification that might or might not even be included.

In *Rock v. Thompson*, 85 Ill. 2d 410, 426 N.E.2d 891 (1981), the Court considered the authority of the Governor in presiding over the Senate's election of a President. The Constitution provides, at the outset of each new General Assembly in January of odd-numbered years, that the Governor shall serve as the temporary Senate President and "convene" the Senate to elect from its membership a President of the Senate. Ill. Const. 1970, Art. IV, § 6(b). In *Rock*, the Governor announced the election of Senator Shapiro as President, claiming that a quorum existed based on the presence of nonvoting senators. The Court held that the Governor lacked any authority to make factual determinations as to the presence of nonvoting senators. The Court reasoned that neither the Constitution nor Senate rules provided the Governor with such authority:

> The authority of a presiding officer is most often derived wholly from the body by which he is elected and over which he presides. Here, the Governor was not elected by the Senate. Hence we need not search for authority inherent in a delegation of power from that body. *** Furthermore, an examination of article IV, section 6(b), which requires the Governor merely to "convene" the Senate, yields no suggestion of such authority.

Id. at 426, 426 N.E.2d at 900 (emphasis supplied, citation omitted). Thus, the Court narrowly construed the Governor's authority to "convene" so that he could not exercise authority that was not delegated to him by the Senate or by the Constitution. Likewise, this Court should narrowly construe the word "convene" so as not to give the Governor authority to exercise the inherently legislative power of scheduling special sessions. In fact, the Court

need only rely on the plain, dictionary meaning of "convene" to determine that the Governor lacks the authority to schedule the time of assembly.

The instant matter presents an even more compelling case for narrowly construing the Governor's power than did *Rock*. In *Rock*, the Governor was, in fact, temporarily assuming a "legislative" role by acting as President *Pro Tem* and calling the Senate to order. Here, in contrast, the Governor does not preside, for one second, over the House. He does not call special sessions to order. He has no legislative role whatsoever. It would be illogical to *narrowly* construe his power while he temporarily assumed a legislative role and gaveled the Senate to order, but to *expansively* construe it here, when his role is far more detached.

The authority to determine the time to assemble, to paraphrase *Rock*, is "derived wholly from the body" that assembles, here the House, granting no authority whatsoever to the Governor in this regard. *Rock*, 85 Ill. 2d at 426, 426 N.E.2d at 900. There is no constitutional text granting the Governor the right to determine the time of assembly, and an explicit, broadly-worded provision that exclusively reserves that prerogative to each house of the General Assembly. The Governor can cause the General Assembly to assemble for a specific purpose, and nothing more. Each house has the exclusive prerogative to determine the timing of that assembly.

B. The Special Sessions Act Does Not, And Constitutionally Could Not, Compel The House To Follow The Governor's Selection Of The Date And Time For Assembly.

The Governor largely relies not on the Constitution but on the Special Sessions Act, 25 ILCS 15/1 *et seq.*, for the proposition that the Governor has the authority to dictate the date and time for the assembling of special sessions. His reliance on that Act is misplaced for two distinct reasons: First, if the Act were construed in such a manner, it would be

unconstitutional. Second, the Act, in any event, plainly does not dictate that the Governor specify the date and time for assembly, much less require the General Assembly to comply with that suggestion.

1. The Special Sessions Act Cannot Trump The House's Constitutional Authority To Determine Its Procedural Rules.

The most obvious reason the Governor's claim fails is that a *statute* on legislative procedure must yield to the *constitutional* authority of the General Assembly to "determine the rules of its proceedings." Ill. Const. 1970, Art. IV, § 6(d). Each house, in each two-year General Assembly (currently the 95th General Assembly), has the authority to determine its procedural rules. Its authority is exclusive and plenary. No statute can intrude on that constitutional prerogative, just as no statute could intrude on another part of Article IV, Section 6(d), relating to the House's exclusive authority to judge its members' qualifications: "Such statutes [regulating how the House judges its members' qualifications] have universally been held to be in violation of the Constitution." *Reif v. Barrett*, 355 Ill. 104, 127, 188 N.E. 889 (1933), *overruled in part on other grounds*, *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E.2d 633 (1969) (disagreeing with *Reif* on whether the legislature can enact certain taxes). As the Court elaborated on this companion provision, the House's discretion under Section 6(d) "is forever conclusive…. No court has the right to review the decision of the House or command it to take action or nonaction …." *Reif*, 355 Ill. at 127, 188 N.E. 889.

"[I]t is not competent for the legislature to attempt to limit its own legislative powers." *People ex rel. City of Chicago v. Barrett*, 373 Ill. 393, 403, 26 N.E.2d 478, 483 (1940); *Mix v. Illinois Central R.R. Co.*, 116 Ill. 502, 508, 6 N.E. 42 (1886). Every court that considered a statute purporting to dictate procedure to the legislature, when balanced against a constitutional provision giving each General Assembly the exclusive right to determine its

own rules of procedure, has followed the fundamental principle that the statute must yield if in conflict with the constitutional prerogative. As one court succinctly put it:

> Each successive General Assembly is a law unto itself in this regard. It is constitutional, not statutory, prohibitions which bind the Legislature. The creator is greater than its creations. Binding the Legislature with procedural rules passed by another General Assembly would violate [the constitutional] grant of the right to the Legislature to determine its own rules.

Mayhew, 46 S.W.3d at 770 (interpreting the Tennessee Constitution's identical grant of authority to each house to "determine the rules of its proceedings"). The Indiana Supreme Court held that a state open-records law could not be judicially enforced against the Indiana House: "to the extent such enactments empower the judicial branch to inquire into and interfere with the internal operations of the Indiana House of Representatives, said application transgresses the … separation of powers provision of our state constitution." *State v. Marion Superior Court No. 1*, 621 N.E.2d 1097, 1098 (Ind. 1993). *See also Malone*, 650 P.2d at 357 (constitutional right of House to select its own officers "may not be impeded or controlled by statute").

This fundamental, black-letter constitutional principle requires no further elaboration. The Special Sessions Act cannot tell the House of Representatives for the 95th General Assembly when to assemble special sessions. If it were construed to do so, it would violate the Constitution.

2. The Special Sessions Act Does Not Mandate That The General Assembly Comply With The Date And Time Specifications Made By The Governor.

The point here is not to suggest that the Special Sessions Act is unconstitutional. This Court has the obligation to construe the Act in a manner to avoid a constitutional infirmity. *In re Application for Judgment and Sale of Delinquent Properties for Tax Year 1989*, 167 Ill.

2d 161, 168, 656 N.E.2d 1049, 1053 (1996); *Sayles v. Thompson*, 99 Ill. 2d 122, 125, 457 N.E.2d 440, 442 (1983). It can easily do so here. Indeed, even without the doctrine of constitutional avoidance, the plain language of the Special Sessions Act clearly does not mandate that the General Assembly comply with any date and time specification the Governor might make in his proclamation.

Under the Constitution, in addition to special sessions that the Governor calls, the Speaker and Senate President may jointly call the General Assembly into special session. Ill. Const. 1970, Art. IV, § 5(b). The Special Sessions Act deals primarily with this latter scenario. Of particular note, however, is the differing language the Act uses between the two different manners for calling special session. A joint proclamation issued by the Speaker and the Senate President must "stat[e] the purpose of the session and the *date and time for the session*." 25 ILCS 15/1 (emphasis supplied). But the lone provision in the Act relating to gubernatorial proclamations does not require the Governor to include the date and time:

> Nothing in this Act affects the power of the Governor under Article IV, Section 5 of the Constitution of Illinois (1970) to call a special session. The Governor, when calling a special session, shall file the proclamation calling the session with the Secretary of State. The Secretary of State shall take whatever reasonable steps necessary to notify the members of the General Assembly of the date and time of the special session.

25 ILCS 15/3. Where the legislature included a certain requirement in one part of a statute but excluded it in another, the Court should presume that different results were intended. *Caveney v. Bower*, 207 Ill. 2d 82, 90, 797 N.E.2d 596, 600 (2003). The legislature was not hesitant to place an additional requirement on the Governor—that he file the proclamation with the Secretary of the State—but placed no requirement that he insert the date and time in his proclamations.

The Governor tries to prove far too much with the phrase "date and time" in the last sentence of Section 3. His argument, in essence, is that by implication, the General Assembly vested authority in the Governor to insert the date and time in his proclamation. Thus, he concludes, the General Assembly is required to follow that date and time. This reasoning is flawed for several reasons.

First, even if the reference to "date and time" is a reference to a date and time *specified by the Governor* (which is not conceded), this is a far cry from any suggestion that the General Assembly is required to *comply* with that specified timing. There is absolutely no mandatory language in Section 3 of the Act that remotely suggests that any timing declared by the Governor would bind the hands of the Speaker and Senate President in the exercise of their discretion. The Governor's argument, at best, is implication layered upon implication. Before reading in such an encroachment on the constitutional prerogative of each chamber of the General Assembly to determine its procedural rules, this Court should at least find some mandatory language suggesting its existence.

Second, again assuming for argument's sake that the reference to "date and time" refers to a gubernatorial specification, Section 3 only requires that the Secretary of State take "reasonable steps" to notify the members of the General Assembly. 25 ILCS 15/3. Obviously, "reasonable steps" does not mean guaranteed success. It is well within the realm of possibility that the Secretary of State will fail to get timely notice to the members. Thus, it was clearly contemplated that the General Assembly might *not* assemble at the time specified by the Governor because it might not know of the proclamation in time. The facts in this case bear this out. The Governor, on the afternoon of Saturday, July 7, issued a call for a Fifth Special Session for the next day, Sunday, at 4:00 pm. The Secretary of State sent this

proclamation, by facsimile, to the House Clerk, but the House had already adjourned and the Clerk's office was closed. The House Clerk did not receive the notice until it re-opened at 3:45 pm on Sunday, July 8, planning for House assembly at 5:00 pm. (Ex. H.) The Secretary of State's actions were perfectly "reasonable," but the House Clerk did not know of the proclamation. The proclamation called for special session at 4:00 pm, but it was literally impossible for the House to assemble at that time, on 15 minutes' notice.

The salient point is that, if the General Assembly truly believed it was up to the Governor to set the date and time, and that the legislature was *required to comply* with that directive down to the minute, it would have enacted a very different framework than simply directing the Secretary of State to make a "reasonable" effort to provide notice—an effort that could, and in this case did, fail, preventing such compliance.

Third and finally, the reference to "date and time" in Section 3 of the Act does not refer to the date and time suggested by the *Governor*. Again, a comparison of the sections of the Act relating to a joint legislative proclamation versus a gubernatorial proclamation is telling. For the typical case of joint proclamations, the Secretary of State shall "send written notice by certified mail to each member of the General Assembly of the *joint proclamation*." 25 ILCS 15/2 (emphasis supplied). In contrast, when the Governor calls special sessions, the Secretary of State is *not* required to send the members the proclamation itself; he is only required to "take whatever reasonable steps necessary to notify the members of the General Assembly of the date and time of the special session." 25 ILCS 15/3.

If, as the Governor contends, the General Assembly must follow the time set forth in the Governor's proclamation, then Section 3 would have simply required the Secretary of State to send the Governor's proclamation itself, just as he must send legislative

proclamations. Section 3 did not do so because, irrespective of whether the Governor includes a date and time in his proclamation, the leaders of the General Assembly will ultimately decide scheduling. The Special Sessions Act does not require the Secretary of State to send the Governor's proclamation to the members because the time contained in that proclamation is not binding. The time contained in a legislative proclamation from the Speaker and President, of course, would be binding on the members. The difference in this language is no accident.

In an ordinary case of statutory construction, even where words such as "shall" appear in a statute, courts will often read these words as directory, not mandatory, when no penalty for noncompliance is specified. *Cooper v. Illinois Dept. of Children and Family Services*, 234 Ill. App. 3d 474, 481-82, 599 N.E.2d 537, 542 (4th Dist. 1992); *South 51 Development Corp. v. Vega*, 335 Ill. App. 3d 542, 561, 781 N.E.2d 528, 544 (1st Dist. 2002) (section of Administrative Procedure Act, directing both the House and Senate to put resolutions from a joint committee on administrative rules directly on the floor instead of sending to committees, was directory, not mandatory provision). This rule of construction is particularly true where a directory, rather than mandatory, interpretation will avoid an unconstitutional result. *People v. Davis*, 93 Ill. 2d 155, 161-62, 442 N.E.2d 855, 858 (1982); *see also In re Application*, 167 Ill. 2d at 168, 656 N.E.2d at 1053; *Sayles*, 99 Ill. 2d at 125, 457 N.E.2d at 442. Here, Section 3 of the Special Sessions Act does not even *contain* such mandatory language that the General Assembly comply with the Governor's requested timing for a special session. Even if such language could be read by implication, contrary to all common sense, it could not be construed as anything more than a non-enforceable directive, and not a mandate, to the General Assembly.

The Special Sessions Act does not, and could not, mandate that the General Assembly follow a date and time that the Governor may insert into a special session proclamation. The Special Sessions Act does not support the Governor's position.

C. The Constitutional Framework For The Legislative Process Confirms That The Constitution Allows The General Assembly To Set The Timing For Special Session.

Putting aside that neither the relevant constitutional provisions, read together, nor the Special Sessions Act support the Governor's position, the Governor's claim also makes no sense as a practical matter, considering the legislative process in its entirety. The Governor places all emphasis on one very small step in the special session process—the time it *begins*. But surely even he would not argue that he controls any other aspect of that special session. This is where his argument is exposed as folly.

It is undeniable, for example, that the moment a special session commences, the House could adjourn it *sine die*—that is, permanently end it. But short of that, the House could also adjourn that special session to *another time*—the time it prefers to take up whatever business it desires to take up. Or *not* take up—the House does not have to draft any legislation, much less call it for a vote, much less pass it or pass the same legislation the Senate passes. Once the special session begins, the House (like the Senate) is in exclusive control of what will transpire and *when* it will transpire. If the House wants to take two weeks to pass legislation related to a special session call, it will do so. If it wants to wait two months, it can do so. Over all of this, the Governor is powerless to intervene.

Thus, when the Governor speaks of hyperbolic scenarios—arguing that if he cannot dictate the timing of special sessions, the House might not assemble for special session until two weeks, or two months, after the Governor's call—the simple fact remains that, if the

House were not inclined to act until two weeks, or two months, from the Governor's call, it would not do so, anyway. If the Governor is correct and he can order the House to assemble at 2:00 pm on July 7, what is the effect? The effect is nothing, because if the House does not want to take up special session business until *September* 7, it would simply assemble at 2:00 pm on July 7 and, at 2:01 pm, adjourn it until September 7. Not even the Governor would deny the House this exclusive discretion. What is the substantive difference between assembling on July 7 for one minute and adjourning until September 7, versus simply assembling for the first time on September 7? There is no difference whatsoever.

And the framers of the Constitution knew this. The framers gave the House this exclusive authority to run its own affairs. Ill. Const. 1970, Art. IV, § 6(d). Why would the framers, knowing that the House would not act on special session legislation until (and if) it so desired, find it so crucial to let someone *other* than the House decide when to *commence* special session? The framers fully realized that, ultimately, each house of the General Assembly would do what it thought proper, *when* it thought proper.

In fact, given that the House will ultimately decide the timing of any legislative action, anyway, one wonders why the Governor cares so much about the technical commencement of the session. The reason, of course, is that the Governor is not using these special sessions to advance any legislation. He cares so much about controlling the start of these sessions because he wants to force the members to remain in Springfield, hoping that this effective imprisonment would force members to the point of exhaustion and capitulation.

The facts of this case demonstrate that, though he was not required to do so, the Speaker went to great lengths to accommodate the Governor's requested times. The Court is presented with no facts demonstrating that the House has tried to subvert the Governor in any

way. But the fact remains that, at the end of the day, a House or Senate that wants to conduct its business at a time different than the Governor's preferred time will do so anyway, even if it is required to *initially* assemble according to the Governor's call. That being the case, it defies all logic to think that the framers would have given someone else the power to determine the *initial* meeting of that special session.

D. Even Were The Court To Find That The General Assembly Must Comply With The Governor's Specified Date And Time, The Speaker Did Not Violate The Constitution.

Even were this Court to find this matter justiciable and rule that the General Assembly must comply with the Governor's preferred date and time for assembly, the Court should enter judgment in favor of the Speaker because the House complied with the Governor's request under any possible rule of law this Court might fashion. The facts demonstrate that the Speaker, after giving notice to the Governor and even inviting him and the relevant executive officers to testify, called the Third Special Session to order at a time on Saturday, July 7, when the House had a quorum present and ready to conduct the Governor's stated business. Anxious and angry members had no intention of waiting until later that Saturday afternoon; they wanted to travel home for part of the day Saturday and part of Sunday before returning Sunday night. The Speaker's decision was utterly reasonable. It is difficult to imagine a ruling to the contrary—after all, the House got to the Governor's supposedly urgent business even more quickly than he requested. This is like complaining that the fire department responded to a blaze too quickly.

The Governor called the Fourth Special Session while the House was assembled for the Third, at the hour of 11:00 am, knowing full well the Speaker's intentions at that point. The House only had three hours' notice of that special session and, like all other special

sessions, the Governor had no bill to offer for consideration. Meeting at 2:30 pm—assuredly without a quorum, as the angry representatives left town—would have been a meaningless exercise. More to the point, the Governor was clearly doing nothing more than trying to instigate a constitutional crisis. Any conceivable standard of "reasonable" compliance, "substantial" compliance, "good-faith," or the like would have to consider the Governor's outrageous conduct compared with the Speaker's entirely reasonable exercise of discretion. By calling to order the Third and Fourth Special Sessions only a handful of hours earlier than the time the Governor requested, on the same date, and under all of the attendant circumstances, the Speaker clearly satisfied any conceivable standard of "compliance" this Court could fashion. If this Court were to entertain the Governor's action and accept his interpretation of the Constitution, it should still enter a declaratory judgment that the Speaker's actions did not violate the Constitution.

III. COUNTS II AND III SHOULD BE DISMISSED BECAUSE THE HOUSE IS NOT REQUIRED, AND CANNOT BE REQUIRED, TO ASSEMBLE A QUORUM OF ITS MEMBERS.

Counts II and III mistakenly claim that the Speaker has a constitutional duty to assemble a quorum of members (60 out of 118) for special sessions called by the Governor. He is mistaken for two independent reasons. First, no such duty is remotely suggested in the Constitution. Rather, under parliamentary authority on which the Supreme Court has relied, a legislative body "convenes" when it calls itself to order, irrespective of whether a quorum is present. Second, the Governor cannot manufacture a cause of action solely out of internal, procedural House Rules. For each of these independent reasons, Counts II and III should be dismissed with prejudice.

A. The House "Convenes" When It Is Called To Order, Regardless Of How Many Members Are In Attendance.

The Governor does not cite to any constitutional text to support his argument that the Speaker owed a "duty" to ensure the presence of a quorum when convening special sessions. Permitting the Governor to "convene" the General Assembly into special session does not remotely suggest the number of members a house must have present when it assembles. Ill. Const. 1970, Art. IV, § 5(b).

The Governor is proceeding under the mistaken assumption that a legislative body cannot "convene" unless a quorum is present. He is simply wrong. There is a fundamental difference between a legislative body "convening," on the one hand, and that legislative body possessing the authority to transact substantive business while convened:

> In the absence of a quorum, any business transacted [except for such actions as adjourning and recessing] is null and void. But if a quorum fails to appear at a regularly or properly called meeting, *the inability to transact business does not detract from the fact that the society's rules requiring the meeting to be held were complied with and the meeting was convened*—even though it had to adjourn immediately.

Ex. X, H. Robert, ROBERT'S RULES OF ORDER, § 40, at p. 336 (10th ed. 2000) (emphasis and parenthetical supplied) ("Robert's Rules"). The Illinois Supreme Court relied on, and in fact quoted, this very section of Robert's Rules in *Rock v. Thompson*, 85 Ill. 2d at 419, 426 N.E.2d at 897, in discussing the effect of a lack of a quorum on the Senate's purported election of its Senate President. This provision makes clear, as a fundamental point of parliamentary procedure, that a body "convenes" when it is called to order, regardless of whether a quorum is present. Thus, because the House did convene each special session as that term is properly understood, Counts II and III fail.

The Governor mistakenly cites *Rock* for the proposition that the word "convene" means to assemble a quorum of members. (Complt., ¶ 47.) The Court said nothing of the kind. The issue in *Rock* was whether the Senate could properly elect its President in the absence of a quorum. The Court ruled that it could not, relying in part on the above-quoted provision in Robert's Rules. *Rock*, 85 Ill. 2d at 419, 426 N.E.2d at 897. The Court further ruled that the Governor lacked authority to make factual determinations as to the presence of a quorum because neither the Constitution, statute, nor Senate Rules gave him that authority. *Id.*, 426 N.E.2d at 897. That, however, is far different from holding that the Senate was not in session at all—that it had failed to "convene" because it lacked a quorum. The Court could have avoided all of this discussion if, as the Governor contends, it believed that the Senate had never "convened" in the first place. If this were not obvious enough, the Supreme Court said so explicitly:

> Because the transcript fails to reflect the presence of a quorum, we are of the opinion that the purported election of respondent Shapiro did not constitute compliance with the provision of Article IV, Section 6(b), that the Senate *while convened*, "elect from its membership a President of the Senate as presiding officer."

Rock, 85 Ill. 2d at 426-27, 426 N.E.2d at 900 (emphasis supplied). Thus, *Rock*, consistent with the above-quoted provision of Robert's Rules that the Court itself cited, stands for the proposition that the lack of a quorum prevents a house of the General Assembly from transacting business while convened—but not from "convening" in the first instance.

The Governor's position is inconsistent with *Rock* and centuries of parliamentary practice. The House "convenes" when it assembles as a body and is called to order. The Governor does not and cannot contend that the House failed to call any of its special sessions

to order. Therefore, he cannot argue that the House failed to "convene." For this reason alone, Counts II and III should be dismissed.

B. The Governor Cannot Base His Cause Of Action Solely On The House's Internal Rules.

Having absolutely no constitutional text, case law, or parliamentary authority to support his claim, the Governor next tries to build a cause of action out of the House Rules. He argues that the Speaker has a duty to enforce all House Rules; that he has the authority to compel absent members; and that he determines whether to allow members to be absent.

His position is plainly flawed. First, there is absolutely nothing in the House Rules that suggests that the body must assemble with a quorum, much less that the Speaker must take actions to ensure a quorum. House Rule 32(a) gives the Speaker the *discretion*, not the duty, to compel absent members. ILL. H. RULE 32(a), 95TH GEN. ASSEMBLY ("[t]he attendance of absent members *may* also be compelled by order of the Speaker."). House Rule 51(i) provides three bases for absence: leave, sickness, or if a member is "otherwise unavailable." ILL. H. RULE 51(i), 95TH GEN. ASSEMBLY. The Governor focuses on the word "leave," but that word, by definition, is discretionary. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006) (defining "leave" as "permission"). In short, the Governor can point to absolutely nothing in the House Rules that compels a quorum for any legislative session, much less compels that the Speaker take actions to ensure one.

More fundamentally, the violation of an internal legislative rule cannot be the basis of a constitutional challenge. In *People ex rel. Harless v. Hatch*, 33 Ill. 9, 1863 WL 3219 (1863), the Supreme Court rejected the notion that a violation of a joint House-Senate rule constituted a constitutional violation, because an internal rule of a legislative body in Illinois:

> is not a constitutional requirement, and like all such rules it was adopted to facilitate the transaction of business, and doubtless, should be observed by the two houses. But will it be said, that, because this or any other rule is violated, an act not in contravention of the Constitution is void alone for that reason? Suppose a law should be adopted with all the constitutional and legislative requirements, but in violation of a joint rule, or a rule of one of the houses, can it be said that the law would be void?

Id., 1863 WL 3219 at * 16. Since then, courts have repeatedly refused to entertain a constitutional challenge based on the legislature's alleged failure to follow its own procedural rules. *Durjak v. Thompson*, 144 Ill. App. 3d 594, 596, 494 N.E.2d 589, 591 (1st Dist. 1986); *Chirikos v. Yellow Cab Co.*, 87 Ill. App. 3d 569, 574, 410 N.E.2d 61, 65 (1st Dist. 1980).

In fact, part of the House's constitutional prerogative to determine the rules of its proceedings is the power to enforce them, or not enforce them, as it sees fit. "The legislature, alone, has complete control and discretion whether it shall observe, enforce, waive, suspend or disregard its own rules of procedure." *Starr v. Governor*, 910 A.2d 1247, 1251 (N.H. 2006). "It is a well settled principle of law that legislative bodies are not bound by their own rules of procedure … the same body which makes them can disregard them at its pleasure." *State v. Essling*, 128 N.W.2d 307, 318 (Minn. 1964). *See also Moffitt v. Willis*, 459 So. 2d 1018, 1021 (Fla. 1984) (the legislative power to determine its rules of procedure includes the power "not only to adopt, but also to interpret, enforce, waive or suspend whatever procedures it deems necessary or desirable so long as constitutional requirements for the enacting of *laws* are not violated.") (emphasis supplied). Accordingly, even if the Governor were able to weave an argument out of discretionary House Rules, it is the House's constitutional prerogative whether to enforce those rules.

The House did "convene" every special session, as that term is properly understood. The House Rules do not provide an alternative avenue of support for the Governor, nor

would the House be constitutionally bound to follow those Rules in any event. Counts II and III should be dismissed with prejudice.

IV. COUNT IV SHOULD BE DISMISSED BECAUSE THE GOVERNOR CANNOT AND SHOULD NOT MANDAMUS THE GENERAL ASSEMBLY.

Count IV, sounding in mandamus, essentially combines the claims in the previous counts and asks this Court to compel the Speaker, for all future sessions, to comply with the date and time set by the Governor and to do so with a quorum present. For all of the reasons previously stated, Counts I through III do not state causes of action and, therefore, neither does Count IV.

As an initial matter, mandamus should not be available against the General Assembly. As discussed earlier, *Fergus v. Marks*, 321 Ill. 510, 152 N.E. 557, held that mandamus was inappropriate against the General Assembly, which in that case had violated the constitutional requirement that it re-district the state "every ten years." Ill. Const. 1870, Art. IV, § 6. The duty to re-apportion was "a specific legislative duty imposed by the Constitution solely upon the legislative department of the state, and it alone is responsible to the people for a failure to perform that duty." *Fergus*, 321 Ill. at 516, 152 N.E. at 560. The Court found that the "consensus of authority in this state is to the effect that the judicial department of the state cannot compel by mandamus the legislative department to perform any duty imposed upon it by law …." *Id*. at 518, 152 N.E. at 560.

Moreover, mandamus is an extraordinary remedy to enforce the performance of official duties by a public officer only where no exercise of discretion is involved. *People ex rel. Jaworski v. Jenkins*, 56 Ill. App. 3d 1028, 372 N.E.2d 881 (1st Dist. 1978). The Governor must demonstrate "a clear right to the requested relief, the *respondent's clear duty*

to act, and the respondent's clear authority to comply with the terms of the writ." *Russell v. Blagojevich*, 367 Ill. App. 3d 530, 533, 853 N.E.2d 920, 924 (4th Dist. 2006) (emphasis supplied). As discussed above, the Governor cannot establish *any* duty, much less a "clear" one, on the part of the Speaker to assemble special sessions at the time the Governor dictates or to enforce House Rules to ensure the presence of a quorum.

It is long-settled that courts are particularly loath to use mandamus against public officials to regulate a general course of official conduct, such as compelling the continuous enforcement of a certain law:

> But the writ has never been made use of, and does not lie … for the purpose of enforcing the performance of duties generally. It will not lie where the court would have to control and regulate a general course of official conduct and enforce the performance of official duties generally. *** [W]here the court is asked to require the defendant to adopt a course of official action, although it is a course required by the statute and imposed upon him by the law, it would be necessary for the court to supervise generally his official conduct, and to determine in very numerous instances whether he had persistently, and to the extent of his power and the force in his hands, carried out the mandate of the court and performed his official duty.

People v. Dunne, 219 Ill. 346, 348-49, 76 N.E. 570 (1906). *See People ex rel. Better Broadcasting Council, Inc. v. Keane*, 17 Ill. App. 3d 1090, 1097, 309 N.E.2d 362, 367 (1st Dist. 1973) (city council's consideration of cable franchise law was a "legislative matter … not subject to mandamus"). "Mandamus will not lie where to issue the writ would put into the hands of the court the control and regulation of the general course of official conduct or enforcement or enforce the performance of official duties generally." *People ex rel. Jansen v. City of Park Ridge*, 7 Ill. App. 2d 331, 333, 129 N.E.2d 438, 440 (1st Dist. 1955).

As the Fourth District noted in *Hartigan*, albeit on mootness grounds, a mandamus to force a body to conduct their future meetings in a certain way is "particularly inappropriate"

because it would be "simply impractical for a trial court to draft an injunction which is completely divorced from either an existing or supposed state of facts." *Hartigan*, 131 Ill. App. 3d at 379, 475 N.E.2d at 637. Here, given all of the factors outlined above that would govern any future resolution of these special-session issues on a case-by-case basis, the drafting of the writ would be a practical impossibility. Count IV, sounding in mandamus, should be dismissed with prejudice as well.

CONCLUSION

For all of the reasons stated herein, Speaker Michael J. Madigan respectfully prays this honorable Court enter an Order dismissing the Complaint in its entirety with prejudice.

Respectfully submitted,

MICHAEL J. MADIGAN, SPEAKER OF THE HOUSE
ILLINOIS HOUSE OF REPRESENTATIVES

By: _____
One of his attorneys

David W. Ellis
Chief Counsel to the Speaker
Illinois House of Representatives
Special Assistant Attorney General
412 State House
Springfield, IL 62706
Tel: 217-782-3392
Fax: 217-557-7599