STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 11

CENTER FOR MEDIA & DEMOCRACY
520 University Avenue, Suite 260
Madison, WI 53703,

Plaintiff,

Case No.: 13-CV-1875

v.

LEAH VUKMIR
State Senator
Room 131 South
State Capitol
P.O. Box 7882
Madison, WI 53707

Defendant.

RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO QUASH

The Center for Media and Democracy submits this response to the motion to quash summons filed by defendant, Senator Leah Vukmir, and her counsel, the Attorney General of the State of Wisconsin. For the reasons set forth herein, defendant's motion must be denied.

Senator Vukmir is urging the court to adopt a novel interpretation of the temporary legislative privilege in Article IV, Sec. 15, Wis. Const. ("Section 15"), one which would do enormous damage to Wisconsin's longstanding traditions of openness, transparency, and governmental accountability. Senator Vukmir's arguments would effectively strike out words in the Constitution that limit the reach of the Section 15 privilege. This novel claim ignores both the intent of the framers of Wisconsin's

Constitution and the intent of the people of Wisconsin that their elected representatives be subject to the public records laws that protect the integrity of our democracy. Her new interpretation would give legislators a perpetual grant of immunity from civil actions seeking to enforce the state's public records law – or, for that matter, any state law with civil penalties.

Never before has a legislator sought to invoke the legislative privilege from civil process in the context of an open records suit for mandamus.[1] Research has revealed not a single case where a legislator has successfully argued that the phrase "the session of the legislature" in Section 15 – which was ratified in 1848 -- actually refers to an entirely modern scheduling practice that deems the legislative session to extend uninterrupted for the entire biennium. Because the next "session" begins immediately upon the close of the previous one, under Senator Vukmir's construction, a legislator would be absolutely privileged from any civil process for as long as the legislator holds office.[2]

In fact, prior to filing the rash motion filed on Senator Vukmir's behalf in this case, the Wisconsin Attorney General's office had interpreted Section 15 to apply only when the legislature is actively conducting its work during scheduled floor periods, rather than during the entirety of the never-ending biennial legislative term – a relatively modern invention. In 2002, the Attorney General specifically argued that

---

[1] *See e.g.* Wisconsin Freedom of Information Coalition, "Statement on Claims of Legislative Immunity to State Open Records Law," September 13, 2013, listing open records lawsuits against Wisconsin legislators, none of whom claimed they were privileged from suit under Section 15.

[2] The 2011-2012 biennial session began on January 3, 2011, and ended at noon on January 7, 2013. *See* Senate Joint Resolution 1 (2011). The 2013-2014 session began on the same day the previous session ended, January 7, 2013, and will end at noon on January 5, 2015. *See* Senate Joint Resolution 1 (2013). The next biennial session will almost certainly begin on the final day of the 2013-2014 session, as has been the practice since at least 1971. *See State of Wisconsin Bluebook 2007-2008,* at p. 171 (attached as an exhibit).

Section 15 was limited to scheduled floor periods. *State v. Burke*, 258 Wis.2d 832, 841 n.2 (Ct. App. 2002).

With reference to the immediate case and this new interpretation of Section 15, the Attorney General has said publicly that the privilege is "temporary," but does not explain in Senator Vukmir's brief or anywhere else when the Section 15 privilege could possibly end, for as long as a legislator holds office, if the privilege is in effect for the entire biennium.

The court should reject Senator Vukmir's claim of privilege. First, the complaint and order in this case were served while the legislature was in summer recess. No legislative business was scheduled during the period from June 28 to September 17. Because the legislature was not "in session" for purposes of Wis. Const. Art. IV, §15, Senator Vukmir was not privileged from civil process when she was served on August 29, 2013. Secondly, even if the Legislature had been "in session" within 15 days of service, the privilege conferred by Wis. Const. Art. IV, §15 does not extend to the service of an order of the court directing a legislator to respond to a complaint for mandamus, which did not require Vukmir's personal appearance in court so as to risk depriving her constituents of representation.

I. Summary of Arguments Supporting the Denial of the Defendant's Motion

Article IV, Section 15 of the Wisconsin Constitution has been unchanged since it was ratified in 1848, and states:

> Exemption from arrest and civil process. SECTION 15. Members of the legislature shall in all cases, except treason, felony and breach of the peace, be privileged from arrest; nor shall they be subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.

Under a proper analysis of the Wisconsin Constitution, it becomes clear that the framers of the Constitution clearly understood the phrase "session of the legislature" to apply only to those periods where the legislature is actually meeting. Although the concept of an unending "biennial session" – where each new biennial session is declared to begin immediately upon the close of the previous session, without interruption -- has been the practice for decades, it is an entirely modern conception. For the first hundred-plus years that Wisconsin was a state, legislative sessions lasted only months at a time. "As recently as 1951, the Legislature met in Madison for [only] 5 months, every other year." *State of Wisconsin Bluebook 1985-1986*, at p. 131 (attached as an exhibit).

Under Senator Vukmir's reinterpretation of Section 15 – where the privilege applies during the entire, unending biennial session -- there is no window of time where a legislator could be served with an order and complaint for mandamus to enforce their legal obligations under the state public records law, for as long as he or she remains in office. This is contrary to the plain language of the provision and the intent of the framers in drafting it.

As evidenced by the nineteenth century plain meaning of the provision and its contemporaneous interpretation, the framers of the Constitution quite intentionally made the privilege in Article IV, Section 15 temporary, and never meant to make legislators above the law, in perpetuity. Indeed, by its very terms, Art. IV, Section 15 anticipates at least a thirty-day gap between sessions of the legislature, because it extends the privilege for fifteen days after the end of one session and fifteen days before the next one.[3]

Senator Vukmir's interpretation of the Section 15 legislative privilege would also lead to absurd results. Applying the privilege to the entire biennial session not only eliminates the enforcement mechanism of the open records law – thereby making the law optional – it could provide legislators with perpetual immunity from civil process for everything from ethics and campaign finance violations to a first offense Operating While Intoxicated.

The Wisconsin Supreme Court has concluded that the purpose of the Section 15 privilege is "to preserve the public's right to representation in the state legislature during the session of the legislature. When a legislator cannot appear the people whom the legislator represents lose their voice in debate and vote." *State v. Beno*, 116 Wis.2d 122, 138-139, 341 N.W.2d 668 (1984).

[3] This is, in part, a recognition of how long it took mid-19th Century legislators to travel to-and-from the legislature; similar provisions in other state constitutions state specifically that a legislator is immune when traveling to-and-from the legislative body.

This underlying purpose of Section 15 further demonstrates that the privilege only applies when the legislature is actually meeting, rather than for the duration of the entirely modern and never-ending biennial legislative session.

Additionally, regardless of when the Section 15 legislative privilege applies, an action for mandamus compelling a legislator to comply with his or her statutory duties does not deprive the legislator's constituents a voice in the legislature. A Writ of Mandamus does not interfere with a legislator's public duties; by its very definition, a Writ of Mandamus *compels* public officials to discharge their public duties.

Finally, the Section 15 legislative privilege from "civil process" does not encompass service of an order, which does not require a legislator's personal appearance. This is in clear contrast with the example of a subpoena for deposition provided by Senator Vukmir.

II. Senator Vukmir's Interpretation Was Not Intended to Refer to the Entire Biennium So As To Grant Legislative Immunity in Perpetuity

Senator Vukmir is asking the court to interpret Article IV, Section 15 to immunize a legislator from responding to an order for writ of mandamus in perpetuity, for as long as a legislator holds office, regardless of whether the legislature is actually meeting and conducting business.

As the Wisconsin Supreme Court has previously admonished, interpreting the Wisconsin Constitution is not accomplished using modern definitions and syntax, but by examining:

(1) The [nineteenth century] plain meaning of the words in the context used;

(2) The historical analysis of the constitutional debates and of what practices were in existence in 1848, which the court may reasonably presume were also known to the framers of the 1848 constitution, and;

(3) The earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the constitution.

Burke, 258 Wis.2d at 832, citing *Beno,* 116 Wis.2d at 122.

A. *"During the session of the legislature"* Was Not Intended to Apply to a Biennial Session

The term "session" is not defined in the Wisconsin Constitution and the Wisconsin Statutes use the term in multiple ways.[4] However, by looking to the plain meaning of the phrase "during the session of the legislature" in 1848, when the Wisconsin Constitution was adopted, it becomes clear that the privilege only applies during the period the legislature is actually meeting.[5]

As discussed below, the legislature's practices for calendaring legislative work have changed in recent decades, but these changes in practice cannot possibly be

[4] The Wisconsin Statutes make reference to an "actual session" (*see* Wis. Stat. § 13.47(1), 13.123(2)), a "regular or special legislative session" (*see* §§13.02, 13.123(1)(a)), a "biennial session" (*Id.*), and a "legislative session biennium" (13.45(1)(a)), among other usages.

[5] In the twelve years before the Wisconsin Constitution was adopted, when Wisconsin was a territorial organization, "legislative sessions" lasted between 10 and 76 days. *State of Wisconsin Bluebook 1915*, at p.317 (attached as an exhibit). The legislature was called into session two to three times per year for a relatively short period of time. What was referred to then as "legislative sessions" appear to be analogous to what today we would understand as "floor sessions."

bootstrapped to expand the intentionally narrow and temporary legislative privilege offered by Section 15 into a grant of perpetual immunity for legislators.

At the time Section 15 and the Wisconsin Constitution were enacted, the Constitution demanded that the legislature meet once every year "and no oftener." Wis. Const. Art. IV, Sec. 11 (1848).

The first session of the legislature lasted seventy-eight days. *Id.* The second session convened more than four months later and lasted eighty-three days. *Id.* For decades, legislative sessions lasted just a few months, with months between each session. *Id.* Notably, several times during the early years of Wisconsin, the legislature convened, recessed, and convened again – but only those days where the legislature was actually meeting were counted as part of the "legislative session."[6]

Clearly, the use of the term "legislative sessions" in the Wisconsin Constitution was intended to refer to those periods during which the legislature was actually convened for debate and voting on bills and conducting other legislative business.

In 1881, Art. IV, Sec. 11, of the Wisconsin Constitution was amended to change the legislature from a one-meeting-per-year annual session to a one-meeting-every-other-year biennial session. As a result of this amendment, the legislature did not meet in even-numbered years unless the governor called a special session. *State of Wisconsin Bluebook 2007-2008*, p. 135.

[6] *See* "Legislative Sessions," *State of Wisconsin Bluebook 1915*, at p.318: "Fourteenth Session—Convened January 9, and adjourned April 17, 1861. Reconvened May 15, and adjourned May 27, 1861, a total of one hundred and twelve days."

Accordingly, the legislature convened once every two years in a "biennial session" starting in 1883. But the legislature continued its practice of adjourning when they were not actually meeting, and "[a]s recently as 1951, the Legislature met in Madison for [only] 5 months, every other year." *State of Wisconsin Bluebook 1985-1986*, at p. 131.

Starting in the mid-20th century, the legislature began to change its practice, adjourning via joint resolution, rather than the more decisive *sine die*[7] adjournment. By not adjourning *sine die,* the legislature reserved its ability to call itself back into session, allowing it to override gubernatorial pocket vetoes and to retain the Senate's advice and consent review over the governor's executive appointments.[8] Subsequent legislatures also followed this practice, going into recess for periods defined by joint resolutions but delaying adjournment until the final day of their term. [9]

---

[7] Latin for "without day," meaning the legislature is completely adjourned, with no day assigned for resuming the session. *Black's Law Dictionary.*

[8] In 1945, the legislature adjourned on June 20 until Sept 5 via resolution – rather than sine die adjournment – in order to override the governors' pocket vetoes, and delayed *sine die* adjournment until after September. *State of Wisconsin Bluebook 2007-2008,* p. 135-136. The legislature continued this practice from 1945-1957 (except for 1951). In the 1959 and 1961 biennial sessions, the Republican-controlled legislature recessed itself via joint resolution, but delayed adjournment *sine die* in order to preserve the Senate's advice and consent review over the Democratic governor's executive appointments. The 1959 session did not adjourn until May 27, 1960, "making it in terms of calendar days about twice as long as most recent sessions." *Id.* at 136.

[9] Throughout the 1960s, as the legislature delayed its adjournment until the following year, it ran up against the Constitution's Art. IV, Sect. 11, requirement that the legislature meet "once in two years, and not oftener." An amendment to Art. IV, Sect. 11, allowing the legislature to meet "at such time as provided by law" was adopted by the 1965 and 1967 legislatures and approved by the people in April 1968. There is no evidence that this change was intended to enlarge the limited privilege in Section 15. Moreover, the Court is required by canons of constitutional construction – *Generalia specialibus non derogant* -- to construe later provisions of the Constitution not to override or implicitly repeal earlier provisions unless there is specific language and intent to do so. Additionally, the power of the legislature to set the length of its meeting cannot include the power to moot out the provisions of Section 15, which

Wis. Stat. § 13.02, enacted in 1971, requires the legislature to set its session schedule early in the biennium. The legislature now passes a Senate Joint Resolution (SJR) 1 dividing the biennium into specified floor periods, but never actually adjourning *sine die* throughout the biennium. According to the Legislative Reference Bureau, the legislature has not adjourned *sine die* since the period of May 27, 1960 to January 11, 1961. *State of Wisconsin Bluebook 2002-2003*, at p. 136.

This change in practice of how the legislature creates its calendar and "adjourns" without ending the "session" was unanticipated by the founders and would be alien to their understanding of the phrase "session of the legislature." A mere change in legislative practice should not be ahistorically applied to expand the Section 15 legislative privilege into a sweeping, perpetual grant of legislative immunity. The purpose of the legislative immunity provided by Section 15 was to guarantee that legislators can represent their constituents when the legislature is actually convened for debate and voting, not to provide continuous immunity, for as long as a legislator holds office.

The Legislature's change in practice from *sine die* adjournments at the close of legislative business to a session spanning the entire biennium with designated "floor sessions" for legislative business – that adjourn via joint resolution -- does not transform the constitutional grant of a temporary privilege from civil process into a perpetual immunity for as long as a legislator holds office.

---

by its terms contemplates periods in which the legislature is not in floor session and therefore when Wisconsin legislators can be subject to civil process.

These facts make it clear the Constitution's framers understood the term "*session of the legislature*" to apply only to those periods where the legislature was actively in session.

The notion of the never-ending "biennial session" is a recent construction that reflects a mere change in legislative practice. But just as was the case in 1848, there are still specific times when legislators are actually meeting, debating, and voting on legislation, usually designated as "floor periods."[10] These are the limited periods where a legislator would be privileged from civil process.

The Section 15 privilege does not apply in the immediate case, when Senator Vukmir was served well outside the period of any legislative meetings.

B. Constitutional Framers Never Intended to Grant Permanent Immunity to Legislators

The framers never intended an absolute and never-ending privilege from civil liability for legislators, but instead only intended to protect the democratic process by granting a temporary privilege from arrest and civil process while the legislature was actively in session. Because one biennial session ends as soon as the next one begins, Senator Vukmir's effort to redefine Section 15 would have the effect of making this temporary privilege into permanent immunity.

The temporary nature of Section 15 is demonstrated by looking at the nineteenth century plain meaning of the provision.

[10] In 2013, there were 15 regular floor periods scheduled throughout the year, with months between many of the sessions, even though the legislature never adjourned *sine die*. Senate Joint Resolution 1 (2013).

By its very terms, Section 15 offers legislators a limited privilege from civil and criminal process for a defined time period: "during the session of the legislature" and for fifteen days before and after.

The intentionally temporary nature of Section 15 is further demonstrated by comparing it to Art. IV, Sec. 16, Wis. Const., the speech and debate clause, which was adopted at the same time as Section 15 and has been unchanged since 1848. Section 16 states:

> "No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate."

In contrast with Section 15, the speech and debate clause only protects legislators from specific acts -- liability for words spoken during debate -- but applies permanently: "in ***any*** civil action, or criminal prosecution ***whatever***.[11]

In other words, the framers quite intentionally drafted Section 15 with a time limit, envisioning a time when a legislator could be subject to civil process, and they intentionally omitted a time limit for the immunity granted under Section 16 -- and indeed, made plain that the latter privilege applied perpetually.

It is a canon of constitutional interpretation -- *In Pari Materia* -- that two provisions relating to the same subject matter but which use different terms must be interpreted in light of one another, and construed to give the full meaning to each. Both

[11] These distinctions are reflected in the purposes underlying the two provisions. Section 15 is designed to preserve the people's voices and representation in the legislature, when the legislature is actually meeting. Section 16 is designed to protect the integrity of the legislative process by ensuring that a legislator's speeches on matters of public concern do not subject them to slander claims for matters discussed on the floor.

Section 15 and Section 16 relate to forms of legislative privilege, but only the former includes a precise and unambiguous time limit, whereas the latter quite clearly applies permanently. These two sections must be construed to give full meaning to each provision. Section 15 cannot be properly construed as offering a permanent privilege for lawmakers because when the framers intended permanence, they plainly knew how to write that into law.

Pursuant to the framework in *Beno,* there is nothing in the record of constitutional debates that sheds light on Section 15, but the historical practice at the time provides further evidence that the Section 15 privilege was designed to be temporary.[12]

One of the earliest cases to apply Section 15 is *State ex rel. Isenring v. Polacheck*, 101 Wis. 427 (Wis. 1898), which made it clear that the legislative privilege is temporary. In that case, the Court noted that "after the privilege from arrest *has expired* the relations of the parties are the same as though no arrest had been made" – clearly anticipating a date where the privilege would no longer apply. *Id.* at 433-434 (emphasis added).

Senator Vukmir is attempting to unilaterally amend the Constitution with a novel and damaging interpretation, warping the application of the Section 15 privilege according to modern legislative calendaring practices. In so doing, she is seeking to

[12] The extent of the constitutional debate is largely the following: "During the debates on the article entitled, `Legislative,' Mr. Chase moved to strike out the fifteenth section, exempting members from arrest. Mr. Estabrook then moved `to amend the amendment so as to strike out that part of it which privileged members of the legislature from civil actions.' *Journal of the Convention to Form a Constitution for the State of Wisconsin* at 212 (Tenney, Smith and Holt 1848). Mr. Estabrook's `amendment to the amendment' was rejected. *Journal* at 212." *Beno* at 137.

make Section 15 into a permanent privilege. This is the opposite of what the Constitution's framers intended.

C. **The Legislature Cannot, of its Own Accord, Create a Perpetual Immunity from Civil Process for its Members Until they Leave Office**

The legislature may have changed its practices for organizing its calendar, but by no means does this calendaring process supersede the framers' intent to grant only a narrow and intentionally temporary privilege to legislators for floor sessions.

Since the early years of the State, it has been well-established that it is beyond the power of the legislature to create an open-ended privilege from civil process. In the 1862 decision *Hasbrouck v. Shipman*, 16 Wis. 296 (Wis. 1862), the Wisconsin Supreme Court held that the legislature cannot create an indefinite and open-ended privilege from civil process. In that case, the state's highest court found unconstitutional a law creating a privilege from civil process for military volunteers, since it would have lasted indefinitely, for as long as the volunteer remained in military service – for as many as "three, five, ten or twenty years." *Id.* at 297-298.

It should be noted that Senator Vukmir was elected to the legislature in 2002 and has been in office for over ten years.[13] Thus, under the Attorney General's new construction of Section 15, Senator Vukmir has been immune from civil process continually since she was sworn into office in January 2003, and would be immune for

[13] To use an even farther reaching example, under the Attorney General's construction of the legislative privilege, the Legislature's longest-serving member, Senator Fred Risser, has been immune from any arrest or civil process since at least the early 1970s, when the legislature adopted its current calendaring practice.

as long as she remains in the legislature, regardless of any wrongdoing or abdication of responsibility with civil penalties that might transpire.

In *Hasbrouck*, the Court noted: "It is very evident that this is a suspension for an indefinite period of all remedies whatever. And such being the character of the law, we cannot see upon what ground its validity can be sustained." *Id.* at 298. Accordingly, the Court rejected the legislature's effort to create any general permanent immunity from civil suit by way of statute.

The legislature sets its own meeting schedule, but in so doing it cannot by statute or joint resolution extend a constitutional privilege that was intended to be temporary into something perpetual.

D. **Senator Vukmir's Interpretation Would Lead to Absurd Results**

Senator Vukmir's interpretation of the Section 15 legislative privilege would not only eliminate the enforcement mechanism of the open records law – thereby making the law optional – it could provide legislators with perpetual immunity from civil process for ethics and campaign finance violations, to first offense Operating While Intoxicated (OWI), and a range of other offenses with civil penalties.

For example, according to Wisconsin statutes, a corrupt legislator who promises political favors in exchange for campaign contributions violates Wis. Stat. § 19.45(13), and is subject to a civil forfeiture of up to $5,000 plus the amount of the donation,[14] enforceable via a civil action. A legislator who accepts an illegal gift from a lobbyist

[14] Wis. Stat. § 19.579.

violates Wis. Stat. § 13.625(3), and is subject to a civil forfeiture of up to $1,000.[15] A legislator who fails to file a statement of economic interests[16] faces a civil forfeiture of up to $5,000.[17] But under Senator Vukmir's interpretation of the Section 15 legislative privilege, legislators violating these laws would get a free pass from any suit adjudicating those violations for as long as they are in office, since they are not subject to any civil process during the entire biennium. A lawmaker in a safe district could ignore the law and run for re-election claiming the charges are baseless without ever having to face them, thereby gaming the system. If the legislator holds office for more than three years, he or she could entirely escape liability, since the statute of limitations for these offenses expires three years after the conduct at issue occurred. Wis. Stat. § 893.90(2).

It defies logic to conclude that the comprehensive code governing the conduct of legislators, enforceable by civil penalties, were merely optional and the penalties could not be enforced for as long as the legislator holds office.

In other words, under the Attorney General's interpretation of Section 15, the civil penalties under Wisconsin's ethics, lobbying, and campaign finance laws – as well as the public records laws -- would be made unenforceable for as long as a legislator held office, and in many cases would become entirely unenforceable since the statute of limitations would have expired by the time legislators have left office.

[15] Wis. Stat. § 13.69(6).
[16] Wis. Stat. § 19.43(1).
[17] Wis. Stat.§ 19.579(1).

In the public records context, during such long periods between an alleged violation and the date a legislator could become subject to service, the records sought could be lost or destroyed and the information would almost certainly become less relevant to current debates over public policy. The immunity, in other words, can keep crucial public records out of the public's view, shielding scandal or other disreputable activity from the people of the state. That is a formula for corruption, and it is at odds with Wisconsin's proud traditions of transparency.

The absurdity of the Attorney General's interpretation doesn't end there. This interpretation of Section 15 would put legislators above the law for a vast range of civil forfeitures for offenses unrelated to their public duties, such as violations of hunting and environmental protection laws, motor vehicle laws, trade regulations, professional licensing laws, consumer protection laws, real estate conveyance laws, and gaming laws. Moreover, under the Attorney General's interpretation, such legislators would be immune from civil suit by private parties for anything ranging from contract actions to property disputes, and would even prevent legislators from having to respond to a summons for divorce or child custody proceedings, or even a domestic violence restraining order.

III. The Legislative Privilege in Section 15 Does Not Extend To An Order Requiring A Response To a Complaint for Mandamus

Even if the Attorney General were correct that Section 15 grants an unlimited privilege to legislators immunizing them from civil service for as long as they hold

office, such a privilege should not extend to an order requiring a legislator to respond to a complaint for mandamus in an open records case.

To interpret the constitutional term "civil process," we analyze Section 15 using the framework outlined in *Beno*, 116 Wis.2d at 122 (cited *supra* at pp. 6-7).[18] "Civil process" is not defined in the Wisconsin Constitution. And as noted above, the constitutional debates at the time shed no light on the phrase.[19] But early interpretations of Section 15 and the nineteenth century plain meaning of the relevant terms indicate that the provision's purposes would be thwarted if it were applied to an order requiring a legislator to respond to a complaint for mandamus in an open records case.

In the contemporaneous 1841 decision *Anderson v. Rountree,* the Court explained that legislative privilege is designed to protect legislators from "the service of any civil process that would in any way *interfere with the discharge of their public duties.*" 1 Pin. 115 (1841) (Cited by *Beno* at 138; *Burke* at 835) (emphasis added).

The remedy sought in this case is a Writ of Mandamus, which by no means interferes with a legislator's public duties. By its definition in the late 1800s and today, a Writ of Mandamus *compels* a public official to discharge their public duties. *See* Black's Law Dictionary 748 (1st ed. 1891); *see also Morrissette v. DeZonia*, 63 Wis.2d 429 (1974).

[18] Courts consider: "(1) The [nineteenth century] plain meaning of the words in the context used; (2) The historical analysis of the constitutional debates and of what practices were in existence in 1848, which the court may reasonably presume were also known to the framers of the 1848 constitution, and; (3) The earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the Constitution." *Burke* at 832, citing *Beno* at 122.

[19] *See* footnote 12.

Just as the people are deprived of their voice when their Representative or Senator is absent during debates or votes in floor session, the people are deprived of representation when a legislator fails to perform their statutory duties. A Writ of Mandamus is designed to remedy that.

Under Wis. Stat § 19.37, a writ of mandamus is the enforcement mechanism if a public official refuses to comply with a lawful written public records request. In this case, a Writ of Mandamus would require that Senator Vukmir perform her statutorily-required duties and disclose the public records requested by the Center for Media and Democracy. Mandamus is necessary in a public records case to compel an official to comply with the law, since a failure to perform would result in substantial damages and because there is no other legal remedy available to require the legislator to comply with the public records law. *Burns v. City of Madison*, 92 Wis.2d 232, 243 (1979). Any member of the public is damaged when the public records law is broken. *See Watton v. Hegerty*, 2007 WI App 267, ¶ 33, 306 Wis. 2d 542, *rev'd on other grounds*, 2008 WI 74, 311 Wis. 2d 52.

Senator Vukmir is asking this court to rule that legislators are out of the reach of the courts to enforce the public duties ascribed to them by law. If Senator Vukmir were to have her way, an action for mandamus would essentially become optional, and no court could compel legislators to carry out their assigned statutory duties, public records or otherwise.

However, *any* member of the public has a right to public records, and *any* member of the public is damaged when the open records law is broken. *See Watton*. In

this way, a suit for Mandamus seeking compliance with Wisconsin's public records law is distinguishable from a traditional civil suit: it is a case seeking to vindicate the public's right to public records and to remedy a wrong that is felt by the entire public.

According to the First Edition of the Black's Law Dictionary, the purpose of a civil action "is the enforcement of merely private obligations and duties." Black's Law Dictionary 207 (1st ed. 1891). It involves "the enforcement or protection of a private right, or the prevention or redress of a private wrong." *Id.* This definition reveals the nineteenth-century meaning of the term "civil process" as used in Section 15.

The legislature's current practice of calendaring its session for the entire biennium, following without interruption from the previous session, and calendaring floor periods during which legislative business is scheduled and conducted, is new in terms of Wisconsin's 165-year-history. But it was well-established at the time Wisconsin's Public Records Law was enacted in 1981. Section 15 cannot properly be interpreted to render that law optional, as Senator Vukmir's argument would accomplish. It would be odd indeed for the legislature to have created a comprehensive public records law, subjected itself to that law, and to have created civil forfeitures for violations if the Section 15 privilege applied to the entire biennial session and the public records law could not be enforced.

IV. The Complaint for Mandamus and the Order Directing the Defendant to Respond Are Not "Civil Process" For Purposes of Section 15

Plaintiffs served Senator Vukmir with a complaint for mandamus and an order from this Court directing the defendant to file a response pursuant to Wis. Stat. §

801.02(5). The Section 15 legislative privilege from "civil process" should be construed as not encompassing the service of an order of the court directing a legislator to respond to a complaint for mandamus.

Because a petition for Writ of Mandamus is an extraordinary remedy, Wisconsin law allows a plaintiff to commence a suit by serving a respondent with an order shortening the time for filing a response, in lieu of a summons. *See* Judicial Council Note to Wis. Stat. § 801.02.

Therefore, because the plaintiff has served the defendant with an order rather than a summons, Senator Vukmir's September 11, 2013, "Motion to Quash Summons" is not the proper pleading. But notwithstanding the form of the motion, Senator Vukmir's claim of legislative privilege is improper.

In her Motion to Quash Summons, Senator Vukmir included two court orders from another case purporting to show that "legislative immunity, therefore, undoubtedly applies to this case." *See* Def.'s Motion to Quash Summons at pp. 3-4, exhibits 1-2.

However, those court orders quashed subpoenas that would have required personal appearances from Sen. Scott Fitzgerald and Rep. Jeff Fitzgerald for depositions, while the legislature was in session. The deposition, scheduled for April 25, 2011, was within 15 days of the floor period that ended on April 14, 2011. *See* Senate Joint Resolution 1 (2011)**.** Moreover, at the time of the subpoena and deposition, the legislature was in the midst of a special session ordered by the governor. Those

depositions could have prevented the legislators from being on the floor while the legislature was conducting legislative business.

The court orders submitted by Senator Vukmir in support of her motion only provide further proof that the privilege is intended to protect the public's right to representation and only applies during the period where the session is actually meeting.

In contrast with a deposition – which requires a defendant to personally appear and be deposed for questioning – no personal appearance is required by the order that plaintiffs served on Senator Vukmir and her attorneys. Indeed, Senator Vukmir is represented by counsel, the Attorney General, who presumably will prepare and file the response on her behalf. Accordingly, even if the legislature were in session at the time of service, Senator Vukmir's constituents would not be deprived of representation since the order does not require her personal appearance. Moreover, as the case moves forward, the court has the power to set a schedule for depositions and other discovery that would not require Senator Vukmir to be absent during any legislative floor period.

Interpreting the Section 15 privilege not to apply to the service of an order requiring a response to a complaint for Mandamus is supported by the 19th century understanding and use of the term "subject to any civil process." *Burke,* 258 Wis.2d at 832, citing *Beno,* 116 Wis.2d at 122.

At the time the Wisconsin Constitution was drafted, except for contract actions, civil lawsuits arising *ex delictu* could be commenced by "*capias ad respondendum*" (usually referred to as "a *capias*"), "which commands the sheriff to *take* the defendant,

and him safely keep, so that he may have his body before the court on a certain day, to *answer* the plaintiff in the action." *Burke*, 258 Wis.2d at 840, citing Black's Law Dictionary 168 (1st ed. 1891).

In short, the framers of the Wisconsin Constitution would have understood the phrase "subject to any civil process" in Article IV, Section 15 to include the civil seizure of the person sued. *Burke* at 841. This fact – that a legislator in 1848 subject to civil process might be arrested -- helps explain the underlying purpose of the privilege: "to preserve the public's right to representation in the state legislature during the session of the legislature," by making sure legislators are not hauled off the floor when they are supposed to be representing constituents and carrying out official duties.

Today, a civil summons no longer "summons" a defendant to appear in person, enforceable by the physical seizure of a defendant. Rather, a civil summons only compels the filing of a written answer. An order involves even less interference with a person than a summons. [20]

The leading cases considering the Section 15 privilege support an interpretation of "civil service" that would exclude service of orders that do not require a personal appearance. The legislator in *Beno* successfully invoked the privilege to avoid service of a subpoena for a deposition -- the same form of civil service facing Sen. Fitzgerald and Rep. Fitzgerald in the exhibits cited by the Attorney General in this case – which would

[20] **order,** *n.* (16c) **1.** A command, direction, or instruction. See mandate (1). **2.** A written direction or command delivered by a court or judge.
summons, n. (13c) **1.** A writ or process commencing the plaintiff's action and requiring the defendant to appear and answer. Black's Law Dictionary (9th ed. 2009).

have required the legislator's appearance. In *Burke*, a legislator was facing felony criminal charges, and in criminal proceedings a defendant must appear personally. *See* Wis. Stat. § 968.04. These are clearly distinct from the service of an order, or for that matter, other legal pleadings that do not require the personal appearance of the defendant.

The Constitution's framers would not have intended that Section 15 apply to service of an order. Contemporaneous cases made it clear that the legislative privilege does not apply if a legislator is not required to personally appear. The Wisconsin Supreme Court in *Polacheck,* 101 Wis. 427 (1898), cited *Nones v. Edsall,*[21] a case from New Jersey decided in April 1848, at the same time the Wisconsin Constitution was being ratified. In *Nones*, the Court denied a legislator's effort to invoke the privilege, holding that "it does not necessarily follow, that if this trial proceed the defendant need be compelled to neglect his public duties**.** In contemplation of law he is already in court by his counsel; and his personal attendance is not required at the trial either in theory or in practice. We all know that causes are tried in this and every other civil court, almost daily without the presence of the parties." *Nones v. Edsall* at 297.

In this case, an attorney is appearing on the defendant's behalf, and the order does not demand Senator Vukmir's personal appearance before the court.

CONCLUSION

The most reasonable interpretation of the Section 15 privilege – one supported by the history of the Constitution and by the purpose of the privilege, and one which

[21] 18 F. Cas. 296, 297 (C.C.D.N.J. 1848).

would avoid absurd results – is to find that Section 15 only applies when the legislature is actually meeting, and not to construe the privilege to give immunity to lawmakers during their whole term in office based on a modern scheduling practice that deems the legislative session to extend uninterrupted for the entire biennium.

In the immediate case, it is clear that Senator Vukmir was served when the legislature was in summer recess and was not meeting, and during a period where the legislator herself was so unconsumed by her legislative duties that she was not even in the state.[22]

Additionally, even if the legislative privilege were to apply during this period, it should not apply to service of an order of the court directing a legislator to respond to a complaint for mandamus.

For the above reasons, we respectfully ask the Court to deny Senator Vukmir's Motion to Quash Summons and her novel reinterpretation of the temporary legislative privilege in Section 15, and we respectfully ask the court to preserve Wisconsin's longstanding traditions of openness, transparency, and governmental accountability.

Dated this October 1, 2013, in Madison, Wisconsin.

Respectfully submitted,

[22] The court need not define the specific parameters of when Art. 15 shall apply: it is clear in this situation, when the legislature was not meeting and the legislator herself was actually out of state at the time of service, that the privilege may not be invoked.

Brendan Fischer, SBN 1089027
Attorney for Plaintiff

Mailing Address:
520 University Ave Ste 260
Madison, WI 53703
Telephone: (608) 260-9713
Facsimile: (608) 260-9714
Brendan@prwatch.org