APPENDIX B†

HCN LEGISLATIVE BRANCH V. HCN TRIAL COURT, SU 20-04, AT 4–15 (HCN S. CT. APR. 27, 2022)

This Court possesses the constitutional authority "to interpret and apply the . . . laws of the Ho-Chunk Nation," and may render binding "conclusions of law."[1] The Court reviews determinations uniquely committed to the discretion of the trial level judge, either by statute or rule, under an abuse of discretion standard. As explained over a decade ago,

> [t]his Court previously posed a definition of abuse of discretion, namely "'any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law pertaining to the matter submitted.'" *Youngthunder v. Pettibone*, SU 00-05, at 2 (HCN S. Ct. July 28, 2000) (quoting Black's Law Dictionary 11 (6th ed. 1990)). The adoption of this abstract definition has proven somewhat problematic since it seems to articulate a hyper-deferential approach, but, in practice, we have not always afforded such a high degree of deference. Despite occasional reversals on the grounds of an abuse of discretion, we have seldom, if ever, encountered an unconscionable action of a judge as commonly understood.
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> The reversals have nonetheless been warranted. "'Abuse of discretion' may have different meanings in different contexts; the deference given a particular decision depends upon 'the reason why

† Editor's Note: This Appendix has been lightly edited to conform with the *Journal*'s editorial conventions. The edits are nonsubstantive, and text in this opinion otherwise appears as in the original.

1. HCN CONST. art. VII, §§ 4, 7(a).

> that category or type of decision is committed to the trial court's discretion in the first instance.'"[2]

In this case, the trial court initially determined to grant an *ex parte* temporary restraining order, an extraordinary measure that "*may* be [undertaken] to restrain [an] act" and, by definition,[3] "*may* [be] grant[ed] . . . at any time before a hearing."[4] The appellant allegedly violated this order through subsequent official action, leaving the trial court several potential options as presented in governing statute: a) "[i]f the alleged contempt occur[red] out of the presence of the Court, the presiding Judge . . . *may* schedule a Show Cause Hearing . . .";[5] b) "[t]he Court *may* consider . . . punitive and remedial sanctions for alleged contempt . . .";[6] and c) "[a] Court *may* impose punitive sanctions for past conduct . . . ."[7] The appellant now asks that this Court reverse

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2. *King v. Majestic Pines Casino Food & Beverage Dep't, SU 11-01, at 4 (HCN S. Ct. Aug. 25, 2011) (footnote omitted) (quoting Gasperini v. Ctr. for Humanities, Inc.,* 149 F.3d 137, 141 (2d Cir. 1998) (quoting Henry J. Friendly, *Indiscretion about Discretion,* 31 EMORY L.J. 747, 764 (1982))); *see also* Ho-Chunk Nation v. Christopherson, SU 15-03, at 5–8 (HCN S. Ct. Sept. 10, 2015) (clarifying appropriate use of appellate standards of review).

3. *Ex parte*. Lat. "from the part," i.e., "On or from one party only, usu[ally] without notice to or argument from the adverse party." BLACK'S LAW DICTIONARY (11th ed. 2019).

4. HCN R. CIV. P. 60(B), (D) (emphasis added).

5. Contempt Ordinance, 2 HCC § 5.5c(2) (2005) (emphasis added).

6. *Id.* § 5.5c(3) (emphasis added).

7. *Id.* § 5.6b(1) (emphasis added); *cf. In re* Trusteeship Created by Alaska Indus. Dev. & Expert Auth., Civil No. 10-2996 (DSD/JJG), 2010 WL 4811899, at *1 (D. Minn. Nov. 19, 2010) ("The words 'may' and 'should' generally signify permissive clauses, while the words 'shall,' 'will' or 'must' generally signify mandatory clauses." (citing, in part, McDonnell Douglas Corp. v. Iran, 758 F.2d 341, 346–47 (8th Cir. 1985))); *see also* Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."); Smiljanic v. Niedermeyer, 737 N.W.2d 436, 441 (Wis. Ct. App. 2007) (acknowledging that use of the verb "may" in a statute indicates that a court is to exercise discretion in ordering relief sought). As expressed by the Ninth Circuit Court of Appeals:

> "[D]iscretion" is defined as: "The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court." Bouvier's Law Dictionary 884 (8th ed. 1914). Judicial action—discretionary in that sense—is said to be final and cannot be set aside on appeal except when there is an abuse of discretion. A common example is a court's ruling

these various discretionary determinations.[8]

Before engaging in that case-specific examination, the Court must comment upon the nature of the contempt power, its emergence in this jurisdiction, and its subsequent codification. The Ho-Chunk Nation, by virtue of its status as a sovereign government, has always possessed inherent judicial authority.[9] Therefore, the courts maintain the concomitant power of contempt.[10]

Notably, "[t]he power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of

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> on the extent of cross-examination. *Alford v. United States*, 282 U.S. 687, 694 (1931). Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man [or woman] would take the view adopted by the trial court. If reasonable men [or women] could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Delno v. Market St. Ry. Co., 124 F. 2d 965, 967 (9th Cir. 1942).

This Court references external case law as persuasive, not binding, authority, and in an attempt to demonstrate a consistent approach to basic legal principles. "[O]nly decisions by this [C]ourt are limitations on the trial court." LoneTree v. Funmaker, SU 00-16, at 4 (HCN S. Ct. Mar. 16, 2001). "It is not unusual to cite the decision of courts in foreign jurisdictions, so long as they speak to a matter relevant to the issue . . . . Citing a precedent is, of course, not the same as following it . . . ." Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001); *accord* Ho-Chunk Nation v. Bank of Am., N.A., No. CV 02-93, 6 Am. Tribal Law 275, 293 (HCN Tr. Ct. Jan. 30, 2006); Amerada Hess Corp. v. Conrad, 410 N.W.2d 124, 129 (N.D. 1987).

8. The appellate rules neither incorporate nor reflect any legislative statute(s) of limitation, and, consequently, an appellant presumptively files a timely appeal when submitted within sixty (60) calendar days after issuance of a final decision, HCN R. APP. P. 7(a)(1), 11(a), subject to permissible extension as set forth in the rules. *Id.* 10(a); *cf.* Ho-Chunk Nation v. Christopherson, SU 13-05 (HCN S. Ct. Nov. 18, 2013) (designating an administrative appeal to the trial court as untimely since the civil rules could not lengthen a filing deadline established within an applicable statute of limitation).

9. Thundercloud v. HCN Executive Branch, SU 20-05, at 16 n.3 (HCN S. Ct. Dec. 15, 2021) (Matha, C.J., concurring); *see also* HCN CONST. pmbl. & arts. III, § 1, IV, §§ 1–2.

10. HCN Judiciary Establishment & Org. Act, 1 HCC § 1.7 (2017) (acknowledging antecedent ability).

justice."[11] Earlier, in 1823, the D.C. Circuit similarly—but more passionately—expressed the underlying rationale:

> Their power to enforce their judgments depends more on the continuance and support of the good and virtuous portion of society than upon the power of the executive. In order to obtain that countenance and support they must deserve respect; and that court which may with impunity be treated with contempt, will inevitably be contemptible, even in the eyes of the good and the virtuous. Their judgments will not be executed; the law will become a dead letter, and fraud and violence will prevail. It is therefore of the highest importance to the peace and good order of society, that courts of justice should have the power of punishing contempts.[12]

In 1997, this Court first pronounced that "tribal courts possess inherent power to order punishment for contempt as an inherent aspect of judicial authority."[13] When doing so, the Court also adopted a jurisprudential,[14] and practical, limitation recognized in

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11. *Ex Parte* Robinson, 86 U.S. 505, 510 (1873); *see also* United States v. Hudson, 11 U.S. 32, 34 (1812) ("To fine for contempt—imprison for contumacy—inforce the observance of order, &c. [(et cetera)] are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others . . . .").

12. *Ex Parte* Burr, 4 F. Cas. 791, 797 (C.C.D.C. 1823) (No. 2186).

13. *In re* Lonetree, SU 96-16, at 2 (HCN S. Ct. Apr. 14, 1997).

14. In hindsight, this decision appears premature given that this Court had not previously accepted the federal dichotomy for purposes of distinguishing criminal from civil contempt, i.e., punitive versus remedial effect.

> It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911). Although intended to provide clarity, the U.S. Supreme Court conceded that "[c]ontempts are neither wholly civil nor altogether criminal . . . , [and] 'may partake of the characteristics of both.'" *Id.* (quoting Bessette v. Conkey, 194 U.S. 324, 329 (1904)); *see also* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 830 (1994) (describing the "distinction between civil and criminal contempt fines" as "somewhat elusive"). Tangential to punishment, a court may also employ its civil contempt powers to coerce and compel prospective compliance, either through imposition of a fine or period of incarceration. "[I]t is civil only if

federal court: "a civil proceeding becomes moot upon termination of the underlying main cause of action."[15] This characterization, and partial misstatement,[16] of a conclusory remark in *Gompers* is overly simplistic as a multi-faceted, parallel analysis preceded this determination.

The *Gompers* Court reversed an order requiring individual appellants to serve set periods of incarceration arising out of a civil contempt proceeding.[17] The Court arrived at this conclusion after several findings: 1) deeming the confinement as wholly punitive, rather than coercive;[18] 2) perceiving no remedial impact, e.g., a fine intended to address "pecuniary injury caused by the act of disobedience";[19] 3) confirming the absence of any criminal constitutional protections;[20] 4) noting that the plaintiff independently

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the contemnor is afforded an opportunity to purge." *Id.* at 829; *cf.* United States v. Slaughter, 900 F.2d 1119, 1125 (7th Cir. 1990) (categorizing "two types of civil contempt orders, 'coercive' and 'compensatory[,]'[and a]s their labels imply, the former is intended to force the contemnor to obey a court order, and the latter is intended to afford some party compensation for contemnor's failure to do so").

15. *In re Lonetree* at 2 (citing 221 U.S. 418).

16. In *Gompers*, the underlying civil suit concluded with the parties entering into a settlement of claims. "When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled . . . ." 221 U.S. at 451. The plaintiff/appellee initiated the contempt proceeding, but it did not preserve any outstanding or potential remedial fine against the defendants/appellants when it finalized settlement. However, if the government had initiated the contempt proceeding, then any resulting criminal fine would have survived. "[I]t could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation." *Id.* This possibility existed since criminal contempt may be sought in a civil case and vice versa. *See, e.g.*, Camp v. East Fork Ditch Co., Ltd., 55 P.3d 304 (Idaho 2002) ("Whether contempt is criminal or civil does not depend upon the nature of the lawsuit in which the contempt proceedings are brought."); *In re* J.T.R., 271 P.3d 1262, 1265–66 (Kan. Ct. App. 2012) ("[C]ivil and criminal contempt . . . are distinguished by the intent of the penalty imposed and not necessarily the nature of the underlying legal or equitable action that the court is dealing with.").

17. *See* 221 U.S. at 449 (describing the district court's action as "fundamentally erroneous" since "in answer to a prayer for remedial relief, in the equity case, the court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt").

18. *See supra* note 126.

19. 221 U.S. at 444, 449.

20. *Id.* at 444, 447–48.

served in a prosecutorial capacity;[21] 5) emphasizing, therefore, that the civil caption remained unchanged;[22] and 6) indicating, finally, that the plaintiff proceeded as a private litigant and not as a public agent.[23] On the foregoing bases, the Court "set aside the order of imprisonment" because it derived from a civil finding of contempt, but did not represent a civil remedy.[24] The U.S. Supreme Court continued on to conjecture that since

> this was a proceeding in equity for civil contempt where the only remedial relief possible was a fine payable to the complainant . . . , when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character.[25]

This Court identified the above *dicta* as "the holding of the U.S. Supreme Court in *Gompers*."[26] While still a sound legal proposition, the facts in *Lonetree* bore greater resemblance to the hypothetical facts necessary to uphold the civil contempt remedy contemplated in *Gompers*. Ms. Lonetree failed to adhere to a subpoena issued in an election challenge case, and, as a result, neither provided requested testimony nor documents.[27] Due to constitutional time constraints,[28] the trial court rendered a final decision on the election challenge without this input.[29] Thereafter, the trial court "fashioned a sanction which would educate the party

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21. *Id.* at 445.
22. *Id.* at 446.
23. *Id.* at 449.
24. *Id.*
25. *Id.* at 451–52.
26. *In re* Lonetree, SU 96-16, at 2 (HCN S. Ct. Apr. 14, 1997).
27. *Id.* at 3; *see also In re* Lonetree, CV 95-24, at 4 (HCN Tr. Ct. Dec. 18, 1996) ("There was no evidence showing that the respondent attempted to call the Court at the requested 9:00 a.m. time period[, and] the respondent admitted on the stand that she never provided the subpoenaed documents.").
28. *See* HCN CONST. art. VIII, § 7 (requiring case resolution within twenty days of filing).
29. SU 96-16 at 3.

about her responsibilities to the court's order as well as educate the Ho-Chunk Nation membership."[30] In this regard, the remedy was not decidedly punitive, but curative and educative.

The trial court conducted the show cause hearing on November 26, 1996, and rendered its contempt order on December 18, 1996.[31] The entire procedure followed completion of the election challenge case, which the trial court concluded on July 7, 1995.[32] As the trial court did not impose a criminal contempt penalty, the *Gompers* holding proves inapposite. Also, the cited *dicta* is largely irrelevant since the election dispute did not culminate in a settlement agreement. The election contestant, Gail L. Funmaker, did not initiate the contempt proceeding; did not apparently participate in the show cause hearing, which the trial court conducted;[33] and would not directly benefit from the civil contempt judgment.

Following *Lonetree*, the Legislature promptly codified contempt procedures for use by the Judiciary.[34] These procedures recognize judicial authority to impose punitive sanctions for past contemptible behavior, "regardless of whether or not the underlying action has ended."[35] Despite that, the Contempt Ordinance is

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30. *Id.* at 4. Specifically,

> the Court order[ed] the respondent to serve five hours of community service. These hours of community service [would have] include[d] two duties: 1) the respondent [needed to] attend a trial to observe witness testimonials during a court proceeding[,] and 2) the respondent [needed to] make a presentation at her area meeting about witness compliance with Court ordered subpoenas and subpoena powers.

CV 95-24 at 5.

31. *Id.* at 3.

32. *Id.*

33. "[M]anifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution." Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 446 (1911); *cf.* Contempt Ordinance, 2 HCC § 5.7a(2) (2005) ("In any appeal of an order for contempt, the Court which issued the order shall be the named Appellee.").

34. HCN LEG. RES. 09-29-98A.

35. Contempt Ordinance § 5.4c; *see also id.* § 5.5c(2)–(3) (enabling consideration of punitive sanctions); *id.* § 5.6b(1)(c) ("A Court may impose punitive sanctions for past conduct which was a contempt of court even though

obviously a civil statute.[36] To begin, the statute employs a civil burden of proof: "The movant must demonstrate that the authority, process, order, or directive of the Court has been violated by the alleged contemnor through clear and convincing evidence."[37] Second, "[t]he movant need not prove the alleged contemnor's state of mind."[38] Third, the ordinance defers to existing judicial procedural rules for purposes of service of process.[39] Finally, the statute does not afford the alleged

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the underlying cause of action has been decided, settled, or otherwise terminated.").

36. The U.S. Supreme "Court generally has deferred to a legislature's determination whether a sanction is civil or criminal." Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 838 (1994). In this respect,

> [w]hether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other."

Hudson v. United States, 522 U.S. 93, 99 (1997) (quoting United States v. Ward, 448 U.S. 242, 248 (1980)). And, "monetary assessments are traditionally a form of civil remedy." 448 U.S. at 256 (Blackmun, J., concurring).

37. Contempt Ordinance § 5.5b(3). "Clear and convincing evidence means evidence sufficient to support a finding of 'high probability.'" Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1105 (9th Cir. 1992) (citation omitted); *see also In re* Tri-State Fin., LLC, 885 F.3d 528, 534 (8th Cir. 2018) (constituting "'evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved'" (citation omitted)), *cert. denied*, 506 U.S. 1080 (1993). This evidentiary standard exists in the sphere between the traditional civil and criminal standards of proof, i.e., preponderance of the evidence and beyond a reasonable doubt, respectively. California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93 n.6 (1981); *see also* Addington v. Texas, 441 U.S. 418 (1979) (affirming use of the intermediate standard in a civil commitment proceeding).

38. Contempt Ordinance § 5.5b(4); *cf.* United States v. Trudeau, 812 F.3d 578, 587 n.5 (7th Cir. 2016) ("The circuits are split over whether 'knowledge' or 'recklessness' is the appropriate *mens rea* in criminal contempt cases."), *cert. denied*, 137 S. Ct. 566 (2016); United States v. Kouri-Perez, 187 F.3d 1, 8 (1st Cir. 1999) ("[T]he criminal contempt power is to be reserved for conduct that bespeaks a criminal *mens rea* (i.e., intentional or reckless conduct) and has been proven beyond a reasonable doubt . . . .").

39. Contempt Ordinance § 5.5c(2); *cf. Helvering*, 303 U.S. at 402 (deferring to legislative designation and concluding that "[c]ivil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions").

contemnor constitutional protections associated with criminal prosecution.[40]

The clear civil import of the matter against the appellant in this case renders the central analysis in *Gompers* inapplicable. Also, the underlying matter did not conclude by way of a negotiated settlement, thereby rendering the adopted "holding" of *Gompers* likewise inapplicable. Quite simply, the *Lonetree* decision, and its diminished authoritative character, is not instructive here since disanalogous. The subsequent passage of the Contempt Ordinance did not necessarily serve to reverse a decision arising out of the exercise of inherent judicial authority.[41]

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40. *See* Contempt Ordinance § 5.5b(5), d (prohibiting jury trial and assigning burden to the defendant to rebut *prima facie* demonstration of contempt). *Prima facie*. Lat. "at first sight," which in terms of evidence represents documentation "that will establish a fact or sustain a judgment unless contradictory evidence is produced." BLACK'S LAW DICTIONARY (11th ed. 2019). "The Ho-Chunk Nation, in exercising its powers of self-government, shall not compel any person in any criminal case to be a witness against him[- or her]self . . . ; or deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury . . . ." HCN CONST. art. X, § 1(a)(4), (6), (10); *see also* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202(4), (10), 82 Stat. 73, 77–78 (codified as amended at 25 U.S.C. § 1302(a)(4), (10) (2018)).

41. *See, e.g.*, Bradner v. Hammond, 553 P.2d 1, 5 n.8 (Alaska 1976) (limiting legislative prerogative to "regulat[ing] the procedure and enlarg[ing] the power"); Freeman v. State, 69 S.W.2d 267, 269 (Ark. 1934) ("[T]he power of punishment for contempt is independent of statutory authority, being inherent in an immemorial incident of judicial power . . . ."); State v. Garcia, 355 P.3d 635, 642 (Idaho 2015) (confirming that while the legislative body acknowledged judicial contempt powers in statute, the power itself derived from constitutional and common law sources); People v. Warren, 671 N.E.2d 700, 710–11 (Ill. 1996) (regarding an "undue infringement" upon the court's inherent power of contempt by the legislature as violative of constitutional separation of powers principles); State *ex inf.* Crow v. Shepherd, 76 S.W. 79, 88 (Mo. 1903) ("[T]he power of this court to punish contempts is inherent, and . . . statutes which attempt to confer such power have always been treated as conferring no new power, but simply declaratory of the common-law power that already belonged to every court of record."); Tyler v. Heywood, 607 N.W.2d 186, 190 (Neb. 2000) ("[T]he court's contempt powers are inherent and not derived from or circumscribed by statute."); Gabrelian v. Gabrelian, 108 A.D.2d 445, 450 (N.Y. App. Div. 1985) ("[A]lthough the contempt power has now been codified . . . , it has long been recognized that courts have the inherent power to enforce respect for and compliance with their judgments and mandates by punishment for contempt, which power is not dependent upon any statute."); Hale v. State, 45 N.E. 199, 200 (Ohio 1896) ("[T]he [contempt] power inheres in courts independently of legislative authority[; a] power which the legislature does not give, it cannot take

Returning to the matter at issue, on August 28, 2020, the trial court determined that the plaintiffs had satisfied the four-part test for securing a preliminary injunction, a standard which it had originally adopted from the Seventh Circuit Court of Appeals.[42] As articulated by the Seventh Circuit, the

> test examines whether the plaintiff will otherwise have an adequate remedy at law, whether the threatened injury to the plaintiff outweighs the threatened harm of the injunction, whether the plaintiff has at least a reasonable likelihood of success on the merits and whether the granting of a preliminary injunction will disserve the public interest.[43]

The test omits any direct reference to "irreparable harm," but the court nonetheless understood its central presence in the inquiry.[44]

Accordingly, when the trial court found that only non-monetary relief could rectify the anticipated injury, it necessarily deduced the presence of irreparable

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away."); *In re Cooper,* 32 Vt. 253, 257 (1859) ("The power to punish for contempt is inherent in the nature and constitution of a court. *It is a power not derived from any statute,* but arising from necessity; implied, because it is necessary to the exercise all other powers."); *cf.* Christensen v. Sullivan, 768 N.W.2d 798, 832 (Wis. 2009) (Abrahamson, C.J., dissenting) (rejecting substantial legislative interference with an inherent judicial power and asserting that "[i]ntentional defiance of a court's judgment or order cannot be condoned," thereby "conclud[ing] that when a contempt has terminated and no remedial [statutory] sanction is available . . . , a court may exercise its inherent power to award compensatory damages to effectuate its order"). *But cf. In re* Aaron D., 571 N.W.2d 399, 405 (Wis. Ct. App. 1997) (acknowledging that "the legislature may impose reasonable limitations upon the court's inherent contempt powers," provided such limitations pose "an insubstantial burden").

42. *TRO*, CV 20-05, at 2 (HCN Tr. Ct. Aug. 28, 2020) (citing, in part, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 214–15 (7th Cir. 1993)).

43. 999 F.2d at 214.

44. *Id.* at 215; *see also* Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 11 (7th Cir. 1992) (associating "irreparable harm" with consideration of the first part, such that if the plaintiff "were to prevail on the merits, any harm it would suffer prior to final judgment could be adequately compensated with money damages and would not be irreparable"); *cf.* Reebok Intern Ltd. v. J. Baker, Inc., 32 F.3d 1552, 1555 (Fed. Cir. 1994) (representing a court that explicitly includes "irreparable harm" in the four-part test, replacing the "adequate remedy" phraseology).

harm.[45] The executive branch alleged that the scheduled legislative action would "constitute[ ] a violation of . . . separation of powers."[46] In such an instance, "irreparable harm is presumed to flow from a constitutional violation which is not fully compensable by monetary damages."[47]

Apart from the above interpretive issues, the appellant contends that the judicial directive within the TRO was ambiguous; her actions did not directly violate the literal meaning of the directive; and she maintained a legitimate justification for acting contrary to the directive, provided that a *prima facie* violation exists.[48] This Court regards these related arguments as disingenuous and manufactured to avoid responsibility.[49]

The single sentence injunction appearing in the *ex parte* temporary restraining order reads in its entirety as follows: "The defendants shall refrain from addressing any legislative budgetary matters scheduled on August 31, 2020[,][50] until the [c]ourt is able to render a decision regarding the plaintiff's *Complaint*, which the [c]ourt intends to do on an expedited basis."[51] In an effort to circumvent the unmistakable intent of this directive, the appellant advocates adoption of literal meaning in order to render the prohibitive injunction ineffective.[52] For purposes of illustration:

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45. *TRO* at 4; *see also* HCN R. CIV. P. 60(C) (permitting *ex parte* consideration if "the Court is of the opinion that irreparable harm or damage will result").

46. *TRO* at 5 (citing HCN CONST. art. III, § 2).

47. Bordelon v. Chicago Sch. Reform Bd. of Trustees, 8 F. Supp. 2d 779, 789 (N.D. Ill. 1998).

48. Brief of Appellants at 15–18, HCN Legislative Branch v. HCN Trial Court, SU 20-04 (Jan. 18, 2022); *see also* Contempt Ordinance, 2 HCC § 5. 5b(3), d(1)–(2) (2005).

49. *See Contempt Order*, CV 20-05, at 19 (HCN Tr. Ct. Sept. 28, 2020) (characterizing the argument as "disingenuous given the context and circumstances").

50. The transitive verb, "address," has an acknowledged relevant definition. A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES, vol. 1, 106 (1888) ("To apply, direct, or turn (to some object or purpose)"); AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, vol. 1 (1828) ("To prepare [or] to make suitable dispositions for").

51. *TRO* at 7 (footnote added).

52. *See supra* note 109.

> The Trial Court's *Ex Parte T.R.O.* did not prohibit the calling of a Legislative meeting by the Vice President. . . . The act of calling for the Emergency Special Legislative Meeting was not the equivalent of addressing any budgetary matters scheduled for the Legislative Meeting on August 31, 2020. . . . Add to this, the literal wording of the Trial Court's *Ex Parte T.R.O.* leads to another question: What budgetary matters were scheduled for the Legislature's August 31, 2020 meeting? . . . [A] 90-day continuing budget resolution was set to be addressed by the Legislature on August 31, 2020. But rather than address the 90-day budget resolution at its Emergency Meeting on August 29, 2020, the Legislature considered a 63-day budget resolution. This was not scheduled for the meeting on August 31, 2020. Sticking to what the Trial Court actually said in its *Ex Parte T.R.O.*, the Appellants did not address any budgetary matters that were scheduled on August 31, 2020.[53]

This Court should not confront such obfuscation in appellate briefing. A shorthand test: If a litigant finds him- or herself internally asking whether a certain action would possibly violate a standing judicial directive, then that should prompt an overture to the court and not an opportunity to strategize.

Vice President Thundercloud called an Emergency Special Meeting for the sole purpose of addressing a budgetary matter, i.e., passage of a continuing budget resolution that accompanied the agenda. Vice President Thundercloud, therefore, facilitated or performed the predicate measures necessary to ensure violation of the trial court's prohibitory injunction. Consequently, the appellant argues in the alternative that she maintained "'a reasonable inability to comply.'"[54]

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53. Brief of Appellants at 15–16, *supra* note 160; *see also id.* at 18 ("Did the Court intend to prohibit the Legislature from considering *any* budgetary matters from August 28, 2020 until the Court could render a decision at its hearing on August 31, 2020[, because] the language on page 7 of the Court's *Order* does not state this[, q]uite literally . . . ?").

54. *Id.* at 17 (quoting Contempt Ordinance, 2 HCC § 5.5d(1) (2005)).

Vice President Thundercloud likely had to take some action due to a timing miscalculation, but, even accepting this proposition, the Legislature needed to preserve the *status quo* for a period of less than three days (Saturday, August 29, 2020, to Monday, August 31, 2020). The appellant, however, took essential actions to secure a sixty-three-day continuing budget resolution adopted on Saturday, August 29, 2020, and not a temporary three-day fix. Also, while arrangements were performed in haste, notification to the trial court, for unknown reason(s), did not occur until Sunday, the day after the legislative session.[55] This Court, as well as the trial court, would have sympathetically viewed the appellant's actions if reasonably calculated toward a necessary end, but this did not first occur.

Regardless, the trial court did not impose an onerous fine. The moderate civil contempt penalty issued by the trial court has a predominantly compensatory purpose, albeit an ancillary punitive nature,[56] which proves appropriate in a case involving governmental or institutional actors. Based upon the foregoing, the Court will uphold the contempt fine. Its issuance does not constitute an abuse of discretion. Finally, while this Court ultimately overturned the trial level decision, the

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55. To reiterate, the trial court similarly surmised that "the defendants could have provided a letter to the [c]ourt prior to the Emergency Legislative Meeting informing the [c]ourt of the situation and explaining why they believed they must act on the budget before August 31, 2020." *Contempt Order*, CV 20-05, at 18 (HCN Tr. Ct. Sept. 28, 2020).

56. The trial court derived its fine by calculating the judicial costs associated with issuing the TRO. "The [c]ourt . . . fine[d] Ms. Karena Thundercloud $536.00 as a punitive sanction for her contempt . . . , [deeming] the fine reasonable and necessary to ensure compliance with its lawful orders." *Id.* at 19–20 (citing Contempt Ordinance § 5.6a(3)–(4)). Essentially, the contemnor's action rendered the judicial act a nullity, and the punitive fine approximated the cost associated with the negated governmental function. "The [c]ourt arrived at the above amount by adding the hourly wages of several [c]ourt staff, including the presiding judge, who participated in drafting and processing the issuance of the *Temporary Restraining Order*." *Id.* at 20 n.3. If criminal in character, the trial court would have resorted to an established judicial or legislative fine structure. The trial court could conceivably proceed against a litigant for criminal contempt of court pursuant to its inherent authority, but then it would need to provide certain constitutional protections. *See supra* notes 152–153.

parties must still adhere to presumptively legal judicial directives; otherwise, any party could independently and preemptively violate a judicial order with which he or she disagreed. The Court will not sanction such conduct.