SUPREME COURT OF WISCONSIN

IN RE THE MATTER OF THE EXTENSION OF ORDERS AND INTERIM RULE CONCERNING CONTINUATION OF JURY TRIALS, SUSPENSION OF STATUTORY DEADLINES FOR NON-CRIMINAL JURY TRIALS, AND REMOTE HEARINGS DURING THE COVID-19 PANDEMIC

FILED

MAY 22, 2020

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

You are hereby notified that the Court has issued the following order:

WHEREAS the COVID-19 pandemic continues to require certain mitigation procedures, including social distancing measures, meant to reduce the increase in person-to-person transmission of the virus that causes COVID-19; and

WHEREAS the Supreme Court has administrative and superintending authority over the courts and judicial system of this state and a duty to promote the efficient and effective operation of the state's judicial system, Wis. Const. Art. VII, § 3; In re Kading, 70 Wis. 2d 508, 519-20, 235 N.W.2d 409 (1976); and

WHEREAS, the Supreme Court has issued a number of orders intended to minimize in-person proceedings in the circuit courts of this state during the COVID-19 pandemic, including:

- March 22, 2020 order, as amended April 15, 2020, "In Re The Matter of Remote Hearings During the COVID-19 Pandemic," which suspended, until further order of this court, most in-person hearings in the circuit courts of this state, subject to limited exceptions for certain matters if remote technology is not practicable or adequate to address the matter;
- March 22, 2020 order "In Re The Matter of Jury Trials During the COVID-19 Pandemic," which continued all criminal and civil jury trials scheduled to occur prior to May 22, 2020, to a date after May 22, 2020, to be scheduled by the circuit court judge presiding over the case;

- March 31, 2020 Interim Rule 20-02 "In the Matter of an Interim Rule re Suspension of Deadlines for Non-Criminal Jury Trials Due to the COVID-19 Pandemic," which suspended statutory deadlines for conducting non-criminal jury trials until further order of the court; and
- April 13, 2020 order "In re the Matter of Filing of Court Documents in Circuit and Appellate Courts (Temporary Mailbox Rule)," which deemed documents to be filed as of the date they were mailed;

WHEREAS, the Chief Justice has convened a "Wisconsin Courts COVID-19 Task Force" (the Task Force) which has prepared a "Final Report" that makes recommendations to the circuit courts of this state for planning and preparing operational plans to resume in-person proceedings, including jury trials, which report and recommendations this court has adopted to provide information and recommendations for counties, circuit courts, and other judicial stakeholders and to provide them with a resource for making sound decisions in their community while safely transitioning back to full and in-person circuit court operations, including the resumption of in-person proceedings and trials; and

WHEREAS the Task Force has concluded that fundamental requirements for a gradual resumption of in-person proceedings are (1) the use of face coverings by all individuals present in the courtroom, the jury room, or other court-related confined spaces, and (2) the practice of appropriate sanitation/hygiene of frequently touched surfaces and the hands of participants; and

WHEREAS, the public health emergency caused by COVID-19 is ongoing, which requires that the orders and interim rule identified above must be extended, but this court has determined

that individual circuit courts of this state may begin gradually to resume in-person proceedings, including jury trials, on a county-by-county basis if the circuit court prepares a plan to do so safely that includes the requirements set forth below and that plan is approved by the chief judge of the circuit court's judicial administrative district, which would result in the termination of certain orders and the interim rule for that circuit court and that individual municipal courts may also begin to resume in-person proceedings as set forth below;

NOW THEREFORE, IT IS HEREBY ORDERED, pursuant to this court's administrative and superintending authority, that the April 13, 2020 order "In re the Matter of Filing of Court Documents in Circuit and Appellate Courts (Temporary Mailbox Rule)" shall be extended in its entirety with respect to all circuit courts until further order of this court; and

IT IS FURTHER ORDERED that the March 22, 2020 order, as amended April 15, 2020, "In Re The Matter of Remote Hearings During the COVID-19 Pandemic" applies to each municipal court until the chief judge for the judicial administrative district in which the municipal court is located has issued an order approving an operational plan for that municipal court pursuant to footnote 3 below; and

IT IS FURTHER ORDERED that the April 15, 2020 amended order "In Re The Matter of Remote Hearings During the COVID-19 Pandemic" is extended for each circuit court until that circuit court shall have prepared an operational plan for the safe resumption of in-person proceedings and jury trials and the plan shall have been approved by the chief judge of the

applicable judicial administrative district, as set forth below.[1] When a circuit court's operational plan has been approved by the chief judge, as set forth below, this April 15, 2020 amended order shall cease to apply to that circuit court; and

IT IS FURTHER ORDERED that the March 22, 2020 order "In Re the Matter of Jury Trials During the COVID-19 Pandemic" is extended for each circuit court until that circuit court shall have satisfied the requirements set forth below. The extension of this order means that all civil and criminal jury trials in each circuit court are continued until that circuit court shall have prepared an operational plan for the safe resumption of in-person proceedings and jury trials and the plan shall have been approved by the chief judge of the applicable judicial administrative district, as set forth below. When a circuit court's operational plan has been approved by the chief judge, as set forth below, this March 22, 2020 order shall cease to apply to that circuit court; and

IT IS FURTHER ORDERED that Interim Rule 20-02 "In the Matter of an Interim Rule re Suspension of Deadlines for Non-Criminal Jury Trials Due to the COVID-19 Pandemic" shall remain in effect for each circuit court until that circuit court shall have prepared an operational plan for the safe resumption of in-person proceedings and jury trials and the plan shall have been approved by the chief judge of the applicable judicial administrative district, as set forth below. When a circuit court's operational plan has been approved by the chief judge, as set forth below, Interim Rule 20-02 shall cease to apply to that circuit court; and

[1] The provisions of Wis. Stat. § 885.60(2)(b) and (d) are suspended for each circuit court until the April 15, 2020 amended order "In Re The Matter of Remote Hearings During the COVID-19 Pandemic" ceases to apply to that particular circuit court.

IT IS FURTHER ORDERED that each circuit court shall prepare an operational plan for the safe resumption of in-person proceedings and jury trials in that circuit court. The operational plan shall provide specific information about how that circuit court will conduct in-person proceedings and jury trials in a manner that reduces to the greatest extent possible the risk of transmission of the virus that causes COVID-19 and that promotes the health and safety of all those present in the courtrooms, jury rooms, and other court-related confined spaces of that circuit court. Each operational plan must include the following:

- A statement that the circuit court judge or judges have communicated with the clerk of the circuit court and with representatives of the county, the county sheriff's department, the district attorney's office, and the local office of the state public defender, if applicable, regarding the safe resumption of in-person proceedings and jury trials in that circuit court;
- A requirement that all persons who are present in courtrooms, jury rooms, and other court-related confined spaces shall wear face coverings, unless a judge specifically determines on the record that it is necessary for a witness not to wear a face covering during the witness's testimony in order for the judge or jury to weigh the witness's credibility. The plan must specify that notices regarding this requirement will be posted at the entrance of each courtroom, jury room, and court-related confined space and that this requirement will be enforced by the judge(s) of the circuit court;
- Practices for appropriate sanitation/hygiene of frequently touched surfaces and the hands of participants. The plan must specify that notices regarding the availability

of hand sanitizer and disinfecting wipes/spray in court-related areas of the courthouse will be posted at the entrance of each courtroom, jury room, and court-related confined space.

The circuit courts are encouraged to refer to and to incorporate into their operational plans the recommendations set forth in the Task Force's Final Report, as applicable to the circumstances for that circuit court; and.

IT IS FURTHER ORDERED that each circuit court shall submit its operational plan to the chief judge of the applicable judicial administrative district, who shall review the plan to ensure that it includes the requirements set forth above, reduces to the greatest extent possible the risk of transmission of the virus that causes COVID-19, and promotes the health and safety of all those present in the courtrooms, jury rooms, and other court-related confined spaces. If the chief judge approves the operational plan for a circuit court, the chief judge shall issue a written order stating that the chief judge has approved the operational plan for the specified circuit court and that the April 15, 2020 amended order "In Re The Matter of Remote Hearings During the COVID-19 Pandemic," the March 22, 2020 order "In Re The Matter of Jury Trials During the COVID-19 Pandemic," and Interim Rule 20-02 "In the Matter of an Interim Rule re Suspension of Deadlines for Non-Criminal Jury Trials Due to the COVID-19 Pandemic" shall cease to apply to that circuit

court.[2] The circuit court shall continue to follow its operational plan as approved by the chief judge until further order of this court;[3] and,

IT IS FURTHER ORDERED that the provisions of this order shall be subject to further modification or termination by future orders.

The State Bar of Wisconsin shall take all reasonable steps to notify its members of the contents of this order.

¶1 ANNETTE KINGLAND ZIEGLER and BRIAN K. HAGEDORN, J.J. (*concurring).* This order moves us in the direction of returning to local control. We join it. We would prefer the order provide even more flexibility to determine the safety procedures that

[2] The chief judge shall send via email copies of each written order approving a circuit court's operational plan to the Director of State Courts and to the Chief Justice.

[3] Each municipal court shall be subject to the April 15, 2020 amended order "In Re the Matter of Remote Hearings During the COVID-19 Pandemic" until one of the following two alternatives occurs, at the discretion of the chief judge for the judicial administrative district in which the municipal court is located. The first alternative is that the chief judge may require the municipal court to prepare its own operational plan. In that event, the municipal court shall be subject to the April 15, 2020 amended order until the chief judge for the applicable judicial administrative district approves an operational plan submitted by that municipal court to the chief judge. Under this alternative, when the operational plan is approved, the municipal court shall follow that operational plan. The second alternative is that the chief judge may, by written order, require the municipal court to follow a circuit court's or a municipal court's operational plan that the chief judge has approved. The municipal court shall then follow, to the extent possible, the assigned circuit court or municipal court operational plan. For either alternative, the chief judge shall issue a written order that states that the chief judge has approved the operational plan for one or more identified municipal courts and that the April 15, 2020 amended order ceases to apply to the specified municipal court or courts. The chief judge shall send via email copies of each such order to the Director of State Courts and to the Chief Justice.

are best in those counties. But we understand the importance of statewide standards as we phase back in to operating within the new normal. For these reasons, we concur.

¶1 REBECCA GRASSL BRADLEY, J. (*dissenting*). On March 22, 2020 the court issued an order "In Re The Matter of Jury Trials During the COVID-19 Pandemic," which suspended all criminal and civil jury trials until after May 22, 2020. I dissented from that order because it violates the right to a speedy trial guaranteed by the United States Constitution and the Wisconsin Constitution.[1] On March 31, 2020, the court issued Interim Rule 20-02 "In the Matter of an Interim Rule re Suspension of Deadlines for Non-Criminal Jury Trials Due to the COVID-19 Pandemic," which indefinitely suspended statutory deadlines for conducting non-criminal jury trials. I dissented from that order because the court exceeded its authority by infringing the substantive rights of litigants to have their cases tried within the timeframes established by the legislature.[2] On April 15, 2020, the court issued an amended order "In Re The Matter of Remote Hearings During the COVID-19 Pandemic," which indefinitely suspended in-person proceedings in appellate and circuit courts. I dissented from that order because it did not provide an end date.[3]

[1] See Rebecca Grassl Bradley, J., Dissent to In re the Matter of Jury Trials During the COVID-19 Pandemic (S. Ct. Order issued March 22, 2020), attached as "ADDENDUM A."

[2] See Rebecca Grassl Bradley, J., Dissent to Interim Rule 20-02 In the Matter of an Interim Rule re: Suspension of Deadlines for Non-Criminal Jury Trials Due to the COVID-19 Pandemic (March 31, 2020), attached as "ADDENDUM B."

[3] See Rebecca Grassl Bradley, J., Dissent to In re the Matter of Jury Trials During the COVID-19 Pandemic——Amended (S. Ct. Order issued March 22, 2020; Amended April 15, 2020), attached as "ADDENDUM C."

The original order, issued on March 22, 2020, suspended in-person court proceedings through April 30, 2020 only.

¶2 I would allow each of these orders to expire at this time and leave the manner of conducting circuit court proceedings to the circuit court judges, who at this point have had two months to evaluate when and how they may safely conduct jury trials and other proceedings, in consultation with leaders and stakeholders in their respective counties, and who now have the benefit of additional recommendations and guidance from the May 15, 2020 Final Report of the statewide Wisconsin Courts COVID-19 Task Force as well as their respective chief judges. The court's latest order continues to indefinitely suspend criminal and civil jury trials, with no consideration of the constitutional or statutory rights of litigants. For the reasons expressed in my dissents to prior orders of this court, I again dissent.

¶3 I am authorized to state that Justice DANIEL KELLY joins this dissent.

ADDENDUM A

REBECCA GRASSL BRADLEY, J., DISSENT to In re the Matter of Jury Trials During the COVID-19 Pandemic (S. Ct. Order issued March 22, 2020).

¶1 REBECCA GRASSL BRADLEY, J. (*dissenting*). The Wisconsin Supreme Court suspends the constitutional rights of Wisconsin citizens, citing the exigency of a public health emergency. The Constitution does not countenance such an infringement. "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934) (emphasis added).

¶2 The Sixth Amendment to the United States Constitution commands: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial[.]" U.S. Const. amend. VI. Wisconsin's highest court says a public health emergency justifies a blanket 60-day suspension of a constitutional right. If that is true, then the following constitutionally enumerated rights of the people (among others) are also subject to suspension by judicial decree:

- The free exercise of religion
- The freedom of speech
- The freedom of the press
- The right of the people to peaceably assemble
- The right of the people to petition the Government for a redress of grievances

- The right of the people to keep and bear Arms
- The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.

¶3 Informed by the lessons of history, the Constitution was established to safeguard the rights of the people even under the most exigent circumstances. The framers "foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority. Ex parte Milligan, 71 U.S. 2, 120-21 (1866) (emphasis added).

¶4 The Sixth Amendment's Speedy Trial Clause enshrines an ancient liberty. The Assize of Clarendon, an English code of legal procedure established in 1166, mandated speedy trials for the accused, "without delay." In 1215, following the English barons' revolt against

tyrannical rule, the Magna Carta promised "[t]o no one will we sell, to no one deny or delay the right or justice." See Patrick Ellard, Learning From Katrina: Emphasizing the Right to a Speedy Trial to Protect Constitutional Guarantees in Disasters, 44 Am. Crim. L. Rev. 1207, 1209-10 (2007) (quoted source omitted).

¶5 The right to a "trial by jury" is "a valuable safeguard to liberty" and "the very palladium of free government." The Federalist No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "[T]he Speedy Trial Clause's core concern is impairment of liberty." Doggett v. United States, 505 U.S. 647, 660 (1992) (Thomas, J., dissenting) (quoting United States v. Loud Hawk, 474 U.S. 302, 312 (1986)). "The public interest in a broad sense, as well as the constitutional guarantee, commands prompt disposition of criminal charges." Strunk v. United States, 412 U.S. 434, 439 n.2 (1973). With respect to the rights guaranteed by the Sixth Amendment, "so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified." Ex parte Milligan, 71 U.S. at 120. "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now . . . sought to be avoided." Id. (emphasis added; emphasis omitted).

¶6 Nothing in the Constitution permits the judiciary to limit the fundamental rights secured under the Sixth Amendment. "[T]here is only one instance in the Constitution where the government is expressly permitted to suspend a fundamental right[.]" Mitchell F. Crusto, State of

Emergency: An Emergency Constitution Revisited, 61 Loy. L. Rev. 471, 504 & n.189 (2015); see U.S. Const. art I., § 9, cl. 2. Article I. § 9, cl. 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." If the framers had contemplated suspension of Sixth Amendment rights or any other liberties, they would have said so in the text.

¶7 The court's order not only overrides the United States Constitution, it flouts the Wisconsin Constitution, which mandates: "In all criminal prosecutions, the accused shall enjoy the right . . . to a speedy public trial[.]" Wis. Const. Art. I, § 7. While utterly ignoring the supreme law of the land, the court expressly refuses to follow statutory law. The court says "the ends of justice served by temporarily suspending jury trials in the courts of this state outweigh the interest of the public and the defendant in a speedy trial under Wis. Stat. sec. 971.10(3)(a)." Under that statute, criminal trials in Wisconsin "shall commence" within specified periods of time, depending on the nature of the charges. See Wis. Stat. § 971.10(1)-(2). Continuances are statutorily permissible, provided a circuit court considers multiple case-specific factors. See Wis. Stat. § 971.10(3). The broad sweep of the court's order precludes every circuit court in the state from exercising its discretionary power to weigh various statutory factors——including the interests of the victim——before granting a continuance. See Wis. Stat. § 971.10(3)(b)(3).

¶8 The all-encompassing nature of the court's order postponing every criminal jury trial in the state of Wisconsin for a minimum of two months cannot comport with the Sixth Amendment's speedy trial mandate, which, although not strictly construed so as to forbid any delay whatsoever, "necessarily compels courts to approach speedy trial cases on an ad hoc basis. We

can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972) (emphasis added; footnote omitted). The court's blanket order dispenses with both constitutional and statutory requirements to consider, on a case by case basis, the rights of the accused, the interests of victims, and the best interests of the public. Under Wisconsin law, "[e]very defendant not tried in accordance with this section shall be discharged from custody." Wis. Stat. § 971.10(4). Violations of the Constitution's Speedy Trial Clause require dismissal of the charges against the accused: "In light of the policies which underlie the right to a speedy trial, dismissal must remain, as Barker noted, 'the only possible remedy.'" Strunk, 412 U.S. at 440 (citing Barker, 407 U.S. at 522).

¶9 "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure . . . when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting). Justifying the suspension of the people's constitutionally guaranteed rights based on a public health emergency nullifies our Constitution. Justice Antonin Scalia once explained that "every tinpot dictator has a Bill of Rights which he casually ignores. What was debated in 1787 and what insures our freedom is our structure of government which holds each branch (and in turn by its people) to account." If the people's constitutional rights may be suspended by the judicial branch in the name

of a public health emergency, our freedom is in peril; our republic is lost. More than one million Americans have died defending our liberty from external threats. The liberty for which so many have laid down their lives should not be cast aside even in "troublous times." If the government will not protect constitutional rights designed to preserve our freedom, it is up to the people to reclaim them.

¶10 I am authorized to state that Justice Daniel Kelly joins this dissent.

ADDENDUM B

REBECCA GRASSL BRADLEY, J., DISSENT to Interim Rule 20-02 In the Matter of an Interim Rule re: Suspension of Deadlines for Non-Criminal Jury Trials Due to the COVID-19 Pandemic (March 31, 2020).

¶15 REBECCA GRASSL BRADLEY, J. *(dissenting).*[1]

> [T]he use of the court's superintending authority in the manner it is now being used can become addictive and lead to abuse. Over and over our opinions repeat the mantra that our superintending authority is "unlimited in extent" or "limited only by the necessities of justice," as though there were no bounds to the court's power to do "justice." This sort of nonsense needs to be exposed before this court does something that will provoke a crisis.[2]

The Supreme Court of Wisconsin once again exercises its seemingly inexhaustible "superintending authority over the courts and judicial system of this state" to indefinitely suspend the law enacted

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[1] Citing no legal authority whatsoever, Chief Justice Roggensack's concurrence presents a textbook example of an ad hominem attack. Instead of a substantive response this concurrence appeals to people's emotions and fears associated with COVID-19. Every action this court takes must be governed by the constitution and other applicable law, not panic.

As a former circuit court judge, I trust Wisconsin's circuit court judges to adequately and appropriately address the concerns raised by the Chief Justice in her concurrence regarding the practical aspects of conducting jury trials amidst the threat of COVID-19. The law affords circuit courts the flexibility to do so, as well as to adjourn them. But the law does not permit this court to indefinitely suspend the operation of law at the expense of substantive rights belonging to Wisconsin citizens. Whenever any branch of government claims the authority to act beyond the boundaries of its powers, the people should be alarmed. I write for the people who cherish liberty and who recognize that elected officials are their servants, not their masters.

This concurrence misunderstands my dissent, which nowhere suggests "civil jury trials must go forward now." Any modifications to the time or place for jury trials must be made on a case by case basis by the circuit court judges presiding over them, in accordance with the constitution. This concurrence also betrays a fundamental misunderstanding about the scope of the majority's own order. Even though the order applies to civil trials only, the concurrence purports to speak on behalf of prosecutors and defense lawyers, and, ironically, the rights of criminal defendants. The majority's order applies to none of them.

[2] State v. Ernst, 2005 WI 107, ¶45, 283 Wis. 2d 300, 699 N.W.2d 92 (Prosser, J., concurring).

by the people's representatives in the legislature. Last week, the majority trampled fundamental rights under the Sixth Amendment to the United States Constitution.[3] This week, "the majority ignores governing statutory law and instead invokes its ever-evolving 'superintending authority' to substitute the majority's preference for that of the legislature."[4] Specifically, the majority suspends the right to a jury trial in all civil proceedings, indefinitely keeping children from their parents and indefinitely depriving the mentally ill of their liberty, among other infringements of substantive, individual rights. In doing so, the majority invades the province of the legislature, violates the separation of powers, and "creates a confrontation of constitutional magnitude between the legislature and this court."[5] I dissent.

¶16 The majority discovers its authority to suspend the law within its "administrative and superintending authority over the courts and judicial system" as well as under Wisconsin Stat. § 751.12(1), which provides:

> The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the same and of promoting the speedy determination of litigation upon its merits. The rules shall not abridge, enlarge, or modify the substantive rights of any litigant. The effective dates for all rules adopted by the court shall be January 1 or July 1. A rule shall not become effective until 60 days after its adoption. All rules promulgated under this section shall be printed by the

[3] In re the Matter of Jury Trials During the COVID-19 Pandemic (S. Ct. Order issued March 22, 2020).

[4] See Koschkee v. Evers, 2018 WI 82, ¶27, 382 Wis. 2d 666, 913 N.W.2d 878 (Rebecca Grassl Bradley, J., concurring in part; dissenting in part).

[5] Door Cty. v. Hayes-Brook, 153 Wis. 2d 1, 29, 449 N.W.2d 601 (1990) (Abrahamson, C.J., concurring).

> state printer and paid for out of the state treasury, and the court shall direct the rules to be distributed as it considers proper.

(Emphasis added.) Neither the constitution nor the statutes confer any authority on the court to exercise the breathtaking power reflected in the majority's most recent orders.

¶17 "Our rule-making . . . is a limited grant from the legislature that permits the court to legislate in regard to pleading and practice so long as the rules the court creates do not 'abridge, enlarge, or modify the substantive rights of any litigant.' Wis. Stat. § 751.12(1)." In the matter of the Petition to Amend/Dissolve Wisconsin Statute § 801.54 Discretionary Transfer of Civil Actions to Tribal Court, S. Ct. Order issued July 28, 2016, ¶10 (Roggensack, C.J., dissenting); see also Trinity Petroleum, Inc. v. Scott Oil Co., Inc., 2007 WI 88, ¶118 n.5, 302 Wis. 2d 299, 735 N.W.2d 1 (Roggensack, J., concurring in part; dissenting in part) ("While this court has been delegated a rule-making function by the legislature, that delegation is limited. Under Wis. Stat. § 751.12(1), which this court cited as its authority for the actions taken in [the Supreme Court Order], the rules this court creates 'shall not abridge, enlarge, or modify the substantive rights of any litigant.' § 751.12(1). Therefore, the only way this court can assert it had authority to strike down [the statute] is if that statute does not encompass any substantive rights."). In violation of Wis. Stat. § 751.12(1), the majority "abridge[s]" and "modif[ies] the substantive rights" of litigants in every civil case in every circuit court in the State, unless every party already waived its right to a jury trial.

¶18 Even if the majority's suspension of multiple laws were limited to "pleading, practice, and procedure," the majority altogether ignores the statutory mandates governing the

dictates of its order by suspending statutes immediately and without a hearing. In doing so, the majority exceeds the parameters the legislature established when it delegated this limited authority to the court. Wisconsin Stat. § 751.12(1) prohibits any modified rule from becoming effective "until 60 days after its adoption" and prescribes only two effective dates: January 1 and July 1. (Emphasis added.) In exercising its sweeping powers, the majority circumvents both requirements.[6]

¶19 Finally, no doubt mindful that "the court does not necessarily do a good job when it legislates from the bench[,]"[7] the legislature explicitly prohibited the court from "modifying or suspending" statutes "until the court has held a public hearing." Wis. Stat. § 751.12(2) (emphasis added). Casting aside yet another legislative limit on this delegation of authority, the majority instead suspends multiple statutes by fiat, effective immediately, and will hold a hearing 30 days after the fact.[8] Why bother? The justices in the majority already made up their minds. Even if the court would vacate this order 30 days from now, reversing course at that point could not undo the majority's infringement of litigants' rights in the interim.

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[6] "The effective date for all such rules must be January 1 or July 1st. The [order] of the majority has circumvented these requirements." Nelson v. Travelers Ins. Co., 102 Wis. 2d 159, 173, 306 N.W.2d 71 (1981) (Coffee, J., dissenting).

[7] Ernst, 283 Wis. 2d 300, ¶46 (Prosser, J., concurring).

[8] The majority does not explain its fidelity to the statutory requirement of providing public notice 30 days before the scheduled hearing pursuant to Wis. Stat. § 751.12(3) at the same time the majority ignores the other requirements of § 751.12.

¶20 The majority shrouds its order under the façade of "rulemaking" in order to lend it the appearance of lawfulness. Suspending the rule of law does not constitute "rulemaking;" the court, in fact, makes no rule at all. "The court should confine itself to the adoption of real 'rules' through proper procedures" in order to "protect statutory and constitutional rights."[9] Instead, the majority overrides both statutory and constitutional rights and flouts mandatory statutory procedures in the process.

¶21 As a preliminary matter, the right to a jury trial is a substantive right, not merely a matter of pleading, practice or procedure. Both our federal and state constitutions secure the right to a jury trial in civil proceedings. The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved[.]" U.S. Const. amend. VII. The Wisconsin Constitution similarly provides robust protection of the civil jury trial right: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy[.]" Wis. Const. Art. I, § 5 (emphasis added). Although the jury trial right is constitutionally preserved, this court has long recognized that the timeframes for conducting them are left for the legislature to prescribe. "While the defendant has a right to a trial by jury, he has no vested right under the Wisconsin Constitution to the manner or time in which that right may be exercised or waived. Those are procedural matters expressly left for determination by law[.]"[10]

[9] Ernst, 283 Wis. 2d 300, ¶48 (Prosser, J., concurring) (emphasis added).

[10] State ex Rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 523 261 N.W.2d 434 (1978) (emphasis added; quoted source omitted).

This court possesses no authority to alter the statutory time frames for conducting civil jury trials; only "[t]he legislature may modify old procedures, or create new ones," provided "the substantive right to jury trial is preserved."[11]

¶22 This court previously explained the distinction between a substantive statute and a procedural statute: "If a statute simply prescribes the method——the 'legal machinery'——used in enforcing a right or remedy, it is procedural. If, however, the law creates, defines or regulates rights or obligations, it is substantive——a change in the substantive law of the state." Betthauser v. Medical Protective Co., 172 Wis. 2d 141, 148, 493 N.W.2d 40 (1992) (quoting City of Madison v. Town of Madison, 127 Wis. 2d 96, 102, 377 N.W.2d 221 (Ct. App. 1985) (emphasis added)). "Although the jury demand and fees payment are procedural mechanisms by which the right to a jury trial is executed, the right to a jury trial is a substantive right." Kroner v. Oneida Seven Generations Corp., 2012 WI 88, ¶93, 342 Wis. 2d 626, 819 N.W.2d 264 (Roggensack, J., concurring; emphasis added). When the court suspends the deadlines for commencing jury trials, the court undoubtedly meddles with substantive rights and interferes with an exclusively legislative prerogative. The legislature's limited grant of rulemaking authority never conferred this power on the court. Nor did the people constitutionally bestow it.

¶23 Examining each of the statutes the majority indefinitely suspends reveals the extent of the substantive rights the majority infringes. Wisconsin Stat. § 48.30(7) gives children and their parents the right to a fact-finding hearing within 20 to 30 days after the plea hearing in an action

[11] Strykowski, 81 Wis. 2d at 523.

by the State alleging a child or unborn child is in need of protection or services (CHIPS); the shorter deadline for the fact-finding hearing applies whenever the child is in secure custody.[12] Wisconsin Stat. § 48.31(2)[13] guarantees "the child, the child's parent, guardian, or legal custodian, the unborn child's guardian ad litem," and "the expectant mother of the unborn child" "the right to

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[12] Wisconsin Stat. § 48.30(7) provides:

> If the petition is contested, the court, subject to s. 48.299 (9), shall set a date for the fact-finding hearing which allows reasonable time for the parties to prepare but is no more than 20 days after the plea hearing for a child who is held in secure custody and no more than 30 days after the plea hearing for a child or an expectant mother who is not held in secure custody.

[13] Wisconsin Stat. § 48.31(2) provides:

> The hearing shall be to the court unless the child, the child's parent, guardian, or legal custodian, the unborn child's guardian ad litem, or the expectant mother of the unborn child exercises the right to a jury trial by demanding a jury trial at any time before or during the plea hearing. If a jury trial is demanded in a proceeding under s. 48.13 or 48.133, the jury shall consist of 6 persons. If a jury trial is demanded in a proceeding under s. 48.42, the jury shall consist of 12 persons unless the parties agree to a lesser number. Chapters 756 and 805 shall govern the selection of jurors. If the hearing involves a child victim or witness, as defined in s. 950.02, the court may order that a deposition be taken by audiovisual means and allow the use of a recorded deposition under s. 967.04 (7) to (10) and, with the district attorney, shall comply with s. 971.105. At the conclusion of the hearing, the court or jury shall make a determination of the facts, except that in a case alleging a child or an unborn child to be in need of protection or services under s. 48.13 or 48.133, the court shall make the determination under s. 48.13 (intro.) or 48.133 relating to whether the child or unborn child is in need of protection or services that can be ordered by the court. If the court finds that the child or unborn child is not within the jurisdiction of the court or, in a case alleging a child or an unborn child to be in need of protection or services under s. 48.13 or 48.133, that the child or unborn child is not in need of protection or services that can be ordered by the court, or if the court or jury finds that the facts alleged in the petition have not been proved, the court shall dismiss the petition with prejudice.

a jury trial" upon demand. Wisconsin Stat. § 48.422(1) requires a hearing on a petition to terminate parental rights (TPR) to be held within 30 days after the petition is filed.[14] A fact-finding hearing must be held within 45 days after the hearing on the petition. Wis. Stat. § 48.422(2).[15] The affected child and parents are entitled to a jury trial upon request. Wis. Stat. § 48.422(4).[16] The legislature enacted each of these statutory mandates; the majority suspends them indefinitely, under the guise of "pleading, practice, and procedure." The majority misleads the public in suggesting that its suspension of statutorily-mandated jury trial rights does not affect the substantive rights of litigants. Parents have a "fundamental liberty interest in raising their children."[17] The United

[14] Wisconsin Stat. § 48.422(1) provides:

> (1) Except as provided in s. 48.42 (2g) (ag), the hearing on the petition to terminate parental rights shall be held within 30 days after the petition is filed. At the hearing on the petition to terminate parental rights the court shall determine whether any party wishes to contest the petition and inform the parties of their rights under sub. (4) and s. 48.423.

[15] Wisconsin Stat. § 48.422(2) provides:

> Except as provided in s. 48.42 (2g) (ag), if the petition is contested the court shall set a date for a fact-finding hearing to be held within 45 days after the hearing on the petition, unless all of the necessary parties agree to commence with the hearing on the merits immediately.

[16] Wisconsin Stat. § 48.422(4) provides:

> Any party who is necessary to the proceeding or whose rights may be affected by an order terminating parental rights shall be granted a jury trial upon request if the request is made before the end of the initial hearing on the petition.

[17] Michels v. Lyons, 2019 WI 57, ¶46, 387 Wis. 2d 1, 927 N.W.2d 486 (Rebecca Grassl Bradley, J., dissenting).

States Supreme Court has deemed "the interest of parents in the care, custody, and control of their children" to be "perhaps the oldest of the fundamental liberty interests recognized by this Court."[18] Under its latest order, the majority indefinitely suspends each party's individual right to a jury trial, thereby infringing on the fundamental liberty interest of parents and children in a familial relationship free of governmental interference, by allowing the State to separate children from their parents——indefinitely. The majority undeniably infringes the parties' substantive rights in CHIPS and TPR proceedings, as this court has previously recognized them: "children . . . and their parents, clearly have a due process right to have these decisions determined within the time limits set by the legislature, unless statutory provisions for a continuance are followed."[19] ¶24 The majority does not address the legal ramifications of its blanket order. For example, if circuit courts presiding over Chapter 48 and Chapter 55 cases fail to comply with statutory deadlines, they lose their competency to act in those matters. With respect to TPR proceedings, this court has held that if "[t]he circuit court did not hold the fact-finding hearing within the time limits established by § 48.422(2), and never granted a proper extension or continuance pursuant to Wis. Stat. §§ 48.315(1)(a) and (2)," the court "lost competency to proceed before it ordered the termination of [the mother's] parental rights."[20] Similarly, in Chapter 55 proceedings governing petitions for protective services for, or placement of, citizens with "serious and persistent mental illness,

[18] Troxel v. Granville, 530 U.S. 57, 65 (2000).

[19] In re Termination of Parental Rights to Joshua S., 2005 WI 84, ¶36, 282 Wis. 2d 150, 172, 698 N.W.2d 631 (emphasis added).

[20] Joshua S., 282 Wis. 2d 150, ¶37.

degenerative brain disorder, developmental disabilities, or other like incapacities,"[21] a circuit court loses competency to address the petition if the 60-day deadline for a hearing[22] expires before trial, unless a party requests an extension.[23]

¶25 In attempting to impose a one-size-fits-all solution in the face of the COVID-19 pandemic, the majority's order will inevitably generate countless motions by hamstringing the circuit courts from complying with statutory deadlines that cannot be waived.[24] Once the majority

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[21] Wis. Stat. § 55.001.

[22] Wisconsin Stat. § 55.10(1)&(4)(c) provide:

> (1) Time limits. A petition for protective placement or protective services shall be heard within 60 days after it is filed unless an extension of this time is requested by the petitioner, the individual sought to be protected or the individual's guardian ad litem, or the county department, in which case the court may extend the date for hearing by up to 45 days. If an individual under s. 50.06 (3) alleges that another individual is making a health care decision under s. 50.06 (5) (a) that is not in the best interests of the incapacitated individual or if the incapacitated individual verbally objects to or otherwise actively protests the admission, the petition shall be heard as soon as possible within the 60-day period.
>
> (4)(c) Trial by jury; right to cross examine witnesses. The individual sought to be protected has the right to a trial by a jury if demanded by the individual sought to be protected or his or her attorney or guardian ad litem. The number of jurors shall be determined under s. 756.06 (2) (b). The individual sought to be protected, and the individual's attorney and guardian ad litem have the right to present and cross-examine witnesses, including any person making an evaluation or review under s. 55.11.

[23] Matter of Guardianship of Spencer B.H., No. 2014AP1793, unpublished slip op., *1 (Wis. Ct. App. Mar. 11, 2015).

[24] "[A] competency challenge based on the violation of the statutory time limitation of Wis. Stat. § 48.422(2) cannot be waived[.]" Joshua S., 282 Wis. 2d 150, ¶37.

decides to lift the indefinite suspension of all jury trials, the court system will likely be overwhelmed with motions asserting violations of statutory and constitutional rights, further delaying justice and finality in a multitude of cases. When litigants bring these challenges before this court, the majority's order places the court in the judicially precarious position of deciding whether its own orders violated the statutory or constitutional rights of litigants. Wisconsin Stat. § 757.19(2)(e), however, mandates the recusal of any judge (which includes supreme court justices) who "handled the action or proceeding while judge of an inferior court." By inserting itself into every single legal proceeding in which the parties have not already waived their rights to jury trials, the majority arguably has "handled" those proceedings, supplanting every circuit court judge in the State of Wisconsin with respect to every pending matter in which a party has preserved its jury trial right.

¶26 The majority's order indefinitely delays jury trials in commitment proceedings under Wis. Stat. Chapter 51 involving mental health, drug dependency, developmental disability, and alcohol dependency. "In recognition of the significant liberty interest an individual has in living where and under what conditions he or she chooses, the legislature has imposed tight time limits in connection with involuntary detention proceedings."[25] When a jury trial is promptly demanded by a non-incarcerated individual whom the State seeks to involuntarily detain, the jury

[25] In re Commitment of Stevenson L.J., 2009 WI App 84, ¶11, 320 Wis. 2d 194, 768 N.W.2d 223 (citing *Kindcare, Inc. v. Judith G.*, 2002 WI App 36, ¶12, 250 Wis. 2d 817, 640 N.W.2d 839) (emphasis added).

trial "shall be held within 14 days of detention." Wis. Stat. § 51.20(11)(a).[26] With respect to commitment proceedings involving alcohol dependency, the jury trial must take place within 14 days after the probable cause finding. Wis. Stat. § 51.45(13)(e).[27] Regardless of the nature of the

[26] Wisconsin Stat. § 51.20(11)(a) provides:

> If before involuntary commitment a jury is demanded by the individual against whom a petition has been filed under sub. (1) or by the individual's counsel if the individual does not object, the court shall direct that a jury of 6 people be selected to determine if the allegations specified in sub. (1) (a) or (ar) are true. A jury trial is deemed waived unless demanded at least 48 hours in advance of the time set for final hearing, if notice of that time has been previously provided to the subject individual or his or her counsel. If a jury trial demand is filed within 5 days of detention, the final hearing shall be held within 14 days of detention. If a jury trial demand is filed later than 5 days after detention, the final hearing shall be held within 14 days of the date of demand. If an inmate of a state prison, county jail or house of correction demands a jury trial within 5 days after the probable cause hearing, the final hearing shall be held within 28 days of the probable cause hearing. If an inmate of a state prison, county jail or house of correction demands a jury trial later than 5 days after the probable cause hearing, the final hearing shall be held within 28 days of the date of demand.

[27] Wisconsin Stat. § 51.45(13)(e) provides:

> Upon a finding of probable cause under par. (d), the court shall fix a date for a full hearing to be held within 14 days. An extension of not more than 14 days may be granted upon motion of the person sought to be committed upon a showing of cause. Effective and timely notice of the full hearing, the right to counsel, the right to jury trial, and the standards under which the person may be committed shall be given to the person, the immediate family other than a petitioner under par. (a) or sub. (12) (b) if they can be located, the legal guardian if the person is adjudicated incompetent, the superintendent in charge of the appropriate approved public treatment facility if the person has been temporarily committed under par. (b) or sub. (12), the person's counsel, unless waived, and to the petitioner under par. (a). Counsel, or the person if counsel is waived, shall have access to all reports and records, psychiatric and otherwise, which have been made prior to the full hearing on commitment, and shall be given the names of all persons who may testify in

commitment proceeding, the resulting detention affects the substantive liberty interests of the individual against whom a petition has been filed. "[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[28]

¶27 In the name of a public health emergency, the majority disregards the policy choices inherent in the legislature's short time limits for trying involuntary commitments, instead allowing some of Wisconsin's most vulnerable citizens to be indefinitely held by the government against their will upon the filing of petitions for commitment. The court's characterization of its suspension of the individual right to a jury trial within 14 days of this significant deprivation of liberty as merely a matter of "pleading, practice and procedure" is patently absurd.

¶28 This court has also recognized the substantive nature of the jury trial right in commitment proceedings under Wis. Stat. Chapter 980. Under Wis. Stat. § 980.03(3),[29] the subject

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favor of commitment and a summary of their proposed testimony at least 96 hours before the full hearing, exclusive of Saturdays, Sundays and legal holidays.

[28] In re Commitment of J.W.K., 2019 WI 54, ¶16, 386 Wis. 2d 672, 927 N.W.2d 509 (quoting Jones v. United States, 463 U.S. 354, 361 (1983) (emphasis added; alterations in original).

[29] Wisconsin Stat. § 980.03(3) provides:

> The person who is the subject of the petition, the person's attorney, or the petitioner may request that a trial under s. 980.05 be to a jury. A request for a jury trial shall be made as provided under s. 980.05 (2). Notwithstanding s. 980.05 (2), if the person, the person's attorney, or the petitioner does not request a jury trial, the court may on its own motion require that the trial be to a jury. The jury shall be selected as provided under s. 980.05 (2m). A verdict of a jury under this chapter is not valid unless it is unanimous.

of a petition for commitment has the right to a jury trial,[30] which must commence no later than 90 days after the probable cause hearing. Wis. Stat. § 980.05(1).[31] A violation of § 980.05(1) is substantive in nature.[32] Indefinitely delaying the exercise of this jury trial right implicates significant liberty interests at stake in every commitment proceeding.[33] "This statutory framework requires the commitment process to move forward after the filing of the petition."[34] Contrary to the law's mandatory framework, the majority's order indefinitely halts the process the legislature

[30] "The respondent has the right to be tried by a jury." In re Commitment of Kaminski, 2009 WI App 175, ¶14, 322 Wis. 2d 653, 777 N.W.2d 654 (citing Wis. Stat. § 980.05(2)).

[31] Wisconsin Stat. § 980.05(1)&(2) provide:

> (1) A trial to determine whether the person who is the subject of a petition under s. 980.02 is a sexually violent person shall commence no later than 90 days after the date of the probable cause hearing under s. 980.04 (2) (a). The court may grant one or more continuances of the trial date for good cause upon its own motion, the motion of any party or the stipulation of the parties.
>
> (2) The person who is the subject of the petition, the person's attorney, or the petitioner may request that a trial under this section be to a jury of 12. A request for a jury trial under this subsection shall be made within 10 days after the probable cause hearing under s. 980.04 (2) (a). If no request is made, the trial shall be to the court. The person, the person's attorney, or the petitioner may withdraw his, her, or its request for a jury trial if the 2 persons who did not make the request consent to the withdrawal.

[32] In re Commitment of Matthew A.B., 231 Wis. 2d 688, ¶¶10, 14, 605 N.W.2d 598 (Ct. App. 1999) (referring to claimed violation of Wis. Stat. § 980.05(1) as "substantive").

[33] In re Commitment of Hager, 2018 WI 40, ¶37, 381 Wis. 2d 74, 911 N.W.2d 17 ("Involuntary commitments in general implicate the fundamental right to be free from bodily restraint.").

[34] In re Commitment of Gilbert, 2012 WI 72, ¶38 n.16, 342 Wis. 2d 82, 816 N.W.2d 215 (emphasis added).

enacted into law, infringing substantive rights under § 980.05(1). This court has no authority, under Wis. Stat. § 751.12 or otherwise, to freeze an entire statutory scheme enacted by the legislature, at the expense of individual liberty.

¶29 The majority indefinitely suspends the 60- and 90-day time periods within which the legislature mandates petitions for guardianship must be tried to a jury under Wis. Stat. §§ 54.42(2)[35] and 54.44.[36] "Wisconsin Stat. § 54.44(1)'s mandate that the petition 'shall be heard

[35] Wisconsin Stat. § 54.42(2) provides:

> Right to jury trial. The proposed ward or ward has the right to a trial by a jury if demanded by the proposed ward or ward, his or her attorney, or the guardian ad litem, except that the right is waived unless demanded at least 48 hours before the time set for the hearing. The number of jurors for such a trial is determined under s. 756.06 (2) (b). The proposed ward or ward, his or her attorney, or the guardian ad litem each has the right to present and cross-examine witnesses, including any physician or licensed psychologist who reports to the court concerning the proposed ward.

[36] Wisconsin Stat. § 54.44(1) provides:

> (a) Time of hearing for petition. A petition for guardianship, other than a petition under par. (b) or (c) or s. 54.50 (1), shall be heard within 90 days after it is filed. The guardian ad litem and attorney for the proposed ward or ward shall be provided with a copy of the report of the examining physician or psychologist under s. 54.36 (1) at least 96 hours before the time of the hearing.
>
> (b) Time of hearing for certain appointments. A petition for guardianship of an individual who has been admitted to a nursing home or a community-based residential facility under s. 50.06 shall be heard within 60 days after it is filed. If an individual under s. 50.06 (3) alleges that an individual is making a health care decision under s. 50.06 (5) (a) that is not in the best interests of the incapacitated individual or if the incapacitated individual verbally objects to or otherwise actively protests the admission, the petition shall be heard as soon as possible within the 60-day period.

within ninety days' plainly contemplates the hearing's completion within that period."[37] Recognizing the legislature's extensive authority to set the timeframe within which guardianship trials must be completed, the court of appeals noted that "[i]f the legislature had intended to allow a guardianship hearing to go beyond the ninety-day limit, it would have provided for an extension of the time limit."[38]

¶30 The majority indefinitely suspends the right to a jury trial in small claims actions involving residential evictions. Wisconsin Stat. § 799.20(4)[39] mandates such trials be held "within

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> (c) Time of hearing for petition for receipt and acceptance of a foreign guardianship.
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> 1. If a motion for a hearing on a petition for receipt and acceptance of a foreign guardianship is made by the foreign ward, by a person who has received notice under s. 53.32 (2), or on the court's own motion, a hearing on the petition shall be heard within 90 days after the petition is filed.
>
> 2. If a petition for receipt and acceptance of a foreign guardianship includes a request to modify the provisions of the foreign guardianship, the petition shall be heard within 90 days after it is filed.
>
> 3. If a person receiving notice of the petition for receipt and acceptance of the foreign guardianship challenges the validity of the foreign guardianship or the authority of the foreign court to appoint the foreign guardian, the court may stay the proceeding under this subsection to afford the opportunity to the interested person to have the foreign court hear the challenge and determine its merits.

[37] In re Guardianship of Elizabeth L., No. 2012 WI App 88, unpublished slip op., ¶14 (Wis. Ct. App. June 5, 2012) (emphasis added).

[38] Id.

[39] Wisconsin Stat. § 799.20(4) provides:

> Inquiry of defendant who appears on return date. If the defendant appears on the return date of the summons or any adjourned date thereof, the court or circuit court

30 days of the return date of the summons." Indefinitely delaying trials in residential eviction cases affects the substantive rights of both the tenant and the landlord. An "overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic."[40] If the tenant is in fact entitled to possession of the premises, suspending the jury trial right indefinitely perpetuates a state of insecurity with respect to the tenant's home. To avoid this untenable situation, Wis. Stat. § 799.20(4) promises a prompt resolution for the tenant facing an unlawful eviction action. Likewise, if a continued tenancy is unlawful, the landlord has a substantive, statutory right to proceed with the eviction in order to promptly reclaim the property. "[C]ourts serve as the great protector of people's rights to life, liberty, and property. . . . Property rights become tenuous when they are subject to largely unreviewable ad hoc decision-making[.]"[41]

> commissioner shall make sufficient inquiry of the defendant to determine whether the defendant claims a defense to the action. If it appears to the court or circuit court commissioner that the defendant claims a defense to the action, the court or circuit court commissioner shall schedule a trial of all the issues involved in the action, unless the parties stipulate otherwise or the action is subject to immediate dismissal. In a residential eviction action, the court or circuit court commissioner shall hold and complete a court or jury trial of the issue of possession of the premises involved in the action within 30 days of the return date of the summons or any adjourned date thereof, unless the parties stipulate otherwise or the action is subject to immediate dismissal.

[40] State v. Sobczak, 2013 WI 52, ¶11, 347 Wis. 2d 724, 833 N.W.2d 59 (quoting Payton v. New York, 445 U.S. 573, 601 (1980) (footnote omitted)); Holt v. State, 17 Wis.2d 468, 477, 117 N.W.2d 626 (1962) ("A home is entitled to special dignity and special sanctity.").

[41] Hilton ex rel. Pages Homeowners' Ass'n v. DNR, 2006 WI 84, ¶67, 293 Wis. 2d 1, 717 N.W.2d 166 (Prosser, J., concurring).

Because the majority's order indefinitely suspending jury trials in residential eviction cases is unreviewable, the majority deprives property owners of rightful redress——indefinitely.

¶31 In order to ensure that every civil jury trial in the State of Wisconsin is suspended indefinitely, the majority includes a catchall provision in its order, suspending any "deadline requiring a jury trial within a specified period of time in a non-criminal action or proceeding in any other statutory provision." It is unnecessary to comb the statutes in order to identify "any other statutory provision" specifying the timeframe for conducting a jury trial because it is abundantly clear that the court's order impermissibly affects the substantive rights of parties, regardless of the nature of the action. In Pulchinski v. Strnad, 88 Wis. 2d 423, 429, 276 N.W.2d 781 (1979), this court was asked to permit the enlargement of the statutorily-prescribed time for filing a complaint, which initiates a legal action. Citing the limits of its authority under the precursor to § 751.12,[42] the court declined to do so because expanding the time for initiating a legal action would "affect substantive rights of the parties and violate the Rules enabling provision." Pulchinski, 88 Wis. 2d at 429. If the statutorily-prescribed timeframe for initiating a legal proceeding may not be

[42] The predecessor statute to Wis. Stat. § 751.12 in effect in 1975, Wis. Stat. § 251.18, provided in pertinent part:

> The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.

Wis. Stat. § 251.18 (1975-76).

extended under the court's rulemaking authority because of its impact on the parties' substantive rights, the resolution of legal proceedings through the exercise of a party's right to a trial by jury cannot be indefinitely delayed via rulemaking, without severely affecting the parties' substantive rights.

¶32 "As Wis. Stat. § 751.12(1) explicitly provides, rules promulgated pursuant to § 751.12(1) 'shall not abridge, enlarge, or modify the substantive rights of any litigant.' There are good reasons why the legislature specifically limited the court's rule-making authority to procedural rules and prohibited substantive rule-making under § 751.12(1). One reason is the separate constitutional functions that the legislature and the courts generally provide in Wisconsin's tripartite system of government." Kroner v. Oneida Seven Generations Corp, 2012 WI 88, ¶104, 342 Wis. 2d 626, 819 N.W.2d 264 (Roggensack, J., concurring). "When litigation is conducted in Wisconsin courts, this court expects judges to take great care in assuring that the constitutional and statutory rights of the litigants are protected." Id., ¶108 (Roggensack, J., concurring). By precluding Wisconsin's circuit court judges from making individualized determinations regarding how and when to conduct jury trials, the majority forecloses the careful consideration of each party's statutory and constitutional rights that only a case-by-case approach affords. Discarding the legislature's restrictions on judicial rulemaking also oversteps the court's constitutional boundaries. For nearly 100 years, this court has recognized that "[w]here the legislature has enacted statutes within the proper field of legislation and not violative of the provisions of the federal and state constitutions, its edicts are supreme, and they cannot be

interfered with by the courts[.]" City of Milwaukee v. State, 193 Wis. 423, 428, 214 N.W. 820 (1927).

¶33 As the majority asserts its authority to enter its sweeping order under Wis. Stat. § 751.12, it is unclear why it also claims "superintending authority" to justify it. The majority treads a dangerous path by invoking its constitutional "superintending authority" to justify any and every action it wishes to take in violation of both constitutional and statutory rights of Wisconsin's citizens. "This court is not above the law and unless the statute is unconstitutional, we are bound to apply it." Koschkee v. Evers, 2018 WI 82, ¶41, 382 Wis. 2d 666, 913 N.W.2d 878 (Rebecca Grassl Bradley, J., concurring in part; dissenting in part) (citing Rhinelander Paper Co. v. Indus. Comm'n, 216 Wis. 623, 627, 258 N.W. 384 (1935) (court cannot order lower court to do something it has no power to do because it would violate applicable statute); Baker v. State, 84 Wis. 584, 585, 54 N.W. 1003 (1893) (court has no power to suspend rules having the force of a statute until abrogated by competent authority)). The court's superintending authority does not give the court license to erase the constitutional and statutory rights of litigants in every type of case and in every court in the state. Rather, "the superintending authority of the supreme court over all courts is intended to give this court broad power to protect the legal rights of a litigant when the ordinary course of litigation, such as review, is inadequate. The authority was never intended as carte blanche power to mandate 'rules' of general application for the bench and bar[.]" State v. Ernst, 2005 WI 107, ¶44, 283 Wis. 2d 300, 699 N.W.2d 92 (Prosser, J., concurring) (emphasis added).

¶34 This court's superintending authority is not a warrant to unilaterally rewrite the law that should be applied in every circuit court action in the state. Rather, under an originalist

interpretation of the constitutional grant of power, "this court's superintending authority over all courts is case specific, contemplating the use of supervisory writs and individual relief. It does not empower this court to rewrite statutes in individual cases to effect some judicial objective. The supreme court may modify or suspend a statute relating to pleading, practice, and procedure when the court promulgates a rule pursuant to Wis. Stat. § 751.12. But that procedure is entirely different from supplementing statutes with judicial mandates whenever the court thinks it can do a better job than the legislature."[43]

¶35 The majority expands its recent and dangerous precedent interpreting the scope of the court's superintending authority. "It brandishes its superintending authority like a veto over laws it does not wish to apply." Koschkee, 382 Wis. 2d 666, ¶43 (Rebecca Grassl Bradley, J., concurring in part; dissenting in part). However well-intentioned, the majority's order suspending the operation of numerous laws "thwarts the will of the people" as reflected in the statutes enacted by the people's representatives in the legislature. Id. "'To avoid an arbitrary discretion in the

[43] State v. Anderson, 2002 WI 7, ¶45 n.1, 249 Wis. 2d 586, 638 N.W.2d 301 (Prosser, J., dissenting) ("Article VII, Section 3(1) of the Wisconsin Constitution states that '[t]he supreme court shall have superintending and administrative authority over all courts.' This language is based in large part upon the same section of the 1848 constitution: 'The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same.' Wis. Const. art. VII, § 3 (1849). See Revised Statutes of Wisconsin (1849) at 28-29. Neither the old constitutional language nor the new constitutional language empowers this court, as part of its superintending authority, to rewrite statutes in individual decisions. The superintending authority over all courts embodies authority 'to control the course of ordinary litigation' in inferior courts, State ex rel. Fourth Nat'l Bank of Philadelphia v. Johnson, 103 Wis. 591, 613, 79 N.W. 1081 (1899); it does not authorize the court to erase a valid exercise of legislative power in an opinion.") (emphasis added; formatting altered).

courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.'" Id., (citing The Federalist No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "The majority casts aside the statutorily-expressed will of the people but '[t]he people of Wisconsin have never bestowed this kind of power on the Wisconsin Supreme Court.'"[44]

¶36 The majority would have the public think that indefinitely suspending all jury trials in the State of Wisconsin is necessary to protect the public. Not so. "Whenever it is deemed unsafe or inexpedient, by reason of war, pestilence or other public calamity, to hold any court at the time and place appointed therefor," Wis. Stat. § 757.12 allows "the justices or judges of the court" the discretion to "appoint any other place within the same county and any other time for holding court." This statute mandates that "[e]very such appointment shall be made by an order in writing, signed by the justices or judges making the appointment, and shall be published as a class 1 notice, under ch. 985, or in such other manner as is required in the order."[45]

¶37 Contradictorily, the court invokes this statute as "authority to alter statutes and rules governing how the court system operates" but then says "[w]e do not decide at this time whether

[44] Koschkee, 382 Wis. 2d 666, ¶43 (Rebecca Grassl Bradley, J., concurring in part; dissenting in part) (citing In re Jerrell C.J., 283 Wis. 2d 145, ¶155, 699 N.W.2d 110 (Prosser, J., dissenting)).

[45] While Justice Brian Hagedorn agrees that Wis. Stat. § 757.12 applies, he misapplies it. In his concurrence, Justice Hagedorn interprets this statute, when combined with this court's superintending authority, to authorize this court to indefinitely postpone every civil jury trial in Wisconsin. If so, this court would be required to "appoint" a time and place for each and every adjourned trial, and publish orders reflecting each adjournment, in accordance with the statute. This court has not, and could not do so, which reveals the error in Justice Hagedorn's interpretation.

this statute applies to the current public health emergency." Of course it does. The common and ordinary meaning of "pestilence" is "a contagious or infectious epidemic disease that is virulent and devastating."[46] No one would dispute that COVID-19 meets that definition. Under such circumstances, the legislature long ago determined it is appropriate for justices to choose a different time and place for supreme court proceedings, for court of appeals judges to choose a different time and place for appellate proceedings, and for circuit court judges to choose a different time and place for circuit court proceedings. Nothing in that statute, however, gives this court the authority to suspend all jury trials in the state indefinitely; rather, this statute gives each circuit court judge the authority to "appoint any other place within the same county and any other time for holding court" and only by a written order, which must be published.

¶38 Given the breadth of the Wisconsin Department of Health Services' "Safer at Home" order, under which all "non-essential" private and public facilities are closed, circuit courts could "appoint" a multitude of other places for jury trials to take place safely while maintaining recommended social distancing. The notion that a blanket prohibition on jury trials is necessary "to protect the health of the public and the individuals who work for the courts of this state" is belied by the express terms of the order, which provides that "all . . . jurors and grand jurors . . . are categorically exempt from this Order" not to mention the hundreds of exemptions from the "Safer at Home" order for "Essential Businesses and Operations" that are "encouraged to remain open."[47]

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[46] Pestilence, Meriam-Webster Dictionary, available at: https://www.merriam-webster.com/dictionary/pestilence (last visited Mar. 30, 2020).

[47] The "Safer at Home" order characterizes the following businesses, among many others, as "Essential Businesses and Operations" that are "encouraged to remain

open": "Grocery stores, bakeries, pharmacies, farm and produce stands, supermarkets, food banks and food pantries, convenience stores, and other establishments engaged in the retail sale of groceries, canned food, dry goods, frozen foods, fresh fruits and vegetables, pet supply, fresh meats, fish, poultry, prepared food, alcoholic and non-alcoholic beverages, and any other household consumer products (such as cleaning and personal care products)"; "Food and beverage manufacturing, production, processing, transportation, and cultivation; farming, livestock, fishing, baking, and other production agriculture, including cultivation, marketing, production, and distribution of animals and goods for consumption; businesses that provide food, shelter, and other necessities of life for animals, including animal shelters, boarding, rescues, kennels, and adopting facilities; farm and agriculture equipment, supplies, and repair services"; "Businesses and religious and secular nonprofit organizations, including prevocational group supportive employment, food banks and food pantries, when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this public health emergency, and people with disabilities"; "Religious facilities, entities, groups, and gatherings, and weddings and funerals"; "Funeral establishments"; "Newspapers, television, radio, and other media services"; "Gas stations; auto and motorcycle supply, repair and sales; boat supply, repair, and sales; and bicycle supply, repair, and sales"; "Banks, credit unions, and other depository or lending institutions; licensed financial service providers; insurance services; personnel necessary to perform essential functions at broker dealers and investment advisor offices"; "Hardware stores and businesses that sell electrical, plumbing, heating, and construction material"; "Building and Construction Tradesmen and Tradeswomen, and other trades including but not limited to plumbers, electricians, carpenters, laborers, sheet metal, iron workers, masonry, pipe trades, fabricators, finishers, exterminators, pesticide application, cleaning and janitorial staff for commercial and governmental properties, security staff, operating engineers, HVAC, painting, moving and relocation services, forestry and arborists, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, Essential Governmental Functions, and Essential Businesses and Operations"; "Post offices and other businesses that provide shipping and delivery services, and businesses that ship or deliver groceries, food, beverages, goods or services to end users or through commercial channels"; "Laundromats, dry cleaners, industrial laundry services, and laundry service providers"; "Businesses that sell, manufacture, or supply products needed for people to work from home"; "Businesses that sell, manufacture, or supply other Essential Businesses and Operations and Essential Governmental Functions with

How can the majority deem constitutionally-guaranteed jury trials dispensable while another branch of government deems "establishments engaged in the retail sale of . . . alcoholic and non-alcoholic beverages" to be "Essential Businesses and Operations" permitted to continue their operations? The court indefinitely closes the courtroom doors while the Safer at Home order keeps

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> the support or supplies necessary to operate, including computers; audio and video electronics; household appliances; IT and telecommunication equipment; hardware; paint; flat glass; electrical, plumbing, and heating materials; construction materials and equipment; sanitary equipment; personal hygiene products; food, food additives, ingredients, and components; medical and orthopedic equipment; firearm and ammunition suppliers and retailers for purposes of safety and security; optics and photography equipment; diagnostic; food and beverages; chemicals; paper and paper products; soaps and detergents"; "Airlines, taxis, transportation network providers (such as Uber and Lyft), vehicle rental services, paratransit, and other private, public, and commercial transportation and logistics providers necessary for Essential Activities and other purposes expressly authorized in this Order"; "Home-based care for seniors, adults, children, and/or people with disabilities, substance use disorders, and/or mental illness, including caregivers or nannies who may travel to the child's home to provide care, and other in-home services including meal delivery"; "Professional services, such as legal or accounting services, insurance services, real estate services (including appraisal, home inspection, and title services"; "Manufacturing companies, distributors, and supply chain companies producing and supplying essential products and services in and for industries such as pharmaceutical, technology, biotechnology, healthcare, chemicals and sanitation, waste pickup and disposal, agriculture, food and beverage, transportation, energy, steel and steel products, petroleum and fuel, mining, construction, national defense, communications, and products used by other Essential Governmental Functions and Essential Businesses and Operations"; "Critical labor union functions. Essential activities include the administration of health and welfare funds and personnel checking on the well-being and safety of members providing services in Essential Business and Operations"; "Hotels and motels"; and "Higher educational institutions, for purposes of facilitating distance learning, performing critical research, or performing essential functions as determined by the institution."
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> See Wis. Dep't of Health Servs. Emergency Order #12, "Safer at Home." (Mar. 24, 2020) (emphasis added; formatting altered).

boat and bicycle sales and repair shops operational. While many if not all of the exempt businesses are indeed "essential"——for their owners and employees no less than their customers——court operations necessary for the exercise of the constitutionally-guaranteed jury trial right cannot reasonably be treated as somehow less essential.

* * *

¶39 In ordering the indefinite suspension of all jury trials in the State of Wisconsin, "the court exceeded the authority the legislature granted" under Wis. Stat. § 751.12 because indefinitely suspending parties' constitutionally- and statutorily-guaranteed jury trial rights "affect[s] litigants' substantive right of access to Wisconsin courts and litigants' substantive right to the constitutional protections that our courts provide to all."[48] Neither the constitution nor the statutes recognize an exception for public health emergencies. The court lacks any authority to infringe the right of Wisconsin citizens to have their cases tried by juries within the time frames established by the people's representatives in the legislature. Impervious to United States Supreme Court review on such matters of purely state law, the Wisconsin Supreme Court does whatever it wishes as the highest court in the State. I cannot join this raw exercise of power. However well-intentioned, the court nonetheless transgresses the limits of its authority. I dissent.

¶40 I am authorized to state that Justice DANIEL KELLY joins this dissent.

[48] In the matter of the Petition to Amend/Dissolve Wisconsin Statute § 801.54 Discretionary Transfer of Civil Actions to Tribal Court, S. Ct. Order issued July 28, 2016, ¶10 (Roggensack, C.J., dissenting).

ADDENDUM C

REBECCA GRASSL BRADLEY, J., DISSENT to In re the Matter of Jury Trials During the COVID-19 Pandemic——Amended (S. Ct. Order issued March 22, 2020; Amended April 15, 2020).

REBECCA GRASSL BRADLEY, J. (*dissenting*). This order drastically changes court proceedings in the entire State. This court's original order, issued on March 22, 2020, suspended in-person court proceedings through April 30, 2020, subject to extension or modification as circumstances warrant. I would retain that end date for this amended order.