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April 6, 2020

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You are hereby notified that the Court has entered the following amended order setting forth its reasoning in support of the order issued previously on April 6, 2020:

No. 2020AP608-OA

Wisconsin Legislature v. Evers

Earlier today, Governor Tony Evers issued Executive Order No. 74 purporting to, among other things, suspend in-person voting for the election scheduled for tomorrow. This action has the practical effect of suspending or rewriting numerous election-related statutes, including mandatory election dates, election procedures, and terms of office for local officials. While the Governor's emergency powers are vast, they are not unlimited. This court acknowledges the public health emergency plaguing our state, country, and world, but any action taken by the

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Governor, no matter how well-intentioned, must be authorized by law. In support of his order, the Governor cited several general constitutional provisions and one statute. Even if the Governor's policy judgments reflected in the order are well-founded, and even if we agreed with those policy judgments, none of the authorities cited in the order support this broad sweep of power.

The Wisconsin Constitution establishes three branches of government: the legislative branch to write the laws, the executive branch to enforce the laws, and the judicial branch to interpret and apply the laws to cases before it. The Governor's authority to issue Executive Order No. 74 must be grounded in either the constitution or the laws enacted by the Legislature. Executive Order No. 74 states that the legal bases for the directives are several provisions of the Wisconsin Constitution—namely the Preamble; art. IV, § 11; art. V, § 1; and art. V, § 4—and Wisconsin Stat. § 323.12(4)(b).

None of these provisions authorize the Governor to issue the directives in Executive Order No. 74, with the exception of the directive requiring the Legislature to convene in special session at 2:00 p.m. on April 7, 2020. Article IV, Section 11 of the Wisconsin Constitution gives the Governor the authority to convene the legislative special session, as we agree he has lawfully done. Article V, Section 1 provides that “[t]he executive power shall be vested in a governor,” nothing of which grants the Governor any authority to suspend the statutes at issue. Article V, Section 4 requires the Governor to take care that the laws be faithfully executed, and grants other related powers.¹ Notably, Article V, Section 4 does reference danger from contagious disease, but specifies that this circumstance gives the Governor the power to convene the Legislature at another “suitable place.” Finally, the Preamble² sets forth the purposes and goals for the Constitution; it does not authorize any of the three created branches to assume any powers necessary to accomplish

¹ In full, Article V, Section 4 reads as follows:

The governor shall be commander in chief of the military and naval forces of the state. He shall have power to convene the legislature on extraordinary occasions, and in case of invasion, or danger from the prevalence of contagious disease at the seat of government, he may convene them at any other suitable place within the state. He shall communicate to the legislature, at every session, the condition of the state, and recommend such matters to them for their consideration as he may deem expedient. He shall transact all necessary business with the officers of the government, civil and military. He shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws be faithfully executed.

Wis. Const. art. V, § 4.

² The Wisconsin Constitution Preamble reads as follows: “We, the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility and promote the general welfare, do establish this constitution.”

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those purposes. We conclude none of these constitutional provisions authorize the Governor's directives in Executive Order No. 74.

The Governor also relies on Wis. Stat. § 323.12(4). Chapter 323 of the Wisconsin Statutes governs emergency management, and subchapter II of Chapter 323 sets forth the powers and duties in the event of an emergency. Wisconsin Stat. § 323.12 is addressed specifically to the duties and powers of the Governor. In particular, subsection (4) enumerates the Governor's powers when he declares an emergency under Wis. Stat. § 323.10, which he has done here. Paragraphs (4)(a) and (c) grant him power to prioritize or engage in certain contracts. Paragraph (4)(e) grants him power to waive fees for permits, licenses, approvals, and other similar authorizations.

In Executive Order No. 74, the Governor relies specifically on paragraph (4)(b), which grants the Governor authority to "issue such orders as he or she deems necessary for the security of persons and property." Wis. Stat. § 323.12(4)(b). While broadly worded, this provision must be read in light of the whole statute. Notably, in paragraph (4)(d), the Governor is granted the power to "[s]uspend the provisions of any administrative rule" if certain conditions are met. In contrast to this power, nothing in subsection (4) grants the Governor the power to suspend or rewrite statutes in the broad fashion asserted here, what amounts to ignoring or rewriting statutory provisions governing mandatory election dates, mandatory election procedures, and terms of elected office. Since the Legislature provided the Governor the authority to suspend administrative rules in paragraph (4)(d), the logical inference with respect to paragraph (4)(b) is that the Legislature has not granted him the authority to suspend or rewrite statutes in the name of public safety. To conclude otherwise would be to render the administrative rules provision in paragraph (4)(d) pure surplusage. Therefore, Wis. Stat. § 323.12(4)(b) does not support the governor's broad assertion of power.

The Legislature could have granted the Governor broader emergency powers to suspend elections or statutory mandates. The Governor's brief to this court represents that many other state legislatures explicitly give their Governor this very kind of clear, broad power. The Wisconsin Legislature has not done so. The Legislature and Governor also could have moved this election or changed the rules governing it through the ordinary legislative process. They have not done so.

The dissent raises new arguments regarding the authority of the Department of Health Services to issue such an order. Setting aside that Executive Order No. 74 was issued by the Governor (not DHS), and the incredibly broad and unsupported claim that DHS has authority to postpone elections, none of these arguments were cited or raised by the Governor here, so we do not consider them further.

The question presented is not whether the policy choice to continue with this election is good or bad, or otherwise in the public interest. The dissent's arguments are focused largely on this policy rationale. Rather, the question presented to this court is whether the Governor has the authority to suspend or rewrite state election laws. Although we recognize the extreme seriousness of the pandemic that this state is currently facing, we conclude that he does not.

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In light of the extraordinary circumstances and importance of these issues, the petition for original action is granted.

The petitioners also request temporary injunctive relief. To obtain such relief, a movant must show (1) a reasonable probability of success on the merits; (2) a lack of an adequate remedy at law; (3) that the movant will suffer irreparable harm in the absence of an injunction; and (4) that a balancing of the equities favors issuing the injunction. See, e.g., Pure Milk Products Coop. v. National Farmers Org., 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). As we have explained, petitioners are likely to succeed on the merits of their claim that Executive Order No. 74 was unlawful with the exception of the directive requiring the Legislature to convene in special session at 2:00 p.m. on April 7, 2020. The only remedy for this is a temporary injunction, and the failure to enjoin this action would irrevocably allow the Governor to invade the province of the Legislature by unilaterally suspending and rewriting laws without authority. Accordingly, the equities favor issuing the injunction at this time.

IT IS ORDERED that the petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70 is granted; and

IT IS FURTHER ORDERED that the provisions of Executive Order No. 74 are hereby enjoined in their entirety, with the sole exception of the provision bearing the number 2 on page four of Executive Order No. 74, which “[r]equire[s] the convening of a special session of the Legislature at the Capitol in the City of Madison, to commence at 2:00 p.m. on April 7, 2020, solely to consider and act upon legislation to set a new in-person voting date for the 2020 Spring election.”

DANIEL KELLY, J., did not participate.

ANN WALSH BRADLEY, J. (*dissenting*). Offering scant rationale for its misguided orders granting a temporary injunction and an original action, the majority gives Wisconsinites an untenable choice: endanger your safety and potentially your life by voting or give up your right to vote by heeding the recent and urgent warnings about the fast growing pandemic. These orders are but another example of this court's unmitigated support of efforts to disenfranchise voters.³

According to national and state officials, the threat of the COVID-19 pandemic is quickly escalating, requiring enhanced and immediate responses to the surge. On Saturday, April 4, 2020, at a White House press conference, the White House coronavirus response coordinator stated that social isolation was crucial during the next two weeks. She advised that during that time period

³ See League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302; Milwaukee Branch of NAACP v. Walker, 2014 WI 98, 357 Wis. 2d 469, 851 N.W.2d 262.

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all people should refrain from going to grocery stores or pharmacies—heretofore locations exempted from stay-at-home orders.⁴

This was followed the next day by President Donald Trump's warning that the country could be headed into its "toughest" weeks yet as the COVID-19 death toll mounts.⁵ Also on Sunday, United States Surgeon General, Jerome M. Adams, warned that this week will be "our Pearl Harbor moment, our 9/11 moment, only it's not going to be localized. It's going to be happening all over the country." In a daunting and foreboding prediction, he explained that this will be "the hardest and saddest week of most Americans' lives"⁶

Consistent with the dire nature of these statements, some members of this court have previously recognized the unacceptable risk of forcing Wisconsinites to congregate during this pandemic. See In the matter of an Interim Rule Re Suspension of Deadlines For Non-Criminal Jury Trials Due to the COVID-19 Pandemic: Public Hearing Notice, No. 20-02, ¶2 (Mar. 31, 2020) (Roggensack, C.J., concurring). Taking Justice Rebecca Grassl Bradley to task for her dissent, Chief Justice Roggensack wrote, "Certainly, she does not write for the people of Wisconsin, whom she would require to risk acquiring COVID-19 infections when they appear to serve in civil jury trials. She does not write for the families of jurors who would be at increased risk of COVID-19 infections carried home by family members who performed jury service."

Echoing these grave warnings, Wisconsin Governor Tony Evers today issued an executive order "[s]uspend[ing] in-person voting for April 7, 2020, until June 9, 2020, unless the Legislature passes and the Governor approves a different date for in-person voting."

On the heels of this executive order, the majority of this court looks reality in the face, but then turns the other way. Risking the health of our families, neighbors and friends, the majority mandates that in-person voting in Wisconsin's election must occur tomorrow, April 7. In justifying its decision, the majority states that the law compels such a result.

⁴ Jason Slotkin and Barbara Sprunt, "Trump Warns 'One Of The Toughest Weeks Is Ahead, Says To Brace For 'A Lot Of Death,'" National Public Radio (Apr. 4, 2020), <https://www.npr.org/2020/04/04/826741317/federal-government-implements-relief-as-nation-reels-from-coronavirus-pandemic>.

⁵ Id.

⁶ Dave Michaels, "Surgeon General, Next Week Will Be Hardest, Saddest," Wall Street Journal (Apr. 5, 2020) <https://www.wsj.com/livecoverage/coronavirus-2020-04-03/card/1YJjTvtgwgAnGUaW3FLw>; Sarah Westwood, "Surgeon General: This week will be like a 'Pearl Harbor' and '9/11' moment," CNN (Apr. 5, 2020) <https://www.cnn.com/2020/04/05/politics/jerome-adams-coronavirus/index.html>.

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Nonsense. Neither the law nor common sense support the majority's tenuous and callous order.

As passed by the Legislature, the law concisely explains the Governor's powers. It provides that during these extraordinary times of a state of emergency, the Governor has the power to issue certain orders. Specifically relevant here, Wis. Stat. § 323.12(4)(b) provides: "The governor may . . . [i]ssue such orders as he or she deems necessary for the security of persons and property."

Further evidencing the extraordinary nature of current times, this court has never before had the opportunity to interpret this particular provision of state law. But the interpretation is clear given the familiar maxim that "[s]tatutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." State ex rel. Kalal v. Cir. Ct. for Dane Cty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. With no court decision interpreting the term "security of persons," I turn to Merriam Webster's dictionary,⁷ which provides as the first definition, "the quality or state of being secure: such as freedom from danger." "Security," Merriam Webster Online Dictionary (2020), <https://www.merriam-webster.com/dictionary/security>. COVID-19 is certainly a "danger," and it is a danger that spreads more easily in large groups of people. By saying otherwise, the majority simply ignores the plain language of the statute.

Underscoring the executive branch's ability to take action in circumstances such as these, even the Secretary of the Department of Health Services is authorized to act. Specifically, Wis. Stat. § 252.02(3) provides that "[t]he department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." Even more broadly, Wis. Stat. § 252.02(6) sets forth that "[t]he department may authorize and implement all emergency measures necessary to control communicable diseases" (emphasis added). If the Secretary of the Department, part of the executive branch, has the power to forbid public gatherings to control outbreaks and epidemics, then surely the Governor as the head of the executive branch has such power. Nevertheless, the majority takes the decision away from the executive branch despite the statutes that place such a decision within its purview.

Further, the majority's misguided determination is out of step with common sense and will have real consequences. When voters have been ordered to stay at home, many will make the choice not to risk their health and the health of their loved ones by venturing outside to a potentially crowded polling place. Voters who make this reasonable choice to put their health first will be disenfranchised. Those voters who do show up, along with poll workers, and everyone with whom they come in contact, will be put at needless risk of contracting a deadly virus.

⁷ See State v. Sample, 215 Wis. 2d 487, ¶21, 573 N.W.2d 187 (1998) ("For purposes of statutory interpretation or construction, the common and approved usage of words may be established by consulting dictionary definitions.").

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With the decision of the majority, democracy takes a step backwards. Paying no heed to the warnings or the science, the majority circumvents the law, while disenfranchising voters and putting at risk the health and safety of our fellow Wisconsinites.

Accordingly, I dissent.

I am authorized to state that Justice REBECCA FRANK DALLET joins this dissent.

Sheila T. Reiff
Clerk of Supreme Court