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Supreme Court of Wisconsin

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May 11, 2020

To:

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

No. 2020XX639 In the Matter of the Condition of C.R.F. L.C. #2019ME154

The court having considered, the "Emergency Motion for Prompt Chapter 51 Recommitment Jury Trial" filed on behalf of the petitioner, C.R.F., on April 29, 2020, together with the court ordered response filed on behalf of the Chippewa County Department of Human Services on May 6, 2020;

IT IS ORDERED that the emergency motion for an exception to the jury trial suspension order and interim rule of this court is denied. If C.R.F. chooses to stand on his demand for a jury trial, the circuit court shall schedule a jury trial in this proceeding for a date after May 22, 2020 (or a subsequent date if the suspension of jury trials is extended by this court). If, on the other hand, C.R.F. chooses to waive his right to a jury trial, the circuit court may conduct a bench trial pursuant to this court's March 22, 2020 administrative order "In re: the Matter of Remote Hearings during the COVID-19 Pandemic," as amended on April 15, 2020.

ANN WALSH BRADLEY, J. (*concurring*). I concur in the order, but write separately out of concern that it may cause some confusion. It may give rise to what might prove to be

unfounded expectations that, regardless of safety issues, non-criminal jury trials can be scheduled for dates immediately after May 22, 2020. As the order suggests, there may be further direction from this court. Indeed, further guidance certainly is needed as we navigate together these uncharted waters.

I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice REBECCA FRANK DALLET join this concurrence.

REBECCA GRASSL BRADLEY, J. *(dissenting).* The Supreme Court of Wisconsin denies C.R.F. a timely jury trial and deprives him of his liberty without due process of law, based on the court's prior orders[1] indefinitely suspending all criminal and civil jury trial rights in the State. "[T]he majority ignores governing statutory law and instead invokes its ever-evolving 'superintending authority' to substitute the majority's preference for that of the legislature."[2] This court cannot lawfully override the Constitution or the laws enacted by the people's representatives in the legislature, even in a pandemic. In refusing to apply the law in C.R.F.'s case, the majority tramples his fundamental rights,[3] invades the province of the legislature, violates the separation of powers, and "creates a confrontation of constitutional magnitude between the legislature and this court."[4] I dissent.

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 mental health 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, unless they forego their right to a jury trial. Neither the Constitution nor the Wisconsin Statutes countenance such an indefinite deprivation of liberty. Nor does the Constitution permit this court to force an individual involuntarily detained by the government to sacrifice his right to a jury trial in order to regain his liberty.

"Since 1880, Wisconsin has allowed individuals subject to confinement for purposes of psychiatric treatment to have the option of a jury determination." In re Mental Commitment of

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[1] In re the Matter of Jury Trials During the COVID-19 Pandemic (S. Ct. Order issued March 22, 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 (March 31, 2020).

[2] 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).

[3] Liberty is a fundamental right, Foucha v. Louisiana, 504 U.S. 71, 86 (1992), and involuntary civil commitment is a "significant deprivation of liberty." Addington v. Texas, 441 U.S. 418, 425 (1979).

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

Mary F.-R., 2013 WI 92, ¶13, 351 Wis. 2d 273, 284, 839 N.W.2d 581 (citing State ex rel. Farrell v. Stovall, 59 Wis. 2d 148, 163, 207 N.W.2d 809 (1973) (citing Humphrey v. Cady, 405 U.S. 504, 509 (1972)). In its current form, Wis. Stat. § 51.20(5)(a) mandates "due process and fair treatment" for those detained under chapter 51, which expressly encompasses the right to a jury trial if requested:

> The hearings which are required to be held under this chapter shall conform to the essentials of due process and fair treatment including the right to an open hearing, the right to request a closed hearing, the right to counsel, the right to present and cross-examine witnesses, the right to remain silent and the right to a jury trial if requested under sub. (11).

Wis. Stat. § 51.20(5)(a) (emphasis added). Under Wis. Stat. § 51.20(11)(a),[5] the individual against whom a petition has been filed is entitled to a jury trial, which in C.R.F.'s case must be conducted within 14 days of the date he demanded one.[6] Under this statute, the people of Wisconsin

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[5] 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.

[6] C.R.F. is currently confined under a commitment order that expires on May 21, 2020. C.R.F.'s petition asks for a jury trial "within normal limits as set by Wis. Stat. § 51.20(11)(a), or in any event no later than May 15, 2020." Chippewa County's response, relying on the May 21st expiration of C.R.F.'s current commitment order, contends a jury trial, if granted, should be held by May 20, 2020. Resolution of this dispute is not necessary given the court's denial of C.R.F.'s request. Once C.R.F.'s current commitment order expires, his continued (and indefinite) involuntary confinement without due process violates both Wisconsin statutes and his constitutional right to liberty.

recognize the right to a jury trial in involuntary commitment cases as a due process right. The Fourteenth Amendment to the United States Constitution, in relevant part, provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend XIV, § 1 (emphasis added). "[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Jones v. United States, 463 U.S. 354, 361 (1983) (quoted source omitted). Nothing in the Constitution allows the judiciary to suspend its provisions in times of emergency: "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). The majority's orders flout these core principles, reducing the Constitution to hollow rhetoric.

While the majority's earlier blanket orders deny timely jury trials to every litigant in every civil and criminal proceeding in the entire State, the majority permits "circuit courts or parties" to "file a motion with this court seeking an exception to this order." Those orders give no clue under what circumstances the majority might grant one, leaving parties guessing as to what showing they must make. In this case, the majority neglects to explain its denial of C.R.F.'s requested exception. If the majority so readily ignores constitutional commands and statutory law, what factors could possibly sway the majority to restore the jury trial right for any litigant? The majority's orders offer no meaningful "process" much less "fair treatment."

The majority orders the circuit court in C.R.F.'s case to "schedule a jury trial in this proceeding for a date after May 22, 2020 (or a subsequent date if the suspension of jury trials is extended by this court)." This indefinite suspension violates C.R.F.'s statutory and constitutional rights. "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."[7] A Chapter 51 detention affects the substantive liberty

[7] 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).

interests of the individual against whom a petition has been filed.[8] The majority's order offers C.R.F. two options: (1) sacrifice his liberty if he exercises his guaranteed right to a jury trial, or (2) surrender his jury trial right in order to vindicate his liberty interests. The majority's order says: "If C.R.F. chooses to stand on his demand for a jury trial, the circuit court shall schedule a jury trial in this proceeding for a date after May 22, 2020 (or a subsequent date if the suspension of jury trials is extended by this court). If, on the other hand, C.R.F. chooses to waive his right to a jury trial, the circuit court may conduct a bench trial[.]" (emphasis added).

The Constitution prohibits this court from forcing an individual to choose between two fundamental rights. This court has enforced this principle against other governmental actors, but now declines to hold itself to its own pronouncements. Just three years ago, this court recognized that it is "unacceptable when the State requires a person to sideline one constitutional right before exercising another." Milewski v. Town of Dover, 2017 WI 79, ¶67, 377 Wis. 2d 38, 399 N.W.2d 303. While the majority apparently dismisses the jury trial right as dispensable, it should recognize the dangerousness of the precedent it has established in doing so. "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all." Frost v. Railroad Comm'n, 271 U.S. 583, 594 (1926). Just three years ago, this court considered it "inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." Milewski, 377 Wis. 2d 38, ¶67 (citing Frost, 271 U.S. at 594).

The people of Wisconsin should be particularly leery of governmental infringement of fundamental rights justified by declarations of necessity. "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." When the judiciary casually ignores the rights of the people, our freedom is in peril.

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 Wis. Stat. § 751.12(1), which provides:

[8] "[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." 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).

> 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 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 override the rights of the people enshrined in the Constitution and codified in statutory law.

"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 C.R.F., who has not waived his rights in this case.

Even if the majority's suspension of multiple laws were limited to "pleading, practice, and procedure," the majority altogether ignored the statutory mandates governing the dictates of its order by suspending statutes immediately and without a hearing. In doing so, the majority exceeded 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 circumvented both requirements.[9]

[9] "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).

Finally, no doubt mindful that "the court does not necessarily do a good job when it legislates from the bench[,]"[10] 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 suspended multiple statutes by fiat, effective immediately, with a promise to hold a hearing 30 days after the fact. This "hearing" was held on May 1, 2020 and lasted about four minutes. As expected, the justices in the majority had already made up their minds.[11] There is no telling when the court will lift its orders suspending jury trials; regardless, reversing course at that point will not undo the majority's infringement of C.R.F.'s rights in the interim.

The majority shrouded 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."[12] Instead, the majority overrode both statutory and constitutional rights and flouted mandatory statutory procedures in the process.

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

[10] State v. Ernst, 2005 WI 107, ¶46, 283 Wis. 2d 300, 699 N.W.2d 92 (Prosser, J., concurring).

[11] At the hearing, only the Chief Justice spoke. She acknowledged the five comments submitted regarding the court's order, including a letter from circuit court judges urging the court to allow the circuit courts to decide whether to conduct in-person proceedings and jury trials and a comment objecting to the indefinite timeframe of the court's order suspending non-criminal jury trials. The Chief Justice also mentioned the court's COVID-19 task force, described the type of matters covered by the court's order suspending non-criminal jury trials, and announced the court's hope to lift the jury trial suspension order "within a short period of time" but that the court "has not had the opportunity to thoroughly consider where we might go or what we might do."

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

procedural matters expressly left for determination by law[.]"[13] This court possesses no authority to alter the statutory timeframes 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."[14]

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 suspended the deadlines for commencing jury trials, the court undoubtedly meddled with substantive rights and interfered 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.

In attempting to impose a one-size-fits-all solution in the face of the COVID-19 pandemic, the majority's previous orders inevitably generated C.R.F.'s motion by hamstringing the circuit court from complying with statutory deadlines that cannot be waived. C.R.F.'s motion asserts violations of statutory and constitutional rights. The majority's orders place the court in the judicially precarious position of deciding whether its own orders violate the statutory or constitutional rights of C.R.F. 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 C.R.F.'s proceeding at this stage, the majority arguably has "handled" this case, supplanting the circuit court judge, and leaving citizens of Wisconsin like C.R.F. with no meaningful appellate recourse, except before the United States Supreme Court.

The majority's characterization of its suspension of the individual right to a jury trial——which in C.R.F.'s case results in a significant deprivation of liberty——as merely a matter of "pleading, practice and procedure" is patently absurd. 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. It is abundantly clear that the court's order impermissibly affects the substantive rights of parties in Chapter 51 proceedings. 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

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

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

authority under the precursor to § 751.12,[15] 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 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.

"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).

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

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[15] 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).

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).

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."[16]

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 prior order suspending the operation of numerous laws "thwarts the will of the people" as reflected in the

[16] 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).

statutes enacted by the people's representatives in the legislature. Id. '"To avoid an arbitrary discretion in the 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.'"[17]

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."

Contradictorily, the court invoked this statute as "authority to alter statutes and rules governing how the court system operates" but then said "[w]e do not decide at this time whether 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."[18] 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.

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

[17] 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)).

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

at Home" order for "Essential Businesses and Operations" that are "encouraged to remain open."[19] How can the majority deem constitutionally-guaranteed jury trials dispensable while another

[19] 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

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 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. In the name of a pandemic, C.R.F. will remain indefinitely confined against his will in violation of the Constitution and Wisconsin law, while

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> Essential Businesses and Operations and Essential Governmental Functions with 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."

See Wis. Dep't of Health Servs. Emergency Order #12, "Safer at Home." (Mar. 24, 2020) (emphasis added; formatting altered).

other citizens enjoy the liberty to play golf or rent a kayak.[20] Something is gravely amiss within our constitutional order.

Chippewa County does not dispute that C.R.F. is entitled to a jury trial and does not "take issue" with C.R.F.'s "numerous statutory and constitutional arguments regarding [C.R.F.'s] personal liberty interests and due process rights." Chippewa County's response does not dispute the substantive right denied to C.R.F. The County spends most of its brief asking the court for guidance on how to conduct a jury trial safely. This reveals a practical problem with this court's blanket orders. Counties, which undoubtedly are in a better position to assess particular conditions in local courthouses as well as their communities, are much better suited to answer these questions than seven justices who are altogether unfamiliar with most courtrooms in the state.

Eleven circuit court judges from across Wisconsin objected to this court's jury trial suspension order and expressed concern about "the withdrawal of local decision-making" and the "specific liberty interests involved with civil commitment proceedings." The circuit court judges said:

> It cannot be disputed that courts will be able to safely conduct jury trials on different timeframes. The issues that will drive whether a jury trial can safely be conducted in Bayfield or Ashland County may be very different than the issued faced in Eau Claire or Chippewa County, or Adams or Marquette County, or Racine or Kenosha County. If a judge is able to make arrangements to safely conduct a jury trial, he or she should not be prohibited from doing so until such time as the Supreme Court of Wisconsin determines that such trials can safely be held in every court all across the state.

The circuit court judges further advised:

> We are intimately familiar with the infrastructure, unique to each court and county, in which we work everyday. We are also familiar with the existing and evolving conditions in the communities in which we work and live. We believe that we are in the best position to find the right balance.

The majority never explains why it believes this court, rather than circuit courts, should decide when and in what manner jury trials may be safely conducted. The court's broad brush, statewide approach silently dismisses the differences among counties and within each courthouse. Circuit courts are much better situated than this court to work with their respective counties to make individualized decisions on safely proceeding with jury trials, while upholding the rights of litigants. While the Wisconsin Courts COVID-19 Task Force instituted by the Chief Justice will

[20] See Wis. Dep't of Health Servs. Emergency Order #28, "Safer at Home." (Apr. 16, 2020); Wis. Dep't of Health Servs. Emergency Order #34 "Interim Order to Turn the Dial" (Apr. 27, 2020).

hopefully provide helpful guidance to aid each circuit court and county in establishing a framework for conducting trials, it should not supplant local decision-making particularized for the circumstances of each county and each courtroom.

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In denying C.R.F. his jury trial right under its previous order indefinitely prohibiting 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."[21] Neither the Constitution nor the statutes recognize an exception for public health emergencies. The court lacks any authority to infringe the right of any Wisconsin citizen to have his case tried by a jury within the mandatory timeframe established by the people's representatives in the legislature, particularly when the State has deprived a vulnerable citizen of his liberty. I cannot join this raw exercise of power. However well-intentioned, the court nonetheless transgresses the limits of its authority. I dissent.

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

Sheila T. Reiff
Clerk of Supreme Court

[21] 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).