

IN THE SUPREME COURT OF WISCONSIN

Case No. 20-AP-765-OA

WISCONSIN LEGISLATURE,

Petitioner

V.

SECRETARY-DESIGNEE ANDREA PALM; JULIE WILLEMS
VAN DIJK AND NICOLE SAFAR, IN THEIR OFFICIAL
CAPACITIES AS EXECUTIVES OF WISCONSIN
DEPARTMENT OF HEALTH SERVICES,

Respondents.

NON-PARTY BRIEF OF AMICI CURIAE, HUNTER
NATION, WISCONSIN LAKESHORE BUSINESS
ASSOCIATION, SPORT-FISHING GUIDES (See Appendix
A), and INDIVIDUAL ANGLERS (See Appendix A) IN
SUPPORT OF THE EMERGENCY PETITION FOR AN
ORIGINAL ACTION AND IN SUPPORT OF THE
EMERGENCY MOTION FOR TEMPORARY INJUNCTION

Adam M. Jarchow (WI Bar No. 1073678)
Jarchow Law, LLC
360 4th Street - PO Box 117
Clear Lake, Wisconsin
Telephone: (715) 263-4200
Facsimile: (715) 263-2980
adam@jarchowlaw.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
I. Hunter Nation	1
II. Wisconsin Lakeshore Business Association, Inc.	1
III. Sport-fishing Guides and Business Owners	2
IV. Individual Anglers	2
ARGUMENT	5
I. The Order is arbitrary and capricious to the extent it deems businesses essential and non-essential.....	5
A. Captain Bret Alexander	7
B. Captain Troy Mattson	9
C. Hunter Nation’s Tyler Ruhland	11
II. The Order should be immediately enjoined because it exceeds the Secretary-Designee’s statutory authority.....	14
III. The Order should be immediately enjoined because it violates Wisconsin’s constitutional right to hunt and fish.....	17
CONCLUSION.....	22
APPENDIX A	23
APPENDIX B.....	24
FORM AND LENGTH CERTIFICATION.....	25
CERTIFICATION REGARDING AN ELECTRONIC BRIEF.....	26
CERTIFICATE OF SERVICE.....	27

TABLE OF AUTHORITIES

Cases

<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	18
<i>Smith v. City of Milwaukee</i> , 2014 WI App 95, 356 Wis.2d 779 854, N.W.2d 857	6
<i>State Ex Re. Kalal v. Circuit Court of Dane County</i> , 2004 WI 58, 271 Wis.2d 633, N.W.2d	14
<i>State v. Hamdan</i> , 264 Wis.2d 433, 2003 WI 113	19, 20, 21
<i>Wisconsin Legislature v. Evers</i> , 2020AP608-OA.....	15
<i>Wisconsin Prof'l Police Ass'n v. Pub. Serv. Comm'n of Wisconsin</i> , 206 Wis.2d 60, 555 N.W.2d 179 (Ct. App 1996)	6, 14
<i>Wisconsin State Tel. Ass'n v. Pub. Serv. Comm'n of Wisconsin</i> , 105 Wis.2d 601, N.W.2d 873 (Ct. App. 1981)	5

Statutes and Constitutions

Wis. Const. Art I §25.....	19, 20
Wis. Const. Art I §26.....	17, 19
Wis. Stat. §29.519.....	15
Wis. Stat. §252.02.....	16
Wis. Stat. §252.02(3).....	15
Wis. Stat. §252.02(4).....	15

Wis. Stat. §252.02(6).....	15
----------------------------	----

Wis. Stat. Chapter 29	15
-----------------------------	----

Other Authorities

Emergency Order #12 (the original “Safer at Home” order).....	7,13
---	------

Emergency Order #28 (the extended “Safer at Home” order).....	4,14,20
---	---------

Sheboygan Press (Apr 21, 2002)	13
--------------------------------------	----

Wis. Admin. Code ch. NR 19 – NR 26	15
--	----

INTEREST OF AMICI CURIAE

I. Hunter Nation

Hunter Nation is the fastest growing grassroots organization in America fighting to protect and expand our sporting heritage. Hunter Nation is committed to supporting laws and policies that restore as much land and wildlife management authority from federal management back to State Fish and Game Agencies. Hunter Nation has more than 20,000 dues-paying members in all 50 states - 2,000 of whom call Wisconsin home.

II. Wisconsin Lakeshore Business Association, Inc.

Wisconsin Lakeshore Business Association, Inc. (WLBA) is a Wisconsin, non-profit, non-stock corporation organized to represent the interests of Wisconsin industries that operate in or around the Great Lakes. WLBA has approximately 2,500 individual members, and over 100 business members operating around Wisconsin's Great Lakes. Its primary focus is the growth and sustainability of Wisconsin's sport-fishing industry and the businesses supported by the industry.

III. Sport-fishing Guides and Business Owners

The Sport-fishing guides and business owner amici curiae, listed on Appendix A, represent a broad and diverse cross-section of an industry stretching along Wisconsin's lakeshore from Kenosha to points north of Green Bay. These individuals have decades of experience and millions of dollars invested in the boats and equipment that make Wisconsin's sport-fishing heritage one of the most vibrant in the nation. Under the so-called Safer-at-Home Orders, these businesses have been deemed non-essential and have been idled since March. Without immediate relief, many fishing boat captains will lose everything. It's not an exaggeration to say that these emergency orders issued by the Wisconsin Department of Health Services ("Department") have crippled the industry to which many of the amici have devoted their entire professional lives.

IV. Individual Anglers.

The individual angler amici curiae, listed on Appendix A, are Wisconsin residents who have made a tradition of exercising their constitutionally protected right to fish with the assistance of Wisconsin's sport-fishing guides. Under the Safer-at-Home orders,

these individuals are prohibited from fishing with a guide, which for all practicable purposes, prohibits them from fishing Wisconsin's Great Lakes.

Fishing is a \$2.75 billion industry in Wisconsin employing an estimated 30,000 people.¹ Much of the industry is comprised of very small business owners – charter captains (inland lakes and Great Lakes) who own between one and five fishing boats. Because of Wisconsin's climate, the season only lasts a few months. The revenue from those months must sustain these small businesses and the families who own them, all year. The sweeping edict set out in Emergency Order #28 ("Order") issued by the unelected, unconfirmed Secretary-Designee of the Department – with no input or involvement from the Legislature – determined that amici or amici's members must don the Scarlett Letter of "non-essential," thereby shuttering them, just as their season begins. The unlawful Order is destroying Wisconsin's guided sport-fishing industry and the families who depend upon it.

¹ See Wisconsin Department of Tourism, www.wisconsinmarine.org/economic-impact.htm

With respect to the business of guided sport-fishing, there is no logic to the Order. On one hand, the Order permits sport-fishing guides to bring their friends and family out fishing (even on the same boats they use for business purposes), while on the other hand, the Order prohibits sport-fishing guides from accepting a fee for bringing those same people fishing on those same boats simply because they have been unilaterally deemed “non-essential.” It defies logic to believe that paying for a service heightens the chances of contracting Covid-19 or stopping its spread.

It also stretches the bounds of credulity to believe that an unelected, unconfirmed bureaucrat possesses the unbounded power to amend or suspend statutes when the Governor doesn’t even have that power. Finally, we are just a few days away from opening fishing weekend – a civic tradition in Wisconsin rivaled only by opening deer hunting. In Wisconsin, fishing is not only a sacred tradition; it is a protected right under Article I, Section 26 of the Wisconsin Constitution. Yet, without this Court’s intervention, Emergency Order #28 will prevent thousands of anglers from exercising that cherished constitutional right on opening weekend and beyond.

This Court should enjoin DHS' Order because it (i) is arbitrary and capricious, (ii) exceeds the Department's statutory authority; and (iii) infringes on Wisconsin's constitutionally protected right to hunt and fish.

ARGUMENT

I. The Order is arbitrary and capricious to the extent it deems businesses essential and non-essential.

The ability of the courts to set aside agency action that is arbitrary and capricious protects affected parties from being deprived of their rights or interests without some form of due process. Due process requires that an administrative rule, to be valid, must be reasonably related to the purpose for which it was promulgated. *See Wisconsin State Tel. Ass'n v. Pub. Serv. Comm'n of Wisconsin*, 105 Wis. 2d 601, 611, 314 N.W.2d 873, (Ct. App. 1981). "A regulation is arbitrary if there are no facts to justify its enactment." *Id.*

An agency decision is "arbitrary and capricious" if it "lacks a rational basis and is the result of an unconsidered, willful or irrational choice rather than a 'sifting and winnowing' process."

Wisconsin Prof'l Police Ass'n v. Pub. Serv. Comm'n of Wisconsin, 205 Wis. 2d 60, 73-74, 555 N.W.2d 179 (Ct. App. 1996); *accord Smith v. City of Milwaukee*, 2014 WI App 95, ¶ 21, 356 Wis. 2d 779, 854 N.W.2d 857.

The Order and its application cannot be said to be anything but arbitrary. Fishing guides have been deemed “non-essential” by the Department.² Sport-fishing guides bring anglers fishing on their boats in exchange for payment. These guides are experts in their craft. They know where to fish, how to fish, what bait to use, when to use it, and they have the proper equipment. A guided sport-fishing trip usually involves a captain and one crew member. They take small groups (usually 4-8 people) on a boat large enough to handle the rough waters of the Great Lakes. Most of the trips are with close family and friends. They are outdoors, in the fresh air. Handwashing and social distancing are no more difficult on a guided fishing trip, than on any other fishing outing. In sum, there are 10 or fewer people on a large boat – outside with ample opportunity for handwashing and sanitation procedures. Contrast

² See Safer at Home FAQ. Available at: https://content.govdelivery.com/attachments/WIGOV/2020/04/16/file_attachments/1428997/2020-04-16%20Safer%20at%20Home%20extension%20FAQ.pdf

this activity with items allowed under Emergency Order #28 and the absurdity becomes apparent. People stand in long lines to buy mulch and paint at big box retailers, and are packed into crowded supermarkets. A few people fishing outside on a boat is prohibited, but cramming people into the stuffy confines of certain retailers is acceptable. This is the very definition of arbitrary.

Amici's direct experience with the administration demonstrates the arbitrary nature of its determination.

A. Captain Bret Alexander

In a panic after learning about Order #12 (the Predecessor to Order #28), one of the amici, Captain Bret Alexander, sent an email to a variety of governmental entities to find out if he could run his guided sport-fishing business. On March 26, 2020, Captain Alexander and Governor Evers' *Deputy Press Secretary* (hardly a public health, public policy, or legal expert) had the following email exchange³:

Cara, hope all is well with you today. My name is Bret Alexander owner of Alexander's Sport Fishing. We run a charter business and provide fish/food for people to take home to feed there (sic) families. If we keep our distances of 6 ft or

³ The emails referenced in this section, may all be viewed at: <https://www.accuratemarineandstorage.com/fishing-report/>

more in the boat are we allowed to continue running our business? See Alexander Email Exchanges, available at link in footnote 3.

The response is nothing short of extraordinary – it shows a government that is literally making it up as it goes with no real, or meaningful, standards:

Hi Bret,

I apologize for any confusion I may have caused. We are trying our best to answer questions and direct questions to the appropriate people and are working on those processes. **Guided sport fishing businesses are nonessential and should not be operating at this time. Individual anglers are welcome to fish privately,** as long as the maintain 6 ft. distance between them and others. *Id.*

In effect, a business is told it may not operate by a member of the Governor's communications team. It is unclear whether the Governor's Deputy Press Secretary was relying on advice from the Department or the Wisconsin Economic Development Corporation (WEDC) in making this determination or making this determination herself. In either event, this one individual has been empowered to shutter an entire industry with her determination that it is non-essential. As is illustrated by this communication, the Order distinguishes between two identical activities. On the one hand, people are allowed to fish and Captain Alexander could

even bring them fishing on his boat⁴; the Deputy Press Secretary's email contemplates maintaining six feet between *multiple* people while fishing. But if Captain Alexander charges those same people a fee for bringing them on his boat fishing, then he is rendered a "non-essential business". This can only be described as "arbitrary": the exchange of money between an angler and a guide does not make the activity more dangerous than had no money been exchanged. The Order attacks *commerce* – not dangerous activity. Unfortunately, Captain Alexander's experience is not unique.

B. Captain Troy Mattson

On April 6, 2020, another amicus, Captain Troy Mattson, had the following email exchange with WEDC's Chief Legal Counsel in response to the operation of his guided sport-fishing business:

Hi Troy,

Thank you for your patience awaiting our response. Unfortunately, if your business is for recreation or recreational fishing, it does not qualify as an "Essential Business or Operation. See Mattson Email Exchanges.⁵

⁴ Under Emergency Order #34 which was just issued on April 26, 2020, Captain Alexander could now even rent his boat to anglers. But if he goes on the boat, and acts as a guide, he violates Emergency Order #28. Emergency Order #34 can be viewed at: https://content.govdelivery.com/attachments/WIGOV/2020/04/27/file_attachments/1436850/EMO34-SAHDIalTurn.pdf

⁵ Available at <https://www.accuratemarineandstorage.com/fishing-report/>

In Response, Mr. Mattson sent the following back to WEDC:

Couple questions: None of our anglers practice catch and release for recreation, our anglers strictly for food harvesting. Will all businesses be open after April 24th? *Id.*

WEDC only responded to the last question, noting the order expires on April 24. Captain Mattson reached out to this same individual at WEDC two additional times to try to gain additional clarification, and received no response. On April 8, 2020, Captain Mattson sent the following communication:

Ok what Did you come back with recreational fishing? Our clients do not catch and release for recreation. Nor do they fish tournaments. All fish harvested are for harvest and substance.

According to definition: Recreational fishing, is fishing for pleasure or competition. It can be contrasted with commercial and charter fishing, which is fishing for profit, or subsistence fishing, which is fishing for survival.

Please provide guidance as again we are not tournament or catch and release fisherman for recreation. *Id.*

He received no response. He tried one more time on April 12, 2020:

Jennifer,

Can you verify definition for us when you can. I am getting calls daily for cancellations and need clarity as soon as possible.

Not to make matters worse but they are having weekly walleye tournaments in Green Bay fox river with anglers from

all different states and county's doing catch and release recreational tournaments.

Yet our clients fish only for food, we do not catch and release or fish for recreation. I would appreciate guidance as soon as possible. Our livelihood is at stake, potentially losing [sic] a whole industry.

According to definition: Recreational fishing, is fishing for pleasure or competition. It can be contrasted with commercial and charter fishing, which is fishing for profit, or subsistence fishing, which is fishing for survival. *Id.*

Once again, he received no response.

C. Hunter Nation's Tyler Ruhland.

Shortly thereafter, the Wisconsin Representative for Hunter Nation, Tyler Ruhland, attempted to gain clarity about guided sport-fishing. On April 13, he emailed the following question to Keith Warnke – the Wisconsin DNR's Administrator for Fish, Wildlife and Parks:

Over the past week I have been fielding calls from charter fishermen and guides as to whether or not their business will be allowed to operate as normal under Emergency Order #12. As you know, fishing in Wisconsin has a substantial impact on our economy and for the thousands of tax payers who rely on it for their livelihoods. Generally, you will never see more than 6-8 people on a charter vessel or more than four people on an inland fishing trip. All in the open air and, for the most part, with the same household members. See Ruhland Email Exchange⁶

⁶ Available at <https://www.accuratemarineandstorage.com/fishing-report/>

That same day, Administrator Warnke responded as follows: “At this time, we are all go for fishing.” *Id.*

Mr. Ruhland responded a few minutes later thanking Administrator Warnke for the clarification that “fishing guides and charter captains can operate their Spring and Summer business as normal.” *Id.*

A couple hours later, but still on the same date, Mr. Ruhland was contacted by Sarah Hoyer – the DNR’s Communication’s Director. In her email (which copied Administrator Warnke), she indicated that she was writing to “clarify” a few items. In fact, what she did was the opposite of clarity. She directed Mr. Ruhland to the WEDC website to determine if a business qualified is essential or branded with the ignominious designation of “non-essential.” She added that the “DNR is not the appropriate agency to confirm if fishing guides and charter captains can operate their Spring and Summer business as normal.” *Id.*

This is truly stunning. The DNR, which the Legislature has delegated significant authority to manage Wisconsin’s natural resources, is completely out of the loop on whether sport-fishing

guides may operate. Instead that decision is left to the WEDC (and apparently the Governor's Deputy Press Secretary).

Amici are not alone in their experience as “non-essential.” Many small business owners from various industries are confused about the application of the Order. According to a recent news report, during the week that Emergency Order #12 went into effect, approximately 2,000 businesses across the state of Wisconsin sent correspondence to WEDC inquiring whether they were essential. Ann Marie Hilton and Matt Piper, *Wisconsin Businesses Received Inconsistent Messages About Whether they were Essential. Now, Some are Rejecting Evers' Order*, Sheboygan Press (Apr. 21, 2020)⁷.

In response to their inquiries, many businesses received automated responses “created with the help of a marketing software.” *Id.* At least one of those business owners was not impressed with the response: “Hurst said in an email to USA TODAY NETWORK-Wisconsin that the WEDC used ‘a whole

⁷ Article Available at: <https://www.sheboyganpress.com/story/news/2020/04/21/what-wisconsin-businesses-essential-wedc-coronavirus-guidance-uneven/5156423002/>

bunch of words to say basically nothing and leave me just as confused as I was about the initial order.” *Id.*

In another instance, “[p]rinters who served health care and grocery clients were told they were essential, but a Monona printer was advised it was nonessential despite explaining to WEDC that it prints absentee ballot envelopes. The same fate met a quilt shop that said it sold materials for homemade masks.” *Id.*

There is no consistency or logic to which businesses are branded non-essential and which are not. The Order is arbitrary and capricious, particularly in its application to certain industries such as the guided sport-fishing industry and the Court should set it aside. *Wisconsin Prof'l Police Ass'n*, 205 Wis. 2d at 73-74.

II. The Order should be immediately enjoined because it exceeds the Secretary-Designee’s statutory authority.

This Court has held that in interpreting a statute, “[c]ontext is important to meaning.” *State Ex Rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110. Thus, in determining whether Emergency Order #28 is unlawful, context matters. *See id.* This Court has also said that it reviews the “structure of the statute in which the operative language

appears... in order to “avoid absurd or unreasonable results” and “surplusage.”” *Id.* Order #28 cites Wis. Stat. §§ 252.02(3), (4) and (6) as its wellspring of authority. And while significant authority does flow from those provisions, its waters are insufficient to quench the Secretary-Designee’s insatiable thirst for power and authority.

Fishing is a heavily regulated activity in Wisconsin by both statute and administrative rule. Chapter 29 of the Wisconsin Statutes sets forth the general framework, and Wis. Stat. § 29.519 provides a pervasive scheme of regulating commercial fishing, including guided sport-fishing. In addition, there are at least a half-dozen administrative rule chapters relating to fishing alone. *See* Wis. Admin. Code ch. NR 19 – NR 26. The Order effectively suspends, or modifies, portions of many of these statutes and administrative rules (particularly as they relate to guided sport-fishing). As the Court recently held in *Wisconsin Legislature v. Evers*, 2020AP608-OA at Page 3 (April 6, 2020),⁸ when the Governor declares an emergency, the Governor has the express

⁸ We are unclear if this case was actually published and out of an abundance of caution, we are attaching a copy, as Appendix B, per Wis. Stats. §809.23(3)(c).

statutory authority to suspend administrative rules, but no corresponding power to suspend or modify statutes. This Court reasoned that the Legislature clearly knows how to grant the power to suspend statutes if it wants to confer that power – but in the context of the Governor’s emergency powers, it has not done so. Similarly, the Legislature has declined to provide the Department the ability to suspend statutes or administrative rules. While, Wis. Stat. §§ 252.02(4) does allow the Department (under certain circumstances) to issue orders that supersede local regulations and ordinances, the Legislature has not granted the Department the authority to suspend or supersede statutes or administrative rules. Given the statutory context, this omission means the Department has no such authority.

It would indeed be strange if, as this Court has held, the Governor lacks the authority to suspend or rewrite statutes, but an unelected, unconfirmed agency secretary-designee has that authority. *See id.* It would also fly in the face of the carefully crafted scheme set forth in § 252.02. In other words, if the Secretary-Designee is able to rewrite statutes relating to the entire guided sport-fishing industry, across the entire state, whether

there is even one identified case of the disease or not in a particular county, “in order to stop communicable diseases,” it’s hard to find a logical end of this power. If the Legislature had wished to confer such sweeping authority on a single person or persons, it certainly could have said so. It chose not to.

The Order should be immediately enjoined because the Secretary-Designee’s wellspring of authority runs dry well short of amending or suspending statutes and administrative rules.

III. The Order should be immediately enjoined because it violates Wisconsin’s constitutional right to hunt and fish.

The Secretary-Designee believes the Order finds safe harbor in the Department’s statutory authority. However, even if she is correct (she is not), at least with respect to guided sport-fishing, any such authority runs aground on the shoals of the Wisconsin Constitution: “The people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law.” Wis. Const. Art. I § 26.⁹

⁹ The Order is unconstitutional, and it falls on that ground alone. But the constitutional right to hunt and fish also matters in another way. As the Legislature points out in its brief, the Court should interpret the Secretary-Designee’s *statutory* authority in a way that avoids creating constitutional

In 2003, the people of the State of Wisconsin, by an 82 / 18 margin, voted to amend our state's Constitution to protect the right to hunt and fish. The striking thing about this language is how absolute it is. The only caveat is "reasonable restrictions as prescribed by law." If the Department is able to interfere with this provision with the stroke of a pen, then it's a meaningless dead letter. Just as the right to free speech is meaningless without the ability to pay to disseminate that speech, the constitutional right to fish is dead for many anglers if they are not able to pay a guide to bring them fishing. *Buckley v. Valeo*, 424 U. S. 1, 19 (1976) (per curiam) (A "restriction on the amount of money a person or group can spend on political communication during a campaign, necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.")

Based on the size of the guided sport-fishing industry in Wisconsin, it is quite clear that without the services provided by

doubt. (See Pet'r's Mem. 43–44 (citing, *e.g.*, *Chi. & N.W. Ry. Co. v. Pub. Serv. Comm'n*, 43 Wis. 2d 570, 577-78, 169 N.W.2d 65 (1969)).) With the constitutional right to hunt and fish in mind, this Court should interpret section 252.02 as not authorizing the Order.

professional guides, many people would be left with no ability to exercise their constitutionally protected right to fish. Many Wisconsinites do not own fishing boats, and do not have the experience or expertise necessary to enjoy the sport without the assistance of a professional guide.

While there appear to be no reported cases interpreting Wis. Const. Art. 1, § 26, this Court had occasion to interpret the right to keep and bear arms under Wis. Const. Art. I, § 25 of the Wisconsin Constitution against the backdrop of a pre-existing law that prohibited the concealed carrying of weapons. *State v. Hamdan*, 264 Wis.2d 433, 2003 WI 113. Some parallels can be drawn from the principles set forth in *Hamdan*. In *Hamdan*, the defendant, Munir Hamdan, succeeded in his argument, that “as applied” to his situation, the then-existing Wisconsin law prohibiting conceal carry of weapons violated Wis. Const. Art. I, § 25. *See id.* In *Hamdan*, this Court noted:

Article I, Section 25 does not establish an unfettered right to bear arms. Clearly, the State retains the power to impose reasonable regulations on weapons, including a general prohibition on the carrying of concealed weapons. However, the State may not apply these regulations in situations that functionally disallow the exercise of the rights conferred under

Article I, Section 25. The State must be especially vigilant in circumstances where a person's need to exercise the right is the most pronounced. If the State applies reasonable laws in circumstances that unreasonably impair the right to keep and bear arms, the State's police power must yield in those circumstances to the exercise of the right. *The prohibition of conduct that is indispensable to the right to keep (possess) or bear (carry) arms for lawful purposes will not be sustained. Id. at 461 (emphasis added).*

In the instant case, the angler amici would like to fish with guide. Emergency Order #28 prohibits them from engaging in that conduct *if they pay for it*. Obviously, the sport-fishing guides will not bring anglers fishing without payment, and many anglers have no means to fish the Great Lakes without the sport-fishing guides. The reality is that sport-fishing guides are indispensable to the ability of most Wisconsinites to fish the Great Lakes. In *Hamdan*, this Court recognized that it would not sustain prohibitions on conduct that it is indispensable to exercising a right protected by the Wisconsin Constitution. *See id.* In that case, it was an individual business owner in Milwaukee carrying a concealed weapon at his business in violation of the concealed carry statute. *See id.* In this case, its anglers who desire to fish the Great Lakes with a guide.

Sure, the anglers could dip their lines in the water from a pier. Just as Mr. Hamdan could have open-carried his weapon. But this Court recognized the practical problem with open carry, and it should also recognize the practical problem with relegating anglers to piers. In *Hamdan*, the Court said: “[i]f the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence or privately operated business, and to safely move and store weapons within these premises.” *Id.* at 479.

Similarly, if the constitutional right to fish is to mean anything, it must, as a general matter, mean that an unelected, unconfirmed Secretary-Designee of the Department, cannot by the stroke of a pen, prohibit thousands of anglers from availing themselves of the only means they have to fish – via guided charters. If the Department is able to sustain that prohibition, for most anglers in Wisconsin, the Great Lakes would be nothing more than a mirage and the constitutional right to fish would become a mere fish story.

CONCLUSION

Because it is (i) arbitrary and capricious, (ii) exceeds the Secretary-Designee's Authority; and (iii) violates Wisconsin's Constitutional Right to Hunt and Fish, the Court should grant the Legislature's Petition to Immediately Enjoin Order #28.

Dated: April 29, 2020

Respectfully submitted,

Jarchow Law, LLC



Adam M Jarchow (WI Bar. No. 1073678)
360 4th Street - PO Box 117
Clear Lake, Wisconsin
Telephone: (715) 263-4200
Facsimile: (715) 263-2980
Email: adam@jarchowlaw.com

Attorney for Amici Curiae

APPENDIX A
LIST OF AMICI CURIAE

III. Sport-Fishing Guide Amici

- a. DAN WELSCH (DUMPER DAN'S CHARTERS);
- b. KENNETH MICHAEL KOHN;
- c. TROY MATTSON (BIG DADDY CHARTERS);
- d. BRAD HUSE;
- e. GEORGE GAHAGAN;
- f. MATTHEW SOLCHENBERGER (TRIO FISHING CHARTERS & BUCKS HARBOR);
- g. BRET COOK (KSF, LLC d/b/a KINNS SPORT FISHING);
- h. JASON WODA (REEL SENSATION CHARTERS);
- i. ARNIE ARREDONDO (SOUTH PORT CHARTER SERVICE);
- j. PHILIP SCHWEIK (HOOKSETTERS GUIDE SERVICE);
- k. JOHN SPARBEL;
- l. BRET ALEXANDER (ALEXANDER SPORT FISHING);
- m. ROY IHLENFELT (HOMEWRECKER CHARTERS);
- n. BRIAN EBBEN (EBBEN'S GREAT LAKES GUIDE SERVICE);
- o. KEITH IHLENFELT (TIGER II CHARTERS); and
- p. TIM BROMLEY (ALL ANGLERS CHARTER SERVICE).

IV. Individual Angler Amici.

- a. RYAN T. CASEY;
- b. SCOTT MEYER; AND
- c. LUKE HILGEMANN.

APPENDIX B

See attached

Wisconsin Legislature v. Evers, 2020AP608-OA (April 6, 2020)



OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WI 53701-1688

TELEPHONE (608) 266-1880

FACSIMILE (608) 267-0640

Web Site: www.wicourts.gov

April 6, 2020

To:

Charlotte Gibson
Colin Hector
Hannah Schieber Jurss
Colin Thomas Roth
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Amy Catherine Miller
Ryan J. Walsh
Eimer Stahl LLP
10 East Doty Street, Ste. 800
Madison, WI 53703

Douglas M. Poland
David Perry Hollander
Rathje Woodward LLC
10 E. Doty Street, Ste. 507
Madison, WI 53703

Lane E. B. Ruhland
Husch Blackwell, LLP
P.O. Box 1379
Madison, WI 53701

Richard M. Esenberg
Wisconsin Institute for Law & Liberty
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202-3141

Tamara Packard
Lester A. Pines
Pines Bach LLP
122 W. Washington Ave., Ste. 900
Madison, WI 53703-2718

Andrew T. Phillips
von Briesen & Roper, S.C.
411 E. Washington Ave., Suite 1000
Milwaukee, WI 53202

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

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.”

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.

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.

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>.

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.").

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

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font, and with this Court's Order dated April 21, 2020. This brief contains 4145 words, calculated using Microsoft Word.

Dated: April 29, 2020



Adam M. Jarchow

CERTIFICATION REGARDING AN ELECTRONIC BRIEF

I hereby certify that:

I have submitted an electronic copy of this non-party brief, including the appendix, which complies with the requirements of section 809.12(12) Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

I copy of this certification has been served with the paper copies of this brief filed with the Court and served on all parties.

Dated: April 29, 2020



Adam M. Jarchow

CERTIFICATE OF SERVICE

I, Adam M. Jarchow, attorney for *amici curiae*, hereby certify that on the 29th day of April, 2020, I caused three (3) true and correct copies of the foregoing non-party brief to be served upon counsel of record via U.S. Mail, first-class postage, addressed as follows:

Atty. Eric M. McLeod
Atty. Lane E.N. Ruhland
P.O. Box 1379
Madison, WI 53701-1379

Atty. Ryan J. Walsh
Atty. Amy Catherine Miller
10 East Doty St., Ste. 800
Madison, WI 53703

Attorneys for Petitioners

Atty. Joshua L. Kaul
Atty. Colin A. Hector
Atty. Thomas C. Bellavia
Atty. Colin R. Stroud
Atty. Hannah S. Jurss
Atty. Colin T. Roth
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857

Attorneys for Respondents

Dated: April 29, 2020


Adam M. Jarchow