

**IN THE SUPREME COURT OF WISCONSIN**

No. \_\_\_\_\_

WISCONSIN LEGISLATURE,

*Petitioner,*

v.

TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE  
STATE OF WISCONSIN,

*Respondent.*

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**MEMORANDUM IN SUPPORT OF EMERGENCY  
PETITION FOR ORIGINAL ACTION AND EMERGENCY  
MOTION FOR TEMPORARY INJUNCTION**

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## ISSUE PRESENTED

Whether the Governor can unilaterally suspend or otherwise amend the Wisconsin Statutes establishing the time of the spring election and the deadline for casting in-person ballots in that election.

## INTRODUCTION

Defying numerous state-election statutes and his countless previous statements that he clearly lacks legal authority to cancel tomorrow's election, the Governor announced moments ago—at the eleventh hour—that he was doing just that. The order is void for several, independent constitutional and statutory reasons, as the Governor has himself conceded. *This Court should immediately issue an administrative stay of the Governor's order, grant this original action, hold the order invalid, and enjoin enforcement of the Governor's order as soon as possible*, as this election and preparations for tomorrow's voting are ongoing. Failure to do so will result in widespread voter confusion. Further, failure to grant an immediate administrative

stay risks interfering with the Legislature’s stay application currently pending before the Supreme Court of the United States.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Although this case would warrant oral argument under ordinary circumstances, the Legislature respectfully requests that the Court resolve this urgent dispute without it. Publication is also unnecessary given that the legal questions presented are straightforward and settled.

## **STATEMENT OF THE CASE**

### **I. Statutory Background**

Wisconsin’s emergency management statutes authorize the Governor to “issue an executive order declaring a state of emergency related to public health for the state or any portion of the state” if he “determines that a public health emergency exists.” Wis. Stat. § 323.10. A “[p]ublic health emergency” includes “the occurrence or imminent threat of an illness or health condition that . . . [i]s believed to be caused by . . . a novel . . . biological agent” and “[p]oses a high probability of . . . [a] large number of deaths” or “of widespread exposure to a biological . . . agent that

creates a significant risk of substantial future harm to a large number of people.” Wis. Stat. § 323.02(16). The term “[b]iological agent” includes agents specified in an appendix from 42 CFR 72, Appendix A (2002), and “[a]n agent specified by the department of health services by rule.” Wis. Stat. § 323.02(3).

The emergency management statutes further provide that “during a state of emergency declared under s. 323.10” “[t]he governor may” take certain enumerated actions. For example, he is authorized to “take, use, and destroy . . . private property for emergency management purposes,” “contract on behalf of the state with any person to provide . . . [emergency] equipment and services,” and “declare priority of emergency management contracts over other contracts.” Wis. Stat. § 323.12(4)(a), (c), (e). The Governor may also “[s]uspend the provisions of any administrative rule if the strict compliance with that rule would prevent, hinder, or delay necessary actions to respond to the disaster,” and “[i]ssue such orders as he or she deems necessary for the security of persons and property.” Wis. Stat. § 323.12(4)(b), (d).

Crucially, unlike the laws of some other States, Wisconsin's emergency management statutes do *not* give the Governor or any agency authority to suspend legislatively enacted statutes, including election laws. *See, e.g.*, Alaska Stat. Ann. § 26.20.040; N.Y. Exec. Law § 29-a; Ariz. Rev. Stat. Ann. § 26-303; Cal. Gov't Code § 8571; Colo. Rev. Stat. Ann. § 24-33.5-704; Del. Code Ann. tit. 20, § 3116; Conn. Gen. Laws. Tit. 28, Ch. 517, s. 28-9(b)(1); Okla. Stat. Ann. tit. 63, § 6403. Wisconsin law contains no remotely analogous provision.

## **II. Factual Background**

1. In February 2020, the novel coronavirus, COVID-19, began spreading throughout the United States. The Atlantic, *How the Coronavirus Became an American Catastrophe* (March 21, 2020).<sup>1</sup> In response, Governor Evers issued Executive Order 72, declaring a public health emergency throughout the State of Wisconsin. Executive Order # 72 (March 12, 2020).<sup>2</sup> The State

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Available at <https://www.theatlantic.com/health/archive/2020/03/how-many-americans-are-sick-lost-february/608521/>.

<sup>2</sup> Available at [https://evers.wi.gov/Documents/EO/EO072-Declaring ealthEmergencyCOVID-19.pdf](https://evers.wi.gov/Documents/EO/EO072-Declaring%20Public%20Health%20Emergency%20COVID-19.pdf).

Department of Health Services (DHS) then issued several orders closing schools and restricting public gatherings. *See* Emergency Order 1 (March 13, 2020); 4 (March 16, 2020); 5 (March 17, 2020); 8 (March 20, 2020).<sup>3</sup> The Governor also issued emergency orders suspending the rules of various administrative agencies. *See* Emergency Order 3 (March 15, 2020); 10 (March 21, 2020); 11 (March 21, 2020); 17 (March 27, 2020); 18 (March 31, 2020).<sup>4</sup>

On March 24, “at the direction of” the Governor, DHS issued its most sweeping emergency order, entitled “Safer at Home,” which requires “[a]ll individuals within the State of Wisconsin” “to stay at home or in their place of residence.” Emergency Order 12 (March 24, 2020).<sup>5</sup> This requirement is subject to numerous exceptions, including for “[e]ssential [g]overnment [f]unctions” and “[e]ssential . . . [o]perations,” and “travel related” to these functions and operations. *Id.* at 8–15. These essential functions

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<sup>3</sup> Available at <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx>.

<sup>4</sup> Available at <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx>.

<sup>5</sup> Available at <https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf>.

specifically include elections. *See id.* at 9 (referencing the list from the U.S. Department of Homeland Security); U.S. Dept. of Homeland Security, Cybersecurity & Infrastructure Security Agency (CISA), *Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*.<sup>6</sup>

2. The Wisconsin Elections Commission (Commission) and municipal clerks across the State have undertaken tremendous efforts to ensure that Wisconsin's Spring Election, scheduled to take place on April 7, 2020,<sup>7</sup> is safe and effective. The Commission provided multiple webinars to municipal clerks and poll workers regarding how to address COVID-19 on election day. *See* Wisconsin Elections Commission, *Election Day Procedures Q & A Sessions* (March 31, 2020);<sup>8</sup> Wisconsin Elections Commission,

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<sup>6</sup> Available at [https://www.cisa.gov/sites/default/files/publications/CISA\\_Guidance\\_on\\_the\\_Essential\\_Critical\\_Infrastructure\\_Workforce\\_Version\\_2.0\\_Updated.pdf](https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf).

<sup>7</sup> *See* Wisconsin Elections Commission, *Spring 2020 Election and Presidential Preference Primary*, available at <https://elections.wi.gov/node/6524>.

<sup>8</sup> Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/Election%20Day%20Procedures%20QA%20Clerks%20Memo%204%201%202020.pdf>.

COVID-19 Pollwork Training Webinar; <sup>9</sup> Wisconsin Elections Commission, Polling Place Procedures (COVID-19) Video – EA.<sup>10</sup> Along with these webinars, the Commission has provided municipalities with myriad printed guidance on handling COVID-19 on election day. See Wisconsin Elections Commission, *Public Health Guidance for Elections – COVID-19* (March 29, 2020).<sup>11</sup> This guidance includes having “a station for voters to wash or hand sanitize immediately upon entering and leaving the polling place,” “[w]ip[ing] down tables, door handles, pens, etc. with sanitizer regularly, or at least every 10 minutes,” taking regular breaks for poll workers “every 10 minutes” to either wash or sanitizing their hands, and ensuring a six-foot distance between voters, observers, and poll workers. See Wisconsin Elections Commission, *Poll Worker Procedures for April 7, 2020*.<sup>12</sup>

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<sup>9</sup> Available at <https://vimeo.com/402027273>.

<sup>10</sup> Available at <https://elections.wi.gov/publications/video/PollingPlaceSpring2020>. at

<sup>11</sup> Available at <https://elections.wi.gov/node/6787>.

<sup>12</sup> Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Poll%20Worker%20Training%20-%20COVID.pdf>.



The Commission, the National Guard, and others are also providing polling places with supplies and staffing. The Commission provided all counties with sanitizing products for use on election day, including 70 percent ethyl alcohol sanitizing solution and spray bottles, face masks, gloves, paper towels, tape to indicate six-foot distancing, and signs and other printed materials to inform voters of proper safety measures. *See* Wisconsin Elections Commission, *Election Day Supplies* (April 3, 2020).<sup>13</sup> The Commission also ordered “enough pens for each voter,” and plans to send them to counties as soon as they are available. *Id.* The National Guard has mobilized troops to distribute supplies and work the polls on election day. *See* United States Department of Defense, *Wisconsin National Guard Takes on New COVID-19 Missions* (April 2, 2020).<sup>14</sup> And the Republican Party of Wisconsin has been assisting in recruiting poll workers

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<sup>13</sup> Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/Election%20Day%20Supplies%20Memo%20to%20Munis.pdf>.

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<https://www.defense.gov/Explore/News/Article/Article/2134596/wisconsin-national-guard-takes-on-new-covid-19-missions/>.

for municipalities. See Superior Telegram, *Wisconsin municipalities short of poll workers* (March 31, 2020).<sup>15</sup>

3. Although the Governor has issued numerous orders relating to the COVID-19 public-health emergency, he has repeatedly and clearly stated that he lacks authority to change Wisconsin's election laws. On March 20, for example, Governor Evers stated that "he doesn't have the authority to move" the Spring Election. Mike Kemmeter, 105.7 WAPL, *Evers doesn't have authority to move election* (March 20, 2020).<sup>16</sup> He also has explained that delaying the election would jeopardize public safety because "all of the local offices that are on the ballot would be empty" and "those positions need to be filled to help get the state through the coronavirus pandemic." *Id.* He has also observed that postponing the election could backfire if the "coronavirus situation" "worse[ned] in May or June." *Id.* Just last week, the Governor again announced that he could not "change[] the election

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<sup>15</sup> <https://www.superiortelegram.com/news/government-and-politics/5024413-Wisconsin-municipalities-short-of-poll-workers>.

<sup>16</sup> Available at <https://www.wapl.com/2020/03/20/evers-doesnt-have-authority-to-move-election/>.

on [his] own ... without violating state law.” Amy Gardner and John Wagner, *The Hour*, *Wisconsin Gov. Tony Evers asks lawmakers to cancel voting Tuesday, convert to all-mail election with May deadline* (April 3, 2020).<sup>17</sup> On April 2, the Governor’s office repeated that the Governor “doesn’t have the authority” to “halt the election” and that the Governor “wanted people to participate in this election.” Politico, *Wisconsin Democrats apologetic over governor’s handling of Tuesday primary*.<sup>18</sup> To ensure that the polls are sufficiently staffed and able to accommodate in-person voting, the Governor has ordered the Wisconsin National Guard to prepare to assist with voting locations on April 7. Molly Beck, *Milwaukee Journal Sentinel*, *Gov. Tony Evers to use National Guard members to work the polls amid massive shortage of workers* (April 1, 2020).<sup>19</sup>

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<sup>17</sup> Available at <https://www.thehour.com/news/article/Wisconsin-Gov-Tony-Evers-asks-lawmakers-to-15177835.php>.

<sup>18</sup> Available at <https://www.politico.com/news/2020/04/02/tony-evers-wisconsin-democrats-primary-election-161423>

<sup>19</sup> Available at <https://www.jsonline.com/story/news/politics/elections/2020/04/01/tony-evers-use-national-guard-members-work-polls-amid-massive-shortage-workers/5102869002/>.

On April 3, 2020, the Governor abandoned his previous position that the election should proceed and issued Executive Order 73, which called on the Legislature to meet in Special Session the next day to consider postponing the election. Governor Tony Evers, Press Release, *Gov. Evers Calls for Special Session on Spring Election* (April 3, 2020).<sup>20</sup> The Governor asked the Legislature to take up bills that would create an all-mail election, require clerks to send absentee ballots to every registered voter, and extend the time to return those ballots to late May. Executive Order 73 (April 3, 2020).<sup>21</sup> The Governor reiterated that he “could not move the election or change the rules on his own.” Amy Gardner and Rachel Siegel, *The Washington Post*, *GOP lawmakers in Wisconsin rebuff calls to cancel in-person voting in Tuesday’s elections* (April 4, 2020).<sup>22</sup> The Governor proposed several other changes to the election laws, including eliminating the witness-

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<sup>20</sup> Available at <https://content.govdelivery.com/accounts/WIGOV/bulletins/284c149>.

<sup>21</sup> Available at [https://content.govdelivery.com/attachments/WIGOV/2020/04/03/file\\_attachments/1418891/EO073-SpecialSessionElections%20final.pdf](https://content.govdelivery.com/attachments/WIGOV/2020/04/03/file_attachments/1418891/EO073-SpecialSessionElections%20final.pdf).

<sup>22</sup> Available at <https://www.washingtonpost.com/politics/2020/04/04/gop-lawmakers-wisconsin-rebuff-calls-cancel-in-person-voting-tuesdays-elections/>.

signature requirement to absentee balloting, tabulating absentee ballots until May 26, 2020, and keeping in-place currently elected leaders until three business days after his proposed election timeline. Executive Order 73. The Legislature convened the special session on April 4, but declined to enact any of the Governor's proposed changes to the election laws. The Legislature convened the special session again on April 6, but again took no action.

Finally, on April 6, 2020, despite his repeated insistence that he lacked authority to change the date of the election, Governor Evers issued Executive Order #74 (“the Order”), which purports to “suspend 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.” Executive Order #74.<sup>23</sup> The order also purports to authorize “individuals currently serving in an office to be filled based upon the results of the Spring 2020 election ballot . . . to continue fulfilling the duties of those offices,

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[https://content.govdelivery.com/attachments/WIGOV/2020/04/06/file\\_attachments/1420231/EO074-SuspendingInPersonVotingAndSpecialSession.pdf](https://content.govdelivery.com/attachments/WIGOV/2020/04/06/file_attachments/1420231/EO074-SuspendingInPersonVotingAndSpecialSession.pdf).

and exercising the privileges of those offices, until three business days after county, municipal, and school district clerks issue certificates of election, . . . once the deadline to file a petition for recount and appeal of recount has passed.” *Id.* The Governor relied on Section 323.12(4)(b), and his “executive power.” *Id.* (citing Wisc. Const. art. V, §1, which vests “executive power” in the governor).

The Legislature promptly filed this petition for an original action seeking a declaration that Emergency Order #74 is unlawful and thus void.

### **STANDARD OF REVIEW**

Although there is no decision below for this Court to review, issues of statutory and constitutional interpretation are pure questions of law that the Court decides de novo. *Black v. City of Milwaukee*, 2016 WI 47, ¶ 21, 369 Wis. 2d 272, 291, 882 N.W.2d 333.

## ARGUMENT

### **I. The Governor's Unprecedented Assertion of Authority to Change the Statutorily Prescribed Date for the Spring Election Presents A Significant Legal Issue Warranting Exercise Of This Court's Original Jurisdiction**

In deciding whether to grant a petition for an “original action[],” Wisc. Const. art. 7, this Court looks to whether “a judgment by the court significantly affects the community at large.” *Wisconsin Prof'l Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807. The exercise of original jurisdiction is thus warranted when “the questions presented are of such importance as under the circumstances to call for a[] speedy and authoritative determination by this court in the first instance.” *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938). The Court favors cases involving pure questions of law where “no fact-finding procedure is necessary.” *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 683, 264 N.W.2d 539 (1978).

This case unquestionably satisfies this Court's requirements for the exercise of original jurisdiction. The Governor's order “significantly affects the community at large” because it purports

to alter longstanding statutes regulating the time and manner of a statewide election scheduled to occur *tomorrow*—an election in which over 720,000 voters have already cast their ballots. *Lightbourn*, 243 Wis. 2d 512, ¶ 4. These eleventh-hour changes will erode confidence in Wisconsin’s electoral process and undermine the efforts of candidates up and down the ballot. As the United States Supreme Court has recognized, changing election laws at the last minute causes “serious disruption of the election process” and “confus[e]” voters. *Williams v. Rhodes*, 393 U.S. 23, 34–35 (1968). For this reason, the Court typically rejects judicially crafted changes to election laws made within weeks of an election, *even when the state’s laws burden the constitutionally protected right to vote*. See, e.g., *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam); *Abbott v. Perez*, 138 S. Ct. 49 (2017); *North Carolina v. League of Women Voters of N. Carolina*, 574 U.S. 927 (2014); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014).

These core interests in election integrity are at their zenith here, given that Wisconsin’s Spring Election has been in full swing for weeks and in-person voting is scheduled to take place



*tomorrow*. Over 1.2 million voters have requested (and received) absentee ballots and more than 720,000 have returned them.<sup>24</sup> This has involved substantial work from the Wisconsin Elections Commission, county clerks, volunteers, and voters. Candidates and advocacy groups have also invested countless hours and millions of dollars in this election, in reliance on the election date and election rules. The Democratic Party presidential candidates have devoted nearly \$6.5 million to this State.<sup>25</sup> Less high-profile judicial and local election candidates, as well as advocates for multiple referenda, have also worked hard to convince voters in the many races and issues at stake in this Spring Election to support their cause. See Wisconsin Elections Commission, *Candidates on Ballot by Election: 2020 Spring Election*, available at <https://elections.wi.gov/node/6524>. Because Executive Order #74 postponing the election will destroy “[c]onfidence in the

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<sup>24</sup> Wisconsin Elections Commission, *Absentee Ballot Report – April 7, 2020 Spring Election and Presidential Preference Primary* (April 6, 2020), available at <https://elections.wi.gov/node/68147>.

<sup>25</sup> Open Secrets, WI Party Transfers, 2020 Cycle (accessed March 30, 2020), available at <https://www.opensecrets.org/states/pres.php?cycle=2020&state=WI>.

integrity of our electoral process,” *Purcell*, 549 U.S. at 4, a “judgment” by this Court invalidating that order will “significantly affect[] the community at large.” *Wisconsin Prof’l Police Ass’n, Inc. v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807.

This Court’s exercise of original jurisdiction is also appropriate because this case pits one branch of government against another, thus raising important separation-of-powers questions that require this Court’s resolution. *See, e.g., State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436; *Joni B. v. State*, 202 Wis. 2d 1, 8, 549 N.W.2d 411 (1996)); *see also Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 488, 534 N.W.2d 608 (1995). The Court has been particularly solicitous of petitions for original actions brought by the Legislature, its committees, and members. *See, e.g., Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666; *Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997); *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 534 N.W.2d 608 (1995); *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d. 385 (1988); *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978).

Finally, as the election is scheduled for *tomorrow*, there is no time for lower court review followed by an appeal to this Court. A “speedy and authoritative determination by this court in the first instance” is therefore imperative. *Petition of Heil*, 284 N.W. at 50.

Given the gravity and exigency of this case, and the need for an authoritative decision from this Court on a critically important question of law, this Court should exercise its original jurisdiction over the Legislature’s petition.

**II. This Court Should Immediately Enjoin Executive Order #74 Because It Unlawfully Amends the Election Statutes And The Legislature Will Be Irreparably Harmed Absent An Immediate Injunction**

**A. The Legislature Is Exceedingly Likely To Succeed on the Merits, Because The Governor’s Executive Order Is Legally Void**

1. *The order exceeds the Governor’s constitutional power.*

a. The Wisconsin Constitution “created three branches of government, each with distinct functions and powers, and the separation of powers doctrine is implicit in this tripartite division.” *Gabler v. Crime Victims Rights Bd.*, 376 Wis. 2d 147, 897 N.W.2d 384 (2017) (citation omitted) (cleaned up). Within this division,

the State’s “Constitution preserves the independence of each branch vis-à-vis the others and precludes each branch from obstructing the performance of another branch’s constitutional duties.” *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, 387 Wis. 2d 511, 535, 929 N.W.2d 209. “Each branch’s core powers reflect zones of authority constitutionally established for each branch of government,” and “[a]s to these areas of authority, . . . any exercise of authority by another branch of government is unconstitutional.” *Id.* at 536 (citation omitted).

The Wisconsin Constitution unequivocally vests “[t]he legislative power” in the “senate and assembly.” Wis. Const. art. IV, §1. The “legislature has plenary power except where forbidden to act by the Wisconsin Constitution.” *Libertarian Party of Wisc. v. State*, 199 Wis.2d 790, 801, 546 N.W.2d 424 (1996); *see also Bushnell v. Beloit*, 10 Wis. 195, 225 (1860) (“[I]t is competent for the legislature to exercise all legislative power not forbidden by the constitution or delegated to the general government, or prohibited by the constitution of the United States.”). Although the Constitution gives the governor power to veto bills that have

“passed the legislature,” Wis. Const. art. V, §10, it does not delegate *any* legislative authority to him. Instead, the Constitution vests “executive power” in the governor. Wis. Const. art. V, §1.

As this Court has repeatedly held, fixing the time, place, and manner of elections is a *legislative* power, and thus “the legislature,” not the governor, “has the constitutional power to say how, when, and where elections shall be conducted.” *League of Women Voters*, 357 Wis.2d at 372, 851 N.W.2d 302 (quoting *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W. 2d 473 (1949)); *see also Gradinjan v. Boho*, 29 Wis.2d 674, 684-85, 139 N.W.2d 557 (1966) (same). The statutes establishing April 7 as the date of the election thus fall comfortably within the “legitimate field of legislative activity.” *League of Women Voters*, 357 Wis.2d at 372, 851 N.W.2d 302; *see also State ex rel. Small v. Bosacki*, 154 Wis. 475, 478-79, 143 N.W. 175 (1913) (“[T]he right as well as the duty is vested in the legislature to prescribe reasonable rules and regulations under which [the franchise] may be exercised.”).

b. As relevant here, the Legislature has provided that the “[s]pring election” must be “held on the first Tuesday in April to

elect judicial, education and municipal officers, nonpartisan county officers and sewerage commissioners and to express preference for the persons to be the presidential candidate for each party” in a Presidential election year. Wis. Stat § 5.02(21). The Legislature has further provided that all votes must be received by election day (if cast by absentee ballot) or cast on election day. Wis. Stat. § 6.87(6). These statutes, which provide for the orderly administration of elections, instill public confidence in the integrity of the State’s election process. And there is no dispute that the Legislature can amend these statutes if it believes such changes are necessary. Indeed, the Governor called the Legislature into an emergency session on Saturday, April 4, 2020, to request that it do just that, but the Legislature declined.

Apparently dissatisfied with the Legislature’s decision, the Governor issued Executive Order #74, which purports to amend the State’s election statutes, suspending in-person voting until June 9, 2020, and thus changing the date by which all votes must be received. By attempting to rewrite duly enacted statutes, the Governor has unlawfully intruded on one of the Legislature’s “core

constitutional powers.” *League of Women Voters of Wisconsin*, 387 Wis. 2d 511 at 536, 929 N.W.2d 209. “This court is highly mindful of the separation of powers,” and it has not hesitated to invalidate similarly unconstitutional acts. *Id.*; *see also Gabler v. Crime Victims Rights Bd.*, 376 Wis. 2d 147, 897 N.W.2d 384 (2017); *In re Complaint Against Grady*, 118 Wis. 2d 762, 348 N.W.2d 559 (1984). Because the Governor here has exceeded his constitutional authority and usurped the rightful prerogative of the Legislature to fix the time and place of elections, the Court should declare the Governor’s Emergency Order void so that the election may proceed as scheduled.

2. *The order exceeds the Governor’s statutory power.*

a. The Governor’s Emergency Order relies on Wisconsin’s emergency management statutes, Wis. Stat. ch. 323, as the source of authority for the rule. Yet although those statutes grant the Governor specific, enumerated emergency powers, *see supra* at [], their text and context confirm that the Governor does **not** have

authority to unilaterally suspend or otherwise alter the Wisconsin election statutes.

Statutory interpretation “focus[es] primarily on the language of the statute,” because the Court “assume[s] that the legislature’s intent is expressed in the statutory language.” *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 663, 681 N.W.2d 110. “Statutory language is given its common, ordinary, and accepted meaning.” *Id.* “[C]ontext” and “structure” are also “important to meaning.” *Id.* ¶ 46. “[S]tatutory language” is thus “interpreted in the context in which it is used; not in isolation but as part of a whole; . . . and reasonably, to avoid unreasonable results.” *Id.* Moreover, “[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.” *Id.* Where the Legislature’s includes language in one section that it declines to include in a similar section, the Court evinces the Legislature’s intent to exclude the language from the latter section. *See Gister v. Am. Fam. Mut. Ins. Co.*, 2012 WI 86, ¶ 33, 342 Wis. 2d 496, 818 N.W.2d 880; *Responsible Use of*



*Rural and Agr. Land (RURAL) v. Pub. Serv. Comm'n*, 2000 WI 129, ¶ 39, 239 Wis. 2d 660, 619 N.W.2d 888.

The Court also “avoids interpreting statutes in a way that places their constitutionality in question.” *Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2017 WI 71, ¶ 21, 376 Wis. 2d 528, 898 N.W.2d 70. This allows the court “to limit the solution to the problem rather than enjoining the application of the entire statute due to a limited flaw.” *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 64, 357 Wis. 2d 469, 851 N.W.2d 262.

b. Application of these interpretive principles to Section 323.12 confirms that the Governor’s power to issue orders during an emergency does **not** include the power to suspend or alter the Wisconsin election statutes.

Section 323.12 provides that, during an emergency, the governor “may” “[i]ssue such orders as he or she deems necessary for the security of persons and property.” Wis. Stat. § 323.12(4)(b).

Nothing in that language suggests that the Governor has authority to “suspend,” “amend,” or otherwise alter statutes.

The context of Section 323.12 provides further evidence that the Governor does not have the emergency power to alter statutes. For example, the statute specifically authorizes the Governor, to “[s]uspend the provisions of any administrative rule” during a state of emergency. Wis. Stat. § 323.12(4)(d). The Legislature’s inclusion of this “suspen[sion]” language for administrative rules, but not statutes, indicates the Legislature’s intent to withhold such authority. *See Gister*, 342 Wis. 2d 496, ¶ 33; *RURAL*, 239 Wis. 2d 660, ¶ 39. Moreover, if the Governor’s emergency power to issue orders were so broad as to include the power to suspend statutes, it would also include the power to suspend administrative rules, rendering Section 323.12(4)(d) surplusage. *Kalal*, 271 Wis. 2d 663, ¶ 46.

If the Legislature had wished to confer such sweeping authority on a single person, it certainly could have said so. For example, Connecticut’s statutes provide that, during an emergency, “the Governor may modify or suspend in whole or in

part, by order as hereinafter provided, any statute, . . . or part thereof.” Conn. Gen. Laws. Tit. 28, Ch. 517, s. 28-9(b)(1). Examples from other states abound. Alaska Stat. Ann. § 26.20.040 (similar); N.Y. Exec. Law § 29-a (similar); Ariz. Rev. Stat. Ann. § 26-303 (similar); Cal. Gov’t Code § 8571 (similar); Colo. Rev. Stat. Ann. § 24-33.5-704 (similar); Del. Code Ann. tit. 20, § 3116 (similar); Okla. Stat. Ann. tit. 63, § 6403 (similar). Even more striking, many such states explicitly subject election laws to this emergency statute-suspension power. Fla. Stat. § 101.733(1) (“The Governor may, upon issuance of an executive order declaring a state of emergency or impending emergency, suspend or delay any election.”); La. R.S. § 18:401.1 B (similar); Md. Election Law Code Ann. § 8-103(1)(1) (similar); Va. Code Ann. § 24.2-603.1 (similar). Wisconsin could have taken the same path, but it deliberately did not.

For this reason, the Court should not read Section 323.12 as empowering the Governor to suspend or otherwise amend the election statutes because such an interpretation would call into question Section 323.12’s constitutionality. *See Segregated*

*Account of Ambac Assurance Corp.*, 376 Wis. 2d 528, ¶ 21. As explained above, the Constitution vests the power to make and amend statutes—including the election statutes—in the Legislature alone. *See supra* II.A.1. This authority cannot be delegated. *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 534, 182 N.W.2d 257 (1971) (citation omitted) (“The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate, is a power which is vested by our Constitution in the Legislature and may not be delegated.”). Reading Section 323.12 to delegate to the Governor authority to unilaterally amend statutes would thus render the statute unconstitutional.<sup>26</sup>

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<sup>26</sup> Although courts have held that the Legislature may, in certain circumstances, delegate “the power to suspend a law of general application,” it must provide “adequate standards” to “control[]” the “exercise” of this delegated power. *J.F. Ahern Co. v. Wisconsin State Bldg. Comm’n*, 114 Wis. 2d 69, 89, 336 N.W.2d 679 (Ct. App. 1983). Section 323.12 states only that the Governor “may” “[i]ssue such orders as he or she deems necessary for the security of persons and property.” Wis. Stat. § 323.12(4)(b). This surely fails to provide sufficient standards for the exercise of the enormous legislative power to suspend statutes. By comparison, Connecticut’s statute, which clearly permits the Governor to suspend statutes, provides detailed standards controlling the exercise of that power. Conn. Gen. Laws. Tit. 28, Ch. 517, s.

3. *The Governor has no authority to alter the terms of local officials.*<sup>27</sup> Wisconsin law states that an “elective” “public office is vacant when” “the incumbent’s term expires,” with the exception of “the officer for sheriff, coroner, register of deeds or district attorney.” Wis. Stat. § 17.03(10). Regarding county offices, state law provides that the terms for the offices of “register of deeds, county clerk, county treasurer, and county suveryor . . . shall continue 4 years and until his or her successor qualifies.” Wis. Stat. § 59.20(2)(a). The same is true for the office of comptroller, Wis. Stat. § 59.20(2)(am), sheriff and coroner, Wis. Stat. § 59.20(2)(b), and clerk of circuit court, Wis. Stat. § 59.20(2)(bm). By contrast, the term of the county “office of supervisors is 2 years,” except in certain circumstances in Milwaukee County, in which case they “serve for 4-year terms.” Wis. Stat. § 59.10(1)(b), (2)(b), (2)(d)2, (3)(d). County

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28-9(b)(1) (the Governor may suspend a statutes only when he “finds such statute . . . is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health,” the Governor must “specify . . . the reason or reasons” for the suspension, and the period of suspension may not exceed six months).

<sup>27</sup> This Court’s order enjoining the executive order will, of course, apply to all local officials.

supervisors are elected in the Spring Election in even-numbered years and take their offices on the third Monday or Tuesday in April following the election. Wis. Stat. § 59.10(1)(b), (2)(b), (3)(d). Likewise, in counties with populations of at least 750,000 or that have decided to have the office, the office of county executive “shall be elected for a 4-year term” at the Spring Election. Wis. Stat. § 59.17(1). “[T]he legislature has the power to declare the circumstances under which an office shall be deemed vacant, and has so declared in sec. 17.03.” *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 290, 125 N.W.2d 636 (1964). That Section provides an “elective” “public office is vacant when” “the incumbent’s term expires,” except only for the offices of sheriff, coroner, register of deeds or district attorney. Wis. Stat. § 17.03(10). As explained above, the Governor has no authority to usurp this Legislative function.

**B. All of the Remaining Factors Strongly Favor Immediate Injunctive Relief**

The Legislature also satisfies the remaining requirements for a temporary injunction.

First, the Legislature's lacks an adequate remedy at law. *See Werner*, 80 Wis. 2d at 520. The election is *tomorrow*, and therefore any relief other than an immediate injunction would be inadequate.

For the same reason, the Legislature satisfies the irreparable-harm requirement. For one thing, the Legislature is irreparably harmed anytime the enforcement of "duly enacted" law is prevented. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018), Additionally, if this Court does not act immediately to enjoin Executive Order #74 and preserve the status quo, then tomorrow's election will be irrevocably impaired. A later, permanent injunction "would be [ ] futile." *See id.* Last, but not least, the Order's drastic eleventh-hour changes to the election undermines "[c]onfidence in the integrity of our elector process" and the "orderly administration" of the State's elections, both of which are compelling State interests. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196–97 (controlling plurality of Stevens, J.).

Finally, "on balance," the equities "favor[ ] issuing the injunction." *Pure Milk Prod. Co-op*, 90 Wis. 2d at 800. Early and

absentee voting in the Spring Election has been ongoing for weeks, and hundreds of thousands of voters have already cast their ballots. Wisconsin Elections Commission, *Absentee Ballot Report – April 7, 2020 Spring Election and Presidential Preference Primary* (April 5, 2020).<sup>28</sup> Candidates and advocacy groups have invested countless hours and millions of dollars into this election, in reliance on the election date. See Open Secrets, *WI Party Transfers, 2020 Cycle* (accessed March 30, 2020).<sup>29</sup> Municipal clerks, volunteers, and the National Guard have spent countless hours training and preparing to hold the in-person election tomorrow. The Order undermines all the time and energy invested in holding the in-person election tomorrow. The equities clearly favor a temporary injunction to preserve the status quo and allow tomorrow's election to go forward as planned.

## CONCLUSION

This Court should grant the Petition, hold that the Governor does not have the authority to unilaterally suspend or otherwise

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<sup>28</sup> Available at <https://elections.wi.gov/node/6815>.

<sup>29</sup> Available at <https://www.opensecrets.org/states/pres.php?cycle=2020&state=WI>.



alter Wisconsin's elections statutes, and enjoin him from preventing or otherwise interfering with the execution of Wisconsin's election statutes.

Dated: April 6, 2020

Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

A copy of this Memorandum is being served on all opposing parties via electronic mail and first-class mail.

Dated: April 6, 2020

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