

STATE OF WISCONSIN  
IN SUPREME COURT

Case No. 220AP0608-OA

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WISCONSIN LEGISLATURE,

Petitioner,

v.

TONY EVERS, in his official capacity  
as Governor of the State of Wisconsin,

Respondent.

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ORIGINAL ACTION

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**PETITIONER'S RESPONSE  
TO LEGISLATURE'S ORIGINAL ACTION**

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HANNAH S. JURSS  
Assistant Attorney General  
State Bar #1081221

COLIN T. ROTH  
Assistant Attorney General  
State Bar #1103985

COLIN A. HECTOR  
Assistant Attorney General  
State Bar #1120064

Attorneys for Respondent

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-8101 (HSJ)  
(608) 264-6219 (CTR)  
(608) 267-8407 (CAH)  
(608) 267-2223 (Fax)  
jursshj@doj.state.wi.us  
rothct@doj.state.wi.us  
hectorca@doj.state.wi.us

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## INTRODUCTION

In the throes of a worldwide pandemic, Wisconsin has been rapidly approaching an extraordinary crisis: We have a scheduled spring election to determine—among other things—thousands of local government positions, a presidential primary, and a Justice of this Court. But the COVID-19 virus has turned the polling place itself into a life-threatening danger. Indeed, as of April 2, over 15 other states had delayed scheduled spring elections in response to COVID-19, leaving Wisconsin as the *only* state in the country to still have a scheduled in-person April election. With Executive Order 74<sup>1</sup>, Wisconsin is now in line with the rest of the country.

The final days leading up to April 7, 2020, have shown that—despite the tremendous efforts of the many agencies and municipalities who have been working tirelessly—polling places would not be safe on April 7. As it stands, going to the polls to cast a vote on April 7, or working at the polls to help others vote on April 7, would mean risking illness, hospitalization, or death. No one should dispute that Wisconsinites should not have to choose between their fundamental right to vote and their lives.

In these extraordinarily rare, narrow circumstances—where the sanctity of the polling place has collided with the safety of the people, and time is of the essence—the

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<sup>1</sup> Wis. Governor Tony Evers, *EXECUTIVE ORDER #74, Relating to suspending in-person voting on April 7, 2020, due to the COVID-19 Pandemic* (Apr. 6, 2020), <https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession.pdf>

Governor had to act, and he did. Executive Order 74 ensures that Wisconsinites may exercise their voting rights safely, and that the many municipalities across Wisconsin, tasked with running an election in these challenging times, may do so successfully.

This Court should confirm that the Governor had the authority to issue Executive Order 74. During an emergency, our statutes impose a duty on the Governor to protect the state and its residents, and they empower him to issue those emergency orders he deems necessary for the security of the people.

Here, protecting public health and safety demanded postponing in-person voting. The April 7 date threatened not only those who would have served as poll workers and every voter who would have visited the polls, but also every Wisconsinite who might come in contact with one of those people in the weeks that follow. There is no Wisconsin statute specifically addressing what should occur if a public health emergency renders the polling place a danger. Rather, the emergency powers vested in the Governor are the only statutes that apply to the present circumstances. The effect of the order is the extension of the normal election date to a safer date, and a plain-language reading of the Governor's statutory emergency-order authority shows that the Governor's emergency powers must allow this in these circumstances.

Given his statutory authority, this Court need not address the scope of the Governor's constitutional authority. However, it would also be the case that the Governor had constitutional authority to act to protect the people by ensuring a safe election during this time of crisis.

No one wants to be in the midst of this pandemic, but we are. Everyone wishes we could have a normal, safe

election on April 7, but we cannot. Action had to be taken, and quickly, and the Governor—at the helm during this emergency—acted. This Court should issue a judgment declaring that Executive Order 74 is lawful.

## **ISSUES PRESENTED**

1. Did the Governor have statutory authority to issue Executive Order 74, pursuant to his emergency power to issue orders securing public safety under Wis. Stat. § 323.12(4)(b)?

2. Did the Governor have constitutional authority to issue Executive Order 74, pursuant to his constitutional power to act during times of emergency?

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

Given both the time and safety constraints, Governor Evers seeks neither publication nor oral argument.

## **BACKGROUND FACTS**

### **I. The coronavirus pandemic.**

In December 2019, a novel strain of a coronavirus respiratory infection was detected, now named COVID-19, and it has spread throughout the world, including every state in the United States. No vaccine has been discovered for COVID-19, nor have any existing drugs been approved by the FDA for treating the disease.<sup>2</sup>

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<sup>2</sup> See Centers for Disease Control and Prevention, *COVID-19 Situation Summary*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html> (last updated Mar. 26, 2020).

The COVID-19 pandemic continues to worsen everywhere—and Wisconsin is no exception. In our state, the number of confirmed cases has skyrocketed from 32 confirmed cases on March 15, 2020, to 2,440 cases on April 6, 2020, more than a 70-fold increase in around three weeks.<sup>3</sup> A similarly dire trend is appearing nationwide, with the number of cases shooting up from 3,487 on March 15, 2020, to 304,826 on April 4, 2020.<sup>4</sup>

Deaths from COVID-19 infections in Wisconsin and nationwide have also continued to rise. As of April 5, 68 people in Wisconsin and 7,616 people nationwide have died from the virus.<sup>5</sup>

In Wisconsin, around 1 in 4 people with confirmed COVID-19 infections have required hospitalization.<sup>6</sup> If the disease continues to spread, the high rate of hospitalization will overwhelm many hospitals' capacity to house and care for ill patients who require hospital beds, ICU treatment,

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<sup>3</sup> See Wis. Dep't of Health Servs., *COVID-19: Wisconsin Data*, <https://www.dhs.wisconsin.gov/covid-19/data.htm> (last visited Apr. 6, 2020)).

<sup>4</sup> See Centers for Disease Control and Prevention, *COVID-19 cases in the United States by date of illness onset*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last updated Mar. 26, 2020).

<sup>5</sup> See Wis. Dep't of Health Servs., *COVID-19: Wisconsin Data*, <https://www.dhs.wisconsin.gov/covid-19/data.htm> (last visited Apr. 5, 2020); Centers for Disease Control and Prevention, *COVID-19 cases in the United States by date of illness onset*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last updated Apr. 6, 2020).

<sup>6</sup> See Wis. Dep't of Health Servs., *COVID-19: Wisconsin Data*, <https://www.dhs.wisconsin.gov/covid-19/data.htm> (last visited Apr. 5, 2020).

and scarce respirator and ventilator equipment, not to mention the necessary hospital staff, medical professionals, and personal protective equipment they all need (e.g., masks, gloves, and gowns).<sup>7</sup>

Experts agree that COVID-19 transmits through people being in close proximity to each other.<sup>8</sup> Moreover, the disease spreads easily, and the Centers for Disease Control and Prevention (CDC) reports that some studies suggest that COVID-19 may be spread by people who are not showing symptoms.<sup>9</sup>

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<sup>7</sup> News stories from New York City, the current epicenter of COVID-19 infections in the United States, indicate that hospitals are already facing dire shortages of personnel, equipment, and bed space. *See, e.g.,* Brian M. Rosenthal, *Coronavirus in N.Y.: ‘Deluge’ of Cases Begins Hitting Hospitals*, N.Y. Times (updated Mar. 21, 2020), <https://www.nytimes.com/2020/03/20/nyregion/ny-coronavirus-hospitals.html>. Hospital officials in Wisconsin have already warned about the prospect of similar resource shortages here. *See* Sarah Hauer, *Coronavirus cases rise above 100 in Wisconsin as day care capacity is limited and election lawsuit filed*, Milwaukee Journal Sentinel (Mar. 18, 2020, 7:45 PM), <https://www.jsonline.com/story/news/2020/03/18/coronavirus-wisconsin-hospital-bed-shortage-election-lawsuit/2868842001/>.

<sup>8</sup> *See, e.g.,* Wis. Dep’t of Health Services, *Covid-19: You are Safer at Home*, <https://www.dhs.wisconsin.gov/covid-19/prepare.htm> (last visited Apr. 6, 2020); Center for Disease Control and Prevention, *How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last updated Apr. 2, 2020); Ohio Dep’t of Health, *Coronavirus Disease 2019, FAQs*, <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/families-and-individuals/frequently-asked-questions/> (last visited Apr. 6, 2020).

<sup>9</sup> Centers for Disease Control and Prevention, *How COVID-19 Spreads*, *supra* n.7.

Therefore, social distancing—the practice of keeping at least six feet apart from others—is the only known effective means of slowing the spread of the virus and thus preventing disastrous rates of infection, hospitalization, and deaths. As the CDC has advised, “[t]he best way to prevent illness is to avoid being exposed to this virus.”<sup>10</sup>

The CDC identifies older adults as having a higher risk of developing more serious complications from COVID-19 and recommends that older adults stay home as much as possible during times of spread.<sup>11</sup> Younger people, however, are also at risk of catching COVID-19 and suffering severe complications from the disease.<sup>12</sup>

On March 30, 2020, Wisconsin Department of Health Services (DHS) Secretary-Designee Andrea Palm warned that it could be “10-plus days” before the growth curve of COVID-19 flattens out in Wisconsin.<sup>13</sup> The same day,

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<sup>10</sup> Centers for Disease Control and Prevention, *How to Protect Yourself*, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html> (last updated Apr. 4, 2020).

<sup>11</sup> Centers for Disease Control and Prevention, *Are You at Higher Risk for Severe Illness?*, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (last visited Mar. 26, 2020)).

<sup>12</sup> See Wis. Dep’t of Health Servs., *Outbreaks in Wisconsin*, <https://www.dhs.wisconsin.gov/outbreaks/index.htm> (last updated Apr. 3, 2020).

<sup>13</sup> Mary Spicuzza, *Wisconsin prepares for possible next stage of coronavirus spread with more testing, scouting locations for response*, Milwaukee Journal Sentinel (Mar. 30, 2020), <https://www.jsonline.com/story/news/2020/03/30/wisconsin-coronavirus-testing-could-double-army-scouts-locations/5089808002/>.

Governor Evers warned that Wisconsin was still approaching the worst of the pandemic.<sup>14</sup>

On April 5, the Surgeon General of the United States warned the nation that this coming week—the week including April 7—will be the most devastating week for the United States thus far: “This is going to be the hardest and saddest week of most Americans’ lives.”<sup>15</sup> A few days ago, the Federal Emergency Management Agency (FEMA) asked the Pentagon for 100,000 body bags, as part of FEMA’s planning efforts to address “mortuary contingencies on behalf of state health agencies.”<sup>16</sup>

Minimizing the number of COVID-19 infections, illnesses, and deaths over the next two weeks is therefore critical. Without continued social distancing, many more people would surely get sick and die than if those measures were rigorously followed.

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<sup>14</sup> Riley Vetterkind, *Tony Evers calls for agreement on emergency legislation as unemployment claims skyrocket amid COVID-19 pandemic*, Madison.com (Mar. 31, 2020), [https://madison.com/wsj/news/local/govt-and-politics/gov-tony-evers-calls-for-agreement-on-emergency-legislation-as/article\\_c4098526-d042-5efe-9f6c-03be4ba9890c.html](https://madison.com/wsj/news/local/govt-and-politics/gov-tony-evers-calls-for-agreement-on-emergency-legislation-as/article_c4098526-d042-5efe-9f6c-03be4ba9890c.html).

<sup>15</sup> Tara Law, *Surgeon General Adams Warns of ‘Saddest Week of Most Americans’ Lives’ as COVID-19 Pandemic Spreads*, TIME (Apr. 5, 2020), <https://time.com/5815870/jerome-adams-surgeon-general-saddest-week-covid-19/>.

<sup>16</sup> Tom Vanden Brook, *FEMA seeks 100,000 body bags from Pentagon as coronavirus pandemic worsens*, USA Today (Apr. 2, 2020, 10:49 AM), <https://www.usatoday.com/story/news/politics/2020/04/02/coronavirus-fema-seeks-100-000-body-bags-pentagon-covid-19/5111412002/>.

## **II. The State’s response to COVID-19, so far.**

Governor Evers and the Wisconsin Department of Health Services have taken a number of emergency measures to address the public health crisis caused by COVID-19, consistent with the extraordinary threat posed by the disease’s spread and the reality that only social distancing can reduce that threat:

- On March 12, 2020, Governor Evers declared a public health emergency to direct all resources needed to respond to and contain COVID-19 in Wisconsin.<sup>17</sup>
- On March 13, 2020, DHS issued an emergency order closing schools statewide.
- On March 17, 2020, DHS issued an emergency order prohibiting mass gatherings of 10 people or more.
- On March 18, 2020, DHS issued an emergency order restricting the size of child-care settings.
- On March 20, 2020, DHS issued an emergency order further limiting mass gatherings.
- On March 24, 2020, DHS issued the “Safer At Home” order directing Wisconsin citizens to stay at home until April 24, 2020, with certain exceptions for essential activities and businesses.

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<sup>17</sup> All the Governor’s executive orders can be accessed at <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx> (last visited Apr. 5, 2020).

Collectively, these orders recognize that the entire State of Wisconsin—including residents, businesses, community organizations, and government—must take all possible actions to reduce the further spread of COVID-19 and thus save lives.

Other branches of state government have taken similar measures to protect public health. The Wisconsin State Senate, which is made up of a total of 33 State Senators, has ceased meeting in person at the Wisconsin State Capitol, and now is meeting by teleconference.<sup>18</sup> And on March 20, 2020, this Court issued orders postponing jury trials and temporarily suspending in-person proceedings statewide “[i]n an effort to protect the public, attorneys, court staff and judges from the health risks associated with COVID-19.”<sup>19</sup>

### **III. The upcoming April 7, 2020 election.**

The State of Wisconsin’s Spring 2020 election was scheduled to conclude with in-person voting on April 7, 2020. That election will cover many important matters, including: an election for a seat as a justice of the Supreme Court of Wisconsin; Presidential preference primaries for both major

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<sup>18</sup> See Riley Vetterkind, *State Senate holds dress rehearsal in anticipation of Wisconsin’s first-ever virtual session*, Madison State Journal (Mar. 26, 2020), [https://madison.com/wsj/news/local/govt-and-politics/state-senate-holds-dress-rehearsal-in-anticipation-of-wisconsin-s/article\\_dd3e87c6-14f4-5b04-9ce1-146e29621f5f.html](https://madison.com/wsj/news/local/govt-and-politics/state-senate-holds-dress-rehearsal-in-anticipation-of-wisconsin-s/article_dd3e87c6-14f4-5b04-9ce1-146e29621f5f.html).

<sup>19</sup> See *In re the Matter of Jury Trials During the COVID-19 Pandemic*, <https://wicourts.gov/news/docs/jurytrials.pdf> (last visited Apr. 4, 2020); *In re the Matter of Remote Hearings During the COVID-19 Pandemic*, <https://wicourts.gov/news/docs/remotehearings.pdf> (last visited Apr. 4, 2020).

national political parties; a State-wide referendum on a proposed amendment to the Wisconsin Constitution; elections for 3 seats as judges of the Wisconsin Court of Appeals; elections for 34 seats as judges of county circuit courts; elections for 102 seats as judges of municipal courts; elections for 1,596 county supervisors and officers; elections for 763 alders, mayors, and other city offices; elections for 464 village board trustees, board members, and other offices; elections for 291 town supervisors, clerks, and other offices; elections for 565 seats on the boards of common, union, and unified school districts; elections for 12 seats as supervisors on the boards of sanitary districts; and 132 county, school district, and local referenda. Many of the municipal offices have new terms scheduled to be filled by the winners of the election as soon as April 21, 2020.

The State of Wisconsin has a highly decentralized election system under which elections are overseen by the Wisconsin Elections Commission and administered by 1,850 municipal clerks or election commissions and 72 county clerks. The extensive work of conducting an election in Wisconsin typically requires assistance from around 30,000 poll workers.<sup>20</sup> Poll workers are, generally speaking, older than the general population—precisely the demographic at greatest risk of severe illness caused by COVID-19.<sup>21</sup>

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<sup>20</sup> See *Wisconsin Needs Poll Workers to Deal with COVID-19 Situation*, Wis. Elections Commission, <https://elections.wi.gov/node/6766> (last visited Apr. 4, 2020).

<sup>21</sup> See Rashad Williams, *State officials encouraging more poll workers to replace older workers for their safety*, WAOW.com (Mar. 24, 2020, 8:15 PM), <https://waow.com/2020/03/24/state-officials-encouraging-more-poll-workers-to-replace-older-workers-for-their-safety/>.

In-person voting on April 7 would pose two intractable problems, given the COVID-19 pandemic:

First, given the unavoidable close physical proximity among poll workers, election officials, and voters at polling locations on election day, and the virtual certainty that some individuals will be infected with COVID-19 when they come to the polls, it is inevitable that COVID-19 infections will spread more rapidly than they otherwise would, absent an in-person election.

Second, given the heightened health risks of voting in person, municipalities are facing critical shortages of poll workers to administer an in-person election on April 7.

In-person voting requires close contact between and among poll workers and voters at nearly every step in the process:

- Two identical lists of the registered voters in each ward, known as “poll books,” are provided to each ward. A minimum of two poll workers are assigned to each ward table and are responsible for checking voters’ photo IDs, locating names and addresses in the poll book, assigning sequential voter numbers, and issuing ballot to the voters.
- There are typically two poll workers at each ward table whenever a voter is being issued a ballot for the purpose of cross checking each other’s work and avoiding errors.
- Poll workers work closely together the entire election day to ensure the integrity of the election by confirming the information recorded on each voter list is accurate and identical.

- Each eligible voter must state his or her full name and address when appearing at a ward table to vote. Voters must then present a photo ID.
- Verification of each voter's name, address, and photo ID is completed by two poll workers at the voting location.
- After the information is validated, the voter must sign the poll book used by the poll workers.
- A ballot must be initialed by two poll workers and is then issued to the voter, along with a voter number.
- After the voter completes the ballot, the voter number is returned to the poll workers when the voter feeds their ballot into the voting machine.<sup>22</sup>

While state agencies, counties, and local municipalities have all been working tirelessly to devise and implement protections to lessen the risk of in-person voting, real challenges, and real risks, still remained.

Additionally, as of March 31, 2020, nearly 60% of Wisconsin municipalities reported a poll worker shortage. 111 municipalities reported being unable to staff even one polling place; 126 municipalities reported being unable to staff all normal polling places; and another 542 reported having fewer staff than needed for efficient operations. These shortages are scattered throughout the state, from the

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<sup>22</sup> See generally Wisconsin Statutes Chapter 6, Subchapters II to III, which set forth Wisconsin's in-person voting procedure.

populous areas around Madison and Milwaukee to more sparsely populated regions in the north.<sup>23</sup>

This problem has only worsened in the past few days, as 35% of Wisconsin clerks have reported that poll workers are quitting faster than they can be replaced.<sup>24</sup> As of April 6, Wisconsin was still short roughly 7,000 poll workers.<sup>25</sup>

Given these shortages of poll workers, a significant consolidation of polling places has occurred across the state. For example, news reports indicate that, in Milwaukee, only 5 of the city's typical roughly 180 polling locations would be open on April 7.<sup>26</sup> Two other examples: the City of Green Bay has had to consolidate from 31 to 2 polling locations, and the City of Waukesha has had to consolidate its polling places from 15 down to 1.<sup>27</sup>

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<sup>23</sup> See Memorandum from Megan Wolfe to Members, Wisconsin Elections Commission (Mar. 31, 2020), [https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Complete%20Packet%203\\_31.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Complete%20Packet%203_31.pdf).

<sup>24</sup> See *id.* Such dramatic shortages have persisted, even with an estimated 2,400 Wisconsin National Guard members set to help at the polls.

<sup>25</sup> Laurel White, *'It's Madness.'* *Wisconsin's Election Amid Coronavirus Sparks Anger*, NPR (Apr. 6, 2020, 05:00 AM), <https://www.npr.org/2020/04/06/827122852/it-s-madness-wisconsin-s-election-amid-coronavirus-sparks-anger>.

<sup>26</sup> Alison Dirr, *Milwaukee officials announce five voting centers to be open Tuesday for in-person voting*, Milwaukee Journal Sentinel (April 3, 2020, 03:22 PM), <https://www.jsonline.com/story/news/politics/elections/2020/04/03/coronavirus-milwaukee-election-officials-announce-5-voting-centers/2942990001/>.

<sup>27</sup> Haley BeMiller, *Green Bay to hold in-person voting at East and West High instead of the usual 31 polling places*, Green Bay Press-Gazette (Apr. 2, 2020, 05:25 PM),

The consolidation of polling places in turn means the consolidation of people at those polling places, which would thereby undermine social distancing efforts and instead contribute to the spread of COVID-19.<sup>28</sup>

On April 6, the Wisconsin Public Health Association and Wisconsin Association of Local Health Departments and Boards, on behalf of over 1,000 public health officials and 200 public health organizations across the state, asked for the postponement of the April 7 election: “Our surveillance clearly documents a growing risk of transmission from infected persons without recognized symptoms which has led to increased community transmission.” “It is not possible for people to safely assemble in polling places without risking the further spread of COVID-19 to voters and poll workers.” The letter also stressed that given the hopeful progress made by current restrictions on in-person contact, now would be the “worst time” to relax physical proximity restrictions.

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<https://www.greenbaypressgazette.com/story/news/2020/04/02/coronavirus-brown-county-cities-limit-polling-sites-election/5115662002/>; *Polling Places*, The City of Waukesha, <https://waukesha-wi.gov/258/List-of-Polling-Places> (last visited Apr. 6, 2020),

<sup>28</sup> A devastating example from Washington state shows just how dangerous in-person gatherings can be: in March, a choir had a two-and-one-half hour practice; 60 members showed up. A greeter offered hand sanitizer at the door, and the members avoided direct physical contact. Though no one appeared to be sick at the time, roughly three weeks later, 45 of the attendees had tested positive for COVID-19, at least three had been hospitalized, and two had died. Richard Read, *A choir decided to go ahead with rehearsal. Now dozens of members have COVID-19 and two are dead*, LA Times (Mar. 29, 2020, 07:34 PM), <https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak>.

Notably, as of April 2, Wisconsin remained the only state in the country still scheduled to have an in-person spring election in April.<sup>29</sup> Over 15 other states had delayed spring elections due to the COVID-19 threat. To do so, some of those other states relied on already-existing state statutes addressing changes to election procedure in the face of an emergency; in other states, the Legislature took action to delay the election; and in a number of other states, the Governor issued an executive order postponing the election.<sup>30</sup>

#### **IV. No other branch of government has acted.**

Neither the judiciary nor the Legislature has acted to address the looming threat that in-person voting on April 7 presents.

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<sup>29</sup> Chris Cillizza, *Why in the world is Wisconsin still holding a primary on Tuesday?*, CNN.com (Apr. 2, 2020, 3:35 PM), <https://www.cnn.com/2020/04/02/politics/wisconsin-primary-april-7-coronavirus/index.html>.

<sup>30</sup> See *COVID-19 and Elections*, National Conference of State Legislatures, <https://www.ncsl.org/research/elections-and-campaigns/state-action-on-covid-19-and-elections.aspx> (last visited Apr. 6, 2020) (providing a list of state government responses to scheduled spring elections).

Examples of executive orders postponing spring elections include: Delaware (<https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Sixth-Modification-to-State-of-Emergency-03242020.pdf>); Maryland (<https://governor.maryland.gov/wp-content/uploads/2020/03/Renewal-of-State-of-Emergency.pdf>); New Jersey (<https://nj.gov/infobank/eo/056murphy/pdf/EO-105.pdf>); New York ([https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.12.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.12.pdf)); Rhode Island (<http://www.governor.ri.gov/documents/orders/Executive-Order-20-11.pdf>); and West Virginia (<https://governor.wv.gov/Documents/2020%20Proclamations/EO%2018-20.pdf>).

At least three federal cases have been filed seeking to move the date of the April 7 election, generally alleging that, if the election goes forward on April 7, the severe health risks posed by COVID-19 will impose high barriers to voting and thereby cause violations of the constitutional right to vote. *See City of Green Bay v. Bostelmann*, No. 20-CV-479- (E.D. Wis.); *Lewis v. Knudson*, No. 20-CV-284 (W.D. Wis.); and *Taylor v. Milwaukee Election Comm'n*, No. 20-CV-545 (E.D. Wis.). One of these cases has already been dismissed (*City of Green Bay*), the court in another declined to postpone the election (*Lewis*), and the court in the third has not yet acted (*Taylor*).

On April 3, 2020, Governor Evers issued Executive Order #73, exercising his constitutional authority under Article IV, § 11, and Article V, § 4, to convene the Legislature in a special session on April 4, 2020.<sup>31</sup> In short, he asked the Legislature to enact legislation that would transform the spring election into an all-mail election in which all ballots received by May 19, 2020, would be counted. Under the Governor's proposal, no in-person voting would occur. The Legislature adjourned the special session on April 4 and then again on April 6 without debating, much less passing any legislation that addressed the Governor's concerns.

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<sup>31</sup> *See* Wis. Governor Tony Evers, EXECUTIVE ORDER # 73, *Relating to a Special Session of the Legislature to Provide for an All-Mail Spring Election and Special Election for the 7<sup>th</sup> Congressional District during the COVID-19 Pandemic* (Mar. 2020), <https://evers.wi.gov/Documents/COVID19/EO073-SpecialSessionElections%20searchable.pdf>.

## V. **Executive Order 74.**

To stop the extremely serious and life-threatening consequences of in-person voting on April 7, Governor Evers on April 6 issued Executive Order 74. That order has three key features:

- It suspends in-person voting scheduled for April 7, 2020, until June 9, 2020, unless the Legislature passes and the Governor approves a different date for in-person voting.
- It calls the Legislature into a new special session to convene on April 7 solely to consider and act upon legislation to set a new in-person voting date for the 2020 Spring Election.
- It provides that all municipal officeholders whose terms would normally expire sometime after April 7 will have their terms extended until three days after the results of the Spring 2020 election are finalized.

The order also preserves the validity of all votes already cast for the spring election.

## **ARGUMENT**

**I. In these extraordinarily rare, narrow circumstances—where the polling place itself is life-threatening—Governor Evers had the authority to issue Executive Order 74.**

**A. When it became increasingly clear that an April 7 election would pose a direct and imminent threat to public safety, Wis. Stat. § 323.12(4)(b) gave the Governor express authority to issue Executive Order 74.**

During an emergency, the Governor has a statutory duty to issue orders, delegate authority, and direct the division of emergency management. Wis. Stat. § 323.12(3).

The critical provision that gave the Governor the express authority to issue Executive Order 74 is his statutory power to “Issue such orders as he or she deems necessary for the security of persons and property.” Wis. Stat. § 323.12(4)(b).

Statutory interpretation begins with the plain language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Additionally, statutory language is read “in the context in which it is used,” and “reasonably, to avoid absurd or unreasonable results.” *Id.* ¶¶ 45–46.

The plain language shows that the Governor had express power to issue Executive Order 74 to move the election—when it became increasingly clear that an April 7 election would pose a direct, clear, and imminent threat to public safety. In the present, narrow context, that is the most reasonable meaning of that provision. The language empowers the Governor to issue orders “necessary for the security of persons and property.” Wis. Stat. § 323.12(4)(b). And, importantly, the statutory language gives the Governor discretion to determine what is “necessary” to protect the public. Wis. Stat. § 323.12(4)(b) (“ . . . as he or she *deems necessary*. . .”).

Whatever the scope of that discretion, the present order is within it. There can be no question that moving the election was within that power, as applied to the extraordinarily rare circumstances presented here: Even with social distancing efforts, the number of Wisconsinites infected, hospitalized, and dead from the virus continues to grow daily. Health officials in Wisconsin, in other states

facing similar election dilemmas, and nationally, all agree that COVID-19 transmits through people being in close proximity to each other.<sup>32</sup> Moreover, the disease spreads easily, and reports suggest it may be spread by people who are not showing symptoms.<sup>33</sup> No one seriously questions that this situation is a bona fide public health emergency.

A straightforward reading of Wis. Stat. § 323.12(4)(b) limits the Governor’s power to what he deems “necessary.” A “necessary” action is “needed,” “essential,” or “must exist or happen.” Black’s Law Dictionary, *Necessary* (11th ed. 2019). Notably, just as the nature of an emergency will change or develop—as is occurring with the COVID-19 pandemic—so too will the “necessary” steps a Governor must take to fulfill his duties under the emergency statutes.

Executive Order 74 became necessary when it became increasingly clear that in-person voting could not be safely held on April 7, and that no other governmental action would be taken to address this danger. The number of Wisconsinites infected, hospitalized, and dead from COVID-19 has continued to skyrocket (with the Surgeon General predicting that the week of April 7 will be the most

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<sup>32</sup> See, e.g., Wis. Dep’t of Health Servs., *Covid-19: You are Safer at Home*, <https://www.dhs.wisconsin.gov/covid-19/prepare.htm> (last visited Apr. 6, 2020); Center for Disease Control and Prevention, *How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 6, 2020); Ohio Dep’t of Health, *Coronavirus Disease 2019, FAQs*, <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/families-and-individuals/frequently-asked-questions/> (Apr. 6, 2020).

<sup>33</sup> CDC, *How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 6, 2020)

devastating to the nation overall thus far); the ever-growing pandemic has understandably caused a massive shortage in poll workers; that shortage has, in turn, caused the necessary consolidation of many polling places; and that, in turn, risks bringing even more people together, on top of the already-present threat posed by in-person April 7 voting in any polling place in Wisconsin. So, when it became clear that postponing the election was necessary to protect the public, the Governor acted in accordance with Wis. Stat. § 323.12(4)(b) by issuing Executive Order 74.

Applying the plain language of the statute to the specific circumstances here means the Governor properly acted. This inevitably meant that the law stating when the spring election normally occurs had to give way, but only to the limited extent necessary to give effect to the emergency power provision, as applied to these specific circumstances. Where adhering to the statutory election date would result in a clear, direct, and imminent threat to public safety, Wis. Stat. § 323.12(4)(b) must empower the Governor to issue an order superseding that statute to the extent necessary to mitigate the public safety threat. That is exactly what he has done. Indeed, there is no Wisconsin statute specifically addressing when public health emergency makes an election date untenable.<sup>34</sup> Rather, the emergency powers vested in the Governor are the only statutes that apply to the present circumstances.

Like all statutes, Wisconsin Stat. § 323.12(4)(b) “means what it says.” *Employers Mut. Fire Ins. Co. v.*

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<sup>34</sup> It is worth noting that many other states have specific statutes addressing changes to election procedures during an emergency; Wisconsin has no statute specifically addressing that scenario. *See infra* n.38.

*Haucke*, 267 Wis. 72, 64 N.W. 2d 426 (1954). It says the Governor may issue any “necessary” orders to protect public safety. That necessarily means that, where directly contrary to the public safety, another statute may have to give way—and, here, it is a statute simply providing a date. If the Legislature had intended to impose a blanket ban that no act of emergency powers under the statutes could, in a limited way, require adjustment to another statute, it would have said so.

And it is for good reason that no such blanket ban exists. Such a critical limitation on the Governor’s emergency powers would render those powers ineffectual when the rare circumstance arises that a statute itself becomes the source of a threat to public safety. If the Legislature meant to impose such a limitation, “it would have said so.” *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 36, 341 Wis. 2d 607, 815 N.W. 2d 367 (2012); see *Liberty Grove Town Bd. v. Door County Bd. of Supervisors*, 284 Wis.2d 814, 823 (WI Ct. App. 2005).

Beyond adding non-existent limitations into the language of the statute, such a conclusion would also create a profound mismatch between the statute’s text and its purpose, depriving the Governor from protecting the public in the rare but present situation where operation of another law poses an imminent harm to public safety.

If such a limitation were read into the statute, the Governor would be prohibited from, among other things, doing the following in other emergencies:

- Ordering the immediate reconstruction or improvement of structures used to control floods, as doing so would violate the statutory requirements under Wis. Stat. § 87.15, which require the filing of a

petition that must be considered, approved, and certified;

- Ordering the immediate replenishment or stockpiling of food supplies, where doing so would violate statutory licensing requirements for food warehouses under Wis. Stat. §§ 97.27 or food branding under Wis. Stat. § 97.03;
- Ordering the widespread distribution of prescription drugs to treat anthrax, other bioterrorism agents, radiation or nuclear fallout, and chemical emergencies, violating statutes such as Wis. Stat. §§ 448.03 and 450.11, governing licensing, dispensing, and labeling of prescription drugs;<sup>35</sup> or
- Ordering immediate necessary safeguards to be taken to protect the purity of the water supply, thereby violating Wis. Stat. § 280.11, which requires that the Department of Natural Resources convene a public hearing prior to such action.

Of course our statutes themselves do not normally create a risk to public safety. But, as these examples show, in an extraordinary circumstance where that proves true,

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<sup>35</sup> As the lead agency in a public health emergency, DHS also has the power to “purchase, store, or distribute antitoxins, serums, vaccines, immunizing agents, antibiotics, and other pharmaceutical agents or medical supplies that the department determines are advisable to control a public health emergency.” Wis. Stat. § 250.042(2)(a). As with the Governor’s ability to issue necessary orders, this emergency power would be hobbled by grafting a limitation into the statute that such actions must comply with existing statutory requirements.

binding the Governor to every existing statute would negate his express power to take the “necessary” action to protect Wisconsinites. Put differently, the Governor would be prohibited from taking the very action Wis. Stat. § 323.12(4)(b) gives him express power to take—and, importantly, the very action Wis. Stat. § 323.12(3) imposes on him a duty to take—at the time where swift executive action is most needed.<sup>36</sup>

Consider, for example, the Supreme Court of New Jersey’s opinion in *Worthington v. Fauver*, 440 A.2d 1128 (N.J. 1982). There, the Governor issued an emergency order that ran contrary to otherwise-existing normal state statute. *Id.* at 1140. The challengers argued that because the Governor acted contrary to those statutes, he acted contrary to the express intent of the Legislature, and therefore unconstitutionally. *Id.*

The Supreme Court of New Jersey, however, concluded that—in that emergency situation—the Governor’s statutory emergency powers gave the Governor express power to enter an order that suspended normal operation of other statutes: “To the extent that the executive order suspends the normal operation of the statutes discussed above, it does so pursuant to the emergency powers of the Governor explicitly

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<sup>36</sup> Wis. Stat. § 323.12(3) creates three separate duties a Governor *shall* take during an emergency: (1) “issue orders,” (2) “delegate such authority as is necessary to the [administrator of emergency management services],” (3) “*and* direct the [emergency management division] to coordinate emergency management activities.” (emphasis added); see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 116 (2012) (under the conjunctive/disjunctive canon, the use of “and” means a conjunctive list—i.e. multiple requirements—while “or” connotes alternatives).

delegated to him by the Legislature.” *Id.* at 1137. The Court explained that such a conclusion should not be “surprising”: “If every law applicable to tranquil times were required to be followed in emergencies, there would be no point in delegating emergency powers and no adequate and prompt means for dealing with emergencies.” *Id.* (citation omitted).

At this rare moment in history, to protect the public, the Governor had to move the election. That is the only way to carry out his duty under the emergency provision—in other words, it is the only reasonable interpretation of that statute as it applies to this specific scenario Wisconsin faces. Moving that date applies the emergency statutory duties in measured and highly appropriate way, as it leaves intact the fundamental components and protections of Wisconsin’s statutory voting scheme, while simply moving forward in time the election to a safer date.

A ramification of moving the election while leaving normal voting procedures intact is that local government seats with terms expiring in the upcoming weeks may not be filled. Local governments play an important role in emergency management. *See* Wis. Stat. § 323.14. The Executive Order therefore separately works to protect public safety during this public health crisis by ensuring continuity in local government until the election occurs.

States of emergency already are rare in Wisconsin. The collision of a rapidly spreading deadly virus and a scheduled spring election is extraordinarily rare. Here, the timing of COVID-19’s spread across Wisconsin, combined with both how easily it spreads and how hard it often is to detect those who are infected, created a perfect storm with the scheduled April 7 Spring 2020 election. This dangerous nexus between the particular emergency at hand and the current risks presented by April 7 in-person voting shows

just how necessary the Governor’s statutory emergency order is here.

**B. Closely related emergency statutes further support that Wis. Stat. § 323.12(4)(b) gave the Governor authority to issue Executive Order 74, after it became clear that an April 7 election would pose a direct and imminent threat to public safety.**

The Governor’s additional emergency powers under Wis. Stat. § 323.12 further demonstrate that he had express power to issue Executive Order 74.

Wisconsin Chapter 323, Wisconsin’s specific statutory scheme for emergency management, empowers the Governor to take the necessary steps swiftly to address the emergency.

First, the Governor has the power to declare a state of emergency by executive order. Wis. Stat. § 323.10. If the Governor determines that a public health emergency exists, he may issue an executive order declaring a public health emergency, and may designate the department of health services as the lead agency to respond. *Id.*<sup>37</sup>

Wisconsin Stat. § 323.12(4) provides that the Governor “may do all of the following during a state of emergency,” and lists five categories. Importantly, the power to issue orders necessary to protect the public—Wis. Stat. § 323.12(4)(b)—is set forth as a stand-alone category.

The Governor’s additional listed powers all set forth what the Governor may do separately from issuing orders:

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<sup>37</sup> The Legislature has the power to revoke the emergency order by joint resolution. *Id.*

prioritize emergency management contracts, allocate materials, take or destroy property, contract on behalf of the state, waive fees, and suspend administrative rules. Wis. Stat. § 323.12(4).

Wisconsin Stat. § 323.12(4) sets forth different standards for when the Governor may use these additional powers: For example, the authority to issue orders is limited to actions the Governor “deems necessary for the security of persons and property.” Wis. Stat. § 323.12(4)(b). In contrast, there is a lower bar for suspending administrative rules; they need only impede necessary action. Wis. Stat. § 323.12(4)(d). Also, the Governor may contract on behalf of the state for whatever equipment or services will be used to respond to the disaster or its threat. Wis. Stat. § 323.12(4)(c). And the Governor may prioritize emergency management contracts, allocate materials and facilities, take, use, and destroy private property, and waive any fee required for replacement of a permit, license, approval, or other authorization, at his discretion—as long as the action relates to the emergency, Wis. Stat. §§ 323.12(4)(a), (e).

Because Wis. Stat. § 323.12(4) sets forth distinct categories of power subject to independent standards, the plain language authorizing the Governor to enter orders he deems necessary to protect the public is not limited by the other enumerated powers. *See Moya v. Aurora Healthcare, Inc.*, 2017 WI 45, 375 Wis. 2d 38, 894 N.W.2d 405 (2017) (interpreting “any person authorized in writing by the patient” broadly, given plain language of the statute and fact that it appeared as a stand-alone category in enumerated list).

The Governor’s additional statutory power to suspend administrative rules that impede necessary actions lends added support to a plain language reading that gave express power to the Governor to issue Executive Order 74. The

Governor may “[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.” Wis. Stat. § 323.12(4)(d). In other words, the law allows the Governor to cut through administrative red tape to further a necessary action—even if suspending the administrative rule is not in itself necessary to protect the public. *See id.* § 323.12(4)(d).

The statutory design of the Governor’s emergency powers—setting forth a core power to issue necessary orders and a supplemental power to remove administrative red-tape impediments—reinforces the plain language authorizing the Governor to issue any “necessary” order. Otherwise, the power to remove administrative rules that “delay” the necessary action would instead be a limitation on the Governor’s authority to take necessary action in the first instance. Reading the power to suspend administrative rules as a limit on the Governor’s emergency power to issue necessary orders would run headlong into the text and purpose of the statute. Under this reading, section 323.12(4)(d) would be the *only* way the Governor could suspend an administrative rule in an emergency. That interpretation makes no sense: the Governor would be able to suspend administrative rules that “impede” necessary actions, but would not be able to suspend those same rules as part of an order that is “necessary” to protect the public. Instead, the more sensible reading is that the statute means what it says. The Governor can issue necessary orders to protect the public—even where it has the effect of displacing a statute or rule—and can separately cut administrative red tape that impedes those orders.

**C. When it became clear that an April 7 election would pose a direct and imminent threat to public safety, and that legislative action would not occur, Governor Evers had the constitutional duty and authority to issue Executive Order 74.**

Although this Court need not reach it, there would be an additional reason that the Governor had authority to issue Executive Order 74. In these extraordinary circumstances, the Governor has the constitutional duty and authority to take action to protect the people of Wisconsin.

The Wisconsin Constitution vests the executive power in the Governor and entrusts in him the duty to “take care that the laws be faithfully executed.” Wis. Const. art. V, §§ 1, 4.<sup>38</sup> The vesting clause grants the Governor the executive power to oversee state government, and the take care clause imposes on him a more demanding duty to faithfully carry out the laws.<sup>39</sup> The take care clause “gives the governor sole control over the enforcement of laws, including the manner

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<sup>38</sup> Notably, the Wisconsin Constitution also specifically contemplates the Governor’s expanded role during a “danger from the prevalence of contagious disease.” It does so when discussing the Governor’s power to convene the Legislature on extraordinary occasions: where there exists “danger from the prevalence of contagious disease at the seat of government, he may convene them at any other suitable place within the state.” Wis. Const. art. V, § 4. On Friday, April 3, 2020, the Governor called the Legislature into special session; but the Legislature declined to act.

<sup>39</sup> Richard A. Champagne & Madeline Kasper, Wis. Legis. Reference Bureau, *The Use of Executive Orders in Wisconsin*, 6 (Mar. 2018), [https://docs.legis.wisconsin.gov/misc/lrb/lrb\\_reports/lrb\\_reports\\_2\\_2.pdf](https://docs.legis.wisconsin.gov/misc/lrb/lrb_reports/lrb_reports_2_2.pdf) (hereinafter “The Use of Executive Orders”).

in which the laws are enforced.” *The Use of Executive Order*, 6.<sup>40</sup>

Importantly, the Governor’s constitutional powers during an emergency are not exclusive, “in that they are concurrent with the legislature’s power to adopt law and to spend public money.” Jim Rossi, *State Executive Lawmaking in Crisis*, 56 Duke L.J. 237, 240 (2006). Put differently, if the Legislature takes action that addresses the emergency, through enacting law or allocating funds, the Governor may not need to act.

But when, as here, the Legislature has declined to act, and swift action must be taken—the Governor, tasked with the constitutional duty to enforce the laws—must act. Otherwise, the state may be paralyzed at the time when action is most needed.

As Alexander Hamilton explained, “Whenever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion.” The Federalist No. 70 (Alexander Hamilton). Allowing such differences to unnecessarily endanger the people at a time of crisis, however, “might impede or frustrate the most important measures of government, in the most critical emergencies of the state.” *Id.*

Consider Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642–55 (1952) (Jackson, J., concurring). There, the Supreme Court concluded that President Truman lacked authority to enter

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<sup>40</sup> Wisconsin’s take care clause is modeled after Article II, Section 3 of the United States Constitution. *Id.* at 6, n.25; *see also* U.S. Const. art. 2, § 3 (“ . . . he shall take care the laws be faithfully executed. . .”).

an executive order that directed the Secretary of Commerce to take possession of and operate most American steel mills. *Id.* at 582. Following a 1951 labor dispute and notice of a nation-wide strike amongst steel workers, President Truman feared that the strike would jeopardize national defense given the necessity of a steady supply of steel for use in weapons and other war materials. *Id.* at 582–83.

Justice Jackson agreed that President Truman lacked authority under ordinary circumstances, but he acknowledged that there may be, during times of emergency, “a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.* at 637 (Jackson, J. concurring).

Justice Jackson explained that, in that “zone of twilight,” “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.” *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring). “In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” *Id.*

As scholar Gordon G. Young explains, “Let us imagine a temporary bird flu quarantine imposed by a President until Congress can pass legislation, under circumstances where no preexisting statutory framework exists. One can read Jackson as at least open to the possibility of such inherent power. . . .” Gordon G. Young, *Youngstown, Hamdan, and “Inherent” Emergency Presidential Policymaking Powers*, 66 Md. L. Rev. 787, 793 (2007).

Indeed, otherwise, as Hamilton warned, differences of opinion may lead to paralysis at the very time when the people most need action. Put differently, absent executive authority to act, “there is strong potential for inaction in the

face of crisis, and at the extreme, blame.” Rossi, *State Executive Lawmaking in Crisis*, at 242.

Nor does the fact that the Governor’s action may temporarily displace, in a limited way, other existing statutory provisions undermine his constitutional authority to act in this twilight. In *Worthington*, for example, the Supreme Court of New Jersey rejected the argument that because the Governor’s emergency order conflicted with other statutes, he acted contrary to the express intent of the Legislature and, in turn, unconstitutionally. *Worthington*, 440 A.2d at 1140. Discussing Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co.*, the Court explained that because the Governor acted pursuant to emergency statutes, he acted in accordance with legislative power, and, in turn, constitutionally.

Notably, despite an otherwise robust system of codified statutes, Wisconsin—unlike many other states—has no statutory provisions addressing what should happen to an election during an emergency.<sup>41</sup> As discussed above, only the

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<sup>41</sup> Oklahoma, Virginia, and Florida, for example, have numerous, detailed statutes specifically addressing many aspects of the electoral process that may need to change in an emergency. *See, e.g.*, Okla. Stat. Ann. tit. 26, §§ 22-101 to 110; Fla. Stat. Ann. §§ 101.731–101.74; La. Stat. Ann. § 18.401.1-3. Some state statutes grant election officials emergency powers over elections, while other statutes give such power to the Governor. *See, e.g.*, Iowa Code Ann. § 47.1(2) and N.C. Ann. § 163A-27.1(a) (power to elections officials); Fla. Stat. Ann. § 101.733(1)–(2) and Md. Code Ann., Elec. Law § 8-103(a) (power to Governor). Some state statutes specifically authorize the postponement of an election in the face of an emergency. *See, e.g.* Haw. Rev. Stat. § 11-92.3(a); Idaho Code § 34-106(1)(C); Md. Code Ann., Elec. Law § 8-103(a)(1); N.Y. Elec. Law § 3-108; Ky. Rev. Stat. Ann. § 39.100(1)(l). And some states address particular issues related to holding elections during or after an emergency, including

Governor’s statutory emergency powers, as applied here, address the present circumstances.<sup>42</sup> But, even lacking those express statutory powers, the Governor would still need to fill that gap as a basic matter of governance, in according with his constitutional duties as Wisconsin’s executive.

Here, there was no more time, and action *had* to be taken. Governor Evers only issued Executive Order 74 after:

- (1) it became clear that the COVID-19 virus would still be wreaking havoc on Wisconsin on April 7;
- (2) it became clear that—despite the tireless efforts of the many agencies working to try and ensure safety at the polling places—such efforts would not be sufficient to protect the public safety: *i.e.*, that the polling place

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waiving restrictions on absentee voting during emergencies. *See, e.g.*, Code of Ala. § 17-11-3(e); Ind. Code Ann. § 3-11-4-1(c); 10 Ill. Comp. Stat. Ann. 5/20-25; N.D. Cent. Code Ann. § 16.1-07-05(2); Kan. Stat. Ann. § 25-622.

<sup>42</sup> Executive Order 74 fills a gap in the voting statutes through the Governor’s emergency powers. However, even if that Order were viewed as suspending a statute, that would be justified here. As Thomas Jefferson explained, “a strict observance of the written laws is doubtless one of the high duties of a good citizen: but it is not the highest.” Letter from Thomas Jefferson to John Colvin (Sept. 20, 1810), *available at* <https://founders.archives.gov/documents/Jefferson/03-03-02-0060>. Rather, “saving our country when in danger” is a “higher obligation.” *Id.* In those rare circumstances, “scrupulous adherence to written law, would be to lose the law itself. . . thus absurdly sacrificing the ends to the means.” *Id.*; *see also The Apollon*, 22 U.S. 362, 366–67 (1824) (“It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency. . . by summary measures, which are not found in the text of the laws.”).

would still pose life-threatening dangers to voters and poll workers alike; and

(3) the Governor on April 3, 2020, called the Legislature into special session, asked it to use its law-making authority to postpone the election, and the Legislature declined to take action.

Given the very real risk of losing more Wisconsin lives, and the guaranteed further spread of the dangerous virus, the Governor properly concluded that inaction simply was not on the table. The Governor has the statutory authority, under these circumstances, to issue the present order. He also would have the constitutional duty, and power, to execute the laws. The laws impose on the Governor the duty and power to issue orders during emergencies to protect the people of Wisconsin, and to have an election that protects the right of the people to vote. Executive Order 74 executes those law in the only realistic, viable way under these extraordinarily rare circumstances.

“A feeble Executive implies a feeble execution of the government.” The Federalist 70 (Alexander Hamilton). In this extraordinarily rare collision of the timing of our scheduled spring election, and the nature of the COVID-19 virus, this Court should not undercut the Governor’s authority to act.

## CONCLUSION

This Court should declare Executive Order 74 a proper exercise of the Governor's lawful emergency authority and reject Petitioners' requested relief.<sup>43</sup>

Dated this 6th day of April 2020.

Respectfully submitted,

HANNAH S. JURSS  
Assistant Attorney General  
State Bar #1081221

COLIN T. ROTH  
Assistant Attorney General  
State Bar #1103985

COLIN A. HECTOR  
Assistant Attorney General  
State Bar #1120064

Attorneys for Respondent

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-8101 (HSJ)  
(608) 264-6219 (CTR)  
(608) 267-8407 (CAH)  
(608) 267-2223 (Fax)  
jursshj@doj.state.wi.us  
rothct@doj.state.wi.us  
hectorca@doj.state.wi.us

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<sup>43</sup> It is the Respondent's understanding that, in addition to the Executive Order, there is a patchwork of places around the state with local orders prohibiting in-person voting.