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

No. 2020AP1927-OA Gymfinity, Ltd. v. Dane County

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, an appendix, an emergency motion for a temporary injunction, and supporting legal memorandum having been filed on behalf of petitioners, Gymfinity, Ltd., et al.; and a response and appendix in opposition to the petition for original action having been filed on behalf of respondent, Dane County, et al.; and a non-party brief in support of the petition for leave to commence an original action having been filed on behalf of the Liberty Justice Center; and additional letters having been filed by counsel for respondents and counsel for petitioners;

IT IS ORDERED that the petition for leave to commence an original action is denied; and

IT IS FURTHER ORDERED that the emergency motion for a temporary injunction is denied as moot.

BRIAN HAGEDORN, J. (*concurring*). This court is designed to be the court of last resort, not the court of first resort. That is why we have historically been receptive to original actions only rarely.[1] I hope we return there again.

But these are unusual times. The COVID-19 pandemic has raised unique policy and legal challenges. Governments around the world and here at home have responded by attempting to exercise power that appears without parallel in my lifetime, exposing already deep disagreements over the role of government. Unsurprisingly, the pushback has been passionate and persistent.

I have been supportive of this court's efforts to grant COVID-related original actions and decide them expeditiously. These cases have raised vital questions regarding the nature and limits of the tools available to those we've entrusted with leading our state. They have also raised discrete and dispositive legal issues where fact-finding would not be needed.

This petition raises similarly significant issues; however, multiple claims would seem to turn on questions of fact. At the very least, factual issues stand a good chance of being a barrier to deciding all the questions presented. I am also concerned that inserting ourselves into early-stage litigation of local regulations where the possible applications are complex and unknown could entrap us in the tangled web of passing judgment on all kinds of local restrictions for as long as COVID-19 endures. We are simply not equipped for that; circuit courts are.[2]

That said, the petitioners present important statutory and constitutional questions that deserve judicial scrutiny. The petitioners also offer arguments calling on this court to enforce a more vigorous separation of powers to better align government operations with our constitutional order. If these issues reach this court in an appropriate case and procedural context, we can address them at that time.

For now, however, I agree with the court's determination to deny the petition for original action. In my judgment, this case presents complicated legal issues across a number of claims involving disputed questions of fact. It would be imprudent and potentially counter-productive to weigh in at this time.

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[1] See In re Exercise of Original Jurisdiction of Supreme Court, 201 Wis. 123, 128, 229 N.W. 643 (1930) (per curiam) ("This court will with the greatest reluctance grant leave for the exercise of its original jurisdiction in all such cases, especially where questions of fact are involved.").

[2] Petition of Heil, 230 Wis. 428, 448, 284 N.W. 42 (1939) ("This court is primarily an appellate court, and it should not be burdened with matters not clearly within its province if it is to discharge in a proper and efficient manner its primary function. Mere expedition of causes, convenience of parties to actions, and the prevention of a multiplicity of suits are matters which form no basis for the exercise of original jurisdiction of this court.").

PATIENCE DRAKE ROGGENSACK, C.J. (*dissenting*). While this court has recently received a barrage of petitions to commence original actions, when it is presented to us that fundamental personal liberty is suppressed by an unelected official, we must act. Waiting until the matter proceeds through a circuit court and the court of appeals will be justice denied.

I. BACKGROUND

On November 17, 2020, Janel Heinrich, public health officer for Madison and Dane County, issued Emergency Order #10 (EO #10), which bans all indoor gatherings, including gatherings in private homes, among individuals who are not within the same immediate household. EO #10 became effective November 20, 2020 and expired December 16, 2020. EO #10 defines "Mass Gatherings" as "any gathering of individuals that are not members of the same household or living unit." It then provides that "A Mass Gathering inside any property is prohibited." A violation of EO #10 is a violation of Madison Municipal Ordinance Sec. 7.05(6) and Dane County Ordinance Sec. 46.40(2). It also subjects violators to a $1,000 forfeiture.

On December 15, 2020, Heinrich issued Emergency Order #l1 (EO #11), which is effective December 16, 2020 and expires January 13, 2021. EO #11 defines Mass Gatherings as a "planned event" such as a festival, meeting or party. "Individuals that are members of the same household or living unit do not count towards the Mass Gathering numbers in their own household or living unit."[3] Heinrich also directs, "A Mass Gathering inside any property is permitted with ten (10) individuals or less not including employees. Individuals must maintain physical distancing."[4]

Gymfinity, Ltd. is a Wisconsin business that operates a gymnastics gymnasium in Fitchburg. It avers that Heinrich's order prohibits it from conducting its gymnastics education, training and classes, even though it has taken extensive efforts to protect against the spread of COVID-19.

Jeffrey Becker, who resides in Verona, is the father of four children who participate in a soccer club based in Dane County. He alleges that his children have been impacted by the sports restrictions and he and his children have been impacted by the restrictions of their personal associations with others.

Andrea Klein resides in Stoughton and is the mother of three boys, two of whom participate in Stoughton Youth Hockey Association, that are negatively affected by Heinrich's order. She also claims her personal liberty is affected by the restrictions on private gatherings.

Petitioners claim that Heinrich's order goes beyond her authority under Wis. Stat. § 252.03(2) to "do what is reasonable and necessary for the prevention and suppression of disease." They assert that the statute is limited to "public gatherings," and therefore, she has no authority to

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[3] EO #11, par. 2.

[4] EO #11, par. 2 a.

regulate private gatherings. Petitioners contend that Heinrich infringes on constitutionally protected rights of association and on personal liberty protections that apply to one's home. Petitioners further contend that Heinrich's $1,000 fine contravenes Wis. Stat. § 66.0113, which permits the governing body of a county or city to authorize the use of citations for violations of municipal ordinances but it does not permit fines to be created by a local administrative official.

Petitioners urge us to accept their petition for original action because there is a need to reaffirm the requirement of procedural safeguards when an executive is exercising legislative power. Watchmaking Examining Bd. v. Husar, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971); Dowling v. Lancashire Ins. Co., 92 Wis. 63, 74-75, 65 N.W. 738 (1896). They assert that a decision from us is urgently needed because there has been little attention given to administrative acts of local administrative officials.

Petitioners ask us to enjoin Heinrich's order to the extent that it limits all indoor gatherings for private sporting activities and to the extent that it regulates private gatherings of one's family members in one's home when all family members do not reside in the same household. Petitioners assert that there is no basis in Wis. Stat. § 252.03(2) to regulate private gatherings in businesses or homes. They assert that the ban on private gatherings violates constitutional rights to freedom of association and invades upon constitutionally protected rights of personal liberty.

II. DISCUSSION

There are many reasons why we should grant this petition for original action. Heinrich's regulation began with EO #10 and continues with EO #11. Heinrich likely will continue to issue subsequent orders regulating private conduct in one's business and home until a court tells her to stop. However, it is not necessary to dwell on each reason because Petitioners' focus on her regulation of the fundamental personal liberty interests exercised inside one's home is, in and of itself, sufficient to require that we accept this petition for original action.

Petitioners contend that EO #11 continues to suppress fundamental, personal liberty by defining "Mass Gatherings" as "a planned event" such as a "festival" or a "party." It continues to regulate who and how many people Dane County residents can have in their own homes. "A Mass Gathering inside any property is permitted with ten (10) individuals or less not including employees."[5] It regulates how far apart from each other guests in one's home must be during planned events. "Individuals must maintain physical distancing."[6] The order goes on to direct that "[i]ndividuals that are members of the same household or living unit do not count towards the Mass Gathering numbers in their own household or living unit."[7] Apparently, EO #11 applies to

[5] EO #11, par. 2. a.

[6] Id.

[7] Id., par 2.

Christmas Eve and Christmas Day parties, and it directs how many people one can permit to attend Christmas Eve and Christmas Day dinners in one's own home.

Petitioners contend that we have longstanding protections against orders such as EO #10 and EO #11 under both state and federal law.

They point us to Article I, Section 1 of the Wisconsin Constitution, which provides, "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuant of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

"An inherent right to liberty means all people are born with it; the government does not bestow it upon us and it may not infringe it." Porter v. State, 2018 WI 79, ¶52, 382 Wis. 2d 697, 913 N.W.2d 842 (R. Bradley, J., dissenting). There is a long history in the law wherein many decisions "have respected the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Supreme Court considered an ordinance that limited the "occupancy of a dwelling unit to members of a single family." Id. at 496. The ordinance narrowly defined "family." Id. A woman had been living with her son and two grandsons, and one of the grandsons fell outside of the definition of "family." Id. at 497. The ordinance was enforced, and grandmother was convicted of a crime. Id. at 496. However, the ordinance did not survive Supreme Court review. The United States Supreme Court explained that "the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns." Id. at 506.

When intimate human relationships are at issue, the United States Constitution protects them as a fundamental element of personal liberty. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). Furthermore, "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." Id. at 620. "[T]he safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life." Griswold v. Connecticut, 381 U.S. 479, 495 (1965).

Wisconsin law is in accord. "The safeguarding of the home is a vital public interest. That references to the right to be undisturbed in one's own home are brief, almost casual, in United States Supreme Court decisions must be taken to mean that this fundamental right is considered beyond challenge, not needing frequent defense." City of Wauwatosa v. King, 49 Wis. 2d 398, 405, 182 N.W.2d 530 (1971).

"There is no pandemic exception . . . to the fundamental liberties the Constitution safeguards." Wis. Legislature v. Palm, 2020 WI 42, ¶53, 391 Wis. 2d 497, 942 N.W.2d 900. "'[I]ndividual rights secured by the Constitution do not disappear during a public health crisis.'

These individual rights, including the protections in the Bill of Rights . . . are always in force and restrain government action." Id. (quoting Statement of Interest, Temple Baptist Church v. City of Greenville, No. 4:20-cv-64-DMB-JMV, 2020 WL 1932929 (N.D. Miss. April 14, 2020), ECF No. 6)).

III. CONCLUSION

Because personal liberty interests must be protected when brought to this court's attention, and it is argued to us that Heinrich's orders repeatedly contravene personal liberty interests, I would grant the petition to commence an original action in this matter. Accordingly, because the majority decides otherwise, I respectfully dissent.

I am authorized to state that Justices ANNETTE KINGSLAND ZIEGLER and REBECCA GRASSL BRADLEY join this dissent.

Sheila T. Reiff
Clerk of Supreme Court