Survey of Significant Wisconsin Court Decisions, 2019–20

Surveyed below are the most significant Wisconsin court decisions during 2019 and 2020. In the last two years, the Wisconsin Supreme Court has broken new ground on a number of issues involving the ability of the legislature to call itself into extraordinary session, the governor's partial veto power, the governor's and the legislature's oversight of the state agency rulemaking process, and the involvement of the legislature in litigation handled by the attorney general. Rarely have so many cases involving the core and essential powers of the state's political institutions been on the court's docket.

The court has been active in other policy areas as well, issuing decisions on what constitutes a "mission" of a traffic stop, claims against firearm classified advertising, pretrial identification of crime suspects, involuntary medication of prisoners, provision of electronic documents under the state's public records law, and presumptions regarding implied consent to searches of incapacitated persons operating motor vehicles.

But, most importantly, during this period, the Wisconsin Supreme Court issued momentous decisions on matters involving the state government's response to the COVID-19 pandemic. The court struck down attempts by the secretary of health services to close nonessential businesses, prohibit private gatherings of non-household members, and forbid nonessential travel. In addition, the court also ruled that the governor, during a public health emergency, could not suspend statutes so as to prohibit in-person voting during the April 2020 elections.

The following survey prepared by attorneys at the Legislative Reference Bureau summarizes these critical and important judicial decisions. The LRB attorneys who prepared these summaries practice law, conduct research, and draft legislation in these issue areas. To be sure, each decision merits a much longer discussion because the issues confronted by the court in these cases touch on different and competing views of the legal authority of Wisconsin's political institutions and the role of government in society and the economy. The case summaries presented in this report serve as a concise introduction to the court's important activities in the last two years. Please contact us at the LRB offices if you would like a fuller discussion of any of these decisions, as well as of the significant issues litigated in these cases.

Emergency order issued under the COVID-19 pandemic

In *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, the supreme court held that an emergency order issued by the state's secretary of health services-designee to address the 2020 COVID-19 pandemic constituted a "rule" within the meaning of the administrative procedure law and, as such, was required to be promulgated using the emergency rule process in order to be valid. Because that process had not been followed when the order was issued, the court declared the order unenforceable. The court also determined that parts of the order exceeded the authority granted by the statutes on which they relied.

The spring of 2020 saw the sudden emergence of the SARS-CoV-2 coronavirus pandemic around the world, and on March 12, 2020, Governor Tony Evers issued Executive Order 72, "Declaring a Health Emergency in Response to the COVID-19 Coronavirus." In addition to declaring a public health emergency for the state of Wisconsin, Executive Order 72 designated the Department of Health Services (DHS) as the lead agency to respond to the public health emergency and directed DHS to "take all necessary and appropriate measures to prevent and respond to incidents of COVID-19 in the State." Over the course of March 2020, Governor Evers and DHS issued a series of emergency orders ordering a number of actions in response to the pandemic, including a March 24, 2020, "Safer at Home" emergency order that directed all individuals present in Wisconsin to stay at their home or residence, with certain exceptions.

On April 16, 2020, DHS issued a similar, follow-up "Safer at Home" emergency order (Order 28) relying on certain powers granted to DHS under the laws governing communicable diseases. In contrast to some of the earlier orders, Order 28 did not purport to rely upon the governor's declaration of a public health emergency. DHS also, on April 20, 2020, issued a subsequent emergency order establishing criteria for lifting the measures put in place by Order 28. The orders were signed by secretary of health services-designee Andrea Palm. The legislature filed an emergency petition for original action related to Order 28 on April 21, 2020, and the court accepted the petition.

In a majority opinion authored by Chief Justice Patience D. Roggensack, the court first addressed the legislature's standing to seek judicial review of the order. Because, the majority wrote, the legislature claimed that the secretary was impinging upon the legislature's constitutional core power and functions, it had standing to proceed on the claims for which the court had granted review.

The court then moved to a discussion of whether Order 28 was required to be promulgated as a rule in order to be valid. Citing the definition of "rule" in Wis. Stat. ch. 227, and the court's opinion in *Citizens for Sensible Zoning, Inc. v.*

Wisconsin Department of Natural Resources, 90 Wis. 2d 804, 280 N.W.2d 702 (1979), the court concluded that Order 28 was a "general order of general application" that regulated all persons in Wisconsin at the time of issuance and all who would come into the state in the future. The court rejected an argument that Order 28 was not a rule because it was responding only to a specific, limited-in-time scenario, observing that the criteria for lifting the measures meant that the measures could continue indefinitely. The court further wrote that in order for a violation of Order 28 to constitute criminal conduct, as was provided in the order, the order would have to be promulgated as a rule. The court recognized that the governor had emergency powers, which were not being challenged in the case, but that the governor could not rely on those emergency powers indefinitely in confronting an emergency such as a pandemic. As such, the court wrote, DHS was required to follow the procedures for promulgating emergency rules in issuing Order 28, and, because it had not, Order 28 was unenforceable. Exempt from the court's order was a provision in Order 28 closing public and private k–12 schools.

The court also addressed more specifically the powers granted to DHS under the laws governing communicable diseases. Measures in Order 28 such as travel restrictions, the court wrote, were broader than what was permitted under the statute. Citing a legislative "canon of construction" against reading broad authority being implied in statutes, the court wrote that grants of authority to agencies were to be narrowly construed in the absence of explicit language granting such authority.

The court concluded by reiterating that Order 28 was invalid and unenforceable due to not having been promulgated as a rule and having exceeded DHS's statutory authority. The court also noted that the legislature had requested a stay of the court's order of at least six days. Citing the amount of time that had already passed since the court began consideration of the case, the majority declined to order a stay.

Chief Justice Roggensack also wrote a concurring opinion separate from her majority opinion. She wrote that although she joined the majority opinion, she also concluded that there was a legal basis for granting the legislature's request for a temporary stay of the court's order and that she would grant one. Justice Rebecca Grassl Bradley, joined by Justice Daniel Kelly, also concurred in the judgment, writing about the danger of concentrating governmental power in a single individual, in this case Palm, and against the erosion of constitutional rights during an emergency such as a pandemic. Justice Kelly also wrote separately, joined by Justice R.G. Bradley, emphasizing the limitations on the legislature's ability to delegate power to the executive branch and that, in his view, Order 28 went too far in making policy decisions in which the legislature need have a role.

Justice Ann Walsh Bradley, joined by Justice Rebecca Frank Dallet, wrote in dissent to criticize the chief justice's concurrence. The two justices concluded that the rulemaking procedures were incompatible with responding to the pandemic and observing that the statutes gave DHS broad authority to act. She further concluded that Order 28 was not a rule due to its being limited and not of future application, and that the legislature lacked standing to bring the claims. Justice Brian Hagedorn, joined in part by Justices A.W. Bradley and Dallet, offered a lengthy dissent further exploring some of the potential implications of the majority's decision. He wrote that Order 28 was ill-suited to the emergency rulemaking process, and that the majority's decision cast doubt on a host of other statutes that also provided for criminal violations.

Constitutionality of legislative extraordinary sessions

In *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209, the supreme court considered the constitutionality of extraordinary sessions held by the Wisconsin Legislature and, specifically, whether an extraordinary session convened by the legislature in December 2018 was constitutional. The court held that the December 2018 extraordinary session was constitutional, finding that the Wisconsin Constitution directs the legislature to meet at a time provided by law and that the legislature did so when it convened the extraordinary session.

Article IV, section 11, of the Wisconsin Constitution mandates that the legislature meet at such time "as shall be provided by law." The court has held that "provided by law" means statutory law. Article IV, section 8, of the Wisconsin Constitution further provides that "each house" of the legislature "may determine the rules of its own proceedings."

Under Wis. Stat. § 13.02 (3), "the joint committee on legislative organization shall meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year, to be submitted to the legislature as a joint resolution."

In January 2017, the legislature adopted its work schedule for the 2017–18 legislature in 2017 Joint Resolution 1 (JR1). JR1 lists the dates of the 2017–18 session as January 3, 2017, to January 7, 2019. In December 2018, acting pursuant to JR1, the legislature convened an extraordinary session and passed three bills that were subsequently signed into law by then Governor Scott Walker as 2017 Wisconsin Act 368, 2017 Wisconsin Act 369, and 2017 Wisconsin Act 370. During the same extraordinary session, the senate confirmed 82 appointees that had been nominated by Governor Walker to various state authorities, boards, councils, and commissions.

In January 2019, the League of Women Voters of Wisconsin, along with several other plaintiffs (collectively, the League), filed an action in Dane County Circuit Court against Governor Tony Evers and officers of the Wisconsin Elections Commission (WEC) seeking a declaratory judgment and injunctive relief. The League sought a declaration that the three acts passed and 82 appointments confirmed during the extraordinary session were unconstitutional and unenforceable because they occurred during a constitutionally invalid session of the legislature. The legislature filed a motion to intervene in the case, which the circuit court granted. The WEC defendants and the legislature filed motions to dismiss, and the legislature requested a stay of any injunction the court might issue.

The parties agreed to dismiss the WEC defendants from the case. In March 2019, the circuit court denied the legislature's motion to dismiss, granted a temporary injunction, and denied the legislature's motion to stay the injunction. The legislature appealed. The League filed a petition requesting to bypass the court of appeals, which the supreme court granted.

In a majority opinion authored by Justice R.G. Bradley, the supreme court found that extraordinary sessions are not unconstitutional and that the extraordinary session held by the Wisconsin Legislature in December 2018 did not violate the Wisconsin Constitution. The court held "that extraordinary sessions do not violate the Wisconsin Constitution because the text of our constitution directs the Legislature to meet at times as 'provided by law,' and Wis. Stat. § 13.02 (3) provides the law giving the Legislature the discretion to construct its work schedule, including preserving times for it to meet in an extraordinary session." The court found that the plain language of Wis. Stat. § 13.02 (3), which directs a committee of the legislature to develop a work schedule for the legislative session, "satisfies the 'provided by law' requirement under Article IV, Section 11 of the Wisconsin Constitution."

The court noted that while "extraordinary sessions" are not expressly mentioned in Wis. Stat. § 13.02, terminology such as "floorperiods" and "extraordinary sessions" are terms used by the legislature in setting the work schedule and that "[t]he specific terminology [the legislature] chooses is not prescribed or limited by our constitution or by statute." The court rejected the argument that the legislature had terminated its 2017–18 session when it concluded the last general business floorperiod on March 22, 2018. The court held that "[t]he work schedule the Legislature formulated for its 2017–2018 biennial session established the beginning and end dates of the session period and specifically contemplated the convening of an extraordinary session, which occurred within the biennial session."

Finding that the circuit court "invaded the province of the Legislature in declaring the extraordinary session unconstitutional, enjoining enforcement of

the three Acts, and vacating the 82 appointments," the supreme court vacated the circuit court's order and remanded the matter with directions to dismiss the League's complaint.

Justice Dallet, joined by Justices Shirley S. Abrahamson and A.W. Bradley, dissented, finding that the extraordinary session held by the legislature in December 2018 was unconstitutional and that, therefore, the three acts passed during those sessions (2017 Wisconsin Acts 368, 369, and 370) and the confirmation of 82 gubernatorial appointments were invalid.

Separation of powers and the constitutionality of post-election laws

In *Service Employees International Union (SEIU), Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, the supreme court considered whether certain acts passed by the Wisconsin Legislature after the November 2018 election, but before a new administration took office, were unconstitutional as a violation of separation of powers. The court, through two separate majority opinions authored by different justices, held that 1) legislation relating to the authority of the governor and attorney general was facially constitutional, and 2) some provisions relating to "guidance documents" failed a facial constitutional analysis, while others survived.

The case arose from enactment of 2017 Wisconsin Act 369 and 2017 Wisconsin Act 370, which were passed by the legislature in December 2018, after the November election, and then signed by the governor before the new administration took office. Service Employees International Union (SEIU), Local 1, and other plaintiffs (collectively, SEIU) filed suit in Dane County Circuit Court against leaders of both houses of the legislature (collectively, the legislative defendants), the governor, and the attorney general, all in their official capacities, seeking declaratory and injunctive relief and moving for a temporary injunction. The legislative defendants moved to dismiss the complaint, arguing all provisions were consistent with the Wisconsin Constitution. While named as a defendant, the governor brought his own motion for a temporary injunction and sought to enjoin provisions not raised in SEIU's motion, while filing a cross-claim joining SEIU's complaint and requesting his own declaratory and injunctive relief regarding the provisions he challenged. The attorney general also largely supported SEIU and asked the circuit court to strike down multiple laws relating to his authority as attorney general.

The circuit court denied the legislative defendants' motion to dismiss while granting, in part, the motions for temporary injunction. The court enjoined laws concerning legislative involvement in state-related litigation, the ability for a legislative committee to suspend an administrative rule multiple times, and various provisions relating to agency communications referred to as guidance documents.

The legislative defendants appealed both the denial of the motion to dismiss and the order granting injunctive relief. The supreme court first assumed jurisdiction over the appeal of the temporary injunction and later assumed jurisdiction over and granted the interlocutory appeal of the denial of the motion to dismiss.

The supreme court reviewed the circuit court's denial of the legislative defendants' motion to dismiss and, therefore, had to determine whether the complaint stated a valid legal claim against the challenged laws, while assuming all allegations in the complaint were true. The court found that certain claims not enjoined by the circuit court were not sufficiently developed by the parties for the court to make a ruling, and the court issued no opinion about those provisions, indicating they could proceed in the ordinary course of litigation when the case was remanded to the circuit court.

In the first majority opinion, authored by Justice Hagedorn, the court noted that the constitutional challenge was a facial challenge, requiring a party to show "that all applications of the law are unconstitutional." The court rejected these facial challenges to several provisions, including provisions allowing legislative involvement in litigation and limiting the attorney general's ability to settle litigation; a provision regarding security at the capitol; a provision regarding multiple suspensions of administrative rules; and finally, a provision partially codifying the supreme court's ruling in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21. The court held that there were at least some constitutionally valid applications of these provisions and that, as such, the facial challenge failed. The court vacated the temporary injunction and directed the circuit court to grant the motion to dismiss with respect to these provisions.

Justice Kelly authored a second majority opinion constituting the opinion of the court with regard to provisions of Act 369 that relate to guidance documents. The supreme court affirmed the circuit court's ruling that two provisions of Act 369 are facially unconstitutional because "they intrude on power the Wisconsin Constitution vests in the executive branch of the government." The court found that a provision requiring an agency to identify existing law that supports a guidance document's contents and a provision establishing a notice and comment procedure that an agency must follow when creating a guidance document are unconstitutional. The court found that "the creation and dissemination of guidance documents fall within the executive's core authority." The court reversed the circuit court on the other challenged guidance document-related provisions, finding, for purposes of a facial constitutional challenge, that it was not established that the remaining provisions would be unenforceable under any circumstances.

Chief Justice Roggensack concurred in part and dissented in part, concluding that Act 369's regulation of guidance documents "does not invade the executive's

core powers." Chief Justice Roggensack found the majority opinion flawed in holding the creation of guidance documents to be a core power of the executive, instead concluding that interpreting the law is a shared power and that, for purposes of the facial challenge, it was not established that any of the guidance document provisions are unduly burdensome in all circumstances.

Justice Dallet also concurred in part and dissented in part, joined by Justice A.W. Bradley, finding that SEIU's complaint "plausibly suggests that the sweep of the 'Litigation Control' provisions" in Act 369 violates the constitutional separation of powers doctrine.

Justice Hagedorn wrote a separate opinion, concurring in part and dissenting in part, joined by Justice Annette Kingsland Ziegler, stating that he would hold that all of the guidance document provisions survive a facial challenge.

Governor's partial veto power

In *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685, the supreme court held that three of the four partial vetoes that were challenged in the case were unconstitutional and invalid. In June 2019, the Wisconsin Legislature passed the 2019–21 biennial budget bill. Governor Tony Evers signed the bill with numerous partial vetoes. Three individual taxpayers sued to invalidate four of these partial vetoes.

In the first challenged veto, the budget bill had provided that certain funds were to be used to award grants to school boards for the replacement of school buses with energy efficient buses, including school buses that use alternative fuels. Governor Evers partially vetoed this language so that the sole remaining requirement was that the funds be used "for alternative fuels." In the second challenged veto, Governor Evers partially vetoed a provision that provided funds "for the local roads improvement discretionary supplemental grant program"—a program that provides money to local governments to improve deteriorating local roads—so that it allowed the funds to be used "for local grant [sic]," with no requirement that the money be used for road improvement. In the third challenged veto, the budget bill had changed the registration fees for four different weight classes of vehicles so that they were all the same—for two lighter weight classes the registration fee increased, and for two heavier classes the fee decreased. Governor Evers partially vetoed the decrease in fees for the heavier weight classes while leaving intact the increase in fees for the lighter weight classes. In the fourth challenged veto, Governor Evers vetoed language in the definition of "vapor product" so that a newly created tax on vapor products would apply not only to vaping devices but also to vaping fluid.

Under article V, section 10 (1) (b), of the Wisconsin Constitution, "[a]ppropriation bills may be approved in whole or in part by the governor, and the part

approved shall become law." In deciding whether a governor's partial veto is valid, the supreme court previously applied an objective test of whether the resulting approved material resulted in a "complete, entire and workable law." The court had also previously discussed the notion that "the consequences of any partial veto must be a law that is germane to the topic or subject matter of the vetoed provisions."

In this case, a majority of the court held that the school bus modernization veto, the local roads improvement veto, and the vapor products tax veto were unconstitutional and invalid, and that the vehicle registration fee veto was constitutional and should be upheld. However, the court could not agree on a rationale for these holdings, and instead issued a per curium opinion with four separate writings and four separate rationales.

Chief Justice Roggensack's opinion elevated the germaneness requirement discussed in previous cases to a constitutional test that asks whether a partial veto has altered the legislative idea reflected in the text of the bill. Chief Justice Roggensack found the school bus modernization and the local road improvement vetoes to be unconstitutional because they resulted in topics or subject matters not found in the original bill: the part remaining after the school bus modernization veto related to reducing carbon emissions and had nothing to do with schools or buses; and the part remaining after the local road improvement veto created a general, undirected local fund and had nothing to do with road improvement. However, the chief justice held that the vapor products tax and vehicle registration fee vetoes were constitutional because they did not alter the topic or subject matter of the parts of the bill that were approved.

Justice Kelly, in an opinion joined by Justice R.G. Bradley, looked to the origination clause, amendment clause, and legislative passage clause of the Wisconsin Constitution and determined that the court's prior decisions on the partial veto had been wrongly decided. Justice Kelly concluded that, because the purpose of the partial veto power is to address the legislative practice of bundling several proposed laws into one bill, it followed that the smallest part of a bill that can be vetoed should be one of those proposed laws. Justice Kelly's opinion found that, "After exercising the partial veto, the remaining part of the bill must not only be a 'complete, entire, and workable law,' it must also be a law on which the legislature actually voted." Justice Kelly added that "the part or parts of the bill the governor did not approve must also comprise one or more 'complete, entire, and workable laws' that had passed the legislature." Applying this test, Justice Kelly found all four of the challenged vetoes to be invalid.

Justice Hagedorn, joined by Justice Ziegler, acknowledged that the governor may veto something less than an "item," but determined that he or she may not

"selectively edit parts of a bill to create a new policy that was not proposed by the legislature. He may negate separable proposals actually made, but he may not create new proposals not presented in the bill." Applying this "policy" test, Justice Hagedorn held that, "with three of the challenges—the school bus modernization fund, the local road improvement fund, and the vapor products tax—the governor's vetoes went beyond negating legislative policy proposals; they created brand new ones." The vehicle registration fee veto, however, merely negated a policy proposal advanced by the legislature rather than creating a new policy and was therefore valid.

Justice A.W. Bradley, joined by Justice Dallet, supported applying the objective "complete, entire and workable law" test that the court had previously applied, under which all four of the challenged partial vetoes would be constitutional. Justice A.W. Bradley argued that none of the parties had argued or briefed the "legislative idea" test supported by Chief Justice Roggensack, the requirement that the vetoed material also be "complete, entire and workable" that was introduced by Justice Kelly, or the "policy" test proposed by Justice Hagedorn. Justice A.W. Bradley also argued that the "legislative idea" and "policy" tests were subjective and therefore difficult to apply. Finally, she rejected Justice Kelly's approach because it would overturn 85 years of jurisprudence; would ignore the difference between the words "part" and "item," even though the state constitution specifically authorizes a veto in "part" rather than a line-item veto; and would make article V, section 10 (1) (c), of the Wisconsin Constitution—which prohibits the governor from creating a new word by rejecting individual letters in the words of a bill or creating a new sentence by combining parts of two or more sentences of a bill—superfluous, because there would be no need for this constitutional provision if the constitution already limited the governor to vetoing an "item."

On the same day that it issued its opinion in *Bartlett*, the supreme court also decided *Wisconsin Small Business United, Inc. v. Brennan*, 2020 WI 69, 393 Wis. 2d 308, 946 N.W.2d 101. In that case, the court held that challenges to partial vetoes by Governor Walker in the 2017–19 biennial budget bill—which were not brought before the court until after the 2019–21 budget bill had been enacted—were brought too late and were therefore barred by the doctrine of laches. The merits of the case would have raised the question of whether the governor may partially veto individual numbers within a date, an issue that the court has never directly addressed.

Gubernatorial review of rules promulgated by the state superintendent of public instruction

In *Koschkee v. Taylor*, 2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600, the supreme

court held that provisions enacted under 2011 Wisconsin Act 21 that gave the governor and the secretary of administration certain authority over agency rulemaking were constitutional as applied to rules promulgated by the state superintendent of public instruction (SPI), a constitutional office established by article X, section 1, of the Wisconsin Constitution. Article X, section 1, establishes the SPI and provides that the "supervision of public instruction" shall be vested in the SPI and "such other officers as the legislature shall direct." The court's ruling in *Koschkee* overruled the court's earlier decision on substantially the same issue in *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520.

In May 2011, Governor Scott Walker signed 2011 Wisconsin Act 21 into law. Act 21 made numerous changes to provisions in Wis. Stat ch. 227 that delineate the process for state agencies to promulgate administrative rules. Among the changes in Act 21 were requirements that the governor approve agencies' initial "statements of scope" for proposed rulemaking and that the governor approve agencies' final drafts of proposed administrative rules. In *Coyne*, a number of parties (Coyne) filed suit, arguing that the provisions gave the governor and the secretary of administration equal or superior authority over the SPI and were therefore unconstitutional. The SPI sided with Coyne throughout the litigation. With a divided mandate split between multiple opinions, a majority of the court ruled in *Coyne* that the Act 21 requirements were unconstitutional as applied to the SPI and the Department of Public Instruction (DPI).

In August 2017, Governor Walker signed 2017 Wisconsin Act 57, also known as the REINS (Regulations from the Executive in Need of Scrutiny) Act into law. Act 57 made further changes to the rulemaking process, including requiring statements of scope for administrative rules to be first forwarded to the Department of Administration (DOA) for review before being submitted to the governor for approval. However, Act 57 preserved the gubernatorial approval requirements enacted in 2011 Wisconsin Act 21 that were the subject of *Coyne*. In *Koschkee*, the petitioners (Koschkee) filed a petition for an original action with the supreme court, seeking a declaratory judgment that then-SPI Tony Evers and DPI were required to submit statements of scope for administrative rules to DOA for review and approval by the governor. The court granted the petition, and the case was decided in June 2019.

With Chief Justice Roggensack writing for the majority, the court began by reiterating that administrative agencies are creations of the legislature and that the power to promulgate rules is a power delegated by the legislature, subject to limitations and conditions prescribed by the legislature. The court then moved to a discussion of article X, section 1, of the Wisconsin Constitution, concluding that the SPI was understood as having been given executive, not legislative, authority,

with the SPI's duties to be further defined by the legislature. The constitution, the court concluded, vested the supervision of public instruction, an executive function, in the SPI. In contrast, the SPI's rulemaking authority was a delegation of legislative power and therefore was not the "supervision of public instruction" within the meaning of article X, section 1. The court rejected the argument, with which a majority of the court had agreed in *Coyne*, that the challenged provisions impermissibly elevated the governor to a position greater or equal to the SPI with regard to something the SPI does, calling it of no constitutional concern given that rulemaking is a legislative, not executive, power.

Justice R.G. Bradley concurred in the judgment to express her view that the majority was improperly acquiescing to delegations to administrative agencies and straying from original understandings of the separation of powers. Justice Kelly filed a separate concurring opinion. Justice A.W. Bradley wrote in dissent, joined by Justice Dallet, observing that *Coyne* was recently decided precedent by a court whose membership had since changed and concluding that *Coyne*, despite having had multiple opinions, had correctly held that the challenged provisions unconstitutionally infringed on the SPI's supervisory powers.

Justice Abrahamson withdrew from participation.

Suspending an election by executive order

In *Wisconsin Legislature v. Evers*, 2020 Wis. ___, the supreme court held that the governor could not by executive order suspend in-person voting on April 7, 2020, an action that would have resulted in modifying a number of election-related statutes outside of the lawmaking process. The court held that, although the governor's power during a public health emergency is substantial, it is not unlimited and not broad enough to suspend the operation of the statutes.

On March 12, 2020, Governor Tony Evers issued an executive order, "Declaring a Health Emergency in Response to the COVID-19 Coronavirus." Following that order, a number of parties filed lawsuits in federal court to modify or suspend certain election-related procedures for the upcoming spring election so that voters would be able to limit their exposure to the novel coronavirus while exercising their right to vote. The United States District Court for the Western District of Wisconsin, with Judge William M. Conley presiding, received three complaints which it consolidated into one case as *Democratic Nat'l Comm. v. Bostelmann*, 451 Supp. 3d 952 (2020). The parties seeking relief sought to enjoin a number of state statutory provisions regarding the conduct of elections, including the procedures for requesting and submitting absentee ballots and the photo identification requirement for voting. In addition, the parties asked the court to postpone the spring election. The parties noted that the governor himself had indicated that

he did not believe he had the authority to issue an order postponing the spring election.

Judge Conley issued his decision and order on April 2, five days before the election. Although Judge Conley enjoined and modified certain absentee ballot procedures, he found that it was not in the court's purview to postpone the election. He also noted that delaying the election would create a different host of problems. For example, the WEC had already taken a number of actions in an attempt to conduct an election in as safe and efficient a manner as possible and that the commission administrator had testified that there were no good dates on which to move the election that would not hamper the administration of other elections.

On April 6, the day before the election, Governor Evers issued Executive Order 74, "Related to suspending in-person voting on April 7, 2020, due to the COVID-19 Pandemic." In addition to suspending the spring election and postponing it until June 9, the order also called the legislature into special session to commence at noon on April 7 for the purpose of considering legislation to determine a new date for holding the 2020 spring election. As a consequence of postponing the election, the order also extended the period for requesting, completing, and submitting absentee ballots and the terms of office for all local officials whose terms were, by statute, set to expire following the spring election. Those terms would continue until after the rescheduled election, when the terms for the newly elected officials would begin.

As authority for the order, the governor cited Wis. Stat. § 323.12 (4) (b), which provides that the governor may issue orders during an emergency "as he or she deems necessary for the security of persons and property." The governor also cited several provisions of the Wisconsin Constitution: the preamble, which provides, in part, that the people of Wisconsin establish the constitution in order to "form a more perfect government, insure domestic tranquility and promote the general welfare"; article IV, section 11, which authorizes the governor to convene the legislature into special session; article V, section 1, which provides that the executive power is vested in the governor; and article V, section 4, which authorizes the governor to convene the legislature at a location other than the seat of government due to "danger from the prevalence of contagious disease."

On the same day that the governor issued Executive Order 74, the legislature filed a petition with the supreme court to commence an original action challenging the legality of the order and seeking a temporary injunction. The court granted the petition and issued its decision that day. The court found that none of the authorities cited by the governor, with the exception of article IV, section 11, of the Wisconsin Constitution, pertaining to commencing a special session, allowed the governor to do what he intended under the order.

With regard to Wis. Stat. § 323.12 (4) (b), although it appears to provide a broad grant of executive power during an emergency, the court noted that it had to be construed in the context of the statute as a whole. For example, Wis. Stat. § 323.12 (4) (d) allows the governor to suspend "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," which is the subject of an emergency order. Other statutory provisions grant the governor the power during an emergency to engage in certain contracts and to waive fees for permits and licenses. Importantly, the court noted that nothing in Wis. Stat. § 323.12 (4) grants the governor the power to suspend the statutes or postpone an election during an emergency. In other words, if the legislature had intended to grant that power, it would have said so, just as it did with the authority to suspend the administrative rules.

Ultimately, the court enjoined the provisions of Executive Order 74, with the exception of calling the legislature into special session. The court held that failing to do otherwise would have allowed the governor "to invade the province of the Legislature by unilaterally suspending and rewriting laws without authority."

Justice A.W. Bradley, joined by Justice Dallet, dissented, opining that the power granted under Wis. Stat. § 323.12 (4) (b) to issue orders "necessary for the security of persons and property" is broad enough to allow the governor to postpone an election during a pandemic and to modify the operation of the various statutes that are implicated by that postponement.

Justice Kelly did not participate.

Indefinitely confined voters

In *Jefferson v. Dane County*, 2020 Wis. ___, the supreme court enjoined the Dane County clerk from advising all eligible voters in Dane County that they could designate themselves as "indefinitely confined" because of the governor's "Safer at Home" order and thereby request and receive an absentee ballot without having to provide photo identification.

On March 12, 2020, Governor Tony Evers issued Executive Order 72, "Declaring a Health Emergency in Response to the COVID-19 Coronavirus." On March 24, 2020, as an attempt to reduce the spread of the novel coronavirus, the secretary of health services-designee, Andrea Palm, issued Emergency Order 12, the "Safer at Home" order, which required all individuals present in the state to stay at their place of residence, with certain exceptions. For example, the order allowed individuals to leave their homes to buy groceries or household products. In addition, residents employed at essential businesses or providing essential services were allowed to leave their residence to go to work. Essential businesses and services included health care, infrastructure, construction, food production

and distribution, law enforcement, and government. The order did not require that those who were ill from COVID-19 or at high-risk for becoming ill from it stay at home, but, instead, they were "urged to stay at their home or residence to the extent possible except as necessary to seek medical care." The order took effect at 8 a.m. on March 25, 2020, and was to remain in effect until 8 a.m. on April 24, 2020.

On March 25, 2020, Dane County Clerk Scott McDonnell posted a statement on his Facebook page indicating that, as a result of the executive order declaring a health emergency and the "Safer at Home" order, all eligible voters in Dane County could, as needed, declare themselves "indefinitely confined" for purposes of requesting and completing an absentee ballot for the upcoming spring election. He further urged absentee voters who were having difficulty presenting photo identification with their absentee ballot request to indicate that they were "indefinitely confined" in order to avoid that requirement.

Section 6.86 (2) (a) of the Wisconsin Statutes allows an eligible voter to automatically receive an absentee ballot for every election if the voter includes with his or her absentee ballot application a signed statement indicating that the voter is "indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period." A voter who certifies himself or herself as "indefinitely confined" is not required to present photo identification to vote absentee if the individual who witnesses the voting of the ballot submits a statement that contains the voter's name and address and verifies that the voter's name and address are correct. A voter who certifies as "indefinitely confined" is required to notify the municipal clerk when the voter no longer qualifies as being "indefinitely confined."

Two days after the Dane County clerk's Facebook post, the Republican Party of Wisconsin and Mark Jefferson, its executive director, filed with the supreme court a petition for leave to commence an original action and a motion for a temporary injunction that would require the county clerk to remove his Facebook post from March 25, 2020, and issue a new statement that set forth the interpretation of Wis. Stat. § 6.86 (2) (a) proposed by the petitioners. On March 31, 2020, the court granted the motion for a temporary injunction, finding that the clerk's advice to the municipal clerks and voters of Dane County was "legally incorrect." The court also found that the clerk's subsequent posting of guidance from the WEC with regard to voters who certify themselves as "indefinitely confined" did not render the issue moot as that did not prevent the clerk from reposting the erroneous, misleading information or from the continued distribution of the original posting on the Internet. The court expressed its concern that eligible voters, relying on the clerk's incorrect advice, would be misled into thinking they could declare themselves "indefinitely confined" simply because of the public health

emergency and the "Safer at Home" order and receive an absentee ballot without providing the photo identification that the law otherwise requires.

Consequently, the court ordered McDonnell to refrain from posting any advice regarding voters declaring themselves "indefinitely confined" that is inconsistent with WEC guidance. The court found that the WEC guidance provided an important clarification. Specifically, although the guidance indicated that the designation of "indefinitely confined" is a decision to be made by the voter on the basis or his or her current circumstances, the designation is not to be used solely as a means to avoid the photo identification requirement for voting. The WEC guidance also indicated that being "indefinitely confined" does not mean that the voter is either permanently or completely unable to travel outside the person's residence, but that the voter must be "indefinitely confined" because of age, physical illness or infirmity, or disability.

Justice Kelly did not participate in the decision.

On April 1, 2020, the court also granted the petition for leave to commence an original action. The petition set forth two questions for the court to resolve. The first question was whether the Dane County clerk had the authority to issue an interpretation of Wis. Stat. § 6.86 (2) (a) that would have allowed voters to request and return an absentee ballot without providing photo identification. The second question was whether all eligible Wisconsin voters could avoid the photo identification requirement for absentee ballots on the grounds that the "Safer at Home" order rendered them "indefinitely confined" because of age, physical illness or infirmity, or disability. The court heard oral argument on September 29, 2020.

On December 14, 2020, in a majority opinion authored by Chief Justice Patience D. Roggensack, the court held that the Dane County clerk's interpretation of Wis. Stat. § 6.86 (2) (a) was erroneous and that the "Safer at Home" order did not make all eligible Wisconsin voters "indefinitely confined" for the purpose of receiving absentee ballots without having to present photo identification. To reach that conclusion, the court determined that Wis. Stat. § 6.86 (2) allows each individual voter to make the determination as to whether he or she is "indefinitely confined" on the basis of age, physical illness or infirmity, or disability. All of the justices concurred in this part of the opinion.

However, the majority also held that the designation of being "indefinitely confined" could not be made on the basis of someone else's age, physical illness or infirmity, or disability. For example, an individual taking care of an eligible voter who is "indefinitely confined" may not claim that designation solely because the individual is the voter's caretaker. The court addressed this issue in response to arguments raised by Disability Rights Wisconsin, which the court had allowed

to intervene. Justice A.W. Bradley and Justice Dallet filed separate dissents to this part of the decision and Justice Karofsky joined Justice Dallet's dissent. Justice A.W. Bradley objected to the majority "inserting its own words into the statutory text chosen by the legislature" in order to determine that a voter must determine whether he or she is "indefinitely confined" on the basis of his or her own age, illness, or disability. Justice Dallet objected to the majority reaching its determination by considering hypothetical voters in hypothetical situations and not on the facts before court.

Incapacitated driver provision of implied consent law is unconstitutional

In *State v. Prado*, 2020 WI App 42, 393 Wis. 2d 526, 947 N.W.2d 182, the court of appeals considered whether the implied consent that drivers are deemed to have given and are unable to withdraw due to incapacitation satisfies the Fourth Amendment to the U.S. Constitution. The court found that it does not and held the provision to be unconstitutional.

The implied consent law provides that a person operating a motor vehicle on a public highway has given consent to have a sample of his or her breath, blood, or urine subjected to a chemical test to determine the presence of alcohol, controlled substances, or other drugs. When a law enforcement officer requests a chemical test sample, the person may withdraw his or her consent. However, if the person is incapacitated, the person is presumed not to have withdrawn consent, and the officer may obtain a chemical test sample if the officer has probable cause to believe the person was operating a motor vehicle while intoxicated.

Dawn Prado was involved in a fatal car crash and was transported to a hospital. While Prado was unconscious, a law enforcement officer directed that a sample of Prado's blood be drawn for chemical testing. The officer did not obtain a warrant but instead relied on the incapacitated driver provision of the implied consent law.

Prado's blood sample revealed the presence of a controlled substance and a prohibited alcohol concentration. Prado moved to suppress the results of the blood test, arguing that the incapacitated driver provision upon which the officer relied is unconstitutional. The circuit court agreed, suppressing the results of the blood test, and the state appealed.

The court of appeals noted that it had certified the question of the constitutionality of the incapacitated driver provision to the Wisconsin Supreme Court on three prior occasions but had yet to see the issue definitively resolved. Indeed, the court of appeals stayed this appeal for over two years awaiting the outcome of other cases that raised the same issue. One of those appeals was taken up by

the U.S. Supreme Court, which declined to directly address the issue, in *Mitchell v. Wisconsin*, 588 U.S. ___, 139 S. Ct. 2525 (2019).

In its consideration of the issue, the court of appeals provided a thorough review of relevant case law, including the most recent U.S. Supreme Court opinions. The court of appeals reasoned that collection of a blood sample is a search governed by the Fourth Amendment to the U.S. Constitution and may not be conducted without a warrant unless the search falls within one of the specifically established exceptions to the warrant requirement. Consent is one such exception, but the court held that implied consent that is not withdrawn does not meet the standards established by the U.S. Supreme Court in *Mitchell* and *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160 (2016). The court held that "implied consent" is not itself an established exception to the warrant requirement, nor does it satisfy the traditional warrant exception for voluntary consent.

The court of appeals held that the incapacitated driver provision of the implied consent statute authorizes warrantless searches that do not fit within any exception to the warrant requirement. Thus, the court held, any search conducted under that authority violates the Fourth Amendment to the U.S. Constitution. Ultimately, the court held the incapacitated driver provision to be unconstitutional.

However, the court noted that, while evidence obtained through unconstitutional searches should be excluded at trial, courts may deviate from this rule when law enforcement has acted in good faith reliance on settled law. The court held that the blood draw in this case occurred before *Birchfield* and *Mitchell* were decided and was therefore conducted in good-faith reliance on the incapacitated driver provision, which was settled law for decades. Thus, although the court found the provision to be unconstitutional, the court reversed the lower court's suppression of Prado's blood test result because the law enforcement officer was acting on a good faith understanding of the law.

Open records

In *Lueders v. Krug*, 2019 WI App 36, 388 Wis. 2d 147, 931 N.W.2d 898, the court of appeals held that Wisconsin's open records law requires a state representative to provide electronic, rather than paper, copies of emails when sought through an open records request.

In this case, Bill Lueders sent Representative Scott Krug a request to review correspondence sent to Krug's office during a certain period that related to specific topics and bills relating to the state's water laws. Krug provided Lueders with paper printouts of relevant emails. Lueders then sent Krug a request for all emails relating to changes in the state's water laws received by Krug's office within that same period, and requested that the records be provided in electronic form and

not as printed copies. Krug declined, stating that he had already provided Lueders with printed copies of the requested emails, which satisfied the requirements of the open records law.

Wisconsin's open records law, Wis. Stat. § 19.35 (1) (b), provides that "any requester has a right to inspect a record and to make or receive a copy of a record." This provision also states the following: "If a requester appears personally to request a copy of a record that permits copying, the authority having custody of the record may, at its option, permit the requester to copy the record or provide the requester with a copy substantially as readable as the original."

The circuit court ordered Krug to provide electronic versions of the emails, and Krug appealed, arguing that the state's open records law required only that he provide copies of records that were substantially as readable as the originals.

The court of appeals first found that the provision under the open records law upon which Krug relied, which requires the custodian to provide the requester "with a copy substantially as readable as the original," applies only if "a requester appears personally to request a copy of a record." The provision did not apply in this case because Lueders did not appear personally, but instead submitted his open records requests by email.

The court of appeals next looked to *State ex rel. Milwaukee Police Ass'n v. Jones*, 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190, in which the Milwaukee Police Department denied a request to provide a digital recording of a 911 call after the department had provided an analog copy of the call in response to a previous request. The court in that case held that the digital version of the recording would contain data not found in the analog version and that the requester was entitled to the digital copy. The court in that case noted that "[i]f a 'copy' differs in some significant way for purposes of responding to an open records request, then it is not truly an identical copy, but instead a different record."

In *Lueders*, the court held that the electronic copies of the emails that Lueders requested were substantially different from the printed copies he was provided because the electronic copies contained information not available on the printed versions, including metadata that showed when the emails were created and who created them. The court therefore concluded that providing paper versions of the emails was not a satisfactory response to Lueders's second request that specifically asked for digital versions of the emails and affirmed the circuit court's order requiring disclosure of the electronic versions of the emails.

Activities that are included in the mission of a traffic stop

In two cases before the Wisconsin Supreme Court, the court evaluated and applied the recent U.S. Supreme Court case *Rodriguez v. United States*, 575 U.S. 348 (2015),

in which the U.S. Supreme Court held that the tolerable duration of police inquiries in the traffic-stop context is determined by the length of time reasonably required to complete the "mission" of the traffic stop.

The Fourth Amendment to the U.S. Constitution prohibits unreasonable seizures. A traffic stop is a type of seizure under the Fourth Amendment, and authority for a traffic stop seizure ends when the police officer completes, or reasonably should have completed, the "mission" of the traffic stop. The U.S. Supreme Court has explained that the mission includes 1) addressing the traffic violation that warranted the stop, 2) conducting ordinary inquiries incident to the stop, and 3) taking negligibly burdensome precautions to ensure officer safety. In addition, officers may make certain unrelated investigations as long as they do not measurably extend the duration of the traffic stop.

In *State v. Wright*, 2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 157, the Wisconsin Supreme Court considered whether a police officer unlawfully extended a traffic stop in violation of the Fourth Amendment to the U.S. Constitution when the officer asked the driver about the presence of weapons in the car and asked whether the driver held a valid permit to carry a concealed weapon (CCW permit).

In this case, police officers stopped the car John Patrick Wright was driving because the passenger-side headlight was out. Officer Kristopher Sardina asked Wright for his driver's license and asked several other questions, including whether Wright held a CCW permit and whether he had any weapons in the car. Wright admitted that he did not have a CCW permit and that he did have a firearm in the glove compartment. Officer Sardina took Wright's license back to the squad car, ran Wright's information, and ran a CCW permit check. Officer Sardina discovered that Wright did not hold a valid CCW permit and arrested him for carrying a concealed weapon.

Wright moved to suppress the firearm evidence on the basis that Officer Sardina unlawfully extended the traffic stop in violation of the Fourth Amendment to the U.S. Constitution when he asked questions about whether Wright held a CCW permit and about the presence of weapons. The circuit court granted Wright's motion to suppress, and the court of appeals affirmed.

In a unanimous opinion authored by Justice Abrahamson, the supreme court reversed. The court asked whether Officer Sardina's questions constituted part of the mission of the traffic stop. The court explained that, if the questions were part of the mission, they would not be considered an extension of the traffic stop, and, if the questions were not part of the mission, they would violate the Fourth Amendment to the U.S. Constitution only if they measurably extended the duration of the traffic stop.

The court quickly dispensed with the officer's question regarding the presence

of weapons, concluding that the question was part of the mission of the traffic stop because the question was "a negligibly burdensome precaution taken to ensure officer safety." Because the question was part of the mission, it did not extend the traffic stop and did not violate the Fourth Amendment.

On the other hand, with respect to Officer Sardina's question regarding whether Wright held a CCW permit, the court held that the question and the CCW permit check were not part of the ordinary inquiries incident to the traffic stop. The court noted that ordinary inquiries typically involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. Further, the question was not related to officer safety because it is the potential presence of a weapon that implicates the safety of the officer, not whether that weapon is being lawfully carried. Thus, in the absence of reasonable suspicion of criminal activity, the question and the CCW permit check were an investigation unrelated to the mission of the traffic stop.

Nevertheless, the court concluded that, in this case, there was no evidence that those activities had measurably extended the duration of the traffic stop. Because asking about the CCW permit and running a CCW permit check were conducted concurrently with mission-related activities, those unrelated investigations did not violate Wright's Fourth Amendment rights.

In *State v. Brown*, 2020 WI 63, 392 Wis. 2d 454, 945 N.W.2d 584, the supreme court considered whether a police officer unlawfully extended a traffic stop in violation of the Fourth Amendment to the U.S. Constitution when the officer, after writing a traffic ticket but before handing it to the driver, ordered the driver out of the car, led the driver to the front of the squad car, asked the driver if he had anything on his person that the officer should "be concerned about," and asked permission to search the driver.

In this case, Officer Christopher Deering pulled over the car Courtney Brown was driving for failing to make a complete stop at a stop sign. Officer Deering asked Brown multiple questions about his whereabouts and destination that evening and found Brown's story suspicious. Officer Deering ran a records search on Brown while writing him a ticket for failing to wear a seatbelt, then, with the completed ticket in hand, returned to Brown's vehicle. Officer Deering did not give Brown the ticket or return his driver's license. Instead, Officer Deering asked Brown to exit the car, led him back to the front of the squad car, and asked if there was anything on Brown's person that Officer Deering "needed to know about" or "be concerned about." Brown answered that he had nothing, but Officer Deering asked for consent to search Brown's person and proceeded to conduct the search, uncovering drugs and cash.

Brown was charged with possession with intent to deliver cocaine and moved to suppress the evidence of drugs and money on the grounds that the search was an unlawful extension of the traffic stop unsupported by reasonable suspicion. The circuit court denied the motion, and the court of appeals affirmed on other grounds.

In a majority opinion authored by Justice R.G. Bradley, the supreme court affirmed. The court examined each action taken by Officer Deering after writing the traffic ticket and returning to Brown's car, finding that the mission of the stop had not been completed and all of Officer Deering's actions were negligibly burdensome actions related to officer safety, which is part of the mission of the traffic stop.

With respect to the officer's request for Brown to exit the vehicle, the court held that the request was "of no constitutional moment" because courts decades ago established a bright-line rule in the interest of officer safety that officers may order a driver out of the vehicle during a lawful traffic stop without violating the Fourth Amendment to the U.S. Constitution. The court explained that, because the officer had not yet handed Brown the ticket, the mission of the traffic stop had not been completed. The court flatly rejected Brown's assertion that the stop reasonably should have been completed because "all that remained was handing the ticket to Brown and ending the seizure." The court stated that "the mission of the stop continued."

The court similarly disposed of Brown's challenge regarding Officer Deering walking Brown away from his car and back to the front of the squad car. The court noted the inherent danger of the driver and officer standing a few feet from passing traffic. The court concluded, "There is no distinction for Fourth Amendment purposes between law enforcement directing a driver to stand next to his car, at the curb, or behind his car, and leading a driver to the front of the officer's squad car."

Next, the court examined whether it was reasonable for Officer Deering to ask Brown whether he had anything on his person with which the officer should be concerned. The parties disagreed on the specific words Officer Deering used but agreed that he did not specifically ask about weapons. The court concluded that no "magic words" were required and, given the facts of the case, Officer Deering had a constitutionally reasonable safety concern regarding the presence of a weapon. The court essentially determined that the officer's question simultaneously asked two questions—one mission related, and one not. The court concluded that 1) the officer's question was negligibly burdensome and pursuant to the stop's mission because it concerned officer safety, and 2) the officer's question regarding possession of concerning items did not measurably extend the duration of the stop because it was posed concurrently with mission-related activities.

Finally, the court briefly considered Officer Deering's request to search Brown. The court noted that, while a search may be a severe intrusion, a *request* to search is not. The court summarily concluded that the request for consent to search "was constitutionally permissible as a negligibly burdensome inquiry related to officer safety." The court did not address the constitutionality of the actual search and did not address whether Brown actually gave consent for the search.

Justice R.G. Bradley also wrote a concurring opinion joined by Justice Kelly. Justice Dallet filed a dissenting opinion. Justices A.W. Bradley and Hagedorn did not participate.

Due process; fair identification requirement

In *State v. Roberson*, 2019 WI 102, 389 Wis. 2d 190, 935 N.W.2d 813, the supreme court held that pretrial identification of a crime suspect may be based on presenting the witness with a single photograph, overturning precedent that required the use of a photo array.

The case arose from an incident in which the victim, C.A.S., was shot over a drug deal that went wrong. In the days preceding the incident, C.A.S. spent a total of two-and-a-half to three hours over the course of three encounters with the man who shot him. When asked whether he could identify the shooter, C.A.S. initially responded with uncertainty. However, when a police officer showed C.A.S. a photograph of the defendant, Stephan I. Roberson, C.A.S. affirmatively identified Roberson as his shooter. The circuit court ordered the identification evidence to be suppressed on the basis that the investigators used a single photograph as opposed to a photo array. Previous supreme court precedent established that a "showup," or an identification based on showing a witness only one suspect, is inadmissible evidence unless, on the basis of the totality of the circumstances, the procedure was necessary.

In this case, the court of appeals, in an unpublished decision, reversed the circuit court's suppression, and the supreme court agreed. In a majority opinion authored by Chief Justice Roggensack, the court held that due process does not prohibit identification of a crime suspect on the basis of a showup, but rather requires that the identification evidence has a sufficient "indicia of reliability" to be admissible.

In reaching its conclusion, the supreme court overturned its 2005 decision in *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. The court in Dubose had determined that identifications based on showups were unreliable because they were impermissibly suggestive and, therefore, allowing that identification evidence into the trial violated the defendant's right to due process under article I, section 8, of the Wisconsin Constitution. In its opinion in *Dubose*, the

court acknowledged that the standard the court was adopting diverged from the standard that had been adopted by the U.S. Supreme Court in interpreting the due process clause of the Fourteenth Amendment to the U.S. Constitution. The U.S. Supreme Court has not interpreted the Fourteenth Amendment to prohibit identifications on the basis of showups, but rather requires an evaluation of the reliability of the identification testimony.

The court in *Roberson* criticized its decision in *Dubose* for its departure from past practice of interpreting the state's constitutional due process requirements as the same as federal constitutional due process requirements. In addition, the court disagreed with the reliance in *Dubose* on social science to evaluate the reliability of eyewitness identifications. Finally, the court noted several instances in which the standard set forth in *Dubose* was not followed. For these reasons, the court found that the decision in *Dubose* was unsound in principle and should be overturned.

After determining that *Dubose* was overturned, the court returned to the test employed to determine the reliability of an eyewitness identification pre-*Dubose*. Under the pre-*Dubose* standard, a criminal defendant bears the initial burden of demonstrating that a showup was impermissibly suggestive. If the defendant meets this burden, the state may still introduce the evidence if it proves that under the totality of the circumstances, the identification was reliable even though the confrontation procedure was suggestive. In *Roberson*, the court held that the state met its burden, and the identification based on a single photograph was allowed as evidence in the trial.

Justice R.G. Bradley filed a concurring opinion that was joined by Justice Kelly. Justice Hagedorn filed a separate concurring opinion. Justice Dallet, joined by Justice A.W. Bradley, dissented.

Claims against firearm classified advertising website barred by federal law

In *Daniel v. Armslist, LLC*, 2019 WI 47, 386 Wis. 2d 449, 926 N.W.2d 710, the supreme court held that the federal Communications Decency Act of 1996 (the CDA) barred claims asserted against the operator of a website that advertised a firearm for sale by a third party when an individual unlawfully purchased the gun and used it to commit a mass shooting.

In October 2012, a Wisconsin court granted Zina Daniel Haughton a restraining order against her husband Radcliffe Haughton after he assaulted her and threatened to kill her. Among other things, the restraining order prohibited Radcliffe from possessing a firearm for a period of four years. Within two days after the order was entered, Radcliffe used the firearm advertising website armslist.com to arrange to purchase a semiautomatic handgun and ammunition from

Devin Linn for $500. The following day, Radcliffe carried the handgun into the spa where Zina worked and fatally shot her and two other people, injured four others, and shot and killed himself.

Zina's daughter Yasmeen Daniel witnessed the shooting and brought this case against Armslist, LLC, the company that operated armslist.com, alleging negligence, wrongful death, and other claims on her own behalf and on behalf of her mother's estate. In her complaint, Daniel alleged that Armslist knew or should have known that its website would put firearms in the hands of dangerous, prohibited purchasers and that Armslist specifically designed its website to facilitate illegal transactions. Armslist moved to dismiss Daniel's complaint, arguing that Daniel's claims were barred under the CDA. The circuit court agreed and granted the motion to dismiss. The court of appeals reversed.

In an opinion written by Chief Justice Roggensack, the supreme court reversed the court of appeals's decision and affirmed the circuit court's dismissal of Daniel's complaint. The supreme court explained that the CDA was intended, in part, to prevent state and federal laws from interfering with the free exchange of information over the Internet. To that end, the CDA provides immunity from tort liability for "interactive computer service providers" for hosting third-party content. The question, then, came down to whether Armslist merely provided a platform for third parties to post information or whether Armslist, through the design and operation of its website, shared responsibility for the "creation or development" of the content that was posted.

The court noted that a website operator is considered to be responsible for developing content only if the operator materially contributed to the illegality of the content. In determining whether a website's design features materially contributed to the unlawfulness of third-party content, the court explained that, if a feature could be used for proper or improper purposes, it was a "neutral tool" and would generally not be considered to have contributed to the content's unlawfulness, even if the website operator knew that the neutral tools were being used for illegal purposes. Therefore, the court concluded, it was immaterial whether Armslist "knew or should have known," or even if Armslist intended, that its website would be used by third parties to facilitate illegal gun sales. Regardless of whether Armslist knew or intended that illegal content was being posted on the website, Armslist was not liable because it provided neutral tools and, thus, did not materially contribute to the content's illegality.

The court also rejected Daniel's claims because the CDA bars claims that treat an interactive computer service provider as the "publisher or speaker" of third-party content posted on a website. The court analyzed each of Daniel's claims and determined that, despite "artful pleading" by Daniel, all of the claims required

that Armslist be treated as a publisher or speaker of information posted by third parties and therefore were barred by the CDA.

Justice A.W. Bradley dissented. Justice Abrahamson withdrew from participation in the case before oral argument.

Involuntary medication; finding of dangerousness

In *Winnebago County v. C.S.*, 2020 WI 33, 391 Wis. 2d 35, 940 N.W.2d 875, the supreme court held that an order for involuntary medication of a prisoner is unconstitutional when it is made without a finding of dangerousness.

Under Wisconsin statutes, involuntary commitment is generally allowed only if it is proved that the individual is mentally ill, a proper subject for treatment, and dangerous. However, if the individual is a prisoner, the standard for involuntary commitment does not require a finding that the individual is dangerous, but rather requires only that the court find that the individual is "in need of treatment."

Once an individual has been involuntarily committed, he or she generally has the right to refuse medication. A court may order an individual to be involuntarily medicated if the court finds that the individual is not competent to refuse medication or if medication is necessary to prevent serious physical harm to the individual or others. Because involuntary commitment is a prerequisite to involuntary medication, and involuntary commitment requires a finding of dangerousness for non-prisoners, an order for involuntary medication for non-prisoners will always include a finding of dangerousness. However, because involuntary commitment of a prisoner under the statutes does not require a finding of dangerousness, an order for involuntary medication for a prisoner may be entered without a finding of dangerousness.

C.S. was a prisoner who was subject to an involuntary commitment and involuntary medication order while he was incarcerated, without any finding or conclusions regarding dangerousness. C.S. sought post-commitment relief with the circuit court, arguing that the involuntary medication statute is unconstitutional for any inmate who is involuntarily committed without a finding of dangerousness. The circuit court denied the petition for post-commitment relief, concluding that involuntary medication is in the legitimate interests of both the county and C.S.

C.S. appealed the circuit court decision. The court of appeals found that the general welfare of a prisoner is a sufficiently legitimate reason for the state to involuntarily medicate and treat a prisoner even when there is no finding of dangerousness.

In an opinion authored by Justice Ziegler, the supreme court held that Wisconsin's involuntary medication statute violates the substantive due process rights

of a prisoner who is involuntarily committed without a finding of dangerousness. The court grounded its analysis in a trilogy of U.S. Supreme Court cases, as well as Wisconsin precedent discussing a person's "significant liberty interest" in refusing medication.

In reaching its holding in this case, the Wisconsin Supreme Court distinguished between involuntary commitment and involuntary medication. While the supreme court previously held that the involuntary commitment statute was not unconstitutional because involuntary commitment of a prisoner is "reasonably related to the State's legitimate interest in providing care and assistance to inmates suffering from mental illness," the court recognized here that "[i]nvoluntary medication is much more invasive and must be justified by an overriding or essential [state] interest." The court concluded that incompetence to refuse medication alone is not an essential or overriding state interest and cannot justify involuntary medication.

Justice R.G. Bradley dissented, and Justice Hagedorn, joined by Chief Justice Roggensack, filed a separate dissenting opinion. Both opinions dissented on the basis of concerns relating to reliance on due process to guarantee specific substantive rights under the U.S. Constitution. BB