

IN THE SUPREME COURT OF THE STATE OF OREGON

Elkhorn Baptist Church, Calvary
Chapel Newberg, Calvary Chapel
Lincoln City, Calvary Chapel Southeast
Portland, New Horizon Christian
Fellowship, Camas Valley Christian
Fellowship, Peoples Church, Prepare
The Way, Bend Community Church,
Covenant Grace Church, Jedidiah
McCampbell, Ronald Ochs, Brian
Nicholson, James B. Thwing, Mark
Russell, Phil Magnan, Ronald W. Rust,
Travis Hunt, Mason Goodknight, Mark
Mayberry, Lori Mayberry, Benjamin
Steers, Michael Carroll, Kevin J. Smith,
Polly Johnson, Benjamin Boyd, Annette
Lathrop, Andrew S. Atanasoff, Sherry
L. Atanasoff, Micah Agnew and Angela
Eckhardt,

Plaintiffs-Adverse Parties,

v.

Katherine Brown, Governor of the State
of Oregon and Does 1 through 50,

Defendants-Relators.

Baker County Circuit Court
No. 20CV17482

Supreme Court No. S _____

DEFENDANTS' EMERGENCY MOTION
— STAY UNDER ORAP 7.35

Earlier today, the Baker County Circuit Court issued a preliminary
injunction barring defendants, including Governor Kate Brown, from enforcing
the Governor's executive orders related to the COVID-19 pandemic.

Defendants ask this court to stay that preliminary injunction immediately while

it considers their petition for a writ of mandamus vacating the injunction. This is an emergency motion because the preliminary injunction takes effect immediately and will allow the sort of large gatherings that are likely to spread the novel coronavirus that causes COVID-19—a fact that plaintiffs have not disputed in this litigation. To minimize that risk, defendants respectfully request at least a temporary stay while the court considers the motion no later than **today, May 18, 2020**.

Because mandamus directed at a trial court is functionally appellate review of an interlocutory order, this court should consider the factors listed in ORS 19.350(3), which governs discretionary stays pending appeal. Those factors include, along with “any other factors the Court considers important” (ORS 19.350(5)):

- (a) The likelihood of the appellant prevailing on appeal.
- (b) Whether the appeal is taken in good faith and not for the purpose of delay.
- (c) Whether there is any support in fact or in law for the appeal.
- (d) The nature of the harm to the appellant, to other parties, to other persons and to the public that will likely result from the grant or denial of a stay.

ORS 19.350(3).

For the reasons explained at more length in defendants’ memorandum in support of the mandamus petition, this court should grant an immediate stay of

the preliminary injunction. First, defendants are likely to prevail in this mandamus proceeding. As defendants explained in their memorandum, the trial court committed fundamental legal error in concluding that the Governor's emergency authority expired after 28 days, and the preliminary injunction is beyond the trial court's discretionary authority. Second, defendants have sought mandamus in good faith and not for the purpose of delaying implementation of a valid court ruling. Third, for the reasons explained in the memorandum, there is support in law for the mandamus petition. Finally, and again as explained in the memorandum, the preliminary injunction threatens irreparable harm to the public health by undoing the state's extensive efforts to slow the spread of COVID-19.

The situation in Wisconsin highlights what could happen without an immediate stay. Last week the Wisconsin Supreme Court invalidated that state's stay-at-home order. *Wisconsin Legislature v. Palm*, __ NW2d __, 2020 WL 2465677 (May 13, 2020). News reports indicate that just hours after the ruling, bars in the state were "packed wall to wall, standing room only," while local health authorities "scrambled" in the "chaos" to institute new measures to "prevent[] more death." Meagan Flynn, *After Wisconsin court ruling, crowds liberated and thirsty descend on bars. 'We're the Wild West,' Gov. Tony Evers says.*, Wash Post (May 14, 2020), *available at*

<https://www.washingtonpost.com/nation/2020/05/14/wisconsin-bars-reopen-evers/>. This court should immediately stay the preliminary injunction to prevent the same chaos from being unleashed here tonight.

Defendants orally requested a stay from the trial court on May 14 and 18, 2020; the trial court declined the request.

Undersigned counsel notified counsel for plaintiffs and intervenors, Ray D. Hacke and Kevin L. Mannix, by e-mail that I would be moving for an emergency stay in this court. Plaintiffs object to the motion and intend to file a response. As of this filing I have not heard from intervenors' counsel.

This court should grant an immediate stay of the preliminary injunction pending the court's consideration of defendants' mandamus petition.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on May 18, 2020, I directed the original Defendants-Relators' Emergency Motion — Stay Under ORAP 7.35 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system.

I further certify that on May 18, 2020, I directed the Defendants-Relators' Emergency Motion — Stay Under ORAP 7.35 to be served upon Ray D. Hacke attorney for plaintiffs, and Kevin L. Mannix, attorney for intervenors, by mailing a copy, with postage prepaid, in an envelope addressed to:

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Calvary Chapel Southeast Portland,
New Horizon Christian Fellowship,
Camas Valley Christian Fellowship,
Peoples Church, Prepare The Way,
Bend Community Church, Covenant
Grace Church, Jedidiah McCampbell,
Ronald Ochs, Brian Nicholson, James
B. Thwing, Mark Russell, Phil Magnan,
Ronald W. Rust, Travis Hunt, Mason
Goodknight, Mark Mayberry, Lori
Mayberry, Benjamin Steers, Michael
Carroll, Kevin J. Smith, Polly Johnson,
Benjamin Boyd, Annette Lathrop,
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Supreme Court No. S _____

RELATORS' MEMORANDUM IN SUPPORT OF PETITION FOR A
PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS

Continued...

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RELATORS' MEMORANDUM IN SUPPORT OF PETITION FOR A PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS

INTRODUCTION

This court should immediately issue a writ of mandamus to vacate a preliminary injunction that, if allowed to stand, sharply increases the risk that Oregonians will be exposed to and contract COVID-19. The trial court committed fundamental legal error in issuing the preliminary injunction, because plaintiffs' arguments that the Governor lacks sufficient authority to address this emergency have no merit. And even if they did, a preliminary injunction was outside the range of permissible discretionary choices because the balance of hardship and public interest weigh overwhelming against disturbing the Governor's executive orders. Plaintiffs do not dispute that public gatherings like those they seek to convene are precisely the sort of events that are likely to increase transmission of the virus that causes COVID-19. Rather they argue that particular features of the relevant statutes make the particular orders invalid. Because these arguments are fundamentally wrong and the court's decision creates undisputed dangers, this court should exercise its mandamus authority to protect the public health and allow the Governor to oversee an orderly transition from the Stay Home, Stay Safe executive order to less restrictive conditions.

At a minimum, this court should immediately stay the preliminary injunction pending further proceedings in this court.

ARGUMENT

A. **The trial court erred as a matter of law in issuing a preliminary injunction.**

The trial court issued a preliminary injunction barring defendants from enforcing the executive orders while this case is pending. (ER 138–144). That injunction was wrong for two reasons. First, the court committed fundamental legal error in determining that the Governor’s emergency powers under ORS chapter 401 are time-limited to 28 days based on provisions in ORS chapter 433. Second, the court’s decision to issue a preliminary injunction fell outside the range of permissible discretionary choices for the trial court. Either reason alone warrants vacating the preliminary injunction.

1. **A court may issue a preliminary injunction only if the plaintiff makes a strong showing of a substantive right to relief and the balance of hardships and public interest favor an injunction.**

A preliminary injunction is never a matter of right, and it always requires a strong showing that the plaintiff has a valid substantive claim. Under ORCP 79 A, a preliminary injunction “may” be allowed if the plaintiff is “entitled to relief” demanded in the pleading and would suffer injury during the litigation or if the defendant is violating the plaintiff’s rights in a manner that would “render the judgment ineffectual”:

A(1) Circumstances. Subject to the requirements of Rule 82 A(1), a temporary restraining order or preliminary injunction may be allowed under this rule:

A(1)(a) When it appears that a party is entitled to relief demanded in a pleading, and such relief, or any part thereof, consists of restraining the commission or continuance of some act, the commission or

continuance of which during the litigation would produce injury to the party seeking the relief; or

A(1)(b). When it appears that the party against whom a judgment is sought is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of a party seeking judgment concerning the subject matter of the action, and tending to render the judgment ineffectual.

Because there is little appellate precedent addressing preliminary injunctions, which generally are not appealable, it is appropriate to look to the principles governing permanent injunction. *Cf. Winter v. Nat. Res. Def. Council, Inc.*, 555 US 7, 32, 129 S Ct 365, 172 L Ed 2d 249 (2008) (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success”) (citation omitted). Injunctive relief is an “extraordinary remedy” that should be granted sparingly. *Jewett v. Deerhorn Enters. Inc.*, 281 Or 469, 473, 575 P2d 164 (1978). In determining whether to exercise their discretion to award this extraordinary relief, Oregon courts apply traditional equitable factors. First, “clear and convincing proof” on the merits is required. *Jewett*, 281 Or at 473. Second, the party seeking an injunction must show that “irreparable harm” will occur and that “there is no adequate legal remedy.” *Gildow v. Smith*, 153 Or App 648, 653, 957 P2d 199 (1998); *Josephine Cty. v. Garnier*, 163 Or App 333, 336–37, 987 P2d 1263 (1999) (“proof of irreparable harm is a prerequisite of injunctive relief generally”). Third, courts consider the “relative hardship likely to result to the defendant if the injunction is

granted and to the plaintiff if it is denied.” *York v. Stallings*, 217 Or 13, 23-25, 341 P2d 529 (1959). Finally, courts consider the public interest. *Bennett v. City of Salem*, 192 Or 531, 546, 235 P2d 772 (1951) (“[T]here are situations where the public interest would be so seriously affected by the issuance of an injunction that the court will deny an application therefor.”).

Similar principles govern preliminary injunctions in federal court. Under the federal standard, as in Oregon, preliminary injunctive relief is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 US at 22. A plaintiff seeking a preliminary injunction “must establish” four factors, which essentially mirror the equitable factors applied by Oregon courts in the permanent injunction setting: (1) a likelihood of success on the merits, (2) likely irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Id.* at 2.

Thus, although a trial court has some discretion to decide whether to issue a preliminary injunction, that relief is inappropriate as a matter of law unless the plaintiffs makes a sufficiently strong showing that (1) the plaintiff will likely prevail in the litigation; (2) the plaintiff is likely to suffer irreparable harm without a preliminary injunction; (3) that harm outweighs any harm that a preliminary injunction will cause to the defendant; and (4) the public interest favors a preliminary injunction.

2. Plaintiffs have no legal basis for challenging the executive order.

Plaintiffs did not establish the threshold requirement for a preliminary injunction against the executive orders: a meritorious legal claim that would invalidate those orders. The trial court committed fundamental legal error in concluding otherwise.

The Governor declared a state of emergency statewide under ORS 401.165. (ER 31). That declaration gave her the power to exercise “all police powers vested in the state by the Oregon Constitution.” ORS 401.168(1). It also allowed her to “implement any action authorized by ORS 433.441 to 433.452,” which includes the power to “[c]ontrol or limit entry into, exit from, movement within and the occupancy of premises in any public area subject to or threatened by a public health emergency.” ORS 433.441(3)(d), (4). Those powers gave the Governor ample authority to issue the executive orders challenged here, including the Stay Home, Stay Safe order. And there is no time limit fixed by statute on a state of emergency declared under ORS 401.165; it continues until it is terminated by the Governor or the legislature. ORS 401.204.

The trial court erred in finding that the Governor’s emergency powers under ORS chapter 401 are time-limited by the provisions of ORS chapter 433. (ER 41–42). The provisions for public-health emergencies in chapter 433 supplement rather than supplant the Governor’s powers under chapter 401. ORS 443.441(4) states, “Nothing in ORS 433.441 to 433.452 limits the authority of the Governor to

declare a state of emergency under ORS 401.165. If a state of emergency is declared as authorized under ORS 401.165, the Governor may implement any action authorized by ORS 433.441 to 433.452.” The Governor did not declare a public health emergency under ORS 443.441; she declared a state of emergency under ORS 401.165. (ER 31). Thus, while she had the authority to implement *actions* authorized by chapter 433—including controlling the movement of the public under ORS 433.441(3)(d)—she was not limited by any of chapter 433’s provisions governing the *length* of a state of emergency. The thing that expires under ORS 433.441(5) is the “proclamation of a state of public health emergency.” Under the trial court’s ruling, declarations under ORS 401.165 also must expire. But limiting some declarations under ORS 401.165 to 28 days directly conflicts with ORS 433.441(4)’ statement that “[n]othing in ORS 433.441 to 433.452 limits the authority of the Governor to declare a state of emergency under ORS 401.165.”

Chapters 401 and 433 address different, although overlapping, problems. Chapter 433 addresses public health emergencies that could include highly contained, small-scale events. *See* ORS 433.442(4) (defining “Public health emergency” to require significant actual or probable effects “*in the affected population*”) (emphasis added). Chapter 401 involves much larger-scale emergencies that threaten “widespread” loss of life or other consequences. ORS 401.025(1) (defining “Emergency”). It should not be surprising that the legislature put time limits on the statute that might be invoked more frequently, but not on the

statute for much more widespread (and therefore rarer) threats. Nor is it surprising that the legislature allowed the Governor to exercise all of her powers under the statute for widespread threats through the duration of the emergency. Although the trial court stated that the two statutes are “in conflict” with one another (ER 141), they do not. The two statutes coexist and supplement each other.

And even if the authority to use chapter 433 powers during a chapter 401 emergency expired after 14 days—which it does not—that would not matter here. Chapter 401 itself grants the Governor “all the police power vested in the state by the Oregon Constitution.” ORS 401.168(1). That necessarily includes the authority to control the movement of people to the extent needed to respond to a public-health crisis, as ORS 433.441(3)(d) expressly confirms during a public health emergency. In other words, if the Governor may constitutionally use that power during a public health emergency, ORS 401.168(1) provides that she may use the same power during a declared emergency under chapter 401—without resort to chapter 433 whatsoever. Again, there is no conflict between the two statutes.

Oregon law thus provides complementary sets of tools that the Governor can use in an emergency: the more limited powers in a public health emergency declared under chapter 433, and more expansive police powers during an emergency declared under chapter 401. The legislature saw fit to place time limits

on chapter 433, but not on chapter 401 powers. The trial court's contrary conclusion reflects a basic misunderstanding of how the statutes work together.

Plaintiffs' legal arguments have no merit. The Governor had and has statutory authority to issue, and continue, a state of emergency under ORS 401.165 due to the COVID-19 pandemic. For that reason alone, it was fundamental legal error for the trial court to issue a preliminary injunction.

3. The trial court exceeded its discretion in issuing a preliminary injunction during a pandemic.

Even if plaintiffs' claims had any merit, which they do not, the other factors tip so decidedly against a preliminary injunction that it fell outside the trial court's range of discretionary choices.

First, whatever harm plaintiffs may experience if the executive orders remain in force pales in comparison to the undisputed harm to the state and the public if the orders are enjoined. The executive orders bar plaintiffs from holding large gatherings or engaging in other non-essential activities that would require the sort of close personal contact that presents the highest risk for disease transmission. (ER 39–41); Executive Order 20-07 (Mar. 17, 2020), *available at* http://oregon.gov/gov/admin/Pages/eo_20-07.aspx. They remain free to engage in other activities, including holding worship services and other religious ceremonies in small groups or through other appropriately distanced means, such as online or drive-in services. While defendants do not minimize the difficulties that the executive orders cause all Oregonians, those difficulties are not life-threatening.

And the restrictions in those executive orders are already being lifted in many Oregon counties, under a phased approach that takes into account the best available data about what is safe. *See* Executive Order 20-25 (May 14, 2020), *available at* https://www.oregon.gov/gov/admin/Pages/eo_20-25.aspx.

A preliminary injunction, by contrast, creates a renewed public-health crisis. COVID-19 is a global pandemic. (ER 68). Plaintiffs do not dispute that the highly contagious virus can be transmitted by asymptomatic carriers and does not manifest itself until 2 to 14 days after exposure. *See generally* Centers for Disease Control and Prevention, *How COVID-19 Spreads*, at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (visited May 15, 2020); Centers for Disease Control and Prevention, *Symptoms of Coronavirus*, at <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (visited May 15, 2020). The preliminary injunction allows the very sort of large gatherings in which the virus is most likely to be transmitted, a fact that plaintiffs have not disputed in this litigation. Plaintiffs may be prepared to risk their own lives, but they do not dispute that the gatherings also sharply increase the risk to others who come into contact with them.

Second, for the same reason, the public interest weighs heavily against a preliminary injunction. Plaintiffs do not dispute that the Governor's prompt executive orders slowed the spread of COVID-19, and as a result Oregon has had many fewer cases and deaths (both absolutely and per capita) than most states. *See*

Kaiser Family Foundation, *Confirmed COVID-19 Cases and Deaths*, at <https://www.kff.org/other/state-indicator/confirmed-covid-19-cases-and-deaths/> (last visited May 14, 2020). The preliminary injunction undoes that work and threatens to squander the enormous sacrifices Oregonians have made over the last two months to protect the public health. The Governor has laid out a measured, science-driven process for lifting restrictions county by county in a manner that continues to protect the public health while returning to business as usual. *See* Executive Order 20-25, *supra*. The blunt force of the preliminary injunction upends that careful approach.

This is not a close case. No reasonable jurist could conclude that a preliminary injunction is warranted in these circumstances. Whatever discretion a court might otherwise have had here, a preliminary injunction like the one the court issued was outside the range of permissible choices.

B. This court should exercise its discretion to issue a writ of mandamus because of the profound statewide importance of the issue.

Mandamus lies within this court’s discretion. But this case presents the sort of extraordinary circumstances that warrant exercising that discretion. Mandamus is the only means for defendants to obtain appellate review of the preliminary injunction. *See State ex rel. Keisling v. Norblad*, 317 Or 615, 623, 860 P2d 241 (1993). It is an appropriate vehicle when the preliminary injunction is either based on a “fundamental legal error” or “outside the permissible range of discretionary choices open to the trial court.” *Id.* As explained above, the preliminary

injunction here is both: It is based on fundamentally flawed legal challenges to lawful executive orders, and it is beyond the trial court's discretionary authority.

Defendants do not lightly invoke this court's mandamus authority. But the enormous stakes of this case justify that request. We are in a global pandemic, one that Oregon has largely managed successfully. This court should not let one trial court's preliminary ruling unleash a renewed public-health crisis on the state.

CONCLUSION

This court should exercise its original mandamus jurisdiction in this matter under Article VII (amended), section 2, of the Oregon Constitution and ORS 34.250. This court should issue a peremptory writ of mandamus directing the circuit court to vacate its preliminary injunction.

Alternatively, this court should immediately stay the injunction and issue an alternative writ of mandamus directing the trial court to vacate the injunction or to show cause for not doing so.

Respectfully submitted,

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