

# SUPREME COURT



## Media Release

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Cases decided June 12, 2020.

*Elkhorn Baptist Church et al. v. Katherine Brown, Governor of the State of Oregon et al.*,  
(CC 20CV17482) (SC S067736)

On petition for peremptory writ of mandamus from an order of the Baker County Circuit Court, Matthew B. Shirtcliff, Judge. Peremptory writ of mandamus to issue immediately, in terms consistent with the opinion. Opinion of the Court Per Curiam. Justice Christopher L. Garrett filed an opinion concurring in the judgment, in which Justice Thomas A. Balmer joined. Chief Justice Martha L. Walters did not participate in the consideration or decision of the case.

Today, the Oregon Supreme Court issued a peremptory writ of mandamus directing the Baker County Circuit Court to vacate a preliminary injunction that it had granted enjoining enforcement of executive orders issued by Governor Brown in response to the coronavirus pandemic.

The issue arose in an action for declaratory and injunctive relief filed in Baker County Circuit Court against the Governor. Plaintiffs are churches and individual churchgoers. In their complaint, plaintiffs sought judicial declarations that Governor Brown's May 8, 2020, executive order declaring a 60-day state of emergency based on the coronavirus pandemic, and other subsequent orders issued pursuant to that declaration, had expired. They also sought an injunction enjoining enforcement of the orders.

After filing their complaint, plaintiffs moved for a preliminary injunction to enjoin enforcement of the Governor's executive orders while the merits of the claims were being decided in the circuit court. The circuit court granted that motion on May 18, 2020, accepting plaintiffs' argument that the orders violated a 28-day statutory time limit established by ORS 433.441(5).

On the same day that the preliminary injunction issued, the Governor petitioned the Oregon Supreme Court for either a peremptory writ of mandamus directing

the circuit court to vacate the preliminary injunction or an alternative writ that would allow the circuit court (through plaintiffs) an opportunity "show cause" why the order should not be vacated. The Governor also moved to stay the preliminary injunction, pending resolution of her mandamus petition, which the Court granted.

On May 23, 2020, the Court issued an alternative writ of mandamus. Once the circuit court indicated that it would not comply with the alternative writ, the parties -- which at that point included additional local government officials, business owners, and others who had been permitted to intervene in plaintiffs' declaratory and injunctive relief action and several *amici curiae* -- filed briefs in support of or in opposition to vacation of the preliminary injunction.

In a per curiam opinion, the Court concluded that the circuit court had erred when it determined that the Governor's executive orders had violated the 28-day statutory time limit in ORS 433.441(5).

At the outset, the Court explained that, in responding to the threat posed by the coronavirus, each of the three branches of Oregon's state government have different roles to play. For example, to the extent that debates about how best to respond to that threat concern policy choices, they are properly for policy makers -- that is, the people's representatives in the legislative and executive branches of government. The role of the judicial branch, by contrast, is to determine whether the other branches have exceeded the legal limits on their authority.

As mentioned, the circuit court granted the preliminary injunction based on its conclusion that the Governor's executive orders violated a statutory time limit. In the ensuing mandamus proceeding, the question before the Court was whether the preliminary injunction had been based on a fundamental legal error or whether the circuit court had acted outside the permissible range of discretion in granting it.

The Court held that the circuit court's preliminary injunction was based on a fundamental error because the circuit court's conclusion about the statutory time limit was incorrect. The Court explained that the Governor had issued the executive orders pursuant to ORS 401.165, which authorizes the Governor to declare a state of emergency. That statute is one of a series of statutes in ORS chapter 401, which concern states of emergency, ORS 401.165 to 401.236. The declaration of a state of emergency pursuant to ORS 401.165 gives rise to certain emergency powers. Those powers, which the legislature has granted to the Governor through statutes, include, but are not limited to, "all police powers vested in the state by the Oregon Constitution in order to effectuate the purposes of [chapter 401]." ORS 401.168(1). The term "police power" refers to "the whole sum of inherent sovereign power which the state possesses, and, within constitutional limitations, may exercise for the promotion of the order, safety, health, morals, and general welfare of the public." As the United States Supreme Court has held,

through the police power, a community can "protect itself against an epidemic of disease which threatens the safety of its members." In addition, the legislature has expressly provided in ORS 433.441(4) that, "[i]f 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," which include actions relating to public health emergencies.

Although there are many statutory and constitutional limits on the Governor's emergency powers during a state of emergency declared pursuant to ORS 401.165, a declared state of emergency is not subject to a time limit of certain number of days. Instead, the legislature has expressly provided, "The powers granted to the Governor by ORS 401.165 shall continue until termination of the state of emergency." ORS 401.192. It has also provided that either the Governor or the Legislative Assembly may terminate the state of emergency. ORS 401.204 states, "(1) The Governor shall terminate the state of emergency by proclamation when the emergency no longer exists, or when the threat of an emergency has passed. (2) The state of emergency proclaimed by the Governor may be terminated at any time by joint resolution of the Legislative Assembly."

A statute in a different chapter, ORS chapter 433, provides that a different type of emergency proclamation, one for a "public health emergency" under that same chapter, expires no later than 28 days from the day it is proclaimed. ORS 433.441(5). The circuit court had relied on that statute in determining that the Governor's executive orders had expired, but the Court explained that, contrary to that conclusion, the challenged orders were not subject to that time limit.

ORS chapter 433 contains a series of statutes that concern public health emergencies, ORS 433.441 to 433.452. The legislature has specifically provided 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. 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." ORS 433.441(4).

The Court explained that the legislature enacted ORS 433.441 to 433.452 to give the Governor the option of declaring a public health emergency as an alternative to declaring a state of emergency under ORS chapter 401. ORS 433.441(1) authorizes the Governor to proclaim a state of public health emergency. Such a proclamation gives rise to lesser emergency powers than a declaration of a state of emergency pursuant to ORS 401.165 and is subject to the 28-day time limit under ORS 433.441(5). But, by its terms, that time limit applies only to "[a] proclamation of a state of public health emergency." Moreover, the Court explained, related statutes and the legislative history of the time limit show that the legislature did not intend the time limit to affect the duration of, or the Governor's powers during, a state of emergency declared pursuant to ORS 401.165. Therefore, the Court held, the circuit court had erred in concluding that the Governor's

executive orders were subject to the time limit under ORS 433.441(5).

In addition, the Court confirmed that the circuit court had correctly rejected plaintiffs' alternative theory for invalidating the Governor's executive orders -- that the state of emergency that had been declared necessarily was subject to the time limit on a "catastrophic disaster" declared under Article X-A of the Oregon Constitution. Finally, the Court noted that it would not address issues pertaining to plaintiffs' constitutionally protected religious freedoms. It explained that plaintiffs had requested the preliminary injunction based on their claim that the Governor's orders had expired -- as evidenced by the fact that they sought to enjoin all of the orders, not just those that they identified as affecting their religious liberties -- and that was the claim on which the circuit court granted the preliminary injunction.

Accordingly, the Court determined that the circuit court had erred when it granted the requested preliminary injunction on the theory that the Governor's executive orders were subject to the statutory time limit set out in ORS 433.411(5). In light of that error, the Court concluded that the preliminary injunction must be vacated, and it ordered the immediate issuance of a peremptory writ of mandamus to that effect.

Justice Christopher L. Garrett filed an opinion concurring in the judgment, in which Justice Thomas A. Balmer joined. He explained that he agreed with the Court's conclusion that the circuit court's preliminary injunction must be vacated, but he would have reached that result by holding that the circuit court's order exceeded its permissible range of discretion under the traditional equitable factors applicable to a request for preliminary injunctive relief. Justice Garrett emphasized that the circuit court erred in failing to give sufficient attention to the Governor's role, in emergency situations, in determining what is in the public interest.