

DEREK LINDOO,
BRANDON WIDIKER,
and JOHN KRAFT

Case No: 20-CV-219

Plaintiffs,

v.

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

Defendant.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR A TEMPORARY INJUNCTION

INTRODUCTION

The Wisconsin Supreme Court recently held that “there is no pandemic exception ... to the fundamental liberties that the Constitution safeguards.” *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 53, 391 Wis. 2d 497, 531, 942 N.W.2d 900, 917 (quoting U.S. Department of Justice, Statement of Interest, *Temple Baptist Church v. City of Greenville*, No. 4:20-cv-64-DMB-JMV (N.D. Miss. April 14, 2020), ECF No. 6). Concurring, Justice Rebecca Grassl Bradley wrote that “fear never overrides the Constitution.” *Id.* at ¶ 145 n.11. In this case, Governor Tony Evers has declared a second and now a third state of emergency based upon for the same underlying public health problem – the COVID 19 pandemic.¹ If these orders are allowed to stand, the state of Wisconsin will have spent over 170 days and counting under a state of emergency allowing the

¹ The Plaintiffs are filing an amended complaint contemporaneously with the filing of the motion for a temporary injunction. The amended complaint adds allegations that challenge Defendant Evers’ third declaration of a state of emergency in Executive Order #90 issued on September 22, 2020.

Governor to rule by decree, authorizing him to issue “any order” said to be necessary for “the protection of persons or property.”

But that’s not how the law works. The extraordinary powers granted when the Governor declares an emergency come with an expiration date. Wis. Stat. § 323.10 allows the Governor to “issue an executive order declaring a state of emergency related to public health for the state or any portion of the state ...,” but it limits the duration of such an emergency, specifically stating that “[a] state of emergency **shall not exceed 60 days**, unless the state of emergency is extended by joint resolution of the legislature.” (Emphasis added). Under the statute there is one, and only one, way for the state of emergency to ever exceed 60 days – and that is by joint resolution of the Legislature. No such resolution has been passed.

Were the Governor’s emergency powers not limited in this way such that he or she could make law by “order” over an indefinite period, they would violate the state Constitution. Wis. Const., Art. IV, § 1 (“The legislative power shall be vested in a senate and assembly.”)² But, contrary to the plain wording of the statute and this constitutional limitation, Defendant Evers contends that he has the power to extend the state of emergency indefinitely by simply declaring a second and third emergency (and presumably even a fourth or tenth) relating to the same public health problem – namely COVID-19. If a Governor is allowed to declare emergencies arising from the same state of affairs in series – one after another – then the pandemic – or any other emergency – will have been permitted to override the rule of law and our constitutional separation of powers.

Defendant Evers issued Executive Order #72 on March 12, 2020, declaring a state of emergency related to the COVID-19 pandemic. That state of emergency expired May 11, 2020.

² This implies that the Legislature may neither acquiesce to a state of emergency extending more than 60 days or itself extend an emergency indefinitely. The Legislature may not simply give its power away. See *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717, 718 (1931).

During this period, COVID-19 did not go away. In fact, there were more new cases diagnosed of COVID-19 on May 11, 2020 (199 cases) than there had been on March 16, 2020 (15 cases)³.

However, Governor Evers never asked the legislature to extend the emergency and it did not do so. Instead, faced with expiration of the emergency in late April and wishing to extend the “Safer at Home” order without legislative approval or input, the Governor attempted an end-around by invoking the powers granted to the Department of Health Services under § 252.02. In *Wisconsin Legislature v. Palm, supra*, the Court blocked this work around, holding that extending the “Safer at Home” order under that section could only be done in part and only by rule-making. *Wisconsin Legislature v. Palm, supra*, at ¶3. After a cursory effort to make such a rule, the Governor gave up. Back then, he understood he had no power to declare a new COVID emergency or extend the old one. He claimed to be “hamstrung”⁴ and that he doubted a mask mandate would hold up in court.⁵

But, then, on July 30, 2020, Defendant Evers “discovered” power that he had earlier recognized he did not have. He issued Executive Order #82, declaring a second state of emergency related to the COVID-19 pandemic and simultaneously issued Emergency Order #1 under his new emergency powers, requiring all Wisconsinites to wear masks (the “Mask Mandate”). The basis

³ Wisconsin Department of Health Services, *COVID-19: Wisconsin Cases*, <https://www.dhs.wisconsin.gov/covid-19/cases.htm> (last accessed September 28, 2020) (note that March 16 is the first date listed with daily count numbers on DHS’ data website), this data is also attached as Exhibit F to the amended complaint.

⁴ Randy Neupert, *Governor Evers continues calls for wearing masks in public as COVID-19 cases rise dramatically*, Wisconsin Public Radio (July 8, 2020) <https://www.wrn.com/2020/07/governor-evers-continues-calls-for-wearing-masks-in-public-as-covid-19-cases-rise-dramatically/> (“Evers says his Administration is exploring options to do so legally. Unfortunately the reality is that the Supreme Court ruling in the Republican lawsuit really hamstrung our ability to respond to this pandemic.”)

⁵ Mitchell Schmidt, *Momentum building among Wisconsin Democrats calling for statewide mask order*, Wisconsin State Journal (July 29, 2020) https://madison.com/wsj/news/local/govt-and-politics/momentum-building-among-wisconsin-democrats-calling-for-statewide-mask-order/article_ef22ad4f-f933-5de0-840c-4d1b44023dc5.html (“While Democratic Gov. Tony Evers has expressed doubt that a statewide mask mandate would hold up in court, momentum continues to build among state Democrats for a face-covering requirement in Wisconsin...Evers also reiterated on a Thursday call with reporters that his authority to impose a statewide order to limit the spread of COVID-19 — which has killed 906 Wisconsinites as of Tuesday — is likely limited by the state Supreme Court’s decision to toss out his stay-at-home order in May”)

for this emergency was the same as the one that had been declared in March – the COVID pandemic. But COVID-19 was not new. It was the basis for the March 12 order. No serious person could maintain that it had gone away or that its nature had changed. The rate of infection has gone up and down – but the pandemic that we had on July 28 and September 21 is indisputably the same one we had on March 12.

Emergency Order #82 and the accompanying Mask Mandate led to the filing of this lawsuit on August 25. Unfortunately, the Governor’s emergency order appears to have little to no effect on COVID-19 in Wisconsin. According to the Wisconsin Department of Health Services⁶, since the passage of the first mask mandate, the rate of increase in coronavirus cases has actually accelerated. In the first four months of the pandemic prior to the Mask Mandate on August 1st, Wisconsin had 54,002 cases. By September 22nd, the state had an additional 50,168 additional cases. There is little evidence that the mask mandate has achieved its intended goals. Indeed, rates of coronavirus in Wisconsin look very similar to neighboring states, regardless of any such mandates.⁷

In the four plus months since the expiration of the emergency declared on March 12, Defendant Evers did not attempt to promulgate and pass a mask requirement through legislation. Nor did he – or his cabinet secretaries – attempt to promulgate a mask requirement through the rulemaking process.

Plaintiffs brought this action seeking a declaration that Defendant Evers’ second state of emergency stemming from COVID-19 was an unlawful end-run around the statute. In light of

⁶ Wisconsin Department of Health Services, *COVID-19: Wisconsin Cases*, <https://www.dhs.wisconsin.gov/covid-19/cases.htm> (last accessed September 28, 2020), this data is also attached as Exhibit F to the amended complaint.

⁷ See Will Flanders, Don Daugherty and Rick Esenberg, *Legal Group WILL Opposes Pandemic*, Urban Milwaukee (September 18, 2020), <https://urbanmilwaukee.com/2020/09/18/op-ed-legal-group-will-opposes-pandemic/> (This lack of a discernible impact, moreover, predated the increase in positive tests associated with the return of college students to campus.)

Defendant Evers declaration of a new, third state of emergency (per Executive Order #90), Plaintiffs amended their complaint to challenge that new order as well, and now seek injunctive relief, requesting that the Court put the Plaintiffs in the same position they would have been in had Defendant Evers complied with state law, i.e., invalidating both the second and the third states of emergency because they extend the COVID emergency beyond sixty days without legislative approval.⁸ As discussed herein, Defendant Evers' second and third states of emergency are either unlawful under Wis. Stat. 323.10, or they render the statute an unconstitutional delegation of legislative power.

BACKGROUND

The Parties

Plaintiffs are each Wisconsin residents and taxpayers. Plaintiffs are subject to the mandates of both of Defendant Evers' Emergency Order #1, which were adopted based upon the powers purportedly activated by declaring a state of emergency in Executive Orders #82 and #90.

Defendant Tony Evers is sued in his official capacity as the Governor of Wisconsin. Defendant Evers issued Executive Order #82 declaring a second state of emergency related to COVID-19 and subsequently issued Emergency Order #1 requiring all Wisconsinites to wear masks. Defendant Evers also issued Executive Order #90 declaring a third state of emergency relating to COVID-19 and extending the Mask Mandate an additional 60 days.

Nature of the Complaint

The law is clear. In this context, it requires the Governor to determine whether a "public health emergency" exists. Wis. Stat. § 323.02(16) provides:

(16) "Public health emergency" means the occurrence or imminent threat of an illness or health condition that meets all of the following criteria:

⁸ Such a declaration would also invalidate Emergency Order #1 because that order is legally dependent on Executive Orders #82 and #90.

- (a) Is believed to be caused by bioterrorism or a novel or previously controlled or eradicated biological agent.
- (b) Poses a high probability of any of the following:
 - 1. A large number of deaths or serious or long-term disabilities among humans.
 - 2. A high probability of widespread exposure to a biological, chemical, or radiological agent that creates a significant risk of substantial future harm to a large number of people.

In Executive Order #72 (the March 12, 2020 Order), Defendant Evers determined that a public health emergency existed because “a novel strain of the coronavirus was detected, now named COVID-19, and it has spread throughout numerous countries including the United States.” Based on the existence of COVID-19, Defendant Evers declared a state of emergency and issued a variety of additional emergency orders based on that declaration. Plaintiffs do not contest the Governor’s determination that the COVID outbreak constitutes a “public health emergency.” But there is a hard limit upon the length of the legal state of emergency related to COVID-19 declared by Defendant Evers. It may not exceed 60 days. That limit may be exceeded only if the Legislature, in its sole discretion, extends the state of emergency by joint resolution.

This is true notwithstanding the course of the pandemic. No one knew then (or knows today) how long COVID-19 will continue to exist – it could last anywhere from weeks to years. Its severity may fluctuate, and indeed it has. But the Governor’s emergency powers are time-limited. They are designed to fulfill exigent needs; to permit action until such time as the Legislature can act or normal administrative processes can be undertaken. Thus, the statutory scheme grants the Governor extraordinary emergency powers for only 60 days. Beyond that, we return to regular constitutional order and the Governor must utilize the normal methods of governing: proposing legislation and/or directing the agencies that he controls to propose and promulgate administrative rules.

As set forth above, on March 12, 2020, Defendant Evers determined that COVID-19 created a public health emergency in Wisconsin. To deal with its effects, he declared a state of emergency. That state of emergency expired on May 11, 2020, and was not extended by the Legislature. As of May 12, 2020, the Governor could no longer deal with the problems caused by COVID-19 on a unilateral basis using emergency powers but instead from that day forward the Governor needed to either propose legislation (and persuade the Legislature to enact his proposals) or to direct one of the administrative agencies he controls to lawfully propose and promulgate a rule.

It is undisputed that following the expiration of Executive Order #72's state of emergency on May 11, 2020, the underlying public health emergency created by COVID-19 did not go away, or even abate, in Wisconsin. But Defendant Evers' power to deal with it unilaterally did go away. The Legislature, apparently satisfied that the response to COVID-19 should be managed at the local level (because COVID-19 affected different parts of the state differently), decided not to extend the state of emergency and in so doing denied Defendant Evers the emergency powers that would otherwise have been available. Local units of government were free to exercise their own powers to combat COVID-19. *See generally* Wis. Stat. §§ 252.03, 323.11. Many have done so.

But Defendant Evers appears to disagree. He would prefer to exercise unilateral power at the state level. And so he has tried to do so. Side-stepping the Legislature, on July 30, 2020, he issued Executive Order #82, declaring a second state of emergency based on COVID-19. Just as Executive Order # 72 (the March 12 order), was based on a finding that “a novel strain of the coronavirus was detected, now named COVID-19, has spread throughout numerous countries,” Executive Order #82 (the July 30 order) is expressly premised on that fact that “the COVID-19 pandemic has impacted the lives of Wisconsinites throughout the state” and that there had been a

“dramatic increase” and “drastic spike” in the number of infections. He then used those unilateral powers to issue Emergency Order #1, requiring the wearing of masks for all Wisconsinites. As noted above, the Mask Mandate has had no discernable impact, so still not satisfied with ruling on a unilateral basis for the 120 days provided by the March 12 and July 30 declarations, Defendant Evers issued a third emergency declaration based on COVID-19 on September 22. Just as Executive Order #82 (the July 30 order) was based on a finding that there had been a “dramatic increase” and “drastic spike,” Executive Order #90 is premised upon the fact that “Wisconsin is now experiencing unprecedented, near exponential growth of the COVID-19 pandemic.” Relying upon Executive Order #90, Defendant Evers also extended the Mask Mandate an additional 60 days.

Whether the approach adopted by the Legislature or the approach preferred by Governor Evers is correct is not at issue here. Right or wrong as a matter of policy, both the second and third states of emergency to deal with the COVID-19 pandemic are unlawful because they are based upon the same public health problem as the first state of emergency. The statutes do not allow the Governor to take such extraordinary actions without Legislative approval. The Defendant’s conduct has harmed the Plaintiffs.

I. THE PLAINTIFFS ARE ENTITLED TO A TEMPORARY INJUNCTION PROHIBITING THE DEFENDANT FROM IGNORING THE TIME LIMITS CONTAINED IN WIS. STAT. § 323.10.

The standards for the issuance of a temporary injunction are well-known. A movant must show: (1) a reasonable probability of success on the merits; (2) lack of an adequate remedy at law; (3) that the movant will suffer irreparable harm in the absence of an injunction; and (4) that a balancing of the equities favors issuing the injunction. See *Pure Milk Products Coop. v. National Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)). Wisconsin courts have sometimes also said that the purpose of the

proposed injunction must be to maintain the status quo and treat that consideration as an additional factor.⁹ *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 659, 883 N.W.2d 154, 161. Plaintiffs can meet this burden and the Court should grant the motion for a temporary injunction.

A. Plaintiffs have a reasonable likelihood of success on the merits

Wisconsin law plainly does not allow a Governor to proclaim a second or a third state of emergency related to the same public health problem, nor does the law allow a Governor to extend a state of emergency beyond the 60-day statutory window without legislative extension. In the alternative, if the emergency powers statute does work in the manner that Defendant Evers believes it does, then that statute lacks the required procedural safeguards and is unconstitutional.

i. The First State of Emergency

Executive Order #72, establishing the first state of emergency, proclaimed that “a public health emergency, as defined in Section 323.02(16) of the Wisconsin Statutes, exists for the State of Wisconsin.” And the order explained that because “a novel strain of the coronavirus was detected, now named COVID-19, and it has spread throughout numerous countries including the United States.”

After Defendant Evers declared the first state of emergency on March 12, 2020, he and his agencies issued some 36 emergency orders and various guidance documents designed to combat COVID-19 in Wisconsin. For example, on March 24, 2020, Defendant Evers directed Secretary-designee Andrea Palm of the Wisconsin Department of Health Services to issue Emergency Order #12 (the first “Safer at Home”) order. This order was of extraordinary scope, imposing travel and

⁹ The Plaintiffs do not believe that this actually is or should be a necessary factor for obtaining a temporary injunction and some courts do not mention it as a factor. See, e.g., *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 22, 301 Wis. 2d 266, 277, 732 N.W.2d 828, 834 (only factors listed are likelihood of success on the merits, a likelihood of irreparable harm, and an inadequate remedy at law).

gathering restrictions on individuals throughout Wisconsin and shuttering businesses all across the state.

COVID-19 did not go away during the 60-day period during which Defendant Evers could lawfully exercise emergency powers. It got worse. For example, on March 24, the day that the first “Safer at Home” order was issued, Wisconsin saw 41 new positive COVID-19 cases, and the 7-day average number of new cases was 55.¹⁰ On May 11, the day that the state of emergency expired, Wisconsin saw 199 new positive cases and the 7-day average number of new cases was 311.¹¹

Despite the worsening effects of COVID-19, Defendant Evers accomplished none of the steps necessary to create laws and lasting policies needed to combat the virus on a long-term basis. He simply issued his emergency orders all of which expired at the end of the 60 day limit on those orders.

ii. First Attempt to Extend the Emergency

As the 60-day expiration date of the state of emergency approached, instead of taking lawful steps to create necessary new laws or rules, Defendant Evers sought alternatives to extend the emergency measures that were undertaken at the state level.

On April 16, 2020, DHS Secretary-designee Palm issued a second “Safer at Home” order, Emergency Order #28, purporting to extend the order through the month of May, well after the expiration of the initial “state of emergency” declared by Defendant Evers. On April 20, 2020, Secretary-designee Palm issued a related order, Emergency Order #31, known as the “Badger Bounce Back Plan” which set metrics by which the state could “re-open” from the restrictions of

¹⁰ Wisconsin Department of Health Services, *COVID-19: Wisconsin Cases*, <https://www.dhs.wisconsin.gov/covid-19/cases.htm> (last accessed September 28, 2020), this data is also attached as Exhibit F to the amended complaint.

¹¹ *Id.*

the Safer at Home order. The Badger Bounce Back Plan, apparently, eliminated any specific “expiration date” of the Safer at Home order and instead tied its expiration to certain health metrics related to COVID-19.

In *Wisconsin Legislature v. Palm*, as discussed *supra*, the Wisconsin Supreme Court declared the second “Safer at Home” order unlawful, finding that it was not properly adopted, and subsequently the Badger Bounce Back plan which was tied to the Safer at Home order, was moot. Based upon *Palm*, Defendant Evers’ first attempt to continue to govern unilaterally failed. As noted above, Defendant Evers did not attempt to work with the Legislature or use the rule-making procedures identified in *Palm* to act. Each of those alternatives would have involved public input and working with the Legislature. The Governor refused.

iii. COVID-19 Continued

While the initial state of emergency expired on May 11, 2020, the underlying public health problem related to COVID-19, however, has never abated. On the day Executive Order #72 expired (May 11, 2020), the 7-day average number of new cases was 311, since then the 7-day average has waivered from a low of 265 on June 17, 2020, up to 930 on July 26, 2020, down to 665 on August 24, 2020, and then up to a high of 2,090 on September 27, 2020.¹² During this time the number of deaths from COVID-19 has remained steady.¹³ It is beyond dispute that the underlying public health concern related to COVID-19 never ended. While infection numbers have gone up and down over the course of the past 6 months, at no point did it completely abate. The impact of COVID-19 has varied by location in Wisconsin. Polk County has seen just 244 of the

¹² Wisconsin Department of Health Services, *COVID-19: Wisconsin Cases*, <https://www.dhs.wisconsin.gov/covid-19/cases.htm> (last accessed September 28, 2020), this data is also attached as Exhibit F to the amended complaint.

¹³ Wisconsin Department of Health Services, *COVID-19: Wisconsin Deaths*, <https://www.dhs.wisconsin.gov/covid-19/deaths.htm> (last accessed September 28, 2020), this data is also attached as Exhibit G to the amended complaint.

115,862 cases statewide, and has seen two total deaths.¹⁴ Thus, there has not been an end to the public health problem based upon which Defendant Evers declared the first emergency and then a new and second (and then a third) public health emergency sprang into existence. Rather, the second and third states of emergency are based upon the same underlying public health problem as the first state of emergency. The statute does not allow this.

iv. Second Attempt to Extend the State of Emergency

For awhile, as noted above, Defendant Evers conceded that his time to rule by decree was over. But, over time, this apparently chafed. Not content with allowing local governments to manage the COVID-19 response, and not content with the statutory and constitutional constraints on his ability to wield unilateral power, Defendant Evers sought to again re-activate his emergency powers. On July 30, 2020, Defendant Evers issued Executive Order #82, declaring a second state of emergency based on COVID-19 for the entire State of Wisconsin.

Executive Order #82 proclaimed that “a public health emergency, as defined in Section 323.02(16) of the Wisconsin Statutes, exists for the State of Wisconsin.” Executive Order #82 explained that this new state of emergency was necessary because “the COVID-19 pandemic has impacted the lives of Wisconsinites throughout the state.” He also added that the increase in cases was “dramatic” and “drastic” and that a “spike has occurred due to the unprecedented number of new confirmed COVID-19 cases.”

But the continuation of the pandemic, and even its increase, does not allow Defendant Evers to exercise unilateral emergency powers for more than the 60 days permitted under § 323.10. If he were permitted to issue serial orders one after another or even serial orders separated in time, the 60-day limit in the statute would be meaningless.

¹⁴ Wisconsin Department of Health Services, *COVID-19: County Data*, <https://www.dhs.wisconsin.gov/covid-19/county.htm> (last accessed September 28, 2020), this data is also attached as Exhibit H to the amended complaint.

v. Third attempt to extend the state of emergency.

During this unlawful extension of the state of emergency lasting from July 30 to September 22, COVID-19 did not go away. It got worse. As noted, *supra*, DHS data shows that in the first four months of the pandemic prior to the Mask Mandate on August 1st, Wisconsin had 54,002 cases. By September 22nd, the state had an additional 50,168 additional cases. The number of infections and the rate of positive tests have both increased.

On September 22, 2020, prior to the expiration of Executive Order #82, Defendant Evers issued Executive Order #90 declaring a *third* state of emergency arising from the COVID-19 pandemic. In declaring the third state of emergency Defendant Evers declared a new state of emergency was necessary because “Wisconsin is now experiencing unprecedented, near exponential growth of the COVID-19 pandemic.”

vi. Executive Orders #82 and #90 Violate Wis. Stat. § 323.10

Wis. Stat. § 323.10 does not allow for unilaterally extended states of emergency in Wisconsin to combat a public health emergency. The Governor is empowered to declare one, and only one, state of emergency to deal with a public health emergency on his own. During the 60-day period of that state of emergency the Governor has certain extraordinary powers but he cannot continue to exercise those powers indefinitely through the declaration of serial emergencies without the Legislature’s approval. There is no “it still exists” or “it got worse” exception to the statute. The only exception to the 60-day limit on a Governor’s ability to unilaterally act under emergency powers is if the Legislature in its sole discretion allows for an extension through the adoption of a joint resolution. Thus, once he declared an emergency on March 12, 2020, in addition to the 36 unilateral Emergency Orders that he issued, Defendant Evers should have taken additional steps to make sure that whatever laws or rules he thought were necessary to deal with

COVID-19 on a long-term basis were lawfully enacted or rules promulgated. His failure to do so does not grant him the power to continue to govern unilaterally. If it did, that would be a perverse incentive for the Governor.

“[S]tatutory interpretation ‘begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.’” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (internal citations omitted). Here, the meaning of Wis. Stat. § 323.10 is plain, and the duty and powers of the Governor and Legislature under that statute are clear. A Governor may not unilaterally extend a state of emergency beyond 60 days without legislative approval. A joint resolution of the Legislature is the only exception to the 60-day expiration requirement.

Furthermore, in providing for a *single* way to extend a state of emergency related to public health beyond an initial 60 days, the law excludes any other options. *Benson v. City of Madison*, 2017 WI 65, ¶ 32, 376 Wis. 2d 35, 897 N.W.2d 16 (“Under the well-established canon of *expressio unius est exclusion alterius* (the expression of one thing excludes another), where the Legislature specifically enumerates certain exceptions to a statute, [courts] conclude , based on the rule, that the Legislature intended to exclude any other exception.”) (quoting *State v. Delaney*, 2003 WI 9, ¶ 22, 259 Wis. 2d 77, 658 N.W.2d 416). That is, because there is only one exception in the statute, there can be no “it still exists” or “it got worse” exception (or any other exception) to the 60-day state of emergency maximum.

If Defendant Evers can declare multiple and serial states of emergency for a single public health problem by stating that the continuation of – or fluctuations in - a public health problem is a new “emergency,” then the 60-day limitation in Wis. Stat. § 323.10 is meaningless and is mere surplusage. Such a reading of the statute is unreasonable and should be avoided. See *Kalal, supra*

at ¶ 46 (“Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.”). Defendant Evers’ contention that he can declare serial states of emergency rewrites the statute by eliminating the 60-day limit and inserting a provision that allows the Governor to declare a state emergency (and assert unilateral emergency powers) for as long as he thinks – or can claim – there is an emergency. The Legislature never gave the Governor such over-arching authority to assert (and usurp) legislative power. Executive Orders #82 and #90 violate Wis. Stat. § 323.10.

The fact that only the Legislature may extend the sixty day emergency precludes a reading that the time limit merely requires a “fresh” declaraton from the Governor every sixty days. To read the statute in a way that allows the Governor to declare emergencies in series would be to transform our system of government into one in which the Governor may indefinitely suspend our constitutional order by declaring multiple states of emergency. The powers conferred by Wis. Stat. § 323.10 are, as noted above, “extraordinary.” To permit the Governor to issue “any order” said to be necessary for “the protection of persons or property” suspends the vesting of legislative authority exclusively in the Legislature. Wis. Const., Art. IV, § 1. It may suspend the operation of chapter 227. These powers are not limited to public health emergencies but to a “disaster or the imminent threat of a disaster” Wis. Stat. § 323.10. In short, a Governor could claim that an “emergency is almost anything – racism, urban unrest, climate change, illegal immigration. Even if such a scheme would be constitutional, such an extraordinary state of affairs would have to be more clearly stated.

- vii. **Interpreting Wis. Stat. § 323.10 to allow Defendant Evers to govern the State unilaterally for an indefinite period of time through serial emergency orders would violate the Wisconsin Constitution.**

But such expansive authority to declare multiple emergencies would not be constitutional. Wisconsin's Constitution clearly vests the legislative power in the Senate and Assembly. Wis. Const. Art. IV, §1. The Legislature may not simply give that power away. *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717, 718 (1931). The constitutional separation of powers is not for the benefit of those who hold those powers; it is the bedrock of liberty. *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, ¶45 (plurality opinion). For that reason, each branch must “jealously guard” and exercise its constitutional responsibilities. *Gabler v. Crime Victims Rights Board*, 2017 WI 67, ¶31.

In particular, courts “must be assiduous in patrolling the borders between the branches. This is not just a practical matter of efficient and effective government. We maintain this separation because it provides structural protection against depredations on our liberties.” *Tetra Tech EC, Inc.*, 2018 WI 75, ¶ 45 (plurality opinion).

Courts in Wisconsin have permitted the delegation of legislative power to the executive so long as “the purpose of the delegating statute is ascertainable and there are procedural safe-guards to insure that the board or agency acts within that legislative purpose,” *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971). Courts even approve “broad grants of legislative powers” where there are “procedural and judicial safeguards against arbitrary, unreasonable, or oppressive conduct of the agency,” *Westring v. James*, 71 Wis. 2d 462, 468, 238 N.W.2d 695 (1976) (emphasis added) (citing *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 158 N.W.2d 306 (1968)). While “the nature of the delegated power still plays a role in Wisconsin's non-delegation doctrine,” “[t]he presence of adequate procedural safeguards is the paramount

consideration.” *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, ¶¶79 & n.29; see also *Id.* at ¶¶54-55.¹⁵

Wis. Stat. § 323.10 is a delegation from the Legislature to the Governor to determine when a “public health emergency” or other emergency exists and to unilaterally exercise emergency powers for up to 60 days during that emergency. For such a delegation to be allowed under the Wisconsin Constitution, this Court should look for “the presence of adequate procedural safeguards” as its paramount consideration. *Id.*

Here, there is a procedural safeguard in place: namely, the fact that a state of emergency expires after 60 days and may only be extended by an affirmative vote of the Legislature. That is the underlying procedural safeguard which ensures the Governor does not overstep his delegated authority. The Legislature has said that such emergency powers are available for 60 days. During that 60-day window a Governor is free to exercise his emergency powers to deal with the emergency but if he is doing his job properly he should also develop a plan for dealing with the public health problem after the expiration of the 60-day period. Among other things, he could propose specific legislation to the Legislature to deal with the problem on a long term basis, or, he could instruct one of his agencies to promulgate lawful administrative rules to deal with the problem. If he thought he needed more time to do these things he could also ask the Legislature to extend the state of emergency past 60 days. But the thing he cannot do is the one one thing he has actually done – unilaterally extend his emergency powers. Without this procedural safeguard,

¹⁵ Wisconsin’s current caselaw on the nondelegation doctrine focuses on procedural safeguards on the delegated power. In the past, Courts in Wisconsin have gone further and enforced substantive safeguards. See, e.g., *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N.W. 738, 741 (1896) (“[A] law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the . . . delegate of the legislature”); see also *State v. Burdge*, 95 Wis. 390, 70 N.W. 347, 350 (1897) (prior to making rules and regulations “there must first be some substantive provision of law to be administered and carried into effect.”). While Plaintiff understands this Court cannot overrule current caselaw, if this case ultimately makes it to the Supreme Court of Wisconsin, Plaintiffs do intend to argue for a return to such substantive protections.

a Governor could simply extend a state of emergency in perpetuity if he or she wanted, or stack states of emergency on top of each other taking up emergency powers whenever he or she so wished and for as long as he or she liked. That's not what the statute says, and it is not what our Constitution allows.

Although the Legislature is able to *rescind* a unilaterally extended state of emergency – that provision is not an adequate procedural safeguard. Indeed, there will be times when the two houses of the Legislature are controlled by different parties, with the Governor of the same party as one of them – in such a case it might not be possible (due to partisan politics) for the Legislature to rescind such a state of emergency and then the State of Wisconsin would be subject to unilateral rule by the Governor for whatever period of time the Governor deemed appropriate. Thus, the ability to “rescind” the state of emergency is no protection at all – it is the statutory requirement that the state of emergency *expire* after 60 days, and the provision that only the Legislature may extend it, that provides procedural safeguards sufficient to allow such an enormous delegation of legislative power to the Governor.

To the extent that the Court determines that Wis. Stat. § 323.10 allows the Governor to either unilaterally extend a state of emergency beyond 60 days, or to declare subsequent states of emergency for the same underlying public health problem – as Defendant Evers has done here – then Wis Stat. § 323.10 is unconstitutional as an invalid delegation because it lacks adequate procedural safeguards.

viii. Disallowing Circumvention of Constitutional and Legislative Protections is the norm in Wisconsin and Elsewhere

Emergency powers are of limited duration, and any attempt to go around those limitations and exercise those emergency powers should be disallowed. We see this in other areas of Wisconsin law where emergency powers are utilized by state agencies. For example, some state

agencies are empowered to adopt administrative rules according to the provisions of Chapter 227. In certain emergency situations, those agencies may avoid some of the stringent requirements of Chapter 227 and promulgate an “emergency rule.” However, such rules are *only* valid for 150 days *unless extended by the Legislature*. Wis. Stat. § 227.24. A formal Attorney General opinion makes clear that this limitation is a “clear expression of intent that the effectiveness of an emergency rule may not be extended beyond” the initial effective period simply by re-filing it. 62 Atty. Gen 305, 308. The Attorney General further explained that this initial period of time “was intended to afford an agency the requisite time to adopt rules pursuant to the normal procedures of ch. 227, if the agency perceives that what begins as an emergency presents the need for rules of lasting effect.” *Id.* The application of this reasoning to the Wis. Stat. § 323.10 60-day limitation produces an identical outcome. The 60-day period is intended to afford the Governor enough time to work with the Legislature to either extend the period or to adopt legislation to deal with the public health emergency, or even for his agencies to adopt rules to deal with the crisis. The Governor’s unpreparedness and unwillingness to work with others does not negate the 60-day statutory limitation.

This reading of the law is consistent with how courts in other states have held on the use of emergency powers as well. See *Enberg v. Bonde*, 331 N.W.2d 731, 740 (Minn., 1983) (finding that serial emergency confinements of an individual beyond the 72 hours allowed by statute are impermissible); see also *All States Health Sys. v. Tex. Workers’ Comp. Comm’n*, 125 S.W.3d 96, 103 (Tex. App. 2003) (finding that expiration limits for emergency rulemaking “prevents administrative agencies from using the less stringent requirements for adopting an emergency rule and then prolonging the application of that rule *ad infinitum*” (emphasis original)); *District of Columbia v. Wash. Home Ownership Council, Inc.*, 415 A.2d 1349, 1358 (D.C. 1980); *id.* at 1367

(Gallagher, J., concurring) (noting that “indefinite successive utilization of emergency legislation on the same problem would enable the Council to avoid the Congressional supervision which is crucial to the statutory scheme”).

No matter how Defendant Evers attempts to present the second and third states of emergency, they are clearly an attempt to work around the statutory 60-day limitation, and are unlawful.

B. Plaintiffs have no other adequate remedy at law

To obtain a temporary injunction, a movant must also “show that no adequate legal remedy is available, i.e., that the injury cannot be compensated by damages.” *Kohlbeck v. Reliance Const. Co.*, 2002 WI App 142, ¶ 13, 256 Wis. 2d 235, 246, 647 N.W.2d 277, 282, *Allen v. Wisconsin Public Service Corp.*, 2005 WI App 40, ¶ 30, 279 Wis. 2d 488, 505, 694 N.W.2d 420, 429 (“Irreparable harm is that which is not adequately compensable in damages”).

There are no other legal remedies available to the Plaintiffs. The Plaintiffs do not seek and cannot obtain damages to remedy the wrong here. The only way to right this wrong is for this Court to declare Defendant Evers’ declaration of states of emergency in Executive Orders #82 and #90 are unlawful and to issue an injunction prohibiting their enforcement absent legislative approval, as required by statute.

C. Plaintiffs will suffer irreparable harm

“Injunctions are not to be issued without a showing of ... irreparable harm but at the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.” *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 314 (1977).

Here, absent a temporary injunction Plaintiffs will continue to be subjected to an unlawful executive order, and will be forced to comply with the existing emergency order based upon it as well as any other future emergency order under its authority. Without a temporary injunction, the Plaintiffs' request for relief is rendered futile. Plaintiffs will thus suffer irreparable harm without such an injunction.

D. A balancing of the equities favors issuing the injunction

When considering whether to issue a temporary injunction, “competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction.” *Pure Milk Products Co-op*, 90 Wis. 2d at 800.

Clearly, the Governor has a substantial interest in effectively combatting COVID-19 in Wisconsin. However, Plaintiffs as residents and taxpayers have at least as substantial of an interest in ensuring government officials act within the four corners of the law. Ignoring or overriding the clearly stated laws of our state violates our constitutional design. Defendant Evers' second and third states of emergency declarations are in violation of the law, and when balancing the equities, this Court should conclude that the equities favor the Plaintiffs and a temporary injunction is appropriate.

E. A temporary injunction is necessary to preserve the status quo

As noted supra, courts sometimes look to maintaining the status quo as an additional injunction factor. In the context of a temporary injunction, the *status quo* does not mean the facts as they exist on the date of the request for an injunction, but rather it means the facts as they existed prior to the defendant's illegal conduct. For example, in *Shearer v. Congdon*, 25 Wis. 2d 663, 131 N.W.2d 377 (1964), one of the seminal Wisconsin cases setting forth the standards for a temporary

injunction, the plaintiff sought an injunction requiring the owner of property to keep a private drive-way open to the plaintiff based on the plaintiff's claim of a prescriptive easement.

The facts of *Shearer v. Congdon* were that the plaintiff had historically had access to the road but on February 6, 1964, the defendants installed a gate to prevent the plaintiff and the public from using the road. The trial court issued an injunction on March 17, 1964 (more than a month after the gate was in place) requiring the defendants to keep the road open to the plaintiff. *Shearer*, 25 Wis. 2d at 665.

The state of the facts as of March 17th (the date of the injunction) was that the defendant had installed the gate but the court did not find that the facts on March 17th constituted the "status quo" but rather that the state of facts prior to the defendants' alleged unlawful conduct of installing the gate was the "status quo."

Here, by analogy, the *status quo* consists of the state of facts that would exist if Defendant Evers followed the law and not issued the second (and a third), unlawful, states of emergency. As set forth above, there are several lawful routes that Defendant Evers could have taken (or can take) to achieve his policy objectives lawfully – he has failed to do so. The status quo in this case is that there is no active lawful state of emergency related to public health regarding the COVID-19 pandemic in Wisconsin. But Defendant Evers is destroying the status quo by refusing to follow the law.

CONCLUSION

Plaintiffs have met their burden to obtain a temporary injunction. The Court should grant the motion, declare that Executive Orders #82 and #90 (along with Emergency Order #1 – the Mask Mandate) are invalid and void, and enjoin the enforcement of any of those orders.

Dated this 28th day of September, 2020.

Respectfully Submitted,

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