IN THE SUPREME COURT OF WISCONSIN
APPEAL NO. 2020AP765-OA

WISCONSIN LEGISLATURE,

Petitioner,

v.

ANDREA PALM, JULIE WILLEMS VAN DIJK, AND NICOLE SAFAR, IN THEIR OFFICIAL CAPACITIES AS EXECUTIVES OF WISCONSIN DEPARTMENT OF HEALTH SERVICES,

Respondents.

On Emergency Petition for Original Action

RESPONSE OF INTERVENORS MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, MADISON TEACHERS INC., SEIU HEALTHCARE WISCONSIN, AND AMALGAMATED TRANSIT UNION LOCAL 998 TO LEGISLATURE'S PETITION FOR ORIGINAL ACTION AND MOTION FOR TEMPORARY INJUNCTION

PINES BACH LLP
Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
Christa O. Westerberg, SBN 1040530
122 West Washington Ave, Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
lpines@pinesbach.com
tpackard@pinesbach.com
cwesterberg@pinesbach.com

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INTRODUCTION

Intervenors Milwaukee Teachers' Education Association, Madison Teachers Inc., SEIU Healthcare Wisconsin, and the Amalgamated Transit Union Local 998 represent a broad group of workers at high risk for exposure to the COVID-19 virus. They are the ones who deserve "a seat at the table" because they are on the frontlines of this public health battle.

They do not consider the social distancing regulations found in Order 28[1] to be the work of a "czar-like" nemesis failing to recognize the serious economic consequences resulting from the measures necessary to protect the public from the most dangerous virus and pandemic that has stricken our State and Nation in over 100 years.

[1] Intervenors refer to the challenged Order, Department of Health Services' April 16, 2020 Emergency Order 28, as "Order 28." This response also refers to other Department executive orders by their number. Most are included with the Affidavit of Ryan Walsh. Those that are not, as well as additional authorities cited in this response, are provided in the accompanying Affidavit of Counsel for Intervenors.

These workers are among the hardest hit populations in the State of Wisconsin due to their frequent contact with other people, including people sick with the virus. They are at risk of losing their lives, not just their livelihoods. They depend on the employees of the Division of Public Health in the Department of Health Services, who are closely connected to the Centers for Disease Control, the World Health Organization, and an organized network of local public health departments, to protect them. They want this public health emergency to be managed by people who every single day worry about and pay attention to communicable diseases, how to prevent their spread, and how to treat them.

The Court should reject the Legislature's petition for original action and its motion for a temporary injunction.

FACTS

The onset of the public health emergency.

In December 2019, a novel strain of coronavirus was detected, now named COVID-19. Order 28 at 1. By January 30, 2020, the World Health Organization had declared COVID-19 to be a Public

Health Emergency of International Concern. (*Id*.) As the Legislature acknowledges, by February 2020, COVID-19 was recognized to be spreading throughout the United States. (Leg. Memo.[2] at 12.) As the Legislature further acknowledges, in response to the growing and grave threat to the health of Wisconsin citizens, on March 12, 2020, Governor Evers issued Executive Order 72, declaring a state-wide public health emergency. (*Id*.) President Trump declared a National Emergency connected with COVID-19 on March 13, 2020. (Order 28 at 1.)

Wisconsin government's reaction to the public health emergency.

At the Governor's direction and under the authority of Wis. Stat. § 252.02(3), part of the authority under which Order 28 was issued, the Department of Health Services ("DHS" or the "Department") followed Governor Evers' emergency declaration with orders of increasing limitations on social interaction, as public health needs became clear. Recognizing schools as one of the most

[2] This response refers to the Memorandum in Support of Legislature's Emergency Petition for Original Jurisdiction and Emergency Motion for Temporary Injunction, filed on 4/21/20, as "Leg. Memo."

dangerous sites for transmission of COVID-19, DHS first closed schools to pupil instruction and extracurricular activities as "a reasonable and necessary step to prevent, suppress, and control this disease." Order 1. The Department next prohibited gatherings of 50 or more people, effectively closing theaters, concert venues, gyms, and other populous gathering places, with limited exceptions. Order 4. Next, DHS prohibited gatherings of 10 or more people, closing indoor shopping malls and effectively closing other businesses, including regular service in bars and restaurants, with limited exceptions, Order 5; DHS then restricted the number of staff and children present in child care settings. Order 6.[3] No one has challenged the Department's authority to issue any of these Orders.

On March 20, 2020, under that same authority, DHS issued Emergency Order 8 further restricting and regulating gatherings. Among other things, that Order reiterated the earlier ban on gatherings of 10 or more people, the closure of schools, and

[3] Wis. Dep't of Health Servs., Emergency Order #6: Restricting the Size of Child Care Settings, *available at* https://evers.wi.gov/Documents/COVID19/DHS%20Order6_3.18.2020.pdf.

limitations on child care facilities; imposed social distancing and other public health precautions for gatherings of fewer than ten people; closed hair salons, barber shops, and related service businesses; and encouraged businesses, non-profit entities, and government entities to implement and practice social distancing in their facilities, including remote working arrangements. Emergency Order 8 directed social distancing to the greatest extent practicable on mass transit systems. Like Emergency Orders 4, 5, 6, and 28, violations of Emergency Order 8 punishable by imprisonment, fines, or both pursuant to Wis. Stat. § 252.25. No one has challenged the legality of Emergency Order 8.

On March 24, 2020, under the authority of Wis. Stat. §§ 252.02(3) and (6) as well as additional powers, DHS issued the "Safer at Home" Order, Emergency Order 12, announcing the most restrictive public health measures in Wisconsin yet (though far less restrictive than in some other states and countries). At that time, despite lesser efforts at containing infection, the number of positive COVID-19 tests was doubling every 3.4 days in Wisconsin. Order 28

at 1. The Safer at Home Order continued many of the prior limitations on social interaction, and added another layer, directing everyone in Wisconsin to "stay at home" unless an exception in the Order applied. Order 12. Businesses were limited in their operations. Those deemed essential were still required to limit social contact and facilitate remote work; other businesses were still allowed to operate, but only to a limited extent ("Minimum Basic Operations"). No one has challenged the legality of that Order, either.

By April 16, 2020, evidence showed the restrictions in the Safer at Home Order were working to slow the spread of the virus: the doubling rate of positive COVID-19 tests in Wisconsin had slowed from 3.4 days to 12 days. At least 240, and as many as 1,400, Wisconsin deaths had been prevented as a result of the Safer at Home Order. Order 28. But with the Safer at Home Order set to expire on April 24 and COVID-19 continuing to spread, there remained a need to contain the rate of spread in light of health care capacity and the limited availability of testing, contact tracing, and personal protective equipment ("PPE"). To those ends, on April 16,

2020, DHS issued Order 28, directing that many restrictions in the Safer at Home Order continue for another month.

Mindful of the economic needs of Wisconsin and Wisconsinites, however, DHS lightened some restrictions affecting businesses, including by allowing non-essential businesses to carry out a broader array of operations, including remote work, deliveries, and curb-side pick-up if performed by one person at a time. *Id*. at 18. To encourage citizens to sew their own PPE, such as facemasks, arts and crafts stores are allowed more than one staff member to work at a time in order to fill orders for making PPE. *Id*. at 19. On April 20, 2020, DHS issued Emergency Order 31, establishing goals which, when achieved, would allow for further lifting of restrictions. A subsequent order, issued on April 27, 2020, lifted some restrictions.[4] Those orders have also not been challenged by anyone.

[4] Wis. Dep't of Health Servs., Emergency Order #34: Interim Order to Turn the Dial, *available at* https://content.govdelivery.com/attachments/WIGOV/2020/04/27/file_attachments/1436850/EMO34-SAHDialTurn.pdf

Although the Legislature does challenge the legality of Order 28, it has made no effort to exercise its own authority to pass any legislation that would address the defects it now finds in the Department's Order, or call an extraordinary session aimed at managing the unprecedented public health emergency that we are currently experiencing. It has also presented no evidence or argument of any sort demonstrating any effort on the Legislature's part to bring information to DHS or work with the administration in any way to address this crisis differently.

The current state of the public health emergency in Wisconsin and elsewhere.

COVID-19 presents truly unprecedented challenges worldwide. As of April 26, 2020, COVID-19 has spread to 213 countries and territories, including the United States. There have been more than 2,858,635 confirmed cases (up from about 500,000 a month before) and over 196,000 related deaths (up from fewer than

25,000 a month before).[5] The number of cases continues to grow, prompting local, state, federal, and international health officials and organizations to issue directives and recommendations that all individuals practice social distancing and refrain from meeting in large or even small groups, with the aim of slowing the spread of the disease throughout communities.

Wisconsin is at a critical stage of the most extreme public health and safety emergency that anyone in the state has likely experienced. Not since the Spanish flu pandemic of 1918, which infected 103,000 and killed 8,459 Wisconsinites, has Wisconsin experienced such a threat to the public safety. As of Monday, April 27, 2020, 6,081 Wisconsinites have tested positive for COVID-19, 1,415 have been hospitalized, and 281 have died.[6]

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[5] World Health Organization, Coronavirus disease (COVID-19) Pandemic, https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (last visited April 27, 2020).

[6] Wis. Dep't of Health Services, COVID-10: Wisconsin Summary Data, https://www.dhs.wisconsin.gov/covid-19/data.htm (last viewed April 27, 2020).

National trends from the Centers for Disease Control show that the infection curve is continuing to climb.[7] During the four-week period between March 29, 2020, and April 26, 2020, confirmed cases of COVID-19 across the United States grew from 140,904 to 957,875. *Id.* In Wisconsin in the same four-week period, the number of confirmed cases grew more than tenfold, from 1,112 cases on March 29, 2020, to 5,911 cases on April 26, 2020.[8]

Scientific evidence regarding transmission prevention and risk.

Since the March 24 Safer at Home Order, the threat to public safety has been recognized as even more serious than thought at that time, with the U.S. Centers for Disease Control and Prevention ("CDC") advising that "a significant portion of individuals with coronavirus lack symptoms ('asymptomatic') and that even those

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[7] Centers for Disease Control and Prevention, COVID-19 cases in the United States by date reported, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited April 27, 2020).

[8] *See* Wis. Dep't of Health Servs., Cumulative total and newly reported COVID-19 cases by date confirmed, https://www.dhs.wisconsin.gov/covid-19/index.htm (last visited April 27, 2020).

who eventually develop symptoms ('pre-symptomatic') can transmit the virus to others before showing symptoms."[9] This means that the deadly coronavirus tearing through Wisconsin can be transmitted from person to person merely by breathing in the same room as someone showing no symptoms. There is no dispute that "**[t]he best way to prevent illness is to avoid being exposed to this virus**" and that the best way to do that is by putting "**distance between yourself and other people**" (original emphasis).[10]

A study published last week found that children are at a similar risk of infection as the general population, though most children infected with COVID-19 exhibit mild symptoms or are asymptomatic. The researchers recommended that these findings be considered in analyses of transmission and control. Specifically, they hypothesized that "children, even when presenting with mild

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[9] *See* Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), Recommendations for Cloth Face Covers, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html (last visited April 27, 2020).

[10] Centers for Disease Control and Prevention, How to Protect Yourself & Others https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited April 27, 2020).

symptoms or are asymptomatic, might be a source of viral transmission. This underscores the importance of extensive preventative strategies that include quarantining and limitation of playing and school activities."[11]

In addition, the CDC identifies older adults and those of all ages with certain underlying health conditions—groups that are well-represented in Intervenors' membership and their families—as having a higher risk of developing more serious complications from COVID-19.[12] The CDC recommends that older adults stay home as much as possible during times of spread.[13]

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[11] Riccardo Castognoli, MD, Martina Votto, MD, Amelia Licari, MD, et al., Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Infection in Children and Adolescents, A Systematic Review, JAMA Pediatr., published online April 22, 2020, https://jamanetwork.com/journals/jamapediatrics/fullarticle/2765169.

[12] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), People Who Are at Higher Risk, https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html (last visited April 27, 2020).

[13] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), Older Adults, *available at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html (last visited April 27, 2020).

Continuing many of the measures described in Order 12, while slowly allowing more interaction, as Orders 28, 31, and 34 do, is in conformance with the guidance of the President of the United States.[14] Among other things, that guidance says "[i]n states with evidence of community transmission, bars, restaurants, food courts, gyms, and other indoor and outdoor venues where groups of people congregate should be closed." That is precisely what Emergency Order 28 does. The coronavirus has spread throughout the state, having been identified in 66 of 72 Wisconsin counties. Order 34.

The measures in Emergency Orders 28 and 31 are supported by sound public health practice. For instance, the University of Washington's Institute for Health Metrics and Evaluation currently estimates that the earliest date after which relaxing social distancing may be possible in Wisconsin, with containment strategies that

[14] The President's Coronavirus Guidelines for America, https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf (last visited Apr. 27, 2020).

include testing, contact tracing, isolation, and limiting gathering size, is May 21, 2020.[15]

STANDARD OF REVIEW

As the Legislature is forced to admit, "there is no decision below for this Court to review." (Leg. Memo. at 22.) There are only legal standards that apply to the Legislature's requested relief. These are discussed below.

ARGUMENT

The Court should deny the Legislature's Petition for Original Action because:

- the Legislature lacks authority to bring this action;
- the Petition is procedurally defective; and
- the Petition does not meet this Court's criteria for an original action.

Section I, *infra*. The Court should also deny the Legislature's emergency request for a temporary injunction. It is unlikely to succeed on its merits because Order 28:

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[15] Institute for Health Metrics and Evaluation, University of Washington, Current social distancing assumed until infections minimized and containment implemented: Wisconsin, https://covid19.healthdata.org/united-states-of-america/wisconsin (last visited April 27, 2020).

- is not a rule;
- is fully within the Department's legal authority; and
- is not arbitrary and capricious.

The Legislature also cannot satisfy the remaining criteria for an injunction—a fact-intensive inquiry not well-suited for resolution in this Court. Section II, *infra*.

The Legislature's attempt to pit public health against Wisconsin's economy in an extraordinary legal filing demonstrates that the State's response to COVID-19 should not be a political football. The pandemic is instead a matter of life-and-death that has and continues to be best managed by experts in the Department, using the broad authority the Legislature has granted them in Wis. Stat. ch. 252.

I. The Court should deny the Petition for Original Action.

A. The "Wisconsin Legislature" cannot be a party in a lawsuit absent constitutional or statutory authorization.

Article IV, Section 1 of the Wisconsin Constitution, entitled "Legislative power," states: "The legislative power shall be vested in

a senate and assembly." The balance of Article IV, Sections 2 through 34, do not grant the Legislature the power to file lawsuits, and it has not pled that it has any such power.

Chapter 13 of the Wisconsin Statutes, entitled "Legislative," elucidates the powers of the Legislature. Like the Constitution, it does not grant the Legislature authority to initiate lawsuits. *See Schuette v. Van De Hey*, 205 Wis. 2d 475, 481, 556 N.W.2d 127, 129 (Ct. App. 1996). "Legislative power… is the authority to make laws, but not to enforce them…"). The Legislature is not even allowed to intervene in a civil lawsuit in its own name. Such intervention may be done only by the joint committee on legislative organization on behalf of the Legislature in the limited circumstances set out in Wis. Stat. § 13.365(3). With the exception of *Legislature v. Evers*, 2020AP608-OA, there has never been a case initiated by the Wisconsin Legislature.[16] If the Legislature wants to be able to initiate lawsuits it must have legal authority to do so. It has none.

[16] That case, too, was brought on an Emergency Petition, and decided within hours of filing, in highly unusual circumstances. None of the parties or the Court raised or addressed the question of the Legislature's ability to bring lawsuits.

The Petition for Original Action does not allege by what authority the Wisconsin Legislature purports to submit the Petition. Moreover, there is nothing demonstrating that anyone has been authorized to act on behalf of the Wisconsin Legislature. The Court can take judicial notice of the fact that there is absolutely no record of the Wisconsin Legislature enacting a statute or even passing a joint resolution that directed that the Petition be filed. All the Court has before it is a petition, signed by attorneys who purport to represent the "Wisconsin Legislature," alleging that the "Petitioner is the Wisconsin Legislature, located at the Wisconsin State Capitol, Madison, Wisconsin, 53703." It does not allege what legal basis the attorneys have to file an action on behalf of the "Wisconsin Legislature." The reason is simple: there is none.

On that fundamental basis alone, the Court should reject the "Legislature's" Emergency Petition for Original Action.

B. Assuming, *arguendo*, that the "Legislature" has the capacity to file a Petition for Original Action, the Petition is procedurally defective.[17]

[17] There is no statutory basis for a party to file an "Emergency" Petition for Original Action. The proper procedure where there is an exigent circumstance is

The Petition challenges Order 28 on three separate grounds. However, the Legislature failed to comply with the procedural requirements in Wis. Stat. ch. 227 that are conditions precedent to bringing its claims.

1. The Legislature failed to meet the justiciability requirement for a declaratory judgment action.

The Legislature's first claim—that Order 28 is an invalid, unpromulgated rule—should have been brought as a declaratory judgment action under Wis. Stat. § 227.40 *et seq*. This statute provides "the exclusive means of judicial review of the validity of a rule or guidance document." Wis. Stat. § 227.40(1); *see also id*. (4)(a). The Petition should be dismissed for non-compliance with that provision alone. But, even if the Court were to allow this matter to proceed, its claim for declaratory judgment is non-justiciable.

Four factors of justiciability must be satisfied in order to seek a declaratory judgment under Wisconsin chapter 227:

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to file a Petition for Original Action with a motion to shorten the times for response in Wis. Stat. § 809.70(2).

> (1) a controversy in which a claim of right is asserted against one who has an interest in contesting it, (2) the controversy must be between persons whose interests are adverse, (3) the party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest, and (4) the issue involved in the controversy must be ripe for judicial determination.

Olson v. Town of Cottage Grove, 2008 WI 51, ¶ 29, 309 Wis. 2d 365, 749 N.W.2d 211.

The Legislature makes no attempt to show that it satisfies those criteria, let alone acknowledge the requirement of justiciability. In particular, the Legislature has not shown it has a legally protectible interest, i.e. that it has standing. *City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 228, 332 N.W.2d 782, 784 (1983). To establish standing, a party must demonstrate it has "a personal stake in the outcome" and it is "directly affected by the issue in controversy." *Planned Parenthood of Wis., Inc. v. Schimel*, 2016 WI App 19, ¶ 19, 367 Wis. 2d 712, 729, 877 N.W.2d 604, 611.[18] This is evidenced by either pecuniary loss or a showing that the party "otherwise will sustain a substantial injury to [its] interests." *Lake*

[18] The same factors apply to declaratory judgment actions brought under Wis. Stat. § 806.04. *See Loy v. Bunderson*, 107 Wis. 2d 400, 413–14, 320 N.W.2d 175, 183–84 (1982).

Country Racquet & Athletic Club, Inc. v. Vill. of Hartland, 2002 WI App 301, ¶ 17, 259 Wis. 2d 107, 655 N.W.2d 189.

The Legislature's reliance on *Panzer v. Doyle* for standing, proposing that "no other party has an 'equivalent stake' in this dispute," is misguided. Pet.[19] ¶ 19 (citing *Panzer v. Doyle*, 2004 WI 52, ¶ 42, 271 Wis. 2d 295, 680 N.W.2d 666). Unlike here, *Panzer* was a separation of powers case in which the individual plaintiff legislators and a legislative committee asserted an injury "imping[ing] upon the core power and function of the legislature." *Id*. ¶ 42. This Court reasoned that "no one outside the legislature would have an equivalent stake in the issue" where such a constitutional injury was alleged—*i.e.*, that the Governor was "acting to deprive the legislature of the ability to exercise its core function in a specific subject area." *Id*.

The Legislature's core interest is to carry out its constitutional power to legislate by enacting laws and setting the public policy of

[19] This response refers to the Emergency Petition for Original Action as "Pet."

the state. Wis. Const. ART. IV § 1; *see also* Wis. Stat. § 15.001(1). Whether or not Order 28 is an emergency rule suffering defects in its promulgation does not affect the Legislature's power to carry out its constitutional duties. It is free to legislate and will remain so regardless of the outcome of its Petition. The Legislature has, in fact, done so in relation to some aspects of the current crisis. *See* 2019 Wis. Act 185, "relating to state government response to the COVID-19 pandemic," enacted April 15, 2020. There is nothing stopping it from doing more. Put another way, if the Court agrees with the Legislature's interpretation of Wis. Stat. §§ 227.24 or 252.02, that interpretation will not remedy an "injury" to the Legislature because Order 28 does not remove or interfere with the Legislature's power to enact legislation. The Legislature's failure or refusal to pass laws setting parameters for the resumption of economic and social activities during this pandemic is its own fault, not the Department's.

The specific injury that the Legislature asserts is that the Department's issuance of Order 28 is "causing ongoing harm to the

Legislature because, under the Wisconsin Statutes, the Legislature has the right to oversee sweeping agency action," citing the emergency rulemaking procedures of Wis. Stats. §§ 227.24 and 227.26. Under the Legislature's theory, if the Order were, in fact, an emergency rule, the Joint Committee for Review of Administrative (JCRAR) would have had an opportunity to review the rule under various standards, and the absence of that oversight constitutes injury. Wis. Stat. §§ 227.26(2)(d), 227.19(4)(d). (Leg. Memo. at 10.)

Not only does this theory incorrectly assume Order 28 is a rule, *see* Section II.A., *infra*, but it is not sufficiently material to support standing. *Seebach v. Pub. Serv. Comm'n of Wis.*, 97 Wis. 2d 712, 721, 295 N.W.2d 753, 759 (Ct. App. 1980) (holding that although error occurred, "the instant petitioners have not demonstrated that [the error] prejudiced them to a material degree"). The Legislature cannot "bear its burden of proof" on this matter, because they have not shown a different outcome would have occurred had the emergency rule process occurred, or that they could not remedy any failure to receive this process by passing legislation to override

Order 28 or the statute on which it was based. *In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d 403, 412, 466 N.W.2d 227, 230–31 (Ct. App. 1991) (holding that the continued provision of services required to be conducted by statute was not sufficient to support standing).

The Legislature also implies it can stand in the shoes of the Wisconsin citizens whom it believes are harmed by Order 28. (*See, e.g.*, Pet. ¶ 11 ("Business sales have fallen 15 percent…. Restaurants and travel-sector businesses' sales have declined 40 percent and 86 percent, respectively…Dairy, corn, and other farmers have also felt the negative effects… .")) In *Panzer,* the Court noted that allowing standing to the individual legislators and legislative committee was "consistent with our treatment of standing in *Wisconsin Senate v. Thompson*." There, the Court held that individual legislators who had also sued in their private capacities as taxpayers had standing to challenge the Governor's partial veto because the Governor's actions would otherwise "be insulated or immunized from this court's review and possible invalidation." *Wisconsin Senate v. Thompson*, 144

Wis. 2d 429, 435, 424 N.W.2d 385 (1988). Such is not the case here, because innumerable private parties would have standing to challenge Order 28, and no individual legislator has joined the case in a private capacity.

The fact that the "Legislature" has run to this Court to obtain an alteration to the state government's public health response to the crisis, instead of legislating, suggests that it is politically unpalatable for it to interfere with Order 28 and it would rather have this Court do so on its behalf. That preference, however, is not a legally protectible interest that confers standing.

2. The Legislature failed to demonstrate standing and follow the necessary procedural requirements for issues 2 and 3.

The Legislature's second and third issues assume that Order 28 is not subject to the procedures that normally govern rulemaking. (See Leg. Memo. at 1, 40.) Consequently, the Legislature raises claims that would regularly be brought in a petition for judicial review against an agency decision under Wis. Stat. § 227.52 *et seq.*—in this case, as in excess of the Department's legal authority, Wis.

Stat. § 227.57(5), or as arbitrary and capricious, Wis. Stat. § 227.57(8).[20] The Legislature has not met minimal standing or filing prerequisites to these claims.

a. The Legislature is not "aggrieved by an administrative agency decision" under Wis. Stat. § 227.52.

Only persons "aggrieved by a[n administrative agency] decision" possess standing to seek judicial review of it. Wis. Stat. § 227.53(1). The administrative decision, in this instance, is Order 28.

Standing, for purposes of Wisconsin Chapter 227 judicial review, requires a two-step analysis. *Fox v. Dep't of Health & Social Servs.*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983). First, like standing in a declaratory judgment action, the party must assert a "direct injury." *Id.* As described in Section I.B.2., above, the Legislature has suffered no direct injury at all.

Second, the direct injury must be "within the zone of interests to be protected or regulated by the statute or constitutional

[20] Alternatively, even if Executive Order 28 were subject to rulemaking, the Legislature's challenge to Issues 2 and 3 are non-justiciable for the reasons stated in the previous section.

provision in question." *Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶ 15, 275 Wis. 2d 533, 545, 685 N.W.2d 573. The boundaries of the "zone of interests" may be found in the law's "express recognition of [its] protective purposes." *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n of Wis.*, 69 Wis. 2d 1, 16, 230 N.W.2d 243 (1975).

Here, Wis. Stat. § 252.02 subsections (3), (4), and (6) expressly recognize the protective purposes of orders issued pursuant to them: "to control outbreaks and epidemics," to "guard[] against the introduction of any communicable disease," to "control and suppress[] communicable diseases," and to maintain "sanitary care of jails, state prisons, mental health institutions, schools, and public buildings and connected premises," among other things. The object of protection, and thus potential injuries falling within the statute's zone of interests, necessarily lies with members of the public who may be vulnerable to communicable disease.

The Legislature's asserted interest in overseeing rulemaking does not fall within the zone of interest of Chapter 252, which is

solely oriented at public health. To be sure, individuals suffering harm or the threat of harm due to public health orders issued pursuant to Wis. Stat. § 252.02 may have standing to seek judicial review of them under Chapter 227, as members of the public are those sought to be protected. But as described above, the Legislature as a body does not stand in the shoes of its constituents as if those interests are its own. Thus, the Legislature lacks standing.

b. The Legislature has failed to follow the mandatory filing requirements found in Wis. Stat. § 227.53.

The right to judicial review of an agency action is dependent on strict compliance with the filing requirements of Wis. Stat. § 227.53(1). *Wis. Power & Light Co. v. Pub. Serv. Comm'n of Wis*., 2006 WI App 221, ¶ 11, 296 Wis. 2d 705, 725 N.W.2d 423. The Legislature did not follow those requirements here.

Wisconsin Statute chapter 227 was enacted in 1943 to bring uniformity to administrative procedure and review, which prior to that time had been fragmented and disorganized. Ralph M. Hoyt, *The Wisconsin Administrative Procedure Act*, 1944 Wis. L. Rev. 214, 214

(1944). Chapter 227 placed circuit courts on the front line of reviewing agency rules and actions, *id*. at 216, based on the procedures now codified in Wis. Stat. § 227.40 and Wis. Stat. § 227.52-53.

To preserve this uniform system of review, Wis. Stat. § 227.53 includes mandatory filing procedures for those challenging agency actions. Wis. Stat. § 227.53(1) ("Except as otherwise provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review . . . **subject to all of the following procedural requirements**.") (emphasis added). These requirements include: filing suit within 30 days of the decision in the circuit court of the county where the petitioner resides, service on the agency within 30 days of the decision, content requirements for the petition, and service on parties who appeared before the agency on the contested issue. Wis. Stat. § 227.53(1)(a)-(c).

The Legislature identifies no exception Wis. Stat. § 227.53, and no exceptions are specified in Wis. Stat. § 809.70 for original actions. Courts have strictly construed the filing requirements of Wis. Stat.

§ 227.53, even when they produce an inequitable result. *E.g.*, *Ryan v. Wis. Dep't of Revenue*, 68 Wis. 2d 467, 472, 228 N.W.2d 357, 359 (1975) ("To dismiss an appeal because it comes one day late may seem harsh. However, if statutory time limits to obtain appellate jurisdiction are to be meaningful they must be unbending.") (citation omitted); *Currier v. Wis. Dep't of Revenue*, 2006 WI App 12, ¶ 23, 288 Wis. 2d 693, 709 N.W.2d 520.

The Legislature is subject to the same rules as other litigants for challenging agency actions like Order 28.

C. The Petition does not meet criteria for original action.

Even if the Legislature had properly brought this Petition, it should still be denied because it does not meet this Court's criteria for accepting original actions.

1. Original jurisdiction is rarely invoked.

It is this Court's long-held precedent to "only entertain original jurisdiction in exceptional cases." *State* ex rel. *State Cent. Comm. of Progressive Party v. Bd. of Election Comm'rs of Milwaukee*, 240 Wis. 204, 214, 3 N.W.2d 123, 127 (1942); *Wis. Prof'l Police Ass'n, Inc. v.*

Lightbourn, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807. The Court will not accept a petition for original action unless:

> (1) the matter is *publici juris*;
> (2) there are no adequate remedies available in the lower courts; and
> (3) there are no disputes of material fact and/or no factual record that needs to be developed for proper resolution of the legal issues.

Petition of Heil, 230 Wis. 428, 284 N.W. 42, 48 (1939); *State* ex rel. *Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 19, 334 Wis. 2d 70, 798 N.W.2d 436.

The Legislature's Petition fails to meet the high bar that the Court has set for original jurisdiction. First, the Petition's three issues do not warrant review for reasons discussed in Section II.A., *infra*, which for brevity's sake are not repeated here. Second, the Legislature had an adequate—indeed, mandatory—remedy available in the lower courts via Chapter 227. Section I.B., *supra*. Third, a factual record must be developed, and factual disputes resolved, all of which would have occurred if the Legislature had properly commenced this action under Wis. Stat. ch. 227.

2. There are adequate remedies both in the Legislature and in circuit court.

The Court does not invoke original jurisdiction when there is an adequate remedy in the lower courts. "Because it is the principal function of the circuit court to try cases and of this court to review cases which have been tried, due regard should be had to these fundamental considerations." *State* ex rel. *Atty. Gen. v. John F. Jelke Co.*, 230 Wis. 497, 284 N.W. 494 (1939).

As previously explained, the Legislature is uniquely positioned to remedy any concerns it may have with Order 28 by passing laws. The circuit courts are also fully capable of reviewing the Legislature's challenges to Order 28 under Chapter 227 and the statutes governing preliminary injunctions. The Legislature summarily claims that "there is no time for [it]to go through ordinary judicial procedures because DHS's new rules regarding business closure will go into effect on April 24 and expire 32 days later." (Leg. Memo. at 26.) It does not explain why the circuit court cannot address this matter on short notice, such as by shortening the usual deadlines for response and review under Wis. Stat. §§ 227.40 and .53. As this Court has said, even for matters of *publici juris:*

> [I]it is probably true as to most of the questions *publici juris* which are litigated, that there can be no full, final, or complete determination in the trial courts. **Nevertheless, the mere fact that it would be more desirable to achieve that result in the first court having jurisdiction does not warrant this court in taking original jurisdiction when there are other courts which have adequate jurisdiction in all other respects**.

In re Zabel, 219 Wis. 49, 261 N.W. 669, 669 (1935) (emphasis added).

Furthermore, Order 28 loses effect on May 26, and under the current briefing deadlines for this action, any relief the Court could impose would be very short-lived and does not warrant granting the petition. Although the Legislature speculates that Order 28 could "even run into 2021," this is unlikely. As the COVID-19 epidemic has shown, no two emergency orders are the same, and they evolve with rapidly emerging science, public health expertise, and contagion threat. *See, e.g.*, Walsh Aff., Exhs. 1, 3-16; Orders 6, 31, 34.

The Court should deny the Petition for original action, because there is no "reasonable certainty that a result could be reached which would be effective in order to justify the use of the original jurisdiction. It is too great a power to be used hastily, or to

accomplish an impotent result." *In re Anderson*, 164 Wis. 1, 159 N.W. 559, 560 (1916).

3. This case requires the development of a factual record.

The Legislature states, in conclusory fashion, that "no fact finding is necessary" because this case involves only issues of law. (Leg. Memo. at 26.) That assertion is laughable in the current pandemic environment where Order 28 was created, and in light of the nature of the Legislature's claims.

In its Petition, the Legislature has presented numerous factual assertions, supported with citations to documents like social media posts and news reports. Walsh Aff., Exhs. 17-30. It uses these as the material basis for its arguments on irreparable harm as well as arbitrary and capriciousness, though sometimes it provides minimal to no factual support to back its claims. (*E.g.*, Leg. Memo. at 12-22, 56-62.)

The Legislature's proffered facts are not the end of the story. As outlined in the Facts section above, Order 28 was built on prior

orders, and refers to factual considerations the Department relied on. These considerations include the current and evolving rate of spread of COVID-19, the health care system's capacity to meet the needs of COVID-19 patients; the interests of those critical workers on the "front lines" (including Intervenors' members); the testing, contact tracing, and isolation capacity of the state; the availability of PPE for health care workers (including Intervenors' members); and the economic needs of Wisconsin and Wisconsinites—which also includes Intervenors' members. Order 28 at 2. The Legislature makes no effort to understand or develop a complete record of these facts, many of which would likely contradict the Legislature's proffered facts or fill holes in the Legislature's selective factual recitation.

Moreover, the Legislature has raised legal claims which require fact-finding under the standards and procedures set by statute and by this Court. For example, a petition under Wis. Stat. § 227.52 would require the agency to file the record of decision, on which the court could rely to determine the agency's compliance with the law. Wis. Stat. § 227.55; *see also* Wis. Stat. § 227.56

(permitting additional evidence). Declaratory judgment actions to review the validity of a rule under Wis. Stat. § 227.40 may also require development of a factual record. *Liberty Homes, Inc. v. Dep't of Indus., Labor & Human Relations*, 136 Wis. 2d 368, 379, 383-84, 401 N.W.2d 805 (1987) (concluding that circuit court "must be free to accept relevant evidence to supplement that agency record" if necessary). This is particularly true for cases like the one at bar: "[T]he court must understand the issues involved in the rulemaking. Particularly in a highly technical, complex area of rulemaking, such understanding is possible only if an adequate factual record is available to the court." *Id*. at 379.

This Court recently denied a Petition for original action under similar circumstances involving the COVID-19 epidemic:

> The court is mindful of the seriousness of the issues presented by the petition. It has carefully considered the documents filed by the parties, including the respondents' description of current efforts being taken to mitigate the risks and harms associated with the COVID-19 pandemic on the incarcerated population of Wisconsin, together with staff and members of the public who interact with these individuals. These measures include, but are not limited to, following CDC guidelines for management of COVID-19 in correctional facilities. The court has also considered the relief sought by the petitioners. The court is not persuaded that the relief requested, namely this court's appointment of a special master to

> order and oversee the expedited reduction of a substantial population of Wisconsin's correctional facilities is, in view of the myriad factual determinations this relief would entail, either within the scope of this court's powers of mandamus or proper for an original action.

Wis. Ass'n of Criminal Def. Lawyers v. Evers, No. 2020AP687-OA (Apr. 24, 2020). Although the Legislature does not seek appointment of a special master in this case, the level of factfinding required in this case would be comparable to that needed in that case.

"Inasmuch as under the principles established the circuit court has jurisdiction to proceed, the excluding jurisdiction of this court will not be exercised in doubtful cases." *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 51 (1938). This is, at best, a doubtful case. For the foregoing reasons, the Petition should be denied.

II. The Court should deny the Legislature's emergency motion for a temporary injunction.

The Legislature has moved for a temporary injunction enjoining enforcement of Order 28. The motion should be denied. The Legislature concedes that "certain aspects of Emergency Order 28 . . . are within § 252.02's express delegation of authority" (Leg. Memo. at 55); thus, enjoining the entire Order is an excessive

remedy for the Order's alleged shortcomings. As to those unspecified sections of the Order 28 the Legislature still disputes, it cannot meet the elements for the relief it seeks: likelihood of success on the merits, the need to preserve the status quo, no adequate remedy at law, irreparable harm. *See Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis.2d 513, 520, 259 N.W.2d 310, 313-14 (1977). The equities also do not favor an injunction, and the Legislature's motion should be denied.

A. The Legislature is unlikely to succeed on the merits of its claims.

1. The Department has broad and longstanding authority to issue orders to protect the public health during a potential or actual outbreak of a communicable disease.

The Legislature ignores the broad police power it has delegated to the Department to control communicable diseases, like COVID-19, through rules ***and*** orders. A decade before the 1918 influenza pandemic, this Court recognized the unique need for public health administrators to have a free and nimble hand to deal with public health crises:

> A health officer who is expected to accomplish any results must necessarily possess large powers and be endowed with the right to take summary action, which at times must trench closely upon despotic rule. The public health cannot wait upon the slow processes of a legislative body, or the leisurely deliberation of a court.

State ex rel. *Nowotny v. City of Milwaukee*, 140 Wis. 38, 121 N.W. 658 (1909). The Court further recognized that executive officers are best suited to "deal at once with the emergency under general principles laid down by the lawmaking body." *Id.*; *see also Jacobson v. Massachusetts*, 197 U.S. 11, 25, 27, 25 S.Ct. 358 (1905) (confirming validity of the legislature's delegation of authority to local boards of health) ("To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement.").

The broad power recognized in *Nowotny* is codified in Wisconsin's statutes today, and not only in the provisions of Wis. Stat. § 252.02 underlying Order 28. For instance, "[t]he department has general supervision throughout the state of the health of citizens and…has power to execute what is reasonable and necessary for the prevention and suppression of disease." Wis. Stat. § 250.04(1).

Further, even local health officers "may do what is reasonable and necessary for the prevention and suppression of disease" and "shall promptly take all measures necessary to prevent, suppress and control communicable diseases." Wis. Stat. § 252.03(1), (2). Their power, in turn, is directly checked by that of the Department. Wis. Stat. §§ 250.04(1)(b), 252.02, 252.03.[21]

The Legislature suggests that there may be constitutional infirmities with the Department's broad powers under Chapter 252. (Leg. Memo. at 43-45.) It makes an undeveloped separation of powers argument, then implies that the statute violates the nondelegation doctrine because it lacks sufficient standards for Department implementation. Certainly, administrative agencies are "creatures of the legislature" which may grant them powers,

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[21] A Joint Legislative Council committee reviewed these authorities after the attacks of September 11, 2001, to ensure "the capacity of the public health system and the **adequacy of state laws to enable that system to detect and response quickly to** a terrorist act or **public health emergency**." See *Joint Legislative Council, Special Committee on Public Health System's Response to Terrorism and Public Health Emergencies, Staff Brief 02-04* (Aug. 27, 2002) (emphasis added). Its review was based in part on the Model State Emergency Health Act (Dec. 21, 2001) *available at* www.jhsph.edu/research/centers-and-institutes/center-for-law-and-the-publics-health/model_laws/MSEHPA.pdf (visited April 23, 2020).

"withdraw powers which have been granted [and] prescribe the procedure through which granted powers are to be exercised." *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 57, 158 N.W.2d 306 (1968).

However, the Legislature may choose to grant authority through broad standards—for example, so agencies may apply discretion on matters where science and fact-finding are involved. *See Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, ¶ 43, 335 Wis. 2d 47, 799 N.W.2d 73. "The fact that these are broad standards does not make them non-existent ones." *Id.* A statute granting that authority, and the agency exercising it, does not violate the non-delegation doctrine or, for that matter, the separation of powers doctrine. *See Schmidt*, 39 Wis. 2d at 59.

The legislative delegation of authority to the DHS to control communicable diseases is well-supported and makes sense, given expertise within the agency, *see* Wis. Stat. §§ 250.02(1), (2), 250.03, its relationship with local public health departments, the CDC, and health care providers throughout the state, and the need to act quickly as recognized in *Nowotny*. The Legislature's current buyer's

remorse for the broad powers it has granted is not a basis for original action or an injunction.

2. Order 28 is not a rule.

The Legislature claims that Order 28 is an administrative rule, and that it is therefore deficient because it was not properly promulgated as such. (Leg. Memo. at 27.) Order 28, however, is not a rule.

a. The Legislature gave the Department express authority to issue Order 28 as an order and *not* promulgate it as a rule.

Wisconsin Statute § 252.02 explicitly grants the Department power to exercise its broad authority to control communicable disease through rules *or* orders:

> [T]he department may ***promulgate and enforce rules or issue orders*** for guarding against the introduction of any communicable disease into the state, for the control and suppression of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease and for the sanitary care of jails, state prisons, mental health institutions, schools, and public buildings and connected premises. ***Any rule or order*** may be made applicable to the whole or any specified part of the state, or to any vessel or other conveyance. The department may issue orders for any city, village or county by service upon the local health officer. ***Rules that are promulgated and orders that are issued*** under this

> subsection supersede conflicting or less stringent local regulations, orders or ordinances.

Wis. Stat. § 252.02(4) (emphasis added).

When planning its response to a communicable disease, the Department may opt to promulgate a rule if necessary to implement or interpret a statute. On the other hand, the Legislature wisely ratified the *Nowotny* court's recognition that often "public health cannot wait upon the slow processes" when it enacted Wis. Stat. § 252.02, allowing the Department the freedom to act quickly through orders to stop communicable diseases and save lives.

This dichotomy between rules and orders was a deliberate legislative choice. In 1981, the statute—then numbered Wis. Stat. § 143.02—was specifically amended to grant the Department authority to "issue orders," in addition to and apart from its then-existing authority to "adopt and enforce rules":

> The department may adopt and enforce rules or issue orders for guarding against the introduction of any ~~such~~ communicable disease into the state, for the control and suppression ~~thereof within it~~ of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by ~~such~~ a communicable disease . . .

1981 Wis. Laws, ch. 291, § 21 (amending Wis. Stat. § 143.02(4)).

The Legislature attempts to elide the difference between rules and orders, arguing that the latter is merely a type of the former, and completely ignoring the statute's repeated references to both. (Leg. Memo. at 29-30). However, "[i]n construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *State* ex rel. *Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (internal quotation omitted). "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* Further, this Court has repeatedly affirmed that "[s]tatutes should be so construed that no word or clause shall be rendered surplusage." *Metro. Assocs. v. City of Milwaukee*, 2018 WI 4, ¶ 42, 379 Wis. 2d 141, 905 N.W.2d 784 (internal quotation omitted).

Here, Wis. Stat. § 252.02(4) has unambiguously given the Department a choice of procedure in the context of the statute's

enumerated set of communicable disease-battling actions: the "department may promulgate and enforce rules ***or*** issue orders" (emphasis added). If the enacting Legislature had intended the same procedural requirements to apply regardless of which method the Department used to implement its action, it would have said so. Instead, the statute is explicit in allowing the Department to act by *either* rules that are "promulgated" or orders that are "issued." In order to avoid unreasonable surplusage, the Court must separately interpret the Department's authority to issue rules (on one hand) and orders (on the other hand).[22]

The Legislature's grant of authority to the Department to make Orders is particularly stark in the provision that "[a]ny rule ***or order*** may be made applicable ***to the whole*** or any specified part of the ***state***." Wis. Stat. § 252.02(4). Because the Legislature has thus expressly provided that a (non-rule) order under this statute may be

[22] Likewise, the Department's authority to "close schools and forbid public gatherings" and "authorize and implement all emergency measures necessary to control communicable diseases," Wis. Stat. § 252.02(3) and (6), is given in the same statute, conspicuously without the requirement that such actions be accomplished only by rule.

made applicable to the entire state, the fact that Order 28 applies throughout Wisconsin does not render it a rule. Even to any extent that this would otherwise conflict with the definition of "rule" in Wis. Stat. § 227.01(13), it must be interpreted as excepting orders under Wis. Stat. § 252.02 from these provisions. "In the event of a conflict between a general and a specific statute, the latter controls." *Belding v. Demoulin*, 2014 WI 8, ¶ 17, 352 Wis. 2d 359, 843 N.W.2d 373 (internal quotation omitted).

The fact that Order 28 is, in fact, an order not subject to rulemaking is not simply the Department's "self-serving label" but rather the Department's ***choice of action*** that it was explicitly empowered to make by the Legislature.

b. Order 28 does not meet the definition of "Rule" in Wis. Stat. § 227.01(13).

Order 28 is not a rule subject to rulemaking requirements because it does not meet the statutory definition of a "rule."

"Rule" is defined in Wis. Stat. § 227.01(13) as "a regulation, standard, statement of policy, or general order of general application

that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency." Case law has broken this definition down into five elements:

> [F]or purposes of Chapter 227," a policy is a "rule only if it is all of (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency.

Cholvin v. Wisconsin Dep't of Health & Family Servs., 2008 WI App 127, ¶ 22, 313 Wis. 2d 749, 758 N.W.2d 118.

At least the second and fifth *Cholvin* elements do not apply to Order 28. *First,* Order 28 is not rule because it is not "of general application." Order 28 is of limited duration, with a lifespan of merely a few weeks, through May 26, 2020. *Harweger v. Wilcox*, 16 Wis. 2d 526, 531–32, 114 N.W.2d 818 (1962) (noting that a time limit creates an exception to a statute of otherwise general application). Moreover, the Order is premised on factual findings described in 18 "whereas" clauses. These findings describe the

particular, unprecedented characteristics and impacts of the pandemic at a specific moment in time, which give rise to the Department's ability to invoke Wis. Stat. § 252.02(3), (4), and (6). Its applicability is, therefore, not general but specifically tied to those specific factual findings. The Legislature focuses on a rule's applicability to persons across the state (Leg. Memo. at 30), but Wis. Stat. § 252.02(4) specifically recognizes that an order may be "made applicable to the whole . . . state." The short duration of the Order also undermines any claim that new members can continue to be added to the class of people covered.

Second, Order 28 does not meet *Cholvin*'s fifth element because it is not designed to implement or interpret a statute or create policy.[23] This is evident in the language of Order 28, which nowhere attempts to interpret statute or "make specific legislation." Wis. Stat. § 227.01(13). Order 28 is a tool to promptly and effectively respond to and halt communicable diseases utilizing the police powers

[23] The Legislature ignores this element (and two others) entirely in its brief. As such, the Court should deem the Legislature to have forfeited the issue. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

granted in Wis. Stat. § 252.02(3), (4), and (6). It effectuates the necessarily broad authority Wisconsin's Legislature—like those around the country—gives to public health officials who have the knowledge, access to facts, and expertise necessary to make quick life-saving determinations about what is needed to control contagion. That Order 28 is enforceable does not make it a "rule;" rather, Wis. Stat. § 252.25 specifically contemplates that a "departmental order under this chapter" is enforceable, along with "any state statute or rule."

Order 28 is not a rule.

c. Because Order 28 is not a rule, its issuance was procedurally sound.

The Legislature argues at length about the alleged procedural defects surrounding issuance of Order 28 and how it would have participated in the emergency rule process. (Leg. Memo. at 37-39.) However, this argument is premised on Order 28 being a rule in the first place. As explained above, it is not.

The Legislature misleadingly describes the emergency rulemaking process as a quick fix for implementing Department powers under Wis. Stat. ch. 252. Yet the emergency rulemaking process still requires, *inter alia*, that the promulgating agency prepare a scope statement and submit to several attendant authorities; wait at least 10 days before getting approval of the scope statement and commencing any work on the rule itself; draft the rule and submit it to the Governor for approval; prepare a plain language analysis and a fiscal analysis; mail the latter to each member of the Legislature and the Legislative Reference Bureau; and file with several entities, including the small business regulatory review board, with whom the agency may have to work to ameliorate the rule's impacts. Wis. Stat. § 227.24(1), (3), (3m).

Even then, the agency must hold a public hearing within 45 days of publication. Wis. Stat. § 227.24(4). For all that work, the agency will be able to use its emergency rule for 150 days unless it obtains an extension from the Legislature. Wis. Stat. § 227.24(1)(c).

As a result, the imposition of even the fastest possible version of rulemaking would, in this case, hobble the effectiveness of Wis. Stat. § 252.02 and imperil the Department's attempts to safeguard Wisconsin's citizens. The fact that the duration of Order 28 is so much shorter than the 45-day public hearing timeline and, especially, the 150-day initial lifespan of an emergency rule underscore incongruity between the rulemaking process and the short-term order at issue here.

The Legislature gave specific authority to the Department in Wis. Stat. § 252.02(3), (4), and (6) to prevent and control epidemics by issuing public health orders. Actions under that authority, such as Order 28, are not rules and not subject to rulemaking procedures.

3. Order 28 does not exceed the Department's authority.

The Legislature next argues that some—but not all—of Order 28 exceeds the three statutory bases the order cites as authority. (Leg. Memo. at 40-56; *see also id*. at 55-56 (conceding that "certain aspects of Emergency Order, such as school closures and bans on

public gatherings, are within § 252.02's express delegation of authority"). It is unlikely to succeed on the merits of this claim.

Section 252.02(3) permits the Department to "close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." The Legislature's Memorandum asks the Court to engage in linguistic gymnastics to conclude that this authority is limited to schools, churches, or places that are similar to schools or churches.

The explicit, plain language of Wis. Stat. § 252.02(3) permits the Department to forbid public gatherings in any ***other place*** that the Department deems necessary to control outbreaks and epidemics. The common understanding and dictionary definition of the word "other" means "different" or "distinct from that or those first mentioned." *Merriam Webster Dictionary;*[24] Wis. Stat. § 990.01(1) ("All words and phrases shall be construed according to common and approved usage.") That is, the statutes authorize the

[24] www.merriam-webster.com/dictionary/other

Department to forbid gatherings in places ***that are different than schools or churches***. The only limitation is that the closing be for the purpose of controlling an outbreak or epidemic.

It would make no sense to limit the Department's authority to schools or churches, because outbreaks and epidemics can be spread in numerous other settings that are unlike schools or churches (or the contrived list included on page 47 of the Memorandum). COVID-19 is spread in a variety of places, wherever social interaction occurs—both public and private, including food processing plants,[25] offices,[26] grocery stores,[27] restaurants,[28]

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[25] Josh Funk/AP, Stopping virus a huge challenge at crowded US meat plants, WIS. STATE J. (Apr. 23, 2020), *available at* https://madison.com/news/national/stopping-virus-a-huge-challenge-at-crowded-us-meat-plants/article_0a2d2203-7889-52ca-b876-172d2b10127d.html.

[26] Konrad Putzier, Your open-floor office could help spread coronavirus, WALL ST. J. (Mar. 10, 2020), *available at* https://www.wsj.com/articles/your-open-floor-collaborative-office-could-help-spread-coronavirus-11583784275.

[27] Tucker Reals, This is how coughing can spread coronavirus in a grocery store, researchers say, CBS NEWS (Apr. 9, 2020), *available at* https://www.cbsnews.com/news/coronavirus-coughing-spread-covid-19-grocery-store-researchers/.

[28] Chris Ciaccia, Coronavirus may have spread via air conditioning in Chinese restaurant, researchers warn, FOX NEWS (Apr. 22, 2020), *available at* https://www.foxnews.com/science/coronavirus-spread-via-air-conditioning-chinese-restaurant.

funerals,[29] and in-home parties.[30] It is even spread to first responders and in health care settings, despite the advanced training of medical staff and protective measures taken, as evidenced by the high numbers of providers being sickened with the virus and even killed.[31] Hence, it would do little to stop the spread of COVID-19 to ban only the gatherings suggested by the Legislature. But more importantly, such a restrictive interpretation is wholly inconsistent with the plain language of the statute.

The provisions of Order 28 limiting the operations of non-essential businesses; regulating the operations of essential businesses; closing schools, libraries, and places of public amusement and activity; and placing conditions on other activities

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[29] Ariana Eunjung Cha, A funeral and a birthday party: CDC traces Chicago coronavirus outbreak to two family gatherings, WASH. POST (Apr. 8, 2020), *available at* https://www.washingtonpost.com/health/2020/04/08/funeral-birthday-party-hugs-covid-19/.

[30] Elizabeth Williamson and Kristin Hussey, *Party Zero: How a Soiree in Connecticut Because a 'Super Spreader'*, N.Y. TIMES (Mar. 23, 2020), *available at* https://www.nytimes.com/2020/03/23/us/coronavirus-westport-connecticut-party-zero.html.

[31] Janet Adamy, New Coronavirus Has Infected More than 9,000 U.S. Health Care Workers, WALL ST. J. (Apr. 14, 2020), *available at* https://www.wsj.com/articles/new-coronavirus-has-infected-more-than-9-000-u-s-health-care-workers-11586904265.

all serve to, and are consistent, with the Department's explicit authority to, "forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics."

Section 252.02(4) explicitly confers upon the Department the authority to, *inter alia*, issue orders for "guarding against the introduction of any communicable disease into the state, [and] for the control and suppression of communicable diseases." The Legislature contorts canons of statutory construction to defeat this broad language. For example, it claims that Wis. Stat. § 252.02(4) must be limited to the more narrow subject matter in (3) (regarding schools and churches), or else (3) would be surplusage. (Leg. Memo. at 50.)

First, (3) and (4) are different subsections, with different subject matter, and should be read as such. Even if subsections (3) and (4) contain some overlap, that does not render (3) surplusage, but reflects a "belt-and-suspenders" approach to ensuring the Department retains broad powers to close schools and churches, as well as take other measures to "control and suppress[]

communicable diseases." *See* Ethan J. Leib and James J. Brudney, *The Belt-and-Suspenders Canon*, 105 Iowa L. Rev. 735, 741 (Jan. 2020) ("legislators may be especially focused on textual exhaustiveness to make sure implementers get the message"); *see also N. Highland Inc. v. Jefferson Machine & Tool, Inc*., 2017 WI 75, ¶ 137, 377 Wis. 2d 496, 898 N.W.2d 741 (R. Bradley, J., dissenting). Such an approach is especially important when a public health pandemic is present, to ensure an effective response that prevents illness and saves lives.

The Legislature also misuses, or misunderstands, the terms "isolation" and "quarantine," implying that the Department's powers to isolate or quarantine are only exercisable by rule, and only in connection with those circumstances described in Wis. Stat. § 252.06. (Leg. Memo. at 47-49.) Quarantine and isolation are medical and public health terms of art, and describe specific techniques that may be employed in certain situations as set forth in statute.[32] Wis. Stat. § 252.04(4) clearly is not limited to "quarantine

[32] Public health officials issue orders to isolate or quarantine people who may have been exposed to a communicable disease or who are contagious. Individuals subject to such orders are not allowed to go to their places of

and disinfection," and separately permits the Department to implement different measures to "control or suppress communicable disease."

In any case, Order 28 does not direct quarantine or isolation, as these words do not appear in the Order, nor does any provision of the Order constitute quarantine or isolation. *See* note 32, *supra*. Although Order 28 may limit where Wisconsin residents may go and how they act when they leave home, they simply do not constitute isolation or quarantine. The statutes governing these measures do not apply here. *Kalal*, 271 Wis. 2d 633, ¶ 45; *In re Washington*, 2007 WI 104, ¶ 32, 304 Wis. 2d 98, 735 N.W.2d 111

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employment, grocery stores, parks or anywhere beyond the location of their isolation or quarantine order (or to seek medical care). *See* Wis. Stat. §§ 252.06, 252.07(1g)(c). The CDC employs a similar definition:

- Isolation separates sick people with a quarantinable communicable disease from people who are not sick.
- Quarantine separates and restricts the movement of people who were exposed to a contagious disease to see if they become sick.

See Centers for Disease Control and Prevention: Quarantine and Isolation: Legal Authorities for Public Health Orders, *available at* www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html (last visited Apr. 27, 2020).

("when construing a word or phrase that is a legal term of art, we give the word or phrase its accepted legal meaning") (citing *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 6, 270 Wis. 2d 318, 677 N.W.2d 318; Wis. Stat. § 990.01(1).

Although the Legislature now chafes at the broad power it has granted the Department, it forgets that this arrangement is by design. *Nowotny*, 140 Wis. 38. It cannot attempt a post-hoc narrowing of Wis. Stat. § 252.02(4) through this Court.

Section 252.02(6) explicitly grants the Department authority to "authorize and implement all emergency measures necessary to control communicable diseases." Contrary to the Legislature's hyperbolic argument, the Department has not relied on this provision "to control every aspect of public and private life in Wisconsin indefinitely." (Leg. Memo. at 54.) The Order takes only those emergency measures necessary to control COVID-19, and only through May 26, 2020.

If presented, perhaps evidence that a measure authorized or implemented by the Department is not "necessary to control"

COVID-19 could be a valid basis for a challenge. Wis. Stat. § 252.02(6). But the Legislature fails to present any such evidence. Essential to any analysis of the propriety of the Department's Order would be current epidemiological reports about COVID-19 and its spread, as well as current expert opinions about the most effective methods of reducing the spread. Several news clippings are woefully insufficient to provide the facts and expertise required for a court to properly make such a determination.

Order 28 does not exceed the Department's authority.

4. Order 28 is not arbitrary and capricious or an erroneous exercise of discretion.

Finally, the Legislature claims Order 28 is arbitrary and capricious. (Leg. Memo. at 56.) It cites Wis. Stat. § 227.57(8), relating to erroneous exercise of agency discretion (Leg. Memo. at 22-23, 56) but cases interpreting this provision affirm the Department's decision to issue Order 28. [33]

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[33] The Legislature suggests Order 28 is a "legislative-type decision" citing *J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis. 2d 69, 91, 336 N.W.2d 679 (Ct. App. 1983)) (Leg. Memo. at 56). However, that term apparently only refers to agency decisions that are not the result of a contested case hearing. *See Daly v. Nat. Res.*

The standard for overturning an agency's discretionary decision is high—particularly where, as here, the agency has been granted broad discretionary authority by statute.

> Courts must indulge in every prima facie presumption in favor of the good faith of the superintendent [of public instruction] in making such orders in the discharge of his official duties; and have no right to interfere with the exercise of the judgment and discretion committed by the Legislature to such an official.

Sch. Dist. No. 3 of Town of Adams v. Callahan, 237 Wis. 560, 297 N.W.2d 407 (1941) (affirming decision to consolidate school districts); *see also Froebel v. DNR*, 217 Wis. 2d 652, 667-68, 579 N.W.2d 774, 781 (Ct. App. 1988) (declining to reverse DNR decision on dam removal under statute which "affords the DNR broad discretion").

The Legislature does not cite a single case where a court has invalidated a public health order as arbitrary and capricious. Indeed, it only cites two cases finding an agency decision arbitrary and capricious at all, though both were brought—unlike this case—

Bd., 60 Wis. 2d 208, 216, 208 N.W.2d 839, 843 (1973). It does not mean the Department was exercising legislative power, as opposed to executive power, when it issued Order 28. The Legislature implicitly concedes this by citing the legal standard in Wis. Stat. § 227.57(8), which is used to review executive agency—not legislative—decisions.

under the relevant jurisdiction's Administrative Procedures Act.[34] (Leg. Memo. at 61, citing *Motor Vehicle Mfrs. Assoc. of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Kammes v. State Mining Inv. and Local Impact Fund Bd.*, 115 Wis. 2d 114, 157, 340 N.W.2d 206 (Ct. App. 1983).)

Wis. Stat. § 227.57(8) is specific about what may constitute an erroneous exercise of discretion, such as the exercise of discretion outside of statutory boundaries or an unexplained deviation from a prior agency policy or rule.[35] *Id.*; *see also Sterlingworth Condo Assoc.,*

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[34] One case the Legislature cites concerns review of municipal, not agency, decisions. (*E.g.*, Leg. Memo. at 57, citing *Smith v. City of Milwaukee*, 2014 WI App 95, 356 Wis. 2d 779, 854 N.W.2d 857.) Another is a case between two private litigants where the court evaluated the standard for finding a ***regulation***—not a decision—is arbitrary and capricious. (Leg. Memo. at 61, citing *Preston v. Meriter Hosp.*, 2005 WI 122, ¶ 32, 284 Wis. 2d 264, 700 N.W.2d 158). These cases are inapposite.

[35] This legal standard provides:

> The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

Wis. Stat. § 227.57(8)

Inc. v. DNR, 205 Wis. 2d 710, 730-33, 556 N.W.2d 791, 798-99 (Ct. App. 1996) (alternatively describing an erroneous exercise of discretion as "arbitrary and capricious"). Even if a court disagrees with the agency's decision, it "shall not substitute its judgment for that of the agency on an issue of discretion." Wis. Stat. § 227.57(8).

Here, the Legislature tries to claim Order 28 is arbitrary and capricious on a variety of grounds, but none are founded in the statute. The Department has wide discretion under Wis. Stat. § 252.02 to issue orders and take other measures in order to control and suppress communicable diseases. *See* Section II.A.1., 2., *supra*. Order 28 is squarely within that discretion, and takes action to further the objectives in Wis. Stat. § 252.02(3), (4), and (6). Indeed, the Legislature does not generally dispute that the Department has authority to order the temporary closure of businesses to control and suppress communicable diseases (Leg. Memo. at 57), or even that the Order's designation of businesses as essential and non-essential is inconsistent with the purpose of preventing communicable disease.

The Legislature instead focuses on a perceived lack of explanation or fact-finding for the way businesses, recreational activities, and "First Amendment-protected activities" are treated. (Leg. Memo. at 57-61.) Yet Order 28 describes the information considered, including prior orders, the positive public health effects of those orders, and facts central to the restrictions contained in the Order. "Rational choices can be made in a process which considers opinions and predictions based on experience." *Sterlingworth Condo. Assoc.*, 205 Wis. 2d at 730 (citing *J.F. Ahern Co. v. Building Comm'n*, 114 Wis. 2d 69, 96, 336 N.W.2d 679, 692 (Ct. App. 1983)).

To the Legislature's currently stated concern for business, Order 28 also noted the sacrifices to individuals' businesses and incomes, and stated "we must find creative ways to get businesses and employees back on their feet in a way that will not sacrifice our progress in fighting the spread of COVID-19." Order 28 at 2. It specifically stated that "the economic needs of Wisconsin and Wisconsinites" were considered in whether to extend and how to modify the Safer at Home order. (*Id.*) Considerations regarding

business impacts, along with the Department's need to contain the pandemic and preserve the health care system, were reasonably considered and explained in Order 28.

Certainly, Wis. Stat. § 252.02 does not require more. It contains no requirements as to the form or content of emergency orders, as long as the purpose of the statute is fulfilled. The drafters likely recognized that requiring detailed factfinding and presentation of evidence in public heath orders would risk turning them into treatises, which would burn precious time and produce a less understandable result. Cases interpreting Wis. Stat. § 227.57(8) confirm the Department's approach was appropriate. *E.g., Wis. Prof'l Police Assoc. v. PSC*, 205 Wis. 2d 60, 75, 555 N.W.2d 179, 186 (Ct. App. 1996) (finding Wis. Stat. § 227.57(8) did not require commission's decision "to be supported by statistical evidence" or even a showing that it was the "most effective method" to achieve objective).

It is not enough for the Legislature to point out that some businesses and activities are treated differently than others to prove that Order 28 is arbitrary: "[I]nconsistencies in determinations

arising by comparison are not proof of arbitrariness or capriciousness." *Robertson Transp. Co. v. PSC*, 39 Wis. 2d 653, 661, 159 N.W.2d 636, 640 (1968).

Some of the Legislature's claims about the Order, such that it impermissibly allows the Department to "decide which businesses will survive and which will die" (Leg. Memo. at 57), are hyperbolic and simply untrue on their face.[36] Similarly, the Legislature says Order 28 "delegate[s] public authority to WEDC" by referring businesses to an online form maintained by the Wisconsin Economic Development Corporation to seek essential business status. While WEDC may collect the form, there is no suggestion in Order 28 that it makes the final decision on which businesses may safely operate as "essential." There is nothing wrong with the Department

[36] The Legislature claims that Order 28 did not consider the "social devastation [it] would cause," citing "increases in abuse or suicide," "sickness and death from other undiagnosed and untreated diseases," and similar factors. (Leg. Memo. at 61-62.) This claim is contradicted by the language of the Order itself, which reflects consideration of these factors by deeming domestic abuse services, mental health services, and law enforcement as essential functions or activities. Order 28, ¶¶ 1, 9, 11.a, 12. This more permissive treatment allows those needing services to get them.

delegating information-gathering or asking an agency with useful expertise to make recommendations, while reserving the final decision for itself. *Sch. Dist. No. 3*, 297 N.W. at 415 ("[i]t suffices that the judgment and discretion finally exercised and the orders finally made by the superintendent were actually his own").

The Legislature's memorandum does not demonstrate that Order 28 is arbitrary and capricious or violates Wis. Stat. § 227.57(8).

For the reasons above, the Legislature is unlikely to succeed on the merits of the three issues it has raised. At the least, any alleged error in discretion cannot support the Legislature's request for injunctive relief, since only the Department—not the Court—may exercise the discretion delegated under Wis. Stat. ch. 252. *See* Wis. Stat. § 227.57(8); *Froebel*, 217 Wis. 2d at 668.

B. The Legislature cannot succeed on the remaining factors for obtaining a temporary injunction.

Even if the Legislature could demonstrate likelihood of success on the merits, it cannot show that it lacks an adequate remedy at law, that an injunction is necessary to preserve the status

quo, that irreparable harm would result if the injunction does not issue, or that the equities otherwise favor an injunction. (Leg. Memo. at 63.)

1. Injunctions are an extreme remedy.

"Injunctions, whether temporary or permanent, are not to be issued lightly." *Werner v. A.L. Grooemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). A temporary injunction is a significant remedy and can have major impact at an early stage of litigation. The impact is even more substantial when this extreme form of temporary relief effectively becomes permanent, as in this case, due to the limited term of Order 28.[37]

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[37] A significant number of oft-cited and recent cases affirmed the denial of an injunction. *See Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO, 2007 WI 72, ¶ 4, 301 Wis. 2d 266, 272, 732 N.W.2d 828, 832* (Dispute over Sherriff's effort to stop using county employees to provide meals service in the jail and whether this was his constitutional prerogative or a management decision. Trial court issued an injunction against the union. This Court vacated and remanded the cause); *see also Minuteman, Inc. v. Alexander, 147 Wis. 2d 842, 859, 434 N.W.2d 773, 780 (1989)* (finding circuit court did not abuse its discretion by declining to grant a temporary injunction where there was evidence of misappropriation of trade secret because there was not an adequate showing of irreparable harm and that damages were not an adequate remedy at law.); *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20 , 370 Wis. 2d 644 , 883 N.W.2d 154 (holding trial court did not abuse discretion in denying temporary injunction where sheriff did not prove facts which would entitle him to this relief); *Prah v. Maretti*, 108 Wis. 2d 223, 224, 321 N.W.2d 182, 184 (1982).

Despite the Legislature's blithe request and scant justification for an injunction, or specificity about what parts of Order 28 really need to be enjoined, the "*Werner* Test" is not a mere incantation. It is a quantum of proof, *Werner,* 80 Wis. 2d 520-21, all the more important in cases with "the existence of sharp disputes on the merits," *Bloomquist v. Better Bus. Bureau*, 17 Wis. 2d 101, 104, 115 N.W.2d 545 (1962).

The Legislature's petition and supporting documents fail to make the necessary showing to pass the *Werner* test.

2. The Legislature does not lack an adequate remedy at law.

As discussed earlier, the Legislature not only has an adequate remedy at law; it has the **ultimate** remedy at law. *See Werner,* 80 Wis. 2d at 520. The Legislature has the power to make, revise and repeal laws. If the application of the specific powers it granted to the Department in Wis. Stat Chap. 252 now somehow offends the Legislature's desire for oversight, it can repeal or change that that

authority, and it can enact by statute a different public health response to COVID-19.

3. An injunction is not necessary to preserve the status quo.

The Legislature seeks to disrupt the status quo, not to preserve it, by its motion for temporary injunction. *See Werner,* 80 Wis. 2d at 520.

The current status quo is that Order 28 is effective. The Legislature's request to enjoin enforcement of Order 28 would disrupt the status quo. The Legislature's offer that the injunction could be stayed for six days—is insufficient to protect the status quo (and public health) because, as shown above, the Department could not issue a new emergency rule within these six days. *See* Section II.A.1, *supra*.

To the extent the Legislature attempts to impose the emergency rulemaking process on Department emergency orders more generally, this would also disrupt the status quo. It is undisputed that the COVID-19 pandemic presents a serious public

health emergency. (Leg. Memo. at 39.) The Department has addressed it through a series of orders, culminating in Emergency Order 12, the "Safer at Home Order," on March 24, 2020. Order 28 essentially extends "Safer at Home" for a month, with modifications,[38] beyond the original expiration date of April 24, 2020.

The Legislature's insistence on a different process, with different objectives, and presumably with different implementation alters the status quo. This Court should not issue a temporary injunction altering the status quo. *See Sch. Dist. v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 374, 563 N.W.2d 585 (Ct. App. 1997) (holding that granting injunction that alters status quo constitutes misuse of discretion).

[38] Some of those modifications lessen restrictions in the Safer at Home Order. Emergency Order 31 articulates an evidence-based approach, with public health criteria, for lifting restrictions even before May 26 if conditions merit. Order 34 does the same.

4. The Legislature will not suffer irreparable harm.

The Legislature claims irreparable harm because the Department's actions, it claims, block it from its statutory right to oversee rulemaking as to Order 28.

If there is irreparable harm any time a "duly enacted" law is prevented, as argued by the Legislature, this Court should not enjoin the DHS from acting to protect public through authority granted in Chapter 252. *See Abbot v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). As argued in Section II.A.2., *supra*, the Department's actions are fully within the legislative grant of authority in Chapter 252.02. Enjoining Order 28 will create the same irreparable harm the Legislature claims it seeks to avoid because it will block the enforcement and implementation of a lawful order.

The Legislature argues that irreparable harm is shown because monetary damages are an insufficient remedy. *See Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Although lack of adequate compensation in damages is one example of irreparable injury, it is not dispositive. *Id*. Competing

interests must be reconciled. *Id*. Order 28 is by its terms temporary. Even if the Legislature is harmed, it can remedy that harm by enacting legislation limiting the authority previously granted to the Department.

5. The equities do not otherwise favor an injunction.

The party seeking an injunction must satisfy the Court "that on balance equity favors issuing an injunction." *See id.* at 800. On balance, equity does not favor issuance of an injunction.

The Legislature decries the lack of clear empirical evidence and data regarding the effectiveness of Order 28 which extends the "Safer at Home" practices of the last month. That argument requires the willful disregard of information that even the most passive consumer of current events understands. COVID-19 is highly contagious and people get very sick, very quickly. Over 250 Wisconsin citizens have died from the virus, and over 1,300 have been hospitalized with it. *See* Facts, *supra*. With no vaccine, people continue to risk getting sick or spreading the virus to others. With

no widespread testing, it is impossible to determine who is contagious.

The Centers for Disease Control and Prevention has published clear guidelines and information demonstrating the efficacy of social distancing measures for schools, workplaces, and mass gatherings.[39] If this were not obvious and apparent, one need only to look to the recent spike of COVID-19 cases in Brown County, more than half tied to workers in three meat packing plants.[40] The Legislature has provided no evidence, empirical or other, that social distancing as implemented by Order 28 is not effective in slowing the transmission of the virus and reducing COVID-19 illness.

The Legislature pits the public health interests of containment of a devastating communicable disease against the financial interests

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[39] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Social Distancing, *available at* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html.

[40] Haley BeMiller, Brown County coronavirus cases surge past 800 as OSHA investigates more facilities, Green Bay Press Gazette (Apr. 27, 2020), *available at* https://www.greenbaypressgazette.com/story/news/2020/04/27/coronavirus-brown-county-cases-surge-past-800-osha-investigates/3032765001/.

of the citizens and businesses of the State. It seeks to negate the public health imperative of social distancing with evidence of financial suffering by Wisconsin citizens and businesses. This is a false dichotomy because both are true. Social distancing is necessary to control this epidemic **and** the State economy is suffering.

No amount of data regarding unemployment, decreased sales, or other adverse economic impact will decrease the danger of the pandemic if restrictions on social contact are lifted too soon. Moreover, there is nothing in Order 28 that prevents the Legislature from addressing the economic impacts. This State can address health and economic needs at the same time; they are not mutually exclusive.

The citizens and businesses of the State have already invested more than a month in trying to slow and contain the spread of the virus. It has come at significant financial and social costs. It would be tragic and inequitable to squander this investment by relaxing the social distancing standards too soon and inviting a spike in transmission of the virus and an increase in COVID-19

hospitalizations and deaths. Public health needs to be the primary concern. On balance, equity disfavors issuance of the injunction.

The Legislature's motion for temporary injunction should be denied.

CONCLUSION

The Legislature's request that the Court grant its Emergency Petition for Original Action should be denied, as should its Motion for Temporary Injunction.

Respectfully submitted this 28th day of April, 2020.

PINES BACH LLP
/s/Tamara B. Packard

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Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
Christa O. Westerberg, SBN 1040530

Attorneys for Intervenors

Mailing Address:
122 West Washington Ave
Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
lpines@pinesbach.com
tpackard@pinesbach.com
cwesterberg@pinesbach.com

CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Court's April 21, 2020 Order in the above-captioned case and the Court's April 8, 2020 Administrative Order, on April 28, 2020 I submitted the foregoing document to the Clerk of the Court for filing via electronic mail at this address: clerk@wicourts.gov.

On April 28, 2020 I also caused an original and one copy of this document to be delivered by U.S. Mail to the Clerk of Court, and caused this document to be served on all counsel of record via electronic mail and U.S. Mail.

/s/Tamara B. Packard

Tamara B. Packard