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Sawyer County, WI
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STATE OF WISCONSIN CIRCUIT COURT SAWYER COUNTY

TAVERN LEAGUE OF WISCONSIN,
INC., SAWYER COUNTY TAVERN
LEAGUE, INC., and FLAMBEAU
FOREST INN LLC,

Plaintiffs,

v.

Case No. 2020CV128

ANDREA PALM, in her official
capacity as Secretary-Designee of the
Wisconsin Department of Health
Services, WISCONSIN DEPARTMENT
OF HEALTH SERVICES, and JULIA
LYONS, in her official capacity as
Health Officer of Sawyer County
Health & Human Services,

Defendants.

**BRIEF OF DEFENDANTS ANDREA PALM AND WISCONSIN
DEPARTMENT OF HEALTH SERVICES IN OPPOSITION TO
MOTION FOR A TEMPORARY INJUNCTION**

INTRODUCTION

No one wants Wisconsinites to need hospitalization or die because of COVID-19. No one wants Wisconsin to be a national COVID-19 hotspot. And no one wants Wisconsin small businesses, including restaurants and bars, to suffer. We all want a healthy Wisconsin public, and a healthy Wisconsin economy.

But the reality is that COVID-19 has left Wisconsin, now more than ever, in a position where quick action *must* at times be taken to protect the health and lives of its people. Wisconsin Stat. § 252.02(3), by its plain language, provides the Department of Health Services (DHS) with authority to react quickly to do just that: DHS may “forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.”

DHS’s Emergency Order 3 falls squarely within those statutory parameters. It forbids gatherings of the public, in “other places” akin to schools and churches in the context of viral spread—i.e. places where people from different households come together indoors—to control the skyrocketing number of COVID-19 cases across Wisconsin. And it lasts for only two 14-day COVID-19 incubation periods.

Plaintiffs’ entire claim rests on the faulty premise that Emergency Order 3 is barred by *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W. 2d 900, because it did not proceed through rulemaking. But Emergency Order 3 is not barred by *Palm*. And with that flawed foundation cleared away, Plaintiffs’ argument crumbles.

The *Palm* Court examined multiple provisions of Wis. Stat. ch. 252 to determine whether DHS needed to conduct rulemaking for specific aspects of the Safer at Home order. The majority concluded that given some of the far-reaching measures of Safer at Home, and in light of the need to read the

general language in Wis. Stat. § 252.02(4) and 252.02(6) to disfavor open-ended grants of power, the Safer at Home order was a rule. But the *Palm* Court did not define an exact line between rulemaking and the enforcement or application of a statute. And most importantly, the court exempted Wis. Stat. § 252.02(3)—the provision at issue in this case—from its rulemaking analysis. That provision explicitly grants DHS powers to take certain types of action. One of those actions is to close schools, and the *Palm* Court concluded that DHS could close schools without rulemaking.

For the same reason, the *Palm* Court’s rulemaking analysis does not apply to Emergency Order 3. The order Plaintiffs challenge was also issued under subsection 252.02(3). In addition to allowing DHS to close schools, that subsection explicitly grants DHS the authority to forbid public gatherings for a particular purpose, controlling outbreaks and epidemics. Given the specific direction in subsection 252.02(3), no rulemaking was needed for DHS to issue that order.

Emergency Order 3 is narrowly and squarely confined to DHS’s explicit authority under Wis. Stat. § 252.02(3) to forbid gatherings of the public in certain locations “to control outbreaks and epidemics.” Wis. Stat. § 252.02(3). No rulemaking was required; indeed, the duration of the order is so short that even emergency rulemaking could not be completed before the order expires.

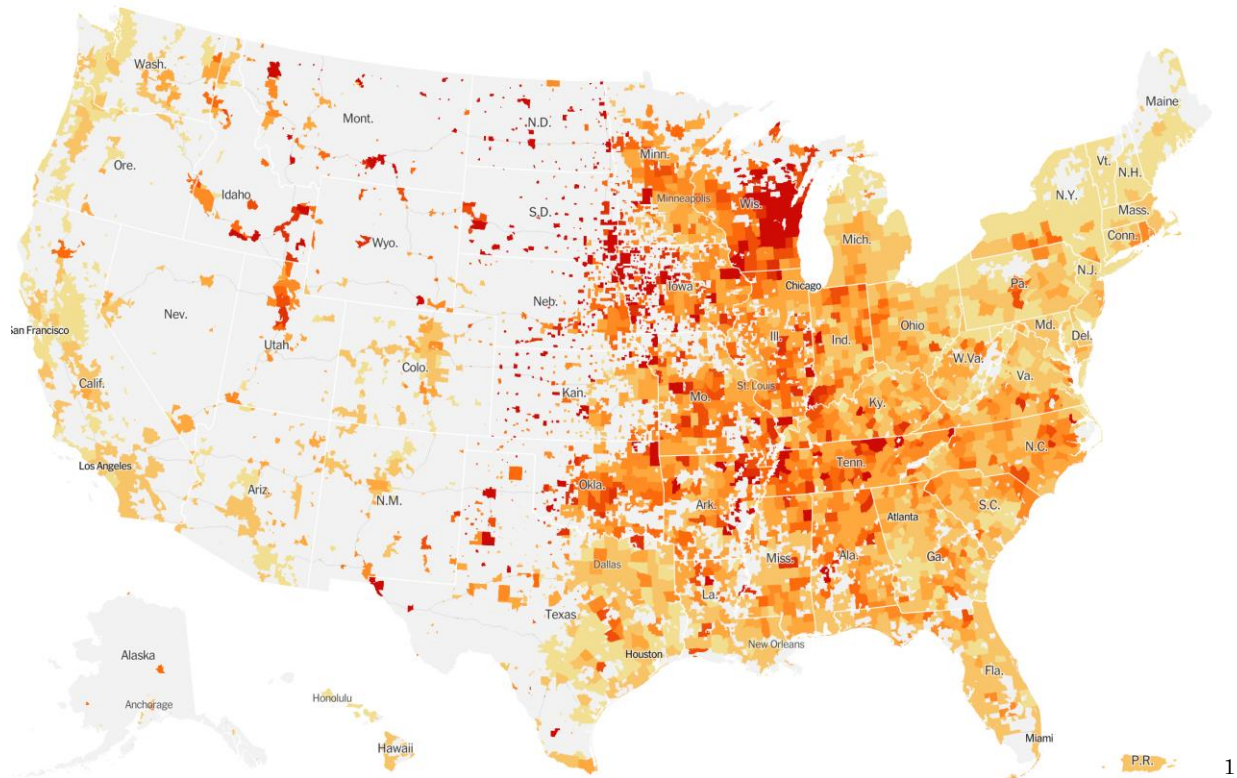
Because Plaintiffs cannot show a reasonable likelihood of success on the merits of their claim, their temporary injunction motion fails.

And while this Court therefore need not consider the other temporary injunction factors, they also militate against Plaintiffs' request. DHS does not minimize the economic harm that Plaintiffs and others are suffering from COVID-19 pandemic generally, or from Emergency Order 3. That, however, is not enough to warrant the extraordinary remedy of a temporary injunction, particularly when balanced against the harm to the health and lives of Wisconsinites that would result from this Court granting a temporary injunction.

FACTUAL BACKGROUND

I. Wisconsin has become a national COVID-19 hotspot.

Wisconsin, sadly, is currently a national COVID-19 hotspot:

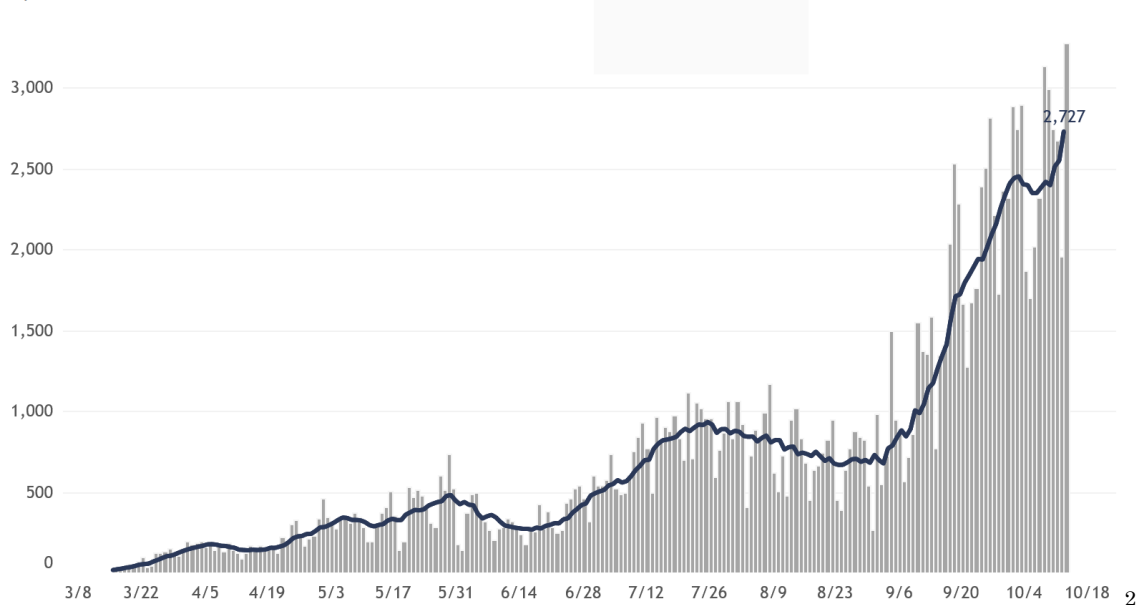


¹ *COVID in the U.S.: Latest Map and Case Count*, The New York Times, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last updated Oct. 15, 2020) (information updated regularly).

September saw an unprecedented skyrocketing of COVID-19 cases in Wisconsin, which has now continued in October:

New confirmed COVID-19 cases by date confirmed, and 7-day average

Updated: 10/13/2020



Nearly 22% of recent COVID-19 tests in Wisconsin have been positive, contrasted with only, for example, roughly 1% positive tests in New York.³

² Wis. Dep't. of Health Servs., *COVID-19: Wisconsin Cases*, <https://www.dhs.wisconsin.gov/covid-19/cases.htm> (last revised Oct. 12, 2020) (information updated regularly).

³ Sophie Carson & Madeline Heim, *State reports nearly 22% positive coronavirus tests as outbreak in northeast Wisconsin worsens*, Milwaukee Journal Sentinel (Sept. 28, 2020, 7:24 PM), <https://www.jsonline.com/story/news/2020/09/28/wisconsin-coronavirus-green-bay-fox-valley-outbreaks-worsen/3562169001>; Rob Mentzer, *Wisconsin's September COVID-19 Spike 'Couldn't Have Come at a Worse Time'*, Wisconsin Public Radio (Sept. 29, 2020, 5:55 AM), <https://www.wpr.org/wisconsins-september-covid-19-spike-couldnt-have-come-worse-time>.

Wisconsin, North Dakota, South Dakota, and Montana have become the top four states in the nation for growth of new cases per 100,000 people.⁴

Unfortunately, within the past few weeks, Wisconsin has repeatedly shattered its own COVID-19 records.⁵ September saw repeated records for new daily COVID cases—in daily amounts of over 2,000 cases. October has brought even worse news. On October 8, for example, Wisconsin had 3,132 new COVID-19 cases.⁶ On October 13, Wisconsin had 3,279 new cases.⁷ On October 15, there were 3,747 new cases.⁸

Following the skyrocketing of COVID-19 cases, deaths have rapidly risen. In a period of only five days—October 1 to October 6—COVID-19 killed 72 Wisconsinites.⁹ And on October 13, *alone*, COVID-19 killed 34 Wisconsinites.¹⁰

⁴ Ctrs. for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), *United States COVID-19 Cases and Deaths by State*, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (data updated Oct. 15, 2020, rate per 100,000 based on last seven days).

⁵ See Affidavit of Dr. Ryan Westeraard (“Westergaard Aff.”) ¶¶ 5–18 (describing spread of COVID-19 in Wisconsin and affects on public health resources).

⁶ Wis. Dep’t. of Health Servs., *COVID-19: Wisconsin Cases*, <https://www.dhs.wisconsin.gov/covid-19/deaths.htm> (last updated Oct. 13, 2020) (information updated regularly).

⁷ *Id.*

⁸ *Id.*

⁹ Wis. Dep’t. of Health Servs., *COVID-19: Wisconsin Deaths*, <https://www.dhs.wisconsin.gov/covid-19/deaths.htm> (last revised Oct. 13, 2020) (information updated regularly).

¹⁰ *Id.*

According to the data available to DHS, Wisconsin is quickly approaching hospital-bed capacity: 84% of licensed hospital beds are currently unavailable across the State.¹¹ Aspirus Healthcare in Wausau, for example, has had to place some patients on a waitlist.¹² As the ThedaCare President has explained, approaching hospital capacity does not just endanger COVID-19 patients; rather, it puts anyone at risk who may need to be hospitalized for other reasons.¹³ Indeed, Wisconsin is so close to hospital capacity that that a field hospital is opening at the Wisconsin State Fairgrounds to help address surge in Wisconsinites who need care for COVID-19.¹⁴

The recent explosion of COVID-19 cases poses a great threat to Wisconsin's economy. As the director of the University of Wisconsin's Center for Research on the Wisconsin Economy recently explained, Wisconsin's economic recovery appears to have slowed, if not reversed, with the recent

¹¹ Wis. Dep't. of Health Servs., *COVID-19: Hospital*, <https://www.dhs.wisconsin.gov/covid-19/hosp-data.htm> (last revised Oct. 13, 2020) (information updated regularly); see also Westergaard Aff. ¶¶ 16–17 (describing Fox Valley hospital capacity at 87.2% full and ICU capacity at 89.5% full as of October 6).

¹² Madeline Heim, *Community actions must change now to stop the 'tidal wave' of COVID-19 patients pouring into Fox Valley hospitals, health care leaders say*, Appleton Post-Crescent, (Oct. 1, 2020, 1:57 PM), <https://www.postcrescent.com/story/news/2020/10/01/wisconsin-coronavirus-fox-valley-hospitals-serious-danger-being-overwhelmed-coronavirus-patients-off/5879574002/>.

¹³ Heim, *supra* note 12.

¹⁴ Emilee Fannon, *Gov. Evers activates field hospital as COVID-19 continues Wisconsin surge*, WKOW.com (Oct. 7, 2020, 12:48 PM), <https://wkow.com/2020/10/07/gov-evers-activates-field-hospital-as-covid-19-continues-wisconsin-surge/>.

skyrocketing of COVID-19 cases: “Clearly it’s going to depend on how long it takes to get this spike under control and get things back to normal.”¹⁵

II. COVID-19 spreads most easily when members of the public gather indoors where mask-wearing and social distancing are difficult.

As we all now know, COVID-19 is understood to spread mostly via respiratory droplets released when people talk, sing, cough, or sneeze.¹⁶ Accordingly, people are most likely to contract the virus indoors, particularly when social distancing is challenging, because people are sharing more air than they would outdoors.¹⁷

COVID-19 spreads easily and invisibly. Many people with COVID-19 will remain asymptomatic (meaning they do not exhibit symptoms) altogether; those who do develop symptoms may not exhibit them until days after contracting the virus. Thus, a person may look and feel completely healthy, but unknowingly be spreading COVID-19.

Epidemiologic studies, case studies of outbreaks, and contract tracing analysis all indicate that crowded indoor settings, especially those with poor

¹⁵ Jeff Bollier & Nusaiba Mizan, *As number of COVID-19 cases in Northeast Wisconsin soars, experts worry it could sink state’s economic recovery from pandemic* (Oct. 9, 2020, 8:00 AM), <https://www.greenbaypressgazette.com/story/money/2020/10/09/wisconsin-businesses-brace-economic-impact-covid-19-cases-soar/3623210001/>.

¹⁶ Affidavit of Dr. Ryan Westergaard ¶ 23.

¹⁷ Ctrs. for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19), Deciding to Go Out*, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html> (last updated Sept. 11, 2020).

ventilation, significantly increase the risk of SARS-CoV-2 transmission.¹⁸ For example, a recent analysis of 1,038 COVID-19 cases in Hong Kong between the onset of the virus and April 28, found a large number of positive cases associated with bars. Characterizing the cases into local clusters of transmission, the study found that the largest local cluster of COVID-19, consisting of 106 cases, was traced to four bars.¹⁹ The second largest cluster, consisting of 22 cases, was linked to a wedding and preceding social event. The authors concluded that “[a]ssuming that local elimination is not possible, disease control efforts should focus on the rapid tracing and quarantine of confirmed contacts, along with the implementation of physical distancing policies including either closures or reduced capacity measures targeting high-risk social settings such as bars, weddings, religious sites and restaurants . . . this would have considerable effect in reducing the overall reproduction number.”²⁰

¹⁸ Westergaard Aff. ¶¶ 26–33.

¹⁹ Adam C. Dillon, et al., *Clustering and superspreading potential of SARS-CoV-2 infections in Hong Kong*, Nat Med. Sept. 17, 2020, <https://www.nature.com/articles/s41591-020-1092-0>; see also Yuki Furuse, et al., *Clusters of Coronavirus Disease in Communities, Japan, January-April 2020*, Emerg Infect Dis., Sept. 2020, 26(9):2176–9, https://wwwnc.cdc.gov/eid/article/26/9/20-2272_article (analysis of over 3,000 COVID-19 cases in Japan, finding 45% of non-healthcare related COVID-19 clusters were associated with restaurants or bars).

²⁰ Dillon, et al., *supra* note 199.

Similarly, a recent Centers for Disease Control and Prevention (CDC) study found that adults with positive COVID-19 tests were 2.4 times as likely to have reported dining at a restaurant in the 14 days before becoming ill than those with negative COVID-19 tests.²¹ When the analysis was restricted to participants without known close contact to a person with COVID-19, individuals who had tested positive for COVID-19 were 2.8 times more likely to report dining at a restaurant, and 3.9 times more likely to report going to a bar or coffee shop, compared to those who tested negative.²²

The CDC study concluded: “Exposures and activities where mask use and social distancing are difficult to maintain, including going to places that offer on-site eating or drinking, might be important risk factors for acquiring COVID-19.”²³ It therefore recommended that, “As communities reopen, efforts to reduce possible exposures at locations that offer on-site eating and drinking options should be considered to protect customers, employees, and communities.”²⁴

²¹ Kiva A. Fisher et al., *Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥ 17 Years in 11 Outpatient Health Care Facilities—United States, July 2020*, 69 *Morbidity & Mortal Wkly. Rep.* 1258, 1259 (2020) <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6936a5-H.pdf>. A summary of the study is available. *Id.* at 1263.

²² *Id.*

²³ *Id.* at 1258.

²⁴ *Id.*

These recommendations were echoed in a report that the White House Coronavirus Task Force issued on October 11, 2020, offering similar guidance to Wisconsin, *specifically*. The Task Force explained that it “share[s] the concern of the state health officials that the current situation can continue to worsen. Wisconsin’s ability to limit further and avoid increases in hospitalizations and deaths will depend on increased observation of social distancing mitigation measures by the community until cases decline.”²⁵ Included in mitigation efforts, the Task Force explained, should be “avoiding crowds in public and social gatherings in private,” “as well as tailored business and public venue measures.” The Task force also recommended, in “high incidence jurisdictions,” “limiting indoor gathering sizes.” “Lack of compliance” with mitigation measures, the Task Force warned, “will lead to preventable deaths.”

III. DHS issued Emergency Order 3 to limit gatherings of the public to respond to the skyrocketing of COVID-19 cases, hospitalizations, and deaths in Wisconsin.

With Wisconsin now having the unfortunate status as a national COVID-19 hotspot and our hospitals approaching capacity, and with the knowledge that indoor public gatherings pose the highest risk of COVID-19

²⁵ The report is available at CBS 58, *Report: White House COVID-19 Task Force Concerned About Wisconsin* (Oct. 15, 2020), <https://www.cbs58.com/news/report-white-house-covid-19-task-force-concerned-about-wisconsin>.

transmission, DHS Secretary-Designee Palm issued Emergency Order 3 on October 6, 2020.²⁶ Secretary-Designee Palm did so pursuant to DHS's authority under Wis. Stat. § 252.02(3). (Emergency Order (EO) 3 pg. 3).

Effective from October 8 to November 6, 2020—two incubation periods of COVID-19—the order limits gatherings of the public. The order defines public gatherings as an “indoor event, convening, or collection of individuals, whether planned or spontaneous, that is open to the public and brings together people who are not part of the same household in a single room.” (EO 3 pg. 3).

It provides that in a location where a total occupancy limit exists, gatherings are limited to no more than 25% of the total limit; otherwise, public gatherings are limited to more than 10 people. (EO 3 pg. 3).²⁷

It exempts private residences, except in circumstances when an event occurs at a private residence that is open to the public; in that circumstance, the order limits the gathering to 10 people. (EO 3 pg. 3). Emergency Order 3 also provides other exemptions, including for childcare settings, schools and universities, health care and human services operations, Tribal nations, and government and public infrastructure operations (including food distributors).

²⁶ Wis. Dep't of Health Servs., *EMERGENCY ORDER #3: LIMITING PUBLIC GATHERINGS* (Oct. 6, 2020), <https://evers.wi.gov/Documents/COVID19/EmO03-LimitingPublicGatherings.pdf>.

²⁷ The same day that Secretary Palm issued Emergency Order 3, Governor Evers announced over \$100 million in grants to help small businesses endure the pandemic. <https://content.govdelivery.com/accounts/WIGOV/bulletins/2a4759f>.

(EO 3 pg 3–5). It further exempts places of religious worship, political rallies, and other speech protected by the First Amendment. (EO 3 pg 5–6.)

STANDARD FOR TEMPORARY INJUNCTIVE RELIEF

Wisconsin Stat. § 813.02(1)(a) provides that a court may grant a temporary injunction where it appears that one party is entitled to judgment, and that another party may take some action during the litigation that could violate rights of the first party, or render the subsequent judgment ineffectual. Temporary injunctions are an extraordinary form of relief, which are not to be issued lightly. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)

A movant must establish: (1) a reasonable probability of ultimate success on the merits; (2) that the injunction is necessary to preserve the status quo; (3) the lack of an adequate remedy at law; and (4) a likelihood of suffering irreparable harm if the injunction does not issue. *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154.

To show irreparable injury, the movant must demonstrate that, without a temporary injunction to preserve the status quo during the litigation, the issuance of permanent injunctive relief at the end of the case would be rendered futile. *Werner*, 80 Wis. 2d at 520.

“Where the issuance of a temporary injunction would have the effect of granting all the relief that could be obtained by a final decree, and would practically dispose of the whole case, it ordinarily will not be granted unless the complainant’s right to relief is clear.” *Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 172, 127 N.W.2d 29 (1964).

Additionally, although not always stated as an explicit part of the test for preliminary injunctive relief, courts have long recognized the importance of weighing “competing claims of injury” and “the effect on each party of the granting or withholding of the requested relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (quoting *Amoco Prod. Co. v. Village of Gambell*, 408 U.S. 531, 542 (1987)). “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

Lastly, the granting of a temporary injunction rests within the court’s discretion. *Werner*, 80 Wis. 2d at 519. Even if the statutory requirements for have been met, a court need not grant an injunction. *Id.* at 524.

ARGUMENT

I. Plaintiffs cannot show a reasonable probability of success on the merits because Emergency Rule 3 was within the scope of Wis. Stat. § 252.02(3) and consistent with *Palm*; a contrary reading would be absurd and dangerous.

A. The plain language of subsection 252.02(3) permitted DHS to issue an order limiting public gatherings.

Emergency Order 3 was authorized under the plain language of Wis. Stat. § 252.02(3). That provision provides, in full: “The department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.” Wis. Stat. § 252.02(3).

.Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. “[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.* ¶ 46.

Additionally, “Statutory purpose is important in discerning the plain meaning of a statute.” *Westmas v. Creekside Tree Serv. Inc.*, 2018 WI 12, ¶ 19, 379 Wis. 2d 471, 907 N.W.2d 68 (citing *Kalal*, 271 Wis. 2d 633, ¶ 48). In construing a statute, courts “favor a construction that fulfills the purpose of the statute over one that defeats statutory purpose.” *Id.*

Wisconsin Stat. § 252.02(3) explicitly provides DHS with authority to “forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.” “*Public* gatherings” means gatherings of the public, not simply gatherings in publicly owned places. That reading is the more natural reading of the phrase, and is supported by the surrounding language in the subsection. Subsection 252.02(3) describes public gatherings as happening in churches, and obviously churches are not publicly owned.

Moreover, the “other places” where DHS may limit public gatherings must be read in relation to the words in the phrase—schools and churches, other places where people gather and an outbreak or epidemic *spreads*. The purpose of the closure is to “control outbreaks and epidemics.” Wis. Stat. § 252.02(3). In the context of that explicit purpose, the provision’s description of places where DHS may forbid public gatherings should be read as places where a virus may easily spread. Notably, both schools and churches are places where individuals from different households come together in close proximity indoors.

Emergency Order 3 accordingly fits well within the parameters of DHS’s authority under the plain language of Wis. Stat. § 252.02(3). Emergency Order 3 “forbids public gatherings” in places where persons from different households will be together in close proximity indoors. It applies only to indoor gatherings that are open to the public and bring together people who are not part of the

same household. (EO 3 pg. 3). Put differently, it applies only to “other places” akin to churches and schools when it comes to viral spread. *See* Wis. Stat. § 252.02(3).

Additionally, by prohibiting public gatherings in amounts of over 25% total occupancy if applicable, or over 10 persons if not, DHS “forbid[s]” public gatherings of *larger* groups. Where the plain language of the statute permits DHS forbidding public gatherings, to “control outbreaks and epidemics,” a prohibition of gatherings above a certain person threshold necessarily serves to “control outbreaks.” Wis. Stat. § 252.02(3). Thus, Emergency Order 3 comports with the plain language of Wis. Stat. § 252.02(3).

B. Emergency Order 3 does not violate *Palm*.

Plaintiffs argue that Emergency Order 3 is forbidden by *Palm*. They argue that *Palm* held that limiting public gatherings is outside the scope of Wis. Stat. § 252.02 or, alternatively, that DHS must undergo rulemaking if it wants to limit such gatherings. But *Palm* reached no such conclusions as to Wis. Stat. § 252.02(3) and in fact upheld part of the Safer at Home order that acted under that subsection.

The *Palm* Court concluded that most aspects of the Safer at Home Order were invalid, for three different reasons. Only one is even arguably relevant here, and the *Palm* majority’s ruling cuts against Plaintiffs’ claim on that issue.

First, the court concluded that though Safer at Home imposed criminal penalties, subsection 252.02(6) lacked the specificity required for the imposition of such penalties. *Palm*, 391 Wis. 2d 497, ¶¶ 45–47. Here, Emergency Order 3 includes no criminal penalties.

Second, the court concluded that the broad travel and business activity restrictions in Safer at Home could not be imposed under subsection 252.02(4) because the statutory language did not authorize those restrictions. *Id.* ¶ 50. That provision is not at issue here. Plaintiffs make a conclusory argument that limiting public gatherings is tantamount to closing non-essential businesses, but in light of the explicit grant of authority for DHS to limit public gatherings in Wis. Stat. § 252.02(3), the premise that DHS lacked statutory authority is plainly without merit.

Third, and the focus of Plaintiffs' claim here, the majority concluded that the Safer at Home order was invalid because it had not been promulgated as a rule. But *Palm*'s analysis addressed only certain considerations in determining whether rulemaking is required, and its reasoning confirms that Emergency Order 3 is *not* a rule.

The parties in *Palm* disagreed whether the Safer at Home orders were “general orders” or “rules” within the meaning of Wis. Stat. § 227.01(13), which defines a “rule” as “a regulation, standard, statement of policy, or general order

of general application.”²⁸ Subsection 252.02(4) permits DHS to issue both “general orders” and to promulgate rules.

But the definition of a rule requires more: the agency action must be “to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.” Wis. Stat. § 227.01(13). By contrast, where an agency simply applies or enforces a statute that permits a specific action to be taken in a particular circumstance—such as the school closures in the Safer at Home order—no rulemaking is necessary.

That distinction is consistent with provision of ch. 227 that governs when rulemaking is necessary. Under Wis. Stat. § 227.10(1), “[e]ach agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.” Applying that standard here, DHS was not required to promulgate Emergency Order 3 as a rule unless that order is either a statement of general policy or an interpretation of Wis. Stat. § 252.02(3)

²⁸ Although the *Palm* decision is controlling on this Court as to the question of whether the Safer at Home order issued under subsection 252.02(4) and (6) was a “rule” under Wis. Stat. § 227.01(13), Secretary Palm and DHS maintains that it was based on an erroneous conclusion of law. Because the Safer at Home order was a response to a specific and particular fact scenario, it was not a general order of general applicability.

That holding does not control the result here because Emergency Order 3 did not require rulemaking for separate, additional reasons. Defendant Palm simply notes this disagreement to preserve the argument on appeal that Emergency Order 3 is also not a rule because it is not a general order of general applicability.

adopted by DHS to govern its enforcement or administration of that statute. Because Emergency Order 3 is neither of those things, rulemaking was not required.

First, Emergency Order 3, on its face, is not a statement of general policy. It is an order issued to deal with specific public health needs arising at the present time out of a specific pandemic.

Second, Emergency Order 3 also is not an interpretation of Wis. Stat. § 252.02(3) adopted by DHS to govern its enforcement or administration of that statute. It is an executive action carrying out the DHS's express power under Wis. Stat. § 252.02(3) to "forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics," under the specific factual circumstances of the current public health crisis in Wisconsin. In contrast to such executive action by an agency, rulemaking involves an agency's exercise of delegated legislative power to "fill up the details" of a statute. *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929, 941 (1928). Agencies thus need not undertake rulemaking every time they act under the statutes they are charged with executing. They must promulgate rules only when the relevant authorizing statute itself contains gaps that must be filled in. *Cf. Lamar Cent. Outdoor, LLC v. DHA*, 2019 WI 109, ¶ 24, 389 Wis. 2d 486, 936 N.W.2d 573 (2019) (holding that rulemaking is required when an agency changes its interpretation of an ambiguous statute, but not when it conforms

its interpretation to an unambiguous statute); *Schoolway Transp. Co. v. Div. of Motor Vehicles*, 72 Wis. 2d 223, 228, 240 N.W.2d 403 (1976) (“When a statute is plain and unambiguous, no interpretation is required . . .”). Here, there were no details of Wis. Stat. § 252.02(3) that needed to be filled in. DHS simply executed its power under the plain terms of that statute.

This basic question about a statute’s specificity, and the extent to which the Safer at Home order constituted application or enforcement, was not explicitly discussed by the *Palm* majority. That is because the primary statutes addressed by the court, Wis. Stat. § 252.02(4) and (6), described DHS’s powers very generally: the court observed the law conferred broad powers, but used “imprecise terminology.” *Palm*, 391 Wis. 2d 497, ¶ 55. Those provisions, referring to orders and emergency measures, did not include specific actions DHS could take to protect the public health.

But that predicate for rulemaking is more central to orders under subsection 252.02(3) because that subsection *does* contain the explicit steps that DHS can take. Even if a public health order could possibly constitute a “rule” under the open-ended subsections of Wis. Stat. § 252.02, DHS need not promulgate a rule when it issues an order under the specific language of subsection 252.02(3).

The *Palm* majority implicitly recognized that fact when it upheld the Safer at Home order closing schools. That order issued pursuant to the explicit

authority granted in Wis. Stat. § 252.02(3), which permits DHS to “close schools.” The school closure portion of Safer at Home reflected the already-explicit authority of DHS to take a specific act. In other words, no rule was necessary to “make specific” already specific legislation.

The same holds true with Emergency Order 3. Just as subsection 252.02(3) explicitly allows DHS to close schools, it explicitly authorizes DHS to forbid public gatherings to control an outbreak or epidemic. And that is precisely what Emergency Order 3 does.

While Plaintiffs assert that *Palm* requires rulemaking for every DHS public health order, they recognize that the court did not require it for Safer at Home’s closure of schools. To avoid that result here, they suggest that DHS needed to promulgate a rule to prohibit public gatherings, even though Wis. Stat. § 252.02(3) provides explicit authority for that act, on the theory that the order contained details. But the Safer at Home order provided the same sorts of details about school closing, and the *Palm* Court still upheld it: the Order set a temporal limit on the school closures (“the remainder of the 2019–2020 school year”), provided that schools could continue to provide “distance learning or virtual learning,” and could still be used “for Essential Government Functions and food distribution.” Emergency Order 28, § 4. a. The *Palm* Court realized that Wis. Stat. § 252.02(3) is sufficiently specific that the agency need not promulgate rules to act under it.

Given that fact, DHS may act under that subsection to carry out the actions the statute authorizes. Plaintiffs suggest an absurd version of rulemaking that would prevent state agencies from doing their most basic duties under the statutes they carry out if there is any minute detail left to add. No court has embraced such a view.

And subsection 252.02(3) is distinguishable from the provisions discussed in *Palm* in an additional way: its text limits DHS in time by confining it to addressing a situation that will end. Courts describe administrative rules as “rules of the road” that will apply without a built-in expiration. *See Citizens v. Sensible Zoning, Inc., v. DNR*, 90 Wis. 2d 804, 814–15, 280 N.W.2d 702 (flood plain zoning ordinance applied to anyone moving forward who acquired legal interest in the subject land); *Cholvin v. DHFS*, 2008 WI App 127, ¶¶ 24–25, 313 Wis. 2d 749, 758 N.W.2d 118 (instruction to determine new applicants eligibility for a certain Medicaid program applied to all applicants moving forward). The *Palm* majority viewed Safer at Home as not limited in time and thus like rules that go forward without expiration. *See Palm*, 391 Wis. 2d 497, ¶ 27 (“[A] ‘limited-in-time scenario’ is not the power that *Palm* has seized.”)

But subsection 252.02(3)’s plain language bakes in a temporal limitation: it allows DHS to act only “to control outbreaks and epidemics,” discrete situations that will come to an end. That means that orders issued under subsection 252.02(3) necessarily cannot be ongoing rules of the road. It would

not be possible to promulgate a “rule,” with its inherent ongoing viability, that would satisfy the language of subsection 252.02(3).

DHS did just as the plain language of Wis. Stat. § 252.02(3) and separation of powers principles require, and as *Palm* permits: executing the specific language of a statute to achieve its plainly stated purpose. In direct response to an unprecedented skyrocketing of new COVID-19 cases across the State, Emergency Order 3 forbids gatherings of the public in certain places where members of different households come together indoors, and limits its duration to two COVID-incubation periods (two 14-day periods).

C. Plaintiffs’ incorrect interpretation of *Palm* and Wis. Stat. § 252.02(3) would be both absurd and dangerous.

Courts interpret statutes to avoid unreasonable results. An interpretation that an order forbidding public gatherings under Wis. Stat. § 252.02(3) alone requires rulemaking would be absurd, and dangerous in its absurdity. What if, for example, DHS became aware of an Ebola outbreak in Wisconsin? Ebola is spreading, and people are dying at a rapid rate. Under Plaintiffs’ interpretation, despite the plain language of Wis. Stat. § 252.02(3), DHS would be *powerless* to forbid gatherings of the public to control the outbreak, and would instead have to go through rulemaking procedures that unquestionably takes *weeks*.

Or, consider how quickly and dramatically the COVID-19 pandemic itself recently escalated in Wisconsin. On October 13, 2020, alone, it killed 34 Wisconsinites. This novel virus spreads easily, often through completely asymptomatic individuals, and we have seen first-hand that risk levels, hospitalizations, and deaths, can increase rapidly. Wisconsin Stat. § 252.02(3) recognizes the fact that diseases like COVID-19 do not abide by contemplative timeframes, and accordingly that DHS must have the ability to issue targeted responses—whether through closing schools or forbidding gatherings of the public—quickly. A contrary interpretation would be absurd, because if correct, DHS would not actually be able to “control outbreaks and epidemics” in accordance with its express statutory authority. Wis. Stat. § 252.02(3).

How could it possibly be that our Legislature, which drafted a statute specifically designed to empower DHS to respond quickly and effectively to control outbreaks, would make it impossible for DHS to do just that? We interpret statutes in light of their purpose, and the plain purpose of Wis. Stat. § 252.02(3) is to give DHS a tool to *react* to control an outbreak or epidemic, quickly. DHS could act under the well-defined parameters of Wis. Stat. § 252.02(3) without undertaking rulemaking. Because Plaintiffs therefore

cannot show a likelihood of success on the merits of their claim, they are not entitled to a temporary injunction.²⁹

II. Plaintiffs also fail to meet other requisite showings to warrant a temporary injunction, particularly when balanced with the harms to public health and safety that would result from the issuance of a temporary injunction.

Because Plaintiffs cannot meet their burden to show a likelihood of success on the merits, this Court should deny the motion for temporary injunctive relief on that basis alone. But beyond the merits, Plaintiffs also do not carry their burden to show irreparable injury or that the equities weigh in favor of their requested order.

To be clear, DHS in no way means to make light of the economic hardships Plaintiffs face due to COVID-19 generally, or due to the public gathering restrictions in Emergency Order 3 specifically. The COVID-19 pandemic has come at a tremendous cost to not only the health of Wisconsinites, but also to the livelihoods of many Wisconsin businesses.

But that economic hardship, even if significant, does not carry Plaintiffs' burden to warrant the extraordinary relief of a temporary injunction. *See*

²⁹ Plaintiffs assert that the Joint Committee for Administrative Rules (“JCRAR”)’s recent determination that Emergency Order 3 constituted a rule “[f]urther underscores the need for injunctive relief,” because JCRAR cannot currently prevent DHS from enforcing the rule. (Pls.’ Br. 13.) But JCRAR appears to be under the same mistaken understanding that the Wisconsin Supreme Court in *Palm* prohibited *any* action that DHS takes under Wis. Stat. § 252.02 (3) without administrative rulemaking. JCRAR, like Plaintiffs, misread *Palm*.

Werner, 80 Wis. 2d at 520. Rather, to show irreparable harm, Plaintiffs must show that if this Court does not grant them relief *now*, the relief that this Court would ultimately grant them, if it ruled in their favor at the end of the case, would be rendered futile. *Id.*

Emergency Order 3 expires November 6. Plaintiffs make broad allegations that, absent a temporary injunction, Plaintiff Flambeau Inn, and “similarly situated members of the other Plaintiffs,” will be “substantially or entirely out of business.” (Pls.’ Br. 13.) But Plaintiffs do not assert that they will forever be out of business without a temporary injunction, but only “for as long as the occupancy restriction remains in place.” (Slack Aff. 2.) Put differently, Plaintiffs allege that they are being harmed by Emergency Order 3 while it lasts, and therefore they seek *faster* relief. But that does not mean that *ultimate* relief in their favor would be *futile* absent an extraordinary temporary injunction.

And critically, this Court must consider competing harms as well. Plaintiffs’ brief does not even attempt to grapple with the fact that Wisconsin is currently seeing a devastating number of COVID-19 cases, hospitalizations, and deaths. On the same day that Plaintiffs filed their brief seeking a temporary injunction, October 13, 2020, 34 Wisconsinites died from COVID-

19. On that one day, *alone*.³⁰ Our hospitals are approaching capacity, which affects all who may need hospital care—not just COVID-19 patients.

And in this regard, granting Plaintiffs a temporary injunction would not maintain the status quo. Rather, it would remove DHS's ability to promptly respond to the COVID-19 pandemic that has already infected over 155,000 Wisconsinites, hospitalized over 8,500, and killed over 1,500. And it would do so when Wisconsin is in the throes of the worst COVID-19 spread our state has seen, when Wisconsin is a *national* COVID-19 hotspot.

No one wants restaurants and bars to have fewer customers, even in the short term. But without prompt action by DHS and our State working together, the catastrophic consequences of unchecked COVID-19 will sicken thousands more of our loved ones, killing many of them, and leave others with other healthcare needs without access to hospitals. And Wisconsin's economy cannot recover as long as the pandemic is out of control. And DHS must act promptly under Wis. Stat. § 252.02(3) to forbid gatherings of the public, just as it did in Emergency Order 3. The Wisconsin Supreme Court did not leave DHS powerless, and this Court should not, either.

³⁰ Wis. Dep't. of Health Servs., *COVID-19: Wisconsin Deaths*, *supra* note 9.

III. In the event this Court rules against Secretary-Designee Palm and DHS, this Court is urged to stay its decision pending appeal.

This Court should deny Plaintiffs' request for a temporary injunction because Plaintiffs have not met their requisite showings. But if this Court were to issue a decision to the contrary, Secretary-Designee Palm and DHS respectfully request that this Court stay that decision to permit them to file an immediate notice of appeal and written motion for a stay with this Court.

CONCLUSION

This Court should deny Plaintiffs' motion for a temporary injunction.

Dated this 16th day of October 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Colin Hector
COLIN A. HECTOR
Assistant Attorney General
State Bar #1120064

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

Attorneys for Defendants Andrea Palm
and Wisconsin Department of Health
Services

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8407 (CAH)
(608) 266-8690 (TCB)
(608) 266-8101 (HSJ)
(608) 294-2907 (Fax)
hectorca@doj.state.wi.us
bellaviatc@doj.state.wi.us
jursshs@doj.state.wi.us