No.________

In the Wisconsin Court of Appeals

DISTRICT III

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

v.

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*,
DEFENDANTS-RESPONDENTS,

AND

THE MIX UP, INC. (D/B/A MIKI JO'S MIX UP), LIZ SIEBEN, PRO-LIFE WISCONSIN EDUCATION TASK FORCE, INC., PRO-LIFE WISCONSIN, INC., *AND* DAN MILLER,
INTERVENOR-PLAINTIFFS-PETITIONERS.

On Appeal From The Sawyer County Circuit Court,
The Honorable James C. Babler, Presiding
Case No. 2020CV128

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL

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INTRODUCTION

On May 13, 2020, the Wisconsin Supreme Court ruled in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, that, as relevant here, if Secretary-designee Andrea Palm wanted to issue Emergency Order #28's statewide selective business closures and capacity limits, in response to COVID-19, she had to go through the well-established emergency rulemaking process in Chapter 227. Yet, on October 6, Secretary-designee Palm issued Emergency Order #3, which—remarkably—imposes statewide selective capacity limits to address COVID-19, without going through that mandatory rulemaking process.

The Secretary-designee's actions here are, with all respect, an indefensible assault on the separation of powers and the rule of law. There is simply no basis to distinguish Emergency Order #28's statewide selective business closures and capacity limits from Emergency Order #3's capacity limits, *in terms of Palm's Chapter 227 reasoning*, as articulated in Part C.1 of that opinion. While Emergency Order #28 and *Palm also* involved other provisions and

rulings not at issue with Emergency Order #3—such as travel restrictions and criminal penalties, which *Palm* invalidated on *both* procedural grounds (in Section C.1 of its opinion) *and* because they exceeded the Secretary-designee's *substantive* authority under Sections 252.02(3), (4), and (6) (in Section C.2 of its opinion), and a blanket school closure, which the Supreme Court summarily upheld against all challenges in two short, identical footnotes—these two Orders' statewide selective capacity limits are materially indistinguishable for purposes of *Palm*'s Chapter 227 holding.

Importantly, this Emergency Motion is the only mechanism for Intervenor-Plaintiffs to protect their legitimate rights, including their rights to earn an honest living, to host fundraisers to support their charitable mission, and as taxpayers, given that Emergency Order #3 expires on November 6, 2020. **Accordingly, Intervenor-Plaintiffs respectfully request a ruling on this Emergency Motion by Friday, October 23, 2020—just two weeks before the 28-day Order here expires**.

STATEMENT OF THE CASE[1]

A. Legal Background

1. Under Chapter 227, agencies must follow certain mandatory rule-making procedures before promulgating a rule, including, as particularly relevant here, an emergency rule. Wis. Stat. § 227.24. Chapter 227 defines a "rule" as "a regulation, standard, statement of policy, or general order of general application that has the force of law" from an agency and that "implement[s], interpret[s], or make[s] specific legislation enforced or administered by the agency . . . ." Wis. Stat. § 227.01(13); *see Palm*, 2020 WI 42, ¶ 16.

To promulgate an emergency rule, Section 227.24 provides that an agency must prepare a finding of emergency, submit a scope statement to the Department of Administration and to the agency for approval, have that statement published in the Administrative Register, and follow other necessary requirements. *See* Wis. Stat. §§ 227.24(1)(e), 227.135(1)–(2). Then, the agency must

[1] To facilitate the Court's review of Intervenor-Plaintiffs' Petition For Permissive Appeal and this Motion For An Injunction Pending Appeal, Intervenor-Plaintiffs repeat this Statement Of The Case in both filings.

submit the rule to the Legislature's Joint Committee for Review of Administrative Rules, which "may suspend any rule by a majority vote of a quorum of the committee," Wis. Stat. § 227.26(2)(d), on the grounds of "absence of statutory authority," "failure to comply with legislative intent," or "[a]rbitrariness and capriciousness, or imposition of an undue hardship," Wis. Stat. § 227.19(4)(d)(1), (3), (6).

2. In *Palm*, the Wisconsin Supreme Court considered when an emergency order from an agency—there, Secretary-designee Palm's Emergency Order #28—is a "rule" that must follow Chapter 227's emergency-rulemaking procedures.

Most relevant here, Emergency Order #28 selectively closed some businesses throughout the State, while also imposing capacity limits on other businesses that were allowed to reopen. *See generally* Emergency Order #28 ("EO#28") at 3–5, 14–15.[2] In particular, the order closed "non-essential" businesses, while allowing "essential businesses" to remain open. EO#28 at 3–4 (capitalization altered).

[2] Available at https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf (all websites last visited October 20, 2020).

Additionally, for those "essential" businesses and other exempt organizations, like religious institutions, that could open, Emergency Order #28 imposed certain statewide capacity limitations—such as 25% of the maximum occupancy for certain businesses or, for religious institutions, 10 people. EO#28 at 5, 14–15

Palm explained the governing principle for when an order qualifies as a "rule" under Chapter 227 in Section C.1 of its opinion: the order is "(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." *Palm*, 2020 WI 42 ¶ 22 (citation omitted). Or, in other words, an order is a "rule" for purposes of Chapter 227 when it applies to a "class [ ] described in general terms and new members can be added to the class." *Id.* ¶ 21 (citation omitted).

Palm then concluded that Emergency Order #28 was a "rule," subject to Emergency Order #28's required rulemaking procedures. *See id.* ¶¶ 15–42. As described above, that order

selectively closed businesses that it defined as "non-essential" and exempted businesses it defined as "essential" and other organizations from this order, while imposing certain capacity limitations on those exempt entities. Chapter 227's rulemaking requirement, *Palm* explained, "exists precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official, Palm, is not imposed in Wisconsin." *Id.* ¶ 28.

Finally, in Section C.2 of the opinion, *Palm* reviewed the substantive validity of Emergency Order #28—"assum[ing], arguendo, that rulemaking was not required"—and declared that "clearly Order 28 went too far" beyond the grant of authority to Secretary-designee Palm in Wis. Stat. § 252.02(3), (4), and (6) in various respects. *Id.* ¶¶ 43, 54.

3. This case involves the Secretary-designee's Emergency Order #3, issued on October 6, 2020, effective from

October 8, 2020 to November 6, 2020, and enforceable by civil forfeiture under Section 252.25. App. 1–7.[3]

Emergency Order #3 purports to regulate all persons operating businesses and attending public gatherings in Wisconsin, from October 8, 2020, at 8:00 a.m., to November 6, 2020. App. 7. It provides that "[p]ublic gatherings are limited to no more than 25% of the total occupancy limits for the room or building, as established by the local municipality," but "[f]or indoor spaces without an occupancy limit . . . established by the local municipality . . . public gatherings are limited to no more than 10 people." App. 3–4. The Order defines "[p]ublic gathering" broadly 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." App. 3. This includes "[r]ooms within a business location," which would include indoor restaurants. App. 3.

[3] Emergency Order #3 is found in Intervenor-Plaintiffs' Appendix at App. 1–7, and it is also available at https://evers.wi.gov/Documents/COVID19/EmO03-LimitingPublicGatherings.pdf.

Emergency Order #3 then creates numerous exceptions to its strict limits, which exceptions the Order places into two groups. First, Emergency Order #3 defines three categories of "Places" that "are not part of the definition of a public gathering": (1) "Office spaces, manufacturing plant, and other facilities that are accessible only by employees or other authorized personnel"; (2) "Invitation-only events that exclude uninvited guests"; and (3) "Private residences[,] [e]xcept a residence is considered open to the public during an event that allows entrance to any individual [in which case] such public gatherings are limited to 10 people." App. 3. Second, it lists additional categories that "are exempt," including "Child care settings," "Placements for children in out-of-home care," "4K-12 schools," "Institutions of higher education," "Health care and public health operations," "Human services operations," "Public Infrastructure operations," "State and local government operations and facilities," "Churches and other places of religious worship," "Political rallies . . . and other [protected] speech," and certain governmental facilities. App. 4–6.

b. On October 7, 2020, Senate Majority Leader Scott Fitzgerald and Assembly Speaker Robin J. Vos delivered a letter to Secretary-designee Palm, explaining that, under *Palm*, Emergency Order #3 was a rule—since it "purports to 'regulate[ ] all persons in Wisconsin . . . and . . . all who will come into Wisconsin in the future'"—that was "subject to the Administrative Procedure Act's emergency rulemaking procedures." Letter from Senate Majority Leader Fitzgerald and Assembly Speaker Vos to Secretary-designee Palm at 1 (Oct. 7, 2020) (quoting *Palm*, 2020 WI 42, ¶¶ 23–25 (alterations in original)).[4] Yet, these legislative leaders explained that the Department of Health Services "did not comply with those procedures before issuing this document," *id.*, nor was the rule submitted to the Joint Committee for Review of Administrative Reviews for its assessment under Wis. Stat. § 227.26, *id.* at 2. Accordingly, the letter concluded that Emergency Order #3 was invalid and unenforceable under *Palm*. *Id.* at 1. This letter also explained that the

[4] Available at https://www.wispolitics.com/wp-content/uploads/2020/10/201007Letter.pdf.

nonpartisan Legislative Reference Bureau had reached the same conclusion. *Id.*; *see* Legislative Reference Bureau, *Analysis of Emergency Order #3 and* Wisconsin Legislature v. Palm (Oct. 7, 2020).[5]

The Joint Committee for Review of Administrative Rules then held an Executive Session in response to Secretary-designee Palm's unlawful promulgation of Emergency Order #3. *See* Notice of Executive Session for Oct. 12, 2020, JCRAR;[6] *see Joint Committee for Review of Administrative Rules Hearing*, WisconsinEye (Oct. 12, 2020, 1:00 PM) (recording of Executive Session).[7] The Joint Committee for Review of Administrative Rules concluded that Emergency Order #3 is a rule and directed Secretary-designee Palm to promulgate Emergency Order #3 according to the required procedures within 30 days. *Joint Committee for*

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[5] Available at https://www.wispolitics.com/wp-content/uploads/2020/10/LRB.Memo_.Anlysis-of-Emergency-Order-3.pdf.

[6] Available at https://docs.legis.wisconsin.gov/raw/cid/1573309.

[7] Available at https://wiseye.org/2020/10/12/joint-committee-for-review-of-administrative-rules-55/.

Review of Administrative Rules Hearing, WisconsinEye, *supra* at 48:25–49:10; *see* Wis. Stat. § 227.26(2)(b).

B. Factual And Procedural Background

1.a. Intervenor-Plaintiffs are The Mix Up, Inc. (hereinafter "The Mix Up"); Liz Sieben; and Pro-Life Wisconsin Education Task Force, Inc. and Pro-Life Wisconsin, Inc. (hereinafter, collectively, "Pro-Life Wisconsin"), and Daniel J. Miller. On Friday, October 16, 2020, they moved to intervene in the circuit court as plaintiffs, R.42, submitting a one-count complaint asserting the same challenge to Emergency Order #3 that plaintiffs raised, R.43 at 22–23. Intervenor-Plaintiffs also filed a proposed motion for a temporary injunction, R.50, adopting and supplementing the arguments in support of the plaintiffs' motion, R.51.

"The Mix Up" is a family restaurant and neighborhood bar in Amery, Wisconsin. App. 16. Sieben is the sole owner and operator of The Mix Up, and she acquired the restaurant in February 2020. App. 16. Both The Mix Up and Sieben are Wisconsin taxpayers. App. 21. On a normal, reasonably busy day, The Mix Up will serve about 40 to 50 customers inside at

once. App. 17. The Mix Up closed in March 2020 due to Governor Evers' and Secretary-designee Palm's COVID-19 orders, and then reopened the same day that the Wisconsin Supreme Court issued *Palm*. App. 16–17.

After this reopening, The Mix Up has operated according to detailed health-and-safety procedures, procedures that follow all state and local public-health orders. App. 18. For example, The Mix Up: (a) requires a detailed daily check-in procedure for staff prior to their shift, which includes taking their temperatures; (b) requires staff to follow social-distancing practices; (c) requires staff and customers to wear masks, if capable; (d) replaced all community condiments with individually packaged items; (e) placed disinfectant supplies on tables and near high-touch surfaces for customers and staff to use; (f) requires staff to clean bathrooms hourly and to even more regularly wipe down all surfaces; and (g) has hired professional cleaners to clean the entire restaurant daily before opening. App. 18. These procedures have increased The Mix Up's operational budget by a factor of six. App. 19.

Emergency Order #3 already harmed The Mix Up for the few days it was in place before the circuit court issued the temporary restraining order, and it will continue to suffer harm unless the Order is enjoined. Under the Order, The Mix Up is limited to a maximum indoor capacity of no more than 25% of the its total occupancy limit. App. 3–4. This capacity limit includes any employees and staff in the restaurant. App. 3–4; App. 19. As Sieben stated in an unrebutted, sworn affidavit submitted to the circuit court, since Secretary-designee Palm released Emergency Order #3, effective on October 8, The Mix Up saw a *50% reduction in sales*, despite the good weather and open outdoor seating over the weekend of October 10–11, 2020. App. 20. That reduction is attributable to Emergency Order #3 itself: The Mix Up's customer base must, in general, plan to drive to The Mix Up, since the restaurant's location does not lend itself to customers stopping in spontaneously. App. 20. Because Emergency Order #3 severely restricts The Mix Up's maximum capacity, a large number of customers have decided not to patronize the restaurant, given the inconvenience of

specifically planning to drive to the restaurant, only to be turned away at the door if Emergency Order #3's extremely low occupancy limit has already been reached. App. 20.

Because of these significant sales losses, The Mix Up cannot profitably operate in its usual manner, if it is forced to comply with Emergency Order #3. App. 20. Rather, The Mix Up would almost certainly be forced to modify its operations by only opening four days a week and cutting expenses and staff by approximately 75%—or even by shutting down operations entirely until the extreme occupancy limits are no longer in force. App. 20.

Finally, because Liz Sieben only recently assumed ownership and operation of The Mix Up this year, forcing compliance with Emergency Order #3 would be particularly detrimental to this business, vis-à-vis more well-established businesses. App. 20. Establishing The Mix Up's reputation in the community in this first year, under Liz Sieben's ownership, is essential to its long-term viability. App. 20. That is only possible with sustained, full operation of the restaurant, which Emergency Order #3 prohibits. App. 20.

b. Intervenor-Plaintiff Pro-Life Wisconsin is a pair of Wisconsin nonprofit organizations dedicated to the bedrock principle of the pro-life movement—that all preborn babies are "persons" and all innocent persons share the inalienable right to life. App. 11. Pro-Life Wisconsin has over 30 affiliates throughout the State who carry out its mission on a year-round basis; Intervenor Plaintiff Petitioner Daniel J. Miller is the State Director of both organizations. App. 11–12. Both Pro-Life Wisconsin and Miller are Wisconsin taxpayers. App. 13.

Among other activities, Pro-Life Wisconsin educates the public through educational seminars; engages in political efforts and lobbies elected officials; and engages in public, free-speech activism all throughout the State, such as by using the public rights-of-way near abortion centers located throughout Wisconsin. App. 11–12. Pro-Life Wisconsin also regularly holds other events for the public, like Bible studies, fundraising dinners, and meet-and-greets. App. 11–12.

The restrictions set forth by Emergency Order #3 have made Pro-Life Wisconsin's planning and scheduling of venues

for its events next to impossible. App. 12. Because of Pro-Life Wisconsin's location in Wisconsin, it must conduct many of the things that it does indoors, relying on the free market to allow it to engage in civic discourse at venues of many types and seating capacities. App. 12. However, many venues have minimum expenditures, which are very difficult to reach because of Emergency Order #3's capacity limit of 25% of the venue's usual occupancy capacity. App. 12. Further, many venues are fearful of losing their licenses if they are found to have breached the capacity limits prescribed by Emergency Order #3. App. 13. Indeed, Pro-Life Wisconsin has been only able to book a single venue in Amery, Wisconsin—a fundraising event open to the public. App. 12. And even where Pro-Life Wisconsin does book a venue, Emergency Order #3 always puts it at risk of local health authorities shutting down these events, or fining the owners of these venues. App. 13.

2. On October 13, 2020, the original plaintiffs here—the Tavern League of Wisconsin, Inc., Sawyer County Tavern League, Inc., and Flambeau Forest Inn, LLC—filed their one-

count complaint challenging the validity of Emergency Order #3. R.4 at 1, 3–4, 8.[8] Plaintiffs named Secretary-designee Palm, the Wisconsin Department of Health Services, and Sawyer County Health Officer Julia Lyons as Defendants. *Id.* at 1, 3–4. As the original plaintiffs' complaint explained, Emergency Order #3 is invalid because the Secretary-designee did not follow the required emergency-rule-promulgation in Chapter 227 before the Order's promulgation, in violation of *Palm*. *Id.* at 4–9.

Plaintiffs then immediately moved for an *ex parte* temporary restraining order and a temporary injunction, R.6, and the circuit court (Judge John M. Yackel presiding) granted the *ex parte* temporary restraining order the following day, October 14, Cir. Ct. Dkt. Entry 10-14-2020.[9] The circuit court then set a temporary-injunction hearing for Monday, October 19, 2020, Cir. Ct. Dkt. Entry 10-15-2020.

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[8] Citations of "R." refer to filed documents in the Sawyer County Circuit Court, No. 2020CV128.

[9] Citations of "Cir. Ct. Dkt. Entry" refer to entries on the public docket of the Sawyer County Circuit Court, No. 2020CV128. Available at https://wcca.wicourts.gov/caseDetail.html?caseNo=2020CV000128&countyNo=57.

3. The circuit court (Judge James C. Babler presiding) held its temporary-injunction hearing on October 19, 2020. Cir. Ct. Dkt. Entry 10-19-2020.[10] The circuit court granted Intervenor-Plaintiffs' motion to intervene, as noted above, but then proceeded to vacate the *ex parte* temporary restraining order and deny Intervenor-Plaintiffs' and original plaintiffs' motions for a temporary injunction. *Id.*; App. 8–9.

On the likelihood-of-success prong, the court first quoted from one of the dissents in *Palm* and then explained that *Palm*'s holding did not apply to Emergency Order #3 because, among other points: (1) Emergency Order #28, unlike Emergency Order #3, imposed criminal sanctions; (2) Emergency Order #28, unlike Emergency Order #3, included provisions beyond capacity limits; (3) *Palm* refused to invalidate Emergency Order #28's school-closure provisions

[10] Given the exigencies of this appeal, Intervenor-Plaintiffs could not delay filing until the transcript for this hearing was prepared. The details of the circuit court's hearing are instead drawn from the docket text on the circuit court's public docket. Intervenor-Plaintiffs intend to file the transcript with the Court upon receipt. Video of the hearing is available at: https://www.channel3000.com/hearing-to-be-held-monday-in-lawsuit-over-gov-evers-indoor-capacity-limits/.

in a footnote; and (4) *Palm* did not, in the circuit court's view, discuss Section 252.02(3) in sufficient enough detail.

On the equities, the circuit court—with all respect—showed confusion throughout the hearing about Executive Order #3's duration, stating repeatedly that the court believed that there was no irreparable harm or disruption of the status quo, absent injunctive relief, because Emergency Order #3 was a sixty day order, which no one claimed to have complied with in the forty days before the issuance of the temporary restraining order. The premise of the circuit court's repeated point here appeared to be that Emergency Order #3 was practically irrelevant because everyone had violated it for forty days before the temporary restraining order. In fact, Emergency Order #3 was in place for only a couple of days before the temporary restraining order and, as discussed above, The Mix Up had seen a 50% reduction in business as a direct result, while Pro-Life Wisconsin had been unable to book fundraising events. *See supra* pp. 10–16. After counsel for the original plaintiffs corrected the court's understanding as to the duration of Emergency Order #3, noting the

extremely short duration of the Order before entry of the temporary restraining order, the Court did not adjust its equitable conclusions.

Intervenor-Plaintiffs then orally moved for a stay of the court's vacating of the *ex parte* temporary restraining order while they sought this emergency appellate review. The court orally denied the motion, explaining that the restraining order would never have been issued had the prior circuit court judge seen all of the arguments now before the court.

STANDARD OF REVIEW

Under Section 808.07(2) of the Wisconsin Statutes, "an appellate court may . . . grant an injunction" "[d]uring the pendency of an appeal" upon filing of a motion with the Court of Appeals. Wis. Stat. § 808.07(2); *see* Wis. Stat. § (Rule) 809.12. As the Wisconsin Supreme Court recently explained in issuing temporary relief pending appeal under this very provision, "temporary relief pending appeal is appropriate where the moving party: (1) makes a strong showing that it is likely to succeed on the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable harm; (3) shows that no

substantive harm will come to other interest parties; and (4) shows that a stay will do no harm to the public interest." App. 24 n.4 (citing *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)). These four considerations are "interrelated factors to be considered; they are not separate prerequisites." App. 28. Where, as here, a circuit court denies to plaintiff the relief thereafter sought from the appellate court, review of the circuit court's actions is for an "erroneous exercise of discretion." App. 27.

ARGUMENT

I. Intervenor-Plaintiffs Are Entitled To Temporary Relief Pending Appeal

A. Intervenor-Plaintiffs Are Exceedingly Likely To Succeed On Their Claim That Emergency Order #3 Is Unlawful Under *Palm*'s Section 227 Holding

Section C.1 of the Wisconsin Supreme Court's decision in *Palm* expressly holds that agency orders like Emergency Order #3 are "rules" within the meaning of Wis. Stat. § 227.01(13), and so must follow Chapter 227's required rulemaking procedures, *see Palm*, 2020 WI 42, ¶¶ 15–42. Because the Secretary-designee did not follow such procedures before issuing Emergency Order #3, that Order "is

unenforceable." *Id.* ¶ 58. The circuit court erroneously exercised its discretion on this point because it misunderstood *Palm*'s core reasoning and holding as to Chapter 227.

1. As *Palm* explained, under Chapter 227, an agency must follow certain rulemaking procedures whenever it issues a "rule." *Palm*, 2020 WI 42, ¶ 16. A "rule," in turn, is "a regulation, standard, statement of policy, or general order of general application that has the force of law" from an agency that "implement[s], interpret[s], or make[s] specific legislation enforced or administered by the agency . . . ." Wis. Stat. § 227.01(13). Section 227.24 then establishes particular procedures for an agency to follow when promulgating a "rule"—as still defined in Section 227.01(13)—as an "emergency rule." Wis. Stat. § 227.24(1). For example, the agency must submit and publish a scope statement, Wis. Stat. § 227.24(1)(e); then, post-promulgation, submit the rule to the Legislature's Joint Committee for Review of Administrative Rules for its review, *see* Wis. Stat. § 227.26(2)(d); Wis. Stat. § 227.19(4)(d)(1), (3), (6). If it promulgates a "rule" without

complying with Chapter 227, that rule "is unenforceable" and invalid. *Palm*, 2020 WI 42, ¶ 58; *see also id.* ¶ 16.

In Section C.1 of *Palm*, 2020 WI 42, ¶¶ 15–42, the Court addressed when an "order" qualifies as a "rule" under Section 227.01(13): if the order is "(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." *Id.* ¶ 22 (citation omitted). An order qualifies under this test when it makes policy decisions that control the conduct of persons and businesses on a statewide basis, even if that control is purportedly asserted to respond to a "specific, limited-in-time scenario," such a COVID-19. *Id.* ¶¶ 18–27. Put another way, an order is a "rule" when it applies to a "*class [ ] described in general terms and new members can be added to the class*." *Id.* ¶ 21 (emphasis in original; citation omitted).

Palm then applied this understanding of Section 227.01(13) to hold that Emergency Order #28 was a "rule," and thus was procedurally invalid. *Palm*, 2020 WI 42, ¶¶ 15–

42. Emergency Order #28, as most relevant here, selectively imposed capacity limits on a statewide basis. The Order closed "[n]on-essential" businesses, while allowing "essential businesses" to remain open. *Supra* pp. 7–8. Then, for those "essential businesses" and other partially exempt organizations, like religious institutions, Emergency Order #28 set capacity limitations—such as 25% of the maximum occupancy or, in other circumstances, 10 people. *Supra* p. 7. "Rulemaking exists," the *Palm* Court explained, "precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official, Palm, is not imposed in Wisconsin." *Palm*, 2020 WI 42 ¶ 28. Further, Emergency Order #28 was "not an 'order in a contested case' nor 'an order directed to a specifically named person or to a group of specifically named persons that does not constitute a general class,'" or "exempt from the definition of a rule set out in § 227.01(13)." *Id.* ¶ 17 (citations omitted).

2. Applying *Palm*'s reasoning to Emergency Order #3, at issue here, leads to the obvious conclusion that Emergency Order #3 is an unlawfully promulgated emergency rule.

Emergency Order #3, just like Emergency Order #28, purports to impose selective strict capacity limitations on public gatherings attended by all persons in any (non-exempt) business, organization, or private home. *Supra* pp. 7–8. For those such places, "[p]ublic gatherings are limited to no more than 25% of the total occupancy limits for the room or building, as established by the local municipality," or "no more than 10 people" if there are no municipal limits. App. 3–4; *compare* EO#28 at 5 (25% for certain essential businesses); EO#28 at 14–15 (10-person limit for religious gatherings). So, *exactly* like Emergency Order #28, Emergency Order #3 applies to a "class [ ] described in general terms and new members can be added to the class." *Palm*, 2020 WI 42, ¶ 21 (emphasis and citation omitted). And, just like Emergency order #28, Emergency Order #3 makes policy decisions that control the conduct of persons and businesses on a statewide basis, even if that control is purportedly asserted to respond to a "specific, limited-in-time scenario." *Id.* ¶¶ 18–27. Emergency Order #3 is also "not an 'order in a contested case' nor 'an order directed to a specifically named person or to a

group of specifically named persons that does not constitute a general class,'" or "exempt from the definition of a rule set out in § 227.01(13)." *Id.* ¶ 17 (citation omitted).

As *Palm* explained in words just as applicable to Emergency Order #3, "[r]ulemaking exists precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official, Palm, is not imposed in Wisconsin." *Id.* ¶ 28. The reach and exemptions from Emergency Order #3 are "defined solely" by the Secretary-designee. *Id.* ¶ 40. For example, Emergency Order #3 exempts (in various provisions) public gatherings in office spaces accessible to employees only, child-care settings, health-care operations, churches, and political rallies. App. 4–6; *see also supra* pp. 7–8. Since there are no statutory provisions applicable to the Secretary-designee even obliquely mandating such exceptions, their presence in Emergency Order #3 is explainable only as an exercise of Secretary-designee's *policy* decisions to implement, interpret, or make specific the statutes within her authority in a particular manner. *See* Wis. Stat. § 227.01(13).

Given that the Secretary-designee "promulgated" Emergency Order #3 "without compliance with statutory rule-making . . . procedures," Wis. Stat. § 227.40(4)(a), *Palm* inescapably requires this Court to conclude that it "is unenforceable" and invalid, *Palm*, 2020 WI 42, ¶ 58, which means Intervenor-Plaintiffs are likely to succeed (indeed, entirely certain to succeed) on the merits of this appeal.

3. In denying Intervenor-Plaintiffs' motions for a temporary injunction and then stay pending an emergency appeal, the circuit court—after quoting from one of the dissents in *Palm*—relied primarily upon four considerations: (1) Emergency Order #28, unlike Emergency Order #3, imposed criminal sanctions; (2) Emergency Order #28, unlike Emergency Order #3, included provisions beyond business closure and capacity limits; (3) *Palm* refused to invalidate Emergency Order #28's school-closure provisions in a footnote; and (4) *Palm* did not, in the circuit court's view, discuss Sections 252.02(3) in sufficient enough detail. With respect, these reasons cannot withstand any scrutiny.

First, while *Palm* did discuss that Emergency Order #28 imposed criminal sanction as underscoring the breadth of the Secretary-designee's position, *see Palm*, 2020 WI 42, ¶¶ 36–38, nowhere did the court suggest—let alone hold—that an order that falls within Wis. Stat. § 227.01(13)'s definition of "rule" is exempt from rulemaking requirements because, like Emergency Order #3, App. 6, it is enforceable through civil forfeitures, and not criminal sanctions.

Second, although Emergency Order #28 did involve other provisions beyond business closures and capacity limits, such as travel restrictions, *Palm* held that *all* aspects of Emergency Order #28 are subject to rulemaking procedures *except for the closure of school provision not at issue here.*

Third, as to *Palm*'s footnoted holding that Emergency Order #28's school-closure provision need not go through rulemaking, although *Palm* did not explain in its footnote why the Secretary-designee could close all schools without proceeding through Chapter 227 rulemaking, that unexplained aspect of *Palm* does not raise many of the considerations that the Court articulated in other parts of its

opinion, applicable to statewide, selective capacity restrictions. The blanket school closure did not involve the exercise of "subjective judgment," unlike a statewide regime of *selective* closures and capacity limitations, involving a "*class [ ] described in general terms [in which] new members can be added to the class*." *Palm*, 2020 WI 42, ¶¶ 21, 28 (emphasis in original; citation omitted). In any event, and most importantly, *Palm*'s holding as to the school-closure provision in Emergency Order #28 is irrelevant here because *Emergency Order #3 does not purport to close any schools*. *Palm unequivocally* held that the Secretary-designee had to follow rulemaking procedures to impose statewide selective business closures and capacity limits, and Emergency Order #3 obviously falls within that holding. *See supra* pp. 4–6.

Finally, that *Palm* did not discuss Sections 252.02(3) in any detail within the relevant section of its opinion—Section C.1—is an irrelevant red herring. *Palm*'s relevant Chapter 227 holding, embodied in Section C.1, is that a DHS order that meets the legal test for a "rule" under Wis. Stat. § 227.01(13) must go through Section 227 rulemaking procedures, *unless*

a particular statutory exemption from those procedures applies. In *Palm*, the Secretary-designee relied upon three claimed statutory sources of authority to seek to exempt itself from Section 227's rulemaking requirements—Sections 252.02(3), (4), and (6)—and the Supreme Court held that ***regardless of the source of authority invoked***, Section 227's mandatory procedures applied. As the Court explained, in the clearest terms imaginable: "despite the detailed nature of the list [of exemptions from the Section 227 definition of a rule], and the Legislature's consideration of acts of DHS and its consideration of 'orders,' ***no act or order of DHS pursuant to Wis. Stat. § 252.02 is exempted from the definition of 'Rule.'***" *Palm*, 2020 WI 42, ¶ 30 (emphasis added). That "***no act or order***" language plainly applies regardless of whether the Secretary-designee purports to act under Sections 252.02(3), (4), and (6), or any other provisions.

B. The Three Equitable Considerations Favor Temporary Injunctive Relief

An appellate court considering a motion for an injunction pending appeal should also consider three

equitable factors: irreparable harm to the movant absent relief, harm to other interested parties, and balance of the public-interest considerations. *See* App. 24 & n.4 (citing *Gudenschwager*, 191 Wis. 2d at 440). This Court must consider these as "interrelated factors" with each other and with the likelihood of success, "not [as] separate prerequisites." App. 28 (citing *Gudenschwager*, 191 Wis. 2d at 440). Here, all of these considerations favor granting this Emergency Motion. Further, the circuit court erroneously exercised its discretion, including because it based much of its reasoning on these factors on its mistaken belief that Emergency Order #3 had been in place for 40 days, during which no one had claimed to have been harmed by it.

A. Intervenor-Plaintiffs will plainly suffer irreparable harm absent relief from this Court, disrupting the status quo under which Intervenor-Plaintiffs could operate profitably and plan their events under preexisting law.

As the undisputed evidence in the record establishes, Intervenor-Plaintiff The Mix Up (as well as its owner, Intervenor-Plaintiff Liz Seiben) already lost sales during the

very short period when Emergency Order #3 was in effect before the circuit court's temporary restraining order. The Order limits The Mix Up to just 25% of its total occupancy limit, including employees and staff. App. 3–4. As Sieben stated in an unrebutted, sworn affidavit, The Mix Up suffered a *50% reduction in sales* immediately after the issuance of Emergency Order #3, despite the good weather and open outdoor seating over the weekend of October 10–11, 2020. App. 20. This loss was understandable because The Mix Up's customer base typically drives to the establishment, and customers are unlikely to want to chance this drive to grab dinner if they believe that they will be turned away at the door because of Emergency Order #3's extremely low occupancy limits. App. 20. Thus, if Emergency Order #3 is enforced, The Mix Up would almost certainly be forced to modify its operations by opening only four days a week and cutting expenses and staff, or even by shutting down operations until the Order ultimately expires (assuming it is not renewed). App. 20. Furthermore, while many businesses are facing similarly grave hardships because of Emergency

Order #3, these injuries are particularly harmful to The Mix Up because it is under new ownership, as of February 2020, and developing a positive reputation in the community is essential to its long-term viability. App. 16, 23.

The Order similarly imposes serious harms on Pro-Life Wisconsin. As explained in an unrebutted, sworn affidavit, the Order makes its "*impossible*" for these organizations to "schedul[e] venues" even for "*regular* fundraising events, which are open to the public," and their "educational itinerary." App. 12–13 (emphases added).

And all Intervenor-Plaintiffs suffer irreparable harm as taxpayers. *See* App. 13, 21. Emergency Order #3 inflicts "direct and personal pecuniary injur[ies]" upon them as taxpayers of the State, given that Defendants Secretary-designee Palm and the Department of Health Services are illegally expending government funds in the creation and enforcement of this unlawful order, which is directly contrary to the Wisconsin Supreme Court's *Palm* decision. *See City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 884, 419 N.W.2d 249 (1988); *Kaiser v. City of Mauston*, 99 Wis. 2d 345,

360, 299 N.W.2d 259 (Ct. App. 1980), *overruled on other grounds by State Dep't of Nat. Res. v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994).

The irreparable nature of all of these harms is clear. Defendants are government officials and agencies, sued in their official capacities, and therefore, Intervenor-Plaintiffs will not be able to recover money damages for these harms because such relief is precluded by the doctrine of sovereign immunity. *See generally Grall v. Bugher*, 181 Wis. 2d 163, 511 N.W.2d 336 (Ct. App. 1993), *rev'd on other grounds*, 193 Wis. 2d 65, 532 N.W.2d 122 (1995); *see also Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable.").

The circuit court's contrary conclusion here—and throughout its equitable analysis at the hearing—seemed to rest largely on its mistaken belief that Emergency Order #3 has been in effect for a full forty days, and had harmed no one during that time. *See supra* pp. 18–20. That is, of course,

wrong as a legal and factual matter. In fact, The Mix Up had submitted an undisputed affidavit that during the *only weekend* where the Order was in effect—not forty days—it had lost *half of its sales during that time*. *See supra* pp. 13, 19. Pro-Life Wisconsin, meanwhile, had submitted an undisputed affidavit that it was having trouble finding venues that would host its events, given the strict capacity limitations in Emergency Order #3. *See supra* pp. 15–16, 33. That Intervenor-Plaintiffs could not attest to additional harms was only a function of the fact that the temporary restraining order blocked the Order very soon after its effective date. What Intervenor-Plaintiffs seek here is to prevent the harms that they suffered in the short period where the Order was in effect from recurring.

B. On the other hand, Secretary-designee Palm would not suffer any harm from merely being required to abide by the law, as articulated by the Supreme Court in *Palm*. The Secretary-designee was fully aware that Chapter 227's rulemaking procedures were *mandatory* for orders like Emergency Order #3, given that the Wisconsin Supreme

Court's decision in *Palm*. Indeed, on October 12, the Joint Committee for Review of Administrative Rules, which is statutorily empowered to review administrative rules, directed Secretary-designee Palm to promulgate Emergency Order #3 according to the required procedures within 30 days. *Joint Committee for Review of Administrative Rules Hearing*, WisconsinEye, *supra* at 48:25–49:10; *see* Wis. Stat. § 227.26(2)(b). The Secretary-designee now need only comply with that lawful directive.

C. The public interest strongly favors relief here because of the core interests in the separation of powers and the rule of law. Emergency Order #3 flouts the authority of the Legislature by denying it a seat at the table, in precisely the way *Palm* held was impermissible, allowing "one unelected official" to control the livelihoods of Wisconsinites without legislative input. *Palm*, 2020 WI 42, ¶ 1.

The Secretary-designee's actions are also an affront of the judiciary and the rule of law. "No aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies

arising under the law." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384. But the Secretary-designee has arrogated to herself the authority to "say what the law is." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 50, 382 Wis. 2d 496, 914 N.W.2d 21 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). Requiring public officials to respect "judicial decisions of the highest tribunal . . . as establishing the true construction of the laws," and "as precedents and authority, to bind future cases of the same nature," is of paramount importance to the public interest. 1 Joseph Story, Commentaries on the Constitution of the United States § 377 (1st ed. 1833).

Finally, while combating COVID-19 is unquestionably an important state interest, and Intervenor-Plaintiffs do not doubt that the Secretary-designee earnestly seeks to advance this interest, our Supreme Court has made clear multiple times, including in *Palm* itself, that even that significant goal does not provide a sufficient equitable basis for denying relief against a state action that violates the separation of powers and the rule of law. *See Palm*, 2020 WI 42; *Wis. Legislature*

v. Evers, No. 2020AP000608-OA (Wis. Apr. 6, 2020); *James v. Heinrich*, Nos. 2020AP001419-OA, et al. (Wis. Sept. 10, 2020).

CONCLUSION

This Court should grant an injunction pending appeal.

Dated: October 20, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Memorandum is being served on all opposing parties via electronic mail and first-class mail.

Dated: October 20, 2020.

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