STATE OF WISCONSIN CIRCUIT COURT POLK COUNTY

DEREK LINDOO,
BRANDON WIDIKER,
and JOHN KRAFT

Case No: 20-CV-219

Plaintiffs,

v.

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

Defendant.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

On October 12, 2020 this Court issued its Decision and Order on the Plaintiffs' Motion for a Temporary Injunction. In that Decision and Order the Court determined that the Plaintiffs were not likely to succed on the merits of their claim because the Court agreed with the Defendant's interpretation of Wis. Stat. § 323.10 and disagreed with the Plaintiffs' interpretation of that statute. The interpretation of Wis. Stat. § 323.10, of course, is the dispositive issue on the Plaintiffs' claim under that statute and the Plaintiffs understand that they cannot prevail on that claim unless this Court is persuaded to reverse its conclusion as set forth in its October 12, 2020 Decision and Order.

As part of this motion, the Plaintiffs ask that the Court reconsider that question but the Plaintiffs frankly state that their argument herein regarding the interpretation of the statute is not materially different than the argument they previously made on their motion for a temporary injunction. If nothing contained herein causes the Court to change its mind then the Plaintiffs simply request that the Court issue a final judgment in that regard.

However, in its October 12, 2020 Decision and Order this Court did not address the claim contained in paragraphs 55-62 of the Amended Complaint, i.e., that if this Court accepts the Defendant's interpretation of the statute (which the Court has currently done) then the statute is an unconstitutional delegation of legislative power to the Governor. The Plaintiffs request that the Court also issue a final judgment on that claim so that the entire case is disposed of and can be appealed as of right by the party so entitled.

In that regard, the Plaintiffs specifically request that if the Court determines that the Plaintiffs are not entitled to summary judgment in their favor, then pursuant to Wis. Stat. §802.08(6) the Court determine that the Defendant is entitled to summary judgment in his favor even if the Defendant has not moved for summary judgment.[1] That result would be appropriate because there are no material facts in dispute with respect to the proper interpretation of Wis. Stat. §323.10 or with respect to the Plaintiffs' constitutional claim and, therefore, if the Plaintiffs are not entitled to summary judgment based on their interpretation of that statute or on their constitutional claim then the Defendant would be.

I. THE PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR STATUTORY CLAIM.

Wis. Stat. §323.10 provides as follows:

> If the governor determines that a public health emergency exists, he or she may issue an executive order declaring a state of emergency related to public health for the state or any portions of the state and may designate the department of health services as the lead state agency to respond to that emergency.… A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature.

[1] Wis. Stat. § 802.08(6) provides that "If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor."

The issue here is whether the statute imposes a hard limit upon the length of a state of emergency. Does the language of the statute allow a state of emergency declared by a governor related to a specific public health problem (in this case, COVID-19) to exceed 60 days, or may that limit be exceeded only if the Legislature, in its sole discretion, extends the state of emergency by joint resolution? This question is critical here because Defendant Evers has declared three successive states of emergency, all related to the same underlying public health issue, COVID-19, and at no point has the Legislature extended any of the states of emergency.

A. The History of States of Emergency Declared by Defendant Evers relate to COVID-19.

On March 12, 2020 Defendant Evers issued Executive Order #72. In that order, Defendant Evers determined that a public health emergency existed because "a novel strain of the coronavirus was detected, now named COVID-19, and it has spread throughout numerous countries including the United States." Based on the existence of COVID-19, Defendant Evers declared a state of emergency and issued a variety of additional emergency orders (the primary one of which was referred to as the "Safer at Home Order") based on that declaration. That state of emergency expired on May 11, 2020, and was not extended by the Legislature.

During the first state of emergency, COVID-19 did not go away. In fact, there were more new cases of COVID-19 diagnosed on May 11, 2020 (199 cases) than there had been on March 16, 2020 (15 cases)[2]. In late April, faced with the upcoming expiration of the state of emergency and wishing to extend the emergency orders he had issued based on his declared state of emergency, Defendant Evers attempted an end-around by invoking the powers granted to the Department of Health Services under §252.02.

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

Specifically, on April 16, 2020, DHS Secretary-designee Palm issued a second "Safer at Home" order, Emergency Order #28, purporting to extend the order through the month of May, well after the expiration of the initial "state of emergency" declared by Defendant Evers. On April 20, 2020, Secretary-designee Palm issued a related order, Emergency Order #31, known as the "Badger Bounce Back Plan" which set metrics by which the state could "re-open" from the restrictions of the Safer at Home order. The Badger Bounce Back Plan eliminated any specific "expiration date" of the Safer at Home order and instead tied its expiration to certain health metrics related to COVID-19.

In *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, however, the Wisconsin Supreme Court blocked this workaround, holding that extending the "Safer at Home" order under that section could only be done in part and only by rule-making. *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 3. It also noted that the Governor's emergency powers "are premised on the inability to secure legislative approval given the nature of the emergency" and that "in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely." *Id.*, ¶ 41; *see also id.* at n.14 ("We note that 60 days is more than enough time to follow rulemaking procedures pursuant to Wis. Stat. §227.24."). After a cursory effort to make a rule such as the Supreme Court indicated was necessary, the Governor gave up. He understood that he had no power to declare a new COVID

emergency or extend the one he had declared. He claimed to be "hamstrung"[3] and he doubted a mask mandate would hold up in court.[4]

On July 30, 2020, however, Defendant Evers issued Executive Order #82, declaring a second state of emergency based on COVID-19 stating that "the COVID-19 pandemic has impacted the lives of Wisconsinites throughout the state" and that there had been a "dramatic increase" and "drastic spike" in the number of infections. He then used the unilateral powers granted to him based upon his declaration of a state of emergency to issue Emergency Order #1, requiring the wearing of masks for all Wisconsinites (the "Mask Mandate").

Moreover, not satisfied with ruling on a unilateral basis for the 120 days provided by the March 12 and July 30 declarations, on September 22, 2020, Defendant Evers extended the second state of emergency by issuing a third emergency declaration (Executive Order #90). Emergency Order #90, like the previous two states of emergency, was based on COVID-19 with Defendant Evers stating that "Wisconsin is now experiencing unprecedented, near exponential growth of the COVID-19 pandemic." Relying upon Executive Order #90, Defendant Evers also extended the Mask Mandate an additional 60 days.

B. The Parties

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

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

The Plaintiffs are each Wisconsin residents and taxpayers. Plaintiffs are subject to the mandates of both of Defendant Evers' Emergency Order #1 (the Mask Mandate), which were adopted based upon the powers purportedly activated by declaring a state of emergency in Executive Orders #82 and #90. They are being required to wear a face-covering based upon a unilateral order by Defendant Evers rather that a law validly passed by the Legislature or a rule validly enacted by a state agency.

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

C. Nature of the Complaint

It is undisputed that following the expiration of Defendant Evers' first state of emergency on May 11, 2020, the underlying public health problem created by COVID-19 was not controlled or eradicated in Wisconsin. It is also undisputed that the Legislature, did not extend the state of emergency declared by Defendant Evers.

Given this state of affairs, the legal methods for creating law to deal with COVID-19 were: (1) enacting a law through passage of a bill by the Legislature and having it signed by the Governor, (2) a state agency promulgating a lawful rule under Chapter 227 of the Wisconsin Statutes, and/or (3) local units of government exercising their own powers as delegated by the Legislature under Wis. Stat. §§ 252.03 and 323.11.

Defendant Evers did not attempt to combat COVID-19 through any of the above. Instead, he decided to continue to exercise extraordinaty unilateral power and declare second and third

states of emergency related to the same public health problem that justified his first state of emergency, COVID-19. The complaint in this case challenges Defendant Evers' powers to unilaterally make law through multiple states of emergency as a violation of §323.10 and a violation of the Wisconsin Constitution.

D. A Governor may not declare multiple states of emergency arising from the same public health problem.

The Wisconsin Supreme Court recently held that "there is no pandemic exception … to the fundamental liberties that the Constitution safeguards." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 53, 391 Wis. 2d 497, 531, 942 N.W.2d 900, 917 (quoting U.S. Department of Justice, Statement of Interest, *Temple Baptist Church v. City of Greenville*, No. 4:20-cv-64-DMB-JMV (N.D. Miss. April 14, 2020), ECF No. 6). Concurring, Justice Rebecca Grassl Bradley wrote that "fear never overrides the Constitution." *Id*. at ¶ 145 n.11. In this case, Governor Tony Evers has declared a second and a third state of emergency based upon for the same underlying public health problem – the COVID-19 pandemic. If these orders are allowed to stand, the state of Wisconsin will have spent nearly 180 days under a state of emergency allowing the Governor to rule by decree, authorizing him to issue "any order" said to be necessary for "the protection of persons or property."

But that's not how the law works. The extraordinary powers granted when the Governor declares an emergency come with an expiration date. Wis. Stat. § 323.10 allows the Governor to "issue an executive order declaring a state of emergency related to public health for the state or any portion of the state …," but it limits the duration of such an emergency, specifically stating that "[a] state of emergency **shall not exceed 60 days**, unless the state of emergency is extended by joint resolution of the legislature." (Emphasis added). Under the statute there is one, and only

one, way for the state of emergency to ever exceed 60 days – and that is by joint resolution of the Legislature. No such resolution has been passed.

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

Wis. Stat. § 323.10 does not allow for unilaterally extended states of emergency in Wisconsin to combat a public health emergency. The Governor is empowered to declare one, and only one, state of emergency to deal with a public health emergency on his own. During the 60-day period of that state of emergency the Governor has certain extraordinary powers but he cannot continue to exercise those powers indefinitely through the declaration of serial emergencies without the Legislature's approval.

Respectfully, this Court's conclusion to the contrary in its October 12, 2020 Decision and Order was incorrect for five reasons.

First, the Court's interpretation of the statute reads the words "A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature" right out of the statute. Under the Court's interpretation, the statute would mean exactly the same thing if that sentence were deleted. If Defendant Evers can declare multiple and serial states of emergency for a single public health problem then the 60-day limitation in Wis. Stat. § 323.10 is meaningless and is mere surplusage. Such a reading of the statute is unreasonable and should be avoided. *State ex rel. Kalal v. Circuit Court for Dane Cty.,* 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.").

Indeed, the Michigan Supreme Court recently held—unanimously—that under a similar statutory grant of emergency powers, allowing the Michigan Governor to declare serial states of emergency due to the COVID-19 pandemic without legislative approval would render the

applicable durational limit ineffective. *In re Certified Questions From United States Dist. Court , W. Dist. of Michigan, S. Div.*, No. 161492, 2020 WL 5877599, at *8 (Mich. Oct. 2, 2020). More specifically, in *In re Certified Questions* the Michigan Legislature had granted the governor the ability to declare a state of disaster or emergency but the governor was required to terminate it after 28 days unless extended by the Legislature. *Id.* at *6. After the Governor redeclared successive states of emergencies related to COVID-19 without legislative approval, affected private parties sued. *Id.* at *4. The Michigan Supreme Court concluded that allowing the Governor's actions "would effectively render the 28-day limitation a nullity." *Id.* at *6. The same is true here.

In its October 12, 2020 Decision and Order, the Court explains that the 60-day limit is still important (even though, under the Court's view, it does not prevent the Governor from declaring successive states of emergency) because it "prevents the governor from perpetuating emergency powers after the emergency has dissipated" but it is unclear how this preventative feature would work. For it to work, there must be some means of holding him accountable when his actions go too far. If the Court means to suggest that citizens could contest whether an emergency "has dissipated," the Court does not suggest a legal or theoretical basis for making such a determination. How will we know when COVID-19 has dissipated? What is the objective standard the Court would apply? What if COVID-19 is always around (like the flu and the common cold) or what if it comes and goes?

For these reasons, a challenge that "the governor [was] perpetuating emergency powers after the emergency has dissipated" would almost certainly be met by the Governor's assertion that his determination as to the existence of a state of emergency is a political question unreviewable by a coordinate branch – and, thus, no check at all. Under this Court's current

interpretation, Defendant Evers could continue to make law unilaterally almost indefinitely without Wisconsin citizens being able to contest that exercise of raw power.

On the other hand, the Court may mean only to suggest that the check is solely for the benefit of the Legislature. For example, the Court says that if the Legislature is unconvinced that a state of emergency does exist, the Legislature has the ultimate power to end it, but that is little solace to Wisconsin citizens. That simply means that, as a practical matter, if one party controls the governorship and one house of the legislature, then Wisconsin citizens must accept unilateral rule by the Governor for an indefinite period of time if the Governor asserts that a state of emergency exists.

Even where divided government exists, the Legislature may not be able to reach agreement. And even where the Legislature is able to reach agreement, as the Legislature itself notes in an amicus brief, "nothing would stop the Governor from simply issuing *yet another* declaration," perhaps slightly tweaking the data or grounds cited in justification, "so long as he still thought (as he surely would) 'that an emergency resulting from a disaster or the imminent threat of a disaster exists,' Wis. Stat. § 323.10." Non-Party Br. of Wisconsin Legislature in Supp. of Pl.s' Mot. for Temp. Inj. 11 (Oct. 2, 2020).

Moreover, requiring the citizens of Wisconsin to rely solely on the actions of the Legislature in any of these circumstances is inconsistent with the language of the statute. It permits the Legislature to affirmatively extend an emergency but does not permit it to be extended through inaction. It's sixty day limit operates automatically. The difference between action and inaction is an integral part of the statutory scheme.

And, again with respect, any interpretation of the statute that allows this result simply does not protect the liberty interests of Wiconsinites. It also slights the Wisconsin Supreme Court's

admonition in *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 41, 391 Wis. 2d 497, 942 N.W.2d 900, that "the Governor cannot rely upon emergency powers indefinitely."

The Court suggests that the language in *Palm* is inapplicable "when a public health emergency exists and the legislature lets him do it." Order 2 (Oct. 12, 2020). That interpretation, however, simply does not comport with the relevant passage in *Palm*. The Supreme Court noted that indefinite reliance on emergency powers was impermissible *even* during "a pandemic, which lasts month after month," *Palm*, 2020 WI 42, ¶ 41, that is, in this Court's words, "when a public health emergency exists." And it explicitly noted the 60-day limit on the governors' powers in §323.10, *id.* at n.14, without suggesting that approval-by-inaction might apply even though the Legislature had never acted to revoke the Governors' state of emergency to that point. *Id.* at (noting that "60 days is more than enough time to follow rulemaking procedures."). Although this discussion was not necessarily essential to the holding of the case, lower courts are not permitted to dismiss statements of the Supreme Court as inapplicable dictum. *Cf.* Zarder v. Humana Ins. Co., 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 782 N.W.2d 682 ("[T]he court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum.")

Second, the Court's interpretation of Wis. Stat. § 323.10 ignores that a joint resolution of the Legislature is the only exception to the 60-day expiration requirement contained in the statute. In providing for a *single* way to extend a state of emergency related to public health beyond an initial 60 days, the law excludes any other options. *Benson v. City of Madison*, 2017 WI 65, ¶ 32, 376 Wis. 2d 35, 897 N.W.2d 16 ("Under the well-established canon of *expresio unius est exclusion alterus* (the expression of one thing excludes another), where the Legislature specifically enumerates certain exceptions to a statute, [courts] conclude , based on the rule, that the Legislature intended to exclude any other exception.") (quoting *State v. Delaney*, 2003 WI 9, ¶ 22, 259 Wis.

2d 77, 658 N.W.2d 416); *see also* In re Certified Questions, 2020 WL 5877599, at *7 (explaining that the statute contained only one exception to termination of the state of emergency after 28 days, extension by the legislature, and that the statutory text did not contain an additional exception allowing the Governor to unilaterally extend a state of emergency).

Third, as the Legislature makes clear in its amicus brief, the "knew-how-to" canon says that evidence that the Legislature knew how to include a provision but did not is evidence the statute was intended not to include that provision. *See generally* Non-Party Br. of the Wisconsin Legislature 2. Here, the legislative history indicates that Section 323 is modeled after the Model State Emergency Health Powers Act. *Id.* at 8-9. That act includes a provision that permits a governor to keep his or her state in a state of emergency indefinitely. *Id.* at 4. And while other states have included that provision in their emergency powers framework, Wisconsin has not—it includes the 60-day expiration date. *Id.* at 5-9. That strongly suggests that the choice was intentional.[5]

Fourth, this Court's conclusion incentivizes the Governor not to implement permanent solutions or frameworks through legislation or rulemaking. During the first state of emergency Defendant Evers should have proposed legislation and lobbied the Legislature to adopt it, or directed one of the agencies he directs to promulgate lawful rules or lobbied local officials to use their statutory powers to fight COVID-19. He should have taken whatever legitimate steps necessary to make sure that whatever laws or rules he thought were necessary to deal with COVID-19 on a long-term basis were lawfully enacted or rules promulgated. He did not do so. In fact, he

[5] "[A]s a general matter, legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation. State ex rel. Kalal v. Circuit Court for Dane Cty., 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 681 N.W.2d 110.

did not do so during his second or third states of emergency either. This Court's decision perversely incentivizes Defendant Evers never to do so. It is easier for him to simply make laws unilaterally for as long as he wants to do so.

Fifth, courts "generally avoid[] interpreting statutes in a way that places their constitutionality in question." *Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2017 WI 71, ¶ 21, 376 Wis. 2d 528, 898 N.W.2d 70. As discussed further *infra*, the Court's interpretation that "'the governor [can] rely on emergency powers *indefinitely*' . . . when a public health emergency exists and the legislature lets him do it," Order at 2 (quoting *Palm*, 2020 WI 42, ¶ 41, raises significant separation of powers questions about the legislature's ability—even if it wishes to do so—to delegate the legislative power the state constitution vests in it without any substantive restrictions or adequate procedural safeguards such as durational limits. If the Legislature has done so—if it has authorized the Governor to exercise what is in effect the police power unless the Legislature says otherwise—the constitutionality of Wis. Stat. §323.10 is, at minimum, placed in substantial question. Where another at least equally plausible interpretation of the statute is available that does not raise such serious issues (here, the Plaintiffs' interpretation), this Court should assume that it is the correct one. It is difficult to believe the Legislature simply gave its powers away.

This Court's conclusion that Defendant Evers can declare serial states of emergency rewrites the statute by eliminating the 60-day limit and inserting a provision that allows the Governor to declare a state emergency (and assert unilateral emergency powers) for as long as he thinks – or can claim – there is an emergency. The Legislature never gave the Governor such over-arching authority to assert (and usurp) legislative power.

II. Interpreting Wis. Stat. § 323.10 to allow Defendant Evers to govern the State unilaterally for an indefinite period of time through serial emergency orders violates the Wisconsin Constitution.

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

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

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

consideration." *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, ¶79 & n.29; see also *id*. at ¶¶54-55.[6]

Wis. Stat. § 323.10 is a delegation from the Legislature to the Governor to determine when a "public health emergency" or other emergency exists and to unilaterally exercise expansive emergency powers—the ability to issue "any order" said to be necessary for "the protection of persons or property"—for up to 60 days during that emergency. For such a delegation to be allowed under the Wisconsin Constitution, this Court should look for "the presence of adequate procedural safeguards" as its paramount consideration. *Id.*

Here, there is a procedural safeguard in place: namely, the fact that a state of emergency expires after 60 days and may only be extended by an affirmative vote of the Legislature. That is the underlying procedural safeguard which ensures the Governor does not overstep his delegated authority. The Legislature has said that such emergency powers are available for 60 days. During that 60-day window a Governor is free to exercise his emergency powers to deal with the emergency but if he is doing his job properly he should also develop a plan for dealing with the public health problem after the expiration of the 60-day period. As stated above, he could propose specific legislation to the Legislature to deal with the problem on a long term basis, or, he could instruct one of his agencies to promulgate lawful administrative rules to deal with the problem. If he thought he needed more time to do these things he could also ask the Legislature to extend the state of emergency past 60 days. But the thing he cannot do is the one one thing he has actually

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

done – unilaterally extend his emergency powers. Without this procedural safeguard, a Governor could simply extend a state of emergency in perpetuity if he or she wanted, or stack states of emergency on top of each other taking up broad emergency powers whenever he or she so wished and for as long as he or she liked. That's not what our Constitution allows. *Cf.* *In re Certified Questions*, 2020 WL 5877599, at *18 (allowing governor "free rein to exercise a substantial part of our state and local legislative authority--including police powers--for an indefinite period of time," namely the ability to "promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property," constituted an unlawful delegation of legislative power to the executive).

Although the Legislature is able to *rescind* a unilaterally extended state of emergency – that provision is not an adequate procedural safeguard. As an initial matter, whether a safeguard is "adequate" logically depends on the scope of the power delegated—where, as in this case, expansive powers are granted, stronger safeguards are needed to ensure that the power is not exercised in a manner injurious to the public. *Cf. Panzer*, 2004 WI 52, ¶ 55 ("We normally review both the nature of delegated power and the presence of adequate procedural safeguards, giving less emphasis to the former when the latter is present.").

Such safeguards are totally lacking here. Indeed, there will be times when the two houses of the Legislature are controlled by different parties, with the Governor of the same party as one of them – in such a case it might not be possible (due to partisan politics) for the Legislature to rescind such a state of emergency and then the State of Wisconsin would be subject to unilateral rule by the Governor for whatever period of time the Governor deemed appropriate. In any event, the failure to rescind an emergency is not the same as approval. All it means is that one house has failed to act. Thus, the ability to "rescind" the state of emergency is no protection at all – it is the

statutory requirement that the state of emergency *expire* after 60 days, and the provision that only the Legislature may extend it, that provides procedural safeguards sufficient to allow such an enormous delegation of legislative power to the Governor.

Further, as discussed in the previous sections, even where divided government exists, the Legislature may not be able to reach agreement, and even where the Legislature is able to reach agreement, as the Legislature notes in an amicus brief, "nothing would stop the Governor from simply issuing *yet another* declaration," perhaps slightly tweaking the data or grounds cited in justification, "so long as he still thought (as he surely would) 'that an emergency resulting from a disaster or the imminent threat of a disaster exists,' Wis. Stat. § 323.10." Non-Party Br. of Wisconsin Legislature 11. A "safeguard" nullified by so many different vagaries cannot possibly, in light of the expansive power delegated in this instance, be characterized as "adequate." To the extent that the Court determines that Wis. Stat. § 323.10 allows the Governor to either unilaterally extend a state of emergency beyond 60 days, or to declare subsequent states of emergency for the same underlying public health problem – as Defendant Evers has done here – then Wis Stat. § 323.10 is unconstitutional as an invalid delegation because it lacks adequate procedural safeguards.

III. Disallowing Circumvention of Constitutional and Legislative Protections is the norm in Wisconsin and Elswhere

Emergency powers are of limited duration, and any attempt to go around those limitations and exercise those emergency powers should be disallowed. We see this in other areas of Wisconsin law where emergency powers are utilized by state agencies. For example, some state agencies are empowered to adopt administrative rules according to the provisions of Chapter 227. In certain emergency situations, those agencies may avoid some of the stringent requirements of Chapter 227 and promulgate an "emergency rule." However, such rules are *only* valid for 150 days *unless extended by the Legislature*. Wis. Stat. § 227.24. A formal Attorney General opinion

makes clear that this limitation is a "clear expression of intent that the effectiveness of an emergency rule may not be extended beyond" the initial effective period simply by re-filing it. 62 Atty. Gen 305, 308. The Attorney General further explained that this initial period of time "was intended to afford an agency the requisite time to adopt rules pursuant to the normal procedures of ch. 227, if the agency perceives that what begins as an emergency presents the need for rules of lasting effect." *Id.* The application of this reasoning to the Wis. Stat. § 323.10 60-day limitation produces an identical outcome. The 60-day period is intended to afford the Governor enough time to work with the Legislature to either extend the period or to adopt legislation to deal with the public health emergency, or even for his agencies to adopt rules to deal with the crisis. *See Palm*, 2020 WI 42, ¶ 41 (explainting that "[t]he Governor's emergency powers are premised on the inability to secure legislative approval given the nature of the emergency," where "there is no time for debate" and "[a]ction is needed."). The Governor's unpreparedness and unwillingness to work with others does not negate the 60-day statutory limitation.

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

on the same problem would enable the Council to avoid the Congressional supervision which is crucial to the statutory scheme").

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

CONCLUSION

For the reasons set forth above, the Plaintiffs request that the Court grant their motion for summary judgment.

Dated this 23rd day of October, 2020.

Respectfully Submitted,

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