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# MORE THAN “A LITTLE DANGER”

*Reforming Wisconsin's Emergency  
Powers After COVID-19*



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# Executive Summary

During the COVID-19 pandemic, Wisconsin state and local officials have embraced statutory powers—both vast and vague—to issue orders impacting the ordinary lives of all Wisconsinites. From requiring everyone to “stay at home” to closing businesses and churches, these emergency orders have revealed fundamental flaws in Wisconsin state law.

In this report, we explain why Wisconsin’s outmoded state laws are inadequate to protect basic civil liberties, and blur the lines between the legislative and executive functions of our government. After first surveying our current laws, the emergency orders issued by state and local officials, and the framework used by other states to establish emergency powers, this report proposes some much-needed reforms to the laws chiefly used by state and local officials during the COVID-19 pandemic. If the Wisconsin Legislature chooses to adopt these policies, then our civil liberties and the separation of powers will be more secure when we confront the next emergency.

## KEY FINDINGS

1. **Wisconsin’s antiquated emergency-powers statutes grant the governor and other officials seemingly limitless powers.** Relatively unchanged since the 1960s, Wisconsin state laws grant the governor and other officials seemingly limitless emergency powers to issue any orders they deem “necessary” to respond to a disaster or a public-health emergency like COVID-19.
2. **During COVID-19, Wisconsin officials have wielded this power in extraordinary ways.** State officials have issued over 50 emergency orders and kept Wisconsin in a state of emergency for more than 300 days. Many local officials have done the

same. The extent of many of these orders has been breathtaking: for example, state and local officials have closed schools and “non-essential” businesses, limited travel, limited church attendance, restricted gatherings in private homes, required face coverings, and prohibited evictions and foreclosures.

3. **Existing law does not adequately protect individual liberties or the separation of powers.** This current legal framework permitting rule-by-order amounts to a violation of the basic civil liberties of all Wisconsinites, and a substantial transfer of legislative power to state and local officials, with very little oversight or participation by legislative bodies.
4. **Wisconsin’s outmoded statutes are behind the curve.** Other states provide more legislative-branch participation in the exercise of emergency powers and in some cases require affirmative ratification of emergency orders by the relevant legislative body.

## POLICY RECOMMENDATIONS

1. **Limit emergency declarations.** Like most other states, Wisconsin had limited emergency declarations to just 30 days until 2009 when the legislature expanded this period to 60 days. The legislature should dial back the governor’s authority to 30 days, allow a single house of the legislature to terminate the emergency, and, while the statute appears to explicitly prohibit them, make even clearer that the serial declarations, which Governor Evers has employed five times, are not permitted.
2. **Require orders to be promulgated as rules.** Following the lead of the Wisconsin Supreme

Court, the legislature should explicitly require emergency orders—save for an initial 14-day grace period under certain circumstances—to follow existing rulemaking statutes. This reform alone will provide the legislature a seat at the table in the creation and implementation of future emergency orders.

- 3. Impose legislative oversight of local emergency orders.** Local officials have also wielded incredible powers with little or no oversight from elected officials. The legislature should clarify current law and explicitly require local health orders to be ratified by the local legislative body.
- 4. Prohibit categorical orders and provide for judicial review.** The legislature should explicitly and categorically define what types of conduct cannot be regulated by emergency orders, such as orders confining people to their homes, prohibiting travel, closing churches or businesses, or otherwise violating constitutional rights. Citizens challenging such

orders should be heard quickly in court, have a right to appeal, and the ability to recover attorney fees and costs when a state or local official violates fundamental rights.

- 5. Reform enforcement powers.** Wisconsin statutes provide dramatically different enforcement powers to enforce state emergency orders. Violating one order gives you a ticket; violating another order could land you in jail. The legislature should harmonize and update emergency-order enforcement authorities.
- 6. Provide local opt outs.** It should go without saying, but most of Wisconsin is not like Madison or Milwaukee. Yet northern Wisconsin and our rural counties have been subjected to one-size-fits-all “safer at home” orders designed by bureaucrats in Madison. Like several other states, Wisconsin should allow local units of government to opt-out of statewide health orders, subject to override by the Wisconsin legislature.





# Introduction

Echoing the Declaration of Independence, our Wisconsin Constitution begins with the foundational principle that all governmental power derives “from the consent of the governed.” Wisconsin’s state and local officials, therefore, cannot act unless they act “within the confines of the authority the people give them.”<sup>1</sup>

But what about emergencies? An emergency, by its very nature, entails unforeseen circumstances. If we cannot foresee the details of an emergency—floods, tornadoes, violent riots, cyber-attacks, or virus outbreaks—then how can we give our consent when we don’t know what power will be needed? Is it possible, or even wise, to grant the executive the emergency power “to do all things reasonable and necessary”? Should we be concerned with executive overreach in emergencies?

Executive overreach during an emergency is a relatively modern concern in Wisconsin. Our state’s founding generation worried chiefly about “extraordinary emergencies” like “invasion,” “insurrection,” and other threats to Wisconsin’s pioneers and early settlers.<sup>2</sup> During our state’s constitutional debate, one contemporary summed up the need for an active executive: “much depends on [the governor’s] promptness and decision in emergencies threatening the peace of the state. There is but a little danger of an abuse of authority by the governor of the

state, and therefore he should be clothed with ample authority.”<sup>3</sup>

Yet our recent experience with COVID-19 shows that government overreach is much more than a “little danger.” In the first year of COVID-19, the governor issued more than two dozen “executive orders” and “emergency orders” touching every part of life in Wisconsin: he proclaimed a state of “public health emergency” six times, activated the National Guard, suspended all in-

person voting, and required “[e]very individual, age five and older, in Wisconsin” to wear a mask. His cabinet member, the Secretary-designee of the Department of Health Services, went even further, issuing more than a dozen “emergency orders” requiring, for example, “all individuals present within the State of Wisconsin to stay at home,” closing all public and private schools, closing most businesses in the state,

and prohibiting gatherings of 10 people or more. Local officials have likewise exercised broad powers, limiting or in some cases closing bars, restaurants, public and private schools, and places of worship.

Whether these orders were wise or effective is open to debate. We think that by and large they were not. If they had been, then the people of Wisconsin would have demanded that the

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*While Wisconsin’s founding generation believed that government overreach during an emergency was but “a little danger,” our experience with COVID-19 teaches differently.*

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1 *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 66, 391 Wis. 2d 497, 536, 942 N.W.2d 900, 919 (Rebecca Bradley, J., concurring).

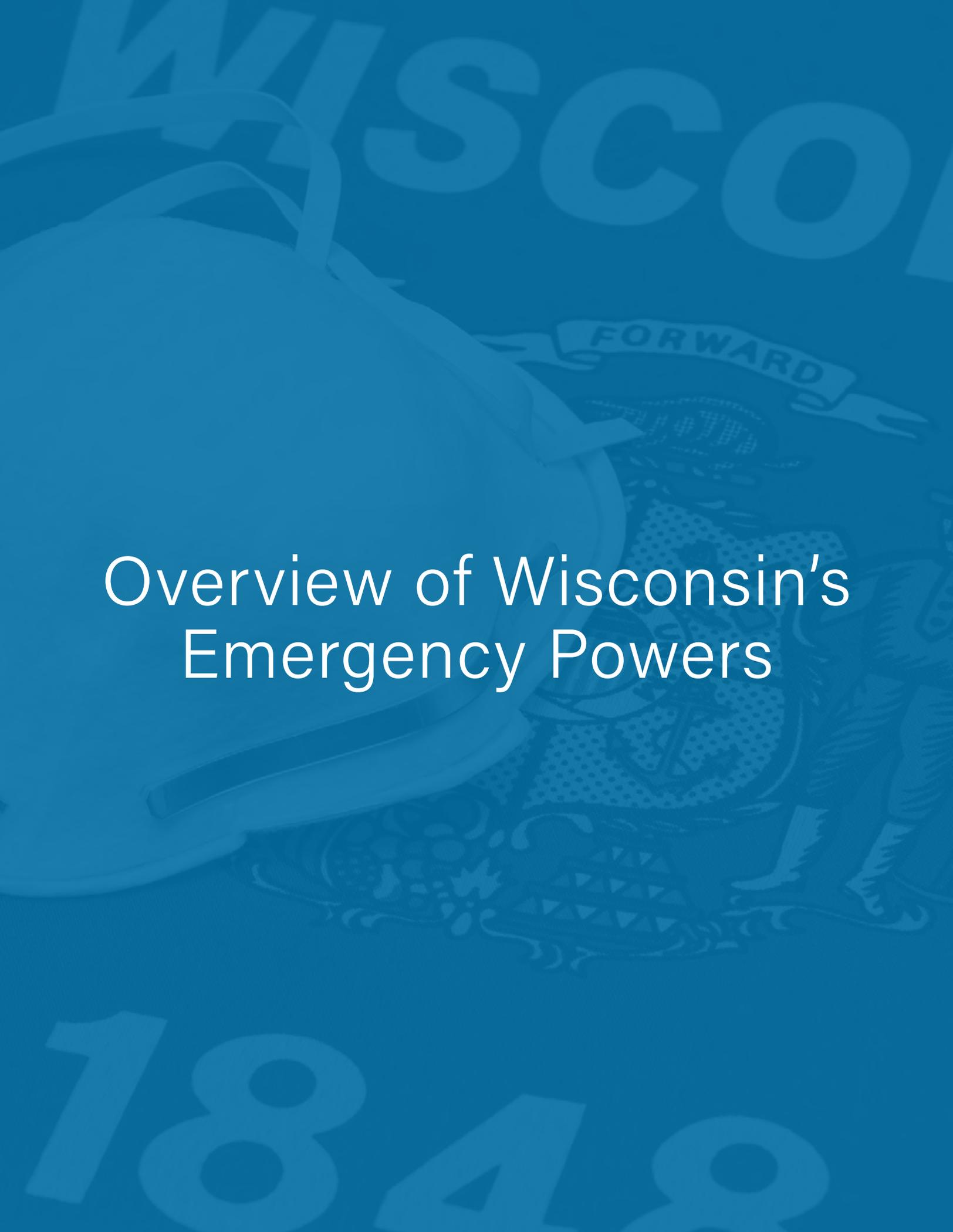
2 Milo M. Quaife, *The Movement for Statehood, 1845–1846* 514 (1918).

3 *Id.* at 344.

legislature pass these restrictions into law. That did not happen. But no matter what you believe about the merits of that debate, the lesson remains: when confronted with an emergency, our modern executive branch is ready to wield vast powers in response, many times at the expense of both the separation of powers and individual liberty. Our recent experience, therefore, presents us with a unique opportunity to evaluate and carefully consider the powers we’ve given to executive officials to deal with an emergency and the impact upon our constitutional rights.

This report proposes some common-sense reforms that will both meet the needs of future emergencies, but also reign in the potential overreach of the executive branch and protect individual liberties. First, this report will provide an overview of emergency powers used (and challenged) during the COVID-19 pandemic. Second, this report will highlight states with less expansive powers and more legislative participation in the exercise of emergency powers. Finally, this report will propose some reforms to Wisconsin’s emergency powers that will limit the future potential for abuse while still protecting our citizens.



The background of the slide is a solid blue color. It features a large, faint watermark of the Wisconsin State Seal in the center. The seal includes a figure holding a bow and arrow, a banner with the word 'FORWARD', and a shield with a plow and sheaves of wheat. At the top of the seal, the word 'WISCONSIN' is partially visible. At the bottom of the slide, the year '1848' is written in a large, light blue font.

# Overview of Wisconsin's Emergency Powers

Most emergency powers in Wisconsin, and specifically those most relevant to a public-health emergency, are codified in two chapters of the Wisconsin Statutes: Chapters 323 (Emergency Management) and 252 (Communicable Diseases). This section will first summarize Chapter 323 because it provides certain overarching powers to the governor that then relate to other powers in Chapter 252. Although the Wisconsin statutes may grant other emergency powers, this report focuses on the emergency powers employed chiefly during the COVID-19 pandemic.

## CHAPTER 323—EMERGENCY MANAGEMENT

Chapter 323, entitled “Emergency Management,” sets out a statutory scheme for the exercise of power by the governor, other state officials, and local governments during an emergency. The powers described in Chapter 323 originated from powers granted to the Wisconsin National Guard to assist “in the event of public disaster,”<sup>4</sup> and then the powers granted to the governor and the Bureau of Civil Defense in 1959 to respond to a “natural or man-made disaster.”<sup>5</sup>

In 1979, Wisconsin’s emergency powers expanded with the creation of the Division of Emergency Management, which followed the creation of the Federal Emergency Management Agency.<sup>6</sup> Chapter 166, later revised and updated as Chapter 323, granted the governor the power to declare a state of emergency resulting from a “natural or man-made disaster” and to issue orders “he or she deems necessary for the security of persons or property.”<sup>7</sup> In 2001, the legislature explicitly granted the governor the power to declare a “public health emergency,” although the duration of the emergency was limited to 30 days.<sup>8</sup> In 2009, the legislature expanded this duration to 60 days.<sup>9</sup>

### 1. The Governor’s Emergency Powers

The current version of Chapter 323 grants the governor the power to declare an emergency in the event of a “disaster” or “public health emergency.”<sup>10</sup> These definitions are very broad, and the governor’s powers are triggered “if he or she determines” one of these events has occurred.<sup>11</sup> There is no statutory role for the legislature in the governor’s declaration—only its duration. The legislature may terminate the declaration at any time; furthermore, a state of

4 Wis. Stat. § 21.11 (1941).

5 Wis. Stat. ch. 22 (1959).

6 See 1979 Wis. Act 361, § 4. On April 1, 1979, President Jimmy Carter created FEMA through Executive Order 12127.

7 Wis. Stat. § 166.03(1)(b) (1979).

8 See 2001 Wis. Act 109, § 340j (July 29, 2002).

9 See 2009 Wis. Act 42, § 72 (Oct. 20, 2009).

10 Wis. Stat. § 323.10. Unless otherwise noted, all statutes cited are those in effect on January 28, 2021.

11 A “disaster” is defined as any “severe or prolonged, natural or human-caused, occurrence that threatens or negatively impacts life, health, property, infrastructure, the environment, the security of this state or a portion of this state, or critical systems, including computer, telecommunications, or agricultural systems.” Wis. Stat. § 323.02(6). A “public health emergency” means “an illness or health condition” caused by bioterrorism or a “novel or previously controlled or eradicated biological agent” with a “high possibility” of a large number of deaths, disabilities, or “widespread exposure” that creates a “significant risk of substantial future harm to a large number of people.” Wis. Stat. § 323.06(16).

emergency “shall not exceed 60 days” unless extended by joint resolution of the legislature.<sup>12</sup>

During an emergency, most of the governor’s powers are narrowly tailored and less controversial: he may waive certain state fees, enter into contracts to respond to a disaster, suspend rules if they would interfere with the response to a disaster, declare the priority of emergency management contracts over other contracts, take property (so long as the governor keeps a record and refers evidence to the claims board for reimbursement), and generally oversee the state and local emergency response.<sup>13</sup>

Yet one broad power looms within these specific powers: the governor may “[i]ssue such orders as he or she deems necessary for the security of persons or property.”<sup>14</sup> The governor’s power under this provision has existed in the Wisconsin Statutes since 1959 with few changes.<sup>15</sup> Given that an emergency is capaciously defined to include, in addition to public health emergencies, any “severe or prolonged, natural or human-caused, occurrence that threatens or negatively impacts life, health, property, infrastructure, the environment, the security of this state or a portion of this state, or critical systems, including computer, telecommunications, or agricultural systems,” Wis. Stat. § 323.02(6), there are many conditions—climate change, illegal immigration, racism, urban unrest or crime, etc.—

that could be invoked to justify the exercise of this extraordinary power.

The Wisconsin Statutes further provide a mechanism to enforce the governor’s orders: anyone who intentionally fails to comply with the governor’s order is subject to a forfeiture of not more than \$200.<sup>16</sup>

## 2. Local Emergency Powers

Like the governor, local governments may also declare emergencies. This power, however, contains legislative involvement on the front end. A local declaration of emergency may only be declared through an “ordinance or resolution” passed by the “governing body,” such as a county board or city council. A local government may declare such an emergency “whenever conditions arise by reason of a riot or civil commotion, a disaster, or an imminent threat of a disaster, that impairs transportation, food or fuel supplies, medical care, fire, health or police protection, or other critical systems of the local unit of government.”<sup>17</sup> Local emergency declarations “shall be limited by the ordinance or resolution to the time during which the emergency conditions exist or are likely to exist.”<sup>18</sup>

After an emergency declaration, a local governing

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12 Wis. Stat. § 323.10. Although the statute grants the governor the power only to declare a state of emergency related to a “disaster” or “public health,” the statute goes on to mention an “emergency” that is “related to computer or telecommunication systems.” The statute appears to contemplate a “disaster” that involves computers or telecommunication systems.

13 *See generally* Wis. Stat. § 323.12; *see also* Wis. Stat. § 323.12(1)(c) (granting the governor the power to “direct” the state response and “delegate” authority to the administrator of emergency management); Wis. Stat. § 323.13 (describing the powers of the adjutant general, who is defined as the “governor’s principal assistant for directing and coordinating emergency management activities”).

14 Wis. Stat. § 323.12(4)(b).

15 Wis. Stat. § 22.01(4)(p) (1959).

16 Wis. Stat. § 323.28.

17 Wis. Stat. § 323.11.

18 *Id.*

body may “order, by ordinance or resolution, whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government.”<sup>19</sup> Also, if the local governing body cannot exercise these powers because they are unable to meet, then the chief executive officer or acting chief executive officer “shall exercise by proclamation” all the powers “that appear necessary and expedient.”<sup>20</sup> These powers are subject to later ratification, alteration, or repeal by the legislative body.<sup>21</sup>

Like with an order of the governor, any person who intentionally fails to comply with the order of a local unit of government is subject to a forfeiture of not more than \$200.

## CHAPTER 252—COMMUNICABLE DISEASES

When Wisconsin faces an emergency related to public health, Chapter 252 of the Wisconsin Statutes contains the most relevant emergency

powers. Battling the spread of disease is not new: Wisconsin state law has granted powers to fight the spread of communicable diseases since 1849.<sup>22</sup> After the creation of the State Board of Health in 1876,<sup>23</sup> Wisconsin developed a set of laws empowering both state and local officials with independent powers to address the spread of communicable diseases.

This section discusses the powers granted in Chapter 252 to the Wisconsin Department of Health Services (DHS) and local governments.

### 1. Powers of DHS

Chapter 252 gives DHS the power to “close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.”<sup>24</sup> DHS may also promulgate rules or “issue orders” “to control and suppress [ ] communicable diseases.”<sup>25</sup> Chapter 252 grants DHS the power to quarantine “persons” and “localities.”<sup>26</sup> In a related section, DHS’s quarantine power extends to persons infected, anyone in contact with an infected person,

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19 Wis. Stat. § 323.14(4)(a).

20 Wis. Stat. § 323.14(4)(b).

21 *Id.* The balance of Chapter 323 contains rather specific powers granted to the Adjutant General and administrator of emergency management, to direct statewide emergency responses, coordinate with other states and the federal government, and complementary powers to local emergency management committees. Nearly all these powers relate to government response to a disaster and precise topics such as the continuity of government, federal and state disaster assistance, and responding to a release of hazardous substances. *See* Wis. Stat. ch. 323, subchapters II–VIII. Although these powers were employed during COVID-19—primarily related to COVID-19 testing, vaccination, and the distribution of supplies—these powers did not restrict individual liberties or otherwise impact the separation of powers, which is the focus of this Report.

22 *See* Laws of Wisconsin, Ch. 166 (1849) (requiring villages to appoint a board of health with powers to “establish and enforce such regulation, as they may deem proper to prevent the taking or spreading of any infectious, noxious, contagious or pestilential disease or epidemic within said village.”)

23 1876 Wis. Act 366.

24 Wis. Stat. § 252.02(3).

25 Wis. Stat. § 252.02(4). DHS’s power to “issue orders” to guard against the spread of communicable disease first appeared in 1981. Before that time, DHS simply had the power to “adopt and enforce rules.” *See* 1981 Wisconsin Act ch. 291, § 20.

26 Wis. Stat. § 252.02(4).

and anyone refusing a vaccination (even for reasons of religion or conscience).<sup>27</sup> And in perhaps its most sweeping grant of authority, the Wisconsin Statutes grant DHS the power to “authorize and implement all emergency measures necessary to control communicable diseases.”<sup>28</sup>

If anyone in charge of a “building” or “school” fails to comply with a DHS order, then DHS “may appoint an agent to execute its rules or orders.”<sup>29</sup> Any person who “willfully violates or obstructs the execution” of any state law, rule, or DHS order relating to public health, “shall be imprisoned for not more than 30 days or fined not more than \$500 or both.”<sup>30</sup>

## 2. Local Health Powers

Chapter 252 seems to grant “local health officers” broad powers to address communicable diseases. The text provides that the local health officer “shall promptly take all measures necessary to prevent, suppress, and control communicable diseases” and may “inspect schools and other public buildings.”<sup>31</sup> This section continues: “Local health officers

may do what is reasonable and necessary for the prevention and suppression of disease; may forbid public gatherings when deemed necessary to control outbreaks or epidemics.”<sup>32</sup> If a local health official “fails to enforce” the statutes and rules, then DHS “shall take charge.”<sup>33</sup>

Notably, however, Chapter 252 does not provide any enforcement mechanism for local health orders, and multiple other statutes indicate that this language is not meant to include the power to issue enforceable general orders; instead, any enforceable prohibitions must be adopted by the local governing body.<sup>34</sup>

Local health officers also have the power to quarantine, which extends to persons infected, anyone in contact with infected persons, and anyone refusing a vaccination.<sup>35</sup>

Chapter 252 does not explicitly require local health orders to be ratified by the local governing board. The orders themselves, however, are not enforceable under Chapter 252—only a “county, city or village ordinance” may be enforced.<sup>36</sup>

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27 Wis. Stat. § 252.06(1).

28 Wis. Stat. § 252.02(6).

29 Wis. Stat. § 252.02(5).

30 Wis. Stat. § 252.25.

31 Wis. Stat. § 252.03(1).

32 Wis. Stat. § 252.03

33 Wis. Stat. § 252.03(3).

34 See generally *Becker v. Dane Cty*, 21-CV-143 (Dane Cty. Cir. Ct. Jan. 20, 2021). WILL represents the plaintiffs in this case and is advocating for the position that the language in Wis. Stat. § 252.03 is not meant to include the authority to issue enforceable orders regulating private activity, but instead cover things that do not require enforcement, like promoting or providing masks, offering testing and vaccination, contact tracing, and even developing proposed ordinances or resolutions for the governing body to consider and adopt, if necessary. Although this Report broadly describes the current textual flaws in Chapter 252, and advances certain policy proposals, nothing in this Report is intended to conflict with the plaintiffs’ position advanced in *Becker*.

35 Wis. Stat. § 252.06(1).

36 Wis. Stat. § 252.25 (“Any person who willfully violates or obstructs the execution of any state statute or rule, **county, city or village ordinance** or departmental order under this chapter and relating to the public health, for which no other penalty is prescribed, shall be imprisoned for not more than 30 days or fined not more than \$500 or both.”) (emphasis added).



# State-Level COVID-19 Orders & Litigation

Based on the legal authorities described above, Governor Tony Evers and DHS Secretary-designee Andrea Palm have issued over 50 executive or emergency orders since March 12, 2020. These orders are summarized in the appendix. Most of these orders relate to agencies and officers and involve the power to suspend administrative rules provided by Wis. Stat. § 323.12(4)(d).

From the perspective of individual rights and the separation of powers, the most problematic orders are the roughly two dozen orders regulating private conduct or declaring multiple periods of emergency. Only five of these orders have been challenged in court. In this section, we will summarize those orders and discuss the purported authority for such orders. We will also pose questions presented by these orders (and the resulting litigation) that should be considerations for policymakers.

### THE GOVERNOR’S SERIAL EMERGENCIES: STATEWIDE PUBLIC HEALTH EMERGENCY DECLARATIONS

On March 12, 2020, Governor Evers issued Executive Order 72, which “[p]roclaim[s] that a public health emergency, as defined in Section 323.02(16) of the Wisconsin Statutes, exists for the State of Wisconsin.”<sup>37</sup> Governor Evers declared this emergency pursuant to the authority granted in Wis. Stat. § 323.10. As explained above, this statute authorizes the governor to declare a public-health

emergency “if he or she determines that a public health emergency exists.”<sup>38</sup>

As provided by Wis. Stat. § 323.10, Executive Order 72 expired May 11, 2020 because the legislature did not extend it: “state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature.”<sup>39</sup>

The governor took no action on May 11, 2020. Instead, as discussed below, DHS continued to issue emergency orders although no emergency declaration was in effect.

Despite the provision of state law providing a limit on the governor that a “state of emergency shall not exceed 60 days,” Governor Evers issued COVID-19 emergency declarations on March 12, 2020, July 10, September 22, November 20, 2020, and then again on January 19, 2021, all premised on the same COVID-19 pandemic, which had never abated.

After Governor Evers’ third emergency declaration, a lawsuit challenged Governor Evers’ use of serial emergency declarations in the case *Fabick v. Evers*, No. 2020AP1718 (Wis. Oct. 15, 2020). The case is pending at the Wisconsin Supreme Court.<sup>40</sup>

On January 26, 2021, the Wisconsin Senate approved a resolution terminating the governor’s emergency declaration.<sup>41</sup> The Assembly approved a resolution terminating the emergency on February 4, 2021.

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<sup>37</sup> All declarations and orders quoted in this section are available in the appendix.

<sup>38</sup> Wis. Stat. § 323.10.

<sup>39</sup> *Id.*

<sup>40</sup> An earlier lawsuit, *Lindoo v. Evers*, 20-cv-219 (Polk Cty. Aug. 25, 2020), was filed after Governor Evers’s second emergency declaration, but it was stayed by the Wisconsin Supreme Court pending *Fabick*. WILL represents the plaintiffs in *Lindoo*.

<sup>41</sup> See Senate Joint Resolution 3 (Jan. 26, 2021, LRB-1644).

Within hours of the resolution’s passage, Governor Evers issued his sixth emergency declaration and re-issued the statewide mask mandate, the so-called “Emergency Order #1,” which is described more below.<sup>42</sup>

## THE GOVERNOR’S ORDERS REGULATING PRIVATE CONDUCT

Apart from proclaiming a public-health emergency and issuing orders to Wisconsin agencies and officers (mostly related to the suspension of administrative rules), Governor Evers also used his emergency powers to issue three substantive orders affirmatively regulating private conduct. The governor claimed that these orders were proper based on his power under Wis. Stat. § 323.12(4)(b) to “[i]ssue such orders as he or she deems necessary for the security of persons and property.”

- On March 27, 2020, in conjunction with DHS, Governor Evers suspended all evictions and foreclosures.
- On April 6, 2020, Governor Evers unilaterally suspended “in-person voting for April 7, 2020, until June 9, 2020.”
- On July 30, 2020, Governor Evers issued an emergency order requiring “[e]very individual, age five and older, in Wisconsin shall wear a face covering” under certain circumstances

and with certain exceptions. The governor re-issued his face-covering mandate on September 22, 2020, November 20, 2020, January 19, 2021, and February 4, 2021.

The Wisconsin Supreme Court enjoined Governor Evers’ order suspending in-person voting.<sup>43</sup> While recognizing that the language granting the governor the power to issue orders is very broad, the court stated that the power is not unlimited. For example, in this case, the court stated that the language does not give “him the authority to suspend or rewrite statutes in the name of public safety.”<sup>44</sup>

Governor Evers’ two other substantive orders—prohibiting foreclosures and evictions and requiring face coverings—have not been challenged directly in court.<sup>45</sup>

## DHS’S STATEWIDE ORDERS REGULATING PRIVATE CONDUCT

DHS’s then-Secretary-designee Andrea Palm has issued more than a dozen orders based on DHS’s powers in three sub paragraphs of Wis. Stat. § 252.02: subparagraphs (3), (4), and (6).

As explained more above, subparagraph (3) gives DHS the power to “close schools and forbid public gatherings,” subparagraph (4) gives DHS the power to issue orders “for the control and suppression

42 Mitchell Schmidt, *Tony Evers issues new statewide mask order after GOP votes to strike current measure down*, Wis. State J. (Feb. 4, 2021).

43 *Wis. Legislature v. Evers*, No. 2020AP608-OA (Wis. April 6, 2020).

44 *Id.* at 3.

45 The face-coverings mandate, Emergency Order 1, was indirectly challenged in *Lindoo v. Evers*, 20-cv-219 (Polk Cty. Aug. 25, 2020). As noted, this lawsuit, like *Fabick v. Evers*, No. 2020AP1718 (Wis. Oct. 15., 2020), challenged an emergency declaration, and the governor’s power to issue the face-coverings mandate only resulted from an emergency declaration. *See* Wis. Stat. § 323.12(4)(b). On February 9, 2021, the petitioners in *Fabick* sought to strike down the most recent declaration. Contrary to press accounts, the petitioners did not ask for specific relief with respect to the mask mandate. *Fabick*, No. 2020AP1718 (Wis. Feb. 9, 2021) (Petitioner’s memo in support of his emergency motion for a temporary injunction at p. 16).

of communicable diseases” among other things, and subparagraph (6) gives DHS the power to “authorize and implement all emergency measures necessary to control communicable diseases.”

## 1. Emergency Order 28

Relying on all three of these broad powers, DHS Secretary-designee Andrea Palm issued statewide orders in 2020 labeled as “Safer at Home” (March 24 and April 16), “Badger Bounce Back” (April 20), or “Interim Order to Turn the Dial.” (April 27 and May 11). The most sweeping order, and the one reviewed by the Wisconsin Supreme Court, was the April 16 “Safer at Home” order, also known as “Emergency Order 28.” The Wisconsin Supreme Court described this sweeping order as follows:

Emergency Order 28 commands all individuals in Wisconsin “to stay at home or at their place of residence” with certain limited exceptions approved by Palm or risk punishment “by up to 30 days imprisonment, or up to \$250 fine, or both.” Order 28 also:

- Prohibits “[a]ll forms of travel” except what Palm deems essential.
- Orders “[a]ll for-profit and non-profit businesses” to “cease all activities” except for minimum operations that Palm deemed basic.
- Prohibits “[a]ll public and private gatherings of any number” “not part of a single household.”
- Declares that all public and private K-12 schools “shall remain closed” for the remainder of the year.

- Declares that libraries shall remain closed for “all in-person services.”
- Declares all “public amusement and activity” places closed regardless of whether “indoors or outdoors” except golf courses (with restrictions). The order says “Driving ranges and miniature golf must remain closed.”
- Continues the ordered closure of all salons and spas.
- Continues the closure of every restaurant and bar except for take-out or delivery service.
- Orders religious groups to limit gatherings to “fewer than 10 people in a room” including weddings and funerals.
- Imposes a six-foot social distancing requirement for any person not “residing in a single living unit or household.”<sup>46</sup>

In *Palm*, the Wisconsin Supreme Court held that “Palm’s order confining all people to their homes, forbidding travel and closing businesses exceeded the statutory authority of Wis. Stat. § 252.02, upon which Palm claims to rely.” The court also held that Emergency Order 28 was illegal because it violated a state law that requires rules to be promulgated. According to the court, Emergency Order 28 was a rule because it applied to a defined “class of people” (i.e. everyone in Wisconsin) and “new members can be added to the class” (i.e. anyone who comes into Wisconsin in the future is subject to the order).<sup>47</sup> Because rules must be promulgated under Chapter 227 of the Wisconsin Statutes, and Emergency Order 28 was not properly promulgated, the court invalidated the order.

<sup>46</sup> *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 7, 391 Wis. 2d 497, 942 N.W.2d 900.

<sup>47</sup> *Id.* ¶ 22.

Other than concluding that DHS’s “order confining all people to their homes, forbidding travel and closing businesses” was beyond the power of DHS,<sup>48</sup> the court did not further decide the scope of the power granted in Wis. Stat. § 252.02, or the specific limitations on that power, but did say: “We do not define the precise scope of DHS authority under Wis. Stat. § 252.02(3), (4) and (6) because clearly Order 28 went too far.”<sup>49</sup> The court also noted that these paragraphs are not an “open-ended grant of police powers,”<sup>50</sup> and that these paragraphs should be read narrowly to only grant power that the statute explicitly permits.<sup>51</sup>

## 2. Other DHS Orders Closing Schools and Regulating Public Gatherings

In addition to Emergency Order 28, Secretary-designee Palm issued separate statewide orders

shutting down all schools (March 13) and prohibiting mass gatherings (March 16, 17, 18, 20, and October 6). These orders relied upon Wis. Stat. § 252.02(3), which allows DHS to “close schools and forbid public gatherings.”

The October 6 order, “Emergency Order 3,” among other things, limited indoor public gatherings to no more than 25% of the occupancy limits. The Tavern League of Wisconsin and other plaintiffs sued. The Wisconsin Court of Appeals enjoined Emergency Order 3 and held that the Petitioner “has shown that it is certain to succeed on the merits because Emergency Order #3 is unquestionably invalid and unenforceable under our supreme court’s holding in *Palm*.” The case is pending at the Wisconsin Supreme Court.<sup>52</sup>

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48 *Id.* ¶ 59.

49 *Id.* ¶ 55.

50 *Id.* ¶ 31 (citations omitted).

51 *Id.* ¶ 54.

52 *Tavern League v. Palm*, No. 20AP1742 (Wis. Ct. App. Nov. 6, 2020).





# Local COVID-19 Orders & Litigation

As described above, the Wisconsin Statutes also endow seemingly broad powers to local health officials, including the power to take steps “reasonable and necessary for the prevention and suppression of disease” and “forbid public gatherings when deemed necessary to control outbreaks or epidemics.”<sup>53</sup>

After *Palm*, few local governments have attempted to wield such powers under Chapter 252, presumably because the statutes do not provide an enforcement mechanism. For example, many local governments issued advisory orders encouraging voluntary compliance with DHS and CDC recommendations.<sup>54</sup> Other jurisdictions, like Milwaukee, have gone the legislative route and passed ordinances through their common councils.<sup>55</sup> Local hesitancy may come from the lack of enforcement mechanisms of local health orders; Wis. Stat. § 252.25 does not provide for the enforcement of local health orders. In August

2020, the Wisconsin Counties Association cautioned local governments that “[n]either the statutes nor the administrative code provide for a detailed enforcement mechanism of a local health officer’s general order.”<sup>56</sup>

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*The Wisconsin Counties Association cautioned that there was no “process” or “mechanism” to enforce local orders. Yet a few local officials pushed ahead anyway.*

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A few local jurisdictions, like Dane County, pushed ahead even with unclear authority and issued their own broad orders without legislative involvement.<sup>57</sup> These local orders have purported to limit capacity in businesses, restrict gatherings indoor and outdoor, close public and private schools, and mandate face coverings.<sup>58</sup> Not surprisingly, these orders have faced legal challenges and

exposed problems with Chapter 252.

One major controversy surrounding local orders has involved the power to close schools. On August 21, 2020, a public health official in Dane County issued an order preventing all schools, grades 3 through 12, public and private, from opening in

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53 Wis. Stat. § 252.03(2).

54 See Mitchell Schmidt, *Some Wisconsin counties rescind local stay-at-home orders, Dane County order to stay in place*, Wis. State J. (May 16, 2020).

55 Alison Dirr, *Milwaukee Common Council approves requiring masks in public spaces*, Milwaukee J. Sentinel (July 13, 2020).

56 See Wisconsin Counties Association, *Guidance in Implementing Regulations Surrounding Communicable Disease 27–40* (Aug. 2020).

57 See generally MacIver Institute, *UPDATED: County Governments Seeking Great Powers For Public Health Bureaucrats, Despite Public Opposition* (Aug. 4, 2020).

58 For example, Dane County filed an enforcement action against A Leap Above Dance Studio, alleging that a single event, where a dance studio taped *The Nutcracker* without an audience, and limiting the taping to groups of less than ten students, constituted a “mass gathering.” The County’s complaint contains 119 counts and alleges over \$24,000 in forfeitures. See *Public Health Madison & Dane County vs. A Leap Above Dance, LLC*, No. 2021CV177 (Dane Cty. Cir. Ct. Jan. 25, 2021). WILL represents the defendant in this case.

Dane County. After several schools and parents sued, the Wisconsin Supreme Court stepped in and issued a temporary injunction, stating that “local health officers do not appear to have the statutory authority to do what the Order commands.”<sup>59</sup> On November 12, 2020, a public health official in Racine County attempted to do the same and close all schools, K–12. And again, after schools and parents sued, the Wisconsin Supreme Court put the order on hold.<sup>60</sup>

Another controversy involves whether local health officials may unilaterally issue a general order prohibiting or limiting otherwise lawful conduct. In *Gymfinity v. Dane County*, parents and a

gymnastics gym sued over the Dane County health department’s limits.<sup>61</sup> Among other things, the lawsuit claimed that Dane County violated the non-delegation doctrine by giving too much authority to its health officer with no oversight by the county board. Although the original action was rejected by the Wisconsin Supreme Court on a 4-3 vote, four of the justices indicated that the arguments were substantial and deserved judicial scrutiny, so the plaintiffs have re-filed a similar challenge in Dane County Circuit Court.<sup>62</sup> This new lawsuit again raises a non-delegation argument, and also argues that Chapters 251 and 252 do not permit local health officials to issue enforceable orders without ratification by the local governing legislative body.

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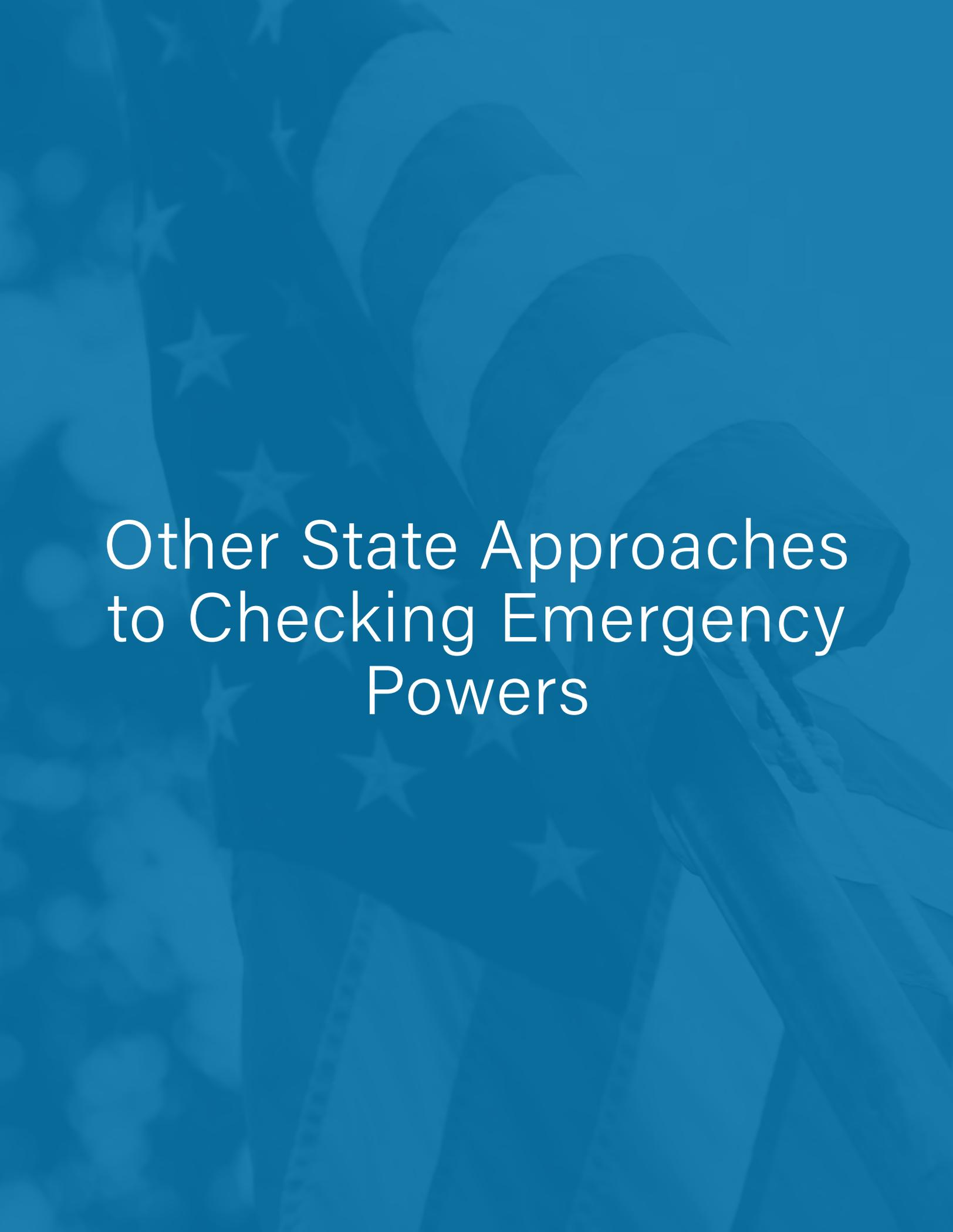
59 *James v. Heinrich*, Consolidated Cases, No. 2020AP1419 (Wis. Sept. 10, 2020). WILL represents a group of plaintiffs in these consolidated cases. See *WCRIS v. Heinrich*, No. 2020AP001420 (Wis. Aug. 26, 2020).

60 *School Choice Wis. Action v. Bowersox*, 2020AP1911-OA (Wis. Nov. 25, 2020). A new closure order, which has now expired, was then issued by the public health authority who argued the order rested on power delegated by the local legislative body. WILL represented the plaintiffs in this matter.

61 *Gymfinity, Ltd. v. Dane Cty.*, No. 2020AP1927-OA (Wis. Dec. 21, 2020).

62 See *Becker v. Dane Cty.*, 21-CV-143 (Dane Cty. Cir. Ct. Jan. 20, 2021).



The background of the slide is a solid blue color with a faint, semi-transparent pattern of the American flag's stars and stripes. The stars are arranged in a grid, and the stripes are horizontal, creating a subtle watermark effect.

# Other State Approaches to Checking Emergency Powers

Like Wisconsin, every other state gives its governor the power to declare a state of emergency. Furthermore, most states provide their legislatures with the power to terminate a state of emergency and the option to extend it or let it expire.

As discussed above, Wisconsin’s governor may declare a state of emergency that exists for 60 days. The legislature may terminate the state of emergency at any time with a joint resolution. Furthermore, the legislature may also extend the state of emergency with a joint resolution. Otherwise, the emergency expires without further legislative involvement.

A review of other states’ legislative schemes reveals some critical points. Nearly all states that permit a limited period for a gubernatorial declaration do not explicitly allow the use of serial declarations. So as a primary matter, Wisconsin’s inability to rein in its governor’s repeated 60-day emergency declarations places Wisconsin in poor company.<sup>63</sup> Only a handful of states allow governors the power to extend emergencies indefinitely—a power that Governor Evers has attempted to claim (although it is subject to

litigation<sup>64</sup>) and the Wisconsin Legislature has yet to rein in (although the Legislature terminated one emergency declaration, it was quickly replaced by another).<sup>65</sup>

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*Wisconsin’s emergency powers are some of the worst (tied at 33rd) at protecting basic notions of liberty and the separation of powers.*

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Moreover, other states provide a few notable variants that may curb executive power and provide more opportunities for legislative oversight. This section discusses these variants, namely: (1) even more clearly limiting the duration of the state of emergency, (2) making it easier for the legislature to terminate the state of emergency, (3) requiring legislative ratification, and (4) allowing a local opt-out.

## LIMITING THE DURATION OF THE STATE OF EMERGENCY

Wisconsin’s 60-day time limit is one of the more generous time periods in the country. As noted above, for most of Wisconsin’s history the established limit of an emergency declaration was 30 days, but this limit was expanded to 60 days in 2009.<sup>66</sup>

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63 WILL would like to thank the Maine Policy Institute and its report *Scoring Emergency Executive Power in All 50 States*, available at <https://mainepolicy.org/project/emergency-powers/>. Specifically, WILL acknowledges the assistance of Nick Murray, whose research was invaluable in the compilation of this section. Based on Mr. Murray’s analysis, when Governor Evers’s serial emergency declarations are taken into account, Wisconsin ranks near the bottom (33rd) in emergency-powers laws that are protective of individual rights and the separation of powers.

64 See *Lindoo v. Evers*, 20-cv-219 (Polk Cty. Aug. 25, 2020); *Fabick v. Evers*, No. 2020AP1718 (Wis. Oct. 15., 2020).

65 See LRB 1644, AJR-004, SJR-003 (Adopted Feb. 4, 2021). Within hours, Governor Evers issued Emergency Order 105. See appendix.

66 See 2009 Wis. Act 42, § 72 (Oct. 20, 2009).



declarations to 30 days, while Michigan sets the limit at 28 days.<sup>73</sup>

## MAKING IT EASIER FOR THE LEGISLATURE TO TERMINATE THE STATE OF EMERGENCY

Another possible check on the power to declare a state of emergency is the legislature’s power to terminate. Thirty-four states grant the legislature the power to terminate the state of emergency at any time.

Wisconsin’s neighbors are split on this issue. In Illinois<sup>74</sup> only the governor may terminate a state of emergency. Iowa,<sup>75</sup> Michigan,<sup>76</sup> and Minnesota<sup>77</sup> provide that an emergency may, like Wisconsin, be terminated by joint legislative resolution at any time.

There are a few variations to the power to terminate a state of emergency. While most states require a joint resolution to terminate the emergency, Louisiana grants either house of the legislature the power to terminate the state of emergency.<sup>78</sup> And Connecticut, when the emergency involves a “man-made cause,” the emergency “may be

disapproved by majority vote of a joint legislative committee consisting of the president pro tempore of the Senate, the speaker of the House of Representatives and the majority and minority leaders of both houses of the General Assembly, provided at least one of the minority leaders votes for such disapproval.”<sup>79</sup>

## REQUIRING LEGISLATIVE RATIFICATION

There are also states that require affirmative ratification of an emergency. Alaska, for example, provides that “actions taken by the governor” after the close of the legislative session “that are not ratified by law adopted during that session are void.” In other words, if the Alaska Legislature is in session and the governor is issuing orders, then the legislature must ratify the orders or the orders are void.<sup>80</sup>

Georgia also requires its legislature to ratify the emergency. “As a condition precedent to declaring that a state of emergency or disaster exists as a result of a public health emergency, the Governor shall issue a call for a special session of the General Assembly ..., which session shall convene at 8:00 A.M. on the second day following the date of such

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73 Mich. Comp. Laws § 30.403.

74 20 Ill. Comp. Stats. 3305/7.

75 IA Code § 29C.6.

76 Mich. Comp. Laws § 30.403. Another provision, Mich. Comp. Laws § 10.31(2), purporting to give only the governor the power to terminate the emergency has been declared unconstitutional. See *In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div., No. 161492*, 2020 WL 5877599, at \*6 (Mich. Oct. 2, 2020) (“Given that MCL 30.403(3) and (4) required the Governor to terminate a declaration of a state of emergency or state of disaster after 28 days in the absence of a legislatively authorized extension, we do not believe that the Legislature intended to allow the Governor to redeclare under the EMA the identical state of emergency and state of disaster under these circumstances.”).

77 Minn. Stat. § 12.31.

78 La. Stat. Ann. § 29:724(B)(2).

79 Conn. Gen. Stat. § 28-9.

80 Alaska Stat. § 26.23.025(b).

declaration for the purpose of concurring with or terminating the public health emergency.”<sup>81</sup>

Kansas requires ratification of an emergency after 15 days, with the option that a joint committee of the legislature may also ratify the emergency: “no state of disaster emergency may continue for longer than 15 days unless ratified by concurrent resolution of the legislature, with the single exception that upon specific application by the governor to the state finance council and an affirmative vote of a majority of the legislative members thereof, a state of disaster emergency may be extended once for a specified period not to exceed 30 days beyond such 15-day period.”<sup>82</sup>

And although not legislative ratification, Minnesota requires ratification of the emergency by an Executive Council within five days. This council is not a part of the legislature but includes other statewide elected officials (the lieutenant governor, secretary of state, state auditor, and attorney general).<sup>83</sup>

## PROVIDING LOCAL OPT-OUTS

Some states also employ interesting local opt-outs, providing flexibility to local units of government. Kansas, for example, grants local county boards the power to opt-out of a statewide order relating to public health. County boards may adopt provisions “less stringent than the provisions of an executive order” if the county adopts findings that consulted with a local health officer and that implementation of “the full scope of provisions in the governor’s order are not necessary to protect the public health and safety of the county.”<sup>84</sup>

Vermont also allows local opt-out of statewide order: “Upon receiving notice that a majority of the legislative body of a municipality affected by a natural disaster no longer desires that the state of emergency continue within its municipality, shall declare the state of emergency terminated within that particular municipality.”<sup>85</sup> On December 30, 2020, the City of Stamford voted to opt-out of the Vermont statewide emergency declaration.<sup>86</sup>

81 Ga. Code Ann. § 38-3-51.

82 Kan. Ann. Stat. § 48-924.

83 Minn. Stat. Ann. § 12.31.

84 Kan. Ann. Stat. § 48-925(h).

85 Vt. Stat. Ann. tit. 20, § 13.

86 CBS Boston, *Vermont Town Votes to “Terminate” State Virus Restrictions*, (Jan. 2, 2021).



# Moving Forward: Reforms to Wisconsin's Emergency Powers

There is little doubt that the Wisconsin Statutes contain very broad grants of emergency power to the governor, DHS, and local health officials.<sup>87</sup> Based on our experience with COVID-19, and informed by the statutory choices in other states, we present the following menu of choices that Wisconsin policymakers could consider when reforming our emergency powers. These statutory amendments, if adopted, would rebalance the separation of powers and protect individual liberties.

## GOVERNOR’S POWER TO DECLARE AN EMERGENCY

The Wisconsin Governor has the power to declare a state of emergency for 60 days, subject only to a joint resolution of the legislature cancelling the declaration. Moreover, despite a pending case before the Wisconsin Supreme Court, the governor’s position is that 60-day emergencies may be declared repeatedly. The governor has even declared a *sixth* emergency based on the same facts immediately after the legislature terminated his fifth emergency. While his position seems to contradict the plain language of the statute and would raise serious constitutional questions, this issue remains unresolved in the courts.

To bring Wisconsin in line with other states and provide more legislative oversight, the Wisconsin Legislature should consider reducing the 60-day period to 30 days and allowing an emergency declaration to be revoked by either house of the legislature. Finally, the provision below would eliminate any question regarding the governor’s

claimed ability to issue serial declarations over the same subject matter.

### Proposed Amendment to Wis. Stat. § 323.10

A state of emergency shall not exceed 30 days, unless the state of emergency is extended by joint resolution of the legislature. A copy of the executive order shall be filed with the secretary of state. The executive order may be revoked at the discretion of the governor by executive order or by either house of the legislature by resolution. In the event that an emergency declaration expires or is revoked under this section, any subsequent emergency declaration relating to the same disaster, public health emergency, or emergency related to computer or telecommunication systems shall not be valid unless ratified by a majority of both houses of the legislature.

## REFORMING STATE OFFICIALS’ POWER TO ISSUE “ORDERS”

Since March 2020, the governor and the DHS Secretary-designee have relied exclusively on four specific paragraphs in the Wisconsin Statutes to issue orders governing private conduct. DHS has relied on three broad grants of power under Wis. Stat. § 252.02: subparagraph (3) gives DHS the power to “close schools and forbid public gatherings,” subparagraph (4) gives DHS the power to issue orders “for the control and suppression of communicable diseases” among other things, and subparagraph (6) gives DHS the power to “authorize and implement

<sup>87</sup> Although the power granted to local health officials is seemingly broad, as described above in this Report, there is not a relevant enforcement mechanism.

all emergency measures necessary to control communicable diseases.”

At the same time, the governor has relied on the broad power under Wis. Stat. § 323.12(4)(b) to “[i]ssue such orders as he or she deems necessary for the security of persons and property.”

The legislature could simply remove these powers. But such a revision may risk removing powers that may be needed in a future emergency pandemic with a virus that could be much more virulent than COVID-19.

In *Wisconsin Legislature v. Palm*, the Wisconsin Supreme Court identified the root of the problem with state-level orders: there is no legislative role or oversight in the executive branch’s policy choices in creating orders and criminalizing certain conduct, which is, at bottom, an act of lawmaking. The court’s solution was to impose the rulemaking requirements of Chapter 227 upon Emergency Order 28: “The procedural requirements of Wis. Stat. Ch. 227 must be followed because they safeguard all people.”<sup>88</sup> The legislature has a defined role in the rulemaking process and even created an emergency-rulemaking power.<sup>89</sup> Given the Supreme Court’s roadmap, one potential reform of the power of state officials to issue orders is simply to codify *Palm* and impose rulemaking requirements on orders issued under those statutes.

Codifying *Palm* is important for two independently sufficient reasons. First, the Supreme Court could overrule or loosen *Palm*’s requirements at any time. Second, the Supreme Court only required codification of Emergency Order 28, which was a statewide order applying to every person in

Wisconsin. Future orders applying to fewer-than-all Wisconsin residents or regulating activities different from those in Emergency Order 28, would require future litigation to sort out when promulgation is required.

When codifying *Palm*, however, it is important to note the current timeframe for promulgating an emergency rule. Under current law, an agency must wait 10 days after the approval of a scope statement.<sup>90</sup> So in the event of a true emergency or disaster, an order requiring promulgation would be ineffective for at least 10 days. This 10-day period may unreasonably delay an emergency response by the governor or DHS. As such, legislators should either exempt emergency rules promulgated during a state of emergency (and which relate directly to the emergency) from the 10-day waiting period, or give the executive a grace period during which emergency orders can be enforced pending promulgation.

### **Proposed Amendment to Chapter 252 (DHS)**

Any order issued under Wis. Stat. § 252.02(3), (4), or (6) shall expire within 14 days of the order’s effective date unless it has been promulgated as provided by Wis. Stat. Ch. 227. Upon expiration, the same or a substantially similar order may not be re-issued unless promulgated as a rule as provided by Wis. Stat. Ch. 227.

### **Proposed Amendment to Chapter 323 (Governor)**

Any order issued under Wis. Stat. § 323.12(4) (d) shall expire within 14 days of the order’s

<sup>88</sup> *Palm*, 2020 WI 42, ¶158.

<sup>89</sup> Wis. Stat. § 227.24.

<sup>90</sup> Wis. Stat. § 227.135(2).

effective date unless it has been promulgated as provided by Wis. Stat. Ch. 227. Upon expiration, the same or a substantially similar order may not be re-issued unless promulgated as a rule as provided by Wis. Stat. Ch. 227.

## REFORMING ORDERS BY LOCAL HEALTH OFFICIALS

Local orders are not subject to rulemaking under Chapter 227. Yet local orders under Wis. Stat. § 252.03 can present the same separation-of-powers issues presented in *Palm*. The cure for excessive exercise of legislative powers by an executive official at the local level should be legislative oversight, just as at the state level. The following proposed amendment requires ratification of local health orders by the local legislative body within seven days of issuance.

### **Proposed Amendment to Wis. Stat. § 252.03**

Any health order issued under Wis. Stat. § 252.03 shall expire within seven days of the order’s effective date unless it is ratified by a majority of the local legislative body. Upon ratification, the local legislative body shall set an expiration date for the order. A majority of the local legislative body may cancel an order issued under Wis. Stat. § 252.03 at any time. Any order issued under Wis. Stat. § 252.03 relating to the same subject matter or same geographic area of an order that expired or was cancelled within the preceding six months shall be invalid unless ratified by a majority of the local legislative body.

## PROTECTING INDIVIDUAL AND RELIGIOUS LIBERTIES

One reoccurring issue with the emergency orders has been their impact upon individual liberties.

As noted in *Palm*, the order in that case confining all people to their homes, forbidding travel, and closing businesses was beyond the power of DHS. In addition, under the guise of emergency orders, state and local health officials have attempted to close private religious schools and churches in violation of religious liberty. The legislature should categorically exclude this type of regulation, provide for judicial review, and recovery of attorney fees by a prevailing plaintiff.

### **Proposed Amendments to Chapter 252**

No order issued under Wis. Stat. §§ 252.02, 252.03, or 323.12(4)(d) may close or limit attendance at any place of worship, religious school, or religious institution, confine residents to their homes, forbid travel, close businesses, impair the right to earn a living or otherwise infringe upon rights protected by the Wisconsin Constitution, unless a court finds by clear and convincing evidence that the order is narrowly tailored to advance a compelling government interest. Any person aggrieved by an order issued in violation of this section may seek relief in court and such case shall be heard and decided as soon as practicable and without delay. If a court finds that this section has been violated, the prevailing party shall be entitled to recover attorney fees and costs.

Any party aggrieved by a court order under this section shall have an immediate right to appeal.

## REFORMING ENFORCEMENT OF EMERGENCY ORDERS

Litigation surrounding the various emergency orders has exposed some inconsistencies and gaps in enforcement. First, violation of a governor’s order under Wis. Stat. § 323.28 is punishable by a forfeiture of \$200. Yet a violation of a DHS order is punishable

by 30 days in jail and a \$500 fine. These violation provisions should be harmonized. Second, Wis. Stat. § 252.25 does not provide for the enforcement of local orders. In order to solve these issues, the following text should replace Wis. Stat. § 252.25:

**Proposed Amendments to Wis. Stat. § 252.25**

Any person who willfully violates or obstructs the execution of any state statute or rule, county, city or village ordinance, that has been ratified by the local governing body or departmental order that has been promulgated as a rule under Ch. 227 under this chapter and relating to the public health, for which no other penalty is prescribed by law, shall be subject to a forfeiture of not more than \$200.

**LOCAL OPT-OUT**

As shown above, some states allow local units of government to opt-out of statewide orders based on local conditions. Northern and rural Wisconsin counties should not be required to abide by a one-size-fits all public-health order developed in Madison. Therefore, the following reforms are proposed based on Kansas's statute, with the addition of a legislative override:

**Proposed Amendment to Chapter 252**

A local governing body may issue an order relating to public health that includes provisions that are less stringent than the provisions of any order issued under Wis. Stat. §§ 252.02 or 323.12(4)(b). Any local governing body issuing such an order must make the following findings and include such findings in the order:

- (1) The local governing body has consulted with the local health officer or other local health officials regarding the public health order issued under Wis. Stat. §§ 252.02 or 323.12(4)(b);
- (2) following such consultation, implementation of the full scope of the provisions in the public health order issued under Wis. Stat. §§ 252.02 or 323.12(4)(b) are not necessary to protect the public health and safety of the county; and
- (3) all other relevant findings to support the board's decision.

Any order issued under this paragraph may be revoked by a joint resolution of the legislature.

# Conclusion

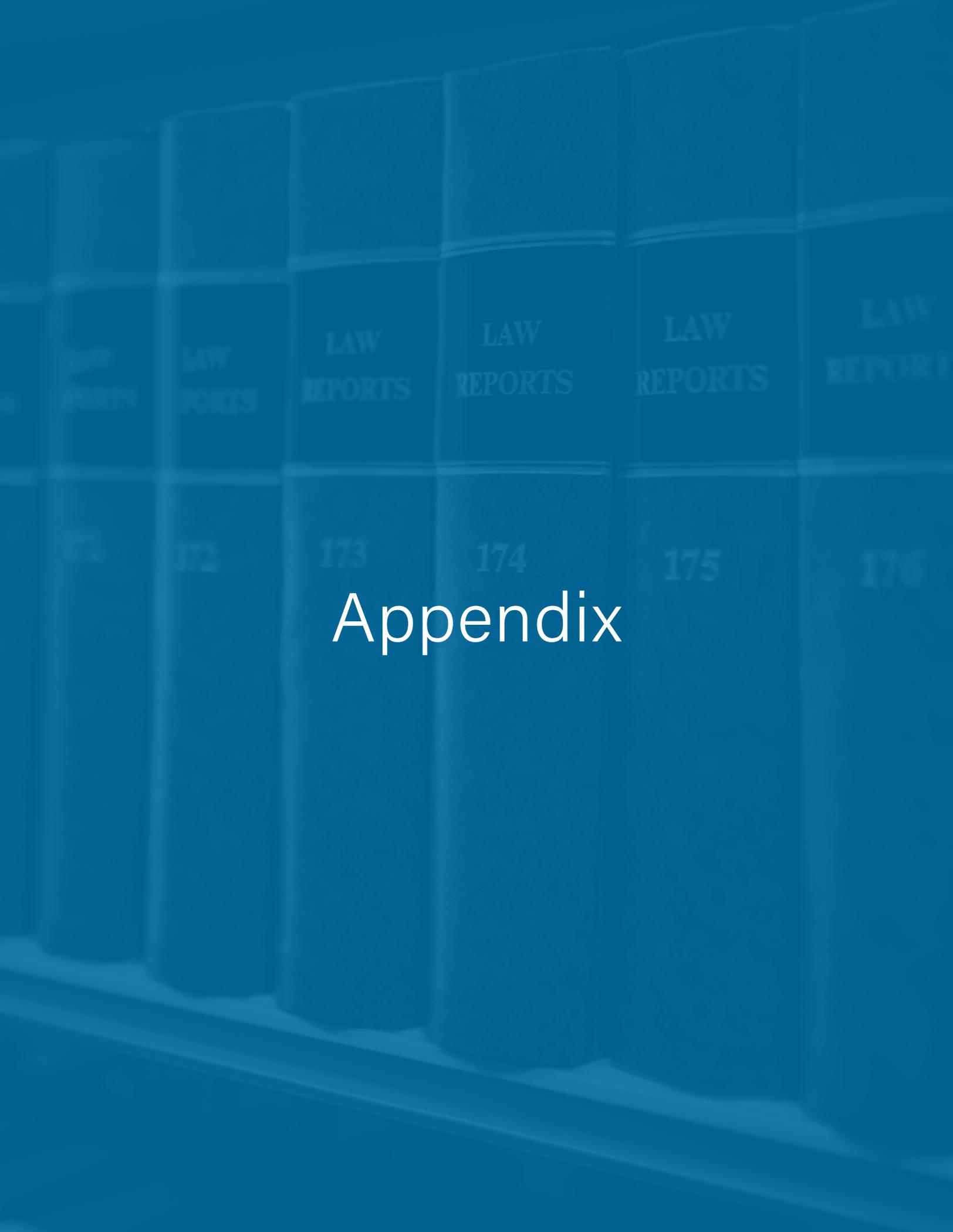
Wisconsin’s COVID-19 experience has illuminated several problems with some rarely used, but exceedingly powerful statutes. The chief concern with these statutes is that the executive branch may act without any standards apart from issuing orders that the official deems reasonable and necessary. When implementing these vague statutes, the relevant official engages in an act of lawmaking. This power is especially sensitive when it comes with an enforcement mechanism that could result in criminal liability.

Wisconsin policymakers have a unique opportunity to reform these laws. The chief solution is to insert more legislative oversight and participation in the process of issuing orders that many times restrict

individual liberties: “The Constitution promises that only the people’s elected representatives may adopt new [ ] laws restricting liberty.”<sup>91</sup> We believe that these reforms proposed above will go a long way to re-balancing the legislative and executive powers in light of the COVID-19 pandemic.

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91 *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

A row of seven law books is shown on a shelf, receding into the distance. The spines of the books are visible, with the words 'LAW REPORTS' and the numbers 172, 173, 174, 175, and 176 printed on them. The entire image has a blue color cast. The word 'Appendix' is written in white, sans-serif font, centered over the books.

# Appendix

**Summary by Issuing Officer**

GOV (EVERS)	31
DHS (PALM)	13
Joint Orders	8
<b>Total</b>	<b>52</b>

**Summary by Type of Order**

Governor's Declarations of Emergency	6
Orders Suspending Rules/Regulating Agencies	25
Orders Regulating Private Conduct	19
Other (special session, advisory orders)	2
<b>Total</b>	<b>52</b>

**List of Orders**

	<b>Date</b>	<b>Order By</b>	<b>Main Authority</b>	<b>Title and Links</b>
1.	Feb. 4, 2021	EVERS	323.10	<a href="#">Executive Order 105: Relating to Declaring a State of Emergency and Public Health Emergency</a>
2.	Feb. 4, 2021	EVERS	323.12(4)(b)	<a href="#">Emergency Order 1: Relating to Reducing Hospital Bed and Staff Shortages by Requiring Face Coverings</a>
3.	Jan. 19, 2021	EVERS	323.10	<a href="#">Executive Order 104: Relating to Declaring a State of Emergency and Public Health Emergency</a>
4.	Jan. 19, 2020	EVERS	323.12(4)(b)	<a href="#">Emergency Order 1: Relating to Reducing Hospital Bed and Staff Shortages by Requiring Face Coverings</a>
5.	Nov. 20, 2020	EVERS	323.10	<a href="#">Executive Order 95: Relating to Declaring a State of Emergency and Public Health Emergency</a>
6.	Nov. 20, 2020	EVERS	323.12(4)(b)	<a href="#">Emergency Order 1: Relating to Reducing Hospital Bed and Staff Shortages by Requiring Face Coverings</a>
7.	Nov. 10, 2020	EVERS	Advisory	<a href="#">Executive Order 94: Relating to Actions Every Wisconsinite Should Take to Protect their Family, Friends, and Neighbors from COVID-19</a>

8.	October 6, 2020	PALM	252.02(3)	<p>“Emergency Order 3 Limiting Public Gatherings” – <i>Note that Evers issued a previous Emergency Order #3 on March 16, 2020</i></p> <p><i>Order Suspended Pending Review by Tavern League v. Palm, 2020AP1742 (Wis.)</i></p>
9.	October 1, 2020	EVERS & PALM	252.02(2)	<p>“Emergency Order 2 Order To Aid Our Healthcare Facilities To Provide Treatment To Wisconsinites Impacted By COVID-19” –</p> <p><i>Note that Evers issued a previous order also labeled “Emergency Order #2” on March 14, 2020</i></p>
10.	Sept. 22, 2020	EVERS	323.12(4)(b)	Emergency Order 1: Relating to Reducing Hospital Bed and Staff Shortages by Requiring Face Coverings
11.	Sept. 22, 2020	EVERS	323.10	<p>Executive Order 90: Relating to Declaring a Public Health Emergency</p> <p><i>Challenged by Fabick v. Evers, 2020AP1718 (Wis.) pending</i></p>
12.	July 30, 2020	EVERS	323.12(4)(b)	Emergency Order 1: Relating to Reducing Hospital Bed and Staff Shortages by Requiring Face Coverings
13.	July 30, 2020	EVERS	323.10	<p>Executive Order 82: Relating to Declaring a Public Health Emergency</p> <p><i>Challenged by Fabick v. Evers, 2020AP1718 (Wis.) pending</i></p>
14.	May 11, 2020	PALM	252.02(3), (4), (6)	Emergency Order 36: Interim Order to Turn the Dial
15.	May 3, 2020	EVERS & PALM	323.12(4)(d) 252.02(6)	Emergency Order 35: Relating to the Department of Health Services and Department of Safety and Professional Services
16.	April 27, 2020	PALM	252.02(3), (4), (6)	Emergency Order 34: Interim Order to Turn the Dial
17.	April 23, 2020	EVERS	323.12(4)(d)	Emergency Order 33: Department of Revenue Administrative Rule Suspensions
18.	April 23, 2020	PALM	252.02(2)	Emergency Order 32: Relating to the Operations of the Alternative Care Facility

19.	April 20, 2020	PALM	252.02(3), (4), (6)	Emergency Order 31: Badger Bounce Back
20.	April 17, 2020	EVERS	323.12(4)(d)	Emergency Order 30: Department of Natural Resources Administrative Rule Suspensions
21.	April 17, 2020	EVERS	323.12(4)(d)	Emergency Order 29: University of Wisconsin System Administrative Rule Suspensions
22.	April 16, 2020	PALM	252.02(3), (4), (6)	Emergency Order 28: Safer at Home Order <i>Overtaken by Wisconsin Legislature v. Palm, 2020AP765 (Wis. May 13, 2020)</i>
23.	April 15, 2020	EVERS	323.12(4)(d)	Emergency Order 27: Relating to Joint Effort Marketing Administered by the Department of Tourism
24.	April 14, 2020	EVERS	323.12(4)(d)	Emergency Order 26: Relating to Department of Children and Families Administrative Rule Suspensions
25.	April 14, 2020	PALM	252.02(3), (4), (6)	Emergency Order 25: Relating to Additional Safety Measures Related to the Department of Workforce Development (DWD) and Migrant Labor Camps
26.	April 10, 2020	EVERS	323.12(4)(d)	Emergency Order 24: Relating to the Department of Transportation Emergency Overweight Commodity Permits
27.	April 9, 2020	EVERS	323.12(4)(d)	Emergency Order 23: Related to the Department of Veterans Affairs Assistance to Needy Veterans Program
28.	April 9, 2020	EVERS	323.12(4)(d)	Emergency Order 22: Related to Certain Timelines Established by the Department of Safety and Professional Services
29.	April 6, 2020	EVERS	323.12(4)(b)	<i>Executive Order 74, Relating to suspending in-person voting on April 7, 2020, due to the COVID-19 Pandemic</i> <i>Order Suspended by Wisconsin Legislature v. Evers, No. 2020AP608 (Wis. April 6, 2020)</i>

30.	April 3, 2020	EVERS & PALM	323.12(4)(d) 252.02(6)	Emergency Order 21: Relating to the Department of Health Services Administrative Rule Suspensions and Order
31.	April 3, 2020	EVERS & PALM	323.12(4)(d) 252.02(6)	Emergency Order 20: Relating to Modification of Emergency Order #16
32.	April 3, 2020	EVERS	Art. V, § 4 – special session	Executive Order 73, Relating to a Special Session of the Legislature to Provide for an All-Mail Spring Election and Special Election for the 7th Congressional District during the COVID-19 Pandemic –
33.	April 3, 2020	EVERS & PALM	323.12(4) 252.02(6)	Emergency Order 19: Appropriate Use of COVID-19 Information by Law Enforcement Agencies, First Responders, and Public Safety Workers
34.	March 31, 2020	EVERS	323.12(4)(d)	Emergency Order 18: Department of Children and Families Administration Rule Suspensions
35.	March 27, 2020	EVERS	323.12(4)(d)	Emergency Order 17: Department of Natural Resources Administrative Rule Suspension
36.	March 27, 2020	EVERS & PALM	323.12(4)(d) 252.02(6)	Emergency Order 16: Relating to Certain Health Care Providers and the Department of Safety and Professional Services Credentialing
37.	March 27, 2020	EVERS & PALM	323.12(4)(b) 252.02(6)	Emergency Order 15: Temporary Ban on Evictions and Foreclosures
38.	March 27, 2020	EVERS & PALM	323.12(4) 252.02(6)	Emergency Order 14: Relating to Extending the Department of Transportation Emergency Permits to Assist with Grocery Supply Efforts
39.	March 27, 2020	EVERS	323.12(4)(d)	Emergency Order 13: Order to the Department of the Workforce Development Regarding Minor Work Permits
40.	March 24, 2020	PALM	252.02(3), (6)	Emergency Order 12: Safer at Home Order
41.	March 21, 2020	EVERS	323.12(4)(d)	Emergency Order 11: Public Service Commission Administrative Rule Suspensions

42.	March 21, 2020	EVERS	323.12(4)(d)	Emergency Order 10: Department of Public Instruction Administrative Rule Suspension and Emergency Orders
43.	March 20, 2020	EVERS	323.12(4)(b)	Emergency Order 9: Order to the Department of Corrections
44.	March 20, 2020	PALM	252.02(6)	Emergency Order 8: Updated Mass Gathering Ban
45.	March 20, 2020	EVERS	323.12(4)(b)	Emergency Order 7: Order to the Department of Workforce Development Regarding Unemployment Insurance
46.	March 18, 2020	PALM	252.02(3)	Emergency Order 6: Order Restricting the Size of Child Care Settings
47.	March 17, 2020	PALM	252.02(3)	Emergency Order 5: Order Prohibiting Mass Gatherings of 10 People or More
48.	March 16, 2020	PALM	252.02(3)	Emergency Order 4: Order Prohibiting Mass Gatherings of 50 People or More
49.	March 16, 2020	EVERS	323.12(4)(d)	Emergency Order 3: Order for Department of Children and Families Administrative Rule Suspension and Emergency Orders
50.	March 14, 2020	EVERS	323.12(4)(d)	Emergency Order 2: Order for Department of Transportation Permits to Assist with Grocery Supply Efforts
51.	March 13, 2020	PALM	252.02(3)	Emergency Order 1: Order for Statewide School Closure
52.	March 12, 2020	EVERS	323.10	Executive Order 72, Relating to Declaring a Health Emergency in Response to the COVID-19 Coronavirus



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