

FILED

11-05-2020

CLERK OF WISCONSIN  
SUPREME COURT

---

**No. 2020AP1718-OA**

---

**In the Supreme Court of Wisconsin**

---

JERÉ FABICK,  
PETITIONER,

*v.*

TONY EVERS, IN HIS OFFICIAL CAPACITY AS  
GOVERNOR OF WISCONSIN,  
RESPONDENT.

---

**NON-PARTY BRIEF OF *AMICUS CURIAE*  
WISCONSIN LEGISLATURE IN SUPPORT OF PETITIONER**

---

RYAN J. WALSH  
*Counsel of Record*  
JOHN D. TRIPOLI  
EIMER STAHL LLP  
10 East Doty Street  
Suite 800  
Madison, WI 53703  
(608) 441-5798  
*rwalsh@eimerstahl.com*  
*jtripoli@eimerstahl.com*

*Counsel for Non-Party  
Wisconsin Legislature*

---

## TABLE OF CONTENTS

INTRODUCTION .....	1
ARGUMENT .....	3
I. The Legislature Knew How to Write a Provision Permitting the Unilateral and Indefinite Renewal of Emergency Declarations, But It Deliberately Declined to Adopt One .....	3
II. Adopting Petitioner's and the Legislature's Plain- Language Reading of the Emergency-Powers Statute Would Avoid Putting Its Constitutionality into Doubt.....	13
III. The Governor's Abuse of the Emergency Statute Cannot Be Remedied by a Joint Resolution of the Legislature .....	16
CONCLUSION .....	17

## TABLE OF AUTHORITIES

### Cases

<i>Gabler v. Crime Victims Rights Bd.</i> , 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384 .....	14
<i>Gundy v. United States</i> , 139 S. Ct. 2116 (2019).....	14
<i>Hirschhorn v. Auto-Owners Ins. Co.</i> , 2012 WI 20, 338 Wis. 2d 761, 809 N.W.2d 529 .....	3
<i>Lake City Corp. v. City of Mequon</i> , 207 Wis. 2d 155, 558 N.W.2d 100 (1997) .....	3
<i>Milwaukee Journal Sentinel v. City of Milwaukee</i> , 2012 WI 65, 341 Wis. 2d 607, 815 N.W.2d 367 .....	3
<i>State ex rel. Kalal v. Circuit Court for Dane Cnty.</i> , 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110 .....	3, 12
<i>State v. Cole</i> , 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 .....	15
<i>State v. Cooper</i> , 2016 WI App 63, 371 Wis. 2d 539, 885 N.W.2d 390.....	4
<i>State v. Hall</i> , 207 Wis. 2d 54, 557 N.W.2d 778 (1997) .....	1, 3, 11
<i>Wisconsin Legislature v. Palm</i> , 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900 .....	1, 2, 13, 14

### Statutes

20 Ill. Comp. Stat. 3305/7 .....	9
30 R.I. Gen. Laws Ann. § 30-15-9(b) .....	8
35 Pa. Stat. and Cons. Stat. Ann. § 7301(c) .....	7
Ala. Code § 31-9-8(a) .....	7
Alaska Stat. Ann. § 26.23.020(c) .....	9
Ariz. Rev. Stat. Ann. § 26-303(F) .....	8
Ark. Code Ann. § 12-75-107.....	7
Cal. Gov't Code § 862.....	8

Colo. Rev. Stat. Ann. § 24-33.5-704(4) .....	7
Conn. Gen. Stat. Ann. § 19a-131a(b)(2)–(3) .....	8
Del. Code Ann. tit. 20, § 3115(c).....	8
Fla Stat. Ann. § 252.36(2).....	8
Ga. Code Ann. § 38-3-51(a).....	8
Haw. Rev. Stat. § 127A-14(d) .....	9
Idaho Code § 46-1008(2) .....	8
Ind. Code § 10-14-3-12(a).....	8
Iowa Code § 29C.6(1) .....	8
Kan. Stat. Ann. § 48-924(b) .....	9
Ky. Rev. Stat. Ann. § 39A.100 .....	8
La. Stat. Ann. § 29:768(A) .....	7
Md. Code Ann. Pub. Safety § 14-3A-02(c)(3) .....	8
Me. Stat. tit. 37-B, § 743(2) .....	8
Mich. Comp. Laws Ann. § 30.403(3) .....	9
Minn. Stat. Ann. 12.31(2) .....	8
Miss. Code Ann. § 33-15-11(b)(18) .....	8
Mo. Rev. Stat. § 44.100(1)(2) .....	8
Mont. Code Ann. § 10-3-302(3).....	9
N.C. Gen. Stat. § 166A-19.20(c) .....	8
N.D. Cent. Code § 37-17.1-05(3).....	8
N.H. Rev. Stat. Ann. § 4:45(II) .....	9
N.J. Stat. Ann. § 26:13-3(b) .....	8
N.M. Stat. Ann. § 12-10A-5(D) .....	8
N.Y. Exec. Law § 28(3).....	8
Neb. Rev. Stat. § 81-829.40(3).....	8
Nev. Rev. Stat. Ann. § 414.070 .....	8
Okla. Stat. tit. 63, § 6405(B) .....	8
Or. Rev. Stat. Ann. 433.441(5) .....	8

S.C. Code Ann. § 25-1-440(a)(2) .....	10
S.D. Codified Laws § 34-48A-5.....	8
Tenn. Code Ann. § 58-2-107(b)(2) .....	8
Tex. Health & Safety Code Ann. § 81.082(d).....	10
Utah Code Ann. § 53-2a-206(3) .....	10
Va. Code Ann. § 44-146.17.....	9
Vt. Stat. Ann. tit. 20 §§ 9, 13.....	8
W. Va. Code Ann. § 15-5-6(b) .....	8
Wash. Rev. Code § 43.06.220(4) .....	10
Wis. Stat. § 227.01(1).....	15
Wis. Stat. § 323.10 .....	<i>passim</i>
Wis. Stat. § 323.11 .....	12
Wis. Stat. § 323.12 .....	15
Wyo. Stat. Ann. § 35-4-115(a)(i).....	8

## **Acts**

2001 Wis. Act 109 § 340L .....	10
2020 Ky. Acts ch. 73, SB 150.....	8

## **Other Authorities**

2A <i>Sutherland Statutory Construction</i> § 46:6 (7th ed.) .....	2, 3, 11
ACLU, <i>Q&amp;A on the Model State Emergency Health Powers Act</i> ...	6
Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> 167 (2012).....	12
Corrine Parver, <i>Lessons from Disaster: HIPAA, Medicaid, and Privacy Issues—the Nation’s Response to Hurricane Katrina</i> , 58 Admin. L. Rev. 651 (2006) .....	7
David Gray Carlson, <i>The Chapter 13 Estate and Its Discontents</i> , 17 Am. Bankr. Inst. L. Rev. 233 (2009) .....	4
Julie Bruce, <i>Bioterrorism Meets Privacy: An Analysis of the Model State Emergency Health Powers Act and the HIPAA Privacy Rule</i> , 12 Annals Health L. 75 (2003).....	5

Lawrence O. Gostin, <i>The Model State Emergency Health Powers Act: Public Health and Civil Liberties in a Time of Terrorism</i> , 13 Health Matrix 3, 4 (2003) .....	4
Model State Emergency Health Powers Act (“MSEHPA”) § 301 (Ctr. for L. and the Pub.’s Health at Georgetown and Johns Hopkins Univs., Proposed Official Draft Oct. 23, 2001) ..	5, 6, 7
Wis. Legislative Fiscal Bureau, <i>2001-03 Budget Adjustment Bill: Comparative Summary of Budget Recommendations, 2001 Wis. Act 109</i> (Sept. 2002) .....	10

## INTRODUCTION

As this Court unambiguously stated mere months ago, even “in the case of a pandemic,” which can last “month after month,” “*the Governor cannot rely on emergency powers indefinitely.*” *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 41 & n.14, 391 Wis. 2d 497, 942 N.W.2d 900 (citing Wis. Stat. § 323.10) (emphasis added). Yet the Governor, bucking under the plain text reading of Section 323.10 confirmed in *Palm*, asks this Court to reverse itself. He argues that Section 323.10 should instead be read to permit him to perpetuate his emergency powers for as long as he sees fit.

But the “[L]egislature knew how” to write Wisconsin’s emergency statutes to empower the Governor to renew declarations of emergency unilaterally and indefinitely, “yet [it] deliberately chose not to do so.” *State v. Hall*, 207 Wis. 2d 54, 89, 557 N.W.2d 778 (1997). The State last revised its public-health-emergency laws after the attacks of September 11, 2001, as the nation readied for outbreaks of disease caused by bioterrorism. Lawmakers across the country, including in Wisconsin, looked to the Model State Emergency Health Powers Act, drafted at the direction of the Centers for Disease Control, for guidance. But the Model Act proved controversial, especially because it proposed to arm governors with the power not only to declare time-limited states of emergency but also to “renew” those declarations *perpetually*—and *unilaterally*, without needing to seek the legislative body’s consent. Preferring a wholly executive-dominated regime, a number of States have codified a version of

this gubernatorial “emergency renewal” power, with some adopting the Model Act’s language verbatim.

Wisconsin, however, has not. Although the Legislature *considered* adding the Model Act’s “renewal” provision, it quite intentionally declined to do so. Likewise, it might have modeled Section 323.10 after Section 323.11, which permits local governments to wield emergency powers for the full period “during which the emergency conditions exist or are likely to exist.” Instead, the Legislature stuck with its unambiguous text limiting the Governor to *only one* time-limited, unilateral declaration of emergency per emergency, reserving to the popular branch the sole authority to extend an emergency declaration as appropriate. It follows that, because the Legislature “model[ed]” its “act on another statute but d[id] not include [the] specific [renewal] provision in the original,” the enacted statute should not be read as if it contained the rejected provision. 2A *Sutherland Statutory Construction* § 46:6 n.10 (7th ed.).

Finally, even if the Court regards Section 323.10 as ambiguous (despite its statement in *Palm*), it should nevertheless adopt Petitioner’s reading. Adopting the Governor’s reading would render the law an unconstitutional delegation of legislative power to the executive, because it would leave the law without any procedural or substantive safeguards whatsoever. That outcome can and should be avoided.

For this reason and others given by Petitioner, this Court should enjoin the Governor’s two most recent emergency declarations and vindicate Wisconsin’s separation of powers.



## ARGUMENT

### **I. The Legislature Knew How to Write a Provision Permitting the Unilateral and Indefinite Renewal of Emergency Declarations, But It Deliberately Declined to Adopt One**

To ascertain a statute's meaning, "interpretive resources outside the statutory text" need not be consulted "unless the language of the statute is ambiguous." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 50, 271 Wis. 2d 633, 681 N.W.2d 110. Yet interpretive tools can help "confirm [and] verify" a provision's "plain-meaning interpretation." *Id.* at 666–67.

It is a fundamental canon of construction that "[i]f a legislature models an act on another statute but does not include a specific provision in the original, courts presume the legislature intended to omit that provision." 2A *Sutherland on Statutory Construction* § 46:6 n.10 (7th ed.) (collecting cases); see *Hirschhorn v. Auto-Owners Ins. Co.*, 2012 WI 20, ¶ 34, 338 Wis. 2d 761, 778, 809 N.W.2d 529 (using canons of construction to confirm, not displace, the plain meaning of an unambiguous term).

This Court is particularly "fond of" this principle. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 36, 341 Wis. 2d 607, 815 N.W.2d 367. It has explained that, under this canon, evidence that the "legislature knew how" to include a particular statutory provision, "yet deliberately chose not to do so," is evidence that the statute was not intended to include that provision. *Hall*, 207 Wis. 2d at 89; see also, e.g., *Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 171–72, 558 N.W.2d 100 (1997)

(same); *State v. Cooper*, 2016 WI App 63, ¶ 10, 371 Wis. 2d 539, 885 N.W.2d 390 (same). One scholar has dubbed this the “knew how to’ canon of interpretation.” David Gray Carlson, *The Chapter Estate and Its Discontents*, 17 Am. Bankr. Inst. L. Rev. 233, 283 (2009).

Applied here, this interpretive canon shows that Wisconsin’s emergency-powers statute cannot possibly be read to justify a Governor’s power to renew, unilaterally and indefinitely, a declared state of emergency caused by a single pandemic, regardless of how long the pandemic lasts or how its severity changes over time. This follows from the history of the emergency-powers statute, which confirms that the choice not to give the Governor the power to renew declarations of emergency was quite deliberate.

A. In the wake of the September 11 terrorist attacks and subsequent anthrax scare, the Centers for Disease Control and Prevention (CDC) asked experts at two major universities to draft a Model State Emergency Health Powers Act, “in collaboration with members of national organizations representing governors, legislators, attorneys general, and health commissioners.” Lawrence O. Gostin, *The Model State Emergency Health Powers Act: Public Health and Civil Liberties in a Time of Terrorism*, 13 Health Matrix 3, 4 (2003). The goal was to craft, for each State’s consideration, a decision-making structure that would “provide[ ] responsible state actors with the powers they need to detect and contain a potentially catastrophic disease outbreak and, at the same time, protect[ ] individual rights and freedoms.” *Id.* at 5. Yet

the Model Act was “not necessarily intended to be adopted in its draft form by every state legislature.” Julie Bruce, *Bioterrorism Meets Privacy: An Analysis of the Model State Emergency Health Powers Act and the HIPAA Privacy Rule*, 12 *Annals Health L.* 75, 78 (2003). The CDC understood, after all, that each State would adopt only those provisions that it thought “most beneficial to its citizens, in order to create a final result that is uniquely tailored to each individual state.” *Id.* (citing CDC commentary).

The Model Act concentrates “enormous power” in governors. Bruce, *supra*, 77. It states that “[a] state of public health emergency shall be declared by the Governor” if he concludes that, as relevant here, a pandemic poses a substantial risk of significant harm. Model State Emergency Health Powers Act (“MSEHPA”) § 301 (Ctr. for L. and the Pub.’s Health at Georgetown and Johns Hopkins Univs., Proposed Official Draft Oct. 23, 2001).<sup>1</sup> Having declared an emergency, the Governor may then “[s]uspend” statutes and administrative rules and orders, commandeer “all available resources of the State government and its political subdivisions,” and redefine the “functions” of the State’s various “departments and agencies.” MSEHPA, § 303(a). In effect, the Governor in an “emergency” assumes the powers of a public-health potentate, exercising not only the traditional executive functions but the full suite of legislative authorities as well.

---

<sup>1</sup> Available at [https://docs.legis.wisconsin.gov/2001/related/drafting\\_files/assembly\\_intro\\_legislation/assembly\\_bills\\_not\\_enacted/2001\\_ab\\_0849/01\\_ab\\_849/01\\_4715df\\_pt01of04.pdf](https://docs.legis.wisconsin.gov/2001/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2001_ab_0849/01_ab_849/01_4715df_pt01of04.pdf).

The Model Act goes still further, vesting in the executive the power not only to declare an initial 30-day state of emergency but, critically, also to “renew” that order—and to “renew” any “renewal.” MSEHPA, § 305(b). In other words, the State is to remain in a state of emergency for as long as the Governor wishes, whether it be 30 days, 60 days, 6 months, or 3 years. There is no expiration date. And while the Legislature “may terminate” the emergency at any point either by a two-thirds vote of both chambers or by some lesser margin (the Model Act offers both alternatives), that is the only means under the Act of “overrid[ing] any renewal by the Governor.” *Id.* § 305(c).

Not long after the States began to consider the Model Act, it became “a lightning rod for criticism from both ends of the political spectrum,” “galvaniz[ing] public debate around the appropriate balance between personal rights and common goods.” Gostin, *supra*, 5. According to the American Civil Liberties Union, for example, the Model Act “doesn’t adequately protect citizens against the misuse of the tremendous powers that it would grant in an emergency” and “is replete with civil liberties problems.” ACLU, *Q&A on the Model State Emergency Health Powers Act*.<sup>2</sup> Particularly controversial was the Act’s consolidation of authority in governors. Bruce, *supra*, 77.

---

<sup>2</sup> Available at <https://www.aclu.org/other/model-state-emergency-health-powers-act?redirect=credirect/14857>.

While a large majority of States have enacted “some version” of the Act,<sup>3</sup> they have split over whether to empower a governor to declare unilaterally, through “renewals,” a state of emergency of conceivably unlimited duration. This part of the Model Act was itself based on Colorado and Louisiana statutes, which remain on the books. Colo. Rev. Stat. Ann. § 24-33.5-704(4) (formerly Colo. Rev. Stat. Ann. § 24-32-2104); La. Stat. Ann. § 29:768(A). In particular, the Model Act proposed: “[A] state of public health emergency shall be terminated automatically thirty days after its declaration *unless renewed* by the Governor,” and “[a]ny such renewal shall also be terminated automatically after thirty days *unless renewed* by the Governor.” MSEHPA, § 305(b) (emphases added).<sup>4</sup> At least thirty-five other States have taken a similar approach, adopting language similar (and in many cases identical) to the Model Act’s “unless renewed” language permitting a Governor to extend an emergency indefinitely. *See* 35 Pa. Stat. and Cons. Stat. Ann. § 7301(c) (governor may declare a “disaster emergency,” and “no state of disaster emergency may continue for longer than 90 days *unless renewed by the Governor*”) (emphasis added); Ala. Code § 31-9-8(a) (same except first declaration lasts only 60 days unless renewed); Ark. Code Ann. § 12-75-107 (same);

---

<sup>3</sup> Corrine Parver, *Lessons from Disaster: HIPAA, Medicaid, and Privacy Issues—the Nation’s Response to Hurricane Katrina*, 58 Admin. L. Rev. 651, 656 (2006) (noting that “44 states have introduced some version of MSEHPA, with 37 states adopting legislation as of February 1, 2006”).

<sup>4</sup> *See* footnote 1, *supra*; *see also* MSEHPA, § 405(b) (Proposed Official Draft Dec. 21, 2001) (proposing same), available at <https://www.aclu.org/other/text-msehpa>.

Fla Stat. Ann. § 252.36(2) (same); Tenn. Code Ann. § 58-2-107(b)(2) (same); Del. Code Ann. tit. 20, § 3115(c) (same except first declaration lasts only 30 days unless renewed); Ga. Code Ann. § 38-3-51(a) (same); Ind. Code § 10-14-3-12(a) (same); Me. Stat. tit. 37-B, § 743(2) (same); Okla. Stat. tit. 63, § 6405(B) (same); 30 R.I. Gen. Laws Ann. § 30-15-9(b) (same); Idaho Code § 46-1008(2) (similar); Iowa Code § 29C.6(1) (similar); Md. Code Ann. Pub. Safety § 14-3A-02(c)(3) (similar); Minn. Stat. Ann. 12.31(2) (similar); Miss. Code Ann. § 33-15-11(b)(18) (similar); N.J. Stat. Ann. § 26:13-3(b) (similar); N.M. Stat. Ann. § 12-10A-5(D) (similar); N.Y. Exec. Law § 28(3) (similar except first declaration lasts six months); S.D. Codified Laws § 34-48A-5 (similar); Or. Rev. Stat. Ann. 433.441(5) (similar except first declaration lasts 14 days). *See also* Ariz. Rev. Stat. Ann. § 26-303(F) (providing that state of emergency shall last until terminated by governor or legislature); Cal. Gov't Code § 8629 (similar); Conn. Gen. Stat. Ann. § 19a-131a(b)(2)–(3) (similar); Mo. Rev. Stat. § 44.100(1)(2) (similar); Neb. Rev. Stat. § 81-829.40(3) (similar); Nev. Rev. Stat. Ann. § 414.070 (similar); N.C. Gen. Stat. § 166A-19.20(c) (similar); N.D. Cent. Code § 37-17.1-05(3) (similar); Vt. Stat. Ann. tit. 20 §§ 9, 13 (similar); W. Va. Code Ann. § 15-5-6(b) (similar); Wyo. Stat. Ann. § 35-4-115(a)(i) (similar); Ky. Rev. Stat. Ann. § 39A.100 (providing no time limit on declared state of emergency)<sup>5</sup>; N.H.

---

<sup>5</sup> *But see* 2020 Ky. Acts ch. 73, SB 150 (signed by Governor Mar. 30, 2020) (“Notwithstanding any state law to the contrary, the Governor shall declare, in writing, the date upon which the state of emergency in response to COVID-19, declared on March 6, 2020, by Executive Order 2020-215, has ceased. In

Rev. Stat. Ann. § 4:45(II) (providing that “governor may, by executive order, renew a declaration of a state of emergency as many times as the governor finds is necessary to protect the safety and welfare of the inhabitants of this state,” including after concurrent resolution of legislature terminating emergency if governor declares “a new emergency for different circumstances”); Va. Code Ann. § 44-146.17 (providing that no emergency rule, regulation, or order “shall have any effect beyond June 30 next following the next adjournment of the regular session of the General Assembly but the same or a similar rule, regulation, or order may thereafter be issued again if not contrary to law”).

Meanwhile, Wisconsin (and at least ten other States<sup>6</sup>) have taken a different tact, likely agreeing with critics of the Model Act

---

the event no such declaration is made by the Governor on or before the first day of the next regular session of the General Assembly, the General Assembly may make the determination.”).

<sup>6</sup> See, e.g. Alaska Stat. Ann. § 26.23.020(c) (“A proclamation of disaster emergency may not remain in effect longer than 30 days unless extended by the legislature by a concurrent resolution.”); Haw. Rev. Stat. § 127A-14(d) (“A state of emergency . . . shall terminate automatically sixty days after the issuance of a proclamation of a state of emergency . . . or by a separate proclamation of the governor . . . whichever occurs first.”); 20 Ill. Comp. Stat. 3305/7 (providing that governor may exercise emergency powers “for a period not to exceed 30 days” following proclamation of an emergency); Kan. Stat. Ann. § 48-924(b) (limiting state of disaster emergency to 15 days unless extended by legislature or legislative members of state finance council); Mich. Comp. Laws Ann. § 30.403(3) (“After 28 days, the governor shall issue an executive order or proclamation declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature.”); Mont. Code Ann. § 10-3-302(3) (“A state of emergency may not continue for longer than 30 days unless continuing conditions of the state of emergency exist, which must be determined by a declaration of an emergency



that it delegates too much unchecked authority to the executive. In the case of Wisconsin, the drafting history of its most recent substantive update of the emergency statutes puts this beyond doubt. Current Section 323.10's key provision confirming the Governor's authority to "declare a state of emergency related to public health" originated in 2001 Wisconsin Act 109, a budget adjustment law meant to update the Governor's statutory emergency powers in the wake of the terrorist attacks of September 11, 2001, and the publication of the Model Act. 2001 Wis. Act 109 § 340L. The language in Act 109, in turn, drew from 2001 Assembly Bill 850,<sup>7</sup> which explicitly attempted to adopt some

---

by the president of the United States or by a declaration of the legislature by joint resolution of continuing conditions of the state of emergency."); S.C. Code Ann. § 25-1-440(a)(2) ("A declared state of emergency shall not continue for a period of more than fifteen days without the consent of the General Assembly."); Tex. Health & Safety Code Ann. § 81.082(d) ("A declaration of a public health disaster may continue for not more than 30 days. A public health disaster may be renewed one time by the commissioner for an additional 30 days."); Utah Code Ann. § 53-2a-206(3) ("A state of emergency may not continue for longer than 30 days unless extended by joint resolution of the Legislature, which may also terminate a state of emergency by joint resolution at any time."); Wash. Rev. Code § 43.06.220(4) (limiting certain emergency powers of governor to 30 days "unless extended by the legislature through concurrent resolution").

<sup>7</sup> See Wis. Legislative Fiscal Bureau, *2001-03 Budget Adjustment Bill: Comparative Summary of Budget Recommendations*, 2001 Wis. Act 109 at 246 (Sept. 2002), [https://docs.legis.wisconsin.gov/misc/lfb/budget/2001\\_03\\_budget\\_adjustment/comparative\\_summary\\_of\\_budget\\_recommendations\\_act\\_109\\_september\\_2002](https://docs.legis.wisconsin.gov/misc/lfb/budget/2001_03_budget_adjustment/comparative_summary_of_budget_recommendations_act_109_september_2002).



version of the Model Act for Wisconsin. Indeed, a marked-up copy of the Model Act is the main document in the bill's drafting file.<sup>8</sup>

**B.** Because this history makes clear that the Legislature “model[ed]” its “act on another statute but d[id] not include a specific provision in the original,” this Court should not read Wisconsin’s emergency statute as if it contained that provision. 2A *Sutherland Statutory Construction* § 46:6 n.10 (7th ed.). Put differently, the “legislature knew how” to write an “unless renewed” provision that would have given the executive *carte blanche* to perpetuate a declared state of emergency, yet it “deliberately chose not to do so.” *Hall*, 207 Wis. 2d at 89. Like other States, Wisconsin opted instead for a shorter grant of (still sweeping) emergency powers to the executive, while giving to the Legislature *alone* the power to extend any declared emergency: “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,” but “[a] state of emergency shall not exceed 60 days, *unless the state of emergency is extended by joint resolution of the legislature.*” Wis. Stat. § 323.10 (emphasis added). The power to terminate the emergency *before* the 60 days have run, in stark contrast, lies with both the executive and legislative branches: “The executive order may be revoked at the discretion of either the governor by executive order or the legislature by joint resolution.” *Id.*

---

<sup>8</sup> See Drafting File for 2001 Assembly Bill 850, Wis. Legis. Reference Bureau, [https://docs.legis.wisconsin.gov/2001/related/drafting\\_files/assembly\\_intro\\_legislation/assembly\\_bills\\_not\\_enacted/2001\\_ab\\_0850](https://docs.legis.wisconsin.gov/2001/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2001_ab_0850).

Reading Section 323.10 in light of Section 323.11 puts this conclusion beyond doubt. *Kalal*, 271 Wis. 2d at 665; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (the “whole-text canon”). Specifically, it confirms that, when the Legislature wants an unfixed period of emergency in Chapter 323, it says so. Section 323.11—the statute immediately following Section 323.10—permits local governments to declare an emergency “whenever conditions arise by reason of . . . a disaster, or an imminent threat of a disaster, that impairs . . . health . . . or other critical systems of the local unit of government.” Wis. Stat. § 323.11. But Section 323.11’s emergency time period, unlike that of Section 323.10, spans the entire “time during which the emergency conditions exist or are likely to exist.” *Id.* The contrast could not be more stark: Section 323.10 caps an emergency period at 60 days, regardless of how long the emergency in fact lasts, while Section 323.11 effectively adopts the Governor’s position here. So reading Section 323.10 as if it mirrors Section 323.11 would do violence to both. For this reason, too, the Governor need not qualify an emergency as a “renewal” for it to be so. Nor does it matter whether emergency orders are spaced apart in time. Regardless of evolving circumstances or temporal contiguity, Section 323.10 does not permit the Governor to unilaterally renew the same underlying emergency (as under the Model Act) or unilaterally dictate the duration of an emergency (as under Section 323.11).

The argument that the Governor somehow needs a limitless version of Section 323.10 to effectively manage an extraordinary

public-health crisis is wrong. First, this contention overlooks an independent source of executive-branch emergency powers: the emergency rulemaking statutes, the main avenue by which the executive branch “respon[ds] to extraordinary circumstances.” *Palm*, 391 Wis. 2d at 519. “[I]n the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.” *Id.* at 525. And “60 days is more than enough time to follow rulemaking procedures pursuant to Wis. Stat. § 227.24.” *Id.* at 525 n.14. Unlike an emergency declaration, an emergency rule remains in effect for 150 days (or longer, if a joint committee of the Legislature extends it). *Id.* at 519. And generally, the executive branch need not even issue emergency rules until the Governor’s sweeping Section 323.10 powers expire. So—far from leaving the Governor powerless to confront emergencies that last longer than 60 days—state law gives the executive branch ample authority to help craft the State’s response to a long-term viral outbreak, even without a joint resolution of the Legislature extending his 60-day powers.

## **II. Adopting Petitioner’s and the Legislature’s Plain-Language Reading of the Emergency-Powers Statute Would Avoid Putting Its Constitutionality into Doubt**

This Court “disfavor[s] statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration,” including constructions that would amount to an impermissible “delegation of legislative power” to the executive branch. *Palm*, 391 Wis. 2d at 521. To “avert[] the accumulation of power by one body—a grave threat to liberty—the

people devised a diffusion of governmental powers” among three government branches, and “preserving clear boundaries between the branches has been understood since the founding of our nation.” *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 60, 376 Wis. 2d 147, 897 N.W.2d 384. Hence the legislative power—“the power to adopt generally applicable rules of conduct governing future actions by private persons”<sup>9</sup>—must remain exclusively in the Senate and Assembly. It cannot be loaned to the Governor, even in an emergency. *See State ex rel. Martin v. Giessel*, 252 Wis. 363, 372, 31 N.W.2d 626 (1948). This means, in practice, that if the Legislature attempts to confer power that lacks “adequate standards for conducting the allocated power” or procedural and judicial “safeguards to prevent [] arbitrary, unreasonable or oppressive conduct” by the executive, then the power purportedly delegated is in substance “legislative,” and its transfer is invalid under the non-delegation doctrine. *Palm*, 391 Wis. 2d at 522.

The emergency-powers statute, as read by the Governor, fails this test. For one thing, it plainly lacks “adequate standards for conducting the allocated power.” The only “standard” under the Governor’s reading of Section 323.10—that he has “determined that a public health emergency exists”—is not remotely “adequate.” After all, what a “public health emergency” is or whether one “exists” are matters left solely up to him. Nor does one find “adequate” boundaries in Section 323.10, which directs the Governor during a declared emergency to, among other things,

---

<sup>9</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

issue whatever “orders” that “he or she deems necessary for the security of persons and property,” Wis. Stat. § 323.12—in other words, to exercise the State’s police powers, *see State v. Cole*, 2003 WI 112, ¶ 22, 264 Wis. 2d 520, 665 N.W.2d 328 (police powers defined as those for “the protection of the public health, safety, or welfare”). Again, the standard for determining whether the power is triggered is not even “necess[ity],” an open-ended yet not entirely content-less concept, but rather what “*he or she deems*” to be a “necess[ity].” Wis. Stat. § 323.12. Judges and lawmakers play no role. And while all of this would pass muster with the 60-day expiration date and Legislature’s joint resolution authority intact, the Governor asks this Court to red-pencil those provisos.

Just as it lacks substantive limits, the emergency-powers statute, as read by the Governor, foregoes any procedural or judicial safeguards. It is exempt not only from the Administrative Procedure Act,<sup>10</sup> but from legislative review entirely, since any joint resolution nullifying a state of emergency could be rendered obsolete in seconds by a “renewed” declaration. And that pattern (joint resolution followed quickly by new emergency declaration) would of course perpetuate the Governor’s emergency powers indefinitely. It would be difficult to imagine more limitless authority.

---

<sup>10</sup> *See* Wis. Stat. § 227.01(1) (excluding the governor from the definition of an administrative agency).

### **III. The Governor's Abuse of the Emergency Statute Cannot Be Remedied by a Joint Resolution of the Legislature**

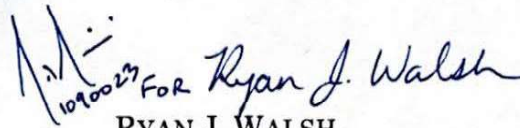
Only a court can stop a governor bent on reading into Section 323.10 the Model Act's "unless renewed" provision. A joint resolution would be futile. Even if the Legislature were to convene days after the issuance of a renewed emergency declaration and vote it down, nothing would stop the Governor from simply issuing *yet another* declaration, 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. After all, the statute allows the Legislature to revoke only "*the* executive order," not some order that does not yet exist. *Id.* (emphasis added). The Legislature could try preemptively to vote down any future renewed declaration of a coronavirus-related emergency, but the Governor would probably reply that any forward-looking "revo[cation]" would have no effect. He would also likely argue that, even if a prospective revocation could work in principle, it could not nullify a declaration for a different "emergency," even if it is only an "emergency" within the broader pandemic "emergency," such as an "increase in COVID-19 cases" (Executive Order 82) or "disease activity" (Executive Order 90). So even if the Legislature gathered in Madison tomorrow to revoke the Governor's third illegal renewal of his initial 60-day state of emergency, the question presented here would remain just as relevant and urgent.

## **CONCLUSION**

Executive Orders 82 and 90 violate Wisconsin law because they exceed the scope of authority permitted under Section 323.10. The Legislature respectfully requests that this Court rule in Petitioner's favor and declare the Orders void and unenforceable.

Dated: November 4, 2020

Respectfully submitted,

 1090023 FOR Ryan J. Walsh

RYAN J. WALSH

State Bar No. 1091821

*Counsel of Record*

JOHN D. TRIPOLI

State Bar No. 1090023

EIMER STAHL LLP

10 East Doty Street

Suite 800

Madison, WI 53703

(608) 441-5798

(608) 441-5707 (fax)

rwalsh@eimerstahl.com

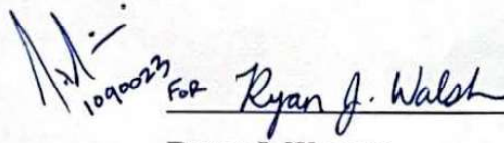
jtripoli@eimerstahl.com



### FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font, and with this Court's Order dated October 28, 2020. The length of this brief is 17 pages and contains 4,234 words, calculated using Microsoft Word.

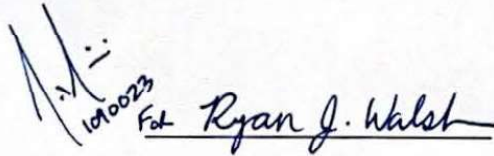
Dated: November 4, 2020.

  
10990023 For Ryan J. Walsh  
RYAN J. WALSH

**CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(f)**

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated: November 4, 2020.

  
For Ryan J. Walsh  
RYAN J. WALSH

### CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2020, I caused three copies of the foregoing brief to be served upon counsel of record via U.S. Mail, first-class postage, addressed as follows:

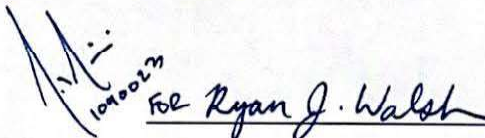
Matthew M. Fernholz  
P.O. Box 558  
Waukesha, WI 53187-0558

*Counsel for Petitioner*

Thomas C. Bellavia  
Hannah Schieber Jurss  
Colin Hector  
P.O. Box 7857  
Madison, WI 53707-7857

*Counsel for Respondents*

Dated: November 4, 2020.

  
RYAN J. WALSH