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No. 2020AP1742

In the Wisconsin Court of Appeals

DISTRICT III

TAVERN LEAGUE OF WISCONSIN, INC., SAWYER COUNTY TAVERN LEAGUE, INC., AND FLAMBEAU FOREST INN, LLC,
PLAINTIFFS,
V.
ANDREA PALM, JULIA LYONS AND WISCONSIN DEPARTMENT OF HEALTH SERVICES,
DEFENDANTS-RESPONDENTS,
AND
THE MIX UP, INC. (D/B/A MIKI JO'S MIX UP), LIZ SIEBEN, PRO-LIFE WISCONSIN EDUCATION TASK FORCE, INC., PRO-LIFE WISCONSIN, INC., *AND* DAN MILLER,
INTERVENORS-PLAINTIFFS-APPELLANTS.

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

OPENING BRIEF OF INTERVENORS-PLAINTIFFS-APPELLANTS

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ISSUES PRESENTED

1. Whether, under *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, Secretary-designee Palm can issue a "rule," Wis. Stat. § 227.01(13), that provides a statewide selective regime of capacity limits, while "failing to follow emergency rule procedures required under Wis. Stat. § 227.24," *Palm*, 2020 WI 42, ¶2.

The circuit court concluded that Intervenor-Plaintiffs did not have a strong likelihood of success on this issue.

2. Whether the circuit court erroneously exercised its discretion in denying Intervenor-Plaintiffs' motion for a temporary injunction, thereby permitting Secretary-designee Palm to violate the Supreme Court's decision in *Palm* and to impose irreparable harm upon Intervenor-Plaintiffs.

By denying the motion for a temporary injunction, the circuit court held, by implication, that it did not abuse its own discretion.

INTRODUCTION

The Order at issue here is a grave affront to the separation of powers and the rule of law. Just five months ago, the Supreme Court in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, held that if Secretary-designee Palm wanted to address COVID-19 by creating a statewide regime of selective business closures and capacity limits in Emergency Order #28, she had to comply with Chapter 227's rulemaking procedures. *Id.* ¶¶ 27–29, 42. Yet, three weeks ago, the Secretary-designee *again* imposed statewide selective capacity limits to address COVID-19, now in Emergency Order #3, without following Chapter 227. The Secretary-designee's core justification is that she acted in the Spring under Section 252.02(3), (4), *and* (6), whereas now she was acting only under Section 252.02(3). Under this remarkable reasoning, the Secretary-designee could have reissued *all* of Emergency Order #28's selective capacity limits the day after *Palm*, by simply copying and pasting those limits into a new order that cited only Section 252.02(3).

The Secretary-designee is plainly wrong on the law. Emergency Order #3, just like Emergency Order #28, violates *Palm*'s prohibition against the Secretary-designee making "controlling, subjective judgment[s]" about the rules that will govern the lives of Wisconsinites, without following Chapter 227's democratically accountable processes. *Palm*, 2020 WI 42, ¶ 28. Emergency Order #3 decides that some activities—running family-owned restaurants and hosting

fundraisers for charity—are not worthy of respect, whereas, other activities—operating institutions of higher education, including their crowded dorms—can continue unrestrained, presumably because the Secretary-designee considers the second category of gatherings to be more socially valuable (wholly apart from any comparative impact on COVID-19 spread). Under *Palm*'s reasoning, that Emergency Order #3 makes these subjective, statewide policy judgments is part of what renders Chapter 227's procedures directly applicable. That is why *Palm* held that "no act or order of DHS pursuant to Wis. Stat. § 252.02 is exempted from the definition of 'Rule,'" *Palm*, 2020 WI 42, ¶ 30, without regard to what statutory provision the Secretary-designee cites in the relevant order.

Finally, the equitable injunctive factors all support issuance of a temporary injunction, meaning that the circuit court erroneous exercised its discretion for this reason as well. Intervenor-Plaintiffs face irreparable harms from Emergency Order #3, which Order shifted the status quo and sidelined their business and public-interest missions. And the public interest is in Intervenor-Plaintiffs' favor, as the Secretary-designee's actions here are a frontal attack on the separation of powers and the rule of law. While, of course, limiting the spread of COVID-19 is an important governmental interest, *Palm* and other recent decisions of the Wisconsin Supreme Court powerfully vindicate the fundamental principle that

upholding the rule of law is of special, *paramount* concern, *especially* in these challenging times.

ORAL ARGUMENT AND PUBLICATION

Although the outcome of this case is directly controlled by *Palm*, publication is appropriate given the Secretary-designee's apparent misunderstanding of *Palm*'s holding. Given the press of time, it appears that oral argument will not be feasible before this Court renders its decision.

STATEMENT OF THE CASE[1]

A. Legal Background

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

To promulgate an emergency rule, Section 227.24 provides that an agency must prepare a finding of emergency, submit a scope statement to the Department of Administration and to the agency for approval, have that

[1] Intervenor-Plaintiffs have adapted this Statement Of The Case from their prior submission to this Court, filed last week.

statement published in the Administrative Register, and follow other various requirements. *See* Wis. Stat. §§ 227.24(1)(e), 227.135(1)–(2). Then, the agency must submit the rule to the Legislature's Joint Committee for Review of Administrative Rules, which "may suspend any rule by a majority vote of a quorum of the committee," Wis. Stat. § 227.26(2)(d), on the grounds of "absence of statutory authority," "failure to comply with legislative intent," "[a]rbitrariness and capriciousness, or imposition of an undue hardship," Wis. Stat. § 227.19(4)(d)(1), (3), (6).

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

Most relevant here, Emergency Order #28 selectively closed some businesses throughout the State, while also imposing selective capacity limits on other businesses that were allowed to reopen. *See generally* Emergency Order #28 ("EO#28") at 3–5, 14–15.[2] Emergency Order #28 closed "non-essential" businesses, while allowing "essential businesses" to remain open. EO#28 at 3–4 (capitalization altered). For those "essential" businesses and other exempt organizations, like religious institutions, that could open, Emergency Order #28 imposed certain statewide capacity limitations—such as

[2] Available at https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf (all websites last visited October 27, 2020).

25% of the maximum occupancy for certain businesses or, for religious institutions, 10 people. EO#28 at 5, 14–15.

Palm explained the test for when an order qualifies as a "rule" under Chapter 227 in Section C.1 of its opinion: the order is "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency." *Palm*, 2020 WI 42, ¶ 22 (citation omitted). Or, in other words, an order is a "rule" for purposes of Chapter 227 when it applies to a "class [ ] described in general terms and new members can be added to the class." *Id.* ¶ 21 (citation omitted). Such orders of general applicability reflect the "subjective," policy-based "judgment" of an agency, and Chapter 227 subjects such judgments to rulemaking to ensure that "one unelected official" does not unilaterally "impose[ ]" her preferred policies across the State. *Id.* ¶¶ 27–28; *accord id.* ¶ 28 (rulemaking allows for "mature consideration of rules of general application" (citations omitted)); *id.* ¶ 35 ("hinder[s] arbitrary or oppressive conduct").

Palm then concluded that Emergency Order #28 was a "rule," subject to Chapter 227's required rulemaking procedures. *See id.* ¶¶ 15–42. As described above, that Order selectively closed businesses that it defined as "non-essential" and exempted businesses it defined as "essential" and other organizations from its terms, while imposing certain capacity limitations on those exempt entities. Chapter 227's

rulemaking requirement, *Palm* explained, "exists precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official, Palm, is not imposed in Wisconsin." *Id.* ¶ 28. That is, rulemaking is needed to "hinder" this "arbitrary or oppressive conduct by an agency." *Id.* ¶ 35.

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

3. This case involves Emergency Order #3, issued on October 6, 2020, effective from October 8, 2020 to November 6, 2020, and enforceable by civil forfeiture under Section 252.25 of the Wisconsin Statutes. App'x 1–7.[3]

Emergency Order #3 purports to regulate all persons operating businesses and attending public gatherings in Wisconsin, from October 8, 2020, at 8:00 a.m., to November 6, 2020. App'x 7. It provides that "[p]ublic gatherings are limited to no more than 25% of the total occupancy limits for the room or building, as established by the local municipality," but "[f]or indoor spaces without an occupancy limit . . . established by the local municipality . . . public gatherings are limited to no more than 10 people." App'x 3–

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

4. It defines "[p]ublic gathering" broadly as "an indoor event, convening, or collection of individuals, whether planned or spontaneous, that is open to the public and brings together people who are not part of the same household in a single room." App'x 3. This includes "[r]ooms within a business location," which would include indoor restaurants. App'x 3.

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

b. On October 7, 2020, Senate Majority Leader Scott Fitzgerald and Assembly Speaker Robin J. Vos delivered a

letter to Secretary-designee Palm, explaining that, under *Palm*, Emergency Order #3 was a rule. Letter from Senate Majority Leader Fitzgerald and Assembly Speaker Vos to Secretary-designee Palm at 1 (Oct. 7, 2020).[4] Yet, these legislative leaders explained that the Department of Health Services (hereinafter "the Department" or "DHS") "did not comply with those procedures before issuing this document," *id.*, nor was the rule submitted to the Joint Committee for Review of Administrative Rules under Wis. Stat. § 227.26, *id.* at 2. Accordingly, the letter concluded that Emergency Order #3 was invalid under *Palm*. *Id.* at 1. This letter also explained that the nonpartisan Legislative Reference Bureau had reached the same conclusion. *Id.*; *see* Legislative Reference Bureau, *Analysis of Emergency Order #3 and* Wisconsin Legislature v. Palm (Oct. 7, 2020).[5]

The Joint Committee for Review of Administrative Rules then held an Executive Session. *See* Notice of Executive Session for Oct. 12, 2020, JCRAR;[6] *see Joint Committee for Review of Administrative Rules Hearing*, WisconsinEye (Oct. 12, 2020, 1:00 PM) (recording of Executive Session).[7] The Committee concluded that Emergency Order

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

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

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

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

#3 is a rule and directed Secretary-designee Palm under Wis. Stat. § 227.26(2)(b) to promulgate Emergency Order #3 according to the required procedures within 30 days. *Joint Committee for Review of Administrative Rules Hearing*, WisconsinEye, *supra* at 48:25–49:10.

B. Factual And Procedural Background

1.a. Intervenor-Plaintiffs are The Mix Up, Inc. (hereinafter "The Mix Up"); Liz Sieben; Pro-Life Wisconsin Education Task Force, Inc. and Pro-Life Wisconsin, Inc. (hereinafter, collectively, "Pro-Life Wisconsin"); and Daniel J. Miller. On Friday, October 16, 2020, they moved to intervene in the circuit court as plaintiffs, R.42; App.R. 44,[8] submitting a one-count complaint asserting the same challenge to Emergency Order #3 that plaintiffs raised, R.43 at 22–23; App.R.45. Intervenor-Plaintiffs also filed a proposed motion for a temporary injunction, R.50; App.R.51, adopting and supplementing the arguments in support of the plaintiffs' motion, R.51; App.R.52.

"The Mix Up" is a family restaurant and neighborhood bar in Amery, Wisconsin. App'x 16. Sieben is the sole owner and operator of The Mix Up, and she acquired the restaurant in February 2020. App'x 16. Both The Mix Up and Sieben are Wisconsin taxpayers. App'x 21. On a normal, reasonably

[8] Citations of "R." refer to filed documents in the Sawyer County Circuit Court, No. 2020CV128, as numbered on that court's docket. Citations of "App.R." refer to those same filed documents as numbered in the indexed record on appeal.

busy day, The Mix Up will serve about 40 to 50 customers inside at once. App'x 17. The Mix Up closed in March 2020 due to Governor Evers' and Secretary-designee Palm's COVID-19 orders, and then reopened the same day that the Wisconsin Supreme Court issued *Palm*. App'x 16–17.

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

Emergency Order #3 already harmed The Mix Up for the few days it was in place, before the circuit court issued the temporary restraining order blocking Emergency Order #3, and The Mix Up would have continued to suffer harm absent this Court's recent injunction pending appeal. *See infra* pp. 17–18. Under the Order, The Mix Up is limited to a

maximum indoor capacity of no more than 25% of its total occupancy limit. App'x 3–4. This capacity limit includes any employees and staff in the restaurant. App'x 3–4; App'x 19. As Sieben stated in her unrebutted, sworn affidavit, after Secretary-designee Palm released Emergency Order #3, effective on October 8, The Mix Up saw a *50% reduction in sales*, despite the good weather and open outdoor seating over the weekend of October 10–11, 2020. App'x 20. That reduction is attributable to Emergency Order #3 itself: The Mix Up's customer base must, in general, plan to drive to The Mix Up, since the restaurant's location does not lend itself to customers stopping in spontaneously. App'x 20. Because Emergency Order #3 severely restricts The Mix Up's maximum capacity, many customers have decided not to patronize the restaurant, given the inconvenience of specifically planning to drive to the restaurant, only to be turned away at the door if Emergency Order #3's extremely low occupancy limit has already been reached. App'x 20.

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

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

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

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

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

2. On October 13, 2020, the original plaintiffs—the Tavern League of Wisconsin, Inc., Sawyer County Tavern League, Inc., and Flambeau Forest Inn, LLC—filed a complaint challenging the validity of Emergency Order #3. R.4 at 1, 3–4, 8; App.R.2. Plaintiffs named Secretary-designee Palm, the Wisconsin Department of Health Services, and Sawyer County Health Officer Julia Lyons as Defendants. R.4 at 1, 3–4; App.R.2. As this complaint explained, Emergency Order #3 is invalid because the Secretary-

designee did not follow the required emergency-rule-promulgation requirements in Chapter 227 before the Order's promulgation, in violation of *Palm*. R.4 at 4–9; App.R.2.

Plaintiffs then immediately moved for an *ex parte* temporary restraining order and a temporary injunction, R.6; App.R.4, and the circuit court (Judge John M. Yackel presiding) granted the *ex parte* temporary restraining order the following day, October 14, Cir. Ct. Dkt. Entry 10-14-2020.[9] The circuit court set a temporary-injunction hearing for Monday, October 19, 2020, Cir. Ct. Dkt. Entry 10-15-2020.

3. The circuit court (Judge James C. Babler now presiding[10]) held its temporary-injunction hearing on October 19, 2020. App'x 22–89. The circuit court granted Intervenor-Plaintiffs' motion to intervene, App'x 28, and then vacated the *ex parte* temporary restraining order and denied Intervenor-Plaintiffs' and original plaintiffs' motions for a temporary injunction. App'x 83, 87; App'x 8–9.

On the likelihood-of-success prong, the court explained that *Palm*'s holding did not apply to Emergency Order #3 for several reasons. App'x 78–83. Emergency Order #28 "imposed criminal sanctions," while Emergency Order #3 has

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

[10] Both the original plaintiffs and Secretary-designee Palm exercised their statutory right to request substitution of a new judge. R.16, 26; App.R.16, 20; *see* Wis. Stat. § 801.58.

"no criminal sanctions," but rather only "civil penalties." App'x 78. Emergency Order #28 also included "broad travel and business restrictions" in addition to capacity limits. App'x 78. *Palm* refused to invalidate Emergency Order #28's school-closure provisions in a footnote, which "never explained" the Court's rationale and did not even "talk about schools." App'x 79–81. Finally, *Palm* "mostly focuses on [subsections] (4) and (6) of [Section] 252.0[2]," and "largely ignore[s]" Section 252.02(3). App'x 79–80.

On the equities, the circuit court—with all respect—showed confusion throughout the hearing about Executive Order #3's duration, stating repeatedly that the court believed that there was "no showing of irreparable harm" or disruption of the status quo, absent injunctive relief, because Emergency Order #3 was a sixty day order, which no one claimed to have complied with in the forty days before the issuance of the temporary restraining order. App'x 83–84 ("for the last 40 days"; "[t]here's 20 days left from today"); *see also* App'x 69 ("We're 40 days into the order before a court hears a temporary hearing on a temporary injunction."). The premise of the circuit court's point here appeared to be that Emergency Order #3 was practically irrelevant because everyone was "not complying" with the Order for forty days. App'x 59; *see* App'x 58, 60, 65, 69, 83–84. In fact, Emergency Order #3 was in place for only a couple of days before the temporary restraining order and, as discussed above, The Mix Up had seen a 50% reduction in business as a direct result, while Pro-

Life Wisconsin had been unable to book fundraising events. *See supra* p. 12. After counsel for the original plaintiffs corrected the court's misunderstanding as to the duration of Emergency Order #3, noting the extremely short duration of the Order before entry of the temporary restraining order, the Court did not adjust its equitable conclusions without sufficiently explaining why its prior equitable considerations—based repeatedly upon a misunderstanding of the Order's duration—continued to apply. App'x 84–85.

Intervenor-Plaintiffs then orally moved for a stay of the court's decision vacating the *ex parte* temporary restraining order while they sought emergency appellate review from this Court. App'x 85–86. The court orally denied the motion, explaining that the restraining order would never have been issued had the prior circuit court judge seen all of the arguments now before the court. App'x 87.

4. After the circuit court entered its order denying Intervenor-Petitioners' motion for a temporary injunction, Intervenor-Petitioners petitioned this Court for permission to appeal that denial and moved for an injunction pending appeal. Dkt. Entries 10-20-2020, No. 2020AP1742 (Cir. Ct.).

On October 23, this Court granted Intervenor-Petitioners permission to appeal and then stayed "the circuit court's order denying the motion for a temporary injunction," which therefore "reinstat[ed] the ex parte order for a temporary injunction" for the duration of this appeal. Order at 3–4, 10-23-2020, No. 2020AP1742 (Cir. Ct.) (hereinafter

"Stay Order"). In issuing this Order, this Court considered the "likelihood of success on appeal," Stay Order at 2, and whether Intervenor-Petitioners have "ma[de]" a strong showing that [they are] likely to succeed on the merits," Stay Order at 3. This Court also considered whether Intervenor-Petitioners "will suffer irreparable injury," any "substantial harm" to other "interested parties," and "the public interest." Stay Order at 3. Considering all of these factors, this Court explained that permission to appeal and relief pending appeal were justified because Intervenor-Petitioners "ha[ve] shown a sufficient likelihood of success on the merits of an appeal." Stay Order at 3. The Court then expedited its consideration of the merits of this appeal. Stay Order at 4.

SUMMARY OF ARGUMENT

The circuit court erroneously exercised its discretion in its consideration of the temporary injunction factors, thereby warranting reversal.

I. Intervenor-Plaintiffs are certain to succeed on the merits of their claim that, under *Palm*, Emergency Order #3 qualifies as a rule, which is unlawful for failure to undergo Chapter 227 rulemaking procedures.

A. As *Palm* clearly holds, an order is a "rule" for purposes of Wis. Stat. § 227.24(1) if it is: (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; and (5) to implement, interpret, or make specific

legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency. *Palm* applied this five-part test to determine that Emergency Order #28—which imposed selective statewide business closures and capacity limits statewide—was a rule. Further, *Palm* expressly held that *all rules* issued by the Secretary-designee must proceed through Chapter 227's rulemaking procedures, otherwise they are unenforceable and invalid.

B. Emergency Order #3 is an invalid rule under *Palm*. Emergency Order #3 is formal agency action, purportedly promulgated under Secretary-designee Palm's authority under Wisconsin law. Emergency Order #3 is of general application, since it applies to a class of people and businesses described in general terms and allows for new individuals and businesses to join the class. Emergency Order #3 has the effect of law, since it is enforceable by civil forfeitures, and it is issued by a state agency. Finally, Emergency Order #3 implements, interprets, or makes specific legislation enforced by Secretary-designee Palm. Emergency Order #3 reflects numerous subjective, policy-based choices. For example, the Order exempts higher-education institutions from its capacity limitations—but not restaurants—based upon the Secretary-designee's subjective policy preferences.

C. The position of the circuit court, and the counterarguments of Secretary-designee Palm throughout this case, are—with all respect—entirely unpersuasive. The Secretary-designee primarily argues that Emergency

Order #3 is lawful under Section 252.02(3), but *Palm* held—in entirely unambiguous terms—that "no act or order of DHS pursuant to Wis. Stat. § 252.02 is exempted from the definition of 'Rule.'" *Palm*, 2020 WI 42, ¶ 30. What matters is that Emergency Order #3 qualifies as a "rule" under *Palm*'s five-element test, which the Order plainly does.

II. Intervenor-Plaintiffs will also suffer irreparable harm, with no adequate remedy of law, absent temporary injunctive relief. The Mix Up lost 50% of all sales because of the Order's onerous capacity limits, and a continuation of that unlawful policy would almost certainly require The Mix Up to modify its operations by opening only four days a week, cutting expenses and staff, or even shutting down until the Order expires. Similarly, the Order thwarted Pro-Life Wisconsin's core efforts of fundraising, educating the public, and engaging in the critical activism that it exists to further. Furthermore, all Intervenor-Plaintiffs suffer irreparable harm as taxpayers because Emergency Order #3 is an unlawful government act, funded by their tax dollars.

III. The balance of equities and public interest all support an injunction, especially because the Secretary-designee's issuance of this unlawful Order is a continuing, grave assault on the separation of powers and the rule of law.

STANDARD OF REVIEW

To obtain a temporary injunction, the moving party must show that it is entitled to relief according to four

interrelated considerations: (1) reasonable probability of success on the merits; (2) lack of adequate remedy at law; (3) irreparable harm absent injunctive relief; and (4) the equities, on balance, favor injunctive relief. *See Serv. Employees Int'l Union, Local 1 v. Vos ("SEIU")*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35; *Pure Milk Prods. Co-op v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977); *see also* Wis. Stat. § 813.02(1)(a). An appellate court reviews the denial of a motion for a temporary injunction "for an erroneous exercise of discretion." *SEIU*, 2020 WI 67, ¶ 93. However, when likelihood of success on the merits depends upon a question of law, the appellate court reviews that question de novo. *See id.* ¶ 28.

ARGUMENT

I. Intervenor-Plaintiffs Are Certain To Succeed On Their Claim That Emergency Order #3 Is Unlawful Under *Palm*

The circuit court incorrectly concluded that *Palm*'s clear holding does *not* require Secretary-designee Palm to subject Emergency Order #3 to Chapter 227 rulemaking. That ruling is an error of law, which error is necessarily an erroneous exercise of discretion. *See SEIU*, 2020 WI 67, ¶¶ 27, 93.

A. *Palm* Holds That "Orders" Imposing Selective, Statewide Capacity Limits Are Rules Subject To Chapter 227 Rulemaking

1. Chapter 227 governs administrative procedure in Wisconsin, including the promulgation of administrative rules. Chapter 227 defines a "rule" as "a regulation, standard, statement of policy, or general order of general application that has the force of law" from an agency that "implement[s], interpret[s], or make[s] specific legislation enforced or administered by the agency." Wis. Stat. § 227.01(13). For an "emergency rule"—defined as a "rule" under Section 227.01(13)—Section 227.24 establishes the procedures that an agency follows. Wis. Stat. § 227.24(1). These include the agency submitting and publishing a scope statement, Wis. Stat. § 227.24(1)(e), and then, post-promulgation, submitting the emergency rule to the Legislature's Joint Committee for Review of Administrative Rules for its statutorily authorized review, *see* Wis. Stat. § 227.26(2)(d); Wis. Stat. § 227.19(4)(d)(1), (3), (6). Whenever an agency promulgates a "rule"—including an "emergency rule"—without complying with Chapter 227's commands, that rule "is unenforceable" and invalid. *Palm*, 2020 WI 42, ¶ 58; *see also id.* ¶ 16.

Section C.1 of the Supreme Court's decision in *Palm* addresses when an agency's "order" qualifies as a "rule" under Section 227.01(13), thus requiring the agency to follow Chapter 227's rulemaking procedures. *Id.*, ¶¶ 15–42. Under *Palm*, an order is a rule if it satisfies five elements.

First, the rule must be "a regulation, standard, statement of policy or general order," *Id.*, ¶ 22 (citation omitted)—which are formal "agency action[s]," such as published "zoning ordinance[s]" from the Department of Natural Resources, *id.* ¶ 21 (citations omitted).

Second, the order must be "of general application." *Id.*, ¶ 22 (citation omitted). This element's "focus [is] on the people who [are] regulated by the order . . . not on the type of factual circumstances that led to the [agency's] order." *Id.* That is, an order is of general application if "the class of people regulated . . . is described in general terms and new members can be added to the class," *id.* (citation omitted), even if the agency issued the order in response "to a specific, limited-in-time scenario," *id.* ¶¶ 18, 27. The "general application" element has "the focus [ ] on the people regulated, not on the factual context in which the regulation arose," such that an order is a rule if "it applie[s] to [an] entire class of persons . . . [and] members can be added to the class." *Id.* ¶ 23 (citations omitted). This requirement contrasts with an order directed "to a specifically named person or to a group of specifically named persons." *Id.* ¶ 17 (citation omitted).

Third and fourth, the order must "hav[e] the effect of law" and be "issued by an agency." *Id.*, ¶ 22 (citing *Citizens for Sensible Zoning, Inc. v. Dep't of Nat. Res., Columbia Cty.*, 90 Wis. 2d 804, 814–16, 280 N.W.2d 702 (1979)). An order satisfies these requirements when "criminal *or* civil sanctions can result as a violation," *Cholvin v. Wis. Dep't of Health &*

Family Servs., 2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 758 N.W.2d 118 (emphasis added); *accord Palm*, 2020 WI 42, ¶ 23 (relying on *Cholvin*), and when an agency like the Department of Natural Resources (or the Department of Health Services) is responsible for its promulgation, *see Palm*, 2020 WI 42, ¶ 23; *Citizens for Sensible Zoning*, 90 Wis. 2d at 816.

Finally, the order must "implement, interpret or make specific legislation enforced or administered by such agency." *Palm*, 2020 WI 42, ¶ 22 (citation omitted). This means that the order expresses the "subjective judgment" of the agency, reflecting the agency's policy decisions and not simply executing the "mature consideration" of the Legislature as expressed in the statute. *Id.* ¶ 28 (citations omitted). Put another way, a rule creates "controlling" requirements, beyond the requirements found in the statute administered by the agency, *id.*—thus rulemaking is an important "procedural safeguard[ ]" to ensure the agency's policy choices are not "arbitrary, unreasonable or oppressive," *id.* ¶ 34.

2. The Court in *Palm* then applied this understanding of a "rule" under Section 227.01(13) to Emergency Order #28, holding that this order qualified as a "rule" and that, therefore, it was invalid for lack of Chapter 227 rulemaking. *See Palm*, 2020 WI 42, ¶¶ 15–42.

First, Emergency Order #28 was a "general order," *id.* ¶ 21, from Secretary-designee Palm as the head of the Department of Health Services, purporting to rely on that agency's statutory authority, *id.* ¶ 6. Accordingly, Emergency

Order #28 represented formal "agency action." *Id.* ¶ 21 (citation omitted).

Second, Emergency Order #28 was an order "of general application," since it "regulates all persons in Wisconsin at the time it was issued and it regulates all who will come into Wisconsin in the future." *Id.* ¶ 24. That is, this order "impacts every person in Wisconsin, as well as persons who come into Wisconsin, and every 'non-essential' business," *id.* ¶ 11—such that "persons travelling from other states become bound by Order 28 when the cross into Wisconsin," *id.* ¶ 25. So, under the Order's terms, *all* of these individuals and businesses had to comply with its statewide selective business closure and capacity limits, not just "a specifically named person or [ ] a group of specifically named persons." *Id.* ¶ 17 (citation omitted). The Court was "not persuaded" by Secretary-designee Palm's claim that Emergency Order #28 lacked general applicability because "it responds only to" the "limited-in-time scenario" of COVID-19. *Id.* ¶ 27. The "focus" of this inquiry is "on the people regulated, not on the factual context in which the regulation arose," *id.* ¶ 23, and the order still reflected the "kind of controlling, subjective judgment" that "[r]ulemaking exists" to cabin, *id.* ¶ 28.

Third and fourth, Emergency Order #28 had "the effect of law" because it "purport[ed] to criminalize conduct" and impose "criminal penalties," *id.* ¶¶ 22, 36–39; *Cholvin*, 2008 WI App 127, ¶ 26, and it was "issued by an agency"—the

Department of Health Services, *Palm*, 2020 WI 42, ¶ 22 (citations omitted); *see also id.* ¶ 7.

Finally, Emergency Order #28 "implement[ed], interpret[ed] or ma[d]e specific legislation enforced or administered by" the Department of Health Services, since it embodied numerous "subjective" policy-based "judgment[s]" of the Secretary-designee not found within the statutes that she administers. *Id.*, ¶¶ 22, 27–28 (citation omitted). Emergency Order #28 closed "[n]on-essential" businesses—such as restaurants, taverns, and salons, *see id.* ¶ 7—while allowing "essential businesses" to remain open. *Supra* pp. 6–7. Then, for those "essential businesses" and other partially exempt organizations, Emergency Order #28 set capacity limitations—such as 25% of the maximum occupancy or, in other circumstances, 10 people. *Supra* p. 5. None of the statutes that Secretary-designee administers makes such policy judgments. *See Palm*, 2020 WI 41, ¶¶ 43–57. So, only the "subjective judgment [of] one unelected official,"—not the "mature consideration" of the Legislature—imposed the distinctions between essential/non-essential businesses or the choices to set capacity limits at a particular level. *Id.* ¶¶ 27–28 (citations omitted). Yet, "[r]ulemaking exists precisely to ensure that kind of controlling, subjective judgment" from a single agency head "is not imposed in Wisconsin" unilaterally, *id.* ¶ 28, lest the people suffer "arbitrary or oppressive conduct by an agency," *id.* ¶ 35.

B. Emergency Order #3 Is An Invalid Rule For Lack Of Rulemaking, Under A Straightforward Application Of *Palm*

In this case, under *Palm*, Emergency Order #3 is plainly an unlawfully promulgated emergency rule.

First, Emergency Order #3 is "a regulation, standard, statement of policy *or general order*." *Palm*, 2020 WI 42, ¶ 22 (emphasis added; citation omitted). Emergency Order #3 is a formal "agency action" from Secretary-designee Palm, purporting to rely upon that Department's authority under Wisconsin law and ordering specific actions on a statewide basis. *See id.* ¶¶ 6, 21; *see* App'x 3.

Second, Emergency Order #3 is "of general application," like Emergency Order #28. *Palm*, 2020 WI 42, ¶ 22 (citation omitted). Emergency Order #3's selective statewide capacity limits apply to a "class [ ] described in general terms and new members can be added to the class," not "to a specifically named person" or group of such persons. *Id.* ¶¶ 17, 21 (emphasis and citation omitted); App'x 3–6. That is, Emergency Order #3 applies to all persons or businesses hosting public gatherings during its term—unless falling within its class-based exemptions—whether those individuals were present in Wisconsin at the time of Emergency Order #3's promulgation or not. *See* App'x 3–6; *compare Palm*, 2020 WI 42, ¶¶ 1, 17, 24–25. And, as with Emergency Order #28, "the type of factual circumstances that led to" Emergency Order #3—COVID-19—and the fact that it reflects a "specific,

limited-in-time scenario," bear no relevance to its status as a rule. *Palm*, 2020 WI 42, ¶¶ 18, 22. The "focus" of this analysis is "on the people who [are] regulated by the order," and those people are a class described in general terms, who may have new members added to them. *Id.* ¶ 22.

Third and fourth, Emergency Order #3 "ha[s] the effect of law" and was "issued by an agency." *Id.* (citations omitted). This Order states that violators are subject to "civil forfeiture" under "Wis. Stat. § 252.25," App'x 6, which is clearly a "civil sanction" having the force of law, *Cholvin*, 2008 WI App 127, ¶ 26. And the Secretary-designee issued this Order as "Department of Health Services Secretary-designee," App'x 3, thus it is "issued by an agency, *Palm*, 2020 WI 42, ¶ 22 (citation omitted).

Finally, Emergency Order #3 "implement[s], interpret[s] or make[s] specific legislation enforced or administered by" the Department of Health Services, rather than simply enforcing statutes within the domain of that agency. *Id.* (citation omitted). The only claimed source of statutory authority for Emergency Order #3 is Section 252.02(3), App'x 3, which provides that "[t]he department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics," Wis. Stat. § 252.02(3). This text does not even tangentially require Emergency Order #3's *selective* statewide capacity limitations; instead, those are solely the product of Secretary-designee Palm's "subjective judgment."

Palm, 2020 WI 42, ¶¶ 27–28; *see also id.* ¶ 21. For example, nothing in Section 252.02(3) privileges gatherings undertaken at "[i]nstitutions of higher education," App'x 4, over small restaurants and charitable fundraising events core to Plaintiff-Intervenors' operations. As *Palm* explained in words just as pertinent to Emergency Order #3, "[r]ulemaking exists precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official, Palm, is not imposed in Wisconsin." *Id.* ¶ 28.

In all, given that the Secretary-designee "promulgated" Emergency Order #3 "without compliance with statutory rule-making . . . procedures," Wis. Stat. § 227.40(4)(a), Intervenor-Plaintiffs are certain to succeed on the merits.

C. The Position Of The Circuit Court And The Counterarguments Of Secretary-designee Palm Are Incorrect

The contrary position that the circuit court articulated in denying Intervenor-Plaintiffs' motion for a temporary injunction, as well as the responsive arguments raised by Secretary-designee Palm, do not withstand scrutiny.

Secretary-designee Palm's primary argument is that she does not need to follow Chapter 227's rulemaking procedures because she issued Emergency Order #3 under Section 252.02(3)—which, as relevant here, provides that the Secretary-designee can "forbid public gatherings in . . . other places to control outbreaks and epidemics," Wis. Stat. § 252.02(3)—whereas she issued Emergency Order #28 under

Sections 252.02(3), (4), *and* (6). Resp. Opp'ing Mot. for Emergency Temp. Relief Pending Appeal at 8, No. 2020AP1742 (Ct. App. Oct. 23, 2020) (hereinafter "Resp."); *see* R.47 at 18; App.R.48; *accord* App'x 73–82 (circuit court discussing this argument). But *Palm*'s relevant holding is that an order meeting the five-part legal test for a "rule" under Section 227.01(13) must proceed through Chapter 227 rulemaking, unless an explicit statutory exemption from such procedures applies. In *Palm*, the Secretary-designee relied upon three claimed statutory sources of authority to seek to exempt Emergency Order #28 from Chapter 227—Sections 252.02(3), (4), and (6)—and *Palm* held that, *regardless of the source of authority invoked*, Chapter 227's mandatory procedures applied. As the Court explained: "despite the detailed nature of the list [of exemptions from the Chapter 227 definition of a rule], and the Legislature's consideration of acts of DHS and its consideration of 'orders,' no act or order of DHS pursuant to Wis. Stat. § 252.02 is exempted from the definition of 'Rule.'" *Palm*, 2020 WI 42, ¶ 30. This "no act or order" language clearly applies no matter whether the Secretary-designee claims to act under Sections 252.02(3), (4), or (6)—or any other provisions in the Wisconsin Statutes.

Put another way, *Palm* makes clear that it is what an order *does*, not the statutory provision cited in an order, that controls the analysis of whether it is rule. Here, as explained above, the *manner* in which the Secretary-designee purported to implement her authority under Section 252.02(3) satisfies

Palm's five-part test, which is all that matters. *See supra* pp. 27–29. So while the Secretary-designee is purporting in Emergency Order #3 to "forbid public gatherings in . . . other places to control outbreaks and epidemics," she is doing so in a *manner* that satisfies the five-part test for a rule, which must go through Chapter 227 rulemaking. Any contrary conclusion would lead to the absurd position that the day after *Palm*, the Secretary-designee could have reissued the exact same statewide selective capacity limits as contained in Emergency Order #28 by simply removing the citations of Sections 252.02(4) and (6), while leaving only the citation of Section 252.02(3). There is an obvious reason why the Secretary-designee did not do this in May: she, and everyone else, recognized that this would be plainly unlawful under *Palm*'s reasoning and holding.

Nor does *Palm*'s footnoted upholding of Emergency Order #28's school-closure provision do anything to salvage Emergency Order #3. App'x 79–81; R.47 at 22–23; App.R.48; Resp. 8. In Emergency Order #28, the Secretary-designee closed *all* schools under Section 252.02(3)'s "may close schools" clause. *Palm*'s school-closure, footnote holding is thus entirely irrelevant here because Emergency Order #3 does not purport to close any schools under Section 252.02(3) or under any other provision, and instead imposes selective statewide capacity limits. All that matters for purposes of this case is that *Palm unambiguously* held that the Secretary-designee must follow rulemaking procedures before imposing

statewide selective capacity limits, and Emergency Order #3 plainly falls within that holding.

Notably, although *Palm*'s school-closure footnote did not offer any reasoning, this aspect of *Palm* avoids several of the Court's concerns regarding the statewide *selective* capacity restrictions. A blanket school closure, as found in Emergency Order #28, does not involve "subjective," policy-based "judgment" as between favored and disfavored schools, in the way that both Emergency Order #28 and Emergency Order #3 make as between various types of businesses and establishments (such as, for example, disfavoring family-run restaurants, on the one hand, and favoring higher education institutions, on the other hand, *see supra* pp. 7–8). *See Palm*, 2020 WI 42, ¶¶ 21, 27–28. That difference is arguably relevant to whether an order satisfies the fifth essential element of a "rule" under Section 227.01(13)—"implement[ing], interpret[ing] or mak[ing] specific legislation enforced or administered by [the] agency." *Id.* ¶ 22 (citation omitted). In any event, *Palm* entered a controlling holding that a selective, statewide capacity-limits regime is a "rule" under Chapter 227, which is the end of the matter.

Nor does the fact that Emergency Order #28 involved criminal penalties, or provisions beyond business closures and capacity limits, change the analysis. App'x 78; R.47 at 19; App.R.48; Resp. at 8. While *Palm* did discuss Emergency Order #28's criminal sanctions to highlight the breadth of the Secretary-designee's position, *see Palm*, 2020 WI 42, ¶¶ 36–

38, nowhere did the Court mention—let alone hold—that an order is exempt from Wis. Stat. § 227.01(13)'s definition of "rule" because, like Emergency Order #3, it is enforceable through civil forfeitures only. Indeed, binding case law already holds that an order imposing "criminal *or* civil sanctions" may qualify as a rule. *Cholvin*, 2008 WI App 127, ¶ 26 (emphasis added); *Palm*, 2020 WI 42, ¶ 23 (relying on *Cholvin*). And while Emergency Order #28 extended beyond business closures and capacity limits, including by imposing travel restrictions, *Palm* held that *all* parts of Emergency Order #28 must comply with rulemaking, with the sole exception for the school-closure provision not relevant here.

Finally, the Secretary-designee argued below that Intervenor-Plaintiffs' interpretation of Section 252.02(3) would lead to "absurd and dangerous" results, since it would, for example, impede the Department's response to "an Ebola outbreak in Wisconsin." R.47 at 25–27; App.R.48. Yet, as *Palm* explained, "the Governor's emergency powers"—which allow him to declare a 60-day emergency under Wis. Stat. § 323.10 after an outbreak occurs and to take steps to combat that outbreak immediately—suffice to address these sorts of emergencies, when "there is no time for debate," yet "[a]ction is needed." *Palm*, 2020 WI 42, ¶ 41. That statutory 60-day window provides more than sufficient time for compliance with the Chapter 227 emergency-rule procedure. *See id.*

II. Intervenor-Plaintiffs Lack Any Adequate Legal Remedy In Lieu Of Injunctive Relief And Will Suffer Irreparable Harm Absent Such Relief.

The circuit court also erroneously exercised its discretion in concluding that Intervenor-Plaintiffs failed to show that they lacked an adequate remedy at law and would not suffer irreparable harm, absent relief. *SEIU*, 2020 WI 67, ¶¶ 92–93. A movant shows both lack of an adequate legal remedy and irreparable harm absent injunctive relief if the movant's "injury cannot be compensated by damages." *Kohlbeck v. Reliance Constr. Co.*, 2002 WI App 142, ¶ 13, 256 Wis. 2d 235, 647 N.W.2d 277. While some cases list maintenance of the status quo as a related equitable factor for injunctive relief, *see, e.g.*, *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154, other cases do not address this consideration as a separate factor, *see, e.g.*, App'x 93; *Kocken v. Wis. Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 22, 301 Wis. 2d 266, 732 N.W.2d 828. In any event, Intervenor-Plaintiffs prevail on this "status quo" consideration for all of the same reasons described immediately below: Intervenor-Plaintiffs merely sought to return to the status-quo time immediately before Secretary-designee Palm issued Emergency Order #3, which Order imposed the following irreparable harms on them.

Emergency Order #3 imposes irreparable harms on the operations of The Mix Up and Pro-Life Wisconsin, which harms cannot later be remedied under law, including because

the Secretary-designee is not subject to a damages lawsuit for issuing Emergency Order #3, under the doctrine of sovereign immunity. *See generally Grall v. Bugher*, 181 Wis. 2d 163, 511 N.W.2d 336 (Ct. App. 1993), *rev'd on other grounds*, 193 Wis. 2d 65, 532 N.W.2d 122 (1995); *see also Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable.").

As the undisputed evidence establishes, The Mix Up (and its owner, Intervenor-Plaintiff Seiben) has already lost sales during the very short period when Emergency Order #3 was in effect before the circuit court's temporary restraining order. Under the Order, The Mix Up is limited to only 25% of its total occupancy limit, including employees and staff. App'x 3–4. As Sieben stated in her unrebutted, sworn affidavit, The Mix Up suffered a *50% reduction in sales* immediately after the issuance of Emergency Order #3, despite the good weather and open outdoor seating over the weekend of October 10–11, 2020. App'x 20. This harsh economic loss was inevitable because The Mix Up's customer base typically drives to the establishment, and customers are unlikely to chance that drive to grab dinner or drinks if they believe that they will be turned away at the door because of Emergency Order #3's onerous occupancy limits. App'x 20. Thus, if Emergency Order #3 is again enforced, The Mix Up will almost certainly need to modify its operations by opening only four days a week

and cutting expenses and staff, or even by shutting down operations entirely until the Order expires (assuming it is not renewed). App'x 20. And while many businesses face serious hardships because of Emergency Order #3, these injuries are particularly acute for The Mix Up because it is under new ownership, as of February 2020. Developing a positive reputation in the community is thus critical to its long-term viability. App'x 16, 23.

The Order similarly imposes serious, irreparable harms on Pro-Life Wisconsin. As explained in Intervenor-Plaintiff Miller's unrebutted, sworn affidavit, the Order makes it nearly "*impossible*" for these organizations to "schedul[e] venues" even for "*regular* fundraising events, which are open to the public," and to accomplish their "educational itinerary." App'x 12–13 (emphases added). Thus, Emergency Order #3 severely undermines Pro-Life Wisconsin's core mission during the period it remains in effect, causing grave harm to Pro-Life Wisconsin's charitable endeavors.

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

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

The circuit court concluded that Intervenor-Plaintiffs had not prevailed on these equitable considerations because it mistakenly believed that Emergency Order #3 had been in effect for approximately forty days, without evidence that Intervenor-Plaintiffs had been harmed during that time. *See* App'x 68–69. That conclusion is plainly wrong as a legal and factual matter, evidencing an erroneous exercise of discretion. The Mix Up submitted an undisputed affidavit that during the *only weekend* where the Order was in effect—rather than the forty days the court mistakenly believed it was applicable—The Mix Up had lost *half of its sales during that time*. *See supra* p. 35. Pro-Life Wisconsin, meanwhile, submitted an undisputed affidavit that it was nearly impossible to find any venues that would host its events, given the strict capacity limitations in Emergency Order #3. *See supra* p. 36. The only reason that Intervenor-Plaintiffs did not suffer any further harm was that the circuit court issued its temporary restraining order blocking Emergency Order #3 after just one weekend of that Order's operations.

III. The Equities Weigh Heavily In Intervenor-Plaintiffs' Favor, Especially When Considering The Importance Of Compliance With The Separation Of Powers And The Rule Of Law, As Embodied In A Recently Issued Wisconsin Supreme Court Decision

Finally, the circuit court erroneously exercised its discretion in failing to find that the balance of the equities, including the public interest, supports injunctive relief. *SEIU*, 2020 WI 67, ¶ 93.

Emergency Order #3 is an affront to the separation of powers. The Secretary-designee issued the Order without following Chapter 227's rulemaking procedures, in order to evade the Legislature's role in the rulemaking process. *See Palm*, 2020 WI 42, ¶ 1. Indeed, that the Secretary-designee took this evasive path many months after *Palm* issued can only fairly be explained by her desire not to seek legislative input into her policy decision. As *Palm* explained, the Chapter 227 rulemaking requirements exist "*precisely*" to stop "that kind of controlling, subjective judgment asserted by one unelected official, Palm." *Id.* ¶ 28 (emphasis added).

The Secretary-designee's actions are also an insult to both the judiciary and the rule of law. As the Wisconsin Supreme Court has explained, "[n]o aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384. Notwithstanding that core function of the judicial branch, the

Secretary-designee has chosen to ignore *Palm*'s clear holding and apparently seized for herself the authority to "'say what the law is'" in cases of emergency orders. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 50, 382 Wis. 2d 496, 914 N.W.2d 21 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). This unlawful arrogation of power offends the requirement that public officials respect "judicial decisions of the highest tribunal . . . as establishing the true construction of the laws," and "as precedents and authority, to bind future cases of the same nature," 1 Joseph Story, Commentaries on the Constitution of the United States § 377 (1st ed. 1833), a paramount consideration in our system of ordered liberty.

On the other end of the equitable balance, an injunction will not harm any defendants, who merely must comply with *Palm*. Secretary-designee Palm and other defendants will not suffer *any* harm from merely being required to abide by the *Palm* decision, which provides a clear path to issue such emergency rulemaking in conjunction with the Legislature. *Palm*, 2020 WI 42, ¶ 42. The Secretary-designee is fully aware that Chapter 227's rulemaking procedures were mandatory for orders like Emergency Order #3, given the Wisconsin Supreme Court's decision in *Palm*, to which she was a named party. Indeed, even beyond the obvious notice provided by *Palm* and this lawsuit, on October 12, Secretary-designee Palm was directed by the Joint Committee for Review of Administrative Rules—which is statutorily empowered to review administrative rules—to promulgate

Emergency Order #3 according to the required procedures within 30 days. *Joint Committee for Review of Administrative Rules Hearing*, WisconsinEye, *supra* at 48:25–49:10; *see* Wis. Stat. § 227.26(2)(b). The Secretary-designee now need only comply with that lawful directive, and doing so imposes no harm on her or the other Defendants.

Finally, the ongoing pandemic does nothing to change this calculus or excuse Secretary-designee Palm's recalcitrance. Although combating the spread of COVID-19 is an important state interest, and Intervenor-Plaintiffs do not doubt that the Secretary-designee remains committed to advancing this interest, the Supreme Court has held time and again, including in *Palm* itself, that even that significant goal is insufficient for denying relief against a state action that violates the separation of powers and the rule of law. *See Palm*, 2020 WI 42; App'x 90–96; *James v. Heinrich*, Nos. 2020AP001419-OA, et al. (Wis. Sept. 10, 2020).

CONCLUSION

This Court should reverse the circuit court's denial of Intervenor-Plaintiffs' motion for a temporary injunction and order the circuit court, on remand, to replace the temporary restraining order with a temporary injunction.

Dated: October 27, 2020.

Respectfully submitted,

Electronically signed by Andrew M. Bath
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 9,048 words.

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