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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1742

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

Plaintiffs,

v.

ANDREA PALM and WISCONSIN DEPARTMENT OF HEALTH SERVICES,

Defendants-Respondents-Petitioners,

JULIA LYONS,

Defendant-Respondent,

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 AN ORDER GRANTING TEMPORARY INJUNCTION RELIEF, ENTERED IN THE COURT OF APPEALS, DISTRICT III

OPENING BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS-PETITIONERS ANDREA PALM AND WISCONSIN DEPARTMENT OF HEALTH SERVICES

JOSHUA L. KAUL
Attorney General of Wisconsin

COLIN A. HECTOR
Assistant Attorney General
State Bar #1120064

HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

Attorneys for Defendants-Respondents-Petitioners Andrea Palm and Wisconsin Department of Health Services

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8407 (CAH)
(608) 266-8101 (HSJ)
(608) 266-8690 (TCB
(608) 294-2907 (Fax)
hectorca@doj.state.wi.us
jursshs@doj.state.wi.us
bellaviatc@doj.state.wi.us

TABLE OF CONTENTS

Page

INTRODUCTION 1

ISSUE PRESENTED.....2

STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....2

STATEMENT OF THE CASE 3

I. Since the beginning of October, over 200,000 Wisconsinites have contracted COVID-19, and more than 1,657 have died. 3

II. Secretary-designee Palm issued Emergency Order 3 to help control Wisconsin's unprecedented outbreak of COVID-19 spread.....4

III. Following conflicting circuit court preliminary relief decisions, the court of appeals struck down Emergency Order 3 in a sharply divided opinion. 7

A. The circuit court proceedings. 7

B. The court of appeals decision. 9

1. The majority opinion.....9

2. Judge Stark's dissent..... 11

STANDARD OF REVIEW..... 13

ARGUMENT 13

I. Emergency Order 3 did not constitute a rule..... 13

A. Under our constitutional structure, agencies may properly be required to go through rulemaking only for actions that set policy and have the force of law..... 13

Page

B. Chapter 227 does not make executive action subject to rulemaking when it applies plain statutory authority to facts on the ground. 15

1. To be a rule, the agency's action must fill in the gaps of a statute in a way that requires the agency to engage in policymaking. 16

2. Chapter 227's rulemaking procedures apply only to agency actions that will govern the ongoing enforcement or application of the law..... 17

C. Emergency Order 3 applied a well-delineated statute to specific factual circumstances..... 20

D. The court of appeals' interpretation of Wis. Stat. ch 227 would lead to absurd results. 21

II. Emergency Order 3 was not a rule under *Palm*..... 23

A. *Palm* held only that the provisions of the Safer at Home order premised on broad, non-specific grants of authority were rules. 23

B. *Palm* did not require rulemaking every time an agency exercises discretion in its enforcement of the law..... 24

C. The capacity limitations at issue in *Palm* were inextricably connected to the business closure provisions ordered under Wis. Stat. § 252.02(4) and (6)..... 26

CONCLUSION..... 27

Page

TABLE OF AUTHORITIES

Cases

American Power & Light Co. v. SEC,
329 U.S. 90 (1946) 25

Bowen v. Georgetown University Hosp.,
488 U.S. 204 (1988) 14

Citizens for Sensible Zoning v. DNR,
90 Wis. 2d 804, 280 N.W.2d 702 (1979) 11, 19

Clean Wisconsin, Inc. v. Public Service Commission of Wisconsin,
282 Wis. 2d 250, 700 N.W.2d 768..... 16

FTC v. Brigadier Indus. Corp.,
613 F.2d 1110 (D.C. Cir. 1979) 18

Gibson v. Transp. Comm'n, DOT,
103 Wis. 2d 595, 309 N.W.2d 858..... 17

Kalal v. Circuit Court for Dane Cty.,
2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110..... 17, 21

Kocken v. Wis. Council 40, AFSCME, AFL-CIO,
2007 WI 72, 301 Wis. 2d 266, 732 N.W.2d 828..... 13

Lamar Cent. Outdoor, LLC v. DHA,
2019 WI 109, 389 Wis. 2d 486, 936 N.W.2d 573 (2019) ... 20

Schoolway Transp. Co. v. Div. of Motor Vehicles,
72 Wis. 2d 223, 240 N.W.2d 403 (1976) 16, 19

Serv. Emps. Int'l Union, Local 1 *v. V*os,
("SEIU"), 2020 WI 67, 393 Wis. 2d 38,
946 N.W.2d 35 ..... 13, 14, 15, 18

State ex rel. Wis. Inspection Bureau v. Whitman,
196 Wis. 472, 220 N.W. 929 (1928) 16

Tetra Tech EC, Inc. v. Wisconsin DOR,
2018 WI 75, 382 Wis. 2d 496 13

Page

United States v. Florida East Coast Ry. Co.,
410 U.S. 224 (1973) 14

Utility Air Regulatory Group v. EPA,
573 U.S. 302 (2014) 14

Westmas v. Creekside Tree Serv. Inc.,
2018 WI 12, 379 Wis. 2d 471, 907 N.W.2d 68..... 21

Wisconsin Electric Power Co. v. DNR,
93 Wis. 2d 222, 287 N.W.2d 113 (1980) 19

Wisconsin Legislature v. Palm,
2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.....1, *passim*

Statutes

Wis. Stat. ch. 227 ..... 2, 21, 27

Wis. Stat. § 227.01(13)..... 16, 18, 19, 23

Wis. Stat. § 227.10(1)..... 18

Wis. Stat. § 227.19(1)(b) 15

Wis. Stat. § 252.02 8

Wis. Stat. § 252.02(3).....1, *passim*

Wis. Stat. § 252.02(6)..... 2, 23, 24, 26

Wis. Stat. § 252.02(4)..... 2, 23, 24, 26

Constitutional Provisions

Wis. Const. art. IV, §§ 1, 17..... 13

Wis. Const. art. V, § 4 ..... 13, 15

INTRODUCTION

In the past three months, the COVID-19 situation in Wisconsin has become far more dire: the virus has raged across the state, causing a surge in case rates, deaths, and hospitalizations. In early October, the Wisconsin Department of Health Services (DHS), through Secretary-designee Palm, responded to the rapidly escalating spread of COVID-19 by issuing Emergency Order 3.

That order limited indoor public gatherings. Medical evidence has confirmed that COVID-19 spreads primarily through aerosol droplets via close contact, and that indoor crowding plays a significant role in viral transmission, including making "super spreader" events more common. DHS issued the order pursuant to Wis. Stat. § 252.02(3), which, by its plain statutory language, authorized it to forbid public gatherings to control outbreaks and epidemics.

Despite that plain authority, Emergency Order 3 was short-lived. After conflicting circuit court decisions on preliminary relief, a two-member majority of the court of appeals struck the order down. The court held that *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, prohibits DHS from issuing an order limiting indoor public gatherings that pose a particularly severe risk of viral transmission, unless the order is first promulgated as a rule.

The opinion below conflicts with the plain meaning of the law and the reasoning of *Palm*.

First, chapter 227 did not require Emergency Order 3 to be promulgated as a rule. Separation of powers principles allow the Legislature to have a check on agency actions only when those actions take on a legislative hue. Accordingly, chapter 227 requires rulemaking when an agency makes policy decisions about a general statute that will govern its ongoing enforcement or administration of that law. DHS did

not do that here. It executed the terms of a specific statute that authorized it to "forbid public gatherings" in order to "control" the specific public health crisis facing Wisconsin. It applied the statute to the specific situation at hand and set no course for future action. That type of action is not a rule.

Second, *Palm* reinforces this straightforward textual conclusion. In *Palm*, the Court invalidated the portions of DHS's Safer at Home order that were issued under the open-ended grants of authority under Wis. Stat. § 252.02(4) and (6). In contrast, the Court upheld school closures issued under the plain language of Wis. Stat. § 252.02(3), the section at issue here. Exercising authority under subsection 3 required no policymaking determination that would govern agency action going forward. DHS simply applied its plain authority to "close schools" in order to "control" the specific epidemic facing Wisconsin. In this case, DHS is acting under section 252.02(3). Consistent with the nature of rulemaking, the exercise of that statutory power does not constitute a rule subject to ch. 227 under *Palm*.

ISSUE PRESENTED

Did the court of appeals err in concluding that Emergency Order 3 was invalid because it was not promulgated as a rule pursuant to Wis. Stat. ch. 227?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to grant review reflects that publication is warranted and oral argument has been scheduled.

STATEMENT OF THE CASE

This case concerns DHS's authority to forbid public gatherings during the current pandemic under the plain language of Wis. Stat. § 252.02(3). That provision authorizes DHS to "close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics."

I. Since the beginning of October, over 200,000 Wisconsinites have contracted COVID-19, and more than 1,657 have died.

After the beginning of the school year, Wisconsin began to experience an unprecedented surge in COVID-19 cases. In September, the state started to see daily case rates of over 2,000 for the first time.[1] Death rates, a lagging indicator, shot up not long after. By early October, COVID-19 was killing 14 Wisconsinites, on average, every day—more than ever before.[2]

Things have gotten progressively worse. The state has seen explosive growth for the past several weeks, repeatedly shattering single-day case records. Since the beginning of October, Wisconsin has had more than 200,000 reported COVID-19 cases and 1,657 deaths, more than half of the total COVID-19 cases and deaths in Wisconsin to date. And the

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[1] All case data is available online. Wis. Dep't of Health Servs., *COVID-19: Wisconsin Cases*, https://www.dhs.wisconsin.gov/covid-19/cases.htm (last updated Nov. 23, 2020).

[2] All death data is available online. Wis. Dep't of Health Servs., *COVID-19: Wisconsin Deaths*, https://www.dhs.wisconsin.gov/covid-19/deaths.htm (last updated Nov. 23, 2020).

healthcare system is under extreme strain, with numerous hospitals at or close to capacity.[3]

In addition, Wisconsin's economic recovery appears to have slowed, if not reversed, with the recent skyrocketing of COVID-19 cases. As the director of the University of Wisconsin's Center for Research on the Wisconsin Economy recently explained, "Clearly it's going to depend on how long it takes to get this spike under control and get things back to normal."[4]

II. Secretary-designee Palm issued Emergency Order 3 to help control Wisconsin's unprecedented outbreak of COVID-19 spread.

The SARS-Cov-2 novel coronavirus spreads primarily via respiratory droplets via close contact. (Westergaard Aff. ¶ 5, Pet.-App. 139.) Accordingly, people are more likely to contract the virus indoors, particularly when social distancing is challenging, because people are sharing more air than they would outdoors.[5] Recent epidemiological studies confirm these risks, and case categorizations have shown the dramatic

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[3] Molly Beck, *Wisconsin hurling toward 'tipping point' when hospitals won't be able to save everyone who is sick, health officials warn*, Milwaukee Journal Sentinel, Nov. 11, 2020, https://www.jsonline.com/story/news/politics/2020/11/11/covid-19-cases-put-wisconsin-hospitals-close-tipping-point/6253922002/.

[4] Jeff Bollier & Nusaiba Mizan, *As number of COVID-19 cases in Northeast Wisconsin soars, experts worry it could sink state's economic recovery from pandemic* (Oct. 9, 2020, 8:00 AM), https://www.greenbaypressgazette.com/story/money/2020/10/09/wisconsin-businesses-brace-economic-impact-covid-19-cases-soar/3623210001/.

[5] Ctrs. for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), *Deciding to Go Out*, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html (last updated Oct. 28, 2020).

impact that indoor "super spreader" events have had on COVID-19 spread. (Westergaard Aff. ¶¶ 32–33, Pet.-App. 147–48.)

Places that offer on-site eating and drinking pose particular dangers, because of the difficulty in using face coverings to mitigate transmission. For example, a recent Centers for Disease Control and Prevention (CDC) study found that adults with positive COVID-19 tests were 2.4 times as likely to have reported dining at a restaurant in the 14 days before becoming ill than those with negative COVID-19 tests.[6] When the analysis was restricted to participants without known close contact to a person with COVID-19, individuals who had tested positive for COVID-19 were 2.8 times more likely to report dining at a restaurant, and 3.9 times more likely to report going to a bar or coffee shop, compared to those who tested negative.[7] (*See* also Westergaard Aff. ¶ 33, Pet.-App. 148.)

In light of its findings, the CDC study recommended that, "As communities reopen, efforts to reduce possible exposures at locations that offer on-site eating and drinking options should be considered to protect customers, employees, and communities."[8] (*See also* Westergaard Aff. ¶ 33, Pet.-App. 148.) Echoing concerns about indoor crowding, an October report on Wisconsin by the White House Coronavirus Task Force recommended "tailored business and public venues

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[6] Kiva A. Fisher et al., *Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥ 17 Years in 11 Outpatient Health Care Facilities—United States, July 2020*, 69 Morbidity & Mortal Wkly. Rep. 1258, 1259 (2020) https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6936a5-H.pdf. A summary of the study is available. *Id.* at 1263.

[7] *Id.*

[8] *Id.*

measures" and "limiting indoor gathering sizes" to address high activity levels, calling the latter "especially important in the next few weeks given the recent increased transmission with larger numbers of infectious individuals."[9]

On October 6, consistent with the medical evidence, DHS issued Emergency Order 3 (Pet.-App. 120–26). The order banned larger public gatherings, limiting indoor crowds to no more than 25% of the municipal occupancy limit for a given room, or no more than 10 people in the absence of a municipal limit. (EO-3, Pet-App. 122).[10] It exempted private residences unless used for events that are open to the public. (EO-3, Pet-App. 122). And it provided other exemptions, including for childcare settings, schools and universities, health care and human services operations, Tribal nations, and government and public infrastructure operations (including food distributors). (EO-3, Pet-App. 122–24). It exempted places of religious worship, political rallies, and other speech protected by the First Amendment. (EO-3, Pet-App. 124–25.) The order explained that it would be effective from October 8 to November 6, 2020—two incubation periods of COVID-19. (EO-3, Pet-App. 126.)

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[9] White House Coronavirus Task Force, Wisconsin State Report (Oct. 11, 2020), https://webpubcontent.gray.tv/wsaw/documents/WHTaskForceReport.pdf [https://perma.cc/SL5V-U6DY].

[10] The same day that DHS issued Emergency Order 3, Governor Evers announced over $100 million in grants to help small businesses endure the pandemic. Press Release, Wis. Governor Tony Evers, Gov. Evers Invests Additional $100 Million in Wisconsin Small Businesses and Economic Stabilization (Oct. 6, 2020), https://content.govdelivery.com/accounts/WIGOV/bulletins/2a4759f

Given the continuing high level of COVID-19 activity, DHS has drafted a subsequent order to forbid certain indoor public gatherings. (EO-4, Pet.-App. 132–37.) Like Emergency Order 3, Emergency Order 4 contains exemptions, including private residences except when a private residence is open to the public for an event; in that instance, gatherings would be limited to 10 people. It would provide that public gatherings are limited to no more than 25% of total occupancy limits; if no occupancy limit exists, then gatherings would be limited to 4 people per 1000 square feet. (EO-4, Pet.-App. 133.) It would remain in effect for 28 days—two COVID-19 incubation periods—unless changed by a subsequent DHS order. (EO-4, Pet.-App. 136.) Secretary-designee Palm has attested that DHS wishes to issue Emergency Order 4 as soon as possible, but believes they could not currently do so given the court of appeals' holding; should this Court reverse that holding, DHS would issue the order. (Palm Aff. ¶¶ 18–21, Pet.-App. 130–31.)

III. Following conflicting circuit court preliminary relief decisions, the court of appeals struck down Emergency Order 3 in a sharply divided opinion.

A. The circuit court proceedings.

This case began with a complaint brought by plaintiffs—not parties to this appeal—challenging Emergency Order 3. On October 13, the original plaintiffs moved for an ex parte restraining order and temporary injunction. The next day, the circuit court, the Honorable John M. Yackel presiding, granted the ex parte motion without explanation. (R. 17.) DHS and Secretary-designee Palm (hereinafter "DHS") and plaintiffs both filed notices of judicial substitution, and the Honorable James C. Babler was ultimately assigned to preside. (R. 14; 16; 32.)

On October 16, Intervenors-Plaintiffs The Mix Up, Liz Sieben, Pro-Life Wisconsin Education Task Force, Inc., and Dan Miller appeared and sought intervention as additional plaintiffs. (R. 44; 50.) Intervenors-Plaintiffs argued that Emergency Order 3 also harmed them and joined in the request for a temporary injunction. (R. 45; 51; 52.)

On October 19, the circuit court held a hearing on the motions. After granting the motion to intervene, the court denied the motion for a temporary injunction.[11]

The circuit court held that the movants failed to show a likelihood of success on the merits. The circuit court noted that this Court's decision in *Palm* dealt primarily with subsections of Wis. Stat. § 252.02 that were not the basis of Emergency Order 3, and that the *Palm* court did not provide clarity on how its rulemaking analysis applied to subsection (3). Rather, the circuit court explained, the *Palm* court barely discussed that subsection and specifically left in place the provision of the Safer at Home order that closed schools. The court concluded that the movants failed to show a reasonable

[11] The court of appeals ordered expedited compilation of the existing record, and the existing circuit court filings were transmitted to the court of appeals. The court of appeals waived the transcript requirement, so no transcript of the hearing is in the record. A recording of the hearing is currently available through TMJ4 News' Facebook page. TMJ4 News, *Tavern League Lawsuit Injunction Hearing,* Facebook (Oct. 19, 2020) https://www.facebook.com/tmj4/videos/tavern-league-lawsuit-injunction-hearing/348453463047434/. The circuit court's explanation of his decision begins at approximately 1:18:30 in the video.

chance of success on the merits, and denied the motion for a temporary injunction.[12]

B. The court of appeals decision.

On October 25, the court of appeals granted (1) Intervenors-Plaintiffs' petition for an interlocutory appeal challenging the circuit court's denial of a temporary injunction, and (2) an order enjoining Emergency Order 3 pending appeal. The original plaintiffs did not join in these requests. Following expedited briefing, on November 6, the court of appeals issued a summary disposition order reversing the circuit court's order denying Intervenors-Plaintiffs' motion for a temporary injunction. (Ct. App. Op., Pet.-App. 101–17.)

1. The majority opinion

The majority decision held that "under our supreme court's holding in *Palm*, Emergency Order #3 is invalid and unenforceable as a matter of law." (Ct. App. Op. 3, Pet.-App. 103.) The court began by reiterating the five-part standard for rulemaking under chapter 227. (Ct. App. Op. 3, Pet-App. 103.) The court did not explain how Emergency Order 3 met any of the individual elements of the test; instead, it noted that the *Palm* decision "emphasized" that Safer at Home "relied heavily on Palm's subjective judgment." (Ct. App. Op. 3–4, Pet.-App. 103–04 (citing *Palm*, 391 Wis. 2d 497, ¶¶ 27–28)). The court reasoned that because Emergency Order 3 imposed capacity limits that—like the Safer at Home order—reflected discretionary judgment about how to combat COVID-19, it

[12] The circuit court also found that the movants failed to show: (i) irreparable harm; and (ii) that temporary injunctive relief was necessary to preserve the status quo. Those issues are not raised in this appeal.

was an unpromulgated rule under *Palm*'s reasoning. (Ct. App. Op. 5, Pet.-App. 105.)

The court pointed to the fact that the Safer at Home order had included capacity limits as part of exemptions in that order to the closure of businesses, allowing essential businesses to remain open with certain capacity limits. (Ct. App. Op. 5, Pet.-App. 105.) Because those closures were struck down by this Court in *Palm*, the court of appeals inferred that any capacity limitations must be invalid. (Ct. App. Op. 5, Pet.-App. 105.)

The court acknowledged in a footnote that this Court did not invalidate the part of the Safer at Home order that closed schools. (Ct. App. Op. 6, n.3, Pet.-App. 106.) Because this Court did not "provide any explanation for its decision in that regard," and because "Emergency Order #3 does not purport to close any schools," the court of appeals "decline[d] to read the *Palm* court's failure to invalidate Emergency Order #28's school closure provision as having any effect on the validity of Emergency Order #3." (Ct. App. Op. 6, n.3, Pet.-App. 106.)

The majority concluded that Intervenors-Plaintiffs were "certain to succeed on the merits because Emergency Order #3 was unquestionably invalid and unenforceable under our supreme court's holding in *Palm*." (Ct. App. Op. 8, Pet.-App. 108.)[13]

[13] The majority also reversed the circuit court's holdings regarding the preservation of the status quo and irreparable harm. (Ct. App. Op. 6–7, Pet.-App. 106–07.) DHS does not contest those holdings at this stage.

2. Judge Stark's dissent.

Judge Stark dissented, opining that the majority's holding "considerably over-reads portions" of the *Palm* decision "and ignores other portions of that decision." (Ct. App. Op. 9, Pet.-App. 109.) She noted that the *Palm* Court focused on the breadth of the Safer at Home order. (Ct. App. Op. 9, Pet.-App. 109.) And she observed that this Court only gave "specific attention" to the "general order of general application" component of the five-part definition of a "rule." (Ct. App. Op. 11, Pet.-App. 111.) She noted that the *Palm* dispute seemed "restricted to whether Emergency Order #28 was a 'general order of general application,'" and emphasized that this Court did not otherwise "withdraw or overrule" any other caselaw concerning the full requirements of what constitutes a "rule." (Ct. App. Op. 11, Pet.-App. 111.)

Judge Stark rejected the majority's view that, under *Palm*, every general order of general application involving any degree of discretion constitutes a rule. She did "not read *Palm* as saying that" challengers are "absolved of their obligation to show that the acts complained of constitute a 'rule' under the specific facts of each case." (Ct. App. Op. 11, Pet.-App. 111.) Instead, Judge Stark emphasized an additional element of the five-part rulemaking standard: that "the specific agency action 'implement[s], interpret[s] or make[s] specific legislation enforced or administered by such agency *as to govern the interpretation or procedure of such agency*." (Ct. App. Op. 11–12, Pet.-App. 111–12 (alteration in original) (citing *Citizens for Sensible Zoning v. DNR*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979).)

Judge Stark observed that the exemption of the school closure provision in *Palm* illustrated that a "general order of general application" is not a rule if it does not satisfy the other elements of the five-part standard. She noted that the fact "that the supreme court left a portion of the [Safer at Home]

order untouched is a significant indication that the scope of the *Palm* decision is not nearly as broad as the majority thinks." (Ct. App. Op. 13, Pet.-App. 113.) And that was particularly true, in her view, since "nowhere did the supreme court discuss the Secretary-Designee's authority under subsec. (3)." (Ct. App. Op. 13, Pet.-App. 113.)

As to the capacity limitations in Emergency Order 3, Judge Stark found that the majority's holding was "based on a misunderstanding of the scope of Emergency Order #28." (Ct. App. Op. 14, Pet.-App. 114). She recognized that capacity limitations were included in a provision of the Safer at Home order that distinguished "essential" from "non-essential" businesses and operations. (Ct. App. Op. 14, Pet.-App. 114). The capacity limits, as Judge Stark explained, applied to essential businesses that remained open for in-person sales; they were not a standalone provision of the Safer at Home order. (Ct. App. Op. 15, Pet.-App. 115.) In other words, "the supreme court could not leave the capacity limits untouched in Executive Order #28 without preserving the essential/nonessential business distinction." (Ct. App. Op. 15, Pet.-App. 115.)

Judge Stark concluded that "Emergency Order #3 is substantially narrower and does not contain the kind of subjective judgments at issue in *Palm*." (Ct. App. Op. 15, Pet.-App. 115.) That is because "[i]t does one thing and one thing only: limit public gatherings." (Ct. App. Op. 15, Pet.-App. 115.) Judge Stark therefore opined that "*Palm* does not dictate that the provisions of Emergency Order #3 had to be promulgated as a rule—in fact, *Palm* suggests that the Secretary-Designee could validly issue the order without going through the rulemaking process." (Ct. App. Op. 16, Pet.-App. 116.).

STANDARD OF REVIEW

This case originated with the circuit court's order denying a motion for a temporary injunction. The Court of Appeals reversed, finding that the circuit court erroneously exercised its discretion by misapplying the law. This Court reviews the question of law embedded in discretionary decisions independently. *See Kocken v. Wis. Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 26, 301 Wis. 2d 266, 732 N.W.2d 828.

ARGUMENT

I. Emergency Order 3 did not constitute a rule.

A. Under our constitutional structure, agencies may properly be required to go through rulemaking only for actions that set policy and have the force of law.

Administrative rulemaking requirements are grounded in separation of powers principles. Under those principles, the legislative branch determines policy choices in the first instance, pursuant to the constitutional grant of the legislative power of the state to the Legislature. Wis. Const. art. IV, §§ 1, 17.

Following enactment of a law, the Legislature's task is generally finished. The baton passes to the executive branch to execute it. Wis. Const. art. V, § 4. In carrying out its constitutional mandate, the executive branch necessarily has authority to interpret the law and to exercise judgment in applying the law to the facts before it. *Tetra Tech EC, Inc. v. Wisconsin DOR*, 2018 WI 75, ¶ 53, 382 Wis. 2d 496 ("The executive must certainly interpret and apply the law; it would be impossible to perform his duties if he did not."); *see also Serv. Emps. Int'l Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶ 106, 393 Wis. 2d 38, 946 N.W.2d 35 (observing that "the

executive's interpretation of the laws . . . is inseparable from the executive's constitutionally-vested power.")

The execution of the law is generally a core executive power. That is so even though, in carrying out this role, the executive must exercise discretion to determine how to apply the policy determinations embedded in the law. *See SEIU*, 393 Wis. 2d 38, ¶ 106. "The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by [the Legislature] that arise during the law's administration." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327 (2014).

In certain circumstances, the Legislature may require the executive branch to go through a rulemaking process before it sets a course, seeking the Legislature's check on that course. That involvement is permissible only when factors are present that make the action a shared executive and legislative power.

First, the statute under which the executive acts must create broad, undefined goals or policies, so that the executive must formulate forward looking policies in order to act. Second, the executive's action must set a prospective, binding course for the future: it must have the force of law going forward. *See, e.g. United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 245 (1973) (noting the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other").

When these factors are present, the Legislature may permissibly weigh-in because the action creates policy and will be applied as a rule to all facts as they come in the future. *Cf. Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 219–20 (1988) (Scalia, J., concurring) (drawing on Administrative

Procedure Act guidance in observing that rulemaking "is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations") (quoting Attorney General's Manual on the Administrative Procedure Act at 13–14 (1947)).

But when those factors are *not* present, the executive is simply carrying out the law, and its actions are exclusively executive in nature. The most basic power of the executive branch is to enforce and apply the law. Wis. Const. art. V, § 4. Allowing the Legislature to be a gatekeeper when the executive engages in that enforcement and application "would demote the executive branch to a wholly-owned subsidiary of the legislature." *SEIU*, 393 Wis. 2d 38, ¶ 107; *see also* Federalist Papers 48–49 (James Madison) (opining that no branch should have "an overruling influence" on another, and observing that structural encroachment are most likely to come from "the legislative at the expense of the other departments").

B. Chapter 227 does not make executive action subject to rulemaking when it applies plain statutory authority to facts on the ground.

Chapter 227 recognizes that the Legislature "may delegate rule-making authority to . . . agencies to facilitate administration of legislative policy." Wis. Stat. § 227.19(1)(b). But agencies need not undertake rulemaking every time they act under the statutes they are charged with executing. Consistent with separation of powers principles, the definition of "rule" in that chapter reflects that rulemaking is needed only when (1) a statute leaves large enough gaps that require the agency to engage in policymaking, and (2) the agency seeks to implement that policy in its enforcement or administration of the law going forward.

1. To be a rule, the agency's action must fill in the gaps of a statute in a way that requires the agency to engage in policymaking.

First, chapter 227 requires no rulemaking where an agency applies the plain terms of a statute to a particular factual scenario. Wisconsin Stat. § 227.01(13) defines a rule as "a regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency." That definition reflects agency action that takes the relevant statute and "implements," "interprets" or makes it specific going forward.

Courts agree that agencies do not need to engage in rulemaking where they execute plain statutes. *Schoolway Transp. Co. v. Div. of Motor Vehicles*, 72 Wis. 2d 223, 228, 240 N.W.2d 403 (1976) ("When a statute is plain and unambiguous, no interpretation is required . . ."). Rulemaking involves an agency's exercise of delegated legislative power to "fill up the details" of a statute. *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929, 941 (1928).

For example, in *Clean Wisconsin, Inc. v. Public Service Commission of Wisconsin*, this Court observed that the Public Service Commission's method in applying its directive to prioritize certain types of energy production, did not amount to a rule. 282 Wis. 2d 250, ¶¶ 123–34, 700 N.W.2d 768. The application of the law unquestionably involved "discretion," but the exercise of that discretion "was necessary to determining whether alternatives were cost effective and technically feasible, a clear requirement of [the Energy Priorities Act.]" *Id.* ¶ 132. The Court held no rulemaking was required because the relevant policy choices were resolved by

applying an explicit statutory mandate to a particular factual scenario. *See id.* ¶ 124; *see also, e.g.*, *Gibson v. Transp. Comm'n, DOT*, 103 Wis. 2d 595, 605, 309 N.W.2d 858 (observing that the Legislature "has recognized that an agency must apply facts to rules or statutes and has provided that the process is not rulemaking").

Agencies must promulgate rules only when the relevant authorizing statute is sufficiently broad and undefined that the executive must fill in gaps by making forward-looking policy that the Legislature did not determine.

2. Chapter 227's rulemaking procedures apply only to agency actions that will govern the ongoing enforcement or application of the law.

Second, chapter 227 requires rulemaking only for agency action that will govern the agency's ongoing enforcement or administration of the law, not just the enforcement or application of the statute in a specific circumstance. This, too, is consistent with the separation of powers: when the agency creates an enforceable standard that will govern the application of the law to the facts as they arise, it is engaging in a shared executive and legislative task.

Multiple words in chapter 227's definitional sections reflect that only an agency's ongoing, prospective rules of the road, applicable to whatever facts arise, are treated as "rules" under that chapter.

"[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Read in context, chapter 227's definitional terms make clear that an agency's

action is a rule when it is setting a course for its prospective governance of a statute it enforces or administers.

Section 227.01(13) defines a rule as having "the force of law" and issued "to implement, interpret, or make specific legislation enforced or administered by the agency." The term "implement" means "to give practical effect and ensure of actual fulfillment by concrete measures." *Implement*, Merriam-Webster's Collegiate Dictionary 624 (11th ed. 2003). It means to begin or set on a prospective course of action; it does not mean simply responding to facts on the ground. *Cf. FTC v. Brigadier Indus. Corp.*, 613 F.2d 1110, 1117 (D.C. Cir. 1979) ("Rulemaking is prospective in scope and nonaccusatory in form, directed to the implementation of general policy concerns into legal standards.").[14] And the provision applies only to legislation "enforced" or "administered" by the agency. Those verbs apply when the agency has ongoing duties to carry out a statute. Their inclusion shows that a "rule" is one that will govern how the agency's ongoing execution of those duties.

Wisconsin Stat. § 227.10(1), which describes when rulemaking is required, is consistent. It provides that "[e]ach agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Rules "govern," and "govern" means "to control and direct the making and administration of policy." *Govern*, Merriam-Webster.com, https://www.merriam-webster.com/

[14] The term "implement" is sometimes defined more broadly to mean essentially any action. For example, when an executive agency carries out (or "implements") a specific legislative mandate or direction, it is engaging in an executive action. *See SEIU, Local 1 v. Vos*, 2020 WI 67, ¶ n.6, 393 Wis. 2d 39, 946 N.W.2d 35. Here, however, "implement"—just like "interpret" and "mak[e] specific" refers to forward-looking government action.

dictionary/govern (last visited Nov. 23, 2020). Agency determinations that control how policies are "made and administered," in turn, are necessarily ones that have ongoing effect to facts as they emerge over time.

Courts have long drawn a distinction between rules with ongoing, implementing effect and executive application of the law to facts. They have recognized that rulemaking is required only where an agency takes action to set general policy or control future application. In *Wisconsin Electric Power Co. v. DNR*, for example, the court drew on prior versions of Wis. Stat. §§ 227.01(13) and 227.10 in concluding that, to be a rule, government action must be "issued . . . as to govern the interpretation or procedure of such agency." 93 Wis. 2d 222, 232, 287 N.W.2d 113 (1980) (*quoting Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 914, 280 N.W.2d 702 (1979)).

This Court has treated agency action as a rule when it implemented the law in a way that controlled future regulation in a particular area. In *Schoolway*, the court held that an agency's interpretation constituted a rule because it was "being administered as law" and controlled "the manner in which the terms of the statute" would be applied. 72 Wis. 2d at 237. Similarly, in *Citizens for Sensible Zoning*, the court held that an agency "implement[ed]" law by imposing floodplain ordinance that governed its regulation of area going forward. 90 Wis. 2d at 816. And in *Wisconsin Electric Power*, the court held that an agency "implement[ed]" a statute by imposing uniform chlorine limitations intended to apply to all power plants permits going forward. *Wisconsin Electric Power*, 93 Wis. 2d at 234–35.

In contrast, where agency action is not taken to govern how a law is enforced or administered in future situations, it is not a rule. Indeed, as this Court has observed, the exemption in chapter 227's rulemaking requirements for

specific factual cases "merely recognizes that, in resolving specific matters, agency decisions will often contain—but not create—a statement of policy, or interpretation of a statute as applied to the matter at hand, and that they need not adopt a new rule for each specific matter they resolve." *Lamar Cent. Outdoor, LLC v. DHA*, 2019 WI 109, ¶ 24, 389 Wis. 2d 486, 936 N.W.2d 573 (2019).

Chapter 227 requires rulemaking only when an agency makes policy based on a general statute that controls the ongoing enforcement or administration of that law.

C. Emergency Order 3 applied a well-delineated statute to specific factual circumstances.

Under the meaning of a rule as defined in chapter 227 and interpreted by courts, Emergency Order 3 was not a rule. It applied the plain language of Wis. Stat. § 252.02(3) to specific factual circumstances. It implemented no standards for the agency's ongoing enforcement or administration of a law.

First, the statute left no policymaking for DHS to develop. DHS simply applied the plain terms of the statutory language. Wisconsin Stat. § 252.02(3) explicitly provides DHS with authority to "forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." The law explains the actions DHS can do (close schools and forbid public gatherings) and when and why it can do it (to control outbreaks and epidemics).

Second, Emergency Order 3 did not implement a standard for the agency's ongoing enforcement or administration of a statute. Emergency Order 3 did not create any standard for the ongoing governance of Wis. Stat. § 252.02(3). DHS simply responded to specific facts about the pandemic, in its most recent, specific manifestation. It

"forbids public gatherings" of large crowds in places that are open to the public. And it was issued to "control" the rapid spread of COVID-19, using capacity limitations to target circumstances that pose particularly high risks of viral spread based on the epidemiological facts.

Indeed, Wis. Stat. § 252.02(3) confines DHS to responding to facts, not creating a rule, by its very terms. It allows DHS to address a situation limited to a specific time and situation: an outbreak or epidemic.

Emergency Order 3 was not a rule under Wis. Stat. ch. 227, and DHS did not need to undertake rulemaking to apply its terms.

D. The court of appeals' interpretation of Wis. Stat. ch 227 would lead to absurd results.

The court of appeals suggested that DHS could act without rulemaking only if it exercised no discretion at all. That reading would lead to an absurd result.

Courts interpret statutory language in a way that aligns with common sense—"reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. To that end, "[s]tatutory purpose is important in discerning the plain meaning of a statute," with courts "favor[ing] a construction that fulfills the purpose of the statute over one that defeats statutory purpose." *Westmas v. Creekside Tree Serv. Inc.*, 2018 WI 12, ¶ 19, 379 Wis. 2d 471, 907 N.W.2d 68 (citing *Kalal*, 271 Wis. 2d 633, ¶ 48).

The court of appeals majority's reasoning leads to a bizarre principle. If correct, rulemaking would be required under Wis. Stat. § 252.02(3) only when DHS determines that something *less* than a total ban on public gatherings is appropriate in light of the epidemiological facts. The court of appeals took issue with Emergency Order 3 not because it

forbade public gatherings, but because it targeted its approach "to control outbreaks and epidemics" by using capacity limitations and exemptions. In other words, under the court of appeals' reasoning, if DHS had simply banned *all* public gatherings, DHS would not have needed to promulgate that action as a rule because it would involve no discretion on DHS's part.

Indeed, Intervenors-Plaintiffs leave no doubt that this is precisely where that position would lead. They have argued that the school closures preserved in *Palm* are distinguishable because it was a "*blanket* school-closure" that did not involve any selective judgment. (Resp. to Pet. for Review 13–14.) The upshot is that the state's public health agency would be forced into an all-or-nothing approach: impose a complete ban across the state, with no exceptions, or go through weeks (if not months or longer) of rulemaking procedures to take targeted action that may be inapplicable by the time it gets promulgated.

Beyond the plain language of ch. 227 and the executive branch's prerogative to apply the law, that result cannot be squared with common sense—the idea that rulemaking procedures require *more* legislative oversight when agency action is *less* expansive is nonsensical. Indeed, that result would be particularly unreasonable in the context of Wis. Stat. § 252.02(3). The law authorizes DHS to "control" outbreaks or epidemics—not to navigate a maze of rulemaking procedures while a virus rampages across the state.

Even emergency rulemaking takes weeks if not months, diseases can spread quickly, and the situation on the ground can change so much in a matter of days that the rule the agency drafted would be stale before promulgated. That timeline is wholly inconsistent with a fast-moving and quickly evolving pandemic or outbreak. Consider, for example, that in

a recent 18-day period (roughly the technical minimum time to promulgate a rule) Wisconsin saw 100,000 new COVID-19 cases and 769 deaths.[15] No reasonable interpretation of the legislative purpose in Wis. Stat. § 252.02(3) would require the kind of delay that the court of appeals decision would entail.

II. Emergency Order 3 was not a rule under *Palm*.

Intervenors-Plaintiffs and the majority below believed that *Palm* compelled the conclusion that Emergency Order 3 was a rule. As the court of appeals dissent recognized, the court significantly overread *Palm*

A. *Palm* held only that the provisions of the Safer at Home order premised on broad, non-specific grants of authority were rules.

In *Palm*, the parties disagreed on whether the provisions of the Safer at Home order were "general orders" of "general applicability" within the meaning of Wis. Stat. § 227.01(13). Although the *Palm* court did not address the final part of the rulemaking test—whether DHS's action implemented, interpreted, or made specific legislation enforced or administered by the agency—it emphasized that Safer at Home was issued under the broad, non-specific grants of statutory authority in Wis. Stat. § 252.02(4) and (6). *See, e.g., Palm*, 391 Wis. 2d 497, ¶ 31.[16]

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[15] Wis. Dep't of Health Servs., *COVID-19: Cases*, https://www.dhs.wisconsin.gov/covid-19/cases.htm (last revised Nov. 18, 2020) (information updated regularly) (using time period of October 31 to November 17).

[16] Wisconsin Stat. § 252.02(4) provides that DHS may "promulgate and enforce rules or issue orders" (1) to "guard[ ] against the introduction of any communicable disease into the state"; (2) "for the control and suppression of communicable

The Court did not discuss the defined authority in Wis. Stat. § 252.02(3) to "close schools" or "forbid public gatherings" in its rulemaking analysis. *See id.* ¶¶ 15–42. Instead, it upheld the provision of the Safer at Home order that applied that power—school closures. *Id.* ¶ 3 n.6. That was consistent, because Wis. Stat. § 252.02(3) did not use the "imprecise terminology" that the *Palm* court focused on in Wis. Stat. §§ 252.02(4) and (6). *See id.* ¶ 55.

Here, Emergency Order 3 applied the same statutory provision: Wis. Stat. § 252.02(3). That statute conferred well-delineated statutory power, and DHS applied that power to the current public crisis, with no need to determine the scope of its authority under an open-ended mandate.

As Judge Stark observed in her dissenting opinion, "Emergency Order #3 is substantially narrower and does not contain the kind of subjective judgments at issue in *Palm*." (Ct. App. Op. 15, Pet.-App. 115.) That is because the order "does one thing and one thing only: limit public gatherings." (Ct. App. Op. 15, Pet.-App. 115.)

B. *Palm* did not require rulemaking every time an agency exercises discretion in its enforcement of the law.

The court of appeals majority concluded that the school-closure components of the Safer at Home order were different from forbidding public gatherings in Emergency Order 3 on

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diseases"; (3) "for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease," and (4) "for the sanitary care of jails, state prisons, mental health institutions, schools, and public buildings and connected premises." And Wis. Stat. § 252.02(6) provides, without further specification, that DHS "may authorize and implement all emergency measures necessary to control communicable diseases."

the theory that the school closure provisions "did not involve the same level of subjective judgment as Emergency Order #3." (Ct. App. Op. 6, Pet.-App. 106.) That subjectivity theory is contrary to longstanding case law, and *Palm* did nothing to disrupt that precedent.

As a factual matter, the court of appeals' premise about the Safer at Home order's school closure provision is incorrect. The Safer at Home order did not simply close schools. Under the Safer at Home order, schools were closed for a specific time period, could continue to provide "distance learning or virtual learning," and could still be used "for Essential Government Functions and food distribution." Emergency Order 28, § 4. Thus, as here, DHS exercised judgment when determining how and when to close schools under Wis. Stat. § 252.02(3).

More importantly, as a legal matter, the court of appeals' subjectivity test is unhelpful and incorrect. All executive action requires some amount of discretion: it is inherent in carrying out the law. *See, e.g.*, *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) ("The legislative process would frequently bog down if Congress were constitutionally required to apprise before-hand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation.")

As discussed above, the question is instead whether the gaps left in the statute are sufficiently great that they require the agency to engage in setting the policy for the law. Section 252.02(3) comes nowhere near to leaving such gaps. It provides explicit authority and requires no policymaking from DHS. As such, executing its terms required no rulemaking.

C. The capacity limitations at issue in *Palm* were inextricably connected to the business closure provisions ordered under Wis. Stat. § 252.02(4) and (6).

The court of appeals majority reasoned that *Palm* required treating Emergency Order 3 as a rule because selective capacity limitations were part of the Safer at Home provisions that were struck down in *Palm*. That conclusion was incorrect; it failed to read *Palm* in context. *Palm* struck down those provisions only because they were inherently part of the business closure provisions DHS ordered pursuant to Wis. Stat. §§ 252.02(4) and (6).

In the Safer at Home order, the capacity limitations were part of an exemption to the order closing businesses and operations. *See* Emergency Order 28 § 2(b)(iii)). That exemption allowed essential businesses to stay open subject to certain capacity limitations. *Id*. The *Palm* court held that the business closures constituted a rule because they required DHS to make an ex ante determination concerning what it could do under broad and open grants of statutory authority under Wis. Stat. § 252.02(4) and (6). *See id.* ¶ 30. While that ruling required all aspects of the business closures to be struck, including exemptions for essential businesses with capacity limits, there was no analysis of DHS's authority to separately forbid public gatherings under Wis. Stat. § 252.02(3). The Court did not even mention, let alone specifically analyze, capacity limitations as an independent provision that DHS could order. *See, e.g.*, *id.* ¶ 17 (listing provisions of the Safer at Home order).

The court of appeals majority substantially overread *Palm*. The decision does not require concluding that Emergency Rule 3 is a rule; to the contrary, its holding and underlying analysis counsel that it is not.

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Executive agencies carry out the laws they are charged to every day, and most of that action requires no rulemaking. Rulemaking is required only when an agency fills in the details of a general statute in a way that makes policy decisions about implementing the governance of that statute. It is not required when agencies apply a plain law to facts on the ground, even when they exercise discretion in doing so. Courts have long recognized that distinction, and *Palm* did not upend that precedent.

CONCLUSION

This Court should hold that Emergency Order 3 was not a rule under Wis. Stat. ch. 227.

Dated this 24th day of November 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

COLIN A. HECTOR
Assistant Attorney General
State Bar #1120064

HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

Attorneys for Defendants-Respondents-Petitioners Andrea Palm and Wisconsin Department of Health Services

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8407 (CAH)
(608) 266-8101 (HSJ)
(608) 266-8690 (TCB
(608) 294-2907 (Fax)
hectorca@doj.state.wi.us
jursshs@doj.state.wi.us
bellaviatc@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,224 words.

Dated this 24th day of November 2020.

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COLIN A. HECTOR
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (Rule) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 opposing parties.

Dated this 24th day of November 2020.

_____
COLIN A. HECTOR
Assistant Attorney General