

RECEIVED

OCT 29 2020

CLERK OF SUPREME COURT
OF WISCONSIN

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,

Intervenor-Plaintiffs-Appellants-Respondents.

ON APPEAL FROM A NON-FINAL ORDER DENYING
TEMPORARY INJUNCTIVE RELIEF, ENTERED IN THE
CIRCUIT COURT FOR SAWYER COUNTY, THE
HONORABLE JAMES C. BABLER, PRESIDING

**ANDREA PALM AND WISCONSIN DEPARTMENT OF
HEALTH SERVICES' PETITION AND APPENDIX TO
BYPASS COURT OF APPEALS**

JOSHUA L. KAUL
Attorney General of Wisconsin

HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

COLIN A. HECTOR
Assistant Attorney General
State Bar #1120064

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

Attorneys for Petitioners Andrea
Palm and Wisconsin Department
of Health Services

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

TABLE OF CONTENTS

| | Page |
|---|------|
| INTRODUCTION | 1 |
| ISSUE PRESENTED | 3 |
| RELIEF REQUESTED | 3 |
| STATEMENT OF THE CASE | 4 |
| I. DHS issued Emergency Order 3 in response to the unprecedented surge of COVID-19 spread across the State. | 4 |
| II. The circuit court denied Intervenor- Plaintiffs' motion to temporarily enjoin Emergency Order 3 | 5 |
| III. The Court of Appeals granted Intervenor-Plaintiffs' petition for leave to appeal and motion to enjoin Emergency Order 3 pending appeal, and ordered expedited briefing. | 7 |
| ARGUMENT | 8 |
| I. Bypass is warranted where an appeal satisfies this Court's criteria for review, where this Court will ultimately review the matter anyway, and where a clear need to hasten the ultimate appellate decision exists | 8 |
| II. This appeal satisfies criteria for review under Wis. Stat. § (Rule) 809.62(1r). | 8 |
| III. Ultimately, this Court will likely decide to review this appeal anyway. | 12 |
| IV. Hastened review is necessary as Wisconsin wages its toughest battles against COVID-19 spread. | 13 |
| CONCLUSION | 14 |

TABLE OF AUTHORITIES

Cases

| | |
|--|------------|
| <i>Kirk v. Credit Acceptance Corp.</i> , 2013 WI App 32, 346 Wis. 2d 635, 829 N.W.2d 522 | 5 |
| <i>Matter of Commitment of J.W.K.</i> , 2019 WI 54, 386 Wis. 2d 672, 927 N.W.2d 509 | 12 |
| <i>Serv. Emps.' Int'l Union, Local 1 v. Vos</i> , 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 | 10 |
| <i>Wisconsin Legislature v. Palm</i> , 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900 | 1, 2, 6, 9 |

Statutes

| | |
|-----------------------------------|------------------|
| Wis. Stat. § 227.01(13) | 9 |
| Wis. Stat. § 252.02 | 1, 6, 9, 10 |
| Wis. Stat. § 252.02(3) | 1, <i>passim</i> |
| Wis. Stat. § 252.02(4) | 9 |
| Wis. Stat. § 252.02(6) | 9 |
| Wis. Stat. § 808.05(1) | 8 |
| Wis. Stat. § 809.62(1) | 2 |
| Wis. Stat. § 809.62(1r) | 2, 12 |
| Wis. Stat. § 809.62(1r)(c) | 8 |
| Wis. Stat. § 809.62(1r)(c)1 | 8, 11 |
| Wis. Stat. § 809.62(1r)(c)3 | 11 |

INTRODUCTION

This case involves immediate, life-threatening public health conditions that justify bypassing a decision by the court of appeals and proceeding directly to this Court. On October 27, 2020, *alone*, Wisconsin saw over 5,200 newly reported COVID-19 infections, and 64 Wisconsinites died.¹ This new record has followed days upon days of record-breaking numbers of new Wisconsin COVID-19 cases, hospitalizations, and deaths.

Wisconsin Stat. § 252.02(3) gives the Wisconsin Department of Health Services (DHS) the authority to “close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.” Under that provision, DHS, acting through Secretary-Designee Palm, issued Emergency Order 3, temporarily forbidding certain public gatherings to help control the unprecedented surge of COVID-19 spread across the State. At present, this critical public health order is temporarily enjoined, pending the outcome of this appeal. That circumstance makes it urgent to expedite this matter.

In May, in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, this Court struck down most of DHS’s earlier Safer at Home order, which had relied on DHS’s authority under subsections (4) and (6) of Wis. Stat. § 252.02, as well as subsection (3), which is at issue here. This Court’s holding in *Palm*, however, specifically

¹ Wis. Dep’t of Health Servs., *COVID-19: Wisconsin Cases*, <https://www.dhs.wisconsin.gov/covid-19/deaths.htm> (last updated Oct. 28, 2020) (information updated regularly); Wis. Dep’t of Health Servs., *COVID-19: Wisconsin Deaths*, <https://www.dhs.wisconsin.gov/covid-19/deaths.htm> (last revised Oct. 28, 2020) (information updated regularly).

exempted the provision in Safer at Home that closed schools pursuant to Wis. Stat. § 252.02(3). Moreover, this Court's legal analysis in *Palm* did not include any substantive discussion of Wis. Stat. § 252.02(3). The applicability of *Palm*'s holding to orders issued by DHS under Wis. Stat. § 252.02(3) thus remains an open question.

Intervenor-Plaintiffs here appeal the circuit court's denial of a temporary injunction of Emergency Order 3. Their challenge to that order rests entirely on their position that it violates this Court's holding in *Palm* because it was not promulgated as a rule. The extent, if any, to which *Palm*'s analysis applies to Wis. Stat. § 252.02(3) and to Emergency Order 3 are questions that ultimately must be resolved by this Court—and the sooner this Court acts, the better for the health, lives, and livelihood of all the people of Wisconsin.

First, whether *Palm* requires an agency to go through the rulemaking process whenever it issues a statewide order that merely applies a statute with well-defined parameters, like Wis. Stat. § 252.02(3), to a presently existing fact situation like the current public health crisis, is a question that meets numerous criteria for review under Wis. Stat. § 809.62(1r). It is a novel question that has statewide impact, and this Court has not offered any previous clarification of *Palm*. Moreover, absent clarification, controversies like this one are likely to recur, not only in the context of DHS's efforts to protect public health during the current pandemic, but any time an administrative agency seeks to execute a statute of statewide effect.

Given the significance of the legal issues in this case and the immediate public impact of the affirmance or reversal of the circuit court's discretionary denial of a temporary injunction, it seems all but inevitable that this appeal will ultimately come before this Court. But every day

in the meantime is a day that DHS is left without a critical, statutorily authorized tool to promptly respond to help contain the spread of COVID-19—a tool that DHS and Secretary-Designee Palm are confident this Court did not intend to wholly strip away from them in *Palm*. And every day of delay is a day that more and more Wisconsinites are infected, hospitalized, and killed by COVID-19. This Court should grant bypass.

ISSUE PRESENTED

This appeal reviews the circuit court's denial of Intervenor-Plaintiffs' motion for a temporary injunction. One element of that issue is whether the circuit court erroneously concluded that Intervenor-Plaintiffs failed to show a likelihood of success on the merits of their challenge to Emergency Order 3.

Intervenor-Plaintiffs' entire merits argument is that this Court's decision in *Palm* required DHS to promulgate Emergency Order 3 as an administrative rule. This appeal therefore requires review of the circuit court's interpretation of *Palm* when it denied the temporary injunction. More specifically, it asks whether *Palm* prohibits DHS from issuing a statewide order under Wis. Stat. § 252.02(3) alone absent rulemaking.

RELIEF REQUESTED

Defendants-Respondents-Petitioners DHS and Palm (hereinafter the "State Defendants") respectfully request that this Court take jurisdiction of this appeal. If bypass is granted, the State Defendants request supplemental briefing and oral argument before this Court.

STATEMENT OF THE CASE

I. DHS issued Emergency Order 3 in response to the unprecedented surge of COVID-19 spread across the State.

In response to Wisconsin's dramatic surge of COVID-19 cases, hospitalizations, and deaths, and with the knowledge that indoor public gatherings pose the highest risk of COVID-19 transmission, DHS Secretary-Designee Palm issued Emergency Order 3 on October 6, 2020, pursuant to DHS's authority under Wis. Stat. § 252.02(3).² (Pet'rs' App. 103.)

Wisconsin Stat. § 252.02(3) provides, in full: "The department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." Wis. Stat. § 252.02(3).

Effective from October 8 to November 6, 2020—two incubation periods of COVID-19—Emergency Order 3 limits gatherings of the public. The order defines public gatherings 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." (Pet'rs' App. 103.)

It provides that in a location where a total occupancy limit exists, gatherings are limited to no more than 25% of the total limit; otherwise, public gatherings are limited to more than 10 people. (Pet'rs' App. 103.)

It exempts private residences, except in circumstances when an event occurs at a private residence that is open to

² Emergency Order 3 is included in the appendix to this petition. (Pet'rs' App. 101–07.)

the public; in that circumstance, the order limits the gathering to 10 people. (Pet'rs' App. 103.) Emergency Order 3 also provides 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). (Pet'rs' App. 103–05.) It further exempts places of religious worship, political rallies, and other speech protected by the First Amendment. (Pet'rs' App. 105–06.)

II. The circuit court denied Intervenor-Plaintiffs' motion to temporarily enjoin Emergency Order 3.

This case began with a complaint brought by plaintiffs—not parties to this appeal—against DHS and DHS Secretary-Designee Palm on October 13, 2020.³ The plaintiffs asked the circuit court to declare Emergency Order 3 unlawful; specifically, they argued that Emergency Order 3 violates this Court's holding in *Palm* because DHS did not promulgate it as a rule.

The original plaintiffs moved for an ex parte restraining order and temporary injunction. On October 14, the circuit court, the Honorable John M. Yackel presiding, granted the ex parte motion. (R. 17.) The State Defendants and plaintiffs both subsequently filed notices of judicial

³ The Court of Appeals ordered expedited compilation of the existing record, and the existing circuit court filings have now been transmitted to the Court of Appeals. This Court may also take judicial notice of the circuit court log set forth on Wisconsin Circuit Court Case Access (CCAP). See *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522. The Court of Appeals waived the transcript requirement, so no transcript of the hearing is in the record.

substitution, and the Honorable James C. Babler was ultimately assigned to preside. (R. 14; 16; 32.)

On October 16, Intervenor-Plaintiffs appeared and sought intervention as additional plaintiffs. They adopted the plaintiffs' arguments and rested on the position that Emergency Order 3 violated this Court's holding in *Palm*. They also joined in the request for a temporary injunction.

On October 19, the circuit court held a hearing on the motions. After granting the motions to intervene, it denied the original plaintiffs' and intervenors' motion for a temporary injunction. The circuit court concluded that the movants failed to make three necessary showings.

The court first concluded that the movants failed to show a likelihood of success on the merits. The court noted that this Court's decision in *Palm* dealt primarily with subsections of Wis. Stat. § 252.02 that are not the basis of Emergency Order 3, and that the Court did not provide clarity on how its rulemaking analysis applied to subsection (3), the relevant provision here. 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 relied on Wis. Stat. § 252.02(3): the provision closing schools.

The court also found that the movants failed to show that: (1) a temporary injunction was necessary to preserve the status quo; and (2) that they would suffer irreparable harm absent the injunction. The court stressed that the affidavits the movants relied on did not set forth specific allegations establishing that they had been complying with Emergency Order 3, and in turn did not establish that any harm was the result of Emergency Order 3 specifically, as opposed to the COVID-19 pandemic generally.

The court also denied the movants' motion for a stay of its decision denying the temporary injunction motion. The circuit court entered an order reflecting its denial of the temporary injunction motion.⁴

III. The Court of Appeals granted Intervenor-Plaintiffs' petition for leave to appeal and motion to enjoin Emergency Order 3 pending appeal, and ordered expedited briefing.

On October 20, 2020, Intervenor-Plaintiffs, not joined by the original plaintiffs, sought leave to appeal the circuit court's order denying the temporary injunction of Emergency Order 3. Following expedited briefing, the Court of Appeals granted both the petition for leave to appeal, and the motion to enjoin Emergency Order 3 pending appeal.⁵ In a divided ruling, the court explained that it believed that Intervenor-Plaintiffs had shown a sufficient likelihood of success on the merits to warrant relief pending appeal. (Pet'rs' App. 112–13.)⁶

The Court of Appeals ordered expedited briefing of the merits of the appeal, (Pet'rs' App. 113); pursuant to that order, Intervenor-Plaintiffs filed their initial brief on October 27, 2020, and the State Defendants today, October 29, 2020, filed their response brief. This petition follows.

⁴ This order is included in the appendix to this petition. (Pet'rs' App. 108–09.)

⁵ On October 24, 2020, the Court of Appeals issued an amended order to correct a “typographical error, case suffix, and docketing statement filing.” That amended order is included in the appendix to this petition. (Pet'rs' App. 110–13.)

⁶ The Court of Appeals referred to the relief pending appeal as a “stay,” but given that the circuit court had denied the temporary injunction, the Court of Appeals' order instead affirmatively enjoined Emergency Order 3 pending appeal.

ARGUMENT

- I. Bypass is warranted where an appeal satisfies this Court's criteria for review, where this Court will ultimately review the matter anyway, and where a clear need to hasten the ultimate appellate decision exists.**

Wisconsin Stat. § 808.05(1) provides that this Court may take jurisdiction of an appeal if “[i]t grants direct review upon a petition to bypass filed by a party.” Wisconsin Stat. § (Rule) 809.60(1) provides that a party may file with this Court “a petition to bypass the court of appeals pursuant to s. 808.05 no later than 14 days following the filing of the respondent’s brief under s. 809.19 or response.”

This Court’s internal operating procedures set forth circumstances where bypass is warranted: “A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1), and one the court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issue.” Wisconsin Supreme Court Internal Operating Procedures, § II.B.2. Additionally, “[a]t times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision.” *Id.*

- II. This appeal satisfies criteria for review under Wis. Stat. § (Rule) 809.62(1r).**

First, this appeal meets multiple criteria for review, and, accordingly, for bypass here. Most significantly, the underlying question about the scope and nature of this Court’s holding in *Palm* is a “novel one, the resolution of which will have statewide impact,” and only a decision from this Court will help clarify the law. *See* Wis. Stat. § (Rule) 809.62(1r)(c).

Intervenor-Plaintiffs read *Palm* as requiring DHS to go through rulemaking whenever it issues *any* statewide order under Wis. Stat. § 252.02. Yet, as the State Defendants argue in their response brief to the Court of Appeals, *Palm* explicitly exempted from its holding the provision of Safer at Home that closed schools pursuant to the plain language of Wis. Stat. § 252.02(3). See *Palm*, 391 Wis. 2d 497, ¶ 58, n.21 (“This decision does not apply to Section 4. a. of Emergency Order 28.”). Moreover, though *Palm* provided some analysis of DHS’s authority under Wis. Stat. § 252.02(4) and (6), this Court did not include any substantive discussion of Wis. Stat. § 252.02(3). See *generally id.* ¶¶ 15–59. On top of that, this Court explicitly stated that it was not defining the “precise scope” of DHS’s authority under Wis. Stat. § 252.02. *Id.* ¶ 55.

The State Defendants argue that the omission of Wis. Stat. § 252.02(3) from the analysis and holding in *Palm* makes sense because when an agency merely executes a clear statute by applying it to a particular fact situation, its action does not fall within the definition of a “rule” in Wis. Stat. § 227.01(13). In contrast, this Court in *Palm* concluded that most of the provisions in Safer at Home did constitute a “rule” because they were premised on broad, non-specific grants of authority in Wis. Stat. § 252.02(4) and (6) which, absent the procedural safeguards of rulemaking, gave DHS too much ability to determine the scope of its own power. See, e.g., *Palm*, 391 Wis. 2d 497, ¶ 110 (Kelly, J., concurring) (reasoning that DHS was interpreting the law, by announcing policy decisions that DHS had “the authority to confine people to their homes” or “to close private businesses, or forbid private gatherings, or ban intra-state travel, or dictate personal behavior”).

On the other hand, agency action under the more precisely delineated parameters of Wis. Stat. § 252.02(3) would constitute execution of the law, not rulemaking. Otherwise, separation of powers principles would be violated because the executive branch would lose all discretion to execute already defined laws without first obtaining legislative approval. *See, e.g., Serv. Emps.' Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶¶ 104–08, 393 Wis. 2d 38, 946 N.W.2d 35 (“If the legislature can regulate the necessary predicate to executing the law, then the legislature can control the execution of the law itself. . . . [D]emot[ing] the executive branch to a wholly-owned subsidiary of the legislature.”)

Intervenor-Plaintiffs, in contrast, argue that *Palm* absolutely requires rulemaking for any statewide order issued by DHS under any part of Wis. Stat. § 252.02, including subsection (3). Moreover, in spite of the fact that subsection (3) is much more specific than subsections (4) and (6), and in spite of the facts that the *Palm* holding expressly exempted the school closing portion of Safer at Home that was squarely based on subsection (3), Intervenor-Plaintiffs contend that *Palm* was so clear on this point that the State Defendants’ actions constitute an “insult to both the judiciary and the rule of law.” (The Mix Up Initial COA Br. 38.)

If Intervenor-Plaintiffs’ reading of *Palm* is correct, then this Court has limited DHS to an all-or-nothing approach under Wis. Stat. § 252.02(3) absent rulemaking. If the State Defendants’ reading of *Palm* is correct, then DHS is prohibited from taking statutorily authorized action to respond to Wisconsin’s COVID-19 surge in the midst of that surge which is infecting, hospitalizing, and killing more and more Wisconsinites on a daily basis. Either way, this is a novel issue that affects the entire state of Wisconsin, which this Court should address immediately.

Additionally, because this Court only issued *Palm* in May of this year, the application of *Palm* to a DHS order issued solely under Wis. Stat. § 252.02(3) “calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation.” Wis. Stat. § (Rule) 809.62(1r)(c)1. This Court has not offered further interpretation of *Palm* since May, and this Court should now further clarify that recent, critically important holding for the parties here, and for the State overall.

Moreover, absent clarity from this Court on what DHS action *Palm* did and did not prohibit absent rulemaking, this issue will likely recur if DHS determines it needs to promptly respond to a COVID-19 outbreak moving forward. Absent review, any statewide DHS action will be seemingly subject to immediate legal challenge, with challengers raising the same absolute reading of *Palm* that Intervenor-Plaintiffs advance in this appeal.

Lastly, the ping-ponging that has occurred with Emergency Order 3—the order being in effect, being temporarily restrained, being back in effect, and now again being temporarily enjoined—has created confusion for Wisconsin citizens and businesses in the midst of dangerous, stressful circumstances. Such confusion does not benefit anyone. Bypass is therefore further warranted to avoid a potentially recurring issue, particularly where the issue concerns the ability of Wisconsin’s health services agency’s ability to promptly and meaningfully respond in the midst of a serious pandemic. See Wis. Stat. § (Rule) 809.62(1r)(c)3.

To be clear, review of the discretionary denial of a temporary injunction would not often itself warrant this Court’s limited review. But the underlying question of whether the circuit court’s exercise of its discretion rested on incorrect legal conclusions about *Palm* is an issue that

affects the entire State, and significantly so. This case meets the criteria for review under Wis. Stat. § 809.62(1r).

III. Ultimately, this Court will likely decide to review this appeal anyway.

It is hard to imagine that this case—or at the very least, the underlying issue about the applicability of this Court’s holding in *Palm* to a DHS order issued solely under Wis. Stat. § 252.02(3)—does not ultimately end up before this Court.

There is every reason to believe that, even though the appeal concerns the denial of a temporary injunction, a decision from the Court of Appeals will address the circuit court’s assessment of Intervenor-Plaintiffs’ merits argument. In so doing, the Court of Appeals will be addressing a question that can only be definitively answered by this Court. And in that circumstance, it seems inevitable that the losing party in the Court of Appeals would seek this Court’s review, and that this Court would in turn recognize that this is a question that only it can answer, and that it should answer.

This is so even though Emergency Order 3 (which ends on November 6) may very well expire before this Court—or likely even the Court of Appeals, if this Court were not to grant bypass—could issue a thorough decision. Even then, this issue would likely meet several of the exceptional or compelling circumstances that warrant exceptions to the mootness doctrine. See *Matter of Commitment of J.W.K.*, 2019 WI 54, ¶ 12, 386 Wis. 2d 672, 927 N.W.2d 509 (holding court may elect to address moot issues where, for example, the issues are of great public importance, the issue is likely to recur and should be resolved to avoid uncertainty, or where the issue is capable and likely of repetition and yet evades review).

This is a question that only this Court can answer. It should therefore do so now, particularly where every day without further clarity leaves DHS unable to use its plain statutory authority under Wis. Stat. § 252.02(3) to help control the current COVID-19 surge.

IV. Hastened review is necessary as Wisconsin wages its toughest battles against COVID-19 spread.

As it stands, Emergency Order 3 is enjoined pending appeal, and it is so enjoined because the Court of Appeals believes that Intervenor-Plaintiffs are likely to be able to show that it violates this Court's holding in *Palm*. Every single day that Emergency Order 3 remains enjoined—or that continued debate exists over whether this Court's holding in *Palm* extends to a DHS order issued solely under the parameters of Wis. Stat. § 252.02(3)—is a day that jeopardizes DHS's ability to promptly and (and thus effectively) help control the surge of COVID-19 that has made Wisconsin a national COVID-19 hotspot, has led us to rapidly approach hospital capacity, and has caused more and more deaths.

The State Defendants are confident that this Court did not intend *Palm* to leave DHS wholly powerless to issue a statewide order to control this deadly pandemic under Wis. Stat. § 252.02(3) absent rulemaking. But that is a question that only this Court can definitively answer. For the benefit of the health, lives, and livelihoods of the Wisconsin people, this Court should answer it now.

CONCLUSION

This Court should grant this petition for bypass and assume jurisdiction of this appeal.

Dated this 29th day of October 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

COLIN A. HECTOR
Assistant Attorney General
State Bar #1120064

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) 266-8101 (HSJ)
(608) 266-8407 (CAH)
(608) 266-8690 (TCB)
(608) 294-2907 (Fax)
jurssh@doj.state.wi.us
hectorca@doj.state.wi.us
bellaviatc@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3552 words.

Dated this 29th day of October 2020.

A handwritten signature in black ink, appearing to read "Hannah S. Jurss", written over a horizontal line.

HANNAH S. JURSS

Assistant Attorney General

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,

Intervenor-Plaintiffs-Appellants-Respondents.

ON APPEAL FROM A NON-FINAL ORDER DENYING
TEMPORARY INJUNCTIVE RELIEF, ENTERED IN THE
CIRCUIT COURT FOR SAWYER COUNTY, THE
HONORABLE JAMES C. BABLER, PRESIDING

**ANDREA PALM AND WISCONSIN DEPARTMENT OF
HEALTH SERVICES' APPENDIX TO PETITION TO
BYPASS COURT OF APPEALS**

JOSHUA L. KAUL
Attorney General of Wisconsin

HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

COLIN A. HECTOR
Assistant Attorney General
State Bar #1120064

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

Attorneys for Petitioners Andrea
Palm and Wisconsin Department
of Health Services

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

TABLE OF CONTENTS

| | Page |
|--|--------|
| Wis. Dep't of Health Servs., Emergency Order #3: Limiting Public Gatherings (Oct. 6, 2020) | 101–07 |
| <i>Tavern League of Wis., Inc. v. Palm,</i> No. 20CV128 (Wis. Cir. Ct. Sawyer Cty.), Order denying the temporary injunction (Oct. 20, 2020) | 108–09 |
| <i>Tavern League of Wis., Inc. v. Palm,</i> No. 20AP1742 (Wis. Ct. App.), Order granting the petition for leave and the motion to enjoin Emergency Order 3 pending appeal (amended Oct. 24, 2020)..... | 110–13 |



State of Wisconsin
Department of Health Services

Tony Evers, Governor
Andrea Palm, Secretary

EMERGENCY ORDER #3

LIMITING PUBLIC GATHERINGS

The State of Wisconsin is in the midst of a deadly, uncontrolled, and exponentially growing spike in cases of COVID-19. The State is the nation's COVID-19 hot spot, and intervening measures are necessary to slow the rampage of illness and death caused by the virus.

Without a vaccine, the only tools to slow the spread of COVID-19 are wearing a face covering in public, staying at least six feet away from other people when you leave your home, washing your hands regularly, and staying home as much as possible. Without using these simple but vital life-saving tools, Wisconsin will suffer from unnecessary illness and death.

During the first three months of the pandemic (March-May), when Wisconsin's mass gathering bans and Safer at Home orders were in place, Wisconsin experienced a total of 20,000 cases of COVID-19. However, after the Legislature sued to end Safer at Home, which the Wisconsin Supreme Court ended on May 13, 2020, the spread of the virus rapidly accelerated. Wisconsin's next 20,000 cases occurred over six weeks and the subsequent 20,000 occurred in only three weeks.

Wisconsin is now a COVID-19 hotspot. It had the third highest number of new cases in the past seven days (17,641 cases), with only California and Texas having more new cases (and 6.8 times and 5 times the population, respectively). Wisconsin is also third in the nation in new cases per 100,000 residents (303 cases per 100,000 residents in the past seven days), with only North Dakota and South Dakota having higher rates. Compared to neighboring states that have statewide mitigation efforts in place, Wisconsin's increase in cases (17,641) over the last 7 days is more than double both Minnesota's increase (7,093 cases) and Michigan's increase (6,878 cases) (New York Times, October 5, 2020).

Wisconsin must use all its tools, including keeping people physically apart and wearing face coverings, to slow this dangerous spike. The consequences of failing to act could be devastating and deadly. Because of the time period between infection, diagnosis, and the development of serious symptoms, hospitalizations and deaths lag behind case counts. Wisconsin is now experiencing increases in

1 West Wilson Street • Post Office Box 7850 • Madison, WI 53707-7850 • Telephone 608-266-9622 •

www.dhs.wisconsin.gov

Protecting and promoting the health and safety of the people of Wisconsin

both of these serious indicators because of the steep rise in cases of COVID-19 over the past month.

Hospital capacity strains in some parts of the state are at record high levels. The State of Wisconsin is divided into seven healthcare emergency readiness coalition regions (HERC regions), which coordinate how public health, healthcare institutions, and first responder agencies respond to health emergencies and catastrophic events.

As of September 29, every HERC region in the state has very high disease activity level (i.e., greater than 350 cases per 100,000 population during the past two weeks). On July 29, 2020, while all of the HERC regions had a high disease activity level (i.e., greater than 100 cases and less than 350 cases per 100,000 population during the past two weeks), none of the HERC regions were experiencing a very high disease burden.

This high level of disease activity is now manifesting itself with increased hospitalizations. On September 3rd, there were 293 patients hospitalized with COVID-19 in Wisconsin. One month later, on October 3rd, this number had more than doubled to 692 patients across the state and more than quadrupled in the Fox Valley, Northeast, Northwest, Northcentral, and Western regions of the state. Hospital leaders in Green Bay, Appleton, Neenah, and Wausau are reporting ICU's at capacity, transfers of patients to other facilities, and critical staffing shortages.

Over the past six months, significant gains have been made in the care for patients with COVID-19; however, despite these gains, the disease continues to take the ultimate toll for too many Wisconsinites. On September 4th, the average number of newly reported deaths among patients with COVID-19 over the past seven days was six. By October 4th, this average had doubled to fourteen. In the first six months of the COVID-19 pandemic, 1,242 deaths were reported across the state. In comparison, during the 2019-2020 influenza season, there were 183 deaths from influenza in our state. Assuming deaths increase at the same rate, COVID-19 would rank as the sixth leading cause of death in Wisconsin in 2020 behind only heart disease, cancer, unintentional injuries, lower respiratory disease, and stroke.

While the current death rate for COVID-19 is 1.1% of all cases, the risk of death increases with age. In Wisconsin, 23% of people in their nineties, 14% of people in their eighties, and 5% of people in their seventies who contract COVID-19 die. The lower overall mortality rate is a reflection of the disproportionate representation of the disease in younger populations where 55% of all Wisconsin COVID-19 cases have been diagnosed in people under age 40 and 92% in people under age 70.

For these reasons, I, Andrea Palm, Department of Health Services Secretary-designee, in fulfilling my constitutional duty under Article I, Section I, as part of the government instituted by the people to secure the rights of all people to life, liberty, and the pursuit of happiness, the Laws of this State including Section 252.02(3) of the Wisconsin Statutes, and consistent with *Wisconsin Legislature v. Palm*, 2020 WI 42, order the following:

1. Definitions.

a. Public gathering means 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.

i. Places that are **open to the public** include, but are not limited to:

1. Rooms within a business location, store, or facility that allow members of the public to enter.
2. Ticketed events where tickets are available for free or for purchase by any individual or by any individual within a specific class of people.

ii. Places that are **not open to the public**, and therefore are not part of the definition of a public gathering and are not limited by this order, include, but are not limited to:

1. Office spaces, manufacturing plant, and other facilities that are accessible only by employees or other authorized personnel.
2. Invitation-only events that exclude uninvited guests.
3. Private residences. Except, a residence is considered open to the public during an event that allows entrance to any individual; such public gatherings are limited to 10 people.

2. Public gatherings limited.

- a.** Public gatherings are limited to no more than 25% of the total occupancy limits for the room or building, as established by the local municipality.
- b.** For indoor spaces without an occupancy limit for the room or building that is established by the local municipality, such as a

private residence, public gatherings are limited to no more than 10 people.

- c. The following are exempt from limitations on public gatherings:
- i. Child care settings, including all licensed and certified child care providers who provide care for any age or ages of children up to 13 years of age or children with disabilities up to 19 years of age; Head Start and Early Head Start programs; programs providing before or after school care or virtual learning support during the school day.
 - ii. Placements for children in out-of-home care, including but not limited to residential care centers, group homes, foster homes, and shelter care; overnight service providers for homeless and runaway youth.
 - iii. 4K-12 schools.
 - iv. Institutions of higher education.
 - v. Health care and public health operations, which includes: hospitals; medical facilities; clinics; ambulatory surgery centers for response to urgent health issues or related COVID-19 activities; manufacturers, technicians, logistics, and warehouse operators and distributors of medical equipment, personal protective equipment (PPE), medical gases, pharmaceuticals, blood and blood products, vaccines, testing materials, laboratory supplies, cleaning, sanitizing, disinfecting or sterilization supplies, and tissue and paper towel products; dental offices; pharmacies; public health entities, including those that compile, model, analyze, and communicate public health information; pharmaceutical, pharmacy, medical device and equipment, and biotechnology companies (including operations, research and development, manufacture, and supply chain); healthcare information technology companies; organizations collecting blood, platelets, plasma, and other necessary materials; obstetricians, gynecologists, and midwife practices; eye care centers, including those that sell glasses and contact lenses; home health agencies and providers; mental health and substance abuse providers; detoxification and alcohol or drug treatment programs and facilities; syringe access programs, and naloxone distribution programs; other healthcare facilities and suppliers and providers of any related or any ancillary healthcare services; entities that transport and

dispose of medical materials and remains; personal care agencies; hospices; allied health providers; veterinary care; acupuncturists; massage therapists; chiropractors; and adult family homes.

- vi.** Human services operations, which includes: long-term care and assisted living facilities, as long as the facility follows all current DHS Recommendations for Prevention of COVID-19 in Long-Term Facilities and Assisted Living Facilities and all applicable U.S. Centers for Disease Control Recommendations; residential settings and shelters for adults, seniors, children, victims of domestic abuse, people with disabilities, people with substance use disorders, or mental illness; transitional facilities; home-based settings to provide services to individuals with physical, intellectual, or developmental disabilities, seniors, adults, or children; adult day care, adult day services, and supportive home care; field offices that provide and help to determine eligibility for basic needs including food, cash assistance, medical coverage, vocational services, or rehabilitation services; developmental centers; adoption agencies; businesses that provide food, shelter, social services, or other necessities of life for economically disadvantaged individuals, individuals with physical, intellectual, or developmental disabilities, or otherwise needy individuals.
- vii.** Public Infrastructure operations, which includes: food production, food distribution and fulfillment centers, food storage facilities; construction; building management and maintenance; airports and airport operations; utilities operation and maintenance, including water, sewer, gas, and electric (including power generation, distribution, production of raw materials, and Wisconsin Department of Natural Resources-certified and registered drinking water and wastewater testing laboratories); Wisconsin Home Energy Assistance, Low Income Home Energy Assistance Program, and Public Benefits Energy Assistance Program offices, customer service centers, and public intake centers; oil and biofuel refining; roads, highways, railroads, and public transportation; ports; cybersecurity operations; flood control; solid waste and recycling collection and removal; and internet, video, and telecommunications systems.
- viii.** State and local government operations and facilities, including polling locations.

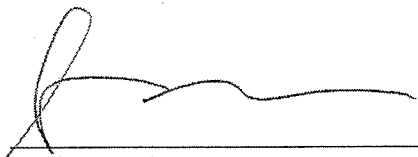
- ix. Churches and other places of religious worship.
 - x. Political rallies, demonstrations, and other speech protected by the First Amendment.
 - xi. State facilities under the control of the Wisconsin Supreme Court and the Wisconsin Legislature.
 - xii. Federal facilities under the control of the federal government.
3. **Public health directives and orders.** All individuals are strongly encouraged to take personal responsibility for following public health guidance from local health officials, the Department of Health Services, and the Center for Disease Control. Individuals must follow all directives and orders issued by local or state authorities regarding measures to combat COVID-19, including any local or state orders regarding wearing face coverings.

ENFORCEMENT AND APPLICABILITY

4. Tribal Nations.

- a. These restrictions do not apply to activities by Tribal members within the boundaries of their Tribal reservations and federal land held in trust for any one of the eleven federally recognized Tribes in Wisconsin, but Tribal members may be subject to restrictions by Tribal authorities.
 - b. Non-tribal members should be respectful of and avoid non-essential travel to Tribal territory.
 - c. Wisconsin's local governments shall coordinate, collaborate, and share information with the Tribal Nations in their region.
5. **Local Orders.** Local governments may issue orders that are more restrictive than the provisions in this order.
6. **Enforcement.** This order is enforceable by civil forfeiture. Wis. Stat. § 252.25; *Legislature v. Palm*, 2020 WI 42.
7. **Severability.** If any provision of this order or its application to any person or circumstance is held to be invalid, then the remainder of the order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this order are severable.

8. **Duration.** This order shall become effective at 8:00 a.m. on October 8, 2020. This order shall remain in effect for two incubation periods of COVID-19, which will end November 6, 2020.



Andrea Palm
Secretary-designee
Department of Health Services
State of Wisconsin

10/06/2020

Date

FILED
10-20-2020
Clerk of Circuit Court
Sawyer County, WI
2020CV000128

DATE SIGNED: October 20, 2020

Electronically signed by The Honorable James C Babler
Circuit Court Judge

STATE OF WISCONSIN : CIRCUIT COURT : SAWYER COUNTY

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

Plaintiffs,

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,

Intervenor-Plaintiffs,

v.

ANDREA PALM, WISCONSIN DEPARTMENT
OF HEALTH SERVICES, and JULIA LYONS,

Defendants.

Case No. 20-CV-128

Code No(s). 30701, 30607
(Declaratory Judgment; Administrative
Agency Review)

ORDER

The above matter having come before the Court on October 19, 2020 for a hearing on
Plaintiffs' Motion for an Ex Parte Temporary Restraining Order and Preliminary Injunction and
Intervenor-Plaintiffs' Motion for a Temporary Injunction, for the reasons stated by the Court on

the record, **IT IS ORDERED** that Plaintiffs' Motion for a Preliminary Injunction is **DENIED**; and Intervenor-Plaintiffs' Motion for a Temporary Injunction is **DENIED**.



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT III

*Amended October 24, 2020 as to
typographical error, case suffix, and
docketing statement filing.*

October 23, 2020

To:

Hon. James C. Babler
James.Babler@WICOURTS.GOV

Hannah Schieber Jurss
jursshs@doj.state.wi.us

Marge Kelsey
Clerk of Circuit Court
Marge.Kelsey@WICOURTS.GOV

Erick G. Kaardal
kaardal@mklaw.com

Andrew M. Bath
abath@thomasmoresociety.org

Kevin M. LeRoy
kevin.leroy@troutman.com

Thomas C. Bellavia
bellaviatc@doj.state.wi.us

Andrew T. Phillips
aphillips@vonbriesen.com

Colin Hector
hectorca@doj.state.wi.us

Rebecca J. R. Roeker
rroeker@vonbriesen.com

Josh Johanningmeier
jjohanningmeier@gklaw.com

Joseph Michael Russell
jrussell@vonbriesen.com

Misha Tseytlin
misha.tseytlin@troutman.com

You are hereby notified that the Court has entered the following order:

2020AP1742

Tavern League of Wisconsin, Inc. v. Andrea Palm
(L.C. # 2020CV128)

Before Stark, P.J., Hruz and Seidl, JJ.

Intervenor-Plaintiffs The Mix Up, Inc., Liz Sieben, Pro-Life Wisconsin Education Task Force, Inc., Pro-Life Wisconsin, Inc., and Dan Miller (collectively, "The Mix Up") have filed a petition for leave to appeal that part of the circuit court's October 20, 2020 order denying their motion for a temporary injunction of Emergency Order #3. The Intervenor-Plaintiffs have also

Pet'rs' App. 110

filed an emergency motion for a temporary injunction pending appeal. Respondents Andrea Palm, in her official capacity as Secretary-Designee of the Wisconsin Department of Health Services, and the Wisconsin Department of Health Services have filed responses opposing the petition and the motion.¹

We have discretion to review an order not appealable as of right when an appeal would materially advance the termination of the litigation or clarify further proceedings, protect the petitioner from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice. . See WIS. STAT. § 808.03(2). We also consider the petitioner's likelihood of success on appeal, and whether the necessity of intermediate review outweighs our general policy against the piecemeal disposition of litigation. *Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 268 n.2, 569 N.W.2d 45 (Ct. App. 1997); *State v. Salmon*, 163 Wis. 2d 369, 374-75, 471 N.W.2d 286 (Ct. App. 1991). Having considered those factors, and given the expiration date of the order at issue, we conclude interlocutory review is warranted here and sua sponte expedite this appeal.

When presented with a motion for relief pending appeal in a case where, as here, the circuit court has already addressed the motion, this court reviews the circuit court's order under an erroneous exercise of discretion standard. *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995). An appellate court will sustain a discretionary act if it finds that the

¹ Julia Lyons, in her official capacity as Health Officer of Sawyer County, did not take a position on the petition or the motion.

trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Id.* at 440.

A stay pending appeal is appropriate where the moving party: (1) makes a strong showing that he or she is likely to succeed on the merits of the appeal; (2) shows that, unless the stay is granted, he or she will suffer irreparable injury; (3) shows that no substantial harm will come to other interested parties; and (4) shows that a stay will do no harm to the public interest. *Id.* These factors are not prerequisites, but rather are interrelated considerations that must be balanced together. *Id.* More of one factor may excuse less of another. *Id.* at 441. However, the moving party is always required to show more than the mere possibility of success. *Id.*

Based on the submissions currently before this court, we conclude The Mix Up has shown a sufficient likelihood of success on the merits of an appeal to warrant granting a stay pending appeal.

Therefore, upon the foregoing,

IT IS ORDERED that the petition for leave to appeal is granted and this appeal is expedited. Pursuant to WIS. STAT. RULE 809.11(2), the clerk of the circuit court or responsible court official shall return the copy of the order granting this petition and the circuit court case entries maintained pursuant to WIS. STAT. § 59.40 to the clerk of this court within three days of receipt of this order. Entry of this order has the effect of the filing of the notice of appeal. WIS. STAT. RULE 809.50(3).

IT IS FURTHER ORDERED that the requirements to file a docketing statement and statement on transcript are waived.

IT IS FURTHER ORDERED that transmittal of the record is expedited and the inspection period is waived. The clerk shall compile and submit the record within three days of the date of this order. The clerk shall use the circuit court document numbers as the document numbers in the appellate index.

IT IS FURTHER ORDERED that the appellants' brief is due no later than 4:00 p.m. on Tuesday, October 27, 2020. The respondents' brief is due no later than 4:00 p.m. on Thursday, October 29, 2020. The appellants' reply brief is due no later than 4:00 p.m. on Friday, October 30, 2020.

IT IS FURTHER ORDERED that the motion for relief pending appeal is granted. That part of the circuit court's order denying the motion for a temporary injunction is stayed, thus reinstating the ex parte order for a temporary injunction.

Stark, P.J., Dissenting.

I would deny the petition for leave to appeal and the motion for relief pending appeal.

Sheila T. Reiff
Clerk of Court of Appeals

