No. 2020AP1742

In the Supreme Court of Wisconsin

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

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

INTERVENORS-PLAINTIFFS-APPELLANTS' RESPONSE TO PETITION TO BYPASS

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INTRODUCTION

Just five months ago, this Court held in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, that a selective statewide capacity limits regime satisfied the long-standing, five-part test for a "rule" under Chapter 227. Yet, on October 6, 2020, Secretary-designee Andrea Palm and the Department of Health Services (hereinafter "Defendants") issued Emergency Order #3, which Order—incredibly—again creates a statewide selective capacity limits regime without going through rulemaking. The Court of Appeals understandably held, at the stay-pending-appeal stage, that the challengers to this plainly illegal Order had "shown a sufficient likelihood of success on the merits of an appeal." Pet'rs' App. 112. Defendants now file a Petition To Bypass, cynically seeking to avoid the Court of Appeals' impending merits decision. This Court should deny the Petition for two independently sufficient reasons.

First, Emergency Order #3 is set to expire in just four days, on Friday, November 6, and Defendants—who waited almost a full week to seek relief from this Court—do not even ask this Court to issue its merits ruling before that expiration. Instead, Defendants request "supplemental briefing and oral argument before this Court," Pet. 3, which would make any ruling before the Order's expiration likely impossible. The far better course would be for this Court to deny the Petition To Bypass promptly—hopefully today or tomorrow—which

would free up the Court of Appeals to issue its merits decision. That court, in turn, has given every indication that it intends to rule before the Order's expiration, including by setting an expedited briefing schedule that the parties already completed. After the Court of Appeals rules on the merits of this case, this Court will be able to consider any Petition For Review, if one is filed, including deciding whether any exception to the mootness doctrine applies.

Second, Defendants failed to meet this Court's standards for granting bypass in any event. This Court in *Palm* re-articulated the long-settled, five-part test for deciding whether an order qualifies as a rule under Chapter 227 and then applied that test to, as relevant here, a selective statewide regime of capacity limits. Emergency Order #3 at issue here is yet another selective statewide regime of capacity limits. The application of this Court's precedent to a materially indistinguishable circumstance is a decision that this Court generally leaves to the lower courts, as a core function of Wisconsin's unified court system.

In all, Intervenor-Plaintiffs respectfully request that this Court deny the Petition To Bypass—today or tomorrow, if at all possible—to permit the Court of Appeals to resolve this case before Emergency Order #3 expires on Friday, November 6, 2020. *See* Wis. Stat. § (Rule) 809.60(3).

STATEMENT OF THE CASE

A. In *Palm*, this Court explained the longstanding test for when an order qualifies as a "rule" under Chapter 227. An order is a rule if it "is (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency." *Palm*, 2020 WI 42, ¶ 22 (quoting *Citizens for Sensible Zoning, Inc. v. Dep't of Nat. Res.*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)). Most relevant here, an order is a rule, under the fifth element of this test, if it reflects the "subjective" policy "judgment" of an agency; Chapter 227 subjects such judgments to rulemaking to ensure that "one unelected official" does not unilaterally "impose[ ]" her own preferred policies across the State. *Id.* ¶¶ 27–28.

Palm then held that Emergency Order #28 was a "rule," under Chapter 227. *See generally id.* ¶¶ 15–42. As relevant to the present case, Emergency Order #28 selectively closed some businesses throughout the State, while also imposing selective capacity limits on other businesses that were allowed to reopen. *See* Emergency Order #28 ("EO#28") at 3–5, 13–15.[1] Chapter 227's rulemaking requirement, *Palm*

[1] Available at https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf (all websites last visited November 2, 2020). This Court may take judicial notice of government websites. *Perkins v. State*, 61 Wis. 2d 341, 346, 212 N.W.2d 141 (1973); *see* Wis. Stat. § 902.01.

explained, "exists precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official, Palm, is not imposed in Wisconsin." *Palm*, 2020 WI 42, ¶ 28. That is, rulemaking is needed to "hinder" this "arbitrary or oppressive conduct by an agency." *Id.* ¶ 35.

B. This case involves Emergency Order #3, issued on October 6, and effective from October 8 to November 6. Pet'rs' App. 101–07.[2] The Order provides that "[p]ublic gatherings are limited to no more than 25% of the total occupancy limits for the room or building, as established by the local municipality," but "[f]or indoor spaces without an occupancy limit . . . public gatherings are limited to no more than 10 people." Pet'rs' App. 103–04. This Order creates two groups of exceptions. First, it defines three categories of "Places" that "are not part of the definition of a public gathering": (1) "Office spaces, manufacturing plant[s], and other facilities that are accessible only by employees or other authorized personnel"; (2) "Invitation-only events that exclude uninvited guests"; and (3) "Private residences[,] [e]xcept, a residence is considered open to the public during an event that allows entrance to any individual [in which case] such public gatherings are limited to 10 people." Pet'rs' App. 103. Second, it lists "exempt" categories: "Child care settings," "Placements for children in out-of-home care," "4K-12 schools,"

[2] Emergency Order #3 is found in Secretary-designee Palm's Appendix at Pet'rs' App. 101–07, and it is also available at https://evers.wi.gov/Documents/COVID19/EmO03-LimitingPublicGatherings.pdf.

"Institutions of higher education," "Health care and public health operations," "Human services operations," "Public Infrastructure operations," "State and local government operations and facilities," "Churches and other places of religious worship," "Political rallies . . . and other [protected] speech," and some governmental facilities. Pet'rs' App. 104–06.

C. On October 7, 2020, Senate Majority Leader Scott Fitzgerald and Assembly Speaker Robin J. Vos delivered a letter to Secretary-designee Palm, explaining that, under *Palm*, Emergency Order #3 was a rule that "did not comply with" Chapter 227's rulemaking procedures. Letter from Senate Majority Leader Fitzgerald and Assembly Speaker Vos to Secretary-designee Palm at 1–2 (Oct. 7, 2020).[3] Accordingly, the letter concluded that Emergency Order #3 was invalid under *Palm*. *Id.* at 1. This letter also explained that the nonpartisan Legislative Reference Bureau had reached the same conclusion. *Id.*; *see* Legislative Reference Bureau, *Analysis of Emergency Order #3 and* Wisconsin Legislature v. Palm (Oct. 7, 2020).[4]

The Joint Committee for Review of Administrative Rules then held an Executive Session. *See* Notice of Executive Session for Oct. 12, 2020, JCRAR;[5] *see Joint*

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

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

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

Committee for Review of Administrative Rules Hearing, WisconsinEye (Oct. 12, 2020, 1:00 PM) (recording of Executive Session).[6] The Committee concluded that Emergency Order #3 is a rule and directed Secretary-designee Palm under Wis. Stat. § 227.26(2)(b) to promulgate Emergency Order #3 according to the required procedures within 30 days. *Joint Committee for Review of Administrative Rules Hearing*, WisconsinEye, *supra* at 48:25–49:10.

D. On October 13, 2020, the original plaintiffs filed a complaint challenging Emergency Order #3 for failure to follow Chapter 227's rulemaking procedures. App.R.2 at 1, 3–11.[7] The original plaintiffs moved for an *ex parte* temporary restraining order and a temporary injunction, App.R.4, and the circuit court—Judge John M. Yackel presiding—granted the *ex parte* temporary restraining order the following day. App.R.17; *see* Cir. Ct. Dkt. Entry 10-14-2020.[8]

Intervenor-Plaintiffs are The Mix Up, Inc., Liz Sieben, Pro-Life Wisconsin Education Task Force, Inc. and Pro-Life Wisconsin, Inc., and Daniel J. Miller, who intervened in the case three days after it began, submitted a one-count complaint challenging Emergency Order #3, App.R.45 at 22–

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

[7] Citations of "App.R." refer to documents filed in the circuit court, as numbered in the indexed record on appeal.

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

23, and moved for a temporary injunction against this Order, App.R.51–52. In support of their temporary-injunction motion, the Intervenor-Plaintiffs submitted affidavits explaining the harms that the Order imposed on them for just the couple of days it was in effect, including The Mix-Up immediately losing 50% of its sales over one weekend, as well as the extensive harms that the Order would impose on them unless its enforcement were enjoined. SA 1–12.[9]

On Monday, October 19, the circuit court—Judge James C. Babler now presiding[10]—held a temporary-injunction hearing during which it granted Intervenor-Plaintiffs' motion to intervene, vacated the *ex parte* temporary restraining order, denied both Intervenor-Plaintiffs' and original plaintiffs' motions for a temporary injunction, and denied Intervenor-Plaintiffs' oral motion for a stay pending appeal. SA 18–19, 75, 76–78;[11] Pet'rs' App. 108–09, 113. On likelihood of success, the court explained that, in its view, *Palm* did not

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[9] Citations of "SA" refer to Intervenor-Plaintiffs' Supplemental Appendix, filed with this Response.

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

[11] Defendants claim that the transcript of the temporary-injunction hearing is not in the appellate record because the Court of Appeals waived the requirement for a Statement on the Transcript. Pet. 5 n.3. However, Intervenor-Plaintiffs filed the transcript with the Court of Appeals as soon as the court reporter filed it with the circuit court, prior to the Court of Appeals granting Intervenor-Plaintiffs' petition for permissive appeal, upon instructions of the clerk's office. Dkt. Entry 10-21-2020, No. 2020AP1742. That timely submission explains why the Court of Appeals waived the Statement on the Transcript. Pet'rs' App. 113.

apply to Emergency Order #3, including because *Palm* "mostly focuses on [subsections] (4) and (6) of [Section] 252.0[2]," and not Section 252.02(3) of the Wisconsin Statutes. SA 70–71. On the equities, the circuit court—with all respect—showed confusion about Emergency Order #3's duration, stating repeatedly that plaintiff had not been harmed by the Order for the "40 days" before the issuance of the temporary restraining order. SA 63–64; *see also* SA 60. In fact, Emergency Order #3 was in place for only a couple of days before the temporary restraining order, and Intervenor-Plaintiffs suffered substantial irreparable harms during that period, as described in their sworn, unrebutted affidavits. SA 2–4, 7–11, 75–76. After counsel for original plaintiffs clarified the timeline of the Order, the court neither adjusted its equitable conclusions nor sufficiently explained why its prior equitable considerations continued to apply. SA 75–76.

E. On October 20, Intervenor-Plaintiffs petitioned the Court of Appeals for permission to appeal and moved for an injunction pending appeal. Dkt. Entries 10-20-2020, No. 2020AP1742; *see* Pet'rs' App. 110–11. The court granted Intervenor-Plaintiffs permission to appeal and then stayed "the circuit court's order denying the motion for a temporary injunction," which "reinstat[ed] the ex parte order for a temporary injunction" for the duration of this appeal. Pet'rs' App. 112–13. The court explained that permission to appeal and relief pending appeal were justified because Intervenor-

Plaintiffs "ha[ve] shown a sufficient likelihood of success on the merits of an appeal." Pet'rs' App. 112.

The Court of Appeals then expedited its consideration of this appeal by ordering accelerated briefing. Pet'rs' App. 113. Intervenor-Plaintiffs filed their opening brief on Tuesday, October 27, Defendants filed their response brief on Thursday, October 29, and Defendants field their reply brief on Friday, October 30. That means that the case is now fully briefed and ready for the Court of Appeals' merits decision.

STANDARD FOR PETITION TO BYPASS

This Court "may take jurisdiction of an appeal . . . pending in the court of appeals" upon "a petition to bypass filed by a party," "certification from the court of appeals," or "on its own motion." Wis. Stat. § 808.05; *see* Wis. Stat. § (Rule) 809.60; *see also* Wis. Const. art. VII, § 3(3). "A matter appropriate for bypass is usually one which meets one or more of the criteria for review [under Wis. Stat. § (Rule) 809.62(1r)], and one the court concludes it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues." *See* Sup. Ct. IOP § III.B.2. These criteria include whether this Court's decision "will help develop, clarify or harmonize the law." Wis. Stat. § (Rule) 809.62(1r)(c).

ARGUMENT

I. Bypass Is Unwarranted Because The Order Expires In Four Days And Defendants—Who Waited Almost A Full Week To Seek Relief From This Court—Do Not Ask For A Ruling Before That Expiration

The timing of this case makes the grant of the Petition To Bypass entirely unwarranted. Emergency Order #3 expires in four days, on Friday, November 6. Pet'rs App. 107. Belying their claim of exigency, Pet. 13, Defendants waited almost a full week after the Court of Appeals granted the Intervenor-Plaintiffs' Petition To Appeal and Motion For An Injunction Pending Appeal before seeking bypass from this Court. Then, in that Petition To Bypass, Defendants did not ask this Court to decide the case based upon the extant Court of Appeals' briefing. Rather, they asked for "supplemental briefing and oral argument before this Court." Pet. 3. That approach would make a decision before Emergency Order #3's expiration practically impossible. To take just one recent example, when this Court granted the Petition For Original Action in *Fabick v. Evers*, 2020AP1718-OA, on October 28—which also deals with the State's response to COVID-19—this Court set briefing to complete by November 9, with oral argument to take place on November 16. SA 81–83.

Notably, while this Court would likely be unable to adjudicate this case before Emergency Order #3 expires—especially if it grants Defendants' request for "supplemental briefing and oral argument," Pet. 3—the Court of Appeals

appears ready to decide this case before that expiration date. The parties have already completed merits briefing, under the Court of Appeals' order expediting that schedule, and the Court of Appeals *already* received and considered briefing on these issues during the injunction-pending-appeal stage. *See supra* pp. 8–9. The Court of Appeals' decision to expedite this case with briefing to take place over a one-week period gives every indication that the Court intends to issue its decision before the expiration of Emergency Order #3.

Given that the Court of Appeals appears ready to resolve this matter now, bypass would be counterproductive. That is, if this Court were to grant bypass now and then follow Defendants' suggested approach, the parties would have to submit new briefing to this Court and then take part in oral argument, and this Court would be deprived of the "benefit" of the Court of Appeals' "analys[i]s." *State v. Brooks*, 2020 WI 60, ¶ 7, 392 Wis. 2d 402, 944 N.W.2d 832 (citation omitted).

The far more efficient path, Intervenor-Plaintiffs respectfully submit, is to deny the Petition; allow the Court of Appeals to rule promptly; and then consider whether to grant plenary review of the Court of Appeals' decision, should any party file a Petition For Review. At that point, this Court will be positioned to decide whether any exception to the mootness doctrine applies, after full briefing on the mootness issue. *See* Pet. 12 (asserting that the legal dispute here "would likely meet several of the exceptional or compelling circumstances

that warrant exceptions to the mootness doctrine," without actually briefing any of those circumstances or exceptions).

Finally, given that Defendants do not ask this Court to rule before Emergency Order #3 expires, their decision to petition to bypass just days before the Court of Appeals appears ready to issue its decision has a more cynical and, sadly, plausible explanation: they are seeking to avoid a merits ruling from the Court of Appeals, given that the court had already *preliminarily* indicated, at the injunction-pending-appeal stage, that it is not persuaded by their defense of Emergency Order #3. That would be of a piece with Defendants' litigation strategy in this case, including their switching out of Judge Yackel under Wis. Stat. § 801.58 *after* he granted a temporary restraining order. *See* App.R.16. While, of course, any party has the statutory right to request judicial substitution and to petition to bypass, it is troubling for powerful public officials/bodies, represented by the State's Attorney General, to engage in such repeated judge-shopping.

II. Bypass Is Also Unwarranted Because *Palm* Already Resolved The Only Merits Issue In This Case

A. Even putting timing considerations aside, Defendants' Petition To Bypass does not meet the bypass criteria. Given that *Palm*'s reasoning and holding govern the outcome in this case, leaving no questions of first impression for the Court of Appeals to resolve, this Court's review is not needed to "help develop, clarify or harmonize the law." Wis. Stat. § (Rule) 809.62(1r)(c). Similarly, this Court is unlikely

to "ultimately [ ] choose to consider" this case "regardless of how the Court of Appeals might decide the issues." Sup. Ct. IOP § III.B.2. *Palm*'s controlling reasoning and holding resolve Intervenor-Plaintiffs' single challenge to the validity of Emergency Order #3. Accordingly, if the Court of Appeals were to hold (correctly) that Intervenor-Plaintiffs merit temporary-injunctive relief, under *Palm*'s plain terms, there would be no need for this Court to engage in any further review. *See generally* Wis. Stat. § (Rule) 809.62(1r).

In *Palm*, this Court reaffirmed its longstanding, five-part test for whether an agency's "order" is actually a "rule" for purposes of Wis. Stat. § 227.24(1), such that the agency must submit that rule to Chapter 227 rulemaking in order for it to be enforceable. *Palm*, 2020 WI 42, ¶ 22 (quoting *Citizens for Sensible Zoning*, 90 Wis. 2d at 814). This Court then applied that test to hold that Emergency Order #28, an order that imposed selective statewide business closures and capacity limits, met all five elements. Most relevant to the issues in dispute between the parties in this case, Emergency Order #28 satisfied the fifth element because it "implement[ed], interpret[ed] or ma[d]e specific legislation enforced or administered by" the Department of Health Services, since it reflected many "subjective" policy-based "judgment[s]" from the Secretary-designee that were not found within the statutes administered by her department. *Id.* ¶¶ 22, 27–28 (citation omitted). Since *Palm* concluded that Emergency Order #28 was a rule, and since Defendants

did not follow Chapter 227's rulemaking procedures, this Court then held that the Order was "unenforceable" and invalid. *Id.* ¶ 58.

Emergency Order #3—which, like Emergency Order #28, imposes a selective statewide regime of capacity limitations—is also a rule that is invalid for lack of rulemaking, under a straightforward application of *Palm*. As relevant to the only element of the five-element test for a rule that Defendants disputed before the Court of Appeals, Emergency Order #3 clearly satisfies the fifth element because it "implement[s], interpret[s] or make[s] specific legislation enforced or administered by" the Department of Health Services, as it embodies numerous "subjective," policy-based choices not found within the Wisconsin Statutes. *Id.* ¶¶ 22, 27–28 (citation omitted). To take one of many examples, the Order exempts higher-education institutions from its capacity limitations—but not family-owned restaurants like The Mix Up—based upon Defendants' subjective policy preferences that gatherings at universities are more socially valuable than those at restaurants. *See* Pet'rs' App. 104. Indeed, before the Court of Appeals, Defendants did not dispute that Emergency Order #3 makes judgments as between permitted and prohibited gatherings on a policy basis "*wholly apart from any comparative impact on COVID-19 spread*." Opening Br. Of Intervenors-Plaintiffs-Appellants at 2–3, No. 2020AP1742 (Oct. 27, 2020) (emphasis added).

Thus, *Palm* squarely settles all of the issues in this case, as a matter of stare decisis, leaving nothing to "help develop, clarify or harmonize [in] the law" in this case. Wis. Stat. § (Rule) 809.62(1r)(c); *see Elections Bd. of Wis. v. Wis. Mfrs. & Commerce*, 227 Wis. 2d 650, 653, 597 N.W.2d 721 (1999). Specifically, *Palm* articulated *both* the legal principles governing this case—the five-element test for whether an order is a rule under Chapter 227—*and* applied those principles to materially indistinguishable facts: an order from Defendants imposing selective statewide capacity limits without first proceeding through Chapter 227 rulemaking. Since "[t]his court follows the doctrine of stare decisis scrupulously," *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257, and since *Palm*'s stare decisis effect "carries enhanced force" as "a decision" that "interprets a statute," namely, Chapter 227, *State v. Lynch*, 2016 WI 66, ¶ 39 n.18, 371 Wis. 2d 1, 885 N.W.2d 89 (emphases omitted; citation omitted), no further review by this Court would be needed, *see* Wis. Stat. § (Rule) 809.62(1r)(c); *Elections Bd. of Wis.*, 227 Wis. 2d at 653. Further, this Court issued *Palm* just five months ago, and "[n]o change in the law is justified by a change in the membership of the court," *Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins.*, 2006 WI 91, ¶ 32, 293 Wis. 2d 38, 717 N.W.2d 216 (citation omitted).

Even beyond general principles of stare decisis, Secretary-designee Palm was a party to *Palm* itself. *Palm*'s

judgment "is held to be conclusive upon" Secretary-designee Palm, as a "part[y] to the action in which the judgment was rendered." *McCourt v. Algiers*, 4 Wis. 2d 607, 613, 91 N.W.2d 194 (1958). Wisconsin law already affords parties unhappy with this Court's judgments ample opportunities to seek relief. They "may seek reconsideration of the judgment or opinion" entered in an appeal, Wis. Stat. § (Rule) 809.64; or they may seek relief from the judgment, Wis. Stat. § 806.07; *see Koschkee v. Evers*, 2018 WI 82, ¶ 8 n.1, 382 Wis. 2d 666, 913 N.W.2d 878 (Court "sit[s] as the trial court in an original action[.]" (citation omitted)); or they may ask the Legislature to change the law, when the Court rests its decision on statutory grounds, *see generally* Wis. Const. art. IV, § 1. What a party cannot do is decline to pursue any of those lawful avenues of relief, wait five months, and then violate this Court's plain holding by issuing an order materially indistinguishable from the order that this Court already invalidated—all the while hoping that a change in the composition of this Court in the interim will lead to a different result the second time around.

Granting bypass here when a straightforward application of *Palm* requires invalidating Emergency Order #3 would also undermine the core functioning of the State's unified court system. The reason that Wisconsin's "unified court system" places lower courts like "a court of appeals" below this Court, Wis. Const. art. VII, § 2, is to enforce this Court's rulings, like *Palm*, *see Cook v. Cook*, 208

Wis. 2d 166, 188, 560 N.W.2d 246 (1997). That is, the Court of Appeals' "primary function is error correcting," ensuring that the circuit courts (and, therefore, litigants like Defendants) correctly adhere to the rule of law established by this Court's decisions. *Id.*; *see also State v. Stuart*, 2003 WI 73, ¶ 23, 262 Wis. 2d 620, 664 N.W.2d 82.

C. None of Defendants' arguments counsels in favor of this Court granting the Petition To Bypass.

Defendants claim that the "[m]ost significant[ ]" reason to grant the Petition is that this case raises a "novel" issue, specifically, "the scope and nature of this Court's holding in *Palm*," as applied to Emergency Order #3. Pet. 8–12 (citing Wis. Stat. § (Rule) 809.62(1r)(c)). But *Palm* both provided the controlling legal principle here (Wis. Stat. § 227.01(13)'s five-part test), *and* applied that test to a selective statewide capacity limits regime that is materially no different than Emergency Order #3, for purposes of the five-part test. *Supra* pp. 12–14. Thus, this case is a straightforward application of *Palm*'s core holding, involving no novel issue whatsoever.

Defendants make only a single argument in support of their claim that Emergency Order #3 is beyond *Palm*'s core holding. Namely, they claim that *Palm* categorically exempted from rulemaking any order issued by the Department under its authority in Wis. Stat. § 252.02(3), like Emergency Order #3, since *Palm* "did not include any substantive discussion of Wis. Stat. § 252.02(3)." Pet. 9. That argument is wrong. As *Palm* explained, Chapter 227

"contains 72 specific exemptions from the definition of 'Rule,'" and those exemptions do not include any "act or order of DHS pursuant to Wis. Stat. § 252.02"—which includes Section 252.02(3). *Palm*, 2020 WI 42, ¶ 30; *see Groh v. Groh*, 110 Wis. 2d 117, 125, 327 N.W.2d 655 (1982) (*expressio unius est exclusio alterius* canon); *accord* Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation Of Legal Texts 107–11 (2012). And while Defendants point out "that the *Palm* holding expressly exempted the school closing portion of [Emergency Order #28] that was squarely based on subsection (3)," Pet. 10, they have no answer to the only point that matters here with regard to any exemption: *Palm* did *not* exempt the selective statewide capacity limits regime from its decision, even though Defendants had relied upon Wis. Stat. § 252.02(3) to justify that aspect of Emergency Order #28.

Defendants also falsely assert that "Intervenor-Plaintiffs read *Palm* as requiring DHS to go through rulemaking whenever it issues any statewide order under Wis. Stat. § 252.02," and then go so far as to claim that, without this Court's immediate review, "any statewide DHS action will be seemingly subject to immediate legal challenge[.]" Pet. 9, 11 (emphasis omitted). But Intervenor-Plaintiffs did not make any such argument. To the exact contrary, Intervenor-Plaintiffs have made abundantly clear over and again that, under *Palm*, only those orders that satisfy Section 227.01(13)'s five-part test must proceed through rulemaking, and that Defendants' claimed

categorical exemption for orders issued under Section 252.02(3) is contrary to *Palm*'s holding and reasoning. Opening Br. Of Intervenors-Petitioners-Appellants at 30, No. 2020AP1742 (Oct. 27, 2020); Reply Br. Of Intervenors-Petitioners-Appellants at 5–6, No. 2020AP1742 (Oct. 30, 2020). Intervenor-Plaintiffs' modest submission is that *Palm* already applied this five-part test to a selective statewide capacity limits regime, which is what makes this case an easy one under this Court's controlling case law.

Finally, Defendants claim that rejecting their Petition will threaten "the health, lives, and livelihoods of the Wisconsin people." Pet. 13. But this Court already explained in *Palm* that "the Governor's emergency powers," which afford him significant power to act for 60 days, give the Executive Branch ample authority to combat COVID-19 without undue delay. *Palm*, 2020 WI 42, ¶ 41; *see* Wis. Stat. § 323.10. During that 60-day window, the Executive Branch has more than sufficient time to proceed through Chapter 227 emergency rulemaking, should it conclude that that measures meeting Section 227.01(13)'s five-part test, like Emergency Order #3, are needed. Defendants have never offered any explanation throughout this litigation for why they have not even attempted to proceed through the democratically accountable, emergency rulemaking process to promulgate a selective capacity limit regime—or even a rule-based framework for the future issuance of statewide capacity limits

if certain COVID-19 metrics are met—despite this Court issuing *Palm* five months ago.

CONCLUSION

The Court should deny the Petition To Bypass.

Dated: November 2, 2020.

Respectfully submitted,

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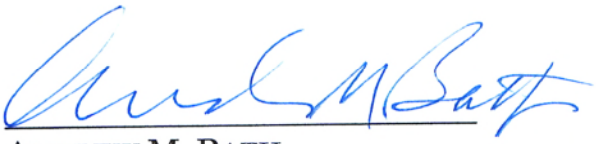

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CERTIFICATION

I hereby certify that this Response To Petition To Bypass conforms to the rules contained in Wis. Stat. §§ (Rules) 809.62(4) and 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this Response To Petition To Bypass is 4,557 words.

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