

No. 2020AP1718 - OA

In the Supreme Court of Wisconsin

Jeré Fabick

Petitioner,

v.

Tony Evers, in his Official Capacity as the Governor of Wisconsin

Respondent.

**PETITIONER'S SUPPLEMENTAL APPENDIX IN SUPPORT OF HIS
EMERGENCY MOTION FOR A TEMPORARY INJUNCTION**

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WISCONSIN LEGISLATURE

P.O. Box 7882 • Madison, WI 53707-7882

February 4, 2021

Governor Tony Evers
P.O. Box 7863
Madison, WI 53707
DELIVERED ELECTRONICALLY

Dear Governor Evers,

As we began 2021, we were hopeful your administration would work with us on some of the serious issues that plagued Wisconsin during 2020. Wisconsin's vaccine rollout has been poorly planned and executed, the Department of Workforce Development has continually failed the unemployed in Wisconsin and the state's response to COVID has been disorganized and poorly communicated. We again confirm our willingness to work with you on each of these issues in the hope of finding long-term bipartisan solutions.

When the pandemic began last year, we worked cooperatively with your administration and our Democratic colleagues to pass bipartisan legislation that contained over 55 provisions that gave you the tools to help deal with the virus and assist those who were suffering from the economic devastation of Wisconsin's response.

Instead of continuing to work together to repeat our bipartisan work the month before, in May 2020 you chose to issue an Executive Order without any meaningful consultation with the state Legislature. Your decision had devastating economic effects on hundreds of thousands of Wisconsinites. If allowed to stand, your lockdown of small businesses and restaurants last year would have decimated the state economy.

One only has to look at many of our neighboring states to see the devastating impact your order would have had, if Republicans in the Legislature had not acted to overturn your unlawful and irrational emergency orders. After the Wisconsin Supreme Court overturned your illegal executive overreach, we again asked you to work with us by submitting your COVID-19 plan through the rules process to the Legislature so we could cooperatively work on the state's response, but you again refused.

In three different instances, we have asked to work together and you chose a go-it-alone approach that ultimately was unlawful and damaging to the citizens of the state of Wisconsin.

The citizens of Wisconsin are sick and tired of your go-it-alone approach. We therefore are writing to respectfully ask you to change course and work within the established system to legally enact rules that will keep those who are vulnerable safe and also protect the rights of our citizens to live their lives.

As we have said for months, the vote the Assembly will be taking today is not about your mask order. State law is incredibly clear that you may issue an Executive Order for 60 days but after that time, you must seek approval from the Legislature to continue the Public Health Emergency.

Over the course of last spring and fall, members of our caucus, including members of the Joint Committee for Review of Administrative Rules (JCRAR) reached out both publicly and privately to your office and the Department of Health Services with the goal of working together on the rules process. While you appreciated the offer, you refused to work with us on the state response to the coronavirus, which is why we are once again renewing our request for you to work with us to address these important issues through the necessary legal avenues.

The Wisconsin state law does not allow the Legislature to introduce rules for adoption. Only a governor or their agencies may do that action. We therefore are asking you to please introduce rules to the Legislature for our review that will do the following:

- 1) Enact reasonable masking requirements in places in Wisconsin that are susceptible to transmission of the virus to those who are especially vulnerable, such as health care facilities, nursing homes, mass transit, state government buildings, assisted living facilities, public schools, universities, and prisons.
- 2) Allow any private or public entity in the state that would like to require face masking to be allowed to do so on their property.
- 3) Require the Department of Health Services to pay for COVID-19 tests that anyone may take, free of charge, paid for by the state of Wisconsin.
- 4) The rules would be in place and reviewed by JCRAR every 30 days for any necessary modifications and would stay in place until a majority of eligible Wisconsinites are voluntarily vaccinated.

We hope you take this letter as a sincere attempt to find common ground and end the public bickering that has frustrated so many in our state.

If you send the rules to our chamber, we give you our assurance that they will be reviewed fairly and judiciously. Our goal would be to have the rules become effective before our floor period in February so when the unlawful public health order is overturned, there will not be any gap in the masking requirement for those spaces where we can agree face coverings provide the most benefit for our residents.

Sincerely,



Rep. Robin J. Vos
Assembly Speaker



Rep. Jim Steineke
Majority Leader



Rep. Tyler August
Speaker Pro-Tempore



Rep. Kevin Petersen
Assistant Majority Leader



Rep. Tyler Vorpagel
Majority Caucus Chair



Rep. Cindi Duchow
Majority Caucus Vice-Chair



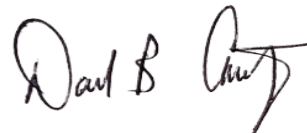
Rep. Jesse James
Majority Caucus Secretary



Rep. Samantha Kerkman
Caucus Sergeant at Arms



Rep. Scott Allen
97th Assembly District



Rep. David Armstrong
75th Assembly District



Rep. Mark Born
39th Assembly District



Rep. Janel Brandtjen
22nd Assembly District



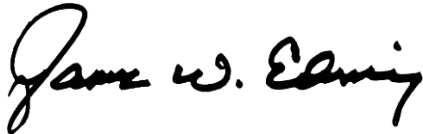
Rep. Robert Brooks
60th Assembly District



Rep. Calvin Callahan
35th Assembly District



Rep. Alex Dallman
41st Assembly District



Rep. James Edming
87th Assembly District



Rep. Terry Katsma
26th Assembly District



Rep. Rachael Cabral-Guevara
55th Assembly District



Rep. Mike Kuglitsch
84th Assembly District



Rep. Amy Loudenbeck
31st Assembly District



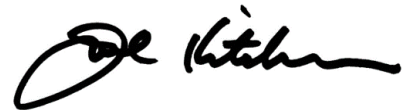
Rep. Gae Magnafici
28th Assembly District



Rep. Barbara Dittrich
38th Assembly District



Rep. Rick Gundrum
58th Assembly District



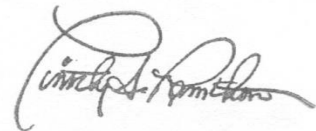
Rep. Joel Kitchens
1st Assembly District



Rep. Scott Krug
72nd Assembly District



Rep. Tony Kurtz
50th Assembly District



Rep. Timothy Ramthun
59th Assembly District



Rep. Clint Moses
29th Assembly District



Rep. Dave Murphy
56th Assembly District



Rep. Adam Neylon
98th Assembly District



Rep. Loren Oldenburg
96th Assembly District



Rep. Jon Plumer
42nd Assembly District



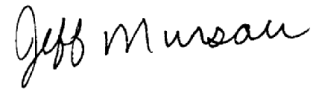
Rep. Jessie Rodriguez
21st Assembly District



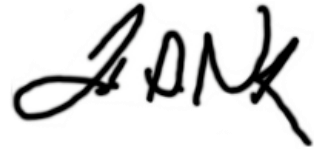
Rep. Joe Sanfelippo
15th Assembly District



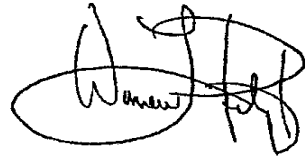
Rep. Shannon Zimmerman
30th Assembly District



Rep. Jeffrey Mursau
36th Assembly District



Rep. Todd Novak
51st Assembly District



Rep. Warren Petryk
93rd Assembly District



Rep. Treig Pronschinske
92nd Assembly District



Rep. Donna Rozar
69th Assembly District



Rep. Michael Schraa
53rd Assembly District



Rep. Pat Snyder
85th Assembly District



Rep. Shae Sortwell
2nd Assembly District



Rep. John Spiros
86th Assembly District



Rep. David Steffen
4th Assembly District



Rep. Rob Summerfield
67th Assembly District



Rep. Rob Swearingen
34th Assembly District



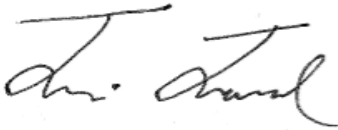
Rep. Gary Tauchen
6th Assembly District



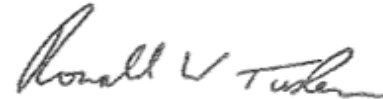
Rep. Jeremy Thiesfeldt
52nd Assembly District




Rep. Paul Tittel
25th Assembly District



Rep. Travis Tranel
49th Assembly District



Rep. Ron Tusler
3rd Assembly District



Rep. Nancy VanderMeer
70th Assembly District



Rep. Chuck Wichgers
83rd Assembly District



Rep. Robert Wittke
62nd Assembly District



2021 SENATE JOINT RESOLUTION 3

January 21, 2021 - Introduced by Senators NASS, BRADLEY, KAPENGA, STROEBEL, FELZKOWSKI, JACQUE, TESTIN, MARKLEIN and WANGGAARD, cosponsored by Representatives RAMTHUN, HORLACHER, SORTWELL, MAGNAFICI, WICHGERS, CABRAL-GUEVARA, BROOKS, JAGLER, GUNDRUM, MACCO, SKOWRONSKI, THIESFELDT, BRANDTJEN, ALLEN, DITTRICH, MOSES, KNODL and SCHRAA. Referred to Committee on Senate Organization.

1 **Relating to:** terminating the COVID-19 public health emergency, including all
2 emergency orders and actions taken pursuant to declaration of the public
3 health emergency.

Analysis by the Legislative Reference Bureau

This joint resolution resolves that the public health emergency declared by the governor in Executive Order #104 on January 19, 2021, in response to the COVID-19 coronavirus, is unlawful and is terminated. The termination of the public health emergency applies to all actions of the governor and all emergency orders issued pursuant to the declaration of the public health emergency.

4 Whereas, under the United States Constitution and the Wisconsin State
5 Constitution, the structural separation and limitation of governmental powers is
6 foundational to our republican form of government, in that it ensures the
7 government exercises only that authority to which the governed have consented; and

8 Whereas, under section 323.10 of the statutes the governor may issue an
9 executive order declaring the existence of a public health emergency; and

1 Whereas, section 323.12 of the statutes grants the governor certain powers that
2 may be used in responding to the specified public health emergency, as defined in
3 section 323.02 (16) of the statutes; and

4 Whereas, the governor's authority to use the powers granted under section
5 323.12 of the statutes automatically expires 60 days after the declaration of the
6 emergency, unless the legislature extends the state of emergency by joint resolution,
7 or at such time as the legislature rescinds the executive order declaring the
8 emergency, whichever occurs first; and

9 Whereas, on March 12, 2020, Governor Tony Evers issued Executive Order #72
10 declaring a public health emergency for the COVID-19 coronavirus, which gave the
11 governor access to the powers identified in section 323.12 of the statutes for the
12 purpose of taking immediate action on the COVID-19 coronavirus emergency; and

13 Whereas, the legislature has not extended the state of emergency related to the
14 COVID-19 coronavirus emergency identified in Executive Order #72, with the result
15 that the governor's authority to address the COVID-19 coronavirus using the
16 emergency powers identified in section 323.12 of the statutes expired on May 11,
17 2020; and

18 Whereas, given that legislative oversight is vital to ensuring the governor's
19 proper exercise of the emergency powers granted by section 323.12 of the statutes,
20 legislative oversight is rendered useless if the governor ignores the temporal
21 limitations on the emergency powers by continuously reissuing emergency
22 declarations for the same emergency; and

23 Whereas, under section 323.10 of the statutes, any extension of the declaration
24 of emergency caused by the COVID-19 coronavirus requires a joint resolution of the
25 legislature; and

1 Whereas, the Wisconsin Supreme Court has already reaffirmed the
2 legislature's constitutionally mandated participation in any further response to the
3 COVID-19 coronavirus in *Wisconsin Legislature v. Palm*; and

4 Whereas, Executive Order #82 was unlawfully issued on July 30, 2020, to
5 address the very same COVID-19 public health emergency that expired with
6 Executive Order #72 on May 11, 2020; and

7 Whereas, Executive Order #90 was unlawfully issued on September 22, 2020,
8 to address the very same COVID-19 public health emergency that expired with
9 Executive Order #72 on May 11, 2020; and

10 Whereas, Executive Order #95 was unlawfully issued on November 20, 2020,
11 to address the very same COVID-19 public health emergency that expired with
12 Executive Order #72 on May 11, 2020; and

13 Whereas, it is incumbent upon the three branches of government to act as
14 checks on one another's power in order to vigorously protect and defend the principle
15 of structurally separated and limited power, so as to protect the governed from
16 abusive government; and

17 Whereas, the legislature can and must take immediate action to protect the
18 integrity of the legislative powers authorized under the Wisconsin Constitution and
19 the integrity of this republican form of government; now, therefore, be it

20 ***Resolved by the senate, the assembly concurring, That*** the governor had
21 no authority to issue Executive Order #104 on January 19, 2021, and it was therefore
22 void from the date of its issuance, as were any and all of the governor's actions or
23 orders related to the declared public health emergency to the extent the authority
24 for those orders or actions depended on Executive Order #104, or sections 323.10 or
25 323.12 of the statutes; and



EXECUTIVE ORDER #105

Relating to Declaring a State of Emergency and Public Health Emergency

WHEREAS, despite the progress in the fight against COVID-19, the virus continues to present a real and changing threat to Wisconsin's economy, healthcare system, and most importantly, its people;

WHEREAS, new, more contagious strains of the virus that causes COVID-19 are emerging throughout the United States, such as the B.1.1.7 variant which has been found in 32 states, including Wisconsin, Minnesota, Michigan, and Illinois;

WHEREAS, by spreading more easily and quickly, these variants threaten to drastically increase the number of COVID-19 cases while our health care system is still severely stressed;

WHEREAS, although the vaccine program offers a welcome ray of hope, it is not an immediate solution to this complex and deadly problem;

WHEREAS, economies throughout the world have been hit by the unexpected and dramatic change to the way we all live our lives, and Wisconsin is no exception;

WHEREAS, in Wisconsin, 390,000 households – approximately 740,000 Wisconsinites – receive nutrition support through FoodShare Wisconsin;

WHEREAS, because of the COVID-19 pandemic and economic fallout it caused, the number of individuals and families receiving FoodShare Wisconsin benefits has been increasing rapidly, with 140,000 people enrolling in the past year;

WHEREAS, to assist with the economic impact of COVID-19, the federal government took the important step of passing the Families First Coronavirus Response Act of 2020, providing critical support for families across the country who continue to struggle from the economic hardships caused by this brutal pandemic;

WHEREAS, the Family First Coronavirus Response Act of 2020 included additional federal funding for FoodShare Wisconsin, amounting to \$42 million to \$50 million in additional funding for Wisconsin *each month*;

WHEREAS, approximately 240,000 households rely on the additional federal funds to help them weather the storm caused by the COVID-19 pandemic;

WHEREAS, in December, 2019, FoodShare Wisconsin benefits lasted the average household for 16 days, but in December, 2020, with the additional federal funds, the benefits lasted for an average of 23 days;

WHEREAS, not only does this additional funding help feed economically-strained families, but it acts as a booster shot for local economies, with money

moving quickly from consumer to local businesses, including grocery stores, farmers, truckers, and their employees;

WHEREAS, Wisconsin is only eligible for these vital additional federal funds for FoodShare Wisconsin during a state public health emergency;

WHEREAS, without this additional funding, hundreds of thousands of Wisconsin families are losing approximately \$50 million in FoodShare Wisconsin funds *every month* that would otherwise have gone directly to families who are just trying to feed themselves;

WHEREAS, a sudden change to the food security of hundreds of thousands of Wisconsinites will have a severe impact on the life, health, property, and security of this state or a portion of this state;

WHEREAS, this economic and food security disaster is not occurring in isolation – COVID-19 is inflicting a devastating toll on Wisconsinites, their families, health care providers, the healthcare system, and the economy;

WHEREAS, Wisconsin continues to make progress in administering the new vaccines, with 659,026 doses having been administered as of February 3, 2021, and more than 21 percent of all persons over the age of 65 having received their first dose of vaccine;

WHEREAS, the State of Wisconsin and its local health care partners continue to make significant progress administering the COVID-19 vaccine, with 1,129 providers administering vaccine at 1,682 locations across the State;

WHEREAS, this is the largest vaccination campaign in history, but with only 89,950 first-doses arriving in Wisconsin each week, the process will take time before herd immunity is achieved;

WHEREAS, in the meantime, Wisconsinites must continue preventative measures to slow the spread of COVID-19, including staying at home as much as possible, wearing a face covering whenever they are indoors with people who are not part of their household, staying at least six feet away from other people when they leave home, and washing their hands frequently; and

WHEREAS, to protect the life and wellbeing of Wisconsinites, Wisconsin must take additional actions to ensure Wisconsinites have access to food and health care.

NOW, THEREFORE, I, TONY EVERS, Governor of the State of Wisconsin, by the authority vested in me by the Constitution and laws of this state, and specifically by Sections 321.39, 323.10, 323.12, and 323.13 of the Wisconsin Statutes, hereby:

1. Determine that a disaster threatening and negatively impacting the life and health of Wisconsinites exists pursuant to Sections 323.10 and 323.02(6) of the Wisconsin Statutes.
2. Proclaim that a public health emergency, as defined in Section 323.02(16) of the Wisconsin Statutes, exists for the State of Wisconsin.
3. Designate the Department of Health Services as the lead agency to respond to the public health emergency and direct the Department to take all necessary and appropriate measures to address this public health emergency, including taking all possible actions to secure and maintain additional federal funding for FoodShare Wisconsin;
4. Authorize the Adjutant General to activate the Wisconsin National Guard as necessary and appropriate to assist in the State's response to the public health emergency.
5. Direct all state agencies to assist as appropriate in the State's ongoing response to the public health emergency.
6. Pursuant to Section 323.10 of the Wisconsin Statutes, this State of Wisconsin Emergency from this Public Health Emergency shall remain in effect for

60 days, or until it is revoked by the Governor or by joint resolution of the Wisconsin State Legislature.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great seal of the State of Wisconsin to be affixed. Done at the Capitol in the City of Madison this fourth day of February in the year of two thousand twenty-one.

TONY EVERS
Governor

By the Governor:

DOUGLAS LA FOLLETTE
Secretary of State

DEREK LINDOO, BRANDON WIDIKER,
and JOHN KRAFT,

Plaintiffs,

v.

Case No. 20-CV-219

TONY EVERS, in his official capacity as
Governor of the State of Wisconsin,

Defendant.

**DEFENDANT’S RESPONSE OPPOSING PLAINTIFFS’ MOTION FOR
TEMPORARY INJUNCTION**

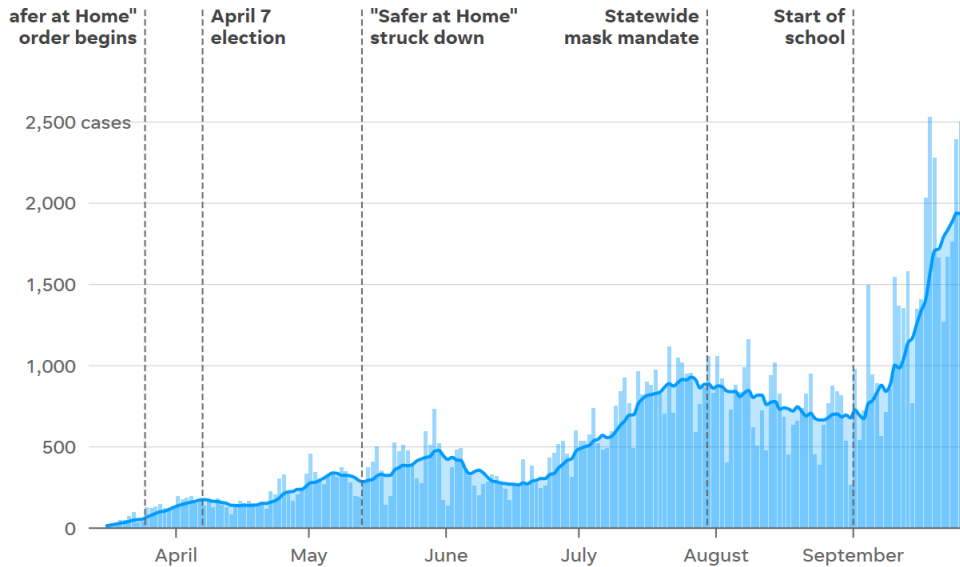
INTRODUCTION

At this point, COVID-19 is not new to Wisconsin. Loved ones have died, businesses have suffered, and we all have struggled to maintain ties in a world where close contact can put others at risk.

But September’s skyrocketing of COVID-19 cases—to never-before-seen numbers, to Wisconsin approaching available hospital-bed capacity, and all propelled at alarming rates by young adults across the State—that *is* new to Wisconsin:

New confirmed cases per day

Line represents the seven-day moving average



1

And it is serious. Wisconsin has become a national COVID-19 hotspot: Wisconsin is now one of only a handful of states in the Center for Disease Control's (CDC) worst category for weekly case growth.² Wisconsin has repeatedly shattered its record for single-day new cases throughout September, Northern Wisconsin now has many of the most significant viral red zones, and hospitalizations across the State are at an all-time high.³

¹ *Tracking Coronavirus in Wisconsin*, USA Today Network—Wisconsin, (Sept. 26, 2020), <https://projects.jsonline.com/topics/coronavirus/tracking/covid-19-cases-testing-and-deaths-in-wisconsin.html>.

² Ctrs. for Disease Control Coronavirus Disease 2019 (COVID-19), *CDC COVID Data Tracker*, (Sept. 26, 2020), https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days.

³ Sophie Carson, *Wisconsin reports more than 2,500 new coronavirus cases and a record-high number of people hospitalized*, Milwaukee Journal Sentinel (Sept. 25, 2020, 3:17 PM), <https://www.jsonline.com/story/news/local/2020/09/25/wisconsin-coronavirus-state-reports-2-504-new-covid-cases-9-deaths/3534186001/>.

In response to the extraordinary acceleration of Wisconsin's COVID-19 cases, Governor Evers issued Executive Order 90, declaring a statewide state of emergency, and Emergency Order 1, implementing a new face covering mandate. Plaintiffs seek a temporary injunction that would enjoin these vital orders. They argue that since Wis. Stat. § 323.10 provides that a state of emergency order may not exceed 60 days absent an extension from the Legislature, the Governor was confined to a single, one-and-done, COVID-19 emergency order. Plaintiffs' arguments fail for several reasons.

To start, the statutory permissibility of a new state of emergency order is a nonjusticiable issue. Plaintiffs have no claim of right under the statute on which they rely, nor does that statute protect the interests that Plaintiffs are asserting. Instead, the statute explicitly leaves the appropriateness of such an emergency order for the executive and legislative branches to decide. The law confers discretion on the Governor to decide the issue in the first instance, and provides a mechanism for the Legislature to revoke the order if it disagrees. Plaintiffs ask the Court to sweep away this carefully crafted process, and impose their preferred outcome by judicial order. The Court should decline the invitation.

But even if this Court holds otherwise, Executive Order 90 and Emergency Order 1 should not be put on hold. First, Plaintiffs do not show that they would suffer irreparable harm in the absence of preliminary relief; they

hardly even try to show it. To meet this required showing, Plaintiffs would have to be able to show that this Court not granting their temporary injunction request would render eventual relief in their favor futile. They do not meet that showing—they just want faster relief. Executive Order 90, standing alone, has no effect on the three plaintiffs—it does not require them to do anything. Plaintiffs’ asserted interest essentially boils down a preference not to wear a face mask in those situations mandated by Emergency Order 1. That does not establish irreparable harm. And it plainly does not outweigh the public equities in protecting Wisconsin from the spread of a dangerous, novel virus.

Second, Plaintiffs are unlikely to succeed on the merits. Executive Order 90 is a straightforward exercise of the Governor’s emergency powers. The statutes do not cabin the Governor’s ability to enter multiple state of emergency orders that arise out of a common underlying cause. Indeed, the law explicitly permits the Governor to declare a state of emergency where there is an “occurrence” of a biological pathogen that presents serious dangers. That is exactly what happened here.

It makes sense that Wis. Stat. § 323.10 limits a particular state of emergency *order* to 60 days absent Legislative extension. That time limit provides a Governor with the ability to address the immediately dangers posed by a particular catastrophic event, and it would be unreasonable for a Governor to extend a particular state of emergency order in perpetuity when the

underlying emergency conditions have ended. But it makes no sense to say that a Governor who has declared a state of emergency is powerless in the face of a resurgence or drastic increase of force—such as a fire that spreads rapidly with new weather conditions, or floodwaters that swell with additional rainfall.

Contrary to Plaintiffs’ one-and-done reading of the law, the statute gives the Governor authority to issue a new order declaring a state of emergency. And if the people’s representatives in the Legislature believe that new order is improper, the remedy is clear: The Legislature can revoke it.

Lastly, Plaintiffs’ only challenge to Emergency Order 1, the face-covering mandate, is fully dependent on this Court agreeing with their challenges to Executive Order 90. So, just as their challenge to Executive Order 90 is unlikely to succeed, so too is their challenge to Emergency Order 1.

This Court should therefore deny Plaintiffs’ temporary injunction request.

FACTUAL BACKGROUND

I. **Despite bending the curve in May, COVID-19 spread across Wisconsin in June and July 2020.**

Wisconsin's exposure to the COVID-19 pandemic started with a handful of confirmed cases in February and early March, with cases steadily increasing in the following months. In March and April, the Secretary-designee of the Department of Health Services (DHS) implemented statewide Safer at Home measures and set forth a phased "Badger Bounce Back" plan for reopening.⁴ By May, with these measures in place, Wisconsinites had successfully "bent the curve," resulting in a slowed trajectory of spread.⁵

That trajectory reversed itself in June and July. On June 5, more than three months after the first reported case, Wisconsin had 20,249 reported

⁴ See Exec. Order 72 (Mar. 12, 2020) (creating state of emergency); Emergency Order 12 (March 24, 2020) (Safer at Home); Emergency Order 28 (Apr. 16, 2020) (Safer at Home); Emergency Order 31 (Badger Bounce Back). All of the Governor's executive orders related to COVID-19 are available online. Wis. Governor Tony Evers, *Executive Orders*, <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx> (last updated Sept. 25, 2020).

⁵ Wis. Dep't. of Health Servs., *COVID-19: Wisconsin Cases*, <https://www.dhs.wisconsin.gov/covid-19/cases.htm> (last updated Sept. 30, 2020) (information updated regularly); see also Jeffrey Kluger & Chris Wilson, *America is Done with COVID-19. COVID-19 Isn't Done with America*, TIME (June 15, 2020, 1:23 PM), <https://time.com/5852913/covid-second-wave/> (discussing states that "bent the curve" and showing Wisconsin's downward trajectory in June).

COVID-19 cases.⁶ The next 20,000 cases occurred in only six weeks, with 40,507 cases on July 17.⁷

II. Governor Evers declared a new state of emergency and implemented a statewide mask mandate, and Wisconsin’s daily COVID-19 cases decreased in August 2020.

Given the escalation of COVID-19 cases, on July 30, 2020, Governor Evers issued Executive Order 82.⁸ Pursuant to Wis. Stat. § 323.10, Governor Evers declared that a public health emergency, as defined by Wis. Stat. § 323.02(16), existed for the State of Wisconsin. The Order described the drastic increase in new cases, including in many areas that had previously seen low COVID-19 activity levels.⁹

Governor Evers designated DHS as the lead agency to respond to the public health emergency. Executive Order 82 explained that, pursuant to Wis. Stat. § 323.10, the order would remain in effect for 60 days, or until revoked by the Governor or by joint resolution of the Legislature. Governor Evers also

⁶ Affidavit of Dr. Ryan P. Westergaard in Opposition to Plaintiffs’ Motion for a Temporary Restraining Order (“Westergaard Aff.”) ¶ 10.

⁷ *Id.*

⁸ Wis. Governor Tony Evers, *Exec. Order 82, Relating to Declaring a Public Health Emergency* (July 30, 2020), <https://evers.wi.gov/Documents/COVID19/EO082-PHECOVIDSecondSpike.pdf>

⁹ *Id.*

issued Emergency Order 1.¹⁰ That Order mandated wearing masks in indoor spaces other than a private residence, with certain exceptions.

Following these actions, Wisconsin's COVID-19 rate decreased substantially. On August 1, Wisconsin's seven-day daily average of new COVID cases was 1,062; by August 31 that number dropped to 678.¹¹ And the next 20,000 cases took almost four weeks instead of three—with 80,300 cases on September 5.¹²

III. The School Year Began, and Wisconsin's New COVID-19 Cases Skyrocketed.

But, unfortunately, that progress ended when the school year began. As K-12 and collegiate schools opened up, the number of new daily COVID-19 cases skyrocketed. By September 15 there were 99,562 total COVID-19 cases—almost 20,000 new cases in only two weeks.¹³ On September 17, Wisconsin rose to a record high of 2,034 new cases in one day, and then another record high of 2,534 new cases the very next day.¹⁴ By September 21, the seven-day daily average of new cases had risen to 1,791—more than doubling in a single a month.¹⁵ And those numbers have continued to rise: there were 2,817 new

¹⁰ Wis. Governor Tony Evers, *Emergency Order 1, Relating to Preventing the Spread of COVID-19 by Requiring Face Coverings in Certain Situations* (Mar. 1, 2020), <https://evers.wi.gov/Documents/COVID19/EmO01-FaceCoverings.pdf>.

¹¹ Westergaard Aff. ¶ 11.

¹² *Id.* ¶ 12.

¹³ *Id.*

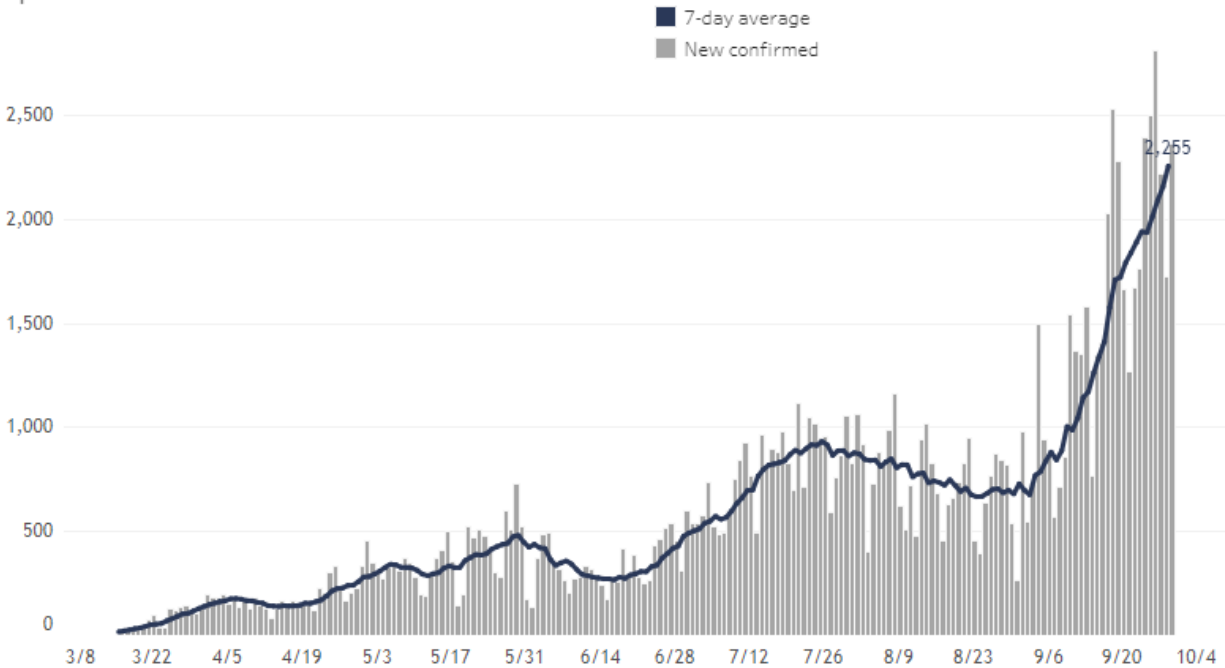
¹⁴ *Id.*

¹⁵ *Id.*

cases on September 26, a new single day record; and by September 29, the seven-day daily average of new cases had risen to 2,225.¹⁶

New confirmed COVID-19 cases by date confirmed, and 7-day average

Updated: 9/29/2020



Alarming, this surge has been driven by 18 to 24 year-olds.¹⁷ With the beginning of the school year, this age cohort had case rates five times higher than any other age group.¹⁸ Spread among college students presents unique challenges and risks, not only for the students but for the entire state: students come together from homes in a wide variety of locations, live in close proximity to each other at school, and then return to their home communities.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* ¶ 13.

In fact, although the acceleration of growing new cases among 18- to 24-year-olds has started to slow slightly, the rate among other age groups had continued to climb, and the total number of cases has gone up.¹⁹ In other words, as case numbers continue to go up, the new cases are spread broadly across the community. As the Milwaukee Journal Sentinel recently reported, over September, “[m]ost age groups reported increases of about 40% to 50% week over week—indicating that while young adults may have driven transmission of the virus early in the month, people of all ages are feeling the consequences of the surge in recent days.”²⁰

Wisconsin is rapidly approaching its available limits of hospital beds: based on data available to DHS, 80% of beds are currently unavailable.²¹ Hospitals in Green Bay and the Fox Valley are near capacity.²² And Aspirus Wausau Hospital has issued a plea to the public to wear a mask because of the dramatic increase in hospitalizations in that area.²³

¹⁹ *Id.* ¶ 13.

²⁰ Carson, *supra* note 3.

²¹ Wis. Dep’t. of Health Servs., *COVID-19: Hospital*, (last updated Sept. 30, 2020), <https://www.dhs.wisconsin.gov/covid-19/hosp-data.htm> (information updated regularly)

²² Westergaard Aff. ¶ 15; Sophie Carson & Madeline Heim, *State reports nearly 22% positive coronavirus tests as outbreak in northeast Wisconsin worsens*, Milwaukee Journal Sentinel (Sept. 28, 2020, 7:24 PM), <https://www.jsonline.com/story/news/2020/09/28/wisconsin-coronavirus-green-bay-fox-valley-outbreaks-worsen/3562169001/>.

²³ Stella Porter, *UPDATE: Aspirus leaders say central Wisconsin at “pivotal” point as COVID hospitalizations spike*, WSAW-TV (Sept. 23, 2020, 10:33 AM),

Additionally, nearly 22% of all COVID-19 tests in Wisconsin are now positive.²⁴ Contrast this with New York and Florida, which are currently reporting positive tests of only roughly 1% and 5%, respectively.²⁵ Wisconsin, North Dakota, and South Dakota, are currently the top three states in the nation for growth of new cases per 100,000 people.²⁶

Seasonal changes make this unprecedented surge in cases even more harrowing. Most respiratory viruses, including influenza and seasonal coronavirus, reach peak activity in Wisconsin in late fall and early spring. If SARS-CoV-2 follows a similar pattern, the number of COVID-19 cases will drastically increase during the winter months.²⁷

IV. In response to this unprecedented acceleration of cases, Governor Evers issued Executive Order 90 and Emergency Order 1.

To combat the unprecedented acceleration of new COVID-19 cases following the start of the school year, on September 22, 2020, Governor Evers

<https://www.wsaw.com/2020/09/23/aspirus-leaders-urge-masking-as-region-sees-uptick-in-covid-cases/>.

²⁴ Carson & Heim, *supra* note 24.

²⁵ *Id.*

²⁶ Rob Mentzer, *Wisconsin's September COVID-19 Spike 'Couldn't Have Come at a Worse Time'*, Wisconsin Public Radio (Sept. 29, 2020, 5:55 AM), <https://www.wpr.org/wisconsins-september-covid-19-spike-couldnt-have-come-worse-time>.

²⁷ Westergaard Aff. ¶ 16.

issued Executive Order 90.²⁸ Pursuant to his authority under Wis. Stat. § 323.10, Governor Evers declared that a public health emergency, as defined under Wis. Stat. § 323.02(16), exists in the State.

Governor Evers again designated DHS as the lead agency to respond to the public health emergency. He also authorized the Adjutant General to activate the Wisconsin National Guard as needed to assist in response to the public health emergency, including with providing personnel to support the November 3 general election and operate community testing sites throughout Wisconsin.

Executive Order 90 provides that, “[p]ursuant to Section 323.10 of the Wisconsin Statutes,” the order “shall remain in effect for 60 days, or until it is revoked by the Governor or by joint resolution of the Wisconsin State Legislature.”

On September 22, 2020, Governor Evers also issued a new face covering mandate—Emergency Order 1.²⁹ Governor Evers explained that “face coverings are a proven, effective way to slow the spread of COVID-19 without having a significant impact on people’s day-to-day lives.” Governor Evers

²⁸ Wis. Governor Tony Evers, *Exec. Order 90, Relating to Declaring a Public Health Emergency* (Sept. 22, 2020), <https://evers.wi.gov/Documents/COVID19/EO090-DeclaringPublicHealthEmergency.pdf>

²⁹ Wis. Governor Tony Evers, *Emergency Order 1, Relating to Requiring Face Coverings* (Mar. 13, 2020), <https://evers.wi.gov/Documents/COVID19/EmO01-SeptFaceCoverings.pdf>

explained that, pursuant to his authority under Wis. Stat. § 323.12(4)(b), he determined that a “statewide face covering requirement is necessary to protect persons throughout the State of Wisconsin from COVID-19.”

Accordingly, Emergency Order 1 mandates that Wisconsinites wear face coverings in certain situations. Specifically, it provides that individuals ages five and older in the State shall wear a face covering where: (1) the individual is indoors or in an enclosed space, other than a private residence; and (2) another person or persons who are not members of the individual’s household are present in the same room or enclosed space.

Emergency Order 1, however, sets forth numerous circumstances where, even in the above two conditions, a face covering is not required, including when eating and drinking, when engaging in work where wearing a face covering would create risk, and where a single individual is speaking to an audience from a distance of over six feet. A face covering further is not required for individuals who have trouble breathing, or who have other medical, mental health, or intellectual conditions that prevent wearing a face covering.

Emergency Order 1 is effective until November 21, 2020, or by a subsequent superseding emergency order.

V. Face Coverings Help Control COVID-19 Spread.

COVID-19 is dispersed primarily through respiratory droplets; for example, when someone sneezes or coughs. Both pre-symptomatic and asymptomatic individuals can transmit the disease; asymptomatic carriers may in fact “be the critical driver needed to maintain epidemic momentum.”³⁰ A July study estimated that *more than half* of all COVID-19 infections were transmitted by a person who was not exhibiting symptoms.³¹

By preventing the dispersion of particles that can transmit COVID-19, cloth face coverings can be an effective measure to limit spread. Put simply, cloth face coverings are a means of “source control”; they block the dispersal of infectious particles that are generated when an infected person exhales, coughs, sneezes, or speaks.³²

CDC Director Robert R. Redfield has called face masks “one of the most powerful weapons we have to slow and stop the spread of the virus – particularly when used universally within a community setting.”³³ High levels

³⁰ Westergaard Aff. ¶¶ 21–23.

³¹ Sayed M. Moghadas, et al., *The implications of silent transmission for the control of COVID-19 outbreaks*, 117 Proceedings of the Nat’l Academy of Sciences 30, 17513–15 (2020), <https://www.pnas.org/content/pnas/117/30/17513.full.pdf>.

³² Westergaard Decl. ¶¶ 24–27.

³³ Press Release, Ctrs. for Disease Control, *CDC Calls on Americans to wear masks to prevent COVID-19 spread* (July 14, 2020), <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html>.

of mask use is particularly important for curbing transmission given the spread of COVID-19 by infected people who do not exhibit symptoms.³⁴

Evidence also indicates that the widespread use of face coverings helps mitigate the brutal effect that the pandemic has had on the economy. For example, a team of economists from Goldman Sachs estimated that mask mandates “have large and highly statistically significant effects on health outcomes,” which could salvage around 5% of GDP in otherwise lost economic activity, or roughly \$1 trillion.³⁵

Most states accordingly have enacted statewide face covering requirements as part of their COVID-19 response.³⁶

STATUTORY BACKGROUND: THE GOVERNOR’S AUTHORITY UNDER CHAPTER 323

Chapter 323 of the Wisconsin Statutes provides a statutory scheme to enable state government to efficiently and effectively respond to an emergency in part or all of the State. Chapter 323 places the Governor at the helm during

³⁴ *Id.*

³⁵ Jean Hatzius, et al., *Face Masks and GDP*, Goldman Sachs (June 29, 2020), <https://www.goldmansachs.com/insights/pages/face-masks-and-gdp.html>; Tom Newmyer, *The Finance 202: Goldman Sachs says wearing face masks could save the economy*, Wash. Post (July 1, 2020), <https://www.washingtonpost.com/news/powerpost/paloma/the-finance-202/2020/07/01/the-finance-202-goldman-sachs-says-wearing-face-masks-could-save-the-economy/5efbc17388e0fa7b44f6b7f9/>.

³⁶ *See*, The Council of State Governments, *COVID-19 Resources for State Leaders – Executive Orders*, <https://web.csg.org/covid19/executive-orders/> (classification: Masks/ Face Coverings).

an emergency—both to identify the emergency, and to respond to it. To this end, Chapter 323 both requires and empowers the Governor to issue orders to respond to the emergency, and to delegate authority to others to assist in the response. These duties and powers are consistent with the Governor’s constitutional duty to enforce the law. Wis. Const. art. V, §§ 1, 4.

First and foremost, the Governor has the authority to declare a state of emergency, including a public health emergency. Wisconsin Stat. § 323.10 provides that the “governor may issue an executive order declaring a state of emergency for the state of any portion of the state if he or she determines that an emergency resulting from a disaster or the imminent threat of a disaster exists.” A “disaster” means a “severe or prolonged, natural or human-caused, occurrence that threatens or negatively impacts,” among other things, “life” and “health.” Wis. Stat. § 323.02(6).

Wisconsin Stat. § 323.10 also specifically provides that if “the governor determines that a public health emergency exists, he or she may issue an executive order declaring a state of emergency related to public health for the state or any portion of the state and may designate the department of health services as the lead state agency to respond to the emergency.”

Thus, our statutes make clear that the “state of emergency” is a distinct concept from an “emergency” itself. *See, e.g.*, Wis. Stat. § 323.10 (“The governor may issue an executive order declaring a *state of emergency*. . . if he or she

determines that an *emergency*. . . exists”). The “state of emergency” is the condition the Governor declares via order, in response to an emergency, that triggers the emergency procedures of Chapter 323.

Our statutes also place limitations on the duration of a state of emergency order, and give the Legislature power to end or extend it: “A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature. . . The executive order may be revoked at the discretion of either the governor by executive order or by the legislature by joint resolution.” Wis. Stat. § 323.10.

During a state of emergency, the Governor has affirmative duties: “[T]he governor shall issue orders, delegate such authority as is necessary to the [administrator of the division of emergency management], and direct the [division of emergency management] to coordinate emergency management activities.” Wis. Stat. § 323.12(3). The Governor also possesses specific, enumerated powers during a state of emergency. Wis. Stat. § 323.12(4). Among these, the Governor has the power to “[i]ssue such orders as he or she deems necessary for the security of persons and property.” Wis. Stat. § 323.12(4)(b).

Additionally, during a state of emergency related to public health, the Governor may call the State national guard into state active duty. Wis. Stat. § 321.39(1)(a)3. The Adjutant General, who heads the Department of Military Affairs, administers the National Guard and serves as the Governor’s chief

military advisor and emergency management coordinator. Wis. Stat. §§ 15.31, 321.03(1)(a). The Adjutant General also has the duty to develop and adopt a state emergency plan. Wis. Stat. § 323.13(1)(b). Thus, the Governor's ability to declare a state of emergency in turn provides him the important ability to activate the National Guard, which enables the Adjutant General to direct the National Guard to perform state tasks critical in responding to emergencies.³⁷

LEGAL STANDARD

Wisconsin Stat. § 813.02(1)(a) provides that a court may grant a temporary injunction where it appears that one party is entitled to judgment, and that another party may take some action during the litigation that could violate rights of the first party, or render the subsequent judgment ineffectual. Temporary injunctions are an extraordinary form of relief, which are not to be issued lightly. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)

A movant must establish: (1) a reasonable probability of ultimate success on the merits; (2) that the injunction is necessary to preserve the status quo;

³⁷ These tasks may include, for example, helping ensure safe in-person elections in the midst of a pandemic. More than 2400 soldiers and airmen served as poll workers in every county in Wisconsin except one for our April 7 election; National Guard members also delivered cleaning supplies and personal protective equipment to polling sites. Meg Jones, *'A whirlwind': Wisconsin National Guard's new adjutant general started job just in time for pandemic, elections, protests*, Milwaukee Journal Sentinel (July 29, 2020, 6:00 AM), <https://www.jsonline.com/story/news/2020/07/29/meet-paul-knapp-wisconsin-national-guards-new-adjutant-general/5475662002/>.

(3) the lack of an adequate remedy at law; and (4) a likelihood of suffering irreparable harm if the injunction does not issue. *Milwaukee Deputy Sheriffs' Ass'n. v. Milwaukee County*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154.

To show irreparable injury, the movant must demonstrate that, without a temporary injunction to preserve the status quo during the litigation, the issuance of permanent injunctive relief at the end of the case would be rendered futile. *Werner*, 80 Wis. 2d at 520.

A probability of success on the merits turns in part on whether the moving party has stated a claim entitling it to relief. *School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 374, 563 N.W.2d 585 (Ct. App. 1997). The movant must also present sufficient evidence to permit the conclusion that it has a reasonable probability of success. *See id.* at 374–75. Accordingly, “where the issuance of a temporary injunction would have the effect of granting all the relief that could be obtained by a final decree, and would practically dispose of the whole case, it ordinarily will not be granted unless the complainant's right to relief is clear.” *Codept, Inc. v. More-Way North Corp.*, 23 Wis. 2d 165, 172, 127 N.W.2d 29 (1964).

Further, the granting of a temporary injunction rests within the court's discretion. *Werner*, 80 Wis. 2d at 519. Even if the statutory requirements for have been met, a court need not grant an injunction. *Id.* at 524.

ARGUMENT

- I. As a threshold matter, the Court should not reach Plaintiffs’ request for *any* relief—temporary or permanent—because they have not presented a justiciable controversy.**

Plaintiffs fail to satisfy the standards to obtain a temporary injunction. But before the Court even applies those standards, Plaintiffs’ case fails for a more basic, antecedent reason. Plaintiffs have failed to present a justiciable controversy suitable for declaratory judgment because they have not alleged a claim of right under Wis. Stat. § 323.10, and because that statute does not protect the interests they are advancing. Plaintiffs, therefore, are entitled to no relief—temporary or permanent.

In order to maintain a declaratory judgment action under Wis. Stat. § 806.04, a party must establish that a justiciable controversy exists. *See Milwaukee Dist. Council 48 v. Milwaukee County*, 2001 WI 65, ¶ 37, 244 Wis. 2d 333, 627 N.W.2d 866. A declaratory-judgment issue is justiciable when four conditions are satisfied:

- (1) [There must be a] controversy in which a claim of right is asserted against one who has an interest in contesting it.
- (2) The controversy must be between persons whose interests are adverse.
- (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest.
- (4) The issue involved in the controversy must be ripe for judicial determination.

Loy v. Bunderson, 107 Wis. 2d 400, 409, 320 N.W.2d 175 (1982). Plaintiffs’ claim does not satisfy the first or third of those conditions.

A. Plaintiffs have not alleged a claim of right under Wis. Stat. § 323.10 because the only rights and remedies under that statute belong to the Governor and to the Legislature—not to private litigants or to the judiciary.

The first element of justiciability—i.e. the assertion of a claim of right against a party with an interest in contesting it—is not satisfied here because the only rights and remedies under Wis. Stat. § 323.10 belong to the Governor and to the Legislature—not to private litigants or to the judiciary.

Section 323.10 is a provision of public law that, on its face, governs the emergency powers of the State. The legislatively declared purpose of Wis. Stat. ch. 323 is “[t]o prepare the state and its subdivisions to cope with emergencies resulting from a disaster, or the imminent threat of a disaster,” by conferring specified powers and duties upon the Governor and other public officials so as to “establish an organization for emergency management.” Wis. Stat. § 323.01(1). Accordingly, Wis. Stat. § 323.10 protects the safety and welfare of the public in general by expressly creating two—and only two—rights: (1) the Governor’s right, in the first instance, to determine whether emergency conditions exist and to issue an executive order declaring a state of emergency; and (2) the Legislature’s right, at its discretion, to pass a joint resolution revoking or extending such a state of emergency.

Accordingly, the statute creates a single express remedy for invalidating a Governor’s emergency order: by a legislative joint resolution—*not* by private litigation in the courts. *See* Wis. Stat. § 323.10.

Nothing in the text of Wis. Stat. § 323.10 purports to create a claim of right or a judicial remedy for a private plaintiff. Rather, the specific provision empowering the Legislature to revoke a state of emergency plainly embodies a legislative determination that controversies concerning the declaration of an emergency should be resolved between the legislative and executive branches of the government, rather than by the judicial branch through private litigation.

Given the challenging and ever-changing factual circumstances that arise during an emergency, it makes sense that the Legislature created a statutory scheme that empowers those elected branches—not the judiciary—to decide how best to proceed.

Section 323.10’s reliance on the political branches to protect the safety and welfare of the public in emergency situations also aligns with the federal courts’ long-standing recognition of the limits of the judicial role in reviewing factual determinations by government officials that have been specifically authorized by statute. *See, e.g., United States v. George S. Bush & Co., Inc.*, 310 U.S. 371, 380 (1940) (“It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his

judgment that action is necessary . . . to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.”); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1348 (Fed. Cir. 2018) (“[C]ourts have repeatedly confirmed that, where the statute authorizes a Presidential ‘determination,’ the courts have no authority to look behind that determination to see if it is supported by the record.”)

Similarly, in the specific context of a COVID-19 executive order, the Chief Justice of the United States Supreme Court recently reaffirmed that Court’s long-standing recognition that the judiciary should not interfere when elected officials act in areas “fraught with medical and scientific uncertainties” during an emergency. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (Mem.) (Roberts, C.J., concurring).

Here, Plaintiffs’ entire argument rests on the premise that Executive Order 90 is an unlawful extension of previous state-of-emergency orders Governor Evers issued related to the COVID-19 pandemic, because the orders all concern a “single public health problem.” (*See, e.g.*, Pls.’ Br. 14.) The ultimate question thus necessarily comes down to whether the factual emergency conditions underlying the most recent emergency order are sufficiently distinct from the conditions underlying the earlier orders to warrant the conclusion that the Governor has not simply extended an earlier

state of emergency, but rather has declared a new state of emergency based on new and urgent public health threats.

For example, if, in the Spring of 2021, the COVID-19 virus started killing most of those infected, Plaintiffs' interpretation of Wis. Stat. § 323.10 would require the courts to decide whether the new circumstances were really part of the "single public health problem" that the State faced at the time of the original emergency declaration in March 2020. If correct, Plaintiffs' position would render the Governor powerless to take emergency actions to respond to the then-existing public health threat.

Similarly here, Plaintiffs ask this Court to decide whether the unprecedented surge of COVID-19 cases in September 2020 is sufficiently distinct from earlier pandemic conditions to be considered a new public health emergency to which the Governor has power to respond. Section 323.10, however, expressly leaves the resolution of such fact-intensive and often technical questions to the Governor and the Legislature, not the courts.³⁸

³⁸ Notably, in *Wisconsin Legislature v. Palm*, the Wisconsin Supreme Court found the lack of "procedural safeguards on the power" significant when it concluded that some of the provisions in DHS's Safer at Home Order exceeded the agency's authority under Wis. Stat. ch. 252. 2020 WI 42, ¶ 35, 391 Wis. 2d 497, 942 N.W.2d 900. Here, in contrast, Wis. Stat. § 323.10 provides a clear procedural safeguard—i.e. a legislative joint resolution revoking the state of emergency. That safeguard rests with the Legislature, not with the courts.

Plaintiffs, therefore, have not alleged a claim of right under Wis. Stat. § 323.10 and thus have not satisfied the first requirement of a justiciable controversy.

B. Plaintiffs have not alleged a legally protected interest in the Governor’s emergency declaration because Wis. Stat. § 323.10 does not protect the interests they are advancing.

Plaintiffs also have not satisfied the third requirement of the justiciability standard—i.e. the assertion of a legally protected interest in the controversy—because Wis. Stat. § 323.10 does not protect the interests they are advancing.

This aspect of the justiciability inquiry is often stated in terms of a party’s standing to bring a particular cause of action. *Foley-Ciccantelli v. Bishop’s Grove Condo. Ass’n, Inc.*, 2011 WI 36, ¶ 47, 333 Wis. 2d 402, 797 N.W.2d 789; *see also Planned Parenthood of Wisconsin, Inc. v. Schimel*, 2016 WI App 19, ¶ 13, 367 Wis. 2d 712, 877 N.W.2d 604. A party has standing to bring a cause of action if he can show some direct injury or a threat of direct injury to a legally protected interest. *Marx v. Morris*, 2019 WI 34, ¶ 74, 386 Wis. 2d 122, 925 N.W.2d 112, *reconsideration denied*, 2019 WI 84, ¶ 75, 388 Wis. 2d 652, 931 N.W.2d 538. This means that the interest must arguably rest within the zone of interests protected by the provision of law under which the claim is brought. *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 49; *Zehner v. Village of Marshall*, 2006 WI App 6, ¶ 11, 288 Wis. 2d 660, 709 N.W.2d 64.

Plaintiffs fail to satisfy this standing inquiry because the interests they are asserting do not lie within the zone of interests protected by Wis. Stat. § 323.10. That statute protects the general public interest in preparing the State for public emergencies by establishing an organization for emergency management. *See* Wis. Stat. § 323.01(1). More specifically, Wis. Stat. § 323.10 protects (1) the Governor’s interest in initially determining whether emergency conditions exist and, when they do exist, in declaring a state of emergency; and (2) the Legislature’s interest in passing a joint resolution to revoke or extend such an emergency order, whenever the Legislature, in its own discretion, deems such action appropriate. Under the statute, however, only the Legislature has a legally protected interest in revoking a gubernatorial declaration of an emergency. And that may occur only by the statutorily prescribed mechanism of a legislative joint resolution—*not* by private litigation. *See* Wis. Stat. § 323.10.

Moreover, because Wis. Stat. § 323.10 only protects the above interests, Plaintiffs’ attempted reliance on their standing as taxpayers is unavailing. “In order to maintain a taxpayer’s action, it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, *some pecuniary loss*; otherwise the action could only be brought by a public officer.” *S.D. Realty Co. v. Sewerage Comm’n*, 15 Wis. 2d 15, 21–22, 112 N.W.2d 177 (1961) (emphasis added). That legal standard is not met by

Plaintiffs’ general allegation that the State is spending taxpayer money to promulgate and enforce the mask mandate and to deploy the national guard. (Am. Compl. ¶ 36.)

To the contrary, Plaintiffs have alleged no particular pecuniary loss, but instead argue that, as residents and taxpayers, they have a “substantial . . . interest in ensuring government officials act within the four corners of the law.” (Pls.’ Br. 21.) They have supplied no legal authority, however, to support the notion that the pecuniary loss standard is met whenever government personnel do anything pursuant to an allegedly erroneous prior action. Such an overly broad view would render the pecuniary loss standard meaningless. Wisconsin Stat. § 323.10 does not protect Plaintiffs’ private interests as residents or taxpayers, but rather protects general public interests and specifically enumerated interests of the Governor and the Legislature.

Plaintiffs have failed to present a justiciable controversy suitable for declaratory judgment, and they are entitled to no relief—temporary or permanent.

II. Plaintiffs cannot show they are likely to suffer irreparable harm absent an injunction.

If this Court were to nevertheless hold that it could or should address this nonjusticiable controversy, Plaintiffs still are not entitled to a temporary injunction. Most simply, they cannot show that they will likely suffer

irreparable harm absent an injunction. *Werner*, 80 Wis. 2d at 520. They barely even attempt to meet this requirement, because they cannot meet it. And without it, their motion for a temporary injunction must fail.

To establish irreparable harm, Plaintiffs have to be able to show that without this Court acting *now* through a temporary injunction to preserve the status quo, issuing permanent injunctive relief at the end of the case would be futile. *Werner*, 80 Wis. 2d at 520. So, for example, if a party raises a challenge related to an upcoming election, the challenger may be able to show irreparable harm based on the fact that—by the time the normal course of litigation will have completed—the election will have already happened, rendering any relief in the party’s favor meaningless. *See, e.g., Jones v. McGuffage*, 921 F. Supp. 2d 888, 901 (N.D. Ill. 2013) (“It is self-evident that an otherwise qualified candidate would suffer irreparable harm if wrongfully deprived of the opportunity to appear on an election ballot”).

Plaintiffs, however, do not and cannot show anything like that. Instead, they just want faster relief.³⁹ A desire for faster relief does not show a likelihood of irreparable harm.

³⁹ For these same reasons, Plaintiffs also cannot show that an injunction is necessary to preserve the status quo. *Werner v. A.L. Grootemaat & Sons, Inc.*, 820 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). Plaintiffs rely on *Shearer v. Congdon*, 25 Wis. 2d 663, 131 N.W.2d 377 (1964), but that case does not help them. The Court held there, “Respondents ultimately desire a prescriptive easement in the drive. The

Indeed, the core of Plaintiffs’ argument is that the Governor lacked authority to issue the current orders because he previously issued similar orders. Plaintiffs’ first brought this challenge to Executive Order 82—Governor Evers’s previous COVID-19 executive order—and the face covering mandate issued under that Order.⁴⁰ Plaintiffs have been subject to those orders for the over one-month period since they filed the complaint in this case. Plaintiffs do not show they have sustained injury over that time, or that they would in turn sustain injury absent an injunction now.

And they cannot make that showing. Executive Order 90, standing alone, does not require the three plaintiffs to do anything. They assert they are “forced to comply” with the order, (Pls.’ Br. 21), but it imposes no affirmative burden on them, and it does not require them to refrain from taking any action. Although it permits the Governor to take additional actions based on his emergency powers, it is only the exercise of the powers derived from the state-

temporary injunction does not grant this relief, but merely prohibits appellants from obstructing the road until the easement question can be resolved.” *Shearer*, 25 Wis. 2d at 667–68. Put differently, the purpose of the injunction was not to “decide the action before trial.” *Id.* at 667 (citation omitted). Here, however, that is *exactly* what Plaintiffs want. They want to upend the status quo, not preserve it.

⁴⁰ Throughout their brief, Plaintiffs make arguments about both Executive Order 82 and Executive Order 90. They also ask this Court to temporarily enjoin both orders. But Executive Order 82, by statute and its own terms, expired on September 28, 2020 (60 days after its issuance on July 30, 2020). Even if Plaintiffs were due any relief, there would be nothing for this Court to enjoin with regard to Executive Order 82 (or the face covering mandate issued pursuant to that order).

of-emergency declaration, such as the issuance of Emergency Order 1, that could conceivably have any effect on plaintiffs' interests. Plaintiffs rely on their "interest in ensuring government officials act within the four corners of the law", (Pls.' Br. 21)—a universal interest that, if treated as irreparable harm, would render this element meaningless. Such generic interest cannot be enough to warrant such extraordinary relief.

Plaintiffs fail to show a likelihood of irreparable harm, and accordingly fail to show one of the necessary prerequisites for this Court to exercise its discretion to issue a temporary injunction. For this reason alone, Plaintiffs' request for a temporary injunction fails.

III. The equities weigh heavily against temporary injunctive relief.

Although not always stated as an explicit part of the test for preliminary injunctive relief, courts have long recognized the importance of weighing "competing claims of injury" and "the effect on each party of the granting or withholding of the requested relief." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (quoting *Amoco Production Co. v. Village of Gambell*, 408 U.S. 531, 542 (1987)). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

Plaintiffs’ only argument that their interests merit immediate relief is contained in a single, unsupported assertion: that Plaintiffs “have at least as substantial of an interest in ensuring government officials act within the four corners of the law” as the Governor’s has “in effectively combatting COVID-19 in Wisconsin.” (Pls.’ Br. 21.) As discussed above, this one-size-fits-all grievance does not constitute irreparable harm, let alone the type of harm that would outweigh the public interest in preserving a critical health mandate. It is purely legal, conclusory, and generic. Indeed, it is difficult to imagine *any* case that would not merit temporary injunctive relief under Plaintiffs’ theory: after all, the gravamen of every legal challenge is that something is not consistent with the law.

By contrast, stripping the Governor of his ability to impose emergency measures to address the unprecedented surge of a novel, potentially lethal virus presents serious, concrete, immediate dangers. As Dr. Westergaard—the Chief Medical Officer and State Epidemiologist for DHS—explains in his affidavit, the skyrocketing case rates threaten exponential growth, resulting in extremely high case numbers in Wisconsin.⁴¹ It is difficult to overstate the consequences of that spread: COVID-19 is 10% to 20% more deadly than seasonal influenza, and there are no proven effective treatment to reduce

⁴¹ Westergaard Aff. ¶¶ 10–15.

morbidity and mortality.⁴² Wisconsin is approaching hospital-bed capacity, and over one-fifth of all Wisconsin COVID tests are now positive. Removing the Governor's ability to respond to the virus with effective control measures, when the State is experienced an alarming spread, would put many more Wisconsinites' health and lives in danger.⁴³ The equities therefore weigh strongly against the issuance of a temporary injunction while this case is litigated.

IV. Plaintiffs are unlikely to succeed on the merits.

Plaintiffs also cannot show that they are likely to succeed on the merits. Nowhere do our statutes provide that a Governor is limited to a one-and-done state of emergency order simply because the occurrences predicating the order relate to a common underlying disaster. Such a conclusion would be both contrary to the plain language of the statute, and dangerous. A particular state of emergency *order* is cabined to 60 days absent Legislative extension; forces like fires, floods, disease, drought, and radiation, unfortunately, are not, and neither is the Governor's ability to issue a new order to respond to new emergency conditions.

⁴² *Id.* ¶¶ 18–20.

⁴³ *Id.* ¶¶ 25–28 (describing efficacy of masks and forecast showing substantial drop in deaths with universal mask use).

A. Plaintiffs’ challenges to the Governor’s authority to issue Executive Order 90 are unlikely to succeed.

1. Statutory interpretation requires a court to consider the plain language of the text, in context, to avoid absurd results.

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. “Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* Words may be given their dictionary definition, where appropriate. *Id.* ¶¶ 53–54. “[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.” *Id.* ¶ 46.

2. Wisconsin Stat. § 323.10 expressly authorizes the Governor to declare a state of emergency when he determines that emergency conditions exist.

The first sentence of Wis. Stat. § 323.10 says: “The governor may issue an executive order declaring a state of emergency for the state or any portion of the state if he or she determines that an emergency resulting from a disaster or the imminent threat of a disaster exists.” The term “disaster” is statutorily defined as including any “occurrence” that threatens or negatively impacts life or health. Wis. Stat. § 323.02(6). Therefore, the plain language of these

statutory provisions unequivocally authorizes the Governor to declare a state of emergency if he determines that emergency conditions exist resulting from an occurrence that threatens or negatively impacts life or health.

The second sentence of Wis. Stat. § 323.10 further provides that “[i]f the governor determines that a public health emergency exists, he or she may issue an executive order declaring a state of emergency related to public health.” The phrase “public health emergency” is statutorily defined as including the “occurrence or imminent threat” of an illness or health condition that poses a high probability of a large number of deaths or long-term disabilities. Wis. Stat. § 323.02(16). The Governor thus is plainly authorized to declare a public health emergency where an occurrence or imminent threat of that illness presents serious health dangers.

Here, the Governor determined in Executive Order 90 that the recent skyrocketing number of new COVID-19 cases to unprecedented levels, driven by 18- to 24-year-olds, has put the security of the Wisconsinites at risk. Having reached these determinations, Wis. Stat. § 323.10 expressly authorized the Governor to declare both a state of emergency and a public health emergency.

3. Executive Order 90 is not an improper extension of prior COVID-19 executive orders.

Plaintiffs nonetheless argue that the state of emergency declared in Executive Order 90 is legally invalid because it is a subsequent public health

emergency arising out of the COVID-19 pandemic, where the Governor has declared other states of emergency arising out of the COVID-19 pandemic. The duration of a state of emergency, Plaintiffs note, is statutorily limited to 60 days, unless extended by joint resolution of the Legislature. Wis. Stat. § 323.10. The declaration of another state of emergency, they therefore assert, is an improper attempt to effectively extend the state of emergency beyond the 60-day limit. Plaintiffs’ suggestion is unavailing—it adds language to the statute in certain places, and overlooks statutory language in others.

The Governor is expressly authorized to determine, in the first instance, that emergency conditions exist in the State, or in a portion of the State. Wis. Stat. § 323.10. The plain language of that authorization contains no restrictions based on any earlier states of emergency.

The statutory definitions of a “disaster” and “public health emergency” reinforces that a state of emergency may be based on a particular surge in viral transmission. A “disaster” includes a “severe or prolonged. . . occurrence” that threatens life or health. Wis. Stat. § 323.02(6). A “public health emergency” similarly includes an “occurrence . . . of an illness” that poses a high probability of a large number of deaths, a large number of serious or long-term disabilities, or widespread exposure that creates a significant risk of substantial future harm to a large number of people. Wis. Stat. § 323.02(16). Though not defined in Chapter 323, the common meaning of “occurrence” is broad, and

encompasses “[a] thing that occurs, happens, or takes place; an event, an incident.” Occurrence, *Oxford English Dictionary* (3rd ed. 2004); *see also Kalal*, 271 Wis. 2d 633, ¶¶ 53, 54 (affirming the use of dictionary definitions).

The statute, therefore, must be construed to allow the Governor to declare a state of emergency on any given date based on an event that poses a particularly grave danger, full stop. Nothing in the plain statutory language refers to a prior state of emergency, or suggests additional criteria that the Governor must consider.

Moreover, Executive Order 90 arises out of new and substantially changed emergency conditions. Wisconsin’s rate of COVID-19 spread decreased in August. Executive Order 90 is a direct response to the unprecedented spike in new cases that Wisconsin is seeing now that the school year has begun. This is unquestionably an “occurrence” of a novel biological agent that independently creates a significant risk of substantial future harm to a large number of people. *See* Wis. Stat. § 323.02(16). Based on the unprecedented case surge, and the rapidly approaching dangers, the Governor determined that new and substantially changed emergency conditions have developed, necessitating a renewed emergency management response. Having made such determinations, the Governor had express statutory authority to declare a new public health emergency under Wis. Stat. § 323.10.

The Governor did not extend Executive Order 82 beyond a 60-day limit. He issued Executive Order 90. This is not a distinction without a difference; rather, it recognizes both the plain language of the statute, and the unfortunate reality that the same deadly disease can present more than one occurrence that independently result in emergency conditions. Because the law permits the Governor to issue a state of emergency when an occurrence of an illness poses a serious danger—as the recent surge unquestionably does—Executive Order 90 was a valid exercise of the Governor’s statutory authority.

4. To hold otherwise would lead to absurd and dangerous results.

Under Plaintiffs’ position, our statutes create a one-and-done emergency response system for governors. Such an interpretation is not only atextual and contrary to the purpose of Chapter 323, it would also lead to absurd and dangerous results. *Kalal*, 271 Wis. 2d 633, ¶ 46 (courts begin with the plain language of the statute, and interpret statutes to “avoid absurd or unreasonable results”).

Such a limitation is found nowhere in the statute, and rightly so: As much as we may hope otherwise, our statutes cannot predict and define the duration of an emergency that threatens the life, health, and security of Wisconsinites. The statute limits a particular “state of emergency”—i.e. a state

declared by the Governor in response to an underlying emergency—and not the emergency itself, to 60 days. Wis. Stat. § 323.10.

And here we see the flaws in Plaintiffs’ primary argument, which at first blush may seem persuasive. Plaintiffs’ argument rests on the premise that because Wis. Stat. § 323.10 provides that a particular state of emergency order may not exceed 60 days absent Legislative extension, that the 60-day limitation in turn means the Governor is limited to a one-and-done state of emergency declaration per underlying common cause.

To start, Plaintiffs’ one-and-done limitation is found nowhere in the statute. The statute’s plain language does not prohibit multiple state of emergency orders, it prohibits *one* state of emergency order from lasting longer than 60 days absent Legislative extension.

Moreover, Plaintiffs’ one-and-done limitation also runs counter to the unpredictable nature of emergencies. Success in the face of a catastrophe can be short lived: floods are revived by new rainfall, fires pick up with a change of winds, droughts increase with new heat waves, propane shortages get worse with cold snaps, and in the case of viruses, human behavior can cause uncontrolled spread. And when things change, the law empowers the Governor to determine whether it constitutes new emergency conditions.

To be sure, many emergencies only properly give rise to a single state of emergency. It makes sense that a particular state of emergency order cannot

last more than 60 days absent an extension from the Legislature: an underlying disaster may not last a full 60 days. It would be unreasonable for the Governor to be able to then extend in perpetuity a state of emergency order (and the corresponding powers and scheme that state triggers), even though the disaster itself may have only lasted a few weeks.

If, for example, a wildfire broke out in a county, the Governor declared a state of emergency for that county, and the emergency response helped contain the fire in two weeks, there would be no need for an emergency response lasting longer than 60 days. The 60-day limitation accordingly, and properly, serves to prevent the Governor from unilaterally extending a state of emergency where the underlying emergency itself has appeared to be resolved. If it appears to the Legislature that continued action under that order is necessary, the Legislature has the power to extend it.

But neither the 60-day limitation on a particular order, nor the Legislature's ability to extend a particular order, prevents the Governor from addressing newly arising emergency conditions. If, for example, COVID-19 suddenly began killing a majority of infected persons in November, would it really make sense that the Governor could not declare a new state of emergency because he previously declared a COVID-19-related state of emergency in July? Again, keep in mind that the state of emergency is a necessary predicate for the Governor to call the National Guard into state

active duty, to assist with such critical matters as keeping an in-person election safe.

Or, consider as another example, significant flooding caused by torrential summer rainstorms. The flooding is so bad that the Governor declares a state of emergency. Roughly two months later, a dam—straining to contain the floodwaters—breaks, causing even more towns to be flooded. Under Plaintiffs’ interpretation, the Governor would lack statutory authority to declare a new state of emergency, because the same underlying flooding caused a previous state of emergency.

Take that scenario and change it slightly: what if the rain lasts 50 days and then begins to ease up? The Legislature does not extend the state of emergency order, as it seems the flooding will stop. However, on day 59 (or day 61—either way), the downpours get heavier again, and the flooding gets worse. Under Plaintiffs’ interpretation, the Governor would be powerless to declare a new state of emergency, because he already declared a previous state of emergency related to the flooding.

Plaintiffs’ interpretation would also lead to the absurd result that the *less* dramatic the emergency at first, the *more* authority the statutes provide the Governor to respond to it. Consider, again, the wildfire breaking out in a single county. The Governor declares a state of emergency in that single county to combat it. Before the end of 60 days, however, the wildfire has spread to

every county in Wisconsin. Would Plaintiffs really argue that the Governor lacks authority under Wis. Stat. § 323.10 to declare a subsequent state of emergency for the entire state, now combatting the same wildfire that only previously plagued the single county? If Plaintiffs would not raise such a challenge, then why should it be that the Governor has *less* authority to declare subsequent orders when the emergency conditions, in both instances, affect the entire state? Such a limitation would be absurd and dangerous.

On top of that, such a one-and-done limitation would also leave the Governor powerless in the face of a growing catastrophe in a way that undermines the very purpose of emergency powers. Instead of acting quickly, the Governor would have to consider whether it would better serve Wisconsinites by declining to take emergency action *now*, in case things get worse down the line. That too is an absurd and dangerous result.

Importantly, if the response to the above hypotheticals is that in each scenario, the subsequent wave constitutes a new, distinct, underlying occurrence warranting raising the need for a new state of emergency order—the same is true here. And thus, we see that Plaintiffs’ true disagreement is with the Governor’s conclusion that *this* COVID-19 spike constitutes an emergency worthy of a new state-of-emergency declaration. But, again, that is a factual determination that the Governor is empowered to make, and the Legislature is permitted to revoke. It is not an issue this Court should resolve.

Chapter 323 declares its purpose: to prepare the state “to cope with emergencies” by “establish[ing] an organization for emergency management, conferring upon the governor and others specified the powers and duties provided by this Chapter.” Wis. Stat. § 323.01(1). An interpretation that would run directly counter to this purpose in a way that jeopardizes the safety of the Wisconsin people—now and in the future—cannot be correct.

5. Executive Order 90 is consistent with the historical practice of Wisconsin governors.

Moreover, in exercising the plain statutory authority set forth in Wis. Stat. § 323.10, past Wisconsin governors have frequently issued executive orders declaring multiple states of emergency arising out of ongoing emergency situations—including new orders enacted before a previous order has expired.

Most recently, Governor Scott Walker acted similarly on at least two occasions. First, in the autumn and winter of 2013–2014, he issued a series of six state of emergency orders loosening regulatory restrictions on the transportation of propane due to high demand and supply shortages caused by unusually wet agricultural conditions, pipeline shutdowns, long lines at supply terminals, and unseasonably cold and severe winter weather.⁴⁴ These orders,

⁴⁴ Office of the Wisconsin Governor, Executive Order No. 120 (October 25, 2013); No. 121 (November 7, 2013); No. 122 (November 15, 2013); No. 124 (November 27, 2013); No. 127 (December 13, 2013); No. 128 (December 23, 2013), No.

which were based on similar factual circumstances, ran from October 25, 2013, through January 22, 2014. When the underlying propane supply problems were subsequently exacerbated by additional severe winter weather and by a continuation of cold temperatures into the Spring, Governor Walker issued two more similar emergency orders on January 25, 2014, and April 17, 2014.

Second, in the autumn and winter of 2016–17, Governor Walker issued two successive emergency orders waiving certain load limits for the transportation of petroleum products due to a pipeline shutdown and waiting times at supply terminals.⁴⁵ The first order declared an energy emergency for the entire state starting on November 4, 2016, and lasting up to 60 days. The second order declared a similar emergency starting on December 30, 2016, and lasting another 60 days. The two orders were based on similar factual circumstances, and the second was justified in part by an increase in demand due to extreme cold.

In both of the above instances, Governor Walker’s successive emergency orders covered significantly more than 60 days and later orders responded to circumstances that were related to the original emergency conditions, but also

130 (January 25, 2014), No. 132 (April 17, 2014) Wis. State. Legislature, https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/.

⁴⁵ Office of the Wisconsin Governor, Exec. Order No. 223 (November 4, 2016); No. 227 (December 30, 2016), https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/.

included subsequent changes in those conditions. Nonetheless, there is again no indication of any challenges to his use of his statutory emergency powers.

These examples reflect the reality that there can be a common underlying cause that presents numerous distinct occurrences and calls for multiple state of emergency orders. As the historical practice shows, when confronted with distinct or recurring occurrences of emergency conditions that span periods of time longer than the 60-day duration for a single order specified in Wis. Stat. § 323.10, Wisconsin governors have declared multiple states of emergency. This Court should not jeopardize the important statutory power of Governors to take action to respond to a crisis—particularly as Wisconsin wages a battle against a once-in-a-century pandemic.

6. The Legislature’s power to revoke a state-of-emergency order is a meaningful procedural safeguard.

Plaintiffs also argue, without citation, that the Legislature’s power to revoke an executive order is “no protection at all,” because the Governor and Legislature may be of the same mind. (Pls.’ Br. 18.) It is hard to see how giving one elected branch the power to issue an order and the other elected branch the power to revoke that order that does not create a meaningful system of checks and balances. Indeed, if that is not a meaningful balancing of power to protect the people, then many other components of our governmental system would not provide adequate protection in Plaintiffs’ view. Rather, Plaintiffs’

concern seems to be with the amount of authority the plain language of Wis. Stat. § 323.10 gives the Governor specifically.

Thankfully, most of the time we do not live in emergency conditions where the Governor needs to take swift and meaningful action to protect us from harm. But in rare times like these, the plain language of Chapter 323—including Wis. Stat. § 323.10—puts the Governor at the helm, and gives him the authority to act as Governor Evers has acted.

This important procedural safeguard also defeats Plaintiffs’ nondelegation argument. As Plaintiffs correctly note, “[t]he presence of adequate procedural safeguards is the paramount consideration” in determining whether a delegation of power is unconstitutional. (Pls.’ Br. 16 (quoting *Panzer v. Doyle*, 2004 WI 52, ¶ 79, 271 Wis. 2d 295, *abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 2, 295 Wis. 2d 1, 719 N.W.2d 408).) In *Panzer*, the Wisconsin Supreme Court found that “the legislature’s extremely broad delegation of power . . . to enter into gaming compacts” was valid in light of three safeguards. *Id.* ¶¶ 61–72. First, the Legislature “retains the power to repeal” the law “if it is able to muster enough votes to override a gubernatorial veto. *Id.* ¶ 71. Second, the Legislature could “seek to amend” the law to change the scope of the governor’s power. *Id.* Finally, the “legislature may appeal to public opinion,” such that

“[i]f the governor makes a policy choice that is unacceptable to the people, the governor will be held accountable to the people.” *Id.*

The reasoning of *Panzer* forecloses Plaintiffs’ nondelegation argument. Not only is Wis. Stat. § 323.10 subject to the same safeguards that the *Panzer* Court pointed to—repeal, amendment, and public opinion⁴⁶—it contains a much more immediate and powerful safeguard: The Legislature may simply terminate an executive order by joint resolution.

Moreover, courts presume that a statute is constitutional, striking it down “only when it is shown to be unconstitutional beyond a reasonable doubt.” *Id.* ¶ 65. Under the related principle of constitutional avoidance, a court should seek to uphold the validity of a statute, if possible, and should not speculate about potentially invalid applications that are not before the court. *See, e.g., Serv. Emps. Int’l Union, Local 1 v. Vos*, 2020 WI 67, ¶¶ 37–41, ___ Wis. 2d ___, 946 N.W.2d 35. Plaintiffs’ parade of horrors—a Governor extending a state of emergency in perpetuity or declaring a state of emergency on a whim—is thus not properly before the Court here. What *is* before this Court is a state of emergency issued in response to an unprecedented surge in a potentially lethal virus and subject to legislative revocation. Because that exercise of Wis. Stat.

⁴⁶ *Panzer* also undermines Plaintiffs’ argument about the concern of the Governor and Legislature being of the same mind. The *Panzer* Court expressly found that the power to repeal or amend a statute was a sufficient procedural safeguard, even though such power is subject to the vagaries of politics.

§ 323.10 subject to adequate procedural safeguards under *Panzer*, Plaintiffs' nondelegation argument fails.

In sum, Plaintiffs have not shown and cannot show that they are likely to succeed on the merits of their challenge to Governor Evers' authority to issue Executive Order 90.

B. Plaintiffs' challenges to the Governor's authority to issue Emergency Order 1, the face covering mandate, are unlikely to succeed.

Plaintiffs direct most of their energy to challenging Executive Order 90. Their singular argument challenging Emergency Order 1, the face covering mandate, is also unlikely to succeed. It is fully tethered to Plaintiffs' arguments challenging Executive Order 90: Plaintiffs argue that Emergency Order 1 violates nondelegation principles because the Governor is limited to exercising his statutory emergency powers (including the power to issue such orders he deems necessary for the security of persons, Wis. Stat. § 323.12(4)(b)) during the 60-day period of a state of emergency.

If, however, this Court concludes that Plaintiffs are unlikely to succeed on their argument that the Governor is limited to a one-and-done state of emergency order per underlying emergency, then Plaintiffs' nondelegation argument must necessarily fail. If the Governor has statutory authority to declare a state of emergency, he has statutory authority to act pursuant to that

state of emergency. Plaintiffs also therefore have not show that they are likely to succeed on any challenge to Emergency Order 1.

V. In the event this Court rules against the Governor, this Court is urged to stay its decision pending appeal by the Governor.

This Court should deny Plaintiffs' request for a temporary injunction because Plaintiffs' (1) are due no relief at all on this non-justiciable question, (2) make no real effort to show any irreparable harm, because they cannot, and the balance of equities tips strongly against an injunction, and (3) are unlikely to succeed on the merits. But if this Court were to issue a decision to the contrary, Governor Evers respectfully requests that this Court stay that decision to permit him to file an immediate notice of appeal and written motion for a stay with this Court.

CONCLUSION

This Court should deny Plaintiffs' request for a temporary injunction.

Dated this 1st day of October 2020.

Respectfully submitted,

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DATE SIGNED: October 12, 2020

Electronically signed by Michael Waterman
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

POLK COUNTY

DEREK LINDOO,
JOHN KRAFT, and
BRANDON WIDIKER,

Plaintiffs,

v.

TONY EVERS,

Defendant.

DECISION AND ORDER

Case No. 20 CV 219

The plaintiffs commenced this suit to challenge the governor’s authority to issue Executive Order 90, which declared a public health emergency related to COVID-19. Section 323.10 allows the governor to declare a public health emergency for up to 60 days, unless extended by the legislature. The plaintiffs believe that the governor exceeded his statutory authority by declaring public health emergencies on three separate occasions, each related to the same health crisis – COVID-19. By doing so, the plaintiffs argue, the governor has exceeded his authority by essentially extending a state of emergency past 60 days. The plaintiffs ask for a temporary injunction while their case plays out in the courts.

Temporary injunctions are not issued lightly. “Temporary injunctions are to be issued only when necessary to preserve the status quo.” Werner v. A. L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313–14 (1977). Temporary injunctions freeze the litigants’ condition until the merits of the case can be adjudicated at a final hearing.

Plaintiffs in this case don’t ask to preserve the status quo; they ask to change it. They ask the Court to give them the ultimate relief sought in their lawsuit – i.e. termination of Executive Order 90. The Supreme Court has stated on several occasions that where the issuance of a temporary injunction would have the effect of granting all the relief that could be obtained by a

final decree, and would practically dispose of the whole case, it ordinarily will not be granted unless the complainant's right to relief is clear. Codept, Inc. v. More-Way N. Corp., 23 Wis. 2d 165, 172, 127 N.W.2d 29, 34 (1964).

The plaintiffs' right to relief is not clear. Although the plaintiffs agree that COVID-19 constitutes a public health emergency, they believe that the governor may not issue successive executive orders for the same emergency without violating the 60-day limit of section 323.10. To reach that conclusion, the governor argues, one must deviate from the language of the statute and find meaning that is not expressed by the text. The Court agrees. Nothing in the statute prohibits the governor from declaring successive states of emergency. Instead, the statute allows a declaration "if the governor determines that a public health emergency exists."¹ That language gives the governor broad discretion to act whenever conditions in the state constitute a public health emergency. Although "the governor cannot rely on emergency powers indefinitely," Wisconsin Legislature v. Palm, 2020 WI 42, ¶ 41, 391 Wis. 2d 497, 942 N.W.2d 900, he can when a public health emergency exists and the legislature lets him do it.

The plaintiffs disagree with this reading of the plain text. They counter that the 60-day limit becomes meaningless if the governor can declare successive states of emergency for the same crisis. That's incorrect. The 60-day limit serves an important function even if the governor can make successive orders. A finite executive order prevents the governor from perpetuating emergency powers after the emergency has dissipated. When an executive order ends after 60 days, it forces the governor, before issuing another order, to reexamine the situation and publicly identify existing, present-day facts and circumstances that constitute a public health emergency. The 60-day limit provides an important check against run-away executive power, but it does not prevent the governor from issuing a new executive order when the emergency conditions continue to exist. And, if the legislature is unconvinced that a state of emergency does exist, the legislature has the ultimate power to terminate it. Wis. Stat. § 323.10. ("The executive order

¹ A "public health emergency" means the occurrence or imminent threat of an illness or health condition that meets the criteria of Wis. Stat. § 323.02(16), including a novel biological agent that poses a high probability of a large number of deaths, serious long-term disabilities, or widespread exposure that creates a significant risk of substantial future harm to a large number of people.

may be revoked at the discretion of either the governor by executive order or the legislature by joint resolution.”)

That brings the Court to the final point: balancing the equities. The plaintiffs are three private citizens, who are seeking redress for injuries they have suffered from Executive Order 90. Their requested injunction goes well beyond their private interests, though. If granted, the temporary injunction will affect every person in Wisconsin by a judicial act that usurps the governor’s power to declare a state of emergency and the legislature’s power to end one. The legislature can end the state of emergency at anytime, but so far, it has declined to do so. As the statewide representative body of the citizens of Wisconsin, the legislature’s inaction is relevant and it weighs against judicial intervention, especially when the requested intervention will have statewide impact.

For these reasons, the motion for a temporary injunction is denied.

BY THE COURT:



R. Michael Waterman
Circuit Court Judge