

No. 2020AP765-OA

In the Supreme Court of Wisconsin

WISCONSIN LEGISLATURE,

Petitioner,

v.

ANDREA PALM, JULIE WILLEMS VAN DIJK, AND NICOLE SAFAR
IN THEIR OFFICIAL CAPACITIES AS EXECUTIVES OF WISCONSIN
DEPARTMENT OF HEALTH SERVICES

Respondents.

EMERGENCY PETITION FOR ORIGINAL ACTION

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ISSUES PRESENTED

I. Whether the Department of Health Services (“DHS” or “Department”) violated § 227.24, governing emergency rules, by issuing Emergency Order 28 without complying with Section 227.24’s procedures.

II. Even if the Department did not violate § 227.24, whether Emergency Order 28 exceeds the Department’s authority by closing all “nonessential” businesses, ordering all Wisconsin persons to stay at home, and forbidding all “nonessential” travel.

III. Even if the Department did not violate § 227.24, whether the Department acted arbitrarily and capriciously in issuing Emergency Order 28.

INTRODUCTION

Purporting to act under color of state law, an unelected, unconfirmed cabinet secretary has laid claim to a suite of czar-like powers—unlimited in scope and indefinite in duration—over the people of Wisconsin. Per her decree, everyone in the State must stay home and most businesses must remain shuttered (with exceptions for activities and companies arbitrarily deemed “essential”). This goes not only for metropolitan areas with more COVID-19 cases but also for rural counties with few or no known cases. Just as troubling, the Secretary asserts that her go-it-alone shutdown authority has no expiration date—making it greater than even the *Governor’s* emergency powers. To be sure, Emergency Order 28 (the “Order”) *says* it terminates on May 26, but nothing suggests that it won’t be extended again. Perhaps it will even run into 2021. In any case, by the time the Secretary sees fit to lift her decree (be it in five weeks or eight months), many Wisconsinites will have lost their jobs, and many companies will have gone under, to say nothing of the Order’s countless other downstream societal effects. Our State will be in shambles.

Incredibly, the Secretary took this unprecedented action without following *any* of our State’s requirements for rulemaking while also intentionally waiving any reliance on the Governor’s emergency authorities, set to expire before this Order. If a single bureaucrat can evade the controls and accountability measures that the Legislature has enacted to check agency overreach simply by labeling what is obviously an emergency rule a mere “order,” then all of the reforms that the Legislature has put in place, and which this Court has interpreted and enforced over the years, are a meaningless, dead letter—in their *most* consequential application.

Had DHS followed those reforms here, the Legislature, through its Joint Committee for Review of Administrative Rules, would have had had a seat at the table. In particular, it would have had an opportunity to review Emergency Order 28 and to suspend it if it exceeded DHS’s statutory authority, was arbitrary and capricious, or imposed undue hardship, especially on small businesses and local governments. That accountability to the legislative branch—from which agencies derive their powers in the

first place—would, in turn, have produced a more measured rule that balanced the need to protect public health with the need to preserve Wisconsin’s existing cultural and economic edifice. Notably, concern about delay does not (and could not) justify the Secretary’s unilateral approach, since a rule could have been issued just as quickly had the agency followed the law. One is therefore left to conclude that DHS brazenly evaded the administrative-review statutes *precisely* to cut the Legislature out of the decision-making process.

Beyond this straightforward procedural problem, which is reason alone to make DHS start over, the Order also suffers from numerous substantive flaws, all of them fatal. To begin, much of the Order is unauthorized by DHS’s general “duties and powers” statute, the only authority it invokes. Since 2011, agencies in this State can no longer look to “statutory provision[s] describing [their] general powers or duties”—which is, literally, the title of Section 252.02—“to *augment*” their powers “beyond” what other, more specific statutes “explicitly confer[].” Wis. Stat. § 227.11(2)(a)2. (emphasis added). Nor can agencies enforce

“standard[s]” or “requirement[s]” that are not already “explicitly required or explicitly permitted by statute or by a [validly promulgated] rule.” Wis. Stat. § 227.10(2m). These interpretive commands, together with the established canons of construction and the constitutional-doubt principle, confirm that DHS’s limited powers to quarantine infected individuals and prohibit public gatherings do not *remotely* authorize virtually across-the-board bans on travel, gatherings at private residences, and operation of businesses in Wisconsin, especially without regard to those activities’ risk levels. Finally, even if the Legislature had delegated these awesome powers to DHS (which it assuredly did not), the Order is arbitrary and capricious in several respects, including in its freewheeling categorization of businesses as either “essential” or “nonessential”—a criterion that appears nowhere in DHS’s enabling statute and that has nothing to do with public health—and in its sub-delegation of similarly standardless discretion to the Wisconsin Economic Development Corporation.

On Monday, April 20, the Secretary issued yet another edict, Emergency Order 31, that claims not to affect Emergency Order

28 but that in fact mirrors—indeed, magnifies—its defects. Grandly pronouncing that “Wisconsin *shall* adopt a phased approach to re-opening its economy and society,” Order 31 at 2 (emphasis added), the Secretary declares that Emergency Order 28 shall remain in effect until she decides that Wisconsin has made “progress” (undefined) on certain “Core Responsibilities” (barely defined), in which case the State *may* at some point (if she deems appropriate) proceed to a partial re-opening. *Id.* at 3. Unsurprisingly, none of this was run by the Legislature. The administration has made even clearer that it is wholly committed to running the State’s response to the pandemic by administrative fiat.¹

¹ Emergency Order 31 also purports to mirror President Trump’s “comprehensive and thoughtful approach” to reopening America as reflected in his Guidelines for Opening Up America Again. Order 31 at 2. In truth, there are important differences, including that federal guidelines do not recommend keying re-opening decisions to a single official’s finger-in-the-air assessment of “progress.” In any case, although the Legislature agrees that Wisconsin should take steps expeditiously guided by federal guidelines, it must proceed *according to law*. The Legislature is ready, willing, and able to work with DHS and at the same time craft legislation (which it is drafting even now) to respond to the pandemic in a comprehensive and balanced fashion, guided by federal recommendations.

STATEMENT OF FACTS

1. Petitioner is the Wisconsin Legislature, located at the Wisconsin State Capitol, Madison, Wisconsin, 53703.

3. Respondents Andrea Palm, Julie Willems Van Dijk, and Nicole Safar are executives of the Wisconsin Department of Health Services. Their office is located at 1 West Wilson Street, Madison, Wisconsin, 53703.

4. In February 2020, the novel coronavirus, COVID-19, began spreading throughout the United States.²

5. In response, Governor Evers issued Executive Order #72, declaring a public health emergency throughout the State of Wisconsin.³

6. After Governor Evers declared a public health emergency, Secretary-Designee Palm issued several orders closing

² The Atlantic, *How the Coronavirus Became an American Catastrophe* (March 21, 2020), available at <https://www.theatlantic.com/health/archive/2020/03/how-many-americans-are-sick-lost-february/608521/>.

³ Executive Order # 72 (March 12, 2020), available at <https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf>.

schools and restricting public gatherings, including Emergency Orders 1, 4, 5, and 8.⁴

7. Governor Evers also issued several orders suspending administrative rules, including emergency orders 2, 10, 11, 17, and 18, and 21.⁵

8. On March 24, Secretary-Designee Palm, at the direction of Governor Evers, issued Emergency Order 12, entitled “Safer at Home.”⁶

9. Emergency Order 12 exempted from its scope “essential” business and operations as defined in the order.⁷

10. Between March 15 and April 6, Wisconsinites submitted over 313,000 new applications for unemployment

⁴ Emergency Order #1 (March 13, 2020); #4 (March 16, 2020); #5 (March #17, 2020); #8 (March 20, 2020), available at <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx>.

⁵ Emergency Orders #2 (March 14, 2020), #10 (March 21, 2020); #11 (March 21, 2020); #17 (March 27, 2020); #18 (March 31, 2020), available at <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx>.

⁶ Emergency Order #12 (March 24, 2020), available at <https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf>.

⁷ *Id.*

benefits, with weekly claims reaching 589,616.⁸ An additional 69,884 initial unemployment applications were submitted in the week ending April 11, 2020.⁹ The unemployment rate in Wisconsin was estimated to reach 16.71 percent by April 16, 2020, a figure nearly twice as high as the peak rate during the Great Recession.¹⁰

11. Business sales have fallen 15 percent compared to the same period last year.¹¹ Restaurants and travel-sector businesses' sales have declined 40 percent and 86 percent, respectively.¹² Foot-traffic data confirm that economic activity in many sectors has declined—and for some businesses, effectively halted altogether.¹³

⁸ Wis. Dep't of Workforce Development, *DWD Releases Total Number of New Applications, Weekly Claims, and Monetary Amount Distributed for Unemployment Benefits* (Apr. 9, 2020), <https://bit.ly/3amsEmZ>.

⁹ U.S. Dep't of Labor, *News Release 5*, (Apr. 16, 2020), <https://bit.ly/2XO102f>.

¹⁰ Kim J. Ruhl, *The Effects of COVID-19 on Wisconsin's Workers and Firms* 3, UW-Madison Center for Research on the Wisconsin Economy (Mar. 24, 2020, updated Apr. 17, 2020), <https://bit.ly/2ykAUH8>.

¹¹ Noah Williams, *Measuring Wisconsin Economic Activity Using Foot Traffic Data*, UW-Madison Center for Research on the Wisconsin Economy 1, 7 (Apr. 16, 2020), <https://bit.ly/3cqr9Ww>.

¹² *Id.* at 5.

¹³ *Id.* at 5–6.

Dairy, corn, and other farmers have also felt the negative effects of Emergency Order 12 and similar orders in other States.¹⁴

12. On April 16, Secretary-Designee Palm issued Emergency Order 28, which extends Emergency Order #12 and makes some changes to the initial order. The changes from Emergency Order 28 will go into effect on April 24 and will remain in effect until May 26, 2020 or until a superseding order is issued.¹⁵

13. Emergency Order 28, unlike its predecessor, does not rely on the Governor's authority. Instead, the Order relies on "the Laws of the State including but not limited to Section 252.02(3), (4), and (6) of the Wisconsin Statutes." Order 28 at 2. The Governor's chief legal counsel stated that the Department has "ongoing powers that are not dependent upon [a] state of emergency" declaration.¹⁶

¹⁴ Rick Barrett, *Wisconsin Farm Bankruptcies Rising Rapidly as Coronavirus Weighs Heavily on Agriculture*, Milwaukee J. Sentinel (Apr. 14, 2020), <https://bit.ly/34L3yx2>.

¹⁵ Emergency Order #28 (April 16, 2020), available at https://content.govdelivery.com/attachments/WIGOV/2020/04/16/file_attachments/1428995/EMO28-SaferAtHome.pdf.

¹⁶ JR Ross, Twitter (April 16, 2020) ("Ryan Nilsestuen says @DHSWI secretary has ongoing powers not dependent upon [a] state of emergency

14. Emergency Order 28 retains nearly all of the restrictions imposed by Emergency Order 12. For example, the Order requires “[a]ll individuals present within the State of Wisconsin” “to stay at home or at their place of residence,” with only limited exceptions. Order 28 at 2–3. It requires “[a]ll for-profit and non-profit businesses with a facility in Wisconsin, except Essential Businesses and Operations” to “cease all activities at facilities located within Wisconsin,” except for “Minimum Basic Operations” and those that can be performed by an employee “working from home.” *Id.* at 3–4. Those businesses deemed “Essential,” and thus allowed to remain open, must follow “Safe Business Practices,” which include use of technology to facilitate working from home, social distancing, increased standards for cleaning and disinfection, restricting the number of workers on the premises, and limiting the number of customers on the premises. *Id.* at 4–5. The Order prohibits “[a]ll public and private gatherings of any number of people that are not part of a single household or living

declaration.”), available at <https://twitter.com/jrrosswrites/status/1250863607761571842>.

unit,” and it closes all “[p]ublic and private K-12 schools” “for the remainder of the 2019–2020 school year.” *Id.* at 5. It closes places of “public amusement,” such as water parks, playgrounds, and theaters, but it allows golf courses to open with certain restrictions. *Id.* at 6. The Order prohibits “[a]ll forms of travel” “except for Essential Travel as defined in the Order.” *Id.* at 7.

15. As with its predecessor, Emergency Order 28 “is enforceable by any local law enforcement official” and “[v]iolation or obstruction of this Order is punishable by up to 30 days imprisonment, or up to \$250 fine, or both.” *Id.* at 21 (citing Wis. Stat. § 252.25).

16. On April 20, 2020, DHS Secretary-Designee Palm issued yet another sweeping Emergency Order 31.¹⁷ Like the Orders that preceded it, Emergency Order 31 was issued without going through the emergency rulemaking process or being subject to any sort of legislative review. Emergency Order 31 does not “modif[y], alter[] or, supersede[] Emergency Orders 12 and 28.” Order 31 at

¹⁷ Available at https://content.govdelivery.com/attachments/WIGOV/2020/04/20/file_attachments/1431309/EMO31-BadgerBounceBack.pdf.

17. Instead, DHS continues to enforce their mandates closing businesses, banning public gatherings, and requiring Wisconsinites to stay at home *and*, through Emergency Order 31, has given itself the power to determine when to bring the economy back online. When the Secretary-Designee deigns to begin reopening the economy in “phases,” she “shall announce the transition to each Phase” and at that point “fully articulat[e] the activities that will resume.” Order 31 at 3. In order to move to the next “phase”, Wisconsin must make some sort of undefined “progress” towards “core responsibilities” and must fulfill “gating requirements.” The description of Wisconsin’s gating requirements is less than illuminating. Before the restrictions in Emergency Order 28 are relaxed, Wisconsin must accomplish indeterminable milestones such as enacting “robust testing programs” for “at-risk health workers” and “[d]ecreasing numbers of infected healthcare workers.” Order 31 at 4. Based on this criteria, it is impossible for Wisconsin citizens to know when they can reopen their businesses and return to work and school, nor will they be able to predict what

restrictions may still be in place when Secretary-Designee Palm announces that the State has moved to Phase One.

18. The Secretary-Designee's actions under her unprecedented interpretation of Section 252.02 are causing ongoing harm to the Legislature because, under the Wisconsin Statutes, the Legislature has the right to oversee sweeping agency action. *See* Wis. Stat. §§ 227.24, 227.26.

19. The Legislature is the most appropriate party to bring this action because no other party has an "equivalent stake" in this dispute. *Panzer v. Doyle*, 2004 WI 52, ¶ 42, 271 Wis. 2d 295, 680 N.W.2d 666.

STATEMENT OF RELIEF SOUGHT

The Legislature respectfully requests that this Court issue an order temporarily enjoining enforcement of Emergency Order 28, because it is an improperly promulgated rule under Wisconsin Statutes § 227.24, and because it exceeds the Department's authority under § 252.02 and is arbitrary and capricious in violation of § 227.57(8) to the extent it confines all

residents to their homes, prohibits all private gatherings, broadly restricts travel, and closes all businesses deemed nonessential.

The Legislature also respectfully suggests that this Court stay enforcement of its injunction for a period of six days, to allow DHS sufficient time to promulgate a new emergency rule consistent with Wisconsin law. Such a stay would fairly accommodate the parties' mutual interest in preserving the status quo and ensuring no disruption to the State's efforts to control the spread of COVID-19 while DHS undertakes steps to comply with all applicable statutes.

STATEMENT OF THE REASONS WHY THIS COURT SHOULD TAKE JURISDICTION

As discussed in more detail in the Memorandum in Support of Emergency Petition for Original Action and Emergency Motion for Temporary Injunction, this Court should grant this Petition. This case involves a sweeping assertion of authority by an unelected, unconfirmed cabinet secretary who, in promulgating Emergency Order 28, purports to close "[a]ll for-profit and non-profit businesses" (except those DHS arbitrarily deems

“essential”), ban virtually all travel, and “order all persons present” in the State to stay at home unless performing specific functions that DHS deigns to allow.

Prompt resolution of this legal dispute is categorically within the public interest because Emergency Order 28 is unlawful and contributes to significant harm on the State and its citizens, in addition to harming the Legislature by cutting it out of the Chapter 227 rulemaking procedures. Also, this case purely presents questions of law, which do not require fact-finding by this Court.

CONCLUSION

The Legislature respectfully requests that this Court grant the Legislature’s emergency petition.

Dated: April 21, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of this Petition is being served on all opposing parties via electronic mail and first-class mail.

Dated: April 21, 2020

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