No. 2020AP000765 - OA

In the Supreme Court of Wisconsin

WISCONSIN LEGISLATURE,

Petitioner,

v.

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

Respondents.

REPLY MEMORANDUM IN SUPPORT OF EMERGENCY PETITION FOR ORIGINAL ACTION AND EMERGENCY MOTION FOR TEMPORARY INJUNCTION

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INTRODUCTION

The Secretary of the Department of Health Services (DHS) claims that she may wield unbounded powers to control the free movement of Wisconsinites and to close their stores, factories, parks, and churches in perpetuity. Specifically, she asserts that, so long as there is no vaccine or cure for COVID-19 (which may be *years* away), she may issue "order" after "order" (never a rule) dictating how life may be lived and business conducted in Wisconsin, with no legislative oversight whatsoever. This would of course make the Secretary considerably more powerful than even the Governor, who—despite being an elected official constitutionally vested with "[t]he executive power"—must work with the Legislature to extend his emergency powers beyond 60 days. Her position cannot be correct.

Contrasting DHS's powers with the Governor's puts the lie to the agency's repeated assertion that, if DHS's shutdown order must comply with the Wisconsin Administrative Procedure Act's emergency-rulemaking requirements, our State simply could not have reacted as quickly as it did to slow the virus's spread. No one

disputes that the Governor—like the governors in other States that DHS and its *amici* discuss—has substantial power to address emergencies, subject to reasonable constitutional and legislative limits. In fact, the Legislature has expressly given the Governor authority to take drastic measures to protect our State during a public health crisis, including 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). And depending on the Governor's order, DHS may also exercise broad powers during that time as well. (Indeed, the first stay-at-home order at least purported to rely on those gubernatorial powers.[1]) But those powers have an important limitation: the Legislature, by "joint resolution," can suspend or lengthen the period of a declared emergency, which period otherwise expires after 60 days. *Id.* § 323.10. The statutory scheme for public health emergencies thus checks the Governor's substantial "emergency" powers with a reasonable time limit.

[1] Although the Legislature does not concede that everything in that order was lawful, it raises different issues relating to the Governor's powers that are not implicated here.

But Emergency Order 28 disclaims any reliance on the Governor's emergency powers—either because the Governor (using DHS as his cat's paw) is attempting to extend his power *beyond* the 60-day window, or because the DHS Secretary believes that she can go it alone—and instead relies solely on an expansive reading of DHS's enabling statute to micromanage Wisconsin for months or years to come.

Worse, DHS claims that it can act in this manner unilaterally, without legislative oversight, even though Emergency Order 28 is clearly a "general order of general application" with the force of law and therefore a "rule" subject to Chapter 227's rulemaking procedures. Although the Governor has publicly dismissed Chapter 227's requirements as meaningless "procedural hoops," the Legislature understands them to be *laws*—and fundamental ones, too.[2] As for DHS, it offers only *ipse dixits* for the proposition that the Order is for one reason or another not a Chapter 227 "rule," even though courts routinely hold agency

[2] Tweet, Governor Tony Evers (April 28, 2020), available at https://twitter.com/GovEvers/status/1255276277117980673?s=20.

directives like Emergency Order 28 to be rules. And while DHS complains that it could not have complied with Chapter 227 quickly enough, another agency, the Department of Agriculture, Trade and Consumer Protection, had no trouble promulgating its own emergency rule by April 25. DHS could have done the same, especially since DHS had already developed the broad contours of its response to COVID-19 by March 24. Anyway, DHS again overlooks the critical point that Chapter 227 would not have slowed down the *Governor*'s immediate 60-day response, since he is not subject to Chapter 227 in the first place. DHS easily could have prepped and issued an emergency rule during that time.

This Court should immediately enjoin the Order in light of this procedural violation alone. If it does so, the Legislature respectfully suggests that the Court stay enforcement of its injunction in its equitable discretion, to allow DHS sufficient time to promulgate a new emergency rule consistent with Wisconsin law—a process that the Department should already have begun, as the Legislature has repeatedly urged, and which it could undertake expeditiously even if it started today. *See, e.g.*, Second

Affidavit of Ryan Walsh, Ex. 1 (Letter of Scott Fitzgerald and Robin Vos to Secretary-Designee Palm (Apr. 2, 2020)). In the meantime, the Legislature is moving forward with legislation, *see Informational Hearing*, Assembly Committee on State Affairs,[3] though it suspects the Governor will veto any bill so long as (through his DHS Secretary) he can continue to run the State's response to the virus singlehandedly and indefinitely. The Legislature also continues to stand ready to work with the Governor and DHS on a new rule, although unfortunately the Legislature has not yet heard from either one of them.

ARGUMENT

I. The Legislature Unquestionably Has Standing to Challenge DHS's Regulatory Overreach

Standing in Wisconsin is a matter of judicial policy; it is not a constitutional or jurisdictional requirement. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 12, 783 N.W.2d 855; *accord Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.,* 2011 WI 36, ¶ 40 n.18, 333 Wis. 2d 402, 797 N.W.2d 789. Wisconsin

[3] Available at https://docs.legis.wisconsin.gov/raw/cid/1552466.

courts construe standing "liberally." *McConkey*, 326 W is. 2d 1, ¶ 15. "[T]he party seeking relief" has standing so long as it "has alleged such a personal stake in the outcome of the controversy as to give rise to that adverseness necessary to sharpen the presentation of issues . . . " *Id.* ¶ 16 (citation omitted).

No one can seriously dispute that the Legislature—whose "jealously guarded" zone of "constitutional authority" has been invaded by an administrative agency—is sufficiently invested in this controversy to adequately present it and argue it. *See Gabler v. Crime Victims Rights Bd.,* 2017 WI 67, ¶¶ 31, 33, 376 Wis. 2d 147, 897 N.W.2d 384.

For starters, DHS does not contest the Legislature's standing to challenge the agency's flouting of the Administrative Procedure Act's rulemaking requirements—which is the Legislature's lead claim. Resp. 21 n.15. Wisely so. The Legislature's interest in ensuring that it is not cut out of the rulemaking process could not be more direct and obvious. Because the "very existence of [DHS] is dependent upon the will of the legislature," *Martinez v. Dep't of Indus., Labor & Human*

Relations, 165 Wis. 2d 687, 698, 498 N.W.2d 582 (1992) (citation omitted), its "rulemaking authority . . . may be limited, conditioned, or taken away by the legislature." *Koschkee v. Taylor*, 2019 WI 76, ¶ 33, 387 Wis. 2d 552, 929 N.W. 2d 600. Section 227 has done exactly that, ensuring "that the people of this state, *through their elected representatives*, will continue to exercise a significant check on the activities of non-elected agency bureaucrats." *Martinez*, 165 Wis. 2d at 701 (emphasis added). Indeed, the irony is that, had DHS weeks ago complied with Section 227.24 in the first place, *no lawsuit would have been necessary*, since the Legislature could have exercised its *own* superintending authority to countermand the agency's directive and could have worked with the agency on crafting a more balanced rule.[4]

[4] Some *amici* argue that this suit by the Wisconsin Legislature is somehow unauthorized. *See* Brief of Legal Action of Wisconsin 2–5. That is wrong. The Legislature does not need approval from the Joint Committee on Legislative Organization ("JCLO") to bring a lawsuit. *See, e.g.*, *Wisconsin Legislature v. Evers*, No. 20AP608-OA (Wis. Apr. 6, 2020). Regardless, the JCLO has recently confirmed that this litigation is fully authorized. Second Affidavit of Ryan Walsh, Ex. 2 (Vote of the JCLO).

The Legislature also has a concrete interest in setting aside unlawful agency actions, especially when they affect the entire state. *See Gabler*, 376 Wis.2d 147, ¶¶ 30–31. And although other parties—including businesses injured by the Order—would also undoubtedly have standing to challenge the Order as exceeding DHS's authority, the Legislature has a sufficient stake in this controversy to adequately present this claim. *See State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 436–37, 424 N.W.2d 385 (1988) (explaining that, although the case presented political considerations, this Court would decide it because "[i]t is the responsibility of the judiciary" "to resolve [constitutional] disputes"). Because the Legislature has standing, the Court should reach the merits of the petition.

II. This Matter Cries Out for Exercise of This Court's Original Jurisdiction

No one disputes that the "questions presented" in the Legislature's petition are of extreme "importance" to the people of Wisconsin. *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938). Nor could they, because Emergency Order 28 obviously "affects

innumerable members and employees of industry throughout Wisconsin," throwing hundreds of thousands into unemployment and shuttering tens of thousands of businesses. *In re State ex rel. Atty. Gen.*, 220 Wis. 25, 264 N.W. 633, 634 (1936) (citation omitted). The lawfulness of the Order is thus an important question that demands a "speedy and authoritative determination," which this Court alone is capable of providing. *Heil*, 284 N.W. at 50.

Remarkably, DHS suggests that any urgency in resolving this petition is somehow the Legislature's fault because it did not challenge *other* orders issued in March and early April. Resp. 19. This blinks reality. DHS's previous orders—including Emergency Order 12, the predecessor to Emergency Order 28—invoked the *Governor's* emergency powers and explicitly relied on his executive order declaring a public health emergency. The Legislature deferred to the Governor during his time-limited state of emergency, but legislative leadership repeatedly urged him to work with the Legislature if he intended to extend the Safer at Home policy beyond May 11, which is the statutory end date for

unilateral executive action, *see* Wis. Stat. § 323.10.[5] The Legislature's decision not to challenge those initial orders, which rested on a firmer legal foundation, has no bearing on the timeliness of *this* petition, which challenges an Order based *exclusively* on DHS's supposedly interminable, unlimited powers under § 252.02 and which purports to outlast even the Governor's emergency declaration. Indeed, the Legislature sued promptly after DHS issued this Order, filing its papers several days *before* the Order even took effect.

Next, DHS half-heartedly contends that original jurisdiction is improper because resolution of the petition requires "complicated factual development." Resp. 19. It does not. The question "[w]hether an agency's action constitutes a 'rule' under Wis. Stat. § 227.01(13) presents a question of law." *Homeward Bound Servs., Inc. v. Office of Ins. Com'r*, 2006 WI App 208, ¶ 27,

[5] *See, e.g.*, *Republicans consider legislative, legal action over stay-at-home order extension,* Wis.Politics.com (Apr. 17, 2020) (explaining that the Legislature "quickly cried foul" when Governor Evers announced his decision to extend the safer-at-home order and announcing the Legislature's immediate decision to look for "legal or legislative relief" to ensure "lawmakers are working with the guv on these decisions after not being consulted on the latest move"), available at https://www.wispolitics.com/2020/republicans-consider-legislative-legal-action-over-stay-at-home-order-extension/.

296 Wis. 2d 481, 724 N.W. 2d 380. And if the Court concludes that the Order is a "rule," no fact finding is necessary to hold that DHS violated Chapter 227 because the Department has admitted that it did not go through the rulemaking procedures.

Nor is factual development necessary to resolve the Legislature's claim that DHS exceeded its statutory authority, "[b]ecause statutory interpretation is a question of law." *MercyCare Ins. Co. v. Wisconsin Com'r of Ins.*, 2010 WI 87, ¶ 27, 328 Wis. 2d 110, 786 N.W. 2d 785. That claim thus turns on a de novo interpretation of § 252.02. None of the Legislature's statutory arguments turns on facts concerning the alleged "necessity" of Emergency Order 28, Resp. 19, since no "necessity" could justify violating state law.

Finally, even the arbitrary-and-capricious challenge can be resolved without a record (indeed, largely *because* DHS created no record). The Legislature has not challenged DHS's epidemiologic models or infection numbers. Rather, the arbitrary-and-capricious challenge targets the Department's self-evident failure to provide any reasoned basis for drawing lines between "essential" and

"nonessential" businesses—an economic determination DHS has no competency to make in any event—and "essential" and "nonessential" activities.[6]

Because the Court need not look beyond the four corners of the Order to resolve any of the claims asserted in the petition, this Court should exercise original jurisdiction and reach the merits of the Legislature's claims.[7]

III. This Court Should Immediately Enjoin Enforcement of Emergency Order 28

The Court should enjoin Emergency Order 28, which satisfies the statutory definition of an administrative "rule,"

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[6] DHS contends that the need for factual development is somehow "highlighted" by the Legislature's citation to various "press releases, news stories, and white papers," Resp. 20, but those materials were provided solely to provide background and context. The Court need not make any factual findings based on those materials, and the Legislature has not asked it to do so.

[7] *Amici* Milwaukee Teachers' Education Association, et al., suggest (without quite arguing) that Section 227.40 strips this Court of original jurisdiction over challenges to agency actions, requiring all such cases to be brought first in the circuit courts. That is incorrect. In the first place, this Court's original jurisdiction derives solely from the State Constitution; it neither depends on legislation nor may be altered by it. Wis. Const. Art. VII, § 3. Second, Section 227.40 does not attempt to strip this Court's jurisdiction over this action, as it specifically allows for "the state or any officer" to raise the question of a rule's validity in "[a]ny civil proceeding . . . to enforce a statute." Wis. Stat. § 227.40(2)(a).

because DHS failed to comply with *any* of Chapter 227's provisions when it promulgated it; the Order exceeds DHS's statutory authority under Wisconsin Statute § 252.02; the Order is arbitrary and capricious; and the Legislature and public will be irreparably harmed absent a stay, including because DHS's procedural violations deprived the people's representatives of their ability to exercise their constitutionally assigned oversight role.

A. The Legislature Is Very Likely to Succeed on the Merits

1. Emergency Order 28 Is a Classic "Rule," and DHS Failed to Follow Chapter 227's Procedures for Promulgating Rules

On the question of whether a particular agency directive is a "rule" for purposes of Wisconsin's Administrative Procedure Act, the substance of the agency's action—and not the agency's self-serving label—controls, as DHS has most recently admitted in another case pending before this Court.[8] *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. Dep't of Indus., Labor, and Human Relations*, 172 Wis. 2d 299, 320, 493 NW.2d 744 (Ct. App.

[8] Br. of DHS, at 18, 22, *Papa v. Wis. Dept. of Health Services*, No. 2016AP002082, 2017AP000634 (Wis. Feb. 20, 2020).

1992) (collecting this Court's cases); *see also Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) ("[C]ourts have long looked to the *contents* of the agency's action, not the agency's self-serving label." (citing cases)). Section 227.01(13) provides that a "general order of general application" is a "rule" if it has the force of law and purports to implement certain provisions of § 252.02. By contrast, an order directed to a "specifically named person or to a group of specifically named persons *that does not constitute a general class*" is not a rule. Wis. Stat. § 227.01(13)(c) (emphasis added).

a. The Substance of the Order Controls, not the Form, and Emergency Order 28 is a General Order of General Application

DHS concedes that Emergency Order 28 is a "general order," but nevertheless contends that it is not a "rule" because it does not have "general application," Resp. 44—a characterization that will surely come as a surprise to the thousands of businesses and millions of individuals subject to its commands. For its part, the Legislature knows of no case (and the Department does not cite one) that draws a distinction between a "general order" and an order "of general application." *Cf. State v. Joerns Furniture Co.*,

124 Wis. 2d 777, 370 N.W.2d 294 (Ct. App. 1985) ("reject[ing proposed] distinction between an administrative rule and a general order"). And *Frankenthal v. Wisconsin Real Estate Brokers' Board*, the sole case upon which DHS relies for this unusual argument, actually supports the Legislature. 3 Wis. 2d 249, 89 N.W.2d 825 (1958). There, the Court explained that "[w]hen a party files an application for a license with an administrative agency and the latter points to some announced agency policy of general application as a reason for rejecting the application, such announced policy constitutes a rule." *Id.* at 257B. Likewise here, if a "nonessential" business attempted to open its doors and state or local authorities fined the business or imprisoned its owner, the officers would assuredly "point[ ] to some announced agency policy of general application"—*i.e.,* the Order—"as a reason" for taking that enforcement action. *Id.* The prosecuting authority would not point to "some [agency] ruling which is not applicable generally" or "limited to the facts presented by the [specific case]." *Id.*

Likewise, in other cases, this Court has consistently held that an order has "general application" within the meaning of

§ 227.01(13) if it "uniformly impose[s]" limitations on a class of people. *Wisconsin Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 234–35, 287 N.W.2d 113 (1980); *Josam Mfg. Co. v. State Bd. of Health*, 26 Wis. 2d 587, 133 N.W. 2d 301 (1965) (letter directing all plumbers not to use a certain type of fitting was an "administrative rule" because it "was a statement of agency policy of general application"). Because Emergency Order 28 reflects a general policy that applies to the entire state, it is a "rule" under § 227.01(13).[9]

DHS asserts that the Order is not a "rule" because it will not "remain in place indefinitely" or "apply across different

[9] Emergency Order 28 is easily distinguishable from agency actions that have been held not to be "rules." *See, e.g.*, *Tannler v. Wis. Dept of Health and Social Services*, 211 Wis.2d 179, 187 564 N.W.2d 735 (1997) (guidance document was not a "rule" because it "simply recite[d] policies and guidelines, without attempting to establish rules or regulations."); *County of Dane v. Winsand*, 2004 WI App 86, ¶ 9, 271 Wis.2d 786, 679 N.W.2d 885 (2004) (Department of Transportation's "approval" of an instrument for measuring blood alcohol levels was not a "rule" because it was "not a general order of general application."); *Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, ¶ 29, 275 Wis. 2d 533, 685 N.W.2d 573 (manual promulgated by DOT was not a "rule" because it was merely "intended to provide advice and guidelines to the DOT staff and is not intended to have the effect of law"); *Milwaukee Area Joint Plumbing Apprenticeship Committee v. Dept. of Indus., Labor & Human Relations*, 172 Wis. 2d 299, 317, 493 N.W.2d 744 (Ct. App. 1992) (agency's approval of apprenticeship program was not a rule because it was, "at most an order directed to a specifically named person," and thus "not a general order of general application").

circumstances." Resp. 45. But the Order prescribes rules of conduct applicable to *everyone*, in all kinds of different circumstances, from dairy farmers and mechanics to furniture outlets and synagogues. In fact, there is almost no "circumstance" to which the Order does *not* apply. And while the Order has an expiration date, nothing in § 227.01(13) indicates that the definition of "rule" turns on the *duration* of the agency's action. To the contrary, courts routinely hold that an agency directive is no less a "rule" merely because it is time-limited. *E.g.*, *Sorenson Comm. Inc. v. FCC*, 755 F.3d 702, 705-07 (D.C. Cir. 2014) (treating an "Interim Order" by the FCC the same as a rule and reversing because FCC had skipped the federal APA's notice-and-comment procedures without good cause); *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 89 (D.C. Cir. 2012); *Tennessee Gas Pipeline Co. v. F.E.R.C.*, 969 F.2d 1141, 1143-45 (D.C. Cir. 1992). Regardless, the May 26 expiration date means nothing, since DHS can simply re-issue the Order and extend the deadline, which it has done once already.

DHS contends that because § 252.02(4) gives it authority to make "[a]ny rule or order . . . applicable to the whole or any

specified part of the state," it can avoid the rulemaking process simply by labeling a statewide action an "order" rather than a "rule." Resp. 31–32. But § 252.02(4) does not create an exception to § 227.01(13)'s definition of a "rule," which includes "general order[s] of general application." And of course the Legislature knew how to except statewide public-health orders from the definition of "rule" had it wanted to, since it made clear in § 227.01(13) that the term "rule" "does not include" many different types of agency actions that "would otherwise meet the definition" of a "rule"—including actions related to highway construction, fee schedules, wetland general permits, and rates for the use of a personal automobile. Wis. Stat. § 227.01(13)(a)-(zz). Statewide orders addressing a public health emergency did not make the list.

Just as important, § 227.01(13)'s definition of a rule and § 252.02(4)'s grant of authority to issue statewide orders do not conflict—as they would need to, for the latter to have repealed implicitly the former. *See United States v. Fausto*, 484 U.S. 439, 453 (1988) ("[A] later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between

the two.").[10] DHS is thus incorrect when it argues that applying § 227.01(13) to DHS orders would "make nonsense" out of § 252.02(4). Resp. 34.

Moreover, although the Legislature unquestionably gave DHS authority to issue statewide orders, those "orders" (when they have the force of law and implement a statute) will also frequently be "rules" for purposes of Chapter 227, which unambiguously states that *orders* are sometimes *rules* for procedural purposes. There is no conflict between the two provisions.

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[10] In 1951, the Legislature amended Wis. Stat.§ 227.01 to define "Rule" as "a rule, regulation, standard, * * * statement of policy of general application *or general order* having the effect of law, including the amendment or repeal thereof." Laws of 1951, Ch. 717, § 2a. In 1955, the Legislature again amended Wis. Stat. § 227.01, and defined "Rule" as "a regulation, standard, statement of policy or general order (including the amendment or repeal of any of the foregoing), of general application and having the effect of law." Laws of 1955, Ch. 221, § 13. In 1982, the Legislature amended Wis. Stat. § 143.02(4) (now Wis. Stat. § 252.02(4)) to explicitly give DHS power to "issue orders" for certain purposes. Laws of 1981, Ch. 291, § 21. In 1985, the Legislature amended the definition of "Rule" in Section 227.01 to mean "a regulation, standard, statement of policy or general order of general application which has the effect of law." 1985 Wis. Act 182, § 13. Finally, in 2013, the Legislature amended the definition of "Rule" in 227.01, adding a comma, such that the definition now reads "a regulation, standard, statement of policy, or general order of general application which has the effect of law." 2013 Wis. Act 125, § 28. The gist of this statutory history is that the definition of "rule" included "general orders" of "general applicability" in 1982 when the Legislature gave DHS express power to "issue orders."

Nor is the phrase "or orders" surplusage in § 252.02(4) because some orders with statewide effect issued under § 252.02(4) are *not* rules under Chapter 227. For example, an order providing statewide social-distancing guidelines would not be a "rule" if it was merely advisory and did not have the force of law. *See* Wis. Stat. § 227.112(3). By contrast, when DHS makes an order "applicable to the whole" state, and it is a "general order of general application" that implements § 252.02 or some other statute and has the force of law, that directive is unambiguously a "rule" under § 227.01(13).[11]

DHS's next move is to argue that, while it specifically invoked § 252.02 as the basis for its authority in the Order itself, the Order does not in fact implement that statute. According to DHS, there is no need to "implement" the statute because the statute simply "empowers DHS to act." Resp. 45.[12] But as DHS

[11] DHS has promulgated several such rules related to the control of contagious diseases. Wis. Admin. Code § DHS 145.01, *et seq*.

[12] As *amici curiae* Independent Business Association of Wisconsin, et al., have explained, the Department's contention that the Legislature delegated to the agency unbounded authority to issue whatever legislative-type decrees it deems necessary and expedient to combat contagious diseases, rather than implement a circumscribed statute that channels agency

itself explains, the word "implement" means to "carry into effect," Resp. 26–27 (citing *Oxford English Dictionary* (2d ed. 1989)), and Emergency Order 28 purports to carry into effect the provisions of § 252.02. Section 252.06, which gives the Department authority to "require isolation of a patient," likewise empowers DHS to act, but DHS has nevertheless issued rules implementing that statute. *See* Wis. Admin. Code § DHS 145.01, *et seq*.

Finally, DHS cites no authority for its assertion that an order applicable to the entire state is not a "rule" merely because it is a "fact-sensitive response to a current crisis." Resp. 45. State and federal agencies often promulgate fact-specific rules to address breaking crises. *See, e.g.*, *Sorenson Commc'ns*, 755 F.3d at 704–07 (treating as a rule the FCC's "Interim Order" addressing a fact-sensitive emergency caused by certain practices in the telecommunications industry); *Hawaii Helicopter Operators Ass'n v. F.A.A.*, 51 F.3d 212, 213–14 (9th Cir. 1995) (emergency regulation of helicopters after multiple crashes and fatalities).

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discretion, runs headlong into the non-delegation doctrine. *See Amicus* Br. of IBAW.

Indeed, at least one other state agency has already issued an emergency rule designed to address specific problems in the housing market caused by the COVID-19 pandemic (and by DHS's actions). *See infra* Part III.A.I.c.

b. The Order is an Exercise of Legislative, not Executive, Power.

Although "[t]he administrative rulemaking procedures in Wis. Stat. ch. 227 are shot through with legislative review," Resp. 47, DHS's fallback position is that the Order is only an exercise of executive power (despite its forswearing of any reliance on the Governor's emergency powers), not legislative power, and therefore somehow not subject to the rulemaking process.[13] Vaguely invoking Alexander Hamilton, inapposite U.S. Supreme Court authority, a case from the U.S. District Court for the Virgin

[13] As noted above, this Court need not accept DHS's *ipse dixit* as to the nature of the Order. *See supra* pp.14–22. The substance of the order is dispositive, not the label. As DHS recognized earlier this year, an agency directive is a rule if the agency has issued a "law-like pronouncement[ ]." Br. of DHS, *Papa v. DHS*, Nos. 206AP2082, 2017AP634 (Wis. Feb. 20, 2020), at 18, 22. Indeed, Chapter 227 itself highlights this substance-over-form dynamic when it provides that if JCRAR "determines that a statement of policy or an interpretation of statute meets the definition of a rule, it may direct the agency to promulgate the statement or interpretation as an emergency rule under § 227.24(1)(a)." Wis. Stat. § 227.26(2)(b).

Islands, and a few stray decisions from other States' courts, the Department contends that Emergency Order 28 "carries out [a] core executive function" when it "issues orders for guarding against, controlling, and suppressing communicable diseases." Resp. 49–51.

But DHS refutes its own argument when it claims to be exercising the "police power," Resp. 23, and contends that *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), provides the proper framework for analyzing the Legislature's challenge to DHS's exercise of "police power." Resp. 55–57. In *Jacobson*, the Court held that the "[t]he authority of the state *to enact [a] statute* is to be referred to what is commonly called the police power." 197 U.S. at 24–25 (emphasis added). *Jacobson* made clear that the "police power of a state must be held to embrace, at least, such reasonable regulations established directly *by legislative enactment* as will protect the public health and the public safety." *Id.* at 25 (emphasis added). This Court, too, has similarly recognized that the "police powers" are *legislative* powers, not executive powers. *See Adams v. City of Milwaukee*, 144

Wis. 371, 129 N.W.2d 518, 520 (1911) ("[I]t is for the city council to determine upon which theory it will base its police regulations."); *Froncek v. City of Milwaukee*, 269 Wis. 276, 283–84, 69 N.W.2d 242 (1955) ("[I]t is well settled that courts will not interfere with the legislative authority in the exercise of its police power unless it is plain and palpable that such action has no real or substantive relation to the public health or safety or general welfare.") (citation omitted); *cf. State ex. Rel. Milwaukee Sales & Inv. Co. v. RR Comm'n of Wisconsin*, 174 Wis. 458, 183 N.W. 687 (1921) (discussing whether "temporary emergency legislation" was a "proper exercise of the police power in light of the emergency"). To the extent that DHS purports to be wielding the "police power," it is plainly exercising legislative authority.

To be sure, DHS can issue an executive-style order to close a school, prohibit a public gathering at a church, or quarantine an infected individual consistent with express delegations of statutory authority and within constitutional limits. *See* Wis. Stat. § 252.02(3). And of course, the Governor can declare a public health emergency and designate DHS as the "lead state agency to

respond to that emergency." *Id.* § 323.10. During such a state of emergency, the Governor is given broad executive powers to "[i]ssue such orders as he or she deems necessary for the security of persons and property." *Id.* § 323.12(4)(b).[14] But when an agency purports to act under the authority vested in that agency by statute—as DHS here relies on § 252.02—it is exercising delegated legislative authority and "can exercise only those powers granted by the legislature." *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992).

Here, DHS has not purported to act under the Governor's emergency powers, and far from merely closing a school (or even closing all schools), Emergency Order 28 sets out broad rules of conduct governing every business and person in the state.[15]

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[14] Because the Governor is not an "agency," orders issued by the Governor are never "rules" under Chapter 227. *See* Wis. Stat. § 227.01(1) (governor is not an "agency"); *id.* § 227.01(13) (a rule is "issued by an agency").

[15] The Wisconsin Constitution, which defines and delegates the "executive power," does not authorize the Governor to respond unilaterally to public health emergencies. Instead, it gives the Governor "power *to convene the legislature* on extraordinary occasions, and in case of . . . danger from the prevalence of contagious disease." Wis. Const. Art. V, § 4 (emphasis added). It also gives him authority to "expedite all such measures *as may be resolved upon by the legislature*." *Id.* (emphasis added). In other words, the Constitution contemplates that in a public health emergency the Governor will convene the Legislature to quickly develop and enact a plan of action.

Because DHS has issued a "general order of general applicability" on its own authority, it is exercising delegated *legislative authority* and must comply with the procedural requirements of Chapter 227. *See Koschkee v. Taylor*, 2019 WI 76, ¶¶ 12, 25, 34, 387 Wis. 2d 552, 929 N.W. 2d 600.

DHS and its supporting *amici* suggest that adopting the Legislature's position here would leave Wisconsin as the lone state unable to respond appropriately to COVID-19. DHS claims that other states, such as Illinois, have enacted broad public health statutes that give their executives boundless police powers to fight this pandemic. Resp. 49 (citing *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 819 (Ill. 1922)). But an Illinois court recently enjoined that State's safer-at-home order, suggesting perhaps that Illinois law is not so different from Wisconsin. *See Bailey v. Prizker*, No. 2020-CH-06 (Ill. Cir. Ct. Apr. 27, 2020).

The Department's *amici* also argue that permitting the Legislature to exercise its constitutional and statutory oversight would make Wisconsin an outlier. *See* Legal Scholars Br. They cite a host of state statutes and codes for support, *id.* at 4–5 n.1, but

many of those provisions are in fact narrower than § 252.02.[16] In other words, those provisions themselves clearly do not give those States' departments of public health the right to quarantine healthy persons, restrict everyone's travel, or shutter businesses. Consistent with these provisions, the Legislature is in good company to rein in the limitless authority DHS purports to possess under § 252.02. And while provisions cited by the legal scholars do help show how other States have granted more authority to their public health agencies than Wisconsin has,[17] this only underscores why § 252.02 does not sweep as broadly as DHS claims. Unlike

[16] To describe but a few of their cited provisions: Ala. Code § 22-2-2 sanctions the board of health to "investigate," "inspect," "examine," "adopt and promulgate rules," or "act as an advisory board"; Ga. Code § 31-12-2.1 authorizes the department to "ascertain the existence of any illness," "investigate," "define," "promulgate rules and regulations," and "prepare" a "plan"; Minn. Stat. § 144.419 mandates that "[i]solation and quarantine must be by the least restrictive means necessary"; Neb. Rev. Stat. § 71-502 permits the department to "adopt, promulgate, and enforce … rules and regulations"; Nev. Rev. Stat. § 441A.510 states that anyone isolated or quarantined "shall" be furnished with "a document informing the person of his or her rights"; 35 Pa. Stat. § 521.3 describes who is "responsible" for public health.

[17] To describe but a few of their cited provisions: Alaska Stat. § 18.15.390 ("[T]he department … may [ ] close … any facility if there is reasonable cause …."); Del. Code tit. 16, § 122 ("The Department shall have … Supreme authority in matters of quarantine …."); 20 Ill. Comp. Stat. 2305/2 ("The [Department] … has supreme authority in matters of quarantine and isolation …."); Va. Code § 32.1-42 ("The Board of Healthy may promulgate regulations and orders to meet any emergency ….").

many States, for example, Wisconsin does not give its executive branch the power to suspend statutes. *See* Order, *Legislature v. Evers*, No. 2020AP608-OA (Wis. Apr. 6, 2020). So, while our law "could have granted the [Department] broader emergency powers" in the fashion of some other States, it "has not done so." *Id.* at 3.

c. DHS Could have Promulgated the Order in Compliance with Chapter 227

DHS protests that it could not have promulgated Emergency Order 28 in a timely fashion in compliance with § 227.24 because promulgating an emergency rule can take several weeks. Resp. 52. But DHS has had a full *seven weeks* since the Governor declared a public health emergency on March 12. (And of course DHS *always* has 60 days from the date the Governor declares a public health emergency to prepare a rule that can take effect after the Governor's emergency powers expire.) Wis. Stat. § 323.10. Even granting for the sake of argument that Emergency Order 12—which was issued "at the direction of the Governor" and which explicitly relied on the Governor's emergency declaration as a source of authority—did not need to go through formal rulemaking

procedures, DHS has no excuse for failing to initiate the rulemaking procedure to prolong the statewide lockdown beyond the expiration of the public health emergency. Had DHS begun work on an emergency rule in late March or early April, it could have issued it by April 24, when Emergency Order 12 expired. Alternatively, the Governor could have issued his own rule to run through May 11, when the Governor's declared state of emergency expires, while DHS at the same time worked on a statewide rule that could have been circulated and promulgated *well before* May 11 and that could have gone into effect after the public health emergency ends.[18]

Indeed, another agency has already promulgated an emergency rule to address the crisis in the rental market resulting from the economic downturn precipitated by Emergency Order 12. On April 25, the Department of Agriculture, Trade and Consumer Protection (DATCP) published an emergency rule prohibiting

[18] Moreover, a state of emergency declared by the Governor may be "extended by joint resolution of the legislature." § 323.10. Had the Governor cooperated with the Legislature at the beginning of the state of emergency, both branches of government could have agreed to extend the emergency declaration to give agencies more time to develop well-reasoned rules.

landlords from charging late fees or penalties to renters who cannot make rent payments.[19] The Governor approved the statement of scope on March 27, the agency held a public hearing on April 3, and DATCP filed the text of the emergency rule with the legislative reference bureau on April 21, 2020.[20] If DATCP could promulgate an emergency rule—which, like Emergency Order 28, has limited duration and responds to specific factual circumstances arising out of the pandemic—by April 25, DHS could have done the same, especially since DHS had already developed the broad contours of its response to COVID-19 by March 24. *See* Emergency Order 12. Had DHS initiated the procedure for promulgating an emergency rule in early March, it could have promulgated the rule before April 25—or at least by May 11, when the Governor's emergency powers expire—while involving the legislature and the public.[21]

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[19] *See* EmR2002, https://docs.legis.wisconsin.gov/code/register/2020/772B/register/emr/emr2002_rule_text/emr2002_rule_text.

[20] https://docs.legis.wisconsin.gov/code/scope_statements/all/016_20.

[21] The Department of Workforce Development also published an emergency rule earlier this year in just over a month. EmR2001. The Governor approved the statement on January 22, and the rule's effective date was February 25, 2020. https://docs.legis.wisconsin.gov/code/emergency_rules/all/emr2001.

The Department contends that rulemaking is not feasible during a pandemic because DHS must be able to "accommodate significant adjustments along the way." Resp. 54. But DHS could promulgate a rule that would provide the Secretary with manageable standards for opening the economy once objective benchmarks are satisfied. DHS would not need to "start the process all over again with a new scope statement" should circumstances "evolve," *id.* (citing Wis. Stat. § 227.135(4)), because a new statement is required only if "the *subject matter* of the rule-making process changes." *Applegate-Badger Farm, LLC v. Department of Revenue*, 2020 WI App 7, 390 Wis. 2d 708, 735, 940 N.W.2d 725, (emphasis added) (holding that agency did not violate rule-making procedure by failing to prepare a revised scope statement based on changes to draft rule).

2. Even if DHS Had Complied with Section 227.24 in Issuing This Rule, Emergency Order 28 Nevertheless Exceeds DHS's Statutory Authority

a. As the Legislature has explained, two bedrock principles of Wisconsin administrative and constitutional law should guide this Court's analysis of § 252.02. First, agencies are prohibited

from "implement[ing] or enforc[ing] any" "requirement" unless they are "explicitly required or explicitly permitted" to do so, Wis. Stat. § 227.10(2m), and from "augment[ing]" their rulemaking authority beyond that which is "explicitly conferred on the agency by the legislature." *Id.* § 227.11(2)(a)2. Second, courts read statutes, where possible, to avoid raising "constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

The Department contends that Act 21's interpretive provisions have "no bearing" here because Emergency Order 28 "was not promulgated as a rule." Resp. 40. That argument fails for the reasons set forth above. *See supra* Part III.A.1.a. The Order is a "rule" and thus is subject to Act 21, which, as DHS concedes, limits agency action to that which is "*explicitly authorized*." Resp. 41 (citing Wis. Stat. §227.10(2m)). DHS also contends that this provision merely "codified one application of the long-recognized principles that agencies have powers . . . which are necessarily *implied* by the statues under which it operates." *Id.* (citing *Wis. Ass'n of State Prosecutors v. Wis. Emp. Relations Comm'n*, 2018 WI 17, ¶ 37, 380 Wis. 2d 1, 907 N.W.2d 424) (emphasis added)). But

an "implied" power, by definition, is a power that is *not* expressly authorized, so Act 21's insistence on express authorization prohibits agencies from relying on "implied" powers.[22]

The Department claims that "the consequences of the [Legislature's] argument would be that vast swaths of Wisconsin's police power—for exigencies large and small—would disappear." Resp. 40. But that type of policy-based argument cannot overcome the plain text of a duly enacted statute, *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110, and the Legislature enacted Act 21 precisely to cabin runaway agency assertions of legislative power. *See* Office of the Governor, *Regulatory Reform Info Paper* (Dec. 21, 2010).[23]

In any event, the Department's slippery slope argument is meritless. The Legislature does not dispute that the Governor has broad emergency powers that he can wield for 60 days, unless the

[22] This Court has not "confirmed" the Department's mistaken belief. Resp. 41. Although the decision in *Lake Beulah Management District v. DNR*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, references Act 21 in a footnote, it was grounded in the pre–Act 21 paradigm, and none of the other cases DHS discuss the relevant provisions of Act 21.

[23] Available at http://165.189.60.115/press-releases/regulatory-reform-info-paper.

Legislature revokes it, and which he can wield for even longer if the Legislature extends it. The Governor could, to use one of DHS's examples, declare a state of emergency in the event of a "raging wildfire" if the Department of Natural Resources did not have the statutory authority to act. Resp. 42–43; *see* Wis. Stat. § 323.10 (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."). There is no reason to think that such an emergency would extend beyond the generous 60-day limit for public emergencies. But once the Governor's declared state of emergency expires, his emergency powers—and those of cabinet-level officials—must be tethered to exclusive statutory authorizations unless the Legislature agrees to extend the state of emergency. In any event, a decision from this Court holding that DHS cannot unilaterally shutdown the State's economy and throw hundreds of thousands of Wisconsinites into unemployment would not implicate the myriad other emergency powers expressly delegated to various agencies by statute.

Because the Department has forsworn reliance on the Governor's declaration of a public health emergency, the requirements DHS seeks to enforce through Emergency Order 28 must be "*explicitly* permitted by statute or [ ] rule." Wis. Stat. § 227.10(2m) (emphasis added). Applying that criteria, the Order must be set aside because, as set forth below, nowhere in § 252.02 has the Legislature explicitly granted DHS authority to quarantine healthy persons, close "nonessential" businesses, or ban "nonessential" travel.

Section 252.02(3). This provision gives DHS authority to "close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." "[P]ublic gatherings," under the *noscitur a sociis* canon, are congregations of the sort that typically occur in "schools" and "churches" while, under the *ejusdem generis* canon, "other places" must be areas that present the same risk of "outbreaks and epidemics" as those typical of schools and churches. This provision does *not* provide express authority to close businesses DHS deems "nonessential" (or

delegate that decision to another entity), ban most travel, and dictate who may visit a private residence.

The Department all but concedes that the Order cannot be justified under § 252.02(3). Resp. 37. Indeed, it does not even attempt to interpret this provision, much less explain how a provision giving DHS the power to close schools and forbid public gatherings somehow authorizes DHS to prohibit *private* gatherings and close businesses. The two interpretative points DHS does make—that § 252.02(3) does not contain an "emergency threshold" or require a "formal order"—only confirm that the statute should be read narrowly. The Legislature surely did not intend to give DHS power to issue informal directives confining Wisconsinites to their homes even when there is no emergency merely because DHS believes such restrictions might help "control outbreaks and epidemics."

Section 252.02(4). This provision authorizes DHS to "promulgate and enforce rules or issue orders" for controlling and suppressing communicable diseases. The rules and orders issued under this provision must nonetheless be lawful and consistent

with the limited authority delegated by other provisions, since specific provisions within a statute will govern general provisions. *Dairyland Power Co-op.*, 52 Wis. 2d 45 at 53. Thus, for example, the Order's attempt to "isolat[e] and quarantine" all Wisconsinites must be read consistently with § 252.06 while the power to prohibit gatherings must be read consistently with § 252.02(3). Any rule promulgated under § 252.02(4) is further subject to numerous rulemaking requirements under Chapter 227.

For at least two reasons, § 252.02(4) does not authorize the order. First, Emergency Order 28 is, in fact, a rule for purposes of the APA and thus should have been promulgated consistent with Chapter 227, and nothing in § 252.02(4) excuses DHS from the procedures set forth in Chapter 227 when enacting a rule. *See supra* III.A.1. Second, an in any event, DHS exceeded its statutory authority because § 252.02(4) does not "expressly" authorize the Department to close businesses, restrict travel, or order all individuals in Wisconsin to stay at home. *See supra* pp. 32–35.

DHS asserts that § 252.02(4) gives it the power to "issue orders" for the suppression of communicable diseases, and that

Emergency Order 28 is an "order." Resp. 34–35. But that section does not confer *carte blanche* authority to issue any order that DHS deems useful to fight contagion. The Department, for example, cannot "issue an order" directing every statewide member of the Wisconsin National Guard to deploy to China to suppress a communicable disease under § 252.02(4). Yet DHS's interpretation would support this plainly unlawful order. Rather, § 252.02(4) must be read in harmony with other provisions specifically describing DHS's power to respond to contagious diseases.

Attempting to turn § 252.02(4) into a freewheeling delegation of authority unconstrained by the surrounding provisions, DHS asserts that the general/specific canon applies only to conflicting statutes, and that there is no direct conflict between § 252.02(4) and § 252.02(3). Resp. 35. But even if those two provisions do not directly conflict, the Department's capacious reading of §252.02(4) violates another well-established interpretative canon by turning the rest of Chapter 252 (including §252.02(3)) into surplusage. If the Legislature intended to give DHS unbridled authority to issue any order it deems necessary to

suppress contagious diseases, there was no need to specifically grant DHS the power to close schools and churches or forbid public gatherings.

The Department cannot dispute that § 252.02(4) *does* conflict with § 252.06 to the extent it allows DHS to quarantine individuals without following the procedures enumerated in §252.02(6). DHS contends instead that § 252.02(6) is irrelevant because the Emergency Order does not conflict with § 252.06—which specifically governs the Department's power to quarantine—because the Order is "not a quarantine." Resp. 38–39. That assertion is belied by the text of the Order, which states that "[a]ll individuals present within the State of Wisconsin are ordered to stay at home or at their place of residence" with very few exceptions. Order 2–3. This diktat can only be described as a "quarantine"—it restricts travel and isolates people in their homes. "Quarantine" means "to isolate as a precaution against contagious disease." *In re Washington*, 2007 WI 104, ¶ 36, 304 Wis.2d 98, 735 N.W.2d 111 (citing *Webster's Third New International Dictionary* 1859 (1986)). A state edict that "order[s]"

"[a]ll individuals … to stay at home" to prevent the spread of COVID-19 does just that—it "isolates and quarantines" them.[24]

If there be is doubt about the Department's authority here, the canon of constitutional avoidance removes it. *See Am. Petroleum Inst.*, 448 U.S. at 646 (controlling op. of Stevens, J.). DHS claims it has the authority to issue "any" order it deems appropriate to stem the spread of infectious disease. Resp. 33. If DHS is right, then the Legislature has given a single agency the power to completely suspend civil liberties and halt commerce without limitation or guidance other than to "control communicable disease." This would both violate separation of powers and the nondelegation doctrine.[25]

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[24] Refusal to stay at home as the Order commands can also lead to fines or criminal prosecution further supporting that the Order quarantines persons. In Fond Du Lac, for instance, the city enforces the Safer at Home order with fines, and "[b]reaking the state's 'Safer at Home' order can cost big bucks, even if you're just a kid." Monique Lopez, *Fond du Lac allows teens to be fined for 'safer at home' violations*, Fox 11 News (Apr. 10, 2020), available at https://fox11online.com/news/coronavirus/fond-du-lac-allows-teens-to-be-fined-for-safer-at-home-violations; T. Wall Amicus Br. 13 (describing police informing shop owners they cannot stay at their business); *see* Affidavit of Julie Willems Van Dijk (repeatedly citing in exhibits the importance of "quarantine" in support of the Order, including in an exhibit called "Box It In.").

[25] *See* US Attorney General William Barr, *Balancing Public Safety with the Preservation of Civil Rights* (Apr. 27, 2020), available at https://www.justice.gov/opa/page/file/1271456/download ("[T]he Constitution also forbids … undue interference with the national economy. If a state or local

Section 252.02(6). This gap-filling provision's verbs and objects are its interpretive key. Rather than authorizing *DHS itself* to issue (whether as rules or orders) whatever "measures" it deems appropriate—a reading that would swallow the careful enumerations in the rest of the statute and chapter, not to mention render the provision an unconstitutional delegation—the statute merely authorizes DHS in turn to "*authorize*" (i.e., empower or formally approve) and "*implement*" (i.e., carry into effect) "all emergency measures necessary to control communicable diseases." Wis. Stat. § 252.02(6) (emphases added). In other words, it first permits or empowers DHS *merely to permit or empower*, just as the Wisconsin Constitution permits the Legislature to "authorize limited encroachments"—by others—"upon the beds of navigable waters when it will serve the public interest," including by empowering DNR to issue permits. *Borsellino v. Wisconsin Dep't of Nat. Res.*, 2000 WI App 27, ¶ 17, 232 Wis. 2d 430, 606 N.W.2d 255.

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ordinance crosses the line from an appropriate exercise of authority to stop the spread of COVID19 into an overbearing infringement of constitutional and statutory protections, the Department of Justice may have an obligation to address that overreach in federal court.").

Plainly, the power to permit "measures" does not confer freestanding authority to adopt those "measures" in the first instance. And while this provision also permits DHS to help carry into effect "measures," it could not possibly "augment" DHS's powers to promulgate those measures in the first instance under one of its more specific explicit powers. Wis. Stat. § 227.11(2)(a)2.

DHS argues that language giving it power *to authorize* an act should be read more simply, as power to directly *do the act*. Resp. 27. That cannot be right. If it were, the State Constitution's empowering the Legislature to "authorize, by law, courts to revoke a persons' release for a violation of a condition of release" would permit the lawmakers themselves to order supervised release, or perhaps empower courts to do it even without a statute. Art. I, § 8, Cl. 3. Likewise, the legislative power to "authorize the release of students during regular school hours" to attend "religious instruction" presumably would allow the Legislature to order that release directly, rather than leave the matter to school districts, Art. X, § 3, but obviously the language does only the latter.

Common usage therefore supports the Legislature's reading, not the agency's.

DHS next suggests that the word "emergency" in this provision constrains its otherwise unlimited sweep. Resp. 30–31. But of course in DHS's view, an "emergency" means whatever DHS says it means, and lasts as long as DHS says it lasts—unlike an emergency declared by the Secretary's boss, which the Legislature acting alone can suspend or lengthen and which otherwise expires after 60 days. Wis. Stat. § 323.10. Indeed, had the point of § 252.02(6) been to give DHS a more free-ranging set of miscellaneous "emergency" powers, the Legislature surely would have tied its operation to the "period under which the department is designated [by the governor] as the lead state agency . . . [in] a public health emergency," as § 252.041 does to DHS's compulsory-vaccination powers. That it did not confirms that § 252.02(6) is indeed a mouse hole, whose "vague" language could not possibly house one bureaucrat's elephantine power to take any and all "actions" against the spread of a virus, for as long as she sees fit, Resp. 27. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468

(2001). Finally, if an "epidemic" (as well as presumably any major spread of "communicable disease") is almost always an "emergency," as DHS sensibly admits, Resp. 29, then "emergency" in subsection (6) is no more constraining than "epidemic" in subsection (3) or "communicable diseases" in subsection (4). After all, in DHS's views, all of these provisions operate in the context of a quickly spreading disease, and so subsection (6)'s open-ended power grant would indeed eclipse the more specific, limited enumerations of the other provisions.

Finally, DHS fails to address the obvious constitutional problems raised by their boundless reading of § 252.02(6), under which the agency—as it candidly admits—could alone dictate indefinitely the rules of "social and business interactions" in Wisconsin, *see* Resp. 27, presumably until a vaccine is developed.[26] If this is not an impermissible delegation of legislative authority,

[26] There is no guarantee that a vaccine will *ever* be developed. No vaccine has ever been approved for use against various forms of coronavirus. *See* Adam Bienkov, Scientists fear the hunt for a coronavirus vaccine will fail and we will all have to live with the 'constant threat' of COVID-19 (April 25, 2020), available at https://www.businessinsider.com/coronavirus-vaccine-may-be-impossible-to-produce-scientists-covid-2020-4.

nothing is. DHS does not even pretend that its reading puts "ascertainable" boundaries around the secretary's authority, nor does it come with any "procedural safeguards" for the millions of Wisconsinites it burdens. *See Westring v. James*, 71 Wis. 2d 462, 468, 238 N.W.2d 695 (1976). It is "delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

3. The Order Should be Set Aside as Arbitrary and Capricious Because DHS Failed to Provide Rationales for Many of the Lines It Drew

Although the Legislature does not contest that the COVID-19 pandemic poses a threat to the community and that limitations need to be put in place to prevent the spread of the virus, Emergency Order 28 is nevertheless arbitrary and capricious because DHS offered *no* reasoned explanation for the distinctions it drew between "essential" and "non-essential" businesses and between "essential" and "non-essential" activities, *see* Memorandum 56–62, not because DHS should have "drawn" the lines "differently," Resp. 60. For example, per the Order, if a

company sells flowers, it is nonessential. But if it sells flowers along with home improvement products, it is essential. If a business sells and repairs lawnmowers only, it is nonessential. But if it sells lawnmowers with construction material, it can be essential. Smaller, specialty businesses are unfairly and arbitrarily targeted.

DHS responds that *Jacobson* provides the "proper framework" for analyzing the Legislature's arbitrary-and-capricious challenge, Resp. 55, but that is not correct. The rule in *Jacobson* governs federal constitutional challenges to a State's exercise of the police power. *See* 197 U.S. at 24 ("Is the statute, so construed, therefore, inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the state?"); *cf. Adams*, 129 N.W. at 520 (asking whether the ordinance "is void as contrary to the Constitution of the United States"); *Froncek*, 269 Wis. at 282. But the Legislature has not asserted any claim arising under the United States Constitution.

Anyway, *Jacobson* involved review of a state *statute*, not an agency decision. *See* 197 U.S. at 31 ("if *a statute* purporting to have been enacted to protect the public health . . . has no real or substantial relation to those objects . . . it is the duty of the courts" to strike it down") (emphasis added).[27] But the question here is not whether Emergency Order 28 would be a constitutionally valid exercise of the police power if it had been enacted by *the Legislature*. Rather, the relevant question is whether DHS has exercised the police power in an arbitrary and capricious manner. This distinction is important because while courts have long held that legislatures have broad leeway to enact economic regulations with any conceivable rational basis, *see Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483 (1955), agencies must create a record that justifies their decisions. *Liberty Homes, Inc. v. Dep't of Indus., Labor & Human Relations*, 136 Wis. 2d 368, 383–84, 388–89, 401 N.W.2d 805 (1987) ("An administrative agency is subject to more rigid . . . judicial review of its legislative authority and the

[27] The Department cites *Adams*, 144 Wis. 371, and *Froncek*, 269 Wis. 276, but both cases involved challenges to municipal ordinances, not to administrative regulations.

manner in which that authority is exercised.") (citation omitted). An administrative record allows a reviewing court to "understand the nature of the issues confronting the agency and the evidence presented so as to assure itself that the agency rule is based, not on emotion or intuition, but rather on reasonable and reliable *evidence*." *Id.* at 386–87 (emphasis added).

DHS claims that there have been "scores of briefings and steady guidance" as to what businesses are essential, Resp. 62, but these briefings have not provided any insight into DHS's decisionmaking process. Nor have they given Wisconsinites any indication of when DHS intends to reopen the economy. For example, when asked about conflicting requirements in Emergency Order 31, the Governor's Chief Legal Counsel responded that "additional specificity will be provided" when Wisconsin reaches Phase One "to address some of the[se] issues."[28]

[28] "Wisconsin DHS Media Briefing COVID-19 Update for April 23," 12:43–14:48 (April 23, 2020), available at https://wiseye.org/player/?clientID=2789595964&eventID=2020041050&startStreamAt=763&stopStreamAt=888.

And the Governor himself has stated that there is "no timeline" in place for reopening the State.[29]

Delegating administration of the murky essential-verses-nonessential standard to the Wisconsin Economic Development Corporation ("WEDC") did not eliminate the arbitrariness problem—it compounded it. So far as the Legislature knows, DHS did not give WEDC meaningful direction as to how it should make such determinations, and WEDC has not provided any formal guidance to business owners seeking answers. Indeed, near-identical companies have received vastly different responses. One wood and laminate manufacturer was designated an essential business, while another wood and laminate manufacturer (who supplied the government and health care organizations) was nonessential. [30] A WEDC staffer suggested that one tree removal company was essential, while a different tree removal company

[29] *Id.* at 25:36–25:40, available at https://wiseye.org/player/?clientID=2789595964&eventID=2020041044&startStreamAt=1536&stopStreamAt=1540.

[30] AnnMarie Hilton and Matt Piper, "Wisconsin businesses received inconsistent messages about whether they were essential. Not, some are rejecting Evers' order," Sheboygan Press (April 21, 2020), available at https://www.sheboyganpress.com/story/news/2020/04/21/what-wisconsin-businesses-essential-wedc-coronavirus-guidance-uneven/5156423002/.

received a form response that told it to close.[31] Even some local law enforcement officials submitted online inquiries to WEDC, unsure of which businesses they needed to ensure were closed.[32]

DHS complains that it had no time to compile a record to justify its actions, but Governor Evers declared a public health emergency on March 12 and issued Emergency Order 12 on March 24. DHS did not issue Emergency Order 28 until April 16, over a month after the initial declaration of a public emergency and three weeks after the first safer-at-home order. The Department had ample time to develop a record.

Even if DHS had built a record, there is no possibility that DHS's decisions as to which businesses and activities Wisconsinites may engage in are rationally related to the governmental objective that the agency is meant to advance: protection of public health. There is no possible rational reason that big-box stores like Wal-Mart and Costco (both of which sell furniture) can operate safely, while furniture stores like

[31] *Id.*
[32] *Id.*

Slumberland and Steinhafel's cannot. And while DHS argues that liquor stores are essential because alcohol is a "consumable good," whereas clothing stores are nonessential because clothes and shoes are not, Resp. 61, the Order itself does not refer to "consumable goods," and an agency cannot backfill an irrational order with flimsy post-hoc justifications. *See Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (reviewing court must "judge the propriety of [agency] action solely by the grounds invoked by the agency"); *Stas v. Milwaukee Cty. Civil Service Comm'n*, 75 Wis. 2d 465, 249 N.W. 2d 764 (1977).

B. The Legislature and the Public Will Be Irreparably Harmed Absent a Temporary Injunction, and the Equities Favor Immediate Relief

As explained in the Legislature's opening memorandum, the Legislature is irreparably harmed whenever "enforcement of a 'duly enacted' law is prevented," Memorandum 63 (citing *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018)), and when elected officials are prevented from having any say in extreme and invasive regulation of the lives of all Wisconsin citizens, Memorandum 64–65. Moreover, the public is severely harmed by Order 28's extreme

restrictions, including the shuttering of businesses that has caused countless Wisconsinites to go without work or pay. Memorandum 65–66.

DHS fails to support its assertion that enjoining Order 28, subject to a stay, will have catastrophic consequences. In fact, many States have been and are continuing to lift or modify their stay-at-home orders. *See A state-by-state rundown of stay-at-home orders and business re-openings*, Fortune (April 28, 2020).[33] What is more, there are other ways to put in place measures to help prevent a severe outbreak of COVID-19. For example, the Legislature is conducting hearings on plans to re-open businesses, *see Informational Hearing*, Assembly Committee on State Affairs.[34] Unfortunately, the Governor is unlikely to work cooperatively with the Legislature if he can lean on the Secretary of DHS to accomplish his goals by fiat.

Although DHS hyperbolically contends that the Order cannot be lifted without a massive increase in deaths, the

[33] Available at https://fortune.com/2020/04/28/stay-at-home-shutdown-business-open-coronavirus/.

[34] Available at https://docs.legis.wisconsin.gov/raw/cid/1552466.

Legislature stands willing to work with the Governor and DHS to ensure that the public is protected without crippling the State. COVID-19 presents a challenge for our State, but it does not give DHS license to suspend the rule of law for as long as the Secretary sees fit. A temporary injunction is thus needed to ensure that Wisconsin's elected representatives can play an ongoing role in leading the state through these difficult times.

CONCLUSION

The Legislature respectfully requests that this Court issue an order temporarily enjoining enforcement of Emergency Order 28. The Legislature also respectfully suggests that this Court stay enforcement of its injunction, in its equitable discretion, to allow DHS sufficient time to promulgate a new emergency rule if it wishes, consistent with Wisconsin law.

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Respectfully Submitted,

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