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The Pitfalls of Judicial Activism During COVID-19: An Analysis of Wisconsin Legislature v. Palm, 55 UIC L. Rev. 94 (2022)

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THE PITFALLS OF JUDICIAL ACTIVISM DURING COVID-19: AN ANALYSIS OF *WISCONSIN LEGISLATURE V. PALM*

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I. INTRODUCTION

In January 2020, a man in his thirties from the State of Washington, who had recently traveled to Wuhan, China, was diagnosed with a novel coronavirus (“COVID-19”).¹ COVID-19 was a newly discovered strain of virus that could cause symptoms ranging from a common cold to more severe diseases.² The World Health Organization eventually declared COVID-19 a global health emergency.³ On February 29, 2020, the United States reported its

* Courtney Krzmarich, Juris Doctor Candidate 2022, UIC School of Law. I would like to dedicate this case note to everyone who has lost a loved one to COVID-19, especially those in underserved communities. Writing this case note would not have been possible without the support of my friends and family back in Wisconsin and my law school colleagues. Special thanks to my editor, Hudson Cross, for his time and dedication to this case note.

1. Erin Schumaker, *Timeline: How Coronavirus got Started*, ABC NEWS (Sept. 22, 2020), www.abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165 [perma.cc/RVM7-M26U].

2. *What Does “Novel” Coronavirus Mean?*, BATON ROUGE GENERAL (Mar. 24, 2020), www.brgeneral.org/news-blog/2020/march/what-does-novel-coronavirus-mean/ [perma.cc/CW52-3UAZ].

3. Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES, www.nytimes.com/article/coronavirus-timeline.html [perma.cc/JVK8-KZAV] (last updated Mar. 17, 2021).

first COVID-19 related death.⁴ By March 3, COVID-19 had infected more than 90,000 people globally and killed about 3,000.⁵ The deadly virus continued to spread and, on March 13, President Trump declared a national emergency for the United States.⁶ Two days later, the Centers for Disease Control and Prevention (“CDC”) recommended no gatherings of fifty people or more and many businesses were forced to close indefinitely.⁷ Unlike other World leaders,⁸ President Trump did not declare a national lockdown, so state governors across the country were tasked with creating their own plans to stop the spread of COVID-19.⁹ In Wisconsin, Governor Tony Evers decided that Wisconsin’s Department of Health Services (“DHS”) would lead the fight against COVID-19.¹⁰ Unfortunately for Wisconsinites, the DHS’s plan was short lived due to the irresponsibility of the Wisconsin Supreme Court.¹¹

This Note will illuminate how the Wisconsin Supreme Court erred in its decision in *Wisconsin Legislature v. Palm*.¹² Part II of this Note will cover the background of the DHS in Wisconsin and what led to the erroneous decision in *Palm*. Part III will explain why the court’s evaluation of Secretary-elect Andrea Palm’s issuance of Emergency Order 28 was flawed. It will also explain how the Wisconsin Supreme Court Justices’ personal disfavor for the broad discretion granted through Wisconsin Statute Section 252.02

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *See id.* (stating that in other countries, like Italy, officials locked down ten towns after a cluster of cases suddenly surged southeast of Milan).

9. *See* Caitlin Oprysko, *Trump on a Nationwide Lockdown: ‘I don’t Think we’ll ever find that Necessary’*, POLITICO (Mar. 20, 2020), www.politico.com/news/2020/03/20/trump-coronavirus-nationwide-lockdown-139330 [perma.cc/H7QM-HL6T] (stating that President Trump “shot down the prospect for any kind of nationwide lockdown to contain the spread of coronavirus, resisting a step that California, New York and now Illinois have already taken.”); Rachel Treisman, *How is each State Responding to COVID-19?*, NPR (Dec. 4, 2020), www.npr.org/2020/03/12/815200313/what-governors-are-doing-to-tackle-spreading-coronavirus [perma.cc/X8X5-3EKW] (“When the coronavirus first struck the U.S. in March, every state implemented restrictions aimed at limited its spread.”).

10. Office of Governor Tony Evers, Exec. Order No. 72 (Mar. 12, 2020), www.docs.legis.wisconsin.gov/code/executive_orders/2019_tony_evers/2020-72.pdf [perma.cc/7RKM-X9B8] [hereinafter Exec. Order No. 72].

11. *See* Shawn Johnson, *Wisconsin Supreme Court Overturns the State’s Stay-At-Home Orders*, NPR (May 14, 2020), www.npr.org/2020/05/14/855855749/wisconsin-supreme-court-overturns-the-states-stay-at-home-orders [perma.cc/C7HP-Z743] (stating that the Wisconsin Supreme Court ruled that the stay-at-home order was unlawful).

12. *Wis. Legis. v. Palm*, 942 N.W.2d 900 (2020) (This case is referred to as 2020 WI 42 in Wisconsin Supreme Court filings, including briefs discussed *infra.*).

(“Chapter 252”) influenced them to evaluate its powers in a narrow way. This part will also highlight what led the court to unjustly strike Order 28 in its entirety and leave Wisconsinites with no guidance on how to avoid contracting COVID-19. Finally, this Note will offer a personal analysis of *Palm*, offering a more effective statutory analysis and logical outcome to the issues presented in the case.

II. BACKGROUND OF THE DHS IN WISCONSIN AND WHAT LED TO PALM

The global outbreak of COVID-19 created many problems within the United States of America.¹³ One of these problems was deciding the response needed to keep Americans safe but also reopen businesses that had closed.¹⁴ The Federal Government initially struggled to create a comprehensive plan, but eventually announced the *Opening Up America Again Guidelines* on April 16, 2020.¹⁵ This plan created a phased reopening based on the known signs and symptoms of COVID-19.¹⁶ It did not mandate state action, but rather, outlined proposed gating criteria¹⁷ for the states to follow when deciding whether or not to allow businesses to reopen.¹⁸ Each state used these basic guidelines to create its own plan and gating criteria to prevent the spread of COVID-19.¹⁹ States used

13. *Everyone Included: Social Impact of COVID-19*, DEP’T OF ECON. AND SOC. AFFS., UNITED NATIONS, www.un.org/development/desa/dspd/everyone-included-covid-19.html [perma.cc/WZ5P-AX75] (last visited Dec. 21, 2021).

14. In August 2020, three organizations proposed plans for the U.S. to gain control over COVID-19. Janice Hopkins Tanne, *Covid-19: US Needs a National Plan to Fight Rising Infections, Experts Say*, *BMJ* (Aug. 3, 2020), www.bmj.com/content/370/bmj.m3072 [perma.cc/FhE7-SZBZ].

15. Kayleigh McEnany, *Statement by the Press Secretary on COVID-19 Testing*, AM. PRESIDENCY PROJ. (Apr. 27, 2020), www.presidency.ucsb.edu/documents/statement-the-press-secretary-covid-19-testing [perma.cc/2SST-5PKY].

16. *Id.*

17. *What are the Gating Criteria?*, COVID EXIT STRATEGY, www.covidexitstrategy.org/definitions-and-criteria [perma.cc/22PJ-UDXU] (last visited Dec. 21, 2021) (“Gating criteria are the data-driven conditions each region or state should satisfy before proceeding to a phased opening.”).

18. The *Opening Up America Again* plan included proposed gating criteria, such as needing a downward trajectory of COVID-like syndromic cases reported within a fourteen-day period; a downward trajectory of documented COVID-19 cases within a fourteen-day period; and hospitals being able to treat all patients without crises care. Cecelia Smith-Schoenwalder, *Trump Issues Guidelines for Reopening State Economies Amid Coronavirus Pandemic*, *U.S. NEWS* (Apr. 16, 2020), www.usnews.com/news/national-news/articles/2020-04-16/trump-says-us-entering-next-phase-in-coronavirus-war-issues-guidelines-for-reopening-states [perma.cc/8B6T-ZL2R].

19. *See generally COVID-19 Resources for State Leaders*, COUNCIL OF STATE GOV’TS, www.web.csg.org/covid19/executive-orders/ [perma.cc/9V3E-2LTV]

executive orders to compel participation in the reopening plans.²⁰ For example, the State of Illinois created the *Restore Illinois* plan,²¹ which was described as a five-phased reopening plan guided by local health metrics.²² In response, Governor Pritzker issued three Executive Orders, which banned public gatherings, closed public and private schools, and ordered Illinoisans to stay at home unless they had a valid reason to leave.²³ In California, Governor Newsom declared a state of emergency and later ordered the California Department of Public Health to issue guidance on the closures of restaurants, bars, and wineries.²⁴ States like Arkansas and Massachusetts also decided to allow their state health departments to create emergency orders.²⁵

The state health departments issuing emergency orders are part of the states' executive branches, which creates some separation of powers issues.²⁶ The National Conference of State Legislatures has explained that although state executive branches need to be able to respond to emergencies in a timely manner, the state legislative branches still have an important role in making sure the powers exercised by the executive are not abused or in violation of the separation of powers doctrine.²⁷ This conflict played a large role in *Palm* because the Wisconsin Legislature was

(last visited Dec. 21, 2021) (showing each state's plans and orders).

20. *Id.* These executive orders included declaring states of emergencies, closing down public businesses, mandating citizens to wear masks, and explaining how to distribute crucial personal-protective-equipment and ventilators. *Id.*

21. *Restore Illinois*, ILL. DEPT OF PUB. HEALTH, www.dph.illinois.gov/restore [perma.cc/65B4-P9AG] (last updated July 16, 2020).

22. *Id.* This five-phase plan created gating criteria such as the rate at which the infection was spreading among Illinoisans getting tested, the number of infected Illinoisans being admitted to hospital beds, and the rate of Illinoisans recovering after a positive COVID-19 test. *Id.*

23. Office of Governor JB Pritzker, Exec. Order No. 2020-04 (Mar. 13, 2020), www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-04.pdf [perma.cc/68GP-WCTH]; Office of Governor JB Pritzker, Exec. Order No. 2020-05 (Mar. 13, 2020), www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-05.pdf [perma.cc/R8Z2-68JW]; Office of Governor JB Pritzker, Exec. Order No. 2020-10 (Mar. 20, 2020), www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf [perma.cc/EC7L-F2QN].

24. *COVID-19 Resources for State Leaders*, *supra* note 19.

25. *Id.*

26. *Legislative Oversight of Emergency Executive Powers*, NCSL, www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx [perma.cc/4LEE-6EPJ] (last updated Nov. 2, 2021).

27. *Id.* In Wisconsin, a state of emergency shall not exceed sixty days, unless it is extended by joint resolution of the legislature. *Id.* Also, the "executive order may be revoked at the discretion of either the governor by executive order or the legislature by joint resolution." *Id.*

seemingly trying to exercise a check on the executive power exercised by the DHS.²⁸

A. *Events Leading to Palm*

The Wisconsin Legislature itself created the DHS through Wisconsin Statute Section 15.19.²⁹ According to another Wisconsin statute, some of the DHS's powers are triggered when the governor declares a public state of emergency.³⁰ When the emergency is declared, the DHS is then treated as the only public health authority and given certain powers and duties specific to that designation.³¹ However, Chapter 252 of the Wisconsin Code contains separate authority for the DHS that is not dependent on a governor's emergency declaration.³²

On March 12, 2020, Wisconsin Governor Tony Evers issued Executive Order 72 ("Order 72"), which declared a health emergency in response to COVID-19.³³ Much like other states, Order 72 designated the DHS as the lead agency to respond to the emergency.³⁴ Using the power vested to her through Order 72, Andrea Palm, the DHS Secretary, issued Emergency Order 12.³⁵ Emergency Order 12 ordered all individuals present within the state of Wisconsin to stay at home with certain exceptions; this issuance sparked no action from the Wisconsin Legislature.³⁶ It was Palm's later issuance of Emergency Order 28 that compelled the legislature to bring a petition against her.³⁷ Order 28, titled "Safer at Home Order," differed only slightly from Order 12.³⁸ In Order 28,

28. *Palm*, 942 N.W.2d at 904.

29. WIS. STAT. § 15.19 (2020).

30. WIS. STAT. § 323.10 (2020).

31. *Id.*

32. *See* WIS. STAT. § 252.02 (2019) (stating that the DHS is granted broad authority to control communicable diseases, such as the power to close schools and limit public gatherings in order to control outbreaks and epidemics).

33. Exec. Order No. 72, *supra* note 10.

34. *Id.* Along with designating the DHS as the lead agency, Governor Evers directed this agency to "take all necessary and appropriate measures to prevent and respond to incidents of COVID-19[.]" *Id.*

35. *Palm*, 942 N.W.2d at 906.

36. *Id.*

37. *Id.* at 907. Emergency Order 28 prohibited all forms of travel except what Palm deemed essential; ordered all businesses to cease activities except for minimum operations that Palm deemed basic; prohibited all public and private gatherings; closed all K-12 schools for the remainder of the year; ordered religious gatherings to fewer than ten people in a room; and imposed a six-foot social distancing requirement for any person not residing in the same household. *Id.* at 906. This order also imposed a punishment of "up to 30 days imprisonment, or up to \$250 fine, or both." *Id.*

38. *Compare* Wis. Off. of Dep't of Health Serv., Emergency Order No. 28 (Apr. 16, 2020), docs.legis.wisconsin.gov/code/register/2020/772a3/register/emergency_orders/p

Palm relied solely on the powers granted to her under Chapter 252, which allowed for a broader assertion of authority than the powers cited in Order 12.³⁹ Other than that difference, Order 28 was merely an extension of the guidelines outlined in Order 12.⁴⁰ At the core of the petition was the Wisconsin Legislature's disagreement with the executive power exercised under Chapter 252.⁴¹

The Wisconsin Supreme Court granted the legislature's emergency petition and assumed jurisdiction over two issues: (1) whether Palm violated Chapter 227, which governs emergency rule-making, and (2) even if Palm did not violate Chapter 227, whether Palm's issuance of Order 28 exceeded her authority under Chapter 252 by ordering all persons to stay at home, forbidding all nonessential travel, and closing all nonessential businesses.⁴²

B. Suits Against Similar Stay-At-Home Orders in Michigan and Ohio

The exact circumstances surrounding *Palm* were unique, but similar suits challenging the authority of state executive branches during COVID-19 had been brought in other states.⁴³ For example, the Michigan Legislature filed suit against Governor Whitmer and challenged her authority to issue executive orders under the

he_2020_emergency_order_28/phe_2020_emergency_order_28.pdf [perma.cc/MA9J-TC9L] [hereinafter Emergency Order No. 28], with Wis. Off. Of Dep't of Health Serv., Emergency Order No. 12 (Mar. 24, 2020), docs.legis.wisconsin.gov/code/register/2020/771b/register/emergency_orders/phe_2020_emergency_order_12/phe_2020_emergency_order_12.pdf [perma.cc/V7TC-58TD].

39. The court explained that Emergency Order 28 was "not issued by the Governor, nor did it rely on the Governor's emergency declaration." *Palm*, 942 N.W.2d at 906. However, Emergency Order 12 was also not issued by the Governor either, yet the Wisconsin Legislature rose no objections. *Id.* at 906-07. The court further explained that Emergency Order 28 "relied solely on the authority vested in Andrea Palm . . . including but not limited to Wis. Stat § 252.02 (3), (4) and (6)." *Id.* at 906. This distinction by the court made it clear that it had an issue not with Order 28 itself, but the power that Palm used to assert the Order.

40. Emergency Order No. 28, *supra* note 38.

41. *Palm*, 942 N.W.2d at 904.

42. *Id.* at 907. Chief Justice Roggensack wrote both the majority opinion and a concurring opinion. In her concurrence, she explained that although she had just written a majority opinion striking down Emergency Order 28, she agreed that there should be a six day stay on the judgment to allow for the Wisconsin Legislature a draft a new law. *Id.* at 918-19 (Roggensack, C.J., concurring). She explained that an immediate ruling had the possibility of "throwing the state in chaos[.]" yet there was no stay of the judgement in the majority ruling. *Id.* at 919.

43. House of Representatives v. Governor, 960 N.W.2d 125 (Mich. Ct. App. 2020).

Emergency Powers of Governor Act (“EPGA”).⁴⁴ In that case, Governor Whitmer declared a state of emergency and issued a number of executive orders.⁴⁵ Similar to *Palm*, the lawsuit stemmed from a dispute between Whitmer and the legislative branch regarding the scope of the governor’s authority to issue and extend executive orders.⁴⁶ The Michigan Legislature took issue with the broad powers granted through the EPGA, much like the Wisconsin Legislature took issue with the broad powers granted through Chapter 252.⁴⁷

The Michigan Legislature was the body that created and later amended the EPGA.⁴⁸ The EPGA allowed Governor Whitmer to proclaim a state of emergency and make executive orders during a public crisis.⁴⁹ The Court of Appeals of Michigan explained that the EPGA “[did] not provide any active role for the [Michigan] Legislature during a public emergency, let alone the power to directly act as a check against a governor’s exercise of authority under the EPGA.”⁵⁰ This meant that the powers granted to Governor Whitmer were exclusive.⁵¹ Those powers were codified when the Michigan Legislature enacted the Emergency Management Act (“EMA”).⁵² But under the EMA, if Governor Whitmer wanted to extend a state of emergency past twenty-eight days, she had to ask the legislative branch to do so.⁵³ It is important to note that the EMA expressly declared that it could not limit or modify the powers enumerated to Governor Whitmer in the EPGA.⁵⁴

Pursuant to the EMA, Governor Whitmer asked the Michigan Legislature to extend her state of emergency.⁵⁵ But rather than passing a resolution to extend it, the legislature instead introduced a bill that sought to immediately reopen Michigan businesses.⁵⁶ Governor Whitmer vetoed the bill and issued Executive Orders 2020-66 and 2020-67, the latter of which cited directly to the

44. *Id.* at 129.

45. *Id.*

46. *Id.*

47. *Id.* Also similar to *Palm*, Governor Whitmer did not believe that the Michigan Legislature had standing to sue her. *Id.* The Court of Appeals of Michigan ruled that the legislature did have standing; just like the Wisconsin Supreme Court ruled that the Wisconsin legislature had standing. *Id.*

48. *Id.* at 130.

49. *See id.* at 130 (stating the applicable text of the EPGA).

50. *Id.*

51. *Id.*

52. *Id.* at 131.

53. *Id.* (“As reflected in [Section 3 of the EMA], if a governor wishes to extend an existing state of disaster or emergency beyond 28 days, the [l]egislature must approve the extension by resolution.”).

54. *Id.*

55. *Id.* at 132.

56. *Id.*

EPGA.⁵⁷ Executive Order 2020-68 then declared a new state of emergency pursuant to Governor Whitmer’s powers under the EMA.⁵⁸ Just like the Wisconsin Legislature, these back-to-back executive orders triggered an immediate lawsuit from the Michigan Legislature.⁵⁹

Unlike the Wisconsin Supreme Court in *Palm*, when this issue was brought to the Michigan Court of Appeals, it ruled that the “plain and unambiguous language of the EPGA and the EMA [did] not support the [l]egislature’s position” that Governor Whitmer had exceeded her constitutional authority.⁶⁰ It found that under the EPGA, Governor Whitmer had the authority to declare state-wide emergencies and promulgate reasonable orders.⁶¹ And since the EMA could not be used to limit the EPGA, those inherent and exclusive powers were vested to Governor Whitmer.⁶²

When it came to the Michigan Legislature’s argument that the EPGA was, in and of itself, unconstitutional, the Michigan Court of Appeals disagreed.⁶³ The court found that it was the Michigan Legislature itself that had declared that a governor must exercise broad police powers during a public emergency.⁶⁴ Therefore, the EPGA was not unconstitutional.⁶⁵ The court concluded that Governor Whitmer’s declaration of a state of emergency, her extensions of the state of emergency, and her issuance of related executive orders all fell within her scope of authority under the EPGA.⁶⁶ This ruling is contrary to the ruling in *Palm*, and it may explain why the Wisconsin Legislature chose to bring suit against DHS Secretary Palm instead of challenging the governor’s executive powers directly.⁶⁷

Also similar to *Palm*, Ohio Governor DeWine issued Executive Order 2020-01D, which declared a state of emergency and delegated

57. *Id.*

58. *Id.* at 133.

59. *Id.* at 133; *Palm*, 942 N.W.2d at 904.

60. *House of Representatives*, 960 N.W.2d at 137.

61. *Id.* at 139.

62. *Id.* at 140-42.

63. *Id.* at 142, 146.

64. *Id.* at 144.

65. *Id.* at 146.

66. *Id.* at 145-46.

67. Chief Justice Roggensack, writing for the majority in *Palm*, was quick to point out that this case was “not about [Governor Evers’] Emergency Order or the powers of the Governor[.]” but rather, the exclusive power of Andrea Palm. *Palm*, 942 N.W.2d at 904. She further emphasized that Andrea Palm is an “unelected official,” probably to draw a distinction between Palm and the Wisconsin legislators. *Id.* But Roggensack failed to include that Palm was appointed by Evers, who was also an elected official. *Gov.-elect Tony Evers appoints former Obama administration official Andrea Palm to Cabinet*, ASSOCIATED PRESS (Jan. 3, 2019), www.tmj4.com/news/local-news/tony-evers-former-obama-administration-official-andrea-palm-cabinet [perma.cc/4WKF-5M8H].

powers to the Ohio Department of Health.⁶⁸ The Director of the Department of Health, Amy Acton, created an emergency order almost identical to Palm’s Order 28.⁶⁹ Acton derived her authority from R.C. 3701.13, which allowed health officials to make special orders to prevent the spread of contagious or infectious diseases.⁷⁰ The language in R.C. 3701.13 is very similar to the language found in Wisconsin Chapter 252.⁷¹ In Ohio, however, the state legislature did not challenge Acton’s order; it is impossible to know why, but it may be because Governor DeWine is a Republican, and the Republicans control both the Ohio House of Representatives and the Ohio Senate.⁷² In contrast, Governor Whitmer of Michigan is a Democrat, but the Michigan Senate and House of Representatives both have Republican majorities.⁷³ Similarly, Governor Evers of Wisconsin is a Democrat, but the Wisconsin Legislature has Republican majorities in both houses and, at the time of the *Palm* decision, the Wisconsin Supreme Court had a majority of conservative judges.⁷⁴

68. Office of Governor Mike DeWine, Exec. Order No. 2020-01D (Mar. 9, 2020), www.governor.ohio.gov/wps/wcm/connect/gov/79a57015-902d-4e70-a2f1-c489556bb917/Executive+Order+2020-01D.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGK0N0JO00QO9DDDDM3000-79a57015-902d-4e70-a2f1-c489556bb917-n3GDA-k [perma.cc/JV2Q-RS2R]. This executive order gave the Ohio Department of Health the authority to “issue guidelines for private businesses regarding appropriate work and travel restrictions” and gave state agencies the power to “coordinate the State response to COVID-19, and to assist in protecting the lives, safety, and health of the citizens of Ohio.” *Id.*

69. Ohio Off. Of Dep’t of Health, Director’s Stay at Home Order (Mar. 22, 2020), www.content.govdelivery.com/attachments/OHOOD/2020/03/22/file_attachments/1407840/Stay%20Home%20Order.pdf [perma.cc/4C9E-QD4H]. It orders that (1) everyone in Ohio is to stay home; (2) non-essential businesses and operation must cease; and (3) there can only be essential travel. *Id.*

70. OHIO REV. CODE ANN. § 3701.13 (LexisNexis 2021). This statute proclaims that the department of health “shall have supervision of all matters relating to the preservation of the life and health of the people and have authority in matters of quarantine to isolation.” *Id.*

71. Compare OHIO REV. CODE ANN. § 3701.13, with WIS. STAT. § 252.02.

72. *Party Control of Ohio State Government*, BALLOTPEDIA, www.ballotpedia.org/Party_control_of_Ohio_state_government [perma.cc/92WY-HR7] (last visited Dec. 22, 2021).

73. *Party Control of Michigan State Government*, BALLOTPEDIA, www.ballotpedia.org/Party_control_of_Michigan_state_government [perma.cc/6DQ4-S6SW] (last visited Dec. 22, 2021).

74. *Party Control of Wisconsin State Government*, BALLOTPEDIA, www.ballotpedia.org/Party_control_of_Wisconsin_state_government [perma.cc/6GGF-GY2K] (last visited Dec. 22, 2021); *Wisconsin Supreme Court*, BALLOTPEDIA, www.ballotpedia.org/Wisconsin_Supreme_Court [perma.cc/BQA9-8RDR] (last visited Dec. 22, 2021).

C. History of the Department of Health Services' Power in Wisconsin

Before analyzing the Wisconsin Supreme Court's ruling in *Palm*, it is important to understand the history of Chapter 252, which has similarities to Michigan's EPGA and Ohio's R.C. 3701.13.⁷⁵ The predecessor of Chapter 252 did not allow for the DHS to create and issue orders.⁷⁶ The DHS could only "adopt and enforce rules and regulations."⁷⁷ At the beginning of the AIDS epidemic in 1982, however, the Wisconsin Legislature amended the codes and gave the DHS the ability to issue orders of state-wide application.⁷⁸ With that same 1982 amendment, the Wisconsin Legislature also added the requirement that rules of general application had to be adopted using Chapter 227 rule-making procedure.⁷⁹ This amendment remained silent about protocols that needed to be followed when the DHS issued state-wide executive orders.⁸⁰ This created another issue in the *Palm* case because there was disagreement about whether Order 28 was a state-wide executive order or a state-wide rule.

Interestingly, Wisconsin's history of state health laws goes back even further than the 1982 AIDS epidemic. In 1876, the Wisconsin Legislature created the State Board of Health and made it responsible for supervising the general health of the state's citizens.⁸¹ The legislature also granted the board unusually broad powers, such as allowing it to impose statewide quarantines unilaterally in times of public health emergencies.⁸² During the Spanish Flu pandemic of 1918, the State Board of Health exercised that broad authority by closing all public institutions for an indefinite amount of time.⁸³ Wisconsin was the only state to issue a comprehensive state-wide order, and practically every local government within Wisconsin immediately cooperated with the

75. WIS. STAT. § 252.02 (2020).

76. WIS. STAT. § 227.01(3) (1956).

77. Compare WIS. STAT. § 227.01(3) (1956), with WIS. STAT. § 227.01(13) (2020).

78. See § 21, ch. 291, Laws of 1981 (showing that not only does this section give the DHS the power to create statewide orders, § 143.02(3) gives the DHS the express authority to close schools and forbid public gatherings to control outbreaks and epidemics).

79. *Id.*

80. *Id.*

81. Steven Burg, *The Virus that Shut Down Wisconsin: The Great Flu Pandemic of 1918*, WISCONTEXT (Apr. 7, 2020), www.wiscontext.org/virus-shut-down-wisconsin-great-flu-pandemic-1918 [perma.cc/BZD4-SDQV].

82. *Id.*

83. See Steven B. Burg, *Wisconsin and the Great Spanish Flu Epidemic of 1918*, WIS. MAG. OF HIST. 37, 44 (Autumn 2000) (showing headline that read "Schools Closed to Stop Flu").

order.⁸⁴ Just like Palm's authority as the DHS Secretary in 2020, one person on the 1918 State Board of Health possessed the authority to issue state-wide health orders in times of crisis.⁸⁵ The broad authority of health experts to issue orders in times of health crises had uninterruptedly existed in Wisconsin since 1876.⁸⁶

The concept of Wisconsin's governors delegating authority to the DHS in order to handle a health crisis was also not new at the time of the *Palm* decision. Just over a decade prior, the United States declared a public health emergency due to an outbreak of the Swine Influenza (a.k.a. H1N1).⁸⁷ Accordingly, Wisconsin Governor Jim Doyle issued Executive Order 280, which declared a state of emergency and designated the DHS as the lead agency to respond.⁸⁸ Per Wisconsin rules, a state of emergency could only be extended sixty days without a joint resolution by the Wisconsin Legislature.⁸⁹ When it came to Governor Doyle's executive order and grant of authority to the DHS, the Wisconsin Legislature did not challenge it, but rather, it timely created Joint Resolution 94, which extended the state of a public health emergency.⁹⁰ There was never a lawsuit brought against the DHS Secretary regarding the emergency health orders during the Swine Influenza.⁹¹

Allowing the DHS to use its broad authority during a health crisis had been uncontested in Wisconsin up until the decision in *Palm*.⁹² Even modern media outlets wrote praises about Wisconsin's

84. *Id.* The paper explained that Wisconsin "did not flinch in the face of epidemic" and instead "responded with one of the most comprehensive anti-influenza programs in the nation." *Id.* The writers also noted that this comprehensive plan would not have been made possible without the existence of a strong state public health board and a "well-coordinated statewide public health network." *Id.*

85. *Id.*

86. *Palm*, 942 N.W.2d at 944 (Dallet, J., dissenting).

87. *Governor Declares Public Health Emergency*, LA CROSSE TRIB. (May 1, 2009), www.lacrossetribune.com/news/state-and-regional/wi/governor-declares-public-health-emergency/article_35a7c8fb-6dbf-51e5-956d-583334bbdded.html [perma.cc/N4QP-U2GH] (explaining a national public health emergency due to an outbreak of the H1N1 was declared in April 2009).

88. Office of Governor Jim Doyle, Exec. Order No. 280 (Apr. 13, 2009), www.docs.legis.wisconsin.gov/code/executive_orders/2003_jim_doyle/2009-280.pdf [perma.cc/GKL9-MSXY].

89. See § 323.10 (stating that a state of emergency shall not exceed sixty days, unless the state of emergency is extended by joint resolution of the legislature).

90. Assemb. J. Res. 94, 2009-2010 Wis. Leg. (Wis. 2009), www.docs.legis.wisconsin.gov/2009/related/proposals/ajr94.pdf [perma.cc/DJB6-2QZP].

91. DHS issued guidelines about vaccinations to guard against H1N1. *2009 Seasonal Influenza Vaccination Administration*, Wis. Dep't of Health Serv. (2009), www.dhs.wisconsin.gov/ems/seasonalvaccine-injectable.pdf [perma.cc/BV3P-JULK]. It stated that individuals could receive a seasonal flu shot and a H1N1 vaccine simultaneously. *Id.*

92. *Palm*, 942 N.W.2d at 943 (Dallet, J., dissenting).

approach to the Spanish Influenza of 1918.⁹³ Many used Wisconsin's approach in 1918 to predict how the state would fair during the COVID-19 outbreak.⁹⁴ Despite the historical success of Wisconsin's measures in 1918, the Republican-controlled legislature asked the Wisconsin Supreme Court to strike down Palm's Order 28 which aimed to stop the spread of COVID-19.⁹⁵ Before the order was enacted, data found that without significant intervention, COVID-19 cases were going to surge in the state of Wisconsin.⁹⁶ And following the ruling in *Palm*, COVID-19 cases went up significantly in the state.⁹⁷ Even after Wisconsin was deemed an epicenter of the virus, the Wisconsin Legislature failed to deliver on its promise to create a new law that would replace Order 28.⁹⁸ The court's decision in *Palm*, combined with the Wisconsin Legislature's lack of action, jeopardized Wisconsin's safety and well-being during the pandemic.⁹⁹

93. Burg, *supra* note 81. On April 7, 2020, an article was published that explained that Wisconsin was the only state in the nation to meet the Spanish Influenza crisis with uniform and statewide measures. *Id.* Wisconsin's measures were unusual because of their aggressiveness and the public's compliance. *Id.* It is uncontested that these drastic measures helped reduce Spanish Influenza deaths in Wisconsin. *Id.*

94. Jim Malewitz, *Wisconsin's Pandemic Past Offers Clues to its Coronavirus Future*, WIS. WATCH (Apr. 28, 2020), www.wisconsinwatch.org/2020/04/wisconsins-pandemic-past-and-coronavirus-future/ [perma.cc/6L99-Q22H] ("Wisconsin in 1918 provided a clear lesson about what unity and collective sacrifice could achieve for the common good."). Malewitz later explained that the 1918 pandemic is similar to COVID-19 because there were no vaccines, and the only thing that seemed to work was social distancing and the development of herd immunity as people contracted the disease and recovered. *Id.*

95. *Id.* Not only did the Republican legislature not like the Safer at Home order, "an estimated 1,500 protestors, most of them not wearing face masks, rallied at the Wisconsin State Capitol . . . demanding an end" to the Safer at Home shutdowns. *Id.*

96. *See id.* (explaining that cases were "projected to double every 3.4 days" and there would have been between 440 and 1,500 deaths by April 8th).

97. *Tracking Coronavirus in Wisconsin: Latest Map and Case Count*, N.Y. TIMES, www.nytimes.com/interactive/2021/us/wisconsin-covid-cases.html [perma.cc/MGZ2-MU7Q] (last visited Dec. 31, 2021) (Cases rose from 290 confirmed cases on May 13, 2020 to over 2,500 confirmed cases in October 2020).

98. Dan Shafer, *Wisconsin is now the Epicenter for Coronavirus in America*, RECOMBOBULATION AREA (Oct. 3, 2020), www.recombobulationarea.substack.com/p/wisconsin-is-now-the-epicenter-for [perma.cc/F4TF-4MWV]. With a population of about 5.8 million people, Wisconsin saw thousands of more new cases than its neighbors in Illinois, Michigan, or Minnesota in October 2020. *Id.* Due to the ruling in *Palm*, Wisconsin became the only state where the legislature controlled the pandemic response. *Id.* Throughout the pandemic, the Wisconsin Legislature had convened fewer than nine times, in comparison to Minnesota Legislature's sixty-two floor sessions, Michigan's fifty-eight, and Iowa's seventeen. *Id.*

99. *Id.*

III. THE WISCONSIN SUPREME COURT'S ANALYSIS OF THE ISSUES PRESENTED IN PALM

The Wisconsin Legislature petitioned the Wisconsin Supreme Court to evaluate the alleged constitutional violations raised by DHS Secretary Palm's issuance of Order 28. Section A of this analysis will focus on the Wisconsin Supreme Court's decision of whether Order 28 violated the rule-making procedure of Chapter 227, as well as the dissenting opinions. Section B will analyze the court's decision regarding whether Palm exceeded her constitutional authority asserted under Chapter 252 when issuing Order 28.

A. *Palm's Issuance of Emergency Order 28 Violated Wisconsin Chapter 227's Rule-Making Procedure*

Before deciding on the main issues, the Wisconsin Supreme Court had to rule on whether the Wisconsin Legislature even had standing to bring suit.¹⁰⁰ Using its rationale from *Schill v. Wis. Rapids Sch. Dist.*,¹⁰¹ the court found that the legislature had standing to seek judicial review simply because it had a stake in the outcome.¹⁰² Palm contested that analysis and argued that the legislature did not have standing to bring a claim.¹⁰³

After determining standing, the court evaluated the crux of the legislature's claim — that Order 28 was a rule, not a state-wide

100. *Palm*, 942 N.W.2d at 907.

101. *See Schill v. Wis. Rapids Sch. Dist.*, 786 N.W.2d 177 (2010) (holding that a party will have standing to seek judicial review when they have a personal stake in the outcome). “Wisconsin courts evaluate standing as a matter of judicial policy rather than as a jurisdictional prerequisite.” *Id.* Courts are to “construe standing broadly in favor of those seeking” to have it. *Id.*

102. *Palm*, 942 N.W.2d at 907-08.

103. *Id.* at 907. Legal Action of Wisconsin filed an amicus memorandum in opposition to the Legislature's Emergency Petition. Brief for Legal Action of Wisconsin, Inc. as Amici Curiae in Opposition to Emergency Petition for the Original Action and to Motion for Temporary Injunction, Wisconsin Legislature v. Palm, 2020 WI 42 (2020) (No. 2020-AP-765-OA), 2020 WI S. Ct. Briefs Lexis 33. They argued that the Wisconsin Legislature only has institutional standing, so their only protectable interest is the constitutional allocation of power, not the protectable interest of individual Wisconsin residents. *Id.* at 2. The Milwaukee Teachers' Education Association, Madison Teachers Inc., SEIU Healthcare Wisconsin, and Amalgamated Transit Union Local 998 all agreed. Brief for Milwaukee Teachers' Education, et. al., as Amici Curiae in Opposition to Legislature's Petition for Original Action and to Motion for Temporary Injunction, Wisconsin Legislature v. Palm, 2020 WI 42 (2020) (No. 2020-AP-765-OA), 2020 WI S. Ct. Briefs Lexis 97. They argued that the legislature was not allowed to intervene in a civil lawsuit in its own name and such intervention can only be done by the joint committee on legislative organization on behalf of the Legislature. *Id.* at 2.

order.¹⁰⁴ Under Chapter 227, an agency that creates a rule must get approval from the legislature and the governor before it can be enacted.¹⁰⁵ Chapter 227 does allow for an exception to the rule-making procedure if it is an emergency rule.¹⁰⁶ But the court found that the exception did not apply because an emergency rule could only remain in effect for one-hundred-and-fifty days unless extended by the legislature's joint committee.¹⁰⁷

The court then proceeded with its analysis of whether Order 28 was a rule.¹⁰⁸ Chapter 227 defines a rule as a “regulation, standard, statement of policy, or general order of general application that has the force of law[.]”¹⁰⁹ The Wisconsin Legislature claimed that Order 28 was a rule because it was a “general order of general application.”¹¹⁰ Palm asserted that Order 28 did not have general application because it was created to respond to the specific and time sensitive situation of containing the spread of COVID-19.¹¹¹ The court turned to *Citizens for Sensible Zoning v. Dep't of Nat. Res.* for its explanation of the term “general application.”¹¹² The court found that since Order 28: (1) regulated a general class of all people in Wisconsin; and (2) could also regulate any persons coming into Wisconsin in the future, it had general application.¹¹³ Due to its designation as a rule, the court deemed that Order 28 was therefore subject to the statutory rulemaking procedure established in Chapter 227.¹¹⁴ Because Palm issued Order 28 without the legislature's approval, the court found that she violated Chapter 227, and as a result, Order 28 was unenforceable.¹¹⁵

104. *Palm*, 942 N.W.2d at 908.

105. WIS. STAT. § 227.24 (2019). This statute also requires an agency making an emergency rule to: (1) prepare a statement of the scope of the emergency rule; (2) obtain approval of the statement; (3) and hold a preliminary public hearing and comment period; (4) submit the emergency rule in final draft form to the governor for approval; (5) prepare a plain language analysis of the rule; and (6) prepare a fiscal estimate for the rule. *Id.*

106. *Id.* at § 227.24(1)(a).

107. *Palm*, 942 N.W.2d at 911; see § 227.24(1)(c) (stating that a rule promulgated under paragraph (a) takes effect upon publication in the official state newspaper or on any later date specified in the rule and, except as provided under sub. (2), remains in effect only for 150 days).

108. *Palm*, 942 N.W.2d at 908.

109. § 227.01(13).

110. *Palm*, 942 N.W.2d at 908.

111. *Id.* at 909.

112. *Id.*; see *Citizens for Sensible Zoning, Inc. v. Dep't of Nat. Res.*, 280 N.W.2d 702, 707-08 (Wis. 1979) (finding that “[e]ven though an application applies only to persons within a small class, the action is of general application if that class is described in general terms and new members can be added to the class.”).

113. *Palm*, 942 N.W.2d at 910.

114. *Id.* at 914.

115. *Id.*

Justices Dallet and Hagedorn dissented on this issue. First, Justice Dallet disagreed with the court's conclusion that Order 28 was a rule.¹¹⁶ She believed that the majority misinterpreted Chapter 227 and did not consider how it could work together with the language in Chapter 252.¹¹⁷ She wrote that the majority misinterpreted an "order made applicable to the whole" to be synonymous with a "general order of general application."¹¹⁸ According to the majority opinion, she claimed, "any order applicable to the whole state would be a rule."¹¹⁹ But she argued that the creation of Chapter 252 explicitly gave the DHS the power to issue state-wide orders, which are different than rules.¹²⁰ She further explained that the majority's interpretation of Chapter 227 made the word "order" in Chapter 252 "superfluous" and created a system in which executive departments could only promulgate rules rather than giving them the discretion to create state-wide orders or create rules.¹²¹ She emphasized that the court could not allow statutory redundancies just for the sake of aligning Chapter 227 with a brand new policy preference.¹²²

Justice Dallet concluded that the Wisconsin Legislature had given the DHS the authority to promulgate a rule under Chapter 227 and later gave it separate power to issue state-wide orders under Chapter 252.¹²³ As far as policy, She explained that the rule-making process in Wisconsin was too time consuming and argued that the DHS should not always have to follow rule-making procedures.¹²⁴ She noted that this was especially true since Order 28 was created as an immediate response to COVID-19 and not as guidance that would be used for any future contagion.¹²⁵

116. *Id.* at 947 (Dallet, J., dissenting).

117. *Id.*

118. *Id.* The language "order made applicable to the whole" was used in *Citizens*, and Justice Dallet argued it was much different than the phrase "general rule of general application." *Id.*; *Citizens for Sensible Zoning*, 280 N.W.2d at 707-08.

119. *Palm*, 942 N.W.2d at 946.

120. *Id.* at 945-46.

121. *Id.* at 947-48; § 252.02(4) (explaining that the DHS "may promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, for the control and suppression of communicable diseases, for the quarantine and disinfection of persons . . . and for the sanitary care of . . . schools, and public buildings . . .").

122. *Palm*, 942 N.W.2d at 947-48; State ex. rel. Kalel v. Cir. Court for Dane Cnty., 681 N.W.2d 110, 124 (2004) ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.").

123. *Palm*, 942 N.W.2d at 947-49.

124. *Id.* at 948. Judge Dallet also believed that the majority's reading of § 252.02 created a "time-consuming, lengthy rulemaking scheme inconsistent with the authorization for [the] DHS to act immediately and summarily to guard against the introduction of communicable disease as well as to control and suppress it." *Id.*

125. *Id.* at 949.

Justice Hagedorn also wrote a dissenting opinion on this issue.¹²⁶ He explained that “general order” simply meant an order as applied generally throughout the state to all persons and places of employment.¹²⁷ This meant that some general orders could be rules, but that not all of them would be.¹²⁸ He further explained that if all general orders had to be promulgated as rules, the creation of Chapter 252 made no sense.¹²⁹ He believed that the Wisconsin Legislature did not address the “overwhelming textual evidence” that explained what “general order” meant for the purposes of Chapter 227.¹³⁰ He went on to write that the legislature never attempted to give a separate meaning to “general order,” nor did “it engage in any statutory analysis regarding its interpretation.”¹³¹ He agreed with Justice Dallet that Order 28 was temporary and designed to specifically address the COVID-19 pandemic.¹³² For that reason, he would have ruled that Order 28 did not have general application, and it therefore did not meet the definition of a rule under Chapter 227.¹³³ In general, the dissenting justices would have interpreted Order 28 as a statewide order, not as a rule. This classification would have made Order 28 exempt from Chapter 227 rulemaking procedures¹³⁴ and validated the executive power of the DHS.

B. Even if Palm Did Not Violate Chapter 227, Her Issuance of Order 28 Exceeded the DHS Powers Under Chapter 252

When Palm issued Order 28, she cited Chapter 252 for authority.¹³⁵ Chapter 252 states, in part, that any order made by the DHS can be applicable to the whole or any specified part of the state.¹³⁶ Another part of the chapter states that the DHS can authorize and implement all emergency measures needed to control communicable diseases.¹³⁷ Palm argued that, under Chapter 252, she had the authority to issue a statewide order without having to follow Chapter 227 rule-making procedure.¹³⁸ The court concluded that no act or order of the DHS, even pursuant to Chapter 252, was

126. *Id.* at 951-52 (Hagedorn, J., dissenting).

127. *Id.* at 961.

128. *Id.* at 961-62.

129. *Id.* at 962.

130. *Id.* at 963.

131. *Id.* at 964.

132. *Id.* at 968.

133. *Id.*

134. WIS. STAT. § 227.

135. *Palm*, 942 N.W.2d at 909.

136. WIS. STAT. § 252.02(4) (2020).

137. WIS. STAT. § 252.02(6) (2020).

138. *Palm*, 942 N.W.2d at 912.

exempt from its now expanded definition of a rule.¹³⁹

The court even employed the constitutional doubt principle.¹⁴⁰ It reiterated that Palm asserted broad authority under Chapter 252 when she “implement[ed] all emergency measures necessary to control communicable diseases.”¹⁴¹ The court believed that her assertion of power was constitutionally suspect.¹⁴² It emphasized that Chapter 252 could not be construed as an open-ended grant of police powers to a cabinet secretary.¹⁴³ The court went on to explain that through the delegation doctrine, the legislature could delegate rule-making powers to an agency like the DHS, but that the DHS must follow procedural safeguards like those found in Chapter 227.¹⁴⁴ The court found that on the powers Palm claimed under Chapter 252, she could not show any valid procedural safeguards besides judicial review.¹⁴⁵ The court did not believe that judicial review was enough because it traditionally takes place after an alleged right has already been violated.¹⁴⁶ In totality, the court’s ruling rendered the power to make executive orders under Chapter 252’s virtually useless.

Furthermore, the court believed that the issuance of Order 28 went beyond any powers authorized in Chapter 252.¹⁴⁷ The Order issued all people within the State of Wisconsin to stay home or at their place of residence, rather than just people who were infected with COVID-19.¹⁴⁸ The Order also prohibited all public and private gatherings of any number of people that were not part of a single household, not just those infected with COVID-19.¹⁴⁹ The court interpreted this language as exceeding the power granted in Chapter 252 because it believed the power to restrict movement was only to apply to infected persons.¹⁵⁰ The court further emphasized

139. *Id.*

140. *See id.* (explaining that the constitutional doubt principle disfavors “statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration”).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 913.

145. *Id.*

146. *Id.*

147. *Id.* at 916; *see* WIS. STAT. § 252.02(4) (2020) (stating that the department may issue orders for any city, village or county by service upon the local health officer).

148. *Palm*, 942 N.W.2d at 916; Emergency Order No. 28, *supra* note 38 (“All individuals present within the State of Wisconsin are ordered to stay at home or at their place of residence, with the exceptions outlined below.”).

149. Emergency Order No. 28, *supra* note 38 (“All public and private gatherings of any number of people that are not part of a single household or living unit are prohibited, except for the limited purposes expressly permitted in this Order.”).

150. *Palm*, 942 N.W.2d at 916; WIS. STAT. § 252.02(4) (2020) (“[T]he department may promulgate and enforce rules or issue orders for . . . the

that preventing all forms of travel and closing businesses went well beyond protecting against the entry of communicable diseases in the state.¹⁵¹ Since Palm cited no other authority for the issuance of Order 28 outside of Chapter 252, the court ordered to strike it down.¹⁵²

The court also took issue with the criminal penalties that Order 28 imposed.¹⁵³ For example, one of the penalties for violating Order 28 was imprisonment of up to thirty days.¹⁵⁴ The court explained that to constitute criminal conduct, the conduct must be set out with specificity and give fair warning.¹⁵⁵ The court found that it had “long been the law in Wisconsin that in order for” a violation of an emergency order to constitute a crime, the order must have been promulgated as a rule.¹⁵⁶ Therefore, Palm could not assert that Order 28 was an order justified under Chapter 252 powers, but also assert the power to create criminal penalties for violations of the order.¹⁵⁷ In conclusion, the court reasoned that the inclusion of criminal penalties meant Palm could not derive any power from Chapter 252, and Order 28 had to follow Chapter 227 rule-making procedure.

Justices Dallet and Hagedorn dissented on this issue. In her dissent, Justice Dallet wrote that because the legislature created Chapter 252 to give the DHS Secretary the explicit authority to issue orders without first going through the rule-making process, the majority’s decision failed.¹⁵⁸ She turned to the decision in *Jacobson v. Commonwealth of Mass.*, in which the United States Supreme Court recognized that “it [is] appropriate and reasonable to vest a board of health with the authority to respond to an epidemic of disease because it is composed of persons in the affected locality who presumably have fitness to determine such questions.”¹⁵⁹ Justice Dallet looked at the plain language of Chapter 252 and asserted that the legislature had plainly granted the DHS

quarantine and disinfection of persons . . . infected or suspected of being infected by a communicable disease[.]”).

151. *Palm*, 942 N.W.2d at 916.

152. *Id.*

153. *Id.* at 913.

154. *Id.*; Emergency Order No. 28, *supra* note 38 (“Violation or obstruction of this Order is punishable by up to 30 days imprisonment, or up to \$250 fine, or both.”).

155. *Palm*, 942 N.W.2d at 913.

156. *Id.* (citing *HM Distribs. Of Milwaukee v. Dep’t of Ag.*, 198 N.W.2d 598, 602-03 (1972)) (The court here discussed a contention that criminal penalties were not proper because the administrative regulation was not properly promulgated as a rule); *see also* *State v. Lambert*, 229, N.W.2d 622, 624 (1979) (explaining that criminal conduct can follow from a properly promulgated rule).

157. *Palm*, 942 N.W.2d at 913-14.

158. *Id.* at 943 (Dallet, J., dissenting).

159. *Id.* at 944 (citing *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 27 (1905)).

the power to address COVID-19 by issuing orders or rules.¹⁶⁰ She explained that the word “or” in the language of Chapter 252 distinguished orders from rules.¹⁶¹

She emphasized the history of the statute by reminding the court that the legislature itself expanded Chapter 252 in 1982 during the AIDS epidemic.¹⁶² She explained that it explicitly granted the DHS the ability to issue orders of state-wide application.¹⁶³ She also highlighted the later language in Chapter 252, which allowed the department to “authorize and implement all emergency measures necessary to control communicable diseases.”¹⁶⁴ She emphasized that Chapter 252 independently provided authority for the issuance of several provisions of Order 28 without rule-making.¹⁶⁵ It allowed the “DHS to ‘close schools and forbid public gatherings . . . in churches and other places to control outbreaks and epidemics.’”¹⁶⁶ Lastly, she argued that if the majority thought the criminal sanctions in Order 28 were unconstitutional, it should have struck the sanctions and left the rest of the Order intact.¹⁶⁷

Justice Hagedorn believed that the issue of whether the powers granted in Chapter 252 were too broad should have been left for another day.¹⁶⁸ He believed the court had “no business raising and deciding claims to vindicate the rights of parties” that were not before the court.¹⁶⁹ He believed that the issue of whether an executive branch officer could shut down businesses, limit travel, and forbid public gatherings were not adequately before the court.¹⁷⁰ He explained that by taking up the issue, the court allowed the Wisconsin Legislature to argue its own laws as unconstitutional.¹⁷¹ He argued that although the legislature may have had “buyer’s remorse” for the broad discretion it gave to the DHS through Chapter 252, those were the laws it drafted and the court must read them faithfully.¹⁷² He explained that the legislature had petitioned the court on two narrow issues.¹⁷³

160. *Palm*, 942 N.W.2d at 945.

161. *Id.*

162. *Id.* at 945-46.

163. *Id.*

164. *Id.* at 946-47. She also explained that the “very broad language of § 252.02(6) to ‘authorize and implement all emergency measures necessary’ include[d] the issuance of emergency orders necessary to combat a deadly virus.” *Id.* (quoting § 252.02(6)).

165. *Id.* at 947.

166. *Id.* (quoting § 252.02(3)).

167. *Palm*, 942 N.W.2d at 949.

168. *Id.* at 953 (Hagedorn, J., dissenting).

169. *Id.*

170. *Id.* at 952.

171. *Id.* at 952-53.

172. *Id.* at 953.

173. *Id.* at 975.

Neither issue involved a determination of how the DHS could exercise powers under Chapter 252.¹⁷⁴ He thought the legislature asked the court to address only whether Order 28 went beyond statutory powers.¹⁷⁵ For those reasons, he did not agree with the majority partaking in such a broad constitutional analysis.¹⁷⁶

IV. HOW THE COURT IN PALM SHOULD HAVE RULED

This section will explain where the court erred in its decision in *Palm*. First, it wrongly decided that Order 28 was a rule, and that decision created a dangerous precedent that rule-making procedures must be followed even during emergencies.¹⁷⁷ Second, it used a flawed statutory analysis and incorrectly found that Order 28 exceeded powers granted under Chapter 252.¹⁷⁸ Both of these decisions led to Order 28 being struck down in its entirety with nothing in its place.¹⁷⁹ The lack of a cohesive state-wide order left many Wisconsinites vulnerable to contracting COVID-19.¹⁸⁰

A. Order 28 Was Not a Rule and Even if it Was, Emergency Orders Made to Control Public Health Emergencies Should Not Have to Follow Chapter 227 Procedure

The court in *Palm* grossly mischaracterized Order 28 as a rule because of an incomplete statutory analysis. According to Chapter 227, a “rule” is a regulation, standard, statement of policy, or general order of general application that has the force of law and is issued by an agency to govern.¹⁸¹ Looking at that statute alone, it

174. *Id.*

175. *Id.*

176. *Id.* He believed that the executive branch overreach could be challenged only “by those who are harmed by the executive branch action.” *Id.* He went on to explain that “[e]xcept in unusual cases, the lawmaking body is not injured in its lawmaking functions by executive branch enforcement gone awry.” *Id.* Also, Order 28 did not impede on the Legislature’s ability to work because its work was deemed essential by Palm. Emergency Order No. 28, *supra* note 38.

177. *Id.* at 918.

178. *Id.*

179. *Id.*

180. See ‘Everyone is Concerned’ Over Lack of Statewide COVID-19 Plan, *Say Dane County, Public Health Leaders*, WIS. HEALTH NEWS (May 20, 2020), www.wisconsinhealthnews.com/2020/05/20/everyone-is-concerned-over-lack-of-statewide-covid-19-plan-say-dane-county-public-health-leaders/ [perma.cc/M4TW-9Y7B] (stating that Public Health Madison and Dane County Director Janel Heinrich said that multiple “public health leaders across the state” were concerned that there was no state-wide order because the lack of an order could lead to significant spread).

181. § 227.01(14).

could be argued that Order 28 was a rule because it was a “general order of general application.”¹⁸² But although Order 28 applied to all citizens of Wisconsin, it was only meant to address the containment of COVID-19.¹⁸³ The DHS was not, for example, ordering that the declaration of any public health emergency in Wisconsin would result in people needing to stay home and limit travel. An order of that kind would be closer to a rule of general application; but even that order should not trigger the rule-making procedure of Chapter 227 because it deals only with public health emergencies. The court analyzed the language of Chapter 227 too broadly when it defined an emergency health order as a “general order of general application.”¹⁸⁴

Further, the Wisconsin Legislature itself created Chapter 252 to give the DHS power to issue state-wide orders.¹⁸⁵ Why would the Wisconsin Legislature allow state-wide orders in Chapter 252 if all state-wide orders are considered rules under Chapter 227? Clearly, the legislature felt that Chapter 227 did not apply to statewide orders, and that is why Chapter 252 was created. As Justice Dallet alluded to throughout her dissent, if Order 28 was viewed as a “general order of general application” simply because it applied to all Wisconsinites, it would make Chapter 252 completely superfluous.¹⁸⁶ The Wisconsin Supreme Court disregarded that all statutes must be read “to give reasonable effect to every word, in order to avoid surplusage.”¹⁸⁷ When read together, Chapter 227 and Chapter 252 make clear that all rules created by executive agencies will need to follow Chapter 227 rule-making procedure, but state-wide orders created under Chapter 252 authority are not subjected to that same procedure.

The court in *Palm* did not properly analyze Order 28 or the interplay between Chapter 227 procedure and Chapter 252’s grant of power to the DHS. Instead, the court used the broad definition of a rule found in *Citizens* and applied it to Order 28.¹⁸⁸ In *Citizens*, the Wisconsin Department of Natural Resources (“DNR”) issued an order which fixed the limits of a flood plain in Columbia County.¹⁸⁹ The court in *Citizens* explained that although the flood plain zoning ordinance applied only to land within the flood plain and only affected those persons with a legal interest in such land, “a rule

182. Emergency Order No. 28, *supra* note 38.

183. *Id.*

184. *Palm*, 942 N.W.2d at 947-48 (Dallet, J., dissenting).

185. WIS. STAT. § 252.02 (2020).

186. *Palm*, 942 N.W.2d at 947-48 (Dallet, J., dissenting).

187. *Id.* at 946. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 176 (2012) (stating that “legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant”).

188. *Palm*, 942 N.W.2d at 909.

189. *Citizens for Sensible Zoning*, 280 N.W. 2d at 704.

need not apply to all persons within the state” in order to trigger Chapter 227 procedure.¹⁹⁰ The court explained that an action is of “general application” if a “class is described in general terms and new members can be added to the class.”¹⁹¹ The court in *Palm* used that definition and found that because Order 28 applied to all people within Wisconsin, as well as any new member who entered the state, it had to be a rule of general application.¹⁹²

What the Wisconsin Supreme Court in *Palm* failed to explain though, is how a rule establishing a permanent flood plain was analogous to the DHS ordering people to stay at home to try and stop the spread of a deadly virus. In theory, COVID-19 would eventually end or be better understood, rendering Order 28 useless. That scenario is much different than the creation of a permanent flood plain.¹⁹³ There are no similarities between the rule issued by the DNR in *Citizens* and Order 28. Also, the legislature did not grant the DNR the same authority it granted to the DHS through Chapter 252. The court in *Palm* did not even begin to analyze those key differences, and instead used *Citizens* as precedent to determine whether something was a rule.¹⁹⁴ This lack of deeper analysis is what led to Order 28 being struck down in its entirety.

This decision created a dangerous precedent that even in times of crisis, the DHS must go through Chapter 227 rule-making procedure.¹⁹⁵ Simply put, that notion is absurd and endangers the safety of all Wisconsinites. There is no telling of how long the rulemaking process can take, and the DHS should not have to wait. By forcing the DHS to go through the formalities of the rulemaking process, it puts all Wisconsinites at risk of contracting and spreading a deadly virus. With how little was known about COVID-19 at the time *Palm* issued Order 28, swift action was needed. This order was created even before the CDC directed Americans to wear masks, which left social distancing and quarantining as the only viable option to stop the spread.¹⁹⁶ Rather than correctly evaluating Order 28 as a statewide order or evaluating the Order under Chapter 252, the court insisted on classifying it as a rule. The court should have recognized that forcing the DHS to follow Chapter 227 procedure was counterproductive to the state’s mission of keeping

190. *Id.* at 707.

191. *Id.* at 707-08.

192. *Palm*, 942 N.W.2d at 909.

193. See *Encyclopedic Entry*, NAT’L GEO., www.nationalgeographic.org/encyclopedia/flood-plain/ [perma.cc/4Z7F-PNN3] (defining a flood plain as “a generally flat area of land next to a river or stream.”).

194. *Palm*, 942 N.W.2d at 909.

195. *Id.* at 918.

196. *CDC Calls on Americans to Wear Masks to Prevent COVID-19 Spread*, CDC NEWSROOM (July 14, 2020), www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html [perma.cc/48U2-5VQV].

its citizens safe. The finding that Order 28 violated Chapter 252 was especially troubling since the lawsuit was not brought by a concerned citizen, but instead, by the completely unaffected Wisconsin Legislature.¹⁹⁷

B. Palm's Issuance of Order 28 Fell Squarely Within Her Power Granted Through Chapter 252

Rather than evaluate how Chapter 227 and Chapter 252 could be read together, the majority in *Palm* decided to make the broad conclusion that Order 28 violated both chapters.¹⁹⁸ Chapter 252 stated in part that the DHS could promulgate and enforce rules (that would fall under Chapter 227 procedure) *or* issue orders to control and suppress communicable diseases.¹⁹⁹ The court argued that no orders the DHS made could be exempt from its definition of a rule.²⁰⁰ That conclusion was not consistent with sound statutory analysis. If the legislature intended for every DHS order to be promulgated as a rule, it would not have included the phrase “or issue orders” in the statute.²⁰¹ Just as the court did when evaluating Chapter 227, it interpreted Chapter 252 in a way that created surplusage. The legislature included the language “or issue orders” in the statute, and the court should have given meaning to every word of the statute. It was well within the legislature’s power to amend Chapter 252 or create a statute that overruled it entirely. Rather than allowing the legislature to amend its own laws, the court took it upon itself to change the meaning of a clear and unambiguous statute.

The court should have found that, even if Order 28 was issued without following Chapter 227 rule-making procedure, it was still valid under Palm’s Chapter 252 powers. As noted earlier, forcing the DHS to follow Chapter 227 rule-making procedure during a public health emergency can have devastating results. That seems to be the very conflict that Chapter 252 was meant to remedy. Chapter 252 gave the DHS the authority to issue state-wide orders to contain a communicable disease. That was not only clear in the statute, but also could have been validated if the court would have looked at the history of the DHS powers in Wisconsin. The court

197. Emergency Order No. 28, *supra* note 38. Per Order 28, the duties of the Wisconsin legislature would have been deemed as essential, meaning they would not have to stay home. *Id.*

198. *Palm*, 942 N.W.2d at 918.

199. § 252.02(4).

200. *Palm*, 942 N.W.2d at 912.

201. WIS. STAT. § 252.02(4) (2020) (“[T]he department may promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, [or] for the control and for suppression of communicable diseases.”).

instead seemed more concerned with the constitutionality of an “unelected official” issuing state-wide orders.²⁰² But the court failed to mention that the citizens of Wisconsin elected Governor Evers, and with him, came his selection of DHS Secretary Palm. Wisconsinites must be able to trust the DHS Secretary rather than have to worry about their own state legislature lodging claims against her every time it disagrees with her.

Not only should Wisconsinites be able to trust the DHS Secretary, but they should be able to trust the laws created by their legislative branch. All members of the legislature were elected specifically to create sound laws. There is no legitimacy to a judicial system that allows a legislative branch to bring lawsuits against an executive branch official for following a statute it created. Further, the Wisconsin Legislature failed to even attempt to create a law to replace Order 28, which further delegitimized the entire system.²⁰³ The court in this case had an opportunity to uphold at least some parts of Order 28. The court’s concerns over the criminal sanctions imposed through Order 28 could have easily been remedied by striking down only that portion of the Order. Chapter 252, combined with the authority granted to the DHS by the governor to take “all necessary and appropriate measures to prevent and respond to incidents of COVID-19,” was surely enough to conclude that Order 28 was valid, at least in part.²⁰⁴

Palm should not serve as sound precedent for future public health emergencies. When it comes to pandemics, the DHS should have the power to issue swift and comprehensive state-wide orders that aim to limit the spread. Instead of following sound statutory analysis, the court was influenced by the reasoning of some justices that did not believe COVID-19 was a serious issue.²⁰⁵ In reality,

202. *Palm*, 942 N.W.2d at 910.

203. Eric Litke, *Fact Check: Wisconsin Legislators Have Gone About 6 Months Without Passing a Bill*, USA TODAY (Oct. 7, 2020), www.usatoday.com/story/news/factcheck/2020/10/07/fact-check-wisconsin-legislators-havent-passed-bill-since-april/5917707002/ [perma.cc/Y3HU-EEU6].

204. Exec. Order No. 72, *supra* note 10.

205. See generally Kent Wainscott, *Chief Justice: COVID-19 Spread at Meatpacking Plant not Affecting Regular Folks*, WISN 12 NEWS (May 6, 2020), www.wisn.com/article/coronavirus-chief-justice-spread-at-meatpacking-plant-not-affecting-regular-folks/32393991 [perma.cc/7TBC-MTAG] (writing that during oral arguments, Chief Justice Roggensack said in regard to the spread of COVID-19 in Brown County: “[the spread is] due to the meatpacking though, that’s where [sic] Brown County got the flare. It wasn’t just the regular folks in Brown County.”). Many people found that comment offensive and an advocate for meatpacking workers, Christine Neumann-Ortiz, found the comment to be racist and elitist. *Id.* Also during oral arguments, Justice Bradley compared the stay-at-home order to Japanese internment during World War II. Devan Cole, *Wisconsin Supreme Court Justice Invokes Internment of Japanese-Americans in Debate Over State’s Stay-at-Home Order*, CNN (May 5, 2020), www.cnn.com/2020/05/05/politics/wisconsin-supreme-court-coronavirus-

there should not have been standing; the statutory language was clear; and Order 28 was constitutionally sound. Unfortunately for Wisconsinites, the Wisconsin Supreme Court chose to ignore those facts.

V. IMPLICATIONS OF THE PALM DECISION

The court in *Palm* chose to engage in judicial activism and strike down a statutorily valid exercise of executive power. The court chose to protect the interests of the legislature instead of the interests of the citizens within the state. This decision contributed to Reuters deeming Wisconsin an “epicenter of the pandemic in the United States.”²⁰⁶ The lack of a legislative replacement for Order 28 left thousands of Wisconsinites dead due to COVID-19.²⁰⁷ Although the court could not have predicted the future of COVID-19, it should have realized the impact its decision was going to have on the state. Instead of trusting the DHS, the court trusted the legislature to create a better plan. The failure of both branches of the Wisconsin government created a deadly precedent that cannot be relied upon in the future.

Unfortunately, that is exactly what happened. As the pandemic continues to plague the country, the Wisconsin Supreme Court continues to strike down executive orders as unlawful.²⁰⁸ Governor Evers tried to create a state-wide mask mandate, but it was struck down.²⁰⁹ The court essentially used the same reasoning,

hearing-japanese-american-internment/index.html [perma.cc/VJ7Z-NKJP]. This comment caught the attention of Actor George Takei who wrote a book about his time in a Japanese internment camp. Mary Spicuzza, *Actor George Takei Slams Wisconsin Justice Rebecca Bradley for Repeatedly Comparing Stay-at-Home Order to Internment Camp*, MILWAUKEE J. SENTINEL (May 14, 2020), www.jsonline.com/story/news/politics/2020/05/14/george-takei-slams-justice-rebecca-bradley-tweet/5190243002/ [perma.cc/FL7L-VAJM]. Takei tweeted that being in his own home watching Netflix was nothing like an internment camp. George Takei (@GeorgeTakei), TWITTER (May 14, 2020, 9:30 AM), twitter.com/GeorgeTakei/status/1260940615363317760.

206. Brendan O’Brien & Maria Caspani, *COVID-19 Cases Surge in Wisconsin Ahead of Trump Campaign Rally*, REUTERS (Oct. 16, 2020), www.reuters.com/article/healthcoronavirus-usa/refile-not-fake-news-covid-19-cases-surge-in-wisconsin-ahead-of-trump-campaign-rally-idUSL1N2H703M [perma.cc/9ED7-TVJ8] (“[T]he state’s department of health services reported grim records as daily COVID-19 cases reached 3,861 and the seven-day average of new confirmed cases topped 3,000 for the first time.”).

207. *COVID-19: Wisconsin Deaths*, WIS. DEPT OF HEALTH SERV., www.dhs.wisconsin.gov/covid-19/deaths.htm [perma.cc/6WH9-ZGY6] (last updated Dec. 22, 2021).

208. *Wisconsin Supreme Court Strikes Down Mask Executive Orders as “Unlawful”*, WBAY NEWS (Mar. 31, 2021), www.wbay.com/2021/03/31/wisconsin-supreme-court-to-rule-on-gov-evers-mask-mandate/ [perma.cc/6S97-GMDZ].

209. *Id.*

arguing that an executive order creating a mask mandate exceeds executive authority and violates the separation of powers doctrine.²¹⁰ This decision has led to confusion and has forced individual counties to try and enforce mask mandates.²¹¹ The *Palm* decision highlights the pitfalls of judicial activism during a global pandemic. The judicial system should not be used to strike down orders simply because it may be politically unfavorable, but that is what continues to happen in Wisconsin.

210. *Id.*

211. As of December 2021, the two largest counties in the State of Wisconsin have differing mandates. Dane County makes people wear masks indoors, but Milwaukee County has no mask mandate. COVID-19, City of Milwaukee Health Dep't, city.milwaukee.gov/coronavirus [perma.cc/4E9Q-N7VW] (last visited Dec. 23, 2021); Current Order, Madison & Dane Cnty. Pub. Health, www.publichealthmdc.com/coronavirus/current-order [perma.cc/JAV3-GK8L] (last visited Dec. 23, 2021).