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DISTRICT III

November 6, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2020AP1742 Tavern League of Wisconsin, Inc. v. Andrea Palm
(L. C. No. 2020CV128)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Intervenors-Plaintiffs-Appellants The Mix Up, Inc. (d/b/a Miki Jo's Mix Up), Liz Sieben, Pro-Life Wisconsin Education Task Force, Inc., Pro-Life Wisconsin, Inc., and Dan Miller (collectively, "The Mix Up") appeal the circuit court's order denying their motion for a temporary injunction barring the enforcement of Emergency Order #3, which was issued by Andrea Palm in her official capacity as Secretary-Designee of the Wisconsin Department of

Health Services (DHS). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. For the reasons explained below, we summarily reverse the order denying The Mix Up's motion for a temporary injunction. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We remand with directions that the circuit court grant the temporary injunction and conduct further proceedings consistent with this order.

Palm issued Emergency Order #3 on October 6, 2020, in response to the ongoing COVID-19 pandemic. The order went into effect at 8:00 a.m. on October 8, 2020, and it stated it would remain in effect "for two incubation periods of COVID-19, which will end November 6, 2020." The order limits "public gatherings" in indoor spaces to "no more than 25% of the total occupancy limits for the room or building, as established by the local municipality," or to "no more than 10 people" for indoor spaces without occupancy limits. The order then lists a number of places and categories of operations that are exempt from its capacity limits. Palm purported to issue Emergency Order #3 pursuant to her statutory authority under WIS. STAT. § 252.02(3).

The Mix Up moved for a temporary injunction barring the enforcement of Emergency Order #3. In support of its motion, The Mix Up argued the Wisconsin Supreme Court's recent decision in ***Wisconsin Legislature v. Palm***, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, expressly held "that agency orders like Emergency Order #3 are 'rules' within the meaning of [WIS. STAT.] § 227.01(13), and so must follow Chapter 227's required rulemaking procedures." Because it is undisputed that Palm did not follow the rulemaking procedures in WIS. STAT. ch. 227 when issuing Emergency Order #3, The Mix Up argued that order was unenforceable

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

and invalid under ***Palm***'s express terms. The circuit court denied The Mix Up's motion for a temporary injunction, and we granted The Mix Up's petition for leave to appeal that nonfinal order.

A circuit court may issue a temporary injunction when the movant demonstrates four elements: (1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits. ***Service Emps. Int'l Union, Local 1 v. Vos***, 2020 WI 67, ¶93, 393 Wis. 2d 38, 946 N.W.2d 35 (***SEIU***); ***Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.***, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. We review a circuit court's decision to grant or deny a motion for a temporary injunction for an erroneous exercise of discretion. ***SEIU***, 393 Wis. 2d 38, ¶93. When the court's discretionary decision rests on an underlying legal question, however, we review that underlying legal question independently. *See* ***id.***, ¶¶27-28; *see also* ***Covelli v. Covelli***, 2006 WI App 121, ¶13, 293 Wis. 2d 707, 718 N.W.2d 260. The interpretation of prior case law presents a question of law for our independent review. ***State v. Walker***, 2008 WI 34, ¶13, 308 Wis. 2d 666, 747 N.W.2d 673.

Here, we conclude the circuit court erroneously exercised its discretion by denying The Mix Up's motion for a temporary injunction. First and foremost, we agree with The Mix Up that under our supreme court's holding in ***Palm***, Emergency Order #3 is invalid and unenforceable, as a matter of law. Accordingly, The Mix Up has demonstrated that it has a reasonable probability—indeed, an apparent certainty—of success on the merits.

To explain, in ***Palm***, our supreme court considered whether a previous emergency order addressing the COVID-19 pandemic—Emergency Order #28—qualified as a "rule" under WIS. STAT. § 227.01(13), such that Palm was required to comply with the rulemaking procedures in WIS. STAT. ch. 227 when issuing that order. ***Palm***, 391 Wis. 2d 497, ¶¶3-4. Among other things, Emergency Order #28 closed "non-essential businesses," while allowing "essential businesses" to remain open. *See* Emergency Order #28 at 3-5 (capitalization altered).[2] For those essential businesses and other exempt organizations that were allowed to remain open, Emergency Order #28 imposed certain statewide capacity limitations—such as 25% of the maximum occupancy for some businesses, and four people per 1,000 square feet of customer floor space for others. Emergency Order #28 at 5. Palm asserted she had statutory authority to issue Emergency Order #28 under WIS. STAT. § 252.02(3), (4) and (6). ***Palm***, 391 Wis. 2d 497, ¶44.

The ***Palm*** court held that an agency action qualifies as a "rule" under the definition set forth in WIS. STAT. § 227.01(13) when it is: "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency." ***Palm***, 391 Wis. 2d 497, ¶22 (quoting ***Citizens for Sensible Zoning, Inc. v. DNR***, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)). Applying that test, ***Palm*** determined that Emergency Order #28 met the statutory definition of a "rule." *See* ***id.***, ¶¶15-42. In doing so, the court emphasized that Emergency Order #28 relied heavily on Palm's subjective judgment. ***Id.***, ¶¶27-28. The court explained,

[2] Available at https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf (last visited Nov. 4, 2020).

"Rulemaking exists precisely to ensure that kind of controlling, subjective judgment asserted by one unelected official, Palm, is not imposed in Wisconsin." ***Id.***, ¶28.

The ***Palm*** court also noted that WIS. STAT. § 227.01(13)(a)-(zz) contains seventy-two specific exemptions from the statutory definition of the term "rule," some of which apply to actions taken by the DHS, and some of which relate to "orders." ***Palm***, 391 Wis. 2d 497, ¶30. The court emphasized that "despite the detailed nature of the list, and the Legislature's consideration of acts of DHS and its consideration of 'orders,' *no act or order of DHS pursuant to WIS. STAT. § 252.02 is exempted from the definition of 'Rule.'*" ***Palm***, 391 Wis. 2d 497, ¶30 (emphasis added).

We conclude our supreme court's decision in ***Palm*** controls the outcome of this case. In ***Palm***, the court held that Emergency Order #28 qualified as a "rule" under WIS. STAT. § 227.01(13) and was therefore invalid and unenforceable due to Palm's failure to follow the required rulemaking procedures. ***Palm***, 391 Wis. 2d 497, ¶¶3, 56. Emergency Order #28 included statewide capacity limits for certain businesses and organizations, but not others, and it was purportedly issued pursuant to Palm's authority under WIS. STAT. § 252.02(3), (4), and (6).

Here, Emergency Order #3 was likewise purportedly issued pursuant to Palm's authority under WIS. STAT. § 252.02(3). And, like Emergency Order #28, Emergency Order #3 selectively imposes statewide capacity limits on certain businesses and organizations, but not others. As with Emergency Order #28, when issuing Emergency Order #3, Palm made subjective judgments about what businesses and organizations would and would not be subject to capacity limits. Under our supreme court's holding in ***Palm***, Emergency Order #3 therefore qualifies as a "rule" under WIS. STAT. § 227.01(13) and is invalid and unenforceable due to Palm's failure to follow

the required rulemaking procedures. Accordingly, The Mix Up has demonstrated more than a reasonable probability of success on the merits.[3]

In addition, The Mix Up has shown that it is likely to suffer irreparable harm if a temporary injunction is not issued. The Mix Up's owner, Liz Sieben, submitted an affidavit in which she averred that: (1) The Mix Up has about forty to fifty customers inside on a normal, reasonably busy day; (2) after Palm released Emergency Order #3 on October 6, 2020, The Mix Up saw a 50% reduction in sales over the weekend of October 10-11, 2020, despite good weather and open outdoor seating; (3) Sieben believes that Emergency Order #3 caused this reduction in sales because The Mix Up's customer base must specifically plan to drive to The Mix Up, and Sieben believes "that a large number customers have decided not to patronize the restaurant, given the inconvenience of specifically planning to drive to the restaurant, only to be turned away at the door if Emergency Order #3's extremely low occupancy limit has already

[3] Palm and the DHS emphasize the fact that our supreme court did not invalidate the provision of Emergency Order #28 that closed all public and private K-12 schools for the remainder of the 2019-20 school year. *See* Emergency Order #28 at 5; ***Wisconsin Legislature v. Palm***, 2020 WI 42, ¶3 n.6, ¶58 n.21, 391 Wis. 2d 497, 942 N.W.2d 900. The ***Palm*** court did not, however, provide any explanation for its decision in that regard. ***Palm***, 391 Wis. 2d 497, ¶3 n.6, ¶58 n.21. Lacking any such explanation—and given that Emergency Order #3 does not purport to close any schools—we decline to read the ***Palm*** court's failure to invalidate Emergency Order #28's school closure provision as having any effect on the validity of Emergency Order #3.

Palm and the DHS also emphasize that Emergency Order #3 was issued under WIS. STAT. § 252.02(3), which specifically grants the DHS authority to "close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." They contend that because Emergency Order #3 was issued under the specific statutory authority set forth in § 252.02(3), it did not involve the same level of subjective judgment as Emergency Order #28, thus distinguishing this case from ***Palm***. As The Mix Up correctly notes, however, Emergency Order #28 was also purportedly issued pursuant to § 252.02(3), along with § 252.02(4) and (6). Regardless, the supreme court concluded the selective statewide capacity limits in Emergency Order #28 qualified as a rule and were therefore invalid.

In short, given our supreme court's ruling, it is plain that it did not view WIS. STAT. § 252.02(3) as validating Emergency Order #28, either generally or specifically with respect to its forbidding of certain public gatherings or imposing of capacity limitations in some places.

been reached"; and (4) if forced to comply with Emergency Order #3, The Mix Up will be unable to operate profitably in its usual manner and will "almost certainly" be forced to modify its operations by opening only four days a week and cutting its expenses and staff by approximately 75%, or by shutting down operations entirely until the capacity limits are no longer in force. These unrebutted averments are sufficient to establish that The Mix Up has suffered irreparable harm—namely, a substantial loss of business—due to Emergency Order #3 and will continue to suffer such harm absent the issuance of a temporary injunction.

The Mix Up has also demonstrated that it has no other adequate remedy at law. A movant can demonstrate that no other adequate legal remedy is available by showing that the injury in question "cannot be compensated by damages." ***Kohlbeck v. Reliance Constr. Co.***, 2002 WI App 142, ¶13, 256 Wis. 2d 235, 647 N.W.2d 277. The Mix Up asserts—and Palm and the DHS do not dispute—that the doctrine of sovereign immunity prevents The Mix Up from recovering any damages in this case. "[N]umerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable." ***Odebrecht Constr., Inc. v. Secretary, Fla. Dep't of Transp.***, 715 F.3d 1268, 1289 (11th Cir. 2013).

Finally, The Mix Up has shown that the issuance of a temporary injunction was necessary to preserve the status quo. As noted above, after Emergency Order #3 was issued, The Mix Up suffered a dramatic drop in sales during the weekend of October 10-11, 2020. On October 14, 2020, the circuit court issued an ex parte temporary restraining order prohibiting Palm and the DHS from enforcing Emergency Order #3. Given that the enforcement of Emergency Order #3 will likely cause The Mix Up irreparable harm, a temporary injunction was necessary to preserve the status quo that existed after the court issued the ex parte temporary restraining order.

For the foregoing reasons, we conclude The Mix Up satisfied each of the four criteria for the issuance of a temporary injunction enjoining the enforcement of Emergency Order #3. Most critically, The Mix Up has shown that it is certain to succeed on the merits because Emergency Order #3 is unquestionably invalid and unenforceable under our supreme court's holding in ***Palm***. The circuit court therefore erred, as a matter of law, by concluding The Mix Up had failed to establish a reasonable probability of success on the merits. As a result, the court erroneously exercised its discretion by denying The Mix Up's motion for a temporary injunction.

Therefore, upon the foregoing,

IT IS ORDERED that the order is summarily reversed and the cause is remanded with directions that the circuit court grant The Mix Up's motion for a temporary injunction and conduct further proceedings consistent with this order. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

STARK, P.J., dissenting.

This appeal presents a narrow issue regarding a discretionary procedural mechanism. It is the type of appeal this court would not normally entertain, as the petitioners were required to meet the difficult burden of satisfying the standards for granting an interlocutory appeal, *see* WIS. STAT. § 808.03(2) (2017-18),[1] in the context of a circuit court's discretionary decision not to issue a temporary injunction, *see* WIS. STAT. § 813.02. Having accepted the appeal, the majority concludes that the appellants' likelihood of success on the merits was so overwhelming that the circuit court had no choice but to issue the temporary injunction. Because this holding considerably over-reads portions of our supreme court's decision in ***Wisconsin Legislature v. Palm***, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, and ignores other portions of that decision, I respectfully dissent.

It is essential to frame this appeal in the correct procedural context. The denial of a temporary injunction under WIS. STAT. § 813.02 is a matter within the discretion of the circuit court. ***Service Emps. Int'l Union, Local 1 v. Vos***, 2020 WI 67, ¶27, 393 Wis. 2d 35, 57, 946 N.W.2d 35 (citing ***Werner v. A. L. Grootemaat & Sons, Inc.***, 80 Wis. 2d 513, 519, 259 N.W.2d 310 (1977)). This is an extremely deferential standard. "A circuit court's discretionary decision will be sustained if the circuit court has examined the relevant facts, applied the proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable court could reach." ***Kocken v. Wisconsin Council 40***, 2007 WI 72, ¶25, 301 Wis. 2d 266, 278, 732 N.W.2d 828. When granting a temporary injunction would have the effect of granting all relief that could be obtained and would, as a practical matter, dispose of the whole case, it typically

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

will not be granted unless the complainant's right to relief is clear. ***Codept, Inc. v. More-Way N. Corp.***, 23 Wis. 2d 165, 172, 127 N.W.2d 29 (1964).

A temporary injunction is "not to be issued lightly." ***Werner***, 80 Wis. 2d at 520. The party seeking injunctive relief must demonstrate four elements: (1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits. ***Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.***, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. The majority primarily focuses on the fourth element, so I will begin there. I conclude the circuit court did not erroneously exercise its discretion when it determined the appellants lacked a reasonable probability of success on the merits.

The majority's conclusion rests on our supreme court's recent decision in ***Palm***. There, the state legislature challenged Emergency Order #28, which (like Emergency Order #3) was issued by Andrea Palm, the Secretary-Designee of the Department of Health Services (DHS). ***Palm***, 391 Wis. 2d 497, ¶2. As explained by the supreme court, Emergency Order #28 imposed burdensome restrictions upon individuals and businesses in this state in an effort to contain the COVID-19 pandemic. Among other provisions, Emergency Order #28 commanded individuals generally to stay at home; prohibited all but "essential" travel; broadly prohibited public and private gatherings; declared schools and libraries closed; imposed a numerical limit on the number of persons in a single room for religious gatherings; and closed all "nonessential" businesses. ***Palm***, 391 Wis. 2d 497, ¶¶7, 9.

Palm also dealt with a challenge to the scope of the Secretary-Designee's statutory authority, but here we are concerned only with the ***Palm*** court's holding that most of the provisions of Emergency Order #28 were required to be promulgated by emergency rulemaking. *See* ***id.***, ¶¶10-42. Our supreme court explained that a "rule" for purposes of WIS. STAT. ch. 227 is: "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency." ***Palm***, 391 Wis. 2d 497, ¶22 (citing ***Citizens for Sensible Zoning, Inc. v. DNR***, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)).

The supreme court's decision did not explicitly address all of the ***Citizens for Sensible Zoning*** elements, even though the court clearly concluded that most of the provisions of Emergency Order #28 constituted "rules." Significantly, the dispute in ***Palm*** appeared to be restricted to whether Emergency Order #28 was a "general order of general application." *See* ***Palm***, 391 Wis. 2d 497, ¶¶17-21, 24-27. Those first and second elements of the ***Citizens for Sensible Zoning*** test were the only ones given specific attention in ***Palm***, and the supreme court did not withdraw or overrule any portion of ***Citizens for Sensible Zoning***'s articulation of what is a "rule."

As a result, unlike the majority, I do not read ***Palm*** as stating that, whenever the Secretary-Designee exercises authority under WIS. STAT. § 252.02, individuals or entities challenging such actions are absolved of their obligation to show that the acts complained of constitute a "rule" under the specific facts of each case. This includes the obligation of showing that the specific agency action "implement[s], interpret[s] or make[s] specific legislation enforced or administered by such agency *as to govern the interpretation or procedure of such*

agency." ***Citizens for Sensible Zoning***, 90 Wis. 2d at 814 (emphasis added). Not even the appellants claim that ***Palm*** relieved them of this burden, as they have fully briefed the third, fourth and fifth ***Citizens for Sensible Zoning*** elements (after virtually ignoring them in their petition for leave to appeal).

Fundamentally, the majority's position is that ***Palm*** holds that DHS must proceed by some form of rulemaking each time it exercises any discretion granted under WIS. STAT. § 252.02. The majority relies for this proposition on paragraph thirty of the ***Palm*** opinion, which discusses seventy-two specific exemptions to the definition of a "rule" contained in WIS. STAT. § 227.01(13)(a)-(zz). The majority considerably over-reads the court's statement that "no act or order of DHS pursuant to … § 252.02 is exempted from the definition of 'Rule.'" *See* ***Palm***, 391 Wis. 2d 497, ¶30. Read in context, the court was making clear that when there is no specific statutory exception to rulemaking for the type of act or order under consideration, the act or order must be analyzed to determine whether it is in fact a rule. ***Palm*** does not, however, state that all orders issued under § 252.02 are automatically rules.

As proof, one need look no further than the ***Palm*** decision. The supreme court specifically recognized DHS's authority to issue orders under WIS. STAT. § 252.02 without going through rulemaking. *See* ***Palm***, 391 Wis. 2d 497, ¶26. The question is whether an "order" looks and functions like a "rule" under the particular facts of the case—considering not only whether it is a "general order of general applicability," but also the other ***Citizens for Sensible Zoning*** factors. *See* ***Palm***, 391 Wis. 2d 497, ¶26. The court merely observed that DHS could not avoid the rulemaking process by characterizing something fitting the definition of a "rule" as an "order." ***Id.***

Critically, the supreme court illustrated this distinction by stating its decision "does not apply to Section 4. a. of Emergency Order 28." ***Palm***, 391 Wis. 2d 497, ¶¶3 n.6, 58 n.21. Section 4. a. directed the closure of all public and private K-12 schools for the remainder of the 2019-2020 school year for pupil instruction and extracurricular activities. *See* Emergency Order #28 at 5. Although the majority correctly notes that the ***Palm*** court did not explain why it chose not to regard this provision as a rule, it seems apparent that if ***Palm*** held that DHS had no non-rulemaking authority under WIS. STAT. § 252.02, the court would simply have declared Section 4. a. unenforceable like the remainder of Emergency Order #28. The fact that the supreme court left a portion of the order untouched is a significant indication that the scope of the ***Palm*** decision is not nearly as broad as the majority thinks.

The school-closure exception recognized in ***Palm*** is particularly instructive here. Executive Order #3 was issued specifically under the Secretary-Designee's enforcement authority under WIS. STAT. § 252.02(3). That subsection provides that "[t]he department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." ***Id.*** The Secretary-Designee also invoked her authority under subsec. (3) when issuing Emergency Order #28. *See* ***Palm***, 391 Wis. 2d 497, ¶7. Yet nowhere did the supreme court discuss the Secretary-Designee's authority under subsec. (3), nor did it invalidate the Secretary-Designee's exercise of authority under subsec. (3) as it relates to closing schools.[2] *See* ***id.***, ¶19. As a result, ***Palm*** can be reasonably understood as holding that an exercise of authority under subsec. (3) is not subject to rulemaking.

[2] Most of the supreme court's discussion of the statutory provisions occurred in the context of it illustrating that the Secretary-Designee had exceeded her statutory authority. *See* ***Wisconsin Legislature*** (continued)

Even if the majority is correct and ***Palm*** collapses the ***Citizens for Sensible Zoning*** test into a consideration only of whether the DHS action constitutes a "general order of general applicability," the majority ignores critical portions of the supreme court's reasoning when it declared that most provisions of Emergency Order #28 were "rules." The supreme court was plainly—and not unreasonably—concerned with the breadth of Emergency Order #28. *See* ***Palm***, 391 Wis. 2d 497, ¶¶7, 27-28, 31-35. The court's concerns led it to "employ the constitutional-doubt principle" to declare that the Secretary-Designee's efforts to control the COVID-19 pandemic in Emergency Order #28 were subject to the rulemaking process. ***Id.***, ¶31. The court remarked that Emergency Order #28 was "constitutionally suspect" absent rulemaking because it potentially infringed upon citizens' fundamental liberties without any procedural protections, although the court did not explain what liberties those were or what portions of Emergency Order #28 it found problematic. *See* ***Palm***, 391 Wis. 2d 497, ¶31.

These observations prompt the majority to conclude that because Emergency Order #28 contained capacity limits that were struck down, the capacity limits here are impermissible, too. I believe this conclusion is based on a misunderstanding of the scope of Emergency Order #28. Emergency Order #28 contained extensive provisions regarding business operations, directing among other things that "[n]on-essential business and operations must cease." Emergency Order #28 at 3 (formatting altered). The order delineated what was an "essential business" that was allowed to continue. ***Id.*** at 12-18. For those essential businesses that remained open for in-person sales, the order imposed a capacity limit that varied depending upon the store's square

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v. Palm, 2020 WI 42, ¶¶43-57, 391 Wis. 2d 497, 942 N.W.2d 900. That discussion has no bearing on the question of whether a particular DHS action is a "rule."

footage. ***Id.*** at 4-5. And, as previously noted, Emergency Order #28 did a variety of other things, like limit travel and prohibit public and private gatherings.

Emergency Order #3 is substantially narrower and does not contain the kind of subjective judgments at issue in ***Palm***. It does one thing and one thing only: limit public gatherings. It excludes from its reach any place that is not open to the public, including private residences and spaces accessible only by employees. Emergency Order #3 at 3. Spaces that are open to the public and subject to occupancy limits are limited to "no more than 25% of the total occupancy limits for the room or building." ***Id.*** at 3. And the order contains a large number of exemptions, including for schools, child care settings, health care and human services facilities, churches and political rallies. ***Id.*** at 4-6. In other words, Emergency Order #3 bears little similarity to the "constitutionally suspect" Emergency Order #28.

The fact that Emergency Order #28 also included a capacity limit of sorts is not very meaningful. The supreme court did not even mention the capacity limit in its analysis in ***Palm***. Moreover, as explained above, the capacity limit in Emergency Order #3 is established under WIS. STAT. § 252.02(3), and ***Palm*** can be reasonably read as approving of a non-rulemaking exercise of authority under that subsection. Additionally, the supreme court could not leave the capacity limits untouched in Executive Order #28 without preserving the essential/non-essential business distinction. Emergency Order #3 does not shut down non-essential businesses, nor does it apply to private gatherings.

Beyond giving short shrift to the supreme court's constitutional concerns with Emergency Order #28, the majority here also fails to recognize that a violation of Emergency Order #3 is not subject to criminal penalties. This was a key fact in the supreme court's decision

to hold that Emergency Order #28 generally constituted rulemaking. *See* ***Palm***, 391 Wis. 2d 497, ¶36 ("For example, Order 28 purports to impose 30 days in jail when a person leaves home for a purpose Palm did not approve."). Indeed, the court noted "[i]t has long been the law in Wisconsin that in order for the violation of an administrative agency's directive to constitute a crime, the directive must have been properly promulgated as a rule." ***Id.***, ¶38.

Emergency Order #3 contains only a civil forfeiture provision. Emergency Order #3 at 6. "Conduct punishable only by a forfeiture is not a crime." WIS. STAT. § 939.12. Additionally, the appellants here do not argue that Emergency Order #3's civil forfeiture provision is so onerous so as to effectively criminalize the failure to abide by the designated capacity limits. Again, the fact that Emergency Order #3 does not include any criminal penalties is another factor demonstrating that the Secretary-Designee was not required to use the rulemaking process under ***Palm***.

And so we return to where we started: did the circuit court erroneously exercise its discretion by denying the motion for a temporary injunction? Because I conclude ***Palm*** does not dictate that the provisions of Emergency Order #3 had to be promulgated as a rule—in fact, ***Palm*** suggests that the Secretary-Designee could validly issue the order without going through the rulemaking process—I do not conclude that the appellants have demonstrated a reasonable probability, much less a certainty, of success on the merits.

I also conclude the circuit court did not erroneously exercise its discretion when determining that the Intervenors-Plaintiffs-Appellants failed to satisfy the remaining elements necessary for a temporary injunction to issue. The majority fails to identify any irreparable injury to the Pro-Life Wisconsin appellants, nor does it address the circuit court's reasonable

conclusion that The Mix Up failed to demonstrate that any damages it has suffered are attributable to Emergency Order #3 as opposed to other factors, such as the public's apprehensiveness toward dining in restaurants during the COVID-19 pandemic. Further, the circuit court could reasonably conclude that any loss of business, while it would undoubtedly be significant, would be of short duration—specifically, two incubation periods of the COVID-19 virus, or thirty days. Finally, even if all the requirements for issuing a temporary injunction have been met, granting an injunction is not mandatory and the court could exercise its discretion not to issue it. *See* ***Werner***, 80 Wis. 2d at 524. The court could reasonably decide in the exercise of its discretion to deny the temporary injunction given the surge of COVID-19 cases in Wisconsin and the short duration of the order, as well as the potential for confusion and increased risk to the public from the pandemic if the injunction was granted.

The majority's discussion fails to give appropriate deference to the circuit court. The majority does not find any erroneous exercise of discretion, but, rather, effectively determines de novo that The Mix Up is likely to suffer irreparable harm, that it has no other remedy at law, and that a temporary injunction is necessary to preserve the status quo. In doing so, it substitutes its judgment for that of the circuit court on a discretionary matter, which we may not do. *See* ***State v. Rhodes***, 2011 WI 73, ¶26, 336 Wis. 2d 64, 799 N.W.2d 850. I respectfully dissent.

Sheila T. Reiff
Clerk of Court of Appeals