STATE OF WISCONSIN CIRCUIT COURT POLK COUNTY

DEREK LINDOO,
[redacted]

BRANDON WIDIKER,
[redacted]

JOHN KRAFT
[redacted]

Case Type: Declaratory Judgment

Case Code: 30701

Plaintiffs,

v.

TONY EVERS, in his official capacity as Governor of the State of Wisconsin,
115 East, State Capitol,
Madison, WI 53702,

Defendant.

COMPLAINT

Through his undersigned counsel, Plaintiffs Derek Lindoo, Brandon Widiker, and John Kraft, as their complaint against Defendant Tony Evers in his official capacity as Governor of the State of Wisconsin, alleges as follows:

1. This action challenges the legality of Defendant Evers' Executive Order #82, issued on July 30, 2020, purporting to declare a second state of emergency arising from an ongoing public health emergency resulting from the COVID-19 pandemic in Wisconsin and invoking the Governor's emergency powers arising from a state of emergency under Wis. Stat. § 323.10. Defendant Evers had previously issued Executive Order #72 on March 12, 2020, declaring a public

health emergency resulting from the COVID-19 pandemic in Wisconsin and invoking the Governor's powers under a state of emergency pursuant to Wis. Stat. § 323.10. By law, that original state of emergency – and the powers associated with it – expired 60 days after it was issued, and can only be extended by joint resolution of the Legislature.

2. The Governor may not unilaterally extend the state of emergency beyond 60 days, nor may the Governor avoid the law setting a 60 day time limit as set forth in § 323.10 by declaring multiple emergencies arising from the same biological agent without abatement or substantial suppression. To interpret the law otherwise, would allow one person rule by the Governor for what could be a virtually unlimited amount of time whenever the capacious and vague statutory definition of a "public health emergency" or "disaster" can be said to be present. State law, and our Constitution, say otherwise. Defendant Evers' issuance of Executive Order #82 ignores these statutory restrictions and unilaterally and unlawfully extends the state of emergency for another 60 days without approval by the Legislature. In so doing, it arrogates to the Governor the power to unilaterally make law for an indefinite period of time.

3. After issuing Executive Order #82, Defendant Evers availed himself of the emergency powers he activated for himself and issued Emergency Order #1 purporting to mandate mask wearing for all Wisconsinites, with limited exceptions. Since Executive Order #82 itself is unlawful, it follows that Emergency Order #1 (which depends upon the existence and legality of Executive Order #82) is also invalid and void. Although he has not yet done so, Governor Evers would presumably say that he is entitled to issue any number of additional extraordinary measures pursuant to the emergency declared by Executive Order #82, including travel bans, lockdowns and the closing of businesses, churches and other gatherings.

4. This case is not about whether the State of Wisconsin, as a whole, (as opposed to local municipalities) should take additional measures to thwart COVID-19, or what those measures (statewide or local) should be. It is not even about whether there can ever be a mask mandate. This case is about: (1) whether a Governor may extend an emergency past the 60 day statutory time limit without legislative approval, and (2) whether a Governor may sequentially declare consecutive public health emergencies for the same underlying public health crisis

PARTIES

5. Plaintiff Derek Lindoo is a Wisconsin resident and taxpayer. Plaintiff Lindoo resides at [redacted] Polk County, Wisconsin. He is required to follow the mandates of Emergency Order #1 and any other orders issued by the Governor, based on the emergency powers that are being unlawfully exercised as a result of Executive Order #82.

6. Plaintiff Brandon Widiker is a Wisconsin resident and taxpayer. Plaintiff Widiker resides at [redacted] Polk County, Wisconsin. He is required to follow the mandates of Emergency Order #1 and any other orders issued by the Governor, based on the emergency powers that are being unlawfully exercised as a result of Executive Order #82.

7. Plaintiff John Kraft is a Wisconsin resident and taxpayer. Plaintiff Kraft resides at [redacted] Saint Croix County, Wisconsin. He is required to follow the mandates of Emergency Order #1 and any other orders issued by the Governor, based on the emergency powers that are being unlawfully exercised as a result of Executive Order #82.

8. Defendant Tony Evers is Governor of the State of Wisconsin and is sued in his official capacity. Defendant Evers maintains his office at 115 East, Wisconsin State Capitol, in the City of Madison, Dane County, Wisconsin. Defendant Evers issued the orders that are subject of this litigation.

JURISDICTION AND VENUE

9. This Court has jurisdiction to hear this case pursuant to Wis. Stat. § 806.04 (1)-(2).

10. Venue in this Court is proper pursuant to Wis. Stat. § 801.50(2)-(3).

FACTS

11. Wis. Stat. § 323.10 empowers the Governor to determine if a state of emergency exists. An emergency can either be a "disaster" or "public health emergency." A "public health emergency" is defined as the occurrence or imminent threat of an illness or health condition that meets all of the following criteria:

> (a) Is believed to be caused by bioterrorism or a novel or previously controlled or eradicated biological agent.
> (b) Poses a high probability of any of the following:
> 1. A large number of deaths or serious or long-term disabilities among humans.
> 2. A high probability of widespread exposure to a biological, chemical, or radiological agent that creates a significant risk of substantial future harm to a large number of people.

Wis. Stat. § 323.02 (16).

12. Once determined that such a "public health emergency" exists, the Governor may issue an executive order declaring a state of emergency related to public health. But, without regard to the nature of the underlying emergency or its duration, Wisconsin law limits the duration of such a state of emergency declared by the Governor to 60 days unless extended by joint resolution of the Legislature. Wis. Stat. § 323.10.

13. Once a state of emergency has been declared by the Governor, certain emergency powers that are, on their face, extraordinarily broad become available to the Governor pursuant to statute. He or she can, for example, "issue such orders as he or she deems necessary for the security of persons and property." Wis. Stat. § 323.12(4). But these powers exist only for the 60 day period following the declaration of the state of emergency. Unless they are extended by the Legislature, they expire without the need for any action.

14. On March 12, 2020, Defendant Evers made an initial determination that a public health emergency existed in Wisconsin due to COVID-19.

15. In order to activate his statutory emergency powers to combat the COVID-19 pandemic, Defendant Evers issued Executive Order #72 declaring a public health emergency. A true and correct copy of Executive Order #72 is attached hereto as Exhibit A.

16. Executive Order #72 remained in force for a full 60 days, and then expired on May 11, 2020, pursuant to state law.

17. Here, Defendant Evers has now declared a second state of emergency (approximately two months after the expiration of the first), arising from the same underlying public health condition. Defendant Evers never declared that the pandemic leading to the issuance of Executive Order # 72 was suppressed, eradicated or abated. Nor could any reasonable claim be made that it was suppressed, eradicated or abated. It has continued.

18. In fact, Defendant Evers previously attempted to extend his exercise of emergency powers beyond those initial 60 days by directing the Department of Health Services to issue an order extending his desired measures beyond the expiration of the original public health emergency. Thus, in late April, at the Governor's direction, Secretary-designee of the Department of Health Services Andrea Palm issued Emergency Order # 28 substantially extending the "Safer At Home" order beyond the 60-day state of emergency declared by Executive Order # 72, as well as Emergency Order #31, known as the "Badger Bounce Back" order. Both of those emergency orders purported to be in effect well after the expiration of the original state of emergency. In causing these orders to issue, Defendant Evers' administration relied on Chapter 252 of the statutes and argued that they were not subject to the time limits of Chapter 323. The Wisconsin Supreme Court invalidated these orders on May 13, 2020, holding that these Chapter 252 powers were not

as broad as those exercised in these orders and must be promulgated by rule. *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900. True and correct copies of Emergency Order #28 and Emergency Order #31 are attached hereto as exhibits B and C, respectively.

19. As noted above the COVID-19 pandemic still exists and has existed – unabated and unsuppressed – in Wisconsin since both the declaration and expiration of the state of emergency declared by Executive Order #72.

20. At no time has the number of daily infections dipped significantly below the number that existed at expiration of the original state of emergency – a time at which the Governor was arguing for continued extraordinary restrictions. See Exhibit D, attached hereto, a true and correct copy of a chart from the state Department of Health Services showing the number of new infections per day in the state from March through August 20, 2020.[1]

21. Further, the number of deaths each day resulting from COVID-19 has remained steady since the beginning of April. See Exhibit E, a true and correct copy of a chart from the Wisconsin Department of Health Services showing the cumulative deaths from COVID-19 in the state by day from March through August 20, 2020.[2]

22. Nor has the COVID-19 crisis materially changed since the second emergency order and associated mask mandate. Although the nominal case count has, on certain days, declined, this appears to be an artifact of reduced testing (the rate of positive tests has not declined) and, in any event, the COVID-19 pandemic in Wisconsin has not materially abated or worsened since the expirtation of the initial emergency order.

23. COVID-19 has affected different parts of the state differently, and in some cases, drastically differently. Because of this, the Legislature has not extended the statewide state of

[1] Chart downloaded from: https://www.dhs.wisconsin.gov/covid-19/cases.htm
[2] Chart downloaded from: https://www.dhs.wisconsin.gov/covid-19/deaths.htm

emergency declared by Executive Order #72, or imposed other state-wide mandates on Wisconsin citizens, but instead has opted for local solutions, imposed by municipal units of government, to deal with the differing impacts of COVID-19 in different parts of the State.

24. As a result of the expiration of Executive Order #72 on May 11, 2020, and the Legislature's decision not to extend it, Defendant Evers has no constitutional or statutory basis to continue to declare or exercise emergency powers related to COVID-19. Whatever laws may be necessary or appropriate to deal with the COVID-19 pandemic may not be unilaterally imposed by the Governor, but, subject to the strictures of the United States and Wisconsin Constitutions, must instead be: (1) passed by the Legislature and signed into law by the Governor; (2) properly promulgated as a rule using the statutory rulemaking process; or (3) within the powers of local governments as properly delegated by the Legislature by statute.

25. Nevertheless, on July 30, 2020, Defendant Evers issued Executive Order #82 in which he again declared a second state of emergency related to public health for the entire state as a result of the same COVID-19 pandemic that was impacting Wisconsin back in March. A true and correct copy of Executive Order #82 is attached hereto as Exhibit F.

26. In proclaiming a second state of emergency related to the COVID-19 pandemic Defendant Evers sought to grant for himself another 60 days to use the emergency powers which the law denies him because the original state of emergency was not extended and expired.

27. Defendant Evers immediately exercised those new emergency statutory powers to issue Emergency Order #1 purporting to mandate the wearing of a mask by every person throughout the entire State of Wisconsin. A true and correct copy of Emergency Order #1 is attached hereto as Exhibit G.

28. As Wisconsin residents and taxpayers, Plaintiffs are harmed by Emergency Order #1 because, among other reasons: (a) Plaintiffs are being compelled to take an action (wear a mask in certain circumstances when Plaintiffs would otherwise choose not to wear a mask) by an unlawful order of Defendant Evers; (b) the State is spending taxpayer money to promulgate and enforce Defendant Evers' unlawful mask mandate; (c) Defendant Evers now claims plenary powers; and (d) Defendant Evers has used these claimed emergency powers to deploy the national guard at taxpayers' expense.

CLAIM ONE: FOR A DECLARATION THAT EXECUTIVE ORDER #82 EXCEEDS CONSTITUTIONAL AND STATUTORY AUTHORITY AND IS VOID BECAUSE THE LEGISLATURE HAS NOT AGREED TO AN EXTENSION OF THE PUBLIC HEALTH EMERGENCY DUE TO COVID-19 AS CREATED BY EXECUTIVE ORDER #72.

29. Plaintiffs reallege and incorporate by reference all of the allegations of this complaint as if fully set forth herein.

30. Plaintiffs seeks a declaration that Emergency Order #82 is void in so far as it purports to extend a state of emergency related to the COVID-19 pandemic and thereby grant emergency powers after the expiration of the original state of emergency.

31. Defendant Evers has no power to create law unilaterally. The power to make laws is instead vested in the Legislature. Wis. Const. Art. IV, § 1.

32. Although the Legislature has delegated some of its law making power to the Governor by granting the Governor certain emergency powers upon the declaration of a state of emergency under Wis. Stat. § 323.10, it has also made clear that any such state of emergency is strictly time limited. Even if the Legislature fails to act, "[a] state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature." Wis. Stat. § 323.10.

33. Thus, when Defendant Evers determined a public health emergency due to the COVID-19 pandemic existed in Wisconsin back in March, 2020, and subsequently declared a state of emergency to deal with it, that state of emergency could not be lawfully extended beyond 60 days unless the Legislature, by joint resolution, approved of such an extension.

34. Moreover, because § 323.10 provides that the extension must be by "joint resolution" by the Legislature, as opposed to a bill by the Legislature, the decision to approve or not approve the extension belongs exclusively to the Legislature and is not subject to veto by the Governor.

35. During the initial 60-day state of emergency (and even thereafter) Defendant Evers had the option to seek an extension from the Legislature of the state of emergency, propose and negotiate legislation to deal with the pandemic on a long term basis and/or to have the administrative agencies that he controls propose and promulgate rules to deal with COVID-19. Each of these mechanisms would have required Defendant Evers to seek and obtain the input and consent of the public and the Legislature rather than rule unilaterally, and for his own reasons, he chose not to do so.

36. Having failed to use the constitutional and statutory methods for creating law, Defendant Evers instead seeks to regain access to unilateral emergency powers by extending the state of emergency relating to COVID-19 past its 60 day limit. But Defendant Evers may not do so except by approval of the Legislature by joint resolution. As noted in *Wisconsin Legislature v. Palm*, 2020 WI 42, at ¶ 41, 391 Wis. 2d at 525, 942 N.W.2d at 914, in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.

37. Defendant Evers' attempt to extend a "state of emergency" in Wisconsin beyond 60 days without legislative approval exceeds his power under state law. The state of emergency related to the COVID-19 pandemic declared by Executive Order #82 is ultra vires and void.

38. Defendant Evers may contend that Executive Order #82 is not an extension of the state of emergency declared by Executive Order #72 but is instead a new and different public health emergency. This, too, is wrong on its face. The new state of emergency is predicated on the COVID-19 pandemic, the same public health emergency, and no one would contend that the pandemic ever ended or even significantly abated. The law does not permit extension or replication of a state of emergency and the consequent enhancement of gubernatorial powers because a biological agent has not gone away or even because it has become worse.

39. At no point did Defendant Evers ever declare that the emergency was over. At no point either prior to or subsequent to expiration of the original emergency, did the number of daily infections, hospitalizations or fatalities ever dip substantially below the levels reached during the original order. While one might argue that the pandemic has gotten worse (infections are up but hospitalizations and fatalities have been much flatter and less likely to rise), the time limit on a declared state of emergency is absolute and cannot be evaded because the underlying public health emergency has "gotten worse" or has not gone away or substantially decreased from that present during the emergency.

40. The Governor lacks the power to unilaterally extend a state of emergency or to declare multiple states of emergency to deal with the same problem. Any other conclusion would allow a Governor to ignore the legislative power vested in the Legislature and to evade the 60 day limitation imposed by the Legislature in Wis. Stat. § 323.10.

41. Both Executive Order #72 and Executive Order #82 are expressly based upon the COVID-19 pandemic in the State of Wisconsin, that is, they address the same "public health emergency." While the course of the pandemic in Wisconsin has changed over time (with reported cases sometimes going up and sometimes going down), the underlying public health emergency is the same now as it was in March, 2020.

42. There are similar restrictions on the use of emergency powers by executive agencies in other circumstances. For example, when an agency needs to quickly promulgate a rule they may declare an emergency and adopt a rule through the "emergency rulemaking" process under Wis. Stat. § 227.24. But those rules are only valid for 150 days, unless extended by the Legislature, and an agency may not simply re-issue an emergency rule if the Legislature declines to extend it. A formal Attorney General opinion makes clear that this temporal limitation on emergency rulemaking is a "clear expression of intent that the effectiveness of an emergency rule may not be extended beyond" the initial effective period simply by re-filing it. 62 Atty. Gen 305, 308 (1973). Likewise in this case, a state of emergency may not simply be extended beyond the initial 60 day period by re-issuing an executive order.

43. The course of this pandemic – and any other public health emergency for that matter – will always involve changing facts. And if changing facts allow the Governor to unilaterally extend or to declare a "new" emergency and obtain a new 60 day period of emergency powers, then he has been given essentially unlimited power to unilaterally create new laws to be imposed on Wisconsinites via executive fiat.

44. Defendant Evers' attempt to unilaterally extend or to impose multiple states of emergency in Wisconsin exceeds his power under the Wisconsin Constitution and under state law.

The second state of emergency related to the COVID-19 pandemic declared by Executive Order #82 is ultra vires and void.

45. Unless this Court declares that the state of emergency declared by Executive Order #82, along with Emergency Order #1 which depends on the legality of Executive Order #82, are ultra vires and void, Defendant Evers will continue to exercise the emergency statutory powers beyond the 60 day window in which such powers may have been lawful, in violation of the Wisconsin Constitution and state statutes.

CLAIM TWO: IN THE ALTERNATIVE, OR IN ADDITION TO, FOR A DECLARATION THAT THE STATE OF EMERENCY DECLARED BY EXECUTIVE ORDER # 82 AND, CONSEQUENTLY, THE MASK MANDATE ORDERED BY EMERGENCY ORDER #1 ARE UNCONSTITUTIONAL

46. Plaintiffs reallege and incorporate by reference all allegations made in this complaint as if fully set forth herein.

47. If for any reason, this Court determines that Executive Order #82 is authorized by statute, then the Plaintiffs request a declaration that the statute allowing Executive Order # 82's state of emergency and, consequently, the mask mandate ordered by Emergency Order #1 are unconstitutional.

48. The Wisconsin Constitution vests the legislative power in the Legislature. Wis. Const. Art. IV, § 1.

49. Courts in Wisconsin have permitted the delegation of legislative power to the executive but only so long as "the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or agency acts within that legislative purpose," *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971).

50. The ability to declare a public health emergency and the extraordinary emergency powers granted to the Governor during the emergency are both delegations of legislative power to

the executive branch with one of the safeguards being that the Governor may only exercise such emergency powers for 60 days unless that period is extended by joint resolution of the Legislature.

51. Those delegated powers may only be lawfully exercised if they are done consistently with the Wisconsin Constitution, which includes the requirement that they comply with the 60 day safeguard contained in the statute. As the Wisconsin Supreme Court (quoting the U.S. Department of Justice) recently noted "There is no pandemic exception ... to the fundamental liberties the Constitution safeguards." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 53, 391 Wis. 2d 497, 531, 942 N.W.2d 900, 917.

52. If Wis. Stat. § 323.10 allows Governor Evers to unilaterally extend the state of emergency beyond 60 days, or to declare new states of emergency for the same public health emergency, and to exercise emergency powers otherwise unavailable to him beyond 60 days, then the statute is an unconstitutional delegation of legislative power to the executive.

53. If this Court concludes that Wis. Stat. § 323.10 grants Defendant Evers that power, then the statute is an unconstitutional delegation of legislative power to the executive.

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Issue a declaratory judgment that the state of emergency related to public health declared by Executive Order #82 is ultra vires and void;

B. In the alternative, or in addition to, issue a declaratory judgment that Wis. Stat. § 323.10 is an unconstitutional delegation of legislative power to the executive, and is void;

C. Issue an injunction prohibiting the enforcement of the state of emergency declaration in Executive Order #82 and Emergency Order #1; and

D. Such other relief as the Court deems appropriate.

Dated this 25th day of August, 2020.

Respectfully Submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, Inc.
Attorneys for Plaintiffs

/S/ Signed electronically by Richard M. Esenberg

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