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STATE OF WISCONSIN

SUPREME COURT

No. 2020-AP-000765

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WISCONSIN LEGISLATURE,

Petitioner,

v.

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

Respondents.

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NON-PARTY BRIEF AND APPENDIX OF THE  
WISCONSIN ASSOCIATION OF LOCAL HEALTH  
DEPARTMENTS AND BOARDS AND ASSOCIATED  
MUNICIPALITIES AND COUNTIES

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## INTRODUCTION

This brief presents the perspective of health officers from around the State whose expertise and local knowledge are crucial to fighting this pandemic. Inhibiting the Wisconsin Department of Health Services' ("DHS") authority to immediately and comprehensively respond to a statewide health emergency will lead to a slow, chaotic, confusing, and ineffective patchwork of local health responses. We expect this will result in surges of unnecessary COVID-19 infections and deaths throughout the State, reversing the progress and forfeiting the sacrifices all Wisconsinites have made to combat this virus.

## BACKGROUND FACTS<sup>1</sup>

Epidemiological modeling shows that statewide stay-at-home orders, when largely observed by the public, mitigate the spread of the virus and recorded deaths by flattening the curve of infection.<sup>2</sup> These measures are working in Wisconsin, just like they are in other

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<sup>1</sup> The *Amici* agree with the facts as stated in the brief submitted by the Wisconsin Medical Society and therefore offer these limited background facts.

<sup>2</sup> Lindsay Huth and Yan Wu, *Some Forecasts See Virus Upswing for States That Resisted Shutdown Measures*, Wall Street Journal (April 24, 2020), available at [https://www.wsj.com/graphics/coronavirus-projections-for-shutdown-reopening-states/?adobe\\_mc=TS%3D1587810042%7CMCMID%3D86444046554993604754902401842990151753%7CMCORGID%3DCB68E4BA55144CAA0A4C98A5%40AdobeOrg&wsj\\_native\\_webview=androidphone&ns=prod/accounts-wsj](https://www.wsj.com/graphics/coronavirus-projections-for-shutdown-reopening-states/?adobe_mc=TS%3D1587810042%7CMCMID%3D86444046554993604754902401842990151753%7CMCORGID%3DCB68E4BA55144CAA0A4C98A5%40AdobeOrg&wsj_native_webview=androidphone&ns=prod/accounts-wsj)

States around the country.<sup>3</sup> As a result, the worst-case scenario<sup>4</sup> has been averted for now.<sup>5</sup>



DHS’ statewide order allowed our hospitals to adequately respond to critical cases, develop workflows, and increase testing and personal protective equipment (“PPE”) capacity without being overwhelmed by a surge.<sup>6</sup> There is no safety net available to Wisconsin hospitals if that surge comes.<sup>7</sup> Even at the current COVID-19 caseload, many hospitals are struggling to find the PPE

<sup>3</sup> See James Glanz, Benedict Carey, Josh Holder, Derek Watkins, Jennifer Valentino-DeVries, Rick Rojas, and Lauren Leatherby, *Where America Didn’t Stay Home Even as the Virus Spread*, New York Times (April 2, 2020), available at <https://www.nytimes.com/interactive/2020/04/02/us/coronavirus-social-distancing.html>

<sup>4</sup> Wis. Dept. of Health Services, *COVID-19 Modeling* (March 26, 2020), available at <https://www.dhs.wisconsin.gov/publications/p02643.pdf>

<sup>5</sup> *Dane County COVID-19 Data Dashboard* (Viewed Apr. 28, 2020 at 3:30 pm), available at <https://cityofmadison.maps.arcgis.com/apps/opsdashboard/index.html#/e22f5ba4f1f94e0bb0b9529dc82db6a3>

<sup>6</sup> See A-App. 1 (letter from Dr. Conway).

<sup>7</sup> Zoë Schlanger, *Begging for Thermometers, Body Bags, and Gowns: U.S. Health Care Workers Are Dangerously Ill-Equipped to Fight COVID-19*, Time (Apr. 20, 2020), available at <https://time.com/5823983/coronavirus-ppe-shortage/>

they need to keep themselves and patients safe.<sup>8</sup> Rural communities face more challenges than just limited hospital beds and PPE shortages. They already serve older and sicker patients with higher rates of preventable deaths.<sup>9</sup> The highest rates of COVID-19 hospitalizations occur within this population,<sup>10</sup> making rural communities vulnerable even at lower caseloads.

The ability to have a rapid statewide response remains critical because the virus is present in communities throughout Wisconsin, with 66 of 72 counties reporting cases of infection.<sup>11</sup> On April 25, 2020, for the second day in a row, DHS reported a record number of new confirmed cases.<sup>12</sup> COVID-19 does not discriminate; it afflicts urban, rural, suburban, and exurban communities. No corner of Wisconsin is immune from the possibility of an outbreak. For

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<sup>8</sup> Associated Press, *Wisconsin Hospitals Report Shortages of PPE*, Channel3000 (Apr. 10, 2020), available at <https://www.channel3000.com/wisconsin-hospitals-report-shortages-of-ppe/>

<sup>9</sup> *Marshfield Clinic CEO: COVID-19 Will Hit Rural Healthcare Hard*, Wisconsin Health News (Apr. 8, 2020), available at <https://wisconsinhealthnews.com/2020/04/08/marshfield-clinic-ceo-covid-19-will-hit-rural-healthcare-hard/>

<sup>10</sup> See Roni Caryn Rabin, *Nearly All Patients Hospitalized With Covid-19 Had Chronic Health Issues, Study Finds*, New York Times (Apr. 23, 2020), available at <https://www.nytimes.com/2020/04/23/health/coronavirus-patients-risk.html>

<sup>11</sup> As of April 28, 2020. Available at <https://www.dhs.wisconsin.gov/covid-19/county.htm>

<sup>12</sup> Natalie Brophy, *Wisconsin Sees Record Number of New COVID-19 Cases for Second Day in a Row, with 331 New Infections*, Appleton Post-Crescent (Apr. 25, 2020), available at <https://www.postcrescent.com/story/news/2020/04/25/coronavirus-wisconsin-sets-record-new-cases-second-day-row/3026040001/>

example, a recent outbreak at a Green Bay meatpacking plant caused Brown County's cases to jump 900 percent between April 7 and April 22.<sup>13</sup> That county now has the highest infection rate per capita in Wisconsin.<sup>14</sup>

### ANALYSIS

The characteristics of COVID-19 are foundationally incompatible with a slow-footed and patchwork response that would result if the Court grants the Petitioner's request. Should DHS' powers be limited or delayed because of rulemaking, local health officials will be forced to try and control a virus based on county borders. A deadly, invisible virus will be unwittingly carried across jurisdictional boundaries<sup>15</sup> with the movement of people, leading to greater rates of infection.

As Wisconsin local health officers, we need DHS expertise, leadership, data, and quick action to support the decisions we make

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<sup>13</sup> Haley BeMiller, *JBS Plant in Green Bay Linked to 147 Coronavirus Cases as Meatpacking Outbreaks Continue to Spread*, Milwaukee Journal Sentinel (Apr. 22, 2020), available at <https://www.jsonline.com/story/news/2020/04/22/green-bay-jbs-meatpacking-plant-tied-147-coronavirus-cases/3004584001/>.

<sup>14</sup> Doug Schneider, *Brown County Seemed a Step Ahead of the Coronavirus; Suddenly, It Wasn't*, Post Crescent (Apr. 25, 2020), available at <https://www.postcrescent.com/story/news/2020/04/25/brown-county-coronavirus-how-cluster-covid-19-developed/3000721001/>

<sup>15</sup> For example, one of the first cases in La Crosse County was connected to a hockey tournament in Milwaukee. See Mike Thompson, *Mayo Employee Recovers from COVID-19, Now Helping Others Affected by the Virus*, News8000 (April 8, 2020), available at <https://www.news8000.com/mayo-employee-recovers-from-covid-19-now-helping-others-affected-by-the-virus/>



on the front lines as we continue fighting to keep our communities safe from this statewide pandemic. We rely on the State for data analysis and guidance on how to communicate this information to the public. DHS supports our local efforts with contact-tracing, coordinating PPE, and facilitating broad statewide testing efforts. Without this, we could have counties competing against each other for these resources – a situation we have seen play out between states.<sup>16</sup>

**A. The Public Health Response to COVID-19 Must Be a Statewide Response.**

DHS' authority under Wis. Stat. § 252.02(6) provides for the immediate and comprehensive response necessary to this statewide pandemic. “[T]here can be no question but that the promotion and protection of public health is a matter of statewide concern.” *State ex rel. Martin v. City of Juneau*, 238 Wis. 564, 300 N.W. 187, 190 (1941) at 190. If this is not the type of health emergency the Legislature had in mind when it created Wis. Stat. § 252.02(6)<sup>17</sup>, then what is?

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<sup>16</sup> Michael Collins, Nicholas Wu, Cara Kelly and David Heath, *Fact Check: Trump Claims Coronavirus Tests are Widely Available. They Are Not*. USA Today (Apr. 21, 2020), available at <https://www.usatoday.com/story/news/politics/2020/04/21/coronavirus-trump-claims-there-plenty-tests-states-disagree/2997841001/>

<sup>17</sup> “The department may authorize and implement all emergency measures necessary to control communicable diseases.” Wis. Stat. § 252.02(6)

By implementing Safer at Home Orders, Wisconsin has been able to avoid case surges because people are staying home, thanks to the consistent statewide order and message coming from DHS that staying at home limits further transmission of the virus.<sup>18</sup> However, if the Court enjoins DHS' statewide order and limits its ability to respond to this ever-changing pandemic, the ongoing public health response will be left largely to the counties. A confusing and inconsistent county-by-county patchwork of regulations will result, which could endanger Wisconsinites.

Pre-COVID-19, Wisconsinites already travelled in large numbers for non-work related travel.<sup>19</sup> Department of Transportation 2019 origin destination for Waukesha, Brown, La Crosse, Kenosha, and Marathon counties show that the majority of travel residents underwent is not "home to work" but is instead "home to other" or "other to other" for both weekdays and weekends. It is intuitive that if certain counties are "closed", individuals will be willing to travel out of their county and carry along with them a dangerous virus. This is precisely the type of movement statewide

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<sup>18</sup> See A-App. 1 (letter from Dr. Conway).

<sup>19</sup> In an Open Records request to the Dept. of Transportation, we obtained 2019 origin destination data for Waukesha, Brown, La Crosse, Kenosha, and Marathon Counties for weekday, weekend and late night trips as related to travel for non-work purposes. See A-App. 4 (2019 DOT Origin Destination Data).

safer at home orders are meant to prevent.

Consider neighboring counties with discrepant restrictions. An asymptomatic person in a county with a local stay-at-home order could drive into the next county without a stay-at-home order, perhaps to get a haircut, go bowling, or go out to eat. As a result, the counties that loosen restrictions too soon will draw out-of-town visitors, thus increasing spread and threatening the health and safety of their local populations. Ironically, counties may choose looser restrictions because they had manageable caseloads, but with increased spread as described above, those numbers could spiral without warning and overwhelm their health care resources. Our shared objective to restore Wisconsin's economic health and prosperity will be undermined because these new outbreaks and surges could ultimately force a return to more restrictive measures. The fastest way to return to a more normal way of life is to stay stronger together, led by DHS' ability to immediately and comprehensively respond to this virus.

**B. We Are Stronger Together When We Rely on the Authority the Legislature Granted DHS to Take Immediate Action During a Statewide Pandemic.**

Enjoining the Safer at Home Order, as Petitioners propose, will subject Wisconsin's pandemic response to the negotiating

ability of the legislative and executive branches. Not only is such a cumbersome process not required by the separate grant of authority in Chapter 252, such a process would completely undermine the purpose of that chapter – to allow DHS to take immediate and comprehensive action to protect the public health of all Wisconsinites during a pandemic like COVID-19. *See State ex rel. Martin v. City of Juneau*, 238 Wis. 564, 300 N.W. 187, 190 (1941).

To underscore this point, consider Petitioner’s brief, which charts out the “emergency rule” process Petitioner states DHS was required to follow to combat the COVID-19 pandemic. (Petitioner’s Brief at 33-35). The many steps of this process include an automatic 10-day hold for approval of the required statement of scope (§ 227.135(2)) and a public hearing and comment period on the proposed statement of scope if requested by either chairperson of the joint committee for review of administrative rules (§ 227.24(1)(e)1d). At a minimum, the process takes approximately 20 days to complete. While that process plays out, local public health officials will be scrambling to keep our communities safe because the virus will not wait for legislative action.

A slower response will have tragic consequences. How many more Wisconsinites would be infected while waiting 20 days to enact an administrative rule? How many more hospitals would run

out of beds or ventilators while COVID-19 patients waited for a public hearing and comment period to take place? These questions are not hyperbolic – these are things that happened in communities across the world until they were able to effectively impose Safer at Home Orders to flatten the curve.<sup>20</sup>

Moreover, future responses related to the pandemic will be hampered by the process proposed by the Petitioner. COVID-19 “hot spots” can arise at any time<sup>21</sup> and will most certainly happen if this Court removes the ability of DHS to immediately respond to this ever-changing emergency. When that happens in one county, the Petitioner’s proposal would require DHS to tell concerned residents in that county and neighboring counties that it could not act until the Legislature approved the proposed actions.

To be sure, some public health emergencies can be handled completely and adequately at the local level because they are confined or largely confined to a single county. But this is not that emergency. Prompt and comprehensive action is the only response

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<sup>20</sup> See Gabrielle Ouellette, *If Texans Do Not Stay Home, Hospital Beds Will Overflow, Austin Health Authority Says* (March 24, 2020), available at <https://www.kvue.com/article/news/health/coronavirus/texas-hospitals-could-run-out-of-beds-due-to-coronavirus/269-8a0f3aee-c7c5-40c1-ba2c-260084b8e681>

<sup>21</sup> A party in Westport, Connecticut exposed 40 people. Anna Sturla, *40 People in Connecticut Exposed to Coronavirus at a Party, Officials Say*, CNN (March 25, 2020) available at <https://www.cnn.com/2020/03/25/us/connecticut-party-coronavirus-exposure/index.html>

that can possibly work when fighting a pandemic like COVID-19. Indeed, from the moment the World Health Organization declared COVID-19 a global pandemic, the CDC and eventually the White House urged a quick and unified response centered on staying at home and social distancing.<sup>22</sup> As in other states, the ability of the state health department to act immediately and comprehensively ensures the safety and health of all Wisconsinites.

### CONCLUSION

Wisconsin is suffering, but we believe that the best way forward is for the Court to honor the authority the legislature gave DHS in Wis. Stat. § 252.02 to lead a comprehensive statewide response to the most devastating public health emergency in over a century. If Emergency Order #28 is ended or modified or subjected to additional rulemaking procedures through this action, the Court will erode the sacrifices all Wisconsinites have made since Safer at Home began and severely hamper DHS' ability to act quickly as this pandemic unfolds. The Court should stand on the side of public health.

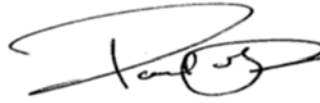
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<sup>22</sup> See Dawn Kopecki, *CDC Recommends Canceling Events with 50 or More People for the Next Eight Weeks Throughout US*, CNBC (March 16, 2020) available at <https://www.cnbc.com/2020/03/16/cdc-recommends-the-cancellation-of-events-with-50-or-more-people-for-the-next-eight-weeks-throughout-us.html>

Dated this 29<sup>th</sup> day of April, 2020.

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### **CERTIFICATE AS TO FORM/LENGTH**

I certify that this brief meets the form and length requirements of Wis. Stat. § (Rule) 809.19(8)(b), (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, and maximum of 60 characters per line of body text. The length of this brief is 2,061 words.

Dated this 29<sup>th</sup> day of April, 2020.

Signed:



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**CERTIFICATE OF COMPLIANCE WITH  
WIS. STAT. § (RULE) 809.19(12)**

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 29<sup>th</sup> day of April, 2020.

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