STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP765-OA

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.

RESPONDENTS' RESPONSE TO PETITION FOR AN ORIGINAL ACTION AND MOTION FOR TEMPORARY INJUNCTION

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INTRODUCTION

We are in the midst of a once-in-a-century pandemic, and there currently is no vaccine available to safeguard against the novel coronavirus that has caused this public health emergency. States, and all three branches of Wisconsin state government, have taken extraordinary action in response.

But this is not the first time this Nation has confronted a public health crisis. Long ago, courts and lawmakers considered how authority should be distributed in such circumstances given the "paramount necessity that a community . . . protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). As a result, states across the country have laws that reflect the need for urgent and decisive executive action to address pandemics and other threats to public health. *See* Lawrence O. Gostin & Lindsay F. Wiley, Public Health Law 426 (3d ed. 2016).

Wisconsin is no exception. More than 115 years ago, this Court recognized that the Legislature may "rightfully grant to boards of health authority to employ all necessary means to protect the public health." *Lowe v. Conroy*, 120 Wis. 151, 97 N.W. 942, 944 (1904). And the Legislature has done so, providing the Wisconsin Department of Health Services ("DHS") with "broad statutory authority . . . to control communicable diseases." Wis. Leg. Council, *Extension and Expiration of the Public Health Emergency and the "Safer at Home" Orders Related to COVID-19*, Issue Brief (April 2020). Indeed, under Wis. Stat. § 252.02(6), DHS can "authorize and implement all emergency measures to control communicable diseases."

Pursuant to the broad and well-established authority granted to the executive branch to respond to public health emergencies, Governor Tony Evers and Secretary-designee Andrea Palm have issued a series of emergency orders to slow the transmission of the coronavirus. These orders, and the actions of Wisconsin residents to fight the coronavirus, have been effective: at least hundreds, and quite possibly thousands, of lives have been saved.

Through this case, however, the petitioners seek to undo the emergency orders that have contributed to Wisconsin's early success in slowing the transmission of the coronavirus. The petitioners are vague as to precisely how they believe the State's response to the coronavirus outbreak should be modified or how that would benefit Wisconsinites. While their brief insinuates (wrongly) that the emergency orders have caused substantial economic harm, it also acknowledges that such harm is "mainly traceable to the pandemic itself," (Pet'r Mem. 66), thereby effectively conceding that any purported choice between effectively fighting the coronavirus and restoring economic growth is a false one. And despite having gone weeks without legal objection to emergency orders, the petitioners now ask for highly expedited review.

The petitioners' arguments should be rejected. They posit a fundamental reworking of how Wisconsin responds to a pandemic—in the midst of one—that is incompatible with the statutes, constitutional principles, and on-the-ground reality. In fact, the petitioners point to nothing like it in the Nation. On the contrary, using authority like DHS's, at least 42 states have instructed their residents to stay at home unless engaging in certain limited activities. (Van Dijk Aff.

¶ 15).[1] In Wisconsin and elsewhere, that has worked to avert what was predicted to be a large surge in cases, leaving Wisconsin positioned to soon lift some restrictions while still making progress. The State has a plan to wind down restrictions, and that process should be allowed to play out. It is based in science and is in line with the White House's guidance. But, as that guidance recognizes, it should not broadly happen immediately.

The petitioners ask this Court to upend the careful planning that has taken place and replace it with an unworkable rulemaking process, or else to strip DHS of its relevant powers entirely. No state does this, and it makes no sense—there is nothing to fill the gap. For example, even the quickest version of rulemaking takes weeks. Compare that with the first Safer-at-Home order: it was issued in response to modeling that showed, with approximately *three days'* warning, Wisconsin had to act to halt the uncontrolled spread of COVID-19. (Van Dijk Aff. ¶¶ 19–21 Ex. A.) That is why every state vests these powers in an executive agency with the flexibility and expertise to find a way through in the moment.

STATEMENT ON ORAL ARGUMENT

If this Court does not summarily deny the petition, oral argument should be set in light of the very significant impact this matter could have on the State.

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[1] Stephen Sorace, *Coronavirus stay-at-home orders: What states have issued directives so far?*, Fox News (Apr. 16, 2020), https://www.foxnews.com/us/coronavirus-stay-at-home-orders-what-states-have-issued-so-far.

BACKGROUND

The accompanying affidavits and exhibits, summarized here, provide a general background on significant aspects of the virus and the response.

I. COVID-19 has rapidly spread across the world, the nation, and Wisconsin.

By now, the basics of COVID-19's spread are well known. In December 2019, the novel strain of coronavirus was detected and became subject to international, national, and state emergencies. Nearly three million people have been diagnosed with COVID-19 worldwide, and over 200,000 people have died.[2] COVID-19 has proven capable of rapid exponential growth: for example, on April 1, 2020, there were 215,000 cases in the U.S., but a mere 20 days after that the number had more than tripled.[3] As of April 24, 2020, COVID-19 has claimed the lives of over 50,000 Americans.

Wisconsin has felt those effects: the virus rapidly spread between March 15, when the State had 32 confirmed cases, but no deaths, to today, with approximately 5,911

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[2] *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University*, Johns Hopkins University & Medicine, https://coronavirus.jhu.edu/map.html (last visited Apr. 26, 2020).

[3] Centers for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), *Cases of Coronavirus Disease (COVID-19) in the U.S.*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last updated Apr. 24, 2020).

confirmed cases and 272 deaths.[4] While Wisconsin has found success in flattening the curve, COVID-19 continues its threat. For example, well over 100 of the most recently confirmed cases are linked to outbreaks at three Green Bay meat packing plants.[5] And COVID-19 cases have now been confirmed in 66 of Wisconsin's 72 counties. Brown County, for example, now has over 700 confirmed cases; Rock County has over 150; and Waukesha County has nearly 300.[6]

II. Medical facts about COVID-19's spread and virulence.

SARS-CoV-2, the virus that causes coronavirus disease 2019 (COVID-19), is highly transmissible via respiratory droplets released when an infected person coughs, sneezes, speaks, or breathes. Infectious particles—which may be shed in large quantities by someone with no symptoms at all—can remain in the air and on surfaces for an extended period, but the precise duration remain unknown. (Westergaard Aff. ¶¶ 5, 11, 15.)

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[4] Wis. Dep't of Health Servs., *COVID-19 (Coronavirus Disease),* https://www.dhs.wisconsin.gov/covid-19/index.htm (last revised Apr. 27, 2020); Wis. Dep't of Health Servs., *COVID-19: Wisconsin Deaths*, https://www.dhs.wisconsin.gov/covid-19/deaths.htm (last revised Apr. 27, 2020).

[5] Chris Conley, *Saturday Update: New COVID-19 cases trend upward*, WSAU (Apr. 25, 2020, 3:48 PM), https://wsau.com/news/articles/2020/apr/25/saturday-update-new-covid-19-cases-trend-upward/1011106/.

[6] The only counties without confirmed cases as of April 27, 2020, were Burnett, Forest, Langlade, Lincoln, Pepin, and Taylor Counties. Wis. Dep't of Health Servs., *COVID-19: County Data*, https://www.dhs.wisconsin.gov/covid-19/county.htm (last revised Apr. 27, 2020).

While precisely how easily COVID-19 is transmitted also remains unknown, some estimates suggest that every person infected with the virus will infect 2.2–3.6 other people. That rate of transmission is significantly higher than the seasonal flu's rate of 1.3, and is comparable to or higher than the estimated rate of 1.4–2.8 for the 1918 novel influenza pandemic—the deadliest communicable disease epidemic in modern history during which 50 million people died worldwide. (Westergaard Aff. ¶¶ 13–14.)

Individuals with COVID-19 report a wide range of symptoms including fever, cough, and shortness of breath or difficulty breathing. Symptoms can appear in as few as two days or as long as 14 days—although some infected people show no symptoms at all. Unsurprisingly, asymptomatic transmission presents an extraordinary challenge for slowing the spread of the novel disease. And COVID-19 is unlike seasonal influenza and other known coronavirus species, for which many people have developed a protective immune response. Rather, the entire population is likely susceptible to infection, a fact that contributes to its rapid global spread. (Westergaard Aff. ¶¶ 6–8; Van Dijk Aff. ¶¶ 3, 5, 13.)

A significant subset of patients with COVID-19 develop severe disease, which may require hospitalization, intensive care, and mechanical ventilation. Risks are highest for older persons, with fatality among persons older than 85 ranging from 10–27%. The overall fatality rate has been reported as 1–2%. The estimated case fatality rate of seasonal influenza is approximately 0.1%. Based on the available data, the estimated COVID-19 case-fatality rate thus is 10–20 times higher. (Westergaard Aff. ¶¶ 9, 19; Van Dijk Aff. ¶ 4.)

III. Mitigation and containment strategies are used to control the spread of the virus, together with models that predict the rapidity of its spread.

Public health experts refer to "containment" as a strategy for responding to communicable diseases such as COVID-19. Containment is resource intensive and requires a well-organized health care system and trained staff. Successful containment requires *identifying* all cases of disease, *isolating* affected patients, and *quarantining* people who have had close contact with infected individuals. The objective is to prevent continued transmission within a population and minimize the burden on health care resources. Contact tracing by public health personnel is the primary disease containment activity needed for containment at the local community level. (Westergaard Aff. ¶ 25; Van Dijk Aff. ¶ 10.)

When containment is not possible, "mitigation" strategies become necessary. The presence of community transmission is significant in that regard: it refers to individuals testing positive for COVID-19 without exposure to a known case and without travel to a location where there is known community spread. DHS first observed community spread of COVID-19 in Wisconsin on or about March 15. Community transmission continues in Wisconsin. As of April 27, 2020, 6,081 cases have been reported, covering 66 out of 72 Wisconsin Counties. (Westergaard Aff. ¶ 30; Van Dijk Aff. ¶¶ 11–12.)

Mitigation is a set of strategies involving larger-scale, community-wide interventions aimed at delaying or slowing the exponential growth of a pandemic when the scope and speed of disease spread makes local containment impossible. Wisconsin, and much of the world, has found itself in that situation. Mitigation measures—like school closures and social distancing for workplaces and gatherings—have been

a core component of the mitigation tactics developed by the CDC and global health agencies. A central premise is that physical distance (i.e., at least 6 feet) between individuals who are infected and those who are susceptible is key to bringing its spread under control. (Westergaard Aff. ¶¶ 26–27; Van Dijk Aff. ¶¶ 12–13.)

Virus transmission inside homes and enclosed public spaces occurs frequently and easily among people with asymptomatic infection. Limiting close contact between members of *different* households is a key strategy for interrupting chains of transmission within communities. Self-isolation, closures of schools and universities, restrictions on gatherings, and safer-at-home orders have been shown to be effective. (Westergaard Aff. ¶¶ 37–38; Van Dijk Aff. ¶¶ 13–14.)

A commonly used measure for understanding the speed and trajectory of an epidemic is the "doubling rate": the number of days it takes for the number of confirmed cases to double. For example, during early March, DHS observed the doubling rate in Wisconsin to be 3.4 days. This doubling rate was comparable to what was observed in countries with rapidly accelerating case counts, such as Italy and Spain. (Westergaard Aff. ¶ 31; Van Dijk Aff. ¶ 18.)

Analyses and models can help predict the likely trajectory of communicable disease epidemics, incorporating basic assumptions about the transmissibility of the virus, duration of infectiousness, and population. For example, researchers predicted that, in the absence of any mitigation efforts, COVID-19 would result in approximately 510,000 deaths in Great Britain and 2.2 million deaths in the United States. (Westergaard Aff. ¶¶ 32–33; Van Dijk ¶ 16.) For Wisconsin, DHS's Office of Health Informatics has developed models incorporating the data observed in Wisconsin during the first several weeks of March. These models showed that,

without proper countermeasures, the number of cases and deaths in Wisconsin would have reached 1,200 cases by March 25 resulting in 10–87 deaths; 5,000 cases by April 1 resulting in 100–350 deaths; and 22,000 cases by April 25 resulting in 440–1,500 deaths. (Westergaard Aff. ¶ 35; Van Dijk Aff. ¶ 18.)

IV. COVID-19's impact on medical systems, the State's emergency response, and the significance of flattening the curve.

Experience with COVID-19 shows that many infected individuals will require hospitalization—roughly one-fourth of confirmed cases—including treatment in intensive care units (ICU) and mechanical ventilation. Once hospitalized, the CDC estimates that the length of time patients spend there ranges from 8 days for a non-ICU stay, to 10 days for an ICU stay with no ventilator, to 16 days for an ICU stay with a ventilator. (Van Dijk Aff. ¶¶ 4, 7–8.) Accordingly, unchecked transmission of the virus would require enough hospitalizations to overwhelm the State's healthcare system.

Wisconsin has around 11,000 hospital beds, most of which are occupied under normal circumstances. Further, hospital capacity is not spread evenly across the state, with some areas reliant on a single critical access hospital. Shifting patients can ease the burden, to an extent, but that would become impossible if the virus were to spread out of control. Then, hospitals would have to ration care and available ventilators, and might also be unable to treat other conditions such as heart failure or violent trauma. And uncontrolled spread would exhaust hospitals' supply of Personal Protective Equipment (PPE), and healthcare workers would be at a significant risk of contracting COVID-19, further limiting the healthcare system's capacity to treat

new cases. (Van Dijk Aff. ¶¶ 8, 25–26; Westergaard Aff. ¶¶ 23–24.)

In response to this looming crisis, Governor Evers designated DHS as the agency leading the State's response, and authorized the Adjutant General to activate the Wisconsin National Guard. On March 16, the State Emergency Operation Center (SEOC) moved its status to Level 1 and began mobilizing the resources of state government and partners around the State to confront the crisis. State employees—including public health physicians, epidemiologists, public health educators, statisticians, logistics specialists, project managers, National Guard servicemembers, human resource specialists, IT professionals, procurement and accounting staff, and more—are working each day to coordinate and execute the State's response. Ten taskforce teams focus on immediate response efforts related to isolation facilities, hospital surge planning, PPE procurement and logistics, laboratory capacity and specimen collection, contact tracing and surveillance, and much more. (Van Dijk Aff. ¶¶ 17, 22–23.)

This framework is essential to responding to an ever-evolving pandemic: for example, since March 20, 2020, at least 127 outbreaks of the virus have been reported in essential businesses and assisted living facilities throughout the state. While helping keep those outbreaks in check, DHS also is building the capacity and infrastructure necessary to transition away from mitigation strategies. But none of that would be possible without Wisconsinites' efforts to "flatten the curve"—including through the implementation and extension of Safer-at-Home. That is essential not only to avoid overwhelming hospital capacity, but also to diminish transmission of the virus enough to allow the State to responsibly move from mitigation to containment. (Van Dijk Aff. ¶¶ 23–24, 26–27, 30; Westergaard Aff. ¶¶ 22–24.)

To implement an effective containment strategy, the State must rapidly expand public health resources and capacity to allow for more expansive testing, tracing and isolation of confirmed cases, and sophisticated surveillance of the virus's continued spread in order to quickly respond to new outbreaks. Without the resources and infrastructure to carry out an effective containment strategy—something the State is currently building up—and so long as community transmission of the virus is widespread, lifting the State's current mitigation strategies would create a surge in infections and erase the hard-fought success in flattening the State's curve. (Van Dijk Aff. ¶¶ 29–31, 33, 40, 42–43 Exs. C–E; Westergaard Aff. ¶ 25.)

V. Safer at Home Orders, Badger Bounce Back, and related orders.

Wisconsin Governor Tony Evers and DHS, in cooperation with various other agencies, quickly took action to combat COVID-19. Beginning in mid-March 2020, Wisconsin (like many states throughout the nation) took a series of incremental but rapid steps to stem the uncontrolled spread of the virus.

On March 12, Governor Evers issued Executive Order 72, declaring a public health emergency in Wisconsin. Then, on March 16, DHS Secretary-Designee Palm limited mass gatherings of 50 people or more; and on March 17, limited mass gatherings of 10 people or more, both with exceptions. (Walsh Aff. Exs. 3, 5–7, 15.)

Shortly thereafter, on March 22, data shared with DHS showed that COVID-19 cases would soon exponentially grow and exceed hospital capacity without the imposition of mitigation strategies in the following two or three days. That meant that there was a window of only two to three days for significant mitigation measures to avoid an unsustainable

surge of cases. Accordingly, on March 24, at the direction of Governor Evers, DHS issued the "Safer at Home Order." (Walsh Aff. Ex. 15; Van Dijk Aff. ¶¶ 17, 19–21; Westergaard Aff. ¶ 36.)

The first Safer-at-Home Order instructed Wisconsin citizens to stay at home until April 24, with certain exceptions for essential activities and businesses. At that point, safer-at-home emergency orders had already been issued in many other states across the country, including in California, Delaware, Hawaii, Illinois, Indiana, Louisiana, Michigan, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Washington, and West Virginia.[7]

Wisconsin's Safer at Home order most closely paralleled Ohio's, issued two days earlier.[8] Like in Ohio and many other states, Wisconsin's approach followed the advice of over 100 of the nation's most prominent infectious disease scientists, who in mid-March advised immediate action, including "[e]nforced social distancing measures" through "closing or severely limiting all non-essential businesses."[9] Like many other safer-at-home strategies, Wisconsin's

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[7] *See* The Council of State Governments, *COVID-19 Resources for State Leaders – Executive Orders*, https://web.csg.org/covid19/executive-orders/ (last visited Apr. 28, 2020).

[8] Ohio Governor Mike DeWine, *DIRECTOR'S STAY AT HOME ORDER re: Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity* (Mar. 22, 2020), https://governor.ohio.gov/static/DirectorsOrderStayAtHome.pdf.

[9] Jocelyn Kaiser, *Disease experts call for nationwide closure of U.S. schools and businesses to slow coronavirus*, Science (Mar. 16, 2020, 2:55 PM), https://www.sciencemag.org/news/2020/03/infectious-disease-experts-call-nationwide-closure-us-schools-and-business-slow#.

established a default requirement that individuals stay at home, that schools and many other public places close, and that non-essential businesses cease in-person activities.

At the same time, Safer-at-Home provided many exceptions and ways to seek clarification on its exceptions. For example, the order permitted individuals to leave their homes to perform essential activities, including obtaining health and safety-related materials, supplies, and engaging in outdoor activity. It further maintained some operations for essential and non-essential businesses, and allowed for essential travel, including travel to perform essential functions and care for others, among other exceptions related to infrastructure and similar needs. It made clear that if a business not covered believed it should be, it could apply to the Wisconsin Economic Development corporation (WEDC). And it ensured that non-essential businesses could maintain minimum basic operations. (Walsh Aff. Ex. 15.)

In short order, Wisconsin became one of at least 42 states to issue a safer-at-home order, and one of at least 46 states to restrict non-essential businesses.[10] And although it did not eliminate COVID-19's spread across Wisconsin, the order had a dramatic, positive effect. For example, at the time of its issuance on March 24, the number of Wisconsinites testing positive for COVID-19 was doubling every 3.4 days; by April 14, that rate of doubling had fallen

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[10] Stephen Sorace, *Coronavirus stay-at-home orders: What states have issued directives so far?*, Fox News (Apr. 16, 2020), https://www.foxnews.com/us/coronavirus-stay-at-home-orders-what-states-have-issued-so-far; Erin Schumaker, *Here are the states that have shut down nonessential businesses*, ABC News (April 3, 2020, 6:58 PM), https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806.

to about every 12 days. (Westergaard Aff. ¶¶ 31. 37–38; Van Dijk Aff. ¶¶ 15, 27.)

However, as March progressed, and the expiration of Safer-at-Home approached, the available data showed that lifting Safer-at-Home after one month would have led to a renewed surge in cases that would have overwhelmed the State's hospital system, especially given the still-developing ability for Wisconsin to carry out effective containment strategies. In contrast, the analyses showed that leaving Safer-at-Home in place, combined with increased testing, tracing, and isolation capacity, would go far in protecting Wisconsin from overwhelming its ICU and ventilator resources. (Van Dijk Aff. ¶¶ 29–31 Ex. B.)

So, on April 16, DHS issued Wisconsin's second Safer-at-Home order.[11] This order, effective through May 26, 2020, follows the same general framework while relaxing some restrictions so that more businesses may reopen and more activities may resume. (Walsh Aff. Ex. 1.) With that Safer-at-Home extension, Wisconsin became one of multiple states to extend a safer-at-home order into mid-to-late May.[12] Most notably, our neighboring states of Illinois and Michigan have done so. And importantly, the renewed order's timeframe tracks the guidance—including that often relied upon by the White House—for when reopening may be sufficiently safe. For Wisconsin, the guidance is that the earliest the State

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[11] Unless otherwise indicated by the context, this memorandum generally uses Safer-at-Home to refer to those orders collectively.

[12] While many other states who approach expiration of safer-at-home orders continue to discuss extensions, and other states have indefinite orders, safer-at-home orders have already been extended into mid-to-late May in states including Illinois, Michigan, New York, and Vermont.

should begin to lift its social distancing is "May 18 to May 24."[13]

The same day that Safer-at-Home was renewed, President Trump unveiled his recommended guidelines for states to use in reopening their states and economies.[14] The guidelines suggest a three-phrase reopening approach, with progressively relaxed social distancing. Each phase recommends a 14-day period of a "downward trajectory" of COVID-19 cases to advance to the next phase. Wisconsin's Badger Bounce Back plan, issued just a few days later, on April 20, closely follows those recommendations. (Walsh Aff. Ex. 16.) It calls for a three-phase approach to reopen Wisconsin, with increasingly large gathering sizes and more activities at each step, and ending with the resumption of all gatherings and business activity. (Walsh Aff. Ex. 16; Van Dijk Aff. ¶ 36; Westergaard Aff. ¶ 40.)

As with the President's guidelines, Wisconsin's plan is to move through the phases by demonstrating progress towards the following goals: a downward trajectory of positive COVID-19 tests as a percent of total tests within a 14-day period; a downward trajectory of COVID-19 and

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[13] University of Washington's Institute for Health Metrics and Evaluation (IHME), *COVID-19: What's New for April 22, 2020*, http://www.healthdata.org/covid/updates (last visited Apr. 27, 2020). That timeline also is similar to ones this Court has set for the suspension of various measures to protect the judiciary.

[14] *White House Unveils Coronavirus Guidelines on Path To Reopening the Country*, NPR (Apr. 16, 2020, updated 7:21 PM), https://www.npr.org/2020/04/16/833451041/watch-white-house-to-share-coronavirus-guidelines-on-a-path-to-reopening-the-cou; *see also* White House, *Guidelines for Opening up America Again,* https://www.whitehouse.gov/openingamerica/ (last visited Apr. 27, 2020).

influenza-like symptomatic cases reported within a 14-day period; and advancements in testing, tracing, and tracking. Importantly, these goals are just that, goals, not requirements. (Van Dijk Aff. ¶¶ 36–41.)

To build in further flexibility, Badger Bounce Back also provides that DHS, in consultation with the WEDC, "shall issue additional orders to reduce restrictions on certain businesses or sectors if it is determined that removing the restrictions will have minimal impact" on making progress toward the goals. New phases, and interim orders reducing restrictions on businesses or sectors, may be issued prior to the expiration of Safer at Home, if appropriate under the articulated criteria. (Walsh Aff. Ex. 16.)

Indeed, on April 27, DHS issued another order continuing down the path to reopening, called Turn the Dial. That order expands minimum basic operations of businesses to include curb-side drop-off of goods or animals to be serviced or cared for by the business, and also loosens restrictions on outdoor recreational rentals, among other businesses. (Van Dijk Aff. ¶ 45 Ex. F.) The Governor's office is actively working with Wisconsin's Department of Workforce Development to identify additional sectors that are most in need of loosened restrictions in the near future and is working with DHS to accomplish those goals consistent with public health.

VI. Safer-at-Home and the related orders are working and need to remain in place for the near future to protect Wisconsin from a surge of cases.

Importantly, Safer-at-Home has succeeded in flattening the curve and avoiding the most alarming potential paths that Wisconsin faced as COVID-19 began its

spread. For example, Wisconsin's hospitals, which before Safer-at-Home were expected to far exceed capacity, have been able to weather the initial surge of cases. (Van Dijk Aff. ¶¶ 27, 29, 31.)

Researchers at the University of Wisconsin's Global Health Institute estimated that, by its initial April 24 expiration date, the Safer-at-Home order had prevented 55,000 cases and 2,200 deaths. Analyses prior to the issuance of the Safer-at-Home extension showed that, without any intervention, COVID-related hospitalizations and ICU admissions would have reached 94,200 and 22,600, respectively, by May 1. That same guidance estimates that, with Safer-at-Home in place for one additional month, these numbers are expected to be further reduced to 13,100 and 4,800, respectively: that is an enormous difference of 17,800 ICU admissions. Consistent with that, data show that states that have implemented measures similar to the Safer-at-Home order see significantly lower numbers of cases than those states that have no such orders. (Van Dijk Aff. ¶¶ 27–31.)

This progress is promising but fragile. For example, Johns Hopkins University's analysis shows that ending the Safer at Home order prematurely would produce a large peak in cases requiring hospitalization that exceeds current capacity. If the order is lifted and not replaced with a (still developing) containment strategy, the DHS modeling data suggests that peak hospitalizations in Wisconsin could exceed 25,000 patients during the summer—far exceeding capacity. (Westergaard Aff. ¶ 39; Van Dijk Aff. ¶¶ 29–31 Ex. B.) But leaving Safer-at-Home in place for another month, with a step-by-step winding down, combined with the development of testing, tracing, and isolation capacity, will go far in protecting Wisconsin from overwhelming its ICU

and ventilator resources as we move forward. (Van Dijk Aff. ¶¶ 29, 31.)

REASONS THE PETITION AND MOTION SHOULD BE DENIED

As a threshold matter, the petition for an original action should be denied because it includes complex factual topics unsuitable for resolution by this Court in an original action. And there is a related problem: the petitioners lack standing to bring most of their complaints. Legislators suffer no cognizable injury when another officer allegedly acts arbitrarily or outside his or her authority. Only a private litigant may bring such a claim in a proper trial court action, alleging specific injuries stemming from specific acts.

Even if the Court were to reach the merits, the petition would fail. Where, as here, there is an undisputed "emergency" and an unquestioned need to "control [a] communicable disease[ ]," Wis. Stat. § 252.02(6), the statutes vest broad powers in DHS to combat this rare statewide threat. As for petitioners' rulemaking claim, it ignores how the DHS pandemic statutes work and is incompatible with the separation of powers. And the petitioners do not even begin to show that the Safer-at-Home order is arbitrary or unsupported by expert guidance. To the contrary, the facts show that the orders have been effective and, by extension, that the statutes enacted for this very purpose are working as designed. Far from being arbitrary, the orders provide reasonable measures designed to slow the spread of COVID-19 while still allowing basic societal needs to be met and, increasingly, providing flexibility for people and businesses in more areas.

The petition's requests are incorrect legally and misguided practically, and that is especially risky given

Wisconsin's fragile circumstances. This Court should deny the petition and motion.

I. This Court should decline to exercise original jurisdiction because the claims are unsuitable for an original action.

As a threshold matter, the petition is unsuitable for an original action. It raises issues involving on-the-ground facts—something this Court does not develop in an original action—and, further, the petitioners lack standing to raise most of their complaints.

Beyond that, the petitioners' request for an urgent decision from this Court is in significant part a problem of their own making: this case might have been filed when DHS first began issuing emergency orders, but it was not. Further, the timing of the request being made now—and the immediate relief sought—would severely impact an ongoing pandemic response. A decision of such importance should not be rushed.

A. Original jurisdiction is inappropriate because complex factual development would be required if it proceeded past the pleading stage.

This Court is rightfully hesitant to assume original jurisdiction over cases that require complicated factual development. *See In re Exercise of Original Jurisdiction*, 201 Wis. 123, 128, 229 N.W. 643 (1930) ("This court will, with the greatest reluctance, grant leave for the exercise of its original jurisdiction . . . where questions of fact are involved."); *see also* Sup. Ct. Internal Operation Procedures (IOP) § III(B)(3).

If it proceeded to the merits, this case would be highly fact dependent. For example, the petitioners' theories, if

pursued past pleadings, implicate statutes that turn on what is "necessary." Scientists, doctors, and the large majority of states have concluded that measures like DHS's are necessary. Even theoretically coming to a contrary conclusion would require complex analyses of the circumstances in light of epidemiology and intertwining economic factors. There would be a similar factual component to show that DHS has acted arbitrarily. The petitioners would need to *prove* that, not merely assert it. Even the administrative rulemaking claim has a factual component: in the real world, the petitioners' proposal would simply not work in a quickly-moving pandemic.

The need for factual development is highlighted by the petitioners' filings, which rely on alleged facts drawn from over a dozen press releases, news stories, and white papers.

In sum, accepting this original action and not dismissing it as a matter of law would entangle the Court in complex medical factual issues, among others.

B. Original jurisdiction is inappropriate because the petitioners lack standing to pursue claims that DHS acted arbitrarily and outside its statutory authority.

The petitioners also lack standing to bring most of their complaints. That poses a legal and practical problem. A party must have standing to ensure that its claim presents a concrete, justiciable controversy for resolution. Specifically, a party has no standing based on "a point not affecting his rights." *Moedern v. McGinnis*, 70 Wis. 2d 1056, 1063, 236 N.W.2d 240 (1975). Rather, a challenger must show that the agency decision "directly causes injury to the interest of the petitioner" that is "recognized by law." *Fox v. Wis. Dep't*

of Health & Soc. Servs., 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983).

The petitioners cannot establish they suffered an injury to their legally protected interests for most of their allegations. They allege no cognizable harm to the Legislature resulting from claims that (vaguely described) pieces of Safer-at-Home exceed DHS's statutory authority under Wis. Stat. § 252.02 or are arbitrary and capricious.[15] The petitioners assert only that private businesses and individuals have been harmed by Safer-at-Home. Injuries to private entities are not injuries to legislators in their official capacities.

This is not merely a technical objection. When a party has not itself suffered injury, it cannot sharpen the facts and legal issues enough to permit a court to resolve a concrete controversy. That problem manifests itself here. It is altogether unclear which specific pieces of Safer-at-Home would be permissible under any particular part of the petitioners' statutory and arbitrariness theories, and why. Closely analyzing whether DHS's statutory powers empower it to control particular "gatherings" or are "necessary," or whether the Safer-at-Home orders are "arbitrary," would turn on the facts specific to each particular provision. All of that is lacking, precisely because petitioners are not themselves affected by the orders.

This standing defect further counsels against accepting original jurisdiction. And, prudentially, this Court also should hesitate before agreeing to serve as the

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[15] The only claim for which the petitioners arguably have standing is the rulemaking one. That claim may be covered by the rule in *Panzer v. Doyle*, 2004 WI 52, ¶ 42, 271 Wis. 2d 295, 680 N.W.2d 666.

petitioners' default court of first resort. Like any litigant, the petitioners should proceed through the court system. In any event, it is more appropriate to let disputes like this either resolve themselves through the political process—including through legislation—or, failing that, through a concrete controversy by a proper plaintiff in the ordinary trial court and appellate process.

II. The petition and motion should be denied because the claims would fail on their merits.

Even if this Court were to accept jurisdiction, the claims should be dismissed as a matter of law.

A. The language, context, and history of Wis. Stat. § 252.02 make clear that DHS was authorized to issue Safer-at-Home.

It is well-accepted that statutes like Wis. Stat. § 252.02 provide broad grants of authority to respond to a very rare and narrow type of crisis—the very one we now face with a rapid spread of a novel communicable disease. These kinds of provisions appear in statutory codes throughout the country. To respondents' knowledge, every state operates under laws vesting these duties in a department of health or similar executive agency, and the petitioners have not suggested otherwise. These laws are designed to provide an executive agency the tools to act quickly and with flexibility based on circumstances on the ground. Wisconsin's version of these laws, in section 252.02, does just that. It gives DHS flexible powers to address the specific threat of a rapidly spreading disease. That makes sense: this Court has long acknowledged the commonsense proposition that public health officials must be able to react swiftly and effectively in the face of an imminent or existing crisis.

As it pertains to the pandemic here, the statutes contain three independent powers that authorize measures found in Safer-at-Home: Section 252.02(6) permits DHS to "authorize and implement all emergency measures to control communicable diseases." Section 252.02(4) allows the agency to "issue orders . . . for the control and suppression of communicable diseases" that "may be made applicable to the whole . . . of the state[ ]." And Section 252.02(3) authorizes DHS to "close schools and forbid public gatherings . . . to control outbreaks and epidemics."

Petitioners' approach to these statues is not only atextual, it also would lead to absurd, and dangerous, results. This is exactly the time when pandemic statutes should apply with their full force.

1. The history of Wis. Stat. § 252.02 reflects a longstanding grant of police power to respond to life-threatening epidemics.

Responding to a pandemic is a quintessential exercise of the police power. "The police power of the state is the inherent power of the government to promote the general welfare." *In Interest of Reginald D.*, 193 Wis. 2d 299, 308, 533 N.W. 2d 181 (1995) (quoting *State v. Interstate Blood Bank, Inc.*, 65 Wis. 2d 482, 490, 222 N.W.2d 912 (1974)). "It covers all matters having a reasonable relation to the protection of the public health, safety or welfare." *Id.*

Unsurprisingly, given the need to "act immediately and summarily in cases of . . . contagious and malignant diseases, which are liable to spread and become epidemic," this Court has long recognized that "under the police power" the legislature may "rightly grant to boards of health authority to employ all necessary means to protect the public health." *Lowe v. Conroy*, 120 Wis. 151, 97 N.W. 942, 944 (1904). This makes sense, given the need for

"[e]xecutive boards or officers, who can deal at once with the emergency under general principles laid down by the lawmaking body." *State ex rel. Nowotny v. City of Milwaukee*, 140 Wis. 38, 121 N.W. 658, 659 (1909); *see also Dougan v. Bd. Of Com'rs of Shawnee County*, 141 Kan. 554, 43 P.2d 223 (Kan. 1935) ("To be of real value health authorities must have authority to take such action as is necessary to prevent a health menace which is reasonably likely to occur under the facts and circumstances applicable thereto.").

Following these principles, Wisconsin—like every other state—has given its health officials power to swiftly address epidemics. For over one hundred years, Wisconsin's public health agency has had multiple tools for that purpose, including longstanding authority to issue orders and take "necessary" actions. 1887 ch. 452 § 2. Instead of retreating from that approach, Wisconsin has further pursued it. For example, in 1981, Wisconsin further clarified the law by making the power to "issue orders" explicitly independent from promulgating rules and, *in addition*, added a new provision that empowers DHS to "authorize and implement all emergency measures to control communicable diseases." 1981 ch. 281 § 21; Wis. Stat. § 143.02(4), (6) (1981). Thus, since 1887, and increasingly so in recent years, DHS's authority to address a pandemic has been a central aspect of Wisconsin's public health laws.

That core feature is now codified in Wis. Stat. § 252.02, which gives DHS "broad statutory authority . . . to control communicable diseases." Wis. Leg. Council, *Extension and Expiration of the Public Health Emergency and the "Safer at Home" Orders Related to COVID-19*, Issue

Brief (April 2020).[16] Reflecting the comprehensive and flexible nature of this authority, section 252.02 sets forth each of DHS's powers and duties as a "stand-alone category, separate and apart from the remaining categories, containing no limitations beyond those expressly written." *Moya v. Aurora Healthcare, Inc.*, 2017 WI 45, ¶ 21, 375 Wis. 2d 38, 894 N.W. 2d 405. Those sections provide ample authority for Safer-at-Home.

2. DHS was authorized to issue Safer-at-Home under the plain language of Wis. Stat. § 252.02.

To reject the petitioners' claim, the Court need look no further than the plain language of the statute in context.

Like all statutes, Wis. Stat. § 252.02 "means what it says." *Emp'rs Mut. Fire Ins. Co. v. Haucke*, 267 Wis. 72, 76, 64 N.W.2d 426 (1954). "[S]tatutory interpretation 'begins with the language of the statute,'" and where the "meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). That language is generally "given its common, ordinary and accepted meaning." *Id.* ¶ 45. "Context is important to meaning," as "is the structure of the statute in which the operative language appears." *Id.* ¶ 46. And where the statutory language "has a plain and reasonable meaning on its face," canons of statutory construction "are inapplicable."

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[16] The specific provisions of Wis. Stat. § 252.02 control the result. But it is worth noting that the result also is consistent with the general structure of chapter 250, which sets up the responsibilities of Wisconsin's public health system. Wis. Stat. §§ 250.03–.04. That chapter establishes DHS as the "state lead agency for public health," with "all powers necessary to fulfill the duties prescribed in the statutes." Wis. Stat. § 252.03(1)(b); Wis. Stat. § 252.04(2)(a).

State v. Peters, 2003 WI 88, ¶ 14, 263 Wis. 2d 475, 665 N.W. 2d 171.

Here, the meaning of the provisions in section 252.02 is plain: DHS has the power to take direct action to control communicable diseases, just as it did through Safer-at-Home. Section 252.02(6) gives DHS expansive authority to respond to a rare public health crisis like COVID-19: it can "authorize and implement *all* emergency measures necessary to control communicable diseases." In addition, Safer-at-Home is independently authorized under section 252.02(4), which provides DHS with multiple avenues "for the control and suppression of communicable diseases." And finally, many of Safer-at-Home's provisions also fall under section 252.02(3), which empowers DHS to "close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics."

a. Section 252.02(6) empowers DHS to "authorize and implement" Safer-at-Home as an "emergency measure necessary to control communicable diseases."

Most broadly, DHS has the power to "authorize and implement all emergency measures necessary to control communicable diseases." Wis. Stat. § 252.02(6). The "common, ordinary" meaning of these words is that the agency can take suitable actions when necessary to control COVID-19—including temporarily limiting individuals' movements and restricting businesses from certain operations, especially where, as here, a novel and deadly virus is threatening to spiral out of control.

To "authorize" means to "give legal force," "make legally valid," "give formal approval to," or "sanction." Authorize, *Oxford English Dictionary* (2d ed. 1989) ("*OED*"); *see also* Authorize, *Black's Law Dictionary* (11th ed. 2019). "Implement" means "[t]o complete, perform," or "carry into

effect." Implement, *OED*. And "measures" means "[a] plan or course of action intended to attain some object." Measure, *OED*. Hence, the plain language of section 252.02 permits DHS to give legal force, and carry into effect, actions required to control and suppress the spread of the particular pandemic we face.

Under the rare circumstances presented by COVID-19, this language necessarily includes the authority to impose limits on certain social and business interactions. The statute authorizes "all" emergency measures "necessary" to respond to the facts on the ground. The term "'all' [as a modifier] suggests an expansive meaning because 'all' is a term of great breadth.'" *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) (alteration in original) (citation omitted); *cf. United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting Webster's Third New International Dictionary 97 (1976)). That doesn't make the statute ambiguous; it simply makes the grant of power explicitly expansive to address just the type of rare circumstances we currently face, where a novel and deadly virus is easily spread, including by people who show no symptoms. *See Penn. Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" (citation omitted)). Put simply, "general words . . . are to be accorded their full and fair scope." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (*Reading Law*) 101 (2012).

The petitioners urge this Court to rewrite section 252.02(6) as a narrow power to hand out permission slips allowing out-of-state doctors to practice in an emergency, or to authorize a hotel "to serve as a field hospital." (Pet'r Mem. 54.) "But this interpretation runs counter to basic rules of grammar." *HUD v. Rucker*, 535 U.S. 125, 131 (2002); *cf.*

Forshee v. Neuschwander, 2018 WI 62, ¶ 63, 381 Wis. 2d 757, 914 N.W.2d 643 (Kelly, J., concurring) (applying "a little grammatical elbow-grease" to discern plain meaning). The law does not state that DHS may "authorize *others* to implement measures," it allows *DHS* to authorize and implement measures. Wis. Stat. § 252.02.[17] Under the statute's plain language, DHS may give legal force to suitable *actions* that it then carries out. The law requires no intermediary that DHS must go through, and this Court should decline the invitation to write one in—doing so would be an outright rejection of the plain text and would yield an absurd and inadequate way for a state to administer an emergency response to a pandemic.

Along similar lines, the petitioners ask this Court to simply strike the term "all," and substitute it with a patchwork of limitations drawn from other parts of the law. That fails for a simple reason: since the meaning of section 252.02(6) is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). There is no occasion to substitute in other subsections.

That is especially true where, as here, subsection (6) postdates those other subsections and, further, confers broad emergency powers, whereas the other sections cover

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[17] The petitioners support their reading by cherry-picking definitions from Black's Law Dictionary that more appropriately apply to authorizing *people*. Authorize, *Black's Law Dictionary* (11th ed. 2019) ("[H]e authorized the employee to act for him."). And it omits the one definition that most closely reflects the meaning of the term in Wis. Stat. § 252.02—"to sanction." *Id.* In fact, the other dictionary the petitioners rely on provides separate definitions for authorizing things as opposed to people. Authorize, *OED*.

scenarios requiring no emergency. There would have been no reason for the Legislature to add this separate and broad subsection just to have it be meaningless. It clearly isn't. For example, section 252.02(6) allows DHS to take necessary *emergency* measures that go beyond those listed in section 252.02(3) (which apply regardless of an emergency or order), and without being subject to the formal issuance of an order under section 252.02(4) (which are broader than subsection (3) but require no emergency). Each subsection has a somewhat different scope—cabined by an emergency, types of places, or a formal order, respectively. However, in the context of an epidemic, it is unsurprising that DHS's ability to take necessary actions fits comfortably under more than one of its powers.

The petitioners' reading would upend meaning of the statutory terms: instead of an expansive grant of power to carry out "*all* . . . measures necessary," DHS would be limited to the narrowest possible procedures that can be found anywhere else in the statute, and in a subsection that predates subsection (6), to boot. Rather, given that the Legislature choose to place "varying parameters on each category" in section 252.02, there is no reason to diverge from the plain text of the statute. *Moya*, 375 Wis. 2d 38, ¶ 25 (declining to read limitation into "any person authorized in writing by the patient" based on contours of other categories). "Put simply, had the legislature intended to place parameters of the kind" the petitioners suggest, "it would have done so." *Id.*

The canon of constitutional avoidance gets the petitioners no further. Indeed, as the United States Supreme Court has repeatedly observed, where the meaning of the law is plain, even "the canon requiring texts to be so construed as to avoid serious constitution problems has no application," "[n]o matter how severe the constitutional

doubt." *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 471 (2001). Moreover, the petitioners plead no bona fide constitutional claim so there is nothing to avoid. *See infra* Section II.B & n.24. And, in any event, since the meaning of the law is plain as applied here, that is the end of the inquiry. *Kalal*, 2004 WI 58, ¶ 44.

Other canons likewise get the petitioners nowhere. For example, they observe that statutes do not "hide elephants in mouseholes." (Pet'r Mem. 54.) Fair enough. But there is no mousehole here. The sections governing DHS's ability to respond to a pandemic are situated in the statute governing DHS's core powers—"exactly the sort of place we would expect to find this elephant." *Atl. Richfield Co. v. Christian*, No. 17-1498, 2020 WL 1906542, at *11 (U.S. Apr. 20, 2020). The text confirms expansive authority for DHS to respond to communicable diseases, depending on what that disease presents on the ground; "after all," these powers are the executive branch's "crucial tools" for combating potentially lethal pandemics. *Cf. Christian*, 2020 WL 1906542, at *11.

Of course, DHS's authority under section 252.02(6) is not boundless; the statute provides limits on the agency's power. First, DHS may exercise its authority under Wis. Stat. § 252.02(6) only in an "emergency"—a "serious situation or occurrence that happens unexpectedly and demands immediate action." Emergency, *Webster's Third International Dictionary* (1961).[18] But no one suggests we do

[18] The word "emergency" has been used in Wis. Stat. § 252.02(6) since 1887, well before the separate "state of emergency" law existed. *Compare* 1877 ch. 452 § 2, *with* 1955 Wis. Act 377. *See* Wis. Leg. Reference Bureau, The First 30 Days: The COVID-19 Public Emergency in Wisconsin 2 (Apr. 2020) ("this authority is independent of the governor to declare a state of emergency related to public health"); Wis. Leg. Council, Extension

not presently face that kind of situation in Wisconsin. Second, the statute requires an action be "necessary" for "control[ling]" a communicable disease. Wis. Stat. § 252.02(6). The kinds of measures in Safer-at-Home have been deemed reasonably necessary throughout the country and world. In any event, whether a private party someday might wish to challenge a particular application of these powers as to a specific right, that theoretical claim is not before this Court.

The petitioners fail to show that Safer-at-Home is beyond section 252.02(6), and so their claim should be dismissed.

b. Section 252.02(4) independently authorizes Safer-at-Home as a statewide order issued "for the control and suppression of communicable diseases."

Safer-at-Home also is independently authorized under DHS's power to "issue orders . . . for the control and suppression of communicable diseases . . . made applicable to the whole or any part of the state." Wis. Stat. § 252.02(4). By its plain terms, the standalone powers in section 252.02(4) provide DHS with authority to issue statewide orders to suppress diseases like COVID-19, where the threat may be present anywhere in the State. That is exactly what DHS has done.

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and Expiration of the Public Health Emergency and the "Safer at Home" Order Related to COVID-19 (Apr. 2020) (same).

That provision states, in pertinent part:

> [T]he department 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, localities and things infected or suspected of being infected by a communicable disease and for the sanitary care of jails, state prisons, mental health institutions, schools, and public buildings and connected premises. Any rule *or* order may be made applicable to the whole or any specified part of the state, or to any vessel or other conveyance.

Wis. Stat. § 252.02(4).

On its face, that language vests authority in DHS to do two things: promulgate rules (i.e., long-lasting procedures or decisional guides to be applied consistently to individual circumstances) *or* issue orders (i.e., targeted, often-quick actions addressed to what is actually happening at a given point in time). And it authorizes those orders "for the control and suppression of communicable diseases."[19]

The independent nature of the power to issue orders is confirmed by the statute's use of disjunctive verb phrases. It

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[19] The petitioners assert in a footnote that subsection (4) only applies to "persons, and localities and things infected or suspected of being infected." (Pet'r Mem. 51.) But that reads the "and" out of the subsection: the department may . . . 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, localities and things infected or suspected of being infected by a communicable disease *and* for the sanitary care of jails . . . ." The italicized language in this series allows for orders "for the control and suppression of communicable diseases."

is a fundamental rule of grammar that phrases connected by "or" are to be given a separate meaning where possible. *FCC v. Pacifica Found.*, 438 U.S. 726, 739–40 (1978) ("The words . . . are [written] in the disjunctive, implying that each has a separate meaning."). That is because "[t]he meaning of 'or' is plain: 'or' is a connector of alternative choices in a series." *Hull v. State Farm Mut. Auto. Ins. Co.*, 222 Wis. 2d 627, 638, 586 N.W. 2d 863; *see also Encino Motorcars, LLC v. Navarro*, 584 U.S. ___,138 S. Ct. 1134, 1141 (2018) ("'[O]r' is almost always disjunctive." (citation omitted)).

Under section 252.02(4), "the department may promulgate and enforce rules *or* issue orders." In turn, any "rule *or* order may be made applicable to the whole . . . of the state" "for the control and suppression of communicable diseases." Hence, section 252.02(4) unambiguously gives DHS the power to address COVID-19's spread through rulemaking *or* issuing orders, depending on whether the task is to promulgate a rule that governs future acts or, as here, to take immediate action to address the present circumstances.[20]

Attempting to avoid the plain language, the petitioners again ask this Court to employ a results-first, text-last approach to statutory construction. Indeed, only at the very end of their argument do the petitioners make any effort to confront the actual words of the statute, emphasizing the "explicit" authority to "promulgate and enforce *rules*" under chapter 227. (Pet'r Mem. 52). But the

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[20] The historical context of the law confirms this straightforward reading: the law was clarified in 1981, when the phrase "to issue orders" was added to the first sentence, leaving no doubt that this was intended as an independent power. 1981 ch. 291 § 21.

law *explicitly* does more: it authorizes DHS to issue orders. And the petitioners' claim that Safer-at-Home is a rule because it applies "to the entire State" would make nonsense out of the statute. On its face, the law permits any "rule or order" to apply to the "whole . . . of the state." Wis. Stat. § 252.02(4).

While Wis. Stat. § 252.02(4) is what specifically governs, the result here would be no different if, as the petitioners suggest, "order" and "rule" should be defined by using the definition of "rule" in Wis. Stat. § 227.01(13). Wisconsin Stat. § 227.01(13) defines a "rule" as a regulation, standard, statement of policy, or "general order of general application." Even if this definition of "rule" were read into Wis. Stat. § 252.02(4), DHS's order would remain an order, not a rule. Most basically, Safer-at-Home is not "of general application" in the rulemaking sense.

The petitioners mistakenly assume that Safer-at-Home's applicability to the population as a whole means that it is of "general application." But section 227.01(13) uses "general" in two different ways, requiring rulemaking only for "general order[s] of general application." While an order responding to the pandemic may be a "general order" because it applies to the population as a whole, it is not of "general application" because it responds only to a specific, limited-in-time scenario. This topic is discussed further in part II.B.2. below.

The clear point is to allow orders to be statewide where, as here, the threat is statewide; if the threat were not, then the order likewise would not be. That has nothing to do with rulemaking. It has to do with the authority to

take action based on the scientific and geographical scope of the pandemic.[21]

The power to issue pandemic orders turns on Wis. Stat. § 252.02, including subsection (4). That statute, and not chapter 227, is the specific provision that governs actions to combat a pandemic. And subsection (4) explicitly contemplates two types of acts: "promulgat[ing] rules" *and* "issu[ing] orders." The petitioners' reading would render the choice to use the broadening disjunctive in this sentence completely meaningless. It is beyond dispute that "it is not the function of this court to rewrite the statutes," and the Court certainly should not do so now. *Bank of Commerce v. Waukesha County*, 89 Wis. 2d 715, 724, 279 N.W.2d 237 (1979).

Likewise, canons cited by the petitioners do not advance their argument. They assert that DHS's powers should be cabined by *separate* parts of the law, in section 252.02(3), based on the general/specific canon. (Pet'r Mem. 50). But a more specific statute controls only "where two *conflicting* statutes apply to the same subject." *Return of Property in State v. Jones*, 226 Wis. 2d 565, ¶ 14, 594 N.W.2d 738 (1999); *State v. Dairyland Power Co-op*, 52 Wis. 2d 45, 53, 187 N.W.2d 878 (1971) ("[T]he rule that the more specific governs the general . . . requires more than the mere existence of one general and one specific statute."). Hence,

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[21] The petitioners do not challenge the geographic scope of Safer-at-Home as unsupported, and for good reason. States across the nation have issued state-wide orders, recognizing that the novel and highly-contagious COVID-19 does not respect boundaries and can be present (and can easily spread) even where a person is asymptomatic. (Van Dijk Aff. ¶¶ 13–15.) And, like throughout the country, COVID-19 has been detected across Wisconsin. (Van Dijk Aff. ¶¶ 11, 25.)

"conflicts between different statutes, by implication or otherwise, are not favored and will not be held to exist if they may otherwise be reasonable construed." *Jones*, 226 Wis. 2d at 576 (citation omitted); *Dairyland Power*, 52 Wis. 2d at 53.

Here, the petitioners do not, and cannot, demonstrate any "irreconcilable conflict" between section 252.02(4) and DHS's powers under section 252.02(3). These provisions are complementary—for example, as noted above, section 252.02(3) applies regardless of an emergency or order, and section 252.02(4) is broader but requires a formal order to execute it. Just because, under the particular circumstances we face, they are overlapping does not change that. The point of having independent, sometimes-overlapping sections is that some or all of them may apply to a given situation. That is how police power statutes to combat events like pandemics are designed, for good reason. *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Inter'l, Inc.*, 534 U.S. 124, 144 (2001) ("[T]his Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases.").

The language in section 252.02(4) is clear: it gives DHS the power to issue statewide orders to control and suppress communicable diseases. Safer-at-Home does just that.

c. Section 252.02(3) authorizes many of the provisions of Safer-at-Home and reinforces DHS's broad authority.

Wisconsin Stat. § 252.02(3), a standalone subsection, provides that "[t]he department may close schools and forbid public gatherings in schools, churches, and other places to

control outbreaks and epidemics." Thus, DHS may close schools and forbid public gatherings in churches (which ordinarily are entitled to special protections) and a variety of places (both those listed and "other places"). Under subsection (3), it may do so regardless whether there is an emergency and need not issue a formal order to do so.

That is unlike subsection (6), which contains an "emergency" threshold. And that is unlike subsection (4), which is carried out by an "order." Rather, subsection (3) closures can be done in the absence of an emergency, so long as it is to "control outbreaks and epidemics," and it requires no formal order.[22] Thus, subsection (3) contains a sometimes-overlapping but separate sort of power.

While subsection (3) would authorize much of Safer-at-Home, whether it authorizes every detail of it does not matter.[23] No one disputes that there is an "emergency," and there is an "order." Thus, DHS's actions also are separately covered by subsection (6) (an emergency) and subsection (4) (an order). Again, the point of having independent, sometimes-overlapping sections is that some or all of them may apply to a given situation, by design. *See J.E.M. Ag*

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[22] There also are other differences. For example, orders under subsection (4) would "supersede conflicting or less stringent local regulations, orders or ordinances." Wis. Stat. § 252.02(4). Orders under subsection (3) would not.

[23] The petitioners assert that subsection (3) must only apply to places like churches, which it asserts are like "athletic events." But that does not read the terms in context. In the context of a section designed to combat an active outbreak, "other places" would reasonably refer to places where that spread is likely. The context implicates places where people may congregate in proximity—not merely big events, rallies, and parades.

Supply, 534 U.S. at 144 (rejecting suggestion that "dual protection" from overlapping statutes cannot exist).

3. None of the petitioners' remaining assertions change the plain meaning of the pandemic statutes.

The petitioners make two further assertions—about a quarantine statute and Act 21—but neither changes the analysis.

a. Safer-at-Home is not a "quarantine" under that separate statute.

The petitioners make a comparison to the quarantine provisions under Wis. Stat. § 252.06 and assert that the specific/general canon applies to bar Safer-at-Home. But that section is irrelevant. Safer-at-Home quarantines no one, and even a cursory review of the quarantine law reveals this.

Wisconsin Stat. § 252.06 provides for formal isolation of a particular "individual" and also "disinfection." For such an individual, it provides "[e]xpenses for necessary medical care, food and other articles needed for the care of the infected person," "conducting examinations and tests," forbidding essentially all people to have "direct contact" with the individual, "remov[ing] the person," and, sometimes, for "guards." Wis. Stat. § 252.06(1), (4)(a), (5), (6)(a), (10)(a).

Those highly restrictive quarantining and isolation powers, applicable only under special circumstances to a particular individual, have no relationship to Safer-at-Home. That order quarantines no one. Section 252.06 says nothing about individuals who have not been diagnosed with a communicable disease, and Safer-at-Home says nothing about imposing those kinds of measures. Rather, it simply

seeks to *reduce* person-to-person contact in the general population because doing so is necessary to prevent the pandemic from overrunning the State (especially given the likelihood of transmission by asymptomatic carriers). There are a variety of things people can do—running, biking, golfing, going to the park or for a walk with a friend while maintaining social distancing, arranging childcare, shopping for groceries or essential goods, attending small-scale religious services, placing pick-up sales, going to a farmers market, ordering take out from restaurants, selling or purchasing real estate, renting a kayak or boat—that are inherently incompatible with a "quarantine" under Wis. Stat. § 252.06.

Put differently, there is no application of the specific/general canon here, as the quarantine statute and the sections under which Safer-at-Home was issued do different things. For the specific/general rule to apply, "the statutes in question 'must be construed in a manner that serves each statute's purpose." *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 19, 245 Wis. 2d 607, 629 N.W.2d 686 (quoting *Jones*, 226 Wis. 2d at 576); *see also* Scalia & Garner, *Reading Law*, 184 ("[T]he general/specific canon does not mean that the existence of a contradictory specific provision voids the general provision. Only its application to cases covered by the specific provision is suspended."). Section 252.06 says nothing about limiting DHS's other powers.

b. Act 21 has no application here.

In line with their reliance on various canons of construction (rather than statutory text), the petitioners also assert that changes made to Wisconsin's Administrative Procedure Act "completely and fundamentally altered"

Wisconsin law in a way that somehow changed the meaning of Wis. Stat. § 252.02. (Pet'r Mem. 41, *see also id.* 41–43, 48, 51–52.) For example, they argue that 2011 Wis. Act 21 "removed" any "doubt" about permissible interpretations of Wisconsin's longstanding pandemic powers. (*See, e.g.*, Pet'r Mem. 51.) For support, the petitioners point to two provisions in Act 21: changes to a rulemaking provision, Wis. Stat. § 227.11(2)(a), and the creation of Wis. Stat. § 227.10(2m), regarding agencies' enforcement or implementation of "standards, requirements, or thresholds." (Pet'r Mem. 41–43.)

Nothing in either provision supports the petitioners' view of the "profound" effect Act 21 had on the pandemic powers in Wis. Stat. § 252.02. (Pet'r Mem. 42.) For one thing, nothing in the Act altered explicit statutory authority elsewhere, such as in Wis. Stat. § 252.02. What's more, the consequences of the petitioners' argument would be that vast swaths of Wisconsin's police power—for exigencies large and small—would disappear. That is absurd.

As for Wis. Stat. § 227.11(2)(a), it applies to rulemaking only: "All of the following apply to *the promulgation of a rule* interpreting the provisions of a statute enforced or administered by an agency." This is confirmed in the subsection on which the petitioners rely, Wis. Stat. § 227.11(2)(a)(2), which states that "[a] statutory provision describing the agency's general powers or duties *does not confer rule-making authority* on the agency or augment the agency's *rule-making authority* beyond the *rule-making authority* that is explicitly conferred on the agency by the legislature." Wis. Stat. § 227.11(2)(a)2.

Here, Safer-at-Home was not promulgated as a rule. Act 21's updated rulemaking procedures have no bearing on it.

Further, even where section 227.11(2)(a) does apply to rulemaking, it does not *remove* authority. It simply requires that rules be promulgated under authority "explicitly conferred on the agency by the legislature." Thus, even if Wis. Stat. § 252.02 had been used for rulemaking here, such a rule would not be void, since DHS's authority to combat a pandemic is "explicit[ ]."

Wisconsin Stat. § 227.10(2m) also does not alter any existing, explicit statutory grants of authority, including Wis. Stat. § 252.02. Section 227.10(2m) states in relevant part: "No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule." On its face, Wis. Stat. § 227.10(2m) simply requires that "standards, requirements, or thresholds" be explicitly authorized either in statute or by rule; it has no effect on existing, explicit grants of authority.

Indeed, far from altering existing law, Wis. Stat. § 227.10(2m) apparently codified one application of the long-recognized principle that agencies "have 'only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates.'" *Wis. Ass'n of State Prosecutors v. Wis. Emp. Relations Comm'n*, 2018 WI 17, ¶ 37, 380 Wis. 2d 1, 907 N.W.2d 425 (citation omitted); *see also* Kirsten A. Koschnick, Comment, *Making "Explicit Authority" Explicit: Deciphering Wis. Act 21's Prescriptions for Agency Rulemaking Authority*, 2019 Wis. L. Rev. 993, 1016 (recognizing that Act 21 simply "restat[ed] and clarif[ied]" constitutional principles governing agency authority). This Court has confirmed this principle no fewer than six times in the years since Act 21's enactment, including at least once directly citing Wis. Stat. § 227.10(2m)

and holding that Act 21 did not alter the Court's analysis. *See Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶¶ 23, 39 n.31, 335 Wis. 2d 47, 799 N.W.2d 73; *accord Koschkee v. Taylor*, 2019 WI 76, ¶ 14, 387 Wis. 2d 552, 929 N.W.2d 600; *Myers v. DNR*, 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 187, 922 N.W.2d 47; *AllEnergy Corp. v. Trempealeau Cty. Env't & Land Use Comm.*, 2017 WI 52, ¶ 37 n.16, 375 Wis. 2d 329, 895 N.W.2d 368; *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 62, 342 Wis. 2d 444, 820 N.W.2d 404.

Thus, both the language of Act 21 and this Court's decisions make clear that DHS's explicit authority under Wis. Stat. § 252.02 remains unaltered after Act 21. Nothing in Act 21, or any other statute, undercuts Safer-at-Home's validity.

Lastly, it is worth noting the implications of what the petitioners suggest. Their line of argument would have the incredible effect of not only *sub silentio* nullifying the pandemic statutes, but also any number of other grants of explicit, broad authority the State relies on to carry out the police power—leaving nothing. That is nonsense. The Legislature knows full well how to repeal a law, and it did not repeal express grants of police power with Act 21, broad or not. Indeed, it is hard to imagine any Governor knowingly signing away pandemic-combating powers or other vital executive tools needed in an emergency.

The petitioners do not begin to address the necessary consequences of their argument. Not only would Wisconsin be adrift now, but numerous other statutes will be secretly invalidated, only to be discovered when government action is most needed in the future. For example, under the petitioners' apparent theory, can a prison warden still "command the aid of the officers" to "suppress riots and prevent escapes"? Wis. Stat. § 302.07. Or can the

Department of Natural Resources still combat a raging wildfire relying on its statutory authority to undertake "all things necessary" relating to the "suppression of forest fires"? Wis. Stat. § 26.11(1). Of course they can, just like DHS obviously can still act under Wis. Stat. § 252.02 in the rare circumstances where it is applicable.

The petitioners' reference to not "hid[ing] elephants in mouseholes" finally finds an apt application: to their argument about Act 21. (Pet'r Mem. 54) Interpreting Act 21 as the petitioners appear to urge would be the height of elephant hiding—presuming that an amendment to a procedural statute "fundamentally alter[ed]" Wisconsin law such that an agency with power to "issue orders . . . for the control and suppression of communicable diseases" and "implement all emergency measures necessary to control communicable diseases" can no longer do either thing. Wis. Stat. § 252.02(4), (6).

B. The rulemaking claim is contrary to the statutes, the separation of powers, and on-the-ground reality.

Aside from their argument that DHS could not act at all in many respects, the petitioners also argue that the Safer-at-Home order is an administrative rule and thus that respondents needed to undertake rulemaking. That is wrong as a matter of law and would leave the executive branch (and the entire state, by implication) without the basic tools it needs to actively combat today's and future pandemics.

1. Section 252.02(4) specifically allows DHS to issue orders that apply "to the whole" of the state.

As discussed, Safer-at-Home is authorized by more than one subsection: in particular, it is authorized by the

standalone powers in Wis. Stat. § 252.02(6), which say nothing about rulemaking.

In addition, because it also is an authorized "order," it also is proper under section 252.02(4), which authorizes both rules and orders. Contrary to the petitioners' assertions, that does not (and cannot) require rulemaking. Rather, the statute allows for *either* a "rule" *or* an "order," depending on what is being done. Again, an order may apply "to the whole" of the state to combat an active pandemic, which is exactly what the Safer-at-Home orders do. *See supra* Section II.A.2.b.

2. Chapter 227 does not compel a different result.

Petitioners ignore the specific language in section 252.02(4) and look instead to the general definition of "rule" in Wis. Stat. § 227.01(13). But that effort does not help their argument.

As discussed above, Wis. Stat. § 227.01(13) defines a "rule" as a regulation, standard, statement of policy, or "general order" of "general application" issued by an agency to "implement, interpret, or make specific" legislation "enforced or administered by" the agency. Even putting aside the specific language about orders in section 252.02(4), Safer-at-Home would not be a rule under the definition in chapter 227, for two reasons.

First, and most basically, Safer-at-Home is not "of general application" in the rulemaking sense because it does not provide the repeating decision-point or procedures for future fact scenarios. "[A] policy of general application" that governs a decision is a "rule." *Frankenthal v. Wis. Real Estate Brokers' Bd.*, 3 Wis. 2d 249, 257B, 89 N.W.2d 825 (1958). If a decision is based on a "ruling which is not applicable generally but is limited to the facts presented,"

"such a ruling does not constitute a 'rule' under ch. 227, Stats." Id. To be a rule under Wis. Stat. § 227.01(13), an order must both be a "general order" and be of "general application." The fact that an order applies to everyone may make it a "general order," but if it is a fact-sensitive response to a current crisis, it is not "of general application."

The petitioners mistakenly assume that Safer-at-Home's applicability to the population as a whole means that it is of "general application" in the rulemaking sense. But as section 252.02(4) recognizes, an order can apply to the population as a whole and still be an order, not a rule. Section 227.01(13) uses "general" in two different ways, requiring rulemaking only for "general order[s] of general application." While an order responding to the pandemic may be a "general order" because it applies to the population as a whole, it is not of "general application" because it responds only to a specific, limited-in-time scenario. Safer-at-Home does not prescribe rules of general applicability that can (or should or will) remain in place indefinitely, and that apply across different circumstances. Rather, the order embodies the quintessential executive task of deciding how to address, for the time being, the exigency caused by COVID-19.

Further, Wis. Stat. § 252.02 is not legislation "enforced or administered by" DHS through issuing Safer-at-Home, and DHS's actions here did not "implement, interpret, or make more specific" standards that the Legislature designed by statute. Unlike statutes that regulate certain conduct or activities, like food safety or traffic laws, section 252.02, as relevant here, simply empowers DHS to act. Thus, Safer-at-Home is not "enforc[ing]" any legislative requirement, unlike a scheme like Medicaid or Wisconsin's concealed carry law. Similarly, section 252.02 does not create any sort of program that an agency "administer[s]." Unlike a scheme like

Medicaid or Wisconsin's concealed carry law, section 252.02 creates no statutory program for an agency to manage as an administrative matter.

The verbs "enforce" and "administer" in Wis. Stat. § 227.01(13) matter because they reflect an agency's role in carrying out legislative requirements or programs. When the enforcing or administering agency interprets those statutes more specifically with ongoing standards, it engages in rulemaking. But where the Legislature designates an agency to carry out executive police powers, and to determine what measures are needed in an emergency, it has not pre-set standards to enforce or developed a program for the agency to administer. The Legislature does not know in advance what will be needed, and so it leaves to the executive agency the job of addressing that crisis if it arises.

3. An administrative rule stems from exercise of delegated legislative power; the executive's efforts to address a time-specific public emergency are an exercise of executive power.

The rulemaking claim also fails because Safer-at-Home is an exercise of executive power, not legislative power. Rulemaking is required where an agency exercise delegated legislative power: the power to set public policy by establishing prospective, generally applicable requirements to govern future conduct. In contrast, the executive's efforts to address public emergencies are a quintessential exercise of executive power.

The distinction between executive and legislative power is fundamental to the separation of the powers. *State ex rel. Friedrich v. Circuit Court for Dane Cty.*, 192 Wis. 2d 1, 25, 531 N.W.2d 32 (1995) ("separation of powers has as a basic element . . . the rule of law." (citation omitted)). "The

legislative power . . . makes the laws; the executive . . . enforces them; and the judicia[ry] . . . expounds and applies them." *In re Appointment of Revisor*, 141 Wis. 592, 597, 124 N.W. 670 (1910); *see also* Wis. Stat. § 15.001(1).

The legislative power to make laws includes delegations to "administrative agencies [of] such legislative powers as may be necessary to carry into effect the general legislative purpose." *Clintonville Transfer Line v. PSC*, 248 Wis. 59, 69, 21 N.W.2d 5 (1945). Thus, "[a] rule is legislative in nature and is intended to have prospective effect only." *China Diesel Imports, Inc. v. United States*, 855 F. Supp. 380, 383 (Ct. Int'l Trade 1994). That principle holds true in Wisconsin. "Wisconsin is in the forefront when it comes to the recognition" that rulemaking is a delegation of legislative power. *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 58, 158 N.W.2d 306 (1968).

It is because rulemaking is delegated legislative power that the Legislature has prescribed rulemaking mechanisms with legislative oversight. The administrative rulemaking procedures in Wis. Stat. ch. 227 are shot through with legislative review. *See Panzer*, 271 Wis. 2d 295, ¶ 56; *State (Dep't of Admin.) v. DILHR*, 77 Wis. 2d 126, 135, 252 N.W.2d 353 (1977). The procedures include preliminary review of the scope of a rule and the agency's statutory authority to promulgate it; review of proposed rules by legislative council staff; notice periods, public hearings, and opportunities for public comment; legislative review by standing committees and by the Joint Committee for Review of Administrative Rules ("JCRAR"); publication of approved rules; and the list goes on. *See* Wis. Stat. §§ 227.114–227.26.

In contrast, "the very essence of 'execution' of the law" is "to implement the legislative mandate," including interpreting the laws enacted by the legislative branch and exercising judgment concerning facts that affect their

application. *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). "The executive must . . . interpret and apply the law; it would be impossible to perform his duties if he did not. After all, he must determine for himself what the law requires (interpretation) so that he may carry it into effect (application). Our constitution not only does not forbid this, it requires it." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 53, 382 Wis. 2d 496, 914 N.W.2d 21. The execution of the law involves the exercise of executive discretion in balancing many practical considerations, including setting priorities, allocating resources, weighing harms, and judging the likelihood of success. *See Morrison v. Olson*, 487 U.S. 654, 707–08, 727–28 (1988) (Scalia, J., dissenting).

4. Courts and commentators agree that responding to emergencies such as pandemics is an executive function.

Courts and commentators agree that responding to public emergencies is a quintessential executive function. The need for energy, unity, and promptness applies with most force to the efforts of executive branch officials to protect against natural disasters and deadly communicable diseases.

Alexander Hamilton observed that "it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them." The Federalist Papers no. 23, *available at* https://avalon.law.yale.edu/18th_century/fed23.asp. And the U.S. Supreme Court has long acknowledged that it would be impossible "[t]o attempt to regulate, by law, the minute movements of every part of the complicated machinery of government." *United States v. Macdaniel*, 7 Peters (32 U.S.) 1, 14 (1833).

Courts thus recognize that, under exigent conditions, "the executive must be permitted to make the decision in the first instance." *Moorhead v. Farrelly*, 727 F. Supp. 193, 201 (D.V.I. 1989). Indeed, the U.S. Supreme Court long ago recognized the appropriateness of giving administrative officials authority over responding to public health crises because of the "paramount necessity that a community . . . protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson*, 197 U.S. 11, 27 (1905). And the Supreme Court has continued to recognize that "[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action." *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981).

State legislatures across the nation—including in Wisconsin—have enacted public health statutes that broadly authorize executive branch officials to act rapidly and decisively where necessary to protect the public against novel infectious diseases. *See* Lawrence O. Gostin & Lindsay F. Wiley, Public Health Law 426 (3d ed. 2016). Courts have recognized this authorizes public health officials to exercise executive, rather than legislative, power because "[l]egislatures cannot anticipate all the contagious and infectious diseases that may break out in a community," much less how to respond to them in the moment. *See People ex rel. Barmore v. Robertson*, 134 N.E. 815, 819 (Ill. 1922); *Globe Sch. Dist. No. 1 of Globe v. Bd. of Health*, 179 P. 55, 60 (Ariz. 1919) ("such powers are administrative—not legislative"); *Stickley v. Givens*, 11 S.E.2d 631, 636 (Va. 1940) (health officials' response to infectious disease was "not a delegation of legislative power but the exercise of administrative and ministerial functions"); *Smith v. State*, 168 S.W. 522, 523 (Tex. Crim. App. 1914) (authority to "establish, maintain, and enforce . . . quarantine lines" was

not a delegated legislative power); *State v. Superior Court for King Cty.*, 174 P. 973, 978 (Wash. 1918) (regarding quarantine power vested in executive officers, "[t]his court has not heretofore considered similar laws as a delegation of legislative power or authority").[24]

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[24] The petitioners make an undeveloped assertion that Wis. Stat. § 252.02 might violate the nondelegation doctrine. They don't state this as a claim for good reason. The doctrine does not apply because DHS used executive power, not legislative power, in issuing Safer-at-Home. *See*, *e.g.*, *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 819 (Ill. 1922) ("The necessity of delegating to an administrative body the power to determine what is a contagious and infectious disease and giving the body authority to take necessary steps to restrict and suppress such disease is apparent to everyone who has followed recent events. Legislatures cannot anticipate all the contagious and infectious diseases that may break out in a community."); *Bd. of Trs. of Highland Park Graded Common Sch. Dist. No. 46 v. McMurtry*, 184 S.W. 390, 394 (Ky. 1916) ("[I]f these agencies of the state created for the purpose of conserving the health of the people are to accomplish the objects for which they were created, they must needs be given authority to take such prompt and effective action, in each case as it comes up, as in the exercise of their reasonable judgment and discretion may be deemed necessary to meet the exigencies of the occasion.").

And even if the nondelegation test applied, its factors would be met. The purpose of Wis. Stat. § 252.02 is "ascertainable," *Gilbert v. State, Medical Examining Board*, 119 Wis. 2d 168, 190, 349 N.W.2d 68, 77 (1984), because the law authorizes DHS to respond with flexibility to public health crises like this one. And the kinds of procedural safeguards recognized as adequate in delegations of legislative authority would be present here: altering the agency's statutory power through further legislative action, declining to confirm agency appointees, and refusing to appropriate funds to the agency. *See Panzer v. Doyle*, 2004 WI 52, ¶ 66, 271 Wis. 2d 295, 339, 680 N.W.2d 666, 688, *abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408.

Safer-at-Home carries out this core executive function. When DHS issues orders for guarding against, controlling, and suppressing communicable diseases, Wis. Stat. § 252.02(4), or "authorize[s] and implement[s] all emergency measures necessary to control communicable diseases," Wis. Stat. § 252.02(6), it performs the executive function of administering and enforcing existing law by applying statutory requirements to the particular circumstances of our public health emergency. That emergency presents unanticipated threats to the lives of the people and necessitates urgent and changeable responses. The power to respond to such crises is a quintessentially executive power.[25]

5. The emergency rulemaking provisions of Wis. Stat. § 227.24 do not apply to executive action, and the petitioners' views of those procedures would leave the executive branch powerless to quickly respond to public health emergencies.

The petitioners assert that the "emergency" rulemaking provisions should apply here, but that makes no sense on multiple levels. As explained, emergency or not, rulemaking has no application to the inherently executive acts here. And in the context of rulemaking, "emergency"

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[25] Thus, for example, courts in Pennsylvania and New Hampshire already rejected large-scale challenges to COVID-19 stay-at-home orders. *See Friends of DeVito v. Wolf*, -- A.3d ---, 2020 WL 1847100 (Pa. Apr. 13, 2020) (rejecting claim to vacate or strike executive order); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Sup. Ct. Mar. 19, 2020) (denying preliminary injunction request and granting motion to dismiss).

merely denotes "expedited," relative to very lengthy process of ordinary rulemaking. It does not mean "emergency" in the sense of our current predicament—a fast-moving pandemic that requires prompt, decisive actions.

Chapter 227's procedures confirm that the emergency rulemaking process is completely incompatible with the executive's duty to respond to a public health crisis quickly and changeably. Promulgating an emergency rule can take up to a *month*—and takes a minimum of *weeks*.[26] It requires assessments of the permanent impacts of the rule. It forbids going forward if plans for the rule need to change as those weeks go by. And it is subject to indefinite suspension by JCRAR. That process bears no relationship to meeting the exigencies of a public health crisis.

First, the process is slow. Drafting and approval of a scope statement takes a minimum of 13 to 19 days, including at least a day to prepare and draft a scope statement (Wis. Stat. §§ 227.24(1)(e)1d., 227.135(1)), a day for review and approval of the scope statement by both DOA and the Governor (Wis. Stat. §§ 227.24(1)(e)1d., 227.135(2)), one to seven days for publication of the scope statement in the Register, published once a week (Wis. Stat. §§ 227.24(1)(e)1d., 227.135(2)–(3), 35.93(2)(a)), and a 10-day statutory waiting period after publication of the scope statement before the agency can proceed to actual preparation of the emergency rule (Wis. Stat. §§ 227.24(1)(e)1d., 227.135(2), 227.136(1)). An additional five

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[26] It is unclear where the petitioners get their shorter timeline from. To the extent they might be relying on general exemption language in Wis. Stat. § 227.24(1)(a), that ignores the notice, hearing, and publication requirements described above, all of which apply to emergency rules.

to ten days is added if either cochair of JCRAR requires the agency to hold a preliminary public hearing, which requires submission and publication of a notice of hearing, again subject to the Register's once-a-week publication timeline (Wis. Stat. § 227.136(2)), and, after the hearing, reporting of public comments to the body with policymaking power over the subject matter of the proposed rule (Wis. Stat. § 227.136(4)–(5)). The agency may begin drafting the text of the proposed emergency rule only once the scope statement process is finished (Wis. Stat. § 227.24(1)(e)1d.), and then the actual rule-writing, gubernatorial approval (Wis. Stat. § 227.24(1)(e)1g), and publication (Wis. Stat. §§ 227.24(1)(e)1g., 227.20(1), 227.24(1)(c)) take an additional 4 to 5 days.

These timelines are inconsistent with an effective response to an exigency. A quick response—for example, the one needed in about three days when the first Safer-at-Home order was issued—is impossible. (Van Dijk Aff. ¶¶ 19–21.)

Second, the process is designed to create a permanent rule. Emergency rules last five months *at a minimum*, and usually longer, as the point of an emergency rule is to buy time before the rule is made permanent. *See* Wis. Stat. § 227.24(1)(c), (2)(a) (emergency rules effective for 150 days, with possible extensions of additional 120 days). Preparation of a scope statement requires the agency to consider and assess factors that speak to the rule's ultimate permanence: a description of existing policies relevant to the rule; an analysis of policy alternatives; a summary and preliminary comparison of relevant federal regulations; a description of the entities that may be affected by the rule; and an estimate of the time state employees will spend developing the rule and resources other than state worker time needed to develop the rule. *See* Wis. Stat. § 227.135(1)(a)–(f).

Orders like Safer-at-Home are not designed for permanence. They are short-term actions to address an immediate and changing problem. No one wants them to be ossified—any more than a firehose should be stuck in place indefinitely when fighting a fire.

Third, the process does not accommodate significant adjustments along the way. If evolving circumstances cause the agency to change the scope of the proposed rule in any meaningful or measurable way, the agency must start the process all over again with a new scope statement. Wis. Stat. §§ 227.135(4); 227.24(1)(e)1d. As we have seen thus far with the COVID-19 pandemic, conditions on the ground change rapidly in the course of days, much less over two to four weeks.[27] By the time a scope statement would be approved (two or three weeks), it would be highly unlikely to reflect events on the ground. The agency would have to go back to the drawing board and try again.

Fourth, the proposed rule would be subject to indefinite suspension, depending on the desires of JCRAR. The petitioners say that, if given the chance, the JCRAR committee "likely" would reject Safer-at-Home. But what happens to the pandemic response then? Does DHS keep trying again and again to find the mix acceptable to JCRAR at a given moment, while the virus spreads? Do the petitioners have in mind some sort of non-statutory (and

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[27] Likewise, the needed responses must change. As summarized in the background, the initial outbreak required a rapid series of orders and, in recent weeks, several orders issued to loosen certain restrictions as soon as possible. Further, during the initial outbreak in Wisconsin—many states, Wisconsin included—have entered into regional collaboration with continual planning. These orders and that kind of collaboration would be impossible even under an emergency rulemaking process.

unconstitutional) pre-approval by a subset of legislators or a legislator, who would promise not to halt it weeks later?

As applied to a crisis like the present pandemic, these procedures would be bizarre, inadequate, and unpredictable. The petitioners point to no state that engages in this absurdity, and likewise point to no basis for Wisconsin to. Rather, the executive's response to the public health crisis is clearly executive action, not an administrative rule.

C. Safer-at-Home is not arbitrary.

The petitioners also allege that Safer-at-Home is arbitrary. While the petitioners are not the proper party to lodge this claim, it is true that courts may entertain specific challenges to the exercise of powers like those in Wis. Stat. § 252.02. The proper framework is the "arbitrary, unreasonable" analysis set forth by the United States Supreme Court in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). That test asks whether the lines DHS has drawn are so disconnected from the reasons underlying their need as to be arbitrary or absurd.

Safer-at-Home clearly is not, but rather is sensibly tied to the immediate threat presented.

1. The governing *Jacobson* test is deferential where public health is in peril.

Jacobson (and many courts since) recognized that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [person or property] . . . regardless of the injury that may be done to others." *Jacobson*, 197 U.S. at 26. It applied that principle in the context of mandatory vaccinations to stop an outbreak of smallpox. *Id.* at 26–28. Pursuant to state law, a local health board, concerned with a

smallpox outbreak, ordered all residents vaccinated; the defendant refused. *Id.* at 14.

The U.S. Supreme Court explained that the "police power of a state must be held to embrace" both reasonable legislative enactments and local administration with "authority in some appropriate way to safeguard the public health and public safety." *Id.* at 25. It rejected the defendant's arguments that the compulsory vaccination was "unreasonable, arbitrary, and oppressive, and therefore, hostile to the inherent right of every freeman to care for his own body and health in such a way as to him seems best." *Id.* at 26.

In doing so, the Court recognized the "fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state.'" *Id.* (citation omitted). "Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others." *Id.* at 26–27.

While this does not mean that individual constitutional rights disappear during a pandemic, the Court acknowledged that those rights could be reasonably restricted: "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Id.* at 29. "Upon the principle of self-defense, of paramount necessity, a community has the right to protect

itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27.[28]

The Court therefore applied a deferential analysis, asking whether the mandatory vaccination scheme was "arbitrary" or "unreasonable"—i.e., whether the requirement had "no real or substantial relation to [its] objects, or is, beyond all question, a plain, palpable invasion of rights secured by fundamental law." *Id.* at 31. In upholding the particular vaccination requirement, the Court observed that it entailed the "methods most usually employed to eradicate the disease," meaning the Court would be overstepping its bounds to hold that the required vaccinations were "arbitrary, and not justified by the necessities of the case." *Id.*

Today, the *Jacobson* framework is applied by courts to address pandemic measures, including those related to COVID-19 emergency orders. *See*, *e.g.*, *In re Abbott*, 954 F.3d 772 (5th Cir. Apr. 7, 2020); *In re Abbott*, -- F.3d --, 2020 WL 1911216 (5th Cir. Apr. 20, 2020).[29] As the Fifth Circuit recently recognized, when in the midst of a pandemic, courts do not pass "judgment on the wisdom and efficacy of that emergency measure, something squarely foreclosed by *Jacobson*." *In re Abbott*, 954 F.3d 772 (5th Cir. 2020).

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[28] This Court also has applied the *Jacobson* framework. *See Adams v. City of Milwaukee,* 144 Wis. 371, 129 N.W.2d 518, 520 (1911) (applying *Jacobson* deference to police-power requirement of tuberculin testing of milk); *Froncek v. City of Milwaukee*, 269 Wis. 2d 276, 281, 69 N.W.2d 242 (1955) (applying *Jacobson* deference to police-power fluoridation of water supply).

[29] *See also Commcan, Inc. v. Charlie Baker*, 2084CV00808-BLS2, 2020 WL 1903822 (Supp. Ct. Mass. Apr. 16, 2020); *Legacy Church, Inc. v. Kunkel*, -- F. Supp. 3d ---, 2020 WL 1905586 (U.S. D.C. N.M. Apr. 17, 2020).

2. Safer-at-Home is not arbitrary under the applicable *Jacobson* framework.

Safer-at-Home easily satisfies *Jacobson*'s test—in fact, it would be reasonable under any arbitrariness test.[30]

First, there can be no question that COVID-19 presents a public health crisis. Cases both nationally and in Wisconsin had skyrocketed in less than a two-month period. (Van Dijk Aff. ¶¶ 6, 17; Westergaard Aff. ¶¶ 28–31.) Further, we know that COVID-19 spreads easily among people in close proximity and can be spread by people who feel healthy. (Van Dijk Aff. ¶¶ 5, 13–14; Westergaard Aff. ¶¶ 6–7.) COVID-19 thus presents a particularly pernicious type of the already-rare pandemic.

Second, Safer-at-Home uses "methods most usually employed to eradicate the disease." *See Jacobson*, 197 U.S. at 28. As the evidence submitted summarizes, medical experts agree that the best means to combat the uncontrolled community spread of COVID-19 is enforced social distancing, including the measures contained in Safer-at-Home. (Van Dijk Aff. ¶ 16; Westergaard Aff. ¶¶ 26–27, 35, 38.) Nationally, infectious disease experts also agree that a critical component of enforced social distancing is the restriction of nonessential businesses. For example, in mid-March, over 100 infectious disease scientists issued an open letter to government officials regarding COVID-19. It urged "[e]nforced social distancing measures" including "closing or

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[30] Even under the petitioners' proposed standard, this Court would not second-guess. *See, e.g. Wis. Prof'l Police Ass'n v. PSC*, 205 Wis. 2d 60, 73–74, 555 N.W.2d 179 (Ct. App. 1996) (under that standard, a court "may not substitute [its] judgment").

severely limiting all non-essential businesses and closing schools nationwide as soon as possible."[31] These kinds of measures are put in place initially so that the states can get a grip on community spread, build resources, and then contain the spread through less restrictive means. (Van Dijk Aff. ¶ 23; Westergaard Aff. ¶¶ 38–40.)

At least 42 states have issued safer-at-home orders, and 46 states have ordered the shutting down of nonessential businesses as means to slow the spread of COVID-19.[32] It is the overwhelming consensus that measures like Safer-at-Home have a "real" and "substantial relation to the protection of public health." *See Jacobson*, U.S. at 31.

3. The petitioners' disagreement with the terms of Safer-at-Home does not make it arbitrary or unreasonable.

The petitioners do not and cannot dispute that Safer-at-Home's basic structure and objectives are reasonable. Nowhere do the petitioners present any evidence that limiting person-to-person contact outside the home "has no

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[31] Jocelyn Kaiser, *Disease experts call for nationwide closure of U.S. schools and businesses to slow coronavirus*, Science (Mar. 16, 2020, 2:55 PM), https://www.sciencemag.org/news/2020/03/infectious-disease-experts-call-nationwide-closure-us-schools-and-business-slow#.

[32] Stephen Sorace, *Coronavirus stay-at-home orders: What states have issued directives so far?*, Fox News (Apr. 16, 2020), https://www.foxnews.com/us/coronavirus-stay-at-home-orders-what-states-have-issued-so-far; Erin Schumaker, *Here are the states that have shut down nonessential businesses*, ABC News (April 3, 2020, 6:58 PM), https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806.

real or substantial relation to the protection of the public health and public safety." *Jacobson*, 197 U.S. at 31.

Instead, the petitioners do the very thing *Jacobson* prohibits: asserting that the lines public health officials have drawn could have been drawn differently, including when it comes to distinguishing between essential and nonessential businesses. (Pet'r Mem. 57–60.)

However, the petitioners do not dispute the core facts: that allowing businesses to remain open risks COVID-19 spread, at a time when the state's health systems would otherwise be overrun. (Van Dijk Aff. ¶¶ 29–31, 42–43; Aff. ¶¶ 38–40.) In fact, the petitioners concede that, at least "arguably," "deciding which businesses present an undue risk of spreading COVID-19" properly rests "within DHS's core competence and statutory mission." (Pet'r Mem. 57.) That necessarily recognizes that a rational basis exists to close some businesses but not others. Common sense agrees, as some businesses simply must stay open despite the risk—grocery stores, food distribution centers, pharmacies, and the like—to keep our society running. Safer-at-Home's effort to distinguish between "essential" and "nonessential" businesses is thus eminently reasonable. Nearly every state's health department has been similarly tasked. And no one suggests that it would be better to simply shutter everything. Rather, a line must be drawn.

The petitioners' argument wholly overlooks the fact that, in these rare and temporary circumstances, infectious disease experts specifically recommended the closure of nonessential businesses as the proper means to enforce social distancing to get ahead of the COVID-19 virus. (Van Dijk Aff. ¶¶ 12, 16; Westergaard Aff. ¶¶ 27, 40.) And limiting public interaction and travel outside the home necessarily reduces the risks. Every component of Safer-at-Home advances social distancing. That should end the inquiry. As

the Supreme Court warned in *Jacobson*, "[i]t is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against the disease." *Jacobson*, 197 U.S. at 30.

Each of the petitioners' assertions come up against that same reality. They assert that Safer-at-Home "fails to provide any justification for allowing arts and craft stores to operate. . . but not furniture stores." (Pet'r Mem. 57.) To the contrary, Safer-at-Home specifically provides that arts and craft stores may have more than one employee working at the store "solely for filling orders for material for making personal protect equipment (i.e. homemade facemasks)." (Order at 19.) That is exactly the type of equipment needed right now, as both experts and the White House have explained.

The petitioners also ask why stores may sell alcohol, but retailers cannot sell clothes or shoes. (Pet'r Mem. 57.) One answer: alcohol cannot be easily purchased online, but clothes and shoes can. And it is a consumable good; clothes are not. Or they ask why "newspapers" are allowed to operate but "churches . . . cannot hold weekly religious services with more than nine people in a room." (Pet'r Mem. 59.) There are, of course, non-arbitrary reasons to have access to the information provided by a newspaper during a pandemic, and newspapers don't inherently involve community gatherings—one can work alone. But gathering in a group is common in a church setting. In fact, the Legislature itself seemed to recognize the need to sometimes restrict these gatherings, as it codified a law that specifically gives DHS the power to "forbid public gatherings in . . . churches . . . to control outbreaks and epidemics." Wis. Stat. § 252.02(2).

Rather, many of the petitioners' contentions are really about increments, but it is always the case that a problem

may be addressed incrementally. *See*, *e.g.*, *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955) ("reform may be taken one step at a time").[33]

Lastly, the petitioners suggest that a lack of detailed explanation in Safer-at-Home somehow renders it arbitrary. (Pet'r Mem. 57.) The petitioners provide no legal support for this view, and that is not the question that *Jacobson* or any similar case poses. Nor would it make sense to pose it. These orders are responding to an ongoing pandemic; they are not administrative decisions issued in the normal course. Rather, the *Jacobson* test is akin to rational basis review. What matters is the existence of a reasonable need under the exigent circumstances, not a particular statement of it. *See*, *e.g.*, *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 77, 358 Wis. 2d 1, 851 N.W.2d 337. In any event, there is much public information available about the orders—there have been scores of briefings and steady guidance.[34]

Any order has to strike a balance. If we close too few businesses, COVID-19 could continue to spread like wildfire around the State, and our healthcare system would be overwhelmed. (Van Dijk Aff. ¶¶ 12–14, 26, 43; Westergaard

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[33] Other examples include the petitioners' mention of golf courses—but the order specifically explains how social distancing can be achieved while golfing, unlike at popular public parks. And keeping daycare centers open is necessary to ensure that essential employees with children are able to work.

[34] *See*, *e.g.*, Wis. Dep't of Health Servs., *COVID-19: Businesses, Employers, and Workers*, https://www.dhs.wisconsin.gov/covid-19/employers.htm (last revised Apr. 27, 2020); Wis. Dep't of Health Servs., *Outbreaks and Investigations,* https://www.dhs.wisconsin.gov/outbreaks/index.htm (last revised April 27, 2020) (noting the three-times weekly media briefings). In contrast, the Legislature's committee has yet to hold an informational meeting.

Aff. ¶¶ 12–13, 22–24.) If we close too many businesses, people will be unable to access goods and necessities. Notably, Safer-at-Home provides that businesses who believe they should be deemed essential may apply for that designation with the Wisconsin Economic Development Corporation—an agency with "expertise in economic matters." Further, the Badger Bounce Back plan additionally contemplates sectors or businesses having loosened restrictions, so long as doing so will not reverse Wisconsin's course—and specific orders under that section already are being issued. (Van Dijk Aff. ¶ 45 Ex. F.)

The petitioners do not bring an individual-rights constitutional claim—nor could they. If individuals believe they have grounds to challenge a particular component of Safer-at-Home, those challenges should be decided on those individual bases. The only question here is whether Safer-at-Home has a real or substantial relation to public health. *Jacobson*, 197 U.S. at 31. It clearly does.

D. If this Court engaged in an equitable analysis, it would not favor the petitioners.

Although there would be no need to reach an equitable balancing—because the petition should be rejected as a matter of law—the balance of equities strongly favors leaving Safer-at-Home in place. It is protective of public health, as everyone agrees. Given the overwhelming public interest in fighting this pandemic, the petitioners face a particularly heavy burden to demonstrate that this Court should upset the careful balance currently in place.

Every indication is that removing the order now would result in a surge of COVID-19 cases—with the corresponding impacts on our health care system, people's lives and, ultimately, the economy. (Van Dijk Aff. ¶¶ 29–31;

Westergaard Aff. ¶ 39.) Indeed, it is extraordinarily telling that the petitioners do not cite even one public health expert to controvert this conclusion. Rather, the petitioners seem to concede that it would be exceedingly unwise to lift Safer-at-Home, by asking for a six-day stay to promulgate an emergency rule (which, as explained, is not possible and also is unpredictable).

Balanced against the certainty of substantial harm to, and likely unnecessary death of, Wisconsin citizens—citizens that overwhelmingly support the Safer-at-Home order[35]—the petitioners argue that they have suffered only a single harm: they were purportedly deprived of their opportunity to exercise "statutorily guaranteed oversight" over Safer-at-Home's issuance. (Pet'r Mem. 63–65.) Assuming this is a "harm," that obviously does not outweigh the public safety implications of lifting Safer-at-Home.

Presumably recognizing that their own alleged harm pales in comparison, the petitioners also appeal to the undeniable economic pain that COVID-19 is causing individuals and businesses throughout Wisconsin. While that may seem more reasonable at first glance, it also provides no adequate reason to enjoin Safer-at-Home. As the petitioners rightly observe, the serious economic harm is "mainly traceable to the pandemic itself." (Pet'r Mem. 66.) That is exactly right. COVID-19 itself is the primary reason

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[35] After the new Safer-at-Home order was announced, 74% of those polled agreed that Wisconsin is "currently doing the right thing" or else they wanted more aggressive action. *See* Public Policy Polling, *Battleground Voters Disapprove of Trump's Handling of the Coronavirus Crisis and Trust Governors Far More* (Apr. 23, 2020), https://www.protectourcare.org/wp-content/uploads/2020/04/Multi-State-Results-Memo-April-2020-1.pdf (stating results of April 20 polling).

that economic activity has dramatically decreased around the world, including in Wisconsin. To avoid infection, the virus itself has led businesses to shutter and people to shelter in their homes.

The petitioners assert that Safer-at-Home has "exacerbated" COVID-19's economic disruptions, but it offers no analysis or evidence to show that things would be meaningfully different under a different order, or no order. In fact, in the long run, it could be significantly worse.[36]

The task now is to get sufficiently ahead of COVID-19 so that Wisconsinites' sacrifices are not for nothing, and that less restrictive containment strategies can be deployed: exactly what the Badger Bounce Back plan proposes. The petitioners' equitable analysis entirely ignores that effort to balance public health and economic recovery. Badger Bounce Back aims to restore business activity in Wisconsin as quickly as the COVID-19 pandemic reasonably permits. That plan is consistent with both White House guidance and the metrics it relies on. *See supra* fn. 13, 16. The petitioners offer no substantive critique of those measures.

Rather than invite a dangerous public health backslide, economic policy—tax cuts, direct aid payments, and the like—can mitigate economic disruption. Both the federal and state government have already enacted legislation to do so, and more will surely follow. That buys

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[36] The petitioners ignore the possibility that, as economists have predicted, prematurely opening the economy would be counterproductive, in that it could lead to renewed surges in COVID-19 infections and thereby require even greater shutdowns in the future. *See* Chicago Booth School of Business – IGM Forum, *Policy for the COVID-19 Crisis* (Mar. 27, 2020 5:41 PM), http://www.igmchicago.org/surveys/policy-for-the-covid-19-crisis/.

Wisconsin time to prepare for the future and avoid the worst of the potential outcomes, including avoiding overrunning our health care system and putting more lives at risk. (Van Dijk Aff. ¶¶ 23, 29–31; Westergaard Aff. ¶¶ 23–27.) That is exactly what the experts at all levels recommend. The equities clearly favor staying the course and maintaining the careful balance Wisconsin has achieved.

CONCLUSION

This Court should deny the petition for an original action and the motion for a temporary injunction.

Dated this 28th day of April 2020.

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