

**IN THE SUPREME COURT OF WISCONSIN**  
Case No. 20-AP-765-OA

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WISCONSIN LEGISLATURE,

Petitioner,

v.

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

Respondents.

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**NON-PARTY BRIEF OF AMICI CURIAE,  
WISCONSIN MANUFACTURES AND COMMERCE AND  
WISCONSIN DAIRY ALLIANCE  
IN SUPPORT OF WISCONSIN LEGISLATURE'S EMERGENCY  
PETITION FOR AN ORIGINAL ACTION AND IN SUPPORT OF  
THE EMERGENCY MOTION FOR A TEMPORARY  
INJUNCTION**

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## INTRODUCTION

The citizens of Wisconsin bravely answered the call to make temporary, but drastic, personal sacrifices for the good of their neighbors by shuttering their businesses, losing income, and postponing their plans to mitigate the spread of COVID-19. And while that sacrifice led to measurable mitigation of the virus, it also created real economic harm, which will worsen the longer lockdown continues. More businesses will close; more workers will lose jobs.

The Department of Health Services' (DHS) April 16<sup>th</sup> Emergency Order #28 to extend the lockdown of the state's economy until May 26 is not justified, and DHS's April 20<sup>th</sup> Emergency Order #31 purporting to allow a reopening is a ruse that can only serve to extend the lockdown beyond May 26. Both these orders ("Orders") were issued by DHS Secretary-designee Andrea Palm, claiming more authority to shut down Wisconsin businesses and sideline our workers than the Wisconsin Governor who appointed her.

### ***Wisconsin Businesses and Citizens Stepped Up and Suffered Greatly***

On March 24, 2020, many businesses were told that their services were non-essential, leaving many workers without jobs. Even for many essential small businesses, take-out and curbside sales were not enough to keep afloat,

forcing them to cut staff to a bare minimum or even close entirely.<sup>1</sup> Many others face the real possibility of closing permanently because, on average, companies with less than 500 employees only have about a month's worth of cash in reserves, and smaller businesses may only have a couple weeks' worth of cash.<sup>2</sup>

DHS presents a false choice with its indefinite lockdowns. It is not as simple as choosing between the health of the economy or the health of the population. In fact, a population told their jobs are “non-essential,” or otherwise kept from working, will face significant health impacts. The consequences of not working are often much worse than the risks of working dangerous jobs.<sup>3</sup> “Not working... places us at greater risk of poorer physical and mental health, long-standing illnesses, psychological distress, increased use of health care resources, and death.”<sup>4</sup> And the longer this goes on, the more damage it will cause.

### ***Many Wisconsin Business will Not Survive This Extended Lockdown***

Business organizations and local governments wanting to responsibly reopen do not take the health risks of COVID-19 lightly, rather they are keenly

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<sup>1</sup> Neither the Pawffee Café in Grand Chute or the White House Restaurant in Milwaukee were able to stay open with only take-out.

*These are just a few of the Wisconsin people who've lost their jobs or put their dreams on hold because of coronavirus*, Milwaukee Journal Sentinel, April 17, 2020.

<sup>2</sup> Chris Arnold, *Small business to Washington: Please send money soon or we won't survive*, NPR, March 18, 2020.

<sup>3</sup> Dr. Christopher Brigham, *Work: It's Good for Us*, Workers' Compensation, Issue 6, vol. 1, (December 2015, January 2016) at 17-18.

<sup>4</sup> *Id.* at 18 (emphasis added).

aware of the high cost of a lockdown. And make no mistake, the costs have been high, with over 450,000 new unemployment claims filed in Wisconsin.<sup>5</sup> Economic activity in Wisconsin, as measured by foot traffic, continues a sharp decline of nearly 60 percent from 2019 levels.<sup>6</sup> A survey by the University of Wisconsin Oshkosh taken between April 1-10, 2020, found that 35 percent of respondents would be forced to permanently close if current conditions continued for more than three months.<sup>7</sup> And this study understated the numbers “as more than 40 percent of responding firms indicated not being able to report specific impacts at the time,” so actual closures would likely be higher.<sup>8</sup> Restaurant industry experts in Wisconsin fear half of the restaurants in the state will close permanently because of the Safer at Home order extension.<sup>9</sup> We are reaching a point of no return for many Wisconsin businesses. Some are already gone forever.

Closures affect every type of business across the state, “essential” and “non-essential” alike. “Non-essential” businesses like Kohls, whose original

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<sup>5</sup> *Economic Impact of COVID-19*, Center for Research on the Wisconsin Economy, (April 23, 2020), <https://crowe.wisc.edu/impact-of-covid19/>

<sup>6</sup> *Id.*

<sup>7</sup> Natalie Johnson, *UWO COVID-19 economic impact study*, UW Oshkosh Today, (April 22, 2020), <https://uwosh.edu/today/84280/uw-oshkosh-economic-impact-study-wisconsin/>

<sup>8</sup> *Id.*

<sup>9</sup> "I'm already hearing from members saying they can't survive," Kristine Hillmer, President and CEO of the Wisconsin Restaurant Association, said. "I've had emails already, people saying, I cannot make it until May 26th. I should just close my doors right now."

Shaun Gallagher, *Experts fear half of Wisconsin Restaurants could close because of 'safer at home' order extension*, TMJ4, April 16, 2020, <https://www.tmj4.com/news/coronavirus/experts-fear-half-of-wisconsin-restaurants-could-close-because-of-safer-at-home-order-extension>.

plan included paying employees while temporarily closed, now are furloughing around 85,000 employees.<sup>10</sup> “Essential” business are being similarly crushed. Dairy farmers are dumping thousands of gallons of milk as the majority of their market disappeared overnight,<sup>11</sup> reaching over \$1 billion in lost sales.<sup>12</sup> Hospitals, too, without the ability to perform elective and non-essential surgery, are furloughing hundreds of employees as their revenue drops by \$170 million.<sup>13</sup> Add to this the mass confusion about the meaning of essential, and business across the state flounders.<sup>14</sup>

***Business Led This Effort from the Start; Now We Can Show the Way Out***

On April 24, 2020, Wisconsin Manufacturers and Commerce, the state’s largest business association, unveiled its Back To Business plan (WMC Plan) that would get people working again while taking responsible public

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<sup>10</sup> Sarah Hauer, *Kohl’s keeping stores closed, furloughing employees*, USA Today, (March 30, 2020), <https://www.usatoday.com/story/money/2020/03/30/kohls-stores-not-open-closed-furloughing-employees-cut-expenses-amid-coronavirus-wisconsin/5090993002/>

<sup>11</sup> Rick Barret, *Wisconsin dairy farmers still must pay fees on milk they can’t sell and have to dump*, Wisconsin State Farmer, (April 10, 2020), <https://www.wisfarmer.com/story/money/2020/04/10/coronavirus-lockdowns-worsen-dairy-crisis-milk-dumping-wisconsin-farmers/5129467002/>

<sup>12</sup> Wisconsin Dairy Alliance, *Estimated 12-month WI Dairy Impact from COVID* (Apr. 29, 2020)(unpublished manuscript)(on file with author).

<sup>13</sup> Rich Kirchen, *Pandemic fallout: Medical College of Wisconsin furloughs 700 employees, cuts compensation*, Milwaukee Business Journal, (April 23, 2020), <https://www.bizjournals.com/milwaukee/news/2020/04/23/pandemic-fallout-medical-college-of-wisconsin.html>

<sup>14</sup> AnnMarie Hilton, *Wisconsin businesses received inconsistent messages about whether they were essential*, Sheboygan Press, (April 22, 2020), <https://www.sheboyganpress.com/story/news/2020/04/21/what-wisconsin-businesses-essential-wedc-coronavirus-guidance-uneven/5156423002/>

health measures.<sup>15</sup> The WMC Plan is highly individualized.<sup>16</sup> Based on four factors, each business is given a risk factor of minimal, moderate, or substantial. The higher the risk, the more precautions would be necessary, such as social distancing among guests and employees, increased sanitization procedures, and reduced capacity. This plan takes an individualized approach that gets people back to work through a rational, data-driven process that manages risk.

By contrast, the DHS Plan actually serves as an indefinite extension of Order #28's May 26 deadline. As a one-size-fits-all approach, the plan does not allow non-essential businesses currently closed to fully reopen until strict criteria move the entire state into Phase One. The DHS Plan requires that "the state must show progress or advancement" multiple categories. A fair reading shows that failure to "progress or advance[]" in any one areas prevents the state as a whole from moving on to the next phase, leaving businesses in counties with no infections closed. Additionally, all of the gating criteria in the Order must be met, which includes a 14 day downward trajectory of positive cases,<sup>17</sup> as well as a decrease in infected health care workers. In effect, the DHS Plan is a vehicle for indefinite extension of lockdown orders.

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<sup>15</sup> *Back to Business*, Wisconsin Manufacturers and Commerce, (Apr. 29, 2020) <https://www.wmc.org/backtobusiness/>

<sup>16</sup> *Id.*

<sup>17</sup> What a "downward trajectory of positive tests" means is also unclear and how the governor says contradicts what Secretary-designee Palm said on April 27. *Wisconsin DHS Media Briefing COVID-19 Update for April 20*, Wisconsin Eye (April 20, 2020), <https://wiseye.org/2020/04/20/wisconsin-dhs-media-briefing-covid-19-update-for-april-20> at 55:45-56:15; *Wisconsin DHS Media Briefing*

DHS’s Plan declares itself to be modeled after the “Opening Up America Again” plan issued by the White House, which recommends an individual approach, encouraging alterations of the plan on a regional basis.<sup>18</sup> The DHS Plan ignores this, opting instead for a one-size-fits-all approach. Under the WMC Plan a “non-essential” business can open in a manner that manages and mitigates risk to employees and customers; under the DHS Plan that same business may not reopen until the entire state reaches Phase Two, which could realistically take months. The WMC Plan is a way for Wisconsin businesses and employees to get back to work quickly and safely. DHS’s Plan provides little hope for Wisconsin businesses failing each passing day. It is not an off-ramp; it is a brick wall.

### ***Wisconsin Has Sufficient Healthcare Resources***

The lack of healthcare resources and move to flatten the curve was the primary purpose for Gov. Evers’ and DHS’s first “Safer at Home” order (Order #12)—these goals have now been met.

The data show that Wisconsin has sufficient healthcare resources to meet future COVID-19 challenges. According to DHS, Wisconsin currently has 123 COVID-19 patients in intensive care units (ICU), with 3,928 of all

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*COVID-19 Update for April 27*, Wisconsin Eye (April 27, 2020), <https://wiseye.org/2020/04/27/wisconsin-dhs-media-briefing-covid-19-update-for-april-27/>.

<sup>18</sup> *Guidelines: Opening Up America Again*, White House, (2020) <https://www.whitehouse.gov/openingamerica/#criteria>

Wisconsin licensed hospital beds available.<sup>19</sup> Of the 1,255 ventilators in Wisconsin, 926 (74 percent) are currently available.<sup>20</sup> In April, we increased the number of hospitals with over seven days of Personal Protective Equipment (PPE) from 9 to 72 percent.<sup>21</sup> Wisconsin has flattened the curve of patient hospitalization.<sup>22</sup> Wisconsin's healthcare resources were not and will not be overwhelmed.<sup>23</sup> Of the seven regions in the Healthcare Emergency Readiness Coalition, four have more hospitals than COVID-19 patients.<sup>24</sup> The first justification for a statewide lockdown no longer exists.

### ***The Rate of Infections has Stabilized***

On April 20, 2020, during a press conference discussing DHS's Plan, Dr. Ryan Westergaard, the Chief Medical Officer of DHS, said that the number of new cases over the last two weeks flattened and lack "a clear trend of going up or down."<sup>25</sup> The "official state numbers" on this pivotable justification show that the rate of infections has stabilized.<sup>26</sup> The second justification for statewide lockdown no longer exists.

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<sup>19</sup> *COVID-19: Hospital Capabilities*, Wisconsin Department of Health Services, (April 28, 2020), <https://www.dhs.wisconsin.gov/covid-19/hosp-data.htm>.

<sup>20</sup> *Id.*

<sup>21</sup> *Covid-19 Situation Awareness Update*, Wisconsin Hospital Association, (April 28, 2020), <https://www.wha.org/Covid-19Update>.

<sup>22</sup> *Id.*

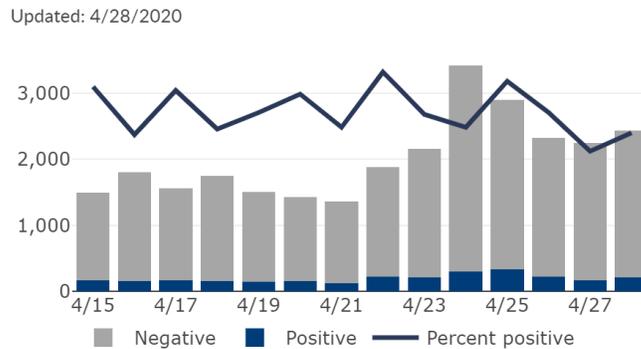
<sup>23</sup> On April 23, Gov. Evers issued Emergency Order #32, which created an Alternative Care Facility on the state fairgrounds, further increasing the capacity for COVID-19 patients.

<sup>24</sup> *Covid-19 Situation Awareness Update*, *supra*.

<sup>25</sup> *Wisconsin DHS Media Briefing COVID-19 Update for April 20* at 1:01:35-1:02:20

<sup>26</sup> *COVID-19: Wisconsin Summary Data*, Wisconsin Department of Health Services, (April 28, 2020), <https://www.dhs.wisconsin.gov/covid-19/data.htm>

## Number of COVID-19 test results (positive or negative) and the percent positive, by day (last 14 days)



Wisconsin businesses and citizens expect—and earned—a degree of relief. We were told that if the curve flattened and the healthcare industry prepared, DHS would start letting us go back to work. But DHS moved the goalposts. The lockdown has been indefinitely extended without any justification.

### INTERESTS OF AMICI

Amici (“Wisconsin Employers”) are associations whose members are global leaders in manufacturing and agricultural industries, as well as main street Wisconsin businesses. They have an interest in assuring that Wisconsin executive branch agencies follow the statutory delegation standards and administrative procedures set forth in Wisconsin Statutes Chapter 227, including the statutory authority limits of Wis. Stat. § 227.10(2m) and the rulemaking requirement of Wis. Stat. § 227.10(1). For the regulated community, it is vitally important that agencies operate within the boundaries

of their enabling statutes. And the procedural requirements for rules, including emergency rules, play a critical role in promoting stability and fairness, especially in times of uncertainty.

## ARGUMENT

### **I. DHS’s Orders to Extend the State Lockdown Until May 26, and the Bounce Back Plan that Furthers that Extension, are Un-Promulgated Rules and Arbitrary and Capricious.**

When an agency avoids rulemaking, it robs affected parties of due process, eliminates effective legislative oversight, and frustrates judicial review. Especially in times of emergency, rulemaking procedures play a critical role in protecting fundamental rights.

#### **A. Emergency Rulemaking Process Set Forth In Chapter 227 Provides Critical Procedural Due Process for Wisconsin Businesses With Needed Input From the Legislature and the Business Community.**

Crucially, rulemaking allows “clear advance notice of permissible and impermissible conduct.”<sup>1</sup> Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.8 (4th ed. 2002). It informs the regulated how and when an agency will regulate them. *See Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982). Thus, rulemaking upholds “[t]raditional concepts of due process...preclud[ing] an agency from penalizing a private party for violating a rule without first providing adequate notice.” *Satellite Broad. Co. v. F.C.C.*, 824 F.2d 1, 3 (D.C. Cir. 1987).

Rulemaking provides necessary legislative oversight. “[W]hen administrative agencies promulgate rules, they are exercising legislative power...” *Koschkee v. Taylor*, 2019 WI 76, ¶12, 387 Wis. 2d 552, 929 N.W.2d 600. But the legislature does not unreservedly delegate authority. It places checks throughout the process to ensure agencies “remain subordinate to the legislature with regard to their rulemaking authority.” *Id.*, ¶20.

Finally, rulemaking prevents agencies from exceeding their legal authority. From the start, a scope statement must include the basis for agency action. Wis. Stat. § 227.135. These disclosures bolster a rigorous judicial review. *Connecticut Light & Power Co.*, 673 F.2d at 530 (“Disclosure of an agency’s rationale is particularly important in order that a reviewing court may fulfill its statutory obligations to determine whether an agency’s choice of rules was arbitrary or capricious.”).

The legislature foresaw that in times of emergency, rigorous rulemaking requirements might prove impracticable, so it created emergency rulemaking, allowing flexibility while also upholding rulemaking objectives. *See* Wis. Stat. § 227.24. Thus, “if preservation of the public peace, health, safety, or welfare necessitates putting [a] rule into effect” sooner than otherwise available, an agency may engage in an abbreviated rulemaking procedure. Wis. Stat. § 227.24(1).

To promulgate an emergency rule, an agency must:

Prepare a statement of the scope of the proposed emergency rule as provided in s. 227.135(1), obtain approval of the statement as provided in s. 227.135(2), send the statement to the legislative reference bureau for publication...and hold a preliminary public hearing and comment period if directed under s. 227.136(1).

Wis. Stat. § 227.24(1)(1d).

Additional requirements include a fiscal estimate and feedback from the small business regulatory review board. Wis. Stat. §§ 227.24(1), (3m).

Finally, emergency rules must ultimately undergo formal rulemaking. Wis. Stat. § 227.24(1)(c) (emergency rules remain in effect only 150 days without extension).

While temporarily more limiting, emergency rules provide vital protections and necessary process for Wisconsin to develop an exit strategy with buy-in from the legislature, businesses, and Wisconsin citizens. And it works—currently five different agencies have put out seven different Scope Statements relating to COVID-19 using emergency rulemaking procedures.<sup>27</sup> In times of emergency, tradeoffs between procedure and efficiency will occur. But the legislature already set the bounds of the tradeoff and an agency cannot ignore it while simultaneously using legislative authority.

**B. Emergency Orders #28 And #31 Are Rule and Must Be Promulgated as such Under Wis. Stat. § 227.24.**

A rule consists of five elements: “(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of

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<sup>27</sup> *Active Scope Statements*, Wisconsin State Legislature, (4/29/2020), [https://docs.legis.wisconsin.gov/code/scope\\_statements/active](https://docs.legis.wisconsin.gov/code/scope_statements/active)

law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency.” *Citizens for Sensible Zoning, Inc. v. Dep't of Nat. Res*, 90 Wis.2d 804, 814, 280 N.W.2d 702 (1979) (citing Wis. Stat. § 227.01(13)). Clearly, the Orders are “general orders” issued by an agency. Thus, elements one and four need no further discussion.

The second element, “of general application,” distinguishes a rule from an order. An order applies to an individual or business, such as with a permit. A rule, meanwhile, applies whenever the action impacts a class of individuals. *Citizens for Sensible Zoning*, 90 Wis.2d 804 at 815-16 (a rule has general application if the class impacted can be “described in general terms and new members...added.”). The Orders impact nearly everyone in Wisconsin and clearly have general application.

DHS’s interpretation of general application fails for at least two reasons. First, rules limited in time already exist—they are emergency rules. Second, the Orders are time-limited only in the sense that DHS has not yet publicly changed the end date of May 26. The fact that DHS claims authority to extend it indefinitely without input or check from the legislature means there is no final date upon which the Orders cannot be extended by DHS (like an emergency rule would have).

As violation of the Orders can result in imprisonment or fines, they clearly have the third element’s effect of law.

Finally, DHS claims authority from Wis. Stat. § 252.02 for the Orders, meeting the fifth element (“to implement...specific legislation enforced or administered by such agency.”)

**C. The Orders Are Arbitrary and Capricious, Lacking a Rational Basis.**

Courts reviews “legislative-type decisions under the arbitrary and capricious standard.” *J.F. Ahern Co. v. Wisconsin State Bldg. Comm’n*, 114 Wis. 2d 69, 91, 336 N.W.2d 679 (Ct. App. 1983). An agency’s action is “arbitrary and capricious” if it “lacks a rational basis and is the result of an unconsidered, willful or irrational choice rather than a ‘sifting and winnowing’ process.” *Wisconsin Prof’l Police Ass’n v. Pub. Serv. Comm’n of Wisconsin*, 205 Wis. 2d 60, 74, 555 N.W.2d 179 (Ct. App. 1996).

Wisconsin Employers are particularly concerned with the arbitrary and capricious manner in which DHS designates some businesses “essential” and others “non-essential” without evident “sifting or winnowing.” For example, DHS sub-delegated its perceived authority to the Wisconsin Economic Development Corporation (WEDC). WEDC has a portal on its site for businesses to determine essential or nonessential status; that is, whether they survive or go bankrupt.<sup>28</sup> But the portal does not work; how could it?<sup>29</sup> It is irrational to shut down businesses in such manner.

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<sup>28</sup> *Essential Business Declaration*, WEDC, (Apr. 29, 2020), <https://wedc.org/essentialbusiness/>

<sup>29</sup> AnnMarie Hilton, *supra*.

In all aspects, the Orders demonstrate extreme overbreadth, even when compared to the standards established in DHS’s own regulations. For example, Wis. Admin. Code HS § 145.06(5)(c) states that when “a [contaminated] person fails to comply...the official who issued the directive may petition a court of record to order the person to comply” provided “that the remedy proposed *is the least restrictive* on the respondent which would serve to correct the situation and to protect the public's health.” (emphasis added.) Far from focusing on those contaminated or implementing least restrictive measures, the Orders regulate broadly.

While the emergency rulemaking process set forth in Chapter 227 provides the best—legally required—opportunity to reach a consensus on how to move forward, for it to work the court must establish definitive boundaries to DHS’s authority under its enabling statutes. A decision without such a ruling will quick return to the court as the first issue in rulemaking is an agency’s authority. Due to the constitutional defects of the Orders, the court should draw boundaries as clearly and narrowly as possible.

For example, under any non-delegation test, the statutory provisions relied on by DHS should be deemed an unconstitutional delegation of legislative power. In particular, Wis. Stat. §252.02(6), as interpreted by DHS, would grant unlimited authority to DHS to implement any emergency measures so long as DHS deems them necessary to “control communicable

diseases.”<sup>30</sup> But a more plausible reading suggests this section simply is not an enabling statute delegating DHS new legal authorities.

## **II. DHS’s Orders Fall Outside of The Boundaries of Its Enabling Statutes.**

Under Wisconsin law, statutory interpretation begins with the statute and gives statutory language “its common, ordinary and accepted meaning.” *State ex rel. Kalal v. Circuit Court for Dane Cty*, 2004 WI 58, ¶ 45, 271 Wis.2d, 681 N.W.2d 110. “Context is important to meaning. So, too, is the structure of the statute in which the operative language appears.” *Id.* ¶ 46. “[L]egislative history need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation.” *Id.*

The first step in assessing whether an agency is acting with its statutory authority is to identify the relevant enabling statute. The Orders rely on Wis. Stat. § 252.02(3), (4), and (6). Each of these provisions was modified by Chapter 291, Laws of 1981 (1981 Assembly Bill 711). *See App.* at 5-6

The drafting file includes drafting instructions from the Bureau of Prevention within the Department of Health and Social Services (DHSS, predecessor to DHS) relating to provisions for inclusion in the 1981-82 biennial budget. *App.* at 14-15 Those changes were not included in the

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<sup>30</sup> Additionally, the Orders assault fundamental rights protected by the U.S. and Wisconsin constitutions, including the right to freedom of travel, freedom of religion, freedom of assembly, and freedom of speech. Even with a compelling state interest, limitations on these fundamental rights must be narrowly crafted. The Orders fail any basic constitutional test.

budget, most of them found their way into AB 711. Notably, under “Explanatory Note,” DHSS states that the changes are: “basically technical changes designed to bring the statute into concordance with the current public health and epidemiologic thought and terminology.”

AB 711, as introduced, included the provisions at issue here.

Markedly, the Legislative Reference Bureau’s (“LRB”) analysis did not describe these changes as providing additional DHSS authorities. App. at 33-36 LRB describes the purpose of its analysis:

The purpose of an analysis is to describe the substance and effect of a legislative proposal in a manner that adequately advises the legislature of the legal effect of the proposal. Legislators rely on the analysis of the bill, and courts consult analyses as aids in statutory construction.

App. at 63.

There is nothing in its legislative history to suggest that the 1981 revisions provide DHS with any additional authority.

An enabling statute is “a statute that confers new powers.” Black’s Law Dictionary 427 (5th ed. 1979). When the legislature delegates authority to an administrative agency, it does so through an enabling statute specifying “powers, duties and scope of authority.” *Martinez v. DILHR*, 165 Wis.2d 687, 698, 478 N.W.2d 582 (1992). Given that Wis. Stat. § 252.02(6) provides no new powers, it is not the enabling statute and cannot be a source for DHS’s Orders.

2011 Act 21 fundamentally altered Wisconsin administrative law relating to agency delegation by requiring explicit delegations. The term

“explicit” was purposefully chosen by the legislature to roll back expansive regulatory delegations.

The dispositive language in Wis. Stat. § 227.10(2m) is the term “explicitly.” It was purposely chosen to heighten what had become a very low delegation threshold upon a finding of authorities that were either “expressly or necessarily implied.” The operative meaning of “explicit” is “leaving nothing implied.”

Act 21 introduced Assembly Bill 8 (“AB 8”).<sup>31</sup> Initial versions of AB 8 used the word “expressly” instead of “explicitly.” However, the Senate replaced “expressly” with “explicitly,” later concurred in by the Assembly. Rep. Tiffany, the Assembly author of AB 8, stated during the Assembly floor debate:

The primary change that was made to [the assembly bill] in the Senate was changing the term expressly to explicitly. The courts have interpreted expressly very broadly, and in order for our legislation that comes out of this body today to reflect the intent that we want. It was important to change the word to explicitly and that was the primary change that was made to the bill in the Senate. (Transcript of Jan. 2011 Special Session Assembly Floor Debate on AB 8, (May 17, 2011),

App. at 67-68.

The legislature clearly understood the difference between these two terms, deliberately choosing “explicitly” to shore up its intent to restore Wisconsin’s history of requiring clear delegation of authority in enabling legislation. It is incongruous that this process, including a floor amendment

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<sup>31</sup> 2011 Assembly Bill 8. <http://docs.legis.wisconsin.gov/2011/proposals/jr1/ab8>.

for the purpose of changing one word, would leave the prior delegation standard intact. Under Act 21, any delegation of agency authority must be explicitly provided for by the legislature.

The Orders go well beyond their explicit authority. Sub. (3) allows DHS to “close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.” This subsection explicitly allows for the closing of certain places and functions, but it does not grant broad authority to ban any type of gathering.

Sub. (4) grants the DHS power to quarantine sick people or communities, as well as other powers to enforce quarantine. However, it does not give DHS unlimited enforcement power for any goal they wish to achieve. It does not give the power to close businesses, or to quarantine healthy individuals, or ban all travel.

Each of the dictates in the orders must be run through the Act 21 construct requiring explicit delegations rather than judicial concepts that gave rise to express and implied delegations.

## **CONCLUSION**

Amici request the Court grant the Legislature’s request for its Emergency Petition for Original Action and its Motion for Temporary Injunction.

Respectfully submitted this 29<sup>th</sup> day of April 2020.

\_\_\_\_\_/s/\_\_\_\_\_  
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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produce with a proportional serif font, and with this Court's Order dated April 21, 2020. This brief contains 4076 words, calculated using Microsoft Word.

Dated April 29, 2020.

\_\_\_\_\_/s/\_\_\_\_\_  
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## CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2020 a true and correct copy of the foregoing motion to file a non-party brief was served on the following by electronic mail and that the paper original and one paper copy of the motion and the original and 10 copies of the brief were hand delivered to:

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I further certify that a copy of the motion for leave to file non-party brief and brief was served on all parties by email, and one copy of the motion for leave to participate as a non-party and three copies of the brief have been served on all parties by U.S. Mail to their counsel of record listed below:

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