No. _____

In the Supreme Court of Wisconsin

WISCONSIN LEGISLATURE,

Petitioner,

v.

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

Respondents.

MEMORANDUM IN SUPPORT OF LEGISLATURE'S EMERGENCY PETITION FOR ORIGINAL ACTION AND EMERGENCY MOTION FOR TEMPORARY INJUNCTION

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ISSUES PRESENTED

I. Whether the Department of Health Services ("DHS" or "Department") violated § 227.24, governing emergency rules, by issuing Emergency Order 28 (the "Order") without complying with Section 227.24's procedures.

II. Even if the Department did not violate § 227.24, whether Emergency Order 28 exceeds the Department's authority by closing all "nonessential" businesses, ordering all Wisconsin persons to stay at home, and forbidding all "nonessential" travel.

III. Even if the Department did not violate § 227.24, whether the Department acted arbitrarily and capriciously in issuing Emergency Order 28.

IV. Whether a temporary injunction should be issued because Emergency Order 28 is unlawful and the Department's failure to comply with Section 227.24 has irreparably harmed the Legislature by depriving it of the ability to exercise its statutorily prescribed oversight of an unprecedented administrative rule affecting the lives of millions of Wisconsinites.

INTRODUCTION

Purporting to act under color of State law, an unelected, unconfirmed cabinet secretary has laid claim to a suite of czar-like powers—unlimited in scope and indefinite in duration—over the people of Wisconsin. Per her decree, everyone in the State must stay home and most businesses must remain shuttered (with exceptions for activities and companies arbitrarily deemed "essential"). These restrictions apply not only to metropolitan areas with more COVID-19 cases but also to rural counties with few or no known cases. Just as troubling, the Secretary asserts that her go-it-alone shutdown authority has no expiration date—making it greater than even the *Governor's* emergency powers. To be sure, Emergency Order 28 *says* it terminates on May 26, but nothing suggests that it won't be extended again. Perhaps it will even run into 2021. In any case, by the time the Secretary sees fit to lift her decree (be it in five weeks or eight months), many Wisconsinites will have lost their jobs, and many companies will have gone under, to say nothing of the Order's countless other downstream societal effects. Our State will be in shambles.

Incredibly, the Secretary took this unprecedented action without following *any* of our State's requirements for rulemaking, while also intentionally waiving any reliance on the Governor's emergency authorities, set to expire before this Order. If a single bureaucrat can evade the controls and accountability measures that the Legislature has enacted to control agency overreach simply by labeling what is obviously an emergency rule a mere "order," then all of the reforms that the Legislature has put in place, and which this Court has interpreted and enforced over the years, are a meaningless, dead letter—in their *most* consequential application.

Had DHS followed those reforms here, the Legislature, through its Joint Committee for Review of Administrative Rules, would have had a seat at the table. It particular, it would have had an opportunity to review Emergency Order 28 and to suspend it if it exceeded DHS's statutory authority, was arbitrary and capricious, or imposed undue hardship, especially on small businesses and local governments. That accountability to the legislative branch—from which agencies derive their powers in the

first place—would, in turn, have produced a more measured rule that balanced the need to protect public health with the need to preserve Wisconsin's existing cultural and economic edifice. Notably, concern about delay does not (and could not) justify the Secretary's unilateral approach, since the rule could have been issued just as quickly had the agency followed the law. One is therefore left to conclude that the Secretary brazenly evaded the administrative-review statutes *precisely* to cut the Legislature out of the decision-making process.

Beyond this straightforward procedural problem, which is reason alone to make DHS start over, the Order also suffers from numerous substantive flaws, all of them fatal. To begin, much of the Order is unauthorized by DHS's general "duties and powers" statute, the only authority it invokes. Since 2011, agencies in this State can no longer look to "statutory provision[s] describing [their] general powers or duties"—which is, literally, the title of Section 252.02—"to *augment*" their powers "beyond" what other, more specific statutes "explicitly confer[ ]." Wis. Stat. § 227.11(2)(a)2. (emphasis added). Nor can agencies enforce

"standard[s]" or "requirement[s]" that are not already "explicitly required or explicitly permitted by statute or by a [validly promulgated] rule." Wis. Stat. § 227.10(2m). These interpretive commands, together with the established canons of construction and the constitutional-doubt principle, confirm that DHS's limited powers to quarantine infected individuals and prohibit public gatherings do not *remotely* authorize virtually across-the-board bans on travel, gatherings at private residences, and operation of businesses in Wisconsin, especially without regard to those activities' risk levels. Finally, even if the Legislature had delegated these awesome powers to DHS (which it assuredly did not), the Order is arbitrary and capricious in several respects, including in its freewheeling categorization of businesses as either "essential" or "nonessential"—a criterion that appears nowhere in DHS's enabling statute and that has nothing to do with public health—and in its sub-delegation of similarly standardless discretion to the Wisconsin Economic Development Corporation.

On Monday, April 20, the Secretary issued yet another edict, Emergency Order 31, that claims not to affect Emergency Order

28 but that in fact mirrors—indeed, magnifies—its defects. Grandly pronouncing that "Wisconsin *shall* adopt a phased approach to re-opening its economy and society," Order at 2 (emphasis added), the Secretary declares that Emergency Order 28 shall remain in effect until she *alone* decides that Wisconsin has made "progress" (undefined) on certain "Core Responsibilities" (barely defined), in which case the State *may* at some point (if she deems appropriate) proceed to a partial re-opening. Unsurprisingly, none of this was run by the Legislature. The administration has made even clearer that it is wholly committed to running the State's response to the pandemic by administrative fiat.[1]

[1] The new Order purports to mirror President Trump's "comprehensive and thoughtful approach" to reopening America as reflected in his Guidelines for Opening Up America Again. Order at 2. In truth, there are important differences, including that federal guidelines do not recommend keying re-opening decisions to a single official's finger-in-the-air assessment of "progress." In any case, although the Legislature agrees that Wisconsin should take steps expeditiously and guided by federal guidelines, it must proceed *according to law*. The Legislature is ready, willing, and able to work with DHS and at the same time craft legislation (which it is drafting even now) to respond to the pandemic in a comprehensive and balanced fashion and guided by federal recommendations.

* * *

The Legislature respectfully requests that this Court issue an order temporarily enjoining enforcement of Emergency Order 28, because it is an improperly promulgated rule under Wisconsin Statutes § 227.24, and because it exceeds the Department's authority under § 252.02 and is arbitrary and capricious in violation of § 227.57(8) to the extent it confines all residents to their homes, prohibits all private gatherings, broadly restricts travel, and closes all businesses deemed nonessential.

The Legislature also respectfully suggests that this Court stay enforcement of its injunction for a period of six days, to allow DHS sufficient time to promulgate a new emergency rule consistent with Wisconsin law (a process that it should begin undertaking as soon as this filing is served on them). Such a stay would fairly accommodate the parties' mutual interest in preserving the status quo and ensuring no disruption to the State's

efforts to control the spread of COVID-19 while DHS undertakes steps to comply with all applicable statutes.[2]

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Although this case would warrant oral argument under ordinary circumstances, the Legislature respectfully requests that the Court resolve this urgent dispute without it. Emergency Order 28 takes effect on April 24, 2020, and prompt adjudication is necessary to avoid ongoing irreparable harm. For the same reason, immediate publication is unnecessary to the extent that it would delay a resolution of the emergency motion.

STATEMENT OF THE CASE

I. Statutory Background

1. Chapter 227 of the Wisconsin Statutes, titled "Administrative Procedure and Review," describes the process by which an agency can issue an emergency rule. A "rule" means "a

[2] The Legislature respectfully suggests the following briefing schedule: that Respondents file any brief in opposition to the emergency petition for original action and emergency motion for temporary injunction by noon on Monday, April 27, and that Petitioner file any reply brief in support of the emergency petition for original action and emergency motion for temporary injunction by 4:00 pm on Wednesday, April 29.

regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement … or make specific legislation enforced or administered by the agency ….” Wis. Stat. § 227.01(13). An agency may promulgate an emergency rule “without complying with the notice, hearing, and publication requirements … if preservation of the public … health … necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.” *Id.* § 227.24(1)(a).

Chapter 227 nonetheless prescribes certain requirements in the event an agency passes an emergency rule. For example, an agency that promulgates a rule “*shall do all of the following*:” “Prepare a statement of the scope of the proposed emergency rule,” “send the statement to the legislative reference bureau,” “[s]ubmit the proposed emergency rule in final draft form to the governor for approval,” “[p]repare a plain language analysis of the rule,” “[p]repare a fiscal estimate for the rule,” and “mail the fiscal estimate to each member of the legislature.” *Id.* § 227.24(1)1d–2 (emphasis added). An agency promulgating an emergency rule

"*shall*" also "mail a copy to the chief clerk of each house and to each member of the legislature at the time that the rule is filed." *Id.* § 227.24(3) (emphasis added). The statute also *requires* an agency to "submit a copy of the rule to the small business regulatory review board" so that "the board may submit to the agency and to the legislative council staff suggested changes in the emergency rule to minimize the economic impact of the emergency rule." *Id.* § 227.24(3m) (emphasis added).

Once an emergency rule has been promulgated, the Joint Committee for Review of Administrative Rules "may suspend any rule by a majority vote of a quorum of the committee" based on "testimony in relation to [the emergency] rule received at a public hearing." *Id.* § 227.26(d). The grounds for suspending a rule are set forth in § 227.19(4)(d) and include an "*absence of statutory authority*," "*failure to comply with legislative intent*," and "*[a]rbitrariness and capriciousness, or imposition of an undue hardship*." *Id*. (emphases added).

2. Enacted in 2011, Act 21 transformed administrative law in Wisconsin by prohibiting agencies from "implement[ing] or

enforcing[ing] any standard, requirement, or threshold … issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter." 2011 Wis. Act 21 § 1r (codified at Wis. Stat. § 227.10(2m)). Act 21 further provides 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).

3. Chapter 323 of the Wisconsin Statutes describes the Governor's emergency powers. "The governor may issue an executive order declaring a state of emergency for the state … if he … determines that an emergency resulting from a disaster or the imminent threat of a disaster exists." *Id.* § 323.10. The Governor's "state of emergency *shall* not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature." *Id.* (emphasis added).

4. The Department has its own statutory powers and duties and is authorized to take certain actions to prevent the spread of communicable diseases. For example, DHS "may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." *Id.* § 252.02(3). Section 252.02 also confers rulemaking authority on DHS: "[T]he department may promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, [and] for the control and suppression of communicable diseases…." *Id.* § 252.02(4). Any rule issued under this subsection "may be made applicable to the whole … state." *Id.* The Department may also "authorize and implement all emergency measures necessary to control communicable diseases." *Id.* § 252.02(6).

II. Factual Background

A. In February 2020, the novel coronavirus, COVID-19, began spreading throughout the United States. In response, Governor Evers issued Executive Order 72, declaring a public health emergency throughout the State of Wisconsin. Executive

Order 72 (March 12, 2020).[3] DHS then issued several orders closing schools and restricting public gatherings. *See* Emergency Order 1 (March 13, 2020); 4 (March 16, 2020); 5 (March 17, 2020); 8 (March 20, 2020).[4] The Governor also issued emergency orders suspending the rules of various administrative agencies. *See* Emergency Order 3 (March 15, 2020); 10 (March 21, 2020); 11 (March 21, 2020); 17 (March 27, 2020); 18 (March 31, 2020); 21 (April 3, 2020).[5]

B. On March 24, "at the direction of" the Governor, Secretary-Designee Andrea Palm issued DHS's most sweeping emergency order to that point, entitled "Safer at Home," which requires "[a]ll individuals present within the State of Wisconsin" "to stay at home or at their place of residence," requires all businesses deemed "nonessential" to close, prohibits nonessential travel, closes schools and libraries, and prohibits all public and

[3] Available at https://evers.wi.gov/Documents/EO/EO072-DeclaringealthEmergencyCOVID-19.pdf.

[4] Available at https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx.

[5] Available at https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx.

private gatherings, even within the home. Emergency Order 12 (March 24, 2020).[6] DHS stated that it was issuing Emergency Order 12 under the authority conferred by Wis. Stat. § 252.02(3) and (6), as well as the "powers vested" in Secretary-Designee Palm "through Executive Order 72, and at the direction of Governor Tony Evers." *Id*. at 2. This order is set to expire on April 24, 2020. *Id*. at 16.

Without questioning Emergency Order 12 as a policy matter, one cannot dispute that it has had collateral effects on Wisconsin's economy and the lives of countless small business owners and employees. Between March 15 and April 6, 2020, Wisconsinites submitted over 313,000 new applications for unemployment benefits, with weekly claims reaching 589,616.[7] During the same period in 2019, by comparison, new applications totaled 17,748, with weekly claims reaching only 155,148.[8] An additional 69,884

[6] Available at https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf.

[7] Wis. Dep't of Workforce Development, *DWD Releases Total Number of New Applications, Weekly Claims, and Monetary Amount Distributed for Unemployment Benefits* (Apr. 9, 2020), available at https://bit.ly/3amsEmZ.

[8] *Id.*

initial unemployment applications were submitted in the week ending April 11, 2020.[9] And by April 16, the estimated unemployment rate in Wisconsin reached 16.71 percent, a figure nearly twice as high as the peak rate during the Great Recession.[10]

Business revenues have fallen as sharply as employment numbers.[11] Indeed, total state sales have fallen 15 percent over the same period last year, with a decline of over 40 percent for in-store transactions at local businesses that do not have an online presence like Amazon.[12] Restaurants and travel-sector businesses have been hit the hardest, with sales declines of 40 percent and 86 percent, respectively.[13] Foot-traffic data confirm that economic activity in many sectors has declined—and for some businesses, effectively halted altogether.[14] Dairy, corn, and other farmers,

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[9] U.S. Dep't of Labor, *News Release*, at 5, (Apr. 16, 2020), available at https://bit.ly/2XOl02f.

[10] Kim J. Ruhl, *The Effects of COVID-19 on Wisconsin's Workers and Firms* 3, UW-Madison Center for Research on the Wisconsin Economy (Mar. 24, 2020, updated Apr. 17, 2020), available at https://bit.ly/2ykAUH8.

[11] Noah Williams, *Consumer Responses to the COVID-19 Pandemic*, UW-Madison Center for Research on the Wisconsin Economy 7 (Apr. 16, 2020), available at https://bit.ly/2wKFiyu.

[12] *Id.*

[13] *Id.* at 5.

[14] Noah Williams, *Measuring Wisconsin Economic Activity Using Foot Traffic Data*, UW-Madison Center for Research on the Wisconsin Economy 1, 5–6 (Apr. 16, 2020), available at https://bit.ly/3cqr9Ww.

with "bankruptcies [ ] on the rise," have particularly felt the negative effects of Emergency Order 12 and similar orders in other States.[15]

The non-economic harms inflicted by Emergency Order 12 may be even more tragic. The Order has likely increased levels of mental stress, anxiety, and depression, which are often caused by economic hardship, social isolation, and decreased access to community and religious support.[16]

C. On April 16, 2020, eight days before Emergency Order 12 was scheduled to expire, Secretary-Designee Palm issued a new order extending Emergency Order 12's core restrictions for another month. *See* Emergency Order 28 (the "Order").[17] Emergency Order 28 will go into effect on April 24, the day Emergency Order 12

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[15] Rick Barrett, *Wisconsin Farm Bankruptcies Rising Rapidly as Coronavirus Weighs Heavily on Agriculture*, Milwaukee J. Sentinel (Apr. 14, 2020), available at https://bit.ly/34L3yx2.

[16] Beth Braverman, *The Coronavirus Is Taking a Huge Toll on Workers' Mental Health across America*, CNBC (Apr. 6, 2020), https://cnb.cx/3cuP8Ui.; *id.* ("[F]rom a suicide prevention perspective, it is concerning that the most critical public health strategy for the COVID-19 crisis is social distancing.").

[17] Available at https://content.govdelivery.com/attachments/WIGOV/2020/04/16/file_attachments/1428995/EMO28-SaferAtHome.pdf; *see also* The National Law Review, *Extension of Wisconsin's Safer at Home Order* (April 17, 2020) (identifying Governor Evers as directing DHS to issue the order).

expires, and will remain in effect until May 26, 2020, or until a superseding order is issued.

Unlike its predecessor, Emergency Order 28 does not rely on any authority resulting from the Governor's declaration of emergency. Instead, the Order relies on "the Laws of the State including but not limited to Section 252.02(3), (4), and (6) of the Wisconsin Statutes." Order at 2. This decision was deliberate, because the Governor's chief legal counsel has asserted that DHS has "ongoing powers that are not dependent on a state of emergency" declaration.[18] The Department may also have decided not to rely on Executive Order 72 because the state of emergency will expire on May 11, and the Governor cannot extend it without legislative approval. Wis. Stat. § 323.10. Thus, DHS has waived any reliance on the Governor's emergency powers.

[18] "Live: Gov. Tony Evers updates Wisconsinites on 'safer at home' order and economic impact of COVID-19," 30:36–32:13 (April 16, 2020), available at https://madison.com/wsj/live/live-gov-tony-evers-updates-wisconsinites-on-safer-at-home-order-and-economic-impact-of/article_2a5d9036-0ed7-58dd-b461-2d6340d85068.html.safer-at-home-order-and-economic-impact-of/article_2a5d9036-0ed7-58dd-b461-2d6340d85068.html.

Emergency Order 28 retains nearly all of the restrictions imposed by Emergency Order 12. For example, the Order requires "[a]ll individuals present within the State of Wisconsin" "to stay at home or at their place of residence," with only limited exceptions. Order at 2–3. It requires "[a]ll for-profit and non-profit businesses with a facility in Wisconsin, except Essential Businesses and Operations" to "cease all activities at facilities located within Wisconsin," except for "Minimum Basic Operations" and those that can be performed by an employee "working from home." *Id.* at 3–4. Those businesses deemed "Essential," and thus allowed to remain open, must follow "Safe Business Practices," which include use of technology to facilitate working from home, social distancing, increased standards for cleaning and disinfection, restricting the number of workers on premises, and limiting the number of customers on the premises. *Id.* at 4–5. The Order prohibits "[a]ll public and private gatherings of any number of people that are not part of a single household or living unit," and it closes all "[p]ublic and private K-12 schools" "for the remainder of the 2019-2020 school year." *Id.* at 5. It closes places of "public

amusement," such as water parks, playgrounds, and theaters, but it allows golf courses to open with certain restrictions. *Id.* at 6. The Order prohibits "[a]ll forms of travel" "except for Essential Travel as defined in the Order." *Id.* at 7.

The Order does not explain how DHS decided which businesses are "essential" and which are not. The list of businesses allowed to operate includes art and craft stores; grocery stores; convenience stores; food and beverage manufacturing; gas stations; banks; hardware stores; funeral establishments; delivery providers; laundromats; retail outlets that sell products needed to work from home; businesses that sell, manufacture, or supply other "Essential Businesses"; transportation providers (to the extent necessary for Essential Activities); home-based care providers; professional services, including legal and accounting services; manufacturing and distribution companies that supply products used by other "Essential Governmental Functions and Essential Businesses"; hotels and motels; and higher educational institutions, for certain purposes. Order at 13–17.

If a business believes it should be added to the list of "Essential Businesses," the Order allows that business to "apply to the Wisconsin Economic Development Corporation" by filling out a cursory form on WEDC's website that simply directs the applicant to state why the business should qualify as "essential." *Id.* at 18.[19] WEDC does not disclose the criteria it applies when deciding whether a business is entitled to an "essential business" exemption or how much time it has to decide.

As with its predecessor, the Order "is enforceable by any local law enforcement official," and "[v]iolation or obstruction of th[e] Order is punishable by up to 30 days imprisonment, or up to $250 fine, or both." *Id.* at 21 (citing Wis. Stat. § 252.25).

On April 20, 2020, DHS Secretary-Designee Palm issued yet another sweeping decree, Emergency Order 31. Like the Orders that preceded it, Emergency Order 31 was issued without going through the emergency rulemaking process or being subject to any sort of legislative review.

[19] *See* Wisconsin Economic Development Corporation, *Essential Business Declaration*, available at https://wedc.org/essentialbusiness/.

Emergency Order 31 does not "modif[y], alter[ ] or, supersede[ ] Emergency Orders #12 and #28." Emergency Order 31 at 4. Instead, DHS continues to enforce its mandates closing businesses, banning public gatherings, and requiring Wisconsinites to stay at home and, through Emergency Order 31, has given itself the power to determine when to bring the economy back online. When the Secretary-Designee deigns to begin reopening the economy in "phases," she "shall announce the transition to each Phase" and at that point "fully articulat[e] the activities that will resume." Emergency Order 31 at 3. In order to move to the next "phase", Wisconsin must make some sort of undefined "progress" towards "core responsibilities" and must fulfill "gating requirements." The description of Wisconsin's gating requirements is less than illuminating. Before the restrictions in Emergency Order 28 are relaxed, Wisconsin must accomplish indeterminable milestones such as enacting "robust testing programs" for "at-risk health workers" and "[d]ecreasing numbers of infected healthcare workers." Order at 4. Based on this criteria, it is impossible for Wisconsin citizens to know when they can

reopen their businesses and return to work and school, nor will they be able to predict what restrictions may still be in place when Secretary-Designee Palm announces that the State has made sufficient "progress" to justify moving to one of her phases.

The Legislature filed an emergency petition for an original action in this Court on April 21, 2020, seeking a declaration and injunction prohibiting DHS or any local law enforcement official from enforcing the Order. It also filed an emergency motion for a temporary injunction.

STANDARD OF REVIEW

Although there is no decision below for this Court to review, statutory and constitutional-interpretation issues are pure questions of law that the Court decides de novo. *Black v. City of Milwaukee*, 2016 WI 47, ¶ 21, 369 Wis. 2d 272, 882 N.W.2d 333. The Court will set aside an agency's discretionary decision "if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction

of the court by the agency; or is otherwise in violation of a constitutional or statutory provision." Wis. Stat. § 227.57(8).

To secure a temporary injunction, the movant must establish: (1) "a reasonable probability of ultimate success on the merits," (2) that an injunction is "necessary to preserve the status quo," (3) "a lack of adequate remedy at law;" and (4) "irreparable harm." *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520–21, 259 N.W.2d 310 (1977).

ARGUMENT

I. DHS's Unprecedented Assertion of Authority Presents Significant and Urgent Legal Issues Warranting Exercise of this Court's Original Jurisdiction

When deciding whether to grant a petition for an "original action[ ]," Wisc. Const. Art. 7, this Court looks to whether "a judgment by the court [would] significantly affect[ ] the community at large." *Wisconsin Prof'l Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807. The exercise of original jurisdiction is warranted when "the questions presented are of such importance as under the circumstances to call for a[ ] speedy

and authoritative determination by this court in the first instance." *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938). The Court favors original cases involving pure questions of law when "no fact-finding procedure is necessary," when there is no other adequate remedy at law, and when exercising original jurisdiction can prevent "irreparable" harm. *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 683, 264 N.W.2d 539 (1978); *Application of Sherper's, Inc.*, 253 Wis. 224, 226, 33 N.W.2d 178, 179 (1948).

This case unquestionably satisfies the original-jurisdiction criteria. This Court has held that it is in the public interest to exercise original jurisdiction when a case "affects innumerable members and employees of industry throughout Wisconsin." *In re State ex rel. Atty. Gen.*, 220 Wis. 25, 264 N.W. 633, 634 (1936). The present case affects *every* person and business in the State, and Emergency Order 28 is having a profound—and, in many cases, ruinous—effect on "the community at large." *Lightbourn*, 243 Wis. 2d 512, ¶ 4. Between March 15 and April 6, 2020, applications for

unemployment benefits in Wisconsin reached 589,616.[20] According to a Wisconsin Department of Workforce Development projection, 48,619 Wisconsin businesses will close, affecting 724,362 employees.[21] The unemployment rate is expected to rise to levels not seen since, and perhaps surpassing, the Great Depression.

This Court's exercise of original jurisdiction is also appropriate because this case implicates important separation-of-powers questions that require this Court's resolution. *See, e.g.*, *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436; *Joni B. v. State*, 202 Wis. 2d 1, 8, 549 N.W.2d 411 (1996)); *see also Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 488, 534 N.W.2d 608 (1995). The Legislature is challenging an emergency rule ostensibly issued under DHS's statutorily delegated rulemaking authority. This challenge asserts that DHS

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[20] Wis. Dep't of Workforce Development, *DWD Releases Total Number of New Applications, Weekly Claims, and Monetary Amount Distributed for Unemployment Benefits* (Apr. 9, 2020), available at https://bit.ly/3amsEmZ.

[21] *See* Tom Daykin, *Wisconsin's unemployment rate could reach 27% because of coronavirus pandemic, preliminary analysis suggests*, Milwaukee Journal Sentinel (April 9, 2020), available at https://www.jsonline.com/story/money/2020/04/09/wisconsin-unemployment-rate-could-reach-27-percent-due-to-coronavirus-analysis-suggests/5124538002/.

failed to comply with *any* of the requirements of the Wisconsin Administrative Procedure Act, that it exceeded its statutory authority, and that it acted arbitrarily and capriciously. Given the stakes, that is precisely the type of dispute that should be resolved by this Court in the first instance.[22]

Additionally, this case is the appropriate subject of this Court's original jurisdiction because it involves only *de novo* issues of law. This case focuses on administrative procedure and statutory interpretation. No fact finding is necessary.

Finally, there is no time for the Legislature to go through ordinary judicial procedures because DHS's new rules regarding business closures will go into effect on April 24 and expire 32 days later.

Given the gravity and exigency of this case, and the need for an authoritative decision from this Court on a critically important

[22] The Court has been particularly solicitous of petitions for original actions brought by the Legislature, its committees, and members. *See, e.g.*, *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666; *abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408; *Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997); *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 534 N.W.2d 608 (1995); *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d. 385 (1988); *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978).

question of law, this Court should exercise its original jurisdiction over the Legislature's petition.

II. This Court Should Enjoin Enforcement of Emergency Order 28

The Court should enjoin Emergency Order 28, which satisfies the statutory definition of an administrative "rule," because DHS failed to comply with *any* of Chapter 227's provisions when it promulgated it, the Order exceeds DHS's statutory authority under Wisconsin Statute § 252.02, the Order is arbitrary and capricious, and the Legislature will be irreparably harmed absent a stay because DHS's procedural violations deprived the Legislature of its ability to exercise its constitutionally assigned oversight role.

A. The Legislature Is Very Likely to Succeed on the Merits of Its Claims That the Order Is Procedurally Defective, Substantively Unlawful, and Arbitrary and Capricious

1. Emergency Order 28 is a "Rule," and DHS Failed to Comply with Chapter 227's Procedures for Promulgating Rules

a. The Wisconsin Constitution vests "[l]egislative power"—the power "to make laws"—in the "senate and assembly." *Koschkee*

v. Taylor, 2019 WI 76, ¶¶ 10, 12, 387 Wis. 2d 552, 929 N.W.2d 600 (citation omitted). "From time to time, the legislature has used its power to create administrative agencies, such as the Department of Health Services . . . and to delegate to [those] agencies certain legislative powers." *Id.* ¶ 13. Because "agencies have no inherent constitutional authority to make rules," when they "promulgate rules, they are exercising legislative power that the legislature has chosen to delegate to them by statute." *Id.* ¶¶ 12, 18 (citation omitted); *see also* Wis. Stat. § 227.11(2) (agencies may promulgate rules only if the Legislature has "expressly conferred" rulemaking authority). As relevant here, the Legislature has delegated DHS authority to "promulgate and enforce rules or issue orders . . . for the control and suppression of communicable diseases." Wis. Stat. § 252.02(4); *see, e.g.*, Wis. Admin. Code § DHS 145.01 *et seq.*

A "[r]ule," as defined in Chapter 227, "means a regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the

organization or procedure of the agency." Wis. Stat. § 227.01(13); *see also Wis. Elec. Power Co. v. Dep't of Natural Resources*, 93 Wis. 2d 222, 232, 287 N.W.2d 113 (1980). As this statutory definition makes clear, some orders are "rules"—namely, those that apply generally to an entire class of persons or entities. Other orders are not rules, such as an "order in a contested case" and "an order directed to a specifically named person or to a group of specifically named persons that does not constitute a general class." Wis. Stat. § 227.01(13)(b)–(c). An order quarantining a sick prisoner, for example, would not be a "rule." Neither would an order closing a single school because of a measles outbreak. Because the term "order" is ambiguous, the Court must look beyond the "form" of the order to determine whether the "agency directive meet[s] the statutory definition" of an "administrative rule." *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. Dep't of Industry, Labor, and Human Relations*, 172 Wis. 2d 299, 320, 493 NW.2d 744 (Ct. App. 1992). It is thus "immaterial" whether an agency "refer[s] to [a] directive as a rule," and courts have not hesitated to label agency directives "rules" even when the agencies have not used

that terminology. *Id.* (citing cases); *see also Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) ("[C]ourts have long looked to the *contents* of the agency's action, not the agency's self-serving *label*, when deciding whether [procedural requirements for rulemaking] apply.")

Emergency Order 28 unquestionably satisfies the statutory definition of a "rule." First, because it applies to every individual, school, and business in the State—and not to "a specifically named person" or "group of specifically named persons"—it is a "general order of general application." Wis. Stat. § 227.01(13); *see, e.g.*, Order at 2 (applying stay-at-home order to "[a]ll individuals present within the State of Wisconsin"); *id.* at 3 (applying closure order to "[a]ll for-profit and non-profit businesses with a facility in Wisconsin"). Second, the Order has the "effect of law" because it is "enforceable by any local law enforcement official, including county sheriffs," and any "[v]iolation or obstruction of th[e] Order is punishable by up to 30 days imprisonment, or up to $250 fine, or both." Order at 21 (citing Wis. Stat. § 252.25); *see Cholvin v. Wis. Dep't of Health & Family Servs.*, 2008 WI App 127, ¶ 26, 313

Wis.2d 749, 758 N.W.2d 118 ("An agency regulation, standard, statement of policy or general order has been held to have the 'effect of law' where criminal or civil sanctions can result as a violation") (citing cases).

b. Because the Order is a "rule," and thus an exercise of legislative power, DHS was required to follow all legislatively established procedures before publishing it. As this Court has explained, "administrative agencies are creations of the legislature" and thus "can exercise only those powers granted by the legislature." *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992); *see also Milwaukee v. Wroten*, 160 Wis. 2d 207, 218, 466 N.W. 2d 861 (1991) ("administrative agencies are a part of the legislative branch of government that created them."). The Legislature's "authority to take away an administrative agency's rulemaking authority completely" necessarily implies that the Legislature "may place limitations and conditions on an agency's exercise of rulemaking authority, including *establishing the procedures* by which agencies may promulgate rules." *Koschkee*, 387 Wis.2d 552, ¶ 20 (emphasis

added). "The legislature may therefore . . . determine the methods by which agencies must promulgate rules." *Id.*

Ordinarily, an agency promulgating a rule must comply with the notice, hearing, and comment provisions set forth in §§ 227.14–227.18, and the Legislature may review the proposed rule before it is published. Wis. Stat § 227.19. Following these procedures, it typically takes between seven and thirteen months to publish a final rule. *See* Wisconsin Legislator Briefing Book 2019–20, Chapter 4, *Administrative Rulemaking* at 15. However, "an agency may . . . promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements under this chapter if preservation of the *public* peace, *health*, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures." Wis. Stat. § 227.24(1)(a) (emphasis added).

Because Governor Evers declared a public health emergency on March 12, 2020, the Department presumably believed Emergency Order 28 needed to go into effect immediately—hence its description as an "Emergency" order. But § 227.24 does not

eliminate *all process* for emergency rules. Instead, it provides for streamlined procedures that allow agencies to publish emergency rules within days, not months. Critically, these procedures are "carefully designed so that the people of this state, through their elected representatives, will continue to exercise a significant check on the activities of non-elected agency bureaucrats." *Martinez*, 165 Wis. 2d at 701.

An agency promulgating an emergency rule must first "[p]repare a statement of the scope of the proposed emergency rule as provided in § 227.135(1),[23] [and] obtain approval of the

[23] Section 227.135(1) provides:

(1) An agency shall prepare a statement of the scope of any rule that it plans to promulgate. The statement shall include all of the following:

> **(a)** A description of the objective of the rule.
> **(b)** A description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives.
> **(c)** The statutory authority for the rule.
> **(d)** Estimates of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule.
> **(e)** A description of all of the entities that may be affected by the rule.
> **(f)** A summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

statement as provided in § 227.135(2)." Wis. Stat. § 227.24(1)(e). To obtain approval, the agency must "present the statement to the department of administration, which shall make a determination as to whether the agency has the explicit authority to promulgate the rule as proposed in the statement of scope and shall report the statement of scope and its determination to the governor who, in his or her discretion, may approve or reject the statement of scope." *Id.* § 227.135(2). The agency must also "present the statement to the individual or body with policy-making powers over the subject matter of the proposed rule for approval," and that individual or body "may not approve the statement until at least 10 days after publication of the statement under [§ 227.135(3)]." *Id.* § 227.135(2).

Once the governor approves the statement, the agency must "send the statement to the legislative reference bureau for publication in the register as provided in § 227.135(3), and hold a preliminary public hearing and comment period if directed under

§ 227.136(1)."[24] *Id.* § 227.24(1)(e)(1d). The agency must then submit the "proposed emergency rule" to the governor for approval. *Id.* § 227.24(1)(e)(1g). "An agency may not file an emergency rule with the legislative reference bureau as provided in § 227.20" or publish the rule "until the governor approves the emergency rule in writing." *Id.*

Finally, the agency must "[p]repare a plain language analysis of the rule" and a "fiscal estimate for the rule." *Id.* § 227.24(1)(e)(1m)-(2). The fiscal estimate must be mailed to "each member of the legislature" and sent to the legislative reference bureau "not later than 10 days after the date on which the rule is published." *Id.* § 227.24(1)(e)(2). The rule can then be filed "as provided in § 227.20," at which time it will take legal effect. *Id.* § 227.24(3); *see also id.* § 227.20(1) ("No rule is valid until the certified copy has been filed" with "the legislative reference bureau.").

[24] Section 227.136(1) authorizes "either cochairperson of the joint committee for the review of administrative rules" to request a "preliminary public hearing and comment period on the statement of scope as provided in this section" "[w]ithin 10 days after publication of a statement of the scope of a proposed rule under §227.135(3)." Wis. Stat. § 227.136(1).

Chapter 227 thus "facilitates a cooperative venture between the legislature and administrative agencies to make and implement rules that are consistent with their statutory authorization." *Martinez*, 165 Wis. 2d at 692. An essential component of that cooperative venture is the Legislature's authority to "delay or suspend the implementation of any rule or proposed rule while under review by the legislature," a right the "legislature reserve[d] to itself." Wis. Stat. § 227.19(1)(b)(4); *see also id.* § 227.26(2)(d) ("The [joint] committee [for the review of administrative rules] may suspend any rule by a majority vote of a quorum of the committee."); *id.* § 227.26(2)(l) (committee may "suspend[ ] an emergency rule under this section"). "The rule suspension process provides a legislative check on agency action which prevents potential agency over-reaching." *Martinez*, 165 Wis. 2d at 701. Although the legislature has exercised this power only "relatively infrequently," "it is a legitimate practice for the legislature, through JCRAR, to retain the ability to suspend a rule which is promulgated in derogation of the delegated authority." *Id.* The Legislature may suspend a rule for several reasons, including

because of "[a]n absence of statutory authority," "[a] failure to comply with legislative intent," "[a] conflict with state law," and "[a]rbitrariness and capriciousness, or imposition of an undue hardship." Wis. Stat. § 227.19(4)(d)1., 2., 4., 6.

c. Here, the Legislature likely would have suspended Emergency Order 28 for all of these reasons if DHS had complied with the procedures set forth in § 227.24 because, as explained below, *infra* Part II.A.2.–3., several aspects of the Order vastly exceed DHS's statutory authority, are arbitrary and capricious, and impose undue hardships on millions of Wisconsinites. However, the Legislature was unable to exercise its constitutionally authorized oversight because the Department *completely* evaded the requirements of Chapter 227 in promulgating Emergency Order 28. It did not send the Legislature a statement of the scope of the Order.[25] Nor did it file a certified copy of the rule with the Legislative Reference Bureau, as evidenced by the fact that no such rule has been published on the

[25] *See generally* http://docs.legis.wisconsin.gov/code/scope_statements/active.

Wisconsin Legislature's list of active emergency rules.[26] Accordingly, the Order is not even presumptively proper. *See Wis. Realtors Ass'n v. Public Service Com'n of Wisconsin*, 2015 WI 63, ¶ 53, 363 Wis. 2d 430, 867 N.W.2d 364 ("Filing a certified copy of a rule with the Legislative Reference Bureau gives rise to a legislatively enacted presumption that the process by which the rules were promulgated was proper."); Wis. Stat. § 227.20(3).

Instead, as far as the Legislature can discern, the Department simply issued the Order based on the "authority vested in [the Secretary-designee] by Section 252.02(3), (4), and (6) of the Wisconsin Statutes." Order at 2. But § 252.02 clearly does not authorize the Department to bypass the requirements of § 227.24 when "promulgat[ing] and enforc[ing] rules or issu[ing] orders . . . for the control and suppression of communicable diseases." Wis. Stat. § 252.02(4). Emergency Order 28 was thus promulgated "without compliance with statutory rule-making or

[26] *See* https://docs.legis.wisconsin.gov/code/emergency_rules/active?sort=agency&sort_order=desc.

adoption procedures" and should therefore be held "invalid." Wis. Stat. § 227.40(4)(a).

The Legislature recognizes, of course, that the COVID-19 pandemic presents a serious public health emergency, but DHS has had ample time to promulgate an emergency rule in accordance with § 227.24. Governor Evers declared a state of emergency on March 12, 2020, more than a month before DHS issued Emergency Order 28. Indeed, DHS did not issue Emergency Order 12—the predecessor to Emergency Order 28—until nearly *two weeks* after the Governor's declaration of a state of emergency.[27] The Department's failure to comply with the procedures set forth in § 227.24 thus cannot be excused on the basis of exigent circumstances—even assuming such circumstances would ever justify skirting the Administrative Procedure Act.

[27] The Legislature is not challenging the validity of Emergency Order 12 because that Order is set to expire on April 24, 2020.

2. Even if DHS Had Complied with Section 227.24 in Issuing This Rule, Emergency Order 28 Nevertheless Exceeds DHS's Statutory Authority

Because DHS failed to promulgate Emergency Order 28 in compliance with § 227.24, the Court need not decide whether the Order exceeds DHS's statutory authority, though doing so would undoubtedly be helpful to DHS since it presumably will want to reissue the rule. Regardless, even if the Order were not procedurally defective, it would still be unlawful because the provisions DHS relies on for its authority—Wis. Stat. § 252.02(3), (4), and (6)—do not give DHS the breathtaking power to quarantine Wisconsinites in their homes, shutter all businesses it deems nonessential, prohibit private gatherings in people's homes, or ban all "nonessential" travel.

a. In addition to the traditional interpretive canons, two bedrock principles of Wisconsin administrative and constitutional law should guide this Court's analysis of Section 252.02, the Department's general "powers and duties" statute.

First, agencies have only those powers that the Legislature specifically and explicitly grants them. "It is axiomatic that

because the legislature creates administrative agencies as part of the executive branch, such agencies have only those powers" that the Legislature has delegated to them, *Wis. Citizens Concerned for Cranes & Doves*, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 677 N.W.2d 612 (citation omitted), and so "[t]he nature and scope of an agency's powers are issues of statutory interpretation." *Id.* ¶ 6. As in any other statutory context, where the Legislature has expressly provided for something, it is the role of courts to give effect to the enacted language. *See id.*; *see also State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶¶ 49–50, 271 Wis. 2d 633, 681 N.W.2d 110. And while it used to be the rule in Wisconsin that agency powers could "be reasonably *implied* from the express terms of the statute," *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358–59, 190 N.W.2d 529 (1971), *vacated on other grounds by* 408 U.S. 915 (1972), the Legislature "completely and fundamentally alter[ed]" Wisconsin administrative law in 2011 when it enacted Act 21. 4 Op. Wis. Att'y Gen. 17, 2017 WL 6408797, at *2 (Dec. 8, 2017).

Act 21 effected this "complete[ ] and fundamental[ ] alteration" of administrative law through two key provisions. The

first prohibits agencies from "implement[ing] or enforc[ing] any standard [or] requirement . . . unless that standard [or] requirement . . . is *explicitly required* or *explicitly permitted* by statute or by a rule that has been promulgated in accordance with this subchapter." 2011 Wis. Act 21, § 1r (codified at Wis. Stat. § 227.10(2m)) (emphases added). Second, Act 21 provides 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*." *Id.* § 3 (emphases added) (codified at Wis. Stat. § 227.11(2)(a)2); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 225 ("Interpretive-Direction Canon": "interpretation clauses are to be carefully followed.")

The upshot of these provisions is straightforward yet profound. "Explicit" means "[d]istinctly expressing all that is meant; leaving nothing merely implied or suggested; express." 5 *Oxford English Dictionary* 572 (2d ed. 1989). "Implicit," on the

other hand, means "[i]mplied though not plainly expressed; naturally or necessarily involved in, or capable of being inferred from, something else." 7 *Oxford English Dictionary* 724 (2d ed. 1989; *see also id.* at 725 (definition of "imply"). Thus, under Act 21, where a law does not confer a power *expressly and specifically*, then it does not confer the power (or augment some other power) at all—*even where* that power is "naturally or necessarily involved in," or a logical consequence of, a general grant of authority.

Second, courts read statutes, where possible, to avoid raising "constitutional doubts," *Clark v. Martinez*, 543 U.S. 371, 381 (2005); *see Chicago & N.W. Ry. Co. v. Pub. Serv. Comm'n*, 43 Wis. 2d 570, 577–78, 169 N.W.2d 65 (1969); Scalia & Garner, *supra*, at 66 ("[p]resumption of [v]alidity" canon)—including concerns that, if interpreted otherwise, an enactment would violate the separation of powers or the nondelegation doctrine. "Each branch's core powers reflect zones of authority constitutionally established for each branch of government," and "[a]s to these areas of authority," any "exercise of authority by another branch of government is unconstitutional." *League of Women Voters of*

Wisconsin v. Evers, 2019 WI 75, ¶ 34, 387 Wis. 2d 511, 929 N.W. 2d 209 (citation omitted); *accord Koschkee*, 387 Wis.2d 552, ¶ 45 (R.G. Bradley, J., concurring). Critically, those zones of authority remained fixed even in an emergency, which "does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved." *State ex rel. Martin v. Giessel*, 252 Wis. 363, 372, 31 N.W.2d 626 (1948) (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934)).

Likewise, the nondelegation doctrine limits grants of authority from "one branch of government . . . to another branch," especially from the Legislature to an agency, that would "fus[e] an overabundance of power in the recipient branch." *Panzer v. Doyle*, 2004 WI 52, ¶ 52, 271 Wis. 2d 295, 332–33, 680 N.W.2d 666, 684–85, *abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408; *see Westring v. James*, 71 Wis. 2d 462, 468, 238 N.W.2d 695 (1976) ("delegation of legislative power to a subordinate agency" must come with "ascertainable" boundaries and "procedural safeguards to insure that the . . . agency acts within that legislative purpose"). Thus,

construing statutes to avoid "open-ended grant[s]" of legislative power to agencies "should certainly be favored." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (controlling op. of Stevens, J.) (applying constitutional-doubt canon to avoid improper delegation of authority to cabinet secretary).

b. Read in light of these and other well-established canons, none of the three provisions of Section 252.02 that the Order cites—subsections (3), (4), or (6)—justifies its sweeping assertions of power.

Section 252.02(3). This provision permits DHS to "close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." Because the terms "public gatherings" and "other places" are not defined, they "should be understood in the same sense as the words immediately surrounding or coupled with [them]." *Benson v. City of Madison*, 2017 WI 65, ¶ 31, 376 Wis. 2d 35, 897 N.W.2d 16 (*noscitur a sociis* canon). Similarly, "other places," as a "general term [that] follows [ ] specific ones," "should be understood as a reference to subjects

akin to the one[s] with specific enumeration," *Brogan v. United States*, 522 U.S. 398, 404 n.2 (1998) (*ejusdem generis* canon)—namely, "schools" and "churches." Applying the *noscitur a sociis* canon, one must conclude that "public gatherings" are congregations of the sort that typically occur in "schools" and "churches": gatherings of a substantial number of people in relatively close contact for a prolonged time in a defined, perhaps even enclosed, space—*i.e.,* gatherings presenting the same risk of "outbreaks and epidemics" as those typical of schools and churches. Likewise, *ejusdem generis* confirms that "other places" must be places like "schools" and "churches," meaning places where the kinds of assemblies just described tend to occur, such as athletic events, concerts, rallies, and parades. By the same token, "public gatherings in . . . other places" would decidedly not include sporadic and brief gatherings at playgrounds, private residences, public parks, or local businesses.

Viewed against that interpretive backdrop, DHS's power to forbid "public gatherings" justifies very little of what appears in Emergency Order 28. To be sure, the statute allows bans on public

gatherings at schools, churches, athletic events, conference centers, town halls, concert venues, parades, and the like. *See* Order at 5–6 (closing schools, libraries, and places of public amusement). Yet, just as plainly, it does *not* authorize DHS to close "[a]ll for-profit and non-profit businesses with a facility in Wisconsin," regardless of whether those businesses involve "public gatherings." And of course, many do not: retail stores, salons, factories, office suites, home-improvement services—the list goes on.

Nor, finally, does Section 252.02(3) empower DHS to prohibit private gatherings at residences, no matter the size, or authorize DHS to quarantine "all individuals present within the State of Wisconsin" in their homes, with exceptions only for "essential" activities. Quite the contrary, an entirely different and far more limited statute spells out DHS's powers to order "[i]solation and quarantine," subject to procedural guarantees and only as

provided in DHS regulations.[28] Wis. Stat. § 252.06. [29] And notably, that section allows DHS to "require" isolation or quarantine *only* "of a patient" or "of an individual" requiring a vaccine, § 252.06(1)—a category of persons hardly encompassing "*all individuals* present within the State." Order at 2 (emphasis added). A provision of DHS's general "powers and duty" statute, therefore, cannot possibly be read as implicitly delegating an authority that the agency's specific "isolation and quarantine" statute withholds: the power to quarantine "all individuals," including the healthy. *See* Wis. Stat. § 227.11(2)(a)2; *see also* Wis. Stat. § 227.10(2m); *State v. Dairyland Power Co-op.*, 52 Wis. 2d 45,

[28] DHS's regulations, in turn, require that, in order to quarantine an individual, there must be evidence that the individual has been exposed to a communicable disease, has tested positive for the disease, or exhibits symptoms of the disease, and that the individual, through his demonstrated behavior, "poses a threat to others." Wis. Admin. Code § DHS 145.06(2), (3). And if the individual refuses to comply, a local health official may enforce the quarantine only by proving to a court "by clear and convincing evidence" that the individual meets the criteria for quarantine. *Id.* § DHS 145.06(5). DHS has clearly not taken the necessary steps to conclude that each and every of the over six million individuals in Wisconsin meets the criteria for quarantine.

[29] When a person confined in a jail or prison has a disease that DHS deems dangerous, "the director of health at the institution shall order in writing the removal of the person to a hospital or other place of safety, there to be provided for and security kept. Upon recovery the person shall be returned." § 252.06(6)(b). In other words, the Department must make an individualized finding that the person, already a ward of the State, is a danger to those around him.

53, 187 N.W.2d 878 (1971) ("[W]here a general and a specific statute relate to the same subject matter, the specific controls.").[30] Finally, application of the constitutional-doubt canon confirms this more limited reading of § 252.02(3), as any alternative interpretation would have breathtaking constitutional implications under the separation-of-powers and nondelegation doctrines, among constitutional provisions. *Am. Petroleum Inst.*, 448 U.S. at 646 (controlling op. of Stevens, J.).[31]

Section 252.02(4). This provision gives DHS power to "promulgate and enforce rules or issue orders for guarding against the introduction" of disease into Wisconsin, "for the control and suppression" of the contagion, and "for the quarantine and

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[30] None of DHS's regulations supports the broad, across the board quarantine of millions of Wisconsin citizens. *See generally* Wis. Admin. Code § DHS 145.01, *et seq.* Indeed, as explained above, *supra* n. 29, DHS's regulations require individualized assessment of a person's potential infection and dangerousness to others before any person may be quarantined.

[31] As the United States Department of Justice has recently written in a COVID-19-related case raising constitutional issues, "There is no pandemic exception … to the fundamental liberties the Constitution safeguards. Indeed, 'individual rights secured by the Constitution do not disappear during a public health crisis.' These individual rights, including the protections in the Bill of Rights made applicable to the states through the Fourteenth Amendment, are always in force and restrain government action." Notice, *Temple Baptist Church v. City of Greenville,* No. 4:20-cv-00064 (N.D. Miss. April 14, 2020), ECF No. 6 (citing *In re Abbott*, – F.3d –, 2020 WL 1685929, at *6 (5th Cir. Apr. 7, 2020)).

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." Wis. Stat. § 252.02(4).

This grant of rulemaking authority must be read alongside other provisions that address the same subject matter and are more specific. *Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60, ¶ 30 & n.6, 381 Wis. 2d 732, 914 N.W.2d 631, 637 ("The statutory construction doctrine of *in pari materia* requires a court to read, apply, and construe statutes relating to the same subject matter together."); *Dairyland Power Co-op.*, 52 Wis. 2d at 53 (specific/general canon). So, with respect to DHS's power to "close" establishments or prohibit assemblages (as opposed to merely mandating social-distancing requirements), subjection (3) is the more specific provision and therefore must control, lest it be rendered superfluous. *See Kalal*, 271 Wis. 2d 663, ¶ 46 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."). Similarly, the carefully crafted limitations of § 252.06 must govern DHS's powers to order

"isolation and quarantine," since an open-ended power "for . . . quarantine and disinfection" cannot erase that provision from Chapter 252.[32]

Were there any doubt that these canons foreclose DHS's capacious reading of § 252.02(4), Act 21 and the constitutional-avoidance doctrine remove it. No statute or rule "explicitly" empowers DHS to adopt or enforce an order closing businesses, quarantining healthy people in their homes, or banning all travel. Wis. Stat. § 227.10(2m); *see also* Wis. Stat. § 227.11(2)(b). Nor does § 252.02(4)—"[a] statutory provision describing the agency's general powers or duties,"[33] "*augment* the agency's" power "*beyond [what] is explicitly conferred on the agency"* by other more specific enactments. Wis. Stat. § 227.11(2)(a)2 (emphases added). In any event, even if it were possible to read § 252.02(4) as giving a

[32] Even if § 252.02(4)'s "quarantine and disinfection" language conferred greater powers than the more specific subsection (3) and § 252.06, it still would not sweep as broadly as DHS suggests, since by its terms this rulemaking authority applies *only* to "persons, localities and things *infected or suspected of being infected*," as well as "for the sanitary care"—*not* quarantine or closure—of certain enumerated places: "jails, state prisons, mental health institutions, schools, and public buildings and connected premises." Wis. Stat. § 252.02(4) (emphasis added).

[33] The title of § 252.02 is literally "[p]owers and duties of department."

cabinet secretary czar-like authority to shutter Wisconsin indefinitely—a power that the Governor, if he had it at all, could exercise for only 60 days without involving the Legislature, *see* Wis. Stat. § 323.10—it would "fus[e] an overabundance" of legislative power in a single appointee, *Panzer v. Doyle*, 271 Wis. 2d 295, ¶ 52, in violation of the separation of powers. *See League of Women Voters of Wisconsin*, 387 Wis. 2d at 536. Such an interpretation must be avoided.

Finally, even if Section 252.02(4) granted the DHS secretary monarchical powers to control the economy and personal movement, the secretary could wield that power only through procedurally valid rulemaking. The text is explicit: the Department may "may promulgate and enforce *rules*." Wis. Stat. § 252/02(4) (emphasis added). And while § 252.02(4) also gives DHS authority to "issue orders," Emergency Order 28 is a "general order of general application" to the entire State and thus a "rule" subject to the Administrative Procedures Act's numerous rulemaking requirements. Wis. Stat. § 227.01(13).

Section 252.02(6). A provision near the end of the statute permits DHS to "authorize and implement all emergency measures necessary to control communicable diseases." Wis. Stat. § 252.02(6). Importantly, it does not say that DHS may "*order all*" emergency measures, but merely that it may "*authorize and implement*" such measures. The Legislature's choice of words was careful and deliberate. "Authorize" means to "give legal authority," "empower," or "formally approve." Authorize, *Black's Law Dictionary* (11th ed. 2019). "Implement" means "to complete, perform, carry into effect (a contract, agreement, etc.)." Implement, *Oxford English Dictionary* (2d ed. 1989). Thus, for example, § 252.02(6) gives DHS power to authorize out-of-state physicians or medical students to treat patients in Wisconsin during an emergency—activities that would normally be prohibited by state law—and to implement that order by granting temporary licenses and rescinding or overriding any contrary regulations. Likewise, DHS might be able to authorize a hotel to serve as a field hospital and implement that order by contracting with the hotel and removing any regulatory barriers. These

measures, which other States have taken, arguably fall within §252.02(6)'s grant of authority.[34] But Emergency Order 28 does not "authorize" businesses to close; it orders them closed. Nor is DHS "implementing" a state-wide quarantine—the Department's officers and employees cannot take any action to "carry out" the quarantine—it has simply *commanded* it. The plain text of § 252.02(6) does not delegate to DHS unbridled authority to issue such sweeping, and legally enforceable, edicts.

While DHS apparently believes that this provision gives it unbounded authority to control every aspect of public and private life in Wisconsin indefinitely, the Wisconsin Legislature, like Congress, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). If it did, all the rest of § 252.02—and the more specific sections that follow—would be superfluous, including the "quarantine and isolation" provision.

[34] *See, e.g.*, Katie Honan, *New York City Weighs Turning Hotels Into Hospitals*, WSJ (March 18, 2020), available at https://www.wsj.com/articles/new-york-city-weighs-turning-hotels-into-hospitals-11584556841.

Wis. Stat. § 252.06. For instance, it would be absurd to interpret § 252.02(6) as giving DHS unfettered authority to quarantine *healthy* residents—which is what Emergency Order 28 effectively does—when the Legislature has placed numerous procedural limits on the Department's ability to quarantine even *infected* individuals who are housed by the State. *See supra* p. 48 n.2. Likewise, if § 252.02(6) gives DHS authority to close concerts, tanning salons, and everything in between that it deems "nonessential," then § 252.02(3) is mere surplusage. Finally, reading Section 252.02(6)—contrary to its text—as providing DHS with *absolute* power to close all businesses, curtail the right to travel, and decide which functions are "essential" would raise obvious separation-of-powers and nondelegation concerns, among others. *See supra* p. 48 nn.30–31.

Although certain aspects of Emergency Order 28, such as school closures and bans on public gatherings, are within § 252.02's express delegation of authority, the Order strays well outside DHS's statutory lane and should be declared invalid to the extent it is *ultra vires*. For its own part, the Legislature is fully

committed to working with the Evers administration and pursuing legislation that will help Wisconsin weather this crisis, guided by federal guidelines.

3. The Order Should be Set Aside as Arbitrary and Capricious Because DHS Failed to Provide Rationales For Many of the Lines It Draws

As explained *supra* Part II.A., Emergency Order 28 is an exercise of legislative power, not executive power. Courts will set aside an agency's "legislative-type decisions" if they are "arbitrary and capricious." *J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n*, 114 Wis. 2d 69, 91, 336 N.W.2d 679 (Ct. App. 1983); *see also Nat'l Motorists Ass'n v. Com'r of Ins.*, 2002 WI App 308, ¶ 25, 259 Wis. 2d 240, 655 N.W.2d 179; Wis. Stat. §227.57(8) ("The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law."). An agency decision 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, 73–74, 555 N.W.2d 179 (Ct. App. 1996); *accord Smith v. City of Milwaukee*, 2014 WI App 95, ¶ 21, 356 Wis. 2d 779, 854 N.W.2d 857.

Emergency Order 28 is arbitrary and capricious to the extent it purports to close businesses it deems "nonessential." Rather than deciding which businesses present an undue risk of spreading COVID-19—an inquiry arguably within DHS's core competence and statutory mission—DHS attempts to make macro-economic decisions about which businesses are essential and which are not. But DHS has no expertise in economic matters, and no statute gives DHS authority to decide which businesses will survive and which will die. Making matters worse, DHS has provided no rationale for its decision to categorize certain businesses as "essential" while closing all others. The Order does not explain, for example, why bars and convenience stores may sell alcohol, *see* Order at 13–14, but retailers are prohibited from selling clothes or shoes. The Order similarly fails to provide any justification for allowing arts and craft stores to operate, Order at 19, but not furniture stores. In short, DHS has provided no reasoned basis

that could justify its ad-hoc micro-managing of Wisconsin's economy. [35]

Although the Order provides a mechanism for businesses to challenge their designation as "nonessential," the established process only underscores the Order's unlawfulness, because nothing in § 252.02 gives DHS the authority to delegate public health decisions to WEDC. Moreover, there are no standards governing WEDC's determinations as to whether a business is essential. Indeed, WEDC's website simply directs a business challenging its nonessential designation to state why it is essential,[36] and WEDC apparently offers no explanation for its

[35] On April 18, 2020, a federal court in Kansas issued a temporary restraining order blocking the State's equivalent safer-at-home rule limiting attendance at in-person religious services to ten people or fewer. The court held that it was "an arbitrary distinction" to limit religious services that can just as easily practice social distancing as other "essential" businesses exempt from the rules. *First Baptist Church et al. v. Governor Laura Kelly*, No. 6:20-cv-01102, Dkt. 14 at 15-16 (D. Kan. Apr. 18, 2020). The State neither explained nor presented evidence "that mass gatherings at churches pose unique health risks that do not arise in mass gatherings at airports, offices, and production facilities," all of which were exempted as "essential" businesses yet "appear comparable in terms of health risks." *Id*.

[36] *See* https://wedc.org/essentialbusiness/

decisions on these applications.[37] Nor is there any apparent mechanism for appealing WEDC's decisions to DHS or a court.

The Order also draws other arbitrary lines. For one, it irrationally discriminates between recreational activities Wisconsinites are permitted to enjoy. For example, golf courses may operate, Order at 6, but parks are closed and fishing is forbidden. The Order also makes irrational distinctions between First Amendment–protected activities: "Newspapers, television, radio, and other media services" are allowed to operate as "essential businesses," Order at 15—even though printing newspapers and producing television and radio shows entail daily human contact—but churches, mosques, and synagogues cannot hold weekly religious services with more than nine people in a room, even if the services could be conducted in accordance with social-distancing guidelines. Order at 14. Indeed, the Order does not explain why it is necessary to prohibit weekly religious

[37] *See* Derrick Rose, *Furniture store objects to state's essential business definition*, WISN-12 (April 14, 2020), available at https://www.wisn.com/article/furniture-store-beefs-with-state-over-essential-business-definition/32150728.

gatherings, or limit weddings and funerals to 10 people, when daycare centers are permitted to operate with up to 50 children and 10 employees. Order at 14.[38] The Order also prohibits peaceful protests and political campaigning, regardless whether those activities could be conducted in compliance with social-distancing guidelines.

The portion of the Order banning all "private gatherings of *any* number of people that are not part of a single household or living unit," Order at 5 (emphasis added), is also arbitrary and capricious because DHS has not provided any evidence that such gatherings—which are important for maintaining social bonds and emotional well-being—present any greater risk of spreading infection than the operation of "essential" businesses. The Department appears to assume, without justification, that Wisconsinites cannot be trusted to exercise prudence when engaging in such private social interactions, including by wearing masks, self-quarantining when sick, and observing social-

[38] Emergency Order 6, https://docs.legis.wisconsin.gov/code/register/2020/771A4/register/emergency_orders/phe_2020_emergency_order_06/phe_2020_emergency_order_06

distancing norms. Similarly, DHS has not explained why it is necessary to prohibit "[a]ll forms of travel," Order at 7, even though automobile travel necessarily entails a measure of social distancing.

The Order is doubly unlawful because DHS "entirely failed to consider an important aspect of the problem," namely, the societal devastation the Order would cause. *Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶ 32, 284 Wis. 2d 264, 700 N.W.2d 158 (applying materially identical version of federal standard) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). And because DHS failed to comply with the streamlined procedural requirements for emergency rules, there is not even a *record* for the Court to review that would "enable[it] to penetrate the reasons underlying the agency['s] decision[ ]." *Liberty Homes, Inc. v. Dep't of Indus., Labor and Human Relations*, 136 Wis. 2d 368, 385–86, 401 N.W.2d 805 (1987); *see also Kammes v. State Mining Inv. and Local Impact Fund Bd.*, 115 Wis. 2d 144, 157, 340 N.W. 2d 206 (Ct. App. 1983) (reversing agency's "arbitrary and capricious" action because the

agency never explained how it considered certain factors to justify its conclusion). The Legislature does not doubt that DHS's intentions are noble—to control the spread of COVID-19—but shutting down businesses across the state implicates many other concerns, including the potential for economic injury; increases in abuse and suicide; sickness and death from other undiagnosed and untreated diseases; a breakdown in social order and increase in crime; and internet scams against the vulnerable, to name but a few. There is no indication in the Order or the (non-existent) administrative record indicating that DHS even considered these aspects of the problem.

For all these reasons, the Order is not an exercise of reasoned decision-making and should be set aside as arbitrary and capricious.

B. The Legislature and the Public Will Be Irreparably Harmed if the Order Is not Enjoined, and the Equities Favor the Legislature and Public

In addition to demonstrating "a reasonable probability of ultimate success on the merits," a movant seeking a temporary injunction must show that it lacks an "adequate remedy at law,"

that an injunction is "necessary to preserve the status quo," and that "irreparable harm" will result if the injunction does not issue. *Werner*, 80 Wis. 2d at 520. Finally, this Court has held that a movant must "satisfy the [ ] court that on balance equity favors issuing the injunction." *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

Just as the Legislature has a strong likelihood of success on the merits, *see supra* Part II.A, the remaining factors also favor issuing an injunction of Emergency Order 28.

First, the Legislature lacks an adequate remedy at law because monetary damages are insufficient to remedy a violation of the separation of powers. *See Werner*, 80 Wis. 2d at 520.

Second, the Legislature will suffer irreparable harm absent an injunction. *See id.* The Legislature is irreparably harmed anytime the enforcement of a "duly enacted" law is prevented. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). And if this Court does not act to enjoin Emergency Order 28, the Legislature will be prevented from exercising its statutorily guaranteed oversight of DHS's sweeping Order.

Chapter 227 unequivocally and repeatedly gives the Legislature oversight of agency actions "that ha[ve] the force of law," Wis. Stat. § 227.01(13), including emergency rules, Wis. Stat. § 227.24. For example, before drafting an emergency rule, agencies "shall" "obtain approval of the statement" of scope for the proposed emergency rule from "the individual or body with policy-making powers over the [proposed rule's] subject matter." *Id.* § 227.24(1)(e)1d.; *see also id.* § 227.135(2). And after the agency promulgates the emergency rule, the Legislature may suspend the rule if, among other things, the agency lacks statutory authority to promulgate the rule, the rule fails to comply with legislative intent, the rule conflicts with state law, or the rule is arbitrary and capricious or imposes an undue hardship. *Id.* §§ 227.19(4)(d); 227.26(2)(d).

Here, in stark contrast to this oversight procedure, no elected official will have any say whatsoever over the extreme and invasive regulation of the lives of millions of Wisconsin citizens inflicted by DHS's Emergency Order 28. This irreparable harm to

Wisconsin's system of representative democracy warrants injunctive relief from this Court.

Finally, "on balance," the equities "favor[ ] issuing the injunction." *Pure Milk Prod. Co-op.*, 90 Wis. 2d at 800. While the Order seeks to serve an important purpose—reducing the spread of COVID-19—the Order is unsupported by any data or empirical analysis regarding its effectiveness. Instead, the Order relies solely on the logical fallacy of *post hoc ergo propter hoc*. Thus, there is no actual evidence showing whether, how, and to what extent the Order provides benefits.[39]

By contrast, clear empirical evidence shows that countless Wisconsin citizens and businesses are suffering as a result of the Governor's original safer-at-home order. Hundreds of thousands of Wisconsinites have lost their jobs since Emergency Order 12 was

[39] In *First Baptist Church v. Governor Laura Kelly*, the court held that, while the State has "immense and sobering responsibility to act quickly to protect the lives of Kansans from a deadly [COVID-19] epidemic," the State would not be irreparably harmed by the court's temporary restraining order enjoining part of Kansas's stay-at-home rule because the plaintiffs "are willing to abide by protocols" identified in the State's social-distancing guidelines. *First Baptist Church et al. v. Governor Laura Kelly*, No. 6:20-cv-01102, Dkt. 14 at 16-17 (D. Kan. Apr. 18, 2020). Nor would the balance of equities favor the State for the same reason. *Id*.

issued.[40] Experts have estimated that Wisconsin's unemployment rate will have reached 16.71 percent in mid-April.[41] Meanwhile, overall business sales have plummeted by more than 15 percent,[42] and restaurants and travel-sector businesses, in particular, have been decimated.[43] Farms have also declared bankruptcy at much higher rates than last year.[44] Added to this economic devastation is the tragic increase in depression, substance abuse, and suicide resulting from social isolation and anxiety over lost jobs and businesses, all of which, though mainly traceable to the pandemic itself, are exacerbated by the agency's sweeping shutdown.

The relief the Legislature has requested—an injunction accompanied by a six-day stay—would not harm DHS. Section 227.24 allows the Department to issue an emergency rule within

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[40] Wis. Dep't of Workforce Development, *DWD Releases Total Number of New Applications, Weekly Claims, and Monetary Amount Distributed for Unemployment Benefits* (Apr. 9, 2020), https://bit.ly/3amsEmZ.

[41] Kim J. Ruhl, *The Effects of COVID-19 on Wisconsin's Workers and Firms* 3, UW-Madison Center for Research on the Wisconsin Economy (Mar. 24, 2020, updated Apr. 17, 2020), https://bit.ly/2ykAUH8.

[42] Noah Williams, *Consumer Responses to the COVID-19 Pandemic*, UW-Madison Center for Research on the Wisconsin Economy 7 (Apr. 16, 2020), https://bit.ly/2wKFiyu.

[43] *Id.* at 5.

[44] Rick Barrett, *Wisconsin Farm Bankruptcies Rising Rapidly as Coronavirus Weighs Heavily on Agriculture*, Milwaukee J. Sentinel (Apr. 14, 2020), https://bit.ly/34L3yx2.

days. Having already issued three emergency "orders" and ample guidance to the public concerning social distancing, DHS could (and should) immediately start working with the Legislature to devise and issue a lawful emergency rule, while the Legislature also pursues legislation that will help Wisconsin comprehensively respond to this pandemic in a way that balances the need to protect public health with the necessity of opening Wisconsin as soon as possible. Meanwhile, DHS's emergency order stays in place, and the public, already educated about the public health crisis, continues to practice social distancing.

CONCLUSION

The Legislature respectfully requests that this Court issue an order temporarily enjoining enforcement of Emergency Order 28, because it is an improperly promulgated rule under Wisconsin Statutes § 227.24, and because it exceeds the Department's authority under § 252.02 and is arbitrary and capricious in violation of § 227.57(8). The Legislature respectfully suggests that this Court stay enforcement of its injunction for a period of six

days, to allow DHS sufficient time to promulgate a new emergency rule consistent with Wisconsin law.

Dated: April 21, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of this Memorandum is being served on all opposing parties via electronic mail and first-class mail.

Dated: April 21, 2020

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