IN THE SUPREME COURT OF WISCONSIN
APPEAL NO. 2020AP765-OA

WISCONSIN LEGISLATURE,

Petitioner,

v.

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

Respondents.

On Emergency Petition for Original Action

AMICUS BRIEF OF MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, MADISON TEACHERS INC., SEIU HEALTHCARE WISCONSIN, AND AMALGAMATED TRANSIT UNION LOCAL 998 IN OPPOSITION TO LEGISLATURE'S PETITION FOR ORIGINAL ACTION AND MOTION FOR TEMPORARY INJUNCTION

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INTRODUCTION

Amici Curiae Milwaukee Teachers' Education Association, Madison Teachers Inc., SEIU Healthcare Wisconsin, and the Amalgamated Transit Union Local 998 represent a broad group of workers at high risk for exposure to the COVID-19 virus who are on the frontlines of this public health battle. Through this brief, they are taking their "seat at the table" to make their position known. First, the Court should reject the Legislature's unprecedented Petition for Original Action outright for failing to meet minimum filing requirements. Second, the Court should reject the false choice between saving public health and Wisconsin's economy that the Legislature presents, and should affirm the broad authority that the Legislature itself granted to the Department of Health Services ("DHS" or "Department") to quickly and decisively act to control communicable diseases like COVID-19. Both the Petition and motion for temporary injunction should be denied.

ARGUMENT

I. The Court should deny the Petition for Original Action.

The Court should deny the Petition for Original Action ("the Petition") because the Legislature lacks standing, and because the Petition violates procedural statutes and does not meet this Court's original action criteria.

A. Absent constitutional or statutory authorization, the "Wisconsin Legislature" cannot be a party.

Article IV, Section 1 of the Wisconsin Constitution, "Legislative power," states: "The legislative power shall be vested in a senate and assembly." The balance of Article IV, Sections 2 through 34, do not grant the Legislature the power to file lawsuits, and it has not pled that it has such power.

Chapter 13 of the Wisconsin Statutes elucidates the powers of the Legislature. Like the Constitution, it does not give the Legislature authority to initiate lawsuits.

The Legislature is not even allowed to intervene in a civil lawsuit in its own name: such intervention may be done only by the

joint committee on legislative organization ("JCLO") on behalf of the Legislature in the limited circumstances set out in Wis. Stat. §13.365(3). With the exception of *Legislature v. Evers*, 2020AP608-OA, a highly unusual case in which the Legislature's ability to bring lawsuits was not discussed, "the Wisconsin Legislature" has never initiated a lawsuit.

Here, the Court has before it a petition, signed by attorneys who purport to represent "the Wisconsin Legislature," alleging that the "Petitioner is the Wisconsin Legislature." It does not state the legal basis the attorneys relied on to file an action on behalf of "the Wisconsin Legislature." There is none.

Moreover, there is no allegation that anyone has been authorized to act on behalf of the Wisconsin Legislature. There is no record of the Wisconsin Legislature enacting a statute or passing a joint resolution directing that the Petition be filed.

Notably, on April 28, 2020, after briefs were filed in this Court challenging the lack of authority, Republican leadership made a hasty request to the JCLO asking it to authorize them to "continue to

represent the interests of the legislature and continue to be authorized to speak for and defend the state's interest" in this case.[1] Not only was that request untimely; JCLO still lacks underlying authority to grant leadership the permission sought.

On that basis alone, the Court should reject the Petition.

B. The Petition is procedurally defective.

The Legislature failed to comply with the conditions precedent to bringing its claims under Wis. Stat. ch. 227.

1. The Legislature failed to meet the justiciability requirement for a declaratory judgment action.

The Legislature's first claim—that Order 28 is an invalid, unpromulgated rule—should have been brought as a declaratory judgment action under Wis. Stat. §227.40. This statute provides "the exclusive means of judicial review of the validity of a rule…," including an improperly promulgated rule. Wis. Stat. §§227.40(1),

[1] Brianna Reilly, Officials defend Wisconsin COVID-19 response in lawsuit brief, THE CAPITAL TIMES (Apr. 28, 2020), https://madison.com/ct/news/local/govt-and-politics/wisconsin-supreme-court-evers-brief-coronavirus-lawsuit/article_256925c3-d9c1-5297-a087-f9bb0d955410.html.

(4)(a). The Petition should be dismissed for non-compliance with that provision alone.

Even if allowed to proceed without such compliance, the Legislature's claim for declaratory judgment is non-justiciable. Four factors of justiciability must be satisfied in order to seek a declaratory judgment under Wisconsin Chapter 227, including that the party seeking declaratory relief must have a legally protectible interest, *i.e.* standing. *City of Madison v. Town of Fitchburg*, 112 Wis.2d 224, 228, 332 N.W.2d 782 (1983). This is evidenced by pecuniary loss or showing that the party "otherwise will sustain a substantial injury to [its] interests." *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶17, 259 Wis.2d 107, 655 N.W.2d 189.

The Legislature claims to have standing because "no other party has an 'equivalent stake' in this dispute." Pet. ¶19 (citing *Panzer v. Doyle*, 2004 WI 52, ¶42, 271 Wis.2d 295, 680 N.W.2d 666). This reliance is misplaced. *Panzer* was a separation of powers case in which the individual plaintiff legislators and a legislative committee asserted an injury "imping[ing] upon the core power and function of

the legislature." *Panzer*, 271 Wis.2d 295, ¶42. This Court reasoned that "no one outside the legislature would have an equivalent stake in the issue" where such a constitutional injury was alleged—*i.e.*, that the Governor was "acting to deprive the legislature of the ability to exercise its core function in a specific subject area." *Id*.

The Legislature's core function is to legislate by enacting laws and setting public policy. Wis. Const. ART. IV §1; *see also* Wis. Stat. §15.001(1). Here, the Legislature only claims harm from JCRAR being unable to review Order 28 as an administrative rule under Wis. Stat. §§227.26(2)(d) and 227.19(4)(d). (Leg. Memo. at 10.) That, at worst, is a procedural error, not the impingement of a core legislative function. The Legislature remains free to legislate, including by modifying Wis. Stat. ch. 252. *Seebach v. Pub. Serv. Comm'n of Wis.*, 97 Wis.2d 712, 721, 295 N.W.2d 753 (Ct. App. 1980) (holding that although error occurred, "the instant petitioners have not demonstrated that [the error] prejudiced them to a material degree"); *In re Delavan Lake Sanitary Dist*., 160 Wis.2d 403, 412, 466 N.W.2d 2271 (Ct. App. 1991).

The Legislature implies it can stand in the shoes of Wisconsin citizens whom it believes are harmed by Order 28. (Pet. ¶11.) In *Panzer,* the Court allowed standing to the individual legislators and legislative committee because it was "consistent with our treatment of standing in *Wisconsin Senate v. Thompson*." 271 Wis. 2d 295, ¶42. There, the Court held that individual legislators who had sued in their private capacities as taxpayers had standing to challenge the Governor's partial veto because the Governor's actions would otherwise "be insulated or immunized from this court's review and possible invalidation." *Wisconsin Senate v. Thompson*, 144 Wis.2d 429, 435, 424 N.W.2d 385 (1988). But here, innumerable private parties are affected by and would have standing to challenge Order 28, and no individual legislator has joined the case in a private capacity.

That the "Legislature" has run to this Court for "emergency" help instead of legislating suggests that it is politically unpalatable for the Legislature to interfere with Order 28. It would rather have this Court do so on its behalf. That preference does not confer standing.

2. The Legislature did not follow the procedural requirements for bringing its second and third issues to the Court.

The Legislature's second and third issues do not depend on Order 28 being a rule (Leg. Memo at 1, 40) and would normally be brought in a petition for judicial review challenging an agency decision under Wis. Stat. §227.52 *et seq.* Wis. Stat. §227.57(5) (reviewing legal errors), (8) (reviewing errors in discretion). The Legislature has not met minimal prerequisites for filing these claims.

First, the right to judicial review of an agency action requires strict compliance with Wis. Stat. §227.53(1), such as filing the petition in the circuit court where the petitioner resides and serving the agency. *Wis. Power & Light Co. v. Pub. Serv. Comm'n of Wis.*, 2006 WI App 221, ¶11, 296 Wis.2d 705, 725 N.W.2d 423. The requirements of Wis. Stat. §227.53 are strictly construed even when they produce harsh results. *E.g.*, *Ryan v. Wis. Dep't of Revenue*, 68 Wis.2d 467, 472, 228 N.W.2d 357 (1975); *Currier v. Wis. Dep't of Revenue*, 2006 WI App 12, ¶23, 288 Wis.2d 693, 709 N.W.2d 520. The Legislature is subject to

the same rules as other litigants when challenging agency actions like Order 28. Its failure to follow them here dooms its Petition.

Second, the Legislature has not demonstrated that it is "aggrieved" by or has standing to challenge Order 28 for purposes of review under Wis. Stat. §227.52. As explained above, the Legislature has suffered no direct injury. It also has not demonstrated that its injury is "within the zone of interests to be protected or regulated by the statute or constitutional provision in question." *Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶15, 275 Wis.2d 533, 685 N.W.2d 573.

The boundaries of the "zone of interests" are found in the law's "express recognition of [its] protective purposes." *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n of Wis.*, 69 Wis.2d 1, 16, 230 N.W.2d 243 (1975). Here, Wis. Stat. §252.02 is designed to protect public health, and thus potential injuries falling within the statute's zone of interests necessarily lie with members of the public whose health may be impacted by Order 28. Because the Legislature's

interest in overseeing rulemaking does not fall within the zone of interest of Chapter 252, it lacks standing.

C. The Petition does not meet criteria for original action.

The Legislature does not meet at least two of this Court's criteria for original actions. *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 48 (1939).

First, there are adequate, even mandatory, remedies in the circuit court, including claims against agency actions under Wis. Stat. §§227.40 and 52. The Legislature states that "there is no time for [it]to go through ordinary judicial procedures because DHS's new rules regarding business closure will go into effect on April 24 and expire 32 days later." (Leg. Memo. at 26.) But it does not explain why the circuit court cannot address this matter on short notice. Further, the Order itself will expire on May 26. There is no "reasonable certainty that a result could be reached which would be effective in order to justify the use of the original jurisdiction. It is too great a power to be used hastily, or to accomplish an impotent result." *In re Anderson*, 164 Wis. 1, 159 N.W. 559, 560 (1916).

Second, this case requires substantial factual development given the complexity of the COVID-19 pandemic and the detailed

Department response. The Legislature claims that "no fact finding is necessary" (Leg. Memo. at 26), but that claim is belied by the affidavits submitted by both it and the Department. This Court recently denied a Petition for original action under similar circumstances involving the COVID-19 epidemic. *Wis. Ass'n of Criminal Def. Lawyers v. Evers*, No. 2020AP687-OA (Order, Apr. 24, 2020).

By filing this case as an original action, the Legislature circumvented the normal means for fact development in challenges to agency actions. Declaratory judgments to review the validity of a rule under Wis. Stat. §227.40 frequently require development of a factual record, "[p]articularly in a highly technical, complex area of rulemaking." *Liberty Homes, Inc. v. Dep't of Indus., Labor & Human Relations*, 136 Wis.2d 368, 379, 383-84, 401 N.W.2d 805 (1987). If the Legislature had challenged Order 28 under Wis. Stat. §227.52, the Department would have filed a record of its decision, on which the Court could rely to determine the agency's compliance with the law. Wis. Stat. §§227.55.

"Inasmuch as under the principles established the circuit court has jurisdiction to proceed, the excluding jurisdiction of this court will not be exercised in doubtful cases." *Petition of Heil*, 284 N.W. at 51. This is, at best, a doubtful case. The Petition should be denied.

II. The Court should deny the Legislature's emergency motion for a temporary injunction.

The Legislature has moved for a temporary injunction enjoining enforcement of Order 28 but concedes that "certain aspects of Emergency Order 28 . . . are within §252.02's express delegation of authority" (Leg. Memo. at 55); thus, enjoining the entire Order is an excessive remedy.

As to those unspecified sections of Order 28 that the Legislature disputes, it cannot show a likelihood of success on the merits, the need to preserve the status quo, no adequate remedy at law, irreparable harm, or that the balance of the equities is in its favor. *See Werner v. A.L. Grootemaat & Sons, Inc*., 80 Wis.2d 513, 520, 259 N.W.2d 310 (1977).

A. The Legislature is unlikely to succeed on the merits of its claims that Order 28 is an unpromulgated rule,

exceeds the Department's authority, or is arbitrary and capricious.

First, Order 28 is not a rule. It is an order. Wisconsin Statute §252.02(4) grants the Department power to exercise broad authority to control communicable disease through rules *or* orders.

The distinction in Wis. Stat. §252.02(4) was deliberate:

> The department may adopt and enforce rules or issue orders for guarding against the introduction of any ~~such~~ communicable disease into the state, for the control and suppression ~~thereof within it~~ of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by ~~such~~ a communicable disease . . .

1981 Wis. Laws, ch. 291, §21 (amending then-Wis. Stat. §143.02(4)).

This flexibility is consistent with the well-understood need for health officers to have a free hand in dealing with health crises. *See State* ex rel. *Nowotny v. City of Milwaukee*, 140 Wis. 38, 121 N.W. 658, 659 (1909) ("A health officer who is expected to accomplish any results must necessarily possess large powers and be endowed with the right to take summary action . . . the public health cannot wait upon the slow processes of a legislative body, or the leisurely deliberation of a court.").

Moreover, the Legislature's grant of authority to the Department allows that "[a]ny rule ***or order*** may be made applicable ***to the whole*** or any specified part of the ***state***." Wis. Stat. §252.02(4). This language defeats the Legislature's argument that orders with statewide applicability are rules under Wis. Stat. §227.01(13).

Because Order 28 is not a rule, rulemaking procedures do not apply and the Order is sound. (*See* Leg. Memo. at 37-39.)

Second, Order 28 is within the Department's broad powers under Wis. Stat. §§252.02(3), (4), and (6). **Section 252.02(3)** permits the Department to "close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." The Legislature asks the Court to engage in linguistic gymnastics to conclude that this authority is limited to schools, churches, or places that are similar to schools or churches. That interpretation violates the plain statutory language, particularly the phrase "other places."

Further, it would make no sense to limit the Department's authority to places similar to schools or churches because outbreaks

and epidemics are spread in numerous settings. COVID-19 is spread in nursing homes, grocery stores, , essential businesses like food-processing plants (Van Dijk Aff., ¶26), and even in private homes. [2] It would do little to stop the spread of COVID-19 to ban gatherings only in the places suggested by the Legislature. More importantly, such a restrictive interpretation is inconsistent with the plain language of the statute.

Section 252.02(4) explicitly confers upon the Department authority to issue orders for "guarding against the introduction of any communicable disease into the state, [and] for the control and suppression of communicable diseases." The Legislature contorts canons of statutory construction to defeat this broad language, claiming that Wis. Stat. §252.02(4) must be limited to the more narrow subject matter in (3) (regarding schools and churches), or else (3) would be surplusage. (Leg. Memo. at 50.)

[2] Ariana Eunjung Cha, A funeral and a birthday party: CDC traces Chicago coronavirus outbreak to two family gatherings, WASH. POST (Apr. 8, 2020), *available at* https://www.washingtonpost.com/health/2020/04/08/funeral-birthday-party-hugs-covid-19/.

Subsections (3) and (4) address different subject matter, and should be read separately. Even if they contain some overlap, that does not render (3) surplusage, but reflects a "belt-and-suspenders" approach to ensuring the Department retains broad powers to close schools and churches, as well as take other measures to "control and suppress[] communicable diseases." *See* Ethan J. Leib and James J. Brudney, *The Belt-and-Suspenders Canon*, 105 Iowa L. Rev. 735, 741 (Jan. 2020) *see also N. Highland Inc. v. Jefferson Machine & Tool, Inc.*, 2017 WI 75, ¶137, 377 Wis.2d 496, 898 N.W.2d 741 (R. Bradley, J., dissenting).

The Legislature also suggests that there may be constitutional infirmities with the Department's broad powers under Chapter 252. (Leg. Memo. at 43-45.) It makes an undeveloped separation of powers argument, then implies that the statute violates the nondelegation doctrine because it lacks sufficient standards for Department implementation. The Legislature may choose to grant authority through broad standards—for example, so agencies may apply discretion on matters where science and fact-finding are

involved. *See Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, ¶43, 335 Wis.2d 47, 799 N.W.2d 73. "The fact that these are broad standards does not make them non-existent ones." *Id.*; *see also Schmidt v. DNR*, 39 Wis. 2d 46, 59, 158 N.W.2d 306, 315 (1968).

Although the Legislature now chafes at the broad power it granted the Department, this arrangement is by design. *Nowotny*, 140 Wis. 38. The Court cannot give the Legislature a *post-hoc* narrowing of Wis. Stat. §252.02(4).

Section 252.02(6) explicitly grants the Department authority to "authorize and implement all emergency measures necessary to control communicable diseases." Contrary to the Legislature's argument, the Department has not relied on that provision "to control every aspect of public and private life in Wisconsin indefinitely." (Leg. Memo. at 54.) The Order takes only those emergency measures necessary to control COVID-19, and only through May 26, 2020.

If presented, perhaps evidence that a Department measure is not "necessary to control" COVID-19 could be a valid basis for a

challenge. Wis. Stat. §252.02(6). The news clippings cited by the Legislature do not accomplish that.

Third, the Order is not arbitrary and capricious. The standard for overturning an agency's discretionary decision is high—particularly where, as here, the agency has been granted broad discretionary authority by statute:

> Courts must indulge in every prima facie presumption in favor of the good faith of the superintendent [of public instruction] in making such orders in the discharge of his official duties; and have no right to interfere with the exercise of the judgment and discretion committed by the Legislature to such an official.

Sch. Dist. No. 3 of Town of Adams v. Callahan, 237 Wis. 560, 297 N.W.2d 407, 415-16 (1941); *see also Froebel v. DNR*, 217 Wis.2d 652, 667-68, 579 N.W.2d 774 (Ct. App. 1988) (declining to reverse decision on dam removal under statute which "affords the DNR broad discretion"). The Legislature does not cite any case where a court has invalidated a public health order as arbitrary and capricious.

The Legislature cites Wis. Stat. §227.57(8) (Leg. Memo. at 22-23, 56),[3] but that statute is specific about what may constitute an erroneous exercise of discretion, such as the exercise of discretion outside of statutory boundaries or an unexplained deviation from a prior agency policy or rule. *Id.*; *see also Sterlingworth Condo Assoc., Inc. v. DNR*, 205 Wis.2d 710, 730-33, 556 N.W.2d 791 (Ct. App. 1996) Even if a court disagrees with an agency's decision, it "shall not substitute its judgment for that of the agency on an issue of discretion." Wis. Stat. §227.57(8).

Here, on a variety of grounds, the Legislature tries to claim Order 28 is arbitrary and capricious, but none are founded in the statute. The Department has wide discretion under Wis. Stat. §252.02 to issue orders and take other measures to control and suppress communicable diseases. Order 28 is squarely within that discretion,

[3] The Legislature suggests Order 28 is a "legislative-type decision" citing *J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis.2d 69, 91, 336 N.W.2d 679 (Ct. App. 1983) (Leg. Memo. at 56). However, that term refers to agency decisions that are not the result of a contested case hearing. *See Daly v. Nat. Res. Bd.*, 60 Wis. 2d 208, 216, 208 N.W.2d 839, 843 (1973). It does not mean the Department was exercising legislative power, as opposed to executive power, when it issued Order 28.

taking action to further the objectives in Wis. Stat. §252.02(3), (4), and (6).

The Legislature focuses on a perceived lack of explanation or fact-finding behind the way businesses, recreational activities, and activities are treated in Order 28. (Leg. Memo. at 57-61.) Yet Order 28 describes the information considered, including prior orders, the positive public health effects of those orders, and facts central to the restrictions in the Order. "Rational choices can be made in a process which considers opinions and predictions based on experience." *Sterlingworth Condo. Assoc.*, 205 Wis.2d at 730 (citing *J.F. Ahern Co. v. Building Comm'n*, 114 Wis.2d 69, 96, 336 N.W.2d 679 (Ct. App. 1983)).

Order 28 reasonably describes its consideration of businesses in the "Whereas" clauses. (Order 28 at 2.) Despite the Legislature's claims, the fact that some businesses and activities are treated differently than others does not itself prove that Order 28 is arbitrary: "[I]nconsistencies in determinations arising by comparison are not proof of arbitrariness or capriciousness." *Robertson Transp. Co. v. PSC*, 39 Wis.2d 653, 661, 159 N.W.2d 636 (1968).

Wis. Stat. §252.02 did not require the Department to do more. It contains no requirements as to the form or content of emergency orders, as long as the purpose of the statute is fulfilled. The drafters likely recognized that requiring detailed factfinding and presentation of evidence in public heath orders would risk turning them into treatises, burning precious time and producing a less understandable result. Cases interpreting Wis. Stat. §227.57(8) confirm the Department's approach was appropriate. *E.g., Wis. Prof'l Police Assoc. v. PSC*, 205 Wis.2d 60, 75, 555 N.W.2d 179 (Ct. App. 1996).

Some of the Legislature's claims about the Order are mere hyperbole, such as that Order 28 allows the Department to "decide which businesses will survive and which will die" (Leg. Memo. at 57), that Order 28 did not consider the "social devastation [it] would cause," and that the Department "delegate[s] public health authority to WEDC" by allowing it to collect "essential business" application

forms.[4] Such statements fail to demonstrate that Order 28 is arbitrary and capricious or violates Wis. Stat. §227.57(8).

The Legislature is unlikely to succeed on the merits of its claims. Moreover, any alleged error in discretion cannot support the Legislature's request for injunctive relief, since only the Department—not the Court—may exercise the discretion delegated under Wis. Stat. ch. 252. *See* Wis. Stat. §227.57(8); *Froebel*, 217 Wis.2d at 668.

B. The Legislature cannot succeed on the remaining factors for obtaining a temporary injunction.

Even if the Legislature could demonstrate likelihood of success on the merits, it cannot meet the quantum of proof needed for a temporary injunction under the remaining *Werner* factors.

First, the Legislature not only has an adequate remedy at law; it has the **ultimate** remedy at law. *See Werner,* 80 Wis.2d at 520. It has

[4] The Legislature claims that Order 28 did not consider the "social devastation [it] would cause," citing "increases in abuse or suicide," "sickness and death from other undiagnosed and untreated diseases," and similar factors. (Leg. Memo. at 61-62.) This is contradicted by the language of the Order, which deems domestic abuse services, mental health services, and law enforcement as essential. Order 28, ¶¶1, 9, 11.a, 12.

the power to make, revise and repeal laws. If the application of the specific powers it granted to the Department in Wis. Stat. ch. 252 now offends the Legislature, it can repeal or change that that authority.

Second, the current status quo is that Order 28 is effective. The Legislature's request to enjoin enforcement of Order 28 would disrupt the status quo. This Court should not issue a temporary injunction altering the status quo. *See Sch. Dist. v. Wis. Interscholastic Athletic Ass'n*, 210 Wis.2d 365, 374, 563 N.W.2d 585 (Ct. App. 1997) (granting injunction that alters status quo constitutes misuse of discretion).

Third, if there is irreparable harm any time a "duly enacted" law is prevented, as argued by the Legislature, this Court should not enjoin the DHS from acting to protect public health through authority granted in Chapter 252. *See Abbot v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Enjoining Order 28 will create the same irreparable harm the Legislature claims it seeks to avoid because it will block the enforcement and implementation of a lawful order.

Fourth, on balance, equity does not favor an injunction. The Legislature pits the public health interests of containment of a devastating communicable disease against the financial interests of the citizens and businesses of the State. It seeks to negate the public health imperative of social distancing with evidence of financial suffering by Wisconsin citizens and businesses. This is a false dichotomy because both are true. Social distancing is necessary to control this epidemic **and** the State economy is suffering.

The Legislature decries the lack of empirical information in Order 28, but no amount of data regarding unemployment, decreased sales, or other adverse economic impact will decrease the danger of COVID-19 if restrictions on social contact are lifted too soon. Moreover, there is nothing in Order 28 that prevents the Legislature from addressing the economic impacts. This State can address health and economic needs at the same time; they are not mutually exclusive.

The citizens and businesses of the State have already invested more than a month in slowing and containing the spread of COVID-

19. It has come at significant financial and social costs. It would be tragic to squander this investment by relaxing social distancing standards too soon and inviting a spike in transmission of the virus and an increase in COVID-19 hospitalizations and deaths. Public health needs to be the primary concern. On balance, equity disfavors issuance of the injunction.

The Legislature's motion for temporary injunction should be denied.

CONCLUSION

The Legislature's Emergency Petition for Original Action should be denied, as should its Motion for Temporary Injunction.

Respectfully submitted this 29th day of April 2020.

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CERTIFICATION

I hereby certify that this brief conforms to this Court's April 21, 2020 Order and the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 4,359 words. I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

/s/Tamara B. Packard

Tamara B. Packard

CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Court's April 21, 2020 Order in the above-captioned case and the Court's April 8, 2020 Administrative Order, on April 29, 2020 I submitted the foregoing document to the Clerk of the Court for filing via electronic mail at this address: clerk@wicourts.gov.

On April 29, 2020 I also caused an original and one copy of this document to be delivered by U.S. Mail to the Clerk of Court, and caused this document to be served on all counsel of record via electronic mail and U.S. Mail.

/s/Tamara B. Packard

Tamara B. Packard