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SUPREME COURT
STATE OF WISCONSIN

SAVANNAH WREN, Individually and as Personal
Representative of the ESTATE OF CALVIN GORDON, Jr.,
and CALVIN GORDON,

Plaintiffs-Appellants-Respondents,

v.

Appeal No. 24-AP-126

COLUMBIA ST. MARY’S HOSPITAL
MILWAUKEE, INC., JESSICA HOELZLE, M.D.,
JORDAN HAUCK, D.O., and INJURED PATIENTS
and FAMILIES COMPENSATION FUND,

Defendants-Respondents-Petitioners.

**JOINT PETITION FOR REVIEW OF DEFENDANTS-RESPONDENTS-
PETITIONERS COLUMBIA ST. MARY’S HOSPITAL MILWAUKEE,
INC., JESSICA HOELZLE, M.D., JORDAN HAUCK, D.O., and
INJURED PATIENTS and FAMILIES COMPENSATION FUND**

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INTRODUCTION

Pursuant to Wis. Stats. §§ 808.10 and 809.62, defendants-respondents-petitioners Columbia St. Mary's Hospital Milwaukee, Inc., Jordan Hauck, D.O., Jessica Hoelzle, M.D., and the Injured Patients and Families Compensation Fund¹ respectfully petition the Wisconsin Supreme Court to review the decision of the Wisconsin Court of Appeals in *Wren v. Columbia St. Mary's Hospital Milwaukee, Inc.*, Appeal No. 24-AP-126 (Ct. App. February 11, 2025)(recommended for publication)(hereinafter referred to as *Wren*)(P.App. 101-120).

At issue is the constitutionality of Wis. Stat. § 895.4801(2)², which provides the following:

(2) Immunity. Subject to sub. (3), any health care professional, health care provider, or employee, agent, or contractor of a health care professional or health care provider is immune from civil liability for the death of or injury to any individual or any damages caused by actions or omissions that satisfy all of the following:

(a) The action or omission is committed while the professional, provider, employee, agent, or contractor is providing services during the state of emergency declared under s. 323.10 on March 12, 2020, by executive order 72, or the 60 days following the date that the state of emergency terminates.

(b) The actions or omissions relate to health services provided or not provided in good faith or are substantially consistent with any of the following:

1. Any direction, guidance, recommendation, or other statement made by a federal, state, or local official to address or in response to the emergency or disaster declared as described under par. (a).

1

As this petition is presented on behalf of all defendants-respondents-petitioners, Columbia St. Mary's Hospital Milwaukee, Inc., Dr. Hauck, Dr. Hoelzle, and the Injured Patients and Families Compensation Fund, the name "Columbia St. Mary's" will serve as the reference for all defendants-respondents-petitioners throughout this petition, unless otherwise noted. *See* Wis. Stat. § 809.19(1)(i).

2

Although the court of appeals cites to Wis. Stat. § 895.4801 in general, it is Wis. Stat. § 895.4801(2) in particular that is at issue. To be consistent with the court of appeals decision, Wis. Stat. § 895.4801 will be cited throughout this petition.

2. Any guidance published by the department of health services, the federal of health and human services, or any divisions or agencies of the federal department of health and human services relied upon in good faith.

(c) The actions or omissions do not involve reckless or wanton conduct or intentional misconduct.

This statute means that when the services of a health care provider were provided between March 12, 2020 and July 10, 2020,³ and the acts or omissions were not reckless, wanton conduct, or intentional misconduct, a health care provider has immunity from claims of allegedly negligent care that occurred during that period of time.

Here, the plaintiffs allege Dr. Hoelzle, Dr. Hauck, and Columbia St. Mary's were negligent in providing care in May 2020, during the period of time Wis. Stat. § 895.4801 provided immunity for allegedly negligent health care providers. Columbia St. Mary's (referred to collectively here) filed a motion to dismiss based on the application of the statute in the circuit court, and the circuit court granted the motion. The court of appeals reversed.

The court of appeals declared Wis. Stat. § 895.4801 unconstitutional, finding the statute deprived Ms. Wren⁴ of her right to a jury trial. The court of appeals relied on only one appellate case in reaching its conclusion, *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, that is distinguishable both factually

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Wis. Stat. § 895.4801 cites to 60 days after the termination of the state of emergency declared under the governor's Executive Order No. 72 on March 12, 2020. By operation of Wis. Stat. § 323.10, Executive Order No. 72 expired on May 11, 2020, so the immunity provision did not expire until July 10, 2020.

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The plaintiffs-appellants-respondents will be referred to as Ms. Wren. *See* Wis. Stat. § 809.19(1)(i).

and legally. One primary distinction, which will be addressed in more detail below, is that *Palm* addressed a challenge to the *unelected* secretary of the State of Wisconsin Department of Health Services issuing an administrative order as opposed to passed by both houses and signed by the governor. As noted in *Palm*: “*The people consent to the Legislature making laws* because they have faith that the procedural hurdles required to pass legislation limit the ability of the Legislature to infringe on their rights.” *Palm*, ¶ 32 (emphasis added).

The court of appeals additionally based its analysis on a *comparison* that does not have anything to do with whether Wis. Stat. § 895.4801 was tailored for a compelling state interest. The court of appeals incorrectly held the statute was drafted too broadly to deny the right to a jury trial for claims related to medical care other than for treatment of Covid 19. But, as will be shown below, the compelling state interest was of providing all manner of health care to the public during an unprecedented time during our state and nation’s recent past when a new, worldwide pandemic was affecting the provision of health care generally, not just the treatment of Covid 19 related issues.

Columbia St. Mary’s respectfully requests the Court grant this petition, as it presents a real and significant question of state constitutional law, the question presented is a novel one which has statewide impact, and the question presented is a question of law that is likely to recur absent resolution from this Court.

STATEMENT OF THE ISSUE

Whether Wis. Stat. § 895.4801's grant of immunity to healthcare providers for allegedly negligent actions at the start of the Covid 19 pandemic is an unconstitutional violation of an individual's right to a jury trial?

The circuit court answered this issue "no."

The court of appeals answered this issue "yes."

STATEMENT OF THE CRITERIA SUPPORTING REVIEW

Pursuant to Wis. Stat. § 809.62 (1r), this Court should exercise its discretionary review of the court of appeals' decision. The court of appeals' decision presents a real and significant question of state constitutional law, the right to a jury as provided in article I, section 5 of the Wisconsin Constitution: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy[.]" See Wis. Stat. § 809.62(1r)(a). The court of appeals erroneously concluded that Wis. Stat. § 895.4801 was unconstitutional in reliance on *Palm*, despite that decision resting on an unelected state department secretary unilaterally issuing an administrative order in contrast to a law enacted by the elected legislature and signed into law by the governor, who had the right to veto the legislation but chose not to do so and instead signed it. Allowing the court of appeals decision to stand would represent a fundamental change in the balance of Wisconsin law between the powers of the judiciary versus the governor and legislature.

In addition, the court of appeals' decision presents an issue of first impression, the resolution of which will have statewide impact. Wis. Stat. § 809.62(1r)(c)2. Wis. Stat. § 895.4801 presents a question of whether health care providers who provided care from March 12, 2020 to July 10, 2020, and who claimants allege were negligent in providing that care, are entitled to immunity as enacted by the state legislature and approved by the governor. Not only has the five year statute of repose not yet expired

for claimants alleging negligence, Wis. Stat. § 893.55(1m)(b), but there are more than likely pending appellate and circuit court cases around the state that are addressing this issue.

Last, the question as to whether Wis. Stat. § 895.4801 is constitutional is a question of law of the type that is likely to recur unless resolved by this Court. Because the statute of repose has not expired, and more than likely other appellate and circuit court cases are pending where the application of section 895.4801 has been raised, a decision from this Court will resolve the question of whether section 895.4801 is constitutional and its significant application to both health care providers and claimants alleging negligent care by those health care providers during the approximately four month period of time when it was in effect.

STATEMENT OF THE CASE

I. Nature of the case.

The facts, for the purpose of this petition, are quite simple and straightforward due to the fact discovery was stayed pursuant to Wis. Stat. § 802.06(1)(b) when Columbia St. Mary's filed its motion to dismiss. Ms. Wren alleges on May 24, 2020 she gave birth, and on the same day, her child was pronounced deceased. (R. 5, ¶ 21).

Ms. Wren alleges Dr. Hoelzle, Dr. Hauck, and Columbia St. Mary's were negligent in providing care and treatment to her and her child. (R. 5, ¶¶ 22-35). Ms. Wren also sued the Injured Patients and Families Compensation Fund. (R. 5, ¶ 13).

II. Procedural status in the circuit court.

Subsequent to the filing of the complaint, Columbia St. Mary's filed its joint defense motion to dismiss the plaintiffs' complaint. (R. 48 and 49). Columbia St. Mary's contended that Wis. Stat. § 895.4801 expressly provided immunity for the health care providers named in this lawsuit as their care and treatment was provided during the immunity time period specified in the statute, and their actions were not

alleged to be reckless, wanton conduct, or intentional misconduct. (R. 49, pp. 1-2). A motion to dismiss hearing initially occurred on November 10, 2023, (R. 74)(P. App. 123-146), and at the December 6, 2023 hearing, the motion was granted. (R. 73)(P. App. 147-179).

III. The circuit court granted Columbia St. Mary's motion to dismiss at a December 6, 2023 hearing.

A. Columbia St. Mary's supported the constitutionality of Wis. Stat. § 895.4801 at the December 6, 2023 hearing.

At the December 6, 2023 hearing, Columbia St. Mary's argued in support for the constitutionality of Wis. Stat. § 895.4801, including its purpose. Columbia St. Mary's stated the "clear purpose of the statute at issue here 895.4801 was to actually preserve access for all person[s] in Wisconsin to all aspect[s] of health care during the pandemic." (R. 73, p. 19). As noted by Columbia St. Mary's, the purpose of section 895.4801 was to encourage health care providers *to remain available during the pandemic. Id.* It applied to not only physicians, but nurses, chiropractors, and other health care providers. *Id.* The statute's purpose was to allow the public to still be able to receive health care, *even if the patient's condition was not related to a Covid 19 issue.* (R. 73, p. 19).

In response to Ms. Wren's argument that Wis. Stat. § 895.476 was also written to address Covid 19 health issues and therefore section 895.4801 was overbroad, Columbia St. Mary's noted that was the point: "In contrast to the statute that the plaintiffs are citing to, that they're saying was more tailored, 895.476, [it] was actually written for a completely different purpose, and that's why it was tailored in the way that it was." (R. 73, p. 20). Wis. Stat. § 895.476 was enacted to address immunity for Covid 19 exposure in a whole range of activities in life, including businesses and schools that were not considered health care providers. (R. 73, p. 20). The focus of

section 895.476 was to protect a wide range of functions in society from being shut down for fear they might become liable for exposure to Covid. (R. 73, p. 20).

Wis. Stat. § 895.4801, in contrast, was meant to encourage health care providers to remain open and address any health care issues that might arise, such as a birth, broken arm, etc. (R. 73, p. 20). It was very clear the governor and the legislature enacted a statute that provided broad immunity to health care providers so that people, like Ms. Wren, would have continued access to health care that was not simply limited to Covid 19 issues. (R. 73, pp. 21 and 22). Thus, Wis. Stat. § 895.4801 provided immunity for medical services provided during the time frame at issue, March 12, 2020 to July 10, 2020. (R. 73, p. 22). The attorney for Ms. Wren agreed the incident that is the subject of this action occurred on May 24, 2020, during the immunity period provided by Wis. Stat. § 895.4801. (R. 73, p. 24). In sum, Columbia St. Mary's contended the purpose of section 895.4801 was to provide health care to all citizens in Wisconsin, no matter what medical issue they were presenting, during the extremely unusual period of time when people were afraid to go to places for fear of Covid 19, including health care facilities. (R. 73, p. 23). Columbia St. Mary's additionally stated that any reference to previous drafts of section 895.4801 before the actual bill became a law provided further evidence the legislature made a conscious decision to protect health care providers during the Covid 19 crisis facing the state and the nation. (R. 73, p. 26).

B. The circuit court upheld the constitutionality of Wis. Stat. § 895.4801.

The circuit court addressed the constitutionality of Wis. Stat. § 895.4801. In assessing whether section 895.4801 was constitutional, the circuit court noted that statutes are presumed to be constitutional, (R. 73, p. 29), and that any doubt regarding the constitutionality of a statute must be resolved in favor of finding a statute

constitutional. (R. 73, p. 30). The Court further noted that “[t]o succeed on a constitutional challenge, a statute must be shown to be unconstitutional beyond a reasonable doubt.” (R. 73, p. 30).

The Court addressed the legislative history of section 895.4801. The Court held that “upon a review of the submissions from the defendants, the legislative history shows that the legislature made a deliberate choice to provide broad immunity when the Covid 19 pandemic first started.” (R. 73, p. 30). The Court concluded that Ms. Wren “has not met the heavy burden of proving that a statute is unconstitutional by merely pointing to a more narrowly construed statute because they must prove it beyond a reasonable doubt. Thus, the facts pled in the complaint satisfy the immunity provide[d] by 895.4801.” (R. 73, p. 31). The Court granted the motion to dismiss with prejudice. (R. 73, p. 32). The Order for Dismissal with prejudice was signed and filed on December 14, 2023. (R. 71)(P.App. 121-122).

IV. The court of appeals reversed the circuit court, declaring that Wis. Stat. § 895.4801 was unconstitutional based on its finding that the right to a jury trial was eliminated.

The court of appeals issued its decision on February 11, 2025.⁵ *Wren*. Of note, because a motion to dismiss had been filed at the beginning of the case, (R. 48 and 49), no discovery has occurred. Wis. Stat. § 802.06(1)(b). Thus, the court of appeals’ recitation of the facts involving this case is based on the allegations of the complaint.

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The court of appeals issued a “corrected” decision the morning of February 12, 2025, but in comparing the original decision issued on February 11, 2025 and the “corrected” decision issued on February 12, 2025, Columbia St. Mary’s could not be ascertain any difference. The court of appeals did not note what was “corrected.” Regardless, the “corrected” decision is cited in Columbia St. Mary’s appendix and throughout this petition. Moreover, the decision on the state court system web site for the appellate courts, CCAP, only references one decision, and it is assumed it is the corrected decision. Courts can take judicial notice of CCAP records. *See Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n. 1, 346 Wis. 2d 635, 829 N.W.2d 522.

Wren, ¶4. Ms. Wren alleges medical malpractice involving the death of her newborn son on May 24, 2020. *Id.*

At the time of the birth, the state and nation were in the throes of the start of the Covid 19 pandemic. *Wren*, ¶ 5. The governor declared a state of emergency on March 12, 2020, pursuant to Executive Order No. 72. *Id.* The governor and state legislature passed Wis. Stat. § 895.4801. *Id.*; *see also* 2019 Wis. Act 185, § 98. This statute established immunity for health care providers beginning on March 12, 2020, until July 10, 2020. *Wren*, ¶ 5 and n. 4.⁶

The court of appeals addressed the constitutionality of Wis. Stat. § 895.4801. *Wren*, ¶¶ 24-39. The court noted the legislature (and, although not stated, the governor approved), passed 2019 Wis. Act 185, a response to the state of emergency created by the Covid 19 pandemic, which included immunity for allegedly negligent care and treatment provided by health care providers during the time period of the allegations at issue. *Wren*, ¶ 24. Along with the immunity provision, Act 185 also contained several other provisions assisting health care providers to provide care during the initial stages of the Covid-19 pandemic:

- relaxing credentialing requirements for certain health care professionals;
- suspending credential renewing requirements for emergency medical services personnel;
- provisions providing civil liability exemptions for the manufacture, distribution, and sale of medical supplies; and
- a provision related to insurance coverage for Covid-19 testing.

Wren, ¶ 24. In other words, the governor and legislature acknowledged the Covid 19 pandemic was creating obstacles for health care providers in providing care for all types of medical conditions, not just specifically related to Covid 19.

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The arguments and decision related to the application of Wis. Stat. § 806.04(11) are not being challenged by Columbia St. Mary's in this petition. *Wren*, ¶¶ 12-23.

Although Ms. Wren raised many challenges to the constitutionality of Wis. Stat. § 895.4801, *Wren*, ¶ 26, the court of appeals limited its analysis to Ms. Wren’s contention that section 895.4801 deprived her of a right to a jury trial pursuant to article I, section 5 of the Wisconsin constitution. *Wren*, ¶ 29, n. 11. That section provides that “[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy[. . . .]” *Id.*

Ms. Wren did not identify in her briefing in the court of appeals whether she was presenting a facial challenge or an as applied challenge to the constitutionality of section 895.4801, although she did state at the circuit court hearing she was presenting a facial constitutional challenge to Wis. Stat. § 895.4801. (R. 73, p. 16); *Wren*, ¶ 28. Columbia St. Mary’s also contended Ms. Wren was presenting a facial challenge. *Id.* As a result, the court of appeals accepted that Ms. Wren was presenting a facial challenge. *Id.* Before addressing whether Wis. Stat. § 895.4801 was constitutional, the court of appeals determined the constitutional framework for review of the statute, concluding strict scrutiny was the standard. *Wren*, ¶ 29.

The heart of the decision, and the focus of this petition, is the court of appeals’ analysis in paragraphs 31-39 of its decision. The court first concluded that Wis. Stat. § 895.4801 “completely eliminates any opportunity for a jury trial on one’s claim related to an act or omission of a health care provider [. . . .]” *Wren*, ¶ 31. The court of appeals believed section 895.4801

is the complete elimination of Wren’s ability to pursue her claims by completely shielding health care professionals and health care providers from liability for anything short of acts or omissions involving reckless or wanton conduct or intentional misconduct.

Id., ¶ 32. The court concluded that the “right of access to the courts and the opportunity to have a jury trial has not been preserved in any capacity [. . . .]” *Id.* The court characterized Wis. Stat. § 895.4801 as a “complete and utter elimination” of the fundamental right to pursue a jury trial. *Id.*

Given these statements, then the court of appeals applied strict scrutiny and concluded the statute was “not narrowly tailored in furtherance of this purpose [the compelling state interest of responding to the Covid-19 pandemic], and therefore, it does not survive strict scrutiny.” *Wren*, ¶ 33. The court determined, incorrectly from the perspective of Columbia St. Mary’s, that “[t]here is no requirement [in Wis. Stat. § 895.4801] that the acts or omissions have any nexus to the state of emergency declared in response [sic] Covid-19.” *Wren*, ¶ 34.

The court, however, correctly noted that Columbia St. Mary’s argued that

the broad nature of the immunity was necessary in the face of the challenges presented to the health care industry during the state of emergency created by the Covid-19 pandemic - including those related to staffing and supply shortages - and providing immunity for all acts and omissions so long as they were taken in good faith was necessary *to ensure the availability of health care services of all kinds during the state of emergency.*

Wren, ¶ 36 (emphasis added).

The court of appeals concluded the reason for Ms. Wren’s claims were unrelated to the compelling state interest of ensure the public’s access to care for non-Covid 19 related but still critical medical issues. *Wren*, ¶¶ 37 and 39. In essence, the court of appeals held that access to labor and delivery, kidney dialysis, cardiac catheterizations, organ transplants, etc. were not compelling enough to ensure access during the state of emergency. The court instead believed the narrow state interest was providing immunity for medical care that treated Covid 19. *Id.* Because the care provided to Ms. Wren was not related to Covid 19, the court concluded Wis. Stat. § 895.4801 was unconstitutional. *Wren*, ¶ 40.

ARGUMENT

I. The court of appeals substituted its own judgment for the determination by Wisconsin’s highest elected officials, the governor and legislature, to enact a policy choice for a limited period of time during the start of a novel, worldwide pandemic.

This petition must be granted to address the significant flaws in the court of appeals’ approach in declaring Wis. Stat. § 895.4801 unconstitutional. The court of appeals ignores the substantial, undisputed evidence that the novel, worldwide pandemic, which had begun in March 2020, presented unprecedented challenges to providing health care. In response, this state’s highest elected officials who determine the policy of the state as set forth in the statutes, the governor and legislature, enacted the policy choice in providing immunity for non-reckless, wanton conduct, or intentional misconduct of health care providers for a short period of time of approximately four months.

The court of appeals’ reliance on *Palm* actually supports the constitutionality of Wis. Stat. § 895.4801. As noted in the first paragraph of *Palm*, “[t]his case is about the assertion of power by *one unelected official*, Andrea Palm, and her order to all people within Wisconsin to remain in their homes, not to travel and to close all businesses that she declares are not ‘essential’ in Emergency Order 28.” *Palm*, ¶ 1 (emphasis added). The dispute in that case was whether the secretary-designee of the state Department of Health Services issued an order that violated the laws of Wisconsin. *Palm*, ¶ 11. The legislature, the plaintiff in *Palm*, argued that Ms. Palm’s order was promulgated without following required statutory procedures applicable to an emergency and, in so doing, she infringed upon the legislature’s constitutional core power and its functions pursuant to Wis. Stats. §§ 227.24 and 227.26. *Palm*, ¶ 13.

In its analysis, the court stated that “[r]ulemaking [promulgating administrative rules] exists precisely to ensure that kind of controlling, subjective judgment asserted

by one unelected official, *Palm*, is not imposed in Wisconsin.” *Palm*, ¶ 28. This is not what is presented here. The legislature passed, and the governor approved, limited immunity for health care providers in providing care for all types of medical issues, not restricted to Covid 19, in light of a novel, worldwide pandemic. This was a policy choice by the governor and legislature that should not have been usurped by the court of appeals.

The *Palm* supreme court noted it “employ[s] the constitutional-doubt principle. That is, we disfavor statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration. *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005).” *Palm*, ¶ 31. “The canon is thus a means of giving effect to congressional intent, not of subverting it.” *Clark*, at 381. As this Court highlighted, an unelected department secretary cannot “impose regulation without going through a process to give the people faith in the justness of the regulation.” *Id.* This is the exact opposite of what occurred in the passage of Wis. Stat. § 895.4801. The court of appeals failed to cite (other than a Wisconsin Legislative Council Act memo, *Wren*, ¶ 24, n. 10) the legislative history, cited below, that establishes the governor, the legislature, and interest groups were aware of the legislation they were proposing, passing, and approving, providing broad immunity at the start of the Covid 19 pandemic.

Thus, contrary to *Palm*, in the instant case the governor and legislature approved Wis. Stat. § 895.4801. The *Palm* court provided justification for this significant difference. “The people consent to the Legislature making laws because they have faith that the procedural hurdles required to pass legislation limit the ability of the Legislature to infringe on their rights.” *Palm*, ¶ 32.

A. The court of appeals' citation to *Palm* fails to provide the entire sentence on which it cites, and the entirety of that citation completely changes the meaning of that sentence.

The citation from *Palm*, ¶ 37, on which the court of appeals relies as the legal authority to reach its decision is a reference to *In re Abbott*, 954 F.3d 772 (5th Cir. 2020). But *In re Abbott* is no longer good law, as on January 25, 2021 the U.S. Supreme Court vacated the case as moot. See *Planned Parenthood v. Abbott*, 141 S.Ct. 1261 (2021).

But even considering *In re Abbott*, it supports this Court granting this petition for review. First, the court of appeals does not note part of its citation in paragraph 37 is not based on appellate case law, and also does not provide the entire citation from *In re Abbott*, which is the fulcrum of its constitutional analysis. The court of appeals cites to paragraph 53 of *Palm*, and copies the following quote from *Palm*:

“[t]here is no pandemic exception . . . to the fundamental liberties the [c]onstitution safeguards. Indeed, ‘individual rights secured by the [c]onstitution do not disappear during a public health crisis.’”

Wren, ¶ 37 (citations omitted). There are a litany of problems with this citation.

The court of appeals fails to state that part of the citation is not a reference to appellate case law, but rather what the U.S. Department of Justice stated in the United States' Statement of Interests in Support of Plaintiffs in a U.S. District Court for the Northern District of Mississippi case involving the free exercise of religion in light of the outbreak of Covid 19. (P. App. 180-193). The U.S. Department of Justice, in essence filing an amicus curiae brief as it was not a party to the case, wrote the following, not a court:

There is no pandemic exception, however, to the fundamental liberties the Constitution safeguards. Indeed, “individual rights secured by the Constitution do not disappear during a public health crisis.” *In re Abbott*, – F.3d —, 2020 WL 1685929, at * 6 (5th Cir. Apr. 7, 2020).

(P. App. 183). Putting aside the obvious factual differences, the U.S. Department of Justice in that case also acknowledged, *in the next paragraph after the citation referred to by the Wren court*, that “[a]t the same time, the Constitution does not hobble government from taking necessary, temporary measures to meet a genuine emergency.” (P. App. 183).

In addition, the citation to *In re Abbott* is misleading *as it cuts off the sentence and leads the reader to thinking the sentence ends at “crisis.”* The complete citation in *In re Abbott*, to which the *Wren* court refers, contains a full change in tone when the entire sentence is stated:

To be sure, individual rights secured by the Constitution do not disappear during a public health crisis, *but the Court plainly stated that rights could be reasonably restricted during those times. Jacobson [v. Commonwealth of Massachusetts]*, 197 U.S. 11 (1905)] at 29. Importantly, the Court narrowly described the scope of judicial authority to review rights-claims under these circumstances: review is “only” available

if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has *no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.*

Elsewhere, the Court similarly described this review as asking whether power had been exercised in an “arbitrary, unreasonable manner,” *Id.* at 28, or through “arbitrary and oppressive regulations.” *Id.* at 38. *Accord Lawton [v. Steele]*, 152 U.S. 133 (1894)] at 137 (“To justify the state in thus interposing its [police power] in behalf of the public, it must appear [1] that the interests of the public generally . . . require such interference; and [2] that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.”)

Id. at 31 (emphasis added for the first italics, subsequent italics in the original)(bracketing in the *Lawton* cite is in the original, but for the case citation). In *Lawton v. Steele*, 152 U.S. 133, 136 (1894), the Court held that “large discretion is

necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.”

Thus, taken in complete context, *In re Abbott* permits reasonable restrictions in the time of a public health crisis. Although Wis. Stat. § 895.4801 does not present a restriction, but rather broadens immunity, given *In re Abbott*'s foundation, the legislative history, and the novel pandemic, the statute was not an arbitrary and unreasonable statutory response.

In fact, *Jacobson* supports the governor and legislature's approval of immunity for alleged negligence in Wis. Stat. § 895.4801. The *Jacobson* court rejected any judicial power to second guess a state's policy choices when crafting a state's emergency public health measures: “Smallpox being prevalent and increasing at Cambridge, the court would *usurp the functions of another branch of government* if it adjudged, as a matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case.” *Jacobson*, 197 U.S. at 28 (emphasis added).

As noted by *In re Abbott*, citing *Jacobson*:

The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some “real or substantial relation” to the public health crisis and are not “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *Jacobson* at 31. Courts may ask whether the state's emergency measures lack basic exceptions for ‘extreme cases,’ and whether the measures are pretextual – that is, arbitrary or oppressive. *Id.* at 38. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures. *Id.* at 28, 30.

In re Abbott, at 784-785. The governor and legislature chose to implement immunity in order for everyone to access health care at the start of the pandemic.

Additionally, the U.S. Supreme Court has held that “[i]n a functioning democracy, policy choices like these usually belong to the people and their elected

representatives. They are entitled to [. . .] try novel ‘social and economic experiments’ if they wish.” *Nat’l Pork Producers v. Ross*, 598 U.S. 356, 382 (2023) (plurality op.)(citation omitted). When the legislature undertakes to act in areas “fraught with medical and scientific uncertainties,” their latitude must be especially broad. *Marshall v. United States*, 414 U.S. 417, 427 (1974). Although in a concurrence, Chief Justice Roberts noted “[o]ur Constitution principally entrusts ‘[t]he safety and the health of the people’ to the *politically accountable officials of the States* ‘to guard and protect.’” *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring)(quoting *Jacobson*, 197 U.S. at 38)(emphasis added). This includes by piloting initiatives aimed at promoting public health. *Id.*

The court of appeals decision removes the policy choices of the governor and legislature, and substitutes its judgment at the time of a pandemic “fraught with medical and scientific uncertainties.” The decision of elected officials to permit access for patients to receive health care for all types of medical conditions at the start of a worldwide pandemic is a compelling state interest that must be upheld.

II. The court of appeals inappropriately analyzed the constitutionality of Wis. Stat. § 895.4801 in the context of whether it addressed medical care related to Covid 19, as opposed to the actual statutory language, which states it is to address care provided for *all* types of medical issues, not just Covid 19 related.

The *Wren* court does not address Wis. Stat. § 895.4801 as written, but rather whether it should have been written to only address Covid 19 related issues. In *Wren*, the court of appeals concluded the reason for Ms. Wren’s claims was unrelated to the compelling state interest of responding to Covid 19. *Wren*, ¶ 37. As incorrectly noted by the court of appeals, Ms. Wren “cannot be denied a right to a jury trial on her

claims when her medical care was unrelated to the compelling state interest behind the statute.” *Id.*

A. The court of appeals decision is bereft of any statutory construction analysis, which also supports a finding of constitutionality.

Absent from the court of appeals’ analysis of Wis. Stat. § 895.4801 is any discussion of statutory interpretation, which also compels the conclusion the statute is constitutional based on its legislative history. “[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. “We assume that the legislature’s intent is expressed in the statutory language.” *Id.*

When interpreting a statute, courts begin with the statutory language. *Id.* The words used by the legislature are to be given their “common, ordinary, and accepted meaning.” *Id.*, ¶ 45. If the meaning of the statute is plain, courts ordinarily stop the inquiry. *Id.*, ¶ 45. Statutory language must be interpreted to avoid absurd or unreasonable results. *Id.*, ¶ 46. In addition, a review of statutory history is part of the analysis “because it is part of the context in which [courts] interpret statutory terms.” *County of Dane v. LIRC*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571 (citation omitted). Courts favor an interpretation of a statute that fulfills a statute’s purpose. *State v. Hanson*, 2012 WI 4, ¶ 17, 338 Wis. 2d 243, 808 N.W.2d 390.

Legislative history can be consulted to confirm or verify a plain-meaning interpretation. *Kalal*, ¶51. The statutory history of section 895.4801 establishes that the legislature deliberately chose to expand immunity for all health care providers during the period of time provided in the statute.

The court of appeals, however, compares apples and oranges. Wis. Stat. § 895.4801 was enacted on April 15, 2020. 2019 Wis. Act 185. Prior to the statute’s enactment, the legislative history of the bill shows that on April 13, 2020 the Speaker

of the State Assembly's office "want[ed] to make a change to the provider liability language to encompass the changes in the attached PDF (named section 98) with the exception of we do NOT want to change 60 days to 90 days. Leave at 60." (R. 53, pp. 3-7)(emphasis in original).

The PDF referred to by the Speaker's office specifically removed the description of immunity for health care providers in Wis. Stat. § 895.4801 "taken in providing services to address or in response to a 2019 novel coronavirus outbreak [. . .]" *Id.* In other words, the legislature, before voting on the bill that became section 895.4801, deliberately chose to remove the limitation on Covid 19 specific care and instead chose to *broaden immunity* to all alleged actions or omissions taken by any health care provider during the time period at issue. *Id.* The court of appeals conceded this in its opinion: "In fact, the original version of the statute introduced in the Assembly as 2019 A.B. 1038 provided immunity for 'actions or omissions taken in providing services to address or in response to a 2019 novel coronavirus outbreak[.]' This limiting language was struck by a later amendment introduced as Assembly Amendment 4." *Wren*, ¶ 34 n. 12. But the court of appeals ignored the axiom that courts decline to read into the statute words the legislature did not see fit to write. *Dawson v. Town of Jackson*, 2011 WI 77, ¶ 42, 336 Wis. 2d 318, 801 N.W.2d 316.

The governor acknowledged the final bill broadly expanded civil liability immunity for health care providers.

The final bill was drastically different from anything the governor would have supported as a stand-alone provision. And it is drastically different from what Wisconsin needs. But despite his serious concerns about this particular provision, the governor signed the bill because it included critical, time-sensitive provisions, such as waiver authority to obtain more than \$600 million in federal funding (which had a deadline from the federal government of 4/17) and the suspension of the one week unemployment insurance waiting period for folks who need this immediate relief.

(R. 53, p. 12).

The Wisconsin Medical Society similarly agreed that Wis. Stat. § 895.4801 broadly expanded immunity for health care providers during the time period.

This provision is critical as physicians are providing care to patients for a diagnosis for which there is currently no approved treatment or vaccine and the standard of care has been dramatically impacted due to recommended changes in practice guidelines. Additionally, *the language of the provision is intended to be broadly applicable to the temporary changes in practice and standards of care in response to the COVID-19 pandemic.*

(R. 53, p. 16)(emphasis added). The Wisconsin Medical Society acknowledged Wis. Stat. § 895.4801 was intended to be broadly applicable because of temporary changes in the practice and standards of care in medicine in light of the Covid 19 pandemic.

In other words, Covid-19 was negatively affecting the provision of care in all areas of health care. The broad immunity of Wis. Stat. § 895.4801 encouraged hospitals, clinics, and the like to be open and see patients for all medical concerns, not just for Covid 19. As acknowledged by the Wisconsin Medical Society, the provision of non-Covid 19 medical care was changed during the pandemic. This impacted not only providers, but everyone in the provision of care chain, including staffing and suppliers. This immunity provision was a conscious decision to broaden immunity to allow providers to provide care given the extraordinary circumstances of a novel pandemic.

Here, the change of wording prior to final passage of the legislation was a deliberate word choice to broaden the application of immunity. “This [wa]s no mere accident of legislative drafting.” *State ex rel. Nudo Holdings, LLC v. Board of Review for the City of Kenosha*, 2022 WI 17, ¶ 23, 401 Wis. 2d 27, 972 N.W.2d 544.

III. Despite the significant hurdles the standard of review provides in reviewing the constitutionality of a statute, the court of appeals did not address this case law in crafting its conclusion.

The entirety of the court of appeals decision addressing the standard of review was encompassed in one paragraph. *Wren*, ¶ 27 (statutes are presumed constitutional). The court of appeals presumed Wis. Stat. § 895.4801 implicated the fundamental right to a jury trial in an unconstitutional manner different from all other limitations on actions. *Id.*, ¶ 29. Absent from this paragraph is any analysis as to whether strict scrutiny applies as opposed to a rational basis review. When applying rational basis, courts uphold the statute as constitutional ““unless it is patently arbitrary and bears no rational relationship to a legitimate government interest.”” *State v. Smith*, 2010 WI 16, ¶12, 323 Wis. 2d 377, 780 N.W.2d 90 (quoted sources omitted). The rational relationship and governmental interest ““need not be expressly stated by the legislature; if the court can conceive of facts on which the legislation could reasonably be based, it must uphold the legislation as constitutional.”” *State v. Quintana*, 2008 WI 33, ¶77, 308 Wis. 2d 615, 748 N.W.2d 447 (quoted source omitted).

What the court did *not* include, and address, was the significant body of case law that states in strong language that all statutes are presumed constitutional, and beyond a reasonable doubt. “All legislative acts are presumed constitutional and we must indulge *every presumption* to sustain the law. [citation omitted.] *Any doubt* that exists regarding the constitutionality of the statute *must* be resolved in favor of its constitutionality.” *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶13, 358 Wis. 2d 1, 851 N.W.2d 337 (citations omitted)(emphasis added). Every presumption and doubt are resolved in favor of the statute's constitutionality. *State v. McManus*, 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989).

Because of the strong presumption in favor of constitutionality, a party bringing a constitutional challenge to a statute bears a “heavy burden.” *State v. Carpenter*, 197 Wis. 2d 252, 276, 541 N.W.2d 105 (1995). It is not sufficient for a party to demonstrate “that the statute’s constitutionality is doubtful or that the statute is probably unconstitutional.” *State v. Smith*, ¶ 8. The presumption can be overcome only if the party establishes “the statute is unconstitutional *beyond a reasonable doubt*.” *Id.* (citation omitted)(emphasis added).

The court of appeals’ specious analysis of the high bar to find a statute unconstitutional is missing from its decision, a significant omission in a recommended for publication decision that strikes down a statute.

IV. The court of appeals additionally does not acknowledge the deference courts provide to the policy choices of a legislature.

Also missing from the court of appeals’ analysis is a robust analysis of the standard of review as applied to facial challenges. *See Wren*, ¶ 28 (citing to only one case, which held that a facial challenge to a statute means the challenger cannot enforce the law under any circumstances). But what the court of appeals ignored was that when a party makes a facial challenge, it bears a heavy burden because a court’s presumption is grounded in its understanding and respect for the differing roles of the legislature and the judiciary. *Vincent v. Voight*, 2000 WI 93, ¶52 n.22, 236 Wis. 2d 588, 614 N.W.2d 388. “[W]e defer to the legislature because it “‘is uniquely equipped to evaluate and respond to such questions of public policy [. . .]”” *Id.* (citation omitted)(emphasis added). “A facial constitutional challenge to a statute is an uphill endeavor.” *State v. Dennis H.*, 2002 WI 104, ¶5, 255 Wis. 2d 359, 647 N.W.2d 851.

Additionally, a court will not *reweigh* the policy choices of the legislature, which is the primary issue presented here. *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 506, 261 N.W.2d 434 (1978). “The presumption of statutory constitutionality

is the product of our recognition that the judiciary is not positioned to make the economic, social, and political decisions that fall within the province of the legislature.” *Aicher v. Wisconsin Patients and Families Comp. Fund*, 2000 WI 98, ¶ 20, 237 Wis. 2d 99, 613 N.W.2d 849. Of course here the governor, and legislature, chose to enact a policy decision in a statute during the initial stages of a novel pandemic that the court of appeals now has chosen, based on a cursory citation to the standard of review, to declare unconstitutional.

V. Wis. Stat. § 895.4801 is constitutional, even applying strict scrutiny to the removal of a claimant’s right to a jury trial in non-reckless, wanton conduct, or intentional misconduct claims.

Columbia St. Mary’s disagrees as to the application of strict scrutiny as the constitutional standard of review. But even if strict scrutiny is applied, “the statute must serve a compelling state interest; the statute must be necessary to serving that interest; and the statute must be narrowly tailored toward furthering that compelling state interest.” *Mayo v. Wisconsin Injured Patients and Families Comp. Fund*, 2018 WI 78, ¶28, 383 Wis. 2d 1, 914 N.W.2d 678. Wis. Stat. § 895.4801 passes strict scrutiny.

Wis. Stat. § 895.4801 was enacted to serve the compelling state interest to encourage hospitals, clinics, and the like to be open and see patients for all medical concerns, not just for Covid 19. The provision of non-Covid 19 medical care was changed at the start of the worldwide pandemic. This impacted not only providers, but everyone in the provision of care chain. The immunity provision was a conscious decision to broaden immunity to allow health care providers to provide care given the extraordinary circumstances of a novel pandemic. The statute was narrowly tailored, providing such immunity for a period of approximately four months and for conduct that was not reckless, wanton, or intentional. The legislature tied the immunity period

to the duration of the emergency declaration of the governor, plus 60 days. Wis. Stat. § 895.4801(2)(a).

Although the court of appeals implicitly contends Wis. Stat. § 895.4801 was not narrowly tailored to serve a state interest as compared to the legislature's passage of Wis. Stat. § 895.476, Wis. Stat. § 895.476 was enacted to address immunity for Covid 19 exposure in the myriad of activities in life, including businesses and schools that were not involved in providing health care. (R. 73, p. 20). The focus of section 895.476 was to protect a wide range of functions in society from being shut down for fear they might become liable for exposure to Covid. *Id.*

In contrast, Wis. Stat. § 895.4801 was meant to encourage health care providers to remain open and address any health care issues that might arise, such as a birth, broken arm, etc. (R. 73, p. 20). Thus Wis. Stat. § 895.4801 was narrowly tailored to serve a compelling state interest.

CONCLUSION

For the above-stated reasons, defendant-respondents-petitioners Columbia St. Mary's Hospital Milwaukee, Inc., Jordan Hauck, D.O., Jessica Hoelzle, M.D., and the Injured Patients and Families Compensation Fund respectfully request this Court grant their petition.

Dated this 13th day of March, 2025 at Milwaukee, Wisconsin.

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CERTIFICATION**Certificate of Compliance with Wis. Stat. § 809.62(4)**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review.

The length of this brief is 7,599 words.

Dated this 13th day of March, 2025.

**GUTGLASS, ERICKSON,
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