STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT 1
Appeal No.: 2024AP126

SAVANNAH WREN AND CALVIN GORDON
individually, and SAVANNAH WREN AS
PERSONAL REPRESENTATIVE FOR THE ESTATE
of CALVIN GORDON, JR., deceased,

Plaintiffs-Appellants

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

Defendants-Respondents.

On Appeal from the Circuit Court for Milwaukee County, Wisconsin,
The Honorable Judge Kristy Yang, Presiding,
Case No.: 2023CV004960

BRIEF OF PLAINTIFFS-APPELLANTS

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STATEMENT OF ISSUES

1. Did the circuit court err in holding that Wisconsin Statutes Section 806.04(11) requires the Wisconsin Attorney General, Speaker of the Assembly, President of the Senate, and Senate Majority Leader be named as parties in order for a Wisconsin circuit court to have jurisdiction over constitutional questions?

Answer of the circuit court: No.

Despite Plaintiffs' compliance with Section 806.04(11)'s clear directive requiring only that the Wisconsin Attorney General, Speaker of the Assembly, President of the Senate, and Senate Majority Leader be "*served* with a copy of the proceeding," the circuit court improperly concluded that § 806.04(11) requires these entities to be named as parties to Plaintiffs' Complaint, and that because they were not, the court lacked subject matter jurisdiction to hear Plaintiffs' constitutional arguments.

2. Did the circuit court err in holding that Wisconsin Statutes Section 895.4801 constitutional under the 5th and 14th Amendments of the United States Constitution and Article 1, Section 9, of the Wisconsin Constitution?

Answer of the circuit court: No.

Upon holding that it had no jurisdiction under § 806.04(11), the circuit court should not have reached the constitutional issues raised for the first time in Defendants' Reply brief. However, even if it had properly reached the

constitutional issues, the circuit court erred by failing to apply the strict scrutiny standard of review in evaluating the constitutionality of Wisconsin Statutes Section 895.4801. Under this standard, Section 895.4801 must be invalidated as unconstitutional pursuant to the 5th and 14th Amendments of the United States Constitution and Article 1, Section 9, of the Wisconsin Constitution.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiffs-Appellants request oral argument and publication. Oral argument will assist the Court in assessing the key facts and legal principles. Publication is appropriate because the issues raised in this case regarding the meaning of Wis. Stat. § 806.04(11) and the constitutionality of Wis. Stat. § 895.4801 are important issues of statutory construction and validity that require resolution and dissemination to the public for awareness in future proceedings.

STATEMENT OF THE CASE

This appeal arises out of a medical malpractice claim based on the wrongful death of baby Calvin Gordon, Jr. (A-App. 1). The circuit court dismissed the action, holding that the defendant medical providers were immune from liability under the "Immunity for Health Care Providers During COVID-19 Emergency" Act, Wis. Stat. § 895.4801, which Plaintiffs-Appellants asserted was unconstitutional (A-App. 2, 4).

This case requires this Court to interpret Wis. Stat. § 806.04(11)'s mandate

that the Wisconsin Attorney General, Speaker of the Assembly, President of the Senate, and Senate Majority Leader (collectively "officials") be "served with a copy of the proceeding" where a party alleges a statute is unconstitutional. Wis. Stat. § 806.04(11). Plaintiffs-Appellants Savannah Wren and Calvin Gordon argue that the circuit court erred in granting Defendants' Motion to Dismiss on the grounds of their failure to name the officials as parties in their Complaint. Plaintiffs complied with the express terms of § 806.04(11) by serving copies of their Complaint and notice of Defendants' motion hearing on the officials (A-App. 5), and the Wisconsin Attorney General's responded by indicating he did not wish to appear in the matter at that time (A-App. 6). Nevertheless, the circuit court interpreted § 806.04(11) to require Plaintiffs to name the officials as parties to their Complaint in order to confer subject-matter jurisdiction on the court to hear Plaintiffs' constitutional arguments (A-App. 4).

The circuit court grievously erred, in multiple ways. First, it ignored the plain language of Section 806.04(11), which nowhere requires, or even mentions, the purported obligation to *name* the officials as parties in order to confer subject-matter jurisdiction. The circuit court then compounded its error by failing to acknowledge—or even allow briefing on the fact—that hundreds of cases involving constitutional questions under § 806.04(11) have proceeded without naming the officials as parties. *See, e.g., Matter of Commitment of C.S.*, 940 N.W.2d

875 (Wis. 2020); *Mayo v. Wis. Injured Patients & Families Compensation Fund,* 914 N.W.2d 678 (Wis. 2018); and *In re Commitment of Hager*, 911 N.W.2d 17 (Wis. 2018). Those cases come as no surprise, as they align with the Wisconsin Supreme Court's decision in *Town of Walworth v. Village of Fontana-on-Geneva Lake*, 270 N.W.2d 442 (Wis. 1978), which directly addressed this issue *and reached the exact opposite conclusion of the circuit court*.

The circuit court's decision improperly contravened the clear holding of the Wisconsin Supreme Court and the terms of the very statute it was purporting to apply. The result of the circuit court's reasoning is to improperly create new law, impeding parties from bringing constitutional challenges under the guise of § 806.04(11). Neither the Wisconsin Legislature, nor the Wisconsin courts, have ever authorized such judicial law-making endeavors. This Court should reverse.

After finding that it lacked jurisdiction to hear Plaintiffs' constitutional arguments, the circuit court nonetheless proceeded to rule on the constitutionality of Wis. Stat. § 895.4801—holding it to be constitutional. Aside from the impropriety of a court ruling on an issue over which it claimed to have no jurisdiction,[1] the circuit court failed to apply the correct constitutional standard—strict scrutiny—in evaluating the constitutionality of § 895.4801. *See*

[1] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (without jurisdiction, "the only function remaining to the court is that of announcing the [same] and dismissing the cause.")

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); *Gooding v. Wilson*, 405 U.S. 518 (1972). In fact, the phrase "strict scrutiny" never appeared in the circuit court's oral ruling, nor in its later Order dismissing Plaintiffs' case (A-App. 2, 4). Because the circuit court failed to apply the correct standard of review in this case, and because the statute in question cannot withstand strict scrutiny, this Court must reverse.

1. Procedural Background

Plaintiffs-Appellants Savannah Wren and Calvin Gordon filed this medical malpractice action on July 6, 2023, based on the wrongful death of their baby boy, Calvin Gordon, Jr., who died at Columbia St. Mary's Hospital Milwaukee shortly after his birth on May 24, 2020 (A-App. 1). Plaintiffs-Appellants claim that Defendants-Respondents Jessica Hoelzle, M.D., and Jordan Hauck, D.O., were negligent in failing to follow American College of Obstetrics and Gynecologists (ACOG) guidelines during Ms. Wren's high-risk pregnancy. *Id.* Ms. Wren and Mr. Gordon seek to recover damages associated with the tragic death of their son, including the costs of health care services, loss of past and future income, and severe emotional distress, PTSD, depression, and other permanent injuries. *Id.*

A few weeks before baby Calvin died, on April 15, 2020, Wisconsin Governor Tony Evers signed a COVID relief bill into law to obtain $600 million

in federal funding; it included Statute 895.4801, providing that any 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 … committed while the health care provider is providing services during the state of emergency … or 60 days" after the state of emergency ends. Wis. Stat. § 895.4801.

Shortly after Plaintiffs-Appellants filed their case in the circuit court, Defendants filed a Motion to Dismiss pursuant to Wis. Stats. §§ 895.4801 and 802.06(2)(a) (A-App. 7). Ms. Wren and Mr. Gordon opposed that Motion, arguing that § 895.4801 is unconstitutional under the 1st, 5th, 7th, and 14th Amendments to the U.S. Constitution and Article 1, Section 9 of the Wisconsin Constitution (A-App. 8, 9). In their Reply brief, Defendants argued for the first time that the circuit court lacked jurisdiction to hear Plaintiffs' constitutional arguments because Plaintiffs had not named the Wisconsin Attorney General, Speaker of the Assembly, President of the Senate, and Senate Majority Leader as defendants in their case pursuant to Wis. Stat. § 806.04(11) (A-App. 10).

The circuit court heard oral argument on December 6, 2023, and ruled in favor of Defendants, holding that it lacked subject-matter jurisdiction to hear Plaintiffs' constitutional arguments and that Wis. Stat. § 895.4801 was constitutional (A-App. 2, 4). The circuit court interpreted Wis. Stat. § 806.04(11) to require that "all persons [ ] be made parties" (A-App. 4 at p. 28:18).

The circuit court issued a final Order for Dismissal on December 14, 2023, and Ms. Wren and Mr. Gordon filed a timely notice of appeal on January 24, 2024 (A-App. 2).

2. Statement of Facts

In September 2019, Savannah Wren and Calvin Gordon were overjoyed to learn that Ms. Wren was pregnant with their first baby. Ms. Wren promptly sought medical care for monitoring of her new pregnancy and was scheduled for her first appointment with Defendant Dr. Jessica Hoelzle on November 15, 2019. Ms. Wren, a twenty-two-year-old African American woman, had a medical history of well-controlled Type II diabetes, and thus, Dr. Hoelzle informed her that her pregnancy was considered high-risk and required close monitoring to ensure a safe outcome for both her and her baby.

Ms. Wren's pregnancy progressed without complication until May 14, 2020, when Ms. Wren presented again to Dr. Hoelzle for a routine office visit at 38 weeks and 5 days gestation. Dr. Hoelzle noted that Ms. Wren's baby's heart rate was slightly elevated at 165bpm and was considered "nonreactive." Dr. Hoelzle sent Ms. Wren to Columbia St. Mary's Hospital Milwaukee for further monitoring and evaluation. After approximately one hour of monitoring, and despite lab tests showing an elevated blood glucose level of 173 and 500mg/dl of glucose present in her urine, Ms. Wren was discharged home with instructions to

monitor the baby's fetal movement and follow up with her obstetrician in one week.

On May 18, 2020, at 39 weeks, 2 days gestation, Ms. Wren saw Dr. Hoelzle for another routine office visit. Mom and baby's vital signs were within normal range, but Ms. Wren had 100mg/dl of glucose in her urine. Dr. Hoelzle scheduled Ms. Wren for an induction of labor the following week on May 24, 2020, at which point Ms. Wren would have been 40 weeks and 1 day gestation.

On May 22, 2020, at approximately 11:00 p.m., Ms. Wren began to experience contractions every three minutes. She presented to Columbia St. Mary's Hospital Milwaukee in the early morning hours of May 23, at which time fetal monitoring was initiated and showed normal tracing. Although Ms. Wren's blood pressure was stable, her heart rate was elevated. A bedside blood glucose revealed a high result of 179mg/dl, and Ms. Wren reported that she had eaten a McDonald's meal on her way to the hospital. After approximately three hours, Dr. Hauck chose to discharge Ms. Wren.

Ms. Wren returned to Columbia St. Mary's Hospital Milwaukee the following day, May 24, 2020, at approximately 9:00 p.m. for her scheduled induction of labor. When a nurse attempted to detect a fetal heart rate on the monitor, it could not be found. Dr. Astrid Marshall was called urgently to the room and performed a bedside ultrasound which confirmed little to no fetal

heart activity. Dr. Marshall called for an emergent caesarean section, and baby Calvin Gordon, Jr., was delivered at 9:14 p.m. limp, apneic with APGARs of 0/0/0. Resuscitation was attempted, but baby Calvin was pronounced dead 28 minutes later at 9:42 p.m. Placental pathology determined that the cause of baby Calvin's death was placental abruption and acute chorioamnionitis.

According to the American College of Obstetrics and Gynecologists (ACOG) guidelines, patients with well-controlled diabetes must be scheduled for delivery no later than 38 weeks and 6 days gestation. Defendants-Respondents did not do so in Ms. Wren's case and now baby Calvin is dead. Plaintiffs-Appellants have retained medical experts who will opine that Defendants' failure to follow the ACOG guidelines in this case was a breach of the accepted standards of medical care and directly and substantially caused baby Calvin's death.

STANDARD OF REVIEW

This Court reviews questions of law, including statutory construction, *de novo*. *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶ 36, 319 Wis. 2d 1, 768 N.W.2d 615 (Wis. 2009). Wisconsin courts "interpret a statute by looking at the text of the statute. The statutory language is examined within the context in which it is used. Words are ordinarily interpreted according to their common and approved usage . . . ." *Legue v. City of Racine*, 849 N.W.2d 837, 849 (Wis.

2014). Further, "Statutes are interpreted to give effect to each word and to avoid surplusage." *Id.*

This Court also reviews the constitutionality of statutes *de novo*. *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63 (Wis. 2010). Generally, a party who challenges the constitutionality of a statute must demonstrate that the statute is unconstitutional "beyond a reasonable doubt." *Mayo v. Wis. Injured Patients & Families Compensation Fund,* 914 N.W.2d 678, 689 (Wis. 2018). This standard is not an evidentiary one, but rather an expression of deference to the legislature. *Id.*

Importantly, however, once the Plaintiffs show a restraint on a fundamental right guaranteed by the Wisconsin and/or U.S. Constitutions, the presumption of constitutionality falls away and the burden shifts to the proponent of the statute to show the statute is constitutional. *San Antonio Indp. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (2000); *James v. Heinrich*, 960 N.W.2d 350 (Wis. 2021). Where a statute restricts a fundamental right or implicates a suspect class, this Court must apply strict scrutiny in assessing the statute's constitutionality. *See R.A.V.*, 505 U.S. 377; *Gooding*, 405 U.S. 518; *Mayo*, 914 N.W.2d at 689; *State ex rel. Tayr Kilaab al Ghashiyah (Khan) v. Sullivan*, 613 N.W.2d 203 (Wis. Ct. App. 2000); *State v. Ruesch*, 571 N.W.2d 898, 904 (Wis. Ct. App. 1997). Strict scrutiny requires that the statute in question serve a compelling state

interest; be necessary to serving that interest; and be narrowly tailored toward furthering that interest. *R.A.V.*, 505 U.S. 377; *Gooding*, 405 U.S. 518. If any one of those three conditions is not met, the statute must be struck down as unconstitutional. *See James*, 960 N.W.2d at 369. "When a legislative act unreasonably invades rights guaranteed by the state constitution, a court has not only the power but also the duty to strike down the act." *Ferdon ex rel. Petrucelli v. Wis. Patients Compensation Fund,* 701 N.W.2d 440, 458 (Wis. 2005) (*overruled on other grounds*).

ARGUMENT

This Court should reverse the circuit court's order dismissing Plaintiffs-Appellants' case because Plaintiffs fully complied with the requirements of Wis. Stat. § 806.04(11) and because Wis. Stat. § 895.4801 is unconstitutional. In dismissing Plaintiffs' case, the circuit court improperly created new law by interpreting Wis. Stat. § 806.04(11) in a way unsupported by the plain language of the statute and contrary to well-established judicial precedent. Furthermore, the circuit court failed to apply the requisite strict scrutiny standard of review in assessing the constitutionality of Wis. Stat. § 895.4801. As such, this Court must reverse and remand for further proceedings.

1. The Circuit Court's Interpretation of Wis. Stat. § 806.04(11) Must be Reversed as it is Contradicted by the Plain Language of the Statute and Well-Established Case Law.

A. The Plain Language of Wis. Stat. § 806.04(11) Requires Only Service—Not Impleader.

Wisconsin Statutes § 806.04(11) provides:

> If a statute, ordinance or franchise is alleged to be unconstitutional [. . .] the attorney general shall also be served with a copy of the proceeding and be entitled to be heard. [. . .] the speaker of the assembly, the president of the senate, and the senate majority leader shall also be served with a copy of the proceeding, and the assembly, the senate, and the state legislature are entitled to be heard. [. . .]

Plaintiffs-Appellants complied with these statutory requirements when they served copies of their pleadings and the underlying Motion to Dismiss papers on Wisconsin Attorney General Josh Kaul, Speaker of Assembly Robin Vos, President of the Senate Chris Kapenga, and Senate Majority Leader Devin LeMahieu on October 24, 2023, and November 14 and 15, 2023 (A-App. 5). It is undisputed Plaintiffs did so, and that is all that Section 806.04(11) required by its plain terms.

Nothing in § 806.04(11) obligates plaintiffs to name or implead the officials as defendants in their case. While the statutory language is clear on its face, the subsequent sentences of the statute remove any doubt and highlight that only service is required, stating:

> ***If*** the assembly, the senate, or the joint committee on legislative organization ***intervenes*** as provided under s. 803.09 (2m), the assembly shall represent the assembly, the senate shall represent the senate, and the joint committee on legislative organization shall represent the legislature.

Wis. Stat. § 806.04(11) (*emphasis added*). This makes clear that the officials—and not the parties themselves—have the responsibility *and the option* to determine whether they wish to become formally involved in the lawsuit, through the well-established mechanism of intervention. Wis. Stat. § 806.04(11).

Conversely, according to the circuit court's interpretation of the statute, the Attorney General and other officials would have to be named as defendants in every single case raising a constitutional challenge. This would create innumerable added litigation burdens and complexities that the legislature clearly sought to avoid by permitting the officials themselves to determine whether they want to become involved in the suit. In other words, not only does the circuit court's ruling violate the letter of the statute, but it would violate the spirit of the statute as well.

Here, Attorney General Kaul stated explicitly that he did not wish to become involved in Plaintiffs' case (A-App. 6). And the remaining officials, despite being provided with notice and an opportunity to become involved or be heard at the circuit court, opted not to make an appearance—as was their right under the statute. Plaintiffs simply had no duty—nor grounds—to amend their complaint to name these officials under the statute.

If the Wisconsin Legislature *had* wanted to require parties to name these government officials as parties in their lawsuit, it could very easily have done so.

In fact, it did do so under other circumstances, as is stated in the final sentence of § 806.04(11):

> In any proceeding under this section in which the constitutionality, construction or application of any provision of ch. 227, or of any statute allowing a legislative committee to suspend, or to delay or prevent the adoption of, a rule as defined in s. 227.01 (13) is placed in issue by the parties, the joint committee for review of administrative rules shall be served with a copy of the petition and, with the approval of the joint committee on legislative organization, ***shall be made a party*** and be entitled to be heard.

Wis. Stat. § 806.04(11) (*emphasis added*). Courts interpret statutes "in the context in which [they are] used; not in isolation but as part of a whole." *State ex rel. Kalal v. Circuit Court for Dane County*, 681 N.W.2d 110, 124 (Wis. 2004). Read in its entirety, the plain language of Wis. Stat. § 806.04(11) clearly demands one and only one interpretation: the officials must only be *served* with a party's constitutional challenge.

B. Case Law Interpreting Section 806.04(11) is Consistent With its Plain Language and Requires Only Service—Not Impleader.

Even if the plain language of § 806.04(11) was not sufficiently clear, Wisconsin courts have long recognized the statute requires only service—both explicitly (by rulings directly interpreting Section 804.04(11)) and implicitly (by allowing dozens of cases challenging statutes' constitutionality to proceed through the courts without adding the officials as parties).

i. Cases interpreting Wis. Stat. § 806.04(11)

In *Town of Walworth v. Village of Fontana-on-Geneva Lake*, 270 N.W.2d 442, 436 (Wis. 1978), the Wisconsin Supreme Court expressly held:

> There is no authority in the statutes or the case law to support the defendant's assertion that sec. 806.04(11), Stats., makes the attorney general a De facto defendant and subject to the 60 day service provision.
>
> [. . .]
>
> The statute specifically requires that a municipality be made a party. No such requirement is made for the attorney general. The language of the statute makes it clear that the legislature did not intend to require that the attorney general be made a party. The purpose of the statute is to give the attorney general the opportunity to defend the statute, ordinance or franchise against a claim of unconstitutionality. The attorney general can perform this function without being made a party.

The circuit court ignored this decision and directly contravened *Town of Walworth* in dismissing Plaintiffs-Appellants' case. This alone warrants reversal. *See Friends of Frame Park, U.A. v. City of Waukesha*, 976 N.W.2d 263, 280 (Wis. 2022), *concurrence* ("The doctrine [of stare decisis] requires lower courts to faithfully apply the decisions of higher courts in their system.")

But *Town of Walworth* does not stand alone. In *Helgeland v. Wisconsin Municipalities*, 724 N.W.2d 208, 217 (Wis. Ct. App. 2006), this Court upheld the circuit court's decision not to allow the Wisconsin Legislature to intervene in Plaintiffs' suit challenging the constitutionality of state employee trust fund statutes under Wis. Stat. § 806.04(11). The court reasoned, "We conclude that the

Legislature . . . [is] not entitled to intervention as a matter of right because the Legislature presents no interest sufficiently related to and potentially impaired by the declaratory judgment action." *Id.* In other words, this Court recognized that the officials (including representatives of the Wisconsin legislature) need not be parties to all cases involving constitutional challenges. This decision was affirmed by the Supreme Court in *Helgeland v. Wisconsin Municipalities*, 745 N.W.2d 1 (Wis. 2008).

These cases, as well as several others, make explicit the fact that Wis. Stat. § 806.04(11)'s requirements are limited to providing service on the officials, without requiring them to be named as defendants. *See also, e.g., State v. Raddemann*, 985 N.W.2d 462 (Wis. Ct. App. 2022); *In re P.L.L.-R.*, 876 N.W.2d 147 (Wis. Ct. App. 2015).

ii. Cases proceeding under Wis. Stat. § 806.04(11) without naming government officials

In addition to the above cases explicitly interpreting Wis. Stat. § 806.04(11), hundreds more involving constitutional challenges proceeded without naming the listed officials. For example, the Wisconsin Supreme Court in *Matter of Estate of Barthel*, 468 N.W.2d 689, 691 (Wis. 1991), noted "The state attorney general was given an opportunity to participate in the May 3, 1989 hearing, but declined to participate." Yet, despite the attorney general's decision not to participate—let alone becoming a party to the litigation—the Supreme Court permitted the case

to move forward, later ruling on the merits in declaring the disputed statutes unconstitutional. *Id*. Other very recent examples of cases proceeding with constitutional challenges under Wis. Stat. § 806.04(11) include *Matter of Commitment of C.S.*, 940 N.W.2d 875 (Wis. 2020); *Mayo v. Wisconsin Injured Patients & Families Compensation Fund,* 914 N.W.2d 678 (Wis. 2018); and *In re Commitment of Hager*, 911 N.W.2d 17 (Wis. 2018). In none of those cases were the state officials named as parties to the litigation.

In fact, the *only* case Defendants-Respondents cited in their Reply Brief to support their argument that § 806.04(11) requires the officials be named as parties actually says nothing of the sort (A-APP. 10). In *Walt v. City of Brookfield*, 859 N.W.2d 115 (Wis. Ct. App. 2014), this Court held that it "lack[ed] subject matter jurisdiction in light of the fact that the Wisconsin Attorney General was not *served* with notice of a constitutional law issue." *Id*. at 125 fn. 7 (emphasis added). The key word, of course is "served"—just as Plaintiffs-Appellants contend here. Nothing in *Walt* requires that the Attorney General, or any of the other official, be *named* as a party.

Because the circuit court's interpretation of § 806.04(11) is wholly without support in the law, it must be reversed.

2. The Circuit Court's Order Dismissing Plaintiffs' Claims Must be Reversed Because it Failed to Apply Strict Scrutiny and Wisconsin Statute Section 895.4801 is Unconstitutional.

The "Immunity for health care providers during COVID-19 emergency" statute, Wis. Stat. § 895.4801, is unconstitutionally overbroad, impermissibly vague, and not narrowly tailored to achieve the governmental interest it seeks to protect, in violation of both the United States and Wisconsin Constitutions. The law, in relevant part, states:

> [A]ny 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 . . . .
>
> (c) The actions or omissions do not involve reckless or wanton conduct or intentional misconduct.

Wis. Stat. § 895.4801(2).

The Fifth and Fourteenth Amendments guarantee citizens Due Process of law, with the Fourteenth Amendment specifically applying these protections to the States. Furthermore, Wisconsin Constitution Article 1, Section 9 states "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character . . . ."

When laws infringe on fundamental rights guaranteed by the U.S. and Wisconsin constitutions, the justifications necessary to satisfy the Due Process Clauses must be examined with strict scrutiny, to ensure they are narrowly tailored to serve a compelling governmental interest and that they are being implemented using the least restrictive means. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Gooding v. Wilson*, 405 U.S. 518 (1972); *State ex rel. Tayr Kilaab al Ghashiyah (Khan) v. Sullivan*, 613 N.W.2d 203 (Wis. Ct. App. 2000); *Mayo*, 914 N.W.2d at 689; *State v. Ruesch*, 571 N.W.2d 898, 904 (Wis. Ct. App. 1997). The circuit court failed to apply these principles, and instead issued an unlawful advisory opinion which is entitled to no weight because it was issued with a (purported) lack of jurisdiction. This Court must reverse.

A. Wis. Stat. § 895.4801 is Unconstitutional Because it Violates the Fifth and Fourteenth Amendment Due Process Clauses by Infringing on the Fundamental Right to Seek Redress of Grievances Through a Jury Trial, is Unconstitutionally Vague, and Disadvantages a Suspect Class.

The Due Process clauses of the Fifth and Fourteenth Amendments state "No person shall...be deprived of life, liberty, or property, without due process of law . . . ." These Amendments require that sufficient justifications exist, and exacting procedures are followed, before citizens' rights can be taken away. *See, e.g.*, *Sullivan*, 613 N.W.2d at 207; *Mayo*, 914 N.W.2d at 689; *Ruesch*, 571 N.W.2d at 904.

Furthermore, under the Due Process Clauses, courts have also held that ordinary citizens be able to understand a law in order to be subject to it. *See, e.g., Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring); *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2309−10 (2012); *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *State v. Ruesch*, 571 N.W.2d 898, 904 (Wis. Ct. App. 1997).

Finally, Wisconsin Constitution Article 1, Section 9, affirms Wisconsinites' right to seek remedy in the law for injuries. Wis. Stat. § 895.4801 violates all of these doctrines and must be invalidated.

i. Wis. Stat. § 895.4801 Infringes on the Fundamental Right to Seek Redress of Grievances Through a Jury Trial.

Among the most fundamental rights intrinsic to United States citizenship is the right to seek redress of grievances through a jury trial. *See* U.S. Const. Amend. I; U.S. Const. Amend VII; Wis. Const. Art. 1, Sec. 9; *Sullivan*, 613 N.W.2d at 207. Wisconsin Statute Section 895.4801(2) directly violates this Right. The sole fact that baby Calvin had the misfortune of being born in the midst of the COVID-19 pandemic did not strip him, nor his parents, of their rights to seek redress for unreasonable medical care. The United States and Wisconsin Constitutions expressly preclude laws like Wis. Stat. § 895.4801 from preventing citizens from seeking justice for their grievances without affording them due process of law. Because Section 895.4801 infringes on this fundamental right, it

must be subjected to strict scrutiny, under which it patently fails (*see infra* section B).

ii. Wis. Stat. § 895.4801 is Unconstitutionally Vague.

Wisconsin Statutes Section 895.4801(2)(b) hinges its entire application on the phrase "good faith." Yet, nowhere in the statute is the phrase "good faith" actually defined. Based on the plain language of Wis. Stat. § 895.4801(2)(b), Plaintiffs had no way of knowing that by seeking medical care in the state of Wisconsin between the dates of March 12, 2020, and July 10, 2020, they were renouncing their—and their son's—rights to receive reasonable medical care. Nothing in the statute provides fair notice of that fact, and had Plaintiffs understood it to mean as such, they would have unquestionably sought care elsewhere. Plaintiffs were not afforded that option due to the unconstitutional vagueness of Wis. Stat. § 895.4801(2) in violation of constitutional procedural due process protections. *See Ruesch*, 571 N.W.2d at 904. The statute is therefore void for vagueness and must be struck down by this Court.

iii. Wis. Stat. § 895.4801 Disadvantages a Suspect Class.

Countless studies have shown that African Americans face a substantially higher risk of mortality due to medical negligence, particularly in the context of obstetric care.[2] Wis. Stat. § 895.4801's prohibition, then, on nearly any and all

[2] *See, e.g.,* Hoyert DL. "Maternal mortality rates in the United States, 2020,"

medical negligence cases brought during the prescribed period substantially disadvantages African American Wisconsinites, such as Plaintiffs, who are much more likely to have suffered medical negligence during that time.

The Fourteenth Amendment Equal Protection Clause states: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Wis. Stat. § 895.4801 violates this provision due to the disadvantage it puts on African American citizens, such as Plaintiffs. As such, Wis. Stat. § 895.476 must be subjected to strict scrutiny under which it plainly fails. *See San Antonio Indp. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (2000).

B. Wis. Stat. § 895.4801 Cannot Withstand Strict Scrutiny.

Because Wis. Stat. § 895.4801 impedes on a fundamental right guaranteed by the U.S. and Wisconsin Constitutions and disadvantages a suspect class, this Court must apply the strict scrutiny standard of review. *See, e.g.*, *San Antonio Indp. Sch. Dist.*, 411 U.S. at 16-17; *Sullivan*, 613 N.W.2d at 207; *Mayo*, 914 N.W.2d at 689; *Ruesch*, 571 N.W.2d at 904. Any compelling governmental interest the Wisconsin Legislature was attempting to protect in enacting Wis. Stat. § 895.4801

NCHS Health E-Stats. 2022. https://dx.doi.org/10.15620/cdc:113967. *See also*, Njoku, A., et al. "Listen to the Whispers before They Become Screams: Addressing Black Maternal Morbidity and Mortality in the United States," Healthcare 2023, 11, 438, Feb 2023 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9914526/.

must be strictly scrutinized to ensure the measures taken were narrowly tailored and implemented using the least restrictive means. *See R.A.V.*, 505 U.S. 377; *Gooding*, 405 U.S. 518. The facts of this case, and a frank analysis of Wis. Stat. § 895.4801, necessitates the conclusion that Wis. Stat. § 895.4801 goes well and beyond those exacting bounds and is therefore unconstitutional.

Plaintiffs do not dispute that the COVID-19 pandemic created unprecedented challenges to the state and healthcare system. But Ms. Wren's obstetric care had nothing to do with COVID beyond screening for the virus symptoms and possible exposures. Notably, on February 25, 2021, several months after the Wisconsin Legislature passed § 895.4801, the State passed a new law providing COVID immunity under a far narrower set of circumstances. This law, Wis. Stat. § 895.476, provides civil immunity to any entity:

> for the death of or injury to any individual or damages caused by an act or omission resulting in or relating to exposure, directly or indirectly, to the novel coronavirus identified as SARS-CoV-2 or COVID-19 in the course of or through the performance or provision of the entity's functions or services.

Wis. Stat. § 895.476.

This law addresses the same governmental interest in freeing actors to respond to the COVID pandemic as Section 895.4801. However, the language of the statute is narrowly tailored to address only actions taken directly in response to COVID. This law shows that the Wisconsin Legislature could have—and

did—respond in a much more precise and tailored way to protect the State's interest in facilitating COVID care and pandemic response efforts. However, when contrasted to the overbreadth of Section 895.4801, it is patently clear that the State failed to do so in April 2020.[3] As a result, Plaintiffs' rights—and the rights of an untold number of other injured parties throughout the State of Wisconsin—have been unconstitutionally curtailed.

The Wisconsin Supreme Court evaluated very similar questions in *James v. Heinrich*, 960 N.W.2d 350 (Wis. 2021), when considering whether school closures under COVID restrictions were constitutional. There, the Court held that such restrictions were not constitutional because they failed to utilize the least restrictive means of addressing the intended governmental interest. *Id*. at 371. Just as here, the Court scrutinized the fact that other state Orders utilized "nuanced and tailored measures" to address COVID concerns, but those measures "were completely abandoned in the Order at issue, replaced by the drastic step of forbidding in-person religious school education entirely for students in grades 3-12." *Id*. This Court must likewise compare the "nuanced and tailored measures" implemented by the Legislature in Wis. Stat. § 895.476

[3] Notably, several other states also passed COVID civil liability protections, including Arizona, Arkansas, Connecticut, Iowa, Maryland, Massachusetts, Michigan, New Jersey, New York, Oklahoma, Vermont, and Virginia; however, those states' statutes were much more narrowly tailored than Wisconsin's. *See* Valerie Gutmann Koch, "Crisis Standards of Care and State Liability Shields," 57 San Diego L. Rev. 973, 982–85 (2020).

with the overbroad and overly restrictive measures used in Section 895.4801. This comparison undeniably shows that Wis. Stat. § 895.4801 fails strict scrutiny. The Court must not allow citizens' rights to be so summarily dismissed—Wis. Stat. § 895.4801 must be invalidated.

CONCLUSION

This Court should reverse the circuit court's order dismissing Plaintiffs-Appellants wrongful death claims. Plaintiffs-Appellants fully complied with Wis. Stat. § 806.04(11) because the plain language of the statute and well-established case law definitively show that only service on—and not impleading of—the officials is required. Furthermore, the circuit court failed to apply strict scrutiny to Wisconsin Statute Section 895.4801, as was required, and thus failed to recognize that the statute is unconstitutional and impermissibly impedes on Plaintiffs' constitutional rights. This Court should reverse the circuit court's Order and invalidate Wisconsin Statute Section 895.4801 as unconstitutional.

Dated: March 4, 2024

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CERTIFICATE OF FONT, WORD COUNT

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with Book Antiqua, a proportional serif font. The length of this brief is 5,798 words.

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