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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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ARGUMENT

1. There is no dispute that the circuit court erred in interpreting Wis. Stat. § 806.04(11).

The gateway issue in this case is whether the circuit court properly dismissed Ms. Wren's[1] case on the basis of its interpretation of Wis. Stat. § 806.04(11). Yet Defendants-Respondents Columbia St. Mary's, et al. ("Columbia St. Mary's"), apparently now abandon all of their prior arguments in support of the lower court's interpretation, leaving Ms. Wren's contentions of error unopposed. *Columbia St. Mary's response brief*, p. 29. Thus, this Court should reverse the circuit court's order dismissing Ms. Wren's case because there is no dispute that the lower court erred in its interpretation of Wis. Stat. § 806.04(11) and that Ms. Wren fully complied with the plain language requirements of the statute.[2]

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[1]Ms. Wren and Mr. Gordon take issue with Columbia St. Mary's ascription of their joint arguments as being "Ms. Wren's." This case is not about Ms. Wren. It is about Baby Calvin and his life that was negligently cut far too short. However, to maintain consistency with Columbia St. Mary's Response Brief and avoid confusion, Ms. Wren and Mr. Gordon continue to utilize this deficient moniker in their Reply Brief.

[2] Columbia St. Mary's does assert several times in its response brief that Ms. Wren failed to cite to the record in her opening brief. *Columbia St. Mary's response brief*, pp. 10, 17. Columbia St. Mary's apparently overlooks the 319-page Appendix containing seventeen exhibits including the most pertinent documents from the Record, to which Ms. Wren cites extensively throughout her opening brief. *See Ms. Wren's Appendix to her brief*. Columbia St. Mary's also argues that Ms. Wren failed to "provide[] notice that she has notified the state Attorney

2. Due Process is the primary operative constitutional provision invalidating Wis. Stat. § 895.4801.

The primary constitutional claim Ms. Wren brought to this Court for consideration on appeal arises out of the substantive due process protections contained in the 5th and 14th Amendments of the U.S. Constitution and Article 1, Section 9, of the Wisconsin Constitution. The constitutional protections afforded by the 1st Amendment, 7th Amendment, and Equal Protection Clause, however, are also relevant to the extent they evidence the fundamental rights and suspect class protections that compel this Court to apply a strict scrutiny analysis.

Columbia St. Marys' contentions that Ms. Wren failed to raise First Amendment and Equal Protection arguments in the lower court are not only patently false,[3] but also fundamentally misunderstand Ms. Wren's constitutional arguments here. *See Columbia St. Mary's response brief*, pp. 19-21. To be clear, Ms. Wren's Notice of Appeal does indicate her appeal of both the circuit court's final order of dismissal as well as "all prior orders affecting that judgment," including

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General of her assertion that Wis. Stat. § 895.4801(2) is unconstitutional." *Columbia St. Mary's response brief*, p. 29. Not only is no such "notice of notification" required anywhere in the statute, but once again Columbia St. Mary's apparently overlooks exhibit A-APP 5, filed with Ms. Wren's Appendix, proving her service of notice upon the Wisconsin Attorney General, Speaker of the Assembly, President of the Senate, and Senate Majority Leader. Ms. Wren also filed copies of her subsequent service of notice of this appeal to the above parties at R. 77-80, included herewith as A-APP 18.

[3] *See* R. 73, A-APP 4, p. 18; R. 52, A-APP 8, p. 4; R. 53, A-APP 9, pp. 2-3.

the court's 11/20/23 Order striking Ms. Wren's supplemental brief. (*See* R. 75, A-APP 19; R. 63, A-APP 20, p. 3.) However, Columbia St. Mary's analyses of whether Wis. Stat. § 895.4801 violates the 1st or 7th Amendments, the Equal Protection clause, or any other constitutional provision, are misdirected. *See Columbia St. Mary's response brief*, pp. 19-22. Rather, Ms. Wren's primary constitutional argument here is that Wis. Stat. § 895.4801 violates substantive due process protections because of its overbreadth, and that a strict scrutiny analysis of the statute necessitates its invalidation.

Columbia St. Mary's also asserts that this Court should include a presumption of constitutionality when performing its *de novo* review of Wis. Stat. § 895.4801. However, where—as here—a statute restrains fundamental right or disadvantages a protected class, no presumption of constitutionality may be afforded. *See, San Antonio Indp. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 16 (2000) (". . . strict scrutiny means that the State's system is not entitled to the usual presumption of validity . . . ."). *See also, 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); *James v. Heinrich,* 960 N.W.2d 350 (Wis. 2021); *Mayo v. Wisconsin Injured Patients & Families Compensation Fund,* 914 N.W.2d 678, 689 (Wis. 2018); *State v. Ruesch,* 571 N.W.2d 898, 904 (Wis. Ct. App. 1997). Therefore, no presumption of constitutionality is

applicable here, and this Court must apply strict scrutiny in holding Wis. Stat. § 895.4801 to be unconstitutional both on its face and as applied to Ms. Wren.

3. Neither Columbia St. Mary's nor the State have met their heavy burden to prove that Wis. Stat. § 895.4801 passes strict scrutiny.

Despite agreeing that Wis. Stat. § 895.4801 is "broad" numerous times in their response brief, neither Columbia St. Mary's nor the State of Wisconsin has provided any evidence or even argumentation as to how or why the statute passes the "necessity" and "narrow tailoring" prongs of strict scrutiny. *See Columbia St. Mary's response brief*, pp. 12-28. *See also*, *Mayo,* 914 N.W.2d at 689; R. 68, A-APP. 6. Pursuant to the U.S. Supreme Court's holding in *Rodriguez*, 411 U.S. at 16-17, and the Wisconsin Supreme Court's holding in *James*, 960 N.W.2d at 369, once a party shows that a statute impedes upon a fundamental right, the burden shifts to the proponent of the statute to show that the statute is constitutional. This is an exceptionally heavy burden. *Rodriguez*, 411 U.S. at 16.

Here, however, Columbia St. Mary's only defenses to the conceded overbreadth of Wis. Stat. § 895.4801 seem to be that "that was the point"[4] and that the statute's overbreadth is acceptable because it was only in force for a period of roughly four months.[5] These arguments fail to fulfill the exacting requirements of strict scrutiny. And the persons in the best position to prove how

[4] *Columbia St. Mary's response brief,* p. 12.
[5] *Id.* at 18.

the statute could satisfy strict scrutiny—the Wisconsin Attorney General and members of the legislature enumerated and empowered by Wis. Stat. § 806.04(11)—have apparently decided not to make any appearance in this case. *See* R. 68, A-APP. 6. Thus, the heavy burden imposed by strict scrutiny has plainly not been met here, and this Court must invalidate Wis. Stat. § 895.4801 as unconstitutionally violative of substantive due process protections.

a. No evidence has been presented to show that the measures utilized by Wis. Stat. § 895.4801 were necessary to achieve the asserted governmental purpose.

The second of the three prongs required by strict scrutiny is "necessity." *See, e.g., Mayo,* 914 N.W.2d at 689. The Wisconsin Supreme Court has defined necessity as: "[a] thing is necessary in the highest degree, when it is inevitable—when it must be. In a lesser degree that is necessary which cannot be otherwise without preventing the purpose intended; that which is indispensable, requisite or essential." *Milwaukee & St. P. Ry. Co. v. City of Milwaukee*, 34 Wis. 271, 277 (Wis. 1874). Likewise, Black's Law Dictionary defines "necessary" as "[t]hat is needed for some purpose or reason; essential," and "That must exist or happen and cannot be avoided." Black's Law Dictionary (11th ed. 2019), "necessary."

Yet here, Columbia St. Mary's has provided no evidence, nor even argumentation, addressing why or how the broad immunity provided by Wis. Stat. § 895.4801(2) is necessary, essential, or unavoidable, to achieve the

purported purpose of "encourage[ing] hospitals, clinics, and the like to be open and see patients for all medical concerns." *Columbia St. Mary's response brief*, p. 17. Indeed, no evidence has been introduced by any entity to show that, had it not been for the legislature's passage of Wis. Stat. § 895.4801(2), hospitals and clinics were threatening to, and in fact would have, closed. *See Columbia St. Mary's response brief*, p. 17-29. Instead, the available evidence does show that the subsequently enacted COVID immunity statute—Wis. Stat. § 895.476—provided an alternative means of achieving the purported end goal of keeping hospitals and clinics open in a much more narrowly tailored way. Thus, the overbroad means utilized by the legislature in Wis. Stat. § 895.4801(2) was—by definition—inessential, avoidable, and unnecessary.

Columbia St. Mary's does argue that the later-enacted COVID statute (Wis. Stat. § 895.476) was "enacted to address immunity for Covid exposure in the myriad of activities in life, including businesses and schools ***that were not involved in providing health care***." *Columbia St. Mary's response brief*, p. 18 (*emphasis added*). However, this assertion contradicts the plain language of Wis. Stat. § 895.476 which defines its covered entities as including "a partnership, corporation, association, governmental entity, tribal government, tribal entity, or other legal entity, including a school, institution of higher education, or nonprofit organization." Wis. Stat. § 895.476(1)(b). Health care facilities such as Columbia

St. Mary's unequivocally fall within these categories, as Columbia St. Mary's admitted in its Answer to Ms. Wren's Complaint. (R. 40, p. 1, ¶ 2 (". . . admits that CSM is a Wisconsin corporation . . . .")). Thus, Wis. Stat. § 895.4801(2) plainly fails the second prong of strict scrutiny requiring a showing of necessity and must be invalidated.

b. No evidence supports the contention that Wis. Stat. § 895.4801 was narrowly tailored.

Turning to the third prong of strict scrutiny—narrow tailoring—the U.S. Supreme Court has defined this requirement as, "[the State] has selected the 'less drastic means' for effectuating its objectives"[6] and no "less intrusive means of accomplishing similar purposes . . . are available."[7] Columbia St. Mary's asserts that this prong was satisfied because of the time limitation included within the statute. *Columbia St. Mary's response brief*, p. 18. According to Columbia St. Mary's analysis, because the immunities enacted by Wis. Stat. § 895.4801 lasted for roughly only four months, this Court should turn a blind eye to its conceded overbreadth. *Id*. Yet, again, that is not what the plain language of the statute says, nor what the U.S. Constitution or Wisconsin Constitution say.

Wis. Stat. § 895.4801(2)(a) states that the immunity provisions contained therein will continue to apply for "60 days following the date that the state of

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[6] *Rodriguez,* 411 U.S. at 17.
[7] *Wygant v. Jackson Bd. Of Educ*., 476 U.S. 267, 268 (1986).

emergency terminates." Wis. Stat. § 895.4801(2)(a). But at the time the statute was enacted, there was no limitation or predetermined date indicating how long that "state of emergency" would last. Thus, the immunity provided under the statute could have lasted four months or forty years. Furthermore, Columbia St. Mary's provides no citation to any case holding that "narrow tailoring" is satisfied when a statute is limited in scope by time. Conversely, the case law cited to by Ms. Wren plainly shows that the Court's focus in analyzing whether a statute is narrowly tailored should be the *means* used, not the duration that the statute is in effect. *See Rodriguez,* 411 U.S. at 16-17, 54 ("the State rather than the complainants must carry a 'heavy burden of justification,' [to] demonstrate that its educational system has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the **'less drastic means'** for effectuating its objectives . . . ."**)** (*emphasis added*); *R.A.V.,* 505 U.S. at 396 ("St. Paul has **sufficient means** at its disposal to prevent such behavior without adding the First Amendment to the fire.") (*emphasis added*); *James,* 960 N.W.2d at 371 ("The **least-restrictive-means** standard is exceptionally demanding, and it requires the government to show that it **lacks other means** of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.") (*emphasis added*) (*quoting Holt v. Hobbs*, 574 U.S. 352, 364-65, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015)).

Indisputably, the U.S. and Wisconsin constitutions, and the fundamental rights they protect, did not cease to apply for the four months Wis. Stat. § 895.4801 was in effect. Just as a prisoner cannot be subjected to cruel and unusual punishment if it only lasts four months or less, political protesters cannot be silenced for "just" four months, and slavery cannot be permitted if only for four months, children cannot be killed with impunity for four months of the year. Wis. Stat. § 895.4801 violates the Due Process clauses of the U.S. Constitution and Article 1, Section 9 of the Wisconsin Constitution, and because both Columbia St. Mary's and the State of Wisconsin have failed to meet their burden to show that the statute can pass strict scrutiny, it must be struck down—regardless of how long its unconstitutionality lasted.

CONCLUSION

This Court should reverse the circuit court's order dismissing Ms. Wren's wrongful death claims and invalidate Wisconsin Statute Section 895.4801 as unconstitutional.

Dated: April 18, 2024

Respectfully submitted,

By: *Electronically signed by: Elizabeth E. Fors*

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CERTIFICATE OF FONT, WORD COUNT

I hereby certify that this reply 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 reply brief is 1907 words.

Dated: April 18, 2024

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