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STATE OF WISCONSIN  
SUPREME COURT

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

Plaintiffs-Appellants-Respondents,

Case No. 2024AP126

v.

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.

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**RESPONSE TO PETITION FOR REVIEW  
OF PLAINTIFFS-APPELLANTS-RESPONDENTS**

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## INTRODUCTION

Plaintiffs-Appellants-Respondents Savannah Wren and Calvin Gordon (hereinafter referred to as Respondents) oppose the request for discretionary review. Not only is the decision of the Wisconsin Court of Appeals correct in finding that Wisconsin Statute Section 895.4801(2) unconstitutionally violated the fundamental right of Wisconsin citizens to seek redress of their grievances through a jury trial, but review is also not necessary because the Wisconsin legislature enacted a second statute, Wis. Stat. § 895.476, that protects the same state interests sought by Wis. Stat. § 895.4801, but does so in a constitutionally permissible way. Further, the limited window of time during which Wis. Stat. § 895.4801 was applicable renders any further court consideration of this matter effectively moot. Review by this Court is therefore unnecessary and would serve no compelling purpose.

Should this Court agree to grant review of the appeals court's decision, however, it should also consider the alternative grounds supporting the finding of unconstitutionality, which were previously raised but not reached by the lower court. These include the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution and those protections that are inherent in the Wisconsin Constitution's Declaration of Rights. *See Wis. Const. Art. 1, Sec. 1.*

## STATEMENT OF THE ISSUE

The court of appeals reversed the circuit court on two separate grounds.<sup>1</sup>

Petitioners, however, seek review only of the following issue:

1. Did the Wisconsin Court of Appeals err in holding Wisconsin Statute Section 895.4801 to be unconstitutional?

Answer of the appeals court: No.

## ARGUMENT

- 1. The Court of Appeals' holding that Wis. Stat. § 895.4801 unconstitutionally infringes on the fundamental right to seek redress through a jury trial is well-founded and in accord with Wisconsin law.**

The Wisconsin Court of Appeals fulfilled its quintessential duty to provide a necessary check on the state legislature's rule-making authority,<sup>2</sup> and its findings are directly in line with the Wisconsin and U.S. constitutions and well-reasoned Wisconsin law. While acknowledging that the COVID-19 pandemic posed unique challenges to the state's health care system, the court reiterated this Court's holding in *Wisconsin Legislature v. Palm*, stating, "[t]here is no pandemic

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<sup>1</sup> Concluding, "the circuit court erroneously dismissed Wren's complaint based on a failure to name the attorney general, the speaker of the assembly, the president of the senate, and the senate majority leader under WIS. STAT. § 806.04(11)." "We further conclude that WIS. STAT. § 895.4801 is unconstitutional and does not provide immunity to Columbia St. Mary's from Wren's claims." *Wren v. Columbia St. Mary's Hospital Milwaukee, Inc.*, 2025 WI App. 22 at ¶ 40.

<sup>2</sup> See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

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 v. Columbia St. Mary’s Hospital Milwaukee, Inc.*, 2025 WI App. 22 at ¶ 37 (citing *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 53, 391 Wis. 2d 497, 942 N.W.2d 900).

The United States and Wisconsin Constitutions expressly forbid laws like Wis. Stat. § 895.4801 from preventing citizens from seeking justice for their grievances without affording them due process of law. *See* U.S. Const. Amend. V; U.S. Const. Amend XIV; Wis. Const. Art. 1, Sec. 1; Wis. Const. Art. 1, Sec. 9 (“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 . . . .”); *see also Buse v. Smith*, 74 Wis. 2d 550, 579, 247 N.W.2d 141 (1976) (“This court has held that art. I, sec. 1, Wis. Const., is substantially the equivalent of the due process and equal protection clauses of the 14th amendment of the U.S. Const.”); *Teague v. Schimel*, 2017 WI 56, ¶ 37, 375 Wis. 2d 458, 896 N.W.2d 286 (“[W]e understand the Wisconsin Constitution as promising due process of law [under art. I, § 1 inherent rights].”); *State v. Nergaard*, 124 Wis. 414, 418–19, 102 N.W. 899 (1905); *Black v. State*, 113 Wis. 205, 218–19, 89 N.W. 522 (1902) (holding that due process, as well as equal protection, are unenumerated rights which have always existed in the “inherent rights” clause of the Wisconsin Constitution’s “Declaration of

Rights.”). Here, 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 fundamental rights to seek redress for negligent medical care.

Because Wis. Stat. § 895.4801 directly infringes on this fundamental right, the appeals court properly subjected the statute to strict scrutiny, under which it manifestly fails. *See, e.g., San Antonio Indp. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (2000); *State ex rel. Tayr Kilaab al Ghashiyah (Khan) v. Sullivan*, 613 N.W.2d 203, 207 (Wis. Ct. App. 2000); *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). The court of appeals’ holding that Wis. Stat. § 895.4801 was not narrowly tailored to serve a compelling governmental interest nor implemented using the least restrictive means was in accord with long-standing U.S. and Wisconsin law. *See e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Sullivan*, 613 N.W.2d at 207; *Mayo*, 914 N.W.2d at 689; *Ruesch*, 571 N.W.2d at 904.

**2. Review by this Court is unnecessary as the Legislature enacted a subsequent statute that protects the same interest as the time-barred, unconstitutional law.**

Review of the court of appeals’ decision is further unnecessary because the Wisconsin Legislature itself seemingly recognized the overbreadth of Wis. Stat. § 895.4801 when, months later on February 25, 2021, it 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.

While this law addresses the same governmental interest in freeing actors to respond to the COVID-19 pandemic as Wis. Stat. § 895.4801 did, it is much more narrowly tailored to address only actions taken directly in response to COVID-19. This is precisely the analysis that the appeals court articulated: that the Wisconsin Legislature could have—and later did—respond in a much more precise and tailored way to protect the State's interest in ensuring the availability of COVID-19 care and facilitating pandemic response efforts.

Finally, there is no credible basis to believe that the issues raised by Wis. Stat. § 895.4801 are “likely to recur.” The limited time-period during which the statute was applicable has long-since passed,<sup>3</sup> and the unique challenges posed by COVID-19 have largely concluded. No other pending circuit court or

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<sup>3</sup> All parties agree, as did the court of appeals, that the statute's effective dates were limited to March 12, 2020, to July 10, 2020. *See* P. Br. pg. 11; *see also Wren*, 2025 WI App. 22 at ¶ 5. The Wisconsin statute of limitations for asserting medical malpractice claims is generally three years from the date of the injury or one year from the date the injury was discovered (or should have been discovered with reasonable diligence), but no later than five years from the date of the alleged negligence. Wis. Stat. § 893.55(1m).

appellate cases have been identified by anyone to have been impacted by Wis. Stat. § 895.4801, even despite amicus briefing filed by the Wisconsin Association for Justice in the appeals court case.

This Court should decline discretionary review.

**3. Wis. Stat. § 895.4801 is further unconstitutional because it violates the Fifth and Fourteenth Amendment Due Process Clauses and Equal Protection Clause.**

While the court of appeals correctly found that Wis. Stat. § 895.4801 was unconstitutional under Article 1, Section 9 of the Wisconsin Constitution, there are additional grounds for striking the statute. If this Court grants review, it will need to address the following constitutional issues as well:

**A. Wis. Stat. § 895.4801 is Unconstitutionally Vague.**

Due Process requires 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); *Ruesch*, 571 N.W.2d at 904.

Here, although Wis. Stat. § 895.4801(2)(b) hinges its entire application on the phrase “good faith,” nowhere in the statute is that phrase actually defined. Based on the plain language of Wis. Stat. § 895.4801(2)(b), Wisconsin citizens had no way of knowing that by seeking medical care in the state between the dates of

March 12, 2020, and July 10, 2020, they were renouncing their rights to receive non-negligent medical care. Nothing in the statute provides fair notice of that fact, and had Respondents understood it to mean as much, they would have unquestionably sought care elsewhere. The unconstitutional vagueness of Wis. Stat. § 895.4801 violates procedural due process protections and is therefore void for vagueness. *See Ruesch*, 571 N.W.2d at 904.

### **B. Wis. Stat. § 895.4801 Disadvantages a Suspect Class.**

The U.S. Constitution's 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." 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.<sup>4</sup> Wis. Stat. § 895.4801's prohibition, then, on nearly any and all medical negligence cases brought during the prescribed period disproportionately disadvantages African American Wisconsinites, such as Respondents, who are much more likely to have suffered medical negligence during that time frame. As such, Wis. Stat. § 895.4801 must be subjected to strict scrutiny under which it plainly fails. *See*

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<sup>4</sup> *See, e.g.*, Hoyert DL. "Maternal mortality rates in the United States, 2020," 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/>.

*Rodriguez*, 411 U.S. at 16-17.

## CONCLUSION

This Court should deny the petition to review the court of appeals' order finding Wis. Stat. § 895.4801 to be unconstitutional. If the Court does grant review, however, it should also consider the alternative grounds advanced below supporting the court of appeals' decision on the issue of constitutionality.

Dated: March 27, 2025

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm) and (8g) and 809.62(4) for a brief produced with Book Antiqua, a proportional serif font. The length of this brief is 2,094 words.

Dated: March 27, 2025

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