STATE OF WISCONSIN CIRCUIT COURT BRANCH __ WAUKESHA COUNTY

WISCONSIN MANUFACTURERS AND COMMERCE, MUSKEGO AREA CHAMBER OF COMMERCE, and NEW BERLIN CHAMBER OF COMMERCE AND VISITORS BUREAU,

Plaintiffs,

vs.

TONY EVERS, in his official capacity as Governor of Wisconsin, ANDREA PALM, in her official capacity as Secretary-Designee of the Wisconsin Department of Health Services, and JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration,

Defendants.

Case No. 20-cv-1389
Hon. Judge Carter

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR EX PARTE TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

INTRODUCTION

It was only a few weeks ago that Governor Evers conceded, with refreshing candor and clarity, that publicizing the names of Wisconsin employers known to have had two or more workers with COVID-19 (going back as far as May) would disclose information that is "not public" and that would raise serious "privacy" concerns. Therefore, at least last month, the Governor's position—which reversed his previous reversal—was the he would not, and should not, release the names.

Then, last night, Plaintiff WMC learned that the Governor had changed his position yet again. Secretary Joel Brennan informed WMC that, on the morning of Friday, October 2, 2020 (**tomorrow**), the Governor plans to sow a scarlet "C" on the names of over 1,000 employers with two or more employees to have been diagnosed with the virus, a list that would include members of the Plaintiff chambers. If the Governor publishes these employers' names, he will be violating numerous Wisconsin statutes that forbid the disclosure of patients' private medical information, including the names of their employers. Publishing employer names, even without the names of the patients, will allow many to determine who among their coworkers have had the coronavirus, resulting in a grievous invasion of privacy.

What is more, the Governor's blacklist will falsely create the impression that the businesses at issue are somehow dangerous, having recently been exposed to the virus. This is especially vexing given Defendants' plan to release the names of employers with cases *dating back to May*, making it likely that the public will suspect that businesses who were never exposed to COVID-19 or were, at worst, exposed several months ago are coronavirus "hotspots," to be avoided at all costs. In other words, Wisconsinites will be given the utterly backwards impression that it is *these* businesses that are to be shunned, when, in reality, they could be the very businesses with the *least degree of present exposure* to the virus in the state.

The effect that the list will have on the over 1,000 businesses is obvious: it will irreparably harm them, just as it will irreparably harm the patients whose private medical information will be outed as a result. ***Plaintiffs respectfully urge this***

Court to issue an immediate, ex parte temporary restraining order and/or preliminary injunction <u>today</u>, before the close of business, to prevent the Governor from carrying out his misconceived plan tomorrow morning.[1]

STATEMENT OF FACTS

A. Background Facts

On July 1, 2020, news media reported that Governor Evers and Secretary-Designee Palm planned to "publish" "the names of all Wisconsin businesses that have recorded at least two COVID-19 cases." M.D. Kittle, *Breaking*: *Evers' DHS outing businesses with COVID cases* (July 1, 2020).[2] The State also said that it was processing "'hundreds' of public records requests for information about COVID-19." Mitchell Schmidt, *Wisconsin business groups raise concerns about what info state might release about COVID cases* (July 3, 2020).[3]

In response, Plaintiff WMC sent a letter to Defendants, explaining that releasing such information would raise legal concerns and "further damage Wisconsin's business community," while "not help[ing] local health authorities

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[1] Plaintiffs certify, per Local Rule 1.2, that they have made "a good faith effort to contact the party sought to be restrained or the party's attorney, if known, prior to the request and inform the party or the party's attorney, if known, prior to the request and inform the party or the party's attorney, if known, of the time such request will be made." Attorney for Plaintiffs informed chief counsel for the Governor of Wisconsin of today's filings by email on the afternoon of October 1, 2020, which was as soon as practicable given the emergency circumstances created by the Governor's eleventh-hour announcement.

[2] https://empowerwisconsin.org/breaking-evers-dhs-outing-businesses-with-covid-cases/.

[3] https://madison.com/wsj/business/wisconsin-business-groups-raise-concerns-about-what-info-state-might-release-about-covid-cases/article_514f3a69-0009-5f63-b249-39277b99565a.html

control the spread of COVID-19," since there would be no way to know whether the cases of the virus among employees were at all connected with the business. *Id.*

After WMC and others raised these concerns, Defendants announced that they had "decided not to post information online about active investigations." Molly Beck, *Wisconsin's health agency shelves plans to name businesses tied to coronavirus cases after pushback from industry lobbyists, GOP*, Milwaukee Journal Sentinel (July 7, 2020).[4] But they warned that "requests for public records could push the[m] to release the details anyway." *Id.*

Plaintiff WMC and other businesses then sent another letter to Defendants, explaining at length that releasing such information, even in a response to a public-records request, would violate several statutory and constitutional provisions designed to protect the privacy of the individuals from whose medical records the data was obtained. Walsh Aff. Exhibit 2; *see also* WMC, *DHS Release of Businesses with COVID-19 Positives Would Violate Several State & Federal Laws* (July 15, 2020).[5] Also, the State's COVID blacklist would inflict massive harm on businesses. Walsh Aff. Exhibit 2. In closing, the letter emphasized that WMC and others share the administration's "concern for the health and safety of all Wisconsinites, and therefore we are very grateful for your attention to this matter." Walsh Aff. Exhibit 2. The letter added: "We respectfully request a reply to this letter at your earliest

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[4] Walsh Aff., Exhibit 1.

[5] https://www.wmc.org/news/dhs-release-of-businesses-with-covid-19-positives-would-violate-several-state-federal-laws/

convenience, which reply would indicate whether you agree or disagree with our conclusions. We look forward to engaging in a constructive dialogue on these critical issues." Walsh Aff. Exhibit 2.

No response came. Thankfully, however, the State did not release the information and, on September 9, 2020, Defendant Evers reaffirmed in a press conference that the State would not be releasing this information. *See* Molly Beck, *Tony Evers says he would take a coronavirus vaccine and blames Trump for sowing distrust in the process*, Milwaukee Journal Sentinel (Sept. 9, 2020).[6] He admitted, with refreshing candor, that such information was "not public" and that posting it would raise "privacy" issues. WMC celebrated this decision.

Despite this seemingly firm decision, on September 30, 2020, the State reversed itself yet again. It announced that it, in fact, *would* be releasing the names of businesses whose employees tested positive for COVID-19. Defendant Brennan informed Plaintiff WMC that the administration plans to release to the *media the names of over 1,000 employers* across the State of Wisconsin who have had at least two COVID-19 cases or close case contacts being investigated by contact tracers. Bauer Aff. ¶¶ 3–4, 6. The company's name and number of known/suspected cases will be released. Bauer Aff. ¶ 7. The release is being limited to companies of more than 25 employees and will not include the names of businesses if the COVID-19 cases or suspected contacts occurred within the last 28 days. Bauer Aff. ¶ 5. The

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[6] https://www.jsonline.com/story/news/politics/2020/09/09/tony-evers-blames-trump-for-sowing-distrust-in-covid-vaccine-process/5760488002/

release will include the names of businesses where the COVID-19 cases or suspected contacts occurred as far back as May 2020. Bauer Aff. ¶ 5. Defendants plan to release this information in response to public records requests. Bauer Aff. ¶ 9.

Defendants stated that they plan to release this information the morning of Friday, October 2, 2020. Bauer Aff. ¶ 10. Plaintiffs have filed a complaint and motion for temporary restraining order and preliminary injunction, to prevent the release of this information, which will irreparably harm Plaintiffs, their members, and many of their employees. This brief supports that motion.

LEGAL STANDARD

Ex parte restraining orders are governed by Wis. Stat. § 813.025. The court may grant an ex parte restraining order "if the court is of the opinion that irreparable loss or damage will result to the applicant unless a temporary restraining order is granted." *Id.* § 813.025(2). Such an order "shall be effective only for 5 days unless extended after notice and hearing thereon, or upon written consent of the parties or their attorneys." *Id.*

Temporary injunctions are governed by Wis. Stat. § 813.02(1). To secure a temporary injunction, the movant must establish: (1) "a reasonable probability of ultimate success on the merits," (2) that an injunction is "necessary to preserve the status quo," (3) "a lack of adequate remedy at law;" and (4) "irreparable harm." *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520–21, 259 N.W.2d 310 (1977). The Wisconsin Supreme Court has also held that a movant must "satisfy the

[ ] court that on balance equity favors issuing the injunction." *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

Before granting a temporary injunction or temporary restraining order, "the court may attempt to contact the party sought to be restrained, or his or her counsel if known, by telephone," but is not required to do so. Wis. Stat. § 813.02(1)(b).

ARGUMENT

I. Plaintiffs Are Extremely Likely to Succeed on the Merits

A. The Records that Defendants Plan to Disclose Are Protected by Patient-Confidentiality Laws

Wisconsin law protects as confidential the information contained in health-care records, including the identity of patients' employers, and therefore DHS may not publicly release that information. "[H]istorical notions of privacy generally accord patients a significant measure of privacy in their medical treatment." *State v. Thompson*, 222 Wis. 2d 179, 192, 585 N.W.2d 905 (Ct. App. 1998). Wisconsin Statute Section 146.82 "emobod[ies] these historical notions of privacy," *id.*, providing that an individual's medical records must "remain confidential." Wis. Stat. § 146.82(1). And the statutes provide harsh penalties for those who violate patient confidentiality, Wis. Stat. § 146.84, evincing a "legislative policy" of "strict compliance with the statutory rules for medical records." *Szymczak v. Terrace at St. Francis*, 2006 WI App 3, ¶ 25, 289 Wis. 2d 110, 709 N.W.2d 103.

Wisconsin Statute Section 146.82 requires any person, including government actors, to keep confidential the information contained in medical records. Any record "related to the health of a patient prepared by or under the supervision of a health

care provider" is a "[p]atient health care record[ ]," Wis. Stat. § 146.81, and therefore must be kept confidential. Wis. Stat. § 146.82. The protection of patient health care records extends to the information contained in the records, *see Johnson v. Rogers Mem'l Hosp., Inc.*, 2005 WI 114, ¶¶ 39–41, 283 Wis. 2d 384, 700 N.W.2d 27 (patient's consent to disclosure related to the "*information*" contained in her medical records) (emphasis added), including the results of diagnostic testing, *see City of Muskego v. Godec*, 167 Wis. 2d 536, 544–46, 482 N.W.2d 79 (1992). And any person, including "the state or any political subdivision," with information from a patient health care record is required to keep that information confidential. *See* Wis. Stat. § 146.84. Thus, as the court of appeals has noted, *Section 146.82 exempts patient health-care records from the open-records law*. *George v. Knick*, 188 Wis. 2d 594, 598, 525 N.W.2d 143 (Ct. App. 1994).

The information that Defendants plan to release is information from confidential medical records and therefore cannot be disclosed. Defendants plan to release the names of businesses with 2 or more employees who tested positive for COVID-19. But information about whether an employee of a facility has tested positive for COVID-19 can come only from the individual's medical records. In effect, Defendants seek to publish the results of medical diagnostic tests conducted on numerous individuals. That information is protected, confidential health-care information that cannot be released without the informed consent of each individual. Wis. Stat. § 142.82.

Although Section 146.82 provides that medical information may be released if "the circumstances of the release do not provide information that would permit the identification of the patient," that exception could not possibly cover identification of the patient's employer. Wis. Stat. § 146.82(2)(a)20. Publicizing the name of a patient's employer would invariably allow *someone*—if only a coworker or friend, at first—to piece together whether a particular person has had the disease. Suppose a particular retail store in Brookfield with five cases of the virus were to make DHS's list. Even if DHS did not name the five patients, it would not take long for one of their coworkers—a prying store clerk, for example, who noticed that several of her colleagues had been out on medical leave in June—to figure out (or, perhaps worse, *think* he has figured out) the identity of the mystery quintet. And from there, the fact (or rumor) could quite easily spread, perhaps even to the cashier's reporter-friend eager for the latest coronavirus-related scoop. As this example shows, removing or redacting an employee's name from whatever list or documents that DHS might release is obviously not enough. The employer's name alone "would permit the identification of the patient," Wis. Stat. § 146.82(2)(a)(20), and therefore its disclosure would be illegal.[7]

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[7] A DHS rule purports to carve out an exception to the confidentiality rules for disclosing information "as may be needed for the purposes of investigation, control and prevention of communicable diseases." Wis. Admin. Code § DHS 145.04(2)(d). Even if this rule on its face would allow the action that DHS is considering, the rule would be invalid as applied here, because it would conflict with a statute. *Seider v. O'Connell*, 2000 WI 76, ¶ 72 ("In those cases in which a conflict arises between a statute and an administrative rule, the statute prevails.").

The statutes governing DHS's collection and release of general public-health data confirm that a patient's employer's name is confidential health-care information. Under Chapter 153, DHS collects, analyzes, and distributes data relating to the quality assurance of medical providers. Wis. Stat. § 153.05. When DHS gathers and releases health data for "public use" under Chapter 153, it must "*protect[ ] by all necessary means*" "[t]he identification of *patients*, *employers*, or health care providers." Wis. Stat. § 153.45(1)(b) (emphases added). Moreover, these statutes prohibit DHS from releasing to any but a few enumerated entities[8] "patient-identifiable data," which data includes a "[p]atient's employer's name." Wis. Stat. § 153.50(1)(b), (4), (5); *see also* 45 C.F.R. § 164.514(b)(1)(2) (requiring removal of employer information to de-identify medical data); Wis. Stat. § 943.201(1)(b) ("Personal identifiable information" includes "[a]n individual's employer or place of employment."); *cf. State v. Allen*, 200 Wis. 2d 301, 305, 307, 546 N.W.2d 517 (Ct. App. 1996) (mentioning the patient's employer's name among the "confidential[ ]" information given out by the medical provider).[9]

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[8] These entities include agents of DHS, of the entity responsible for collecting data for DHS, agencies of the state or federal government, and health-care providers. Wis. Stat. § 153.50(4)(a)1.–4. Furthermore, this information may be shared only for limited, specified purposes. *Id.*

[9] Defendants' plan to release only the names of facilities with 25 or more employees is plainly insufficient to ensure that patients cannot be identified. State law requires that, when releasing aggregate medical data, DHS and its contractors release that data as to populations no smaller than a zip code, and even then the "population density" must be "sufficient to mask patient identity." *See* Wis. Stat. §§ 153.45(b), (c), 153.46(c). A 26-person employer is assuredly less populous than an entire zip code.

Furthermore, to the extent that the information in Defendants' possession comes from an initial disclosure of that information by a third party, the permissible avenues for redisclosure of that information are extremely limited. In the absence of informed consent or a court order, permissible "redisclosure [of a patient health care record] is limited to the purpose for which the patient health care record was initially received." Wis. Stat. § 146.82(5)(c). If Defendants originally received the record information for the purpose of public health officials' investigation of a communicable disease, *see* Wis. Stat. § 252.05, then Defendants may redisclose that record information only for purposes of public health officials' investigation of the disease. Because the planned release of this information to the media is entirely unrelated to public health officials' investigation of COVID-19, Defendants may not redisclose it.

B. Even if the Information That Defendants Plan to Release Were *Not* Explicitly Protected by the Health-Privacy Statutes, the Open-Records Statute Would Not Authorize Disclosure

While Wisconsin law establishes a policy of open government, explaining "that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them," Wis. Stat. § 19.31, this access is not unlimited. *See Watton v. Hegerty*, 311 Wis. 2d 52, 64, 751 N.W.2d 369 (2008). For one thing, the open-records law contains exceptions. *See Democratic Party of Wis. v. Wis. Dep't of Justice*, 2016 WI 100, ¶ 10, 372 Wis. 2d 460, 888 N.W.2d 584. If a statutory exception applies, the the records must not be disclosed. *Id.* ¶ 11; Wis. Stat. § 19.36(1) ("Any record which is specifically

exempted from disclosure by state or federal law . . . is exempt from disclosure under § 19.35(1).").

An exception applies here. Because the identity of a patient's employer is part of that patient's confidential health-care record, it is not subject to Wisconsin's open-records law in the first place. *See* Wis. Stat. §§ 19.36(1) ("Any record which is specifically exempted from disclosure by state or federal law . . . is exempt from disclosure under s. 19.35(1)."); 146.82 (patient health-care records are confidential); *see also* Wis. Stat. § 153.55 (health data obtained by DHS under chapter 153 "is not subject to inspection, copying, or receipt under s. 19.35(1)."); *Watton v. Hegerty*, 2008 WI 74, ¶¶ 9–10.

Even without an exemption, the open-records law would counsel against disclosure here under the familiar "public policy balancing test, which requires consideration of all relevant factors to determine whether the public interest in nondisclosure outweighs the public interest in favor of disclosure." *Democratic Party*, 372 Wis. 2d 460, ¶ 11. "The test considers whether disclosure would cause public harm to the degree that the presumption of openness is overcome." *Id.* In making this determination, factors from the federal Freedom of Information Act (FOIA) "provide a framework that records custodians can use to determine whether the presumption of openness . . . is overcome by another public policy." *Id.* ¶ 13 (quoting *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 33, 254 Wis. 2d 306, 646 N.W.2d 811). FOIA, in turn, exempts form disclosure "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.

§ 552(b)(6). Additionally, constitutional and statutory rights weigh strongly in the public policy analysis. *See Democratic Party*, 372 Wis. 2d 460, ¶ 14 (discussing the constitutional and statutory provisions protecting crime victims).

Applying that test here is straightforward. There is a substantial public interest in non-disclosure of private medical information. "[H]istorical notions of privacy generally accord patients a significant measure of privacy in their medical treatment." *Thompson*, 222 Wis. 2d at 192. This privacy interest is not only protected by statutes, including Section 146.82 and FOIA's exemption for medical records, 5 U.S.C. § 552(b)(6), but also by the Fourteenth Amendment. *Denius*, 209 F.3d at 955–56. As explained above, publicizing the name of a COVID patient's employer would allow third persons to identify who has the disease, which could cause the patients to suffer anxiety and emotional distress. *See Democratic Party*, 372 Wis. 2d 460, ¶ 28. Additionally, publication of private health information can undermine trust in the medical system, *see Hancock v. Cty. of Rensselaer*, 882 F.3d 58, 67 (2d Cir. 2018), and thereby damage the department's efforts to contain the virus. And identifying the names of businesses with as few as two confirmed cases unfairly creates the impression that the businesses themselves are unsafe, when in fact those cases might have nothing to do with the business.

By contrast, there is little public interest in disclosure. As explained above, the release of private medical information does not serve the public policy articulated in Section 19.31. Additionally, releasing the names of businesses where two or more employees test positive for COVID-19 in response to open-records requests is not

likely to aid the public in making informed decisions to minimize the risk of spreading the coronavirus. The information sought does not inform the public whether the affected employees caught the virus at work or elsewhere or whether the employees ever even went to the workplace while infected. Rather, releasing this information creates the false impression that all of the reported cases were caused by spread of the virus in the workplace. This information is not necessary for public health safety and, in fact, is more likely to cause confusion for the public.

II. Disclosure Would Cause Plaintiffs' Members and Employees Irreparable Harm

Defendants' planned disclose would irreparably harm Plaintiffs' members by effectively blacklisting them and permanently harming their reputations. If any of Plaintiffs' members are listed in Defendants' release (as some most assuredly will be, given the breadth of Plaintiffs' memberships and of Defendants' planned release), such information will imply that the businesses are somehow at fault for COVID-19 infections. This is especially troublesome given Defendants' plan to release information dating as far back as May. Thus, it is quite likely that the public will suspect that businesses who were never exposed to COVID-19, or who may have been exposed only months ago, are actually coronavirus "hotspots," and avoid those businesses entirely. *See* Katya Kazakina and Michael Sasso, *Americans Are Avoiding*

Stores Again in New Virus Hot Spots, Bloomberg (July 24, 2020).[10] The reputational damage to Plaintiffs' members would be immense and irreparable.

III. An Injunction is Necessary to Preserve the Status Quo

As it stands, none of the information that Defendants plan to release is publicly available. Thus, preventing Defendants from making the information publicly available is necessary to maintain the status quo while this Court determines whether Defendant's planned release of the information is legally permissible. *See Werner*, 80 Wis. 2d at 520–21.

IV. An Injunction is in the Public Interest

Basic principles of public policy also militate in favor of an injunction. *See Pure Milk Prod. Co-op.*, 90 Wis. 2d at 800. At a time when Wisconsin business owners are taking extraordinary and expensive steps to ensure the health and safety of their employees and customers, identifying the names of businesses with as few as *two* confirmed cases unfairly creates the impression that the establishments themselves are unsafe, when in fact those cases might have nothing to do with the business (perhaps the employee caught the virus from a family member over the weekend) and involved no exposure to the business, its customers, or its other employees (perhaps the employee was immediately tested and quarantined). In addition, publication of private health information might undermine trust in the medical system and thereby damage DHS's efforts to contain the virus. Patients may be less likely to cooperate

[10] https://www.bloomberg.com/news/articles/2020-06-24/in-virus-hotspots-businesses-sweat-return-of-consumer-jitters

with their physicians' requests for information if they suspect that their private health information will be publicly disclosed. The resulting dearth of reliable data would have the effect of both making treatment less effective on the individual level and making the public-health response more difficult to implement state-wide. In fact, publishing this information might even *work against* DHS's interest in protecting public health.

CONCLUSION

Before the close of business today, October 1, 2020, this Court should grant Plaintiffs' motion for an ex parte temporary restraining order and Plaintiffs' motion for a temporary injunction.

Dated: October 1, 2020

Respectfully submitted,

Electronically Signed
/s/ Ryan J. Walsh

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