

STATE OF WISCONSIN

SUPREME COURT

No. 2020-AP-000765

WISCONSIN LEGISLATURE,

Petitioner,

v.

SECRETARY-DESIGNEE ANDREA PALM, JULIE WILLEMS
VAN DIJK, and NICOLE SAFAR, IN THEIR OFFICIAL
CAPACITIES AS EXECUTIVES OF WISCONSIN
DEPARTMENT OF HEALTH SERVICES,

Respondents.

NON-PARTY BRIEF AND APPENDIX OF THE
WISCONSIN ASSOCIATION OF LOCAL HEALTH
DEPARTMENTS AND BOARDS AND ASSOCIATED
MUNICIPALITIES AND COUNTIES

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INTRODUCTION

This brief presents the perspective of health officers from around the State whose expertise and local knowledge are crucial to fighting this pandemic. Inhibiting the Wisconsin Department of Health Services' ("DHS") authority to immediately and comprehensively respond to a statewide health emergency will lead to a slow, chaotic, confusing, and ineffective patchwork of local health responses. We expect this will result in surges of unnecessary COVID-19 infections and deaths throughout the State, reversing the progress and forfeiting the sacrifices all Wisconsinites have made to combat this virus.

BACKGROUND FACTS¹

Epidemiological modeling shows that statewide stay-at-home orders, when largely observed by the public, mitigate the spread of the virus and recorded deaths by flattening the curve of infection.² These measures are working in Wisconsin, just like they are in other

¹ The *Amici* agree with the facts as stated in the brief submitted by the Wisconsin Medical Society and therefore offer these limited background facts.

² Lindsay Huth and Yan Wu, *Some Forecasts See Virus Upswing for States That Resisted Shutdown Measures*, Wall Street Journal (April 24, 2020), available at https://www.wsj.com/graphics/coronavirus-projections-for-shutdown-reopening-states/?adobe_mc=TS%3D1587810042%7CMCMID%3D86444046554993604754902401842990151753%7CMCORGID%3DCB68E4BA55144CAA0A4C98A5%40AdobeOrg&wsj_native_webview=androidphone&ns=prod/accounts-wsj

States around the country.³ As a result, the worst-case scenario⁴ has been averted for now.⁵



DHS’ statewide order allowed our hospitals to adequately respond to critical cases, develop workflows, and increase testing and personal protective equipment (“PPE”) capacity without being overwhelmed by a surge.⁶ There is no safety net available to Wisconsin hospitals if that surge comes.⁷ Even at the current COVID-19 caseload, many hospitals are struggling to find the PPE

³ See James Glanz, Benedict Carey, Josh Holder, Derek Watkins, Jennifer Valentino-DeVries, Rick Rojas, and Lauren Leatherby, *Where America Didn’t Stay Home Even as the Virus Spread*, New York Times (April 2, 2020), available at <https://www.nytimes.com/interactive/2020/04/02/us/coronavirus-social-distancing.html>

⁴ Wis. Dept. of Health Services, *COVID-19 Modeling* (March 26, 2020), available at <https://www.dhs.wisconsin.gov/publications/p02643.pdf>

⁵ *Dane County COVID-19 Data Dashboard* (Viewed Apr. 28, 2020 at 3:30 pm), available at <https://cityofmadison.maps.arcgis.com/apps/opsdashboard/index.html#/e22f5ba4f1f94e0bb0b9529dc82db6a3>

⁶ See A-App. 1 (letter from Dr. Conway).

⁷ Zoë Schlanger, *Begging for Thermometers, Body Bags, and Gowns: U.S. Health Care Workers Are Dangerously Ill-Equipped to Fight COVID-19*, Time (Apr. 20, 2020), available at <https://time.com/5823983/coronavirus-ppe-shortage/>

they need to keep themselves and patients safe.⁸ Rural communities face more challenges than just limited hospital beds and PPE shortages. They already serve older and sicker patients with higher rates of preventable deaths.⁹ The highest rates of COVID-19 hospitalizations occur within this population,¹⁰ making rural communities vulnerable even at lower caseloads.

The ability to have a rapid statewide response remains critical because the virus is present in communities throughout Wisconsin, with 66 of 72 counties reporting cases of infection.¹¹ On April 25, 2020, for the second day in a row, DHS reported a record number of new confirmed cases.¹² COVID-19 does not discriminate; it afflicts urban, rural, suburban, and exurban communities. No corner of Wisconsin is immune from the possibility of an outbreak. For

⁸ Associated Press, *Wisconsin Hospitals Report Shortages of PPE*, Channel3000 (Apr. 10, 2020), available at <https://www.channel3000.com/wisconsin-hospitals-report-shortages-of-ppe/>

⁹ *Marshfield Clinic CEO: COVID-19 Will Hit Rural Healthcare Hard*, Wisconsin Health News (Apr. 8, 2020), available at <https://wisconsinhealthnews.com/2020/04/08/marshfield-clinic-ceo-covid-19-will-hit-rural-healthcare-hard/>

¹⁰ See Roni Caryn Rabin, *Nearly All Patients Hospitalized With Covid-19 Had Chronic Health Issues, Study Finds*, New York Times (Apr. 23, 2020), available at <https://www.nytimes.com/2020/04/23/health/coronavirus-patients-risk.html>

¹¹ As of April 28, 2020. Available at <https://www.dhs.wisconsin.gov/covid-19/county.htm>

¹² Natalie Brophy, *Wisconsin Sees Record Number of New COVID-19 Cases for Second Day in a Row, with 331 New Infections*, Appleton Post-Crescent (Apr. 25, 2020), available at <https://www.postcrescent.com/story/news/2020/04/25/coronavirus-wisconsin-sets-record-new-cases-second-day-row/3026040001/>

example, a recent outbreak at a Green Bay meatpacking plant caused Brown County's cases to jump 900 percent between April 7 and April 22.¹³ That county now has the highest infection rate per capita in Wisconsin.¹⁴

ANALYSIS

The characteristics of COVID-19 are foundationally incompatible with a slow-footed and patchwork response that would result if the Court grants the Petitioner's request. Should DHS' powers be limited or delayed because of rulemaking, local health officials will be forced to try and control a virus based on county borders. A deadly, invisible virus will be unwittingly carried across jurisdictional boundaries¹⁵ with the movement of people, leading to greater rates of infection.

As Wisconsin local health officers, we need DHS expertise, leadership, data, and quick action to support the decisions we make

¹³ Haley BeMiller, *JBS Plant in Green Bay Linked to 147 Coronavirus Cases as Meatpacking Outbreaks Continue to Spread*, Milwaukee Journal Sentinel (Apr. 22, 2020), available at <https://www.jsonline.com/story/news/2020/04/22/green-bay-jbs-meatpacking-plant-tied-147-coronavirus-cases/3004584001/>.

¹⁴ Doug Schneider, *Brown County Seemed a Step Ahead of the Coronavirus; Suddenly, It Wasn't*, Post Crescent (Apr. 25, 2020), available at <https://www.postcrescent.com/story/news/2020/04/25/brown-county-coronavirus-how-cluster-covid-19-developed/3000721001/>

¹⁵ For example, one of the first cases in La Crosse County was connected to a hockey tournament in Milwaukee. See Mike Thompson, *Mayo Employee Recovers from COVID-19, Now Helping Others Affected by the Virus*, News8000 (April 8, 2020), available at <https://www.news8000.com/mayo-employee-recovers-from-covid-19-now-helping-others-affected-by-the-virus/>

on the front lines as we continue fighting to keep our communities safe from this statewide pandemic. We rely on the State for data analysis and guidance on how to communicate this information to the public. DHS supports our local efforts with contact-tracing, coordinating PPE, and facilitating broad statewide testing efforts. Without this, we could have counties competing against each other for these resources – a situation we have seen play out between states.¹⁶

A. The Public Health Response to COVID-19 Must Be a Statewide Response.

DHS’ authority under Wis. Stat. § 252.02(6) provides for the immediate and comprehensive response necessary to this statewide pandemic. “[T]here can be no question but that the promotion and protection of public health is a matter of statewide concern.” *State ex rel. Martin v. City of Juneau*, 238 Wis. 564, 300 N.W. 187, 190 (1941) at 190. If this is not the type of health emergency the Legislature had in mind when it created Wis. Stat. § 252.02(6)¹⁷, then what is?

¹⁶ Michael Collins, Nicholas Wu, Cara Kelly and David Heath, *Fact Check: Trump Claims Coronavirus Tests are Widely Available. They Are Not*. USA Today (Apr. 21,2020), available at <https://www.usatoday.com/story/news/politics/2020/04/21/coronavirus-trump-claims-there-plenty-tests-states-disagree/2997841001/>

¹⁷ “The department may authorize and implement all emergency measures necessary to control communicable diseases.” Wis. Stat. § 252.02(6)

By implementing Safer at Home Orders, Wisconsin has been able to avoid case surges because people are staying home, thanks to the consistent statewide order and message coming from DHS that staying at home limits further transmission of the virus.¹⁸ However, if the Court enjoins DHS' statewide order and limits its ability to respond to this ever-changing pandemic, the ongoing public health response will be left largely to the counties. A confusing and inconsistent county-by-county patchwork of regulations will result, which could endanger Wisconsinites.

Pre-COVID-19, Wisconsinites already travelled in large numbers for non-work related travel.¹⁹ Department of Transportation 2019 origin destination for Waukesha, Brown, La Crosse, Kenosha, and Marathon counties show that the majority of travel residents underwent is not "home to work" but is instead "home to other" or "other to other" for both weekdays and weekends. It is intuitive that if certain counties are "closed", individuals will be willing to travel out of their county and carry along with them a dangerous virus. This is precisely the type of movement statewide

¹⁸ See A-App. 1 (letter from Dr. Conway).

¹⁹ In an Open Records request to the Dept. of Transportation, we obtained 2019 origin destination data for Waukesha, Brown, La Crosse, Kenosha, and Marathon Counties for weekday, weekend and late night trips as related to travel for non-work purposes. See A-App. 4 (2019 DOT Origin Destination Data).

safer at home orders are meant to prevent.

Consider neighboring counties with discrepant restrictions. An asymptomatic person in a county with a local stay-at-home order could drive into the next county without a stay-at-home order, perhaps to get a haircut, go bowling, or go out to eat. As a result, the counties that loosen restrictions too soon will draw out-of-town visitors, thus increasing spread and threatening the health and safety of their local populations. Ironically, counties may choose looser restrictions because they had manageable caseloads, but with increased spread as described above, those numbers could spiral without warning and overwhelm their health care resources. Our shared objective to restore Wisconsin's economic health and prosperity will be undermined because these new outbreaks and surges could ultimately force a return to more restrictive measures. The fastest way to return to a more normal way of life is to stay stronger together, led by DHS' ability to immediately and comprehensively respond to this virus.

B. We Are Stronger Together When We Rely on the Authority the Legislature Granted DHS to Take Immediate Action During a Statewide Pandemic.

Enjoining the Safer at Home Order, as Petitioners propose, will subject Wisconsin's pandemic response to the negotiating

ability of the legislative and executive branches. Not only is such a cumbersome process not required by the separate grant of authority in Chapter 252, such a process would completely undermine the purpose of that chapter – to allow DHS to take immediate and comprehensive action to protect the public health of all Wisconsinites during a pandemic like COVID-19. *See State ex rel. Martin v. City of Juneau*, 238 Wis. 564, 300 N.W. 187, 190 (1941).

To underscore this point, consider Petitioner’s brief, which charts out the “emergency rule” process Petitioner states DHS was required to follow to combat the COVID-19 pandemic. (Petitioner’s Brief at 33-35). The many steps of this process include an automatic 10-day hold for approval of the required statement of scope (§ 227.135(2)) and a public hearing and comment period on the proposed statement of scope if requested by either chairperson of the joint committee for review of administrative rules (§ 227.24(1)(e)1d). At a minimum, the process takes approximately 20 days to complete. While that process plays out, local public health officials will be scrambling to keep our communities safe because the virus will not wait for legislative action.

A slower response will have tragic consequences. How many more Wisconsinites would be infected while waiting 20 days to enact an administrative rule? How many more hospitals would run

out of beds or ventilators while COVID-19 patients waited for a public hearing and comment period to take place? These questions are not hyperbolic – these are things that happened in communities across the world until they were able to effectively impose Safer at Home Orders to flatten the curve.²⁰

Moreover, future responses related to the pandemic will be hampered by the process proposed by the Petitioner. COVID-19 “hot spots” can arise at any time²¹ and will most certainly happen if this Court removes the ability of DHS to immediately respond to this ever-changing emergency. When that happens in one county, the Petitioner’s proposal would require DHS to tell concerned residents in that county and neighboring counties that it could not act until the Legislature approved the proposed actions.

To be sure, some public health emergencies can be handled completely and adequately at the local level because they are confined or largely confined to a single county. But this is not that emergency. Prompt and comprehensive action is the only response

²⁰ See Gabrielle Ouellette, *If Texans Do Not Stay Home, Hospital Beds Will Overflow, Austin Health Authority Says* (March 24, 2020), available at <https://www.kvue.com/article/news/health/coronavirus/texas-hospitals-could-run-out-of-beds-due-to-coronavirus/269-8a0f3aee-c7c5-40c1-ba2c-260084b8e681>

²¹ A party in Westport, Connecticut exposed 40 people. Anna Sturla, *40 People in Connecticut Exposed to Coronavirus at a Party, Officials Say*, CNN (March 25, 2020) available at <https://www.cnn.com/2020/03/25/us/connecticut-party-coronavirus-exposure/index.html>

that can possibly work when fighting a pandemic like COVID-19. Indeed, from the moment the World Health Organization declared COVID-19 a global pandemic, the CDC and eventually the White House urged a quick and unified response centered on staying at home and social distancing.²² As in other states, the ability of the state health department to act immediately and comprehensively ensures the safety and health of all Wisconsinites.

CONCLUSION

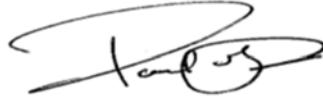
Wisconsin is suffering, but we believe that the best way forward is for the Court to honor the authority the legislature gave DHS in Wis. Stat. § 252.02 to lead a comprehensive statewide response to the most devastating public health emergency in over a century. If Emergency Order #28 is ended or modified or subjected to additional rulemaking procedures through this action, the Court will erode the sacrifices all Wisconsinites have made since Safer at Home began and severely hamper DHS' ability to act quickly as this pandemic unfolds. The Court should stand on the side of public health.

²² See Dawn Kopecki, *CDC Recommends Canceling Events with 50 or More People for the Next Eight Weeks Throughout US*, CNBC (March 16, 2020) available at <https://www.cnbc.com/2020/03/16/cdc-recommends-the-cancellation-of-events-with-50-or-more-people-for-the-next-eight-weeks-throughout-us.html>

Dated this 29th day of April, 2020.

Respectfully submitted,

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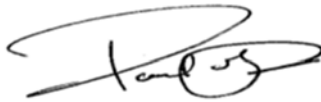
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CERTIFICATE AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Wis. Stat. § (Rule) 809.19(8)(b), (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, and maximum of 60 characters per line of body text. The length of this brief is 2,061 words.

Dated this 29th day of April, 2020.

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**CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. § (RULE) 809.19(12)**

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 29th day of April, 2020.

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WISCONSIN LEGISLATURE,

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NON-PARTY APPENDIX TO BRIEF OF THE
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The novel coronavirus (SARS-CoV2 or COVID-19) has spread globally to become a true pandemic. Individuals and communities across the world are being directly impacted through widespread infection, and the resulting morbidity and mortality associated with the disease, at a historic rate. In addition, the indirect effects are similarly devastating, with vast disruptions to normal activities.

In over 20 years as an infectious disease specialist, I have been involved in planning, management and response to many outbreaks – both domestic and international. Every infectious disease is unique, and the more experience we have with each pathogen, the easier it is to predict and plan. But with every outbreak, we have an obligation to prevent unnecessary disease, and to protect the most vulnerable.

The reasons behind why this particular COVID-19 viral pathogen is so challenging are vast and complicated. While coronavirus infections are common, and generally cause mild respiratory symptoms, this strain is far more contagious than most as well as far more pathogenic. Coronaviruses, like many respiratory viruses, tend to circulate seasonally as they are moved around the globe by travelers. The virus does not respect national, state, or local boundaries and is spread to areas with no or low incidence of infection by travel from “hot spots” or with higher incidence of infection.

Transmission of these infections is primarily through contact with other infected individuals, either by direct physical interactions or with infected secretions. Self-inoculation through hands touching face after contact with infected individuals or vectors they have contaminated is the most significant source of infection. Direct contact with aerosolized secretions after coughing, sneezing, or other means are also reported. But we are still learning about this unique strain every day.

Despite prior experiences with coronavirus outbreaks over the past 20 years, and significant financial investment, the scientific and medical communities have been unable to identify effective treatments nor vaccines against these particular pathogens. Once again, great resources and time are being invested in seeking active medications for treatment or prophylaxis, as well as effective vaccines. But even the most optimistic expectations would suggest that these are years away.

Given the unique aspects of COVID-19 transmission, shedding and severity of subsequent illness in such a wide section of the population, it became clear that outbreaks had the capacity to overwhelm health systems. Only by heroic efforts and community sacrifices in China, Italy, Spain, and other affected European countries, and now in urban centers across the US, have medical and public health professionals managed the surge of cases. Yet, in just 6 weeks, the US had more patients succumb to COVID-19 infection than our worst annual influenza seasons.



The most effective means for controlling this pandemic has been to resort to traditional public health measures. In other words, creating barriers to prevent infected individuals from contact with vulnerable persons. In use for centuries, the techniques of identifying infected

individuals, tracing their contacts, and isolating all those infected or exposed during the incubation and illness periods has proven to be effective. In the absence of being able to identify all infected individuals due to inadequate testing and tracking capability, and the fact that asymptomatic shedders represent a significant component in spread, the difficult decision to isolate and limit contacts between individuals was made by governments across the globe. Because COVID-19 is so contagious, immediate action is necessary to isolate and limit contact between individuals until adequate testing and contact tracing is available. Once the virus is introduced into a community without appropriate mitigation measures, exponential spread is to be expected and would be likely to overwhelm the community's healthcare capacity quickly.

We have been fortunate in Wisconsin, as requests from public health for social distancing and to stay at home have been widely accepted. On March 24, 2020 the Wisconsin Department of Health Services issued a "Safer at Home Order." As a result, the worst-case scenario of a massive surge of cases and deaths has been averted, for now, by early action and high levels of compliance. This has allowed health systems to manage existing patients, develop workflows and PPE capacity, and slowly increase the volume of testing that can be offered. It is clear that massive collaborative efforts between health systems and public health, and planning for a careful graded stepwise return to more social interactions, is the only way to mitigate the threat of COVID-19 to our population. Even while the DHS Safer at Home order has been effective at "flattening the curve," the virus continues to spread in Wisconsin, with markedly higher numbers of cases being reported over the past week.

These isolation measures, like those in Wisconsin's Stay at Home order, are most effective when administered uniformly and broadly on a state-wide basis. Ideally such measures would be administered on a multi-state regional basis due to interstate migration. Given the ease of transport between areas, and the need to do so for business, educational and recreational activities, escalating transmission of virus would be expected quickly after complete easing of statewide restrictions. Unless there is a public health capability to identify cases and their contacts, and to support these individuals during quarantine, ongoing statewide restrictions are the most prudent and practical mitigation measure that can be offered.

Once testing capacity is sufficient, and there are teams of trained public health professionals to manage tracking activities, then gradual easing of limitations will be reasonable. Success will largely still depend on individuals being willing to self-report illness, comply with testing requests, and most importantly maintain quarantine until being no longer contagious. And this should be done in a collaborative fashion across regions, given the open borders between states. Only through collaborative, thoughtful and unified effort will our state, and our surrounding neighbors, manage this challenge in a manner that protects our people.



While everyone is impacted by the disruptions of the past months, this type of public health emergency needs to be managed by public health experts. This group of tireless and dedicated professionals truly have all of our interests and wellness as their top priority. We owe them our gratitude, our patience, and our trust.

Thank you for your consideration. Please feel free to contact me if you have any questions or concerns.

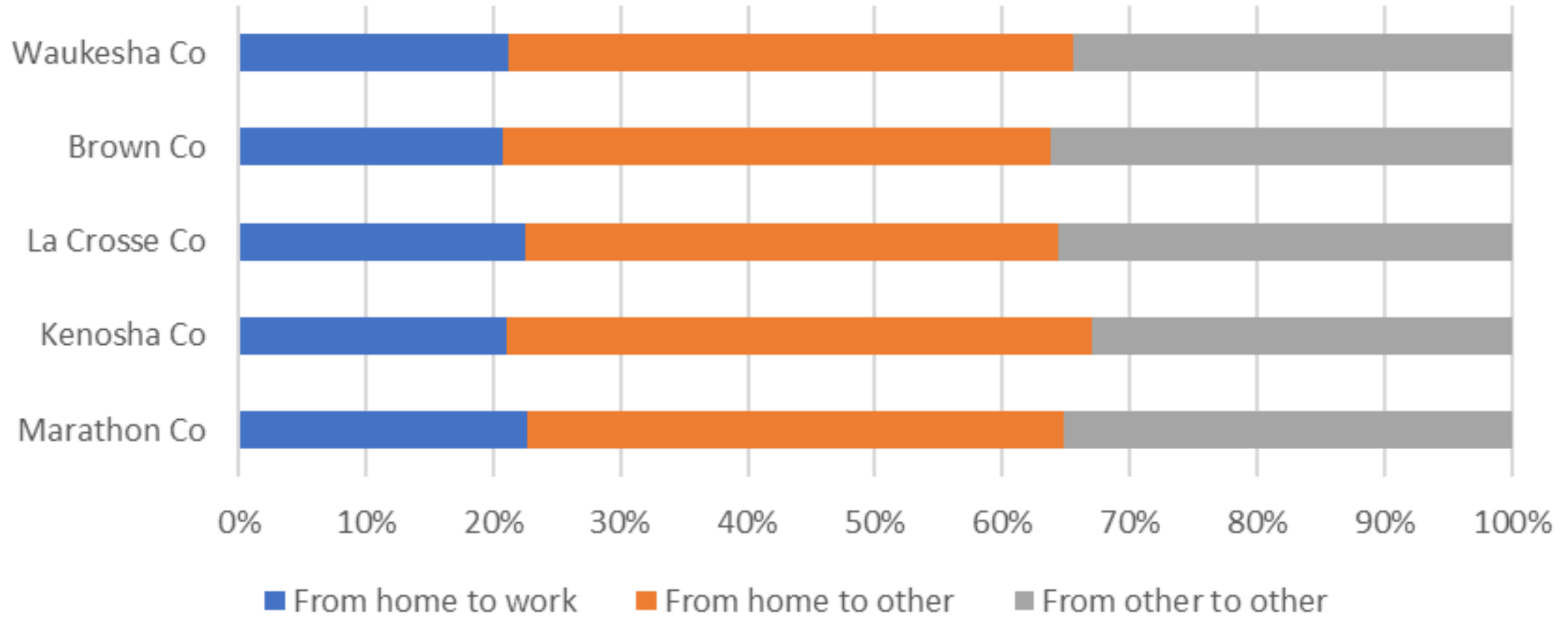
Best Regards,

A handwritten signature in black ink, appearing to read 'James H. Conway'.

James H. Conway, MD FAAP
Professor of Pediatrics - Pediatric Infectious Disease Fellowship Program Director
Associate Director for Health Sciences: UW-Madison Global Health Institute
Medical Director – UW Health Immunization Policy & Planning Committee

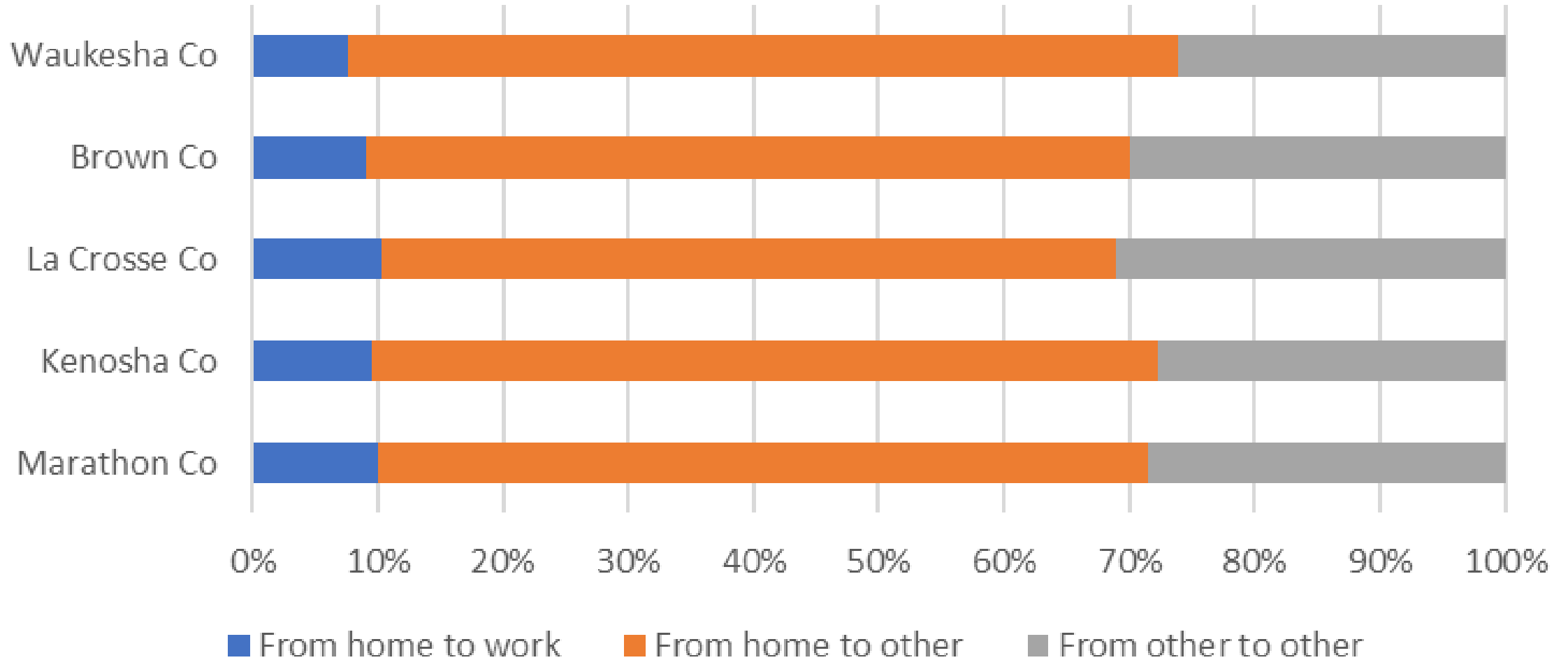
Weekday All Day Trip Purpose

Trip Ends

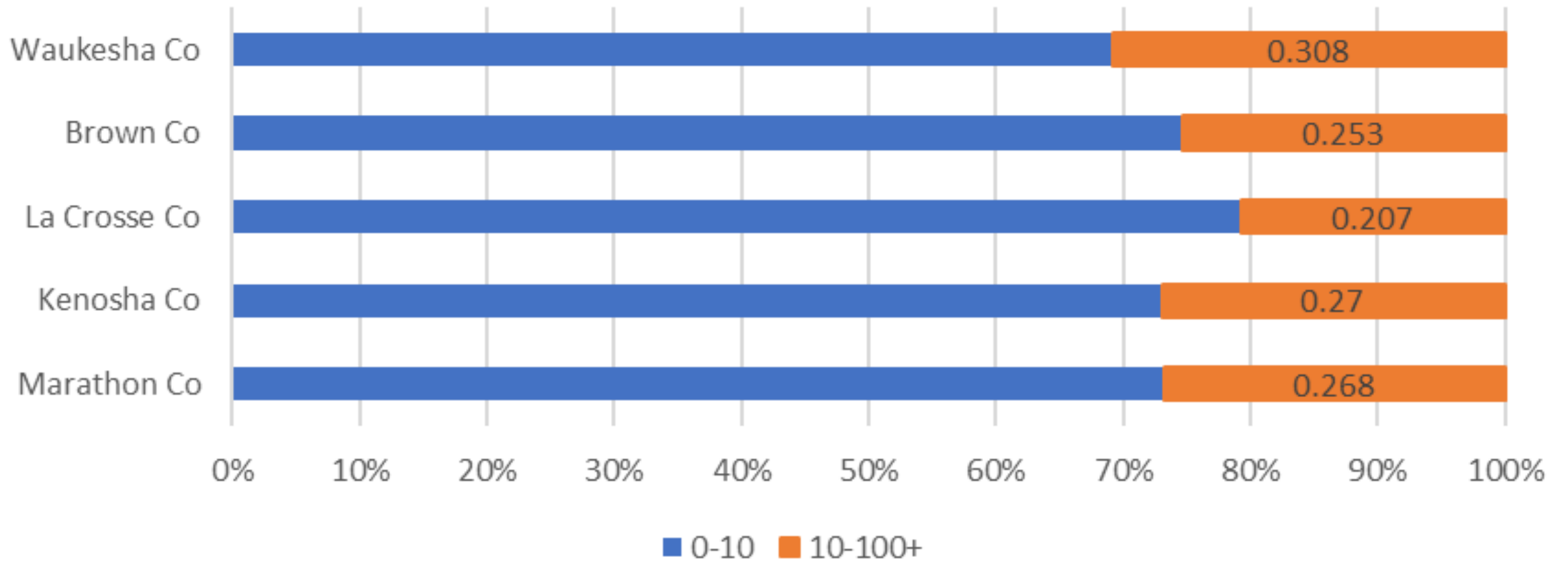


Weekend Late PM Trip Purpose

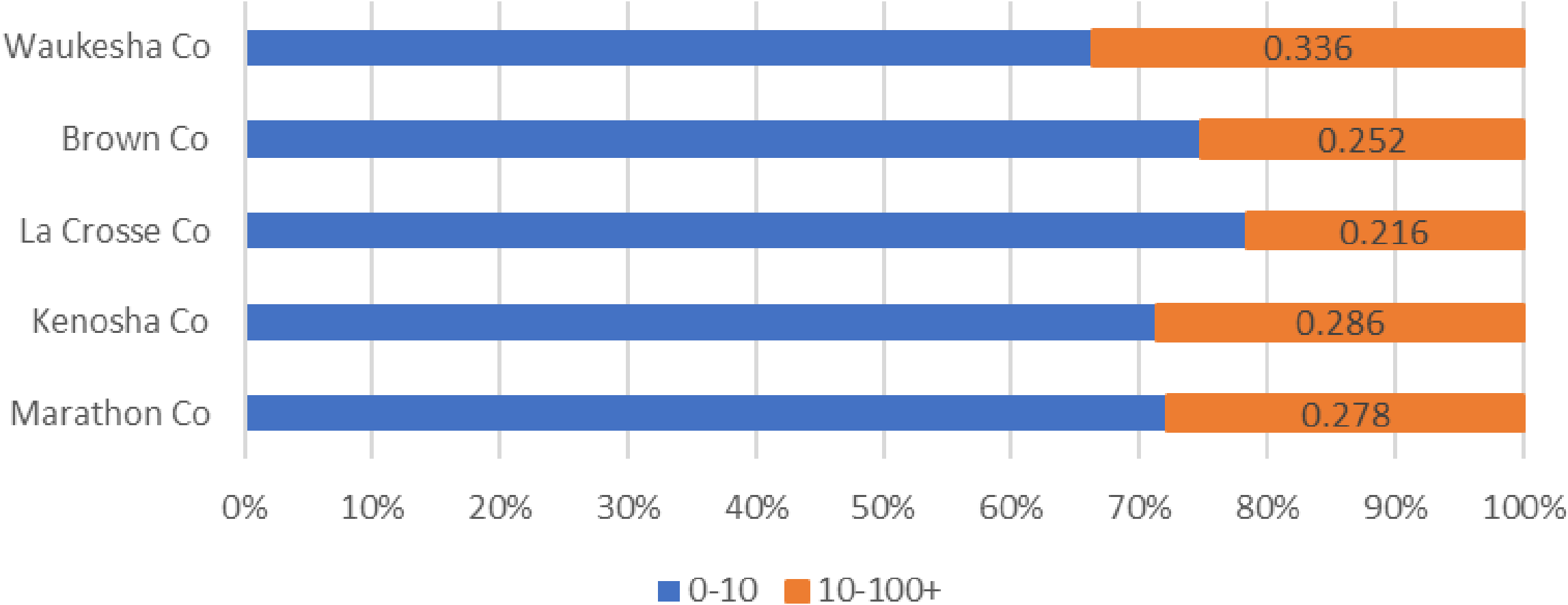
Trip Ends



Weekday All Day Trips > 10 miles

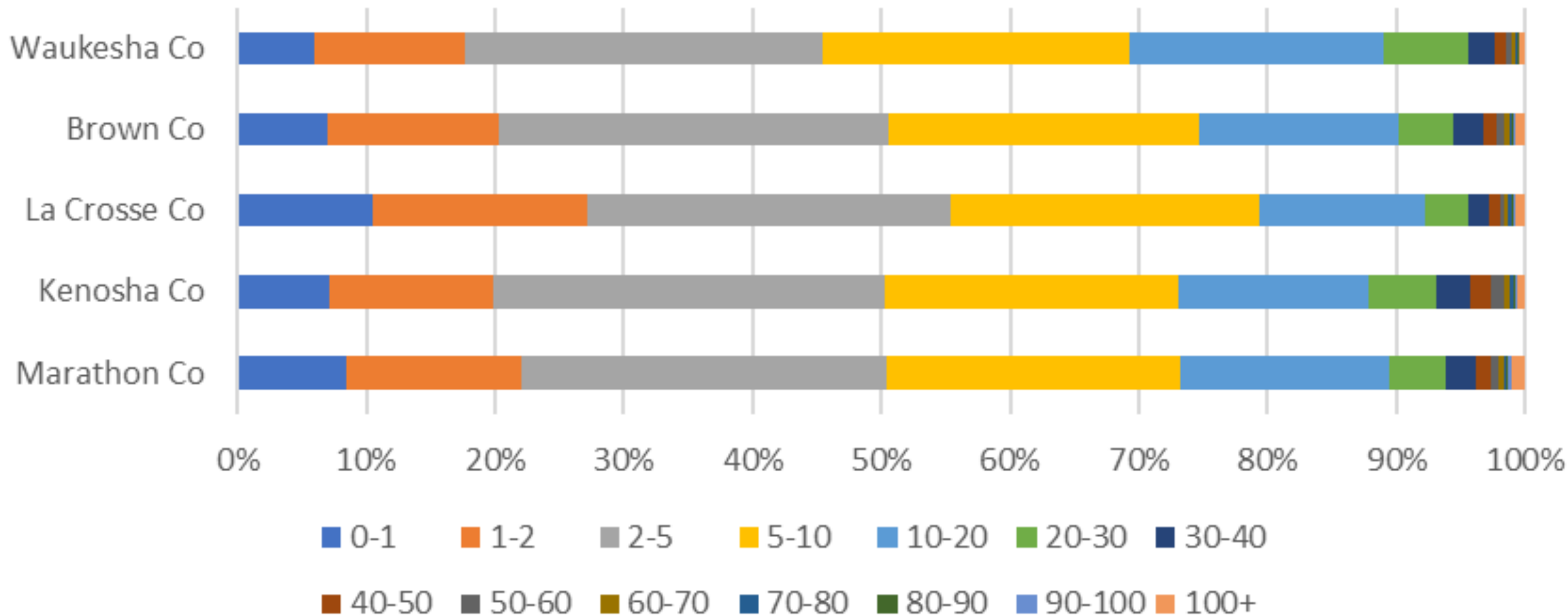


Weekend Late PM Trips > 10 miles



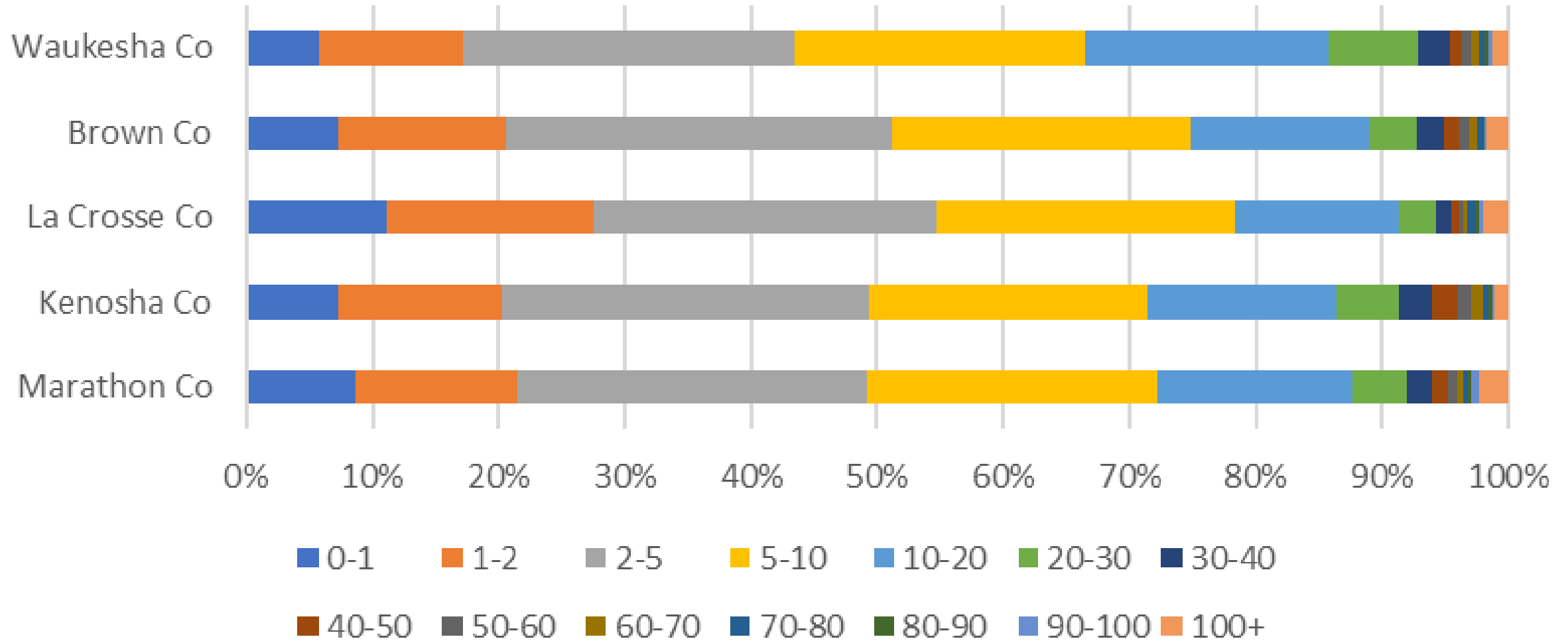
Weekday All Day Trip Length Distribution

Trip Ends

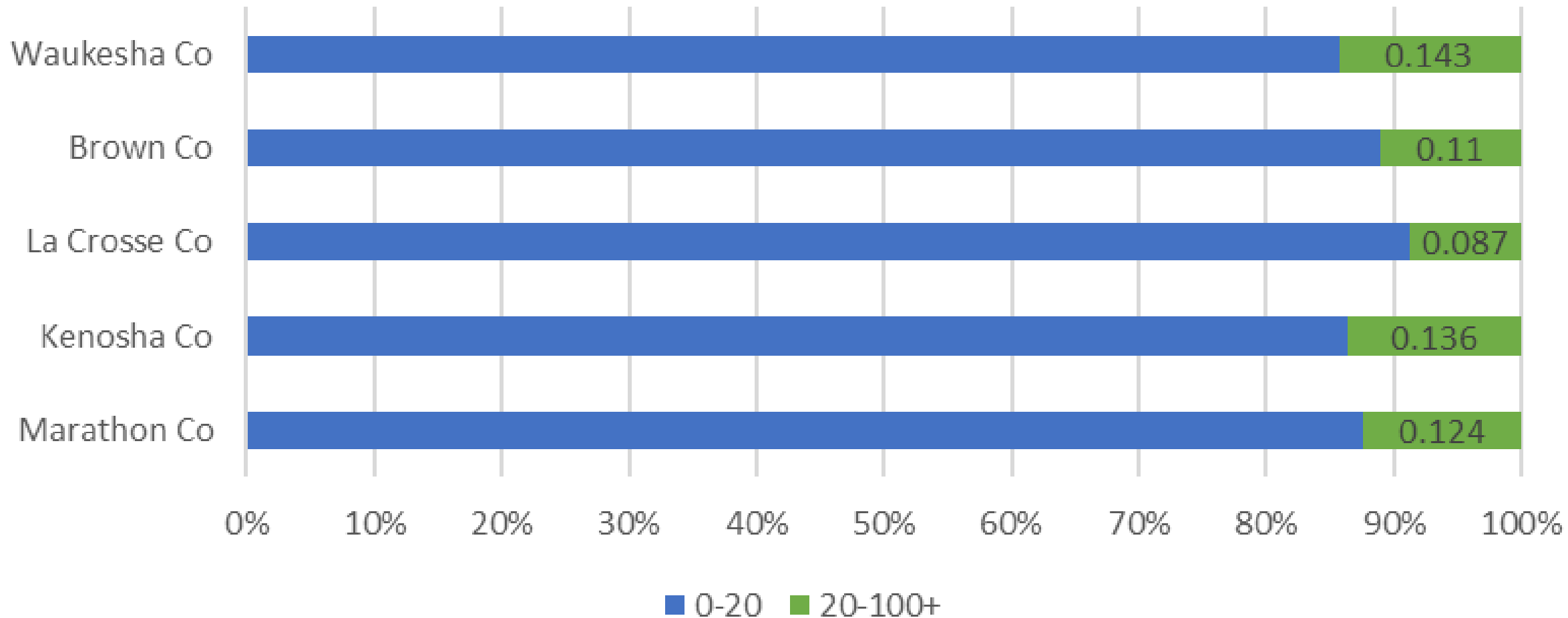


Weekend Late PM Trip Length Distribution

Trip Ends



Weekend Late PM Trips > 20 miles



LIST OF AMICI

1. Wisconsin Association of Public Health Departments and Boards
2. Outagamie County Executive Thomas Nelson
3. Washburn County Board of Supervisors Chair Thomas Mackie
4. La Crosse County Administrator Steve O'Malley
5. City of La Crosse
6. City of Racine
7. City of Madison
8. Dane County
9. Milwaukee County
10. City of Milwaukee
11. Rock County
12. City of Eau Claire
13. City of DePere
14. City of Stoughton
15. Mayor of Sun Prairie
16. City of Beloit
17. Town of Beloit
18. City of Fitchburg

CERTIFICATION TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court (if applicable); (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 29th day of April, 2020.

Respectfully submitted,



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