

RECEIVED  
04-29-2020  
CLERK OF SUPREME COURT  
OF WISCONSIN

WISCONSIN SUPREME COURT

No. 2020AP000765-OA

---

WISCONSIN LEGISLATURE,

*Petitioner,*

v.

SECRETARY-DESIGNEE ANDREA PALM; JULIE WILLEMS VAN DIJK; NICOLE SAFAR, in their official capacities as executives of Wisconsin Department of Health Services,

*Respondents.*

---

On Emergency Petition for Original Action and Emergency Motion for Temporary Restraining Order

---

**BRIEF OF *AMICI CURIAE* 24 WISCONSIN COMMUNITY, ADVOCACY, LABOR, AND MEMBERSHIP ORGANIZATIONS**

---

Douglas M. Poland  
Rathje Woodward LLC  
10 E. Doty Street, Suite 507  
Madison, WI 53703  
(608) 960-7430 (telephone)  
(608) 960-7460 (facsimile)  
dpoland@rathjewoodward.com

Richard Saks  
Hawks Quindel, S.C.  
222 E. Erie St., Suite 210  
Milwaukee, WI 53201  
(414) 271-8650 (telephone)  
(414) 271-8442 (facsimile)  
rsaks@hq-law.com

*Attorneys for Amici Curiae  
24 Community, Advocacy,  
Labor and Membership  
Organizations (Listed by  
Name on Inside Cover)*

**AMICI CURIAE**  
**ABC FOR HEALTH**  
**AFSCME COUNCIL 32**  
**AFT-WISCONSIN**  
**AFT LOCAL, 212**  
**BLACK LEADERS ORGANIZING FOR COMMUNITIES**  
**CITIZEN ACTION WISCONSIN**  
**FEEDING WISCONSIN**  
**FORWARD LATINO**  
**KIDS FORWARD**  
**LULAC WISCONSIN**  
**MILWAUKEE BRANCH OF THE NAACP**  
**MILW. INNER-CITY CONGREG'NS. ALLIED FOR HOPE**  
**ONEIDA NATION**  
**RACINE INTERFAITH COALITION**  
**RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA**  
**SOULS TO THE POLLS**  
**VOCES DE LA FRONTERA**  
**WISCAP**  
**WISCONSIN ALLIANCE FOR WOMEN'S HEALTH**  
**WISCONSIN BUILDING TRADES COUNCIL**  
**WISCONSIN EDUCATION ASSOCIATION COUNCIL**  
**Wis. FED. OF NURSES & HEALTH PROFESSIONALS**  
**WISCONSIN NURSES ASSOCIATION**  
**WISCONSIN STATE AFL-CIO.**

## TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICI CURIAE.....	1
INTRODUCTION.....	3
ARGUMENT.....	8
I. <i>AMICI</i> and their members comprise a substantial segment of Wisconsin’s population and reflect broad support for the Department’s emergency orders to slow the pandemic.....	8
II. <i>AMICI</i> represent the interests of Wisconsin residents who work in essential industries, who are among those most impacted by COVID-019 and by Emergency Order #28.....	10
III. <i>AMICI</i> ’s members and constituents belong to racial, ethnic, and socioeconomic groups that already were among the most vulnerable before the arrival of COVID-19 in Wisconsin, and that have been hardest hit by the COVID-19 pandemic.....	18
IV. Invalidating Emergency Order #28 would have Disastrous health and economic impacts on <i>AMICI</i> and Their members far more profound and devastating Than keeping the Order in place.....	26
CONCLUSION.....	32
CERTIFICATION OF SERVICE .....	35

FORM AND LENGTH CERTIFICATION.....36

CERTIFICATION REGARDING AN ELECTRONIC  
BRIEF.....37

## TABLE OF AUTHORITIES

	<i>Page</i>
<b>Other Authorities</b>	
Emergency Order #12 (the original “Safer at Home” order).....	2, 5, 32
Emergency Order #28 (the extended “Safer at Home” order).....	2, 5, 9, 10, 26, 29, 32

### **INTEREST OF *AMICI***

*Amici* consist of 24 nonpartisan community groups, membership and advocacy organizations, labor organizations, Native American tribes, and community service organizations located throughout Wisconsin that comprise and serve the needs of various demographic, geographic, and other communities in Wisconsin, primarily through providing education, empowerment, cultural enrichment, advocacy, social services, and other similar services. Collectively, *amici* speak for the interests of hundreds of thousands of Wisconsin residents who make up their membership and constituencies. *Amici* submit this brief on behalf of their members and constituents to express their full support for Emergency Order #12, issued by the Department of Health Services (the “Department”) and extended by Emergency Order #28, and for the Department’s plan to reopen Wisconsin in phases. *Amici* have a strong interest in the continuing viability and

enforcement of Emergency Orders #12 and #28, and believe that relaxing restrictions over time while not compromising the health and safety of our communities is the most appropriate strategy for their members and constituents, and will give Wisconsin the necessary time to expand testing and tracing systems, build capacity within the health care system, and secure additional personal protective equipment. *Amici* therefore submit this brief in opposition to the Legislature's petition for an original action and its motion for a temporary restraining order to enjoin the enforcement of Emergency Orders #12 and #28.

## INTRODUCTION

**“YOU DON’T MAKE THE TIMELINE. THE VIRUS MAKES THE TIMELINE.”<sup>1</sup>**

**-Anthony Fauci, Director of the National  
Institute of Allergy and Infectious Diseases**

Wisconsin is at the most critical hour of the most extreme public health and safety emergency that anyone in the state has experienced. Not since the Spanish Flu pandemic of 1918 infected 103,000 Wisconsinites, killing 8,459 of them, has Wisconsin experienced such a threat to the public safety. On Monday, April 27, the number of COVID-19 cases in Wisconsin surpassed 6,000, while 1,415 Wisconsinites have been hospitalized and 281 have died. Starting on April 22, and for six straight days, the number of

---

<sup>1</sup> THE HILL, Z. Budryk, “*You don’t make the timeline. The virus makes the timeline*,” March 26, 2020, available at <https://thehill.com/policy/healthcare/489636-fauci-you-dont-make-the-timeline-the-virus-makes-the-timeline> (last accessed April 27, 2020).



daily new cases in Wisconsin surpassed 200, continuing the upward spiked curve of this once-in-a-century pandemic.<sup>2</sup>

The threat to public health has steadily and consistently increased across Wisconsin since mid-March. Last week, the federal Centers for Disease Control (CDC) described the situation in the U.S. as follows: “Different parts of the country are seeing different levels of COVID-19 activity. The United States nationally is in the acceleration phase of the pandemic. The duration and severity of each pandemic phase can vary depending on the characteristics of the virus and the public health response.”<sup>3</sup>

Because Wisconsin is still seeing a daily rise in cases, hospitalization, and deaths, the state is not ready to move to

---

<sup>2</sup> COVID-19, WISCONSIN CASES, available at <https://www.dhs.wisconsin.gov/covid-19/cases.htm> (last accessed April 28, 2020)

<sup>3</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, Coronavirus Disease 2019 (COVID-19), Situation Summary, April 19, 2020, available at: <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html> (last accessed April 28, 2019).

the next phase. The CDC, public health experts, and scientists speak clearly with one voice on how to minimize and flatten the curve of this pandemic, given its accelerating community spread: social distancing, coupled with rigorous personal hygiene, and widespread testing are the key defenses to the continued spread of the virus.<sup>4</sup>

The continuation of the Department's Emergency Order #12 ("Safer at Home" Order), issued on March 24, 2020, and extended on April 16 by Emergency Order #28 to run through May 26, remains vital to protect the public safety, and is in conformance with the guidance of the President of the United States, the Surgeon General, the Centers for Disease Control and Prevention ("CDC"), county health departments throughout the state, and similar orders and

---

<sup>4</sup> CENTER FOR DISEASE CONTROLS AND PREVENTION, Coronavirus Disease 2019, available at: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last accessed April 28, 2020).

agreements in place in neighboring states and sovereign Indian Nations located in Wisconsin.

*Amici's* members and constituents include the broadest cross-section of our state's workforce, including teachers, skilled trades-persons, agricultural workers, health care workers, transportation and delivery workers, factory workers, social service providers, grocery clerks, and professionals. *Amici's* members also include the most vulnerable populations in Wisconsin that are most significantly impacted – economically, physically, and emotionally – by the COVID-19 pandemic and the Department's Safer at Home orders. *Amici* submit this brief in response to the sweeping claims by the Wisconsin Legislature in its Memorandum to this Court that it represents the interests and views of Wisconsin residents, and that what Wisconsin residents want, and what is best for them, is for the Safer at Home orders to be enjoined. Indeed, to the contrary,

*amici* speak to this Court with a single voice – made up of hundreds of thousands of individual voices – to make clear that the Legislature does *not* speak for them or for their interests on this issue. As people from every walk of life in Wisconsin, including a substantial number of workers who are on the front lines providing essential services day in and day out, *amici's* members and constituents are under severe economic pressure and the threat of contracting COVID-19. But as much as they will welcome the lifting of the Department's Emergency Orders and a reopening of Wisconsin's economy when it is prudent to do so, *amici* and their members and constituents value the health of their families, community, and all Wisconsinites even more. *Amici* write to the Court to emphasize that the Department's phased plan, based in medical science and executed and re-evaluated on an ongoing basis and in coordination within the broader

context of similar national, regional, and local plans, must remain in place.

## ARGUMENT

### **I. AMICI AND THEIR MEMBERS COMPRISE A SUBSTANTIAL SEGMENT OF WISCONSIN'S POPULATION AND REFLECT BROAD SUPPORT FOR THE DEPARTMENT'S EMERGENCY ORDERS TO SLOW THE PANDEMIC.**

The members and constituents of *amici* constitute Wisconsinites from all walks of life, representing a broad cross section of Wisconsin's diverse population. *Amici* include persons of all ethnicities, racial groups, Native American tribes, and religious denominations. *Amici's* members and constituents consist of the scores of thousands of essential workers who every day sacrifice and risk their health so the rest of us can safely work or attend school from our homes, pick up goods and food from curbsides at stores and restaurants, receive deliveries at our homes, and receive medical care when we need it.

The Legislature’s Memorandum in Support of its Emergency Petition for Original Action and Emergency Motion for Temporary Injunction (“Mem.”) makes sweeping statements claiming to speak for all Wisconsinites on a number of issues. For example, the Legislature sets forth its views of the “downstream societal effects” of the Safer at Home orders, Mem. at 3 and the impacts of those orders on “Wisconsin’s existing cultural and economic edifice,” *id.* at 4, as if there is but a single view – that of the Legislature – on these issues. Similarly, the Legislature correctly characterizes the current crisis as one “that affects *every* person and business in the State,” but again presumes far too much when it purports to speak for all of Wisconsin that “Emergency Order 28 is having a profound – and in many cases, ruinous – effect on ‘the community at large.’” Mem. at 24 (citations omitted).<sup>5</sup> Quite to the contrary, when it comes to fighting

---

<sup>5</sup> See also, *e.g.*, Mem. at 37 (asserting that the Safer at Home orders

the COVID-19 pandemic, the Legislature does not speak for *amici* when it so recklessly demands that this Court enjoin the Department's prudent and carefully crafted Safer at Home orders. *Amici* express their ardent belief that on the life-and-death issue of whether those orders should remain in place, the Department – not the Legislature – speaks for them, their members, and their constituents.

**II. AMICI REPRESENT THE INTERESTS OF WISCONSIN RESIDENTS WHO WORK IN ESSENTIAL INDUSTRIES, WHO ARE AMONG THOSE MOST IMPACTED BY COVID-19 AND BY EMERGENCY ORDER #28.**

Wisconsin's essential workers – employed in hospitals, clinics, grocery stores, meat-packing plants, transportation industries, and other businesses – have been on the

---

“impose undue hardships on millions of Wisconsinites”); *id.* at 61 (asserting Safer at Home orders cause “societal devastation”); *id.* at 66 (claiming, without attribution or reference, a “tragic increase in depression, substance abuse, and suicide resulting from social isolation and anxiety over lost jobs and businesses, all of which, though mainly traceable to the pandemic itself, are exacerbated by the [Department's] sweeping shutdown”).

pandemic's front lines since it arrived in Wisconsin earlier this year. These workers face severe health risks so the rest of us can stay safer by adhering to the social distancing and protective guidelines designed to flatten the curve of the pandemic that were first advocated by the United States government and quickly adopted by the State of Wisconsin.

Without deigning to address the potential catastrophic public health consequences of enjoining the Department's Safer at Home orders, the Legislature glosses over the terrible sacrifices by those essential workers who have remained on their posts during this pandemic. Adopting the ill-informed and impatient calls of some to "open Wisconsin back up for business," the Legislature ignores the reality that for scores of thousands of Wisconsinites employed in essential jobs, roughly one-third of the state workforce, Wisconsin is open for business and is visiting untold sacrifices upon these workers, their families, and their neighbors.



As of April 26, 15% of all of Wisconsin's 5,911 confirmed cases of COVID-19, consist of individuals employed as health care workers.<sup>6</sup> Health care workers include nurses, doctors, physicians, physician assistants, clinicians, health care support staff, emergency medical technicians, paramedics, dentists, dental health workers, and pharmacists.<sup>7</sup> Statistics in Wisconsin are consistent with national trends, as reported by the CDC.<sup>8</sup> Essential health care workers in nursing homes face particularly acute risks, as 8% of all COVID cases have arisen in long term care

---

<sup>6</sup> WIS. DEPT. OF HEALTH SERVS., "COVID-19: Wisconsin Cases," available at <https://www.dhs.wisconsin.gov/covid-19/cases.htm> (last accessed April 28, 2020).

<sup>7</sup> *Id.*

<sup>8</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, "Characteristics of Health Care Personnel with COVID-19 — United States, February 12–April 9, 2020," available at [https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e6.htm?s\\_cid=mm6915e6\\_x](https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e6.htm?s_cid=mm6915e6_x) (last accessed April 28, 2020).

facilities.<sup>9</sup> Wisconsin's health care workers, including members of *amici* WFNHP and AFSCME Council 32, strongly support the Safer at Home orders as essential to allow frontline caregivers and other essential workers to slow the spread of COVID-19 and flatten the pandemic curve to the point that other industries can be safely reopened.<sup>10</sup>

Moreover, public service workers charged with maintaining the safety and custody of others, and the public, including WFNHP and AFSCME members who work in childcare, child protection, mental health and county and state

---

<sup>9</sup> WIS. DEPT. OF HEALTH SERVS., "COVID-19: Wisconsin Cases," available at <https://www.dhs.wisconsin.gov/covid-19/cases.htm> (last accessed April 28, 2020).

<sup>10</sup> CITIZEN ACTION OF WISCONSIN, "Health Professionals Speak Out Against Social Distancing Protests," available at [https://www.citizenactionwi.org/news/press-release/health-professionals-speak-out-against-social-distancing-protests/?fbclid=IwAR2CZv9fcLvKUzpuYYyveRZ0-ua5IolEhUfF8Y5NKIDwmy6\\_OHlebWYGtyI](https://www.citizenactionwi.org/news/press-release/health-professionals-speak-out-against-social-distancing-protests/?fbclid=IwAR2CZv9fcLvKUzpuYYyveRZ0-ua5IolEhUfF8Y5NKIDwmy6_OHlebWYGtyI) (last accessed April 28, 2020).

corrections facilities face elevated risk of contagion, injury and death from COVID-19.

Essential workers employed in Wisconsin's meat packing industry have likewise been subjected to an inordinate risk of COVID-19 exposure. As of April 26, the number of COVID-19 cases in Brown County spiked to 776, with 189 of these being directly linked to the JBS Packerland meat-packing facility in Green Bay.<sup>11</sup> Other Wisconsin meat-packing plants in Denmark, Green Bay, and Cudahy have also witnessed substantial outbreaks pouring out of the plant and into the communities where the workers live.<sup>12</sup> *Amicus*

---

<sup>11</sup> WIS. DEPT. OF HEALTH SERVS., "COVID-19: Wisconsin Cases,"; MILWAUKEE JOURNAL SENTINEL, "*JBS Packerland Closed Indefinitely as OSHA Investigates Outbreak*," April 26, 2020, available at <https://www.jsonline.com/story/news/2020/04/26/jbs-packerland-closed-indefinitely-osa-investigates-outbreak/3030066001/> (last accessed April 28, 2020).

<sup>12</sup> WISCONSIN PUBLIC RADIO, *Federal Regulators Investigating 6 Sites Including Several Meatpacking Plants In Wisconsin Hundreds Of COVID-19 Cases Linked To Meat-Processing Plants*, D. Kaeding, April 25, 2020, available at <https://www.wpr.org/federal-regulators->

Voces de la Frontera has worked closely with the meat packers – many of whom are immigrants and members of Voces – to call attention to the sacrifices and public health risks of lifting the stay at home orders for other non-essential businesses across the state.

Enjoining the Safer at Home orders will not return Wisconsin to economic normalcy but will exponentially replicate the growth of COVID-19 cases currently experienced by workers in the essential industries. The Legislature’s requested relief is inconsistent with the current federal guidance from both President Trump and the CDC on guidelines for state governments to “adjust restrictive community mitigation measures in a controlled way that

---

[investigating-6-sites-including-several-meatpacking-plants-wisconsin](#)  
(last accessed April 28, 2020).

supports the safe reopening of communities when appropriate, supporting American reentering civic life.”<sup>13</sup>

The CDC and White House Guidelines state that reopening must meet four conditions:

1. Incidence of infection is “genuinely low.”
2. A “well-functioning” monitoring system capable of “promptly detecting any increase in incidence” of infection.
3. A public health system that is “reacting robustly” to all cases of covid-19 and has surge capacity to react to an increase in cases.
4. A health system that has enough inpatient beds and staffing to rapidly scale up and deal with a surge in cases.”<sup>14</sup>

These Guidelines for “Opening Up America Again” and proceeding to a limited phased opening also require a downward trajectory of documented cases within a 14-day

---

<sup>13</sup> See, CDC, THE WHITE HOUSE, “*Guidelines: Opening Up America Again*,” April 14, 2020, available at <https://www.whitehouse.gov/openingamerica/> (last accessed April 28, 2020).

<sup>14</sup> *Id.*

period and a decreasing percentage of positive tests as a percent of total tests within a 14-day period.<sup>15</sup>

Wisconsin has not yet satisfied any of these conditions. The incident of infection is not “genuinely low,” and has not dropped even once since March 15, 2020.<sup>16</sup> The epidemic curve is still increasing in Wisconsin and has not yet reached its peak. On April 22, for the first time, new COVID-19 cases reported by DHS surpassed 200, and continued its upward trajectory for six straight days.<sup>17</sup> It is dangerous and irresponsible to put all people at risk by reopening the economy prematurely.

The state’s monitoring system also remains incapable of detecting increases, as testing has not yet even reached 1%

---

<sup>15</sup> *Id.*

<sup>16</sup> WIS. DEPT. OF HEALTH SERVS., “COVID-19: Wisconsin Cases,” available at <https://www.dhs.wisconsin.gov/covid-19/cases.htm> (last accessed April 28, 2020).

<sup>17</sup> *Id.*

of the population and the state's capacity for contact tracing remains woefully inadequate.<sup>18</sup> The lack of widespread testing means that Wisconsin public health authorities do not know the true percentage of the population that is infected and contagious, as testing criteria in Wisconsin is limited to several distinct classes of patients, including hospitalized patients, residents of long-term care facilities and other congregate settings, health care workers and first responders, utility workers, and post-mortem testing.<sup>19</sup>

---

<sup>18</sup> See <https://www.dhs.wisconsin.gov/covid-19/providers.htm> (last accessed April 28, 2020); MILWAUKEE JOURNAL-SENTINEL, April 23, 2020, A. Lutheran & C. Spivak, "*Health officials can track where coronavirus is spreading by interviewing patients. Some in Milwaukee say that never happened.*" available at <https://www.jsonline.com/story/news/health/2020/04/23/coronavirus-patients-not-contacted-covid-19-victims-wait-interviewed-milwaukee-health-department/5150125002/> (last accessed April 28, 2020).

<sup>19</sup> See <https://www.dhs.wisconsin.gov/covid-19/providers.htm> (last accessed April 28, 2020).

**III. AMICI'S MEMBERS AND CONSTITUENTS BELONG TO RACIAL, ETHNIC, AND SOCIOECONOMIC GROUPS THAT ALREADY WERE AMONG THE MOST VULNERABLE BEFORE THE ARRIVAL OF COVID-19 IN WISCONSIN, AND THAT HAVE BEEN HARDEST HIT BY THE COVID-19 PANDEMIC.**

*Amici's* members and constituent groups belong to racial, ethnic, socio-economic, and political groups that, even before the COVID-19 pandemic hit, were among the most vulnerable in Wisconsin. The arrival of COVID-19 in Wisconsin has only magnified those pre-existing disparities, exacerbating the hardships on *amici's* members' and constituents' financial, physical, and emotional well-being. For example, even before COVID-19 began its assault on Wisconsin, the CDC reported that underlying health conditions such as obesity and diabetes were more prevalent among minority racial and ethnic groups.<sup>20</sup> The CDC has

---

<sup>20</sup> See <https://www.cdc.gov/minorityhealth/CHDIReport.html> (last accessed April 28, 2020).



identified those underlying health conditions as ones that place people at a high-risk for severe illness from COVID-19.<sup>21</sup>

More specifically, in Milwaukee County, African-Americans constitute 26% of the population, yet as of April 8, accounted for 69% of all COVID-19-related deaths in Milwaukee County, and twice as many positive tests for COVID-19 compared to whites.<sup>22</sup> As of April 26, 489 Latinos residing in Milwaukee County tested positive, representing nearly 25% of all positive COVID-19 cases, despite constituting 15% of the total population.<sup>23</sup> These

---

<sup>21</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html> (last accessed April 27, 2020).

<sup>22</sup> UNIVERSITY OF WISCONSIN-MILWAUKEE, CENTER FOR ECONOMIC DEVELOPMENT, J. Rast, “*Milwaukee’s Coronavirus Racial Divide A Report on the Early Stages of COVID-19 Spread in Milwaukee County*,” available at <https://uwm.edu/ced/wp-content/uploads/sites/431/2020/04/COVID-report-final-version.pdf> (last accessed April 28, 2020).

<sup>23</sup> See MILWAUKEE COUNTY COVID-19 DASHBOARD, available at <https://county.milwaukee.gov/EN/COVID-19> (last accessed April 28,

demographic statistics in Milwaukee regarding COVID-19 exposure are typical of nationwide trends. The CDC confirms a significantly disproportionate burden of illness, hospitalization, and death rates among African-Americans and Latinos compared to the rest of the population, especially with respect to three specific areas.<sup>24</sup>

*First*, with respect to living conditions, African-Americans and Latinos in Milwaukee reside in more densely populated, segregated neighborhoods without proximity to quality grocery stores and hospitals. Many households are multi-generational, making it difficult to provide separate

---

2020); *see also* MILWAUKEE JOURNAL-SENTINEL, A. Luthern, “*UWM report finds 'disturbing patterns,' links to racial inequality and segregation in the spread of COVID-19 in Milwaukee*,” April 21, 2020, available at

<https://www.jsonline.com/story/news/health/2020/04/21/racial-inequality-segregation-linked-covid-19-spread-milwaukee-county-wisconsin-uwm/2997085001/> (last accessed April 28, 2020).

<sup>24</sup> CENTERS FOR DISEASE CONTROL & PREVENTION, “*COVID-19 in Racial and Ethnic Minority Groups*,” available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> (last accessed April 28, 2020).

space to protect older family members who may be sick, while a disproportionate number of individuals reside in congregate living environments such as long-term care facilities or prisons.<sup>25</sup>

*Second*, amici's members' and constituents' employment has been disproportionately impacted by COVID-19, as workforce statistics demonstrate. Nationwide, nearly 25% of all African-American and Latino workers are employed in service-sector jobs, compared to just 16% for the rest of the population. African-Americans, who constitute 12% of the national workforce, represent 30% of all licensed practical nurses and vocational nurses. Latinos, who are heavily concentrated in Wisconsin's dairy farm workforce, represent 17% of the nationwide workforce but constitute 53% of all agricultural workers. Moreover, minority workers are far less likely to have paid sick leave and thus are more

---

<sup>25</sup> *Id.*

likely to continue to work even when they are sick for any reason.<sup>26</sup>

The disproportionate concentration of minority and lower-income workers amongst the essential workforce bears a direct relationship to two key dynamics implicating work circumstances during the pandemic: first, lower-paid jobs in general are less amenable to work-at-home; and second, a disproportionate number of essential workers are concentrated in those lower-paying jobs involving significant social contact with co-workers and the public. This means that for millions of lower-paid jobs in healthcare, child care, food preparation, meatpacking, personal care, factory production, and agriculture, one of two results can occur: layoffs if the industry is deemed non-essential, or, work in congregated occupational environments where social

---

<sup>26</sup> *Id.*

distancing is impossible and the risk of exposure heightened.<sup>27</sup>

**Third**, disparities in health and well-being that existed before COVID-19 further contribute to the increased vulnerability of minority groups to the COVID-19 illness and death. Compared to whites, Hispanics are almost 3 times as likely to be uninsured, and African Americans are almost twice as likely to be uninsured. Serious underlying and chronic medical conditions have substantially higher prevalence rates which produce higher death rates.<sup>28</sup> Approximately 1 in 3 members of the workforce are deemed essential workers, and have continued to report to work,

---

<sup>27</sup> THE BROOKINGS INSTITUTION, B. Avdiu & G. Nayyar, “*When face-to-face interactions become an occupational hazard: Jobs in the time of COVID-19*,” March 30, 2020, available at <https://www.brookings.edu/blog/future-development/2020/03/30/when-face-to-face-interactions-become-an-occupational-hazard-jobs-in-the-time-of-covid-19/> (last accessed April 28, 2020).

<sup>28</sup> CENTERS FOR DISEASE CONTROL & PREVENTION, “*COVID-19 in Racial and Ethnic Minority Groups*,” available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> (last accessed April 28, 2020).

subject to the risks of COVID exposure. A disproportionate percentage of these workers – including grocery store clerks, personal care workers, less skilled health care workers, factory and agricultural workers – were already low-paid and at an economic disadvantage earning lower wages and carrying less health insurance before the crisis hit.<sup>29</sup>

*Amici's* membership and constituent groups comprise precisely these workers in Wisconsin's lower income communities, and they are the ones facing the greatest risks, concentrated in essential industries where social distancing is not possible, as their jobs require close physical contact with co-workers and the public. At a time when the curve of positive COVID-19 cases continues to climb, the opening of restaurants, bars, retail stores, salons, gyms, factories, and

---

<sup>29</sup> THE BROOKINGS INSTITUTION, A. Tomer & J. Kane, "*How to protect essential workers during COVID-19*," March 31, 2020, available at <https://www.brookings.edu/research/how-to-protect-essential-workers-during-covid-19/> (last accessed April 28, 2020).

offices would create new and unacceptable risks of COVID exposure that would subject all Wisconsinites to magnified risks of illness and death, while heaping even greater hardships on those bearing disproportionate amounts of economic hardship, illness, suffering, and deaths.

**IV. INVALIDATING EMERGENCY ORDER #28  
WOULD HAVE DISASTROUS HEALTH AND  
ECONOMIC IMPACTS ON *AMICI* AND THEIR  
MEMBERS FAR MORE PROFOUND AND  
DEVASTATING THAN KEEPING THE ORDER IN  
PLACE.**

If this Court were to enter an injunction barring enforcement Emergency Order #28, it would have at least the following four deleterious impacts on *amici* and their members and constituents, far more harmful than keeping the Order in place:

*First*, it would frustrate the efforts by *amici* to coordinate their efforts to protect their own members and constituents from being exposed to the COVID-19 virus, and

the attendant health risks, with the similar efforts being mounted by the White House, the federal government, the Wisconsin DHS, and neighboring states.

The highest levels of the federal government – the White House and the CDC – have issued guidelines stressing that stay-at-home orders should remain in place until widespread testing is coupled with a downward trend in cases, hospitalization, and deaths for at least 14 days.<sup>30</sup> Those same guidelines recommend that Americans remain at home to the extent they can, and propose to re-open the economy in phases in accordance with “data-driven conditions” the White House and CDC recommend that each region or state should satisfy before proceeding to a phased opening.<sup>31</sup>

---

<sup>30</sup> See <https://www.whitehouse.gov/wp-content/uploads/2020/04/Guidelines-for-Opening-Up-America-Again.pdf> (last accessed April 28, 2020).

<sup>31</sup> *Id.*



The importance of coordinating the re-opening of aspects of the Wisconsin economy with the federal and other states' economies cannot be stated strongly enough. The ability of people to travel among communities and states has caused Wisconsin and other states in the Midwest to reach an agreement to collaborate on a phased re-opening of their respective economies.<sup>32</sup> Similarly, recognizing the interconnected nature of the risk to the citizens of Wisconsin and the citizens of the sovereign American Indian nations located within the geographic boundaries of Wisconsin, the tribes have adopted resolutions based upon public health recommendations, available information, and data that similarly require the tribes' populations to shelter in place for

---

<sup>32</sup> *See*

<https://www.jsonline.com/story/news/politics/2020/04/16/wisconsin-governor-tony-evers-joins-midwest-states-plan-coronavirus-economy-recovery-michigan/5149460002/> (last accessed April 28, 2020); *see also* Affidavit of Julie Willems Van Dijk in Support of Respondents' Response to Petition for Original Action ("Willems Van Dijk Aff."), April 28, 2020, ¶ 32.

various lengths of time.<sup>33</sup> Thus, it is critical that the efforts of DHS and *amici* to loosen restrictions on business, movement, work, and other activities within their respective economies be closely coordinated. Comity and mutual respect, not judicial fiat, should be the mechanism by which these restrictions are relaxed.

*Second*, given the special health vulnerabilities of the populations represented by *amici* caused by long-standing structural inequities and concentration in essential jobs involving substantial contact with the public, the populations represented by *amici* will be subject to an even higher risk of contracting COVID-19 if Emergency Order 28 is enjoined. *Amici* and their members and constituents, facing this special

---

<sup>33</sup> See, e.g., <https://oneida-nsn.gov/dl-file.php?file=2020/04/03-26-20-A-Extension-of-March-12th-Declaration-of-Public-Health-State-of-Emergency.pdf> (last accessed April 28, 2020) (Oneida Nation); <https://files.constantcontact.com/882d7eec701/5351ce44-536e-431e-b739-1062280752b6.pdf> (last accessed April 28, 2020) (Red Cliff Band of Lake Superior Chippewa Indians).

and heightened vulnerability, strongly disfavor the course of action and relief sought by the Legislature, preferring to prioritize the health of their families and communities over the overwhelmingly financial concerns raised by the Legislature.

*Third*, essential workers and the minority community in Wisconsin are shouldering the brunt of the incidence of COVID-19 and deaths caused by the disease. Although this certainly impacts the physical health of all of *amici's* members and constituents, the proliferation of COVID-19 takes an emotional and mental toll as well on both people diagnosed with the disease and on their families. Those effects are magnified when combined with the incidences of occupational exposure, relative economic challenges, lack of access to health insurance, lack of resources, and need for employment experienced by these populations. Although the Legislature notes mental health impacts from economic

uncertainty and anxiety, it fails to acknowledge the incredibly significant toll that the stress, anxiety, fear, and worry have on the mental health and well-being of Wisconsinites and their loved ones who contract COVID-19. Again, *amici* and their members and constituents strongly prefer to have to address their own financial anxieties caused by the Wisconsin non-essential sectors of the economy remaining largely closed rather than to have to deal with that *plus* further anxieties caused by the additional spread of COVID-19 that inevitably would come with the Safer at Home restrictions being lifted.

*Fourth*, and finally, *amici* likewise eagerly await the time when Wisconsin's non-essential businesses begin to reopen, and welcome doing so only when the persistent and continuing spike of COVID-19 cases begins to subside and flatten. That moment has not yet arrived, and until it does, the social distancing and restrictions on our daily activities must remain in place. *Amici* and their members and

constituents understand that as a society, Wisconsinites must continue to take adhere to this sensible regimen by remaining “Safer at Home.” If we do not, we risk the likelihood that this pandemic will last far longer, and cause far more harm, than if we continue our current course until the medical science tells us we can stop.<sup>34</sup>

### CONCLUSION

In Emergency Orders #12 and #28, the Department has drawn from the best available science and information, and in coordination with the federal government, sovereign Native American tribes within Wisconsin, and neighboring states, has adopted a phased plan to re-open Wisconsin’s economy to minimize the economic impact and health impacts to Wisconsin residents. As members of the most exposed and vulnerable populations in Wisconsin, *amici* and their

---

<sup>34</sup> See Willems Van Dijk Aff. ¶ 31; Affidavit of Ryan P. Westergaard in Support of Respondents’ Response to Petition for Original Action, April 28, 2020, ¶¶ 35, 39.

members and constituents have a strong interest in ensuring that those Emergency Orders remain in effect.

Dated: April 29, 2020.

RATHJE WOODWARD LLC

*Electronically signed by Atty. Douglas M. Poland*

Douglas M. Poland  
State Bar No. 1055189

Mailing Address:

10 E Doty Street  
Suite 507  
Madison, WI 53703  
(608) 960-7430 (telephone)  
(608) 960-7460 (facsimile)  
dpoland@rathjewoodward.com

HAWKS QUINDEL, S.C.

*Electronically signed by Atty. Richard Saks*

Richard Saks, SBN 1022048

Mailing Address:

222 E. Erie St.  
Suite 210  
Milwaukee, WI 53201  
(414) 271-8650 (telephone)  
(414) 331-4405 (cell)  
(414) 271-8442  
rsaks@hq-law.com

*Attorneys for Amici Curiae 24 Wisconsin  
Community, Advocacy, Labor, and Membership  
Organizations*

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on April 29, 2020 I delivered a paper original and ten copies of the foregoing submission to the Clerk of Court.

I hereby certify that on April 29, 2020, I caused three true and correct copies of the foregoing submission to be delivered to the following counsel of record by first-class US Mail, postage prepaid:

Ryan J. Walsh  
Amy C. Miller  
Eimer Stahl LLP  
10 East Doty Street  
Suite 800  
Madison, WI 53703

Charlotte Gibson  
Assistant Attorney General  
Wisconsin Department of  
Justice  
P.O. Box 7857  
Madison, WI 53707-7857

*Attorneys for Respondents*

Eric M. McLeod  
Lane E. Ruhland  
Husch Blackwell LLP  
P.O. Box 1379  
33 East Main Street  
Suite 300  
Madison, WI 53701

*Attorneys for Petitioner  
Wisconsin Legislature*

*Electronically signed by*  
*Atty. Douglas M. Poland*  
Douglas M. Poland



### **FORM AND LENGTH CERTIFICATION**

I certify that the foregoing brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the foregoing brief, exclusive of the caption, Tables of Contents, and Table of Authorities, is 4272 words.

Dated: April 29, 2020.

*Electronically signed by*  
*Atty. Douglas M. Poland*  

---

*Douglas M. Poland*

**CERTIFICATION OF COMPLIANCE WITH WIS.  
STAT. § 809.19(12)(f)**

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. § 809.19(12)(f).

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: April 29, 2020.

*Electronically signed by*  
*Atty. Douglas M. Poland*  

---

*Douglas M. Poland*