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**STATE OF WISCONSIN
SUPREME COURT**

Case No. 2020AP765-OA

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.

**BRIEF OF *AMICI CURIAE* DISABILITY RIGHTS
WISCONSIN, THE ARC WISCONSIN, THE ARC, AND
DISABILITY AND AGING ORGANIZATIONS**

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INTEREST OF *AMICI CURIAE*

Amici are 32 organizations that represent, provide direct services to, and advocate for the rights of people with disabilities and older adults. A complete list of the *amici* is set forth in the Appendix to this brief, along with a brief description of each organization. *Amici* share a vital interest in ensuring that their rights and interests receive due consideration from judges and other governmental decision-makers. As set forth in greater detail in the motion for leave, *amici* have in-depth knowledge and experience with the barriers faced by the populations they serve, including the unique vulnerabilities they face as a result of the COVID-19 pandemic. *Amici* respectfully submit that an informed understanding of these grave risks is relevant and important to the Court's consideration of the legal issues presented in this case, particularly the equitable considerations the Court must

weigh in deciding whether to enjoin enforcement of Emergency Order 28.

SUMMARY OF ARGUMENT

The risk of catastrophic loss of human life from the increased spread of COVID-19 if Emergency Order 28 (the “Order”) is enjoined must weigh heavily in balancing the equities and determining whether there is irreparable harm to the public from the Order. The Court also should consider that this risk is greater for people with disabilities and older adults—populations for whom the pandemic presents unique barriers.

Should the Order be enjoined, more Wisconsinites will inevitably contract the virus and people with disabilities and older adults will experience life-threatening consequences at a far higher rate than the rest of the population. This will, in turn, overwhelm an already overburdened healthcare system (dealing with limited supplies of crucial equipment), which

will disproportionately harm people with disabilities and older adults who face an exponentially higher risk of contracting the virus in a life-threatening capacity that requires hospitalization.

The spread of COVID-19 is especially dangerous to people with disabilities and older adults for several reasons. First, for health-related reasons, people with disabilities and older adults are at greater risk of serious complications and death if exposed to the virus. Second, they are more likely than other adults to live in congregate settings, such as group homes or nursing homes where COVID-19 rates of infection and fatality have been disproportionately high and will only worsen if the Order is enjoined. Third, people with disabilities and older adults, whether living in congregate or community-based settings, often require assistance from a workforce that cannot maintain social distance while supporting them in their daily lives. The nationwide shortage

of personal protective equipment (“PPE”) puts both staff and those they are supporting at higher risk of contracting the virus, which will only be exacerbated if the Order is enjoined. Fourth, people with disabilities and older adults are at greater risk of being denied life-saving medical treatment if an uncontrolled outbreak forces rationing of medical care, due to the likelihood of discrimination. Finally, people with disabilities and older adults are more likely to live in poverty and experience homelessness, which is an additional risk factor for contracting COVID-19. For all these reasons, risks to the lives of persons with disabilities and older adults would only be heightened if this Court were to enjoin the State’s efforts to reduce the spread of COVID-19.

The Court should give the risks outlined above serious weight in deciding whether to grant Petitioner such relief.

ARGUMENT

I. THE COURT'S EQUITABLE ANALYSIS SHOULD WEIGH HEAVILY THE RISK OF CATASTROPHIC HARM TO HUMAN LIFE AMONG PEOPLE WITH DISABILITIES AND OLDER ADULTS IF THE STATE'S ORDER IS ENJOINED

In deciding whether to grant injunctive relief, the Court must weigh the relevant equities and must deny the injunction unless the movant has shown that equity affirmatively favors its issuance. Although Petitioner here briefly acknowledges that the order it seeks to enjoin was issued for the “important purpose” of “reducing the spread of COVID-19,” Petitioner’s analysis of the equities does not discuss the risks posed by the spread of that virus. (Pet’r Mem. at 65-66.) Those risks should weigh heavily in this Court’s analysis.

Temporary injunctions “are not to be issued lightly but only to restrain an act that is clearly contrary to equity and good conscience.” *Bartell Broadcasters, Inc. v. Milwaukee*

Broad. Co., 13 Wis. 2d 165, 171, 108 N.W.2d 129, 132 (1961). 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, 700 (1979).

In analyzing the equities here, Petitioner focuses on the condition of Wisconsin’s economy and on the mental health challenges citizens face in these unusual times, although Petitioner acknowledges that these difficulties are “mainly traceable to the pandemic itself.” (Pet’r Mem. at 65-66.) However, Petitioner ignores the damaging impact on individuals’ physical and mental health caused by the risks of exposure to the virus for people with disabilities, as catalogued below.

Amici share Petitioner’s concerns for the mental health and economic well-being of Wisconsinites. In fact, many of those experiencing some of the worst mental health and

financial impacts—including the psychological strain of isolation, the postponement of important medical care, and job loss—are *amici*'s constituents, and their well-being is of the utmost priority to *amici*. Yet these harms are far outweighed by the loss of life and overwhelming demands on the healthcare system that *amici*'s constituents would inevitably experience should the Order be enjoined. Moreover, enjoining the Order will only further strain the economy, as research shows that economic outcomes are better where social distancing is in place to reduce mortality. Premature abandonment of social distancing measures “will inflict needless human suffering, prolong the epidemic, and generate needless economic loss.”¹

¹ Marc Jarsulic, Michael Madowitz, and Christian E. Weller, *Social Distancing To Fight the Coronavirus Saves Lives and Preserves the U.S. Economy*, Center for American Progress (Mar. 31, 2020), available at <https://www.americanprogress.org/issues/economy/news/2020/03/31/482475/social-distancing-fight-coronavirus-saves-lives-preserves-u-s-economy>.

Threats to human life are entitled to the utmost weight in the equitable analysis. *See, e.g., Todd by Todd v. Sorrell*, 841 F.2d 87, 88 (4th Cir. 1988) (harms “measured only in money” are “inconsequential by comparison” to those involving loss of life); *McLaughlin by McLaughlin v. Williams*, 801 F. Supp. 633, 644 (S.D. Fla. 1992) (“The balance of the equities also tilts decidedly in Plaintiff’s favor. Defendant’s monetary risk is substantial; however, Plaintiff’s life is at stake.”); *see also Rockhill Care Ctr., Inc. v. Harris*, 502 F. Supp. 1227, 1231 (W.D. Mo. 1980) (in case where the balance of the equities was “weighted almost entirely in favor of” one party, “the balance would of course shift” if “life-threatening conditions” were present). And where such harms are borne disproportionately by marginalized populations, the Court should take particular care to ensure that its equitable analysis fully accounts for them. *See, e.g., Fraihat v. U.S. Immigration & Customs Enf’t*, No. No. EDCV

19-1546, 2020 WL 1932570, at *28 (C.D. Cal. Apr. 20, 2020) (equities weighed in favor of ensuring “survival is maximized” in face of COVID-19 threat; “there can be no public interest in exposing vulnerable persons to increased risks of severe illness and death”).

The threat to life here is potentially catastrophic. According to official estimates, by the beginning of this week, 6,081 people in Wisconsin had tested positive for COVID-19, of whom 1,415 were hospitalized and 281 died.² Nationally, COVID-19 had infected nearly a million people and caused approximately 54,000 deaths.³ Experts caution that these estimates likely undercount dramatically the

² Wisconsin Department of Health Services, *Outbreaks in Wisconsin*, <https://www.dhs.wisconsin.gov/outbreaks/index.htm> (last visited Apr. 28, 2020).

³ Centers for Disease Control and Prevention, *Cases of Coronavirus Disease (COVID-19) in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Apr. 28, 2020).

dangers COVID-19 poses, especially given the extremely limited availability of testing.⁴

Considering this context as well as the relevant guidance from public health officials and experts, the potentially tragic consequences to human life of enjoining the Order must be given appropriate weight in the equitable analysis. In particular, as discussed below, the COVID-19 pandemic poses uniquely acute and devastating risks to the life and health of persons with disabilities and older adults. These heightened risks are further compounded by race, with African Americans more likely to have a disability than any other group—a disparity that only widens with age.⁵ Generally, “[p]eople of color with disabilities seem to face

⁴ See Emma Brown *et al.*, *Coronavirus death toll: Americans are almost certainly dying of covid-19 but being left out of the official count*, Wash. Post (Apr. 5, 2020).

⁵ National Disability Institute, *Financial Inequality: Disability, Race and Poverty in America* (Feb. 2019) at 9, <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/02/disability-race-poverty-in-america.pdf>.

double marginalization, discrimination and stigma that lead to poor socioeconomic outcomes.”⁶ Across the United States, African Americans are dying of COVID-19 at a rate of more than twice their population share.⁷ In Wisconsin, African Americans are six percent of the population, but 25 percent of cases and 39 percent of deaths.⁸ By contrast, Wisconsin’s white population is 81 percent of the state, but 51 percent of cases and 57 percent of deaths.⁹

II. THE GRAVE RISKS POSED BY THE SPREAD OF COVID-19, WHICH THE CHALLENGED ORDER SEEKS TO LIMIT, ARE ESPECIALLY CATASTROPHIC FOR PEOPLE WITH DISABILITIES and OLDER ADULTS

The challenged Order seeks to reduce the spread of COVID-19 by requiring social distancing, consistent with

⁶ *Id.* at 12.

⁷ See APM Research Lab, *The Color of Coronavirus* (Apr. 28, 2020), <https://www.apmresearchlab.org/covid/deaths-by-race#black>.

⁸ See Samantha Artiga et al., *Growing Data Underscore that Communities of Color are Being Harder Hit by COVID-19* (Apr. 21, 2020), <https://www.kff.org/coronavirus-policy-watch/growing-data-underscore-communities-color-harder-hit-covid-19>.

⁹ See *id.*

guidance from the Centers for Disease Control and Prevention (“CDC”).¹⁰ *Amici* are gravely concerned that enjoining the Order would inevitably lead to more Wisconsinites contracting the virus and spreading it to others. Given the high rate of deaths and hospitalizations caused by COVID-19 (disproportionately so for people with disabilities and older adults), that increase in infections could also overwhelm the already overburdened healthcare system in Wisconsin.

These concerns are especially alarming for people with disabilities and older adults, groups that comprise well over a million Wisconsinites. In Wisconsin, 924,695 people (16% of the population) are over the age of 65, including 263,372 in that age group who have a disability. And among those aged

¹⁰ Centers for Disease Control and Prevention, *Social Distancing, Quarantine, and Isolation*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited Apr. 28, 2020).

18-64 in Wisconsin, an additional 341,121 individuals have a disability.¹¹

People who fall into one or both of these groups face substantially greater risks to their lives and health from the COVID-19 pandemic, for several reasons.

A. People with Disabilities and Older Adults Are at Greater Risk of Serious Complications and Death if Exposed to COVID-19.

Older adults face such risks due to their age alone—indeed, eight out of ten persons who died due to COVID-19 in the United States have been adults age 65 and older.¹²

People with disabilities at any age also are at greater risk. A recent study found, for example, that the COVID-19 fatality rate for people with intellectual and developmental

¹¹ Wisconsin Department of Health Services, *Demographics of Aging in Wisconsin*, <https://www.dhs.wisconsin.gov/aging/demographics.htm> (last visited Apr. 28, 2020).

¹² Centers for Disease Control and Prevention, *Older Adults*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited Apr. 28, 2020).

disabilities (“I/DD”) was far higher than that of the general population.¹³ People with mobility, sensory, and mental disabilities are more likely to have additional underlying health conditions that leave them vulnerable to COVID-19, such as heart disease, stroke, diabetes, or cancer.¹⁴

Across Wisconsin, older adults and people with disabilities (as well as their loved ones) are afraid that if the spread of COVID-19 is not controlled, they will not be able to survive.¹⁵ These fears unfortunately are well-founded based

¹³ Dalton Stevens & Scott D. Landes, *Potential Impacts of COVID-19 on Individuals with Intellectual and Developmental Disability: A Call for Accurate Cause of Death Reporting*, Lerner Center for Public Health Promotion (Apr. 14, 2020), <https://lernercenter.syr.edu/2020/04/14/potential-impacts-of-covid-19-on-individuals-with-intellectual-and-developmental-disability-a-call-for-accurate-cause-of-death-reporting>.

¹⁴ Centers for Disease Control and Prevention, *People with Disabilities*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html> (last visited Apr. 28, 2020)

¹⁵ Survival Coalition of Wisconsin Disability Organizations, *Press Packet: COVID-19 impact on people with disabilities & older adults*, http://www.survivalcoalitionwi.org/wp-content/uploads/2020/04/SurvivalCoalition_PressPacket_COVIDsurvey_042220-1.pdf (last visited Apr. 28, 2020).

on the available research and data regarding COVID-19, and they deserve serious consideration in the equitable analysis.

For example, Houa of Dane County is concerned that her brother Xue, who has a developmental disability, may be “extremely hard” to care for if he gets COVID-19 because he tends to be resistant to treatment: “I know he would try to remove . . . a mask or ventilator so I am very fearful for his health and safety.” Maureen of Sheboygan County expressed her anxiety about underlying conditions: “I am missing half my right lung, breathing for me is always difficult. I am in self isolation as if I catch COVID-19 I will likely not survive.” Susan of Eau Claire County is concerned about her daughter Katie, who has Down syndrome and autism: “We worry about what would happen to her if we got sick or if she got sick and had to go to the hospital with one of us.”¹⁶

¹⁶ The Arc Wisconsin, *People with Disabilities Statewide Share their COVID-19 stories* (Apr. 21, 2020), <https://arcwi.org/2020/04/21/join-us->

B. Congregate Settings Put People with Disabilities and Older Adults at Greater Risk.

Many people with disabilities and older adults also are at greater risk because they live in congregate settings—for example, group homes, nursing homes, intermediate care facilities, or psychiatric facilities—that have seen rampant spread of COVID-19 and a disproportionate number of deaths.

Congregate settings such as these can be particularly dangerous places during a pandemic because they contain large numbers of vulnerable people in a setting where social distancing is nearly impossible. The Administrator of the U.S. Centers for Medicare and Medicaid Services recently stated that nursing homes in particular “have been ground

[thursday-as-people-with-disabilities-statewide-share-their-covid-19-stories.](#)

zero for COVID-19.”¹⁷ Indeed, on the national level roughly a fifth of the deaths from COVID-19 have been tied to nursing homes or other long-term care facilities.¹⁸ The problem is frequently exacerbated by the scarcity of testing and PPE in these facilities, as well as by inadequate staff training.¹⁹ These issues will only worsen if the Order is enjoined and staff members and visitors coming into and out of the facilities experience far greater risk of infection in the wider community, with potentially deadly consequences when they return to the facilities, leading to entirely new outbreaks. Enjoining the Order may mean that visitor restrictions currently in place at these facilities will also be lifted, allowing for more rampant spread.

¹⁷ Centers for Medicare & Medicaid Services, *Trump Administration Announces New Nursing Homes COVID-19 Transparency Effort* (Apr. 19, 2020), <https://www.cms.gov/newsroom/press-releases/trump-administration-announces-new-nursing-homes-covid-19-transparency-effort>.

¹⁸ Farah Stockman *et al.*, ‘*They’re Death Pits*’: *Virus Claims at Least 7,000 Lives in U.S. Nursing Homes*, N.Y. Times (Apr. 17, 2020).

¹⁹ *Id.*

The problems facing individuals in congregate settings are not limited to nursing homes. Similar COVID-19 outbreaks have been reported in Intermediate Care Facilities for Individuals with Intellectual Disabilities (“ICFs”), including in Illinois (where the outbreak has been so significant that the National Guard was called in),²⁰ Massachusetts (where nearly half of the residents in a state-operated ICF are infected),²¹ and several other states. The same is true for psychiatric facilities in numerous states.²² In New York, where COVID-19 has been most widespread, nearly a fifth of patients at one psychiatric hospital were

²⁰ Zak Koeske, *Illinois National Guard activated for COVID-19 response at Park Forest developmental center with more than 100 cases*, Chicago Tribune (Apr. 17, 2020).

²¹ Kevin Rothstein, *Nearly half of developmentally disabled at state home infected with coronavirus*, ABC-WCVB (Apr. 17, 2020), <https://www.wcvb.com/article/nearly-half-of-developmentally-disabled-at-state-home-in-massachusetts-infected-with-coronavirus/32178605>.

²² Kit Ramgopal, *Coronavirus in a psychiatric hospital: ‘It’s the worst of all worlds’*, NBC News (Apr. 17, 2020), <https://www.nbcnews.com/health/mental-health/coronavirus-psychiatric-hospital-it-s-worst-all-worlds-n1184266>.

either confirmed or suspected COVID-19 cases.²³ Similar problems exist at group homes as well: One study found that residents of such facilities were five times more likely than the general population to develop, and to die from, COVID-19.²⁴

These dangers are very real for many families in Wisconsin. There are 373 nursing homes in this State, with more than 29,000 beds. In addition, there are approximately 4,000 assisted living facilities, which include adult family homes, adult day cares, community-based residential facilities and residential care apartment complexes.²⁵ Wisconsin also has 12 psychiatric hospitals.²⁶ Congregate settings (including

²³ See Danny Hakim, *'They Want to Forget Us': Psychiatric Hospital Workers Feel Exposed*, N.Y. Times (Apr. 24, 2020).

²⁴ Danny Hakim, *'It's Hit Our Front Door': Homes for the Disabled See a Surge of Covid-19*, N.Y. Times (Apr. 8, 2020).

²⁵ Daphne Chen & Rory Linnane, *Wisconsin officials won't say which nursing homes have been infected by coronavirus. For families, 'the anxiety is enormous,'* Milwaukee Journal Sentinel (Apr. 20, 2020).

²⁶ Substance Abuse and Mental Health Services Administration, *National Mental Health Services Survey (N-MHSS): 2018* at 102 (Oct. 2019),

group homes and larger intermediate care facilities) served 3,625 Wisconsinites with I/DD.²⁷ There have been hundreds of infections and at least 79 deaths from COVID-19 at such facilities.²⁸

Families who have aging loved ones or loved ones with disabilities in these facilities report that “the anxiety” regarding the COVID-19 situation there “is enormous.”²⁹ Dan from Eau Claire County has noted: “I am [orally] nonverbal and need 24/7 care and support. . . . I worry if any of my [ICF] staff become ill that they will not be able to be with me.” Charlotte from Dunn County stated: “I have Down syndrome and dementia, I require my [ICF] staff to help me

<https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NMHSS-2018.pdf>.

²⁷ See National Residential Information Systems Project, *RISP Profile FY 2016: Wisconsin* (updated Feb. 14, 2018), <https://risp.umn.edu/state-profiles>.

²⁸ See, e.g., Daphne Chen & Rory Linnane, *Wisconsin reports 79 coronavirus deaths in nursing homes and other group facilities, but numbers still incomplete*, Milwaukee Journal Sentinel (Apr. 22, 2020).

²⁹ Daphne Chen & Rory Linnane, *supra* note 25.

with bathing, dressing, and helping in the bathroom. I am scared that with the lack of PPE my staff will be unable to help me.”³⁰

C. PPE Shortages Increase Risks for People with Disabilities, Older Adults, and their Support Staff.

People with disabilities and older adults in both congregate and community-based settings also are at greater risk because they often have extensive interaction with a workforce that supports them in their daily lives—including direct-support professionals, personal care assistants, and social workers—and that has had trouble accessing sufficient PPE. The nationwide shortage of PPE has been so severe that adequate supplies often are not available even for hospital workers, let alone non-medical personnel.³¹ This shortage

³⁰ The Arc Wisconsin, *supra* note 16.

³¹ Zoe Schlanger, *Begging for Thermometers, Body Bags, and Gowns: U.S. Health Care Workers are Dangerously Ill-Equipped to Fight*

will only become more severe if measures to restrict the spread of COVID-19 are enjoined, leading to increased spread of the virus in the community at large and, thereby, creating greater risks for people who depend on such personnel (as well as the personnel themselves) to provide necessary supports for daily life.

Wisconsin already is facing significant challenges in acquiring sufficient PPE. Roughly a third of this State's hospitals have a week's worth or less of critical supplies like masks and gowns.³² That number is substantially higher in some parts of the state, such as the North Central region,

COVID-19, TIME (Apr. 20, 2020),
<https://time.com/5823983/coronavirus-ppe-shortage>.

³² Wisconsin Hospital Association, *COVID-19 Situational Awareness Update*, <https://www.wha.org/COVID19Update> (last visited Apr. 28, 2020).

where more than half of hospitals are running out of such supplies.³³

The difficulty hospitals face in acquiring these critical supplies is only greater for the home healthcare and support services on which people with disabilities and older adults rely. As one employee of a home health agency explained last week, “home health care is left at the bottom of the totem pole,” with the result that older adults and people with disabilities are cared for by staff that daily faces potential COVID-19 exposure with no protection.³⁴ And if staff members at a nursing home or home health service do not have adequate PPE, “they’re generating COVID-19 patients who are coming to the hospital.”³⁵

³³ See Megan Stringer, *Aspirus says its PPE stock will last ‘beyond 30 days’ as supplies run low across Wisconsin*, Wausau Daily Herald (Apr. 17, 2020).

³⁴ Schlanger, *supra* note 31.

³⁵ *Id.*

This problem poses a serious health risk in Wisconsin, where more than 85,000 people rely on in-home personal care, home health, and similar services to stay in their own homes and out of hospitals and nursing homes.³⁶ If more of these support staff are infected with the virus—as is inevitable if stay-at-home measures are lifted—people with disabilities and older adults who rely on their support will be placed at greater risk of being infected. Additionally, without access to these critical supports, individuals with disabilities and older adults with high support needs currently living on their own or in smaller community-based settings may need to be placed in a congregate facility for care which, in turn, only further increases their risk of contracting the virus.

Robin of Dane County notes that she is “very frustrated and scared” because her “caregivers don’t even

³⁶ Survival Coalition of Wisconsin Disability Organizations, *supra* note 15.

have masks to wear” and she is at very high risk because of her disability: “I need 24-hour care and I live by myself. I have no family – no back up plan if someone didn’t show up.” Tim of Outagamie County has used a ventilator “24/7” since 2004 and expressed concerns: “I have a tracheotomy in my throat that the ventilator attaches to. That has to be changed once a month or I can get life threatening infections. Right now, I can’t get any replacements. . . . My home health agency is having problems getting gloves. Any medical procedures require the use of gloves. Without them, certain procedures are not getting done that will lead to a whole host of other potentially dangerous problems.” Maria of Rock County is concerned for her son with asthma: “I fear both for my son's health and the health of his support persons. Support persons are also frontliners who have had close contact with other high risk people in his apartment complex.”³⁷

³⁷ The Arc Wisconsin, *supra* note 16.

**D. People with Disabilities and Older Adults
Are at Greater Risk of Experiencing
Discrimination in Medical Care.**

People with disabilities and older adults also are at greater risk of experiencing discrimination in medical care if the increased spread of COVID-19—inevitable if the Order is enjoined—leads to rationing of health care due to shortages of medical equipment, like ventilators, or personnel.

Rationing plans proposed in some states, including Wisconsin, have raised concerns that people with disabilities or older adults may face particular difficulties accessing equal care.³⁸ These concerns are rooted in a long history of discrimination against people with disabilities in the American healthcare system.³⁹

³⁸ See, e.g., Elaine Godfrey, *Americans With Disabilities are Terrified*, The Atlantic (Apr. 3, 2020), <https://www.theatlantic.com/politics/archive/2020/04/people-disabilities-worry-they-wont-get-treatment/609355>.

³⁹ See, e.g., Pauline W. Chen, *Disability and Discrimination at the Doctor's Office*, N.Y. Times (May 23, 2013).

While COVID-19 has not yet overwhelmed Wisconsin hospitals to the point that they have had to implement rationing, state officials have begun to develop rationing guidelines in case shortages in life-saving technology do occur.⁴⁰ As many of the *amici* have argued to state officials, such guidelines must not discriminate against persons with disabilities and older adults.⁴¹ But avoiding the need to make difficult rationing decisions is in the best interest of all Wisconsinites and supports the need for state officials to take appropriate measures in advance to ensure that such a desperate situation never develops in Wisconsin hospitals.

Amici have seen firsthand the worries that the specter of rationing causes for people with disabilities in Wisconsin.

⁴⁰ Shamane Mills, *State Officials Developing Guidelines for Scarce Medical Equipment*, Wisconsin Public Radio (Apr. 10, 2010), <https://www.wpr.org/state-officials-developing-guidelines-scarce-medical-equipment>.

⁴¹ David Wahlberg, *Who should get ventilators? Group led by UW bioethicist helping state decide*, Wisconsin State Journal (Apr. 6, 2020).

Sara from Outagamie County expressed concern that she might not meet hospital criteria for a ventilator because of her age or disability.⁴² Jason and Julie from Eau Claire County stated that when it comes to medical issues, “[w]e already feel like we are third rate citizens and we are so worried we are going to be denied a ventilator if we test positive, because of our disabilities.”⁴³

E. People with Disabilities and Older Adults are at Greater Risk of Homelessness.

Finally, people with disabilities and older adults also experience poverty and homelessness at far higher rates than the rest of the population, putting them at even greater risk for COVID-19 infection, especially if the Order is enjoined.

⁴² The Arc Wisconsin, *supra* note 16.

⁴³ *Id.*

The CDC recognizes homelessness as a risk factor for COVID-19 exposure.⁴⁴ Nationally, 27 percent of people with disabilities live in poverty, compared to 12 percent of those without disabilities.⁴⁵ This poverty, combined with the crisis in housing affordability, often forces people with disabilities into homelessness in Wisconsin and elsewhere.⁴⁶

In addition, people 50 and older make up more than 30 percent of the nation's homeless population and 45% of adults age 65 and older are "economically vulnerable" with incomes below 200% of the poverty threshold.⁴⁷

⁴⁴ Centers for Disease Control and Prevention, *People Experiencing Homelessness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/homelessness.html> (last visited Apr. 28, 2020).

⁴⁵ Institute on Disability, 2019 Annual Report on People with Disabilities in America 15 (2020),

<https://disabilitycompendium.org/sites/default/files/user-uploads/2019%20Annual%20Report%20---%20FINAL%20ALL.pdf>

⁴⁶ Gina Schaak *et al.*, *Priced Out: The Housing Crisis for People With Disabilities* 8, 43-45 (Dec. 2017),

<http://www.tacinc.org/media/59493/priced-out-in-2016.pdf>.

⁴⁷ Simmons University, *Aging on the Streets: America's Growing Older Homeless Population* (Sept. 29, 2016),

<https://socialwork.simmons.edu/blog/aging-on-the-streets-americas-growing-older-homeless-population>; *see also* Justice in Aging, *How to*

Homelessness among older adults is increasing. The share of homeless individuals over 50 rose from 22.9 percent to 33.8 percent from 2007–2017. The number of people over 62 living in emergency shelters or transitional housing also rose by about 69 percent over the same decade.⁴⁸

Homelessness, in turn, only further increases the risk that people with disabilities and older adults face from COVID-19, especially if the Order is enjoined. The Court should consider these harms in its analysis.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to weigh heavily the risk to human life, particularly among people with disabilities and older adults, in balancing

Prevent and End Homelessness Among Older Adults (Apr. 2016), <https://www.justiceinaging.org/wp-content/uploads/2016/04/Homelessness-Older-Adults.pdf>.

⁴⁸ Joint Center for Housing Studies of Harvard University, *Housing America's Older Adults 2019*, https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Housing_Americas_Older_Adults_2019.pdf.

the equities relevant to Petitioner's request for injunctive relief.

Respectfully submitted,

Date: April 29, 2020

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**CERTIFICATION OF COMPLIANCE WITH
RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. §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 upon the parties.

Dated this 29th day of April, 2020.

Electronically signed by

KRISTIN M. KERSCHENSTEINER

STATE BAR NO. 1035208

**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(8)(B) AND (C)**

I hereby certify that this brief conforms to the Requirements of Wis. Stat. §§809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of this brief is 4,389 words.

Dated this 29th day of April, 2020.

Electronically signed by

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Appendix: *Amici Curiae*

Disability Rights Wisconsin (“DRW”) is the statewide non-profit organization designated by the Governor of the State of Wisconsin to act as the congressionally-mandated protection and advocacy system for Wisconsin residents with mental illness, developmental disabilities and other permanent physical disabilities or impairments, pursuant to Wis. Stats §51.62, 29 U.S.C. §794e, 42 U.S.C. §15041 *et. seq.*, and 42 U.S.C. §10801 *et. seq.* Through the pursuit of administrative, legal and other appropriate remedies DRW seeks to address the issues facing people with disabilities in Wisconsin and to ensure their rights. In the past, this court has benefitted from the amicus participation of DRW on issues involving people with disabilities including, most recently, *C.S. v Winnebago County*, 2020 WI 33, 940 NW2d 875 (2020).

The **Arc of the United States (“The Arc”)** is the nation’s largest organization of and for people with intellectual and developmental disabilities (“I/DD”). The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community. The Arc has a vital interest in ensuring that all individuals with I/DD receive the protections and supports to which they are entitled by law. The Arc has 15 chapters throughout Wisconsin, including The Arc Wisconsin.

The **Arc Wisconsin** supports people with I/DD and their families and advocates for public policies and systemic changes that provide the opportunity to learn, live, and work inclusively in their communities. Since 1960, The Arc

Wisconsin has served individuals and their families through our locally affiliated chapters across the state.

The Aging and Disability Professionals Association of Wisconsin (“ADPAW”) members support older adults, people with disabilities and their families throughout the State of Wisconsin. ADPAW members advocate on issues, policies, and systems that affect ADPAW customers’ ability to live, work and remain a vital member of their community.

The American Association of People with Disabilities (“AAPD”) works to increase the political and economic power of people with disabilities. A national cross-disability organization, AAPD advocates for full recognition of the rights of over 61 million Americans with disabilities.

The Autistic Self Advocacy Network (“ASAN”) is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN’s advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals and others with disabilities to participate fully in community life and enjoy the same rights as others without disabilities.

The Autism Society of America’s Greater Wisconsin, South Central Wisconsin, and Southeastern Wisconsin Affiliates are *amici* here. The Autism Society has

been improving the lives of all affected by autism for over 50 years and envisions a world where individuals and families living with autism are able to maximize their quality of life, are treated with the highest level of dignity, and live in a society in which their talents and skills are appreciated and valued. Through its strong nationwide network of Affiliates, the organization provides advocacy, education, information and referral, support, and community at national, state and local levels. Wisconsin affiliates based in Milwaukee, Madison, and the Fox Valley provide help through support groups, help lines, conferences, and social events across the state.

The Civil Rights Education and Enforcement Center (“CREEC”) is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC’s efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have access to all programs, services, and benefits of public entities, and remain safe during the current pandemic. CREEC lawyers have extensive experience in the enforcement of Title II of the Americans with Disabilities Act and believe the arguments in this brief are essential to realize the full promise of that statute.

Disability Rights Advocates (“DRA”) is a non-profit public interest center that specializes in high-impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment,

transportation, education, employment, technology and housing.

Family Voices of Wisconsin, Wisconsin's Family to Family Health Information Center and an affiliate of national Family Voices, helps families who have children with disabilities and/or special health care needs navigate health care and community supports and services by providing training, both in person and online, and information. The family-run organization also supports families in their own advocacy journey and promotes family-centered care and family/professional partnerships.

In Control Wisconsin is a group of individuals and organizations in Wisconsin who aim to bring about systemic policy change in Wisconsin so that people of any age or need for support get more control over their support and their lives. We support increased awareness of self-direction so that frail elders, people with developmental disabilities and people with physical disabilities have the opportunity to decide what long-term care program is the right fit for their lives and what level of self-direction they want.

The **Judge David L. Bazelon Center for Mental Health Law** is a national public interest organization founded in 1972 to advance the rights of individuals with mental disabilities. The Center advocates for laws and policies that provide people with psychiatric or intellectual disabilities the opportunities and resources they need to participate fully in their communities. Much of its litigation and policy advocacy is based on the Americans with Disabilities Act's guarantees of nondiscrimination and reasonable accommodation.

Justice in Aging's principal mission is to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of legal aid attorneys and other local advocates, we seek to ensure the health and economic security of older adults with limited income and resources. Since 1972, Justice in Aging (formerly the National Senior Citizens Law Center) has worked to promote the independence and well-being of low-income elderly and persons with disabilities, especially women, members of the LGBTQ community, people of color, and people with limited English proficiency. Justice in Aging works to ensure access to Medicaid, Medicare, Social Security and SSI, benefits programs that allow low-income older adults to live with dignity and independence. In addition, the organization seeks to ensure their access to a stable work force to meet their long-term care needs. Justice in Aging is concerned about the impact of prematurely lifting stay-at-home orders in Wisconsin because of the likely harmful impact on older adults.

The **League of Progressive Seniors ("LPS")** is a network of elders from the Milwaukee area. LPS advocates for investment in critical public services and democratic decision-making at all levels of government. LPS has organized direct actions to protect Obamacare, Medicaid, local services for seniors and to reform state revenue policies that impact community services.

Mental Health America of Wisconsin ("MHA") is an affiliate of the nation's leading community-based non-profit dedicated to helping all Americans achieve wellness by living mentally healthier lives. MHA's work is driven by its commitment to promote mental health as a critical part of overall wellness, including: prevention services for all, early

identification and intervention for those at risk, integrated care, and treatment for those who need it and recovery as the goal.

The **National Alliance on Mental Illness (“NAMI”)** **Wisconsin** was founded in Madison, Wisconsin in 1979. NAMI is the nation’s largest grassroots mental health organization dedicated to building better lives for the millions of Americans affected by mental illness. NAMI’s mission is to advocate for access and system changes needed to provide services, provide support, and educates families, persons living with mental health conditions and the public about stigma, mental health conditions, skills needed for self-management and essentials of recovery. NAMI is committed to raising awareness and building a community of hope for all of those affected by mental illness. As the state office of NAMI, NAMI Wisconsin works closely with its 36 officially recognized affiliates providing services in 44 of Wisconsin’s 72 counties.

The **National Council on Independent Living (“NCIL”)** is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL’s membership is comprised of centers for independent living, statewide independent living councils, people with disabilities, and other disability rights organizations. NCIL’s mission is to advance the independent living philosophy and to advocate for the human rights of, and services for, people with disabilities to further their full integration and participation in society.

The **National Disability Rights Network (“NDRN”)** is the non-profit membership organization for the federally mandated Protection and Advocacy (“P&A”) and Client

Assistance Program (“CAP”) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

People First Wisconsin is a statewide grassroots non-profit self-advocacy agency run by and for people with disabilities, especially intellectual disabilities. People First Wisconsin works to empower people to speak up for themselves, to have their voices heard and to effect personal and societal change. People First Wisconsin challenges the institutions, social politics and community attitudes that prevent people with disabilities from achieving their full potential as citizens.

Respite Care Association of Wisconsin (“RCAW”) was established in 1987 to promote, support, and expand quality statewide respite care across the lifespan. RCAW programs connect family caregivers with respite resources and services that provide them with a much needed a break from their daily routine. All RCAW programs are free. Programs include recruitment and training for respite care workers; grants to pay for respite services for family

caregivers; and access to a free statewide matching worker registry that connects caregivers with respite care workers.

Save IRIS (Include, Respect, I Self-Direct) is Wisconsin's self-directed long-term care program. Save IRIS is a non-partisan grassroots movement dedicated to preserving and promoting self-direction in Wisconsin. The organization advocates on behalf of people with disabilities and older adults and their families for the ability to self-direct the long-term care supports that help them stay in their homes and out of costly nursing homes.

Wisconsin APSE is a state membership organization that focuses exclusively on improving and advancing integrated employment opportunities, outcomes, and services for people with disabilities. WI APSE's vision is for people with disabilities to achieve lives that maximize their potential and foster independence through employment and connection that positively impacts our Wisconsin workforce and communities.

The **Wisconsin Association of Area Agencies on Aging** is a membership organization representing Wisconsin's three Area Agencies on Aging serving all of Wisconsin's county and tribal aging units. The Association engages in national and statewide advocacy to address issues which have an impact on the aging and disability services network, older adults, persons with disabilities and their caregivers.

The **Wisconsin Association of Benefit Specialists** is comprised of elder and disability benefit specialists, most of whom are State Health Insurance Assistance Program ("SHIP") counselors. Benefit specialists advocate for older

adults and people with disabilities at the County and tribal level, helping them gain access to resources and providing assistance for issues related to benefits such as Medicare, Medicaid, Social Security, FoodShare (SNAP), and other health insurance.

The **Wisconsin Association of Senior Centers'** mission is to provide Senior Center Directors and staff ongoing support to ensure that older adults across the state have access to programs and services that promote a healthy lifestyle. In addition, the organization provides information on legislation impacting older adults and offers opportunities for advocacy. The Wisconsin Association of Senior Centers was chartered in 1983 and continues to expand in membership.

The **Wisconsin Board for People with Developmental Disabilities** is the federally funded council on developmental disabilities for the state. Its members, who live with developmental disability or are family members, are appointed by the Governor with a charge of advocating for and testing promising practices that improve service systems, ensuring the full inclusion and participation of people with developmental disabilities in all aspects of community life.

The **Wisconsin Coalition of Independent Living Centers, Inc.** is the statewide non-profit coalition of the eight community-based, consumer controlled Centers for Independent Living. Wisconsin Independent Living Centers ("ILCs") are community-based, consumer-directed, not-for-profit organizations. ILCs are nonresidential organizations serving persons of any age with any disabilities in all 72 counties. Unique in the world of human services, ILCs are governed and operated by board and staff comprised of a

majority of people with disabilities. All ILCs provide core services, which include: Peer Support, Information and Referral, Independent Living Skills Training, Individual and Systems Advocacy, and Services that promote access to community life for people leaving school or institutions or who are at risk of institutionalization.

Wisconsin Family Ties serves families that include children and adolescents with social, emotional, behavioral, and/or mental health challenges. These disorders often impact functioning in the areas of planning, judgment, perspective-taking, and decision making. These facts place this population and their families at significantly increased risk of infection if the Safer at Home order is enjoined. Currently, there are over 100,000 school-age children in Wisconsin who have a mental health issue that substantially impairs their functioning.

The **Wisconsin Institute for Healthy Aging (“WIHA”)** is a public-private partnership dedicated to researching and disseminating evidence-based disease prevention and health promotion practices and programs that promote healthy aging. WIHA’s major health issue foci are: chronic disease, diabetes, caregiver support, falls prevention, incontinence prevention, increasing physical activity, mental health and reducing sedentary behavior. All of WIHA’s work is based on scientifically proven interventions. At the first outbreak, WIHA cancelled over 60 Wisconsin workshops that were in process and directed its partners to cancel the over 70 that were scheduled to begin in March, April or May 2020, due to the high risk of COVID-19 transmission and the significantly more severe health impacts of the virus on older adults.

The **Wisconsin Long-Term Care Coalition** was established in 2014. It includes a broad variety of aging and disability organizations, managed care organizations, and other stakeholders in the long term care system. It was formed to analyze and influence state policy related to long term care, to ensure access, quality, and community integration.

The **Wisconsin Long-Term Care Workforce Alliance (“The Alliance”)** is a statewide coalition of organizations and individuals who recognize the critical and indispensable role direct care workers play in meeting the long-term care needs of older adults and people of all ages with disabilities in Wisconsin. The Alliance is dedicated to advancing the voice, image and compensation of caregivers in the state. The Alliance is a recognized leader in long-term care workforce advocacy, offering strategic communication, advocacy opportunities for workers and members, and a collective voice to ensure that the long-term care workforce is valued and properly compensated. The Alliance develops and implements statewide and community-based strategies to improve the recognition, retention, recruitment, and economic status of the long-term care workforce. The Alliance champions direct care workers & their critical role in meeting long-term care needs of older adults and people of all ages with disabilities.

The **Wisconsin Tribal Aging Unit Association (“TAUA”)** supports people with I/DD and their families and advocates for public policies and systemic change that provide the opportunity to learn, live, and work inclusively in their communities.