

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

STATE OF WISCONSIN
SUPREME COURT
Case No. 2020AP000765

WISCONSIN LEGISLATURE,

Petitioner,

v.

ANDREA PALM,
JULIE WILLEMS VAN DIJK,
NICOLE SAFAR

Respondents.

**BRIEF OF NONPARTY
AMERICANS FOR PROSPERITY – WISCONSIN
AS *AMICUS CURIAE***

CRAMER, MULTHAUF,
& HAMMES, LLP
Matthew M. Fernholz
(SBN #1065765)
1601 East Racine Ave
Ste. 200
P.O. Box 558
Waukesha, WI 53187
(262) 542-4278 Tel.
mmf@cmhlaw.com

AMERICANS FOR PROSPERITY
Eric R. Bolinder
1310 N. Courthouse Rd.
Ste 700
Arlington, VA 22201
(571) 329-3324 Tel.
ebolinder@afphq.org

**Pro hac vice pending*

Attorney of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION.....1

ARGUMENT3

 I. Wisconsin’s stay-at-home order is pervasive.3

 II. Blanket shutdowns are the wrong approach.4

 A. Shutdown orders must be narrowly tailored.4

 B. Curtailment of civil liberties must accord with
 due process.....7

 C. Government action must be time limited.....8

 III. Political accountability is essential.9

 A. Respondent must follow existing procedures and
 laws.9

 B. One person should not make these decisions..... 10

 IV. Granting the Petition will give all parties time to
 collaborate and implement better policies. 11

 A. Granting the Petition Will Not Cause a Disaster.. 11

 B. Denying the Petition will cause real harm. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Ex parte Milligan</i> , 71 U.S. 2 (1866).....	2
<i>Gundy v. United States</i> , 139 S. Ct. 2116 (2019).....	7
<i>Home Building & Loan Ass’n v. Blaisdell</i> , 290 U.S. 398 (1934).....	1
<i>State ex rel. Greer v. Wiedenhoeft</i> , 2014 WI 19, 353 Wis. 2d 307, 845 N.W.2d 373	8
 Statutes	
Wisconsin Statutes § 227.01(13)	9
Wisconsin Statutes § 227.24(1)	10
Wisconsin Statutes § 227.24(3)	10
Wisconsin Statutes § 227.24(3m).....	10
 Administrative Orders	
Emergency Order #12 (Mar. 24, 2020)	3
Emergency Order #28 (Apr. 16, 2020)	3
 Other Authorities	
Addy Bink, <i>Festival Foods asks customers with reusable bags to bag groceries themselves, makes other changes due to coronavirus</i> , WeAreGreenbay.com, Apr. 7, 2020, https://bit.ly/2S6nqFL	13
Barry Adams, <i>A Wisconsin fishing season opener like no other amid COVID-19 pandemic</i> , Wisconsin State Journal, Apr. 27, 2020, https://bit.ly/2y732NU	15

Chase McNamara, <i>Wausau River District: 54 downtown businesses in danger of closing amid COVID-19</i> , WAOW, Apr. 24, 2020, https://bit.ly/2Kueaar	14
F.A. Hayek, <i>Law Legislation & Liberty</i> , Vol. 1, Rules & Order (1973).....	1
Henry Michaels, <i>Carry out cocktail kits from some of your favorite Madison establishments</i> , Madison Magazine, Apr. 24, 2020, https://bit.ly/2Y5yYgi	13
Husch Blackwell LLP, 2019 Wisconsin Act 185: Healthcare Regulatory Provisions, JDSUPRA, Apr. 21, 2020, https://bit.ly/2Y20njj	13
Jason Fechner, <i>Wisconsin Church Hosts Parking Lot Services</i> , Spectrum News 1, Apr. 5, 2020, https://bit.ly/3cLr0wZ	5
Jeff Dahdah, <i>Drive through local food pickup connects small farms with customers</i> , Spectrum News 1, Apr. 2, 2020, https://bit.ly/3aw1cTX	13
Jon Radske, <i>Menards Will Take Customers Temperature</i> , KVRR, Apr. 2, 2020, https://bit.ly/2Y4aQec	13
Megan Stringer, <i>Aspirus will furlough some employees, reduce hours as health systems grapple with coronavirus</i> , Wasau Daily Herald, Apr. 22, 2020, https://bit.ly/2VyElDc	15
Melanie Gerritson, <i>Helen’s Kitchen in Waupun closes after 43 years</i> , Daily Citizen, Apr. 11, 2020, https://bit.ly/2VC0oZJ	14
Rich Kirchen, <i>Pandemic fallout: Medical College of Wisconsin furloughs 700 employees, cuts compensation</i> , Milwaukee Business Journal, Apr. 23, 2020, https://bit.ly/2KJZXGB	15

Rory Linnane, *‘No matter when they call, I pick up’:
Mental health workers see increased demand for
treatment, support*, Milwaukee Journal Sentinel,
Apr. 13, 2020, <https://bit.ly/2S7QxbI> 15

Stand Together,
How Businesses Are Keeping People Safe,
<https://bit.ly/2Ky7aJK> 13

*Statewide group outlines plan to reopen Wisconsin
businesses*, WKOW, Apr. 24, 2020,
<https://bit.ly/3cPtCtT> 11, 12

INTRODUCTION

People will not refrain from those restrictions on individual liberty that appear to them the simplest and most direct remedy of a recognized evil, if there does not prevail a strong belief in definite principles.

–F.A. Hayek¹

A pandemic of this scale is unique in the past century. Crisis is not. Our Nation has faced world wars, the threat of nuclear apocalypse, famines, economic depression, and financial tumult. As C.S. Lewis recognized, each new threat does not present an “absolutely new situation; it simply aggravates the permanent human situation so that we can no longer ignore it. Human life has always been lived on the edge of a precipice.”² Even the U.S. Constitution was “adopted in a period of grave emergency.” *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425 (1934). It “is a law for rulers and people . . . and covers with the shield of its protection all classes of men, at all times, and under all

¹ Law Legislation & Liberty, Vol. 1, Rules & Order 61 (1973).

² C.S. Lewis, Learning in War-Time, Address at Church of St. Mary the Virgin, Oxford, England (1939), in *The Weight of Glory and Other Addresses* 44–45 (William B. Eerdmans Pub. Co. 1965).

circumstances.” *Ex parte Milligan*, 71 U.S. 2, 120 (1866). Now more than ever, Americans for Prosperity – Wisconsin (“AFP-WI”) believes we must follow our founding principles, the rule of law, and the Constitution.

The effects of the virus itself, particularly on the most vulnerable populations, are devastating and tragic. Social distancing has proven to be a good way to fight the spread of COVID-19 and buy the Nation time to increase healthcare capacity, develop antivirals, and search for a vaccine.

Government has a key role to play in implementing and guiding this solution. But a complete halt of all societal contact is neither possible nor necessary. There are commonsense ways people can work together to develop an approach that both protects health and keeps food on the table. By respecting core separation-of-powers principles and honoring the legislature and public’s role in addressing the crisis, government is more likely to develop the goodwill necessary for successful outcomes.

This Court should grant the Legislature’s petition and vacate Secretary-Designee Palm’s (“Respondent”) order,

allowing all branches of government and the public to work toward solutions. A single person does not have all the answers; a single person should not dictate policy.

ARGUMENT

I. Wisconsin's stay-at-home order is pervasive.

Wisconsin's shutdown orders touch nearly every aspect of daily life: they close schools, libraries, places of public amusement, salons, and spas. See Emergency Order #12 (Mar. 24, 2020), *available at* <https://bit.ly/3bD0Koz>; Emergency Order #28 (Apr. 16, 2020), *available at* <https://bit.ly/2xdaBCw> (extending core restrictions of #12 until May 26, 2020). Order 28 requires all individuals “to stay at home or at their place of residence,” with limited exceptions. It only permits individuals to leave their homes for an enumerated list of so-called “essential” functions or special situations. As the Legislature outlines in its brief, this order was created without the input of the People's elected representatives, outside the normal process of law, and in a way that exceeds statutory bounds. Pet'r's Suppl.

Br. at 27, *Wis. Legislature v. Palm*, No. 2020AP000765 (Wis. filed Apr. 21, 2020).

The Legislature is right to ask this Court to intervene. The order risks undermining Respondent's well-intended goal of protecting public health because it sweeps too broadly in restricting civil liberties and economic freedoms, eroding the trust in government necessary to combat this pandemic. It is only through collaboration with leaders, legislators, and the governor's office—as required by law—that Respondent can make the best policy decisions that protect public health and preserve civil liberties.

II. Blanket shutdowns are the wrong approach.

During a crisis, governmental actions curtailing civil liberties must be narrowly tailored, respect due process, and be time limited. This prevents all-or-nothing approaches and allows for more innovative solutions.

A. Shutdown orders must be narrowly tailored.

Even in a crisis, effective government restrictions on civil liberties must be narrowly tailored. For example, rather than ban all “church services,” Respondent allowed

for innovative ideas like “drive-in services” at the Prince of Peace Lutheran Church in Sturgeon Bay.³ Worshippers gathered but remained in their cars, turning to an FM dial to hear Pastor James Gomez broadcast live from a “makeshift parking lot pulpit.”⁴ As Pastor Gomez put it, “[t]he idea for a drive-in service really came out of need . . . I just started thinking and dreaming up new things that can work.”⁵ One parishioner remarked it was “nice to get out of the house, just to be able to see our friends.”⁶

Others have not been so lucky. If Respondent deems an activity “non-essential,” people cannot start “thinking and dreaming up new things that can work.”⁷ Blanket shutdowns do not allow for much-needed innovation. Policymakers should focus on whether an activity can be conducted safely, not whether they deem it “essential.”

³ See Jason Fechner, *Wisconsin Church Hosts Parking Lot Services*, Spectrum News 1, Apr. 5, 2020, <https://bit.ly/3cLr0wZ>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Like Pastor Gomez's church, grocery stores, laundromats, home improvement stores, and doctors' offices have been adapting and continue to stay open. As people innovate, more opportunities will arise for activities to be conducted in accordance with public health guidelines. Just as there is room for unique approaches in different states depending on public health demands, some areas of Wisconsin have different needs than others. What's best for Madison may not be best for Minocqua.

Rather than being seen as arbitrarily picking "essential" and "non-essential" businesses, Wisconsin's leaders at the state and local levels should work together with businesses and community groups to agree on standards of public health. Those who can meet the standards should be allowed to reopen. This prevents policymakers from choosing winners and losers via an arbitrary designation of "essential" or "non-essential."

Public trust is paramount for government to combat serious threats, like the one we currently face. That is why the Legislature included important procedural safeguards in

the emergency statutes. They knew, as our Nation's Founders did, that "men are not angels" and concentrated power would be abused. *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (citing *The Federalist* 51 (James Madison)). And even when not abused, the consolidation of power nevertheless erodes public trust.

Respondent is no doubt doing what she believes to be in the best interests of Wisconsin. But government will be more effective when it respects the rule of law, protects civil liberties, and builds public confidence.

B. Curtailment of civil liberties must accord with due process.

Respondent's orders circumvented the collaborative and legally required process. *See* Pet'r's Suppl. Br. at 9–10. Our laws and policy decisions are made by groups of people for this very reason: so that everyone's opinion and input is considered, and nothing is overlooked. The "separate and distinct exercise of the different powers of government" is absolutely "essential to the preservation of liberty[.]" *The Federalist* 51 (James Madison). If government power is

concentrated in one person, then only that person's limited knowledge and perspective is included in the process.

Any government action that deprives an individual of liberty must respect due process. “The Due Process Clause of the United States and Wisconsin Constitutions protect both substantive and procedural due process rights.” *State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶55, 353 Wis. 2d 307, 845 N.W.2d 373 (citation omitted). Due process “requires that even though government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner.” *Id.*, ¶62 (citations omitted).

Here, the Legislature alleges a legion of process violations in the order. The Court should overturn the order because of these defects and allow elected representatives to have a voice in the process—which is what the Wisconsin Constitution and statutes demand.

C. Government action must be time limited.

Our understanding of COVID-19 is rapidly developing. As such, the way our government responds, and the way it

mandates businesses and individuals respond, must be adaptive. Lengthy shutdown orders create a sense of permanence and do not allow for nimble responses as we encounter new developments, technology, or capabilities. Unduly long shutdown orders deprive individuals of civil liberties, breaking down the trust between government and citizens that is especially needed now. That is why government should reconsider such orders on a regular basis—at least every fourteen days.

We do not know how long this pandemic will last, and it seems certain that government action will be warranted for the foreseeable future. But that underscores the need for government to regularly acknowledge the impact it is having on civil liberties and work to avoid those impingements.

III. Political accountability is essential.

A. Respondent must follow existing procedures and laws.

Wisconsin prepared for a day like today by creating procedures to protect civil liberties. These protections preserve the public's right to have input in emergency orders

and require direct legislative oversight. *See* Wis. Stat. §§ 227.01(13) (defining rule); 227.24(1) (establishing procedure); 227.24(3) (mailing requirement to legislature); 227.24(3m) (mailing requirement to small business review board); *see also* Pet'r's Suppl. Br. at 9–10.

Respondent chose not to follow this procedure before issuing her most recent order despite having over a month to prepare it. *Id.* at 39. For example, the Joint Committee for Review of Administrative Rules and the Small Business Regulatory Review Board had no opportunity to review it or to suggest changes. *Id.* Ignoring these rules is not justified by the existence of an emergency—this law was designed specifically for a time of emergency.

B. One person should not make these decisions.

Respondent is not elected, which is why her exercise of emergency powers is subjected to a statutory process that ensures review by the People's representatives. Our government, whether state or federal, never contemplated a single individual would hold that authority, particularly one who is not accountable to the people.

If Respondent had followed the required process, the public could have shared its local knowledge with government officials. Instead, an unelected official made a sweeping decision for nearly six million people. We can and must do better.

IV. Granting the Petition will give all parties time to collaborate and implement better policies.

A. Granting the Petition Will Not Cause a Disaster.

The Legislature asks the Court to stay any favorable order for six days. Pet'r's Suppl. Br. at 7. This will allow the Legislature and Governor time to work together to create better solutions, without causing the existing orders to lapse.

People are working hard on how to safely reopen the state. One group introduced its "Back to Business" plan, which calls for Wisconsin to begin a gradual reopening on May 4.⁸ It is "designed to strategically open Wisconsin businesses based on a number of risk factors and offers a

⁸ *Statewide group outlines plan to reopen Wisconsin businesses*, WKOW, Apr. 24, 2020, <https://bit.ly/3cPtCtT>. Although AFP-WI is not endorsing a plan here, this sort of collaborative thinking is what Wisconsin needs to protect our most vulnerable and reopen society.

clear vision for when and how they can begin to operate[.]”⁹
In the spirit of collaboration, “[t]he plan was developed with input from a diverse group of stakeholders, including those in business, government and the medical community.”¹⁰ The group developed an “algorithm to determine the risk for an individual business based on a number of factors[.]”¹¹ Businesses that score higher on the risk algorithm would be required to undertake more precautions in order to open.¹²

Already, businesses that Respondent allowed to stay open have proven how quickly they can adapt to the demands of the COVID-19 crisis. Festival Foods put Plexiglass partitions between customers and cashiers. The company added distance markers on the floor and closes at 9 P.M. every day for a thorough cleaning. The first two hours of every day are reserved for “elderly shoppers and

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

those with compromised immune systems.”¹³ Another store started taking customers’ temperatures.¹⁴ A farmer’s market instituted drive-through sales.¹⁵ Bars are offering carryout cocktails.¹⁶ But for the order stopping them, others would innovate new, healthy ways to stay open.¹⁷

The Legislature has also been quick to act where it can. For example, it passed a bill loosening restrictions on healthcare workers so patients can get better care during the pandemic.¹⁸ The bill was immediately signed by Governor Evers.¹⁹ Here, the Legislature asks the Court to stay any favorable order for six days, which will allow the Legislature

¹³ Addy Bink, *Festival Foods asks customers with reusable bags to bag groceries themselves, makes other changes due to coronavirus*, WeAreGreenbay.com, Apr. 7, 2020, <https://bit.ly/2S6nqFL>.

¹⁴ Jon Radske, *Menards Will Take Customers Temperature*, KVRN, Apr. 2, 2020, <https://bit.ly/2Y4aQec>.

¹⁵ Jeff Dahdah, *Drive through local food pickup connects small farms with customers*, Spectrum News 1, Apr. 2, 2020, <https://bit.ly/3aw1cTX>.

¹⁶ Henry Michaels, *Carry out cocktail kits from some of your favorite Madison establishments*, Madison Magazine, Apr. 24, 2020, <https://bit.ly/2Y5yYgi>.

¹⁷ Stand Together has detailed how the private sector is adapting to the moment. *See generally*, Stand Together, How Businesses Are Keeping People Safe (collecting examples), <https://bit.ly/2Ky7aJK> (last accessed Apr. 24, 2020).

¹⁸ Husch Blackwell LLP, 2019 Wisconsin Act 185: Healthcare Regulatory Provisions, JDSUPRA, Apr. 21, 2020, <https://bit.ly/2Y20njj>.

¹⁹ *Id.*

and Governor the time to work together to come up with a better, lawful solution.

B. Denying the Petition will cause real harm.

We need to take the threat COVID-19 poses seriously, but we should not discount the harm of an overbroad shutdown either. People are already suffering from the economic damage caused by the virus. Helen's Kitchen in Waupun, which employed approximately forty people, closed permanently because "the coronavirus has created an economic hardship that we can't see a way back from[.]"²⁰ In the Wausau River District, a survey of businesses revealed fifty-four were in danger of closing soon and 104 more of closing in the next five months.²¹ Even closing state parks has had serious downstream effects on local business—

²⁰ Melanie Gerritson, *Helen's Kitchen in Waupun closes after 43 years*, Daily Citizen, Apr. 11, 2020, <https://bit.ly/2VC0oZJ>.

²¹ Chase McNamara, *Wausau River District: 54 downtown businesses in danger of closing amid COVID-19*, WAOW, Apr. 24, 2020, <https://bit.ly/2Kueaar>.

numerous bait shops and guided fishing tour businesses are taking serious economic hits.²²

There has also been significant impact on the healthcare industry. Many patients and providers have had to forego elective procedures as a result of the shutdown, leading to furloughs and layoffs in the industry.²³ The Medical College of Wisconsin has seen a “25% revenue drop” while Froedtert Health “sustained a 40% decline in hospital revenue and a 60% decrease in revenue from its physician practice partnership with the Medical College.”²⁴ Mental health workers have seen increased demand for treatment.²⁵ There are health risks from reopening too quickly, but there are painful outcomes from not reopening at all.

²² Barry Adams, *A Wisconsin fishing season opener like no other amid COVID-19 pandemic*, Wisconsin State J., Apr. 27, 2020, <https://bit.ly/2y732NU>.

²³ Megan Stringer, *Aspirus will furlough some employees, reduce hours as health systems grapple with coronavirus*, Wasau Daily Herald, Apr. 22, 2020, <https://bit.ly/2VyElDc>.

²⁴ Rich Kirchen, *Pandemic fallout: Medical College of Wisconsin furloughs 700 employees, cuts compensation*, Milwaukee Bus. J., Apr. 23, 2020, <https://bit.ly/2KJZXGB>.

²⁵ Rory Linnane, *‘No matter when they call, I pick up’: Mental health workers see increased demand for treatment, support*, Milwaukee J. Sentinel, Apr. 13, 2020, <https://bit.ly/2S7QxbI>.

CONCLUSION

There are no easy answers to the COVID-19 crisis. Government officials must make difficult, sometimes impossible, decisions to protect the health of their constituents. But government was designed to work with the legislative and executive branch checking one another and listening to citizen input. The order here has ignored applicable law and procedure. The Court must intervene to allow the Legislature and private sector to play their proper role. AFP-WI urges this Court to grant the Legislature's petition, vacate Respondent's order, and issue the stay.

Respectfully submitted this 29th day of April 2020.

Attorneys for Americans for Prosperity -
Wisconsin

BY: *s/ Matthew M. Fernholz*
MATTHEW M. FERNHOLZ
(State Bar No. 1065765)

CRAMER, MULTHAUF
& HAMMES, LLP
1601 East Racine Avenue • Suite 200
P.O. Box 558
Waukesha, WI 53187
(262)-542-4278
mmf@cmhlaw.com
Attorneys of Record

BY: *s/ Eric R. Bolinder* _____
Eric R. Bolinder
(Virginia Bar No. 84862)
(*Pro hac vice* pending)

AMERICANS FOR PROSPERITY
1310 N. Courthouse Rd.
Ste 700
Arlington, VA 22201
(571)-329-3324
ebolinder@afphq.org

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 20 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 17 pages and 2,658 words.

Dated this 29th day of April, 2020.

BY: *s/ Matthew M. Fernholz*
MATTHEW M. FERNHOLZ
(State Bar No. 1065765)

**CERTIFICATION OF COMPLIANCE WITH RULE
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 § 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.

BY: *s/ Matthew M. Fernholz*
MATTHEW M. FERNHOLZ
(State Bar No. 1065765)