

IN THE SUPREME COURT OF THE STATE OF OREGON

ELKHORN BAPTIST CHURCH, an Oregon non-profit corporation;
CALVARY CHAPEL NEWBERG, an Oregon non-profit corporation;
CALVARY CHAPEL LINCOLN CITY, an Oregon non-profit corporation;
CALVARY CHAPEL SOUTHEAST PORTLAND, an Oregon non-profit
corporation; NEW HORIZON CHRISTIAN FELLOWSHIP, an Oregon non-
profit corporation; CAMAS VALLEY CHRISTIAN FELLOWSHIP, an Oregon
non-profit corporation; PEOPLES CHURCH, an Oregon non-profit
corporation; PREPARE THE WAY, an Oregon non-profit corporation;
BEND COMMUNITY CHURCH, an Oregon non-profit corporation;
COVENANT GRACE CHURCH, an Oregon non-profit corporation;
JEDIDIAH MCCAMPBELL, an individual; RONALD OCHS, an individual;
BRIAN NICHOLSON, an individual; JAMES B. THWING, an individual;
MARK RUSSELL, an individual; PHIL MAGNAN, an individual; RONALD
W. RUST, an individual; TRAVIS HUNT, an individual; MASON
GOODKNIGHT, an individual; MARK MAYBERRY, an individual; LORI
MAYBERRY, an individual; BENJAMIN STEERS, an individual; MICHAEL
CARROLL, an individual; KEVIN J. SMITH, an individual; POLLY
JOHNSON, an individual; BENJAMIN BOYD, an individual; ANNETTE L.
ATANSOFF, an individual; MICAH AGNEW, an individual; and ANGELA
ECKHARDT, an individual,
Plaintiffs-Adverse Parties,

and

RED ROCKWAY COWBOY CHURCH, an Oregon non-profit
corporation, et. al.,
Plaintiffs,

and

BILL HARVEY, SAM PALMER, GLENN PALMER, JERRY SHAW,
MATTHEW CUNNINGHAM, DONALD A. JAY, JACOE A. BROWN,
SAMUEL N. BROWN, VIRGINIA STEGEMILLER, B. DAVID HURLEY, and
DOUGLAS W. HILLS,
Intervenors-Adverse Parties,

Continued...

May 2020

v.

KATHERINE BROWN, Governor of the State of Oregon and DOES 1
THROUGH 50,

Defendants-Relators.

Baker County Circuit Court
20CV 17482

S067736

AMICUS CURIAE OREGON NURSES ASSOCIATION'S BRIEF

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AMICUS CURIAE OREGON NURSES ASSOCIATION'S BRIEF

I. INTRODUCTION

The world is in the midst of a pandemic and America is an epicenter. As of May 21, 2020, according to the Centers for Disease Control and Prevention ("CDC") daily tracker, there were 1,551,095 total cases (including 22,860 new cases) of Americans diagnosed with COVID-19 and 93,061 total deaths (including 1,397 new deaths) attributable to the virus.¹ Oregon has fared better than most states largely as a result of the State Emergency Executive Orders that are subject of this case.² The consensus of the health care community is that there is an imminent and apparent need for a continued cautious approach to re-opening, not a precipitous removal of restrictions.³ As described below, it is highly likely that without a grant of the requested writ, COVID-19 cases will increase by tens of thousands and there is little doubt that there will be increased deaths.

¹ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

² See link *supra* footnote 1. See also Oregon Health Authority ("OHA") data from May 20, 2020 at: <https://www.oregon.gov/oha/ERD/Pages/OregonReports65NewConfirmedCOVID19Cases10NewPresumptiveCases4NewDeaths.aspx>

³ See <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us-previous.html>. The National Ensemble Forecast suggests that the number of cumulative reported deaths are likely to exceed 100,000 by June 1st.

The front-line, health-professional member led *Amicus Curiae* Oregon Nurses Association was an early advocate for the Governor to issue the order.⁴ *Amicus* supports Relators' Petition for a Peremptory or Alternative Writ of Mandamus on the grounds that the Governor's orders and a more considered approach to re-opening better promote the public health and interest and are well-supported by the law.

II. INTEREST OF *AMICUS CURIAE*.

The Oregon Nurses Association ("ONA") was founded in 1904 as the professional association for nurses in Oregon. A non-profit association, ONA is a constituent member of the American Nurses Association. ONA has several affiliated entities: Oregon Nurses Foundation, Oregon Nurse Political Action Committee, Nurses United Political Action Committee and WorkHealthy Oregon. ONA's member nurses use their collective power to advocate for patients, nurses, nursing practice, quality health care, and healthy communities while assuring compassion, respect and dignity throughout Oregon's health care systems.⁵ As an organization representing more than 14,000 front-line, health-professionals in the treatment and fight

⁴ <https://www.oregonlive.com/business/2020/03/25-portland-area-mayors-press-gov-kate-brown-for-statewide-stay-home-order.html>

⁵ Additional information regarding ONA and the work of its members can be found at: <https://www.oregonrn.org/default.aspx>

against the spread of COVID-19, ONA has a keen interest in the outcome of the mandamus petition and an application of the “correct rule of law” to the Governor’s orders and plan for re-opening.

III. MANDAMUS IS APPROPRIATE TO REVIEW TRIAL COURT’S ISSUANCE OF PRELIMINARY INJUNCTION

In *State ex rel Keisling v. Norblad*, 317 Or 615, 623, 860 P2d 241 (1993), this court clarified that a claim of fundamental legal error underlying a trial court’s exercise of discretion—including error involving issuance of a preliminary injunction—may be raised by mandamus. This is the case because there is no other “plain, speedy, and adequate remedy” other than a mandamus to challenge an interlocutory order such as “an order granting a motion for a preliminary injunction.” *Id.* This is a particularly appropriate case for the exercise of mandamus jurisdiction because the impact of the trial court’s order on the public health of Oregonians could be devastating if the legal error is not reviewed and remedied immediately by this court.

IV. THE PUBLIC HEALTH INTEREST WEIGHS HEAVILY AGAINST THE PRELIMINARY INJUNCTION AND IN FAVOR OF THE GOVERNOR’S ORDERS AND A CONSIDERED APPROACH TO RE-OPENING

Relators correctly note that the grant of a preliminary injunction is an “extraordinary remedy” and is inappropriate as a matter of law unless plaintiffs make a sufficiently strong showing, among other things, that the

public interest favors a preliminary injunction. Relators' Memorandum at pp. 3-4 and authority cited therein. Plaintiffs have not and cannot make that showing because based on the best available data, the public health interest weighs heavily against the preliminary injunction and in favor of the Governor's orders and a considered approach to re-opening.

First, no vaccine for COVID-19 is currently available,⁶ and the only methods available to combat the virus are community mitigation activities designed to slow the spread of this infectious disease, such as limits on large gatherings, restrictions on businesses, school closures, and social distancing practices. According to the CDC, "community mitigation is especially important before a vaccine or drug becomes widely available."⁷

Second, data from other states which have re-opened suddenly or without appropriate protective measures supports the Governor's Orders and cautions against issuance of a preliminary injunction. The events in Wisconsin⁸ cited by relators in their emergency motion for a stay are not

6 See <https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.html>

7 See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Community-Mitigation>

8 See also <https://www.newsweek.com/wisconsin-sees-highest-single-day-rise-coronavirus-cases-days-after-supreme-court-struck-down-1505570>

isolated occurrences. Relators' Emergency Motion, p. 3. Similar events have played out in other states and have even forced houses of worship to shut down after re-opening due to a rise in infections and even death related to COVID-19. For example, on May 19, 2020, two different churches in the states of Texas and Georgia indefinitely suspended services after members and leaders tested positive for the coronavirus shortly after reopening.⁹ The congregants of those churches had been using the distancing methods alleged to be sufficient by plaintiffs and the trial court in this case.¹⁰

Third, the CDC recommends that, "in order to get and keep America open states, tribes, localities, and territories must be able to quickly identify new cases, break chains of transmission, and protect first responders and health care workers from infection." This requires a more considered approach to re-opening that takes into account the ability of localities to test individuals, number of personnel available to pursue contact tracing, and appropriate level of personal protective equipment (PPE), hospital beds,

⁹ See <https://www.washingtonpost.com/religion/2020/05/19/two-churches-reclose-after-faith-leaders-congregants-get-coronavirus/>

¹⁰ See https://www.newsweek.com/two-southern-churches-reclose-indefinitely-after-pastor-dies-leaders-churchgoers-catch-coronavirus-1505291?utm_term=Autofeed&utm_medium=Social&utm_source=Facebook#Echobox=1589945775

and other equipment such as ventilators available to treat those who might contract the virus. The Governor's orders are designed to take such factors into account. See e.g. Executive Order 20-22 (4/27/20)(relating to elective procedures).

Based on current modeling predictions, lifting current restrictions would result in more than 29,000 additional infections by June 17, 2020 with a net increase of 11,000 additional infections as a result of the grant of the injunction.¹¹ As a result of the injunction, there would likely be an increase of severe COVID-19 infections by at least 36 per day until June 17th. This will likely result in 455 additional deaths as a result of the Circuit Court injunction. *Id.*

In addition, current modeling of epidemiological trends described above assume a testing and contact tracing staff that is 600 people larger than employed as of April 30, 2020. Thus, the extent to which these additional contract tracers are not brought on-line in a timely manner, the

¹¹ See OHA: COVID-19 Epidemic Trends and Predictions (5/13/20): <https://www.oregon.gov/oha/PH/DISEASES/CONDITIONS/DISEASESAZ/Emerging%20Respiratory%20Infections/Oregon-COVID-19-Projections-2020-05-13.pdf>

importance of the community mitigation measures reflected in the Governor's Executive Orders becomes of paramount importance.

It should be noted that the epidemiological models described above reflect a "reduction" in community mitigation strategies. A wholesale elimination of those strategies via the Governor's executive order can be assumed to result in an even greater elimination of those mitigation strategies and therefore, these estimates are extremely conservative.

Furthermore, the risk to front-line healthcare workers posed by the injunctive relief issued in this case is further harm that this Court should consider. Nurse, doctors and other healthcare workers, including ONA members are being asked to do extraordinary feats already without adequate PPE. Lifting current restrictions will undoubtedly present an impossible situation.

Moreover, the global supply chain of PPE is already strained under the increased pressure of State and countries that have lifted restrictions. Oregon has just allowed the resumption of elective procedures in the relatively few facilities that are able to maintain 30 days of PPE on hand. The increase in infections will result in an unknown number of visits to family practitioners, urgent care facilities, and emergency rooms, which will devastate the already limited PPE supply, even if patients do not meet

hospital admission criteria. Due to lack of adequate PPE, this surge in patients will place ONA members at substantially increased risk of harm.

Finally, the nursing standards of care that Oregonians deserve and expect have already been put at risk by this pandemic. Nursing ethics demand that patients receive the highest level of care possible and that caregivers have the highest protections possible. Oregon expands upon this ethical mandate in SB 469 (2015) which requires Nurse Staffing Committees in each facility in Oregon to develop Nurse Staffing Plans for each unit that provides the best care and health outcomes for the patients they serve. If the restrictions are abruptly ended and nurses are plunged back into a crisis state that results in hospital-mandated deviation from these staffing plans and the Oregon standards of care, all Oregonians will suffer untold short-term and long-term consequences.

IV. THE GOVERNOR'S ORDERS ARE WELL-SUPPORTED BY THE LAW

ONA agrees with Relators that the text and context of ORS 401.165 provide more than sufficient legal support for the Governor's Orders notwithstanding any time limitations included in ORS 443.441(5). ORS 401.165 includes no time limitation, continues until terminated by the Governor or the legislature (ORS 401.204), and grants the Governor the power to exercise "all police powers vested in the state by the Oregon

Constitution.” ORS 401.168(1). Finally, ORS 433.441(4) makes clear that, “If a state of emergency is declared as authorized under ORS 401.165, the Governor may implement any action authorized by ORS 433.441 to 433.452” and that “nothing in ORS 433.441 to 433.452 limits the authority of the Governor to declare a state of emergency.” The trial court, therefore, clearly erred in finding that the time periods provided in ORS 433.441(5) can “limit the authority of the Governor.” By the express terms of ORS 433.441(4), they cannot. For the court to find otherwise was the type of “fundamental legal error” that requires issuance of the writ of mandamus.

V. CONCLUSION

For the above reasons, ONA respectfully requests that the court grant its ORAP 8.15 application to appear as *Amicus Curiae* to file this brief and grant Relators’ Petition for a Peremptory or Alternative Writ of Mandamus.

Dated this day of May 22, 2020.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b); and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 1666 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b)(ii).

Dated this day of May 22, 2020.

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CERTIFICATE OF FILING

I certify that, I directed the *AMICUS CURIAE* OREGON NURSES ASSOCIATION'S BRIEF to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on May 22, 2020.

CERTIFICATE OF SERVICE

I certify that service of a copy of this *AMICUS CURIAE* OREGON NURSES ASSOCIATION'S BRIEF will be accomplished on the following participant(s) in this case, who is a registered user of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participant's email address as recorded this date in the appellate eFiling system:

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