

**IN THE STATE OF WISCONSIN
CIRCUIT COURT CLARK COUNTY**

PRESIDING HONORABLE JON M. COUNSELL

STATE OF WISCONSIN,

Plaintiff,

vs.

COURT TRIAL
CASE #08CX5

EMANUEL MILLER, JR.,

Defendant

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**BRIEF FOR TWENTY-TWO FARMING, RANCHING AND CONSUMER
ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF DEFENDANT**

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LIST OF AMICI CURIAE

Acres USA
American Grassfed Association
CASPIAN
Equus Survival Trust
Family Farm Defenders
Farm and Ranch Freedom Alliance
Farm-to-Consumer Legal Defense Fund
Food for Maine's Future
Freedom 21
Gun Owners of America
Independent Cattlemen of Iowa
Independent Cattlemen of Nebraska
Michigan Land Trustees
Northern Illinois Draft Horse and Mule Association
Organic Consumers Association
R-CALF USA
Small Farmer's Journal
Small Farms Conservancy
South Dakota Stockgrowers Association
Sovereignty International
Virginia Independent Consumers and Farmers Association
Western Organization of Resource Councils

INTEREST OF AMICI CURIAE

The twenty-two *amici* are farming, ranching, and consumer groups and publications representing over 350,000 people across the country.

The Farm and Ranch Freedom Alliance (FARFA) is a national non-profit association that advocates for farmers, ranchers, and homesteaders to assure their independence in the production and marketing of their food. FARFA also advocates for consumers' access to information and resources to obtain healthy foods of their choice.

The American Grassfed Association is a national multi-species organization dedicated to protecting and promoting grassfed producers and grassfed products through national communication, education, research and marketing efforts. CASPIAN (Consumers Against Supermarket Privacy Invasion and Numbering) is a grass-roots consumer privacy group that

seeks to educate consumers about practices that invade their privacy and encourage businesses to limit collection and misuse of consumer data. Family Farm Defenders is a coalition of organizations and individuals committed to the creation of a farmer controlled and consumer oriented food and fiber production. The Farm-to-Consumer Legal Defense Fund protect the constitutional right of the nation's family farms to provide, and consumers to obtain, processed and unprocessed farm foods directly to consumers through any legal means.

The Organic Consumers Association, the first and only organic consumer organization in the United States, arose from a successful 1998 national grassroots effort to force the US Department of Agriculture to safeguard organic standards and ban genetic engineering and industrial farming practices in organic agriculture. The Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA) is a national non-profit cattle association representing U.S. cattle producers in 46 states on issues concerning international trade and marketing to ensure the profitability and continued viability of independent U.S. cattle producers. The Western Organization of Resource Councils is a nonprofit network of conservation and family agriculture organizations, with members in Colorado, Idaho, Montana, North Dakota, Oregon, South Dakota, and Wyoming, whose mission is to advance the vision of a democratic, sustainable, and just society through community action.

These organizations join with fourteen others in submitting this brief. The *amici* appreciate the Court's interest in understanding the nature of premises registration and its affect on individual rights, and hope that the information presented here will be helpful to the Court's inquiry. A finding that Wisconsin's mandatory premises registration program violates individuals' rights and does not advance a compelling state interest through the least restrictive means available is an important step in protecting the interests of the *amici*'s members.

I. INTRODUCTION

The State of Wisconsin brought this action against Emanuel E. Miller, Jr., for failing to register his property under Chapter 17 of the Wisconsin Administrative Code as promulgated by the Department of Agriculture, Trade & Consumer Protection (DATCP). Mr. Miller admits that he has held livestock on his property since the regulations for mandatory premises registration went into effect, and that he refused, and continues to refuse, to register his property. At a hearing on September 23, 2009, this Court called for briefing on the issues surrounding Mr. Miller's defense that mandatory premises registration violates his freedom of religion as protected by the Wisconsin Constitution.

II. STANDARD

Wisconsin's seminal case regarding freedom of religion under Article I, §18 of the Wisconsin Constitution is *State v Miller*, 202 Wis.2d 56, 549 N.W.2d 235 (Wis. 1996). In *Miller*, the Supreme Court of Wisconsin recognized that Wisconsin "has in her organic law, probably furnished a more-complete bar to any preference for, or discrimination against, any religious sect, organization or society than any other state in the Union." *Miller*, 202 Wis.2d at 65 (quoting *State ex rel. Reynolds*, 17 Wis.2d 148, 165, 115 N.W.2d 761 (Wis. 1962)). The Court affirmed the continued use of the analytical framework for protection of religious freedom established by the United States Supreme Court, concluding that "[t]he guarantees of our state constitution will best be furthered through continued use of the compelling interest/least restrictive alternative analysis of free conscience claims and we see no need to depart from this time-tested standard." *Miller*, 202 Wis.2d at 69 (citing *Sherbert v. Verner*, 374 U.S. 398, 406-07, 83 S.Ct. 1790, 1795-96 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533 (1972); *Thomas v. Review Board, Ind. Empl. Sec. Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432

(1981)). Wisconsin Courts apply the following analysis:

... the challenger carries the burden to prove: (1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative.

Miller, 202 Wis.2d at 70.

III. LAW AND ARGUMENT

Defendant, Emanuel Miller Jr., meets the first two parts of the test established in *Miller*. Specifically, the evidence shows that Mr. Miller is a member of the Old Order Amish and has a sincere belief that registering his farm under Wisconsin's mandatory premises registration program (sometimes "Program") violates the fundamental religious teachings he embraces. The burden thus shifts to the State. Though the State has *some* compelling interest in the health of animals, the State has failed to provide *any evidence* of how the Program furthers that interest and has failed to prove that the Program is the least restrictive means to achieve that interest.

A. Emanuel Miller Jr. holds a sincere religious belief that mandatory premises registration violates his religious beliefs because it may lead to the Mark of the Beast, the path of the antichrist, and denial of salvation.

Wisconsin courts use various factors to determine the sincerity of religious beliefs, including the history of the belief and the length of time the belief has been held. *Miller*, 202 Wis.2d at 67 (citing *United States v. Seeger*, 380 U.S. 163, 186-87, 85 S.Ct. 850 (1965) (sincerity was demonstrated by defendant's Roman Catholic upbringing and close studies of Quaker belief)).

Emanuel Miller Jr. is a member of the Old Order Amish community. The Old Order Amish community has been recognized by the U.S. Supreme Court as an identifiable religion certified by its "long history as a successful and self-sufficient segment of American society."

Wisconsin v. Yoder, 406 U.S. 205, 235, 92 S.Ct. 1526 (1972). Sincerity of belief is demonstrated by the particular “interrelationship of belief with their mode of life.” *Id.* Mr. Miller maintains that his refusal to comply with mandatory premises registration is grounded in the religious conviction that such registration may lead to fulfillment of the Biblical prophecy of the “Mark of the Beast,” the “path of the antichrist”, and denial of eternal salvation in the eyes of God. (Trans.¹, p. 9, line 24 – p. 10, line 5. *See also* Trans. p. 36, lines 5-9 (testimony of N. Schwartz)). If that conviction can be squared with Amish religious beliefs, inquiry into Miller’s sincerity ends there.

The DATCP’s mandatory premises registration requirement directly conflicts, not only with Mr. Miller’s religious beliefs, but the beliefs of his entire Old Order Amish community. Both Mr. Miller and Noah Schwartz, an Amish Bishop, testified that complying with the Program would mean participating in a system that they believe may likely pave the way for the Mark of the Beast. Mr. Miller testified that “the system could very possibly be at least a forerunner of what we read in Revelations” (Trans. p. 17, lines 2-5). Mr. Schwartz testified that “Revelation is quite deep. And I feel some issues in there will be revealed as time goes on, I get close to the end. I can’t redefine and say that this is actually the mark of the beast. I do feel it is probably at least a strong lead to such and would not want to be involved in promoting a system which I think would be – would lead to that.” (Trans. p. 35, lines 13-21) As such, they risk eternal damnation if they comply. (Trans. p. 40, lines 9-11). Later, Mr. Schwartz testified, “Again, I would say that is something that is a deep issue which I can’t exactly say that this is the mark of the beast. But our concerns are since eternal damnation is a punishment for such a violation accepting that mark, we don’t want to take a chance of being in violation.” (Trans. p. 40, line 23- p. 41, line 3).

¹ Transcript references are to the September 23, 2009 Hearing held before Judge Counsell.

Under the law, it is fundamentally improper for secular authorities to impose their interpretations of what is and is not reasonable belief on a religious community. *See State v. Yoder*, 49 Wis.2d 430, 182 N.W.2d 539 (Wis. 1971). In *Yoder*, the Wisconsin Supreme Court observed that for freedom of religion to have any meaning, religious believers must be allowed to define their own beliefs, stating, “This court does not evaluate, and in fact is prohibited from evaluating, a religious belief for ecclesiastical purposes. Irrelevant, too, is this court’s opinion, if it has one, of the validity, the reasonableness, or the merits of the Amish religious beliefs.” *Id.* at 436. The question of what is or will lead to the Mark of the Beast has generated controversy for hundreds of years,² and the State has no authority to challenge the sincerity of Miller’s belief simply because State agents may disagree with his community’s interpretation.

The beliefs articulated by Mr. Miller are consistent with the recognized religious beliefs of the Old Amish community. Wisconsin’s Program would require the Amish to be part of a government program involving computer technology, contrary to their long-standing religious practices of eschewing technology and remaining “separate” from the secular world. (Trans. p. 27, line 8 – p. 28, line 17.)

Mr. Miller has chosen to “accept or endure the consequences,” rather than register. (Trans. p. 48, lines 11-25). A defendant’s willingness to be incarcerated is another factor that Courts consider when evaluating sincerity of belief. *State v. Hershberger*, 462 N.W. 2d 393, 396 (Minn. 1990). In *Hershberger*, the defendant challenged a statute requiring the posting of a slow moving vehicle sign on the back of Old Order Amish members’ buggies. The Court held that the defendant’s willingness to choose incarceration rather than using “a symbol whose color and meaning are antithetical to their faith,” established that their religious belief was sincere. *Id.*

² For instance, there is a 335 page book entitled: “The Contribution of British writers between 1560 and 1830 to the Interpretation of Revelation 13.16-18,” by David Brady (J.C. Mohr 1983).

at 396. Mr. Miller's refusal to comply with the Program has put him at risk for fines and denial of a state dairy license, denying him the occupation he has been engaged in for most of his life, and which is his main source of income.

Emanuel Miller Jr. has carried his burden of proof that his belief is sincere.

B. The history of premises registration and NAIS are consistent with Mr. Miller's belief that this regulation is different from other government requirements.

At the hearing, the State appeared to imply that mandatory premises registration is no different than other requirements that Mr. Miller has already submitted to, such as the back tags at a sales barn, registering a deed to his property and having a "911" address. But as Mr. Schwartz testified that, although the Amish are uncomfortable with these practices, they believe that mandatory premises registration and its consequences are different because their participation in premises registration would mean being involved in establishing the program that is a "strong lead to the mark of the beast" and takes "trust away from God to the government." (Trans. p.57, lines 2-7; *see generally* Trans. p. 55, line 12 – p. 61, line 18.)

The Amish belief that mandatory premises registration is different from other programs is supported by both the history and current incarnation of the program. Mandatory premises registration, as promulgated by the DATCP, is simply a recent step in a program with an extensive history. In the late 1980s and 1990s, industry organizations, working together with technology companies and government agencies developed plans for a program to electronically tag and track every livestock animal in the United States. (*See* Exhibit A, Proceedings of the 1994 Livestock Identification Consortium, Livestock Identification: The Challenge Before Us.) Initially termed the U.S. Animal Identification Program, it was later renamed the National Animal Identification System (NAIS). (Exhibit B, USDA, Draft Strategic Plan (Apr. 25, 2005) at p.4.) In 2005, the U.S. Department of Agriculture (USDA) released a "Draft Plan" and "Draft

Program Standards” setting out the formal proposal for the NAIS. *See* 70 Fed. Reg.23961-63 (May 6, 2005). Although some of the details of the program have changed in subsequent documents, the core plan has remained constant.

The USDA’s NAIS program consists of three stages: (1) premises registration; (2) animal identification; and (3) animal tracking. The first stage, premises registration, consists of assigning a random 7-digit federal number to every geographic location where animals are held. (Exhibit C, USDA, National Animal Identification System: A User Guide and Additional Information (Dec. 2007) at p.17.) In the second stage of NAIS, each animal will be assigned an internationally unique 15-digit identification number when it leaves its birth premises and physically tagged, in many cases with electronic identification such as microchips or radio frequency identification (RFID) tags. (*Id.* at p.23.) The plans allow animals that are managed together from birth to death, as is done in large factory farms, to be identified with a single group identification number. (*Id.* at p.24.) In the third stage, individuals would have to report specified “events,” including buying or selling an animal, to a government-accessible database within 24 hours. (*Id.* at p.36.)

The USDA’s 2005 documents originally called for premises registration to be mandatory nationwide by January 2008, and the entire program to be mandatory by January 2009. (Exhibit B, Draft Plan at p.9-10.) Due to public opposition, however, USDA has yet to adopt mandatory federal regulations and maintains a “voluntary” program at the federal level. (*See* Exhibit C, NAIS User Guide at Preface, p.i.)

Wisconsin instituted the mandatory state-level premises registration at issue in this case in anticipation of the USDA mandating NAIS at the federal level. The statute authorizing the DATCP to adopt the regulations at issue specifically states: “The department shall use premises

codes that are *federally allocated* for premises in the state” based on the “*national animal identification plan* developed by the animal and plant health inspection service” of the USDA. Wis. Stats. 95.51(2)(b)(4) (emphasis added). Under the statute, the numbers assigned to the properties are allocated by USDA from the NAIS system. Wis. Stats. 95.51(4).

The DATCP documents and statements confirm that Wisconsin’s premises registration program is the first step of the multi-step NAIS program. For example, in a letter to Dairy Farmers of America from the DATCP, the DATCP stated: “The [premises registration] law is just one step toward developing a nationwide system to trace livestock movements in case of an animal-borne human disease outbreak.” (Trans. p. 88, lines 6-8). In a letter to Wisconsin veterinarians, the DATCP stated:

Many livestock owners who have registered their premises are asking, “What happens next?” Wisconsin is taking the lead in implementing the National Animal Identification System (NAIS). The next steps after premises registration are animal ID and animal tracking. (Exhibit D, Letter from P. McGraw to Wisconsin Veterinarian (Oct. 30, 2006)).

In an interview last year, Rod Nilsetuen, Secretary of the DATCP, stated that “It’s [animal ID] going to come,” and “when we get there we’ll have a system in place in Wisconsin as we did when this measure pushed through five years ago. We’ll constantly have a universal premises ID system.” (Exhibit E, Sarah Watson, Wisconsin Leads the Way in Identification.³)

USDA documents explain that premises registration is a prerequisite for the rest of the program because tags with NAIS animal identification numbers (AIN) can only be distributed to those who have premises registration numbers. (Exhibit F, USDA Animal Identification Fact Sheet.⁴) “In order to be an authorized AIN device manager, the individual or firm must agree to abide by the following: ... 2. Distribute AIN devices only to a premises or entity that has either

³ http://www.agrview.com/articles/2008/03/17/livestock_news/livestock01.txt.

⁴ http://animalid.aphis.usda.gov/nais/naislibrary/documents/factsheets_brochures/FAQ-animalid.pdf

a premises identification number (PIN) or nonproducer participant number (NPN) and validate the accuracy of the PIN or NPN.” (Exhibit G, USDA Animal Identification Number (AIN) Device Manager (Nov. 30, 2006).⁵) Under the USDA program, the sole purpose of premises registration is to correlate individual livestock with a specific person to track all movement of that specific animal. (*Id.*)

Wisconsin’s DATCP contracted with Wisconsin’s Livestock Identification Consortium (WLIC) to implement mandatory premises registration. (Trans. p. 179, lines 17-20). The WLIC’s website states:

As a resource in implementing a national disease traceability system, following the standards outlined in the National Animal Identification System (NAIS), the Wisconsin Livestock Identification Consortium (WLIC) is working to integrate a system throughout all segments of the Wisconsin livestock industry. ... Building on the success of mandatory premises registration, WLIC will continue to promote and implement the next steps: voluntary animal identification and voluntary animal tracing. ... With a premises registration system already in place, the next step is to record individual animal identification and animal movements. ... Partnering with the Department of Agriculture, Trade and Consumer Protection (DATCP) and industry organizations, WLIC has created a voluntary program to implement animal identification and animal tracing. (Exhibit H.⁶)

Although the State’s witness testified that it does not “distribute” information to the national database (Trans. p. 179, lines 2-4), under the USDA’s guidelines for premises registration, some portion of the information is provided and entered into a database that is accessible by federal authorities:

To ensure animal health officials at the national level have the necessary contact information in case of a disease concern, States/Tribes forward a subset of information to USDA’s National Premises Information Repository. National

⁵http://animalid.aphis.usda.gov/nais/naislibrary/documents/guidelines/Steps_for_Becoming_an_AIN_Device_Manager.pdf

⁶http://www.wiid.org/index.php?action=anid_about

animal health officials can then request and obtain this information quickly during a disease outbreak, helping them coordinate their response with the affected States/Tribes.” (Exhibit C, USDA User Guide at p.17.)

Whether the second and third stage of NAIS, animal identification and tracking, will ever be made mandatory at the federal or state level is unknown. But it is clear the Wisconsin’s mandatory premises registration regulation is an essential part of a larger anticipated national program that includes identification and tracking.

The USDA has described NAIS as “one of the largest systematic changes ever faced by the livestock industry.” (Exhibit I, USDA, Johanns Releases National Animal Identification System Implementation Plan, News Release No. 0120.06 (Apr. 6, 2006).⁷) NAIS is an international numbering system, as evidenced by the assignment of federal premises registration numbers and the use of the “840” code to indicate U.S. country of origin animals, so as to distinguish them from animals from other countries. Government documents refer to the “national herd” in describing NAIS. (Exhibit B, Draft Plan at p.8). The international nature of the numbering system is significant in this case because the Book of Revelation is frequently interpreted to warn of the danger of a One-World Government. (Exhibit J, Does the Bible prophesy a one-world government and a one-world currency in the end times?⁸). Mr. Schwarz testified that he believes the Beast is “probably an overwhelming crushing power taking over.” (Trans. p. 39, lines 19-24).

Moreover, NAIS will do nothing to prevent or treat disease, but is merely intended to facilitate a *government response* to an outbreak of disease, the fate of which is something the Amish see as God’s role. (Trans. p. 36, line 5-p. 37, line 14; p. 71, line 23- p. 73, line 24). In

⁷ <http://animalid.aphis.usda.gov/nais/newsroom/archive.shtml>

⁸ <http://www.gotquestions.org/one-world-government.html>

addition, the premises registration number represents having to answer to the government, something deed registration and a 911 address do not. (Trans. p. 91, lines 8-12).

C. Emanuel Miller and the Old Order Amish community’s beliefs are burdened by the state requirement of mandatory premises registration: they will not be able to dairy or have livestock, even for their private use, and continue to live as they believe God intends.

The DATCP has administrative authority to enforce premises registration under penalty of law. *See* Wis. Stats. 95.51. The DATCP has taken the position that it may deny licenses for livestock-related businesses, such as dairying, for failing to comply with the mandatory premises registration regulation. There are no exceptions (Trans. p. 144, lines 7-8.)

The Old Amish community to which Mr. Miller belongs uniformly decided, based on their religious beliefs, to not comply with mandatory premises registration. As a result, Mr. Miller and others will lose their dairy licenses. Dairying is the principal source of income for many Amish. Noah Schwarz testified that “dairy farming is one of the most successful ways we have found to keep a family together and keep up our way of life.” (Trans. p. 29, lines 22-25; p. 30, lines 2-6).

In addition, *all livestock owners* are obligated to register the premises on which they keep their livestock, whether or not they hold a license for a commercial operation or they own the premises, subject to being fined by the State. *See* Wis. Stats. 95.51(2)(a); Trans. p.165 line 23 – p.166, line 7. This presents two issues. First, compliance would require that the Amish violate their religious beliefs. Amish farmers are dependent on livestock for food, transportation, and income. For all Amish, the normal mode of transportation is horse and buggy. (Trans. p. 30, line 20-p. 31, line 6). Horses are included in both Wisconsin’s mandatory premises registration regulation and NAIS. *See* Wis. Stats. 95.51(1) (includes “equine animals”); Exhibit C, USDA User Guide at p.4. Thus, coercion under the law extends beyond simply being denied a dairy

license; the law literally denies the centuries old Amish way of life based on their profound religious beliefs. As found by the U.S. Supreme Court, “the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.” *Yoder*, 406 U.S. at 216.

The second issue is more insidious. Under the regulation, livestock owners must register the premises on which they have animals. The Director of the Program, Dr. Paul McGraw, gave an example of horse owners being obligated to assure that the stable where they house their animals is registered. Dr. McGraw testified that the horse owner could register the premises, even *without the permission of the property owner*. (Trans. p. 165, line 21 – p. 166, line 7; p. 188, lines 3-9). This is not the same as a property owner recording a deed, survey or land contract, or being assigned a fire number. This law sets up situations where a person is required to register property for which he has no property interest. The Amish face a situation where their premises can be registered by others against their will, and even without their knowledge, forcing them into a system that violates their profound religious beliefs.

Premises registration is coercive, excessive, insidious, and punitive and violates the religious, privacy and ownership interests of the Amish. The State of Wisconsin has placed the Amish on a razor’s edge. If they comply with the law then they will violate their religious beliefs. If they comply with their religious beliefs, they must violate the law or divest their livestock and sacrifice their way of life. Either way the State has placed the Amish in an unconscionable position.

D. The State of Wisconsin has a compelling interest in livestock health. Mandatory premises registration does not further that interest.

The State has the burden to show that premises registration furthers a compelling interest, not simply some state interest, in animal health. *State v. Kasuboski*, 87 Wis.2d 407, 416; 275

N.W.2d 101 (Wis. App. 1978). “A compelling interest is not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation.” *Yoder*, 49 Wis.2d at 438. In this case, even though the State has argued that it has a compelling interest in livestock health, mandatory premises registration has not been demonstrated to further that interest. The State placed no data into evidence to support how mandatory premises registration will further even some interest of the State in livestock health. The State witnesses could not explain why premises registration proved any advantages over systems already in place.

In determining whether the State has a compelling interest, Wisconsin courts evaluate the history and data supporting the State’s claims. In *Miller*, the Old Order Amish objected to displaying an orange triangle slow moving vehicle (“SMV”) emblem on their buggies despite the State’s compelling interest in public highway safety. The Court found that the State did not meet its burden, after noting that the State “was unable to put forth any concrete evidence that the SMV symbol actually serves the interest of promoting public safety better than the white tape alternative.” *See Miller*, 202 Wis.2d at 72. In contrast, in *Peace Lutheran Church*, the Court held that the state’s interest in saving lives and protection of property justified requiring a Church to install fire sprinklers. The Court noted that a sprinkler system “has a proven track record in saving lives and property, “especially in the circumstance where it provides immediate response to a fire and prevents the rapid spread of a fire.” *See Peace Lutheran Church*, 246 Wis.2d 502, 517-18, 631 N.W.2d 229 (Wis. Ct. App. 2001). Similarly, in *Peck*, the Court held that the state’s interest in preserving public health justified conviction of the defendant for manufacturing controlled substances which he claimed was an expression of his religious beliefs. The court reasoned that the record for such a compelling interest was illustrated by the nearly

unanimous rulings of other state and federal courts on the issue. *See State v. Peck*, 143 Wis.2d 624, 422 N.W.2d 160 (Wis. Ct. App. 1988).

The State of Wisconsin has a compelling interest in livestock health. However, as in *Miller*, and unlike *Peck* and *Peace Lutheran Church*, the State has failed to show that the regulation at issue furthers its interest in protecting livestock health.

1. Mandatory premises registration serves a very limited role, if any, in protecting animal health.

Understanding premises registration is important in evaluating how limited its role is in protecting animal health. Premises registration only attempts to identify properties where livestock or poultry animals are held. It does not prevent disease. It does not treat disease. It does not detect disease. It does not protect food from contamination at the slaughterhouse or during processing, nor does it trace contaminated food. Its sole claimed purpose is to facilitate traceback of live animals *after* a disease has been detected to improve containment. Dr. McGraw testified that “livestock premises registration gives us every location where all types of species are located so in the event of a disease outbreak, we would know rapidly who we may need to contact in order to test the livestock for disease and control the disease.” (Trans. p. 143, lines 9-23). In other words, premises registration is intended to facilitate contact with animal owners during traceback of diseased animals.

Wisconsin’s mandatory premises registration program identifies each premises with a number randomly generated by a computer program from the USDA. The registration includes information that can be found in public records, such as addresses and phone numbers. The number is also associated with a geographical identification system, similar to those publicly available based on a street address, survey, or GIS coordinates. The latter is routinely available

through a variety of publicly accessed satellite mapping programs accessed through the World Wide Web.

2. Mandatory premises registration does not significantly advance even traceback of livestock.

The State insists that the Amish be forced to violate their religious beliefs, but is unable to articulate a single clear reason why the numbering of premises under the NAIS system is of more value than a street address. The Court asked Dr. McGraw to explain why the randomly generated premises number was “more beneficial” than using people’s names and addresses. (Trans. p.201, lines 2-3.) Dr. McGraw was unable to provide a valid reason. Rather, he noted that “USDA came out with that program that premises registration using a unique number nationally and so the legislation was written in Wisconsin to use that system to allocate the numbers.” (Trans. p.201, lines 17-20). When the Court pressed again for a reason that the USDA number was better than the address, Dr. McGraw was forced to admit: “I don’t know that I can answer that.” (Trans. p.201, line 24).

3. The State’s claim that it needs to know where every animal is located is unachievable even with mandatory premises registration.

The State’s claim that it needs to know where *every* animal is located in order to handle disease outbreaks is not realistic, and any such system will fail.

The State claims that premises registration will permit rapid targeted response so that the State can avoid the expense of knocking “door-to-door.” (Trans. p. 168, lines 12-17.) Yet the State has failed to factor in the costs of mandating premises registration, including the hardware, software, and labor involved.

Moreover, if one accepts the State’s premise that it needs to know where every animal is located in order to avoid the time and expense of knocking door-to-door, the program fails. Wild

animals provide a reservoir and carry many of the diseases that concern the State, such as pseudorabies in wild hogs and tuberculosis and wasting disease in wild deer. In addition, the locations where animals are held change constantly. As Dr. McGraw noted, for example, some people keep pigs only at certain times of the year for the fairs. (Trans. p. 167, lines 15-20). Individuals may lease pastures for a season or two, followed by other individuals who keep different animals in the same pastures. People constantly move or buy or sell animals. Thus, while the State's identification of the premises remains constant despite change in ownership, the number and diversity of animals on that premises may change constantly.

Unless the premises registration database is updated and verified daily, it will be incomplete and inaccurate. The DATCP's regulation calls for premises registration to be updated only every three years, and provides no mechanism or resources for verifying the information on a real-time basis. True verification could only be achieved by direct site visits to each premises.

Significantly, as this Court noted, no law has 100% compliance. There will be substantial noncompliance with any law, and even more so with a law that has sparked the sort of widespread opposition seen against NAIS. For example, when the USDA proposed mandatory NAIS premises registration for existing disease control programs, thousands of comments were submitted, overwhelmingly in opposition to the proposal. (*See* 74 Fed. Reg. 1634 (Jan. 13, 2009) (proposed rule) and [http://www.regulations.gov/search/Regs/home.html#docket Detail?R=APHIS-2007-0096](http://www.regulations.gov/search/Regs/home.html#docket%20Detail?R=APHIS-2007-0096)⁹). When the USDA held listening sessions around the country earlier this year, reports from the attendees indicated that approximately 85-90% of the people who spoke opposed NAIS.

⁹ The agency's online system shows 9,273 comments submitted online. Those comments include submissions from the Organic Consumers Association and Food and Water Watch that bundled together more than 15,000 individual emails, for a total of approximately **24,000 comments**.

Even for those premises that are registered, the use of premises registration geospatial data has already proven to be faulty. In an unpublished study conducted for the Wisconsin DATCP and WLIC, researchers stated: “preliminary analysis by WDATCP raised questions about the spatial accuracy of premises coordinates in the [premises registration system] that were generated by the USDA’s Animal and Plant Health Inspection Service address geocoding tool (“Allocator” data). (Exhibit K, Validation of Livestock Premises Registration Geospatial Data, Jennifer Borlick and Steve Ventura, University of Wisconsin-Madison Land Information and Computer Graphics Facility (3/5/07) at p.1). “A small sampling of Allocator coordinates were, in some cases, many kilometers from the actual location of the premises.” (*Id.* at p.1.) This error is particularly significant considering that the largest constraint zone for a disease outbreak, foot and mouth, is only 10 kilometers. (Trans. p.168, lines 21-24.) The study then examined an alternative system that was developed by the DATCP, termed the Centrus Data. Yet the study concludes: “It is clear that livestock premises locations derived either by Allocator or Centrus have significant problems.” (Exhibit K at p.13.)

Dr. McGraw also testified that one of the benefits of premises registration is being able to contact the individuals by phone rather than in person. (Trans. p. 167, lines 11-22). But, with respect to the Amish community, Mr. Schwartz testified that the individuals whose properties would be registered do not have telephones. (Trans. p. 31, lines 10-11). So whether or not they registered, they would have to be contacted door-to-door.

Ultimately, if the State needs to locate or verify every property where animals are held, then it will have to resort to knocking door-to-door. In contrast, if the State needs merely to locate most of the animals in an area, this could be achieved by methods such as public service

announcements, records from livestock-related businesses such as feed stores or auction barns, and the other methods that agencies have successfully used for decades.

4. The evidence shows that mandatory premises registration may actually harm animal health.

The state has argued that the premises registration program is essential to trace disease outbreaks, including those that are the result of intentional acts, such as bioterrorism. However, State testimony indicates that the premises registration program actually would have the opposite effect and make traceability more problematic.

Consider the pseudorabies outbreak in Clark County that the State used as an example of the value of the premises registration program. The infected pig was identified at slaughter by mandatory blood tests. The specific pig was associated with a specific farm by means of the buyer and seller information contained on the tag placed on the animal by the hauler. This information was used to identify the farm of origin, and eventually an area within which all farms were contacted and pigs tested. The disease was contained.

As noted by this Court and acknowledged by Dr. McGraw, the premises ID number contains 7 digits that are randomly generated by the USDA's computer program. None of the digits are associated with a specific state, county or zip code. A series of numbers that may differ by a single digit could be assigned to any farm anywhere in the United States. (Trans. p. 200, line 22-p. 201, line 1; p. 202, lines 5-14.)

This Court noted that a single error in recording a premises ID on an auction sales form could send investigators to a different farm within Wisconsin or any other state. Dr. McGraw noted that an error would be quickly revealed. (Trans. p. 203, lines 8-12.) However, if the premises ID were the only number associated with the blood sample, the diseased animal would be untraceable. In contrast, existing records of names and addresses are of use even if there is an

error. So does the State intend for auction barns to maintain duplicate records? If yes, then the premises registration is redundant and unnecessary. If the State does not intend for duplicate records to be kept, and instead rely on the computer-generated premises ID number, the infected animal would be untraceable if there is an error in entering, storing, or transcribing the data, or if the computer fails at a critical moment in time. In fact, concentrating a system's critical data in one central site that is reliant on computer control to make sense of otherwise random numbers makes such a system uniquely vulnerable to bioterrorism, economic manipulation, simple sabotage or random failure, weaknesses which are not typical with the redundancy and "on the ground" human inputs characteristic of current address-based and other systems.

If a person who is selling an infected animal either innocently or knowingly transposes a single digit when providing their premises identification number to the sales barn, the ID number would provide a false lead when the blood sample tested positive. The State would be forced to retrace the animal by current means, handicapped by having to take at least one additional step to return to the point of sale and trace records, if such records are even maintained once the State begins to rely on premises registration. At the very least, time would be lost in tracing the animal; at the worst, the animal could not be traced. The State's claim as to the robust nature of the program to traceback diseased animals defies logic.

Current tracking using the contact information of the buyer and seller, associated with a sales barn number that accompanies the animal's blood sample, is more accurate and less prone to error than reliance on a number randomly generated by the USDA and inserted into a national data base. Obviously, the current system worked since the diseased animal in the pseudorabies outbreak was traced to a specific farm. Despite the State using this outbreak as an example of the value of mandatory premises registration, the premises ID was not used to trace the animal. The

example actually validates the effectiveness of the current less restrictive means to achieve the State's interest. Mandatory premises registration, and the entire NAIS program, appears to be a case of a bad solution looking for a problem.

Based on the State's testimony, the premises registration saved the agency time locating nearby properties during the pseudorabies outbreak. Yet the State still had to go door-to-door. For the reasons outlined above, if the State truly needs to find every animal in a specified area, they will always have to go door-to-door, with or without mandatory premises registration.

5. The State cannot demonstrate that mandatory premises registration furthers the State interest in animal health.

Unlike *Peck* or *Peace Lutheran Church* there are no case studies, historical data or evidence that mandatory premises registration actually furthers the State's compelling interest in assuring the health of livestock. The State's witnesses offered only their personal opinions and hypotheticals. As discussed above, potential problems with mandatory premises registration puts the livestock industry at greater risk due to human error, terrorism, or economic malfeasance, by relying on a single centralized system to trace a diseased animal. Mandatory premises registration places an additional and redundant complicating layer of federal and state bureaucracy over a system of livestock tracing that currently is working. The State's claim that mandatory premises registration furthers the State's compelling interest is not defensible.

E. Even if the court were to find that mandatory premises registration does further a compelling state interest, mandatory premises registration is not the least restrictive viable alternative available to achieve the state's interest.

Even if the court found that mandatory premises registration does further a State of Wisconsin compelling interest, mandatory premises registration is not the least restrictive means to achieve that interest.

The Wisconsin Legislature clearly provided that the DATCP could choose to grant exemptions in implementing premises registration: “The department may promulgate rules specifying exemptions from sub. (2), including exemptions based on the number or type of livestock kept by a person or on the type of location where a person keeps livestock.” Wis. Stats. 95.1(3m). **It was the decision of the DATCP, not legislative policy, that imposed mandatory premises registration on the Amish.**

The DATCP’s decision to mandate premises registration places it in the minority of state and federal agencies in this country. Only two other states have mandated NAIS premises registration: Indiana and Michigan (the latter for cattle only). Forty-seven states, although they have implemented voluntary premises registration, continue to use the traditional methods for locating properties and animals during disease outbreaks, such as sales barn records, information from existing programs such as the scrapie or brucellosis programs, and public service announcements. Five States have specifically prohibited a mandatory NAIS program: Arizona, Kentucky, Missouri, Nebraska, and Utah. *See* Az. Rev. Stat. 3-1207 & 3-1214; Ky. Rev. Stat. 257.497; Mo. Rev. Stat. 267.168.1; Neb. Rev. Stat. 54-702; Utah Rev. Stat. 4-31-22. To date, the USDA has chosen to keep all three stages of NAIS voluntary, despite the initial plans to mandate the entire program by January 2009.

The State has not presented any evidence to support its decision to mandate premises registration and not provide exemptions. In *Miller*, both Defendants and State agreed that the State had a compelling interest in highway safety. The Defendants argued that reflective white tape and a red lantern presented an alternative acceptable to their religious beliefs. The State maintained that there was no adequate alternative to the red and orange slow-moving vehicle (SMV) emblem and that its compelling interest could only be served by the unique and uniform

symbol. But the State could cite no studies supporting their contention. *Miller*, 202 Wis.2d at 71-72. The court noted that the State failed to “put forth any concrete evidence that the SMV symbol actually serves the interest of public safety better than the alternative of using reflective white tape.” *Id.* at 72. The court therefore ruled that the State mandate for displaying the SMV emblem violated the guarantee of freedom of conscience found in Article I, section 18 of the Wisconsin Constitution.

In this case, as in *Miller*, Noah Schwartz testified that the Amish have expressed and demonstrated a willingness to cooperate by providing their names and addresses when they buy and sell livestock and to have that information recorded on paper. (Trans. p. 49, lines 18-25; p. 50, lines 14-20). The Amish already give that information to appropriate personnel when they sell livestock outside of their closed communities. The Amish have expressed a willingness to continue to accept this less restrictive and burdensome alternative, which, unlike mandatory registration, has been shown through time to be efficacious in accomplishing the State’s compelling interest.

As in *Miller*, the State has failed to demonstrate that the compelling interest of livestock health cannot be served by less restrictive alternatives. The State presented no concrete data to support mandatory premises registration as the sole least restrictive means to achieve the State’s interests. The State presented only hypothetical and vague examples of how mandatory premises registration might facilitate maintaining animal health by possibly facilitating traceability.

Even in the example given in support of mandatory registration by the state regarding the pseudorabies outbreak, the identification of the infected pig and trace back to the source was through auction records after the disease was detected at a slaughter facility. (Trans. p. 170, lines 16-24.) Dr. McGraw claimed they were able to save time by phoning numbers in the premises

registration data base, but the State did not address whether they could have simply called the individuals in the area using the phone book. The State did not address the cost of establishing and maintaining the massive premises registration database, as compared to the cost of locating individuals within a specific area at need. Moreover, because the Amish do not have telephones, even if they had registered, the State would have had to visit their farms anyway.

The mandatory premises registration system has no proven track record. There is no concrete evidence to indicate that it is a better alternative than the current less restrictive systems accepted by the Amish to assure livestock health. In *Peace Lutheran Church*, the use of sprinklers to suppress fires and save lives is an immediate, historically sound, and obvious means to achieve a compelling state interest: saving lives. *Peace Lutheran Church*, 246 Wis.2d at 517-18. In contrast, in this case, the use of mandatory premises registration system to assure livestock health is abstract, hypothetical, and may even compromise the State's ability to further its compelling interest.

The State relied on several examples of disease to claim that mandatory premises registration is important. One example was Foot and Mouth Disease. The State correctly noted that the last outbreak occurred in the US in 1924, 80 years ago, indicating that historical and current policies and practices have had a high level of success without mandatory premises registration. (Trans. p. 157, lines 20-25.) The State also gave as the example of the Newcastle outbreak in poultry in western states during 2002, 2003 and 2004. Although there were significant financial losses to private industry, the outbreak was ultimately contained. The State failed to mention that the outbreak may have been due to fighting cocks that were illegally imported from Mexico. (Exhibit L, Texas Animal Health Commission, News Release, Exotic

Newcastle Disease Spreads from California to Nevada (Jan. 17, 2003).¹⁰) It is doubtful that people already engaged in illegal activity would comply with mandatory premises registration. These examples were presented by the state as hypothetical cases where premises registration - *could* or *might* have been of value, but these diseases were identified and contained without mandatory premises registration, and there is no evidence that mandatory premises registration would have been more effective than the methods used. Rather, these examples suggest that the State's interest could best be served by investing resources in existing programs, such as border control to keep diseases out of the country.

IV. CONCLUSION

Mandatory premises registration imposes on the Amish a severe burden on their religious beliefs and an unconscionable financial burden that threatens to destroy the economic basis of their community. The State has failed to demonstrate that mandatory premises registration furthers a compelling state interest in livestock health. The only benefit the State claimed was that mandatory premises registration might have saved a few days work during the pseudorabies outbreak. A voluntary premises registration system coupled with the current system would be less restrictive and still accomplish the State's compelling interest in livestock health.

The undocumented inconvenience to the State of saving a few days' time pales in view of the tremendous burden placed upon the Amish community by mandatory premises registration. Their entire way of life – from the source of their income, to their food, to their daily transportation – is dependent on livestock. Their way of life is dictated by their centuries-old religious faith. Imposing mandatory premises registration forces them to choose between breaking the law or violating their deeply held religious beliefs, in order to perhaps save a State agency some time in tracking a livestock disease after it has already occurred.

¹⁰ http://www.tahc.state.tx.us/news/pr/2003/2003Jan_Newcastle_spread.pdf

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CERTIFICATE OF SERVICE

I, Judith I. McGeary, hereby certify that on this 27th day of November, 2009, I filed the foregoing Brief for Twenty-Two Farming, Ranching, and Consumer Organizations as *Amici Curiae* in Support of Defendant by delivering the original and one copy to this Court via Federal Express Overnight Service. I further certify that a true and complete copy of the foregoing Brief for Twenty-Two Farming, Ranching, and Consumer Organizations as *Amici Curiae* in Support of Defendant has been sent by First Class Mail, U.S. Postal Service, to the following counsel of record:

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