No._____

In the Supreme Court of Wisconsin

JERÉ FABICK AND LARRY CHAPMAN,

Petitioners,

v.

ANDREA PALM, JULIE WILLEMS VAN DIJK, NICOLE SAFAR, IN THEIR OFFICIAL CAPACITIES AS EXECUTIVES OF WISCONSIN DEPARTMENT OF HEALTH SERVICES; JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF WISCONSIN; DAVID ERWIN, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE WISCONSIN STATE CAPITOL POLICE; DAVID MAHONEY, IN HIS OFFICIAL CAPACITY AS SHERIFF OF DANE COUNTY, WISCONSIN; ISMAEL OZANNE, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF DANE COUNTY, WISCONSIN; ERIC SEVERSON, IN HIS OFFICIAL CAPACITY AS SHERIFF OF WAUKESHA COUNTY, WISCONSIN; SUSAN OPPER, IN HER OFFICIAL CAPACITY AS THE DISTRICT ATTORNEY OF WAUKESHA COUNTY, WISCONSIN; KURT PICKNELL, IN HIS OFFICIAL CAPACITY AS SHERIFF OF WALWORTH COUNTY; AND ZEKE WIEDENFELD, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF WALWORTH COUNTY, WISCONSIN.

Respondents.

MEMORANDUM IN SUPPORT OF PETITIONERS' EMERGENCY PETITION FOR ORIGINAL ACTION AND EMERGENCY MOTION FOR INJUNCTION

Charles J. Cooper*
Adam P. Laxalt*
Vincent J. Colatriano*
Harold S. Reeves*
John D. Ohlendorf*
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, DC 20036
(202) 220-9600
(202) 220-9601 (Fax)
ccooper@cooperkirk.com

Matthew M. Fernholz
Counsel of Record
CRAMER, MULTHAUF, & HAMMES, LLP
1601 East Racine Ave.,
Ste. 200
P.O. Box 558
Waukesha, WI 51387
(262) 542-4278
(262) 542-4270 (Fax)
mmf@cmhlaw.com

Counsel for Petitioners

*Applications to appear *pro hac vice* forthcoming.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutions

Executive Orders and Administrative Materials

Other Authorities

ISSUES PRESENTED

I. Whether Emergency Order 28 ("EO 28" or the "Order") infringes upon Petitioners' rights to freedom of worship and liberty of conscience protected under Article I, Section 18 of the Wisconsin Constitution.

II. Whether the Order infringes upon Petitioners' rights to freedom of speech and assembly protected under Article I, Sections 3 and 4 of the Wisconsin Constitution.

III. Whether the Order infringes upon Petitioners' right to travel as protected under the Wisconsin Constitution.

IV. Whether this Court should issue an order enjoining operation and enforcement of those provisions of the Order that infringe upon Petitioners' rights under the Wisconsin Constitution.

INTRODUCTION

The liberties protected by the Wisconsin Constitution are not fair-weather rights. No, like their counterparts under the federal constitution, those constitutional freedoms were designed to endure through "the various *crises* of human affairs." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis original). Those who enshrined those rights in this State's charter "knew what emergencies were, knew the pressures they

engender for authoritative action, knew, too, how they afford a ready pretext for usurpation." *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579, 650 (1952) (Jackson, J., concurring). And the liberties they passed down to us, and wrote out in the pages of our most basic law lest they be forgotten or ignored, were meant to guard against usurpation, no matter how well intentioned, even in times of crisis.

This case involves a clash of fundamentals. No one doubts the seriousness of the current public health crisis caused by the COVID-19 pandemic, or that it poses life-and-death risks to Wisconsin's citizens, especially those who are elderly or otherwise infirm. But the actions Respondents have taken to combat those risks, no doubt in good faith, have gone too far, needlessly infringing our most basic constitutional liberties—to an extent that is without precedent and that would have been virtually *unimaginable* in a free society just two months ago. The Emergency Order Respondents have promulgated and enforced, EO 28, includes restrictions that are simply irreconcilable with the founding constitutional commitments of this State:

- The Order imposes a discriminatory nine-person cap on gatherings for religious worship, even as it allows numerous other similar activities to take place without any similar numerical restriction.

- The Order effectively bans *any* political gatherings, of *any* number, at *any* time, and in *any* place—including political protests, rallies,

demonstrations, and even two neighbors sitting down at opposite ends of a park bench to talk politics.

- The Order imposes a form of modified house arrest on every Wisconsin resident, forbidding the exercise of the most basic liberty imaginable—a liberty that is a necessary predicate of virtually *every* other constitutional right: the freedom to simply leave one's home and travel about on public roads and in public spaces (or even walk next door to visit a neighbor without ever utilizing public thoroughfares).

Restrictions as profound and intrusive as these must be subjected to the most rigorous level of constitutional scrutiny. But they cannot survive even basic scrutiny. Once again: Petitioners do not question the seriousness of the present health crisis, or the weight of the State's interest in dealing with it. But the inexplicable lines drawn and distinctions made in the Order that Respondents have promulgated in response to the epidemic *refute* any contention that these constitutional infringements are the least restrictive means, or even sensible means, of combatting the virus. While EO 28 permits 60 individuals—ten adult staff and 50 children (who obviously can *not* be required or expected to be properly masked and distanced)—to gather together in a day care center, it does not allow even ten religious believers (who can be required and expected to observe recognized protective measures) to gather together for worship. While Respondents allow hundreds of customers into Costco at any given time, *no group of any size* is allowed to assemble in the

park, or any other public or private place, to engage in political protest or expression.

The State has the unquestioned authority—and duty—to implement reasonable measures to stem the tide of the COVID-19 epidemic. But as the Attorney General of the United States publicly emphasized just last week, the United States Constitution "is not suspended in times of crisis. We must therefore be vigilant to ensure its protections are preserved, at the same time that the public is protected."[1] No less is true of the Wisconsin Constitution. Even a public health crisis does not give the State's executive authorities license to impose measures that are arbitrary and irrational, or that patently violate our most sacred constitutional rights. This Court should exercise original jurisdiction and grant a temporary and permanent injunction.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

To the extent that oral argument by teleconference or videoconference would not delay the prompt resolution of the urgent matters addressed in this Emergency Petition and Motion, Petitioners believe that oral argument

[1] Office of the Attorney General, Memorandum for the Assistant Attorney General for Civil Rights and All United States Attorneys at 2 (Apr. 27, 2020), https://bit.ly/2VUC2KA.

would be helpful to the Court's consideration of the momentous issues at stake in this case. Petitioners believe the issues presented in this petition warrant a publication.

STATEMENT OF THE CASE

The Court is no doubt well aware of many of the pertinent facts surrounding the novel coronavirus COVID-19 pandemic and the State's response to it, and many of those facts are discussed in detail in the briefing in *Wisconsin Legislature v. Palm*, No. 202AP-765-OA ("*Wisconsin Legislature*"), currently pending before the Court. Petitioners will therefore confine themselves to a brief summary of those facts bearing upon the relief they request.

A. Secretary-Designee Palm's Sweeping Orders

Beginning in mid-March, the Governor and several state agencies have issued multiple orders addressing aspects of the State's response to the coronavirus pandemic. As relevant here, on March 12, Governor Evers issued Executive Order 72 which, among other things, declared the existence of a public health emergency in the State, designated DHS as the "lead agency" to respond to that emergency, and directed DHS "to take all necessary and appropriate measures to prevent and respond to incidents of

COVID-19 in the State." EO 72 §§ 2, 3 (Pet. App. 47).

DHS Secretary-Designee Palm has since issued a series of orders addressing the public health emergency proclaimed by the Governor. One of those orders, Emergency Order 12 ("EO 12"), was issued twelve days after the emergency declaration. EO 12 (Pet. App. 3). This so-called "Safer at Home Order" imposed sweeping restrictions on all individuals and most businesses within the State, and included (as discussed more fully below in connection with its successor order) provisions (1) severely limiting religious gatherings, (2) banning virtually all public and private gatherings of any nature, and (3) ordering, with limited exceptions, all individuals to stay at home and to cease all non-essential travel. EO 12 became effective on March 25, and by its terms was to remain in effect until April 24 "or until a superseding order [was] issued." EO 12 § 20 (Pet. App. 18).

As might be expected, EO 12's sweeping restrictions have had devastating impacts on the State's economy and on almost every facet of the everyday lives and livelihoods of its citizens and residents. *See* Memorandum in Support of Legislature's Emergency Petition for Original Action and Emergency Motion for Temporary Injunction at 14–16, *Wisconsin Legislature, supra* (filed April 21, 2020) ("Legis. Mem.") (discussing severe impacts

of EO 12). Although Petitioners had serious concerns about these impacts, and about EO 12's impingement upon their and others' constitutional rights and freedoms, the expressly-limited (30-day) duration of the order led Petitioners to decide against challenging the constitutionality of the order's restrictions at that time.

But that all changed on April 16, when Secretary-Designee Palm issued Emergency Order 28 ("EO 28" or the "Order") (Pet. App. at 19). This Order, which became effective at 8:00 a.m. on April 24, reimposed virtually all of the restrictions originally imposed by EO 12 and extended those restrictions for at least another month (until May 26). EO 28 § 21 (Pet. App. 39). Thus, by the end of the Order's stated period of effectiveness, the core restrictions in the Order will have been in effect throughout the State for more than 60 days. Notably, Respondents have provided no assurances that they will not extend those restrictions *again* at the end of the May, and indeed, all indications suggest that the Order will likely be extended in substantially its current form.

As noted, the Order's restrictions touch upon nearly every facet of public and private life in Wisconsin. And the Order provides (as did EO 12) that its restrictions are enforceable "by any local law enforcement official,"

and that any violations or obstructions of its provisions are punishable as crimes by fine (up to $250), imprisonment (up to 30 days), or both. EO 28 § 18 (Pet. App. 39). As relevant to this petition and motion, the Order severely restricts, on pain of criminal penalty, the exercise of the following rights and freedoms:

Restrictions on "religious entities": Although religious facilities and gatherings are designated by the Order as "essential" business activities that are allowed to continue, they are subject to special restrictions not applicable to any other essential activities. In particular, the Order decrees that all religious services and gatherings, including weddings and funerals, "shall include fewer than 10 people in a room or confined space at a time." EO 28 § 13(h) (Pet. App. 32) This nine-person limit on religious gathering applies regardless of the size of the religious facility in question or the nature of the religious practice at issue, and regardless of whether that practice can be performed in accordance with masking practices and with the social distancing requirements that are generally imposed to minimize the risk of transmission of the virus. Again, EO 28 does not impose a nine-person quota on any other establishment or activity in Wisconsin.

Restrictions on speech and assembly: The Order flatly prohibits

"[a]ll public and private gatherings of any number of people that are not part of a single household or living unit," other than for "the limited purposes expressly permitted in this Order." EO 28 § 3 (Pet. App. 5). Notably, the "expressly permitted" purposes do not include the exercise of such core liberties as the right to assemble for purposes of political speech, or to protest government action (including, for example, to protest the Order itself).

Restrictions on travel: The Order imposes sweeping and unprecedented restrictions on freedom of movement. Thus, its very first section provides that "[a]ll individuals present within the State of Wisconsin are *ordered* to stay at home or at their place of residence," with certain limited specified exceptions. EO 28 § 1 (Pet. App. 4) (emphasis added). Section 5 of the Order reinforces Section 1 by providing that "[a]ll forms of travel" other than "essential travel" are flatly "prohibited." EO 28 § 5 (Pet. App. 6). "Essential" travel allowed under these provisions is defined to cover travel for essential business operations and governmental functions, certain defined "essential activities" (such as activities essential to health and safety, to obtain necessary supplies and services, to engage in certain outdoor activities, and to take care of others), and certain designated "special situations" (such as healthcare and human service operations and work relating to "essential"

infrastructure). EO 28 §§ 8–11, 15 (Pet. App. 25–29, 37).[2] Essential travel is also defined to include travel to care for certain vulnerable persons, travel to or from educational institutions for certain limited purposes, travel for a Wisconsin resident to return from outside the jurisdiction and for non-residents to return to residences outside Wisconsin, and travel required by law enforcement or court order. EO 28 § 15(f) (Pet. App. 38). All other travel, regardless of its purpose and regardless of whether it can be accomplished without significant risk of transmission of the virus, is criminalized under the Order.

On April 20, Secretary-Designee Palm issued another order, Emergency Order 31 ("EO 31"), titled the "Badger Bounce Back," which announced the "phased approach" the State would employ "to re-opening its economy and society" over some unannounced and undetermined period of time. EO 31 § 1 (Pet. App. 41). EO 31 accorded to DHS itself the power to determine when it was appropriate to "progress" from one "phase" of re-opening to the next. EO 31 § 2 (Pet. App. 42). Significantly, EO 31 makes clear that nothing in it "modifies, alters, or supersedes" EO 28 or the

[2] *See also* EO 28 §§ 8–10 (Pet. App. 26–28) (describing "Special Situations"); EO 28 §§ 10–11 (Pet. App. 28–30) (defining "Essential Activities" and "Essential Governmental Functions").

restrictions imposed by that Order. EO 31 § 5 (Pet. App. 43). EO 31 does contemplate that DHS may issue additional orders "reducing restrictions" imposed by other orders as circumstances warrant. EO 31 § 5 (Pet. App. 43). Although DHS has since issued at least one order slightly relaxing some of the restrictions imposed by the Order,[3] it has not to date issued any order significantly "reducing" any of the restrictions that are the subject of this Petition, and it has not suggested that any such orders are forthcoming.

B. The Effects of the Order on Petitioners' Exercise of Their Constitutional Rights and Freedoms

1. Petitioner Chapman is a resident of Walworth County, Wisconsin. As he describes in the attached affidavit (Pet. App. 51), Mr. Chapman is a member of Lakewood Baptist Church in Pewaukee Wisconsin; he regularly attended Sunday worship at Lakewood, before the present epidemic. Because of EO 28, Lakewood is no longer able to hold regular, in-person Sunday worship. Like many other places of worship, Lakewood has worked hard to make a variety of "virtual" worship opportunities and resources available during the pandemic. But while Mr. Chapman is grateful for those

[3] *See, e.g.,* Emergency Order 34 (issued April 27, 2020) (Pet. App. 44) (allowing certain "curb-side" activities for some businesses, rentals of certain types of recreational equipment, and the reopening of some types of car washes).

opportunities, in his faith, they are not an adequate substitute for in-person, corporate worship with the body of other believers at Lakewood. Mr. Chapman believes that Scripture calls for regular *in-person* worship, not regular worship at home in front of the computer. Moreover, Lakewood's worship services regularly include the celebration of Holy Communion, and that simply cannot take place in a "virtual" setting. Further still, Mr. Chapman is concerned that many of the more elderly members of his congregation are unable to access and utilize the "virtual" worship resources Lakewood has provided.

For these reasons, Mr. Chapman wishes and intends to attend public, in-person, corporate worship at Lakewood again, as called for by Scripture, as soon as it is possible. Average attendance at one of Lakewood's Sunday services before the pandemic was about 500 believers; but Lakewood could easily hold smaller services, with individuals and family groups maintaining social distance and abiding by all general masking and other public-health safeguards, during the pandemic.

Accordingly, as Mr. Chapman's affidavit attests, EO 28's nine-person cap on gathering for religious worship has seriously burdened his right to worship freely in the manner his conscience dictates.

2. Petitioner Fabick is a long-time resident of Wisconsin who lives in Waukesha County. As described in his affidavit, the Order has had a significant impact on his exercise and enjoyment of his rights and freedoms, including but not limited to his rights of free speech and assembly and his right to travel. (Pet. App. 49). He has been very concerned and alarmed about the wisdom and legality of many of the actions taken by Respondents in response to the pandemic and wishes to engage in peaceful protest with respect to those and other actions and policies of the State. (Pet. App. at 49–50). In fact, were it not for the provisions of the Order prohibiting all public gatherings and all non-essential travel, Petitioner Fabick would have traveled to Madison to join in the protest held there on April 24. (Pet. App. at 50).

STANDARD OF REVIEW

Entry of a temporary injunction is warranted if Petitioners can establish (1) "a reasonable probability of ultimate success on the merits," (2) that there is a risk of "irreparable harm" in the absence of injunctive relief because there is no "adequate remedy at law," (3) that an injunction is "necessary to preserve the status quo," and (4) that the balance of equities favors issuing the injunction. *Werner v. A.L. Grootemaat & Sons, Inc*., 80 Wis. 2d 513, 520–21, 259 N.W.2d 310 (1977); *Pure Milk Prod. Co-op. v. Nat'l Farmers*

Org., 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). The same factors govern entry of a permanent injunction (though the irreparable harm requirement is more demanding). *Werner*, 80 Wis. 2d at 521.

The questions of constitutional law presented by this Motion are questions of law that the Court decides de novo. *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, 2018 WI 78, ¶23, 383 Wis. 2d 1, 914 N.W.2d 678; *Black v. City of Milwaukee*, 2016 WI 47, ¶21, 369 Wis. 2d 272, 882 N.W.2d 333.

ARGUMENT

I. THIS COURT SHOULD EXERCISE ORIGINAL JURISDICTION

The matters raised by this Emergency Petition and Motion satisfy the criteria for this Court's exercise of its original jurisdiction under Article VII, Section 3 of the Wisconsin Constitution. There can be no legitimate dispute that this is an "exceptional case[ ] in which a judgment by the court [would] significantly affect[ ] the community at large." *Wisconsin Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59, ¶4, 243 Wis. 2d 512, 627 N.W.2d 807. Indeed, it is hard to imagine a set of circumstances that would better fit that description. EO 28 has dramatically affected, in an unprecedented manner, not just the "community at large," but almost every aspect of the lives and

livelihood of *every* person in a State with a population of almost 6,000,000 people, as well as virtually every business and religious organization in the State. The reach and impact of the actions at issue in this Petition utterly dwarf the reach and impact of actions that this Court has in the past found sufficiently exceptional to warrant the exercise of original jurisdiction. *See, e.g., id.* (challenge to statute impacting the interests of 460,000 participants in pension system); *In re State ex rel. Attorney General*, 220 Wis. 25, 264 N.W. 633, 634 (1936) (noting the propriety of exercising original jurisdiction in case challenging constitutionality of statutes affecting "innumerable members and employees of industry throughout Wisconsin . . . .") (citation omitted).

But the broad sweep and enormous practical impact of the Order are not the only "exceptional" aspects of this case. This case also presents constitutional—indeed, absolutely critical—questions of the highest order: questions concerning the proper balance between the government's power to address an urgent public health crisis and the most fundamental rights and freedoms known in our society—the freedom of conscience and religious worship, the freedom of speech and assembly, and the very freedom to leave one's home and move about from place to place—rights that are expressly

guaranteed by the Wisconsin Constitution. Again, it is nearly impossible to imagine a case raising legal questions of greater importance than these.[4]

The exercise of original jurisdiction is also warranted by the need for a "prompt and authoritative" determination by this Court of these exceptionally important questions. *Citizens Utility Bd. v. Klauser*, 194 Wis. 2d 484, 488 n.1, 534 N.W.2d 608 (1995); *see also Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938) (exercise of original jurisdiction appropriate when "the questions presented are of such importance as under the circumstances to call for a[ ] speedy and authoritative determination by this court in the first instance"). The Executive Branch's restrictions are having a profound, devastating, *and continuing* impact on almost every aspect of the daily lives and activities of everyone in the State and are infringing Petitioners' constitutional rights and freedoms *each and every day*. Petitioners (and virtually every other citizen) are thus suffering irreparable injury every day that those

[4] *See Panzer v. Doyle*, 2004 WI 52, ¶2, 271 Wis. 2d 295, 680 N.W.2d 666 ("The supreme court hears original actions in cases that involve substantial legal questions of more than ordinary importance to the people of the state."), *abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408; *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶7, 334 Wis. 2d 70, 798 N.W.2d 436 (exercising original jurisdiction in cases involving important separation of powers questions); *Lightbourn*, 243 Wis. 2d at 528 (exercising jurisdiction in case raising constitutional challenge to pension statute); *Joni B. v. State*, 202 Wis. 2d 1, 549 N.W.2d 411 (1996) (exercising jurisdiction in case raising due process and separation of powers challenge to statute).

restrictions are allowed to stay in place. If there is ever to be an authoritative ruling by this Court assessing the constitutionality of those restrictions, and if further irreparable harm to Petitioners is to be prevented, the Court needs to act now—not months from now, after the irreparable harm to the citizenry's constitutional freedoms is compounded as the case winds its way up through the state judicial system.

Finally, while the exercise of original jurisdiction would be appropriate in any event given the above considerations, it is particularly warranted in light of the already pending challenge to EO 28 (No. 2020AP765-OA) filed by the Wisconsin Legislature. For the same reasons that the Court has exercised its jurisdiction to resolve the statutory challenges to the Order raised by the Legislature, it should also utilize that procedure to resolve Petitioners' constitutional challenges on a parallel course. Indeed, it would make little if any sense for the Court to agree to exercise its original jurisdiction in the one case and decline to do so in the other.

In short, what the Legislature has said in its original action applies equally if not more forcefully to this action: "Given the gravity and exigency of this case, and the need for an authoritative decision from this Court on . . . critically important question[s] of law, the Court should exercise its original

jurisdiction." Legis. Mem. at 26–27.

II. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT SEVERAL ASPECTS OF EMERGENCY ORDER 28 ARE UNCONSTITUTIONAL

A. Petitioners Are Likely To Succeed in Showing that EO 28 Infringes The Right to Religious Liberty

"The right to practice one's religion according to the dictates of conscience is fundamental to our system of government." *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶32, 320 Wis. 2d 275, 768 N.W.2d 868. Indeed, the Wisconsin Constitution includes religious liberty protections that are even "more specific" and emphatic, *Coulee Catholic Schools*, 320 Wis. 2d 275, ¶60, than the already robust protections guaranteed under the First Amendment to the United States Constitution:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship….

WIS. CONST. art. 1, § 18.

The challenged Order cannot be squared with these fundamental constitutional protections. EO 28 imposes, in effect, a nine-person cap on gatherings for religious worship. No other activity deemed "essential" by

Respondents is subject to such a numerical limit.[5] Wisconsin residents remain free to shop at the Home Depot or Total Wine & More in numbers exceeding ten, even though general masking and distancing measures can be practiced no more readily by those who have gathered to shop than by those who have gathered to worship. Even day care centers—the only other activity subject to any sort of absolute numerical limitation—can continue to operate with up to 60 individuals in a single facility, *over six times* the number allotted to religious worshipers.[6] And toddlers in a day care center are obviously not going to wear masks and practice social distancing.

Christians believe that "where two or three are gathered together," Christ is in the midst of them. Matthew 18:20. But under EO 28, if the number of worshipers is as high as ten or eleven, they are all "punishable by up to 30 days imprisonment, or up to $250 fine, or both." EO 28 § 18 (Pet. App. 39). That result is intolerable, in a Nation "founded by religious refugees and dedicated to religious freedom." *Elk Grove Unified Sch. Dist. v. Newdow*,

[5] The Order also imposes a nine-person limit on any gathering in "Funeral establishments." EO 28 § 13(i) (Pet. App. 33). Because gatherings in funeral homes are overwhelmingly religious in nature, we do not treat this exception separately from the nine-person quota that applies specifically to "Religious facilities, entities, groups, and gatherings." EO 28 § 13(h) (Pet. App. 32).

[6] Andrea Palm, Wisconsin Department of Health Services, Emergency Order #6: Restricting the Size of Child Care Settings (Mar. 18, 2020) (Pet. App. 1).

542 U.S. 1, 35–36 (2004) (O'Connor, J., concurring). Respondents' nine-person cap is categorically unconstitutional under the Wisconsin Constitution's Freedom of Conscience protections—or, at the very least, it must be subjected to the strictest judicial scrutiny. And because the Order's *own exemptions* for numerous non-religious activities demonstrate that a nine-person quota *is not* necessary to protect the public health and safety, EO 28's "nine worshipers only" limit is not the least restrictive alternative, and it must be struck down.

1. EO 28 Categorically Violates Petitioners' Rights of Conscience by Imposing a Discriminatory Quota on Religious Worship.

The history of America is, in large part, a history of religious dissenters fleeing from government restrictions on the form and manner of public worship. As is well known, the Pilgrims who settled in Massachusetts 400 years ago fled to the New World in search of "the liberty to worship God according to their conscience." *On Fire Christian Ctr., Inc. v. Fischer*, 2020 WL 1820249, at *2 (W.D. Ky. Apr. 11, 2020).[7] Indeed, as one scholar has

[7] Petitioners' claims challenging the Order's infringement of religious liberty and freedom of conscience, like all other claims in this action, are premised solely upon the protections that their rights are accorded under the Wisconsin Constitution. Because those protections are, at a minimum, at least as extensive as—and, in some important respects, exceed—the protections accorded to religious liberty under the First Amendment, decisions discussing the right to free exercise under the First Amendment are cited solely for

recounted, the "most distinctive mark" of the Puritan separatists was their refusal to abide by the prescribed Anglican forms of worship, borne of their belief that "God does not leave to human discretion how God is to be worshiped" but rather "has made the forms of such worship clear in scripture." JAMES F. WHITE, PROTESTANT WORSHIP 118 (1989).

"The Pilgrims' history of fleeing religious persecution was just one of the many 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause' " of the federal Constitution. *On Fire Christian Center*, 2020 WL 1820249, at *2 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)). A generation after the Pilgrims, for example, another minority sect—the Quakers—again faced persecution over their unorthodox form of worship, which (according to their critics) involved ecstatic "quaking fits." THOMAS D. HAMM, THE QUAKERS IN AMERICA 19 (2003). Their efforts to secure religious liberty, under the leadership of William Penn, form another prominent strand in the tapestry of American religious freedom and toleration.

---

their persuasive value to the Court in assessing Petitioners' state law claims. *See State v. Miller*, 202 Wis. 2d 56, 65, 549 N.W.2d 235 (1996) ("[T]he First Amendment and Article I, § 18 serve the same underlying purposes and are based on the same precepts . . . .").

Importantly, the American quest for the free exercise of religion did not end with the adoption of the United States Constitution and the Bill of Rights. As this Court has recounted, for instance, many adherents of the Old Order Amish originally settled in Wisconsin because their refusal to send their children to secular public schools subjected them to "daily fines which became so severe" that "they sought religious freedom here, in a spirit and with a hope not unlike the Pilgrim Fathers who came to America." *State v. Yoder*, 49 Wis. 2d 430, 438, 182 N.W.2d 539 (1971), *aff'd sub nom. Wisconsin v. Yoder*, 406 U.S. 205 (1972). Indeed, it is this experience that in part accounts for the Wisconsin Constitution's "extremely strong language" protecting the freedom of conscience and worship. *Coulee Catholic Schools*, 320 Wis. 2d 275, ¶60. As this Court has described,

> Wisconsin, as one of the later states admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population, . . . 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.

State v. Miller, 202 Wis. 2d 56, 65, 549 N.W.2d 235 (1996) (quoting *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 165, 115 N.W.2d 761 (1962)).

The Order's nine-person cap on religious worship amounts to a frontal assault on these protections guaranteed under Article I, Section 18. Limiting worship services to nine participants or less completely transforms the nature

of most Christian public worship. A nine-person limit makes it impossible for even a pastor, a single musician, and two families of four to meet together in the same service, no matter how spacious the facility. That is flatly contrary to the Wisconsin Constitution's solemn guarantee that the Government may not prescribe or proscribe any particular "modes of worship." WIS. CONST. art. I, § 18.

Further still, EO 28 operates as a *complete ban* on the form of worship practiced by some Wisconsinites. For example, under Jewish law, public prayer and worship may only occur in the presence of a *Minyan*, or quorum of ten Jewish males over the age of 13. *See* Rabbi Shmuel Kogan, *Why Are Ten Men Needed for a Minyan?*, CHABAD.ORG, https://bit.ly/2YmhEUm. By prohibiting the formation of a *Minyan*, EO 28's nine-person cap thus *outlaws* traditional Jewish public prayer and communal worship. The mind struggles to conceive of a more blatantly unconstitutional act.

To be sure, the religious faithful (at least those with the means to do so) remain free to worship "virtually," through audio- or video-conferencing technology.[8] But the availability of "virtual" worship does not allay the

[8] Many Wisconsinites, particularly the poor and those living in rural areas, rely on their local library facilities for access to the Internet and other technologies. Under Section

burden for many religious believers. As discussed, orthodox Jewish worship simply cannot be conducted virtually. And likewise, traditional Christian worship involves (and in some traditions requires) frequent, regular practice of Holy Communion—an aspect of worship that, at least in many denominations, cannot be celebrated virtually. More generally, many Christians interpret Scripture's injunction that believers "not forsak[e] the assembling of ourselves together," Hebrews 10:25, to require the regular celebration of public, corporate, in-person worship. Indeed, "the Greek word translated 'church' in our English versions of the Christian scriptures is the word 'ekklesia,' which literally means 'assembly.' " *On Fire Christian Center*, 2020 WL 1820249, at *8 (quoting A.T. ROBERTSON, A GRAMMAR OF THE GREEK NEW TESTAMENT IN LIGHT OF HISTORICAL RESEARCH (3d ed. 1919)).

Government officials may, of course, take the contrary view that "virtual" religious worship should be good enough. But many people of faith, including Petitioner Chapman, have sincere religious beliefs to the contrary, and it is not the role of the Government, or of this Court, to second-guess

4(b) of the Order, however, those facilities remain closed for all in-person services. EO § 4(b) (Pet. App. 24).

those convictions. *See Yoder*, 49 Wis. 2d at 436 ("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." (citations omitted)); *cf. Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427 (6th Cir. May 2, 2020) (Slip. Op. at 8) ("who is to say that every member of the congregation has access to the necessary technology to make [virtual worship] work? Or to say that every member of the congregation must see it as an adequate substitute for what it means when 'two or three gather in my Name.' Matthew 18:20"); *On Fire Christian Center*, 2020 WL 1820249, at *7 ("It is not the role of a court to tell religious believers what is and isn't important to their religion, so long as their belief in the religious importance is sincere.").

EO 28's nine-person cap is especially pernicious because it is discriminatory, subjecting religious worship to a draconian restriction that *does not apply* to other activities that the Order allows to go forward. The nine-person limit does not apply to *any activity other than religious worship* (and funeral services). And where Respondents have imposed other numerical limits, either *de jure* or *de facto*, they are far less stringent than the nine-person limit

governing worship services.

For instance, Section 13(f) of EO 28 provides that EO 6 "remains in effect," and under that order, child-care facilities may continue operating so long as they have no more than "10 staff" and "50 children present at a time"—a total of sixty individuals. EO 28 § 13(f) (Pet. App. 32). Respondents have not offered, and Petitioners cannot conceive of, any justification for imposing a cap on religious worship that is *over six times more stringent* than the limit governing day care facilities. We hasten to emphasize that we have no quarrel with the Executive's declaring day care centers "essential" or placing a relaxed 60-person limit on their activities. But we submit that the constitutional primacy of the freedom of religious worship makes the nine-person cap on religious gatherings wholly unjustifiable.

All other "essential" facilities or operations allowed to remain open under EO 28 are not subjected to any fixed numerical limit *at all*. For example, the Order exempts "Hardware stores," alcohol retailers, and retailers of "household consumer products." EO 28 §§ 13(b), (m) (Pet. App. 30, 33). Those establishments are allowed to operate without *any numerical limits whatsoever*—so long as they abide by "social distancing" requirements, *id.* § 13(b)(iv) (Pet. App. 30), and limit occupancy to certain levels (for stores

with a footprint greater than 50,000 square feet, four people per 1,000 square feet of floor space), *id* § 2(b)(iii)(3) (Pet. App. 23). Likewise, the Order exempts numerous factories—including those that manufacture "audio and video electronics," "household appliances," "paint," and "photography equipment," *id.* 13(r) (Pet. App. 34)—without imposing any limits on the number of employees allowed to work together on the factory floor. The Wisconsin Constitution simply does not permit the Executive to conclude that 200 to 400 customers may gather together at the local Home Depot or Total Wine & More, but in the same breath forbid ten believers from meeting at their church, synagogue, or mosque to pray together.

To be sure, Petitioners do not suggest that the Executive officials who imposed the nine-person cap acted out of malice towards Christians, Jews, Muslims, or any other religious believers. To the contrary, we do not have reason to doubt the good faith of those officials, acting to protect Wisconsinites from the spread of COVID-19. But under our tradition of religious liberty, "it doesn't matter that the government burdening the religious practices of others 'consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens.' " *On Fire Christian Center*, 2020 WL 1820249, at *7 (quoting *Church of the Lukumi Babalu Aye*,

508 U.S. at 559 (Scalia, J., concurring)). Even when government officials act only out of *indifference* to religious belief, constitutional protections of religious liberty bar them from imposing "a value judgment" that prioritizes "secular" interests—such as the availability of professional child care or home improvement products—over sincere religious commitments and obligations. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.); *see also Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1144 (10th Cir. 2006) (McConnell, J.).

Respondents' discriminatory numerical cap on religious worshipers is therefore wholly contrary to our constitutional traditions, and it cannot be implemented and enforced in a manner consistent with those traditions. That is true quite apart from the "strict scrutiny" or "compelling state interest/least restrictive alternative test" that would ordinarily apply under the Freedom of Conscience Clauses. While this Court has applied that form of scrutiny to most laws burdening religious liberty—and, as discussed below, that form of scrutiny also dooms EO 28's nine-person limit—this Court has held that some types of infringement on religious liberty are so beyond the pale "that the state cannot do it—at all." *Coulee Catholic Schools*, 320 Wis. 2d 275, ¶63.

In *Coulee Catholic Schools*, for instance, the Court held that an attempt to apply general employment discrimination protections to a religious entity's "ministerial" employees was categorically unconstitutional, under the Wisconsin Constitution's "extremely strong language[ ] providing expansive protections for religious liberty." *Id.*, ¶60. As the Court explained, such a law,

> is not simply a burden on an individual's or organization's religious beliefs; it is an effort by the state to intrude into the hiring and firing decisions of a religious organization. . . . There is no weighing of the state's interest or examination of whether the law is narrowly tailored to achieve that interest. The state simply has no authority to control or interfere with the selection of spiritual leaders of a religious organization with a religious mission.

Id., ¶63.

So too here. Under Article I, Section 18's command that "[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed," that no "control of, or interference with, the rights of conscience [may] be permitted," and that no "preference [may] be given by law to any religious establishments or modes of worship," Respondents "simply ha[ve] no authority" to limit worship services to nine attendees or less—and they *certainly* have "no authority" to completely *ban* ten-person gatherings for traditional Jewish worship. *Id.* "There is no weighing of the state's interest or examination of whether the law is narrowly

tailored to achieve that interest. . . . The text of our constitution states that the state cannot do it—at all." *Id.*

Accordingly, EO 28's nine-person cap on religious worship is categorically unconstitutional, and it should be enjoined.

2. In the Alternative, EO 28 Must Be Subjected to Strict Scrutiny Under Article I, Section 18.

Even if EO 28's nine-person quota were not categorically unconstitutional under Wisconsin's Freedom of Conscience Clauses—and it is, for the reasons just discussed—it would still have to survive the strictest judicial scrutiny required under Article I, Section 18.

As noted above, the base-line form of inquiry when a law is challenged under Article I, Section 18's protections of religious liberty is what this Court has called the "compelling state interest/least restrictive alternative test." *Id.*, ¶61 . That is true even when the challenged law is neutral and of general applicability—for this Court has rejected the federal rule that exempts such neutral laws from strict scrutiny. *See Miller*, 202 Wis. 2d at 69 (concluding that "the 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 see no need to depart from this time-tested standard"). Under that inquiry, the challenger "has to prove

(1) that [he] has a sincerely held religious belief, and (2) that such belief is burdened by the application of the state law at issue. Upon this showing, the burden shifts to the state to prove (3) that the law is based upon a compelling state interest (4) that cannot be served by a less restrictive alternative." *Coulee Catholic Schools*, 320 Wis. 2d 275, ¶61.

Here, the first two prongs of this test are clearly met. (The second two prongs—which articulate the application of strict scrutiny—are discussed below). As established in the accompanying affidavit, Petitioner Chapman has sincerely-held beliefs that he holds a religious obligation to meet publicly, on a regular basis, for worship (Pet. App. 51). While other people of faith may not hold such a belief, there can be no question that Mr. Chapman's beliefs are sincerely held, or that he sincerely believes that his religious traditions enjoin him to meet for public, regular, corporate worship.

Nor can there be any doubt at all that EO 28's nine-person cap burdens these religious beliefs. As discussed above, the nine-person limit *forecloses traditional Jewish worship gatherings altogether*—the most severe "burden" imaginable. And it likewise burdens Petitioner's right to worship as his conscience compels him. Limiting worship services to nine attendees makes it completely impossible for Petitioner's congregation to "assembl[e] . . .

together," Hebrews 10:25, as Christians have been doing for two millennia, to worship God in a communal way that demonstrates the unity of their faith and confession.

Accordingly, Respondents' restriction on communal worship can stand under the Wisconsin Constitution only if it is the least restrictive means of furthering a compelling state interest.

3. EO 28 Is Not the Least Restrictive Means of Protecting the Government's Interest.

For the reasons just discussed, under the rights of religious liberty and freedom of conscience guaranteed by the Wisconsin Constitution, EO 28's nine-person limit must, at a minimum, be subjected to the strictest judicial scrutiny. It cannot survive it. For while Petitioners do not dispute the State's compelling public-health interest in mitigating the spread of COVID-19, EO 28 *itself refutes* the notion that limiting public religious services to a maximum of nine worshipers only is the least restrictive means of furthering that interest.

As discussed above, while Respondents apparently concluded that limiting religious worshipers to no more than nine was a public health imperative, they *did not* reach a similar conclusion with respect to myriad other "essential" activities. Day care centers, for example, can remain open without

undue public-health hazard so long as they are limited to "10 staff" and "50 children." Indeed, EO 6 does not require, for obvious reasons, the children at the facility—as opposed to "parents and guardians"—to "practice social distancing." One can only imagine ten day-care workers attempting to maintain social distancing among 50 toddlers. But while this concession to reality is understandable, Petitioners can conceive of *no* plausible public-health justification for allowing day care centers to stay open with 50 adventuresome toddlers while imposing a nine-person cap on churches, mosques, and synagogues, where it is far more feasible for the faithful to assemble together for worship—for example, in a large sanctuary—while maintaining at least six-feet of distance between individual family groups.

The same conclusion follows from the other establishments that EO 28 allows to remain open without any fixed numerical restrictions. As anyone who has visited the local grocery store, Menards, or Target can attest, the number of customers allowed in the store at any one time is far greater than nine. Indeed, most big-box stores allowed to remain open almost certainly have many more than nine *employees* working in the store at any given time. The same is true for the numerous factories, warehouses, and distribution centers exempted by the Order. In fact, even liquor stores are not subject to

any numerical limit.

Where a challenged law is drastically under-inclusive in this way—failing to regulate activity that, by the Government's own account of the interest justifying the law, ought to be regulated *a fortiori*—that eviscerates any argument that the challenged restriction is *necessary*. No one doubts the seriousness of the threat posed by the COVID-19 pandemic, or the importance of "flattening the curve." But if—as Wisconsin has concluded—these public-health interests may be served while allowing Home Depot and Total Wine & More to keep their doors open to all comers, it simply cannot be maintained that religious worship must be limited to groups of no more than nine in the name of public health and safety.

The point is not to impugn the importance of any of the products or establishments left untouched by EO 28. But given the *constitutional* protections of religious liberty, the Government has no authority to establish a list of essential activities that may continue to go forward without any numerical quotas or restrictions *and then leave religious worship off the list*. To paraphrase the Court in *On Fire Christian Center*, if beer is essential, so is church. And if the people of Wisconsin can visit Total Wine & More to pick up a six-pack without undue risk to the public health, the same logic applies to

worshiping with fellow believers in a safe, socially-distanced setting.

Recent case law weighing COVID-19-related restrictions imposed by other States against the similar protections accorded under the First Amendment is in accord. In *Maryville Baptist Church*, for instance, the United States Court of Appeals for the Sixth Circuit temporarily enjoined Kentucky's ban on "gathering for drive-in and in-person worship services regardless of whether they meet or exceed the social distancing and hygiene guidelines in place for permitted commercial and other nonreligious activities." No. 20-5427 (Slip. Op. at 1). The "serial exemptions for secular activities [that] pose comparable public health risks to worship services" demonstrated, the court concluded, that the ban was not the least-restrictive means of protecting public health.

> For example: The exception for "life-sustaining" businesses allows law firms, laundromats, liquor stores, and gun shops to continue to operate so long as they follow social-distancing and other health-related precautions. But the orders do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of essential services and even when they meet outdoors. . . . [R]estrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom.

Id. (Slip. Op. at 7) (citation omitted).

Likewise, in *On Fire Christian Center*, the U.S. District Court for the Western District of Kentucky entered a temporary restraining order against

the City of Louisville's ban on "drive-in" religious services. Because the Government banned drive-in worship "while not prohibiting a multitude of other non-religious drive-ins and drive-throughs—including, for example, drive-through liquor stores," the court concluded that the challenged law could not survive "the most rigorous of scrutiny." 2020 WL 1820249, at *6. Similarly, in *First Baptist Church v. Kelly*, the U.S. District Court for the District of Kansas temporarily restrained the enforcement of Kansas' COVID-19 orders, which—akin to EO 28—limited "churches or other religious services or activities" to "gatherings of . . . ten congregants or parishioner[s] in the same building or confined or enclosed space" but did not apply a similar numerical limitation to "a host of secular activities, many of which bear similarities to the sort of personal contact that will occur during in-person religious services." 2020 WL 1910021, at *2, *5, *7 (D. Kan. Apr. 18, 2020). Under Wisconsin's more robust protection under the Freedom of Conscience Clauses, it follows *a fortiori* that Respondents' restriction on communal worship must be struck down.

Petitioners do not contend that the rights of conscience may be exercised free of *any* health restrictions or safety precautions. Like most other establishments EO 28 allows to operate freely, most houses of worship could

hold religious services that comply with general masking, sanitary, and safety measures, including strictly observing and enforcing social distancing protocols, regularly sanitizing exposed surfaces, and performing a "deep clean" of any worship spaces between services. *See* EO 28 § 2(b)(ii)(3) (Pet. App. 22). Indeed, as discussed above, these measures *far exceed* the requirements Respondents have imposed on day care centers, where children are (understandably) not required to practice social distancing.[9]

EO 28's utter lack of tailoring is brought into sharp relief by the coronavirus-related emergency orders that *do not* impose strict quotas on religious worship. Arizona, Colorado, Florida, Georgia, Iowa, Michigan, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, and West Virginia have all issued shutdown orders akin to EO 28. But unlike Wisconsin, those States also acted to safeguard their citizens' constitutional rights, allowing religious worshipers to continue to gather without any numerical limits—in a safe and

[9] It is no response to point out that religious worship often includes the celebration of rituals such as Holy Communion, since those practices, too, could easily be performed in a safe, social distanced way. For example, the individual who prepares the bread and wine could wear latex or nitrile gloves and a face mask while doing so, and communicants could maintain social distance while partaking of the sacrament. Any minimal risks posed by celebrating the sacrament in this way are certainly no different or more severe than those posed by food preparation in restaurants—which EO 28 allows to *remain open* for carryout, *without* any numerical limit on the number of customers.

socially distanced way—despite the shutdown.[10] While each State is of course free to tailor emergency public health measures to meet the needs of its own citizens, Respondents cannot plausibly show that permitting gatherings of more than nine people for religious worship is consistent with public health necessities in these jurisdictions but not in Wisconsin.

Under the Freedom of Conscience Clauses of the Wisconsin Constitution, it is simply not enough to show that the COVID-19 outbreak represents an urgent public health crisis. Rather, to sustain EO 28's nine-person limit on religious worship, the Government must show that its quota is necessary to protect public health: (1) even though it has allowed other establishments, such as day cares, liquor stores, and home improvement retailers to stay open *without* a similar numerical restriction, and (2) even though, as these very exemptions demonstrate, a variety of measures are available to

[10]Executive Order 2020-18 at ¶ 4(f) (Ariz. Mar. 13, 2020), https://bit.ly/2Sk5p76; Public Health Order 20-24 at ¶ III(C)(5) (Colo. Apr. 9, 2020), https://bit.ly/2zCIqO0; Executive Order 20-91 at § 3(A)(i) (Fla. Apr. 1, 2020), https://bit.ly/2ybcGiI; Alan Judd, *No ban on services, but Kemp urges staying home for Easter amid COVID*, ATLANTA JOURNAL-CONSTITUTION, Apr. 10, 2020, https://bit.ly/2SkSYrF; Proclamation of Disaster Emergency § 6(a) (Ia. Apr. 27, 2020), https://bit.ly/2YenwPH; Executive Order 2020-21 at § 10 (Mich. Mar. 24, 2020), https://bit.ly/2SnCT4C; Amended Director's Stay at Home Order at ¶ 12(e) (Ohio Apr. 2, 2020), https://bit.ly/3eZvodI; Stay at Home Order Guidance (Pa.), https://bit.ly/2SlrHFA; Executive Order 2020-21 at § 1(E)(6) (S.C. Apr. 6, 2020), https://bit.ly/2ybeNDa; Executive Order 22 at ¶ 8(f) (Tenn. Mar. 30, 2020), https://bit.ly/2ySsXsQ; Executive Order GA 14 (Tex. Mar. 31, 2020), https://bit.ly/2zCYyyZ; Executive Order 9-20 at ¶ 3(n) (W.V. Mar. 23, 2020), https://bit.ly/35ooxGs.

protect the public health *while allowing* Wisconsin citizens to continue to worship according to the dictates of their consciences.

As EO 28's numerous other exceptions show, the nine-person cap it imposes on gatherings for religious worship is not the least restrictive means of furthering the State's public-health interest.

4. EO 28 Is Not Justified by the Emergency Nature of the COVID-19 Pandemic.

Respondents are likely to point to the U.S. Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), as justifying the Order's nine-person limit. But *Jacobson* does not control here, and it does not change the result of the analysis above: EO-28's discriminatory cap on religious worship is unconstitutional and must be enjoined.

The plaintiff in *Jacobson* challenged a Massachusetts compulsory smallpox vaccination law as violating "the rights secured to the defendant by the preamble to the Constitution of the United States," the Fourteenth Amendment's Privileges or Immunities, Due Process, and Equal Protection Clauses, and "the spirit of the Constitution." *Id.* at 13–14. The Court upheld the compulsory vaccination law (violations of which were punishable by fine) as consistent with the State's "police power" to "protect itself against an epidemic of disease which threatens the safety of its members,"

concluding that "in view of the methods employed to stamp out the disease of smallpox, [no one] can . . . confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety." *Id.* at 27, 31. But, the Court noted, the State's power to "protect itself against an epidemic" did not give it a blank check:

> if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 31.

The opinion in *Jacobson* does not chart the course that this Court must follow in the present case. Because the case involved the interpretation of *federal* constitutional rights, it has no controlling authority as to Petitioners' claims, which all arise under the Constitution of this State. And no case from this Court has adopted its framework as a matter of State law. The only two Wisconsin cases that have ever relied upon *Jacobson* did not involve emergencies at all, and only cited its analysis as a leading articulation of the deferential review (today known as "rational basis" review) that applies where a plaintiff merely challenges a health and safety regulation as exceeding the State's police power, rather than violating an expressly enumerated

constitutional right. *See Adams v. City of Milwaukee*, 144 Wis. 371, 121 N.W.2d 518 (1911), *aff'd,* 228 U.S. 572 (1913) ("When there are conflicting scientific beliefs or theories in such matters it is for the city council to determine upon which theory it will base its police regulations, and unless it is clearly and manifestly wrong it is not for the courts to interfere on the ground that the scientific theory on which the ordinance is based is incorrect or unsound."); *Froncek v. City of Milwaukee*, 269 Wis. 276, 283–84, 69 N.W.2d 242 (1955) ("[I]t is well settled that courts will not interfere with the legislative authority in the exercise of its police power unless it is plain and palpable that such action has no real or substantive relation to the public health or safety or general welfare."); *see also id.* at 285 (noting that "no epidemic or dangerous disease is involved").

Nor should this Court look to *Jacobson* for persuasive authority. The broadly worded passages some courts have seized upon as establishing a framework for review in all constitutional challenges to the Government's exercise of emergency power are obviously dicta. Indeed, the United States Supreme Court—like this Court in the cases cited above—has often read the decision is standing for little more than the Court's reluctance to strike down health and safety regulations as violating unenumerated substantive due

process rights. *See Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 294 (1990); *Roe v. Wade*, 410 U.S. 113, 154 (1973); *see also Stenberg v. Carhart*, 530 U.S. 914, 970 (2000) (Kennedy, J., dissenting); *Washington v. Glucksberg*, 521 U.S. 702, 742 (1997) (O'Connor, J., concurring).

The compulsory vaccination law challenged in *Jacobson* was also wholly unlike Respondents' restrictions. For *Jacobson* to have any bearing here, one would have to completely re-write the facts of the case: If Henning Jacobson had objected to being vaccinated *for religious reasons*, for example, and if he could show that Massachusetts had riddled its law with arbitrary exceptions for non-religious groups—exempting those who objected to vaccination because they doubted the science behind it, or anarchists who simply objected out of political principle, but *refusing to exempt* those with religious scruples—then perhaps the case would have some relevance to Petitioners' claims. But can there be any doubt—any at all—that if *those* had been the facts in *Jacobson*, under the religious liberty jurisprudence that prevails in the United States Supreme Court and in this State, the Court would have struck such an arbitrary and discriminatory regime down?

Another difficulty with reading *Jacobson* as the North Star of constitutional litigation during a public-health emergency stems from the case's

age. *Jacobson* was decided in 1905, long before the modern constitutional framework for Free Exercise and Freedom of Conscience challenges was established. Indeed, the United States Supreme Court did not apply any sort of "strict scrutiny" test until *half a century after* the decision in *Jacobson* was handed down. *See NAACP v. Button*, 371 U.S. 415, 438 (1963) (Court's first use of "compelling state interest" test). Any reliance upon *Jacobson* must thus overcome the significant "challenge of reconciling century-old precedent with . . . more recent constitutional jurisprudence." *Adams & Boyle, P.C. v. Slatery*, 2020 WL 1982210, at *9 (6th Cir. Apr. 24, 2020). To take merely one illustration of the challenge, one of the principal Supreme Court cases that later cited and built upon *Jacobson*'s precedent is Justice Holmes's now-discredited opinion in *Buck v. Bell* upholding, on *Jacobson*'s authority, Virginia's forcible sterilization of the "feeble minded." *See* 274 U.S. 200, 207 (1927) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U. S. 11. Three generations of imbeciles are enough.").

The amount of weight this Court gives to the framework articulated in *Jacobson* is ultimately irrelevant, however, for even under that "more state-friendly standard of review," *Adams & Boyle*, 2020 WL 1982210, at

*9, Wisconsin's nine-person limit on religious worship cannot pass muster. All *Jacobson*'s dicta ultimately establishes is that "just as constitutional rights have limits, so too does a state's power to issue executive orders limiting such rights in times of emergency." *Robinson v. Att'y Gen.*, 2020 WL 1952370, at *5 (11th Cir. Apr. 23, 2020). And as *Jacobson* itself states, those limits are transgressed where the Government's action, even in the face of an emergency, "has no real or substantial relation to [public health], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. at 31. In that circumstance, "it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id.* That is the Court's duty in this case.

Perhaps in the abstract, a fixed numerical limit on public worship might be said to have a "real or substantial relation" to the public health imperative of combatting the present COVID-19 pandemic. But the reality and substance behind any such contention *disappears entirely*, where the same Government that has imposed such a limit on worship *freely allows* people to congregate, without numerical limit, at the local liquor or hardware store—and allows *over six times the number* of individuals permitted to gather for worship to gather together (without any realistic expectation of social

distancing) at a day care center. No, a government that has drawn and enforced *those* distinctions has acted "in such an arbitrary, unreasonable manner . . . as to authorize or compel the courts to interfere." *Id.* at 28.

It has also acted in a way that is "beyond question, in palpable conflict with the [Wisconsin] Constitution." *Id.* at 31. As demonstrated above, the Wisconsin Constitution *simply does not allow* the Government to "control . . . or interfere[ ] with . . . the rights of conscience" or regulate the "modes of worship," WIS. CONST. art. I, § 18, in a way that infringes the right to public worship for some faiths and prohibits it outright for others. And the Freedom of Conscience Clauses *certainly* do not allow the Government to impose a *discriminatory* quota on religious worship that, by the State's own lights, is obviously not the least restrictive means of furthering its interest in public health. A government that has imposed *that* kind of discriminatory restriction on religious freedom has committed "a plain, palpable invasion of rights secured by the fundamental law," *Jacobson*, 197 U.S. at 31—and that remains so no matter how heavy a thumb the Government attempts to place on its side of the scales. *See, e.g., On Fire Christian Center*, 2020 WL 1820249, at *6 (applying *Jacobson* but concluding that discriminatory ban on drive-in worship services "violate[s] the Free Exercise Clause 'beyond all

question'").

B. Petitioners Are Likely To Succeed in Showing that EO 28 Infringes the Rights to Freedom of Speech and Assembly

Article I, Section 4 of Wisconsin's Constitution guarantees that "[t]he right of the people peaceably to assemble, [and] to consult for the common good . . . shall never be abridged." WIS. CONST. art. I, § 4. And Section 3 of that same article protects Wisconsinites against measures by the State that would "restrain or abridge the liberty of speech." These guarantees, like their counterparts in the United States Constitution, recognize the innate right of a free people to gather to debate and discuss the issues of the day, a right that "cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (citations omitted).[11]

[11] As this Court has held on numerous occasions, the rights protected by the First Amendment to the U.S. Constitution and Sections 3 and 4 of Article I are "coextensive." *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶23, n.9, 358 Wis. 2d 1, 30, n. 9, 851 N.W. 2d 337; *see also Lawson v. Hous. Auth. of Milwaukee*, 270 Wis. 269, 274, 70 N.W.2d 605, 608 (1955) (holding that Article I, Sections 3 and 4 of the Wisconsin Constitution "guarantee the same freedom of speech and right of assembly and petition as do the First and Fourteenth [A]mendments of the United States [C]onstitution."); *Cty. of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 388, 588 N.W.2d 236 (1999) (similar). For that reason, while Petitioners' claims are premised solely upon the protections accorded under Article I, Sections 3 and 4 of the Wisconsin Constitution, decisions interpreting the First Amendment's protections to speech and assembly remain persuasive authority.

While the Wisconsin Constitution thus expressly recognizes and enumerates this basic right of assembly, in truth our very system of republican government "implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1875). Indeed, this right "is found wherever civilization exists." *Id.* at 551. For as Justice Story explained, "[i]t is impossible that [this right] could be practically denied, until the spirit of liberty had wholly disappeared, and the people had become so servile and debased, as to be unfit to exercise any of the privileges of freemen." J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1894.

Testing Justice Story's assertion, Respondents have banned "all public and private gatherings of any number of people," thereby entirely prohibiting Wisconsin citizens from meeting peaceably together to debate and discuss current political affairs. EO 28 at § 3 (Pet. App. 23). That outright, total prohibition of free political assembly can stand only if the Government satisfies rigorous scrutiny. *See Lounge Mgmt., Ltd. v. Town of Trenton*, 219 Wis. 2d 13, 20, 580 N.W.2d 156 (1998). Respondents cannot do so.

1. EO 28 Is Facially and Irremediably Overbroad.

By prohibiting all public and private gatherings, EO 28 § 3 (Pet. App. 23), the Order on its face denies to the people of Wisconsin the right to assemble. It does so anywhere and everywhere, in private and in public, and in groups both small and large. Critically, although there are exceptions for certain activities that Respondents deem "essential," the Order contains no exceptions for assemblies seeking to petition the government for redress of grievances, for public demonstrations, for political protests, for campaign events and political conventions, or for any other form of expressive assembly. In this State, Costco and Menards today remain open for business, but every street, library, private home, public park, meeting hall, convention center, and any other sort of public or private forum in Wisconsin is closed to those citizens who would seek to assemble and express themselves. On its face, EO 28 thus bans all constitutionally protected assembly.

i. The United States Supreme Court has ruled, in the analogous context of the First Amendment, that any law banning all forms of expression is, by definition, substantially overbroad. *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). In *Jews for Jesus*, the Court invalidated a municipal resolution that banned all "First

Amendment activities" in the terminal. The resolution failed to pass constitutional muster because, rather than seeking to regulate only those forms of expression that contributed directly to the problem the government was seeking to solve (congestion in the terminal), it simply prohibited all protected expression whatsoever. *Id.* at 574–75. As the Court explained, it is "obvious that such a ban cannot be justified even if [the airport] were a nonpublic forum because *no conceivable governmental interest* would justify such an absolute prohibition of speech." *Id.* at 575 (emphasis added). The Court did not feel the need to determine whether the airport terminal was a public or nonpublic forum, or whether to subject the restriction to one level of scrutiny rather than another. *Id.* at 573–74. No, it concluded that the flat ban on all expression was categorically unconstitutional under *any* conceivable analysis.

So too here. EO 28 does not limit the timing, size, or nature of assemblies, or impose masking, social-distancing, or other risk-minimization requirements, through targeted regulations designed to mitigate the health crisis that the Order seeks to address. Nor has Wisconsin attempted to ban or to restrict only those assemblies that, because of their number, location, or other characteristics, are more likely to pose a risk to public health. Instead, the

Order categorically *revokes* the right of the people to assemble. EO 28 § 3 (Pet. App. 23). Indeed, as Petitioner Fabick's own experience attests (Pet. App. 49–50), Respondents' restrictions bar Wisconsin citizens from assembling even to discuss or protest *the very law that has stripped them of their rights*. As in *Jews for Jesus,* "no conceivable governmental interest [can] justify such an absolute prohibition of [assembly]." *Id.* at 575; *see also De Jonge*, 299 U.S. at 365 ("Consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed.").

ii. Accordingly, while "courts must apply a limiting construction to a statute, if available, that will eliminate the statute's overreach," *Lounge Mgmt.*, 219 Wis. 2d at 23 (quotation and citation omitted), EO 28's blanket and absolute prohibition on any and all expressive assembly is simply not susceptible to such a narrowing interpretation.

> While a statute should be held valid whenever by any fair interpretation it may be construed to serve a constitutional purpose, courts cannot go beyond the province of legitimate construction to save it, and where the meaning is plain, words cannot be read into it or out of it for the purpose of saving one or other possible alternative.

State v. Hall, 207 Wis. 2d 54, 82, 557 N.W.2d 778 (1997) (citations omitted). For where an unconstitutionally overbroad law could be salvaged *only by rewriting a new one*, that would entail "legislation and not construction," an

activity that is beyond this Court's power. *State v. Zarnke*, 224 Wis. 2d 116, 139, 589 N.W.2d 370 (1999) (citations omitted); *see also State v. Crute*, 2015 WI App 15, ¶36, 360 Wis. 2d 429, 860 N.W.2d 284 (rejecting argument that term "assembly" provided a textual anchor that would have permitted insertion of a specific number into rule requiring permitting for assemblies in state capital).

That is the case here. As in *Jews for Jesus*, no saving construction could be engrafted upon the Order, given its sweeping and unambiguous prohibition, except through a long "series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable." 482 U.S. at 576; *see also Baggett v. Bullitt*, 377 U.S. 360, 378 (1964). EO 28 is thus overbroad in a way no "saving construction" can cure, and the only remedy that can square the Order's blanket prohibition of "[a]ll public and private gatherings," EO 28 § 3 (Pet. App. 23) with the Freedom of Assembly guaranteed under Article I, Section 4 is to strike it down.

2. The Order Also Imposes an Impermissible Time, Place, and Manner Restriction.

Even if the Order were not irredeemably and unconstitutionally overbroad (and it is), it would still fail constitutional muster. For even a narrowly

drawn restriction on free speech and assembly in traditional public fora such as the streets and parks can be upheld only if the restriction satisfies three requirements: "(1) it must be content-neutral; (2) it must be "narrowly tailored to serve a significant governmental interest"; and (3) it must "leave open ample alternatives for communication." *Crute*, 360 Wis. 2d 429, ¶26; *see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Even assuming that the Order's restrictions on assembly are content-neutral, they clearly fail the second and third prongs of this test. And that is so regardless of the public health crisis that motivated Respondents to act.

i. First, although protecting the public health from the present pandemic is obviously a "significant government interest,"[12] the Order is not narrowly tailored to promote that interest. To be sure, a time, place and manner regulation need not adopt "the least restrictive or least intrusive means" for achieving its end. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). But it must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id*. at 799. EO 28 makes no effort whatsoever to tailor its restrictions on public and private assemblies,

[12] That a restriction seeks to protect the public health does not exempt it from the requirement that it be narrowly tailored. *See, e.g., Bamon Corp. v. City of Dayton*, 923 F.2d 470, 473–75 (6th Cir. 1991).

or to regulate them in some less restrictive manner. It simply and flatly bans them. EO 28 is not tailored *at all*, much less tailored narrowly.

That is once again confirmed by the types of gatherings that *are* allowed under the Order. As discussed repeatedly above, EO 28 exempts numerous types of gatherings and activities, ranging from providing children's day care or purchasing pet toys to shopping for power tools or dropping off the dry cleaning. The suggestion that these activities may safely go forward, if social distancing is observed, but that the public health demands the outright prohibition of all public and private political assemblies is untenable. For example, as discussed at length above, EO 28 permits sixty people—ten adult staff and 50 children—to gather indoors in a day care center. EO 28 ¶ 13(f) (Pet. App. 32), EO 6, ¶ 1 (Pet. App. 1). There is no constitutional right to child care; and allowing 50 (decidedly non-social-distanced) toddlers to gather together with ten adults in a day care center obviously poses much greater risks to the public health than allowing 60 adults to gather in the park to protest the Government's orders preventing them from gathering there.

Likewise, the Order permits up to nine people to gather in a room for a religious celebration, EO 28, § 13(h) (Pet. App. 32), and yet no two people may gather to demonstrate, to protest, or to express their opposition to EO

28, *id.* § 3 (Pet. App. 23). For the reasons discussed above, Respondents' nine-person cap on religious worship is itself unconstitutional beyond any question, but the existence of even that—unconstitutionally discriminatory—exception for *one* type of protected activity (freedom of worship) underscores the unjustifiable nature of the Order's *total ban* on another (free speech and assembly). An outdoor religious service poses no less of a threat to the public health than an outdoor political protest; a gathering of nine people in a private house to read scripture poses no less of a threat to the public health than a gathering of nine in a private house to read the Constitution, or to discuss the upcoming elections. The constitutional protections afforded these activities are coextensive. The risks they pose to the public health are identical. Yet the Order bans the one and permits the other. This patently arbitrary difference in treatment is by definition not tailored, much less narrowly so.

The unconstitutionality of Respondents' blunderbuss approach is underscored, yet again, by the tailoring that other States *have* engaged in. At least five other States that have enacted similar "stay-at-home" orders—including New Jersey, one of the epicenters of the pandemic—have carefully

included at least some protections for political expression.[13] No less is required in Wisconsin.

The lack of tailoring is particularly suspect here given that the Order entirely prohibits several traditional and common means of expression—public and private meetings of concerned citizens. "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).[14] The concerns raised by such a categorical ban are at their zenith where, as here, the ban has "totally foreclosed" a "venerable means of communication that is both unique and important." *Id.* at 54–55. There are few means of communication more venerable in our tradition than the public meeting;

[13] Executive Order 2020-18 at ¶ 4(f) (Ariz. Mar. 13, 2020), https://bit.ly/2Sk5p76; Delaware, List of Essential Industries at 4 (De. Apr. 21, 2020), https://bit.ly/2KQnaXn; Executive Order 107 at ¶ 2 (N.J. Mar. 21, 2020), https://bit.ly/3cVjmQO; Amended Director's Stay at Home Order at ¶ 12(g) (Ohio Apr. 2, 2020), https://bit.ly/3eZvodI; Executive Order 9-20 at ¶ 3(v) (W.V. Mar. 23, 2020), https://bit.ly/35ooxGs.

[14] The U.S. Supreme Court has for this reason struck down ordinances that, for example, completely banned the distribution of pamphlets within a municipality, *Lovell v. City of Griffin*, 303 U.S. 444, 451–52 (1938); the distribution of handbills on the public streets, *Jamison v. Texas*, 318 U.S. 413, 416 (1943); the door-to-door distribution of literature, *Martin v. City of Struthers*, 319 U.S. 141, 145–49 (1943); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164–65 (1939); and live entertainment, *Schad v. Mount Ephraim*, 452 U.S. 61, 75–76 (1981).

indeed, "[i]t is hard to overestimate the historic significance and patriotic influence of the public meetings held in all the towns of Massachusetts before and during the Revolution." *Wheelock v. Lowell*, 196 Mass. 220, 227, 81 N.E. 977 (1907). By totally foreclosing all private gatherings, public meetings, and face-to-face discussions, EO 28 goes too far; it restricts too many assemblies and suppresses too much speech.

ii. Second, and relatedly, the Order does not leave open even adequate, much less the ample alternative modes of assembly required by the Wisconsin Constitution. To be sure, an alternative need not be perfect; a "less effective" form of assembly may suffice. *See, e.g., Sauk Cty. v. Gomuz,* 2003 WI App 165, ¶¶68–69, 266 Wis. 2d 758, 669 N.W.2d 509 (ban on assemblies of 1,000 people that continue for eighteen or more consecutive hours upheld where ban still permitted "groups of less than 1,000 [to] assemble on public or private property for more than eighteen hours, and larger groups [to] assemble for any number of days as long as they spend nights in motels, campgrounds, or private homes," and did "not apply to permanently established places of assembly"). But while an alternative need not be perfect, *some* alternative must be left available. A total ban, by definition, leaves no alternatives. EO 28's total ban thus fails the scrutiny that must be applied to

a time, place, and manner regulation for the same reason that it is overbroad.

That individuals may be able to engage in expressive activities other than assembly does not suffice. That is so for two independent reasons. First, the right to assemble is a distinct right, "cognate to those of free speech and free press and . . . equally fundamental." *De Jonge*, 299 U.S. at 364. Sending a letter or submitting a comment online (assuming one can afford access to the Internet) may be alternative forms of expression, but they are not alternative forms of *assembly*. They are not assembly at all. Second, even were one to consider assembly merely one form of expression among others, the alternative means of expression that are permitted by the Order are simply neither adequate nor ample: from the Sons of Liberty to the Freedom Riders, the strongly-worded letter has never been considered an adequate alternative to the public demonstration.

That "virtual assemblies" on the Internet are likewise not adequate alternatives to public meetings, protests, and demonstrations is underscored by the fact that these Internet-age forms of expression are not available to all of Wisconsin's residents. New technologies are often beyond the reach of the poor, who must trust in the power of their voices and their assembled numbers to have any hope of being heard. *See Gilleo*, 512 U.S. at 57

(observing that, "[e]specially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.").[15] The government cannot condition the right to assemble and express one's political views on the means to purchase a computer, webcam, and internet service. And because Internet service providers and platforms are private companies, who again and again demonstrate themselves to be more than willing to censor content and silence disfavored points of view, they offer no adequate alternative as far as the rights of free speech and assembly are concerned.[16]

iii. Finally, Respondents can be expected to look for support here, too, in the United States Supreme Court's 1905 decision in *Jacobson*. But for the same reasons discussed in connection with religious freedom, *supra* at 38–44, that decision provides a poor guide, at best, for courts seeking to ensure that constitutional freedoms do not become a casualty of the coronavirus. The Wisconsin Constitution does not so relax its protections of

[15] In addition, as noted, the Order's prohibition of in-person activities at public libraries has removed the only method relied upon by many poor and rural Wisconsinites to access the Internet.

[16] It is telling that a video in which medical doctors critiqued the wisdom of lockdown orders like EO 28 was recently removed from the Google-owned YouTube platform for violating its "community guidelines." Veronica Morley, 23ABC NEWS, YouTube Issues Statement on Removal of Controversial Video Interview with Bakersfield Doctors, April 27, 2020, https://bit.ly/2W12kLr.

enumerated individual rights in times of crisis. As the United States Supreme Court noted in applying the coextensive protections of the First Amendment:

> '[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.' . . . At the same time the Constitution requires that the powers of government 'must be so exercised as not, in attaining a permissible end, unduly to infringe' a constitutionally protected freedom.

Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964) (citations omitted).

But even were this Court to apply the more relaxed standard of review that has been attributed to *Jacobson*, EO 28 would still fail to pass muster. Given the arbitrary distinctions drawn in the Order, and given that the private gatherings and public political demonstrations protected by the Wisconsin Constitution can be undertaken in compliance with the social distancing and other safety measures deemed sufficient to permit religious assemblies and other activities to continue, the absolute prohibition placed on the right of two or more people to assemble has "no real or substantial relation" to the public health interests the Order addresses. 197 U.S. at 31. And Respondents' exercise of their legitimate power to protect the public health has, to that extent, been exercised in "such an arbitrary, unreasonable manner," and has gone "so far beyond what was reasonably required for the safety of the public," *id.* at 28, as to warrant judicial intervention.

C. Petitioners Are Likely To Succeed in Showing that the Order Infringes the Right To Travel

Emergency Order 28 also imposes severe restrictions on the fundamental right to travel guaranteed by the Wisconsin Constitution. The Order purports to *criminalize* any exercise of that right that has not been pre-cleared by Respondents. Thus, subject to certain limited exceptions for so-called "Essential" activities and operations, "Minimum Basic Operations" (defined in Section 14 of the Order), and "Special Situations" (defined in Sections 8–10), Section 1 of the Order provides that "[a]ll individuals present within the State of Wisconsin are *ordered* to stay at home or at their place of residence." EO 28 § 1 (Pet. App. 20–21) (emphasis added). And under Section 5 of the Order, "[a]ll forms of travel are *prohibited*, except for Essential Travel as defined in the Order." EO 28 § 5 (Pet. App. 25) (emphasis added). To put it bluntly, Wisconsinites are under house arrest.

It would be difficult to envision a more direct State infringement of the right to travel. And because Respondents cannot demonstrate that these extreme restrictions are necessary to serve the admittedly compelling State interests in protecting the public health from the spread of coronavirus, those restrictions cannot withstand scrutiny under either the federal or Wisconsin

constitutions.[17]

1. This Court has squarely held that among the fundamental rights secured to the people under the Wisconsin Constitution is basic freedom of movement, *i.e.,* the right to leave one's home and move about. In *Brandmiller v. Arreola*, this Court held that "independent of federal law . . . the right to travel intrastate is fundamental among the liberties protected by the Wisconsin Constitution." 199 Wis. 2d 528, 539, 544 N.W.2d 894 (1996). In confirming this right, this Court relied upon its earlier decisions in *Ervin v. State*, 41 Wis. 2d 194, 163 N.W.2d 207 (1968), and *Milwaukee v. K.F.*, 145 Wis. 2d 24, 426 N.W.2d 329 (1988). In *Ervin*, the Court stressed the fundamental nature and foundational importance of this right: "The freedom to move about is a basic right of citizens under our form of government, in fact, under any system of ordered liberty worth the name. . . . It has properly been termed 'engrained in our history' and 'a part of our heritage.'" 41 Wis. 2d at 200–01 (citations omitted). And in *K.F.*, this Court confirmed that "[t]his right to be free to move about within one's own state is inherent and distinct

[17] Once again, Petitioners' right to travel claim is premised solely upon the protections provided under the Wisconsin Constitution. We cite to decisions discussing the right to travel under the federal Constitution solely as persuasive authority to the extent they assist the Court in illuminating the right to travel recognized as a matter of State constitutional law.

from the right to interstate travel protected by the commerce clause." 145 Wis. 2d at 42. Indeed, it is hard to imagine a more basic or essential liberty than the freedom to leave one's home and simply move about.

In addition to being fundamental in *its own* right, the right to travel is also fundamental because it is intertwined with, and in fact enables, the exercise of *other* fundamental rights. That includes the exercise of the other constitutional rights invoked in this action. As this Court recognized in *Brandmiller*, for example, "the right to travel is interwoven with the full enjoyment of other fundamental rights retained by the people," including the right of assembly. 199 Wis. 2d at 538. And it recognized in *Ervin* that "[f]reedom of movement is inextricably involved" with other basic liberties such as the freedoms of religious exercise, speech, and assembly, *id.* at 538:

> If, for any reason, people cannot walk or drive to their church, their freedom to worship is impaired. If, for any reason, people cannot walk or drive to the meeting hall, freedom of assembly is effectively blocked. If, for any reason, people cannot safely walk the sidewalks or drive the streets of a community, opportunities for freedom of speech are sharply limited.

41 Wis. 2d at 200.

As with the other rights that are at stake in this action, Wisconsin does not stand alone in recognizing the fundamental nature of the right to travel. The United States Supreme Court and other courts have acknowledged, in a variety of contexts, the critical importance of the right to freedom of

movement in the basic constitutional scheme anchoring a democratic and free society. Thus, the Court has noted that because "[f]reedom of movement is basic in our scheme of values," the right to travel internationally was "part of the 'liberty' of which the citizen cannot be deprived without due process of law." *Kent v. Dulles*, 357 U.S. 116, 125 (1958); *see also United States v. Guest*, 383 U.S. 745, 758 (1966) ("freedom to travel throughout the United States has long been recognized as a basic right under the Constitution"); *Williams v. Fears*, 179 U.S. 270, 274 (1900) ("Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty"); *United States v. Wheeler*, 254 U.S. 281, 293 (1920) (referring to "the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom"); *cf. Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964) (Douglas, J. concurring) ("This freedom of movement is the very essence of our free society . . . .").[18]

[18] *See also Johnson v. Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002) ("In view of the historical endorsement of a right to intrastate travel and the practical necessity of such a right, we hold that the Constitution protects a right to travel locally through public spaces and roadways."); *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) ("We conclude that the right to move freely about one's neighborhood or town . . . is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.' ").

2. It cannot be reasonably disputed, therefore, that Petitioners, and other citizens of Wisconsin, enjoy a fundamental right to travel under the Wisconsin Constitution. Nor can there be any serious dispute that the Order substantially burdens the exercise of that right. As noted, under EO 28 all individuals in Wisconsin are "*ordered*" to stay home, and "[a]ll forms of travel are *prohibited*," EO 28 § 1, 5 (Pet. App. 20–21, 25) (emphases added), subject only to the limited exceptions pre-approved in the Order itself. Thus, unless it has been specifically exempted in advance, *all* travel—at any time, to any place, and for any purpose—has been absolutely prohibited. And, as would be expected (and was intended), this absolute prohibition on travel has had the effect of significantly chilling Wisconsinites' exercise of their fundamental right of freedom of movement—even when they have wished to travel, as Petitioner Fabick did, for the very purpose of registering their deep concern regarding the State's infringement of their constitutional rights. (Pet. App. 49–50).

Such an outright ban on travel—again, a form of house arrest—unquestionably burdens the right to travel and is unconstitutional unless the State satisfies a heavy burden of justification. *See Brandmiller*, 199 Wis. 2d at 544 (subjecting "cruising" ordinance to heightened scrutiny); *K.F.*, 145

Wis. 2d at 46 (subjecting juvenile curfew ordinance to strict scrutiny); *see also Edwards v. People of State of California*, 314 U.S. 160, 177 (1941) (invalidating state statute making it a misdemeanor to bring indigent non-residents into the state); *Aptheker*, 378 U.S. at 507 (invalidating, as a "severe restriction" upon international travel, statute making it unlawful for member of Communist organization to apply for, use, or attempt to use a passport).[19]

3. The burden thus falls upon Respondents to justify their draconian restrictions on this fundamental right. This they cannot do. In order to survive scrutiny under the Wisconsin Constitution, *K.F.*, 145 Wis. 2d at 46, Respondents must demonstrate that the travel restrictions in the Order are "necessary to promote a compelling governmental interest," *Shapiro*, 394 U.S. at 634, and that they have not chosen "means that unnecessarily burden or restrict" freedom of movement. *Dunn*, 405 U.S. at 343 (citations omitted); *see also id.* ("[I]f there are other, reasonable ways to achieve those [compelling] goals with a lesser burden on constitutionally protected activity, a State

[19] Of course, given that the United States Supreme Court has held on multiple occasions that such *indirect* impingements on the right to travel as durational residency requirements sufficiently burden that right as to call their constitutional validity into question, it necessarily and ineluctably follows that the *direct* prohibition on travel imposed by the Order are even more suspect. *See, e.g., Shapiro v. Thompson*,394 U.S. 618, 627 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *Saenz v. Roe*, 526 U.S. 489, 504 (1999).

may not choose the way of greater interference.") (citations omitted).[20]

Once again, Petitioners do not question that the State has a compelling interest in protecting public health and in battling the coronavirus pandemic. However, because Respondents cannot come close to demonstrating that the Order's wholesale prohibition of *any* travel that doesn't fall within one of its narrow excepted categories is necessary to promote that compelling interest, the Order "unnecessarily burden[s and] restrict[s] constitutionally protected activity." *Dunn*, 405 U.S. at 343. The Order bans "non-essential" travel even when such travel can easily be accomplished, through the use of social distancing and other protective measures, without meaningfully exposing the traveler or anyone else to the risk of transmission. And it purports to ban "all forms" of non-essential travel, EO 28 § 5 (Pet. App. 25), even those, such as automobiles, that are ideally suited to social distancing protocols that minimize the risk of infection. Thus, in Wisconsin, an individual is barred from taking a safe and leisurely drive by himself or herself—an activity that poses

[20] In *Brandmiller*, this Court applied intermediate scrutiny rather than strict scrutiny, but that was because the challenged restriction on car travel on certain streets and at certain times of the day was considered akin to a "time, place and manner" restriction. 199 Wis. 2d at 544. Here, the Order's blanket prohibition of all unapproved travel is no "time, place, and manner" limit. Instead, the Order is far more like the mandatory curfew subjected to strict scrutiny in *K.F.* In any event, for the reasons discussed in text, the Order cannot pass muster under either (or frankly, any reasonable) standard.

no risk to others. For these reasons as well, Respondents simply cannot bear their burden of establishing that the Order's blanket travel prohibitions are "necessary to promote a compelling governmental interest," *Shapiro*, 394 U.S. at 634, are "drawn as narrowly as practicable," *K.F.*, 145 Wis. 2d at 46, or are even "narrowly tailored to meet the [State's] significant interests," *Brandmiller*, 199 Wis. 2d at 544; *see also Jew Ho v. Williamson*, 103 F. 10, 22-23 (N.D. Cal. 1900) (holding that quarantine of an entire city district was "not a reasonable regulation to accomplish the purposes sought" where disease was not present throughout the district).

The fact that the Order allows so-called "essential" travel, Order at 19, does not somehow render its prohibition of all other travel narrowly tailored or otherwise constitutionally acceptable. Respondents cannot create arbitrary classes of favored and disfavored travel in this manner, at least not without demonstrating how the disfavored travel poses public health risks that are different in kind or in magnitude from the risks posed by the favored travel. And here, Respondents cannot make such a demonstration since, as discussed above, the Order prohibits travel *even though* it can be undertaken in a way that complies with general social distancing standards—the very standards Respondents have deemed sufficient to protect the public health

when applied to the favored classes of travel they *do* allow. EO 28 § 15 (Pet. App. 37). Since such a social distancing requirement could be imposed on "non-essential" travel as well, the Order's outright ban on such travel not only is not narrowly tailored but is arbitrary.

For these reasons, the Order's travel ban fails even the arguably more forgiving standard applied to emergency measures under *Jacobson* (even assuming that that standard has any place in the analysis of claims, like Petitioners', founded solely upon the State Constitution). As discussed above, that century-old decision is no longer a guide to the analysis required by Petitioners' claims, and the Court should instead resolve those claims by looking to modern constitutional doctrine. But once again, the point is ultimately of no moment. For given the Order's blanket prohibition of travel that can readily be undertaken in accordance with social distancing and other risk-mitigation standards, Respondents' travel restrictions have "no real or substantial relation" to the public health interests that the Order purports to address, *Jacobson*, 197 U.S. at 31, and Respondents' exercise of their legitimate power to protect the public health has, to that extent, been exercised in "such an arbitrary, unreasonable manner," and has gone "so far beyond what was reasonably required for the safety of the public," *id.* at 28, as to warrant

judicial intervention. In addition, given the well-established pedigree, fundamental nature, and critical importance of the constitutional right to travel, the Order's criminal prohibition of such non-essential travel under these circumstances, "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31.

4. At an absolute minimum, if the Court agrees that the Order's infringements of the right to free exercise of religion and freedom of speech and assembly must be enjoined, the Order's prohibition of non-essential travel must also be enjoined to the extent such travel is necessary or appropriate for the exercise of those other rights and freedoms. As previously discussed, *supra* at 62, the right to travel is inherent in and interwoven with the free exercise of these other fundamental rights and freedoms, for those rights cannot be meaningfully protected in the absence of protection of the right to travel. And as Petitioner Fabick's experience shows, the Order's travel ban has directly and adversely affected his ability to exercise his rights to free speech and assembly, and even to join a peaceful protest of the Order itself. (Pet. App. 49–50). *See Brandmiller*, 199 Wis. 2d at 538–39; *Ervin*, 41 Wis. 2d at 200; *see also Aptheker*, 378 U.S. at 520 (Douglas, J., concurring) ("Like the right of assembly and the right of association, [freedom of movement]

makes all other rights meaningful. . . Once the right to travel is curtailed, all other rights suffer.").

III. PETITIONERS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION, AND THE BALANCE OF EQUITIES FAVORS IMMEDIATE INJUNCTIVE RELIEF.

In addition to showing a likelihood of success on the merits, a party seeking temporary or permanent injunctive relief must demonstrate that it lacks an adequate remedy at law and would thus likely suffer irreparable harm in the absence of injunctive relief, that an injunction is necessary to preserve the status quo, and that on balance, equity favors issuing the injunction. *See Werner*, 80 Wis. 2d at 520–21; *Pure Milk Prod.*, 90 Wis. 2d at 800. Petitioners meet these remaining requirements.

Petitioners have alleged ongoing violations of their rights under the Wisconsin Constitution to freedom of worship, freedom of speech and assembly, and freedom to travel. It is well settled that the ongoing deprivation of a constitutional right—particularly fundamental freedoms such as these—constitute *per se* irreparable harm. *See, e.g., White House Milk Co. v. Thomson*, 275 Wis. 243, 245, 81 N.W.2d 275 (1957) (finding "irreparable harm" where challenged "statute is an unreasonable, arbitrary and oppressive interference with, and denial of, plaintiff's freedom of contract; a deprivation of

plaintiff's property without due process of law; and a denial to the plaintiff of the equal protection of the laws."); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) ("[V]iolations of First Amendment rights are presumed to constitute irreparable injuries . . . .").

As shown above, the challenged portions of EO 28 impose arbitrarily discriminatory restrictions on Petitioner Chapman's right to worship as he chooses. The Order also flatly bans Petitioner Fabick from assembling to express his political views in traditional public fora. And the Order also violates both Petitioners' freedom of travel and bodily movement, effectively placing them (and all other Wisconsin residents) under a form of house arrest. No subsequent damages remedy could make these Petitioners whole for the constitutional violations they are enduring every day the challenged restrictions remain in force. *See Pure Milk Prod.*, 90 Wis. 2d at 800 (an "injury is irreparable" where it is "not adequately compensable in damages").

Injunctive relief is particularly appropriate here because it would merely restore the status quo that existed before Respondents'

unconstitutional acts. *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958) ("The status quo is the last uncontested status which preceded the pending controversy."); *LTD Commodities, Inc. v. Perederij*, 699 F.2d 404, 406 (7th Cir. 1983) ("[I]t is the last uncontested status preceding the controversy which is to be maintained by the court, rather than a status wrongfully altered by unilateral action after dispute has arisen."). Before the limits challenged in this case were imposed, Petitioners were free to worship where and as they chose, attend whatever political rallies they wished, and move freely about outside their homes. All of these rights can continue to be exercised under the less restrictive measures designed to protect the public from materially indistinguishable pursuits and activities—masking, social distancing, and other risk-mitigation methods. The injunctive relief we request would do nothing more than "compel defendant[s] to correct injury already inflicted" and thereby maintain the status quo "existing between the parties before the dispute developed." WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2948 (3d ed. 2020).

Finally, the balance of equities strongly favors the grant of an injunction. No one doubts the importance of the State's interest in combatting the COVID-19 pandemic. But as *EO 28's own exceptions* demonstrate, that

interest may be adequately served without the draconian, arbitrary, and discriminatory restrictions on the fundamental constitutional rights of Wisconsin's citizenry. *See Maryville Baptist Church*, No. 20-5427 (Slip. Op. at 7) ("[R]estrictions inexplicably applied to one group and exempted from another do little to further [public health] . . . ."); *First Baptist Church*, 2020 WL 1910021, at *8 (balance of equities favored injunction where plaintiffs "are willing to abide by protocols that have been determined by the Governor to be adequate to protect the lives of Kansans in the context of other mass gatherings"); *On Fire Christian Center*, 2020 WL 1820249, at *9 ("[B]ecause Louisville allows other, non-religious and no-more-essential parking and drive-throughs, there is not yet any evidence in the record that stopping Louisville from enforcing its unconstitutional order will do it any harm.").

In the final analysis, all Petitioners seek is to be treated in the same manner that Respondents themselves have deemed safe for day care centers, liquor and hardware stores, and numerous other activities and establishments they have deemed "essential." The State has no cognizable interest in treating Petitioners *worse* than these other entities, in violation of their fundamental constitutional rights. *See Higher Soc'y of Indiana v. Tippecanoe Cty.,*

Indiana, 858 F.3d 1113, 1116 (7th Cir. 2017) ("[T]he public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional.").

CONCLUSION

Respondents possess considerable authority to address the current public health crisis, and it is their duty to exercise that authority, in a responsible manner, to protect the citizenry of this State. But in exercising their powers, Respondents must also take care to respect the rights guaranteed to the citizenry under the Wisconsin Constitution, restricting them only so much and so long as the crisis *necessitates*.

Benjamin Franklin said, "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."[21] EO 28 unquestionably deprives Wisconsinites of many critical attributes of their "essential Liberty." That is reason enough to call its constitutional validity into doubt. But in light of the numerous arbitrary and irrational distinctions it draws, and its many restrictions on activities that would allow Wisconsin citizens to exercise their fundamental rights in a manner that poses

[21] Pennsylvania Assembly, *Reply to the Governor* (Nov. 11, 1755), https://bit.ly/35p858Q.

little if any risk to public health, those aspects of the Order at issue in this action cannot even be said to be necessary to "purchase a little temporary Safety."

For the foregoing reasons, Petitioners respectfully request that this Court issue an order immediately enjoining enforcement of the following provisions of Emergency Order 28, and any other provisions of that Order to the extent they are related to the implementation, interpretation, or enforcement of such provisions:

(1) The provision of Section 13(h) of the Order limiting religious gatherings to fewer than ten people in a room or confined space;

(2) The provision of Section 3 of the Order prohibiting all public and private gatherings of any number of people that are not part of a single household or living unit;

(3) The provision of Section 1 of the Order ordering all individuals present within Wisconsin to stay at home or at their place of residence;

(4) The provision of Section 5 of the Order prohibiting all forms of travel;

(5) The provision of Section 18 of the Order to the extent it authorizes enforcement by law enforcement officials of those aspects of the Order

that have been enjoined.

Any order issued by the Court should provide that nothing in it should be construed to enjoin enforcement of Social Distancing Requirements as defined under Section 16 of the Order or to preclude application of such Social Distancing Requirements or other general reasonable risk-mitigation measures to activities allowed to resume as a result of this injunction.

Finally, the Court's order should direct Respondents to issue an order or other guidance advising law enforcement officials that they shall not enforce those provisions of the Order whose enforcement has been enjoined while this Court's injunction remains in effect.

Dated: May 4, 2020

Respectfully submitted,

Charles J. Cooper*
Adam P. Laxalt*
Vincent J. Colatriano*
Harold S. Reeves*
John D. Ohlendorf*
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington, DC 20036
(202) 220-9600
(202) 220-9601 (Fax)
ccooper@cooperkirk.com

Matthew M. Fernholz
Counsel of Record
CRAMER, MULTHAUF, & HAMMES, LLP
1601 East Racine Ave.,
Ste. 200
P.O. Box 558
Waukesha, WI 51387
(262) 542-4278
(262) 542-4270 (Fax)
mmf@cmhlaw.com

Counsel for Petitioners

*Applications to appear *pro hac vice* forthcoming

CERTIFICATE OF SERVICE

A copy of this memorandum is being served upon all parties via e-mail and first-class mail.

Dated: May 4, 2020

Matthew M. Fernholz
Counsel of Record
CRAMER, MULTHAUF, & HAMMES, LLP
1601 East Racine Ave.,
Ste. 200
P.O. Box 558
Waukesha, WI 51387
(262) 542-4278
(262) 542-4270 (Fax)
mmf@cmhlaw.com