

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.*

---

### EMERGENCY PETITION FOR ORIGINAL ACTION

---

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.

## **EMERGENCY PETITION FOR ORIGINAL ACTION**

Petitioners, by their attorneys, respectfully and urgently petition the Wisconsin Supreme Court, pursuant to Wisconsin Statutes § 809.70 and Article VII, Section 3(2) of the Wisconsin Constitution, to take original jurisdiction of this action against Respondents seeking to vindicate Petitioners' rights under the Wisconsin Constitution.

### **ISSUES PRESENTED**

I. Whether Emergency Order 28 ("EO 28" or the "Order") issued by Respondent Palm on April 16, 2020 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

Petitioners come before this Court to vindicate the principle that even in times of crisis, and perhaps especially then, the rights and freedoms protected by the Wisconsin Constitution are worthy of protection. The Court is obviously aware of the current public health crisis that grips the Nation. No one doubts the seriousness of 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 as discussed in detail in our supporting brief, these restrictions 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.

The State has the unquestioned authority—and duty—to implement reasonable measures to stem the tide of the COVID-19 epidemic. But even a public health crisis does not give the State 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 an injunction.

## **STATEMENT OF FACTS**

1. Petitioner Jeré C. Fabick is a resident of Waukesha County, Wisconsin.

2. Petitioner Larry Chapman is a resident of Walworth County, Wisconsin. Petitioner Chapman is a Christian and a member of Lakewood Baptist Church, located in Pewaukee, Wisconsin, and regularly attended Sunday worship there before the COVID-19 pandemic.

3. Respondent Andrea Palm is the Secretary-Designee of the Wisconsin Department of Health Services (“DHS”). Her office is located at 1 West Wilson Street, Madison, Wisconsin, 53703.

4. Respondent Julie Willems Van Dijk is the Deputy Secretary of DHS. Her office is located at 1 West Wilson Street, Madison, Wisconsin, 53703.

5. Respondent Nicole Safar is an executive at DHS. Her office is located at 1 West Wilson Street, Madison, Wisconsin, 53703.

6. Respondent Josh Kaul is the Attorney General of Wisconsin. He is the chief law officer in the State of Wisconsin and directs and supervises the Wisconsin Department of Justice. His mailing address at the Wisconsin Department of Justice is PO Box 7857, Madison, Wisconsin, 53707.

7. Respondent David Erwin is the Chief of the Wisconsin State Capitol Police. The Capitol Police has statewide jurisdiction. Among its duties, in addition to law enforcement, are the protection of State property and the issuance of permits for demonstrations and other public gatherings on State property, including but not limited to the grounds of the State Capitol. The headquarters of the Capitol Police are located at 17 W. Main Street, Madison Wisconsin, 53703.

8. Respondent David Mahoney is the Sheriff of Dane County, Wisconsin, the largest law enforcement agency in Dane County, and the fourth largest in the State. The Dane County Sheriff's office is located at 115 W. Doty Street, Madison, Wisconsin, 53703.

9. Respondent Ismael Ozanne is the District Attorney of Dane County, Wisconsin. His office is responsible for, among other things, prosecuting crimes committed within Dane County. His office is located at 215 S. Hamilton Street, Madison Wisconsin, 53703.

10. Respondent Eric Severson is the Sheriff of Waukesha County, Wisconsin. The Waukesha County Sheriff's office is located at 515 W. Moreland Boulevard, Waukesha, Wisconsin, 53188.

11. Respondent Susan Opper is the District Attorney of Waukesha County, Wisconsin. Her office is responsible for, among other things, prosecuting crimes committed within Dane County. Her office is located at 515 W. Moreland Boulevard, Waukesha, Wisconsin, 53188.

12. Respondent Kurt Picknell is the Sheriff of Walworth County, Wisconsin. The Walworth County Sheriff's office is located at 1770 County Road NN, Elkhorn, Wisconsin, 53121.

13. Respondent Zeke Wiedenfeld is the District Attorney of Walworth County, Wisconsin. His office is responsible for, among other things, prosecuting crimes committed within Walworth County. His office is located at 1800 County Trunk NN, Elkhorn, Wisconsin, 53121.

14. In February 2020, the novel coronavirus COVID-19 began spreading within the United States.

15. Beginning in March 2020, 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.”

16. Respondent Palm has since issued a series of orders addressing the COVID-19 pandemic. One of those orders, Emergency Order 12 (EO 12), was issued on March 24, 2020 (Petitioners’ Appendix (“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).

17. 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.

18. Although Petitioners had serious concerns about the impacts of the restrictions imposed by EO 12, 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.

19. However, on April 16, 2020, Respondent Palm issued Emergency Order 28 ("EO 28" or the "Order"). 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.

20. 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, and as

described more fully in the succeeding paragraphs, the Order severely restricts, on pain of criminal penalty, the exercise of several rights and freedoms:

21. **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.

22. **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. 23). 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).

23. **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. 20) (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. 25). “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 §§ 1, 15 (Pet. App. 21, 37). 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 (Pet. App. 37–38). All other travel, regardless of its purpose and regardless of whether it can be accomplished without significant risk of transmission of the virus, is prohibited under the Order.

24. On April 20, Respondent 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. 41–42). 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 restrictions imposed by that Order. EO 31 § 5 (Pet. App. 43).

25. EO 31 does contemplate that DHS may issue additional orders “reducing restrictions” imposed by other orders as circumstances warrant.

Although DHS has since issued at least one order slightly relaxing some of the restrictions imposed by the Order,<sup>1</sup> 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.

26. Petitioner 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 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

---

<sup>1</sup> 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).

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 leading masking and other public-health safeguards, during the pandemic.

27. As noted, Petitioner Fabick is a long-time resident of Wisconsin who lives in Waukesha County. 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. 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. 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.

## **STATEMENT OF THE RELIEF SOUGHT**

Petitioners respectfully request that this Court issue an order immediately and permanently 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.

The Court's order should direct Respondent Palm 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.

The Court should issue a declaration that the above-referenced provisions of the Order are unconstitutional and unenforceable, and it should issue any other relief that it considers just and proper.

Finally, the Court should award such other and further relief as is just and proper, including, without limitation and to the extent available, Petitioners' reasonable costs and attorneys' fees.

**STATEMENT OF REASONS WHY THE COURT  
SHOULD TAKE 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 Professional 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 six millions 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. 2d 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).

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.<sup>2</sup>

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 Board v. Klauser*, 194 Wis. 2d 484,

---

<sup>2</sup> 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 or 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).

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 for every day that those 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 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.

### **CONCLUSION**

For the foregoing reasons, and as discussed more fully in Petitioners' accompanying memorandum, Petitioners respectfully request that the Court grant this emergency petition.

Dated: May 4, 2020

Respectfully submitted,



Charles J. Cooper\*  
Adam P. Laxalt\*  
Vincent J. Colatristano\*  
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 petition is being served upon all parties via e-mail and first-class mail.

Dated: May 4, 2020

A handwritten signature in black ink, appearing to read "Matt M. Fernholz", written over a horizontal line.

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