STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP0828-OA

JERE 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 Wisconsin State Capitol Police, DAVID MAHONEY, in his official capacity as Sheriff of Dane County, ISMAEL OZANNE, in his official capacity as District Attorney of Dane County, ERIC SEVERSON, in his official capacity as Sheriff of Waukesha County, SUSAN OPPER, in her official capacity as District Attorney of Waukesha County, KURT PICKNELL, in his official capacity as Sheriff of Walworth County and ZEKE WIEDENFIELD, in his official capacity as District Attorney of Walworth County,

Respondents.

STATE RESPONDENTS' RESPONSE TO PETITION FOR AN ORIGINAL ACTION AND MOTION FOR TEMPORARY INJUNCTION

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TABLE OF CONTENTS

Page

INTRODUCTION ... 1

STATEMENT ON ORAL ARGUMENT ... 3

BACKGROUND ... 3

- I. COVID-19 is easily transmitted through the air in enclosed spaces, and can be seeded in a community by people who feel completely healthy. ... 4
- II. Safer at Home provides a temporary response to address the nature of COVID-19's spread; however, it broadly allows activities in outdoor open spaces while practicing social distancing. ... 6
- III. Temporarily restricting some types of gatherings slows COVID-19's spread in Wisconsin and allows time for Wisconsin to continue to rachet up its preparedness. ... 9

REASONS THE PETITION AND MOTION SHOULD BE DENIED ... 14

- I. This Court should decline to exercise original jurisdiction because these fact-intensive claims are unsuitable for an original action, and are properly filed in a trial court in the first instance. ... 14
- II. If this Court does not deny the petition, the petitioners' claims fail as a matter of law. ... 17
  - A. The framework the Supreme Court set forth in *Jacobson*, its landmark public health decision, supports Safer at Home's temporary, limited restrictions. ... 17

Page

1. As many other courts have recognized, the *Jacobson* framework applies to COVID-19 measures....................................17

2. The petitioners' attempts to avoid the *Jacobson* framework fall short. 19

B. The petitioners are not likely to succeed on their religious liberty claim because section 13(h) does not infringe upon the freedom of religious worship protected by the Wisconsin Constitution..21

1. Background: section 13(h) carves out an exception for religious gatherings of fewer than ten people...............................21

2. Legal principles: *Jacobson* deference overlays the petitioners' religious liberty claim, otherwise analyzed under the *Coulee* framework.....................24

3. Section 13(h)'s application of Wis. Stat. § 252.02(3) should be upheld under either *Jacobson* or *Coulee*..27

C. The petitioners are unlikely to succeed on their claim that Safer at Home impermissibly infringes upon freedom of assembly for political gatherings protected by the Wisconsin Constitution..32

1. The restriction affecting physical political gatherings is not facially overbroad. 34

Page

a. Legal standard for the overbreadth analysis. 34

b. Safer at Home does not impose a total ban on physical gatherings outside the home, and it leaves open significant room for expressive political activity.....................35

c. Even under the petitioners' incorrect reading, Safer at Home is not unconstitutionally overbroad...............................37

(1) Safer at Home does not restrict non-physical ways of assembling for expressive political purposes.......................37

(2) The restrictions that Safer at Home imposes do not sweep substantially beyond their legitimate purpose. 38

d. The petitioners' argument that there is no saving construction to avoid or cure alleged overbreadth is manifestly incorrect. 40

2. Safer at Home's effect on physical political gatherings is a permissible time, place, or manner restriction. 41

Page

a. The Safer at Home restrictions are content neutral. 41

b. The Safer at Home restrictions serve a significant governmental interest and are narrowly tailored to advance that interest. 42

c. The Safer at Home restrictions leave open ample alternative channels for expressive political association. 44

3. Under no circumstances are the petitioners entitled to the breadth of relief sought. 45

D. The petitioners are unlikely to succeed on their claim that Safer at Home impermissibly infringes upon the Wisconsin Constitution's protection of intrastate travel. 47

1. The *Jacobson* framework applies here and is decisive. 48

2. Even without *Jacobson* deference, Safer at Home's travel restrictions pass constitutional muster. 50

a. Safer at Home's travel restrictions do not impermissibly impinge the petitioners' rights to travel. 50

Page

b. The petitioners' arguments confuse both the applicable law and the facts of Safer at Home. 53

III. The equities weigh in favor of denying an injunction because the challenged restrictions in Safer at Home indisputably save lives in the midst of a rare pandemic. 54

CONCLUSION...56

Page

TABLE OF AUTHORITIES

Cases

Adams v. City of Milwaukee,
144 Wis. 371, 129 N.W.2d 518 (1911) 18

Ayotte v. Planned Parenthood of N. New England,
546 U.S. 320 (2006) 45

Bd. of Airport Comm'rs v. Jews for Jesus, Inc.,
482 U.S. 569 (1987) 34, 39

Brandmiller v. Arreola,
199 Wis. 2d 528, 544 N.W.2d 894 (1996) 47, 51, 53

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 34, 35. 40

Buck v. Bell,
274 U.S. 200 (1927) 20

Cassell v. Snyder,
No. 20-cv-50153, 2020 WL 2112374
(N.D. Ill. May 3, 2020).. 19

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 29

City of Milwaukee v. K.F.,
145 Wis. 2d 24, 426 N.W.2d 329 (1988) 65

Clark v. Cmty. for Creative Non-Violence,
468 U.S. 288 (1984) 41

Commcan, Inc. v. Baker,
No. 2084CV00808-BLS2, 2020 WL 1903822
(Mass. Super. Ct. Apr. 16, 2020) 19

Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana,
186 U.S. 380 (1902) 48

Page

Coulee Catholic Sch. v. LIRC,
2009 WI 88, 320 Wis. 2d 275,
768 N.W.2d 868 ....17, *passim*

Cox v. New Hampshire,
312 U.S. 569 (1941) 41

Cross Culture Christian Ctr. v. Newsom,
No. 20-cv-832, 2020 WL 2121111
(E.D. Cal. May 5, 2020) 19, 26, 30–31

Dunn v. Blumenstein,
405 U.S. 330 (1972) 53

Ervin v. State,
41 Wis. 2d 194, 163 N.W.2d 2017 (1968) ....10, *passim*

First Baptist Church v. Kelly,
2020 WL 1984259 (D. Kan. Apr. 27, 2020) 26

First Baptist Church v. Kelly,
No. 20-cv-1102, 2020 WL 1910021
(D. Kan. Apr. 18, 2020) 26

Froncek v. City of Milwaukee,
269 Wis. 2d 276, 69 N.W.2d 242 (1955) 18–19, 20

Gish v. Newsom,
No. 20-cv-755, 2020 WL 1979970
(C.D. Cal. Apr. 23, 2020) ....24, *passim*

Hague v. CIO,
307 U.S. 496 (1939) 36

In re Abbott,
954 F.3d 772 (5th Cir. Apr. 7, 2020)............................ 19, 20

In re Abbott,
-- F.3d --, 2020 WL 1911216 (5th Cir. Apr. 20, 2020) 19

In re Exercise of Original Jurisdiction,
201 Wis. 123, 229 N.W. 643 (1930).............................. 14, 16

Page

In re Robert T.,
2008 WI App 22, 307 Wis. 2d 488, 746 N.W.2d 564. 34

Jacobson v. Commonwealth of Massachusetts,
197 U.S. 11 (1905) ....1, *passim*

Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO,
2007 WI 72, 301 Wis. 2d 266, 732 N.W.2d 828................. 54

Legacy Church, Inc. v. Kunkel,
No. CIV 20-0327, 2020 WL 1905586
(D.N.M. Apr. 17, 2020) ....26, p*assim*

Lighthouse Fellowship Church v. Northam,
No. 2:20cv204, 2020 WL 2110416
(E.D. Va. May 1, 2020) 19, 26

Madison Teachers, Inc. v. Walker,
2014 WI 99 23 , 358 Wis. 2d 1, 851 N.W.2d 337............... 33

Maryville Baptist Church Inc. v. Andy Beshear,
--- F.3d ----, 2020 WL 2111316
(6th Cir. May 2, 2020) 26, 27

Noesen v. Dep't of Reg. & Licensing,
2008 WI App 52, 311 Wis. 2d 237, 751 N.W.2d 385......... 25

On Fire Christian Center Inc. v. Fischer,
No. 20-cv-264, 2020 WL 1820249
(W.D. Ky. Apr. 11, 2020) 26

Packingham v. North Carolina,
137 S. Ct. 1730 (2017) 38

Peace Lutheran Church, & Acad.,
2001 WI App 139, 246 Wis. 2d 502, 631 N.W.2d 229....... 25

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983) 36

Petition of Heil,
230 Wis. 428, 284 N.W. 42 (1938)...................................... 14

Page

Prince v. Massachusetts,
321 U.S. 158 (1944) 20, 24

Pure Milk Prod. Co-op. v. Nat'l Farmers Org.,
90 Wis. 2d 781, 280 N.W.2d 691 (1979) 54

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 26

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 42

Sauk Cty. v. Gomuz,
2003 WI App 165, 266 Wis. 2d 758,
669 N.W.2d 509 44

Shapiro v. Thompson,
394 U.S. 618 (1969) 53

State ex rel. Hartung v. City of Milwaukee,
102 Wis. 509, 78 N. W. 756 14

State v. Courtney,
74 Wis. 2d 705, 247 N.W.2d 714 (1976) 9

State v. Fisher,
211 Wis. 2d 665, 565 N.W.2d 565 (Ct. App. 1997)............ 31

State v. Hemmingway,
2012 WI App 133, 345 Wis. 2d 297, 825 N.W.2d 303 34

State v. Iverson,
2015 WI 101, 365 Wis. 2d 302, 871 N.W.2d 661............... 51

State v. Janssen,
219 Wis. 2d 362, 580 N.W.2d 260 (1998) 45

State v. Konrath,
218 Wis. 2d 290, 577 N.W.2d 601 (1998) 15, 34

State v. Matejka,
2001 WI 5, 241 Wis. 2d 52, 621 N.W.2d 891..................... 51

Page

State v. Miller,
202 Wis. 2d 56, 549 N.W.2d 235 (1996) 25

State v. Neumann,
2013 WI 58, 348 Wis. 2d 455, 832 N.W.2d 560 25

Theodore Roberts v. Hon. Robert Neace,
No. 20-cv-54, 2020 WL 2115358
(E.D. Ky. May 4, 2020) 26

Virginia v. Hicks,
539 U.S. 113 (2003) 34

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 41, 42

Workman v. Mingo Cty. Bd. of Educ.,
419 F. App'x 348, 2011 WL 1042330 42

Consitutional Provisons

Wis. Const. art. 1, § 4... 3
Wis. Const. art. 1, § 18... 24

Statutes

Wis. Stat. § 66.325 52
Wis. Stat. § 252.02(3)..3, *passim*
Wis. Stat. § 252.25 .... 9, 52
Wis. Stat. § 346.04(3)... 9

INTRODUCTION

In most facets of normal life, one person's exercise of individual liberties does not jeopardize the liberties of another. But a rare contagious pandemic like the one we now face necessarily puts the liberty of one at odds with the liberty, and potentially lives, of others. One person's decision—a person who may feel completely healthy and not know he has COVID-19—could jeopardize the safety of an entire community.

This is why the U.S. Supreme Court has long recognized that courts must consider the public's right to protection "against an epidemic of disease which threatens the safety of its members," when assessing individual liberty claims during a pandemic. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905). And this Court has consistently recognized that when one person's exercise of liberties jeopardizes the safety of others, this Court must balance those individual liberties against public protection.

Safer at Home's restrictions on certain gatherings is helping prevent severe illness and death across Wisconsin. The petitioners' challenges to this vital protection suffer two fundamental flaws: (1) they fail to confront that this Court must balance their individual liberties against public protection; and (2) they challenge Safer at Home for many things it does not do.

Indeed, many of the petitioners' core arguments take aim at strawman limitations not found in Safer at Home. Their inaccurate characterizations illustrate why, as a basic matter, speech and assembly claims require factual inquiries, and why—as a result—this Court's original jurisdiction is inappropriate. But even more significantly, the petitioners' allegations cannot be taken at face value: they are not accurate.

For example, the petitioners assert that they are banned from discussing "political affairs" in the "streets or parks" and, similarly, are banned from political protest. (Pet'r Mem. 47, 52.) That is not the case. The petitioners, and anyone else, are free to be outside using social distancing—in streets or in parks or other open spaces—and may discuss political affairs, if they choose. That is not hypothetical: one can see people across Wisconsin conversing in outdoor spaces all the time. In other words, there certainly is no "total ban" and, in fact, the petitioners already can do what rests at the core of their political assembly claim: engage in that speech in "traditional public fora such as the streets and parks." (Pet'r Mem. 52, 54.)

In turn, the petitioners also misstate the travel restrictions: they may travel to do these things. Specifically, Safer at Home does not restrict the petitioners from traveling outdoors to engage in these activities. On top of that, Safer at Home does not prohibit travel to religious services. Under any view, the petitioners' travel claims fail.

The petitioners' argument about gatherings in religious settings also is flawed, as it rests on an inapt comparison. Rather than treat religious facilities discriminatorily, Safer at Home's temporary restrictions provide religious gatherings with more flexibility than other similar activities. Safer at Home prohibits gatherings of the public in enclosed spaces for extended periods—like in concert halls, sports facilities, and the like. That is because these community gatherings are especially risky in terms of viral spread. However, recognizing the special status that religious gatherings have, Safer at Home exempts those indoor gatherings of up to nine people. Over 20 states have issued safer-at-home orders with similar provisions, and several states have even stricter provisions. Wisconsin's provision should pass muster under the temporary circumstances we currently face.

Indeed, the Legislature, with Wis. Stat. § 252.02(3), specifically recognized the risk of viral spread in such gatherings. It provided DHS with the very authority in question here: to "forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." Wis. Stat. § 252.02(3). The petitioners do not even acknowledge, let alone confront, that their challenge is not only to Safer at Home, but also to a state statute.

The petitioners' individual liberties are unquestionably important. But, in the context of this new, highly contagious and deadly virus, this Court must consider the liberty and lives of rest of the Wisconsin public, too. A careful constitutional analysis that considers both this balancing, and an accurate assessment of Safer at Home's terms, shows that the petitioners' claims—in the extraordinarily rare circumstances of this pandemic—must fail. This Court should deny the petition and motion for an injunction.

STATEMENT ON ORAL ARGUMENT

If the petition and motion are not denied outright, the State respondents request oral argument.

BACKGROUND

The petitioners challenge aspects of Wisconsin's Safer at Home order that relate to certain in-person gatherings and travel. The following briefly summarizes the genesis of these kinds of restrictions, which have been adopted in some form throughout much of the world. These temporary restrictions recognize that COVID-19 is easily spread, especially in enclosed spaces, and can be spread by those who appear healthy.

I. COVID-19 is easily transmitted through the air in enclosed spaces, and can be seeded in a community by people who feel completely healthy.

As the world is now well-aware, COVID-19 is a novel, dangerous, and easily-spread new threat. And the risk of spread appears to be significantly greater in enclosed spaces. Further, it can be seeded in a community even by people who may feel healthy. These characteristics are important to understanding the restrictions being challenged here.

First, COVID-19 is easily spread through the air, especially in enclosed spaces. COVID-19 transmits via respiratory droplets—i.e., when a person speaks, coughs, sneezes, or breathes. Infectious particles can remain both airborne and on surfaces for an extended period of time. (Westergaard Aff. ¶ 11.) Accordingly, a person may spread the virus to another without ever touching the other person.

The concern with airborne transmission is especially acute in enclosed spaces. They likely pose the greatest risk for community spread. (Westergaard Aff. ¶ 37.) Further, as recently reported, "coronavirus could be much more likely to spread indoors than outdoors," and "[o]ne potential contributing factor to the virus's potency indoors is the poor air quality that characterizes some urban buildings, which can facilitate the spread of COVID."[1] It thus appears that "the

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[1] John Hirschauer, *Outdoor Transmission of COVID*, National Review (Apr. 15, 2020), https://www.nationalreview.com/corner/coronavirus-transmission-chinese-study-shows-covid-more-likely-spread-indoors/.

majority of the outbreaks [in China] were fueled by indoor transmission of the disease."[2]

While indoor spaces may pose special problems, that is not to say it is safe to gather closely in groups in defined outdoor spaces. As the Centers for Disease Control and Prevention (CDC) has explained, dense or large gatherings in a defined area pose their own risks, especially where it is not feasible to consistently socially distance.[3]

And the ease of COVID-19's spread is alarming. Some estimates suggest that every person infected with the virus will infect 2.2–3.6 other people. That rate of transmission is significantly higher than the seasonal flu's rate of 1.3, and is comparable to or higher than the estimated rate of 1.4–2.8 for the 1918 novel influenza pandemic—the deadliest communicable disease epidemic in modern history, during which 50 million people may have died worldwide. (Westergaard Aff. ¶¶ 13–14.)

Second, COVID-19 is not only spread while someone is visibly ill, but also is spread amongst people who look and feel entirely healthy. A person infected with COVID-19 may not show any symptoms until 14 days after they contract the

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[2] Marty Johnson, New study finds few cases of outdoor transmission of coronavirus in China, THE HILL (Apr. 23, 2020 2:17 PM), https://thehill.com/policy/healthcare/494348-new-study-finds-few-cases-of-outdoor-transmission-of-coronavirus-in-china.

[3] Centers for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), *Get Your Mass Gathering or Large Community Events Ready*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html (Mar. 15, 2020). Consistent with this, though Safer at Home allows for socially distanced outdoor activities in "open space," it does not exempt places like amusement parks and pools.

virus, but they can still transmit the virus to others during this asymptomatic period. (Westergaard Aff. ¶¶ 6–7.) Compare this to the flu. People with the flu are most contagious in the first three to four days after illness begins, and some may be contagious for only one day before symptoms develop.[4]

These malignant qualities of COVID-19 mean that the actions of even just one infected person—a person who may feel perfectly healthy, without any knowledge that he is infected—may cause a new outbreak: "Just one infected person can seed the virus in a community and thereby cause new surges." (Van Dijk Aff. ¶ 25.)

II. Safer at Home provides a temporary response to address the nature of COVID-19's spread; however, it broadly allows activities in outdoor open spaces while practicing social distancing.

To help limit the spread of this easily transmitted, deadly virus, Safer at Home (also known as Emergency Order #28)[5], generally instructs Wisconsin citizens to stay at home as a default, but it contains many exceptions that encompass simply getting outside to exercise, shopping for groceries, attending a small religious gathering, or attending a socially distanced political protest in open spaces. And its restrictions are steadily being pulled back, consistent with the State's Badger Bounce Back plan and President Trump's

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[4] CDC, *How Flu Spreads*, https://www.cdc.gov/flu/about/disease/spread.htm (last reviewed Aug. 27, 2018).

[5] Wis. Governor Tony Evers and Secretary Andrea Palm, *EMERGENCY ORDER #28 Safer at Home Order* (Apr. 16, 2020), https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf.

recommendations for a three-phased reopening approach with progressively relaxed social distancing.[6]

As relevant here, Safer at Home generally prohibits gatherings of the public, including, for example, at schools, libraries, and places of amusement (concerts and music halls, etc.). *See* Safer at Home, §§ 3–4. This authority to forbid public gatherings, including at "churches," "schools," and "other places," is found in Wis. Stat. § 252.02(3), which provides that DHS "may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics."

However, that is only the beginning of the story, as there are many exceptions to the default restrictions on public gatherings—as can be seen by anyone observing populated areas in Wisconsin. Notably, friends, neighbors, and others can and do converse and socialize in outdoor open spaces, while practicing social distancing. People can and do march and shout outside (i.e. protest) while social distancing.

Public parks and open spaces are open. The order exempts from closure "[p]ublic parks and open space," unless local health officials conclude that socially distancing is not being practiced. Safer at Home, § 4. It likewise expressly permits "outdoor activity" without limitation, so long as social distancing is practiced. Safer at Home, §§ 1, 11(c). In turn, travel restrictions do not apply to these activities: a person

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[6] *White House Unveils Coronavirus Guidelines on Path To Reopening the Country*, NPR (Apr. 16, 2020, updated 7:21 PM), https://www.npr.org/2020/04/16/833451041/watch-white-house-to-share-coronavirus-guidelines-on-a-path-to-reopening-the-cou; *see also* White House, *Guidelines for Opening up America Again,* https://www.whitehouse.gov/openingamerica/ (last visited May 7, 2020).

can drive to an open space or park for any outdoor activity. Safer at Home, § 15(a). A person also can travel for a wide variety of other activities.[7]

Further, while indoor places where people congregate for prolonged periods are, by default, closed (like theaters, playhouses, athletic facilities, etc.), there is a special carveout for religious facilities and also for weddings and funerals. Safer at Home exempts "Religious facilities, entities, groups, and gatherings, and weddings and funerals, except that any gathering shall include fewer than 10 people in a room or confined space at a time and individuals shall adhere to Social Distancing Requirements as much as possible." Safer at Home, § 13(h).

This is not an exhaustive list of the exceptions. For example, people may also leave their homes to perform work at essential businesses and operations[8], perform minimum

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[7] Permissible "Essential Travel" encompasses a broad range of activities: "the provisions of or access to Essential Activities, Special Situations, Essential Governmental Functions, Essential Businesses and Operations, or Minimum basic functions"; caring for dependent, elderly or other vulnerable persons; receiving educational materials, meals, or "any other related service,"; returning home from outside the State, or to a home outside Wisconsin; and complying with law enforcement, court orders, and custody agreements. Safer at Home, § 15.

[8] This is in line with the advice of over 100 of the nation's most prominent infectious disease scientists, who in mid-March recommended "closing or severely limiting all non-essential businesses." Wisconsin is one of over 46 states to have restricted non-essential businesses as part of its public health response to COVID-19. Jocelyn Kaiser, *Disease experts call for nationwide closure of U.S. schools and businesses to slow coronavirus*, Science (Mar. 16, 2020, 2:55 PM), https://www.sciencemag.org/news/2020/03/infectious-disease-experts-call-nationwide-closure-us-schools-and-business-slow#; Erin Schumaker, *Here are the states that*

operations at non-essential businesses, and perform many other activities. *See, e.g.*, Safer at Home, §§ 11(d), 13.[9]

III. Temporarily restricting some types of gatherings slows COVID-19's spread in Wisconsin and allows time for Wisconsin to continue to rachet up its preparedness.

Tragically, COVID-19 has demonstrated why DHS needs the ability to restrict public gatherings under Wis. Stat. § 252.02(3). The statute empowers DHS to address risky types of gatherings, while Wisconsin rachets up its preparedness.

To illustrate, some of the most dramatic outbreaks of COVID-19 nationally have occurred through gatherings at places of worship and funerals.

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have shut down nonessential businesses, ABC News (April 3, 2020, 6:58 PM), https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806.

[9] There also is a statutory enforcement mechanism, which is not at issue here. Further, such a mechanism is neither unprecedented nor problematic. Wisconsin Stat. § 252.25 sets out the elements for someone to be liable: (1) the person must act willfully—a common mens rea in Wisconsin law, particularly traffic law, *see, e.g.*, Wis. Stat. § 346.04(3); (2) the person must engage in the articulated conduct—"violates or obstructs the execution" of; and (3) the person must do so by violating the terms of "the order," which is publicly available and set out in detail.

This Court has before upheld application of statutes, like Wis. Stat. §§ 252.02(3) and 252.25, that base criminal liability on violation of an administrative agency's or executive's requirement. *State v. Courtney*, 74 Wis. 2d 705, 709, 247 N.W.2d 714 (1976) (violation of Department Agriculture pesticide handling requirements); *Ervin v. State*, 41 Wis. 2d 194, 163 N.W.2d 2017 (1968) (mayoral proclamation imposing curfew, discussed further below).

For example, in March, a Washington choir met at church for its two-and-one-half hour practice; 60 members showed up. A greeter offered hand sanitizer at the door, and the members avoided the usual hugs and handshakes. No one was coughing or sneezing or otherwise appeared to be sick at the time. Yet, roughly three weeks later, 45 of the attendees had tested positive for COVID-19, at least three had been hospitalized, and two had died.[10]

Attendance at a funeral in Albany, Georgia, caused the rural county to have—within weeks—"one of the most intense clusters of coronavirus in the country." The virus "hit like a bomb," overwhelming local hospitals. "For a few days, the hospital was so short of staff members that employees who had tested positive but did not yet have symptoms were asked to work."[11]

And a synagogue in the city of New Rochelle became the epicenter of New York State's first major coronavirus outbreak.[12]

In turn, some states have taken the aggressive approach of wholly prohibiting in-person religious services as

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[10] Richard Read, *A choir decided to go ahead with rehearsal. Now dozens of members have COVID-19 and two are dead*, LA Times (Mar. 29, 2020, 07:34 PM), https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak.

[11] Ellen Barry, *Days After a Funeral in a Georgia Town, Coronavirus 'Hit Like a Bomb'*, NY Times, Mar. 30, 2020 https://www.nytimes.com/2020/03/30/us/coronavirus-funeral-albany-georgia.html.

[12] *Coronavirus: New York Creates 'Containment Area' Around Cluster in New Rochelle*, NPR (Mar. 10, 2020 2:17 P.M.), https://www.npr.org/sections/health-shots/2020/03/10/814099444/new-york-creates-containment-area-around-cluster-in-new-rochelle.

part of their safer-at-home orders. Wisconsin, on the other hand, is one of over 20 states to have issued COVID-19 orders permitting in-person religious gatherings, but limiting them to roughly 10 people or fewer.[13]

And, again, Wisconsin also leaves much room for gatherings—at a six-foot social distance—in outdoor open spaces. People can continue to go outside, converse, march, or pray, so long as they practice the undisputedly necessary social distancing safeguards.

These measures have been successful. They have dramatically lessened the risk to Wisconsinites as the State ramps up its ability to combat the novel COVID-19 virus. While restrictions will soon begin to be relaxed, in accordance with Badger Bounce Back, that should not be done abruptly in light of the very real risks that remain while Wisconsin rapidly continues its preparations.

For example, data reflects that without Safer at Home, the number of Wisconsinites infected and killed by COVID-19 would have been far higher. DHS, at the direction of Governor Evers, issued the first "Safer at Home Order" on March 24, in effect until April 24. (Van Dijk Aff. ¶¶ 17, 19–21; Westergaard Aff. ¶ 36.) The order worked to help dramatically slow COVID-19's spread. On March 24, the number of Wisconsinites testing positive for COVID-19 was doubling every 3.4 days; by April 14, that rate of doubling had fallen to about every 12 days. (Westergaard Aff. ¶¶ 31. 37–38; Van Dijk Aff. ¶¶ 15, 27.)

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[13] *Most states have religious exemptions to COVID-19 social distancing rules*, Pew Research Center (Apr. 28, 2020), https://www.pewresearch.org/fact-tank/2020/04/27/most-states-have-religious-exemptions-to-covid-19-social-distancing-rules/ft_20-04-27-covidexemptions_01/ (listings last updated Apr. 28, 2020).

As the expiration of the first Safer at Home order approached, data showed that lifting it after one month would result in a renewed surge that would have overwhelmed the State's hospital system, especially given the still-developing ability for Wisconsin to carry out effective containment strategies. In contrast, the analyses showed that leaving Safer at Home in place, combined with increased testing, tracing, and isolation capacity, would go far in protecting Wisconsin from overwhelming its ICU and ventilator resources. (Van Dijk Aff. ¶¶ 29–31 Ex. B.)

So, on April 16, DHS issued Wisconsin's second Safer-at-Home order (Safer at Home). This order, effective through May 26, 2020, follows the same general framework of the first order, but relaxes some restrictions so that more activities may resume, and more businesses may reopen. In addition, restrictions continue to be lifted in interim steps prior to May 26.[14]

Safer at Home continues to make a tremendous difference for the health and safety of Wisconsinites. Researchers at the University of Wisconsin's Global Health Institute estimated that, by its initial April 24 expiration date, the first order had prevented 55,000 cases and 2,200 deaths. Analyses prior to the issuance of the Safer-at-Home extension showed that, without any intervention, COVID-19-related hospitalizations and ICU admissions would have reached 94,200 and 22,600, respectively, by May 1. (Van Dijk Aff. ¶¶ 27–29.) That same guidance estimates that, with Safer at Home in place for one additional month, these numbers are expected to be further reduced to 13,100 and 4,800,

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[14] For example, on April 27, DHS issued another order further easing restrictions on some business operations. (Van Dijk Aff. ¶ 45 Ex. F.)

respectively: that is an enormous difference of 17,800 ICU admissions. (Van Dijk Aff. ¶¶ 29–31.)

However, the success does not mean the restrictions on some gatherings can be abruptly lifted. COVID-19 still poses a very significant threat. Rates of infection in Wisconsin are stabilizing, and we are becoming better and better prepared to handle the virus, but we are not out of the woods. In roughly the past week, Wisconsin has seen over 2000 new confirmed cases, and roughly 60 more Wisconsinites have died.[15] Cases in Brown County, for example, recently surged to over 1700—more than three times the number of confirmed cases in Dane County.[16] Walworth County has roughly 220 confirmed cases, and Waukesha County has roughly 380. Washington County has roughly 115 confirmed cases. The death rate in Washington and Walworth Counties is 4%, and the death rate in Waukesha County is 6%. (*Id.*)

And neither DHS nor the Governor intend for these temporary restrictions in Safer at Home to last long. While COVID-19 may keep circulating in the population, Badger Bounce Back reflects that Wisconsin will soon be turning the dial back towards normal life, as Wisconsin makes further strides in its ramping up of preparation in the coming weeks.

[15] Wis. Dep't of Health Servs., *COVID-19 (Coronavirus Disease),* https://www.dhs.wisconsin.gov/covid-19/index.htm (last revised May 7, 2020); Wis. Dep't of Health Servs., *COVID-19: Wisconsin Deaths*, https://www.dhs.wisconsin.gov/covid-19/deaths.htm (last revised May 7, 2020). It bears mention that nearly 15% of the Wisconsinites who have died are under 60 years old.

[16] Wis. Dep't of Health Servs., *COVID-19: County Data*, https://www.dhs.wisconsin.gov/covid-19/county.htm (last revised May 7, 2020).

REASONS THE PETITION AND MOTION SHOULD BE DENIED

I. This Court should decline to exercise original jurisdiction because these fact-intensive claims are unsuitable for an original action, and are properly filed in a trial court in the first instance.

As a threshold matter, the petition is unsuitable for an original action because its resolution—if it were to survive dismissal at the pleadings stage—would require a factual evaluation both of the alleged burdens and also the reasons for Safer at Home's relevant provisions. As noted elsewhere, the burdens pled are not accurate and should not be accepted at face value. Further, as this Court has long recognized, cases turning on facts are not amenable to a "speedy and authoritative determination" for which original jurisdiction is appropriate. *Petition of Heil*, 230 Wis. 428, 446, 284 N.W. 42 (1938). Rather, constitutional challenges like the present ones can be brought (and have elsewhere been brought) in a trial court—which can render a decision like trial courts do all the time, including in constitutional challenges.

This Court has consistently expressed "great[ ] reluctance" to "grant leave for the exercise of its original jurisdiction . . . where questions of fact are involved." *In re Exercise of Original Jurisdiction*, 201 Wis. 123, 128, 229 N.W. 643 (1930); *see also* Sup. Ct. Internal Operation Procedures (IOP) § III(B)(3). Instead, the Court has recognized that the circuit courts are "much better equipped for the. . .disposition of questions of fact than is this court," and that cases involving factual questions "should be first presented to" circuit courts. *In re Exercise of Original Jurisdiction*, 201 Wis. at 128 (citing *State ex rel. Hartung v. City of Milwaukee*, 102 Wis. 509, 78 N. W. 756); *see also Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 51 (1938) (counseling against original

jurisdiction in "doubtful cases" potentially requiring factual assessments).

If the petition is not dismissed outright under *Jacobson*, its resolution would require factual assessment under three different constitutional standards of proof (one for each of petitioners' separate claims).[17] To illustrate: for their religious liberty claim, the petitioners first must prove they (1) have a "sincerely held religious belief, and (2) that such belief is burdened by the application of the state law at issue." *Coulee Catholic Sch. v. LIRC*, 2009 WI 88, ¶ 61, 320 Wis. 2d 275, 768 N.W.2d 868. If petitioners carry their burden, only then would the burden shift 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." *Id.* Thus, even assuming the petitioners carry their burden, the Court would need to assess the State's evaluation of the spread of the pandemic and possible responses.

To show impermissible overbreadth for their freedom of political assembly claim, the petitioners would have to show, among other things, that Safer at Home sweeps within its coverage a substantial amount of speech or conduct that may not be burdened or restricted under the circumstances. *State v. Konrath*, 218 Wis. 2d 290, 304–05, 577 N.W.2d 601 (1998).

The petitioners' right-to-travel claim would require yet another factual inquiry: whether Safer at Home's limitations on travel are "reasonably made necessary by conditions

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[17] Petitioners' claims could be dismissed outright with no factual development under *Jacobson*'s standard, which asks only whether the challenged law has *any* "real or substantial relation to [its] objects," or whether the law is, instead, "*beyond all question*, a plain, palpable invasion of rights secured by fundamental law." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905) (emphasis added). None of the ordinary standards would be at issue if the Court adheres to the applicable *Jacobson* standard.

prevailing." *Ervin v. State*, 41 Wis. 2d 194, 201–02, 163 N.W.2d 207 (1968).

These are just the types of factual inquiries that are not amenable to expedited legal determinations, and "should be first presented to" circuit courts. *See In re Exercise of Original Jurisdiction*, 201 Wis. at 128. In fact, just this week, the Supreme Court of Texas reached that conclusion and declined to take up a petition for original jurisdiction challenging certain components of Texas's statewide safer-at-home order. *See In re Salon A la Mode*, No. 20-0340, Order Denying Emergency Petition for Writ of Mandamus (letter denial of petition). As the justices explained in the concurring opinion denying the request, "The Supreme Court is generally a court of last resort. Our original jurisdiction to issue the requested relief is doubtful, and the petition is presented . . . with no record on which the Court could base its inquiry." *Id.* at 3.[18] The same should hold true here.

Legal issues related to the pandemic may continue to arise, but the petitioners provide no reason why the inverse of the normal legal process should apply. Constitutional challenges have been brought in circuit courts throughout Wisconsin's history, and those courts, through the development of facts and argument, are the proper places to bring ones like these, too.

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[18] *In re Salon A la Mode,* No 20-0340 (Tex. May 5, 2020), https://law.justia.com/cases/texas/supreme-court/2020/20-0340.html

II. If this Court does not deny the petition, the petitioners' claims fail as a matter of law.

A. The framework the Supreme Court set forth in *Jacobson*, its landmark public health decision, supports Safer at Home's temporary, limited restrictions.

1. As many other courts have recognized, the *Jacobson* framework applies to COVID-19 measures.

To start, in assessing each of the petitioner's constitutional challenges, this Court should apply the U.S. Supreme Court's framework in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). There, the Court set forth the proper way to analyze the interplay between individual liberties and the community's need to defend itself against contagious diseases during an outbreak.

In *Jacobson*, the Court upheld mandatory vaccinations to stop an outbreak of smallpox. 197 U.S. at 26–28. State law gave local health boards authority to—if the board, "in its opinion," concluded it was necessary for the public health and safety—order that all adult residents be vaccinated.

In rejecting the challenge to that scheme, the Court recognized that the outbreak of a contagious disease must temporarily shift aspects of the constitutional framework. In these circumstances, one person's exercise of individual liberties may mean death for another: "Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." *Jacobson*, 197 U.S. at 26. Given this tension, "[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions

essential to the equal enjoyment of the same right by others." *Id.* at 26–27.

The Court therefore acknowledged that "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint." *Id.* at 29. "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27.

Applying that reality, the Court thus asked whether the mandatory vaccination requirement was "arbitrary" or "unreasonable"—i.e., whether the requirement had "no real or substantial relation to [its] objects, or is, beyond all question, a plain, palpable invasion of rights secured by fundamental law." *Id.* at 31.

Vaccinations easily passed that constitutional test. *Id.* at 27–28. Because vaccination was the "method[ ] most usually employed to eradicate the disease," the Court explained it would be overstepping its bounds to hold that the required vaccinations were "arbitrary, and not justified by the necessities of the case." *Id.* Importantly, the Court declined to substitute its own judgment for that of public health authorities. Despite the defendant's proffer of contrary evidence, the Court recognized that "[i]t is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against the disease." *Id.* at 30.

This Court should apply the *Jacobson* framework here. Notably, this Court has looked to *Jacobson* multiple times before—in less dramatic circumstances. *See Adams v. City of Milwaukee,* 144 Wis. 371, 129 N.W.2d 518, 520 (1911) (applying *Jacobson* deference to police-power requirement of tuberculin testing of cow milk); *Froncek v. City of Milwaukee*,

269 Wis. 2d 276, 281, 69 N.W.2d 242 (1955) (applying *Jacobson* deference to police-power fluoridation of water supply).

Many other courts have applied the *Jacobson* framework to address, and reject, challenges to COVID-19 emergency orders.[19] And, notably, the Fifth Circuit recently struck down orders temporarily restraining a COVID-19 order, because the lower court repeatedly failed to apply "the framework governing the emergency exercises of state authority during a public health crisis, established over 100 years ago in *Jacobson*." *In re Abbott*, 954 F.3d 772 (5th Cir. Apr. 7, 2020); *In re Abbott*, -- F.3d --, 2020 WL 1911216 (5th Cir. Apr. 20, 2020).

2. The petitioners' attempts to avoid the *Jacobson* framework fall short.

The petitioners try but fail to evade *Jacobson*. First, they note that their claims arise solely under Wisconsin law, and argue *Jacobson* therefore does not control. (Pet'r Mem. 40.) But *Jacobson* simply illustrates the well-accepted principle that, "in every well-ordered society," individual liberties must be balanced against the need to respond to a health emergency, with the appropriate amount of judicial

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[19] *See, e.g., Commcan, Inc. v. Baker*, No. 2084CV00808-BLS2, 2020 WL 1903822 (Mass. Super. Ct. Apr. 16, 2020); *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327, 2020 WL 1905586 (D.N.M. Apr. 17, 2020); *Cassell v. Snyder*, No. 20-cv-50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020); *Gish v. Newsom*, No. 20-cv-755, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020); *Cross Culture Christian Ctr. v. Newsom*, No. 20-cv-832, 2020 WL 2121111, at *3 (E.D. Cal. May 5, 2020); *Lighthouse Fellowship Church v. Northam*, No. 2:20cv204, 2020 WL 2110416, at *17 (E.D. Va. May 1, 2020).

deference given to the needs of controlling the outbreak. 197 U.S. at 29. That reality is not special to federal court.

The petitioners also argue that, although this Court has relied on *Jacobson* in *Adams* and *Froncek*, these cases should be ignored because they did not involve emergencies. (Pet'r Mem. 40–41.) However, if anything, *Jacobson* applies with even *greater* force to this emergency situation: again, the Court explained that "the rights of the individual in respect of his liberty may at times, *under pressure of great dangers*, be subjected to . . . restraint." *Id.* at 29 (emphasis added).

The petitioners also argue that *Jacobson* did not address the freedoms of worship and conscience. (Pet'r Mem. 42.) But the *Jacobson* principles apply to any fundamental right—none can demand that society surrender its most effective weapons against a pandemic. And the U.S. Supreme Court has specifically recognized that the "right to practice religion freely does not include liberty to expose the community . . . to communicable disease or . . . ill health or death. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

Nor was *Jacobson*'s core reasoning dicta, as the petitioners say. (Pet'r Mem. 44.) Federal courts have treated it as the "settled rule" that the existence of a public health emergency "allows the state to restrict, for example, one's right to peaceably assemble, to publicly worship, to travel, and even to leave one's home." *In re Abbott*, 954 F.3d 772 (5th Cir. 2020).[20]

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[20] The petitioners also suggest *Jacobson* is irrelevant because it was decided in 1905, and because it was cited in the now infamous case of *Buck v. Bell*, 274 U.S. 200 (1927). (Pet'r Mem. 42–43.) This argument is inapposite, particularly given that *Jacobson* continues to be cited in many modern cases; according to Westlaw, the U.S. Supreme Court has alone cited it in 77 cases beyond *Buck*.

Finally, the petitioners argue that even if *Jacobson* applies, Safer at Home nevertheless flunks its deferential standard of review. That is incorrect, as discussed in detail below. But simply, there is ample evidence that COVID-19 spreads easily, and may be seeded by people who are asymptomatic. The petitioners cannot seriously argue that the gathering and travel restrictions bear no relation to the State's compelling goal of limiting the spread of the virus, thus "flattening the curve," avoiding overwhelming the state's healthcare system, and saving lives.

B. The petitioners are not likely to succeed on their religious liberty claim because section 13(h) does not infringe upon the freedom of religious worship protected by the Wisconsin Constitution.

1. Background: section 13(h) carves out an exception for religious gatherings of fewer than ten people.

The petitioners challenge section 13(h) of Safer-at-Home, the provision relating to religious facilities. However, in effect, they also challenge Wis. Stat. § 252.02(3). It specifically provides that "[t]he department may . . . forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." That is what section 13(h) does. But this single provision of Safer at Home—and the arguments the petitioners make about its constitutionality—can only be understood when considered within the structure of Safer at Home as a whole.

First, Wisconsin citizens are permitted to leave their homes and travel to engage in essential activities, but safeguards consistent with those activities are put in place. For example, because food and drink are essential to human survival, Wisconsinites are expressly permitted to go to

grocery stores to buy food and other supplies. *See* Safer at Home, § 13(b). And, because home repair may be necessary to maintain the value and structural integrity of a home—and sometimes even the health and safety of its occupants—Wisconsinites are expressly permitted to go to hardware stores and similar establishments to purchase home repair supplies. *See* Safer at Home, § 13(m).

Nevertheless, recognizing that shopping at such establishments still presents risks that employees and customers may spread COVID-19, businesses and their customers follow social-distancing and clean-facility guidelines. *See* Safer at Home, § 2(b)(ii). And these businesses are urged to utilize curbside pick-up to the greatest extent possible, limit the number of employees and customers in the establishment at any one time, and "[e]stablish lines to regulate entry . . . with markings for patrons to enable them to stand at least six feet apart from one another while waiting." Safer at Home, § 2.b.iii.4.

Second, as a default, mass gatherings are restricted. "All public and private gatherings of any number of people that are not part of a single household or living unit are prohibited," unless falling under the exemptions. Safer at Home, § 3. That includes schools, inside service in restaurants and bars, sporting events, movies, plays, concerts, libraries, museums, amusement parks, and swimming pools. Safer at Home, § 4(c), 11(c). Wisconsin Stat. § 252.02(3) covers these places of public gathering. And the rationale is clear: when groups of people get together in close proximity to share entertainment, dining, educational, sports, and recreational activities, that proximity and human density imperils the public health because COVID-19 spreads most effectively when people are in close quarters. (*See* Westergaard Aff. ¶ 37.)

Third, some activities straddle these categories. In particular, religious facilities straddle the essential activity and mass gathering categories. Religious activities are "essential." Safer at Home, § 13(h). But, by their very nature, religious gatherings are (in most cases) mass gatherings of groups of worshipers. For that reason, although essential, religious gatherings pose the same dangers of contagion that such non-essential gatherings as concerts and sporting events do.[21] To balance the essential nature of religious services with the dangers posed by mass gatherings, Safer at Home carves out the following exception for religious services from the general prohibition on mass gatherings in confined spaces: "Religious facilities, entities, groups, and gatherings, and weddings and funerals [are essential], except that any gathering shall include fewer than 10 people in a room or confined space at a time and individuals shall adhere to Social Distancing Requirements as much as possible." Safer at Home § 13(h). Drive-in religious services are also permitted.

Childcare centers also straddle the essential and mass gathering categories. Without access to childcare, parents employed as essential workers (including health care practitioners and grocery store clerks) would be forced to choose between not going to work (and depriving Wisconsinites of the services they provide) or leaving their children unattended. Thus, section 13(f) prioritizes care for families based on parental employment. CDC information also reflects that children are at a lower risk of serious complications from COVID-19 than the elderly and those with

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[21] As noted in the background, the experiences of religious communities in Washington State, Georgia, and New York State demonstrate that the interaction among people attending religious events can be a powerful vector for the virus.

serious chronic medical conditions. And this comes with specific prevention and mitigation practices to reduce the chances of viral spread.[22] This strikes a balance between the necessity of providing childcare to the children of essential workers and the dangers of viral spread.

2. Legal principles: *Jacobson* deference overlays the petitioners' religious liberty claim, otherwise analyzed under the *Coulee* framework.

The petitioners bring their challenge under the freedom of worship and liberty of conscience provision of the Wisconsin Constitution. *See* Wis. Const. art. 1, § 18. Normally, this Court evaluates such claims under a four-part test.

But, in the midst of a pandemic, *Jacobson* deference applies. The U.S. Supreme Court, for example, applied *Jacobson* deference to a religious liberty claim in *Prince*, holding that "the right to practice religion freely does not include liberty to expose the community . . . to communicable disease or . . . ill health or death." *Prince*, 321 U.S. at 158, 166–67. Several courts upholding COVID-19 orders against religious-liberty challenges have utilized *Jacobson* deference as part of their constitutional analysis. *See* Section A.I., *supra* (collecting cases). This Court should join *Prince* and the other

[22] Executive Order 6 incorporates by reference Department of Children & Families Guidance Order # 2, which includes these provisions.

COVID-19 courts and analyze section 13(h) under *Jacobson*.[23] Indeed, there is nothing in Wisconsin law that would suggest *Jacobson* deference would not apply to the *Coulee* analysis.[24]

And, with or without that deference, there should be no serious question that *Coulee* is satisfied under the circumstances. Under the *Coulee* analysis, the petitioners must prove that they have a "sincerely held religious belief," which "is burdened by the application of the state law at issue." *Coulee*, 320 Wis. 2d 275, ¶ 61. If the petitioners make this showing, the burden shifts to the government to prove "that the law is based upon a compelling state interest . . . that cannot be served by a less restrictive alternative." *Id.*

Coulee held that there are certain circumstances in which the four-part test does not apply. But such exceptions—concerning the hiring and firing of religious officials—have nothing to do with this case, except that the petitioners erroneously rely on it. *Coulee* involved whether the dismissal

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[23] Though not directly analyzed on First Amendment grounds, this Court has also—outside of a pandemic—recognized the important need to balance individual free exercise with public protections. *State v. Neumann*, 2013 WI 58, ¶¶ 108–11, 348 Wis. 2d 455, 832 N.W.2d 560 (affirming homicide convictions for parents who treated sick child with prayer, rather than medicine, as a proper exercise of police power).

[24] The published *Coulee* cases involve less consequential exercises of government authority. *See*, *e.g.*, *State v. Miller*, 202 Wis. 2d 56, 549 N.W.2d 235 (1996) (application of statutory requirement that slow-moving vehicles display a particular emblem unconstitutional as applied to Old Order Amish); *Noesen v. Dep't of Reg. & Licensing*, 2008 WI App 52, ¶ 26, 311 Wis. 2d 237, 751 N.W.2d 385 (regulatory discipline of pharmacist refusing to fill contraceptive prescription on religious grounds constitutional); *Peace Lutheran Church & Acad.*, 2001 WI App 139, ¶ 21, 246 Wis. 2d 502, 631 N.W.2d 229 (application of village fire protection code to church building constitutional).

of a teacher from a Roman Catholic school violated the Wisconsin Fair Employment Act. 320 Wis. 2d 275, ¶ 1. On such a question, "[t]here 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. That particular circumstance has nothing to do with the pandemic response here.

Tellingly, the overwhelming majority of federal cases to date have upheld COVID-19 state bans on in-person religious gatherings. *See Cross Culture Christian Ctr. v. Newsom*, No. 20-cv-832, 2020 WL 2121111, at *3 (E.D. Cal., May 5, 2020); *Theodore Roberts v. Hon. Robert Neace*, No. 20-cv-54, 2020 WL 2115358 (E.D. Ky. May 4, 2020); *Beloved Church v. Jay Robert Pritzker*, No. 20-cv-50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020); *Lighthouse Fellowship Church v. Ralph Northam*, No. 2:20cv204, 2020 WL 2110416 (E.D. Va. May 1, 2020); *Wendy Gish v. Gavin Newsom*, No. 20-cv-755, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020); *Legacy Church Inc. v. Kathyleen Kunkel*, No CIV 20-0327, 2020 WL 1905586 (D. N.M. Apr. 17, 2020). The only outlier to date is *First Baptist Church v. Kelly*, No. 20-cv-1102, 2020 WL 1910021 (D. Kan. Apr. 18, 2020), which temporarily enjoined a ban on in-person worship. This temporary restraining order did not apply statewide; it applied only to the parties. *Id.* at *8–9; *see also First Baptist Church v. Kelly*, 2020 WL 1984259, at *2 (D. Kan. Apr. 27, 2020) (denying modification).

Notably, the two federal cases on which petitioners primarily rely—*Maryville Baptist Church Inc. v. Andy Beshear*, --- F.3d ----, 2020 WL 2111316 (6th Cir. May 2, 2020), and *On Fire Christian Center Inc. v. Fischer*, No. 20-cv-264, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020)—each involved restraining orders or injunctions against state bans on *drive-*

in religious services.[25] Wisconsin has never prohibited drive-in services. On the contrary, Governor Evers has reiterated that drive-in services (just like small in-person religious services and virtual services) are permitted.[26]

3. Section 13(h)'s application of Wis. Stat. § 252.02(3) should be upheld under either *Jacobson* or *Coulee.*

Wisconsin Stat. § 252.02(3) specifically contemplates *forbidding* gatherings in churches where, as here, it is to control an epidemic. Safer at Home does not even go that far. Its less-restrictive application of the statute satisfies *Jacobson*'s deferential standard, and also satisfies the traditional *Coulee* test, because it serves a compelling state interest and is the least restrictive alternative available.

Under *Jacobsen*, the nexus between large in-person gatherings in close-quarters, and Safer at Home's application of Wis. Stat. § 252.02(3) to such gatherings to combat COVID-19, should resolve any doubt in favor of the provision's constitutionality. This is the rare occasion where "the rights of the individual" may "be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson* 197 U.S. at 29.

Prohibiting large gatherings of the public, without question, has a "real" and "substantial relation" to fighting

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[25] Although some of the reasoning of the Sixth Circuit criticizes Kentucky's justification for an *in-person* ban as well, the opinion clearly limits the injunction to the ban on *drive-in* services. *Maryville Baptist Church Inc. v. Andy Beshear*, --- F.3d ----, 2020 WL 2111316, at *5 (6th Cir. May 2, 2020).

[26] Press Release, Wis. Governor Tony Evers, Office of the Governor, Gov. Evers Reiterates Options Available for Religious Gatherings & Services, (Apr. 9, 2020), https://content.govdelivery.com/accounts/WIGOV/bulletins/285bc79.

COVID-19. *Id.* at 31. And, as further argued below, given that Safer at Home permits small in-person religious gatherings, as well as other forms of worships, it is not "beyond all question, a plain, palpable invasion of rights." *Id.* at 31.

But even under *Coulee*, the petitioners' claims fall short. The petitioners argue that Safer at Home "categorically" violates their right of conscience. (Pet'r Mem. 20–30.) Their sole support for this argument is the inapplicable section of *Coulee*, in which this Court explained that the State has no business interfering with "the selection of spiritual leaders of a religious organization." *Coulee*, 320 Wis. 2d 275, ¶ 63. The Court has not applied this hands-off approach to any other type of legal dispute between a religious institution and an individual or public entity. This is not the time to do so. Here, the Court is reviewing a multi-faceted, facially neutral, generally applicable emergency order, which non-discriminatorily restricts mass gatherings in confined spaces. Rather than imposing *additional* restrictions on religious gatherings, it specifically *allows* small religious gatherings. There is no basis for concluding Safer at Home seeks to interfere with questions of religious doctrine or choice.

The petitioners also assert that they have satisfied the first two *Coulee* factors, because their sincerely held religious beliefs are burdened. (Pet'r Mem. 31–32.) But they "do not dispute the State's compelling public-health interest in mitigating the spread of COVID-19." (Pet'r Mem. 32.) Rather, they contend that it is not the least restrictive alternative to serve the State's compelling interest. (Pet'r Mem. 32.) Especially under the circumstances, that contention should not hold sway.

Their core argument is that Safer at Home does not treat religious entities the same way it treats many secular entities, such as "the local grocery store, Menards, or

Target,"[27] or "the numerous factories, warehouses, and distribution centers exempted by the Order." The petitioners conclude that this is "drastically under-inclusive" in its treatment of religious facilities vis-à-vis commercial facilities, especially retail establishments. (Pet'r Mem. 33–34.)

However, that is the wrong comparison. A challenge must compare *analogous* exemptions or restrictions, not categorically distinguishable ones. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538–40 (1993); *Legacy Church*, 2020 WL 1905586, *33. "[C]onstitutional analysis only requires that the Court compare the prohibited religious conduct with analogous secular conduct when assessing underinclusivity." *Gish*, 2020 WL 1979970, *6. The petitioners' flawed analogy overlooks the nature of how a virus like COVID-19 spreads.

As relevant here, churches, synagogues, and mosques are not akin to retail establishments, because people do not gather for extended periods of time in retail establishments to interact in close quarters. Places of worship are more akin to schools, entertainment venues, restaurants, and recreational centers, where people gather for extended periods of time to interact in close quarters. Notably, Safer at Home directs that all those comparable facilities remain closed. Thus, rather than discriminating against religious facilities, Safer at Home recognizes their special importance and instead provides only the limitation on the number in attendance in a single confined area.

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[27] In addition to being an inapt comparison, it bears mention that these businesses must comply with additional restrictions. Essential retail must substantially limit occupancy, and must use alternative methods for serving customers in person. Safer at Home, § 2.b.iii.

Other courts have recognized as much. The federal district court examining New Mexico's similar public health emergency order explained that the "Order does not prohibit religious conduct only; it prohibits a host of secular activities, both commercial and recreational." *Legacy Church, Inc.*, 2020 WL 1905586, *33. The court explained that comparison of exemptions available to secular versus religious entities must be made between "*analogous* exemptions." *Id.* The court noted that the Order "directs all essential [retail] businesses to reduce occupancy, enforce social distancing, and reduce staffing." *Id.* *34. But "certain activities—namely, large gatherings—present the greatest risk to public health. Accordingly, . . . [the] Order does not irrationally allow mass gatherings in retail stores while prohibiting them in churches, mosques, and synagogues"; instead, it "prohibits *all mass gatherings*, religious and secular alike." *Id.* (emphasis added).

Additionally, in *Gish v. Newsom*, the district court for the Central District of California reasoned that "[a]n in-person religious gathering is not analogous to picking up groceries, food, or medicine, where people enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete." *Gish*, 2020 WL 1979970, *6. On the contrary, such a gathering "is more analogous to attending school or a concert—activities where people sit together in an enclosed space to share a communal experience. Those activities are prohibited under the Orders." *Id.* The court concluded that the Orders are constitutional because they "treat in-person religious gatherings the same as they treat secular in-person communal activities." *Id.*

And the district court for the Eastern District of California similarly observed that plaintiffs "ignore that all comparable assemblies are completely prohibited. Grocery stores, liquor stores, and marijuana dispensaries are not the proper point of comparison." *Cross Culture Christian Ctr.*,

2020 WL 2121111, *6. "[I]ndividuals enter [these stores] at various times to purchase various items; they move around the store individually . . . and they leave when they have achieved their purpose." *Id.* (citation omitted). "In-person church services, on the other hand, are 'by design a communal experience, one for which a large group of individuals come together at the same time in the same place for the same purpose." *Id.*

All of these analyses recognize an unfortunate reality; Wis. Stat. § 252.02(3) recognizes it as well. Large gatherings of the public, in close proximity, for extended periods of time, where speaking, singing, and direct person-to-person contact may occur, easily become hotspots for outbreaks. As discussed above, many of the first major COVID-19 epicenters involved outbreaks through such gatherings. Of course, no one wants this to be the case. But the virus does not operate by human standards.[28]

The petitioners' comparison to childcare facilities is another false equivalency. Like religious facilities, childcare facilities straddle the mass gathering and essential business categories. But, unlike all other places where mass gatherings might take place, childcare centers are uniquely necessary to enabling essential personnel to fight the pandemic. And Safer at Home balances this need against the danger of COVID-19's spread by limiting the number of children and staff, and by

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[28] The petitioners assert that the restriction is especially onerous as applied to practitioners of Judaism (which the petitioners do not purport to be). As a general matter, a plaintiff "may not vindicate . . .the rights of a third party." *State v. Fisher*, 211 Wis. 2d 665, 668 n.2, 565 N.W.2d 565 (Ct. App. 1997). Further, even if the petitioners could raise such an issue on behalf of someone else, they would still need to support it, not just assert it.

incorporating detailed instructions on how staff and children can minimize the potential spread of the virus.

In sum, churches, mosques, and synagogues are not like grocery stores and hardware stores. They are like schools, music halls, movie theaters, and sports venues, where mass gatherings are prohibited. In contrast to these comparable venues, religious facilities alone are allowed to open their doors for worship, provided they do not exceed the under-ten-person cap. Meanwhile, in-person worship is also expressly allowed in the form of drive-in services. This satisfies the least-restrictive-alternative branch of *Coulee*, because it allows some—albeit restricted—forms of in-person religious gatherings, limited by the health needs of the wider community. But again, if there were any doubt, *Jacobson* resolves it in favor of upholding these temporary emergency measures during this pandemic.

C. The petitioners are unlikely to succeed on their claim that Safer at Home impermissibly infringes upon freedom of assembly for political gatherings protected by the Wisconsin Constitution.

The petitioners' claim that Safer at Home allegedly bans all physical gatherings in violation of their rights to freedom of speech and assembly for "political gatherings" and

to discuss "political affairs."[29] (Pet'r Mem. 2–3, 47); *see also* Wis. Const. art. 1, § 4.[30]

The petitioners first argue that the ban on physical gatherings is so facially overbroad that it is categorically invalid, and that it is not subject to any saving interpretation. Second, they argue that, even if not facially overbroad, that ban nonetheless constitutes an impermissible time, place, or manner restriction on gatherings of people for expressive political purposes.

Those arguments fail. To start, they fail under the *Jacobson* framework. For example, Safer at Home's limitations on in-person gatherings of the public cannot be said to have "no real or substantial relation to [its] objects," given how COVID-19 spreads. 197 U.S. at 31. But even under an ordinary freedom of assembly analysis, their theory is flawed: it is neither factually accurate nor legally supported.

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[29] Although the petitioners reference both the right of free speech and free assembly, their arguments are developed exclusively in terms of Safer at Home's impact on the right to assemble for expressive political purposes. They have not developed a discrete freedom-of-speech argument. This response follows suit.

[30] Wisconsin's constitutional rights to speech and assembly are "coextensive" with the U.S. Constitution's First Amendment protections. *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 23 n.9, 358 Wis. 2d 1, 851 N.W.2d 337.

1. The restriction affecting physical political gatherings is not facially overbroad.

a. Legal standard for the overbreadth analysis.

A law may be overbroad if, in addition to imposing a constitutionally permissible restriction, it also sweeps within its coverage a substantial amount of other speech or conduct that may not constitutionally be burdened or restricted. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *State v. Konrath*, 218 Wis. 2d 290, 304–05, 577 N.W.2d 601 (1998).

The U. S. Supreme Court has cautioned, however, that the use of facial overbreadth analysis is "strong medicine" to be employed "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. Among other hurdles, a provision should be invalidated on this ground only if the overbreadth involved is substantial. *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987); *In re Robert T.*, 2008 WI App 22, ¶ 8 307 Wis. 2d 488, 746 N.W.2d 564.

Particularly where the burdened activity involves not just pure speech, but speech joined with other conduct, a provision will not be facially invalidated unless its overbreadth is "not only [] real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615; *State v. Hemmingway*, 2012 WI App 133, ¶ 11, 345 Wis. 2d 297, 825 N.W.2d 303. Such a rule "invalidate[s] statutes for overbreadth only when the flaw is a substantial concern in the context of the statute as a whole." *Broadrick*, 413 U.S. at 616 n.14.

The party challenging a provision has the burden of demonstrating substantial overbreadth. *State v. Hemmingway*, 345 Wis. 2d 297, ¶ 11 (citing *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)). And, importantly, where an available limiting construction will eliminate the statute's

overreach and preserve its constitutionality, the courts must apply that construction. *Id.*; *Broadrick*, 413 U.S. at 613.

Here, the petitioners argue that Safer at Home's restrictions on in-person physical gatherings outside the home are facially overbroad in relation to the constitutional right of free assembly for political purposes. More specifically, they contend that Section 3 of Safer at Home prohibits all gatherings of any number of people that are not part of a single household, and thereby completely forbids any gathering for purposes of political expression. Although they do not mention it, this challenge is really to a statute: Safer at Home's restriction on public gatherings is a product of Wis. Stat. § 252.02(3)'s express authorization to "forbid public gatherings" "to control outbreaks and epidemics."

The petitioners' argument is wrong for two reasons. First, their characterization of Safer at Home is incorrect, and reads in restrictions that do not exist. When Safer at Home is viewed in its entirety, it does not impose the kind of total ban on gatherings about which the petitioners complain. Second, even under the petitioners' incorrect reading, Safer at Home does not impose a total ban on expressive gatherings, and the restrictions it does impose are directly tied to its public health purpose.

b. Safer at Home does not impose a total ban on physical gatherings outside the home, and it leaves open significant room for expressive political activity.

First, the petitioners' overbreadth argument fails outright because its premise is wrong: they incorrectly describe Safer at Home's effect. They argue that Section 3 completely forbids any gathering for purposes of political expression. But that is wrong.

Section 3 says: "All public and private gatherings of any number of people that are not part of a single household or living unit are prohibited, *except for the limited purposes expressly permitted in this Order*." Safer at Home, § 3 (emphasis added). The "purposes expressly permitted" for gatherings actually allow significant room for in-person expressive activity.

Most relevant here, exempt from restrictions are "parks and open spaces," unless closed by local health officials if social distancing cannot be accomplished. Safer at Home, § 4(c)(ii). And it provides that "[i]ndividuals may leave their home or residence" to engage in a variety of activities, including "outdoor activity," without limitation, provided individuals comply with social distancing requirements. Safer at Home, § 11(c). In turn, there is no ban on traveling to do these things.

Contrary to the petitioners' suggestion, then, the exceptions expressly allow people to frequent "public parks and open spaces," and to freely walk, talk, or march about in those places, so long as individuals comply with social distancing requirements (six feet of space). Parks, streets, and other public open spaces, of course, are considered "quintessential public forums" which traditionally "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (*quoting Hague v. CIO*, 307 U.S. 496, 515 (1939)). Safer at Home contains nothing to prevent people from including expressive activity in their outdoor activity in parks and open spaces. In fact, just observing populated areas of Wisconsin would reveal that many people are doing just that every day.

The petitioners also err in suggesting that Safer at Home denies them the ability to travel to a place where they might gather with others to engage in expressive political

action. To the contrary, Section 15(a) expressly permits travel related to "essential activities," which includes traveling to outdoor open spaces. Safer at Home, §§ 11(c), 15(a).

In sum, Safer at Home contains no prohibition on expressive political gatherings, so long as those activities are in open spaces and observe social distancing (which the petitioners appear to agree is justified). People can and do engage in expressive activity, individually or collectively. At this basic level, the petitioners' overbreadth challenge—premised on a non-existent total ban on physical political gatherings—fails.

c. Even under the petitioners' incorrect reading, Safer at Home is not unconstitutionally overbroad.

The foregoing resolves this claim—the petitioners' premise is wrong. But even under the petitioners' incorrect characterization of Safer at Home, their claim would fail. Safer at Home still would not forbid all expressive political gatherings. For example, there would still be non-physical ways for expressing political views. Further, Safer at Home does not sweep substantially beyond the fundamental purpose of protecting the health and safety of the people in the current pandemic.

(1) Safer at Home does not restrict non-physical ways of assembling for expressive political purposes.

Safer at Home does not target First Amendment activity. On its face, it targets the conduct of physically gathering with others outside the home, and only incidentally burdens expressive activity. The constitutional right of free

assembly, however, does not encompass a stand-alone right of people to physically gather together in one place. The right of free assembly is part of the broader right of expressive association. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). Expressive association is the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* As such, it includes the right to physically gather together to engage in expressive activity. But it does not provide constitutional protection for gatherings that occur for other, non-expressive purposes.

While Safer at Home prohibits some physical in-person gatherings outside the home (though not in open spaces with social distancing), a substantial amount of additional expressive activity remains untouched. For example, it leaves individuals free to gather online for expressive purposes, or to express themselves freely over the phone or through any other media that do not require in-person contact. *Accord Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (noting that the internet has become a quintessential forum for the exercise of First Amendment rights). For this additional reason, the restrictions do not constitute a total ban on expressive association.

(2) The restrictions that Safer at Home imposes do not sweep substantially beyond their legitimate purpose.

Finally, there is still another reason why Safer at Home's restrictions are not unconstitutionally overbroad: contrary to the petitioners' suggestions, any restrictions do not sweep substantially beyond Safer at Home's legitimate and important purpose of protecting the health and safety of Wisconsinites during this public health crisis.

To illustrate, the petitioners' overbreadth argument relies on the U.S. Supreme Court's *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). The analogy is unpersuasive. If anything, it illustrates another reason why Safer at Home is permissible.

Jews for Jesus involved a challenge to a resolution by a major airport's board of commissioners, governing conduct in the airport's central terminal. *Id.* at 571. That resolution, on its face, burdened the entire "universe of expressive activity" by expansively declaring that the terminal was "not open for First Amendment activities by any individual and/or entity." *Id.* at 574. The Court emphasized that it did "not merely regulate expressive activity in the [central terminal area] that might create problems such as congestion or the disruption of the activities of those who use [the airport]," but further prohibited even talking, reading, or wearing campaign buttons or symbolic clothing. *Id.* The Court found it obvious that "no conceivable governmental interest would justify such an absolute prohibition of speech." *Id.* at 569.

Jews for Jesus is accordingly nothing like Safer at Home's restrictions. The resolution in *Jews for Jesus* expressly targeted all First Amendment activity in the airport terminal. *See id.* at 574. That resolution thus was necessarily overbroad because it captured wide swaths of expressive conduct that had nothing to do with the resolution's purported purpose to control congestion and traffic in the terminal.

Here, in contrast, Safer at Home does not target First Amendment activity, but targets the conduct of physically gathering with others outside the home, in enclosed spaces. The restrictions imposed are not overbroad in relation to Safer at Home's purpose to protect public health because—based on the known principles about the transmissibility of COVID-19—such restrictions are necessary to control spread, prevent the healthcare system from being swamped, and

protect the lives and health of the people. Safer at Home's restrictions on physical gatherings are not categorically overbroad, but rather target the very ill we face.

d. The petitioners' argument that there is no saving construction to avoid or cure alleged overbreadth is manifestly incorrect.

Although there is no reason to reach it, the petitioners also argue that there is no saving construction that would cure Safer at Home's alleged facial overbreadth. That argument ignores the general rule that statutes (and the acts taken under them) are construed to avoid constitutional problems, and the specific directive of the U.S. Supreme Court that facial overbreadth analysis is "strong medicine" to be administered only when no alternative exists. *Broadrick*, 413 U.S. at 613, 616 n.14. Far from following those principles, the petitioners seek to conjure up a constitutional flaw through a selective and incomplete reading of how Safer at Home carries out Wis. Stat. § 252.02(3).

A "saving" construction is not needed: as already shown, the purported total ban on physical gatherings does not exist. Rather, there is significant room for expressive political activity. Further, even entertaining the incorrect view, that would not mean there is no saving construction. The petitioners only develop arguments as to one particular form of expressive association: gatherings for the purpose of conducting political activity. Accordingly, even if it were deemed facially overbroad under the petitioners' flawed arguments, its constitutionality could be saved simply by invalidating applications to gatherings for the purpose of political demonstration. But again, it is not overbroad.

2. Safer at Home's effect on physical political gatherings is a permissible time, place, or manner restriction.

The petitioners argue, in the alternative, that Safer at Home is an impermissible time, place, or manner restriction on gatherings for expressive political purposes. They argue it is not narrowly tailored to advance public protection against the current pandemic, and does not leave open adequate alternative modes of expressive political assembly. They are incorrect.

It has long been established that the First Amendment right to peaceably assemble may be subject to reasonable time, place, and manner restrictions. *See Cox v. New Hampshire*, 312 U.S. 569, 574–78 (1941). Thus, just as "the government may impose reasonable restrictions on the time, place, or manner of protected speech," so may it place restrictions on assembly. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Such restrictions are permissible, provided (1) they are content-neutral—*i.e.* justified without reference to the content of the speech or the expressive purpose of the assembly; (2) they serve a significant governmental interest and are narrowly tailored to advance that interest; and (3) they leave open ample alternative channels for expression of the information in question. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The restriction on physical gathering imposed by Safer at Home and Wis. Stat. § 252.02(3) passes all three prongs.

a. The Safer at Home restrictions are content neutral.

First, it is undisputed that the Safer at Home and Wis. Stat. § 252.02(3) restrictions are content neutral. Government restriction of expressive activity is content neutral when it is

justified without reference to the content of that expressive activity. *Ward,* 491 U.S. at 791. Here, Safer at Home prohibits many physical gatherings without regard to the content of any expressive activity. It is justified by the important interest in protecting public health. That has nothing to do with the content of anyone's speech or suppressing free expression. Safer at Home thus satisfies the content-neutral requirement.

b. The Safer at Home restrictions serve a significant governmental interest and are narrowly tailored to advance that interest.

Second, the Safer at Home restrictions serve a significant governmental interest and are narrowly tailored to advance that interest.

It is undisputed that Safer at Home serves a significant governmental interest. Public health, safety, and welfare are well-recognized as significant governmental interests. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995); *see also Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 2011 WL 1042330, *4 ("[T]he state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest."). The petitioners do not—and cannot—dispute the significance of the public interests underlying Safer at Home.

The petitioners do contend, however, that Safer at Home's prohibition of many physical gatherings outside the home is not narrowly tailored to advance the governmental interest in public health and safety. They are wrong.

To be deemed narrowly tailored, a restriction need not be the least intrusive means of achieving the interest furthered by the restriction. Rather, narrow tailoring is satisfied if that interest would be achieved less effectively absent the restriction. *See Ward*, 491 U.S. at 798–99. Here,

Safer at Home is narrowly tailored to serve the government's significant interest in protecting public lives, health, and safety, because slowing the spread of COVID-19 would be less effective if people gathered in enclosed spaces.

COVID-19's challenges—highly contagious community transmission, asymptomatic transmission, and the still-developing infrastructure to combat it—make Safer at Home's restrictions on some kinds of gatherings crucial to slowing the spread of the virus. The temporary prohibition on those gatherings is an indispensable part of this strategy. Under these circumstances, the restrictions on physical gatherings in enclosed spaces easily meet the narrowly tailored test.

The petitioners nonetheless suggest that Safer at Home's restrictions are not narrowly tailored because there are exceptions for "essential activities." To the petitioners, those exceptions demonstrate that public protection could be adequately furthered by allowing gatherings to take place subject to the same social distancing requirements currently imposed on "essential activities."

The petitioners' argument fails for several reasons. The "essential activities" that the petitioners refer to are not generally gatherings but rather largely consist of transient shopping for provisions. And, in any event, the petitioners can take advantage of the social-distancing path: they may gather in open spaces using social distancing. To the extent the petitioners believe there should be no "open spaces" requirement, that view is wholly unsupported by science and recent history: before the Safer at Home Order was issued, transmission was spreading out of control; now it is not.[31] (Westergaard Aff. ¶¶ 31, 37–38; Van Dijk Aff. ¶¶ 15, 27.)

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[31] Moreover, this kind of second-guessing between alternative options is the very thing the U.S. Supreme Court rejected in *Jacobson*. 197 U.S. at 30.

Restrictions on physical gatherings like those currently in effect in Wisconsin have been successful, and are accepted to be the most effective way to slow the potential exponential spread of the virus through a community. (*See* Van Dijk Aff. ¶¶ 27–29.) Because the petitioners' proposed alternative measures would be less effective at fighting the pandemic, those alternatives do not establish a lack of narrow tailoring.

c. The Safer at Home restrictions leave open ample alternative channels for expressive political association.

Third, although Safer at Home's restrictions on physical gatherings outside the home do have an incidental impact on gatherings for expressive political purposes, it has already been shown above that ample alternative channels remain. People can gather in open spaces using social distancing. And they also can express themselves freely over the internet, phone, or any other media.

The petitioners try to dodge this point by arguing that not everyone has ready access to forms of expressive association that involve electronic technology. By their own admission, however, an alternative mode of expressive association need not be perfect, and a less effective form of assembly may suffice. (Pet'r Mem. 56 (*citing Sauk Cty. v. Gomuz*, 2003 WI App 165, ¶¶ 68–69, 266 Wis. 2d 758, 669 N.W.2d 509).) Further, gathering in open spaces remains an option, one that is exercised throughout Wisconsin every day.

The petitioners' time-place-manner theory thus fails.

3. Under no circumstances are the petitioners entitled to the breadth of relief sought.

As discussed, Safer at Home's use of Wis. Stat. § 252.02(3) in a way that indirectly restricts some (but certainly not all) "political assembly" is not unconstitutional. But even if it were, the petitioners' request that this Court therefore invalidate *all* uses of section 252.02(3) to bar gatherings—even those unrelated to political assembly—violates basic severability principles. In effect, they make the strange argument that Wis. Stat. § 252.02(3) must be invalidated in its *entirety* just because it might not be constitutionally applicable to political gatherings. That cannot be correct.

When a court concludes that some part of a statute cannot be constitutionally applied, the question becomes whether the unconstitutional part can be severed from the constitutional part. That question turns on legislative intent: "Would the legislature have preferred what is left of its statute to no statute at all?" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006); *see also State v. Janssen*, 219 Wis. 2d 362, ¶¶ 36–39, 580 N.W.2d 260 (1998).

The obvious intent of section 252.02(3) is to allow DHS to prevent, as much as possible, the spread of communicable disease that naturally occurs during "public gatherings," whether that gathering occurs in a publicly-owned place (like a park) or a privately-owned place where the public assembles (like many schools, theaters, or restaurants and bars).[32] In this public health context, preserving the ability to ban *some*

[32] There is no reading of Wis. Stat. § 252.02(3) that would subject acts under it to rulemaking requirements. That section specifically authorizes DHS to close schools and forbid other types of public gatherings in places held open to the public.

gatherings is obviously better than having no ability to ban *any* gatherings. That is, even if the Constitution prevents using the statute to restrict political assemblies during pandemics, the statute makes clear its preference to preserve as much of DHS's ability to prevent disease spread as possible, consistent with the Constitution.[33]

And if the petitioners are making a different point—that even exempting political gatherings from Wis. Stat. § 252.02(3)'s reach is not enough, because that would still unduly chill political gatherings—they contradict themselves by favorably citing other states which have "carefully included at least some protections for political expression" in their gathering bans. (Pet'r Mem. 54–55.[34]) The petitioners offer no facts whatsoever that the "careful[ ]" carve-outs these states have created unduly chill any protected political speech. Indeed, Petitioner Fabick alleges only that the current restriction deterred him from attending a political

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[33] Moreover, Safer at Home itself has a severability clause in section 19: "If any provision of this Order or its application to any person or circumstance is held to be invalid, then the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable."

[34] Executive Order 2020-18 at ¶ 4(f) (Ariz. Mar. 13, 2020) (exception for "[e]ngaging in constitutionally protected activities such as speech"), https://bit.ly/2Sk5p76; Delaware, List of Essential Industries at 4 (De. Apr. 21, 2020) (exception for "social advocacy" and "political" organizations), https://bit.ly/2KQnaXn; Executive Order 107 at ¶ 2 (N.J. Mar. 21, 2020) (exception for "leaving the home for a[ ] . . . political reason"), https://bit.ly/3cVjmQO; Amended Director's Stay at Home Order at ¶ 12(g) (Ohio Apr. 2, 2020) (exception for "First amendment protected speech"), https://bit.ly/3eZvodI; Executive Order 9-20 at ¶ 3(v) (W.V. Mar. 23, 2020) (exception for "first amendment protected speech"), https://bit.ly/35ooxGs.

rally (even though it contains no such restriction), not that a hypothetical narrower restriction that expressly exempts any political assembly would have similarly deterred him. Speculation alone cannot suffice to disarm Wisconsin of a crucial weapon against COVID-19.

Leaving aside the lack of any such facts, the petitioners do not even try to explain why any ambiguity or confusion might result from a political assembly carve-out. Their silence is unsurprising, as it would require an argument that citizens are somehow unable to understand when they are assembling for political purposes and when they are assembling for other purposes. Put simply, everyone understands the difference between a union rally or a protest against Safer at Home, and congregating for a music concert or a brat-eating festival.

In sum, if this Court concludes that Wis. Stat. § 252.02(3) is unconstitutional when used to restrict political assemblies, the proper remedy can go no farther than that—an injunction against applying the statute to such gatherings. The statute's provision for all other kinds of non-political gatherings would still survive.

D. The petitioners are unlikely to succeed on their claim that Safer at Home impermissibly infringes upon the Wisconsin Constitution's protection of intrastate travel.

The text of the Wisconsin Constitution does not specifically articulate a right to travel, but this Court has recognized that it protects against impermissible infringements on freedom of movement. *Brandmiller v. Arreola*, 199 Wis. 2d 528, 537–39, 544 N.W.2d 894 (1996).

In lodging their challenge here, the petitioners overlook the inescapable fact that the more people travel throughout Wisconsin, the more the virus will spread. That nexus alone

satisfies *Jacobson*'s constitutional analysis during a pandemic. But even without *Jacobson* deference, this Court has always balanced an individual's right to travel against public protection. Travel is one of the most regulated parts of everyday life. The additional restrictions imposed here extend that principle to the temporary reality we now face, where individual travel poses a danger to public health.

1. The *Jacobson* framework applies here and is decisive.

Even before *Jacobson*, the U.S. Supreme Court applied deferential analysis to travel restrictions during public health crises. In *Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana*, 186 U.S. 380 (1902), it upheld the Louisiana board of health's refusal to allow passengers to disembark from a ship arriving in New Orleans from Europe. Though the passengers were "free from any . . . contagious disease," the city was "in quarantine." *Id.* at 381–82. Louisiana law gave its board of health discretion to prevent travel into "any infected portion of the state." *Id.* at 385.

The Court rejected a due process liberty challenge to the prohibition. *Id.* at 387. It explained that the power to "enact and enforce quarantine laws for the safety and protection of the health of [states'] inhabitants" is "beyond question." *Id.* It also rejected the idea that this power somehow becomes a constitutional violation should it "directly affect interstate or foreign commerce." *Id.* at 816. The Court also refused to "indulg[e] in conjecture" that, if allowed to regulate state in such a way, the board of health could "arbitrarily" deem part of the state "contagious" to block travel. *Id.* at 392–93.

Under that framework, Safer at Home plainly satisfies *Jacobson*'s deferential test. It works to protect Wisconsinites from a once-in-a-century virus that is easily spread through

the air, and by people who may feel completely healthy. The spread of COVID-19 to almost every county in Wisconsin simply could not have happened without people traveling.[35]

The nexus to a limitation on intrastate travel is therefore obvious: "Just one infected person can seed the virus in a community and thereby cause new surges." (Van Dijk Aff. ¶ 25.) The travel restrictions in Safer at Home accordingly bear a very "real" and "substantial relation to [its] object". *Jacobson*, 197 U.S. at 31.

Nor can it be said that Safer at Home's restrictions on travel are "beyond all question, a plain, palpable invasion of rights secured by fundamental law." *Id.* at 31. Whether this was a "plain and palpable" invasion of the right to travel necessarily depends on the balancing of the petitioners' individual freedoms against public protection. And just as in *Compagnie Francaise* and *Jacobson*, the Wisconsin community has a "self-defense" "right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson*, 197 U.S. at 27.

The petitioners' right-to-travel claim boils down to this: they (1) disagree with DHS's approach, as they believe travel with social distancing to be sufficient to combat the virus; and (2) they argue DHS improperly creates a "blanket" ban on travel. (Pet'r Mem. 68–69.)

Their latter point misstates the limited nature of Safer at Home's travel restrictions. Far from banning all travel, the order allows Wisconsinites to move about for many reasons. *See* Safer at Home, § 15. For instance, people may travel to engage in outdoor activity (including political rallies), to go to

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[35] *See* Wis. Dep't of Health Servs., *COVID-19: County Data*, https://www.dhs.wisconsin.gov/covid-19/county.htm (last revised May 7, 2020).

the grocery store or other stores for supplies and services, to perform essential work functions, or to take care of loved ones in need—among many other examples.

The petitioners' exaggeration of Safer at Home's terms reveals the weakness of their argument: a *total* ban on any travel—to get food, medical treatment, or exercise—could indeed be "beyond all question" a "palpable invasion of rights." *See Jacobson*, 197 U.S. at 30. But Safer at Home draws the very balance petitioners claim it lacks.

And the petitioners sweepingly assert that general social distancing without any travel restrictions would be sufficient. But they do not support this assertion. Nor do they contend with the fact that it is not the function of a court "to determine which one of two modes [is] likely to be the most effective for the protection of the public against the disease." *Jacobson*, 197 U.S. at 30.

2. Even without *Jacobson* deference, Safer at Home's travel restrictions pass constitutional muster.

a. Safer at Home's travel restrictions do not impermissibly impinge the petitioners' rights to travel.

Even without *Jacobson* deference, Safer at Home still does not impermissibly infringe upon the right to travel. Under normal circumstances, public travel is one of—if not *the*—most highly regulated part of everyday life. One need look no further than Wisconsin's traffic code, or this Court's

many cases holding that individuals have reduced privacy and freedoms on public highways.[36]

Why is this so? Because public travel—more so than many other facets of everyday life—presents the real risk that the freedom of one individual may jeopardize the life of another. Accordingly, when this Court has analyzed whether government action impermissibly impinges the constitutional right to freedom of travel, it has always balanced the freedom of the individual against the community interests at play. *See Brandmiller*, 199 Wis. 2d 528 (affirming a ban on "cruising" down the same busy road, over and over again); *Ervin v. State*, 41 Wis. 2d 194, 163 N.W.2d 2017 (1968) (affirming city-wide curfew due to dangerous circumstances); *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 426 N.W.2d 329 (1988) (affirming a juvenile curfew).

The petitioners' suggestion that strict scrutiny applies to travel restrictions is wrong. (Pet'r Mem. 65.) In *Brandmiller*, this Court specifically rejected the argument that strict scrutiny would apply to "infringement on the right to travel." 199 Wis. 2d at 541. "Not every governmental burden on fundamental rights must survive strict scrutiny." *Id.* As for *K.F.*, this Court declined to hold that a specific kind of scrutiny applied. Rather, it simply concluded that because

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[36] *See, e.g.*, *State v. Iverson*, 2015 WI 101, ¶¶ 47–50, 365 Wis. 2d 302, 871 N.W.2d 661 (affirming traffic stop for non-criminal littering violation, noting that—in the traffic context—the Court judges reasonableness by balancing "public interest" against the individual's more limited right to be free from interference); *State v. Matejka*, 2001 WI 5, ¶ 26, 241 Wis. 2d 52, 621 N.W.2d 891 (discussing the United States Supreme Court's recognition that drivers and passengers in cars possess "reduced expectation[s] of privacy," because cars traveling on public roads are subject to "pervasive government controls" (citation omitted)).

the curfew at issue *would* pass strict scrutiny, it did not need to decide whether an intermediate scrutiny standard would apply. 145 Wis. 2d at 46–47.

This Court's analysis in *Ervin* of curfews provides the right model. (The petitioners agree that a "curfew" framework should apply. (Pet'r Mem. 66 n.20.) There, this Court rejected a constitutional freedom of movement challenge to a city-wide Milwaukee curfew imposed by the mayor, designed to quell ongoing riots.[37]

This Court recognized the right to travel as connected to "freedoms set forth in the First Amendment." *Ervin,* 41 Wis. 2d at 200. But the freedom to travel must be balanced against the need for public protection: "The purpose and result of the mayor's curfew proclamation was not to destroy freedom of movement, *but to restore it*." *Id.* at 201 (emphasis added). Because "[t]he Constitution protects against anarchy as well as tyranny," the City's leaders had a "constitutional obligation" to restore order. *Id.* at 200. Accordingly, the "temporary imposition of a curfew, limited in time and reasonably made necessary by conditions prevailing, is a legitimate and proper exercise of the police power of public authority." *Id.* at 201–02.

Thus, even if *Jacobson* were not applied, the petitioners' right to travel claims fail under *Ervin*. Safer at Home is a "temporary" measure "reasonably made necessary" by the conditions of a novel, easily transmittable virus. *See id.* at

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[37] Wisconsin Stat. § 66.325 provided that during an emergency, if the local governing body was unable to promptly act, a city mayor could issue an enforceable proclamation to do whatever was necessary for the health, safety, and order of the city. *See* Wis. Stat. § 66.325 (1963–64). Like Wis. Stat. § 252.25 today, failure to comply was punishable by fine or imprisonment. *Compare* Wis. Stat. § 66.325 (1963–64), *with* Wis. Stat. § 252.25.

201–02. The petitioners "do not question that the State has a compelling interest" in combatting COVID-19. (Pet'r Mem. 66.) And, while important, their individual freedoms to travel must necessarily be balanced against interests of public protection against COVID-19, which has already claimed the lives of hundreds of Wisconsinites and continues to spread.

That balancing, particularly given the many types of travel that Safer at Home permits, shows that—as in *Ervin*—the petitioners' rights to travel have not been impermissibly impinged.

b. The petitioners' arguments confuse both the applicable law and the facts of Safer at Home.

Instead of engaging in a careful constitutional analysis, the petitioners rely on inapplicable case law and an exaggeration of Safer at Home's terms.

For example, they improperly point to *K.F.* as support for application of strict scrutiny. (Pet'r Mem. 55.) But this ignores *Brandmiller*. The petitioners also point to *Dunn v. Blumenstein*, 405 U.S. 330 (1972), and *Shapiro v. Thompson*, 394 U.S. 618 (1969), both of which are equal protection cases with necessarily different analyses.

And even if this Court were, for argument's sake, to apply strict scrutiny, Safer at Home's travel restrictions would satisfy it. The petitioners do not dispute the State's compelling interest. And their main argument—that Safer at Home is not the least restrictive means—rests on their mistaken premise that Safer at Home amounts to an "outright ban" on "any travel." (Pet'r Mem. 64–66.)

This overgeneralization cannot carry them. Again, Safer at Home carves out many types of permissible travel, including travel to do the very things the petitioners

elsewhere claim they cannot do—travel to a religious service, or to go to a park to discuss politics (while socially distancing).

These travel restrictions are narrowly tailored to the compelling interest of combatting the virus. It permits travel to those businesses and operations essential to help combat the virus and to help people sustain normalcy at home; it also permits travel to open places where the dangers of proximity are not present—including through a "leisurely drive." (*See* Pet'r Mem. 66.) This is narrow tailoring.

The petitioners have failed to show any impermissible infringement upon their right to travel. But even if they had, that would not justify invalidating the travel restrictions in their entirety, as the petitioners request. Instead, as with their other claims, any relief must extend no farther than the specific violation they establish.

III. The equities weigh in favor of denying an injunction because the challenged restrictions in Safer at Home indisputably save lives in the midst of a rare pandemic.

This Court should deny the petition and motion for the reasons discussed above. Further, even if the petitioners had sufficiently pleaded a claim, no injunction should issue.

Rather, the equities clearly weigh in favor of leaving the temporary limits in place. "Injunctions, whether temporary or permanent, are not to be issued lightly." *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 24, 301 Wis. 2d 266, 732 N.W.2d 828. Especially important here, "competing interests must be reconciled and the plaintiff must satisfy the . . . court that on balance equity favors issuing the injunction." *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

Here, no one questions that the individual liberties at issue are significant (however, as discussed, the petitioners overstate Safer at Home's effect on them). But just as the constitutional analyses in these extraordinarily rare circumstances must tip in favor of public protection, so too must the equities weigh in favor of public safety. Importantly, the restrictions are temporary—the order in question expires in little more than two weeks, and aspects of it are being rolled back in the meantime. But the competing interests for the general public are profound: it is literally life and death for a percentage of the population.

The temporary restrictions here are directly tied to the threat posed by COVID-19: it spreads extremely easily and does so through people gathering in each other's presence—through breathing and especially through talking, shouting, coughing, or singing. The data indicates that its spread is significantly more rapid than the common flu, as is the death rate. No one disputes this. Likewise, no one seriously disputes that the gatherings and travel in question here will hasten the spread not only among those present at those gatherings, but also among those people's families and anyone they come into contact with in their communities—and, if they travel, in communities throughout the State. (Van Dijk Aff. ¶¶ 23, 29–31; Westergaard Aff. ¶¶ 23–27, 39.)

It is hard to imagine a more compelling equitable reason to deny an injunction. The temporary restriction on the petitioners—however compelling in the near term—cannot outweigh the interest the public has in avoiding the harms that would result if COVID-19 spreads out of control. And to be clear, this state of affairs is very much temporary: while COVID-19 is not going away soon, Wisconsin is loosening restrictions as it rapidly ramps up its testing, tracing, and other public health tools to combat COVID-19. Right now, every effort is being made to put Wisconsin in a more

advantageous position as it moves forward.[38] That temporary state of affairs should be allowed to play out to benefit the compelling public interest.

CONCLUSION

This Court should deny the petition for an original action and motion for a temporary injunction.

Dated this 8th day of May 2020.

Respectfully submitted,

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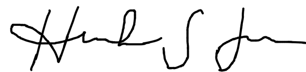

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[38] *Evers announces plan to make Wisconsin among the stops states in COVID-19 testing,* Fox 11 News (May 4, 2020), https://fox11online.com/news/coronavirus/evers-announces-plan-to-make-wisconsin-among-top-states-in-covid-19-testing ("Evers says he's prepared to provide 85,000 COVID-19 tests per week").

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