No. 2020AP0828-OA

# In the Supreme Court of Wisconsin

JERÉ FABICK AND LARRY CHAPMAN,

*Petitioners*,

v.

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

*Respondents.*

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

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

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

Counsel for Petitioners

* Admitted *pro hac vice*.

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## INTRODUCTION

The fundamental rights secured by this State's founding charter "must be protected not only when it is easy but when it is hard." *Tabernacle Baptist Church, Inc. v. Beshear*, No. 20-cv-22 (E.D. Ky. May 8, 2020) (Slip. Op. at 1). This is one of the hard times. Petitioners do not question the critical importance of mitigating the spread of the COVID-19 pandemic that has swept the Nation, and this State. Nor do they dispute that Respondents' efforts to do so are meant in good faith. But the arbitrary distinctions Respondents have imposed—allowing hundreds of shoppers and store employees to congregate in home goods and hardware stores and up to 60 people to gather in a day care center, but limiting religious services to nine worshipers or less and banning (indoor, we are now told) political assembly altogether—cannot be justified in the name of public health, given that the distancing and hygiene protocols required by the State are no less effective (and are likely more so) in a church or meeting hall than in Home Depot. Put simply, if the value of "maintain[ing] the value and structural integrity of a home" justifies keeping Menards and Home Depot open for business despite the marginally increased risk to public health, the Wisconsin Constitution will not tolerate a different result for houses of worship and political assemblies.

Respondents dispute that these distinctions are arbitrary, maintaining that "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." State Respondents' Response to Petition for an Original Action and Motion for Temporary Injunction at 29 (May 8, 2020) ("State Resp."). That argument completely ignores the arbitrary distinction between churches and day care centers, which remain open—for *all* children, not just children of essential workers. And in any event, given Respondents' own evidence that the "[i]nfectious particles [that transmit COVID-19] can remain in the air and on surfaces for an extended period of time," Affidavit of Ryan P. Westergaard in Support of Respondents' Response to Petition for Original Action ¶11 (May 7, 2020), it remains entirely mysterious to us why the State would conclude that hundreds of people trafficking in and out of Menards poses less risk of viral spread than 30 socially distanced believers worshiping together in a properly sanitized sanctuary. As the Sixth Circuit asked just two days ago, "why can someone safely walk down a grocery store aisle but not a pew?" *Roberts v. Neace*, No. 20-5465 (6th Cir. May 9, 2020) (Slip. Op. at 7). The State offers no answer. There is none.

Respondents' attempts to justify their restrictions on the fundamental rights of assembly and travel are equally unpersuasive. Confronted by the unforgiving command of Article I, Section 4 that the people's right of assembly "shall never be abridged," the State attempts to ameliorate the constitutional problems with EO 28's outright ban on all assembly by offering for the first time an atextual, litigation-driven narrowing construction that expands EO 28's exception for outdoor exercise activities to *all* activities that take place out of doors, including political assembly. But that narrowing construction—while welcomed by Petitioners—falls far short of solving EO 28's overbreadth and lack of tailoring. And the State likewise fails to justify its draconian ban on nearly all types of travel—even travel done in a social distanced manner, inside the privacy of one's own family automobile, without any contact with the public.

The State, instead, attempts to dismiss all of these difficulties with a wave of its *Jacobson* wand. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Indeed, the State asserts that the *Jacobson* precedent makes this case an easy, rather than a hard, one—the Court need only defer to the State's judgment that the challenged limits are appropriate. To the contrary, *Jacobson* has no purchase here—not its holding (which concerned the federal

constitution, not Wisconsin's), nor even its dicta (which, over the last 115 years of constitutional jurisprudence, has not aged gracefully). And even if it did apply, that would not change the bottom line in this case, for the discriminatory nature of the limits challenged here are just the sort of infringements—having "no real or substantial relation" to public health, and "in palpable conflict with the Constitution"—that, even *Jacobson* owned, must trigger "the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id.* at 31.

So *Jacobson* or no *Jacobson*, Petitioners' claims must prevail. But while that is the end of the significance of *Jacobson* for Petitioners' challenge, it is not the end of its significance for this Court. For were this Court to accept Respondents' invitation to apply the deferential standard they attribute to *Jacobson*—even if only to invalidate the challenged restrictions nonetheless—it would, in words that Justice Jackson penned in the midst of a crisis no less serious than this one, be validating a principle that will "lie[ ] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). Again, we concede that the need here is urgent, and the hand extended by the State is offered in good

faith. But make no mistake, the *principle* of abject deference advocated by the State, if adopted as "the doctrine of the [Wisconsin] Constitution," will have "a generative power of its own." *Id.* So the Court should pause carefully before sowing that seed into the soil of its own Constitutional jurisprudence.

## ARGUMENT

### I. THIS COURT SHOULD EXERCISE ORIGINAL JURISDICTION

In our opening submission, we demonstrated that this Court's criteria for the exercise of its original jurisdiction under Article VII, Section 3 of the Wisconsin Constitution are satisfied in this case for four separate and independent reasons. Memorandum in Support of Petitioners' Emergency Petition for Original Action and Emergency Motion for Injunction at 14–17 (May 4, 2020) ("Pet. Mem."). Significantly, the State addresses *none* of them in its response, State Resp. 14–16, and it thus implicitly concedes that they each support the exercise of original jurisdiction.

First, the State does not dispute—because it cannot—that this is an "exceptional case[ ] in which a judgment by the court [would] significantly affect[ ] the community at large." *Wisconsin Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59, ¶4, 243 Wis. 2d 512, 627 N.W.2d 807. Because EO 28, like the virus itself, has dramatically affected, in an unprecedented manner,

almost every aspect of the lives and livelihood of *every* person in the State, it would be hard to conjure up a case that would better fit this criterion. *See* Pet. Mem. 14–15.

Second, the State does not dispute—because it cannot—that this case presents extremely important constitutional questions concerning the proper balance between the government's power to address an urgent public health crisis and some of the most basic and fundamental rights and freedoms inherent in our traditions and universally protected by our Nation's fundamental charters, both state and federal. Again, it is nearly impossible to imagine a case raising constitutional questions of greater import than these. *See* Pet. Mem. 15–16.[1]

Third, the State does not dispute—because it cannot—that the exercise of original jurisdiction is also warranted by the need for a "prompt and authoritative" determination by this Court of these exceptionally important questions. *Citizens Utility Bd. v. Klauser*, 194 Wis. 2d 484, 488 n.1, 534 N.W.2d 608 (1995); *see also Petition of Heil*, 230 Wis. 428, 284 N.W. 42,

[1] *See also State ex rel. Ekern v. Dammann*, 215 Wis. 394, 254 N.W. 759, 761 (1934) (agreeing that action dealing with the electoral franchise and raising questions regarding "the rights of citizens to express their political opinions through the medium of a political party" was a "proper case for the exercise of original jurisdiction").

50 (1938). The State can hardly deny that EO 28's restrictions are having a profound, devastating, *and continuing* impact on almost every aspect of the daily lives and activities of everyone in the State and are infringing Petitioners' constitutional rights and freedoms *each and every day*. If there is ever to be an authoritative, and effective, ruling by this Court assessing the constitutionality of those restrictions, and if further irreparable harm to Petitioners (and others) is to be prevented, the Court needs to act now. *See* Pet. Mem. 16–17.

Fourth, the State does not dispute—because it cannot—that Petitioners are seeking nothing more than what this Court has already granted in the Legislature's companion action (*Wisconsin Legislature v. Palm*, No. 202AP-765-OA ("*Wisconsin Legislature*")) challenging the very same Order at issue here. The State does not even mention the Legislature's petition or this Court's decision to assume original jurisdiction over that action, let alone point to any dispositive difference between the two actions that would warrant the exercise of original jurisdiction in the one but not in the other. *See* Pet. Mem. 17.

Each of the above considerations is itself sufficient to warrant this Court's exercise of original jurisdiction. Taken together, they are

overwhelming. It is therefore perhaps not surprising that the State chooses to ignore them altogether in arguing against original jurisdiction.

Turning from what the State does *not* contest in opposing original jurisdiction to what it *does* argue, we find a single contention: that the petition is unsuitable for an original action because of the supposed need for factual development with respect to our claims. State Resp. at 14–16. Notably, the State unsuccessfully opposed the Legislature's petition on very similar grounds,[2] and the same result should obtain here. As in the Legislature's case, the State's assertions regarding the need for factual development are overstated at best.

To begin with, the State ignores that the questions of constitutional law presented in this action are ultimately questions of law that the Court decides de novo. *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, 2018 WI 78, ¶23, 383 Wis. 2d 1, 914 N.W.2d 678 (2018). Perhaps more importantly, all of the "facts" that may be relevant to this case, and to the petition and motion currently before the Court, can be ascertained

[2] *See* Respondents' Response to Petition for an Original Action and Motion for Temporary Injunction at 19, *Wisconsin Legislature, supra* (filed April 28, 2020) (arguing that the Legislature's petition should be denied because it required "complex factual development").

either from the four corners of EO 28 itself or from the affidavits and other supporting materials that have been submitted to the Court.

Such "facts" include DHS's stated justifications for EO 28's restrictions (we do not dispute them), the "State's evaluation of the spread of the pandemic and possible responses" (we concede responding to the pandemic is a compelling interest), the burdens imposed by the challenged provisions of the Order on the exercise of the fundamental rights to freedom of worship, assembly and expression, and freedom of movement (which are apparent from the plain text of the Order), and whether the Order's restrictions meet narrow tailoring or similar requirements (which is a question of law). *See* State Resp. 15 (identifying issues). The State has not even attempted to explain why the materials already before the Court do not adequately establish the relevant facts necessary to the disposition of this action, much less attempt to flesh out the additional factual development that it believes is necessary.[3] Again, Petitioners have *conceded* for purposes of the declaratory and injunctive relief they are seeking some of the "facts" that the State

[3] The State also notes that with respect to religious liberty claims, challengers must demonstrate that they have "sincerely held religious beliefs." State Resp. 15. The State appears to be suggesting that there is reason to doubt the sincerity of Petitioner Chapman's sworn affidavit testimony regarding his religious beliefs—a suggestion that would frankly be insulting—but the State certainly never hints at what additional evidence may be required to test Mr. Chapman's sincerity.

identifies as supposedly in need of further development, such as whether the State has a compelling interest in combatting the COVID pandemic.

Thus, the State's suggestion that significant factual development is needed in this case is meritless. In any event, and at an absolute minimum, this Court should exercise original jurisdiction to the extent necessary to rule on Petitioners' request for an immediate temporary injunction. Courts regularly decide such requests on the basis of paper records just like the one currently before the Court. Such action by the Court is necessary if Petitioners are ever going to obtain a "prompt and authoritative" determination of the exceptionally important constitutional questions they have raised. *Klauser*, 194 Wis. 2d at 488 n.1, 534.

No doubt aware that this case presents the type of exceptional circumstances warranting the exercise of original jurisdiction provided under Wisconsin law, DHS seeks solace in a recent decision arising under the laws of a *different* State. It points to an opinion concurring in the decision by the Texas Supreme Court denying a petition for *writ of mandamus* in a case challenging several "coronavirus response measures" adopted by several local Texas officials. *In re Salon A La Mode*, 2020 WL 2125844 (Tex. May 5, 2020). But the fact that the concurring justices (who constituted, it should

be noted, a minority of the Court's members) expressed some doubt regarding *that* Court's original jurisdiction to entertain the petition in *that* case says nothing at all about whether *this* Court should exercise *its* original jurisdiction to decide *this* case.

Even laying aside the important factual differences between that case and this one,[4] it is sufficient, and indeed dispositive, to note the very different legal regimes establishing this Court's original jurisdiction and that of the Texas Supreme Court. While the Wisconsin Constitution provides an expansive grant of original jurisdiction to this Court, *see* WIS. CONST. art. VII, § 3 ("The Supreme Court . . . may hear original actions and proceedings"), the Texas Constitution expressly limits the original jurisdiction of the Texas Supreme Court to the issuance of extraordinary writs. *See* TEX. CONST. art. 5, § 3 ("The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified"). The fact that the concurring opinion in *Salon A La Mode* expressed some doubt regarding the scope of the Texas Supreme Court's original

[4] The State obscures one of those important differences through its curious use of ellipses. The petition in *Salon A La Mode*, unlike the petition and motion before this Court, was "presented without supporting affidavits and with no record on which the Court could base its inquiry." 2020 WL 2125844. The State includes a portion of this quote in its brief, but omits the phrase "without supporting affidavits." State Resp. 16.

jurisdiction under the provisions of that State's constitution limiting such jurisdiction to the issuance of extraordinary writs has absolutely no bearing on the scope of this Court's original jurisdiction, and the propriety of its exercise, under the very different provisions of the Wisconsin Constitution.

Finally, the State's effort to divert challenges to EO 28 to the circuit courts, if successful, will likely run out the clock on this Court's ability to authoritatively review that Order's extraordinary impositions on Wisconsinites' exercise of their fundamental rights and liberties, and on this Court's ability to grant meaningful relief arresting the compounding irreparable harm inflicted every day on those citizens whose rights and liberties are being infringed. The State's preferred course runs directly counter to the need for a "prompt and authoritative" determination by this Court of the exceptionally important questions raised by this case. It also raises the unacceptable prospect of conflicting decisions by the lower courts, potentially resulting in conflicting standards of allowable conduct applying in different regions of the State while different cases work their way back up to this Court. Because the State's position poses these very real dangers, with no offsetting benefits, it should be rejected.

The Court will recall that in the argument held just last week in the

Legislature's action challenging EO 28, counsel for the State pointed to this very petition as he reassured this Court that it would soon have an opportunity to address the constitutional limits on DHS's powers to order the extraordinary restrictions that it has imposed on the citizens of Wisconsin. The State's advocate characterized our petition (accurately) as raising a number of "fundamental rights-based claims," and suggested that the ability of citizens to file such an action was one of the "fundamental backstops" against an unreasonable or unconstitutional exercise of power by the agency.[5] Later in the argument, he drove home this point even more directly, as he assured the Court that it now had before it, through its consideration of this case, an opportunity to assess at least some fundamental constitutional limitations on DHS's exercise of its power:

> There are limitations on these powers, and this Court will be considering them in very short order. I assure you that you will be receiving briefs within the next week on the fundamental constitutional questions that are raised by … Emergency Order 28. And those are the limits that are there, and that's how this process is supposed to work.[6]

It comes with poor grace for the State to now argue that this Court in fact

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[5] *See* Wisconsin Supreme Court Oral Argument: Wisconsin Legislature v. Andrea Palm, WISCONSIN EYE, https://bit.ly/35O48dR (May 5, 2020) (colloquy beginning at 1:05:38 and continuing through 1:06:55).

[6] *See* Wisconsin Supreme Court Oral Argument: Wisconsin Legislature v. Andrea Palm, WISCONSIN EYE, https://bit.ly/35O48dR (May 5, 2020) (colloquy beginning at 1:23:46).

should *not* be "considering [these constitutional limitations on its power] in very short order," and should not now exercise its own power to act as just such a "backstop" for the protection of critical fundamental rights.[7]

[7] We note that the Sheriff Respondents, who acknowledge that this case raises "substantial and significant questions," nevertheless request that they be dismissed, on the grounds that they were not responsible for the creation of EO 28 and that we have not alleged that they have enforced, will enforce, or intend to enforce that Order. Respondents' Response to Emergency Petition for Original Action and Emergency Motion for Injunction at 1, 2. These respondents, who are the sheriffs either in the counties where Petitioners reside or in Dane County (where many of the political assemblies that are restricted by the Order can be expected to take place) were named as respondents because EO 28 by its express terms provides that it is "enforceable by any local law enforcement official, including county sheriffs." EO 28 § 18 (Pet. App. 39). While Petitioners do not believe that inclusion of the Sheriff Respondents is essential to maintenance of this action, they named the Sheriffs as respondents in order to foreclose any possible argument challenging this Court's ability to issue injunctive relief against enforcement of the Order. The Sheriff Respondents' assigned role in the enforcement of the Order thus more than suffices to justify naming them as respondents.

We further note that at least two of the Sheriff Respondents have in fact made public statements acknowledging their duty to enforce DHS's orders. Thus, the Waukesha County Sheriff has made clear that "[a]s to local enforcement, upon receiving complaints, the Waukesha County Sheriff's Office will continue to investigate each incident on a case by case basis, if a violation is observed it is the Waukesha County Sheriff's Office preference to educate the public through the Governors 'Safer at Home' order and seek voluntary compliance, prior to formal enforcement." News Release, Office of the Sheriff, Update – Coronavirus Disease 2019 (Mar. 24, 2020) https://bit.ly/2WkGR03). And while the Walworth County Sheriff also urged voluntary compliance with "safer-at-home" orders, he has also stressed that his office "will investigate and take enforcement action on blatant violations" of those orders. Press Release, Walworth County Sheriff's Office, Statement from Sheriff Picknell (Mar. 25, 2020), https://bit.ly/2YSPLDY). Likewise, the Dane County Sheriff stated that while involvement of law enforcement would be a "last resort," his office would contact the office of Public Health Madison and Dane County to "investigate" "large gatherings or non-essential businesses being open." Robert Chappell, *Police, Sheriff: Stay Home, We'd Rather Not Give You Tickets*, MADISON365.COM, March 26, 2020, https://bit.ly/2WkaBdA.

## II. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CONSTITUTIONAL CLAIMS

### A. This Court Should Not Look to *Jacobson*'s Deferential Standard of Review To Guide Its Analysis.

The fulcrum of the State's defense of the challenged restrictions is dicta from a 115-year-old opinion that has no controlling authority in this Court. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), is the very first case the State cites; it returns to the opinion well over fifty times in the pages that follow; and it opens its constitutional analysis by stringing together numerous quotations from the opinion in a lengthy discussion that spans six paragraphs. But *Jacobson*'s dicta cannot serve as the guiding light for this Court's inquiry, despite Respondents' efforts to make it so.

As discussed in Petitioners' opening brief, *Jacobson*—even its *holding*, much less the dicta relied upon by the State Respondents—is not controlling here, since the claims it resolved all arose under the United States Constitution, not Wisconsin's. *See id.* at 13–14. Respondents resist this conclusion, pointing to (the only) two Wisconsin cases that cite *Jacobson*: *Froncek v. City of Milwaukee*, 269 Wis. 276, 69 N.W.3d 242 (1955), and *Adams v. Milwaukee*, 144 Wis. 371, 129 N.W. 518 (1911). As we have previously explained, those cases did not involve any claimed infringement of a

fundamental constitutional right and thus merely cite and quote *Jacobson*'s deferential-sounding dicta as an apt articulation of what is now known as "rational basis" review. Neither case holds or even suggests that this deferential review trumps, in emergency situations, the strict judicial scrutiny that ordinarily applies when, as here, the Government is alleged to be violating a fundamental constitutional right. Indeed, nor did either case *even involve* emergency situations—*Adams* involved a Milwaukee ordinance requiring dairy cows to be tested for tuberculosis, 129 N.W. at 519; and *Fronceck* concerned Milwaukee's fluoridation of the city water supply. 269 Wis. 2d at 276. And tellingly, when this Court *has* addressed the scope of government authority to deal with emergency situations, *it has not applied or even cited Jacobson*. *See generally Ervin v. State*, 41 Wis. 2d 194, 163 N.W.2d 207 (1968).

Trying to make the best of things, the State argues that because *Adams* and *Fronceck* applied *Jacobson* in contexts that "did not involve emergencies," it follows "with even *greater* force" that it should apply "to this emergency situation." State Resp. 20. That is an utter non-sequitur. The fact that this Court has used "rational basis" review in cases that *do not* involve any claimed violation of a fundamental right obviously does not show that the

same deferential analysis must apply anytime the State, acting in the context of an emergency, deliberately and severely infringes the fundamental constitutional rights of its citizens. Put simply: it does not follow, from the fact that rational-basis review applies when a law is challenged as irrational because no fundamental constitutional rights are at stake, that *Jacobson*'s standard trumps the ordinary strict-scrutiny test that applies when, as here, fundamental rights are at issue.

The State next suggests that *Jacobson*'s framework should govern because it "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." *Id.* at 19; *see also id.* at 25 (citing *State v. Neumann*, 2013 WI 58, ¶¶108–11, 348 Wis. 2d 455, 832 N.W.2d 560, as accepting "the important need to balance individual free exercise with public protections"). But the strict scrutiny standard *is already designed* to accommodate this need. The *whole point* of that analysis is to serve as a safety-valve that allows the government to justify restrictions on fundamental constitutional rights when they are truly necessary to protect other public interests of extraordinary importance. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (explaining that strict

scrutiny allows "a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates" to "justify an exception" to fundamental constitutional rights like equal protection). It is deeply disingenuous for the government to claim, when it *is unable to* satisfy strict scrutiny in defending its draconian measures, that the Court should suddenly move the goalposts closer to the line of scrimmage to ensure that it will prevail anyway.

It is this last concern that begins to bring into view the full implications of the State's invocation of *Jacobson*—implications that go far beyond the confines of this litigation. If this Court accepts Respondents' invitation to engraft *Jacobson*'s indulgent standard of review onto Wisconsin's constitutional jurisprudence, it can be certain that this case will not be the last time the Court hears the name of *Jacobson* invoked. No, like the "principle of racial discrimination" the U.S. Supreme Court judicially "rationalize[d]" in *Korematsu v. United States*, in the face of an emergency no less dire than this one, the principal of abject deference Respondents attribute to *Jacobson* would "lie[ ] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). "There it [will have] a generative power

of its own, and all that it creates will be in its own image." *Id.* The Court should pause carefully before welcoming so perilous a stranger into Wisconsin's jurisprudence.

The State Respondents also fail to persuasively address the serious difficulties posed by attempting to resurrect *Jacobson*'s antiquated approach and plop it into this case as though nothing had happened in constitutional jurisprudence over the last 115 years. *Jacobson* was decided 33 years before *United States Carolene Products* and its famous footnote four, 304 U.S. 144, 152 n.4 (1938), nearly 50 years before the United States Supreme Court's first application of modern strict scrutiny review, *see NAACP v. Button*, 371 U.S. 415, 438 (1963), and over 100 years before this Court's decision in *Coulee Catholic Schools v. Labor & Industry Review Commission*, 2009 WI 88, 320 Wis. 2d 275, 768 NW.2d 868. Thus, even if the claims placed before this Court by Petitioners were founded on the U.S. Constitution rather than Wisconsin's, the Court should look to these modern constitutional (and controlling) precedents in resolving Petitioners' constitutional claims—not non-binding dicta from the era of Justice Harlan the Elder.

### B. The State's Draconian Infringement on Petitioners' Fundamental Constitutional Rights Cannot Be Justified Even Under *Jacobson*'s Deferential Standard of Review.

Even if the Court were to accept the State's invitation to let *Jacobson* guide its analysis, the result required in this case would not change. Respondents imply that *Jacobson* bars this Court from looking behind their say-so that the challenged measures are necessary to protect public health. State Resp. 18. In fact, *Jacobson* says precisely the opposite: "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, . . . *it is the duty of the courts to so adjudge*." 197 U.S. at 31 (emphasis added). That is the case here, for as discussed in our opening brief and in more detail below, the distinctions DHS has drawn—for example, between day care centers, liquor stores, and hardware stores, on the one hand, and places of worship, on the other—have no substantial or even rational relation to public health. This is not a matter of the political branches' discretion to choose the scientific theory "accepted by the mass of the people, as well as by most members of the medical profession" over the dissenting view held by "some laymen, both learned and unlearned, and some physicians of great skill and repute." *Jacobson*, 197 U.S. at 34. *No scientific theory accepted by anyone*

supports the notion that the coronavirus spreads less readily in the aisles at Wal-Mart than in the pews at Lakewood Baptist Church. *See Maryville Baptist Church, Inc. v. Beshear*, 2020 WL 2111316, at *4 (6th Cir. May 2, 2020) ("Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there.").

As the State concedes, moreover, *Jacobson* preserves intact the judicial duty to strike down government action that "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. at 31; *see* State Resp. 18. As shown in our opening brief and discussed further below, the challenged provisions of EO 28 constitute just such a plain and palpable constitutional violation.

Finally, the State also asks this Court to look to non-binding dicta from another pre-modern United States Supreme Court case, *Prince v. Massachusetts*, 321 U.S. 158 (1944). State Resp. 24. But the Court will find no support for the State's infringement on Petitioners' fundamental constitutional rights in that case either. *Prince* involved a Jehovah's Witness who sought religious exemption from Massachusetts's child labor law so that her children could distribute religious tracts. The Court—*applying* the "clear and present danger" test that anticipated modern strict scrutiny, not the "arbitrary

or unreasonable" test proposed by the State—upheld the law. *Id.* at 167. In passing, the Court stated, in the dicta that Respondents seize upon, that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* at 166–67. But the Court was at pains to emphasize that its actual "ruling does not extend beyond the facts the case presents." *Id.* at 171.

The dicta from *Prince* cannot control this Court's analysis any more than the dicta from *Jacobson*, and for the same reasons. Again, the Court in *Prince*, like the Court in *Jacobson*, simply did not have before it a law even remotely analogous to the restrictions here. *Prince* did not involve a child labor law, for example, that contained exemptions based on economic status or political principle *but not* the dictates of conscience. Nor did its dicta address a law designed to protect "the community [from] communicable disease," *id.*, containing exemptions on numerous secular grounds—but *not* religious ones. If *Jacobson* or *Prince* had upheld *those* sorts of palpably discriminatory laws, perhaps they would have some bearing on the inquiry in this case. The actual decisions do not.

* * * * *

Whether or not this Court heeds Respondents' call to adopt *Jacobson*

as its compass matters not at all to the outcome of this case. With *Jacobson* or without it, Petitioners' claims must prevail. But more yet turns on this Court's decision than Petitioners' ability to exercise their fundamental constitutional rights. The principles this Court establishes in this case will guide the government's conduct in future emergencies, as well—whether genuine (as here) or pretended—for it is in the nature of judicial decision-making that a precedent established now cannot be stamped with a "use in case of COVID-19 pandemic only" label. It is an unfortunate fact of the history of American jurisprudence that nearly each generation of jurists has had to learn anew to recognize the dangerous "generative power" of legal principles adopted out of temporary expedience—the "tendency of a principle to expand itself to the limit of its logic." *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting); *see e.g.*, Act of July 14, 1798, 1 Stat. 596 (Sedition Act of 1798); *Korematsu*, 323 U.S. 214; *Morrison v. Olson*, 487 U.S. 654 (1988); *cf. id.* at 697–99 (Scalia, J., dissenting). This Court ought not contribute to the annals of judicial decisions that, only in the light of hindsight, have "been overruled in the court of history." *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018).

### C. Petitioners' Freedom of Conscience Claim Is Likely to Succeed.

To show that the State's nine-person limit on gathering for religious

worship—enforceable by fine and imprisonment—has violated the Wisconsin Constitution's protections of religious liberty, one need do no more than quote the State's justification for it. EO 28 "strikes a balance," says the State, between certain "necessit[ies]" and "the dangers of viral spread." State Resp. 24. For essential activities such as "maintain[ing] the value and structural integrity of a home," that balance means that hardware and home goods stores remain open without any fixed numerical limits. *Id.* at 21, 22. For "the necessity of providing childcare," it means allowing day care centers to operate with up to 60 people—50 of them children who obviously cannot be expected to follow social distancing, hygiene, or other recognized risk-mitigation measures. *Id.* at 24. But for religious gatherings, though they are "essential" in name, the "balance" mysteriously dictates a draconian limit that is *over six times lower* than the limits imposed on day care centers, and that prevents even a pastor, organist, and two families of four from meeting together for worship in a large sanctuary while maintaining social distance.[8]

[8] Notably, under DHS's "Badger Bounce Back" plan, the disparity between the State's treatment of religious gatherings and its treatment of day care centers will apparently increase rather than decrease. That plan contemplates that when the State moves to Phase One of the "Bounce Back," mass gatherings (presumably including religious gatherings) of up to ten people will be allowed, while "child care settings" will resume "full operation," presumably without the numerical limits imposed by current orders. EO 31 § 1.b (Pet. App. 41); *see also* DHS, *Badger Bounce Back: From Safer at Home to the Badger Bounce Back* at 5–6, https://bit.ly/3dByyD2.

It is difficult to imagine a more explicit, indeed quantifiable, demonstration of the State's decision to "devalue[ ] religious reasons for [gathering together] by judging them to be of lesser import than nonreligious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993). Petitioners do not question the uniquely critical importance of allowing Wisconsin residents "to go to grocery stores to buy food." State Resp. 21–22. And had the State concluded that the situation was so dire that Wisconsinites must be entirely confined to their homes, except when necessary to purchase food and other life-sustaining supplies such as medications, this would be a different case. But that is not the case before the Court.

Instead, EO 28 creates a grab-bag of ad-hoc exemptions, from Costco to Menards, liquor stores to day care centers (which remain open to *all* customers, *not* only "essential workers," as the State at times would pretend). And what the Wisconsin Constitution *does not* permit is the creation of a hierarchy of values that explicitly ranks "maintain[ing] the value and structural integrity of a home" at the top, broad "access to childcare" a bit further down, and religious worship at the bottom rung, only marginally above visiting "theaters, playhouses, [and] athletic facilities." *Id.* at 8, 22, 23. Under our constitutional traditions, the State may not subordinate religious values

to run-of-the-mill secular values in this way. Such a singling out of religious belief and practice "is never permissible," *Church of the Lukumi Babalu Aye*, 508 at 533, so EO 28's nine-person limit on gathering for worship simply cannot stand.

### 1. *Coulee Catholic Schools*' Categorical Analysis Applies.

"[I]n assessing constitutional claims," this Court has held, "one must always begin . . . with the text of the documents." *State v. Randall*, 2019 WI 80, ¶9, 387 Wis. 2d 744, 930 N.W.2d 744. While the State opens its analysis with six paragraphs that reproduce eight carefully selected quotations from the United States Supreme Court's opinion in *Jacobson*, State Resp. 17–18, not once do they quote *any portion* of the constitutional text that governs their actions and this Court's decisions.

It is this:

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

WIS. CONST. art. I, § 18.

As this Court has explained, while this provision imposes a general requirement that burdens on religious liberty must be justified as necessary

to further a compelling interest, it also imposes a "perpetual bar" on some particularly grievous infringements of conscience. *Coulee*, 320 Wis. 2d 275, ¶62 (quoting *State ex rel. Weiss v. Dist. Bd. of Sch.-Dist. No. 8 of City of Edgerton,* 76 Wis. 177, 210–11, 44 N.W. 967 (1890)). Those rare types of infringements are categorically off-limits; "[t]he text of our constitution states that the state cannot do it—at all." *Coulee*, 320 Wis. 2d 275, ¶63. Two such infringements, according to the plain text of Article I, Section 18, are that "[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed," "nor shall . . . any preference be given by law to any religious establishments or modes of worship." WIS. CONST. art. I, § 18.

EO 28 directly violates both of these categorical rules. By imposing an unprecedented nine-person limit—backed by criminal penalty—on gathering together for religious worship (a numerical limit that does not apply to *any other* activity deemed supposedly "essential"), the State has dramatically restricted the rights of believers who—like Petitioner Chapman—hold sincere religious beliefs that direct them to gather together for regular, corporate, in-person worship to "worship Almighty God according to the dictates of [their] conscience." *Id.* And for the same reason, EO 28's discriminatory

cap sets up an impermissible "preference" for certain "modes of worship"—those conducted by "religious establishments" whose "dictates of conscience" allow them to worship individually, or "virtually," rather than in person with the rest of the body of believers. *Id.*

The nine-person limit impermissibly infringes the rights of conscience of believers of *any* faith who feel impelled by conscience to worship together and in person. But as we emphasized in our opening brief and do so again here, the infringement is especially stark for traditional Jews, who can only engage in public prayer and communal worship in the presence of a *Minyan*, or quorum of ten. *See* Pet. Mem. 23. The State barely addresses this point at all, and it offers *no* defense of its decision to effectively ban traditional public Jewish worship, in direct contravention of Article I, Section 18's command that no "preference [shall] be given by law to any religious establishments or modes of worship." WIS. CONST. art. I, § 18. Obviously, a government that genuinely treated religion as "essential" would *at an absolute minimum* have taken care to draw a line that did not entirely ban one of the three main Western religions from public, communal worship. Even if the Court were to accept *every single argument in the State's Response*, it would *still* need to

exercise original jurisdiction and enjoin this flagrant, and completely undefended, violation of the religious liberty of traditional Jewish believers.

The history and original meaning of the Freedom of Conscience Clauses confirms what is already obvious from the constitutional text: the original and animating purpose of these protections was to secure religious liberty from *precisely* the type of infringement on the form and manner of worship at issue here. From the Pilgrim fathers to the Latter Day Saints, the history of America is a story of the persecuted faithful and non-believers alike striving to make ever more secure one of "the American experiment's most audacious guarantees": "the liberty to worship God according to their conscience." *On Fire Christian Center, Inc. v. Fischer*, 2020 WL 1820249, at *2–*3 (W.D. Ky. Apr. 11, 2020). Respondents utterly fail to grapple with this history, and they offer no explanation of how a discriminatory, nine-person limit on gathering for worship could even conceivably be squared with the ancient understanding throughout the Nation, and in this State, that "[t]he right to practice one's religion according to the dictates of conscience is fundamental to our system of government," and, indeed, is "a basic human right." *Coulee*, 320 Wis. 2d 275, ¶¶32-33.

*Amicus* Freedom from Religion Foundation attempts to fill the breach, arguing that the Wisconsin Constitution's protection of religious liberty "is absolute as to beliefs but not as to . . . conduct, which may be regulated for the protection of society." Non-Party Brief on Behalf of The Freedom From Religion Foundation as *Amicus Curiae* in Support of Respondents at 5 (quoting *Neumann*, 348 Wis. 2d. at 516) (May 8, 2020) ("FFRF Amicus Br."). That may be true enough as a general matter—if the regulation in question satisfies strict scrutiny—but that general principle plainly *does not* apply in the rare instances when the State has infringed religious liberty in a way that the constitutional text itself says it "cannot do—at all." *Coulee*, 320 Wis. 2d 275, ¶63. The Freedom From Religion Foundation's contrary suggestion seeks nothing less than a *repudiation* of *Coulee*—for the law at issue in that case plainly regulated not belief, but conduct: the alleged "terminat[ion] [of the plaintiff] from her first-grade teaching position at a Catholic school on the basis of her age." *Id.*, ¶1.

Of course, the State retains power to require houses of worship to abide by genuinely neutral, generally applicable laws such as fire codes and zoning regulations, *see* FFRF Amicus Br. 8—or, as we've repeatedly conceded, social-distancing, masking, and other neutral hygiene requirements

designed to protect against the spread of COVID-19. And once again, this would be a different case had the State deemed it necessary to completely (and evenhandedly) confine all Wisconsin residents to their homes, except to obtain food and other life-sustaining necessities. But whatever the precise boundary of the State's authority in this area, and whatever categorical limits the Wisconsin Constitution places on that authority, the State *does not* possess the power to impose a *discriminatory* nine-person cap on gathering for worship that is far more restrictive than the limits, if any, it imposes on ordinary secular pursuits such as shopping for supplies to "maintain the value and structural integrity of a home," and little better than comparatively trivial ones such as visiting "music halls, movie theaters, and sports venues." State Resp. 22, 32.

The State attempts to distinguish this Court's categorical analysis in *Coulee* as "inapplicable," and it asserts that 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." State Resp. 26, 28. Yes, but the State has *never before* attempted to impose a discriminatory, single-digit quota on gathering for religious worship, or anything like it. And just as Article I, Section 18's command that no "control of, or interference with, the

rights of conscience [may] be permitted" means, categorically, that the State may not "intrude into the hiring and firing decisions of a religious organization," *Coulee*, 320 Wis. 2d 275, ¶62, the constitutional directive that the government simply may not infringe "[t]he right of every person to worship Almighty God according to the dictates of conscience" or give "any preference . . . to any . . . modes of worship" means, categorically, that EO 28's nine-person cap cannot stand, WIS. CONST. art. I, § 18.

### 2. EO 28's Nine-Person Limit Cannot Satisfy the Compelling Interest/Least Restrictive Means Test.

Quite apart from Section 18's categorical ban on EO 28's cap on gathering for worship, that infringement of religious liberty must be subjected to, and cannot survive, strict scrutiny. In interpreting Article I, Section 18, Wisconsin—like 31 other States and the federal government[9]—does not follow the rule that "neutral, generally applicable" restrictions on religious liberty are exempt from serious judicial scrutiny. *State v. Miller*, 202 Wis. 2d 56, 68

[9] *See* 42 U.S.C. § 2000bb (Religious Freedom Restoration Act, repudiating *Smith* as a matter of federal statutory law); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 875 (2019) ("[T]here are twenty-one states that have . . . mini-RFRAs."); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 844 (2014) (identifying ten states, in addition to Wisconsin, that do not have statutory RFRAs but that "have interpreted their state constitutions to protect religiously motivated conduct even from generally applicable laws").

(1996) (declining to follow *Employment Division, Oregon Department of Human Resources v. Smith,* 494 U.S. 872 (1990) as a matter of state constitutional law). Accordingly, strict scrutiny is necessary whenever a petitioner shows "(1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue." *Id.* at 66.

The State does not make any genuine effort to dispute that Petitioners have satisfied these two factors. It does briefly suggest that the sincerity of Petitioner Chapman's religious belief and whether it "is burdened by the application of the state law at issue" "require factual assessment." State Resp. 15. But it gives no explanation of how any "factual assessment" could even conceivably call these matters into question. And it offers no grounds—none at all—for doubting Mr. Chapman's sworn statement that he has a sincere conviction, like millions of other believers, that he has a religious obligation to worship in-person, and celebrate Holy Communion, just as Christians have for over two millennia.

One of the State's *amici* does question whether Petitioner Chapman's religious beliefs are "being burdened." FFRF Amicus Br. 6. Petitioner Chapman has not shown that his church "would commence worship services with ten or more people if Emergency Order 28 is lifted," the Freedom from

Religion Foundation says, so he is in no different position "than a film buff [who lacks control] over the operations of their local movie theatre, or a Rolling Stones fan [who lacks control] over the scheduling of the band's tour." *Id.* at 6–7. Even taking this argument at face value, whether there are *other* obstacles to Petitioner's ability to attend corporate, in-person worship (at his church or any other) does *nothing* to show that EO 28's nine-person cap is not *itself* a burden on Mr. Chapman's religious beliefs. The suggestion that EO 28's restriction barring more than nine people from gathering for religious worship, on pain of fine or imprisonment, does not burden Petitioner's religious beliefs is simply beyond all credulity.

The State, in what may be an attempt to downplay the burden imposed by its nine-person cap, asserts that "Wisconsin has never prohibited drive-in services." State Resp. 27. EO 28 is itself less than entirely clear on this score, and Petitioners note that the Madison Police Department—on the eve of the Easter holiday—interpreted the State's restrictions quite differently. *See* Chief Victor Wahl, *Reminders, Updates and MPD Notable Calls* (Apr. 9, 2020), https://bit.ly/2xNgSoA ("[T]he order only allows religious facilities/entities to hold gatherings if fewer than 10 people are in a room or confined space at the same time. This includes gatherings in parking lots or

outdoor spaces."). Petitioners are pleased to accept the State's contrary interpretation, which we presume the State will honor in any future proceedings. But the fact remains that Petitioner Chapman's religious beliefs require in-person, communal worship in the traditional way "practiced by Christians for over two millennia," Chapman Aff. ¶3 (Pet. App. 51), and limiting churches to conducting services in this novel "mode[ ] of worship," WIS. CONST. art. I, § 18, *itself inflicts* a serious burden on the freedom of worship. The State does not seriously argue otherwise.

Petitioners do not doubt, as another of the State's *amici* asserts, that *some* believers have "faith practices" that have not been "negatively impacted" by the nine-person cap on gathering for worship. Non-Party Brief & App'x of Wisconsin Faith Voices for Justice *Amicus Curiae* in Support of Respondents at 3 (May 8, 2020) ("Faith Voices for Justice *Amicus* Br."). But that quite obviously does not mean that the limit *does not burden Petitioner's* sincere beliefs. Just as a group of Christians cannot defeat a Muslim man's challenge to grooming requirements by pointing out that *they* have no religious objection to going clean-shaven, *cf. Holt v. Hobbs*, 574 U.S. 352 (2015) (striking down prison grooming policy), the fact that many "progressive people of faith" have found sufficiently "meaningful new ways to religiously

connect and re-connect," Faith Voices for Justice *Amcus* Br. at 2, 4, does nothing to defeat Petitioner Chapman's sincere religious belief that when the Author of the Epistle to the Hebrews enjoined Christians to continue "the assembling of ourselves together," Hebrews 10:25, he *actually meant assembling*.

### 3. EO 28's Nine-Person Cap is not the Least Restrictive Means, or Even a Rational Means, of Protecting Public Safety.

Because the State's nine-person limit on gathering for religious worship burdens Petitioner's sincere religious beliefs, "the burden shifts to the State" to justify that limit as the least-restrictive means of furthering a compelling interest. *Miller*, 202 Wis. 2d at 66. While no one questions the compelling nature of the State's interest in combatting the COVID-19 epidemic, the State completely fails to show that its nine-person limit is necessary to protect that interest even though it has deemed far less draconian measures to be sufficient for public health purposes in the context of other gatherings and activities that are materially indistinguishable from a public health perspective. As the United States Court of Appeals for the Sixth Circuit explained just two days ago in enjoining Kentucky's ban on in-person worship, "How can the same person be trusted to comply with social-distancing and

other health guidelines in secular settings but not be trusted to do the same in religious settings? The distinction defies explanation . . . .” *Roberts v. Neace*, No. 20-5465 (May 9, 2020) (Slip. Op. at 6).

As discussed in our opening brief, while the State concluded that imposing a nine-person limit on religious gatherings was necessary to protect public health, it allows 60 people—ten adults and 50 children—to gather together each day, for hours at a time, at a day care center. EO 6, § 1 (Pet. App. 1). It allows hundreds of people to gather at big-box “[h]ardware stores,” alcohol retailers, and retailers of “household consumer products” like Target, Wal-Mart, or Costco. EO 28 §§ 13(b), (m) (Pet. App. 30, 33). And it allows employees to gather *without any limit whatsoever*, for the entire workday, at the numerous factories deemed “essential”—including those that manufacture “audio and video electronics,” “household appliances,” “paint,” and “photography equipment,” *id.* § 13(r) (Pet. App. 34). The State attempts to defend these distinctions in several different ways, but none of them is persuasive. In the final analysis, Respondents’ decision to allow hundreds of people to gather together to shop for power tools or spray paint, but no more than nine people to gather together to pray and worship together remains completely inexplicable, and “ ‘beyond all reason,’ unconstitutional.” *On*

*Fire Christian Center*, 2020 WL 1820249, at *2 (citing *Jacobson*, 197 U.S. at 31).

i. Respondents' principal defense is to claim our criticism of the arbitrary lines they have drawn between religious worship and other activities that pose similar safety risks "rests on an inapt comparison." State Resp. 2.

> [C]hurches, 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.

*Id.* at 29. This attempted defense fails for multiple independent reasons.

As an initial matter, this argument utterly fails to grapple with EO 28's disparate treatment of religious gatherings and *gatherings in a day care center*. Day care centers pose an analogous—and in fact *significantly greater*—risk of spreading infection than gathering for worship by any measure. While most believers in Wisconsin gather together for an hour or two at most on Sunday morning, children and their adult teachers congregate at a day care center every weekday, for hours on end. And while worshipers can be expected and required to abide by social distancing, masking, and other prevailing safety measures, children obviously cannot. Yet DHS, inexplicably,

allows *over six times* the number of people to gather in a day care center than in a house of worship.

The State Respondents attempt to sweep this glaring problem aside by contending that "childcare centers are uniquely necessary to enabling essential personnel to fight the pandemic." State Resp. 31. That response falls short twice over. First, while Petitioners do not question the importance of providing child care to essential workers, Article I, Section 18 *simply does not allow* the State to determine that providing them with *spiritual* care is any *less* essential. Indeed, access to child care, as unquestionably important as it is, is not expressly protected in the constitution. The right to worship freely is.

Second, even if the importance of providing child care to "essential personnel" were a sufficient and constitutionally valid reason for imposing far less onerous occupancy restrictions on day care centers than houses of worship, that would *still* not justify the State's regime. For Respondents *do not limit the availability of child care to essential workers*. EO 6 leaves child care centers open to all comers; and while EO 28 directs them to "prioritize" families of certain types of essential workers, *it does not limit their operation to those individuals.* EO 28 §13(f) (Pet. App. 31). The State's contention that its decision to treat day care centers far more favorably than churches,

synagogues, and mosques is justified by the imperative of "enabling essential personnel to fight the pandemic," State Resp. 31, thus simply does not fly.

The State asserts that "children are at a lower risk of serious complications from COVID-19 than the elderly and those with serious chronic medical conditions." *Id.* at 23–24. Be that as it may, it wholly fails to account for the obvious facts that: (1) the (up to ten) adult supervisors working at day care centers do not enjoy any uniquely "lower risk of serious complications," *id.* at 23, and (2) neither do the families, other caregivers, and any other adults who *come into contact* with a child who goes to day care.

Respondents also completely fail to explain why religious worshipers are limited to groups of nine but *unlimited* numbers of people are allowed to gather at factories that produce such items as "audio and video electronics," "household appliances," "paint," and "photography equipment," *id.* § 13(r) (Pet. App. 34). Like children or employees at a day care, workers at these types of factories are typically "in close proximity, for extended periods of time"—the very considerations that, the State says, justified it in banning religious gatherings. State Resp. 31. Indeed, like day care centers (and unlike religious worshippers), these factory employees are allowed to work in proximity with each other for the *entire workday*—likely five days a week. Why

then, are workers mixing paint or assembling toasters allowed to congregate together without any numerical limit (or even a limit based on the size of the factory floor), while houses of worship are subjected to a nine-person quota? The State does not even try to offer an answer.

Which brings us to the distinction EO 28 draws between religious worship services and many retail stores, which are allowed to continue doing business without any fixed numerical occupancy limits. This discriminatory treatment is alone enough to doom the submission that the challenged nine-person cap "has a 'real' and 'substantial relation' to fighting COVID-19." *Id.* at 27–28. As an initial matter, the State invites this Court to fall into the same error that a few other courts have made in identifying analogous activities to compare with in-person worship services. Those courts have found, as the State urges here, that "the type of gathering that occurs at in-person religious services is much more akin to conduct the orders prohibit—attending movies, restaurants, concerts, and sporting events—than that which the orders allow," such as shopping at retail stores. *Cross Culture Christian Ctr. v. Newsom*, 2020 WL 2121111, at *6 (E.D. Cal., May 5, 2020); *see also Gish v. Gavin Newsom*, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020). Those courts then concluded that because the challenged orders treated worship services

the same as "analogous" gatherings at entertainment venues, the prohibition on all such gatherings was neutral and generally applicable and the specific restriction on religious gatherings was thus subject merely to rational basis scrutiny. *See id.*

But the question, in discerning whether the Government has drawn rational lines or has treated religious practice evenhandedly, is whether the distinctions it has drawn can reasonably be said "to effectuate the stated governmental interests," *Church of the Lukumi Babalu Aye*, 508 U.S. at 538—here, the protection of public health against the spread of the coronavirus. The question is not whether shopping at Costco and going to the mosque for evening prayer are analogous in some aesthetic or ontological sense, nor whether those engaged in the activities share the same purposes or intentions. No, the question is whether the two activities are meaningfully distinguishable in terms of the public health risks the order is designed to protect against and thus whether treating the activities differently makes sense *from a public health perspective*.

It obviously does not. Put simply, a believer walking between pews at his house of worship does not face any greater or different risk of infection than a shopper walking between the aisles at Wal-Mart. The State gropes for

an argument that would show otherwise, but it comes up empty handed. It claims that "people do not gather for extended periods of time in retail establishments to interact in close quarters." State Resp. 29. Every part of that sentence is unpersuasive. While the State's expert suggests that "physical distance" is "key to preventing the virus from spreading from person-to person," Westergaard Aff. ¶27, it is quite obviously no more difficult to social distance in a spacious, quarter-full sanctuary than in the narrow aisles of the Wal-Mart electronics section, *see* Chapman Aff. ¶ 5 (Pet. App. 51) (explaining that Petitioner Chapman's church "could hold smaller services, with individuals and family groups maintaining social distance"). Moreover, it seems highly unlikely that the average shopping trip to Costco is significantly shorter in duration than the average church service. And even if it were, that calculation fails utterly to account for *the numerous employees who are working in the store all day*.

Finally, in all events, given that the "[i]nfectious particles [that transmit COVID-19] can remain in the air and on surfaces for an extended period of time," Westergaard Aff. ¶11, it beggars all belief to claim that an individual who gathers with, say, 50 worshippers in a socially-distanced way for little more than an hour, is exposed to any *greater* risk of contracting the

virus than when he goes to Home Depot to shop for power tools or lumber in a department that perhaps hundreds of other customers have trafficked through, that morning—all breathing, occasionally coughing or sneezing, and periodically handling the merchandise.

Other courts are in accord. In *Roberts*, for example, the United States Court of Appeals for the Sixth Circuit *rejected* Kentucky's argument that "the explanation for [religious worshipers] to be in the same area—intentional worship—creates greater risks of contagion than groups of people, say, in an office setting or an airport." No. 20-5465 (Slip. op. at 9).

> [T]he reason a group of people go to one place has nothing to do with it. Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there. So long as that is the case, why do the orders permit people who practice social distancing and good hygiene in one place but not another for similar lengths of time?

*Id.*; *accord Maryville Baptist Church*, 2020 WL 2111316, at *4; *Tabernacle Baptist Church, Inc. v. Beshear*, No. 20-cv-33 (E.D. Ky. May 8, 2020) (Slip. Op. at 10) (enjoining same ban, since "evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking").

The State resists that conclusion too, arguing that gathering for worship is different because it may involve "speaking, singing, and direct person-to-person contact." State Resp. 31. That simply ignores, without any evidence, Petitioner's sworn testimony that worship could be conducted at his

Church in a way *that does not involve* person-to-person contact and that follows recognized masking, social distancing, and other safety and sanitizing protocols. Chapman Aff. ¶ 5 (Pet. App. 51). And setting aside Petitioner's specific facts, this argument does no more than demonstrate that a flat nine-person limit is plainly *not* the least restrictive means of furthering the State's public health goals—for DHS could easily have mitigated these concerns through the far-less restrictive measure of requiring houses of worship to abide by the sorts of safeguards Petitioner's church intends to follow, rather than imposing a draconian nine-person cap. As the Sixth Circuit asked, "Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities?" *Roberts*, No. 20-5465 (Slip. Op. at 8). "If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection." *Tabernacle Baptist Church*, No. 20-cv-33 (Slip. Op. at 10).

At some points, the State even attempts to paint its nine-person limit on gathering for religious worship as treating religion *especially favorably*: "while indoor places where people congregate for prolonged periods are, by

default, closed (like theaters, playhouses, athletic facilities, etc.)," it explains, "there is a special carveout for religious facilities and also for weddings and funerals." State Resp. 8. The suggestion that DHS should get extra credit for giving religious worship marginally better treatment than such activities as going to the movies or attending a sporting event is beyond the pale. There is no fundamental constitutional right to the free exercise of these entertainments. And Respondents cite no authority for the remarkable proposition that a discriminatory burden that "restrict[s] practices because of their religious motivation," *Church of the Lukumi Babalu Aye*, 508 U.S. at 533, is somehow constitutionally permissible so long as the government targets *other* secular activities *for even worse treatment*.[10]

For similar reasons, there is nothing to the State's argument that "Wisconsin Stat. § 252.02(3) specifically contemplates *forbidding* gatherings in

[10] That also suffices to dispose of Freedom From Religion Foundation's creative argument that "altering Emergency Order 28 to reduce restrictions on religious gatherings would make the order vulnerable to litigation under the federal Establishment Clause." FFRF Amicus Br. 12. Set aside the Orwellian nature of the suggestion that *allowing Churches to meet for worship* would constitute an Establishment Clause violation. And ignore, too, the settled federal jurisprudence making clear that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987). The fact remains that eliminating EO 28's nine-person cap on gathering for religious worship would not "*favor* religious gatherings over similar situated secular gatherings," FFRF Amicus Br. 12—it would merely *restore equality* between the two sets of analogous activities.

churches" and "Safer at Home does not even go that far." State Resp. 27. Petitioners have not challenged Section 252.02's purported grant of authority to DHS to "forbid public gatherings in . . . churches" for the simple reason that it is Respondents' *exercise* of that authority that has burdened Petitioner Chapman's religious beliefs, not the fact that a statute purporting to grant the authority is on the books. And the existence of this statutory authorization is wholly irrelevant to Petitioner's challenge—for the Legislature possesses no more power to violate Petitioner's constitutional right to freedom of conscience than DHS does.

The State's attempts to justify its imposition of significantly more restrictive limits on religious worship than other activities that pose a similar (or greater) risk to public health thus all come up short. EO 28's exceptions represent the State's judgment that these other activities—from sending your children to day care to shopping at Costco or Total Wine & More—can all safely be carried on without a draconian nine-person limit. The Wisconsin Constitution does not allow it to reach a different judgment when it comes to gathering for religious worship.

ii. The State Respondents next turn to argument by anecdote, claiming that EO 28's nine-person cap is justified because "some of the most

dramatic outbreaks of COVID-19 nationally have occurred through gatherings at places of worship and funerals." State Resp. 9. But the three examples they point to as establishing that proposition do nothing of the kind.

Two of Respondents' examples can be readily dismissed. First, the State cites news reporting of a cluster of infections traced to a February 29 funeral in rural Georgia, State Resp. 10; but as the date of the funeral alone demonstrates, this "super-spreading" event took place over a week before knowledge of the coronavirus pandemic had become widespread—and, thus, long before adoption of the social distancing, hygiene, and masking protocols that have now unfortunately become an everyday part of our lives. Accordingly, as the article notes, the congregants attending the funeral "wiped tears away, and embraced, and blew their noses, and belted out hymns." Ellen Barry, *Days After a Funeral in a Georgia Town, Coronavirus 'Hit Like a Bomb'*, N.Y. TIMES (Mar. 30, 2020), https://nyti.ms/3fBJZw8.

Second, while the State cites an NPR story characterizing a synagogue in New Rochelle, New York as the "epicenter" of an early coronavirus outbreak, State Resp. 10, there is simply no indication in the article—or in any other reporting of the outbreak, so far as Petitioners are aware—that the outbreak was actually linked in any way with worship at the synagogue (as

opposed to contacts between members of the community). Bill Chappell, *Coronavirus: New York Creates 'Containment Area' Around Cluster In New Rochelle*, NPR (Mar. 10, 2020), https://n.pr/2SQv2gd. And as with the Georgia anecdote just discussed, the early timing of the New Rochelle outbreak all-but confirms that the members of the affected community were not practicing now-standard social distancing, masking, and other safety precautions.

That leaves the State's third example: a March 6 choir practice in Washington state that reportedly led to the infection of 45 choir members. State Resp. 10. But while the State paints this example as demonstrating the danger posed by in-person worship even when precautions are taken—"[a] greeter offered hand sanitizer at the door," it says, "and the members avoided the usual hugs and handshakes," *id.*—here, too, it appears that the choir members in attendance were not practicing any meaningful social distancing or masking practices. For example, while the L.A. Times article reporting on the event indicates that the sixty members in attendance "avoided direct physical contact," it also reports that they gathered together in "two groups, each standing around separate pianos to sing." Richard Read, *A choir decided to go ahead with rehearsal. Now dozens of members have COVID-19 and two are dead*, L.A. TIMES (Mar. 29, 2020), https://lat.ms/2LiSOgk. And

none of the choir members appear to have been wearing masks (a practice that was not encouraged in early March).

In the final analysis, none of the examples cited by the State as supposedly demonstrating the heightened risk posed by gathering for worship shows that a worship service *held in compliance with masking, social-distancing, and other risk-mitigation measures* actually poses any greater or different risks than the numerous activities DHS *does* allow to go forward without any absolute numeral limit. Indeed, the State's own evidence shows that those distancing measures—not the location in which people gather—are the "key to preventing the virus from spreading from person-to person." Westergaard Aff. ¶27. If, as the State has concluded, those measures are sufficient to reduce the risk of a trip to Menards within tolerable levels, the result can be no different for places of worship.

iii. Finally, the State seeks refuge in a handful of district-court cases that have upheld similar numerical restrictions on religious worship, imposed as part of other States' stay-at-home orders, against challenges under the First Amendment's Free Exercise Clause. State Resp. 26. But its string-cite of these federal-court cases is not sufficient to carry the day.

First, the federal-court precedent is not nearly so lopsided as the State

pretends. Respondents cite six district-court cases upholding bans or limits on gathering for worship: *Cross Culture Christian Ctr. v. Newsom*, 2020 WL 2121111, at *3 (E.D. Cal., May 5, 2020); *Roberts v. Neace*, 2020 WL 2115358 (E.D. Ky. May 4, 2020), *rev'd*, No. 20-5465; *Beloved Church v. Pritzker*, 2020 WL 2112374 (N.D. Ill. May 3, 2020); *Lighthouse Fellowship Church v. Northam*, 2020 WL 2110416 (E.D. Va. May 1, 2020); *Gish v. Newsom*, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020); and *Legacy Church Inc. v. Kunkel*, 2020 WL 1905586 (D. N.M. Apr. 17, 2020). But the Sixth Circuit—the only federal court of appeals to have addressed limits on in-person worship—recently reversed one of the State's cases and reached the diametrically opposite conclusion, enjoining Kentucky's ban on worshiping in person. *Roberts*, No. 20-5465. And two federal district courts have likewise restrained or enjoined limits on in-person worship akin to DHS's: *First Baptist Church v. Kelly*, 2020 WL 1910021 (D. Kan. Apr. 18, 2020), and *Tabernacle Baptist Church*, No. 20-cv-33, *supra*.[11]

Further, another two decisions have enjoined limits on drive-in services. *See Maryville Baptist Church*, 2020 WL 2111316; *On Fire Christian*

[11] *Roberts* and *Tabernacle Baptist Church* are not discussed in the State Respondents' brief, since *Roberts* was decided on Saturday, and *Tabernacle Baptist* was decided the same day their brief was filed.

*Center*, 2020 WL 1820249, at *2. The State attempts to sweep these decisions to the side because they did not involve in-person worship, but that gambit does not work: the core reasoning in these cases—that the challenged bans fail strict scrutiny analysis because other "similar secular activities" are treated more favorably, *Maryville Baptist Church*, 2020 WL 2111316, at *4—applies with equal force to the in-person context. Indeed, the *Sixth Circuit* itself has held as much. *See Roberts*, No. 20-5465; *see also Tabernacle Baptist Church*, No. 20-cv-33 (Slip. Op. at 10) ("It follows that the prohibition on in-person services should be enjoined as well.").

Further still, at least another three challenges were resolved before the courts hearing them rendered a decision, because the governmental defendants *voluntarily withdrew or amended* their limits on gathering for worship, in response to the litigation. *See* Plaintiffs' Notice of Voluntary Dismissal Without Prejudice, *Metropolitan Tabernacle Church v. City of Chattanooga*, No. 20-cv-100 (E.D. Tenn. Apr. 29, 2020); Notice of Withdrawal of Plaintiffs' Motion for Temporary Restraining Order, *Temple Baptist Church v. City of Greenville*, No. 20-cv-64 (N.D. Miss. Apr. 22, 2020); Order of Dismissal, *In re Hotze* No. 20-249 (Tex. Apr. 8, 2020). Taken together, these

decisions *reverse* the result of the State's nose-counting exercise—there have been eight wins for religious liberty, in the COVID-19 era, and five losses.

The exercise of tallying up the results in federal court is ultimately a largely irrelevant one, however, since none of these cases involved the issue before *this* Court: whether DHS's discriminatory nine-person quota on gathering for religious worship passes muster under *the Wisconsin* Constitution. All of these cases concerned the *federal* Constitution's protections for religious liberty; all of them that upheld the challenged restrictions on worship did so on the basis of *Smith*'s rule that a "neutral law of general applicability" is exempt from meaningful constitutional scrutiny under the federal First Amendment. *Smith*, 494 U.S. at 879. And if this Court's religious-liberty jurisprudence establishes anything at all, it is that "[t]he Wisconsin Constitution, with its specific and expansive language, provides much broader protections for religious liberty than the First Amendment," *Coulee*, 320 Wis. 2d 275, ¶66—and in particular, that *Smith*'s cramped understanding of the freedom of conscience *does not apply* under Article I, Section 18, *see Miller*, 202 Wis. 2d at 69. The six federal district court cases relied upon by the State thus all critically depend on a constitutional rule that this Court has

*deliberately rejected* as *insufficiently protective* of "the guarantees of our state constitution." *Id.*

Finally, even ignoring all of the foregoing, the State's laundry-list of federal precedents should not sway the Court's analysis in this case because each one of those decisions was thoroughly unpersuasive. As the State itself explains, the key analytical move in those cases was the conclusion that the challenged limits on gathering for worship were not discriminatory or unjustified, because the "[g]rocery stores, liquor stores, and marijuana dispensaries" left untouched by the challenged orders "are not the proper point of comparison." State Resp. 30 (quoting *Cross Culture Christian Ctr.*, 2020 WL 2121111, at *6). As shown above, that reasoning is utterly unpersuasive. "Risks of contagion turn on social interaction in close quarters" no matter "why [people] are there," and the question why "someone [can] safely walk down a grocery store aisle but not a pew" has no rational answer. *Maryville Baptist Church*, 2020 WL 2111316, at *4. This Court should not follow the federal district courts that have reasoned otherwise into error.

### D. Petitioners Are Likely To Succeed in Showing that EO 28 Infringes the Right to Assembly and the Liberty of Speech.

Section 4 of Article I of the Wisconsin Constitution guarantees that "[t]he right of the people peaceably to assemble, [and] to consult for the

common good . . . shall never be abridged." WIS. CONST. art. I, § 4. "*Shall never be abridged*." There is nothing ambiguous or equivocal about this command. And now, when confronted in this Court by Section 4's language, the State, to its credit, at least partially concedes this issue. The State has now offered a narrowing construction of the Order, inviting the Court to read it as allowing outdoor assemblies of any number and for any purpose. State Resp. at 35–36. Announced for the first time in response to this litigation, this reading of the Order—though quite difficult to square with EO 28's text—is welcomed by Petitioners. But even were this Court to issue an order adopting this interpretation—as it should—EO 28's constitutional defects under Section 4 would only partially be cured.

**1. EO 28 Is Overbroad.**

**a. The Court Should Accept The State's Narrowing Construction Of EO 28**.

EO 28 *does not* restrict political assemblies and public gatherings that take place outdoors, the State now informs this Court and the rest of Wisconsin, because the Order's exception for individualized outdoor exercise in fact permits *all* outdoor activity, so long as participants comply with social distancing regulations. State Resp. at 35–36. For Wisconsinites who cherish the right "peaceably to assemble," this reading of the scope of EO 28's exception

is welcome news. But it is also surprising news, given the plain text of EO 28. That text, as discussed in our opening brief, flatly prohibits "[a]ll public and private gatherings of any number . . . except for the limited purposes expressly permitted in this Order," EO 28, § 3; (Pet. App. at 5)—an unorthodox way to begin, were the State's intent really to allow any activity whatsoever that takes place outdoors (so long as social distancing is observed).

Respondents' newfound interpretation of the Order does not come into any clearer view when one turns to the text of the exception for "outdoor activity" itself:

> Outdoor activity. To engage in outdoor activity, including visiting public and state parks, provided individuals comply with Social Distancing Requirements as defined below. Such activities include, by way of example and without limitation, walking, biking, hiking, or running. Individuals may not engage in team or contact sports such as by way of example and without limitation, basketball, ultimate frisbee, soccer, or football, as these activities do not comply with Social Distancing Requirements. Playgrounds are closed.

EO 28, § 11(c) (Pet. App. at 10). Given the settled ground-rules of statutory construction, one must strain hard indeed to read this provision, as the State now does, as a broad authorization of any sort of outdoor activity. Under the canon of *eiusdem generis*, for example, the "general word" "outdoor activity" would ordinarily be interpreted in a way that is constrained by the "specific words in [the] enumeration" that follows: walking, biking, hiking, and

running. *State v. Engler*, 80 Wis. 2d 402, 408, 259 N.W.2d 97 (1977). And if the enumeration of those specific individualized exercise activities *does not* perform this constraining function, one cannot help but wonder why they were included. *See State ex rel. Reimann v. Circuit Court for Dane County*, 214 Wis. 2d 605, 619, 571 N.W.2d 385 (1997) ("[I]t is a basic rule of statutory construction that courts are to give effect to every word of a statute, if possible, so that no portion of the statute is rendered superfluous."). These standard interpretive considerations explain why Petitioners concluded that this provision could not sensibly be read to authorize, as the State now announces, any and all outdoor gatherings, without limitation as to number of people and for any reason.

It appears that the rest of Wisconsin, including the State itself, has likewise misunderstood the meaning of the "outdoor activities" exception to EO 28's flat ban on "all public and private gatherings of any number of people." The Department of Administration, for example, gave the following reason when it denied a permit to the very outdoor protest that Petitioner Fabick wanted to attend: "Due to the Wisconsin Department of Health

Services safer at home order."[12] Wisconsin Public Radio,[13] private employers,[14] law enforcement officials,[15] and the protesters themselves all also appear to have been led into the same error.[16] And none of the State's leaders—not the Governor, nor the Secretary of DHS, nor the Attorney General—spoke up to correct this widespread misunderstanding of EO 28, until, that is, Petitioners brought the present litigation. The people of Wisconsin

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[12] Mentor36, *Despite Rejected Permit, Organizers Forge Ahead With Friday Rally in Madison to Reopen State,* WISCONSIN DAILY NEWS (Apr. 19, 2020), https://bit.ly/2WIO7lr. A statement by the Department of Administration is reported to have confirmed that "the request for the permit was denied due to the Wisconsin Department of Health Services 'Safer at Home' order, which aims to limit the spread of COVID-19." *Id.*

[13] WPR Staff, *More Than a Thousand Safer-At-Home Protesters Converge On Capitol,* Wisconsin Public Radio (Apr. 24, 2020), https://bit.ly/2WkYugj ("A Madison Police Department spokesperson said city officers were monitoring the gathering, which violates Wisconsin's 'Safer at Home' order, but official jurisdiction of the protest falls to Wisconsin State Capitol Police. Wisconsin's current stay-at-home order[, i.e., EO 28,] bars 'public and private gatherings of any number of people that are not part of a single household.'").

[14] Keith Uhlig, *Aspirus Doctor on Leave After Attending Rally Says He's Target of Harassment,* WAUSAU DAILY NEWS (Apr. 28, 2020), https://bit.ly/3fFMI7N (reporting that Wisconsin doctor ""was placed on leave for breaking [his private employer's] requirement that its employees adhere to the state's safer-at-home order. That order prohibits gatherings of people in groups of 10 or more.").

[15]WPR Staff, *Stay-At-Home Protesters Converge on Wisconsin Capitol, supra* (Madison Chief of Police Chief of the Madison Police Department advised those planning to celebrate Easter that prohibition on gatherings "includes gatherings in parking lots or outdoor spaces").

[16] *Id.* (protester stated that "This is an illegal assembly . . . Evers says we're illegals.") (quotation marks omitted).

should not have had to wait for two of their fellow citizens to come forward and challenge the law to learn the meaning of it.

Notwithstanding these concerns about the State's atextual, litigation-driven interpretation of EO 28, Petitioners welcome DHS's partial concession, and we respectfully urge the Court to adopt it. But if the State's proffered interpretation is a bridge too far for the Court, the State has also suggested the correct, and we submit only, alternative consistent with the command of Article I, Section 4: EO 28's "constitutionality could be saved simply by invalidating applications to gatherings for the purpose of political demonstration." State Resp. at 40. Accordingly, in light of the State's partial concession, we submit that the Court should enter a judgment (1) declaring that EO 28's restriction on public and private gatherings does not (or cannot) apply to political assemblies that are held outdoors (in compliance with social distancing limitations), and (2) enjoining Respondent Palm to promulgate a revised version of EO 28, or other formal public directive, that clearly states the interpretation the State has now advanced in this Court.[17]

[17] This court has explained that a "statute challenged as unconstitutionally overbroad can be 'cured' by means of judicial interpretation, which provides for a narrowing and validating construction of the law. The court may also excise or sever the unconstitutional portion of the statute, leaving the rest of the legislation in force. Finally, the court may strike down the entire statute, holding it to be

### b. Even Accepting The State's Narrowing Construction, EO 28 Remains Unconstitutionally Overbroad.

While narrowing the reach of EO 28 in the way the State suggests would reduce the overbreadth of the Order, that *is not* sufficient to cure its constitutional defects. For the reasons set forth in our opening brief and below, the Order remains unconstitutionally overbroad.[18]

i. Respondents argue that EO 28 is not overbroad because it does not restrict "non-physical" forms of expressive "assembly," such as through the Internet, telephone, and other mass electronic communications. But the right to assemble is a distinct right, "cognate to those of free speech and free press and . . . equally fundamental," *DeJonge v. Oregon*, 299 U.S. 353, 364

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unconstitutional on its face." *State v. Thiel*, 193 Wis. 2d 505, 522, 515 N.W.2d 847 (1994).

[18] Contrary to the State's contention, *see* State Resp. at 45–47, Petitioners did not argue in their opening brief, and do not argue now, that this Court should strike down Wis. Stat. § 252.02(3). Petitioners argue that EO 28 is unconstitutional on its face insofar as it bans all forms of expressive assembly. Because the authority that Wis. Stat. § 252.02(3) confers on Respondent DHS could be, and could here have been exercised in a way that does not violate the Wisconsin Constitution, the Statute is not facially unconstitutional. The presumption that statutes should be read to avoid raising constitutional questions, see *Baird v. La Follette*, 71 Wis. 2d 1, 5-6, 239 N.W.2d 536 (1976), would suggest that, to the extent that EO 28 violates the Wisconsin Constitution, it is quite likely *ultra vires* under Wis. Stat. § 252.02(3).

(1937).[19] And the essential and defining characteristic of the right of *assembly*, what sets it apart from these other forms of expression, is, and always has been, people physically coming together in the same place.[20] Virtual conferences, whether audio or video, travel through wires or over airwaves; but an *assembly* occurs in a physical space. A "non-physical assembly" is a constitutional oxymoron.

It can thus come as no surprise that the United States Supreme Court has made clear that the right to assemble is a right to assemble in person. It is a right that is often exercised outdoors, but that is always exercised physically and in person:

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[19] Indeed, this conclusion is all the clearer in the Wisconsin Constitution, which enumerates "[t]he right of the people peaceably to assemble" and the "liberty of speech" in entirely separate sections of Article 1.

[20] Physical presence has always been the defining feature of the right to assemble. Founding era dictionaries define the verb "assemble" as "[t]o bring together in one place," 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, 1785); *see also* 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New Haven, 1828) (defining "assemble" as "to meet or come together; to convene, as a number of individuals"). At law, an "assembly unlawful" was defined "as a meeting of three or more persons to do an unlawful act"; one such form of unlawful assembly was prescribed in England by the Riot Act, which provided "that where twelve, or more, unlawfully assembled, continue together an hour or more after proclamation to depart, they shall be guilty of felony."1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (London, 1764) (defining an "assembly unlawful" as "a meeting of three or more persons to do an unlawful act"). One could join a conspiracy merely by agreeing, but to assemble unlawfully required being physically present.

> First Amendment rights are not limited to verbal expression. The right to petition often involves the right to walk. The right of assembly may mean pushing or jostling. Picketing involves physical activity as a well as a display of sign.

*Eisenstadt v. Baird*, 405 U.S. 438, 460 (1972) (Douglas, J., concurring). Indeed, sidewalks, streets, and parks occupy "a special position in terms of first Amendment protection," not only because they are public, but because they provide a *physical* location in which the people may assemble to make their collective presence and voice known to, and heard by, those in power, even those who sit on the Supreme Court of the United States itself. *United States v. Grace*, 461 U.S. 171, 180 (1983).[21] A protest march, a demonstration, a telephone or video conference, a book, a radio broadcast, a pamphlet, and a blog are all forms of expression, but only the demonstration and the protest

[21] *See also Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147 (1969) (ordinance prohibiting participation in any parade, procession, or other public demonstration without obtaining permit "unwarrantedly abridge[d] the right of assembly and the opportunities for the communication of thought . . . immemorially associated with the resort to public places") (*quoting Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)) (alterations in original); *Hague v. C.I.O.*, 307 U.S. 496, 515–516 (1939) (opinion of Roberts, J, joined by Black, J.) ("Whenever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.").

march are forms of assembly. For purposes of the Constitution, there are no assemblies on the Internet, any more than there are sidewalks in cyberspace.

ii. As explained in our opening brief, if EO 28 is interpreted according to its plain text—as prohibiting all public and private gatherings for any purpose, both indoors and outside—it is facially and irremediably overbroad and must be struck down. *See Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). But even if the Court accepts Respondents' invitation to adopt a narrowing construction of the Order that limits its ban to "physically gathering with others outside the home, *in enclosed spaces*," State Resp. at 39 (emphasis added), it remains unconstitutionally overbroad—as demonstrated by the other exceptions that Respondents have included in EO 28. As discussed below, while EO 28 bans *all* indoor political assembly (according to the State's construction), it allows a large variety of other types of activities to take place "in enclosed spaces"—from indoor liquor sales and child care to indoor religious services (in groups of no more than nine) and shopping for power tools. For all of these exceptions, and others, the State concluded that it could adequately address "the exact source of the 'evil' it seeks to remedy" with social distancing protocols. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The constitutional right to

assembly does not permit the State to then ban altogether indoor assemblies for political speech and association, which can observe social distancing protocols just as readily if not more so.

iii. Finally, the State's argument that EO 28 imposes restrictions on the right to assemble that are supportable under the *Jacobson* framework fails for both of the reasons discussed above, *supra*, at pp. 15–23. First, *Jacobson* is not controlling precedent when it comes to interpreting the Wisconsin Constitution—and even if it was, as the above discussion alone shows, there has been substantial development in the U.S. Supreme Court's First Amendment jurisprudence in the 115 years that have intervened since *Jacobson* was decided. In any event, the Order imposes a set of restrictions that are both drastically over- and under-inclusive, combining to render EO 28 indefensibly arbitrary and irrational, regardless the standard of review.

**2. EO 28's Ban On Indoor Political Assemblies Is An Impermissible Time, Place, Or Manner Restriction.**

Even if the Order's prohibition on assemblies is construed as limited to assemblies that take place indoors, that ban still constitutes an impermissible time, place, or manner restriction on the right to engage in expressive assembly. That is so for two independent reasons: because the order is not

narrowly tailored and because it does not leave open adequate alternative forms of expressive assembly.

**a. The Ban Is Not Narrowly Tailored.**

Even if construed to bar only those gatherings that take place indoors, EO 28's ban on political assembly is not narrowly tailored. A time, place, or manner restriction may not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). And it must also target "the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485. As demonstrated in our opening brief, Pet. Mem. at 52–58, it is evident from the very different restrictions placed on non-expressive indoor activities that EO 28 is both underinclusive (permitting many indoor gatherings that are, in terms of public health risks, materially indistinguishable from the constitutionally protected political assemblies it prohibits) and overinclusive (barring many constitutionally protected political assemblies that are, in terms of public health risks, indistinguishable from other indoor gatherings that it permits). Again, hundreds of customers and employees may gather at Menards or Total Wine & More, and 50 children and ten adults may assemble in a day care center, but groups of citizens cannot assemble in meeting halls or like venues to exercise

their freedom of political expression, notwithstanding that social distancing and other risk-mitigation measures are at least as feasible (likely more so) in the meeting hall than in Home Depot. Indeed, under EO 28 two neighbors cannot gather together in their living rooms to discuss the upcoming election. No conceivable account of the government's legitimate public-health interests justifies *those* irrational lines.

Pointing to the United States Supreme Court's decision in *Ward*, the State asserts that it may restrict speech and expressive assembly so long as its interest would be achieved "less effectively absent the regulation." State Resp. at 42 (quoting *Ward,* 491 U.S. at 798–99). But as the *Ward* Court explained in the very next sentence, the "less effectively" language seized upon by DHS "*does not mean* that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799 (emphasis added). Moreover, "[a] complete ban can be narrowly tailored but *only if each activity within the proscription's scope* is an appropriately targeted evil." *Id.* at 800–801 (emphasis added) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

*Ward*'s actual standard is fatal to EO 28's ban on political assembly, even if it is confined to indoor gatherings. For as the existence of EO 28's

myriad exceptions for other indoor activities that involve people assembling together shows, an absolute ban on assembling under the same roof for expressive purposes by definition *cannot* be the least-restrictive means of furthering the State's ends. Again, under EO 28's arbitrary regime, while people may not assemble indoors to discuss the upcoming election, attend a political meeting, or even hold a campaign strategy meeting, they *are* allowed to gather inside fulfillment centers, banks, factories, in line at the post office, in laundromats, at the dry cleaners, and in office supply, liquor and hardware stores. If "the 'evil' [EO 28] seeks to remedy," *Frisby*, 487 U.S. at 485, may be addressed through social distancing protocols to allow these establishments, and the numerous others excepted by the Order, to remain open for business, the result cannot be different for political assemblies.

**b. EO 28 Does Not Leave Open Reasonable Alternatives.**

i. EO 28 must also, and independently, be struck down because it does not leave open reasonable alternative channels of expression and association. The State resists this conclusion, insisting that the Order allows Wisconsinites to "express themselves freely over the internet, phone, or any other media." State Resp. at 44. But as explained in our opening brief and above, the availability of these modern electronic media cannot change the

analysis, since they are not alternative channels of *assembly* at all. Again, there is no such thing as a "non-physical assembly."

Moreover, even if such a "virtual assembly" were an alternative "assembly" for purposes of the Constitution—which it is not—it would still not amount to a constitutionally adequate alternative. As an initial matter, these "alternative" forms of "virtual" communication require access to expensive technology and Internet connections and are thus not necessarily available to the economically disadvantaged. The State characterizes this objection as a "dodge," but the U.S. Supreme Court has repeatedly struck down broad bans of speech and assembly on this basis. See *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (residential yard signs constitute "an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute"); *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 160–61 (2002) ("because they lack significant financial resources, the ability of the Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvass door-to-door"); *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) ("[d]oor to door distribution of circulars is essential to the poorly financed causes of little people"); *see also*

*Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) ("[m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive"). This Court should do no less.

Quite apart from their limited availability to people of modest means, the "virtual" forms of "assembly" touted by the State are also insufficient because they are not *comparably effective* means of communication and association. *Gilleo*, 512 U.S. at 57 ("Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means." (emphasis in original)). From Magna Carta to the Constitution, Louis XVI to Richard Nixon, the people assembled *en masse* have always commanded attention that "liking" a comment on Facebook cannot replace (even leaving aside the fact that private companies such as Facebook are more than willing to censor content and silence disfavored points of view).

ii. As just shown, the Government may not justify a ban on one form of political assembly or expression by pointing to alternatives that are patently inadequate. That principle also shows why the State's proposed narrowing construction of EO 28's ban is not sufficient for the State to carry the

day. For the availability of outdoor assemblies is simply not an adequate alternative to indoor assemblies.

The right to gather and exchange ideas in private, out of sight of the state and of the general public, is often essential for open political discussion. While the ancient Athenians may have conducted their public affairs in meetings that occurred out-of-doors, at least since the town meetings of colonial New England, the typical American political assembly has traditionally occurred inside—where the proceedings are more easily organized, and may go forward rain or shine. And indoor assembly is especially important for those who hold, and wish to discuss, dissenting or unpopular viewpoints. While unquestionably vital in their own right, a protest in the public park or a discussion group on the Internet are no alternatives to gatherings, for example, of friends and extended family, held in private kitchens and living rooms, where the issues of the day can be discussed and debated in candor without fear of censure or social reproof. Nor does it suffice to tell members of a political party, for another example, that they may "assemble" to select their leaders or to discuss campaign strategy either in the public park or over the Internet but not in a conference center (observing social distancing protocols). By banning these private indoor gatherings and offering the people the

option of the Internet in their place, EO 28—even as now construed by the State in response to this litigation—unconstitutionally abridges "the right of the people peaceably to assemble, [and] to consult for the common good." WIS. CONST. art. I, § 4.

### E. Petitioners' Right to Travel Claim Is Likely To Succeed.

The State does not dispute that freedom of movement is a fundamental right protected under the Wisconsin Constitution. Indeed, it concedes that this Court "has recognized" that the State Constitution "protects against impermissible infringements on freedom of movement." State Resp. 47 (citing *Brandmiller v. Arreola*, 199 Wis. 2d 528, 544 N.W.2d 894 (1996)). And it also concedes, albeit grudgingly, that Petitioners' "individual freedoms to travel" are "important." State Resp. 53; *see also id.* at 55 (noting that "no one questions that the individual liberties at issue [in this case] are significant").

The State also agrees that it must permit travel that is associated with Wisconsinites' exercise of their fundamental rights to freedom of worship and assembly (at least to that extent that the State allows such activities). *See, e.g.,* State Resp. 2 (EO 28 "does not restrict the petitioners from traveling outdoors to engage in [political] activities" and "does not prohibit travel

to religious services"); *id.* at 49 ("people may travel to engage in outdoor activity (including political rallies)"); *id.* at 53–54 (EO 28 permits "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)"); *see also id.* at 54 (suggesting that the Order allows "leisurely drives" to "open places"). At an absolute minimum, therefore, the State appears to have conceded that to the extent this Court concludes that EO 28 impermissibly restricts the exercise of the rights to worship and assembly, this Court must also invalidate the Order's restrictions on travel associated with those activities.

But that is as far as the State is willing to go. Notwithstanding its failure to seriously dispute that EO 28, which flatly prohibits (indeed, criminalizes) all other travel that the State has not preapproved as "essential" and thus deemed permissible, imposes a substantial burden on the exercise of the right to travel, s*ee* Pet. Mem. 64–65,[22] the State attempts to defend EO 28's

[22] To be sure, the State's description of the Order's travel provisions attempts to soft-pedal their effect, as it suggests that the Order merely "generally instructs Wisconsin citizens to stay at home." State Resp. 6. But the Court should not be distracted by such euphemistic language. EO does not "generally instruct" Wisconsinites to stay home. Its very first section "order[s]" them to do so, EO 28 § 1 (Pet. App. 20), and it subsequently drives home that order by reiterating that "[a]ll forms of travel are prohibited" unless specifically excepted as "essential." EO 28 § 5 (Pet. App. 25).

infringement of this fundamental right. None of its arguments have merit.

1. The State begins, once again, with its contention that the *Jacobson* "framework" both governs this Court's analysis and essentially requires the summary rejection of Petitioners' challenge to the Order's travel restrictions. State Resp. 48–50. For the reasons already discussed, *supra*, pp. 15–23; Pet. Mem. 39–45, 68–69, *Jacobson*'s 115-year-old treatment of a *federal* due process constitutional claim has little bearing on the application of the modern constitutional framework for the examination of claims regarding governmental infringements on fundamental enumerated rights, and it has no bearing at all on the analysis of claims challenging the infringement of fundamental rights guaranteed by the *Wisconsin* Constitution.

In addition, as noted, the State's insistence that *Jacobson* supplies the standard for assessing challenges to emergency orders restricting the exercise of fundamental rights cannot be squared with this Court's decision in *Ervin v. State*, 41 Wis. 2d 194, 163 N.W.2d 207 (1968). This Court never even cited *Jacobson* in *Ervin*, much less suggested that *Jacobson* governed its analysis of the constitutional challenge to the emergency curfew at issue in that case.

The State doubles down on its *Jacobson* argument by suggesting that

an even older federal decision, *Compagnie Francaise de Navigation a Vapeur v. Board of Health*, 186 U.S. 380 (1902), confirms the need for the Court to apply extreme deference to "travel restrictions during public health crises." State Resp. 48. The *Compagnie* decision is of no help to the State. The plaintiff in that case did not raise a right to travel claim. Rather, it sought to recover *damages* that it suffered as a result of the application to its vessel of a Board of Health quarantine order that it alleged amounted to an impermissible interference with foreign and interstate commerce. *Id.* at 380, 387. The Supreme Court's analysis focused primarily on this Commerce Clause challenge to the statute authorizing the quarantine order. *Id.* at 387–93. After rejecting that challenge, the Court turned briefly to, and rejected, the plaintiff's contention that the quarantine order also deprived it of "its *property* without due process of law" by subjecting its "*vessel*" to restrictions. *Id.* at 393 (emphases added). The Court's rejection of a damages action raising federal commerce clause and due process challenges to the quarantining of a single vessel provides little if any guidance for this Court's review of a challenge to an order subjecting everyone in the entire State to restrictions on their fundamental right of travel as guaranteed by the Wisconsin Constitution. It is not surprising that no majority decision of this Court has ever even

cited, much less relied upon, *Compagnie*.[23]

2. The State next argues that even "without *Jacobson* deference," EO 28's restrictions on the fundamental right to travel survive scrutiny. State Resp. 50–53. This argument fails because it both badly misapprehends the applicable legal standard and then badly misapplies it.

The State argues that in *Brandmiller*, this Court rejected the application of strict scrutiny to right to travel claims. State Resp. 51. Not so. As explained in our opening brief, Pet. Mem. 66 n.20, in *Brandmiller*, this Court applied intermediate scrutiny rather than strict scrutiny only because the municipal "cruising" ordinance challenged in that case, which restricted only a certain manner of travel (by automobile) only in certain places and only at certain times of the day, was, as that description would suggest, akin to a "time, place and manner" restriction. 199 Wis. 2d at 544. This Court nowhere suggested, much less held, that strict scrutiny was inapplicable to restrictions on the fundamental right to travel that were more severe than the limited traffic regulations imposed by such cruising ordinances. In fact, the

[23] Notably, even the United States Supreme Court has suggested that *Compagnie* should be read narrowly, as standing only for the proposition that health authorities may quarantine people who are actually suffering from communicable diseases. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 366 (1997).

Court made clear that some serious restrictions on the right to travel were subject to strict scrutiny,[24] and it cited with approval to its earlier decision in *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 426 N.W.2d 329 (1988), in which it did subject a juvenile curfew ordinance to strict scrutiny. *Brandmiller*, 199 Wis. 2d at 539 (discussing *K.F.*).[25]

There can be no legitimate dispute that the DHS stay-at-home order more closely resembles a mandatory curfew like the one subjected to strict scrutiny in *K.F.*, than it does the type of "time, place, and manner" regulation subjected to intermediate scrutiny in *Brandmiller*. If anything, EO 28's provisions ordering all Wisconsinites to stay at home unless they can invoke specific exceptions approved by DHS, and prohibiting "[a]ll forms of travel" not preapproved by that agency, EO 28 §§ 1, 5 (Pet. App. 20-21, 25), are far

[24] *See id.* at 541 ("Not every governmental burden on fundamental rights must survive strict scrutiny. Reviewing all infringements on the right to travel under strict scrutiny is as inappropriate as applying no heightened scrutiny to any infringement on the right to travel.").

[25] The State notes that because this Court in *K.F.* found that the juvenile curfew at issue there would survive strict scrutiny, it declined to hold whether strict scrutiny was required. But what the State neglects to mention is the *reason* why this Court speculated in *K.F.* that strict scrutiny might not be applicable to the challenged juvenile curfew—i.e., because it was a curfew that applied only to *juveniles*. As the Court noted, "lesser scrutiny" might be appropriate to measures affecting juvenile conduct only "because of the States' greater latitude to regulate the conduct of children," and because children have a "lesser capability for making important decisions." *K.F.*, 145 Wis. 2d at 47 n.10. Those special considerations informing the State's interest in addressing juvenile conduct are of course inapplicable here.

*more* restrictive of travel than the limited juvenile curfew in *K.F.* (which did not confine juveniles to their homes but instead restricted their ability to congregate in or loiter in certain *public* places, and which operated in any event only between the hours of 11 p.m. and 5 a.m.). *K.F.*, 145 Wis. 2d at 31.

Nor does it matter that travel is a heavily regulated activity, and Respondents' comparison of the stay-at-home order to the run-of-the-mill traffic safety regulations found in "Wisconsin's traffic code" is risible. State Resp. 50–51. An order prohibiting—on pain of imprisonment—all forms of travel not precleared by DHS, and threatening Wisconsinites with prosecution if they dare to leave their homes absent preapproved justifications, cannot even begin to be compared to speed limits, jaywalking rules, and other ordinary traffic regulations.[26]

3. Ultimately, however, whether the Court applies strict scrutiny as in *K.F.*, or intermediate scrutiny as in *Brandmiller*, EO 28's travel restrictions cannot survive. As we have discussed, Pet. Mem. 66–68, and as the State does not really dispute, EO 28 bans "non-essential" travel even

[26] The State also cites to decisions discussing the reasonableness, under the Fourth Amendment, of certain traffic stops and vehicle searches. State Resp. 51 n.36 (citing *State v. Iverson*, 2015 WI 101, 365 Wis. 2d 302, 871 N.W.2d 661, and *State v. Matejka*, 2001 WI 5, 241 Wis. 2d 52, 621 N.W.2d 891). Neither decision implicates, much less explicates, the fundamental right to travel.

when such travel can be accomplished, through the use of social distancing and other risk-mitigation measures, without meaningfully exposing the traveler *or anyone else* to the risk of transmission. Moreover, it purports to ban "all forms" of non-essential travel, EO 28 § 5 (Pet. App. 25), even those, such as automobiles, that are ideally suited to social distancing protocols that minimize the risk of infection. Even granting that the State's interest in protecting public health and in battling the current pandemic is compelling, EO 28's severe travel restrictions simply cannot be defended as appropriately tailored under any level of meaningful constitutional scrutiny. *See K.F.*, 145 Wis. 2d at 46; *Brandmiller*, 199 Wis. 2d at 544.

The State responds that we do not support our assertion "that general social distancing without any travel restrictions would be sufficient." State Resp. 50. Of course, since the Order restricts the exercise of a fundamental right, it is the State's burden, not Petitioners', to justify that restriction. Regardless, the State's own affiant confirms that social distancing measures are "key to preventing the virus from spreading from person-to person." Westergaard Affidavit ¶27. And the sufficiency of such measures to minimize the risk of transmission is borne out by the preapproved "essential" activities that EO 28 itself allows to continue so long as social distancing

measures are followed. *See* Pet. Mem. 67–68.[27] In any event, if social distancing is enough to permit activities that do not implicate fundamental rights, it should be enough to permit an activity, like freedom of movement, that constitutes "a basic right . . . under any system of ordered liberty worth the name," *Ervin,* 41 Wis. 2d at 200–01, and that is "the very essence of our free society." *Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

For similar reasons, the State is wrong when it points to the existence of exceptions for so-called "essential travel" as somehow rendering the Order's prohibition of all other travel narrowly tailored or otherwise constitutionally acceptable. State Resp. 49–50, 53–54. The State cannot create arbitrary classes of favored and disfavored travel in this manner, at least not without demonstrating how the disfavored travel poses public health risks that are different in kind or in magnitude from the risks posed by the favored travel. As discussed, the State cannot make such a demonstration here since EO 28

[27] It is only because the State all but ignores that Petitioners agree that the State can constitutionally impose such social distancing and other risk-mitigation measures that it can suggest that the exercise of the fundamental travel rights for which Petitioners seek this Court's protection would *necessarily* lead to increased transmission of COVID-19. *See, e.g.,* State Resp. 49. So long as travel is conducted in accordance with such measures, it is simply not the case, much less "inescapabl[y]" so, *id.* at 47, that "the more people travel throughout Wisconsin, the more the virus will spread."

prohibits travel *even though* it can be undertaken in a way that complies with the types of risk-mitigation standards DHS deems sufficient to protect the public health when applied to the favored classes of travel EO 28 *does* allow.

The State also argues that this Court's rejection in *Ervin* of a challenge to a temporary city-wide nighttime curfew during a period of rioting in Milwaukee compels rejection of Petitioners' claims. State Resp. 52–53. This Court in *Ervin* did not explicitly discuss the standard of review governing the challenge to the curfew ordinance, and as discussed, subsequent decisions such as *K.F.* establish that strict scrutiny is the appropriate standard. But even on its own terms, *Ervin* does not help the State.

*Ervin*, to be sure, involved an "emergency" declaration, but that is where the similarities between that case and this one end. A truly temporary restriction on travel in one city during only certain hours of the day is totally unlike the state-wide, months-long (and counting) prohibition of all non-pre-approved travel at issue here. Moreover, the conditions that led to the imposition of the curfew in *Ervin* were so immediately and directly dire and threatening to public safety—involving as they did "the combination of widespread lootings, sniping from rooftops and multiple arsons" (41 Wis. 2d at 198, 163 N.W.2d at 209)—that this Court concluded that the emergency

curfew "undertaken to restore order in the community" not only was "reasonably made necessary by conditions prevailing," but actually promoted rather than retarded freedom of movement. *Id.* at 201.[28]

Despite the State's attempt to force the comparison, EO 28's statewide ban of all unapproved travel—even travel that can be undertaken in accordance with social distancing and other protective measures—cannot similarly be described as the sort of temporary, limited order-restoring measure at issue in *Ervin*. Moreover, unlike Petitioners here, Ervin made no claim that imposition of the curfew was not "necessary" to serve the city's compelling interest in preserving order during riots. He instead raised an "across-the-board challenge" to the curfew, "asserting that no matter how widespread the community chaos, anarchy and disorder, under no possible set of circumstances can the imposition of a community-wide curfew be upheld." *Id.* at 197–98, 163 N.W.2d at 209. Here, by contrast, Petitioners have claimed, and the State has not made a serious attempt to refute, that EO 28's wholesale prohibition of non-essential travel, even when such travel can be conducted safely, is not "reasonably . . . necessary" to address the State's interest in

[28] *See also id.* ("[F]reedom to walk under sniper's bullets, to travel under a fusillade of gunfire, to leave one's home only to encounter milling mobs blocking every thoroughfare is not freedom of movement.").

promoting public health.[29] *Id.* at 201, 163 N.W.2d at 211. In this respect as well, *Ervin*'s rejection of a constitutional challenge has little bearing on how this Court should resolve this case.

## III. THE REMAINING FACTORS FAVOR IMMEDIATE INJUNCTIVE RELIEF

Finally, the remaining equitable factors favor the immediate grant of an injunction. Respondents do not dispute that the injuries EO 28 inflicts on Petitioners' constitutional rights constitute *per se* irreparable harm—harm that a subsequent damages remedy could never make whole. *See White House Milk Co. v. Thomson*, 275 Wis. 243, 245, 81 N.W.2d 275 (1957); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). Respondents do point to the purportedly "temporary" nature of the challenged restrictions, State Resp. 55, but not once do they provide any assurance that these restrictions will not be extended again, when EO 28 expires (and their zealous defense of the challenged limits strongly suggests otherwise). In any event, the State ultimately expressly acknowledges that "the individual liberties at issue are significant." *Id.*

[29] For the same reasons, even under the *Jacobson* standard, the Order's travel restrictions have "no real or substantial relation" to the public health interests that the Order purports to address, *Jacobson*, 197 U.S. at 31, and DHS's exercise of its legitimate power to protect the public health has, to that extent, been exercised in "such an arbitrary, unreasonable manner," *id.* at 28, as to warrant judicial intervention.

Instead, the State contends that the Court should stay its hand because "the competing interests of the general public are profound." *Id.* But Respondent's account of how those interests would be affected is based, in the main, on a description of what could happen if EO 28 were lifted *in its entirety*—a remedy Petitioners have not requested. *Id.* at 11–13. And while the State, and the public's, interest in addressing "the threat posed by COVID-19" are unquestionably compelling, *id.*, Respondents have completely failed to show that the specific, arbitrary distinctions challenged here—allowing Costco and Menards to essentially remain open for business as usual, but imposing draconian restrictions on the fundamental rights of worship, assembly, and travel—do anything whatsoever to advance them. While no one questions "the interest the public has in avoiding the harms that would result if COVID-19 spreads out of control," *id.*, neither the State nor the public has *any* legitimate interest in maintaining restrictions that are not rationally tailored to that goal, and that unjustifiably violate fundamental constitutional rights.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the Petition and the Motion, and that it issue an immediate order

granting Petitioners the injunctive relief they have requested.

Dated: May 11, 2020

Respectfully submitted,

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

Counsel for Petitioners

*Admitted *pro hac vice*

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

## CERTIFICATE OF SERVICE

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

Dated: May 11, 2020

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