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SUPREME COURT

No. 2020AP000828 - OA

**STATE OF WISCONSIN
SUPREME COURT**

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.

**NON-PARTY BRIEF ON BEHALF OF
THE FREEDOM FROM RELIGION FOUNDATION AS *AMICUS*
CURIAE IN SUPPORT OF RESPONDENTS**

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The Freedom From Religion Foundation (“FFRF”) submits this non-party brief in support of Respondents and in opposition to Petitioners’ Emergency Motion for an Injunction.

INTEREST OF AMICUS CURIAE

The Freedom From Religion Foundation is a national non-profit organization whose primary purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF seeks to safeguard the interests of its Wisconsin members. FFRF has more than 32,000 members nationally, including nearly 1,500 Wisconsin members. FFRF’s national headquarters is also located in Madison, Wisconsin.

FFRF has expertise, and a special interest, in the proper application of constitutional principles relating to religion and government. FFRF ends hundreds of state/church entanglements each year through education and persuasion, while also litigating, publishing a newspaper, and broadcasting educational programming. Consequently, FFRF has a direct interest in ensuring the proper application of the religion clauses of both the United States Constitution and the Wisconsin Constitution. In addition, any preferential exceptions to “stay-at-home” orders that would apply to

churches would subject FFRF's members to further community spread of COVID-19.

INTRODUCTION

The United States is in the midst of fighting the deadliest pandemic the world has seen in over a century. To protect the health and safety of citizens, the vast majority of states have issued emergency “stay-at-home” orders of some form or another. In Wisconsin, the “stay-at-home” order at issue in this case is outlined in Emergency Order 28. One petitioner in this case, Larry Chapman, wants to use religion to strike down Wisconsin’s temporary state health order. If this Court agrees to strike down, or even temporarily enjoin the order, the effect will be to spread a deadly virus, which is to risk endangering the health and lives of hundreds if not thousands of other Wisconsin citizens. Fortunately, Emergency Order 28 does not violate Article I, Section 18 of the Wisconsin Constitution, so the Court should not enjoin the order.

ARGUMENT

Mr. Chapman seeks an injunction against Emergency Order 28, which restricts community gatherings in order to combat the ongoing COVID-19 pandemic. He alleges, in part, that it violates his rights under Article I, Section 18 of the Wisconsin Constitution. To succeed in his request for an injunction, Wisconsin law requires Mr. Chapman to make a showing that (1) there is “a reasonable probability of ultimate success on the merits,” (2) there is a risk of “irreparable harm” in the absence of injunctive relief because there is no “adequate remedy at law,” (3) an injunction is “necessary to preserve the status quo,” and (4) the balance of equities favors issuing the injunction. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520–21, 259 N.W.2d 310, 314 (1977), *cf.*, *Pure Milk Prod. Co-op. v. Nat’l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979). This Court should deny the request for an injunction because Mr. Chapman fails to demonstrate a reasonable probability of ultimate success on the merits, and because Mr. Chapman fails to demonstrate that the balance of equities favors issuing an injunction.

I. Mr. Chapman will not succeed on the merits of his Article I, Section 18 claim

Mr. Chapman relies on two arguments to justify his claims under Article I, Section 18 of the Wisconsin Constitution. First, Mr. Chapman suggests that the religious burden he claims to suffer from falls into a special category of conduct that the state could never limit even if it proved a compelling interest to justify its action. Second, Mr. Chapman argues that he has established that the order does not pass strict scrutiny under Article I, Section 18. Both of Mr. Chapman's arguments fail.

A. Conduct related to religious practice may be regulated for the protection of society

Mr. Chapman's first assertion, that worship gathering size could never be limited, is without support. Mr. Chapman essentially argues that even if the government could prove that temporarily restricting public gatherings, including religious gatherings, to nine people would save five million lives, the Court must enjoin the order. This argument relies entirely on language from one case: *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 320 Wis. 2d 275, 768 N.W.2d 868 (2009), which involved a claim related to Wisconsin's "ministerial

exemption.” A more comprehensive view of this Court’s jurisprudence demonstrates that the Court has delineated when the state does, and does not, have the power to burden religious practices. “[T]he constitutional freedom of religion is absolute as to beliefs but not as to the conduct, which may be regulated for the protection of society.” *State v. Neumann*, 348 Wis. 2d 455, 516, 832 N.W.2d 560, 592 (2013) (citations omitted). In *Coulee*, this Court held that telling a religious ministry who it must accept as a minister was categorically outside the power of the government because such an order would take an official position on “Catholic faith and worldview.” *Coulee Catholic Sch.*, 320 Wis. 2d 275, 283, 768 N.W.2d 868, 872 (2009). Here by contrast, the government is not telling Mr. Chapman what his religion does or does not dictate, it is merely regulating activity (in this case communal gatherings) “for the protection of society.”

Mr. Chapman next proposes that claims under Article I, Section 18 of the Wisconsin Constitution are evaluated under a four part inquiry. Under the proposed inquiry the challenger first “has to prove (1) that [he] has a sincerely held religious belief, and (2) that such belief is burdened by the application of the state law at issue.” If the challenger succeeds on both counts “the burden shifts to the state to prove (3) that the law is based upon

a compelling state interest (4) that cannot be served by a less restrictive alternative.” *Coulee*, 320 Wis. 2d 275, ¶61. Mr. Chapman’s claims fail the second, third, and fourth prongs of his proposed test. He is therefore unlikely to succeed on the merits of his claim.

B. Mr. Chapman has not shown that a sincerely held religious belief is burdened by the state

Here, *amicus curiae* assumes that Mr. Chapman has “a sincerely held religious belief.” However, Mr. Chapman has not made a proper showing that such a belief is being burdened. Mr. Chapman requests an injunction so that he may fulfill his desire to “attend public, in-person, corporate worship at Lakewood [Baptist Church],” but provides no evidence that Lakewood Church would commence worship services with ten or more people if Emergency Order 28 is lifted (Pet. Br. 12). If Lakewood, like many other centers of religious worship around the country, voluntarily limited large gatherings in order to protect its members, including its especially vulnerable elderly members, then enjoining Emergency Order 28 would not provide Mr. Chapman with relief. Mr. Chapman is only a member of the church’s congregation. Mr. Chapman has

no more ability to affect when and how his church operates than a film buff has over the operations of their local movie theatre, or a Rolling Stones fan has over the scheduling of the band's tour.

In fact, Emergency Order 28 does not prohibit in-person worship at Lakewood Church at all, it merely requires the gatherings taking place in the church to be limited to no more than nine people. Given the sparse factual claims in the petition, this Court should not issue an injunction until a Wisconsin court can establish the factual record necessary to do so, especially in the midst of an ongoing pandemic. However, even if Mr. Chapman could carry his burden, an injunction is inappropriate because the government will be able to show both that the order is based upon a compelling state interest and that this interest cannot be served by a less restrictive alternative.

C. Emergency Order 28 is based upon a compelling state interest: saving lives.

“Public safety and the protection of human life is a state interest of the highest order.” *State v. Miller*, 196 Wis. 2d 238, 249, 538 N.W.2d 573, 577 (Ct. App. 1995), *aff'd*, 202 Wis. 2d 56, 549 N.W.2d 235 (1996). The

purpose of Emergency Order 28 is to protect human life. It is a response to the global COVID-19 pandemic.

Wisconsinites have rights to worship and to assemble, but neither of those rights is unlimited. The government already regularly limits worship gatherings if they jeopardize public health. For instance, the government can mandate the installation of fire safety equipment in the sanctuary of a church. *Peace Lutheran Church*, 246 Wis. 2d 502, 518, 631 N.W.2d 229, 237 (Ct. App. 2001) (“any burden the Fire Prevention Code may have on the sincerely held beliefs of the Church is outweighed by the compelling interest in preserving life and property”). *See also, Christ College, Inc. v. Bd. of Sup’rs, Fairfax Cty.*, 944 F.2d 901 (4th Cir. 1991) (rejecting the argument that zoning and fire safety policies that limited the number of people who could be inside a church “impinged on [a church’s] first amendment rights to the free exercise of religion.”). The congregants’ right to gather and worship is limited by the government’s need to protect both the lives of congregants and the community from a fire. Preventing large gatherings to protect health due to a pandemic is even more crucial. Consequently, the government will be able to show that Emergency Order

28, including the provision limiting religious gatherings, is based upon a compelling state interest.

Wisconsin is not alone in using “stay-at-home” orders as a tool to fight this virus. At least 42 U.S. states have issued a statewide “stay-at-home” order of some sort.¹ The reason for these restrictions is simple: “stay-at-home” orders, such as Emergency Order 28, save lives.² Some of these orders contain provisions nearly identical to Emergency Order 28’s nine-person religious gathering cap. For example, a federal court has already upheld an Illinois order limiting in-person religious gatherings to no more than ten people, in part because constitutional rights “are subject to restriction if necessary to further compelling government interests—and, certainly, the prevention of mass infections and deaths qualifies.” *Cassell v. Snyders*, No. 3:20-cv-50153, 2020 WL 2112374, at *1 (N.D. Ill. May 3, 2020).

¹ Sarah Mervosh, Denise Lu and Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, New York Times (April 20, 2020), available at: <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>

² Heather Cherone, *Stay-at-Home Order Saved Nearly 1,700 Lives in Chicago: City Data*, WTTW (April 15, 2020), available at: <https://news.wttw.com/2020/04/15/stay-at-home-order-saved-nearly-1700-lives-chicago-city-data>

D. Emergency Order 28 saves lives using the least restrictive means by simply limiting the size of gatherings.

There is no less restrictive way to achieve the government's compelling interest in protecting human life than limiting in-person religious gatherings to nine people. Viruses do not respect houses of worship, they simply travel from person to person. The more people who gather, the more viruses can spread. There is no way to effectively prevent this other than preventing person-to-person contact, so large gatherings must be stopped. As a federal court stated when upholding a nearly identical provision, "the Court has not found any less restrictive rules that would achieve the same result as the prohibition on large gatherings. While permitting [a church] to hold in-person services with its full congregation might be less disruptive, it would not advance the government's interest in curtailing COVID-19 'to the same degree' as the ten-person limit." *Id* at 12. Thus, the state has every right to temporarily limit these services under the current extreme circumstances.

Mr. Chapman argues that this restriction cannot be the least restrictive means of achieving the government's goal of saving lives because other essential activities are not subject to the same limit. Mr.

Chapman goes even further to claim that the order discriminates against religious gatherings based on their religious status. This argument is fatally flawed for two independent reasons.

First, religious gatherings are not subjected to discriminatory treatment on account of their religious character. There are only three types of voluntary communal gatherings deemed essential under Emergency Order 28: religious services, weddings, and funerals. All three activities are subject to the same nine-person restriction. Multiple federal courts have found that the grocery stores and other retailers that Mr. Chapman points to are not similarly situated. “An in-person religious gathering is not analogous to picking up groceries, food, or medicine, where people enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete. Instead, it is more analogous to attending school or a concert—activities where people sit together in an enclosed space to share a communal experience. Those activities are prohibited.” *Gish v. Newsom*, No. 5:20-cv-00755, 2020 WL 1979970, at *6 (C.D. Cal. Apr. 23, 2020); *see also Cassell v. Snyders*, No. 3:20-cv-50153, 2020 WL 2112374, at *9 (N.D. Ill. May 3, 2020).

The second problem is that altering Emergency Order 28 to reduce restrictions on religious gatherings would make the order vulnerable to litigation under the federal Establishment Clause. Indeed, the order is already susceptible to an Establishment Clause challenge because it may actually *favor* religious gatherings over similarly situated secular gatherings. Most essential activities that Emergency Order 28 exempts from gathering restrictions are activities needed to keep people healthy (such as food preparation and medicine), maintain the infrastructure of the state (such as police and utility workers), or provide necessary support for individuals working in other essential sectors (such as childcare and laundry). The provision that stands out on Emergency Order 28's list of essential activities is the inclusion of religious services, which appear to have been categorized as essential solely on the basis of their religious status and not, as the Constitution requires, for "some overarching secular purpose that justifies like benefits for nonreligious groups." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989). While classifying religious gatherings as essential activity may have been a good-faith attempt to comply with the very state constitutional requirements of freedom of

worship that the government is now being sued for, the government must take care to ensure that it does not violate the federal Constitution.

II. The balance of the equities does not weigh in favor of issuing an injunction because the potential harm to the public is severe.

Even if Mr. Chapman was to make a showing that he is likely to succeed on the merits of his claims, a preliminary injunction would not be justified because Mr. Chapman would be unable to demonstrate that, on balance, equity favors issuing an injunction, as required by Wisconsin law. *Pure Milk Prod. Co-op.*, 90 Wis. 2d at 800.

When balancing the equities in this case, the injury suffered by Mr. Chapman would be limited to the alleged burdens “stay-at-home” orders impose on his free exercise rights. This harm would be real, but limited and temporary. In contrast, the injuries suffered by the public, and the government actors working on their behalf, would be far-reaching, severe, and long lasting, if not permanent.

The global spread of COVID-19 has made the consequences of this Court issuing an injunction against Emergency Order 28 as to religious gatherings clear: it could result in the rapid spread of the virus and cause many COVID-19 transmissions and even deaths. Sadly, there are already

many real-world examples of this happening. In South Korea, over half of the country's cases can be traced back to a single patient who attended a church service.³ Additional case clusters in the country have been traced back to other religious gatherings.⁴ Across the United States, similar examples of religious gatherings causing COVID-19 case clusters have already been detected in California, Kansas, Virginia, and Washington.⁵ The case in Washington illustrates why the government determined a sixty-person cap on religious gatherings would be far too high. A church choir decided to go ahead with practice despite concerns about the virus. Approximately sixty people attended, and despite all attendees appearing healthy, and extra precautions taken by the church to reduce the risk of the

³ See Youjin Shin, Bonnie Berkowitz, Min Joo-Kim, *How a South Korean church helped fuel the spread of the coronavirus*, Washington Post, (March 25, 2020), available at: <https://www.washingtonpost.com/graphics/2020/world/coronavirus-south-korea-church/>

⁴ See Park Chan-kyong, *Coronavirus cluster emerges at another South Korean church, as others press ahead with Sunday services*, South China Morning Post (March 30, 2020), available at: [https://www.scmp.com/week-asia/health-](https://www.scmp.com/week-asia/health-environment/article/3077497/coronavirus-cluster-emerges-another-south-korean)

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⁵ See Richard Read, *A choir decided to go ahead with rehearsal. Now dozens have COVID-19 and two are dead*, Los Angeles Times, (March 29, 2020), available at:

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<https://www.nbcnews.com/news/us-news/4-family-members-virginia-bishop-who-died-coronavirus-now-battling-n1187076>

virus spreading, over forty attendees contracted COVID-19, and at least two died.⁶

The increased death toll is only one negative public health outcome that could result from granting an injunction. The long-term effects of COVID-19 on survivors is currently unknown, but it may cause serious, and potentially long-term, kidney and cardiovascular system damage. In New York City, hospitals lacked the personnel and equipment to keep up with increased demand for kidney dialysis treatments related to the virus.⁷ The COVID-19 pandemic is also causing Americans to avoid necessary medical care for unrelated issues, further increasing negative health outcomes, including deaths, across the United States.⁸

Additionally, an injunction against Emergency Order 28 would have negative effects on the government of Wisconsin itself. The increase in cases would overburden the healthcare system and increase the strain on

⁶ *Id.*

⁷ Lenny Bernstein, Carolyn Johnson, Sarah Kaplan, and Laurie McGinley, *Coronavirus Destroys lungs. But doctors are finding its damage in kidneys, hearts and elsewhere*, Washington Post (April 15, 2020), available at: https://www.washingtonpost.com/health/coronavirus-destroys-lungs-but-doctors-are-finding-its-damage-in-kidneys-hearts-and-elsewhere/2020/04/14/7ff71ee0-7db1-11ea-a3ee-13e1ae0a3571_story.html

⁸ Elizabeth Pratt, *Excess Deaths: People Who Are Dying Because of COVID-19 — but Not from It*, healthline (May 4, 2020), available at: <https://www.healthline.com/health-news/excess-deaths-from-covid19-pandemic>

State-owned hospitals and medical personnel. Similarly, if the length of the “stay-at-home” order needs to be increased to compensate for its reduced scope, the economy would suffer for a longer period of time, increasing government obligations under its unemployment programs and decreasing the government’s tax revenue.⁹

CONCLUSION

The provisions of Emergency Order 28 are designed to save lives during a pandemic. The order treats essential voluntary religious gatherings the same as essential voluntary secular gatherings because the religiosity of an event has no bearing on the ability of COVID-19 to be transmitted.

Given that Mr. Chapman is unlikely to succeed on the merits of his claim, and the strong equitable considerations that weigh against this Court issuing an injunction, the Petitioners are unable to bear their burden to show that they are entitled to an injunction. Accordingly, this Court should deny their request and the nine-person cap on religious services included as a part of Emergency Order 28 should remain in place.

⁹ Sylvan Lane, *US economy contracts at 4.8 percent rate, most since Great Recession*, The Hill (April 29, 2020), available at: <https://thehill.com/policy/finance/495196-us-economy-shrank-at-48-percent-annualized-rate-in-first-quarter-amid>

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CERTIFICATION AS TO FORM

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) and the Court's order in this matter dated May 5, 2020, for a brief produced with a proportional font. The length of this brief is 3,153 words.

Dated: May 8, 2020.



Patrick C. Elliott

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that when an electronic copy of this brief is submitted to this Court, it will comply with the requirements of Wis. Stat. § 809.19(12) and will be identical in content to the text of the paper copy of the brief. A copy of this certificate is included with the paper copies of the brief that are submitted for filing with the Court and served on all parties

Dated: May 8, 2020



Patrick C. Elliott