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CLERK OF WISCONSIN

SUPREME COURT

Appeal No. 20AP828-OA

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**SUPREME COURT OF WISCONSIN**

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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 Oppen, in her Official Capacity as the District Attorney of Waukesha County, Wisconsin; Kurt Picknell, in his Official Capacity as Sheriff of Walworth County, Wisconsin; and Zeke Wiedenfeld, in his Official Capacity as District of Attorney of Walworth County, Wisconsin.,

*Respondents.*

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**NON-PARTY BRIEF AND APPENDIX OF  
WISCONSIN FAITH VOICES FOR JUSTICE  
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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## TABLE OF CONTENTS

INTEREST OF <i>AMICUS CURIAE</i> .....	2
ARGUMENT.....	3
I. THE COVID-19 PANDEMIC HAS CREATED A TIME FOR “HOLY IMAGINATION” THAT WISCONSIN’S CLERGY ARE USING TO SUPPORT AND STRENGTHEN THEIR COMMUNITIES.....	4
A. Pastor Cindy Crane, Director, Lutheran Office for Public Policy in Wisconsin, et al.....	5
B. Reverend Kerri Parker, Executive Director, Wisconsin Council of Churches.....	6
C. Reverend Dr. Marcus Allen, Pastor, Mt. Zion Baptist Church.....	7
D. Rt. Reverend Steven A. Miller, Bishop, Episcopal Diocese of Milwaukee.....	8
E. The Reverend Dr. Christian D. Boyd, Stated Clerk & Executive Secretary of the Presbytery of Milwaukee Corporation.....	9
F. Rabbi David Cohen, Congregation Sinai.....	10
G. Rev. Reirin Gumbel, Milwaukee Zen Center.....	11
H. Rev. Steve Zekoff, United Methodist Clergy.....	12
I. Rabbi Betsey Forester, Beth Israel Center.....	12

J. Robin Greenler, Presiding Clerk of Madison Monthly Meeting of the Religious Society of Friends (Quakers).....	14
K. Rev. Joseph B. Barring, Jr., Pastor/Social Action Director, St. Paul AME Church.....	15
L. Kristin Gorton, Pastor, Memorial United Church of Christ.....	16
M. Rev. Steven Welch, Pastor, Plymouth United Church of Christ, Milwaukee.....	17
N. Katherine Griffith, Clerk, Winnebago Friends Worship Group (Quaker).....	18
O. Fr. Jay Poster, St. Joseph Catholic Church.....	19
II. THE 1918 PANDEMIC PROVIDES PRECEDENTIAL GUIDANCE ON THE IMPACT OF SOCIAL DISTANCING IN TIMES OF HEALTH CRISES.....	20
CONCLUSION.....	25
CERTIFICATION OF COUNSEL.....	26
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12).....	27

Jeré Fabick and Larry Chapman (collectively “Fabick and Chapman”) have petitioned the Wisconsin Supreme Court to take original jurisdiction and issue an order immediately enjoining enforcement of certain provisions of Emergency Order 28 (“Order”). Wisconsin Faith Voices for Justice (“WVJV”) strongly opposes the granting of this petition for original action and the motion for injunctive relief.

As of May 7, 2020, Wisconsin has 9,215 confirmed cases of COVID-19 with 374 confirmed deaths.<sup>1</sup> There has been a 34.4% increase in confirmed cases in May alone, with 6,854 cases on April 30 compared to 9,215 on May 7 -- the curve of infection is still rising.<sup>2</sup> The consequences of coronavirus infection are horrific -- pulmonary issues, blood clots, strokes and death -- including in young people once thought to be at low risk.<sup>3</sup> Despite this emergency situation, Fabick and Chapman seek to enjoin provisions of the Order.

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<sup>1</sup> <https://www.dhs.wisconsin.gov/covid-19/index.htm>

<sup>2</sup> *Id.*

<sup>3</sup> <https://www.cnn.com/2020/04/22/health/strokes-coronavirus-young-adults/index.html>

### **INTEREST OF *AMICUS CURIAE***

WFVJ is a 501(c)3 charity formed in 2012 as an interfaith education and advocacy organization working for social and economic justice and interfaith understanding. Its members represent all Wisconsin faiths, from all over the state.<sup>4</sup> The WFVJ mission “draws on the wisdom, courage, and strength of our various faith traditions to advance the common good. United as progressive people of faith, we move people and government through education and advocacy to raise the dignity and address the needs of the hungry, poor, and marginalized, to care for the sick, and to lift up all voices.” (WFVJ-8.)

In their supporting Memorandum of Law, Fabick and Chapman argue that the Order infringes on the right to religious liberty. (*See, e.g.*, Memorandum in Support of Petitioners’ Emergency Petition for Original Action and

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<sup>4</sup> This includes Christian (Catholic, Presbyterian, Baptist, Episcopal, Evangelical, Moravian), Jewish, Muslim, Unitarian, Buddhist, Sikh, Quaker, Mennonite, Baha’i, AME, Hindu and Pagan. (WFVJ-App. 8.)

Emergency Motion for Injunction, p. 8.) These arguments are directly undermined by the interfaith record set forth in this *amicus* brief and the accompanying Appendix, which contains statements from 29 WFVJ members. These diverse religious leaders have special knowledge and direct experience dealing with the Order, and their statements demonstrate that the Order has not negatively impacted their faith practices.

Indeed, the statements made by WFVJ's membership, as set forth in the Appendix, show that the Order should remain in force, for the protection and safety of Wisconsin's faith communities during this time of local and global crisis. (*See* WFVJ-App. 8-50.) The Press Release issued by WFVJ, which is also included in the Appendix, demonstrates the breadth of support for keeping the Stay at Home Order in place. (*See* WFVJ-App. 1-7.)

### **ARGUMENT**

Faith leaders in Wisconsin and around the world have risen to the challenges posed by the pandemic, which include limited social interaction and congregation, as well as Safer at Home orders such as the Order challenged here. The aim of the Order is to ensure the safety and health of Wisconsinites, which

is a goal that aligns entirely with the teachings of many faiths by clergy across the state.

The statements show that faith communities have adapted to the emergency situation by following the Order, protecting and ministering to their flocks, and finding meaningful new ways to religiously connect and re-connect.

**I. THE COVID-19 PANDEMIC HAS CREATED A TIME FOR “HOLY IMAGINATION” THAT WISCONSIN’S CLERGY ARE USING TO SUPPORT AND STRENGTHEN THEIR COMMUNITIES.**

Although the pandemic has resulted in a need for religious organizations to restrict their physical gatherings for the purpose of worship, the faith community in Wisconsin has *increased*, not decreased, access and reach to its members while under the Safer at Home Order. (*See* WFVJ-App. 8-50.) Set forth below are excerpts from statements made by WFVJ members, which are fully set forth in the Appendix. These excerpts, and the statements from which they are taken, demonstrate that changes in faith practices brought about out of necessity have *positively* (and decidedly not negatively) impacted faith communities – by resulting in increased access

to religious programming and ministry, thereby reaching individuals physically unable to safely attend events.<sup>5</sup>

**A. Pastor Cindy Crane, Director, Lutheran Office for Public Policy in Wisconsin, *et al.***

*The Lutheran Office for Public Policy in Wisconsin is an advocacy ministry of the Evangelical Lutheran Church in America. We support the health and well-being of Wisconsinites by supporting just public policies. . . . In this highly unusual time of a pandemic, we find ourselves studying and tracking Governor Evers' executive orders and information from our state and federal health care professionals who are determining when it is safe for us to return to business as usual. We supported Order #12 and now support Order #28 to extend Safer at Home.*

*In relation to making decisions about sheltering in place, the first question to worshipping communities should not be whether or not they are meeting the spiritual needs of their members, but if their lives and the lives of others would be at*

---

<sup>5</sup> See Appendix for complete original statements from 29 WFVJ religious leaders. (WFVJ-App. 8-50.)



*risk by attending worship in person. We happen to know that the spiritual needs of people are being tended to as best as possible online and via television, radio, and the telephone during this time. . . . (WFVJ-App. 39-40.)*

**B. Reverend Kerri Parker, Executive Director, Wisconsin Council of Churches**

*. . . I am particularly concerned that the impact on religious followers' ability to obtain spiritual support in these times is being mischaracterized by the petitioners, and other opponents of these measures.*

*The Wisconsin Council of Churches is a statewide network of 20 Christian traditions, as well as allied faith-based nonprofits, committed to Christian unity, and common mission to assist our society's most vulnerable. . . .*

*. . .*

*The Council of Churches has been resourcing the churches of Wisconsin for this extraordinary time. We have every intent of continuing to do so. We are confident that the faithful in Wisconsin are not being denied spiritual support despite the arrival of the Coronavirus, Safer at Home orders*

*and other restrictions which have been imposed in order to protect life. (WFVJ-App. 33-34.)*

**C. Reverend Dr. Marcus Allen, Pastor, Mt. Zion Baptist Church**

*I currently pastor the historic Mt. Zion Baptist Church in Madison, WI. Which is a predominantly African American congregation that has been established for over 109 years.*

*On March 14, 2020 is when I decided to close the church due to this pandemic. For seven weeks now all operations at our church have been suspended and moved online. Though this has been extremely challenging it has been helpful in saving lives. We are engaging so many more people through our online efforts. The church may have been closed but we are continuing our mission: Our food pantry remains open; we are serving food to school age kids daily in our community and we are helping those who are in financial stress.*

*. . . It is astonishing to me, as we look at the data suggesting that African Americans are tested less but are dying*

*more than any other race, that people are now pleading to open the state back up. (WFVJ-App. 25.)*

**D. Rt. Reverend Steven A. Miller, Bishop,  
Episcopal Diocese of Milwaukee**

*Many of us as children learned the nursery rhyme with the accompanying motions “This is the church, this is the steeple, open the doors and see all the people.” While helpful in entertaining small children during car trips back in the day, for Christians it falls a bit short. In my seventeen years as bishop of the Episcopal Diocese of Milwaukee I have been teaching a revised version which is much more theologically correct. Doing the motions in reverse order, I say, “this is the Church, the Church is people, on Sundays some meet in a building with a steeple.”*

...

*In the Episcopal Diocese of Milwaukee, this time has been a time of great creativity. Clergy are leading corporate worship and study through Zoom and Facebook Live and not just on Sundays. We are working on a diocesan wide worship gathering that will be rolled out shortly. Clergy and lay leaders*

*are also reaching out to one another on a regular basis in a number of ways including the good old fashioned method of calling one another on the telephone. (WFVJ-App. 47-48.)*

**E. The Reverend Dr. Christian D. Boyd, Stated Clerk & Executive Secretary of the Presbytery of Milwaukee Corporation**

*As an ecumenical and interfaith relating denomination, we agree with our fellow religious neighbors that the collective moratorium is a wise decision that protects both people in the community and our faith organizations. To pull back from that decision – on a case-by-case, church-by-church, temple-by-temple, mosque-by-mosque basis – puts an undue burden on faith leaders at a time when their energies are best turned elsewhere. Moreover, those most likely to attend such services are older persons who are particularly vulnerable to the effects of the virus.*

*Our Presbyterian clergy are leading corporate worship and study through Zoom, YouTube, and Facebook Live throughout the week. Faith organizations are teaming together to offer joint services. Clergy and lay leaders are also reaching*

*out to one another regularly in several ways including the good old-fashioned method of calling one another on the telephone. Put simply, social distancing has not required spiritual distancing.*

...

*Worshipping in this way has not only attracted our regulars but is an easier entry point for some who, for whatever reason, are hesitant to enter our buildings. (WFVJ-App. 13.)*

**F. Rabbi David Cohen, Congregation Sinai**

*[W]e've had to find new ways to connect with, and minister to, our congregants. Yet, if numbers are any indication, we are seeing increased participation across the board in all aspects of congregational life: Religious prayer services, online class and discussion groups for youth and adults, pastoral 'visits,' as well as holiday celebrations (we ran several very popular online Passover Seders) and lifecycle events. Yes, the current situation precludes some customary rituals for funerals, but, on the whole, the quantity and quality of our interactions with congregants during these challenging,*

*yet sacred, moments has not been diminished. By some measures, they have been enhanced. (WFVJ-App. 30.)*

**G. Rev. Reirin Gumbel, Milwaukee Zen Center**

*For the last weeks, I have offered all our programs online, and we meet every day by zoom teleconferencing for meditation, service, classes, dharma talks, board meetings and personal consultation. We held an Equinox Service in March. On April 8, we celebrated Vesak, the Annual Buddha's Birthday, and we hold a weekly well-being service for those who are in physical or emotional distress.*

...

*In fact, I am reaching more people than usual, because some join in who live too far away than regularly coming in person. Those who do not have internet access at their homes, I call by phone, and I also write letters to prisoners. I have reached and offered comfort to some who are living in anxiety about the widespread disease and deaths. (WFVJ-App. 11-12.)*

**H. Rev. Steve Zekoff, United Methodist Clergy**

*Many religious groups have creatively come up with ways to keep their adherents and those they come in contact with safe while connecting with each other. On-line services and classes, drive-in style worship, and telephone/e-mail contact chains are some of the examples I have experienced in my local congregation. . . . I have been proud of the religious community's response of finding ways to communally express and experience faith in the light of current health emergency realities.*

*In my religious tradition being responsible as a person of faith includes not needlessly placing others in harm's way. . . .* (WFVJ-App. 28.)

**I. Rabbi Betsey Forester, Beth Israel Center**

*I am appalled that there are those who assert [the] order decreases safe access to religious support. That is untrue. In fact, during this challenging time, my congregation is providing more support than ever to our members.*

*We are the only congregation in Madison affiliated with United Synagogue for Conservative Judaism. As such, some might think that our practices are less amenable to change... We are also finding viable work-arounds for Jewish holidays that involve a mixture of online programming and provision of resources for personal practice.*

*. . .*

*We have found that our new service delivery models offer opportunities for connection even beyond Madison, as members, friends, and relatives from all over the country, and even from other countries, join us in our online events. It is not a stretch to say that our initial duress has yielded new opportunities for engagement and religious support.*

*Life cycle events do pose a particular challenge. We are meeting either through online platforms or by modifying and/or deferring events until such time as large gatherings are safe. Public health is our top priority, consistent with Jewish values. Indeed, nothing could be more important to Jewish people than the preservation of life. . . . (WFVJ-App. 31-32.)*



**J. Robin Greenler, Presiding Clerk of  
Madison Monthly Meeting of the Religious  
Society of Friends (Quakers)**

*The Madison Quaker Meeting has been following Governor's [sic] Safer at Home Orders by conducting all of our religious activities including robust Sunday services by online web conferencing (Zoom). . . .*

*While being unable to worship in person has been a loss, we have also noticed that the online format has increased accessibility for members less able to travel, as well as members or attenders who live at a distance. We have been regularly joined in worship by individuals from all over the country. Ironically the online format has increased accessibility to our worship for many individuals.*

*We are committed to the online format in order to protect and support the health and safety of our Quaker community and of our broader society for as long as necessary. Governor's [sic] Safer at Home orders protect us all, especially the most vulnerable amongst us; this is a witness that we strongly support. Lifting the Safer at Home Orders*

*would place many people at severe risk of sickness and death and would be an unconscionable act. The witness to protecting life and safety must come before politics, economics or convenience. (WVJ-App. 29.)*

**K. Rev. Joseph B. Barring, Jr., Pastor/Social Action Director, ST. Paul AME Church**

*I am a Pastor of the oldest Black Church in Dane County, ST. Paul African Methodist Episcopal Church. I Pastor a congregation of at-risk senior citizens of which I am one.*

*The founder of our Denomination believed in ministering to the whole man, and therefore created institutions of higher learning, organized self-help groups, worked during the yellow fever pandemic, engaged in and encouraged others to participate in the betterment of all people. With that being said, I side with the African Methodist Episcopal Church, Governor Tony Evers, Public Health, and a multitude of others who believe in putting lives ahead of the economy. I understand that we have the freedom to decide,*

*and our economy is suffering, but decisions that endanger the lives of others are foolish and dangerous. (WFVJ-App. 18.)*

**L. Kristin Gorton, Pastor, Memorial United Church of Christ**

*During this time of many changes in our communities as we respond to the pandemic, the faith community at Memorial United Church of Christ (UCC) has been creatively using all modes of communication at our disposal: from phone calls and texts, to letters, emails, FaceTime, Skype, Zoom, and social media. While the church building is closed and staff are working remotely, our Church is still open! The Safer at Home order has NOT restricted any of the religious functions of our church. Memorial UCC supports and will abide by the Safer at Home order issued by Governor Evers that has been extended to May 26, 2020.*

*Our response to the novel coronavirus has been a practice in Holy Imagination. March 22nd was the first time we gathered online to worship. We had over 200 people “present” in our digital sanctuary. On a typical in-person*

*Sunday, the combined attendance at our 2 services is around 110. . . . (WFVJ-App. 16-17.)*

**M. Rev. Steven Welch, Pastor, Plymouth United Church of Christ, Milwaukee**

*This order does NOT decrease safe access for our church family, but in truth it is increasing our congregation's safety and connectedness. Although there are no person to person meetings at the church, we are connecting regularly with worship on Facebook and YouTube. We have Zoom meetings for our church meetings and board and committee meetings. The Confirmation class and weekly Sunday School lessons are available online as well. The Deacons at our church have reached out to every member either by e-mail or telephone to learn if they have any needs or prayers requests or food or other help.*

*Many of our church members are over the age of 60. The Safer at Home order is helping to keep them safe. I join with the other religious leaders in strongly supporting the order because it is keeping our faith tradition and our church family safe. Church is not a building. It is a family. Our family*

*is thankful for the many technologies that make it possible for us to be safe and also connected. (WFVJ-App. 20.)*

**N. Katherine Griffith, Clerk, Winnebago Friends Worship Group (Quaker)**

*I am writing on behalf of the Winnebago Worship Group (Quaker), a group of about 15 individuals which ordinarily meets in the home of one of our members for Sunday worship. We would like to assure you that we support the Safer At Home protocols.*

*Since the Safer At Home order, we have been meeting online via Zoom. While at first we regretted having to go to this format, we have been pleasantly surprised to find that our attendance has gone up, not down, especially during our midweek Spiritual Nuture Group. Members who had moved away are once again joining us, those of us who have less full schedules can attend midweek meetings in far greater numbers, and in fact we have gone to an every-week schedule from our former alternate-week schedule.*

*While we greatly miss some aspects of meeting in person (particularly singing and breaking bread together) on*

*the whole we can say that this time has probably served to strengthen our worship group rather than weaken it, and we have even gained new members since the shutdown started.*

*We are committed to avoiding putting our members or anyone else at physical risk. Many of us are medical professionals, family care-givers or both, and we cannot afford to take unnecessary risks. We appreciate the safety the Safer at Home order has provided for WI residents, and we support the protocols for as long as they play an important role in containing the pandemic in our state. (WFVJ-App. 19.)*

**O. Fr. Jay Poster, St. Joseph Catholic Church**

*We have been livestreaming all our Masses (nine per week) as well as funerals, memorial Masses, weddings.*

*. . .*

*We also have (almost) daily staff meetings on Zoom as well as taking part in many other diocesan and outside activities on Zoom. (WFVJ-App. 44-45.)*

## II. THE 1918 PANDEMIC PROVIDES PRECEDENTIAL GUIDANCE ON THE IMPACT OF SOCIAL DISTANCING IN TIMES OF HEALTH CRISES.<sup>6</sup>

The 1918 H1N1 flu pandemic, also known as the Spanish Flu, occurred globally across three waves over the course of a year.<sup>7</sup> Parallels to the 1918 Spanish Flu pandemic in Wisconsin are striking, including the existence of “leaders who questioned the wisdom of closing churches in a time of crisis.”<sup>8</sup>

On March 31, 1876, the Wisconsin legislature created the State Board of Health (a DHS forerunner), a seven-physician panel responsible for “general supervision of the interest of the health and life of the citizens of the state,” making Wisconsin the tenth state in the nation with such a

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<sup>6</sup> This section takes liberally and quotes from *The Virus That Shut Down Wisconsin: The Great Flu Pandemic of 1918: A Wisconsin Magazine Of History Article From 2000 Recounts State And Local Responses To A Global Health Crisis*, Steven B. Burg (April 7, 2020), available at <https://www.wiscontext.org/virus-shut-down-wisconsin-great-flu-pandemic-1918> (hereafter Burg, *Pandemic of 1918*). WFVJ encourages the Court to read the entire article, which is the basis for this section.

<sup>7</sup> <https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/pandemic-timeline-1918.htm>.

<sup>8</sup> Burg, *Pandemic of 1918*.

board, with the first having been put in place in 1869 by Massachusetts. The legislature also granted the board unusually broad powers, allowing it to impose statewide quarantines unilaterally in times of public health emergencies as well as to issue “rules and regulations for the protection of the public health.”<sup>9</sup>

On October 10, 1918, the deteriorating situation involving Spanish Flu statewide led State Health Officer Dr. Cornelius A. Harper to take the drastic step of ordering all public institutions closed. This followed a recommendation issued by the U.S. Surgeon General suggesting that public health officers might consider closing public institutions should local conditions warrant such action; but nowhere except in Wisconsin was such an order issued statewide or in such a comprehensive fashion.<sup>10</sup>

Specifically, Dr. Harper issued a statewide advisory, ordering all boards of health in Wisconsin “to immediately

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*



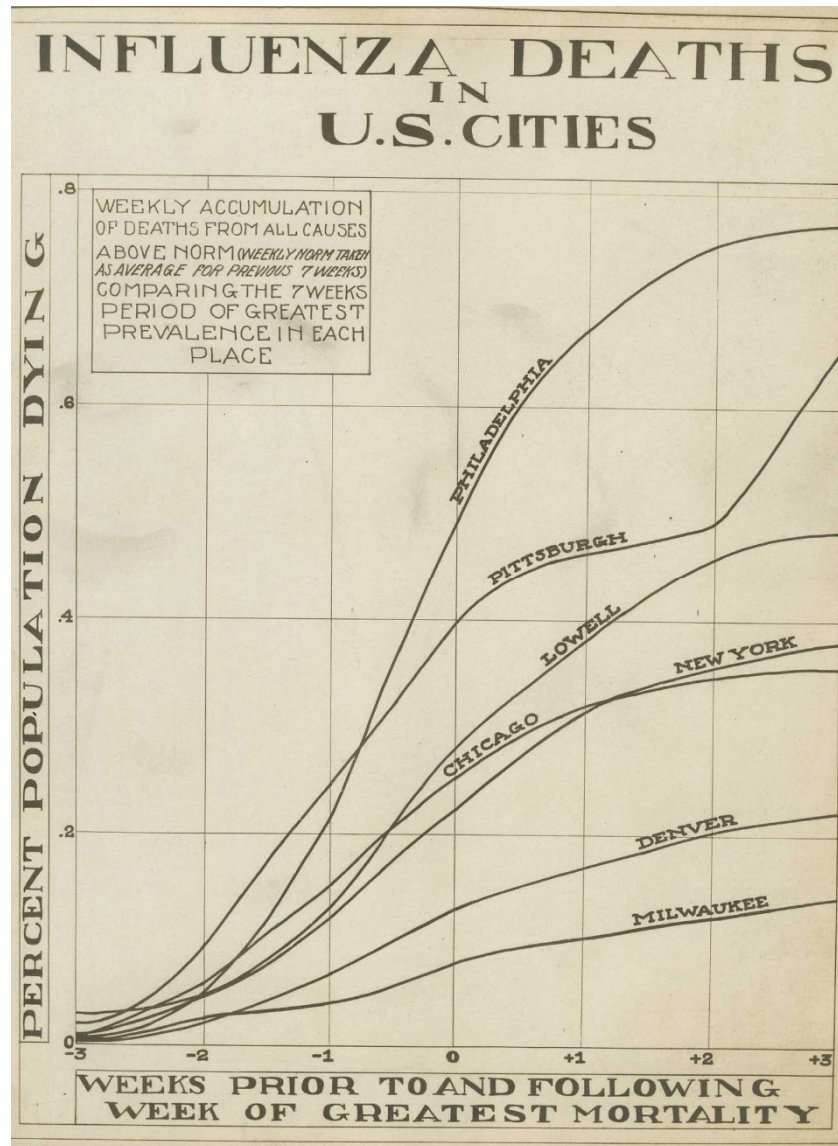
close all schools, theaters, moving picture houses, other places of amusement and public gatherings for an indefinite period of time.” Very quickly, virtually all local government in Wisconsin cooperated and put the order into effect.<sup>11</sup>

For almost three months, isolation rather than socialization became the norm. That emergency order worked. As the chart below shows, Milwaukee suffered significantly less than other large cities did.<sup>12</sup> We can only hope and pray that under the Order, Wisconsin will again have such a good result:

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*



As the epidemic of 1918 began to subside, the State Board of Health reported a “remarkable fact worth mentioning and one which is greatly to the credit of our citizens,” namely that “practically everyone complied with the closing orders to

the best of his ability.” The Milwaukee Health Department had similar plaudits for that city’s residents, stating that among the factors that helped give Milwaukee one of the lowest death rates of all cities of its size was “the readiness of the public to comply with regulatory measures.” The author concludes that “[t]here can be no doubt that compliance spelled the difference between life and death for hundreds, perhaps thousands, of Wisconsin citizens,” and further states: “The question is not whether we will ever again face a medical crisis like that of 1918, but how we as a society will respond when it occurs.”<sup>13</sup>

Today, for the coronavirus pandemic, the Wisconsin faith community has stepped up to the plate. The evidence set forth in the Appendix is compelling. The Order needs to be affirmed, supported and obeyed, as there is nothing more precious than human life. The article, written in 2000, concludes with these prescient words: “In an age of apathy, cynicism, and individualism, it is worth reflecting long and hard that voluntarism, public cooperation, and an activist

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<sup>13</sup> *Id.*

government prevented the worst public health calamity in modern Wisconsin history from being much, much worse.”<sup>14</sup>

Fabick and Chapman’s effort to stop the Order is the antithesis of the historic Wisconsin Idea, which embodies the philosophy that government exists to solve problems and to improve the health and quality of life for all its citizens.

### CONCLUSION

For the foregoing reasons, Wisconsin Faith Voices for Justice respectfully requests that this Court deny Petitioners Jeré Fabick and Larry Chapman’s petition for original action and motion for an injunction.

Dated: May 8, 2020

Respectfully submitted,

/s/ Jeanne M. Armstrong

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<sup>14</sup> *Id.*

**CERTIFICATION OF COUNSEL**

I hereby certify that this brief and the accompanying appendix conform to the rules contained in Wisconsin Statutes Sections 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,888 words.

Dated: May 8, 2020

FUHRMAN & DODGE, S.C.

/s/ Jeanne M. Armstrong

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**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that:

I will submit an electronic copy of this brief, which complies with the requirements of Wisconsin Statutes Section 809.19(12).

I further certify that:

The electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: May 8, 2020

FUHRMAN & DODGE, S.C.

/s/ Jeanne M. Armstrong

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