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BROOKFIELD, WISCONSIN

March 26, 2020

Ms. Julaine K. Appling  
Wisconsin Family Council, Inc.  
PO Box 14440  
Madison, WI 53708-0440

Re: Covid 19 Update

Dear Julaine:

Thank you so much for organizing yesterday's conference call with pastors regarding Gov. Evers' Emergency Order No. 12 and its effect on churches and ministries. Per your request, this memo for callers and others in follow-up to several questions. Citations and links are provided in end notes.

Please note that this memo is informational only. It is not legal advice, and pastors and others should consult their own attorneys regarding Covid 19, Emergency Order No. 12, and related issues.

BACKGROUND

The coronavirus threat has generated comprehensive federal and state responses that are unprecedented for a health risk.<sup>1</sup> The current "lockdown" imposed by states has citizens and media talking about martial law. President Trump himself has referenced being a "wartime president."

Here in Wisconsin, Gov. Evers declared a state of emergency on March 12 and closed schools by executive order on March 13. On March 16, he authorized the Department of Health Services to issue Emergency Order (EO) No. 4, which prohibits "mass gatherings" of 50 or more.<sup>2</sup>

EO No. 4 defines a "mass gathering" as "any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together 50 or more persons in a single room or single confined or enclosed space at the same time." Among other places, the Order covers "public or private schools" and "places of worship and religious gatherings."

On March 17, EO No. 5 lowered the "mass gathering" limit to 10 or more persons and extended school closures. On March 20, EO No. 8 reiterated the 9-person limit, superseded prior orders to the extent they were inconsistent, and warned of criminal penalties for violation.<sup>3</sup>

On March 24, Gov. Evers issued EO No. 12, imposing comprehensive, detailed regulations that took effect March 25. EO No. 12 contains no provision expressly superseding EO No. 8 or the definition of "mass gatherings" in EO No. 4.<sup>4</sup>

FEDERAL-STATE RELATIONSHIP

The federal government has only those powers delegated by the United States Constitution, including regulation of international and *inter*-state commerce and travel. The Tenth Amendment

reserves remaining powers to the states. To control epidemics, federal statute authorizes the federal government to exercise emergency powers to regulate inter-state travel and provide healthcare resources and other assistance to states upon states' requests. Generally, states retain plenary powers over *intra*-state matters. General state police powers are limited only by state constitutions and by the federal constitution in the event a state exercise of power conflicts with federally guaranteed rights.

#### WISCONSIN LAW

Wisconsin statutes create executive powers exercised by the governor and by departments under his authority. The governor may issue an executive order declaring a state of emergency. If the emergency is public health related, he may designate the Department of Health Services (DHS) as the lead state agency to respond. A state of emergency declaration may not exceed 60 days unless extended by legislative joint resolution. The declaration may also be revoked at any time by joint resolution or by the governor himself. Otherwise, there is apparently no restriction on the governor issuing a new declaration after a current declaration expires.<sup>5</sup>

The governor may also issue orders he deems necessary and may delegate authority to the DHS secretary to implement them. DHS may enter any building after obtaining an inspection warrant; “forbid public gatherings in schools, churches, and other places;” issue and enforce orders; appoint agents to take charge of buildings not complying with an order; and “authorize and implement all emergency measures necessary to control communicable diseases.”<sup>6</sup>

Violation of a DHS order is a criminal misdemeanor punishable by 30 days imprisonment and a \$500 fine.<sup>7</sup>

#### EMERGENCY ORDER NO. 12

Section 1 provides “social distancing” regulations. All individuals

are ordered to stay at home or at their place of residence, with exceptions outlined below. To the extent individuals are using shared or outdoor spaces other than their home or residence, they must at all times as reasonably possible maintain social distancing of at least six (6) feet . . . except that they do not need to maintain social distancing between family members in a single living unit or household members.

Further, persons may leave home only for Essential Activities, Essential Businesses and Operations, Minimum Basic Operations, Essential Travel, and Special Situations.

Section 2 requires that “Essential Businesses and Operations” maintain 6-foot social distancing.

Section 3 prohibits all “public and private gatherings of any number of people” except as the Order permits. Members of single households are excepted within the home.

Section 6 requires individuals and organizations to follow DHS guidelines<sup>8</sup> “to the extent possible” when engaging in permitted activities. Essential Businesses and Operations must comply with DHS business guidelines.<sup>9</sup>

Section 11 allows individuals to leave home for Essential Activities, which include activities essential to “health and safety;” “outdoor activity including visiting public and state parks;” and “walking, biking, hiking, or running.” Team sports are not permitted, playgrounds are closed, and all activities are subject to social distancing requirements.

Section 13 requires Essential Businesses and Operations to meet social distancing requirements “on the premises to the extent possible.” They must, “to the greatest extent possible, use technology to avoid meeting in person, including virtual meetings, teleconference, and remote work.” Essential Businesses and Operations include “religious and secular nonprofit organizations” that provide services to the poor and disabled. They also include

- h. Weddings, funerals, and religious entities.** Religious facilities, entities, groups, and gatherings, and weddings and funerals, except that any gathering shall include fewer than 10 people in a room or confined space at a time and individuals shall adhere to Social Distancing Requirements as much as possible.
- y. Higher educational institutions.** Higher educational institutions, for purposes of facilitating distance learning, performing critical research, or performing essential functions as determined by the institution.

Section 15 permits Essential Travel related to Essential Activities and Essential Businesses and Operations.

Section 16 provides “Social Distancing Requirements,” including the 6-foot separation rule, hand washing, etc.

Section 17 notifies that violation of the Order is subject to criminal penalties under § 252.25.

Section 20 provides that the Order is effective until 8 a.m. April 24.

#### CONSTITUTIONAL PERSPECTIVE

In 1992, the United States Supreme Court drastically curtailed historic Free Exercise Clause protections under the First Amendment.<sup>10</sup> The Wisconsin Supreme Court has declined to follow suit in construing the Wisconsin Constitution, so significantly greater protections still exist under Wisconsin’s “rights of conscience” provision, Art. I § 18.<sup>11</sup> Wisconsin also recognizes that freedom of conscience is not only an individual right, it is also a “collective right” of people exercising religious freedom in groups and organizations.<sup>12</sup>

Generally, the state supreme court has construed Art. I § 18 to require that where state action or law impairs the exercise of conscience, government must have a “compelling state interest” and employ the “least restrictive means” to achieve that interest. Under that test, a religious organization must first prove (1) that it has a sincerely held religious belief (2) that is burdened by the action or law at issue. The burden then shifts to the state to prove (3) that the action or law serves a compelling state interest (4) that cannot be served by a less restrictive alternative.<sup>13</sup>

However, if a law or regulation is construed as only a “content-neutral time, place and manner restriction” governing exercise of a fundamental right, then instead of the “compelling interest” test, the state need only show that a law is “narrowly tailored to serve significant government interests - not necessarily compelling ones - while leaving open ample alternative channels” by which persons may exercise the right at issue.<sup>14</sup>

Those same rules are generally applicable to other constitutional rights – speech, press, travel, assembly, petition, etc. Also, because EO No. 12 is enforceable under criminal statute, due process requires that it provide reasonable notice of any conduct prohibited. A regulation violates due process guarantees and is “void when it is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.”<sup>15</sup>

Further, the courts distinguish between “facial” and “as applied” challenges to a law or regulation. A facial challenge must prove that the regulation cannot be constitutionally enforced “under any circumstances.” An “as applied” challenge is based only the “facts of a particular case” and must prove that a constitutional right is “actually violated.”<sup>16</sup>

Finally, a challenge may be dismissed as “moot” when a result no longer would have any practical effect.<sup>17</sup> However, courts may consider even a moot challenge when (1) issues are of great public importance, (2) the challenge is constitutional, (3) the situation is common and trial courts need direction, (4) there is a need to avoid uncertainty or (5) the issue will likely recur but never reach decision because the situation by its nature concludes before a judicial decision can be rendered.<sup>18</sup>

#### COMMENTS

Given that § 13.h. (quoted above) singles out “weddings, funerals, and religious entities” for specific regulation, perhaps it could be argued that the Order is not “content-neutral,” triggering the “least restrictive means” standard. (For example, “higher education” is given the right to determine for itself what is an “essential function.” Sec. 13.y.)

But even if strict scrutiny applies, President Trump and Gov. Evers have declared national and state emergencies. There is no doubt that Wisconsin courts would conclude that a compelling state interest exists, and the technical proof required to determine whether EO No. 12 is the “least restrictive means” would doom a challenge because courts generally will not substitute their judgment for that of the legislative and executive branches constituted to deal with such issues.

If there were any doubt about the Wisconsin Supreme Court’s perspective, on March 22 the court itself issued orders postponing jury trials till after May 22, cancelling oral arguments, and suspending in-person proceedings in lower courts through April 30.<sup>19</sup>

In contrast to facial challenges, as applied challenges may be conceivable under some circumstances. They are especially apropos where, as here, the threat of prosecution exists, because fear of criminal sanctions has a “chilling effect” on exercise of what may well be constitutionally protected speech or conduct.<sup>20</sup>

For instance, even under the “time, place and manner” standard, § 13.h. does not seem narrowly tailored since it prohibits a 10-person church service in a “confined space” without distinguishing between a 200 ft<sup>2</sup> storefront and a 200,000 ft<sup>2</sup> auditorium or arena where attendees could remain well outside the mandated 6-foot social distance.

Conceivably, an as applied “void for vagueness” challenge might also be warranted for a church seeking to hold an outdoor service. For instance, under § 11.c., state and public parks remain open for “outdoor activity” such as “walking, biking, hiking, or running,” but “team or contact sports” such as “basketball, ultimate frisbee, soccer, or football” are prohibited, not because they violate the “10 person confined space” rule, but rather because they “do not comply with Social Distancing Requirements.” And though § 1 provides a blanket prohibition of “mass gatherings,” §§ 8. – 16. provide and define extensive exceptions, including § 13.h., which limits the 9 or fewer rule to only “a room or confined space” when applied to “[r]eligious facilities, entities, groups, and gatherings, and weddings and funerals . . . .”

Consequently, the § 11.c. social distancing rationale would seem to imply that an outdoor church service in a public park is permissible so long as social distancing requirements are observed. On the other hand, the mandates that organizations use virtual media “to the greatest extent possible” and that Essential Business and Operations “use technology to avoid meeting in person” would seem to imply that outdoor services are prohibited even if social distancing requirements are observed.

Yet another ambiguity is the limited authorization of outdoor activity in public parks. It seems unlikely that the Governor or Secretary intended to restrict “outdoor activity” to public parks only. It seems reasonable to conclude instead that the Order does not prohibit outdoor activities on private property or public streets, so long as social distancing is observed.

But the Order does not actually say that and, in fact, Section 1 provides expressly that “All persons may leave their home or residence *only* for the . . . functions . . . defined in this Order.” In fact, in several March 18 Twitter posts, Wisconsin Attorney General Josh Kaul has asserted an extremely aggressive construction of the Order, including that it prohibit *any* gathering of 10 or more:

Given the gravity of the situation, we hope and expect that all Wisconsinites will follow @GovEvers order and that there won't be any gatherings of 10 people or more. If there are, local law enforcement agencies will be the primary enforcement authorities for violations.

Violation of @GovEvers order could result in up to 30 days imprisonment and a fine of up to \$500. More importantly, it would result in increased risk to the health and lives of those who violate the order, their family members, friends, and communities.<sup>21</sup>

#### PRACTICAL CONSIDERATIONS

While Emergency Order No. 12 doesn't indicate that Gov. Evers considers religious exercise of unique importance, churches aren't generally isolated or selectively targeted in the Order for special restrictions that don't apply in varying degrees to other Essential Businesses and Activities (other than the self-determination authority granted higher education).

Given the unprecedented scope and constricted window in which the Order was produced, it is to be expected that ambiguities exist on virtually every page. But under the circumstances, although as applied challenges are conceivable, now is not the time for attempting to prove a constitutional point.

Local officials (especially police) charged with enforcing the Order do not want or need the added burden of trying to figure out its constitutional vagaries. Attitudes of individual officials and police officers and how they understand and enforce the Order will vary widely, and in the immediate future, they, Gov. Evers, and other state and local officials need our prayers and support.

So under the circumstances, consider the following:

- “Virtual” services are clearly contemplated by the Order. Several pastors across the nation have declined to go that route, fearing that believers may become satisfied with faux experiences and inured to the lack of true group worship and fellowship. But most churches have chosen to videotape or live-stream services, and, obviously, pastors and leaders producing the programming should observe the “9 or fewer” and social distancing regulations.

- There was a question during the call about 9 or fewer meeting in homes while observing social distancing. There is little doubt that such groups would qualify as “religious entities” within the Essential Businesses and Operations exception. Historically, house churches were common among early Christians, and Art. I § 18 expressly prohibits preferences among “modes of worship,” so services conducted in private homes should receive the same protection as services in institutional church buildings. Again, however, do not put local law enforcement in difficult situations. Pastors interested in home meetings should check with local law enforcement in advance and guide themselves accordingly.
- Churches have traditionally held Easter sunrise services in public parks. Again, pastors interested in services outdoors or in large indoor spaces they believe are not “confined” should check with park personnel and local law enforcement in advance.

I believe those suggestions are prudent, respectful and appropriate for the time being. But just as several pastors fear virtual worship will inure members to the loss of true Christian fellowship, I fear virtual worship and extended restrictions will inure all of us to the loss of constitutional liberties that have made the United States the greatest nation in history and that allow us to effectively share the Gospel in the first place. *I also fear that officials who have experienced autocratic authority will become accustomed to using it. The unthinkable is now thinkable.*

So again, under the circumstances, consider the following:

- Both Gov. Evers and a joint session of the legislature have authority to rescind the emergency declaration. Communicate your concerns sincerely and respectfully.

Gov. Evers: <https://appengine.egov.com/apps/wi/governor/voice-an-opinion>  
<https://www.nga.org/governors/addresses/> (mailing address and phone #)

Legislature: <https://legis.wisconsin.gov/>

- Circumstances change daily, if not hourly or by the minute. At some point, “the cure will be worse than the disease.” Stay engaged, continue voicing your concerns, and inquire respectfully how and when state and local officials believe restrictions will be lifted.
- Stay informed and communicate. President Trump has commented that federal guidelines and recommendations may be relaxed soon. At some point in time, perhaps in the near future, circumstances may warrant contemplating legal action.

Sincerely,



Michael D. Dean

## END NOTES

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- <sup>1</sup> Federal sites. <https://www.usa.gov/coronavirus> <https://www.cdc.gov/> <https://www.dhs.gov/>  
<https://www.fema.gov/>
- State sites. <https://evers.wi.gov/Pages/Newsroom/Press-Releases.aspx>  
<https://www.dhs.wisconsin.gov/covid-19/index.htm>  
<https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx> (No. 72.)
- Other. <https://www.astho.org/About/https://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Authority-and-Immunity-Toolkit/Robert-T--Stafford-Disaster-Relief-and-Emergency-Assistance-Act-Fact-Sheet/>
- <sup>2</sup> March 12 Gov. Evers declares state of emergency.  
<https://content.govdelivery.com/accounts/WIGOV/bulletins/280ac92>
- March 13 <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>  
Gov. Evers direct closure of schools  
<https://content.govdelivery.com/accounts/WIGOV/bulletins/281127d>  
[https://content.govdelivery.com/attachments/WIGOV/2020/03/13/file\\_attachments/1400831/DHS%20School%20Closure%20Order\\_3.13.20.pdf](https://content.govdelivery.com/attachments/WIGOV/2020/03/13/file_attachments/1400831/DHS%20School%20Closure%20Order_3.13.20.pdf)
- March 16 Gov. Evers directs DHS EO 4 prohibiting “mass gatherings” of 50 or more.  
<https://content.govdelivery.com/accounts/WIGOV/bulletins/2817964>  
[https://content.govdelivery.com/attachments/WIGOV/2020/03/16/file\\_attachments/1402207/DHS%20Order%20Mass%20Gatherings%20of%2050%20or%20More.pdf](https://content.govdelivery.com/attachments/WIGOV/2020/03/16/file_attachments/1402207/DHS%20Order%20Mass%20Gatherings%20of%2050%20or%20More.pdf)
- <sup>3</sup> March 17 Gov. Evers directs DHS EO 5 prohibiting “mass gatherings” of 10 or more.  
<https://content.govdelivery.com/accounts/WIGOV/bulletins/281a7bc>  
<https://evers.wi.gov/Documents/COVID19/UPDATEDOrder10People.pdf>
- March 20 Gov. Evers directs DHS EO 8 updated order on “mass gatherings” of 10 or more.  
<https://content.govdelivery.com/accounts/WIGOV/bulletins/282255c>  
[https://content.govdelivery.com/attachments/WIGOV/2020/03/20/file\\_attachments/1406848/EO%208%20Clarification\\_3.20.2020.pdf](https://content.govdelivery.com/attachments/WIGOV/2020/03/20/file_attachments/1406848/EO%208%20Clarification_3.20.2020.pdf)
- March 24 Gov. Evers directs DHS EO 12 “Safer at Home” order.  
<https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf>
- <sup>4</sup> March 24 Gov. Evers directs DHS EO 12 “Safer at Home” order.  
<https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf>
- <sup>5</sup> Sec. 323.10 Declaration by governor.
- <sup>6</sup> Sec. 323.12(3) and (4b) Governor; duties and powers; out-of-state assistance. Sec. 252.02(1), (3), (4), (6).
- <sup>7</sup> Sec. 252.25. Enforcement.
- <sup>8</sup> <https://www.dhs.wisconsin.gov/covid-19/index.htm>.
- <sup>9</sup> <https://www.dhs.wisconsin.gov/covid-19/employers.htm>.
- <sup>10</sup> *Employment Division v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595 (1990).
- <sup>11</sup> Wis. Const. Art. I, § 18.  
Freedom of worship; liberty of conscience; state religion; public funds. Section 18. 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; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.
- <sup>12</sup> *Coulee Catholic Sch. v. Labor & Indus. Review Comm’n, Dep’t of Workforce Dev.*, 2009 WI 88, ¶ 38, 320 Wis. 2d 275, 298, 768 N.W.2d 868, 879

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<sup>13</sup> *Coulee*, ¶ 61, 320 Wis. 2d at 312, 768 N.W.2d at 886.

<sup>14</sup> *Brandmiller v. Arreola*, 199 Wis. 2d 528, 541, 544 N.W.2d 894, 899 (1996).

<sup>15</sup> *State v. Jadowski*, 2004 WI 68, 272 Wis. 2d 418, 436, 680 N.W.2d 810, 819.

<sup>16</sup> *Matter of Visitation of A. A. L.*, 2019 WI 57, ¶ 11, 387 Wis. 2d 1, 12–13, 927 N.W.2d 486, 491 (citations omitted).

<sup>17</sup> *State v. Fitzgerald*, ¶ 21, 387 Wis. 2d 384, 402, 929 N.W.2d 165, 174 (citations omitted).

<sup>18</sup> *Fitzgerald*, ¶ 22, 387 Wis. 2d at 402–03, 929 N.W.2d at 174.

<sup>19</sup> <https://www.wicourts.gov/news/docs/jurytrials.pdf> <https://www.wicourts.gov/news/docs/oralargs.pdf> .  
<https://www.wicourts.gov/news/docs/remotehearings.pdf>

<sup>20</sup> *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 47, 363 Wis. 2d 1, 47, 866 N.W.2d 165, 187, *decision clarified on denial of reconsideration sub nom. State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, ¶ 47, 365 Wis. 2d 351, 875 N.W.2d 49

<sup>21</sup> <https://twitter.com/JoshKaulWI>