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April 9, 2020

Governor Tony Evers  
115 East State Capitol  
Madison, WI 53707

To Governor Tony Evers:

As we approach Good Friday and Easter Sunday—for many Wisconsinites, the two most sacred religious observances of the year—we are writing to request immediate clarification from your office as to whether your Emergency Order #12 (also known as the “Safer at Home Order”) prevents outdoor, drive-up religious services conducted in accordance with social distancing guidelines. While a number of legal opinions, including an April 8, 2020 Wisconsin Legislative Council memo, have properly concluded that such services are permitted under the Order, some local government officials are using the Order to ban Wisconsinites from responsibly observing these holy days.

Even temporarily putting aside the constitutional issues presented by Art. I, § 18 of the Wisconsin Constitution, which provides that exercise of conscience and religious faith are paramount rights and liberties guaranteed all Wisconsin citizens, our independent assessment of the Order confirms that drive-up religious services are clearly and explicitly permitted by the Order. The Order specifically defines as an “Essential Business[] [or] Operation[]” to which any person may travel for purposes of access all “[r]eligious facilities, entities, groups, and gatherings . . . 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.” (Emphasis added.) Patently, a parking lot is not a “room or confined space.” This is the extent of the needed analysis. A drive-up Good Friday or Easter Sunday service—where, for example, attendees stay in their cars and play the service over their radio—is permitted under the Order, and municipalities that attempt to enforce a contrary rule are violating its terms.

We do not presume that your order is intended to ban such services. It is possible that local units of government have gone too far. But interpreting the order to impose such a restriction would raise grave constitutional questions. Article I, § 18 of the Wisconsin Constitution provides that “[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted.” Wisconsin’s religious liberty protections are much stronger than those that obtain at the federal level—any state government action substantially burdening the right to free exercise must be the *least restrictive means* of furthering a *compelling* government interest. *State v. Miller*, 202 Wis. 2d 56, 66, 549 N.W.2d 235 (1996) (emphases added).

If interpreted to prohibit drive-up religious services, the Order would easily flunk this test. It does not, for example, limit the number of vehicles that may gather in parking lots of grocery stores, restaurants, gas stations, banks, and many other establishments. It specifically authorizes patrons

to enter establishments such as bars and liquor stores to purchase packaged goods and other merchandise. It specifically authorizes higher education to exercise its own discretion in determining what constitute “essential functions as determined by the institution.” And it offers blanket authorization to individuals “[t]o engage in outdoor activity” including “walking, biking, hiking, or running” (provided social distancing guidelines are followed). The Constitution requires that religious exercise be prized *above* these other activities, to say nothing of treated on equal footing with them.

We understand the Governor’s responsibility to facilitate the safety of all Wisconsinites in the midst of this pandemic. But we cannot lose our heads. And state and local actors cannot use the occasion of a public health threat to run roughshod over the right to the free exercise of religion while permitting activities that are functionally equivalent from a public health and safety perspective.

James Madison wrote in his *Memorial and Remonstrance Against Religious Assessments* that “the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him . . . is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.” We ask our government officials to respect the good faith and judgment of leaders in Christian and other faith communities in the same way as they do that of leaders in higher education and other “Essential Business and Operations.” A “drive-in” service in which congregants remain in their cars and practice social distancing is permitted under the terms of Executive Order #12 and protected by our state constitution. Because some local units of government do not seem to understand this we ask that you publicly clarify that religious adherents may celebrate Good Friday and Easter safely, in community, free of government threat, and in keeping with their rights of conscience and the sacred duties they owe their Creator.


Please respond by 2 PM today in writing clarifying your understanding of whether the Order permits drive-up religious services to proceed as planned. We are encouraging all whose free exercise rights are burdened by the actions of local officials to contact us. Your urgent attention to this matter will provide much-needed clarity to religious groups around the state and prevent litigation that may result from the confusion on this issue.

Sincerely,



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Richard M. Esenberg  
President & General Counsel  
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