STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | JEFFERSON COUNTY

ARCHDIOCESE OF MILWAUKEE,

Plaintiff,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS and

KEVIN A. CARR, in his official Capacity as Secretary of the Wisconsin Department of Corrections,

Defendants.

MEMORANDUM DECISION

Case No. 21CV157

INTRODUCTION

The parties have filed cross-motions for Summary Judgment.

Plaintiff's Summary Judgment motion asks the Court for the following relief:

1) For a Declaratory Judgment that the Defendants' refusal to permit members of Plaintiff's clergy to access state correctional institutions to provide religious services to inmates violates Wis. Stat. §301.33(1);

2) For a Declaratory Judgment that the Defendants' refusal to permit members of the clergy to access state correctional institutions to provide religious services to inmates violates Plaintiff's Constitutional Rights. Wis. Const. Art. I, § 18;

3) For a permanent injunction precluding Defendants from violating Plaintiff's clergy's statutory privilege and Plaintiff's Constitutional Rights to access state correctional institutions to provide religious services to inmates.

4) For a Writ of Mandamus mandating Defendants to grant access to state correctional institutions to clergy under Wis. Stat. §301.33(1), in the reasonable exercise of clergy privilege under that statute.

Plaintiff's requests are premised upon its assertion that:

1) The Defendants violated Wis. Stat. § 301.33(1).

2) The Defendants violated Wis. Const. Art. I, § 18; (Plaintiffs constitutional rights) because Defendants' actions burden the sincerely held religious belief of the Plaintiff that they must meet in person with Wisconsin inmates for the purpose of providing religious ministry, particularized to Plaintiff's sincerely held religious beliefs.

3) There is no compelling state interests superior to Plaintiff's rights and;

4) If there are compelling state interests superior to Plaintiff's rights, less restrictive alternatives were and are available to the action taken, a complete denial of entry for approximately 450 days.

Defendants have asked for the Court to dismiss the case in its entirety, under Wis. Stat. §802.08, asserting "no reasonable jury would find in Plaintiff's favor on any of its claims." Doc. 49, page 2 of 2.

Defendants premise their Motion for Summary Judgment upon the following assertions:

1) Plaintiff does not have standing to assert a constitutionally protected right because it does not represent individuals in the prison having legally protected religious interests and only these latter individuals may assert them;

2) Plaintiff's claims are moot;

3) A justiciable controversy does not exist;

4) The matter is not ripe;

5) The Defendants have not violated Wis. Stat. §301.33(1);

6) If the Court rules in favor of Plaintiff on the statutory claim, it need not and should not address the constitutional claim;

7) Plaintiff is not entitled to judgment on the constitutional claim in any event;

8) Because clergy have no constitutional right to enter prisons, *James v. Heinrich*, 2021 WI 58, 397 Wis. 2d 517, 960 N.W.2d 350, does not control the outcome here.

9) If *James* applies:

a. Plaintiff cannot show they are burdened;

b. Prohibition of entry was the least restrictive means to further Defendants' compelling interests;

10) Declaratory relief is not appropriate;

11) Plaintiff has not met its burden of proof to show it is entitled to a permanent injunction and the Court should decline to enter one in its discretion, even if Plaintiff meets its burden of proof, under equitable principles.

12) No Writ of Mandamus should be issued, under law and equity.

This Memorandum Decision concludes all litigation on the merits.

LEGAL STANDARD
SUMMARY JUDGMENT

Summary Judgment is appropriate where there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. §802.08(2). "When the facts are undisputed," interpretation and application of the relevant law to the undisputed

facts presents a question of law appropriate for Summary Judgment. *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 9, 281 Wis. 2d 300, 697 N.W.2d 417.

Summary Judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. §802.08(2). There is a two-part test. "Under the first step, this court asks if the plaintiff stated a claim for relief. Under the second step, this court applies the summary judgment statute and asks if any factual issues exist that preclude a grant of summary judgment." *In re Garza*, 2017 WI 35, ¶ 21, 374 Wis. 2d 555.

When reviewing a Motion for Summary Judgment, the Court must construe all factual inferences in favor of the nonmoving party. *See Burbank Grease Services, LLC v. Sokolowski*, 2006 WI 103, ¶ 40, 294 Wis. 2d 274, 717 N.W.2d 781; *Kraemer Bros. Inc. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979) (explaining that "[t]he inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion").

The existence of a genuine issue of material fact is a question of law for the Court. Wis. Stat. §802.08(2) and (6).

Cross-motions for Summary Judgment sometimes imply a stipulation as to the facts of the case, as in *Powalka v. State Mut. Life Assurance Co.*, 53 Wis. 2d 513 (1972), but not always. A "movant may be correct in stating that the facts relevant to his theory of the case are not in dispute, yet contest the relevant issues of fact under his opponent's theory." *Hiram Walker & Sons., Inc. v. Kirk Line*, 877 F.2d 1508, 1513 n.4 (11th Cir. 1989). Additionally, both parties

might erroneously conclude from the existence of cross-motions that no factual dispute exists, when in fact, one does.

Here, by filing cross-motions for Summary Judgment, both parties naturally assert that no material facts are at issue. Moreover, neither party has requested an opportunity to further develop facts through trial in their presentation opposing the other parties' Motion for Summary Judgment.

One exception to the foregoing does exist in this case. Defendants assert that a material issue of fact exists if a part of Plaintiff's motion is premised upon a set of circumstances occurring hypothetically or undefined prospectively, anchored to whether religious clergy were similarly situated as compared to others who were physically present in the prisons in the past.

Plaintiff argues:

> "But simply asserting that a dispute exists is insufficient to create a genuine issue of material fact and defeat summary judgment. *See* Wis. Stat. §802.08(3) (response "may not rest upon the mere allegations or denials of the pleadings" but instead "must set forth specific facts showing that there is a genuine issue for trial"); *N. Highland Inc. v. Jefferson Mach. & Tool Inc.*, 2017 WI 75, ¶ 22, 377 Wis. 2d 496, 898 N.W.2d 741 ("The mere allegation of a factual dispute will not defeat an otherwise properly supported motion for summary judgment." (quoting *Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.*, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999))."

The Court concludes, herein, that Plaintiff's claims are neither undefined nor hypothetical prospectively. Moreover, Plaintiff's claims are not moored to comparisons of others "similarly situated." Finally, because the Court concludes that Plaintiff has stated claims upon which relief may be granted (as set forth in this Memorandum Decision) and because Defendants have not referred the Court to facts in the record which the Court could conclude that material facts in dispute exist, the Court concludes, independently, that Defendants' stated exception is not

applicable and that there are no disputed material facts requiring resolution through trial procedure on either parties' Motion for Summary Judgment.

Thus, the Court will proceed and follow standard Summary Judgment methodology required by Wisconsin law and resolve the matter on the merits herein. *Stone v. Seeber*, 155 Wis. 2d 275 (Ct. App. 1990).

PARTIES

Plaintiff Archdiocese of Milwaukee (the Archdiocese) is a Wisconsin non-stock, non-profit corporation organized under Chapter 181 of the Wisconsin Statutes.

In the Code of Canon Law of the Roman Catholic Church, a diocese is partly defined as "a portion of the people of God which is entrusted to a bishop for him to shepherd with the cooperation of the presbyterium (*i.e.* the priests]." 1983 Code C. 369; R. 9:6 at ¶ 5. The Archdiocese of Milwaukee incorporates 4,578 square miles in southeast Wisconsin. As of November 2019, it consisted of 193 parishes, 533,963 registered Catholics, 291 diocesan priests, and 176 permanent deacons. R. 9:6 at ¶ 6.

The Archdiocese sends members of its clergy to state correctional institutions throughout southeast Wisconsin to minister to prisoners, including providing sacraments such as the Eucharist, Penance, and the Anointing of the Sick in person as part of its mission, ministry and in the exercise of its religious faith. R. 9:6 at ¶ 8.

Defendant Wisconsin Department of Corrections (DOC) is an administrative agency of the State of Wisconsin, created by statute. *See* Wis. Stat. §15.14; R. 33:2 at ¶ 7. The DOC is required by law to "maintain and govern the state correctional institutions." Wis. Stat. §301.02.

Defendant Kevin A. Carr is the Secretary of the Wisconsin Department of Corrections, and is sued in his official capacity only. *See* R. 3:5 at ¶ 8; R. 33:2 at ¶ 8. Secretary Carr has "direction and supervision" of Defendant DOC. Wis. Stat. §15.14.

FACTS

For over one year (from March 13, 2020 to June 21, 2021), in response to the COVID-19 pandemic, Archdiocesan clergy were prohibited by Defendants from meeting in-person with inmates of state correctional institutions and thus were prohibited from providing spiritual direction, conducting Mass, or administering sacraments that the Code of Canon Law of the Roman Catholic Church has dictated cannot be administered virtually such as the Eucharist, Penance, and the Anointing of the Sick. *See, e.g.*, R. 9:7 at ¶ 9; R. 9:10-11 at ¶¶ 6-10 (explaining refusal of prison staff to allow fully vaccinated priest to hear an inmate's confession).

In discussing its decision to preclude clergy from state correctional institutions, the DOC asserted on its website that "several religious accommodations" were potentially available to inmates, such as the ability to receive "self-study materials," assistance from the on-duty chaplain (who often does not share an inmate's faith), and/or "secular/non-denominational information" such as "uplifting stories." R. 9:27.

The DOC's "no-visitors" policy precluding the entry of the clergy to Wisconsin correctional institutions was not applied to other classes of individuals such as employees or contractors (which would include psychologists, social workers, and teachers), professional visitors (which would include public officials and members of the press), and legal visitors. *See, e.g.*, R. 9:25; Affidavit of Anthony LoCoco ("A. LoCoco Aff.") 11-12, 17-18, 33.

Conceptually, for purposes herein, the Court will refer to employees and/or contractors as "staff" and professional, legal, clergy and general public of any other visitors as "external visitors".

Certain "external visitors" were permitted to enter Wisconsin correctional institutions subject to health and safety protocols developed, implemented and enforced by the DOC during this period. These included lawyers, paralegals, public officials, investigators, members of the press, law enforcement personnel, chaplains, librarians, office associates, professors, therapists, members of the Wisconsin State National Guard, language interpreters, employment specialists, dog trainers, and insurance providers, among others. While individuals in these groups sometimes worked or visited remotely, DOC allowed them (and others) to enter its facilities whenever it, in its discretion, determined entrance was necessary or appropriate. *See* A. LoCoco Aff. 19. Also, *see id.* at 14.

The Roman Catholic sacrament of Penance or Confession cannot be administered through video conferencing or telephone calls by Plaintiff's religious doctrine. And, the DOC did not permit priests to visit inmates in-person to administer the sacrament under any circumstances, even if the priests complied with health and safety protocols. *See* A. LoCoco Aff. 65; R. 9:10-11 at ¶¶ 6-10. Thus, Plaintiff's clergy was not afforded access to the state correctional institution system.

On March 13, 2020, the DOC announced that, "out of an abundance of caution," in order to "minimize the risk of bringing COVID-19 (Coronavirus) into [its] facilities," "[a]ll visits,

including volunteer visits, are temporarily suspended at all Department of Corrections Institutions." R. 9:14.

The suspension applied to all "volunteer" religious ministers who visit DOC facilities to provide religious services, including priests and deacons of the Archdiocese.

The DOC promised to "review[]" its decision to suspend volunteer entry "on a daily basis." R. 9:14. As of early 2021, one year later, the policy remained in place. The DOC had further explained that it was "working with local health officials and the Wisconsin Department of Health Services to determine criteria that indicate[] it is safe to resume in-person visitation." R. 9:25. As of early 2021, no such criteria had been announced.

On April 1, 2021, counsel for the Archdiocese notified Defendant Secretary Carr that the suspension of in-person religious volunteer visitation violated the Plaintiff's constitutional and statutory rights and asked the DOC to immediately reassess the policy and explain what steps it planned to take to come into legal compliance. R. 9:13 at ¶ 4. On April 15, 2021, a DOC administrator notified counsel for the Archdiocese that the DOC would not be changing its policy at that time. *Id.* at ¶ 5.

That disagreement forms the foundation of this lawsuit. The Court is asked to declare which parties' analysis was (is) correct and once determined, the decision will presumably dictate the parties' conduct should similar occurrences arise in the future.

RELEVANT NON-CASE LAW

Wis. Stat. § 301.33 provides:

301.33 Freedom of worship; religious ministration.

(1) Subject to reasonable exercise of the privilege, members of the clergy of all religious faiths shall have an opportunity, at least once each week, to conduct religious services within the state correctional institutions. Attendance at the services is voluntary.

(2) Every inmate shall receive, upon request, religious ministration and sacraments according to the inmate's faith.

(3) Every inmate who requests it shall have the use of the Bible.

Wisconsin Constitution, Article 1, 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. . . "

CASE PROCEDURE

On May 7, 2021, the Archdiocese filed the present suit asserting violations of Wis. Stat. §301.33(1) and Wis. Const. Art. I, § 18. R. 3:7-12. The Archdiocese requested declaratory, permanent injunctive, and mandamus relief. *Id.* at 11.

On June 8, 2021, the Archdiocese moved for a provisional Writ of Mandamus requiring Defendants to facilitate statutory clergy privilege to provide religious services to inmates in Wisconsin's correctional institutions under Wis. Stat. §301.33(1) while this litigation was pending. R. 9.

On June 21, 2021, following briefing and oral argument, R. 10-27, the Court issued the requested writ.

In its oral ruling, the Court recited and recognized the DOC's broad statutory authority to manage state correctional institutions, to set conditions under which those seeking to enter those institutions are subject to and to articulate the conduct expected of those individuals while within the institutions. The Court further recognized that the Legislature has created a Department of Corrections under the direction and supervision of the Secretary of Corrections. Wis. Stat. §15.14 and that the statute requires the DOC to "… maintain and govern the state correctional

institutions." The Court further concluded that the Legislature has granted DOC authority to "[s]upervise, manage, preserve and care for the buildings, grounds and other property pertaining to the state correctional institutions," to "promote the objectives for which they are established ..." Wis. Stat. §301.02.

DOC promulgated several Administrative Rules "for purposes of establishing security standards and practices at state correctional institutions." Wis. Admin. Code § DOC 306.01. The DOC's "primary security objectives" "are to protect the public, staff, and inmates and to afford inmates the opportunity to participate in correctional activities in a safe setting." Wis. Admin. Code § DOC 306.03

In an emergency, "that prevents the normal functioning of the institution," DOC "may suspend the administrative rules of the department or any parts of them . . . until the emergency is ended." Wis. Admin. Code § DOC 306.22(1). The term, "emergency" "means an immediate threat to the safety of the public, staff or inmates of an institution," including a "public health threat." Wis. Admin. Code § DOC 306.02(9)(a).

The DOC regulates visitation of inmates by family members, friends, and others consistent with resources available. The department is responsible for the secure and orderly operation of institutions, public safety, and the protection of visitors, staff and inmates." Wis. Admin. Code § DOC 309.06. Visitors are subject to approval by DOC. *See, e.g.,* Wis. Admin. Code §§ DOC 309.08-309.11; DOC may revoke, suspend or terminate visiting privileges. Wis. Admin. Code § DOC 309.12.

Wisconsin Statute §301.33(1) provides: "Subject to reasonable exercise of the privilege, members of the clergy of all religious faiths shall have an opportunity, at least once each week, to conduct religious services within the state correctional institutions."

After briefing and oral argument, this Court concluded that there was a clear legal right possessed by clergy under Wisconsin law to weekly in-person access to state correctional institutions for the purpose of providing religious services. The Court further concluded that the DOC had a corresponding plain and positive duty under circumstances existing at the time the provisional writ was considered to "accommodate" that weekly access and "facilitate" the reasonable exercise of the statutory privilege.[1] Both the privilege and the obligation to facilitate and accommodate the privilege are required by the clear and unambiguous language of Wis. Stat. §301.33(1).

The Court analyzed the statute using the Rules of Statutory Construction. After that analysis, the Court concluded that the statute, through the use of mandatory "shall" language, required clergy to be given access to the state correctional institutions by DOC, at least weekly. The Court further concluded that the privilege relating to religious ministry under Wis. Stat. §301.33(1) is vested by that statute to the clergy. Specifically, the Court concluded that rights under this statute do not vest in prison inmates. Rights of inmates relating to religious practice are addressed elsewhere in the statute. *See* Wis. Stat. §301.33(2) ("Every inmate shall receive, upon request, religious ministration and sacraments according to the inmate's faith.") The Court also concluded that §301.33(1) grants privilege to clergy and obligates Defendants to accommodate the privilege holder to "conduct" religious services "within" state correctional institutions. The clear, unambiguous term "within" in the statute requires the state to

[1] The words "facilitate" and "accommodate" are obviously not terms used by the Legislature in Wis. Stat. §301.33(1). However, for reasons set forth herein, the Defendants' obligations under statute are clear and unambiguous. The Court uses both "accommodate" and "facilitate" as descriptive terms for those obligations. The Court is aware that it is prohibited from adding language to a statute under the Rules of Statutory Construction. The Court does not do that in its use of these particular descriptive terms.

accommodate religious services inside the institutions, and clergy must also be permitted to "conduct" them inside the institutions.

While it was suggested by Defendants that the statute could always be complied with through religious service video broadcasting, using self-study materials or other such mechanisms, the Court concluded that progress in technology as a substitute for in-person contact "within" the institution was an issue for the Legislature to consider and redefine in its discretion as opposed to being subject to judicial dictates. The Court was obligated in that regard to recognize and honor the Separation of Powers Doctrine.

In the Court's determination, the language used by the Legislature in granting privilege to the clergy (of all religions – this Plaintiff being one) was clear and unambiguous.

The Court concluded that the term "the privilege" as used in Wis. Stat. §301.33(1) means that "members of the clergy of all religious faiths shall have an opportunity, at least once each week, to conduct religious services within the state correctional institutions." This is "the privilege" referred to in Wis. Stat. §301.33, by its clear and unambiguous terms.

The Court proceeded then to consider issues surrounding the statute's use of specific language stating that the privilege is "subject to reasonable exercise."

The Court heard and considered DOC's position that it has promulgated policies and procedures concerning clergy access to state correctional institutions and that the clergy has traditionally exercised its privilege under those policies and procedures.

The DOC contended that Wis. Stat. §301.33(1) permits it to promulgate policies and procedures defining and limiting reasonable exercise of the privilege. Thus, the DOC asserted that it determines what reasonable exercise of the privilege is, under the unambiguous terms used in Wis. Stat. §301.33(1). The Defendant further asserted that since it is authorized by that statute

to promulgate policies and procedures concerning reasonable exercise of the privilege, it also had authority to prohibit exercise of the privilege outright.

The Court disagreed, concluding that DOC's position rendered Wis. Stat. §301.33(1) a nullity. Had the Legislature wished to accomplish that result, it would simply not have adopted Wis. Stat. §301.33(1) or would have authorized the DOC "to permit" clergy to visit state correctional institutions under terms, conditions and rules, in its discretion, it promulgates in that statute. The Court concluded that Wis. Stat. §301.33(1) would be redundant if it conferred authority to the DOC to control exercise of the privilege because the DOC has said authority under powers granted to it in other provisions of the law to generally and specifically control conduct within state correctional institutions. There wouldn't be a need for Wis. Stat. §301.33(1) to confer authority the DOC has over everyone generally to a single group here, the clergy, specifically, under Defendants' asserted statutory interpretation.

Moreover, the Court concluded that the Legislature would not have used "shall" language, would not have specified the mandated frequency of visits and would not have used the idiosyncratic language that described the "privilege" subject to reasonable exercise, if it conferred discretion, in the manner Defendants asserted, to the DOC.

The Court finally concluded that policies relating to "reasonable exercise of the privilege" are much different than policies prohibiting any exercise of the privilege. Indeed, the Legislature has made it very clear that whatever "subject to reasonable exercise" might authorize in this context, a blanket ban on access of the type DOC enforced for over 450 days is not included. We know this because, again, under Wis. Stat. §301.33, clergy must be offered the opportunity to visit "at least once each week." The Legislature removed that particular item from anyone's (including the DOC's) discretion.

Because the Court recognized that the statute conferring statutory privilege (to weekly access) (Wis. Stat. §301.33(1)) also subjected the privilege to "reasonabl[e] exercise," the Court, after sorting out and ruling upon the meaning of the words used in the statute under the Rules of Statutory Construction, considered the DOC's obligations to operate and maintain Wisconsin state correctional institutions and protect the health, safety and security of inmates, workers, contractors, facilitators, visitors and the public at large under (other) statute(s) and Administrative Rules and the privilege conferred upon the clergy by Wis. Stat. §301.33(1), when applied in a time of a pandemic health crisis.

The DOC has always prescribed details like the time, terms and conditions under which weekly services were offered and the place within a facility for Wis. Stat. §301.33(1) religious services to take place. As a result of the pandemic, the Defendants promulgated rules requiring social distancing, health screening, masking, congregation population limits and other safety protocols. And, in other instances of access, those rules were applied. Up until the DOC denied it access (due to the pandemic), Plaintiff's clergy voluntarily complied with the DOC's rules. That is, Plaintiff did not seek declaratory or other relief until its clergy was denied entry totally for a period of over 450 days, after a multitude of other entities, many without similar statutory privilege, were granted access by Defendants and after Defendants denied access to clergy, even at request of counsel, a number of times.

This Court recognized the DOC's authority to "lock down" its facilities during the pandemic using the powers granted to it and referred to by the Legislature (see pages 10 and 11 herein) in statute and Administrative Code to protect the health and safety of its users. In that regard, the Court concluded that the DOC could set forth rules concerning access to state correctional institutions relating to movement in and out of those facilities during a pandemic

public health crisis to all visitors, under authority granted to the DOC both during specific "emergency" conditions and generally through its Legislative mandate to manage state correctional institutions and to protect the health and safety of all those using them.

The Court also took note of the Department's ability to suspend any or all of its Administrative Rules during times of emergency under Administrative Rules and Wisconsin Statute, but also concluded that no Administrative Rule had been promulgated by Defendants that was at issue in this lawsuit.

After all submissions, what became clear to the Court and what it found, specifically, was:

1) The DOC had not recognized, accommodated nor facilitated the clergy's privilege under Wisconsin statute during the initial stages of the COVID-19 pandemic, nor did it place the clergy in any position of priority as, if and when it offered "external visitors" prison access.

2) Clergy was "lumped in" with relatives and "other" visitors in a prohibition to entry while others, not part of "staff" (contractors, lawyers, public officials, doctors et. al.) were allowed access to state correctional institutions.

3) The DOC did not grant clergy any access for 450 days and failed to recognize, accommodate or facilitate statutory privilege by clergy, in any manner.

4) "Reasonable" exercise of clergy privilege is recognized, authorized and mandated by Wisconsin law (Wis. Stat. §301.33(1)).

5) At least once a week, the DOC must accommodate clergy privilege to, at least once each week, conduct religious services "within" the state correctional institutions under Wis. Stat. §301.33(1).

6) The DOC must facilitate clergy's reasonable exercise of its privilege.

Thus, the Court concluded that the DOC had a clear and plain duty under Wis. Stat. §301.33(1) to accommodate weekly in-person access and facilitate reasonable exercise of clergy's privilege to enter correctional institutions to conduct religious services, R. 34:48. The Court concluded that the statute did not authorize the DOC to exercise discretion over or dictate policy concerning the privilege. The Court specifically noted that the DOC had statutory authority to set policy concerning entry of all "external visitors" to state correctional institutions prior to and during "emergency" and to protect the health and safety of inmates, staff and prison users, generally. Finally, the Court framed the issue as one in which two competing statutory functions came into conflict during the health pandemic.

The DOC never attempted to harmonize the conflict. It simply "shut off" clergy access completely for over 450 days. Despite its promise to daily reassess its policies in light of the COVID-19 pandemic's ever changing landscape, there is no evidence that as to clergy privilege it contemporaneously fulfilled its promise.

After full consideration, applying the factors set forth by Wisconsin law pertaining to pre-trial Writs of Mandamus, the Court issued the Plaintiff's requested writ, on June 21, 2021. The Court ordered the DOC "to comply forthwith with the provisions of Wis. Stat. §301.33(1)" and grant Archdiocesan clergy weekly access to state correctional institutions for the purpose of conducting religious services within those facilities while this litigation pended and until a final decision on the merits was rendered by the Court. R. 31:1-2.

ISSUES

I. Is This Case Justiciable?

The test determining whether a Declaratory Judgment action is properly before a Court is whether the claims are justiciable. *See Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 28, 309

Wis. 2d 365, 749 N.W. 2d 211. The decision to grant or deny declaratory relief in such matters lies within the circuit courts' discretion. *Id.* at ¶ 35. However, a "court must be presented with a justiciable controversy before it may exercise its jurisdiction over a declaratory judgment claim." *Id.* at ¶ 28. "This is so because the purpose of the Act is to allow courts to anticipate and resolve identifiable, certain disputes between adverse parties." *Id.* at ¶ 29. "A justiciable controversy requires the existence of present and fixed rights. A declaratory judgment will not determine hypothetical or future rights." *Zehner v. Village of Marshall*, 2006 WI App 6, ¶ 13, 288 Wis. 2d 660, 709 N.W.2d 64 (citation omitted).

The Wisconsin Supreme Court has held:

> "The underlying philosophy of the Uniform Declaratory Judgments Act is to enable controversies of justiciable nature to be brought before the courts for settlement and determination prior to the time that a wrong has been threatened or committed … As such, the Act provides a remedy which is primarily anticipatory or preventative in nature."

Lister v. Bd. Of Regents, 72 Wis. 2d 282, 307, 240 N.W.2d 610; *see also PRN Assocs.*, 2009 WI 53, ¶¶ 57, 67 (affirming trial court's dismissal of a declaratory judgment claim for failure to state a claim upon which relief can be granted where party pursuing declaratory relief sought a remedy which was not "primarily anticipatory or preventative in nature").

Defendants argue that its "decision" to deny entry to the clergy ended on July 7, 2021, and that Plaintiff's injury (now remedied) cannot constitute a wrong upon which an anticipatory or preventative remedy through Declaratory Judgment may be sought. Thus, Defendants contend, this Court's granting of a Declaratory Judgment through Summary Judgment procedure would not and does not serve any useful, practical purpose under the current facts currently existing in this case.

Plaintiff counters that its lawsuit contained valid and justiciable claims when it was filed and that a provisional Writ of Mandamus was actually issued by this Court addressing the "wrongs" that had occurred under the facts presented. Even though the DOC may have "decided" to "allow" the clergy to recommence its visits prior to or during the time in which this Court exercised jurisdiction, Plaintiff's clergy had been denied its privilege to meet (in person) with inmates for the purposes of conducting religious services within Wisconsin correctional institutions for over 450 days. Even though the Plaintiff had on multiple occasions during that time period requested access pursuant to its privilege, access had been denied. The Plaintiff thus asks the Court to declare in Summary Judgment that two specific wrongs have been committed and, because either wrong having once occurred in the past, may certainly reoccur in the future, entitling Plaintiff to the full arsenal of its requested relief under Wisconsin law.

Plaintiff argues further that the DOC will not acknowledge that it violated Wis. Stat. §301.33(1) and/or Wis. Const. Art. I, § 18 (as presently asserted) or admit to fault of any kind. In fact, Defendants have publically asserted that they have authority to deny and then reinstitute access to the clergy as, if and whenever it determines. R. 96:8 at ¶ 19. Thus, unless the Court grants declaratory and injunctive relief, Plaintiff asserts that the questions at issue are not only able to but will arise again whenever the DOC articulates an operational need to exclude clergy from state correctional institutions. Plaintiff urges the Court to resolve the legal issues here, now, so that it will not be required to litigate the question on an emergency or other basis, virtually requiring it to devote significant resources to assert its claim and the Court to devote significant judicial resources to address them.

The Court agrees with the Plaintiff. The DOC has publicly declared that it retains "the authority to suspend in-person visits by volunteer religious ministers in the future for a period of time longer than a week." R. 96:8 at ¶ 19, even though it has "repealed" the "ban" at issue.

As Plaintiff points out, The Declaratory Judgments Act "is to be liberally construed and administered," Wis. Stat. § 806.04(12), and this direction should considered in light of the Act's purpose:

> The underlying philosophy of the . . . Act is to enable controversies of a justiciable nature to be brought before the courts for settlement and determination *prior to the time that a wrong has been threatened or committed.* The purpose is facilitated by authorizing a court to take jurisdiction at a point earlier in time than it would do under ordinary remedial rules and procedures.

Lister v. Bd. of Regents of Univ. Wisconsin Sys., 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976) (emphasis added). The Wisconsin Supreme Court has held that "[t]he preferred view appears to be that declaratory relief is appropriate wherever it will serve a useful purpose." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 42, 309 Wis. 2d 365, 749 N.W.2d 211 (quoting *Lister,* 72 Wis. 2d at 307) (alteration in original). This is true "whether or not further relief is or could be claimed." Wis. Stat. § 806.04(1).

This Court concludes that issuance of a declaration as to what the law requires – and remedies preventing future misbehavior – will serve multiple "useful purpose[s]." Declaratory Judgment will settle the disputes existing here as to statutory and Constitutional Rights, set a rule upon which the government, inmates, and clergy may rely, and offer the Legislature a definitive ruling that will allow it to assess whether the Court has accurately interpreted Wis. Stat. §301.33(1) and if not, whether that statute should be amended to supersede this Court's determination.

This Court concludes that the matter before it is justiciable and that under Wisconsin law it may (in its discretion), through this litigation, definitively resolve whether the DOC violated Wis. Stat. §301.33(1) and Wis. Const. Art. I, § 18 in the past in order to prevent the same or similar improper government conduct from occurring in the future, thus providing clarity to the government and to the public. The Court finally concludes that an identifiable, certain dispute as to the law exists between adverse parties, that present and fixed rights exist as opposed to hypothetical or future rights are at issue and that the remedies proposed are primarily anticipatory or preventative in nature.

This case is justiciable.

II. Is This Case Moot?

"An issue is moot when the court concludes that its resolution cannot have any practical effect on the existing controversy." *PRN Assocs. LLC v. State, Dep't of Admin.*, 2009 WI 53, ¶ 29, 317 Wis. 2d 656, 675, 766 N.W.2d 559, 569. A "moot question is one which circumstances have rendered purely academic." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis.2d 685, 608 N.W.2d 425.

The Plaintiff filed this action challenging the March 2020 clergy suspension policy. DOC rescinded its general policy barring all visitors, including clergy, as of July 7, 2021. This Court's provisional Writ of Mandamus mandated Defendants' reaction to and action concerning clergy privilege to be returned to meet the requirements of Wisconsin law, on June 21, 2021.

Defendants assert that there has been a change in circumstances – the termination of clergy visitation suspension and evolution of the DOC's response to COVID-19. The Defendants argue that; the legality of the closure period has been rendered academic, that the Archdiocese has not complained of any violations or defects by DOC after July 2021, and that

some "possibility" that a set of facts may develop in the future that might cause DOC to prohibit a religious visitor for some unknown reason does not preclude a finding that this case is moot.

Plaintiff argues that this case arose because of disagreement over, and uncertainty regarding, the meaning of Wis. Stat. § 301.33(1) and government acts relating to Wis. Const. Art. I, § 18, in the context of an actual, not theoretical, year-long prohibition of clergy from state correctional institutions.

The Uniform Declaratory Judgments Act's "... purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations" under, *inter alia,* statutes and the constitution. Wis. Stat. § 806.04(12); *see* Wis. Stat. § 806.04(2), (5). Yet even though the DOC repealed its policy following this Court's preliminary conclusion that it violated Wisconsin law, the uncertainty Plaintiff sought to settle persists.

Similarly, in *State ex rel. Badke v. Vill. Bd. of Vill. Of Greendale,* 173 Wis. 2d 553, 494 N.W.2d 408 (1993), village residents sued the village board for violating the open meetings law when members of the board, without notice, met regarding a proposed housing project. *Id.* at 560-61. After a lawsuit under the open meetings law was filed, the Circuit Court temporarily enjoined the housing project developer from proceeding. The village board "reconvened and revoted . . . in a proceeding that complied with the open meeting law." *Id.* at 563-64. The board argued that the open meetings law case became moot. *Id.* at 568. The Wisconsin Supreme Court disagreed:

> [T]he controversy in this case did not end when the Village Board held its second meeting. The controversy in this case is the legal status of the acts that preceded the revote, and a declaratory judgment will have a legal effect on that controversy: it will declare the legal status of the Village Board's acts.

Id. at 568; see also *Id.* at 567 (discussing justiciability) ("This dispute is more than a mere difference of opinion, however, in that [petitioner] seeks to exercise his right under sec. 806.04(2), Stats., to have Wisconsin's Open Meeting Law judicially construed. . . . Succeeding will . . . teach the Village Board what to do under the law to avoid future violations." (footnote omitted)).

This Court likewise concludes that a declaration as to past illegal conduct by the DOC will ensure that similar conduct will not be repeated in the future. Courts have also held that ". . . a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013); *see also, e.g., Watkins v. Dep't of Indus., Lab. & Hum. Rels.*,69 Wis. 2d 78s, 785, 789, 793-95, 233 N.W.2d 360 (1975) (racial discrimination complaint not moot simply because employee obtained the wrongfully denied position); *Wisconsin Employment Relations Bd. v. Allis-Chalmers Workers' Union, Local 248,* 252 Wis. 436, 443, 32 N.W.2d 190 (1948) (enforcement proceeding not moot simply because union ceased objectionable behavior).

The same reasoning applies here. Reopening Wisconsin state correctional institutions to all visitors has not rendered this case, concerning clergy privilege under Wis. Stat. §301.33(1) or Article I, § 18 of the Wisconsin Constitution moot, in this Court's judgment.

But, even if a superior court concludes that this case has been rendered moot by the evolution or de-evolution of the COVID-19 pandemic's effect on the DOC dictates concerning clergy privilege under Wisconsin law and Wisconsin's Constitution, the issue of mootness is nonetheless actually an issue of "judicial restraint," *Matter of D.K.*, 2020 WI 8, ¶ 19, 390 Wis.2d 50, 937 N.W.2d 90. The Court's refraining from deciding a moot issue is not necessarily called

for where, among other things, "the issue is of great public importance," "the issue involves the constitutionality of a statute," "the issue is likely to recur and must be resolved to avoid uncertainty," or "the issue is likely of repetition and evades review." *Id.*

All exceptions articulated in Wisconsin case law to terminating litigation upon a determination that the matter is moot exist in the matter before this Court. Since all of these exceptions exist in this matter, they counter any urge the Trial Court may have to abdicate adjudication of them at this time.

Constitutional religious liberty rights and exercise of legislatively granted privilege are both rights that are of great public importance whenever as here, government action is alleged to have infringed upon them.

And, although the Plaintiff has not challenged the constitutionality of Wis. Stat. §301.33(1), the Defendants have.

Upon the next pandemic or other catastrophic event disrupting order, the same issues as fully and completely litigated here, are likely to arise again. Absent a Court Declaration or Injunction, given the fact that the DOC has actually publicly indicated that it will assert independent authority, the existence of which is and will be in contention, to completely close Wisconsin state correctional institutions, for any amount of time it exclusively deems necessary, to clergy with Legislative privilege and in detriment to Plaintiff's Constitutional Rights, this very same issue before this Court, now, will arise before another court, later.

Consequently, absent this Court accepting the responsibility to declare what the law in Wisconsin is, uncertainty on this fully litigated issue will exist in the future.

Thus, this Court concludes the matter is not moot and that it will retain jurisdiction to adjudicate the issues, even if a superior court concludes that the matter may actually or technically be moot.

III. Is the Case Ripe?

Defendants argue that this case is not ripe, as that term is used in Wisconsin law, for this Court's adjudication. Plaintiff argues that it is. The Court agrees with Plaintiff.

The ripeness doctrine requires "that the facts be sufficiently developed to allow a conclusive adjudication." *Olson,* 309 Wis. 2d 365, ¶ 43. "The facts on which the court is asked to make a judgment should not be contingent or uncertain...." *Id.*

"'The purpose of ripeness is "to avoid courts entangling themselves in abstract disagreements."' Courts resolve concrete cases, not abstract or hypothetical cases." *Papa v. Wisconsin Dep't of Health Servs.*, 2020 WI 66, ¶ 30, 393 Wis. 2d 1, 946 N.W.2d 17 (quoting *Olson*, 309 Wis. 2d 365, ¶43) (citation omitted). "... the ripeness required in declaratory judgment actions is different from the ripeness required in other actions" since "declaratory judgments are prospective remedies." *Id.* (quoting *Olson*, 309 Wis. 2d 365, ¶ 43). Thus, "[a] plaintiff need not prove an injury has already occurred. Rather, the facts must be 'sufficiently developed to allow a conclusive adjudication.'" *Id.* (quoting *Olson*, 309 Wis. 2d 365, ¶ 43) (citation omitted).

This Court concludes that the issues before it are ripe for adjudication because the facts before the Court have been sufficiently developed, allowing this Court to make a conclusive adjudication as to them.

The parties' disagreement, in this Court's judgment, is not abstract or hypothetical. Rather, the Court concludes that the matter is much more concrete in nature. The issues have

been and are clear, fully and completely developed and have been thoroughly addressed by the parties through their cross-motions for Summary Judgment.

Because the remedies requested by Plaintiff are prospective in nature, even if the injury claimed has been "remedied" by the Court preliminarily, the Court is now in a position to determine those matters conclusively.

This case is ripe for judicial determination.

IV. Did DOC Violate Wis. Stat. §301.33(1)?

This Court, through its provisional Writ of Mandamus determination, has previously concluded that the language chosen by the Legislature in enacting the statute clearly and unambiguously assigns the DOC a clear and plain duty to accommodate clergy weekly in-person access to Wisconsin prisons to conduct religious services and facilitate reasonable exercise of that privilege.

This matter proceeds to final conclusion (as opposed to preliminary writ) through determination of all issues, as demanded by both contestants through their cross-motions for Summary Judgment.

Wis. Stat. § 301.33(1) is very concise. It provides:

> "Subject to reasonable exercise of the privilege, members of the clergy of all religious faiths shall have an opportunity, at least once each week, to conduct religious services with the state correctional institutions. Attendance at the services is voluntary."

Plaintiff contends that the Legislature, through statute, has granted clergy a privilege to access state correctional institutions to minister to the religious needs of inmates at least once per week, that the DOC must accommodate the privilege and that the DOC must facilitate reasonable

exercise of the privilege, under the clear and unambiguous language used in Wis. Stat. §301.33(1).

Defendants take a multiple approach in arguing against Plaintiff's requested Declaratory and Injunctive relief as to this issue.

The Court shall address each of them herein:

A. Does Plaintiff Have Standing in This Matter?

Defendants have argued that Plaintiff's case asserts religious rights of prison inmates. But, it does not. The Plaintiff is not a prisoner in the Wisconsin state correctional system. Plaintiff has asked this Court, in its pleadings, to declare that it is privileged to enter Wisconsin correctional institutions to exercise its own religious beliefs as recognized by Wisconsin Statute §301.33(1).

Moreover, in addition to that particular pleading, Plaintiff has separately requested Court declaration concerning its right to exercise its religion under Article I, § 18 of the Wisconsin Constitution within the same set of circumstances as exists in its first claim. . . the Defendants' denial of access (to Plaintiff) to Wisconsin state correctional institutions to practice its religion. (See below at pages 35 through 50, herein).

The Plaintiff asserts its own rights. Plaintiff, in its pleadings, alleges it has been aggrieved and seeks specific redress from this Court, requesting specific remedies in that regard.

Thus, the Court concludes that Plaintiff has standing to pursue its two claims.

B. Is the Statute Ambiguous Under the Rules of Statutory Construction?

In revisiting this issue for purposes of finality, the Court reiterates the analysis it preliminarily engaged in, through its consideration of Plaintiff's request for a provisional writ.

A statute is ambiguous if it is capable of being reasonably understood in two or more senses. *State ex rel. Kalal v. Circuit Court for Dane Cty,* 2004 WI 58, ¶ 47, 271 Wis. 2d 633.

The Court utilizes and applies the principles of statutory interpretation to determine both what the statute means and whether the statute's terms are plain and unambiguous. *Lamar Cent. Outdoor, LLC v. Div. of Hearing & Appeals*, 389 Wis. 2d 486 (2019).

> "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning."
>
> . . .
>
> "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results."
>
> . . .
>
> "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity . . ."
>
> . . .
>
> "[i]t is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute." *State ex rel. Kalal v. Circ. Ct. for Dane Cty.*, 271 Wis. 2d 633 (2004).
>
> . . .
>
> "Notably, for there to be an ambiguity, "[i]t is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute. *Id.* ¶ 47. Put differently, failure to follow plain statutory language, or disagreement about plain language, is not proof of ambiguity. Instead, the ambiguity must be in the statutory language itself. *See id.*"
>
> . . .
>
> "[L]anguage is given its common, ordinary, and accepted meaning." *Kalal, Id.*
>
> . . .
>
> "[S]cope, context, and purpose are perfectly relevant to a plain-meaning interpretation of an unambiguous statute as long as the scope, context and purpose are ascertainable from the text and

> structure of the statute itself, rather than extrinsic sources, such as legislative history." *Id.* ¶ 48.
>
> . . .
>
> "An interpretation "may not add words to the statute's text." *Wis. Dep't of Workforce Dev. v. LIRC,* 378 Wis. 2d 226 (WI App 2017).

This Court concludes that Wis. Stat. §301.33(1) is not ambiguous. The words used in the statute have common, ordinary and accepted meanings. The words used are neither technical nor do they have or require special definitional meaning.

Because the process of analysis yields a clear statutory meaning, there is no ambiguity. The statute is not capable of being reasonably understood in two or more senses.

Scope, context and purposes, as further discussed below, in the context of a plain-meaning interpretation of this unambiguous statute are ascertainable from the text and structure of the statute.

The Court concludes that the statute is not ambiguous.

C. Does "Shall" Mean "May" in the Statute?

Defendants argue that the use of the word "shall" in Wis. Stat. §301.33(1) should be construed as "may," under the Rules of Statutory Construction.

The use of the word "shall" in a statute is presumed mandatory. *Scanlon v. City of Menasha,* 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962).

Courts have held that "the word 'shall' can be construed to mean 'may.'" *Sommerfeld v. Board of Canvassers of City of St. Francis*, 269 Wis. 299, 303, 69 N.W.2d 235, 238 (1955) (citing *George Williams College v. Williams Bay*, 242 Wis. 311, 319, 7 N.W.2d 891 (1943)).

Defendants argue as follows:

> "Here, the term "shall" is not mandatory because the legislature provided that all terms in the statute are subject to discretion, *i.e.*, "subject to reasonable exercise." If the statute is construed to mean that clergy must be allowed to physically enter the state correctional institutions to conduct religious services on at least a weekly basis, the legislature's clear intent that any opportunity to do so is "subject to reasonable exercise" would be obviated. Because the words of a statute are not to be read in isolation, but rather, considered in the overall context in which they are used, the use of the word "shall" in Wis. Stat. § 301.33(1) is not intended as a mandatory term. *See State v. Ziegler,* 2012 WI 73, ¶ 43, 342 Wis. 2d 256, 279, 816 N.W.2d 238, 249; *Kalal*, 271 Wis. 2d 633, ¶ 46."

Plaintiff argues as follows:

> "In the case that the DOC cites for the proposition that "shall" can mean "may," the Court was trying to avoid an interpretation in which the statute under review "would defeat itself." *Sommerfeld v. Bd. of Canvassers of City of St. Francis,* 269 Wis. 299, 303, 69 N.W.2d 235 (1955). And in *George Williams College v. Williams Bay*, 242 Wis. 311, 318-19, 7 N.W.2d 891 (1943), the case on which *Sommerfeld* relies, the Court was trying to avoid an interpretation which would have rendered the statute unconstitutional. Neither defect is present here. "Shall" means "shall."

The Court agrees with Plaintiff. Neither defect remedied by construing the word "shall" to mean "may" under Wisconsin case law, exist here. The Court thus construes the word "shall," as used in Wis. Stat. § 301.33(1) to mean "shall" and mandates that the state accommodate and facilitate exercise of the privilege.

D. Does the Word "Within" as Used in the Statute Include External Technology Usage?

Defendants then argue that "allowing" clergy to conduct religious services remotely complies with the language in Wis. Stat. § 301.33(1) referring to exercise of the privilege "within" the state correctional institutions. Defendants argue that:

> ". . . the plain language of the statute does not require clergy to be physically in-person in prisons to conduct religious services. Offering clergy the opportunity to provide virtual religious services complied with Wis. Stat. § 301.33(1). . . . the Court should find DOC did not violate the statute because clergy had the opportunity to "conduct religious services" for (inmates) . . (with) the services were done remotely.
>
> The term "religious services" is not a defined term in ch. 301, Wis. Stats. . . . clergy members were afforded the opportunity to conduct activities intended to support the spiritual welfare or meet the spiritual needs of (inmates), including video meetings, one-on-one pastoral meetings by telephone or zoom, the provision of reading and other study materials, streaming religious meetings or gatherings, including Catholic masses – any and all of which might have occurred, at least once a week. . . But during this pandemic, religious services in the community have routinely shifted to videoconferencing platforms for the safety of all involved.
>
> The plain language of the statute does not require that the opportunity to conduct religious services be provided in a way that is physically in-person. The Archdiocese reads into the statute the words, "physically in-person" that are not in the statute itself. While "within" could possibly be interpreted to mean "physically present within," it is not necessarily so as within in Wis. Stat. §301.33(1) refers, logically, to the religious services being provided to the prisoners to have access to religious ministration.
>
> While Wis. Stat. §301.33(1) does not explicitly authorize a mode of access that is remote, the statute also does not preclude such a mode of access. In *City of Milwaukee v. Washington,* 2007 WI 104, 304 Wis. 2d 98, 735 N.W.2d 111, the absence of a specific word or phrase was not dispositive when interpreting Wis. Stat. §252.07(9)(a). The statute at issue permitted confinement of a person with tuberculous, in certain circumstances, to a "facility where proper care and treatment will be provided and spread of the disease will be prevented." The question was whether said statute

> permitted confinement to a jail. The statute did not explicitly authorize placement in jail but "the plain language of the statute also does not preclude such placement." 2007 WI 104, ¶ 34. Rather than focusing its analysis on whether the statute used certain words, courts "begin with the statutory language, considering the meaning of operative terms singly, and in relation to the statute as a whole." *Id.* ¶ 33. The Court embraced the statute's various parts, applied commonly accepted meanings and allowed the statutory language to be interpreted "broad[ly] enough" to serve its purpose. 2007 WI 104, ¶¶ 34-41.
>
> The same should be done with Wis. Stat. § 301.33(1), and the Court should find that providing remote ministry satisfied the statute because services occurred within the institutions." R. Doc. 50, pg. 47 and 48."

Plaintiff's position is as follows, noting that in its Temporary Injunction ruling:

> "This Court categorically rejected this argument, explaining that "[i]f extending the term ['within['] to include or substitute virtual access as it relates to the statute, if this is warranted then that's a matter for the Legislature and not the Court's determination." R. 34:47. That is, the statute clearly allows clergy to "*conduct* religious services *within*" the institutions. Wis. Stats. § 301.33(1) (emphases added). The DOC's proposal . . . (allows) clergy to "conduct" the services *outside* the institution and then broadcast them *into* the institution. This is an exception not admitted by the statute's plain terms; by the DOC's logic, football games and operas also take place "within" the institutions if they are played on the televisions there. This is an implausible reading.[1]
>
> . . .
>
> [1] Thus, City of Milwaukee v. Washington, 2007 WI 104, 304 Wis. 2d 98, 735 N.W.2d 111, does not apply. The plain language of §301.33(1) precludes the DOC's preferred approach. Likewise, because § 301.33(1) mandates weekly in-person access, it does not matter if the DOC believes its complete ban was "reasonable." R. Doc. 109, pg. 11 of 41.

The Court agrees with Plaintiff's analysis and concludes (again) that the term "within" as used in Wis. Stat. § 301.33(1) is clear and unambiguous. It has plain and ordinary meaning. This Court will not add language to the statute. Any "expansion" or "compression" of the

privilege to offer religious services within the institution, through use of technology or otherwise, is best left to the Legislature to address should it choose to do so.

The Court concludes that the term within requires in-person access.

E. Does the Court's Construction Raise Constitutional Issues?

Defendants finally assert that interpretation of statutory language contrary to their proposed interpretation improperly raise constitutional issues and thus fail the Rules of Statutory Construction.

Actual or potential constitutional violations do not give rise to a finding of ambiguity but are an important component to ambiguity resolution. *Am. Family Mut. Ins. Co. v. DOR*, 222 Wis. 2d 650 (1998); "given two alternative constructions of a statute, preference is to be given to the one that saves the statute from being struck down as unconstitutional", *State ex rel. Vanko v. Kahl*, 52 Wis. 2d 460 (1971); "if a statute is open to more than one reasonable construction, the construction which will . . . avoid unconstitutionality must be adopted", *Chi. & N.W. Ry. Co. v. PSC*, 43 Wis. 2d 570, 577-78, 169 N.W.2d 65 (1969).

However, the Court, in the circumstances present, is not tasked with resolving any ambiguity if it finds no ambiguity to exist. The Court has determined that there are not two viable interpretations of language used in Wis. Stat. §301.33(1). The statute is not ambiguous and therefore the Court need not resolve ambiguity by "choosing" the interpretation in a way that avoids constitutional issues. This particular Rule of Construction is not applicable here.

F. Does the Statute Authorize the DOC to Modify or Suspend In-Person Visitation Because the Statute Subjects the Privilege it Grants to the DOC's Discretion and its Assessment as to Whether Exercise of the "Privilege" is "Reasonable"?

Defendants argue that the privilege is subject to its discretion because "nothing in the plain language of the statute prohibited DOC from imposing reasonable limitations on in-person visitation by clergy members, include the suspension of in-person visits in response to the COVID-19 public health emergency." R. Doc. 50, pg. 43 of 57.

Further, Defendants argue:

> "The plain language of Wis. Stat. § 301.33(1) recognizes that a clergy member's ability to enter physically into a state correctional institution is a *privilege*, not an absolute right, and that privilege is *subject to reasonable exercise.* Nothing in the plain text of Wis. Stats. §301.33(1) indicates that the legislature intended to relinquish DOC's authority to manage the state correctional institutions and give instead an unfettered right to only a religious clergy member to be physically present in-person in a state correctional institution every week regardless of any other circumstances."
>
> . . .
>
> "The phrase, "[s]ubject to the reasonable exercise" is a condition that applies to the remainder of the sentence. The terms "subject to" limits the scope of Wis. Stat. §301.33(1). "Subject to" indicates that the remainder of the statute is controlled by the terms "reasonable exercise." Thus, the "privilege: that "members of the clergy of all religious faith" have to "an opportunity, at least once each week, to conduct religious services within the state correctional institutions" is limited by the terms "reasonable exercise."
>
> The legislature's use of the word "privilege" underscores the discretionary nature of Wis. Stat. §301.33(1). Had the legislature chosen to, it could readily have used a word other than "privilege" in Wis. Stat. §301.33(1). The legislature's choice to describe the clergy member's opportunity to conduct religious services within the state correctional institution as a privilege means the legislature intended, that like other privileges identified in the statutes – evidentiary privileges, the privilege to hold a license, etc. – it is not an absolute. Rather, a privilege is conditional." R. Doc. 50 pg. 42 and 43 of 57."

Plaintiff argues that:

> ". . . the DOC still must allow the statutory privilege to be exercised in the first place. As this Court earlier concluded, the "privilege is plain and clear." The clergy has a privilege to be afforded an opportunity at minimum once a week to conduct religious services inside state correctional institution." R. 34:46. So long as the DOC is permitting this "minimum" level of access, the statute certainly grants it the authority to impose reasonable limitations . . . it cannot prohibit exercise of the privilege outright. The DOC has no real answer to this. Its interpretation renders the statute a nullity." R. Doc. 109 pg. 10 and 11.

The Court initially concluded and continues to conclude that the statute does not require the DOC to abdicate its authority to manage the state correctional institutions generally, does not require the DOC to abdicate its authority to protect the health and safety of institution workers or "staff" during a pandemic, nor does it grant clergy an "unfettered right" to (at least) once a week conduct religious services within the state correctional institutions.

What the statute does do is subject clergy's privilege to "reasonable exercise." Under the Rules of Statutory Construction, this term sets forth a condition applying to the remainder of the sentence within which it is used. The Court concludes this "reasonable exercise" applies to the privileges exercised and does not confer authority to the DOC to decide what reasonable exercise is. Rather, the statute clearly and unambiguously requires the DOC to accommodate the privilege's exercise at least once a week and facilitate the privilege's reasonable exercise. The Court rejects the Defendants' argument that the statute grants it authority to suspend the privilege in response to the COVID-19 public health emergency and presumably grants it authority to suspend the privilege for other health or security reasons, in its discretion. The plain, unambiguous language of Wis. Stat. §301.33(1) does <u>not</u> confer that authority to the Defendants (although that authority exists in the law elsewhere).

The Court next concludes that in some circumstances, such as health pandemic, natural disaster, declaration of martial law (with suspension of all citizens' rights), significant security issues and other occurrences (beyond the ability of this Court to foresee and list herein comprehensibly), the DOC has authority authorized by statute and Administrative code (other than Wis. Stat. §301.33(1)) to control ingress and egress to the state correctional system when that access endangers the health and safety of inmates, staff and workers. The privilege cannot be reasonably exercised if its exercise places the health and security of state correctional institution inmates, staff and users at risk.

If there is a point in time where the DOC's authority to control ingress and egress to correctional institutions in a manner necessary to protect the health and safety of the institutions' inmates, staff and users, conflicts with the clergy's privilege to enter those state correctional institutions, due to emergency or other catastrophic circumstances (as was present during the COVID-19 pandemic), there must be some resolution as to how to accommodate those distinct interests. This requires the DOC to first recognize the privilege and then to facilitate its reasonable exercise by engaging in a process wherein the privilege is considered in conjunction with health and safety issue(s) applicable to all correctional institution users as well as holders of the privilege.

Plaintiff seems to acknowledge the DOC's ability to control the facilities generally as it relates to its privilege in normal circumstances, but asserts that the DOC must show the Court that any exercise of its privilege would be "impossible" when Defendants deny access entirely.

Plaintiff argues:

> ". . . the principle applicable in such limited circumstances is *lex non cogit ad impossibilia* (the law does not require the doing of impossibilities): "When strict compliance with the terms of the written law is impossible, compliance as near as can be, under

> judicial sanction, is allowed." In *re Paternity of S.M.S*, 129 Wis. 2d 310, 315, 384 N.W.2d 709 (Ct. App. 1986). Impossibility is the standard, and while this Court can save for another day the question of a flood or fire, in *this* case no contention of impossibility – for 450 days, with all manner of outsiders in other government-drawn categories permitted access—can be made. Nor, assuming for the sake of argument that impossibility *could* be shown, did the DOC "compl[y] as near as can be, under judicial sanction." It unilaterally issued a blanket ban." R. Doc. 109 pg. 12 and 13 of 41.

This Court does not agree that the test to be applied when assessing the issue concerning exercise of the privilege when a decision as to general ingress and egress results in a preclusion of the exercise of the privilege entirely is "impossibility." The Legislature placed a "reasonableness" condition on the exercise of the privilege. Had it not, then the "impossibility" test might apply. The Legislature subjected the privilege to reasonable exercise. The test is whether reasonable exercise of privilege could reasonably exist under all the circumstances present.

Reasonableness is usually a question of fact for a finder of fact to resolve. Whether reasonable exercise of the privilege could be accommodated under any set of circumstances likely would not usually be resolved using Summary Judgment methodology.

Here though, the facts are well established and not in dispute. The precise issue here isn't whether the privilege was exercised reasonably because it wasn't allowed to be exercised at all. The issue is whether the DOC met its obligation under Wis. Stat. §301.33(1), as required by law, when it precluded clergy access, totally. It is not disputed that for over 450 days it did not permit access. That is the material fact in this case. It is undisputed so it is not at issue.

There are two distinct and relevant periods in which the Defendants denied access to the clergy. The first was when the DOC denied entry to all "external visitors" (those not directly involved in the institutions' day to day operations), due to COVID-19. The Court is unable, with

particularity, to pinpoint the exact timing of the second, but there came a time when other non-staff, "external visitors" were granted access while the clergy was not.

The Court will first address the initial "lockdown" period, as it relates to Wis. Stat. §301.33(1).

The Court concludes that preliminary or initial "lock down" of any state correctional institutions to any entity entering it other than "staff," i.e. "external visitors" (because of the COVID-19 pandemic breakout or some other "catastrophic" set of circumstances) goes to the operation of the facility and the Defendants' responsible operation of the facility is not prohibited by the language the Legislature chose in Wis. Stat. §301.33(1) in any form superior to other statutes vesting authority to Defendants to operate correctional institutions, protecting the health and safety of all users.

The Court thus concludes that the Defendants did not fail to facilitate clergy privilege when it chose to "lock down" the state correctional institutions to all "external visitors". Again, entry of "external visitors" to state correctional institutions that places the health and safety of inmates, staff and users at risk, in this instance, renders exercise of the clergy privilege unreasonable.

However, as time passed, the Defendants adopted safety protocols (health screens, masking, distancing, physical barriers, etc.) and allowed "external visitors" such as psychologists, social workers, teachers, therapists, healthcare professionals, maintenance workers, and interpreters to enter correctional institutions. Eventually, Defendants permitted additional (non-"staff") "external visitors" such as public officials, members of the press, investigators, law enforcement personnel, chaplains, librarians, office associates, professors, members of the Wisconsin National Guard, employment specialists, insurance providers, and

dog trainers to enter state correctional institutions, under those safety protocols. At all times though, clergy (with statutory privilege) was denied entry.

When Defendants permitted "external visitors" access to state correctional institutions, it had to have determined that total exclusion of all "external visitors" was no longer required to protect the health and safety of inmates, workers and users of those state correctional institutions.

And, once and since the DOC determined that "some" "external visitors" could enter the facilities without endangering the health and safety of state correctional system users, it is clear that reasonable exercise of the clergy's privilege to enter the facilities could be accomplished and was required to be facilitated and accommodated by the clear terms of Wis. Stat. §301.33(1) grant of clergy privilege.

The undisputed facts applied to the language chosen by the Legislature in Wis. Stat. §301.33(1) establishes, as a matter of law, that Defendants' denial of access to clergy having statutory privilege prohibited the exercise of the privilege entirely and thus prohibited any reasonable exercise of the privilege during any time period where entry to "external visitors" did not place the health and safety of inmates, staff and users at risk.

There has been no presentation of fact by Defendants from which this Court can assess (then potentially affirm) the Defendants' complete lack of facilitating and/or accommodating Plaintiff's reasonable exercise of its privilege, once Defendants "re-opened" the institutions to "external visitors". It goes without saying that failing to permit access for over 450 days did not accommodate access "at least once per week" and failing to permit access for 450 days did not facilitate reasonable exercise of the privilege in light of the fact that other "external visitors" were permitted entry subject to specific and comprehensive safety protocols.

Therefore, the Court concludes Defendants violated Wis. Stat. §301.33(1) by failing to accommodate access at least once per week and by failing to facilitate the reasonable exercise of the applicable privilege by denying access beyond that period requiring denial of access to all "external visitors," in order to protect the health and safety of all correctional institution users.

V. Did Denial of Clergy Access to State Correctional Institutions Violate Wisconsin Constitution Article I, § 18?

Article I, § 18 of the Wisconsin Constitution provides:

> "The 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 right of conscience be permitted . . . ."

Defendants assert that if this Court concludes that it violated the statutory mandate to accommodate clergy to access its facilities on a weekly basis and/or that it failed to facilitate reasonable exercise of the privilege for 450 or more days, then the Court should not consider whether Defendants violated provisions of Article I, § 18 of the Wisconsin Constitution.

Again, the Declaratory Judgment Act's stated purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." That purpose would be thwarted, unless it is ". . . liberally construed and administered," Wis. Stat. §806.04(12).

A. Does *James* Prohibit Consideration of the Constitutional Issue?

Defendants assert that Justice Hagedorn's comment in *James* (that in additionally deciding the constitutional claim there the Court was "blaz[ing] no new ground *in reaffirming and applying well-settled law*") discourages if not precludes this Court's consideration of the circumstances of this case on constitutional grounds. Defendants point out that there are no prior

Wisconsin case involving clergy requests to access prisons. R. 100:8 (quoting *James*, 397 Wis. 2d 517, ¶ 59 (Hagedorn, J., concurring) (emphasis added)).

However, just as there have been no prior clergy denial of access to state correctional institutions cases for this Court to consider here, there were no prior Wisconsin cases cited in *James* involving parent access to schools on grounds of religious belief.

The "well-settled" law to which Justice Hagedorn was referring was the compelling interest/least restrictive means test – the same test the Court will apply here. *See James*, 397 Wis. 2d 517, ¶ 59 & n.20 (Hagedorn, J., concurring). And, this Court has the guidance of the Supreme Court in *James* to aid it in its analysis of the case before it.

Finally, the "reoccurring" issue identified by Justice Hagedorn was not "pandemic-based school closures." R. 100:8. In fact, the "reoccurring issue" identified in *James* is identical to the one at issue here: "inattentive[ness] to religious liberty concerns" by "government actors issuing health-related orders during this pandemic." *James*, 397 Wis. 2d 517, ¶ 59 (Hagedorn, J., concurring).

The Court's holding in *James* does not prohibit this Court from considering the constitutional issue in this case.

B. Is the Injury Alleged by Plaintiff Hypothetical?

Defendants also suggest that resolving the constitutional claim involves an "unspecified hypothetical . . . not before this Court." R. 100:8.

The Court concludes that the constitutional issue is not hypothetical. Further, declaratory relief on the constitutional claim will "serve a useful purpose," *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 42, 309 Wis. 2d 365, 749 N.W.2d 211 (quoting *Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976)), by "teach[ing] the [DOC] what to

do under the law [here, the Wisconsin Constitution] to avoid future violations," *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 567, 494 N.W.2d 408 (1993).

A decision on the facts of this case with respect to the Constitution will provide "needed guidance to the public." *Id.* A declaration on the meaning of the Constitution provides further relief not afforded if only a declaration as to Wis. Stat. §301.33(1) issues occurs here.

C. Is Consideration of the Constitutional Issue Timely?

Finally, Defendants argue that this Court should "avoid reaching constitutional questions in advance of the necessity of deciding them." R. 100:7 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445 (1988)).

Federal courts are much more restricted than are state courts on questions of justiciability. *See, e.g. Chafin v. Chafin,* 568 U.S. 165, 171-72 (2013). *James* is better guidance than Federal law cited by Defendants and this Court will exercise its discretion to reach this "fully presented, fully briefed" issue. *James,* 397 Wis. 2d 517, ¶ 59 (Hagedorn, J., concurring).

Finally, under Wis. Stat. §301.33, in-person weekly access to conduct religious services is subject to a different standard and/or test than the constitutional issue is. Whereas the statutory test is whether the state has facilitated "reasonable exercise of the privilege" and/or whether it has accommodated at least once per week access, the constitutional issue test is quite different. While the DOC may adopt certain regulations either accommodating once per week access or facilitating reasonable exercise of the privilege under Wis. Stat. §301.33(1), such acts potentially might not pass muster under Article I, § 18 of the Wisconsin Constitution.

The standard or test on review when evaluating Constitutional Right deprivation is whether the government can demonstrate both a compelling state interest in the acts burdening that right and whether there is a lack of any less restrictive alternative to the official act

interfering with Plaintiff's Constitutional Right(s), once Plaintiff establishes it holds a sincere religious belief that is burdened by state action. Thus, the two interests are analyzed by Courts under two separate tests and in this Court's opinion should be considered separately.

Finally, James is illustrative. In *James*, four justices resolved the religious liberty question even though its earlier statutory holding rendered a constitutional decision unnecessary. *See James v. Heinrich*, 2021 WI 58, ¶ 32 n.18, 397 Wis. 2d 517, 960 N.W.2d 350 (plurality opinion). The plurality and concurrence recognized the great public importance of the question and the need for clarity. Those same considerations apply in this case. ("Our duty to uphold the Constitution, however, is particularly urgent when governmental action is alleged to infringe the people's fundamental right to religious freedom."); *see id.* at ¶ 59 (Hagedorn, J., concurring) (explaining that resolution was warranted in part because "government actors issuing health-related orders during this pandemic have at times been inattentive to religious liberty concerns" and "decision-makers should understand the legal requirements that must inform their decisions in this area").

Likewise, this Court concludes that consideration of the constitutional issues is warranted, specifically rejecting the Defendants' arguments to the contrary.

The Court thus proceeds to consider the issue concerning the Wisconsin Constitution's requirements.

D. Constitutional Analysis

"Wisconsin's framers 'use[d] the strongest possible language in the protection of this right." *James v. Heinrich*, 2021 WI 58, ¶ 38, 397 Wis. 2d 517, 960 N.W.2d 350 (quoting *Coulee Cath. Sch. v. Lab. & Indus. Rev. Comm'n, Dept' of Workforce Dev.*, 2009 WI 88, ¶ 59, 320 Wis. 2d 275, 768 N.W.2d 868) (alteration in original). The result is a safeguard "more prohibitive

than the First Amendment of the United States Constitution." *Id.* (quoting *King v. Vill. of Waunakee,* 185 Wis. 2d 25, 59, 517 N.W.2d 671 (1994) (Heffernan, C.J., dissenting)).

Wisconsin courts apply a four-part "compelling state interest/least restrictive alternative test" to laws burdening religious beliefs:

> Under this test, the [individual] or religious organization has to prove (1) that it has a sincerely held religious belief, and (2) that such belief is burdened by the application of the . . . law at issue. Upon this showing 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.

Id. at ¶ 39 (quoting *Coulee*, 320 Wis. 2d 275, ¶ 61) (alteration in original).

Defendants argue that a more lenient standard may exist in this instance, but that analysis has been rejected by the Wisconsin Supreme Court in Article I, § 18 Wisconsin Constitution cases:

> [I]n 1990, the United State Supreme Court repudiated use of the compelling state interest standard in claims based solely on the Free Exercise Clause of the First Amendment. *Employment Div. v. Smith*, 494 U.S. 872 (1990) . . . . We conclude that the guarantees of our state constitution will best be furthered through continued use of the compelling interest/least restrictive alternative analysis of free conscience claims and see no need to depart from this time-tested standard.

State v. Miller, 202 Wis. 2d 56, 69, 549 N.W.2d 235 (1996) (footnote omitted).

Moreover, this Court is not persuaded by Defendants' arguments that this Court should apply an Establishment Clause test under *O'Malley v. Brierley*, 477 F.2d 785 (3d Cir. 1973), whether or not that case and/or its progeny actually reached conclusions in that regard through the Establishment Clause.

The Wisconsin Supreme Court has recognized that the framers of our State Constitution chose to provide "expansive protections for religious liberty":

> The Wisconsin Constitution uses the strongest possible language in the protection of this right. It provides that the right to worship as one is so convinced "shall never be infringed." It goes even further, stating "nor shall any control of, or interference with, the rights of conscience be permitted."

Coulee, 320 Wis. 2d 275, ¶¶ 59-60.

Thus, this Court will analyze the issues herein under *King* and *Coulee* and *Miller*, as required by the Wisconsin Supreme Court.

The parties seem to agree that Plaintiff has a sincerely held religious belief. While Defendants attempt to deflect the issue, styling Plaintiff's claim as piggybacking to inmates' rights to exercise religion for example, the Court declines Defendants' invitation to analyze the case based upon the rights of individuals who have not filed claims in this lawsuit and instead analyzes the claims of the Plaintiff, actually filed herein.

Plaintiff explain their religious beliefs as follows:

> "The Archbishop of the Archdiocese has explained that the Archdiocese and its clergy sincerely hold the religious belief that they "must have the opportunity to meet in-person with Wisconsin inmates for the purpose of providing religious services, including the administration of sacraments." *See* A. LoCoco Aff. 63.
>
> In explaining this belief, Archbishop Listecki has stated that the Archdiocese's mission is "[t]o proclaim the Gospel of Jesus Christ through his saving death and resurrection by calling, forming and sending disciples to go and make new disciples. As a people, we are called to encounter Jesus and grow as disciples through the sacramental life of the Church." R. 9:6 at ¶ 7. Thus, "[a]s part of its mission and as an exercise of its faith, the Archdiocese sends members of its clergy to state correctional facilities throughout its territory to minister to prisoners," which includes the provision of "sacraments in-person such as the Eucharist, Penance, and the Anointing of the Sick." *Id.* at ¶ 8. It is the Archdiocese's belief that it is the religious duty of its clergy to perform the "Corporal Work of Mercy" of "[v]isiting prisoners" and likewise their duty to "administer sacraments to those in need of them." R. 9:7 at ¶ 10. The Archdiocese views the reception of sacraments, in particular, as "necessary for salvation." *Id.* And, critically, these sacraments must

> be administered in-person under Catholic teaching. A. LoCoco Aff. 65-66.
>
> Similarly, in-person access is required even for non-sacramental religious services likes pastoral counseling, in part because "the spiritual needs of an individual may require in-person ministry," because "remote ministry may not be as effective, especially over a prolonged period," and because "continued remote ministry impedes the clergy from assessing and fulfilling the spiritual needs of inmates, as an all-remote policy may discourage particular inmates from making requests for religious services and hampers the formation of relationships between clergy and inmates." *Id.* at 66.
>
> Although the Archdiocese can speak for its clergy, a priest the Archdiocese additionally provided as an example averred similarly. *See* R. 9:10-11 at ¶¶ 8, 11-12 (clergy's view was that it was his duty to visit prisoners and administer sacraments to those in need of them and that specified sacraments could not be offered virtually)."

Defendants do not dispute that Plaintiff's religious beliefs are sincere under the first *King/Coulee/Miller* test. The Court also concludes, independently, that Plaintiff, a religious organization, has a sincerely held religious belief in its mission to fulfill the spiritual needs of those it ministers and particularly here, those confined in state correctional institutions. The ministry includes sacraments such as the Eucharist, Penance and Anointing of the Sick to those in need of them. Such sacraments must be administered in person under the doctrine of Plaintiff's church as followed by clergy and congregation.

The Court thus concludes that Plaintiff has satisfied the first "compelling state interest/least restrictive alternative test" to state infringements alleged to violate Article I, § 18 of the Wisconsin Constitution.

The second element which Plaintiff must prove under the *King/Coulee/Miller* test is whether the sincerely held religious belief has been burdened by the application of the infringement at issue.

The Defendants' argument that Plaintiff fails to meet its burden is three pronged. Their first argument is to concede (R. Doc. 50, page 31) that while Plaintiff may be able to show a burden, that burden is not a "substantial burden." While Defendants may have, in the course of multiple submissions through briefing, withdrawn this assertion, the Court will consider the issue so that it is definitively addressed herein.

Wisconsin law does not require that a "substantial" burden exist under the *King/Coulee/Miller* test. The test under Wisconsin law is whether a "burden" exists. If it does, then consideration of whether a compelling state interest applies, with burden assignment transferring to the state.

The Court concludes that even if a superior court determines that a "substantial burden" test is required, the Plaintiff has met its burden not only to show that a burden exists but that the burden, in fact, is substantial. Defendants agree that government action substantially burdens religious exercise "if it bears direct, primary, and fundamental responsibility for rendering [a] religious exercise. . . effectively impracticable." DOC Br. 29-30 (quoting *Korte v. Sebelius*, 735 F.3d 654, 682 (7th Cir. 2013)) (alterations in original). When the DOC closed prison doors to the clergy, it fully rendered impracticable Plaintiff's ability to exercise its faith because it was precluded from entering state correctional institutions to minister to the religious needs of Wisconsin inmates. Plaintiff's clergy could not hear confessions; could not distribute the Eucharist; could not administer Last Rites; could not celebrate in-person Masses. That is a burden. The Court concludes that it is a substantial burden, as well.

These were burdens the Wisconsin Supreme Court found sufficient in *James*. *See James*, 397 Wis. 2d 517, ¶¶ 42-43 (school closure order "barr[ing] students from attending Mass, receiving Holy Communion at weekly Masses with their classmates and teachers, receiving the

sacrament of Confession at school, participating in communal prayer with their peers, and going on retreats and service missions throughout the area" "incontrovertibly burden[ed]" the Petitioners' beliefs).

The second prong of Defendants' arguments here is that its act did not burden Plaintiff for all time but did so for "only" 15 months. R. Doc. 50, page 30.

There is no grace period in Wisconsin permitting the government to act unconstitutionally, *see James*, 397 Wis. 2d 517, ¶ 48. The 15-month prohibition in this case is certainly not *de minimis*, in this Court's view.

The issue under the burden "test" is whether the policy by its terms interferes with or prohibits a religious practice, not how long it is in place. The Court must assess, on the merits, whether denial of entry constituted a burden on religious beliefs. *See id.* at ¶¶ 8, 14, 41 (finding sufficient burden even though Court had enjoined the offending policy approximately three weeks after it took effect).

Defendants' third argument is the Plaintiff's clergy could have effectively ministered to prisoners in other ways, such as over the phone. That is not the Plaintiff's religious belief. R. 98:3-6. Moreover, a government entity has no authority to tell a religious adherent that some other means of religious exercise aside from the type it banned is equivalent. To do so would be an actual Establishment Clause violation. *Thomas v. Review Bd. of Indiana Employment Sec. Division,* 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation.")

Thus, the Court concludes, under the second test, that Plaintiff has met its burden and has established that its sincerely held religious belief was burdened (substantially so) when Defendants denied it access to state correctional institutions.

The next test is whether the government action was based on a compelling state interest. The burden switches to the government in this regard.

Defendants assert and Plaintiff seems to agree that the Defendants have met their burden. Upon that agreement and the Court's independent determination, as well, the Court concludes that the COVID-19 pandemic constituted a public health crisis. The Defendants were and are mandated by Wisconsin law to protect the safety and security of inmates, staff and correctional institution users. Slowing the spread of COVID-19 in Wisconsin prisons is and was compelling. The DOC took steps to combat COVID-19 in state correctional institutions by "locking them down." The government had/has compelling state interests to deny access to state correctional institutions to all "external visitors" when entry thereto detrimentally affects the health and safety of inmate and institution users.

Because that element is not contested and has been determined by the Court independently, as well, the Court concludes that Defendants have met their burden as to the third *King/Coulee/Miller* test.

The Court next proceeds to analyze the final test, that is whether the state has proven that the compelling state interest (it has established), could not (cannot) be (have been) served by a less restrictive alternative.

The claim in this case is that under the Wisconsin Constitution, in burdening religious beliefs in service of compelling state interests, the Defendants may not infringe on religious rights to an extent other than that which is absolutely necessary. The state is not permitted to burden constitutionally protected religious beliefs if less restrictive alternatives are (were) available.

Again, there are two distinct periods to which the Court applies its analysis.

The first is the Defendants' initial "lockdown" of state correctional institutions, denying entry to all those not directly involved in the day to day operation of the institutions, including the clergy, as a result of the COVID-19 pandemic.

The Court concludes that Defendants have met their obligation to show that closing their facilities to "external visitors" was the least restrictive means in burdening Constitutional Rights considering its compelling interests, here, to slow the spread of COVID-19 and protect the health and safety of the people in its care, its staff, and the community, during the initial outbreak of the pandemic.

Defendants continuously received and proceeded upon new information from immunization specialists, epidemiologists, infection prevention specialists, communicable disease specialists, and the State Epidemiologist for Wisconsin. (Buono Aff. (Dkt. 87) ¶ 10.) The information was used to plan for the myriad logistics involved in running prisons during a pandemic. (See Buono Ex. 1010 (Dkt. 88).)

Ultimately, though, there came a time when clergy was denied entry while other "external visitors" including lawyers, paralegals, public officials, investigators, members of the press, law enforcement personnel, chaplains, librarians, office associates, psychiatrists, psychologists, social workers, teachers, professors, therapists, maintenance workers, and dog trainers, under health and safety protocols, were permitted entry into state correctional institutions.

In evaluating over 600 "sign ins" in documents encompassing but a few correctional institutions, Plaintiff summarized the documentation as demonstrating that each of the following types of individuals were permitted by Defendants to access a state correctional institution during period at issue:

> "[c]ontracted health care professionals; members of the Wisconsin State National Guard; attorneys; members of law enforcement; a language interpreter for Earned Release Programming; instructors from area technical colleges; substance abuse treatment providers; Windows to Work staff; an employment specialist; a professor; and maintenance contractors."

Id. at 12-13.

Defendants also permitted outside volunteers from a group called "Occu-Paws" to enter a correctional facility while clergy was not. *Id.* at 13-14. This group, among other activities, runs a prison program called "PawsForward" in which inmates "raise, train, feed, water and care for . . . dogs"; volunteers "conduct weekly classes within the institution for inmates on training and grooming. The Court takes judicial notice of PawsForward functioning in Wisconsin correctional institutions, pursuant to Wis. Stat. §902.01(2) and also notes that this Court likes dogs fine. The Court considers this program very worthy as did the Defendants, apparently.

Prison visitor logs for the period at issue also confirm that in addition to allowing in individuals in the categories set forth above – *see, e.g.* A. LoCoco Aff. 40, 42-43 (legal), *id.* at 41-42 (police interview), *id.* at 45, 48-50 (education), Defendants also allowed access to other visitors but not the Plaintiff. *See, e.g. id.* at 39-40 (individuals affiliated with "Camp Reunite"); *id.* at 46 (individual from Moraine Park Technical College entering for "Graduation"); *id.* at 44 ("Job Center"), *id.* at 51 (individual with "Liberty Mutual" insurance); *id.* at 55 ("Parole Commissioner"); *id.* at 57 ("Social Security"); *id.* at 59 ("Retiree" to see the "Warden"); *id.* at 60 ("Mexican consulate").

In February of 2021, around the same time that the DOC informed an Archdiocesan priest he could not enter its facilities to hear an inmate's confession despite the priest's belief that the inmate's eternal salvation was implicated, *see* R. 9:10 at ¶¶ 7-9, the DOC afforded professors of math and theology access. *See* A. LoCoco Aff. 47.

In April of 2021, the same month Defendants specifically denied access to Plaintiff, explaining that it would wait until it was "safe to do so" and that it had an "obligation . . . to limit, as much as possible, the introduction of the virus into our prison population," R. 9:39, the DOC allowed access to visitor(s) for a "retirement party." *See* A. LoCoco Aff. 60.

On June 17, 2021 – the day after the DOC filed a brief in this Court arguing that clergy could not be allowed into its facilities to minister to inmates until the reopening date it had chosen "in consultation with public health and infectious disease experts" in order to "protect their especially vulnerable population," R. 12:2-3 – the American Red Cross held a blood drive at Fox Lake Correctional Institution. *See* A. LoCoco Aff. 52.

The only salient facts/argument Defendants offered to explain this dichotomy was that religious volunteers require escorts and security staff that are not necessarily required for other entrants. (*See* Hepp Aff. (Dkt. 103): ¶ 5; Pettera Aff. (Dkt. 91): ¶¶ 6, 8). Record, Doc. 111, at page 13.

Defendants further argue that there was increased risk from activities where individuals congregated, as they might in religious Masses, but did not submit facts showing that less restrictive measures controlling religious exercise could not have been instituted to accomplish that purpose. Defendants rejected any proposals permitting clergy access under any conditions and circumstances.

Further, the Defendants might have but did not demonstrate that individuals congregating formed unacceptable risk. In fact, the opposite was shown. Inmates were not banned from congregating for any or all other activities such as education classes, recreation or meals. The Defendants failed to conclusively demonstrate that no alternative existed to a complete access prohibition to clergy.

Defendants argue that clergy "regularly participate in large congregate services and individual counselling sessions" but it did not ban any of the entrants into its facilities from attending religious services outside of the facilities or comparable congregate activities. And, tellingly, Defendants did not prevent congregate religious activities in the correctional institutions themselves. *See* Second Affidavit of A. LoCoco 5 (April 2020 email explaining that prison was "conducting 10 man services" "in the Chapel" "all day long, 5 days a week"); *id.* at 7-8 (April 2020 guidance on Passover observance explaining that "[s]ites continuing congregate religious programming limit group size to 10"); R. 16:4 at ¶ 12 (DOC affidavit explaining that "[i]n the past year, many sites also began offering congregate [religious] programming").

"[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too." *Tandon v. Newsom*, 141 S. Ct 1294, 1297 (per curiam); *see James*, 397 Wis. 2d 517, ¶ 47 ("The Order failed to explain why college-aged students could continue to live, learn, and socialize in close communities, while students in grades 3-12 were consigned to computer screens.")

Defendants have failed to demonstrate why/how clergy was determined to be more dangerous to the health and safety of inmates and correctional institution users than those to whom it permitted entry.

The least-restrictive-means standard has been noted to be "exceptionally demanding" by Wisconsin Courts. *James*, 397 Wis. 2d 517, ¶ 45 (quoting *Holt*, 574 U.S. at 364).

Defendants have not asserted much less demonstrated that once it found targeted potential difficulties in admitting clergy that it considered any alternative less restrictive than to deny clergy entry, altogether.

The Court concludes that Defendants have not demonstrated that less restrictive alternatives to a complete denial of access to Plaintiff were not available. In contrast, the record demonstrates that alternatives to a complete ban were actually used for all types of individuals that Defendants allowed to access. The DOC adopted health and safety protocols and applied them to individuals they permitted into state correctional facilities. These measures were temperature checks, COVID testing, mask requirements and social distancing, hand washing and enhanced cleaning protocols. A. LoCoco Aff. 14. Defendants did not demonstrate that the same or similar rules applied to professors and therapists and all of the others that it permitted entry could not be applied to visiting clergy.

Defendants certainly chose to classify clergy differently than others but offered no cogent explanation for why they did not deem the clergy worthy of entry when so many others were. Defendants have not demonstrated on this record what process was used, if any, what evidence was taken and considered, if any, or what criteria they applied if they actually had made these determinations. Defendants did not demonstrate whether they considered the Wisconsin Constitution or law in doing so (or not doing so). The record is void of any contemporaneous demonstration of Defendants' weighing of circumstances process or recognition of Plaintiff's Constitutional Rights in reaching their conclusion, as one might expect be shown to meet a burden requiring a demonstration that no less restrictive alternatives were available. The Court reluctantly concludes that the record evinces Defendants' will, not their judgment. There is

absolutely no evidence that Defendants engaged in any process wherein they considered less restrictive measures to their total denial of Plaintiff's constitutionally protected religious liberty.

Finally and boldly, the Defendants suggest that the Court should give deference to Defendants' experience and expertise in maintaining safety and security in penal institutions." DOC Br. 39. The law does not support that request:

> ". . . courts nearly always face an individual's claim of constitutional right pitted against the government's claim of special expertise in a matter of high importance involving public health or safety. It has never been enough for the State to insist on deference or demand that individual rights give way to collective interests. Of course [judges] are not scientists, but neither may [they] abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty. The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard."

S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (mem.) (Barrett, J., concurring in the partial grant of application for injunctive relief).

The record in this case wholly fails to support the government's contention that no less restrictive alternatives were available to its official acts, burdening Plaintiff's sincere religious beliefs, considering the government's compelling state interests. No alternatives have been shown to even have been considered.

Defendants have failed in their burden as to the fourth element of the test.

SUMMARY

The Court concludes that Plaintiff has proven the existence of the first two tests. The Defendants have proven the third element but have failed to prove the fourth.

Therefore, the Court concludes that the government violated the Plaintiff's rights under Article I, §18 of the Wisconsin Constitution.

VI. What Relief is Appropriate in this Case?

A. Declaratory Relief.

The standards for an award of Declaratory Relief is as follows:

> 1. There must exist a justiciable controversy[,] that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it.
>
> 2. The controversy must be between persons whose interests are adverse.
>
> 3. The party seeking Declaratory Relief must have a legal interest in the controversy[,] that is to say, a legally protectable interest.
>
> 4. The issue involved in the controversy must be ripe for judicial determination.

DSG Evergreen Fam. Ltd. P'ship v. Town of Perry, 2020 WI 23, ¶ 39, 390 Wis. 2d 533, 939 N.W.2d 564.

The Court has concluded that justiciable controversy exists, earlier in this decision, (see pages 17-20 herein). The Court has also concluded that the case is ripe for judicial determination (see pages 23-24 herein). The parties' interests are adverse. Defendants have asserted that they have authority to close access to state correctional institutions to clergy and Plaintiff in the future. *See* A. LoCoco Aff. 8. Plaintiff has a statutory privilege (see pages 25-37 herein) and Constitutional Right (see pages 37-53 herein) that must be legally protected.

The Court concludes that the legal requirements for Declaratory Relief have been proven by Plaintiff. Moreover, the Court has been persuaded, in equity, for reasons stated on pages 53 and 54 herein to issue relief and particularly relief in this form, as requested by Plaintiff.

Plaintiff's request for Declaratory Relief as requested, and as addressed herein, is GRANTED.

B. Injunctive Relief.

The standards for permanent injunction have been held to be as follows:

> To obtain [a permanent] injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of [and will] injure the plaintiff. To invoke the remedy of injunction the plaintiff must moreover establish that the injury is irreparable, i.e. not adequately compensable in damages. Finally, injunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction.

Pure Milk Prod. Co-op. v. Nat'l Farmers Org., 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) (citations omitted).

This Court has determined that there is a sufficient probability both that clergy's statutory privilege to access Wisconsin correctional institutions and Plaintiff's Wisconsin Constitution Article I, § 18 rights will be threatened by Defendants in the future, causing injury to Plaintiff. "[T]o establish a sufficient probability that a defendant's conduct will injure a plaintiff it is not necessary for the plaintiff to wait until some injury has been done; equity will prevent, if possible, an injury. Threat of an injury is sufficient." *See id.* at 802. Here the threat of injury is Defendants' assertion that they have the right to deny Plaintiff access to Wisconsin correctional institutions in the future if conditions warrant as evidenced by Plaintiff's affidavit that Taycheedah Correctional Institution had cancelled all religious services through January 3, 2022, even after this Court issued a preliminary Writ; "[d]ue to an unexpected increase in COVID cases at TCI," (Plaintiff's clergy would be unable to provide Christmas services). A. LoCoco Aff. 70-72. When Defendants were "reminded" that the Court had issued a provisional writ, the decision was reversed. That episode demonstrates the real risk of a future violation. State bureaucrats, however well-intentioned, have summarily ignored both statutory privilege and the Wisconsin Constitution in denying access to clergy, both before and even after this Court made

preliminary Writ of Mandamus its order. The trajectory of the COVID-19 virus is unpredictable. An injunction will eliminate any uncertainty and serve as a permanent "reminder" of the state's obligation under Wisconsin law and the Wisconsin Constitution as determined by the Third Branch of Government.

This Court has previously determined (and continues to do so) that violation of statutory right to minister to inmates is irreparable. R. 34:65-67. No amount of money or later "rectification" remedies interference with Plaintiff's religious duties and constitutional protection thereof as well as its clergy's rights under statute. In fact, at law, Plaintiff's Constitutional Right under Article I, § 18 loss can never be remedied. *See Wright & Miller*, 11A Fed. Prac. & Proc. § 2948.1 (3d ed.) ("when an alleged deprivation of a constitutional right is involved, such as the right to . . . freedom of religion, most courts hold that no further showing of irreparable injury is necessary") (discussing preliminary injunctions).

And, equities weigh in favor of relief. The importance of the statutory and constitutional religious liberty rights at stake, the need to protect the balance struck by the Legislature in determining how best to see to the religious needs of clergy and inmates, the need to ensure that administrative agencies obey the commands of the Legislature, and the need to terminate lingering uncertainty all weigh heavily in favor of the Court exercising its discretion to issue a permanent injunction.

Plaintiff should not be required to seek emergency relief – as it did in this case – whenever Defendants decide that health concerns require that clergy be denied access to state correctional institutions while others are granted access.

Religious interests (guaranteed by the Wisconsin Constitution) and the privilege to clergy (granted by the Wisconsin Legislature through statute) were not given consideration by

Defendants in denying them access to state correctional institutions for over 450 days. The Defendants' acts in that regard were not tailored narrowly to meet competing state interests and Plaintiff rights. They were not tailored at all.

Finally, Defendants assert that:

> "[A] court's power to grant injunctive relief only survives if such relief is actually needed." *Nelson v. Miller,* 570 F.3d 868, 882 (7th Cir. 2009), abrogated on other grounds by *Jones v. Carter*, 915 F.3d 1147, 1149-50 (7th Cir. 2019) . . . ."
>
> "Public Officers are always presumed, in the absence of any showing to the contrary, to be ready and willing to perform their duty . . . until it is made to appear that they have refused to do so, or have neglected to act under circumstances rendering this equivalent to a refusal." *White House Milk Co. v. Thomson*, 275 Wis. 243, 250, 81 N.W.2d 725 (1957) (citing 52 Am. Jur., *Taxpayers' Actions*, §26 at 18). That explains why our supreme court has recognized that a judgment declaring a statute unconstitutional by its own force precludes public officials from enforcing that statute. *See Olson,* 309 Wis. 2d 365, ¶ 44 n.9.

Just as Dane County was unable to explain why kindergarteners and college students could receive in-person education but middle school students could not, Defendants' attempts to draw similar distinctions are inexplicable. Defendants were and are, under Wisconsin law and Wisconsin Constitution, required to give religious beliefs full consideration, and do all in their power to avoid burdening them. Defendants did not do so here, even if good intentions existed in unprecedented emergency conditions: "[T]he government may not override [Wis. Const. Art. I, § 18], even in a pandemic." *James*, 397 Wis. 2d 517, ¶ 48.

Plaintiff asks this Court to bar Defendants from readopting the violative March 2020 policy. Such an order does not "permanently revoke DOC's discretion to determine at what point a known danger could justify suspending visitation to protect the people inside." R. 100:31.

This Court concludes that a Permanent Injunction is warranted and necessary under Wisconsin law. The Court concludes that granting Permanent Injunction is required in equity. The Court GRANTS Permanent Injunction to Plaintiff, as requested and as addressed herein.

C. Writ of Mandamus.

"A writ of mandamus may be used to compel public officers 'to perform duties arising out of their office and presently due to be performed.'" *Pasko v. City of Milwaukee*, 2002 WI 33, ¶ 24, 252 Wis. 2d 1, 643 N.W.2d 72 (quoting *Law Enforcement Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89 (1981).

The elements needed to secure a Writ of Mandamus are: "(1) a clear legal right; (2) a plain and positive duty; (3) substantial damages or injury should the relief not be granted; and (4) no other adequate remedy at law." *State ex rel. Oman v. Hunkins,* 120 Wis. 2d 86, 88, 352 N.W.2d 22 (Ct. App. 1984) (per curiam).

This Court has determined that Wis. Stat. §301.33 confers the following right to clergy: "[s]ubject to reasonable exercise of the privilege, members of the clergy of all religious faiths *shall* have an opportunity, at least once each week, to conduct religious services within the state correctional institutions." (Emphasis added.) The statute uses "shall" language thus requiring the clergy be given access to state correctional institutions at least weekly.

This right belongs to the clergy. The Court addressed its asserted right herein. The rights of inmates to "religious ministration and sacraments according to the inmate's faith" are, in contrast, addressed in Wis. Stat. §301.33(2). The Court has not addressed that statute because proper party Plaintiffs, upon whom such rights have been conferred, are not involved in this lawsuit.

Under Wis. Stat. §301.33(1), the DOC has a plain and positive duty to accommodate clergy privilege through at least once weekly access and facilitate the reasonable exercise of that privilege.

The DOC is permitted to prescribe rules for all persons entering Wisconsin correctional institutions under provisions of statute and Administrative Code other than Wis. Stat. §301.33(1). These rules might include the time weekly services are offered; the place within a facility the services take place; applicable health safety protocols, etc.

This Court has concluded that in extraordinary circumstances affecting the health and safety of prison users, the DOC has legislatively granted authority to "lockdown" state correctional institutions to all "external visitors", including those with statutory and/or constitutional standing to enter (lawyers/doctors/clergy).

However, once the DOC determines that "external visitors" can re-enter the correctional institutions (including requirements protecting prison inmates and users' health and safety), then Plaintiff, with statutory privilege must have access at least once per week unless reasonable exercise of the privilege in that regard cannot occur under the circumstances. Defendants are also obligated to facilitate the reasonable exercise of the privilege in conducting religious services, unless exercise of the privilege cannot occur under the circumstances.

A blanket ban on those with statutory privilege to enter, beyond the time necessary to "lockdown" correctional institutions to all "external visitors" to protect the health and safety of inmates and users, violates Wis. Stat. §301.33. When it is safe for "external visitors" to enter the prison system, then under that statute, clergy with privilege must be permitted to reasonably exercise that privilege and also be permitted to enter correctional institutions no less than once per week to conduct religious services.

Thus, a distinct, substantial harm to clergy occurs whenever the Defendants do not comply with their statutory duty to accommodate clergy's privilege to access state correctional institutions at least once per week to conduct religious services and/or facilitate reasonable exercise of the privilege granted in Wis. Stat. §301.33(1).

The Legislature has deemed the privilege worthy of protection. While the Defendants may disagree with the entity that created it and which confers any and all authority Defendants have and exercises, the Legislature, Wisconsin law, requires Defendants to yield to the judgment of its creator.

Defendants argue that a Writ of Certiorari is available to Plaintiff under the circumstances of this case. Because there is an adequate remedy at law available, an element required for a Court to issue a Writ of Mandamus is negated.

This Court disagrees. The Defendants have not promulgated rules terminating the clergy privilege nor has it been authorized by the Legislature to do so. There is thus no certiorari right to Plaintiff for Court review of any act not authorized by law.

Defendants also argue that relief under Wis. Stat. §227.52 is available. This Court disagrees. Wis. Stat. §227.52 applies to individualized, official proceedings before the agency. *See, e.g., Sierra Club v. Wisconsin Dep't of Nat. Res.,* 2007 WI App 181, ¶ 13, 304 Wis. 2d 614, 736 N.W.2d 918 (review limited to "final" decisions); Wis. Stat. §227.47 (every final decision must be "in writing accompanied by findings of fact and conclusions of law"); §227.57 (review is "confined to the record"); *State v. Ozga Enterprises, Inc.*, 160 Wis. 2d 783, 789, 467 N.W.2d 134 (Ct. App. 1991) ("The record is the record of the administrative proceedings in which the decision under review is made.")

No official proceedings occurred in this case. Defendants announced the closure through a press release, in March 2020. Wis. Stat. §227.52 and its procedures for review are not applicable to the circumstance in this case. Thus, no adequate remedy at law exists to remedy the clergy's injury. The Court concludes that Mandamus is an appropriate remedy in this matter.

Finally, a Writ of Mandamus is a discretionary writ laying within the sound discretion of the Court in equity to either grant or deny once its elements have been established. *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, *supra*.

Having shown, here, that it has a statutory claim, Plaintiff also asserts the public's interest and those of prison inmates as well as its own to persuade the Court, in equity, to grant a Writ of Mandamus. It is legally proper for Plaintiff to do so. *See, e.g.* 42 Am. Jur. 2d Injunctions §39 (courts have discretion to weight interests of public and third parties in deciding whether to issue injunctions).

As to equity, Defendants ask the Court to consider and weigh interests in safety and security. A writ does not destroy those interests. The writ here requires the Defendants to facilitate and accommodate Plaintiff's statutory privilege, lawfully, in accordance with the commands of the Legislature. In weighing the countervailing interests presented by the government herein and the statutory right at stake, ensuring that administrative agencies obey the commands of the Legislature, and the need to terminate lingering uncertainty, the Court determines that in equity, a Writ of Mandamus could issue.

However, this Court concludes that it will not exercise its discretion even after considering and affirming the applicable standards and equitable considerations. The Court will not grant a permanent Writ of Mandamus to Plaintiff under all circumstances presented herein.

While Declaratory Judgment on both Plaintiff's claims is clear, the combination of remedies Permanent Injunction and Writ of Mandamus seems duplicitous under the circumstances here, when public officials' duties are not presently due to be performed under the *Pasko* and *Law Enforcement Standards Board* standards. Thus, the Court concludes that continuing the preliminary Writ of Mandamus as a permanent Writ of Mandamus is redundant, given the Court's determinations to grant Plaintiff Declaratory Judgment and Permanent Injunction. Nonetheless, as indicated above, as to the Wis. Stat. §301.33(1) claim, the provisional writ was appropriate and the standard and equities certainly otherwise have been met, to request the Court to grant an injunction in its discretion.

The Court also has not addressed the constitutional issue in its Writ of Mandamus analysis. As to the constitutional claim at issue, circumstances and context are pivotal in analyzing whether less restrictive alternatives are available as, if and when as a result of compelling state interest, the government burdens a sincerely held religious belief. Thus, a Writ of Mandamus is best left to apply to existing circumstances as, if and when they become clear, in this Court's review, as to the constitutional issue.

Thus, although Summary Judgment to Plaintiff is granted, this Court declines to issue the Writ of Mandamus remedy, in its discretion.

CONCLUSION

Plaintiff's Motion for Summary Judgment is GRANTED.

Defendants' Motion for Summary Judgment is DENIED.

Plaintiff's request for Declaratory Judgment (Wis. Stat. §301.33(1)) is GRANTED, as set forth in the Court's Order, dated this same day.

Plaintiff's request for Declaratory Judgment (Wisconsin Constitution Article I, § 18) is GRANTED, as set forth in the Court's Order, dated this same day.

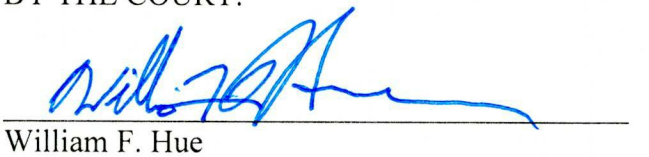
Plaintiff's request for Permanent Injunction as to Wis. Stat. §301.33(1) is GRANTED, as set forth in the Court's Order, dated this same day.

Plaintiff's request for Permanent Injunction (Wisconsin Constitution Article I, § 18) is GRANTED, as set forth in the Court's Order, dated this same day.

Plaintiff's request for Writ of Mandamus (Wis. Stat. §301.33(1)) is DENIED, the Court's preliminary Writ of Mandamus is VACATED.

Dated this 14th day of July, 2022.

BY THE COURT:



William F. Hue
Circuit Court Judge, Branch 2

ec: Counsel