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By Email and Hand Delivery

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Re: Madison and Dane County Restrictions on Religious Worship

Dear Executive Parisi, Mayor Rhodes-Conway, and Director Heinrich:

We write on behalf of Bishop Donald J. Hying and the Roman Catholic Diocese of Madison (the “Church”) regarding the restrictions that Madison and Dane County have placed on religious worship as part of their response to the COVID-19 pandemic and the Forward Dane plan.

Throughout this pandemic, the Church has been a good public citizen. It suspended public worship before the law required, and continues to impose greater operational restrictions than required. At the same time, the Church has continued its ministry to the sick, the poor, and the incarcerated as best as possible, while generally supporting the unprecedented restrictions that public health officials have deemed necessary to combat the novel coronavirus.

Madison and Dane County are now thankfully beginning the process of reopening. Resuming civic activities, including public worship, is a necessary and valuable part of that process. On May 22, 2020, Public Health Madison & Dane County (“PHMDC”) issued Emergency Order 3 and a corresponding reopening plan, which subject the routine operations of houses of worship—and of no other category of organization—to a “Mass Gathering” limit of 50 persons. Retail stores, shopping malls, restaurants, bars, offices, factories, gyms, salons, tattoo parlors, spas,

dog parks, contact sports, trampoline parks, movie theaters, museums, hotels, community centers, car washes—the list goes on—are all permitted to open and conduct “everyday operations” at 25 percent of their certified occupancy but without a generally applicable and blanket numerical cap. To be sure, if such an establishment hosts a “planned event” distinct from its “everyday operations”—such as a concert, training, or conference—that gathering would be subject to the strict 50-person “Mass Gathering” limit. Under Emergency Order 3, however, only religious organizations are singled out by having their core “everyday operation,” religious worship services, uniformly designated as “Mass Gatherings” automatically subject to the 50-person cap without regard to the size or configuration of the venue, mitigation precautions in effect, or any other scientifically-relevant, event-specific consideration. To enforce this special burden, PHMDC has informed the Church and its parishes that they will be fined if more than 50 worshipers gather for prayer.

This treats religious interests unequally and unfairly. Office and factory employees, children enjoying places of amusement, diners sitting in bars and restaurants, and shoppers congregating at a mall are subject only to a 25 percent occupancy limit, which sensibly scales with the capacity of the venue hosting these routine operations. Indeed, depending upon the size of the establishment, hundreds or even thousands of people might participate in these sorts of nonreligious activities together. But in no event, not even in the largest synagogue, mosque, church, or temple, and no matter how carefully spaced or protected, shall more than 50 people gather for worship. This unequal and unfair treatment violates the Church’s cherished constitutional freedoms and, more importantly, hobbles unconscionably its pastoral mission.

The Church has been and remains committed to promoting public health. The Church suspended the public celebration of Mass voluntarily on March 16, 2020, when Wisconsin’s Emergency Order 4 still permitted gatherings of up to 50 people. As a result, for the past eleven weeks, Catholics in Dane County have not known the spiritual, mental, and social benefits that come from congregational worship. Even with that loss, the Church and its members have continued to follow public health guidance. Their religious convictions have spurred them to provide front-line care to those most vulnerable to COVID-19—from comforting those in their dying moments, to hosting drive-through food drives throughout Dane County, to caring for over a hundred uninsured Madisonians each month at Our Lady of Hope Clinic. And in reliance on Emergency Orders 1 and 2, the Church has developed rigorous protocols for resuming public Masses at 25 percent of capacity, subject to strict social distancing and hygiene rules developed in accordance with guidance from the CDC, the WHO, and other public health authorities. A copy of those protocols is attached to this letter.

Now that you have determined that circumstances allow the partial reopening of almost every Dane County business and other activity with appropriate safeguards, there is no valid, nondiscriminatory reason to maintain far stricter restrictions on houses of worship. The Church has developed rigorous social distancing and hygiene measures for all in-person Masses, based

on current guidance issued by the World Health Organization, the U.S. Centers for Disease Control and Prevention, and other public health authorities. Accordingly, basic equality and honest science, not to mention the special solicitude afforded to religious freedom under both the U.S. and Wisconsin constitutions, require the end of your discriminatory policy and the restoration of desperately needed in-person worship.

“The Free Exercise Clause ‘protect[s] religious observers against unequal treatment,’” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (quoting *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in the judgment)), and “subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Lukumi*, 508 U.S. at 533). PHMDC’s policies treat worship gatherings differently than similarly situated secular gatherings “solely because it is a church.” *Id.* at 2022. Because these policies are neither generally applicable nor neutral, they are “odious to our Constitution . . . and cannot stand.” *Id.* at 2025.

Government officials additionally have a “duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731 (2018). Indeed, “[i]t was ‘historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.’” *Lukumi*, 508 U.S. at 532 (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.)). Unfortunately, PHMDC’s discriminatory treatment suggests animus toward religious gatherings. PHMDC initially treated religious and nonreligious interests equally, but then singled out religious entities for discriminatory treatment in Emergency Order 3. Just as Dane County and Madison began relaxing restrictions on most other forms of business, including steps such as eliminating social distancing and numerical limit requirements for “places of amusement,” such as trampoline parks, PHMDC imposed its new 50-person limit on all religious services, no matter how large the building or how strict the hygiene and social distancing protocols. And, PHMDC did this within hours of federal officials encouraging the reopening of houses of worship and respect for religious liberties.

Churches have historically been places of succor and sanctuary. As Justice Kagan has observed, “[f]or centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom,” because “[o]ur Constitution promises that they may worship in their own way, without fear of penalty or danger.” *Town of Greece v. Galloway*, 572 U.S. 565, 615 (2014) (Kagan, J., dissenting). Public worship contributes concretely to the public good, and religious groups act “as beneficial and stabilizing influences in community life.” *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970); see also *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment) (“those who adopted our Constitution” well understood that “the public virtues inculcated by religion are a public good.”). In these trying times, when our streets are nightly filled with unrest and protest,

and when Americans are wrestling with consequential civic and moral issues, it is vastly important that communities be permitted to gather as they traditionally have, including in faith, so that they may find the community and fellowship that brings them peace and comfort.

As the Wisconsin Supreme Court recently emphasized, “individual rights secured by the Constitution do not disappear during a public health crisis,” *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 53. The Wisconsin Constitution mandates that “[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed.” Wisc. Const. Art. I, § 18. This “extremely strong language[] provid[es] expansive protections for religious liberty,” beyond even what the federal First Amendment provides. Freedom of worship is so fundamental that the Wisconsin courts strictly scrutinize virtually any burden placed upon it. *See Coulee Catholic School v. Labor & Industry Review Commission*, 2009 WI 88, ¶¶ 58–60. The County’s discriminatory actions against religion cannot survive such scrutiny.

To be clear, the Church has no wish for litigation or an adversarial relationship with civil authorities. Rather, the Church wishes to contribute to the community as best it can and as it ever has. To do that, the Church must be an equal participant in the reawakening of Madison and Dane County. It is the Church’s fervent hope that you recognize and accept its good faith in this entreaty, and join it in crafting a mutually acceptable and fair resolution to this situation.

BACKGROUND

Since March, Wisconsinites have worked together to limit social interactions, reduce the risk of virus transmission, and “flatten the curve” of the COVID-19 pandemic. On March 24, 2020, Wisconsin Health Services Secretary-Designee Andrea Palm issued Wisconsin Department of Health Services (“WDHS”) Emergency Order 28, requiring most Wisconsinites to stay home and most Wisconsin businesses to close. “Essential Businesses and Operations,” including “[w]eddings, funerals, and religious entities,” were allowed to remain open. WDHS Emergency Order 28 §§ 1(c), 13(h). But while most essential businesses, including retail stores, were permitted to remain open at 25 percent of their certified occupancy (or more for stores larger than 50,000 square feet), religious gatherings were limited to “fewer than 10 people in a room.” *Id.* §§ 2(b), 13(h).

On May 13, 2020, the Wisconsin Supreme Court invalidated WDHS Emergency Order 28 on the basis that Secretary-Designee Palm promulgated the order without following the emergency rulemaking requirements established by the Wisconsin Legislature. *Wisconsin Legislature v. Palm*, No. 2020AP765-OA, 2020 WL 2465677, at *1 ¶ 3 (Wisc. May 13, 2020).

Later that same day, Director Heinrich issued PHMDC Emergency Order 1, reinstating the requirements of WDHS Emergency Order 28 in Madison and Dane County, except that PHMDC took special care to treat religious entities the same as all other “essential businesses and operations,” limited to 25 percent of a building’s capacity (or, for buildings larger than 50,000 square feet, limited to four persons per 1,000 square feet). PHMDC confirmed this

change from the prior statewide 10-person cap in a May 15, 2020 guidance document, which emphasized that while “in-person, indoor services” were “not recommended,” “[t]he maximum number of people allowed is equal to 25% of the occupancy load of the space that is being used,” while “[w]eddings and funerals remain limited to under 10 individuals.” PHMDC, *COVID-19 Guidance for Faith and Spiritual Communities 2* (May 15, 2020). Correcting WDHS Emergency Order 28’s discrimination against religious entities, PHMDC Emergency Order 1 put churches on equal footing with other similarly situated entities.

On May 18, 2020, Director Heinrich issued PHMDC Emergency Order 2, allowing non-essential businesses and operations to prepare for reopening. Emergency Order 2 continued to treat religious entities the same as other essential businesses. PHMDC’s “Forward Dane” guidance for “phased reopening,” issued the same day as Emergency Order 2, confirmed that “faith-based services, religious entities, and places of worship (indoor),” like all other essential businesses and operations, could operate at “25% capacity”:

	SAFER AT HOME Dane County Order issued May 13, 2020	PREPARE FOR SAFE REOPEN Dane County Order issued May 18, 2020	PHASE ONE All activities in Phase 1 that cannot maintain physical distancing must take place only with household members. Example: dining, theater	PHASE TWO	PHASE THREE
Indoor shopping malls	Stores with outside- facing entrances allowed up to 5 patrons Curbside allowed	Stores with outside- facing entrances allowed up to 5 patrons Curbside allowed Minimum basic operations to prepare for reopening allowed	25% capacity	50% capacity	75% capacity
Faith-based services, religious entities, and places of worship (indoor)	Allowed with less than 10 people per room	25% capacity	25% capacity	50% capacity	75% capacity

PHMDC, *Forward Dane: Phased Reopening Plan 13* (May 18, 2020) (“Forward Dane v.1”).

In reliance on Emergency Order 2 and the Forward Dane plan, the Church developed comprehensive guidelines for the resumption of public Masses, based on guidance from the CDC, the WHO, and other public health authorities. The Church’s guidelines, issued on May 21, 2020, limited Mass attendance to 25 percent of capacity and required physical distancing, consistent with PHMDC requirements. They urged at-risk persons to stay at home, and committed to continuing the live-streaming of Masses. The guidelines forbade congregational and choral singing; required extensive use of hand sanitizer and hand washing; and encouraged the wearing of masks whenever possible. The guidelines also forbade the distribution of Communion from the chalice, and prescribed extensive sanitation protocols. *See Attachment.*

On May 21, 2020, it was widely reported that the CDC would soon be issuing guidelines for the reopening of churches, and on May 22 the CDC did so. The CDC guidance emphasized that “in accordance with the First Amendment, no faith community should be asked to adopt any

mitigation strategies that are more stringent than the mitigation strategies asked of similarly situated entities or activities.”¹ That same day, President Trump declared that “houses of worship, churches, synagogues and mosques” are “essential places that provide essential services” and urged state and local officials to permit them to reopen fully.

Later that afternoon, in a seemingly targeted and hostile response to the Federal government’s calls for religious equality, PHMDC abruptly reversed course and “revised” the Forward Dane plan to cap all religious gatherings at 50 persons with future limits “to be determined”:

OVERVIEW See orders for full details and sectors	SAFER AT HOME Dane County Order issued May 13, 2020	PREPARE FOR SAFE REOPEN Dane County Order issued May 18, 2020	PHASE ONE Dane County Order issued May 22, 2020 All activities in Phase 1 that cannot maintain physical distancing must take place only with household members. Example: dining, theater	PHASE TWO	PHASE THREE
Indoor shopping malls	Stores with outside-facing entrances allowed up to 5 patrons Curbside allowed	Stores with outside-facing entrances allowed up to 5 patrons Curbside allowed Minimum basic operations to prepare for reopening allowed	25% capacity Indoor playgrounds must be closed	50% capacity	75% capacity
Faith-based services, religious entities, and places of worship (indoor)	Allowed with less than 10 people per room	25% capacity	25% capacity Gatherings limited to 50	50% capacity Gathering limit to be determined	75% capacity Gathering limit to be determined

PHMDC, *Forward Dane Version 2: Phased Reopening Plan for Dane County During the COVID-19 Pandemic* 13 (May 22, 2020) (“Forward Dane v.2”).

Emergency Order 3, issued that same day, implements PHMDC’s discriminatory restriction. All businesses—including malls, bars, restaurants, and trampoline parks—are permitted to resume routine operations at 25 percent capacity without a numerical limit. The only numerical cap Emergency Order 3 imposes is on “Mass Gatherings,” defined as “planned events . . . such as a concert, festival, meetings, training, conference, religious service, or sporting event.” As PHMDC made clear in a May 29, 2020, “COVID-19 Information Update,” the “Mass Gathering” restrictions do not apply to a business’s “everyday operations.” Only atypical gatherings are capped at 50 people. PHMDC Emergency Order 3, at 2 § 2 (May 22, 2020). Of all businesses and associations, only religious organizations are prohibited from resuming their core everyday operations—religious services—at 25 percent capacity. The Order defines *all* religious services as “Mass Gatherings,” capping *all* religious services at 50 persons without regard to the size or configuration of the venue, the risk mitigation measures in effect, or any other such consideration. *Id.* at §§ 2, 7.

¹ CDC, *Interim Guidance for Communities of Faith*, May 22, 2020, <https://bit.ly/3cke2Wl>.

Emergency Order 3’s discriminatory impact and intent are clear. Under the Order, thousands of people may shop together at a mall; hundreds of employees may arrive at an office or factory every morning to conduct the business’s everyday operations; and hundreds of children may spend a few hours bouncing off each other at trampoline parks. But, because religious services have uniformly been deemed “Mass Gatherings,” no more than 50 of the 1,225 seats in Saint Maria Goretti Church may be filled.

To underscore its commitment to these new restrictions, and to ensure compliance with these burdens on constitutional liberties, public officials called churches and Diocese officials directly and threatened enforcement of Emergency Order 3 by sending officers to monitor Masses and hand out citations if a gathering exceeded the 50-person limit. Indeed, an Assistant City Attorney with Director Heinrich apparently on the line called Bishop Hying himself directly. When these threats were reported in the press, PHMDC disavowed them.² But this conduct underscored that the stern and singular restrictions imposed on religious worship were purposeful, targeted, and discriminatory.

Sadly, of all the entities, businesses, and activities addressed in Forward Dane v.1, only houses of worship are worse off in Forward Dane v.2. For example, in Forward Dane v.1, “Indoor places of arts and culture” including “movie & other theaters, social clubs, [and] museums” were allowed to open in Phase 1 at “25% capacity” with “Minimum 6 feet spacing between groups.” In v.2, that category is combined with “Indoor playgrounds, funplexes, trampoline parks, [and] miniature golf” into a new grouping called “Places of amusement and activity,” and businesses in this category are permitted to reopen at 25 percent capacity—*without* v.1’s requirement of six-foot distancing between groups:

	OVERVIEW See orders for full details and sectors	SAFER AT HOME Dane County Order issued May 13, 2020	PREPARE FOR SAFE REOPEN Dane County Order issued May 18, 2020	PHASE ONE Dane County Order issued May 22, 2020 All activities in Phase 1 that cannot maintain physical distancing must take place only with household members. Example: dining, theater	PHASE TWO	PHASE THREE
Version 1:	Indoor places of arts and culture (Such as movie & other theaters, social clubs, museums)	No	No Minimum basic operations to prepare for reopening	25% capacity Minimum 6 feet spacing between groups	50% capacity	75% capacity
Version 2:	Places of amusement and activity (such as Funplexes, trampoline parks, miniature golf, movie & other theaters, social clubs, museums,	No	No	25% capacity	50% capacity	75% capacity

² That the calls in fact happened could easily be demonstrated in a court of law. To our knowledge, the County did not make similar calls to nonreligious organizations or possibly even other religious denominations threatening surveillance and fines. This is further evidence that the “Mass Gathering” ban is being selectively enforced against houses of worship.

Forward Dane v.1, at 14; Forward Dane v.2, at 13. That the plan allows potentially hundreds of people to physically interact for nonreligious purposes, but prohibits orderly and socially distanced religious services, suggests the plan is motivated by anti-religious animosity rather than sound science and public health.

In response to inquiries from concerned citizens, PHMDC asserted that under Forward Dane v.2 and Emergency Order 3 “Religious entities are not treated any differently.” See PHMDC, COVID-19 Information Update (May 29, 2020). That is patently untrue. PHMDC has allowed every other business and organization to resume its ordinary operations at 25 percent capacity, without a strict numerical cap. The 50-person cap applies only to particular “Mass Gatherings,” “planned event[s] such as a concert, festival,” and the like. Most businesses’ and organizations’ routine operations will fall outside this definition no matter how many employees report for work or customers visit the premises.³ Religious entities, however, are specifically singled out in Section 7 and directed to comply with Section 2, whereby each and every worship service is deemed a Mass Gathering capped at 50 persons. And religious entities—alone to our knowledge—have been further singled out with special threats of enforcement.

The attempted cleverness of this discrimination makes it no less unconstitutional. “The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.” *Lukumi*, 508 U.S. at 534. Moreover, the County can provide no legitimate basis for its discrimination against religious assemblies. There is no reason to believe that 100 people participating in a highly structured religious service pose any greater risk than 100 people gathering at a protest, mall, office, trampoline park, or bowling alley.⁴ PHMDC Emergency Orders 1 and 2 recognized

³ Under Emergency Order 3, even movie theaters are allowed to conduct their everyday business at 25 percent capacity. Forward Dane v.2’s guidance states explicitly that “movie & other theaters” are subject to a 25 percent capacity limitation without any numerical limit. *Forward Dane v. 2* 13. PHMDC’s *post hoc* statements to the contrary are simply untrue. See PHMDC, COVID-19 Information Update (May 29, 2020). Moreover, Dane County cannot save Emergency Order 3 by promising to interpret or enforce it in a nondiscriminatory manner, because Emergency Order 3 is unconstitutional on its face. “[I]n a facial constitutional challenge, individual application facts do not matter.” *Ezell v. City of Chicago*, 651 F.3d 684, 697–98 (7th Cir. 2011); see also *Immanuel Baptist Church v. City of Chicago*, 283 F. Supp. 3d 670, 678 (N.D. Ill. 2017) (“In a facial constitutional challenge, the claimed constitutional violation inheres in the terms of the statute, not its application.”); *Redner v. Dean*, 29 F.3d 1495, 1501 (11th Cir. 1994) (“We cannot depend on the individuals responsible for enforcing the Ordinance to do so in a manner that cures it of constitutional infirmities.”). And in any event, to argue that cinemas are burdened the same as churches because a multiplex may put only 50 people before each screen—totaling many hundreds in the building—itself proves the disparate treatment.

⁴ In fact, the Church can and will mitigate its operational risks more effectively than most businesses will be able to do. As evidenced by its protocols for resuming Masses, the Church can operate without using hymnals or passing collection plates, but a bowling alley cannot operate without bowling balls. Bathrooms and other common areas at offices or shopping malls see far more traffic than those at a typical

this truth in treating religious services the same as other similarly situated businesses. PHMDC's recent decision to impose greater restrictions on churches while simultaneously easing restrictions on nonreligious activities cannot withstand constitutional scrutiny.

PHMDC, Dane County, and the City of Madison have offered no explanation for the erratic treatment of religious gatherings over the last three weeks, which started by correcting the discriminatory treatment of religion in WDHS Emergency Order 28, only to revert to discrimination once President Trump and the CDC specifically urged greater solicitude toward religious observance. And there is no acceptable explanation for government officials threatening Church officials with targeted enforcement of the gathering ban, including the use of government monitors to ensure compliance.

In a May 29, 2020 "COVID-19 Information Update," PHMDC explained that "[w]e believe the best way to slow the spread of COVID-19 is to limit the number of individuals gathering at one specific time at one location to 50 people max, with physical distancing." Yet thousands of protestors have packed the streets of Madison over the past week, and according to media reports there have been very few arrests or citations. Madison and Dane County may choose to allow what they perceive to be free expression, even at significant cost and even if it poses a significant public health risk. However, Madison and Dane County cannot pick and choose among protected First Amendment activities. Allowing crowded protesting while at the same time, in the name of "slowing the spread," enforcing draconian restrictions on religious gatherings that pose little to no risk to public health betrays a view that religious gatherings lack value. The First Amendment precludes public officials from making and acting on that judgment or effectuating anti-religious bias.

LEGAL ANALYSIS

In singling out religious assemblies for special and disfavored treatment, Dane County has violated the protections afforded religion under the U.S. and Wisconsin Constitutions.

The U.S. Constitution's Free Exercise Clause

The First Amendment's Free Exercise Clause protects the right of religious groups to gather for worship. A law enacted with "hostility" that is "inconsistent with the First Amendment's guarantee" of neutrality toward religion "must be invalidated." *Masterpiece Cakeshop*, 138 S. Ct. at 1732. Additionally, burdens on free exercise that are not neutral or generally applicable are subject to the "exceptionally demanding" strict scrutiny test. *Holt v. Hobbs*, 574 U.S. 352, 353 (2015). A law is not generally applicable when the government "decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a

church, and those establishments often cannot be navigated without the use of elevators, escalators, or poorly ventilated stairwells.

religious motivation.” *Lukumi*, 508 U.S. at 542–43. A law is not neutral if its “object . . . is to infringe upon or restrict practices because of their religious motivation.” *Id.* at 533. Even if Emergency Order 3 were not motivated by anti-religious animus, it would be subject to strict scrutiny because it is neither neutral nor generally applicable.

Emergency Order 3 is subject to strict scrutiny because it is not generally applicable.

“[A] law might appear to be generally applicable on the surface but not be so in practice due to exceptions for comparable secular activities.” *Roberts v. Neace*, 958 F.3d 409, 413 (6th Cir. 2020) (*per curiam*). “[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Employment Division, Dep’t of Human Resources v. Smith*, 494 U.S. 872, 884 (1990). In other words, a law is not generally applicable when it “fail[s] to prohibit nonreligious conduct that endangers” the government’s regulatory interest “in a similar or greater degree” than the prohibited religious conduct. *Lukumi*, 508 U.S. at 543.

At first glance, the prohibition on “Mass Gatherings” in Emergency Order 3 appears to be generally applicable. And a true ban on *all* collections of people might well be. To be sure, drastic actions during a pandemic may be appropriate, so long as the government action is “applicable equally to all in like condition” and is not “a plain, palpable invasion of rights secured by the fundamental law.” *Jacobson v. Massachusetts*, 197 U.S. 11, 30–31 (1905). Emergency Order 3, however, is not applicable equally “to all in like condition,” but rather impermissibly and unconstitutionally discriminates against religious organizations. The Order purports to ban gatherings “inside a commercial facility,” Emergency Order 3, at 2 § 2(a)(i), but goes on to permit businesses to operate so long as they “[l]imit capacity to 25% of approved capacity levels,” *id.* § 4(a). In other words, the daily operation of a business is not a “gathering”—no matter how many employees work there, or how closely together (physical distancing is only required “whenever possible,” *id.* § 4(d)(i)), or how frequently they interact, or how many of them arrive at the same time in the morning, leave for and return from lunch together, and depart at the same time in the evening—none of this constitutes “gathering” and none of it triggers the 50-person limit.

One hundred people can therefore work side-by-side for hours in a newsroom, call center, or factory floor, with PHMDC’s blessing, because in a commercial setting only “[m]eetings, trainings, [and] conferences” count as “gatherings” subject to the 50-person limit. *Id.* § 4(h). But while it is possible to operate a business with few or no meetings, trainings, or conferences (especially since, according to PHMDC, simply sitting together in a shared workspace is not a “meeting”), it is impossible to operate a church without holding worship services. The limit placed on gatherings thus uniquely burdens religious entities, because they alone have their core daily activity defined as a “Mass Gathering.”

At least three federal courts have now held that applying public health restrictions differently to churches and other types of organizations violates the Free Exercise Clause’s general applicability requirement. “[T]he more exceptions to a prohibition, the less likely it will count as a

generally applicable.” *Roberts*, 958 F.3d at 413. In *Roberts*, the Sixth Circuit enjoined Kentucky’s executive orders as applied to houses of worship, observing that “[t]he Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same.” *Id.* at 414. In fact, the court pointed out, “the two groups of people [are] often the *same people*—going to work on one day and going to worship on another,” and it “defies explanation” to suggest that “the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings.” *Id.*; see also *First Baptist Church v. Kelly*, 2020 WL 1910021, at *7 (D. Kan. Apr. 18, 2020) (finding that a law is not generally applicable where the state did not “argue[] that mass gatherings at churches pose unique health risks that do not arise in mass gatherings at airports, offices, and production facilities”); *Berean Baptist Church v. Cooper*, No. 4:20-cv-81-D, 2020 WL 2514313, at *8 (E.D.N.C. May 16, 2020) (rejecting regulatory scheme under which “[e]leven men and women can stand side by side working indoors Monday through Friday at a hospital, at a plant, or at a package distribution center and be trusted to follow social distancing and hygiene guidance, but those same eleven men and women cannot be trusted to do the same when they worship inside together on Saturday or Sunday”).⁵

Here, as in Kentucky, Emergency Order 3 and Forward Dane v.2 favor commercial operations over religious worship—even though only the latter constitutes a fundamental First Amendment right. Emergency Order 3 eases restrictions on virtually every category of business in Dane County, so long as they do what the Church is committed to doing: (1) enforce rigorous social distancing and hygiene protocols, and (2) cap the number of congregants to a certain percentage of the facility’s capacity. Emergency Order 3 thus “fail[s] to prohibit nonreligious conduct that endangers” the government’s interest “in a similar or greater degree” than prohibited religious conduct. *Lukumi*, 508 U.S. at 543. PHMDC has “decide[d] that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.” *Id.* at 542–43. The Order is thus not generally applicable.

Emergency Order 3 is subject to strict scrutiny because it is not neutral.

“[A] law can reveal a lack of neutrality by protecting secular activities more than comparable religious ones.” *Roberts*, 2020 WL 2316679, at *4 (“neutrality between religion and non-religion” required). By singling out churches for less protection than virtually every Dane County business, and by setting an absolute limit on church attendance while basing limits on

⁵ The opinions issued by Chief Justice Roberts and Justice Kavanaugh in connection with the Supreme Court’s denial of an application for injunctive relief in *South Bay United Pentecostal Church v. Newsom*, No. 19A1044 (May 29, 2020), are not to the contrary. Both opinions recognized that restrictions on religious worship must be applied neutrally and evenly; they merely disagreed whether the applicant had shown, for purposes of the extraordinarily high threshold for “emergency relief in an interlocutory posture,” slip op. at 3 (Roberts, C.J., concurring in denial of application for injunctive relief), that the restrictions were not being applied neutrally and evenly.

every other business on a proportion of the building's capacity, Emergency Order 3 falls short of the neutrality requirement.

A law also lacks neutrality if it “targets religious conduct for distinctive treatment.” *Lukumi*, 508 U.S. at 534. Emergency Order 3 facially targets specific religious practices and specifies that houses of worship are subject to more restrictions than even businesses that Wisconsin and PHMDC previously designated non-essential. Singling out religion in this manner violates PHMDC's constitutional duty to ensure neutrality toward religion. “[E]ven ‘subtle departures from neutrality’” violate the Free Exercise Clause, and there is nothing subtle about Emergency Order 3. See *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 534). The Order is thus not neutral toward religion.

Emergency Order 3 fails strict scrutiny.

Because Emergency Order 3 is not generally applicable and is not neutral, PHMDC must show that it “advance[s] ‘interests of the highest order’ and [is] narrowly tailored in pursuit of those interests.” *Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). This test, “the most rigorous of scrutiny,” *id.*, is “exceptionally demanding.” *Holt*, 574 U.S. at 364. “A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.” *Lukumi*, 508 U.S. at 546. Because strict scrutiny applies, PHMDC must rebut the presumption that the Order is unconstitutional. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816–17 (2000).

Emergency Order 3 cannot withstand this rigorous analysis. The Order's prohibition on religious gatherings is not narrowly tailored, because “less restrictive means [are] available for the Government to achieve its goals,” *Holt*, 574 U.S. at 365 (quoting *Playboy*, 529 U.S. at 815), as evidenced by the fact that PHMDC has *applied* less restrictive requirements to nonreligious entities in Dane County.

PHMDC's position is also belied by the fact that many other jurisdictions have allowed religious congregations *more* freedom than commercial establishments in reopening to the public. Michigan, for example, has not restricted houses of worship from meeting.⁶ Maryland now

⁶ See, e.g., Executive Order 2020–92, <https://bit.ly/36KvNNr> (“neither a place of religious worship nor its owner is subject to penalty under section 20 of this order for allowing religious worship at such place”).

allows both retailers and in-person worship at 50 percent capacity.⁷ New Mexico, too, now subjects retailers and in-person worship to the same capacity requirement.⁸ Indeed, 31 states are now allowing churches to meet *without* numerical restrictions, as are many cities with larger and denser populations than Madison. It appears that at least 54 Wisconsin counties have followed suit.⁹ In order to withstand strict scrutiny, PHMDC “must, at a minimum, offer persuasive reasons why it believes that it must take a different course.” *Holt*, 574 U.S. at 369 (considering the policies of other states and the federal government in determining whether Arkansas had a compelling interest in enforcing its different policy). Worshipping in Dane County poses no greater health risk than worshipping in Michigan, Maryland, or most other Wisconsin counties. No court would believe otherwise.

Furthermore, the Order does not advance a compelling governmental interest. “Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.” *Lukumi*, 508 U.S. at 546–47. *See also Florida Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment) (“[A] law cannot be regarded as protecting an interest ‘of the highest order’ . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.” (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979))). Put another way, in order to survive strict scrutiny, Dane County must prove that time spent congregating in malls, retail shops, restaurants, bowling alleys, factories, and offices at 25 percent capacity does *not* present a public-health risk—but adding one additional hour of socially-distanced, hygienic in-person worship to the mix *does*. The County cannot meet this burden. There is no basis to conclude that congregating in a building with a cross above the door presents a risk greater than congregating in buildings adorned with corporate logos.

Emergency Order 3’s “Mass Gathering” limitation is neither narrowly tailored nor serves a compelling governmental interest. The limitation is therefore unconstitutional.

The restriction on religious gatherings is presumptively unconstitutional because it was motivated by anti-religious animus.

PHMDC has asserted that Emergency Order 3 and Forward Dane v.2 treat religious and nonreligious gatherings equally. As demonstrated above, that is simply not the case. Even if these directives did facially provide for equal treatment, or if they were amended to facially provide

⁷ *See, e.g.*, Trey Ward & Kai Reed, *Hogan: Stay-home order will be lifted Friday evening*, WBALTV11 (May 14, 2020, 12:45 PM), <https://bit.ly/2ZRxVSb>.

⁸ *See* Public Health Order, <https://bit.ly/3dmmMwo> (New Mexico ordering, as of May 15, 2020, that “non-essential” retailers and houses of worship may each operate at the same capacity).

⁹ Wisconsin Bankers Association, *Wisconsin County List of Safer-At-Home-Orders*, <https://bit.ly/3dnRa9Y>.

for such, they would nonetheless burden the free exercise of religion because of their inherent anti-religious animus.

The First Amendment “subjects to the strictest scrutiny laws that target the religious for special disabilities.” *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *Lukumi*, 508 U.S. at 533). PHMDC’s restriction on religious gatherings has “a discriminatory purpose” that targets “some or all religious beliefs.” *Trinity Lutheran*, 137 S. Ct. at 2021 (quoting *Lukumi*, 508 U.S. at 532). Such a law “is odious to our Constitution.” *Id.* at 2025. “Factors relevant to the assessment of governmental neutrality include ‘the historical background of the decision under challenge [and] the specific series of events leading to the enactment or official policy in question,’” *Masterpiece Cakeshop*, 138 S. Ct. at 1731, and “[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.” *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977).

Here, “the specific sequence of events leading up to” the imposition of a 50-person cap on religious gatherings is telling. First, PHMDC Emergency Order 1 relaxed the restrictions previously imposed by WDHS Emergency Order 28, which had limited religious gatherings to 10 persons or fewer, and replaced them with a sensible limit of 25 percent of capacity. The 25 percent limitation was applied equally to both religious and nonreligious activities, acknowledging that there is no scientific basis to conclude that religious activities pose a greater public health risk. PHMDC Emergency Order 2 and *Forward Dane v.1* continued to follow that sensible approach, and led the Church to believe that houses of worship would be allowed to use an increasing proportion of their facilities’ capacity as the reopening plan progressed, just as secular businesses would be allowed to do. Only after the President and the CDC urged localities to respect religious liberties and treat houses of worship equally did PHMDC issue Emergency Order 3 and *Forward Dane v.2*, singling out the Church and other houses of worship for special disfavor. The public health risk posed by churches had not increased, but the County’s motivation to punish churches had.

In Emergency Order 3 and *Forward Dane v.2*, PHMDC imposed an arbitrary 50-person cap that does not apply to the everyday operations of any other “essential business or operation” or even any *non-essential* business or operation. PHMDC imposed these restrictions on a Friday afternoon without consultation or advance notice, just as the Church and other faith communities were preparing for their first public weekend services in months. The plan deprives houses of worship (and *only* houses of worship) of a predictable path through the phases of reopening, instead promising to subject them to future restrictions “to be determined.” And PHMDC did all this while loosening restrictions on nonreligious activities. These facts strongly support a reasonable inference of animus toward religion.

One further fact cannot be explained by anything *except* animus toward religion: telephone calls by county officials, including by law enforcement, to multiple Church officials, threatening a targeted enforcement campaign with government agents dispatched to take attendance at Masses and dole out \$1,000 citations for violations of the 50-person cap. That threat

alone, even if it is not carried out, will have—and was doubtlessly intended to have—a chilling effect on the Church’s right to free exercise of religion.

The Wisconsin Constitution’s Freedom of Conscience Clause

PHMDC’s restrictions even more clearly violate Wisconsin law. Article I, Section 18 of the Wisconsin Constitution provides that “[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted.” These words “serve[] the same dual purposes as the Establishment Clause and Free Exercise Clause of the U.S. Constitution,” but, “though sharing some similarities with the federal provisions, are not the same.” *Coulee Catholic School v. Labor & Industry Review Commission*, 2009 WI 88, ¶¶ 58–60, 320 Wis. 2d 275, 768 N.W.2d 868 (2009) (citing *State ex rel. Warren v. Nusbaum*, 55 Wis.2d 316, 332, 198 N.W.2d 650 (1972)). Rather, “[t]he protections and prohibitions in the Wisconsin Constitution are far more specific,” and their “extremely strong language[] provid[es] expansive protections for religious liberty.” *Id.* (citing *State v. Miller*, 202 Wis. 2d 56, 65–66, 549 N.W.2d 235 (1996)); see also *DeBruin v. St. Patrick Congregation*, 2012 WI 94, ¶ 26 n.8, 343 Wis. 2d 83, 816 N.W.2d 878 (recognizing that religious-liberty claims under the Wisconsin constitution may prevail against “neutral and generally applicable [] laws”). In other words, the Wisconsin Constitution is even more protective of religious liberty than the U.S. Constitution, and the Wisconsin courts “are not limited to current First Amendment jurisprudence when interpreting our own constitutional protections for religious liberty; rather, we are required to give effect to the more explicit guarantees set forth in our state constitution.” *Coulee*, 2009 WI 88, ¶¶ 58–60; *accord id.* ¶ 32 (“The right to practice one’s religion according to the dictates of conscience is fundamental to our system of government.”).

Moreover, the Wisconsin Supreme Court applies “the compelling state interest/least restrictive alternative test”—that is, strict scrutiny—to virtually all claims that the government has violated the right to free exercise of religion. *Miller*, 202 Wis. 2d at 66. This remains true even though the federal courts no longer *automatically* apply strict scrutiny to comparable claims under the Free Exercise Clause of the U.S. Constitution. *Coulee*, 2009 WI 88, ¶ 62 n.27 (“We still believe, however, that this is the appropriate standard under the Wisconsin Constitution for most laws burdening religious belief.”); see *DeBruin*, 2012 WI 94, ¶ 26 n.8.

In a Wisconsin court it would therefore be unnecessary to show that PHMDC’s restriction on religious gatherings are not neutral or not generally applicable—though, as discussed above, that showing could readily be made. Accordingly, strict scrutiny would apply, even if PHMDC could show that Emergency Order 3 is both generally applicable and neutral for purposes of federal law. And, for the reasons discussed above, the Order cannot survive such scrutiny.

Finally, in addition to its jurisprudence on the freedom of religion, the Wisconsin Supreme Court has recently made clear that “[t]here is no pandemic exception . . . to the fundamental liberties the Constitution safeguards,” and “individual rights secured by the Constitution do

not disappear during a public health crisis.” *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 53 (quoting Statement of Interest by the United States, *Temple Baptist Church v. City of Greenville*, No. 4:20-cv-64-DMB-JMV, 2020 WL 1932929 (N.D. Miss. April 14, 2020), ECF No. 6). Even during a pandemic, therefore, “obvious overreach” by government officials cannot stand. *Id.* ¶ 50. “[T]he judiciary cannot dispense with constitutional principles, even in response to a dire emergency. Indeed, it is in the midst of emergencies that constraints on government power are most important.” *Id.* ¶ 73 (R.G. Bradley, J., concurring). In light of the robust protections Wisconsin law provides for religion and the Wisconsin Supreme Court’s receptivity to engaging with important issues such as this including through an Original Petition, we are confident that if challenged your orders and policies with respect to religious gatherings will not stand.

THE WAY FORWARD

For months, religious entities in Dane County—and indeed, throughout Wisconsin and the entire United States—have accepted extraordinary restrictions on their religious freedom. They have done so because, for Christians, loving their neighbors as themselves is part of the Great Commandment. *See Mark 12:30–31*. Now, PHMDC’s plan for reopening confirms that Christians need not “forsak[e] the assembling of [them]selves together,” Hebrews 10:25, in order to love their neighbors. PHMDC is opening retailers, shopping malls, bars, restaurants, offices, trampoline parks, bowling alleys, tattoo parlors, and virtually every other business in Dane County. Many states and Wisconsin counties are not restricting religious worship at all, and other states reopening in-person worship are doing so on equal footing with the sorts of commercial interests that Madison and Dane County are privileging. All of these approaches respect the special solicitude that the First Amendment affords religious exercise—and the eternal hope that encountering spiritual realities provides to everyone facing temporal fears caused by this pandemic.

The Church would be happy to work with you and your staffs to ensure that worship can resume in a safe and nondiscriminatory manner. Bishop Hying and his top aides, Vicar General Msgr. James Bartylla and Chancellor William Yallaly, are available and eager to discuss a path forward and to address your concerns. The Bishop is committed to safeguarding both the eternal and temporal wellbeing of his flock. We hope that you are willing to work collaboratively with the Church and its 182,000 members in and around Dane County to find a mutually agreeable solution based on sound science.

To be clear, the Church has no particular interest in litigation or in a protracted dispute or an uncooperative relationship with civil authorities. However, the Church is legally and morally entitled to be treated equally with other similarly situated nonreligious associations that have been permitted to reopen up to 25 percent capacity. The Church stands ready to resume public Masses under that standard, and subject to rigorous social distancing and hygiene practices. We and the Church are available to discuss this matter with you and your staffs at your convenience to develop a mutually agreeable solution. We hope for a resolution by Friday, June 5, so that churches may prepare appropriately for upcoming weekend Masses.

Very truly yours,



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Attachment

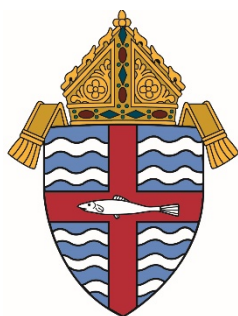
Cc: Michael Haas, Esq.
Madison City Attorney

Marcia A. MacKenzie, Esq.
Dane County Corporation Counsel



Summary – Resumption of Public Masses in the Diocese of Madison

1. Summary of the Most Impactful Measures
 - a. Dispensation from the Sunday Obligation Remains
 - b. At-Risk Persons Should Stay at Home; Livestreamed Masses Still Available
 - c. Mass Attendance Limited to 25% of Occupancy Capacity with Physical Distancing
 - d. Hand Washing and Hand Sanitizing
 - e. Sanitizing of the Facility
 - f. Wearing of Masks
 - g. No Choir or Congregational Singing
 - h. Communication/Signage/Mass Announcements
 - i. Ushers/Volunteers
2. Mandatory Items
 - a. Earliest Start Date – Tuesday, May 26, 2020
 - b. Attendance at or Below 25% of Occupancy (Capacity) Limit
 - c. Obey All Applicable Civil Restrictions
 - d. Physical Distancing
 - e. Canonical Limit on Number of Masses Celebrated Daily by a Priest
 - f. No Wearing of Gloves for Distribution and Reception of Holy Communion
 - g. Sanitizing of the Facility
 - h. Priest Must Refrain from Celebrating Mass If He Has or Shows Symptoms of COVID-19
 - i. Use of at Least One Usher
 - j. Sacristans and Ministers Wash or Sanitize Their Hands Prior to Beginning Work
 - k. Ushers Wear Masks and Chosen from Those Not At-Risk
 - l. No Choir or Congregational Singing
 - m. Single Species of Hosts Only for Distribution of Holy Communion
3. Strongly Encouraged Items
 - a. At-Risk Persons Stay at Home (i.e., Strongest Possible Exhortation to the Faithful)
 - b. Continuation of Livestreaming of Masses
 - c. Hand Sanitizer Available for Use at the Church Entrances
 - d. Hand Sanitizing or Washing by Ministers Immediately Before Distribution of Holy Communion
 - e. Wearing of Masks by the Faithful
 - f. Removal/Non-Use of Pew & Gathering Space Paper Items Including Hymnals and Missalettes.
 - g. Removal of Furniture from Gathering Areas
 - h. Dismissal of the People Pew-by-Pew Starting with Those Closest to the Exit Doors
4. Encouraged Items
 - a. Remind the Faithful of Minimal Requirements for Reception of the Blessed Sacrament
 - b. Minimize Number of Entrances and Exits; Prop Open or Hold Open Doors
 - c. Use of Signage
 - d. Wearing of Masks by Ministers, Including Just at the Distribution of Holy Communion
 - e. Hand Sanitizer Available for Use Throughout the Church
 - f. Monitor and Sanitize Bathrooms by an Usher During Mass
5. Detailed Mass, Offertory Collection, & Holy Communion Guidelines Should Be Reviewed Independently



Guidelines for the Resumption of Public Masses in the Diocese of Madison in Relation to the Coronavirus Pandemic

Earliest Start Date: Tuesday, May 26, 2020

“While they were eating, Jesus took bread, said the blessing, broke it, and giving it to his disciples said, ‘Take and eat; this is my body.’ Then he took a cup, gave thanks, and gave it to them, saying, ‘Drink from it, all of you, for this is my blood of the covenant, which will be shed on behalf of many for the forgiveness of sins.’” (Matthew. 26:26-28)

Given the lifting of civil restrictions in most counties of our diocese, some may ask why we are adopting a gradual approach to reinstating Masses with significant congregations present. The answer lies in the fact that COVID-19 cases continue to emerge in the state and there is still a very real danger of infection without adequate care; therefore, we want to be prudential in light of public health concerns. To simply emerge from these weeks of physical distancing without any gradualism would be irresponsible. Our hope is that our elderly and at-risk faithful people will exercise prudence and not yet attend Mass, especially given the current dispensation from the Sunday obligation, but we do want to begin enabling others to participate in the Eucharistic sacrifice, the central experience of Catholicism, which we have all sorely missed in these challenging weeks of the pandemic. The following are guidelines to assist in achieving these objectives.

Attendance Guidelines

1. Dispensation from the Sunday Obligation - The current dispensation from the obligation to attend Sunday Mass will remain in effect until further notice.
2. At-Risk Persons Remain at Home – **The faithful who are in vulnerable categories (those persons over 65 years of age or with underlying health issues, etc...) are strongly encouraged to remain at home and not attend Mass due to health risk. The faithful who have COVID-19, show symptoms consistent with it, or have had contact with a person with a confirmed diagnosis of COVID-19, should self-quarantine and remain at home until cleared by medical professionals.**
3. Civil Regulations and Current Mass Attendance Limits – All civil regulations, whether State, county, or municipal, must be followed, including limits on Mass attendance. Pastors are advised to monitor this situation closely. Currently, the Diocese of Madison policy is that Mass attendance is limited to **25% of capacity (total occupancy) of the church, with capacity measured as established by the local municipality**, with the additional restriction of maintenance of physical distancing (which depending on the layout of the church, may require attendance at even less than the 25% capacity of the church), along with following protective, personal sanitary, and facility sanitary measures. All of these measures apply equally to wedding and funeral Masses, except in counties or municipalities in which stricter limitations apply (e.g., Dane County maintains a current nine persons or fewer limit for funerals and weddings).
4. Managing Limited Attendance at Mass - Attendance at restricted-number Masses could be first-come first-served, or allocated by some other system (a rotation system based on the first letter of last names, an

online ticketing system like Eventbrite, etc...). The method chosen remains to the discretion of the pastor or parochial administrator. Those not able to attend a weekend Mass due to limited attendance restrictions, may be referred to a weekday Mass (or an announcement could be made at a weekend Mass if anyone would be willing to attend a weekday Mass instead, in order to make room for someone else at the weekend Mass). Other ideas for consideration include numbering pew positions and using a sign-in book for Masses (name and email) in case the need for contact tracing emerges if someone attends Mass who is later determined to have been COVID-19 positive.

5. Continue Live-Streaming Masses - Parishes are strongly encouraged to continue live-streaming Masses, especially for those unable to attend the Holy Mass. Continued live-streamed Masses may also be very helpful as part of the *Go Make Disciples* evangelization plan.
6. Reception of the Holy Eucharist - Because public Masses have been suspended for so long and Confession has been more difficult to access, it is encouraged to remind the faithful of the importance of the Eucharistic fast (canon 919), and the importance of receiving the Blessed Sacrament in Holy Communion only after confessing all grave sins of which they are conscious (canon 916).
7. Daily Number of Masses - The restrictions on the number of Masses celebrated by a priest each day, as allowed by the local ordinary, must be observed (see canon 905), even during a period of limited-attendance Masses. Most priests of the diocese have permission to celebrate the maximum number permitted by law: two Masses on weekdays and three Masses on Sundays and holy days.

Basic Health Guidelines

8. Physical Distancing – Physical distancing restrictions must be followed at all times. At a minimum, people should be seated in every other pew and individuals should remain at least six feet (two arms' length) from each other. Intervening pews should be cordoned off from use, and the first pew closest to the sanctuary should be empty to maintain distance between seated congregants and communicants during distribution of Holy Communion. Members of a single household do not need to practice physical distancing with each other and so may sit together.
9. Hand Sanitization - It is strongly encouraged to provide hand sanitizer at the church doors, and preferably throughout the church. Priests, deacons and liturgical assistants should wash their hands before the start of the Mass as they arrive at the church. Priests, deacons, and Extraordinary Ministers of Holy Communion are strongly encouraged to sanitize their hands immediately prior to the distribution of Holy Communion. The parish may additionally encourage parishioners to bring their own hand sanitizer to Mass.
10. Wearing Masks by the Faithful - In accord with current public health recommendations, the faithful are strongly encouraged to wear cloth face coverings when in public, including when they come to church. The parish may, but is not required to, have a limited number of disposable paper masks available for those who want a mask but didn't bring one. Such masks need to be disposed of properly and safely. Ushers must wear face masks, and should be chosen only if they are willing to do so and are persons who are not in an at-risk health category. Persons should refrain from directly confronting individuals who are not wearing masks, since they may suffer from a condition such as asthma that makes it prohibitively difficult to wear a mask.
11. Wearing Masks by Clerics –Priests, deacons, and Extraordinary Ministers of Holy Communion are encouraged to wear masks during distribution of Holy Communion. It is left to the discretion of the priest or deacon to wear a mask at other times during the Mass. USCCB Guidelines state that priests and other liturgical ministers should not wear a mask or gloves *while in the sanctuary* if they can maintain the physical distancing protocols.
12. Sanitation Guidelines & Volunteers - The sanitation guidelines attached to this document should be followed. Commonly touched surfaces in the church should be regularly cleaned and disinfected, even after each Mass, as feasible and appropriate. Sanitation procedures will *require numerous volunteers*.

13. Infected Priests, Deacons, and Liturgical Assistants - Priests showing signs of infection (fever, cough, or other symptoms of COVID-19) must refrain from celebrating a public Mass and deacons should refrain from assisting at a public Mass for similar reasons, and arrange for a substitute cleric, as necessary. A priest or deacon who feels there is significant risk to his personal health is encouraged to do the same. Liturgical assistants (e.g. readers, EMHCs, servers) also should show no signs of infection, should not be coughing, and not be in an at-risk category. A complete list of symptoms is available from the Center for Disease Control at <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.
14. Confirmed COVID-19 Case in the Religious Facility – When a confirmed person with COVID-19 has been in the facility, parish staff should immediately contact local health officials and assess the risk. The parish staff should also contact the Diocese of Madison (e.g., the Office of the Vicar General). Such a case may lead to cleaning/disinfecting, contact tracing with local health officials, and possible short-term facility closure.

Church Guidelines

15. Entrances/Exits - It is encouraged to minimize the number of entrances and exits to the church that are used for attendance at Mass. This practice may reduce the need to sanitize other entrances/exits and make it easier to count and control the number of attendees, but caution is advised since it could increase crowding at those few entry-points contrary to physical distancing requirements. Doors should be propped open if possible, so that people do not need to touch door handles. If that is not possible, they may be held open as people enter and exit. All holy water fonts should be emptied and cleaned.
16. Bathroom Usage – It is encouraged to monitor bathrooms externally for physical distancing and sanitation, through the positioning of an usher outside the door who could also briefly sanitize the bathroom after each usage. Given the usual duration of the Mass, bathroom access should be made available to attendees.
17. Signage – It is encouraged that signs be posted at the church entrances or in proper locations stating a number of possible important items:
 - a. The faithful who are in vulnerable categories (those persons over 65 years of age or with underlying health issues, etc...) are strongly encouraged to remain at home and not attend Mass due to health risk. The faithful who have COVID-19, show such symptoms, or have had contact with a person with a confirmed diagnosis of COVID-19, should self-quarantine and remain at home until cleared by medical professionals. The faithful are dispensed from the Sunday obligation at the current time, and livestreaming Masses are available for viewing at
 - b. All those who attend Mass are subject to the required attendance limit of 25% of the church's occupancy or capacity limit and the requirement to maintain physical distancing (except for those who live in the same household). All in attendance at Mass are encouraged to wear a mask and use hand sanitizer appropriately.
 - c. The availability of Mass, the Sacrament of Confession, and prayer at the church at other days and times.
 - d. Instructions on Holy Communion, such as the Eucharistic fast and importance of receiving the Blessed Sacrament in Holy Communion only after confessing all grave sins of which one is conscious, physical distancing in the Communion line, hand sanitizing, no use of gloves, etc...
 - e. Miscellaneous instructions on the use of the bathrooms, signing-in, following the instructions of trained ushers, the offertory collection, etc...
18. Removal and Non-Use of Pew and Gathering Space Paper Items – It is strongly encouraged that all missalettes, hymnals, Bibles, pencils and any other item be removed from the pews and hymnal racks. The pews should be completely empty of anything that can be touched. Hymnals, missalettes, etc. may be used again starting at a yet-to-be determined date, but they should be sanitized prior to being replaced

back in the pews. The use of a paper worship aid is permitted if it is posted online, and the faithful print and bring the paper worship aid to use; but it must be destroyed promptly and appropriately.

19. Removal of Furniture – The removal of furniture, at least chairs, from the narthex, gathering space, or other spaces where people may spontaneously gather, is strongly encouraged, if possible.
20. Room for the Sick - A small room should be reserved for use in case someone becomes ill during Mass. That person may be ushered into that room during Mass and asked to leave safely as soon as possible.

Liturgical Preparation Guidelines

21. Sacristans - Sacristans and those who prepare bread, wine, and sacred books and vessels must wash their hands before beginning their work and after their work is complete. It is recommended that they wear masks.
22. Sacred Vessels, etc... - Patens, ciboria, chalice, cruets, bread, wine and linens should be placed on a credence table in the sanctuary or on the altar. These items may only be handled by the sacristan or a delegate of the priest (e.g. altar server) during Mass. All Communion vessels are to be purified during or after Mass according to the ritual, and then properly cleaned with hot, soapy water after each Mass.
23. Readers - Readers do not need to make any changes, but they should remember to keep adequate physical distance from others.
24. Altar Servers – Altar servers may be used but should observe physical distancing. If servers are minors, a parent or guardian’s permission is required. It is encouraged that any vesture they wear be washed more frequently. They also may serve without vesture.
25. Ushers - Ushers should not come into contact with others through shaking hands, etc..., and they must wear masks for their duties, and should be chosen from individuals who are not at-risk (those persons over 65 years of age or with underlying health issues, etc...) or who have COVID-19, show such symptoms, or have had contact with a person with a confirmed diagnosis of COVID-19 without finishing self-quarantine or being cleared by medical professionals. At least one usher (or another person) at each Mass should be familiar with emergency plans and procedures. Selection and training of ushers should include:
 - a. Volunteers who are not elderly or immuno-deficient should be chosen as ushers.
 - b. Ushers must wear masks while performing duties.
 - c. Ushers should be knowledgeable of distancing requirements when seating people.
 - d. Ushers should allow families and those in the same household to sit together.
 - e. Ushers should ensure proper physical distancing of people during the communion procession.
 - f. Ushers should dismiss people at the end of Mass by pew, starting from the rear of the church.
 - g. Ushers should be given some simple instructions regarding how to turn people away politely when the 25% occupancy limit with physical distancing has been reached.
 - h. Collections may only be taken up from the pews with long-handled baskets. There should be no passing of baskets.
26. Music – At this time, there is to be no congregational singing. A cantor and organist/pianist may be present. and simpler music with fewer musicians should be preferred. Choirs may not rehearse or sing at Mass until further notice. Choir members cannot maintain physical distancing and cannot wear masks while singing. They also are “super secretors” and easily infect those around them far beyond 6 feet. Several choirs in the USA that rehearsed and sang during the pandemic infected more than half of the members, some of which were fatalities. In addition, national singing organizations advise that choirs do not meet until further notice. This will be reviewed by the diocese prior to phase III. For more complete information go to https://www.middleclassartist.com/post/nats-panel-of-experts-lays-out-sobering-future-for-singers-no-vaccine-no-safe-public-singing?fbclid=IwAR3oS2-RgDXgM7jqdr0tKeByHN0iScFmMLgqSWfgEgsI_0LHaAEg02VUw.

Mass & Holy Communion Guidelines

27. No Congregational Singing – No congregational singing or chanting is allowed at this time. However, a cantor and organist or pianist may be used. The priest should avoid chanting any part of the Mass that will elicit a chanted response from the congregation.
28. Entrance Procession - The Entrance Procession through the church may be omitted in favor of the persons entering the sanctuary directly via the sacristy.
29. Priest at the Altar – The priest may choose to arrange liturgical and other items on the altar (missal, missal stand, chalice, purificator, paten, pall, corporal, lavabo items, hand sanitizer, etc...), and celebrate the majority of the Mass from the altar, in order to maximize physical distancing and minimize the number of persons in the sanctuary.
30. Missal – According to the priest’s prudent discretion, the missal be placed on a stand in front of the celebrant’s chair or on the altar, eliminating the need for a server to carry or hold it near the celebrant.
31. Presentation of the Gifts – The Presentation of the Gifts by the faithful should be omitted. Before Mass, the gifts should be placed on the credence table in the sanctuary or directly on the altar. For sanitary precautions, the priest may choose to use a scale paten with a large host for the celebrant that is separate from a bowl paten containing the smaller hosts for the faithful. The bowl paten can be enclosed in a clear plastic, e.g., a light ziploc bag, that is open on one end (some suggest to poke a few small needle holes in the plastic bag) and placed on the corporal. That way, the oral droplets from the priest during the words of consecration will not contaminate the bowl paten of hosts to be distributed to the congregation, while the priest eventually personally consumes the host on the scale paten.
32. Lavabo Rite - The lavabo rite should be done by the priest alone at the altar and placed to the side where a server can come and remove the vessels. Alternatively, the lavabo items may be placed on, used at, and later removed from the altar by the priest alone.
33. Collection Announcement - An announcement may be given to prepare the attending faithful for the method of the collection, an appeal to the needs of the parish, etc...
34. Offertory Collection - Collection baskets should not be passed from person to person. A large basket for the collection may be placed near the entry/exit from the church. Alternatively, long-handled baskets may be used by ushers for the collection from those in the pews. Those taking the collection should wear a mask during the collection and wash their hands immediately afterwards. Anyone else handling the collection should wash their hands immediately afterward. When the offertory collection is completed, the collected funds should be placed in a tamper-evident bag, logged, and placed in the safe for three days before being counted. Offertory counters are encouraged to wear mask and gloves. At least two counters should be present, but physical distancing is required for the offertory counters, and they should wash their hands when finished.
35. Sign of Peace - The sign of peace must be omitted.
36. Holy Communion Announcement – The priest may choose to make an announcement just prior to the distribution of Holy Communion to instruct the faithful.
37. Holy Communion Guidelines – Guidelines for the distribution and reception of Holy Communion are as follows:
 - a. Communicating by Clerics - The celebrant and concelebrants can and must self-communicate under both species. If there are concelebrating priests, each priest should drink from a separate chalice. Assisting deacons and priests in choir should receive Holy Communion only under the form of bread.

- b. Vestments - The priest may choose to remove his chasuble at the chair and a deacon remove his dalmatic for the distribution of Holy Communion in alb and stole, so that the clerics do not have to worry about someone touching their chasuble/dalmatic.
- c. Extraordinary Ministers of Holy Communion (EMHCs) – EMHCs may be used only if truly necessary for the distribution of Holy Communion, or if the priest or deacon is unable to distribute Communion.
- d. Hand Sanitizing by Ministers – Any minister distributing Holy Communion is strongly encouraged to wash or sanitize their hands immediately before distributing Holy Communion. The priest or deacon should wash or sanitize his hands before going to the tabernacle. If possible, a small table with an ablution cup, purificator, and hand sanitizer could be available at each Communion station and used by the minister distributing Communion if he inadvertently touches the hand or mouth of a Communicant. Alternatively, such a “station” could be placed in the sacristy for all Communion ministers to use. If the minister needs to sanitize or wash his hands during or after the distribution of Holy Communion, he should first rinse his hands or fingers in an ablution cup and wipe his hands on the purificator prior to using hand sanitizer. The ablution cup water should be properly disposed of into the sacrarium or directly into the earth.
- e. No Use of Gloves - Gloves are not to be worn during either the distribution or reception of Holy Communion.
- f. Use of Masks - The priest and deacon or extraordinary ministers of Holy Communion are encouraged to wear a mask for the distribution of Holy Communion and to minimize potential risk related to the consecrated hosts and the communicants. The faithful who are wearing masks should remove them before reception of Holy Communion.
- g. Single Species Holy Communion - Holy Communion may only be distributed to the faithful under the form of hosts, and the Precious Blood may not be distributed to the faithful. It is best to distribute Holy Communion using hosts consecrated at the same Mass. Because of the practical impossibility of safely distributing under the form of wine to the faithful, those who are medically unable to receive even a low-gluten host should be sensitively asked to refrain from receiving Communion.
- h. Physical Distancing - Holy Communion should take place in the usual manner and at the normal time, but with physical distancing in the Communion line. For example, a single Communion line could be made in each aisle. Ushers may wish to direct the process, allowing those in pews on one side of the aisle into the line, and then, when there is room, allowing those in pews from other side of the aisle to go in that same Communion line. Tape placed at 6-foot intervals will help maintain physical distancing during the Communion procession. Logically, that distance will not be maintained momentarily between the communicant and the Eucharistic minister during reception of Holy Communion.
- i. Hand Sanitizer for Communicants - It is encouraged that hand sanitizer be available throughout the church or at each Communion line for use by the communicants prior to reception of Holy Communion.
- j. Reception of Holy Communion - Holy Communion may be received in the hand or on the tongue. However, no Ordinary or Extraordinary Minister is required to distribute Holy Communion if he thinks it puts his health seriously in jeopardy. For the same truly serious reason, priests may also choose legitimately to limit the manner of reception of Holy Communion to reception in the hand. In such cases, the legitimate desires and rights of the faithful to receive Holy Communion, either at all or in a certain manner (in the hand or on the tongue) should be strongly considered and accommodated to the extent possible, for example by the deputation of another suitable person as

an Extraordinary Minister of Holy Communion who would distribute Holy Communion solely in the manner other than the one adopted by the priest, or request that all those who desire to receive Holy Communion on the tongue wait until those who desire to receive in the hand have finished with reception of Holy Communion.

38. Final Announcement – The priest may choose to make a final announcement regarding the method of dismissal from the church, a reminder not to gather afterwards in the narthex or gathering area, the availability of the on-line bulletin, and any other pertinent announcements.
39. Recessional - The Recessional may be abbreviated to proceed directly from the sanctuary to the sacristy.
40. Dismissal of People – It is strongly encouraged to dismiss the people from the church pew-by-pew, starting with those closest to the door (to avoid crowding at exits). If this is done, the ushers, wearing masks, may help direct the people from their pews to exit the church in an orderly manner.

Sanitization

(Advice based on the Center for Disease Control Guidelines)

- Those cleaning the church should be familiar with the CDC Guidelines for cleaning and disinfecting. See https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fdisinfecting-building-facility.html. Also see <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>.
- In addition to the well-known advice of washing hands, wearing a mask, and practicing physical distancing, the CDC has very complete guidelines at <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>.
- Parishes that have video capability may wish to make a short video explaining proper Mass procedures (e.g. distribution and reception of Holy Communion).
- Cleaning may be done with hot, soapy water. It is even better to use a CDC approved cleanser, such as Lysol Brand Deodorizing Disinfectant Cleaner. A complete list of approved cleansers is available on the CDC website at <https://cfpub.epa.gov/giwiz/disinfectants/index.cfm>.
- After each Mass, please wash and disinfect:
 - Hand rails, door handles, push plates, and knobs
 - Pew tops in rows used by congregants
 - Restrooms
 - Chalice and ciboria after proper purification of the vessels. Please wash using hot, soapy water only.
 - The Lectionary and Roman Missal
 - Microphone covers and adjustable microphones
 - Handles on offertory baskets, if used
 - Anything else frequently touched
- At least weekly, please wash and disinfect:
 - Pews (especially pew tops and backs)
 - Other common rooms or areas
 - Choir loft (if used)
 - Music stands
 - Organ/piano keyboard (special care required; please check with your musicians)
 - Doorbell buttons (if necessary) and light switches
 - Albs, etc... (as necessary)

- COVID-19 Preparedness Vendors
 - Masks Specifically
 - Menards - <https://www.menards.com/main/tools/workwear-safety-gear/respirators-dust-masks/3-ply-disposable-mask-50-pack/2122259/p-7919224473483074-c-13847.htm>
 - ACE Hardware - <https://www.acehardware.com/search?pageSize=30&query=mask&categoryId=342>
 - Sanitizer Products Specifically
 - Dr. Brite (online supplier) - <https://www.drbsite.com/>
 - Eagle Park Brewing Company – This company is owned by the Borgardt Family of St. Mary Parish in Hales Corners, Wisconsin. They are offering our parishes a discounted rate on gallon jugs of hand sanitizer. This 80% alcohol-based hand sanitizer is packaged in one-gallon jugs with an easy-pour cap, and is perfect for refilling smaller bottles you may already own. This product is a liquid, not a gel, so it works in the largest variety of dispensers. Normally priced at \$35 per gallon jug, the cost to the parishes is \$25 per gallon jug. Parishes will need to purchase one case (four jugs) to receive the discounted rate. However, there is no limit to how many cases a parish can purchase, but please order in the next few weeks for availability. For more information, please contact Max Borgardt at 414-803-3177 or max@eagleparkbrewing.com. See their website at www.eaglecreekbrewing.com. They are not able at the current time to ship ground UPS, but they have two locations for pickup at 823 E. Hamilton St., Milwaukee, WI 53202, and S64 W15640 Commerce Center Parkway, Muskego, WI 53150. They would also be willing to use their van to transport a bulk shipment to a single drop-off point in Madison for multiple parishes, with items labeled by parish. Invoicing and payment can occur separately from the drop-off point for the ease of the customer.
 - Dubois Chemicals – They contacted the Diocese of Madison and they sell hand sanitizer/surface disinfectants. The hand sanitizer is EPA/FDA approved. Contact David Spengler, DuBois Chemicals, Technical Sales Representative, at 920.676.4729 or david.spengler@duboischemicals.com.
 - The CDC has a homemade recipe for making sanitizer. It is located on <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/disinfecting-your-home.html> (scroll about halfway down the page). There also is a very detailed page (including info on how to sanitize if someone is found to have COVID-19) at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/guidance-community-faith-organizations.html>. Please note that diocesan liturgical guidelines take precedence over anything mentioned at this site.
 - All Supplies
 - East Office Supply (EZOP) is a local Madison based company, owned by a Catholic couple, that can delivery statewide. The chancery’s sales rep is Steve Schwenn, who is eager to help. He can be contacted directly at sschwenn@ezop.com or 608.310.7429.
 - KleenMark - The chancery uses KleenMark’s services on a regular basis. In addition to typical PPE and cleaning supplies, they carry a hand sanitizer made locally at Doundrins Distillery in Cottage Grove. Call Doug at 608-443-0168. They also offer facility cleaning, either ongoing or as a one-time deep clean.
 - Catholic Purchasing Services – See their website at: https://www.catholicpurchasing.org/facility/Janitorial_Supplies
 - Radwell International - <https://www.radwell.com/en-US/>
 - Complete Office - <https://www.cowiweb.com/public/>
 - Quill - www.quill.com - The chancery and several parishes and schools currently benefit from the CESA cooperative in Wisconsin, which has negotiated special pricing for non-profits and educational institutions. They carry cleaning supplies and PPE, and can do bulk purchasing. Shipping is free. Patricia Andre has been the account rep for the Diocese: patricia.andre@quill.com, 800-789-7020 x1461
 - San-A-Care (currently only servicing existing customers) - <https://www.san-a-care.com/>

- Lakeland Supply - www.lakelandsupply.com

Questions?

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