Wisconsin Legislative Council
INFORMATION MEMORANDUM

IM-2020-02

CONSTITUTIONAL CONSIDERATIONS RELATING TO EMERGENCY ORDER #12, "SAFER AT HOME"

This information memorandum provides an overview of constitutional considerations relating to Emergency Order #12, the "Safer at Home" order issued by the Department of Health Services (DHS) on March 24, 2020 in response to the spread of the COVID-19 disease. The order curtails, and in some cases prohibits, activities that would otherwise be permissible, so it prompts various constitutional considerations, which are discussed in more detail below.

The application of the order to a specific set of circumstances would require an individualized analysis that is beyond the scope of this information memorandum. In addition, the unprecedented breadth and scope of both Emergency Order #12 and the current public health emergency make predictions regarding judicial outcomes more difficult. However, if courts follow past precedents that provide broad latitude to governments in emergency situations, the government's interest in slowing the spread of the virus causing COVID-19 is, on balance, likely sufficient for the order to broadly withstand a challenge to its constitutionality.

OVERVIEW OF STATUTORY AUTHORITY AND RECENT ACTIONS

Wisconsin Statutes provide broad authority to the Governor and DHS during a public health emergency. If the Governor determines that a public health emergency exists, he or she may issue an executive order declaring a state of emergency related to public health and may designate DHS as the lead state agency to respond to that emergency. [s. 323.10, Stats.] During a declared state of emergency, together with other, more specific powers, the Governor may "[i]ssue such orders as he or she deems necessary for the security of persons and property." [s. 323.12 (4) (b), Stats.]

In addition to acting as the lead agency during a public health emergency, DHS also has broad general authority to slow the spread of communicable diseases in Wisconsin. Along with a number of more specific powers, DHS may "issue orders for guarding against the introduction of any communicable disease into the state, for the control and suppression of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease and for the sanitary care of jails, state prisons, mental health institutions, schools, and public buildings and connected premises." DHS may also "authorize and implement all emergency measures necessary to control communicable diseases."[1] [s. 252.02 (4) and (6), Stats.]

On March 12, 2020, Governor Evers issued Executive Order #72, declaring a public health emergency in response to the spread of the COVID-19 disease caused by the new coronavirus

[1] For more information regarding state and local officials' authority in a public health emergency, see Legislative Council Information Memorandum IM-2020-01, *Authority of Public Health Officials During a Public Health Emergency*, available at http://lc.legis.wisconsin.gov/.

and designating DHS as the lead agency to respond to the emergency. The Governor and DHS have subsequently issued progressively more restrictive orders relating to the public health emergency, including orders generally prohibiting gatherings of 10 or more people on March 17 and 20, 2020. At the Governor's direction, DHS issued Emergency Order #12 on March 24, 2020.

SUMMARY OF EMERGENCY ORDER #12

Proclaiming that Wisconsin is in a "critical moment" relating to the COVID-19 outbreak and that "social distancing … is the only effective means of slowing the rate of infection," Emergency Order #12 imposes a number of requirements, described below, on individuals, businesses, and other organizations, aimed to maintain distance between people.

Individuals Ordered to Stay at Home

First, the order requires all individuals within the State of Wisconsin to stay at home or at their place of residence, except to engage in any of the following:

- Essential activities.
- Essential governmental functions.
- To operate essential businesses and operations.
- To perform nonessential minimum basic operations.
- Essential travel.
- Special situations.

The order provides further detail on each of the exceptions above in the order. For example, the "essential activities" exception allows individuals to leave their homes or residences for reasons related to: health and safety; obtaining necessary supplies and services; engaging in outdoor activity; performing certain types of work; and taking care of others.

The order exempts from the order to stay at home, individuals experiencing homelessness and individuals whose homes or residences are unsafe or become unsafe.

Nonessential Businesses and Operations Ordered to Cease

The order directs all for-profit and nonprofit businesses with a facility in Wisconsin, except those businesses and operations designated as "essential businesses and operations," to cease all activities at facilities located within Wisconsin. The order provides two exceptions to this requirement: one allows any operations consisting exclusively of employees or contractors performing activities at their own home or residences; the other allows businesses to continue to engage in "minimum basic operations," defined to mean either of the following:

- The minimum necessary activities to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, or for related functions, including where these functions are outsourced to other entities.
- The minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.

Public and Private Gatherings Prohibited

The order prohibits all public and private gatherings of any number of people that are not part of a single household or living unit, except for the limited purposes allowed under the order.

Certain Facilities Ordered to Close

The order directs all of the following types of facilities to close:

- Public and private K-12 schools for pupil instruction and extracurricular activities and public libraries, except that schools may remain open to the extent necessary to facilitate distance learning or virtual learning, libraries may remain open to the extent necessary to provide online services and programming, and both school and library facilities may be used for essential governmental activities and food distribution.
- Places of public amusement and activity, whether inside or outside.
- Salons and spas.

Nonessential Travel Prohibited

The order prohibits all forms of travel, except for essential travel as defined by the order. Very generally, "essential travel" includes: any travel related to the permissible reasons an individual may leave his or her home under the order; travel to care for elderly persons, minors, dependents, persons with disabilities, or other vulnerable persons; travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals or other related services; travel to return to a place of residence from outside the jurisdiction; travel required by law enforcement or court order, including to transport children pursuant to a child custody agreement; and travel required for nonresidents to return to their place of residence outside Wisconsin.

Guidelines to Be Followed

The order directs that anyone "taking any action permitted under [the] order" shall, to the extent possible, follow DHS guidelines regarding COVID-19. The order directs businesses and operations performing minimum basic operations to follow DHS guidelines for businesses and employers.

High-Risk Populations Encouraged to Take Extra Precautions

The order urges, but does not require, individuals at a high risk of severe illness from COVID-19 and individuals who are sick to stay in their home or residence except as necessary to seek medical care.

Special Circumstances

A section of the order, titled "Special Circumstances" specifically allows individuals to leave their homes or residences for all of the following reasons:

- To work for or obtain services at any "health care and public health operations," as described by the order.
- To work for or obtain services at any state, institutional, or community-based setting providing human services to the public.

- To provide any services or perform any work necessary to offer, provide, operate, maintain, and repair "essential infrastructure," as described by the order.

Essential Businesses and Operations Described

As discussed above, the order requires any nonessential business or operation to cease all activities at facilities located in Wisconsin. A business or operation that falls within the scope of "essential business or operation" is not required to cease operations, and an individual who works for one of these businesses or operations may leave his or her home or residence for the purpose of operating that essential business or operation. Generally, the order enumerates all of the following as essential businesses or operations:[2]

- Any business or worker identified in the memorandum issued by the federal Cybersecurity and Infrastructure Security Agency, titled *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*.
- Stores that sell groceries and medicine.
- Food and beverage production, transport, and agriculture.
- Restaurants, for takeout only.
- Bars for carryout sales of alcohol beverages and food, if carryout is otherwise permitted by state law and municipal ordinance.
- Child care settings, subject to certain limitations on the number of children and staff that may be present and requirements related to prioritizing care for families of individuals engaged in certain types of activities.
- Charitable and social services organizations, when providing food, shelter, and social services and other necessities for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of the public health emergency, and people with disabilities.
- Religious entities, groups, and gatherings, and weddings and funerals, subject to the limitation that these gatherings shall include fewer than 10 people in a room or confined space at a time and individuals shall adhere to social distancing practices.
- Funeral establishments, subject to the limitation that any gathering shall include fewer than 10 people in a room or confined space at a time and individuals shall adhere to social distancing practices.
- Media.
- Gas stations and businesses needed for transportation.
- Financial institutions and services.
- Hardware and supplies stores.
- Various tradespersons.
- Mail, post, shipping, logistics, delivery, and pick-up services.
- Laundry services.

[2] The order provides additional detail with respect to each of the categories listed below. The description of essential businesses and operations in this information memorandum is intended as a broad overview of the types of businesses and operations the order describes as essential.

- Businesses that sell, manufacture, or supply supplies needed for people to work from home.
- Businesses that sell, manufacture, or supply support or supplies necessary for other essential businesses and operations and essential governmental functions.
- Transportation services that are necessary for any transportation or travel permitted under the order.
- Home-based care services.
- Professional services; businesses providing professional services are directed to use technology, to the greatest extent possible, to avoid meeting in person.
- Manufacturing companies, distributors, and supply chain companies that produce and supply essential products and services for a variety of enumerated industries or are used by other essential businesses and operations or for essential governmental functions.
- Certain labor union functions.
- Hotels and motels, subject to certain requirements.
- Higher educational institutions, for facilitating distance learning, performing critical research, or performing essential functions as determined by the institution.
- A business designated by the Wisconsin Economic Development Corporation (WEDC) as an essential business, upon application by the business.

Essential Governmental Functions Described

The order also allows an individual to leave the individual's home or residence to perform essential governmental functions, which the order defines as "all services provided by the State, tribal, or local governments needed to ensure the continuing operation of the government body and provide and support the health, safety, and welfare of the public." The order allows each governmental body to determine its essential government function, if any, and identify employees and contractors necessary to the performance of those functions. The order provides that certain personnel are categorically exempted from the order, such as law enforcement officers, firefighters, and emergency medical service personnel, among others.[3]

Enforcement and Duration

The order provides that it is enforceable by any local law enforcement official, including county sheriffs. Violation or obstruction of the order is punishable by up to 30 days imprisonment, or up to $250 fine, or both. [See also s. 252.25, Stats.]

The order takes effect on March 25, 2020 at 8:00 a.m., and remains in effect until 8:00 a.m. on April 24, 2020, unless a suspending order is issued before then.

CONSTITUTIONAL CONSIDERATIONS

State authority to respond to emergency situations derives from the police powers each state has to protect the welfare, safety, and health of its citizens. Courts have interpreted states' police

[3] The order also lists "others working for or to support Essential Businesses and Operations" as categorically exempt within the same provision. It is not clear what was intended by this language because the provision otherwise pertains only to "Essential Government Functions."

powers very broadly in the context of public health emergencies.[4] Although courts generally emphasize that actions taken during emergency situations are subject to constitutional limitations,[5] tests under various constitutional doctrines have typically been resolved in favor of the government if the government actions are found to be necessary to protect the public from danger. Thus, a challenge to Emergency Order #12 would likely face a relatively high legal threshold. Some of the possible grounds on which a challenge to the order's constitutionality might nevertheless be brought are discussed in more detail below.

Procedural Due Process

Procedural due process is one potential basis for a challenge. Under the Fifth and Fourteenth Amendments to the U.S. Constitution, neither the federal government nor any state may deprive a person of "life, liberty, or property without due process of law." [U.S. Const. amends. 5 and 14.] Likewise, the Wisconsin Constitution provides: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their powers from the consent of the governed." [Wis. Const. art. I, s. 1.] While the language in the two Constitutions is not identical, the Wisconsin Supreme Court interprets the two provisions as providing the same procedural due process protections. [*County of Kenosha v. C&S Management, Inc.*, 223 Wis. 2d 372, 393 (1999).]

Whereas the "property" component of procedural due process is fairly well-developed, the "liberty" component of the procedural due process clause has been interpreted relatively rarely outside of the criminal law context. However, some past cases may provide useful background. An early 20th Century decision, *Jacobson v. Massachusetts*, involved a challenge to a state's mandatory smallpox vaccination law on procedural due process grounds. Noting that "the liberty secured by the Constitution of the United States does not import an absolute right in each person to be at all times, and in all circumstances, wholly freed from restraint," the Court held that a state may infringe upon individual liberty when "under the pressure of great dangers" to "the safety of the general public." [197 U.S. 11 (1905).]

Some mid-20th Century procedural due process decisions were even more deferential. For example, in upholding restrictions on travel to Cuba in *Zemel v. Rusk*, the U.S. Supreme Court noted that "right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law." However, the Court held that the right to travel "does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole." [381 U.S. 1, 14, 28 (1965).] The "materially interfere"

---

[4] See, e.g., *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902) ("[T]he power of States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants … is beyond question."). State authority to regulate travel could in some cases be preempted by a constitutionally valid federal regulation, or by the dormant commerce clause. [See *Edwards v. California*, 314 U.S. 160 (1941).] However, in practice, except for international travel and quarantine at international borders, the federal government has generally deferred to states on questions of quarantine and movement.

[5] See, e.g., *Ex. Parte Milligan*, 71 U.S. 2, 120 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times."). However, U.S. Supreme Court justices have noted the propensity of all three branches of government to overlook such limitations in times of war. See, e.g., *Ziglar v. Abbasi*, 582 U.S. __ (2017) (Breyer, J., dissenting) (discussing the Alien and Sedition Acts and *Korematsu v. United States*, 323 U. S. 214 (1944).).

language was arguably more deferential that the "great dangers" language in *Jacobson*, albeit with the same conclusion.

In more modern cases, courts have generally held that the due process clause typically requires the government to hold a hearing specific to an individual before depriving the individual of his or her liberty. [*Zinermon v. Burch*, 494 U.S. 113 (1990).] However, courts have provided exceptions to that general requirement. Specifically related to quarantine, at least one federal court upheld the mandatory quarantine, without a hearing, of a nurse who had been exposed to Ebola while traveling to Africa upon her return to the United States. In upholding the quarantine, the Court stated that the government is "entitled to some latitude … in its prophylactic efforts to contain what is, at present, an incurable and often fatal disease." [*Hickox v. Christie*, 205 F. Supp. 3d 579, 584 (D.N.J. 2016).]

Although the language and standards applied in procedural due process decisions throughout the years differ, a general theme has been to allow exceptions to rigid procedural requirements where necessary to respond to emergency situations. Requiring the state to provide an individual hearing for every person deprived of liberty under Emergency Order #12 would arguably greatly hamper the state's efforts to slow the spread of the COVID-19 disease. Additionally, with respect to rights that may be affected because a business or organization is not designated in the order as "essential," the order provides a procedure allowing a business or operation that is not expressly designated in the order to apply to WEDC to request designation as an essential business or operation. Thus, it seems likely that a court would cite prior decisions granting "latitude" to uphold the current restrictions against a procedural due process challenge. However, the order is broader in scope and duration than the restrictions in the relatively limited number of past cases, making predictions about judicial outcomes less certain.

Substantive Due Process

Modern cases involving deprivations of liberty have also involved challenges on substantive due process grounds under the Fifth and Fourteenth Amendments to the U.S. Constitution. Rather than focus on the absence of sufficient process, substantive due process prevents the government from engaging in conduct that: (1) shocks the conscience; or (2) interferes with the rights implicit in the concept of ordered liberty. When deciding a substantive due process case, a court typically first determines whether a government restriction "substantially infringes" upon a "fundamental"[6] right. If so, courts then ask whether government infringement of that fundamental right is justified by a legitimate and compelling[7] governmental interest. [*Daniels v. Williams*, 474 U.S. 327, 331 (1986).]

Many recent substantive due process decisions have arisen in the social policy context – e.g., relating to abortion and marriage – and may not be directly analogous. The most relevant U.S. Supreme Court cases might be cases relating to detention. The U.S. Supreme Court has upheld pretrial detentions challenged on substantive due process grounds because the government had a compelling interest in preventing crimes by arrestees. [*United States v. Salerno*, 481 U.S. 739 (1987).] In lower court cases relating more specifically to restrictions imposed to protect public health, courts have upheld restrictions of fundamental liberty rights when such restrictions are

[6] The scope of "fundamental" rights has shifted over time. [Compare the more restrictive scope in *Washington v. Glucksberg*, 521 U.S. 702 (1997), with the more expansive scope in *Obergefell v. Hodges*, 576 US _ (2015).] However, the rights of liberty and travel have consistently been considered "fundamental" under the substantive due process doctrine and various other constitutional doctrines.

[7] Other cases refer to an "important" government interest in this analysis.

needed to protect the public from the dangers of communicable disease. [See, e.g., *Best v. St. Vincent's Hospital*, 03 Cv. 0365 (RMB) (JCF) (S.D.N.Y. Jul. 2, 2003).]

As applied to business regulations, the U.S. Supreme Court has historically upheld government regulations challenged on due process grounds. The Court has held that the U.S. Constitution "does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases." [*Nebbia v. New York*, 291 U.S. 502, 527 (1934).]

A court would likely hold that Emergency Order #12 affects certain fundamental rights, such as rights of liberty and travel. However, given the relatively deferential case law history, and with the same caveats as mentioned above regarding the unprecedented scope of the order, it also seems likely that the need to lessen the spread of COVID-19 would serve as a sufficiently compelling interest such that a court would nevertheless uphold such orders on substantive due process grounds.

Equal Protection

The equal protection clauses of Wis. Const. art. I, s. 1 and the Fourteenth Amendment to the U.S. Constitution prohibit state and local actions that provide unequal treatment under the law. The Fourteenth Amendment of the U.S. Constitution provides that "no state shall make or enforce any law which shall … deny to any person within its jurisdiction the equal protection of the laws." Similarly, Wis. Const. art. 1, s. 1 provides that "[a]ll people are born equally free and independent…."[8]

In general, under the equal protection clauses, unless a government action discriminates based on a "suspect classification," including race, religion, national origin, and alienage, a court will uphold the action if it is justified by a rational basis. If a suspect classification is found, a court will instead apply "strict scrutiny," meaning that the government must demonstrate a "compelling interest" to justify the differential treatment.

In some cases, courts have also applied an either strict or "immediate" scrutiny[9] where differential legal treatment affects a fundamental constitutional right. That "fundamental constitutional right" component of the equal protection analysis does not create an independent substantive right, but instead requires greater scrutiny of a law that implicates an otherwise protected constitutional right. [*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).] For that reason, courts sometimes intertwine the equal protection analysis with the analysis under the due process clause.

By providing several exemptions from its general prohibitions, Emergency Order #12 treats categories of individuals and businesses differently. It does not appear to discriminate based on a suspect classification and would almost certainly be upheld on equal protection grounds if a court applied a rational basis review.[10] However, if a court found that the prohibitions and exemptions implicated a fundamental right protected under a due process or other

---

[8] Wisconsin courts have used the same analysis to review challenges under state and federal equal protection clauses. [*Reginald D. v. State*, 193 Wis. 2d 299, 306 (1995).]

[9] "Intermediate scrutiny" requires a showing that differential treatment furthers an important government interest by means that are substantially related to that interest. Intermediate scrutiny is also referred to as "heightened scrutiny."

[10] In contrast, an order restricting movement or assembly based in part on race would be more likely to be struck down. For example, a federal court struck down a local action in the late Nineteenth Century that quarantined all of Chinatown in San Francisco on equal protection grounds. In that case, the court found that the quarantine decision was made in part based on race. [*Jew Ho v. Williamson*, 103 F. 10 (C.C.D.Cal.1900).]

constitutional theory, a court might apply intermediate or strict scrutiny. If so, the state may need to show that the order is necessary to achieve a compelling governmental interest. Although past cases suggest that the state could do so, the unprecedented scope of the restrictions may make the result less certain than for less sweeping restrictions.

Freedom of Assembly and Free Exercise of Religion

One or more clauses under the First Amendment to the U.S. Constitution could serve as an alternative basis for a challenge to Emergency Order #12.

Freedom of Assembly or Association

First, it is possible that the order would be challenged as an unconstitutional restriction on an individual's freedom of assembly or association.[11] However, government restrictions on assembly, like restrictions on freedom of speech, are most likely to be upheld when they are content-neutral and support a compelling government interest. Thus, a First Amendment challenge appears relatively unlikely to prevail as applied to a government action that is broadly applied, viewpoint neutral, and prompted by a public health emergency – all characteristics of Emergency Order #12.

That result is illustrated in past cases related to travel. In *Zemel v. Rusk*, the decision discussed above relating to restricting travel to Cuba, the U.S. Supreme Court upheld the travel restriction against a First Amendment challenge. The Court distinguished the restriction from past restrictions that had a viewpoint-based focus, such as the restriction relating to citizens who declined to sign an affidavit related to communism in *Kent v. Dulles*, 357 U.S. 116 (1958).

Free Exercise of Religion

A closer constitutional question could arise under the free exercise clause of the First Amendment to the U.S. Constitution or under Wis. Const. art. I, s. 18. The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …." Wisconsin Constitution, Article I, Section 18, similarly prohibits the government from interfering with religious worship and the "rights of conscience." The Wisconsin Constitution has generally been interpreted to restrict government action in more circumstances than does the U.S. Constitution.

During much of the 1960s, 1970s, and 1980s, the U.S. Supreme Court applied a "strict scrutiny"-like test in cases challenging generally applicable laws on free exercise grounds. [See especially *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).] That test required that if a law placed a burden on religious exercise, in order for the law to be found constitutional, that burden must be outweighed by a compelling government interest that the law was designed to achieve. In addition, the burden must be the least restrictive means of accomplishing the government's interest.

The U.S. Supreme Court reversed course in 1990, when it held in *Employment Division v. Smith*, 494 U.S. 872, that laws that are neutral (i.e., not specifically addressing religious practice) and generally applied may be constitutionally applied to religious actions. The Court stated that "the right of free exercise does not relieve an individual of the obligation to comply

[11] The First Amendment to the U.S. Constitution prohibits Congress and the states from abridging the right of the people to "peacefully assemble." The U.S. Supreme Court has not consistently viewed freedom of association as an independent right under the First Amendment.

with a valid and neutral law of general applicability ...." [494 U.S. at 879 (quotation and citation omitted).]

The "neutrality" standard adopted in *Smith* continues to be the primary test applied by the federal courts in most cases challenging the application of a generally applicable law under the free exercise clause. Under that standard, if a law has only an "incidental" effect on religious practice, it will generally be upheld against a challenge brought under the free exercise clause.[12]

However, Wisconsin courts apply a different standard. In *State v. Miller*, 202 Wis. 2d 56 (1996), the Wisconsin Supreme Court held that a person challenging the application of a state or local government law under Wis. Const. art. I, s. 18 is instead subject to the compelling interest and least restrictive means test previously applicable in federal cases. That test can be reiterated as a four-part test, in which a person challenging a law must prove that: (1) the person has a sincerely held religious belief; and (2) the belief is burdened by the application of the state law at issue. If the person successfully establishes these two elements, then the state has the burden to prove that: (3) the law is based on a compelling state interest; and (4) the state interest cannot be served by a less restrictive alternative.

Because the "free exercise" test is more stringent under the Wisconsin Constitution than under the U.S. Constitution, courts would apply the Wisconsin standard when reviewing a challenge to Emergency Order #12. Although the order exempts religious entities from its broad prohibitions, the order retains a restriction from an earlier order that limits religious gatherings to no more than 10 people, and requires such gatherings to follow social distancing protocols. Thus, a person challenging the order could arguably satisfy the first two elements of the four-part test, described above.

If so, the state would need to prove a compelling interest and that the restriction on religious gatherings in the order is the least restrictive means of serving that interest. As with the constitutional doctrines discussed above, it appears likely that a court would be receptive to finding that limiting transmission of COVID-19 is a compelling interest. The more difficult question is whether a court would hold that limiting gatherings to no more than 10 is the least restrictive means of achieving that interest. Given the weight of public health evidence regarding social distancing and the exception granted to religious entities from the order's more restrictive requirements, it seems somewhat more likely than not that a court would uphold the order. However, it is difficult to predict the outcome of that analysis with certainty.

Takings Clause

A business owner could challenge Emergency Order #12 as unconstitutionally taking the owner's property without just compensation. The takings clause of the Fifth Amendment to the U.S. Constitution prohibits the taking of private property "for public use without just compensation." Wisconsin Constitution, Article I, Section 13, similarly provides that "[t]he property of no person shall be taken for public use without just compensation therefor."

To win a constitutional takings claim in a situation where the government does not physically take possession of property, Wisconsin courts have held that an owner must demonstrate that the government's action "practically or substantially renders the property useless for all reasonable purposes." [*Zinn v. State*, 112 Wis. 2d 417, 424 (1983).] By generally requiring

[12] However, the U.S. Supreme Court has declined to apply *Smith* in recent cases involving the application of generally applicable employment discrimination laws to internal management decisions made by religious institutions, holding that in such cases, a "ministerial exception" applies. [See, e.g., *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. __ (2012).]

business owners to cease operations, Emergency Order #12 has arguably rendered certain commercial property "useless" for its current purpose, but it is doubtful that a court would hold that the order has rendered the property useless for all reasonable purposes, particularly given the order's limited duration.

A court may alternatively hold that a regulatory taking has occurred by applying a multi-factor test first established in a 1978 U.S. Supreme Court case, *Penn Central v. New York City*. Under *Penn Central*, a government regulation may be a taking if it goes "too far," based on factors including "the character of the governmental action," "the economic impact of the regulation on the claimant," and "the extent to which the regulation has interfered with distinct investment-backed expectations." [438 U.S. 104, 124 (1978).] Both Wisconsin and federal courts have applied the *Penn Central* multi-factor approach inconsistently. Federal courts have been more likely to apply it as a separate test from the "substantially all" test described above, but have declined to strike down regulations that have only a temporary effect on the use of property. [See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 US 302 (2002).]

The Wisconsin Statutes also provide an "inverse condemnation" cause of action when property has been occupied by a governmental entity that has the power to exercise eminent domain. [s. 32.10, Stats.] However, Wisconsin courts have interpreted the inverse condemnation statute as inapplicable to situations in which the government's entry is only temporary. [*Andersen v. Village of Little Chute*, 201 Wis. 2d 467, 475 (Ct. App. 1996) ("Section 32.10 does not govern inverse condemnation proceedings seeking just compensation for a temporary taking of land for public use.").] Given the temporary nature of the emergency declaration and resulting orders, it appears unlikely that an inverse condemnation claim would succeed.

This information memorandum was prepared by Anna Henning and David Moore, on March 27, 2020.