

No. 2020AP000828  
IN THE SUPREME COURT OF WISCONSIN

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JERÉ FABICK AND LARRY CHAPMAN,  
Petitioners,

v.

ANDREA PALM, JULIE WILLEMS VAN DIJK, NICOLE SAFAR, IN THEIR OFFICIAL CAPACITIES AS EXECUTIVES OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF WISCONSIN, DAVID ERWIN, IN HIS OFFICIAL CAPACITY AS CHIEF OF WISCONSIN STATE CAPITOL POLICE, DAVID MAHONEY, IN HIS OFFICIAL CAPACITY AS SHERIFF OF DANE COUNTY, ISMAEL OZANNE, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF DANE COUNTY, ERIC SEVERSON, IN HIS OFFICIAL CAPACITY OF SHERIFF OF WAUKESHA COUNTY, SUSAN OPPER, IN HER OFFICIAL CAPACITY OF DISTRICT ATTORNEY OF WAUKESHA COUNTY, KURT PICKNELL, IN HIS OFFICIAL CAPACITY AS SHERIFF OF WALWORTH COUNTY AND ZEKE WIEDENFELD, IN HIS OFFICIAL CAPACITY OF DISTRICT ATTORNEY AS WALWORTH COUNTY,  
Respondents.

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**RESPONDENTS' RESPONSE TO EMERGENCY PETITION FOR ORIGINAL ACTION AND EMERGENCY MOTION FOR INJUNCTION**

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## INTRODUCTION

Without articulating any factual allegations, theories of liability or claims for equitable relief, Petitioners seek this Court's leave to proceed against the Sheriffs of Dane County, Walworth County, and Waukesha County (collectively "the Sheriff Respondents") in an original action challenging the constitutionality of an executive order created and implemented by State officials. Petitioners' allegations against the Sheriff Respondents are not just lacking in specificity—they are non-existent. The Sheriff Respondents are referenced more times in the captions of all of Petitioners' filings than in the text of the filings themselves. The Sheriff Respondents now find themselves being forced to defend themselves in litigation that alleges nothing against them and seeks nothing from them.

To be sure, Petitioners' filings raise substantial and significant questions. They ask the Court to take jurisdiction of and grant declaratory and injunctive relief against various State actors (collectively "the State Respondents") for the promulgation and implementation of allegedly unconstitutional provisions of an executive order relating to the novel coronavirus COVID-19 ("Executive Order 28" or "EO 28"). Indeed, Petitioners urge the Court to take jurisdiction of their original action, in part, because the challenged provisions impact the lives of all Wisconsinites. To

that end, Petitioners seek a declaration of unconstitutionality of EO 28 and an order enjoining the enforcement of the challenged provisions.

However, the Sheriff Respondents did not create EO 28 and none of Petitioners' allegations, arguments, or requests for relief in any way suggest that the Sheriff Respondents have enforced, will enforce, or even intend to enforce the challenged provisions of EO 28 against Petitioners. The complete lack of factual allegations against the Respondent Sheriffs highlights not only the seemingly arbitrary inclusion of sheriffs from three of Wisconsin's 72 counties, but it also dooms the Emergency Petition for Original Action against these sheriffs on its face.

Section 809.70(1) of the Wisconsin Statutes codifies the four required statements Petitioners must submit to the Court for the Court to properly consider whether to grant or deny the Emergency Petition for Original Action against the Sheriff Respondents. However, Petitioners' submissions to the Court fall woefully short of all four requisites. Most importantly, Petitioners fail to present the Court with any allegations to show that an actual, live controversy between Petitioners and the Sheriff Respondents exists—a requirement that the Court has placed on litigants seeking original jurisdiction for decades. The additional deficiencies in the Petition flow naturally from the lack of allegations.

In short, there is simply no articulable reason to subject the Sheriff Respondents to the burdens of litigation in an action where the dispute centers not on any alleged conduct of the Sheriff Respondents, but instead solely on Petitioners' arguments as to the constitutionality of EO 28.

For all of these reasons, as stated more fully below, the Sheriff Respondents respectfully request that the Court deny and dismiss the Petition for Original Action against the Sheriff Respondents.

### **STATEMENT ON ORAL ARGUMENT**

The Sheriff Respondents do not believe that an oral argument is necessary to deny the Petition for Original Action against them.

The Sheriff Respondents further believe there is a need for a published opinion based on the criteria set forth in Wis. Stat. § 809.23(1)(a). Specifically, this Court's conclusions on the Sheriff Respondents' arguments may clarify existing rules relating to the requirements for petitioning and maintaining an original action before this Court.

### **BACKGROUND**

Petitioners Jeré Fabick and Larry Chapman seek this Court's leave to file an original action challenging the legality of certain provisions of Emergency Order 28 ("EO 28") under the Wisconsin Constitution. (Pets.' Mem. 1.) Petitioners seek the Court's original jurisdiction solely for adjudication of their requests for equitable relief, including a declaration of

unconstitutionality and an injunction barring the enforcement of the challenged provisions of EO 28. (Em. Pet. Orig. Action 14–15; Em. Mot. Inj. 2–3; Pets.’ Mem. 75–76.)

In addition to several State of Wisconsin officials (collectively “the State Respondents”), Petitioners have named as Respondents the respective Sheriffs of Dane County, Walworth County, and Waukesha County, all in their official capacities (collectively “the Sheriff Respondents”). (Em. Pet. Orig. Action ¶¶ 8, 10, 12.)

Despite Petitioners’ assertion that the Court’s resolution of their case will impact the lives of every Wisconsinite, (Pets.’ Mem. 14–15), with the exception of the Capitol Police, no other law enforcement officers from Wisconsin’s more than 500 law enforcement agencies and 69 other county sheriff’s departments have been named as Respondents in this action. Indeed, when it comes to the relevant background information in Petitioners’ action against the Sheriff Respondents, Petitioners’ allegations are most readily summarized by what they do *not* allege.

Petitioners do not allege that the Sheriff Respondents conceived of, promulgated, or otherwise contributed in any way to the drafting, implementation, or creation of the challenged provisions of EO 28. While Section 18 of EO 28 generally permits county sheriffs to enforce it, (Pets.’ App. 39), Petitioners do not allege that the Sheriff Respondents in fact have

enforced, will enforce, threatened to enforce or even intend to enforce the challenged provisions of EO 28 against Petitioners. Similarly, despite naming them in their official capacities, Petitioners do not allege that the Sheriff Respondents have enacted any policy, procedure, custom, or practice relating to the enforcement of EO 28. Petitioners also do not allege that they have had any EO-28-related contact with the Sheriff Respondents or with any other law enforcement officers in the Sheriff Respondents' respective counties. In fact, Petitioners do not allege that they have had *any* contact with *any* law enforcement officer in any way related to the enforcement of any provision of EO 28.

Aside from simply identifying the Sheriff Respondents, Petitioners do not direct any allegations towards or even mention the Sheriff Respondents in Petitioners' Emergency Motion for Injunction, their supporting Memorandum, their supporting Affidavits, or their other requests for relief. *See* (Em. Pet. Orig. Action ¶¶ 8, 10, 12); *see generally* (Em. Mot. Inj. 1–3; Pets.' Mem. 1–76; Pets.' App. 49–52.) In all of Petitioners' filings with this Court, the only allegations that specifically relate to the Sheriff Respondents are simple recitations of their names, their titles, the addresses of their law enforcement agencies, and, in the case of Dane County, a note about its relative size as a law enforcement agency. *See* (Em. Pet. Orig. Action ¶¶ 8, 10, 12); *see generally* (Em. Mot. Inj. 1–3; Pets.' Mem. 1–76; Pets.' App. 49–52.)



**STATEMENT OF REASONS WHY THE COURT  
SHOULD NOT TAKE JURISDICTION**

**I. THE PETITION AND MEMORANDUM FAIL TO MEET THE STATUTORY REQUIREMENTS FOR AN ORIGINAL ACTION AGAINST THE SHERIFF RESPONDENTS.**

Despite Petitioners' inclusion of the Sheriff Respondents in the caption<sup>1</sup> of this matter and their cursory allegations identifying the Sheriff Respondents, Petitioners have not provided the Court with any substantive basis for exercising original jurisdiction over this action against the Sheriff Respondents. After stripping away Petitioners' allegations and arguments directed at the State Respondents and the content of EO 28, the Court is essentially left with a stack of blank paper lacking the elemental basics for a properly supported request for this Court to exercise its original jurisdiction over the Sheriff Respondents.

Article VII, sec. 3(2) of the Wisconsin Constitution states that the Court "may hear original actions and proceedings." Under Section 809.70(1), Wis. Stat., a party may request that the Court "take jurisdiction of an original action by filing a petition" that "must" contain the following:

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<sup>1</sup> It is worth noting that challenges to stay-home orders in other states have typically omitted law enforcement officers as respondents, particularly in the absence of allegations of actual enforcement by the officers. See, e.g., *Lighthouse Fellowship Church v. Northam*, No. 2:20CV204 (E.D. Va., filed April 24, 2020); *Roberts v. Neace*, No. 2:20CV054 (E.D. Ky., filed April 14, 2020); *Hartman v. Acton*, No. 2:20-CV-1952 (S.D. Ohio, filed April 16, 2020); *Martinko v. Whitmer*, Mich. Ct. Cl., 20-00062 (filed April 14, 2020); *Martinko v. Whitmer*, 2:20-cv-10931 (E.D. Mich., filed April 14, 2020); *Michigan Legislature v Whitmer*, Mich. Ct. Cl., 20-00079 (filed May 6, 2020); *MacEwan v. Inslee*, 3:20-cv-05423 (W.D. Wash., filed May 5, 2020).

- (a) A statement of the issues presented by the controversy.
- (b) A statement of the facts necessary to an understanding of the issues.
- (c) A statement of the relief sought.
- (d) A statement of the reasons why the court should take jurisdiction.

Wis. Stat. § 809.70(1)(a)–(d). Where, as here, the Court orders the respondents to respond to the petition, “[t]he court, upon a consideration of the petition, response, supporting memoranda and argument, may grant or deny the petition.” *Id.* § 809.70(3).

As it relates to the Sheriff Respondents, Petitioners’ submissions to this Court in support of their request for leave to file an original action fail to meet any of the criteria outlined in Wis. Stat. § 809.70(1). Most significantly, Petitioners have failed to submit a statement of issues arising from a controversy between Petitioners and the Sheriff Respondents under Wis. Stat. § 809.70(1)(a). In fact, Petitioners have failed to allege the existence of any controversy at all between Petitioners and the Sheriff Respondents. Petitioners’ failure to meet the remaining criteria under Wis. Stats. § 809.70(1)(b), (c), and (d) flow naturally from the lack of an existing controversy between the parties. These deficiencies are discussed more fully below.

Because Petitioners' submissions fail to include even minimal information required in Wis. Stat. § 809.70(1) as it relates to the Sheriff Respondents, there is effectively no petition for the Court's "consideration" under Wis. Stat. § 809.70(3), thus necessitating a denial of original jurisdiction as to the Sheriff Respondents. For these reasons, the Court should deny the Petition against the Sheriff Respondents.

**A. Petitioners Have Not Alleged the Existence of a Controversy Between Petitioners and the Sheriff Respondents.**

Imbedded in Wis. Stat. § 809.70(1)(a)'s requirement that Petitioners provide a "statement of the issues presented by the controversy" is the jurisdictional prerequisite that Petitioners allege facts sufficient to show an actual, existing controversy between Petitioners and the Sheriff Respondents. *See State ex rel. Ekern v. Dammann*, 215 Wis. 394, 254 N.W. 759, 760 (1934) ("The first question involved is whether the petition discloses a justiciable controversy. It is the rule, too well established to warrant extended discussion, that this court will not entertain an action for declaratory relief in the absence of a genuine controversy.").

In *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627, 627-30 (1936), this Court dismissed Governor La Follette's original action against Secretary of State Dammann for lack of an existing controversy where the Governor asked the Court for several declarations relating to his

ability to fill vacancies on various boards and commissions. The Court explained that original actions seeking declaratory relief required “a justiciable controversy” between “between persons whose interests are adverse,” meaning “a controversy in which a claim of right is asserted against one who has an interest in contesting it . . . .” *Id.* at 629. The Court has repeated this language throughout the years since *State ex rel. La Follette*, as recently as February of this year. *See, e.g., DSG Evergreen Family Limited Partnership v. Town of Perry*, 2020 WI 23, ¶ 39, 390 Wis. 2d 533, 939 N.W.2d 564; *Waukesha Memorial Hospital, Inc. v. Baird*, 45 Wis. 2d 629, 633–34, 173 N.W.2d 700 (1970).

This implicit requirement of an existing controversy, in part, relates to Wisconsin’s law of standing. The essence of standing speaks to the sufficiency of the parties’ “personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Bence v. City of Milwaukee*, 107 Wis. 2d 469, 479, 320 N.W.2d 199 (1982) (quoting *Duke Power Co. v. Carolina Env. Study Group, Inc.*, 438 U.S. 59, 72 (1978) (internal quotations and citations omitted)). This notion of a “personal stake” requires “not only a distinct and palpable injury[ ] to the plaintiff, . . . but also a fairly traceable causal connection between the claimed injury and the challenged conduct.” *Id.*

Petitioners here seek injunctive and declaratory relief relating to the constitutionality of EO 28. However, the Emergency Petition for Original Action, Emergency Motion for Injunction, supporting Memorandum, and supporting Appendix are facially insufficient to inform this Court of the existence of any “concrete adverseness” between Petitioners and the Sheriff Respondents. *Bence*, 107 Wis. 2d at 479 (internal quotations omitted). It is not the proper role of the Sheriff Respondents to take legal positions as to the constitutionality of the challenged provisions of EO 28 as promulgated by the State, particularly when Petitioners have not alleged any facts to show that the Sheriff Respondents have an “interest in contesting” Petitioners’ positions. *State ex rel. La Follette*, 264 N.W. at 629. To that end, there are no allegations that show the Court that Petitioners’ and the Sheriff Respondents’ “interests are adverse.” *Id.* Further, because there are no substantive allegations identifying or challenging the Sheriff Respondents’ conduct,<sup>2</sup> Petitioners have not provided the Court with any information showing “a fairly traceable causal connection between [Petitioners’] claimed

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<sup>2</sup> Even assuming *arguendo* that Petitioners had sufficiently alleged facts showing the existence of an actual controversy with the Sheriff Respondents, Petitioners’ action would nonetheless likely face dismissal under Wis. Stat. § 893.80(1d) and (4), relating to notice requirements and discretionary immunity. *See, e.g., State ex rel. Kuehne v. Burdette*, 2009 WI App 119, ¶¶ 20–22, 320 Wis. 2d 784, 772 N.W.2d 225; *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶¶ 65–66, 350 Wis. 2d 554, 835 N.W.2d 160; *Hoskins v. Dodge County*, 2002 WI App 40, ¶ 14, 251 Wis. 2d 276, 642 N.W.2d 213; *Engelhardt v. City of New Berlin*, 2019 WI 2, ¶ 22, 385 Wis. 2d 86, 921 N.W.2d 714; *Johnson v. City of Edgerton*, 207 Wis. 2d 343, 352, 558 N.W.2d 653 (Ct. App. 1996).

injury and the challenged conduct” identified in their Petition. *Bence*, 107 Wis. 2d at 479 (internal quotations omitted).

Because Petitioners have not provided the Court with any allegations or information showing an existing controversy between Petitioners and the Sheriff Respondents, Petitioners’ “statement of the issues presented by the controversy” is necessarily and patently deficient under Wis. Stat. § 809.70(1)(a). And because Petitioners’ “statement of the issues presented by the controversy” is deficient against the Sheriff Respondents, Petitioners have failed to provide the Court with information required for it to consider accepting jurisdiction over this action against the Sheriff Respondents. For this reason alone, the Court should deny and dismiss the Emergency Petition for Original Action against the Sheriff Respondents.

**B. Petitioners Have Not Alleged Any Facts About the Sheriff Respondents That are Necessary to an Understanding of the Issues.**

Wis. Stat. § 809.70(1)(b) requires Petitioners to submit to the Court a “statement of facts necessary to an understanding of the issues.”

Petitioners present the following issues for the Court’s review: whether EO 28 infringes on Petitioners’ freedom of worship, freedom of speech and assembly, and right to travel under the Wisconsin Constitution; and whether the Court should enjoin operation of those provisions of EO 28 that infringe on Petitioners’ rights. (Pets.’ Mem. 1.)

Petitioners have not provided the Court with a statement of facts that would impart an understanding of how these issues relate to the Sheriff Respondents in this case. There are no allegations that the Sheriff Respondents had any policymaking authority in relation to the creation and implementation of EO 28; there are no allegations that the Sheriff Respondents have enforced or even threatened to enforce EO 28 against Petitioners, nor that they are required to, will, or even intend to enforce the challenged provisions of EO 28 against Petitioners; and there are no allegations that the Sheriff Respondents have any policies, procedures, practices, or customs related to the enforcement of EO 28. Further, there is no mention of the Sheriff Respondents (or any law enforcement officer or agency) in Petitioners' affidavits. (Pets.' App. 49–52.)

In short, there are simply no alleged connections between the requested resolution of Petitioners' proposed issues and the Sheriffs of Dane County, Walworth County, and Waukesha County. Instead, determining whether and how the Sheriff Respondents' might or could enforce EO 28 in each specific case in each of their respective jurisdictions requires an exercise in speculation and conjecture that is incapable of leading to any useful understanding of the issues raised in this action.

Thus, Petitioners have failed to meet the Wis. Stat. § 809.70(1)(b) requirement of providing the Court with a "statement of facts necessary to an

understanding of the issues.” Without such a statement of facts, Petitioners have failed to provide the Court with information required for it to consider accepting jurisdiction over this action against the Sheriff Respondents. For this reason alone, the Court should deny and dismiss the Emergency Petition for Original Action against the Sheriff Respondents.

**C. Petitioners Have Not Alleged What Relief They Seek from the Sheriff Respondents.**

Wis. Stat. § 809.70(1)(c) requires Petitioners to submit to the Court a “statement of the relief sought.”

Petitioners’ statement of relief provides yet another reason why the Sheriff Respondents’ inclusion in this action is puzzling. In their requests for relief, Petitioners ask the Court to enjoin enforcement of Section 18 of EO 28 “to the extent it authorizes enforcement by law enforcement officials of those aspects of the Order” that Petitioners challenge. (Em. Pet. Orig. Action 14.) Petitioners ask the Court to enjoin enforcement of EO 28 not just by the Sheriff Respondents, but by *all* law enforcement officers in Wisconsin.

Petitioners’ request for relief signals that the Sheriff Respondents, like any other law enforcement official in the State, would be bound by an Order from this Court enjoining enforcement of any provision of EO 28, regardless of whether they are parties to this action or not. It is axiomatic that the Sheriff Respondents would abide by any order of this Court impacting every



law enforcement officer in the State, and Petitioners' choice of wording for their request for relief cements the fact that the Sheriff Respondents' inclusion in this action is improper.

Moreover, Petitioners' additional requests for relief—a declaration that the challenged provisions of EO 28 are unconstitutional and an injunction barring enforcement of the challenged provisions—are directed at the State Respondents. Like all law enforcement officers in the State, the Sheriff Respondents are duty-bound to follow any order of this Court impacting whether and how EO 28 (or any other law of this State) can be enforced.

Simply stated, Petitioners' requests for relief show that their remedy in this case will be the same regardless of whether the Sheriff Respondents are included in the caption. As noted above, the Sheriff Respondents, by contrast, must now defend themselves in litigation that alleges nothing against them and seeks nothing from them. Thus, Petitioners have failed to meet Wis. Stat. § 809.70(1)(c)'s requirement of providing the Court with a "statement of the relief sought." Without such a statement of requested relief, Petitioners have failed to provide the Court with information required for it to consider accepting jurisdiction over this action against the Sheriff Respondents. For this reason alone, the Court should deny and dismiss the Emergency Petition for Original Action against the Sheriff Respondents.

**D. Petitioners Have Not Alleged Reasons Why the Court Should Take Jurisdiction of this Action Against the Sheriff Respondents.**

Wis. Stat. § 809.70(1)(d) requires Petitioners to submit to the Court a “statement of the reasons why the court should take jurisdiction.”

Petitioners do not provide the Court with any reason why it should take jurisdiction and permit this action to proceed against the Sheriff Respondents. *See* (Em. Pet. Orig. Action 16–19.) Just as with every other aspect of their filings, Petitioners’ reasons why the Court should take jurisdiction focus on the State Respondents’ actions, the substance of EO 28, and the importance of the Court addressing the same. *See (id.)* By contrast, Petitioners noticeably do not explain why they named as Respondents the sheriffs of only three of Wisconsin’s 72 counties, and they do not explain why this designation weighs in favor of the Court taking original jurisdiction.

As with their requests for relief, the Sheriff Respondents’ presence in this case is completely detached from Petitioners’ reasons for the Court taking original jurisdiction, which further highlights the total absence of any reason to exercise original jurisdiction over the Sheriff Respondents. Indeed, because Petitioners have not alleged the existence of any actual controversy between Petitioners and the Sheriff Respondents, there can be no meaningful reason for the Court to take jurisdiction over the action against the Sheriff Respondents.

Thus, Petitioners have failed to meet Wis. Stat. § 809.70(1)(d)'s requirement of providing the Court with a "statement of the reasons why the court should take jurisdiction." Without such a statement of requested relief, Petitioners have failed to provide the Court with information required for it to consider accepting jurisdiction over this action against the Sheriff Respondents. For this reason alone, the Court should deny and dismiss the Emergency Petition for Original Action against the Sheriff Respondents.

### CONCLUSION

For the foregoing reasons, Respondents David Mahoney, in his Official Capacity as Sheriff of Dane County, Eric Severson, in his Official Capacity as Sheriff of Waukesha County, and Kurt Picknell, in his Official Capacity as Sheriff of Walworth County, respectfully request that the Court deny and dismiss, on the merits and with prejudice, Petitioners Jeré Fabick's and Larry Chapman's Emergency Petition for Original Action.

Thus, Petitioners have failed to meet Wis. Stat. § 809.70(1)(d)'s requirement of providing the Court with a "statement of the reasons why the court should take jurisdiction." Without such a statement of requested relief, Petitioners have failed to provide the Court with information required for it to consider accepting jurisdiction over this action against the Sheriff Respondents. For this reason alone, the Court should deny and dismiss the Emergency Petition for Original Action against the Sheriff Respondents.

### CONCLUSION

For the foregoing reasons, Respondents David Mahoney, in his Official Capacity as Sheriff of Dane County, Eric Severson, in his Official Capacity as Sheriff of Waukesha County, and Kurt Picknell, in his Official Capacity as Sheriff of Walworth County, respectfully request that the Court deny and dismiss, on the merits and with prejudice, Petitioners Jeré Fabick's and Larry Chapman's Emergency Petition for Original Action.

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CERTIFICATION OF SERVICE

I hereby certify that this brief has been filed via E-Mail and hand delivery on May 8, 2020 and that the brief was served on the following counsel by E-Mail:


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