IN THE SUPREME COURT OF THE STATE OF OREGON

ELKHORN BAPTIST CHURCH, an Oregon non-profit corporation; CALVARY CHAPEL NEWBERG, an Oregon non-profit corporation; CALVARY CHAPEL LINCOLN CITY, an Oregon non-profit corporation; CALVARY CHAPEL SOUTHEAST PORTLAND, an Oregon non-profit corporation; NEW HORIZON CHRISTIAN FELLOWSHIP, an Oregon non-profit corporation; CAMAS VALLEY CHRISTIAN FELLOWSHIP, an Oregon nonprofit corporation; PEOPLES CHURCH, an Oregon non-profit corporation; PREPARE THE WAY, an Oregon non-profit corporation; BEND COMMUNITY CHURCH, an Oregon non-profit corporation; COVENANT GRACE CHURCH, an Oregon non-profit corporation; JEDIDIAH MCCAMPBELL, an individual; RONALD OCHS, an individual; BRIAN NICHOLSON, an individual; JAMES B. THWING, an individual; MARK RUSSELL, an individual; PHIL MAGNAN, an individual; RONALD W. RUST, an individual; TRAVIS HUNT, an individual; MASON GOODKNIGHT, an individual; MARK MAYBERRY, an individual; LORI MAYBERRY, an individual; BENJAMIN STEERS, an individual; MICHAEL CARROLL, an individual; KEVIN J. SMITH, an individual; POLLY JOHNSON, an individual; BENJAMIN BOYD, an individual; ANNETTE LATHROP, an individual; ANDREW S. ATANSOFF, an individual; SHERRY L. ATANSOFF, an individual; MICAH AGNEW, an individual; and ANGELA ECKHARDT, an individual,
Plaintiffs-Adverse Parties,

and

RED ROCK COWBOY CHURCH, an Oregon non-profit corporation et al.,
Plaintiffs, and

BILL HARVEY, SAM PALMER, GLENN PALMER, JERRY SHAW, MATTHEW R. CUNNINGHAM, DONALD A. JAY, JACOE A. BROWN, SAMUEL N. BROWN, VIRGINIA STEGEMILLER, B. DAVID HURLEY, and DOUGLAS W. HILLS,
lntervenors-Adverse Parties,

V.

KATHERINE BROWN, Governor of the State of Oregon and DOES 1 THROUGH 50,
Defendants-Relaters

Baker County Circuit Court
20CV17482
S067736

PLAINTIFFS-ADVERSE PARTIES' MEMORANDUM IN OPPOSITION TO DEFENDANT-RELATOR'S MANDAMUS PETITION

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STATEMENT OF THE CASE

Nature of the Action and Relief Sought

Plaintiffs-Adverse Parties ELKHORN BAPTIST CHURCH *et al.* (collectively the "PRACTITIONERS"), the Plaintiffs below, respectfully ask the Oregon Supreme Court (the "Supreme Court") to uphold the preliminary injunction (the "Injunction") that the Baker County Circuit Court (the "Circuit Court") issued on May 18, 2020 invalidating all executive orders that Defendant-Relator KATHERINE "KATE" BROWN ("Gov. Brown"), the presiding Governor of Oregon, has issued in response to the currently ongoing coronavirus pandemic (the "Pandemic"). PRACTITIONERS sought declaratory and injunctive relief from the Orders on two grounds: (1) Gov. Brown failed to observe statutory and constitutional time limits and procedures in exercising her emergency powers, and (2) in exceeding the limits of her emergency powers, Gov. Brown impermissibly infringed, and continues to infringe, on PRACTITIONERS' constitutionally protected freedoms of religion and assembly.

Nature of the Judgment

A preliminary injunction is not a final judgment. *Or. Educ. Ass'n v. Or. Taxpayers United PAC*, 227 Or. App. 37, 47 (2009) ["(A)ny injunction that the court issues '***before judgment***' is a preliminary injunction" (emphasis added)]. However, the Injunction here is the binding decision of the Circuit Court from which GOVERNOR seeks relief.

Basis of Appellate Jurisdiction

The basis of appellate jurisdiction is ORS 34.110.

Effective Date for Appellate Purposes

The Circuit Court issued the Injunction on May 18, 2020. Gov. Brown filed her Petition for a Peremptory or Alternative Writ of Mandamus the same day.

Questions Presented on Appeal

1. Did Gov. Brown fail to properly observe statutory and constitutional limits on her emergency powers under ORS 433.441(5) and Article X-A, § 6 of the Oregon Constitution?
2. Have the executive orders Gov. Brown issued in response to the Pandemic infringed on PRACTITIONERS' constitutionally protected freedoms of religion and assembly?

Proposed Rules of Law

1. Even when responding to the most extreme emergencies, the Governor of Oregon cannot exceed prescribed limits on his or her emergency powers. With regard to public health emergencies, ORS 401.165 *et seq.*, which prescribes the Governor's general emergency powers, cannot be read apart from either ORS 433.441 *et seq.*, which specifically pertains to public health emergencies, or Article X-A of the Oregon Constitution, which concerns "catastrophic disasters" and defines that term to include public health emergencies. ORS 401.165 *et seq*. is thus not a means by which the Governor may bypass the time limits and procedures set forth in ORS 433.441(5) and Article X-A, § 6(2). If the Governor fails to extend an emergency beyond the 14- or 28-day periods prescribed in ORS 433.441(5) or get the three-fifths approval of each house of the Legislature necessary to extend an emergency beyond the 30 days prescribed in Article X-A, § 6(2), the emergency has effectively lapsed by operation of law, and any executive orders the Governor has issued in response to the lapsed emergency are accordingly ineffective by operation of law.
2. Should it be necessary for the Governor, when responding to an emergency, to infringe on liberties protected under the Oregon and/or U.S. constitutions,

such infringement (1) cannot be indefinite in duration, and (2) must be the least restrictive means of achieving the Governor's compelling interest in preserving public health and safety. In the event of a statewide emergency, the Governor must promptly scale back or rescind all restrictions set forth in his or her executive orders in all counties where the danger (1) has substantially subsided or (2) is minimal or non-existent.

Summary of the Argument

1. Under ORS 433.441(5), a public health emergency is in effect for only 14 days after the Governor declares it. If Gov. Brown needed additional time to effectively respond to the public health emergency in this case, she could – and should – have extended the duration of the emergency an additional 14 days pursuant to the same statute. If Gov. Brown needed additional time beyond the 28 total days allotted under ORS 433.441(5), Gov. Brown could – and should – have gotten the approval of three-fifths of each house of the Legislature before 30 days had elapsed, as required under Article X-A, § 6(2) of the Oregon Constitution.

   Here, Gov. Brown did not follow the procedures outlined in either ORS 433.441(5) or Article X-A, § 6(2): In declaring a public health emergency in response to the Pandemic via Executive Order 20-03,[1] Gov. Brown gave herself 60 days – more than twice the maximum of 28 allotted to her under ORS 433.441(5) – to respond to the Pandemic. Gov. Brown thus failed to extend the duration of the emergency until May 4, well beyond the initial 14-day period that commenced when Gov. Brown issued Order 20-03 on

[1] Hereinafter all references to "Orders" will be to executive orders GOVERNOR issued in response to the Pandemic. The abbreviation "EO" will precede citations to specific Orders.

March 8. With Order 20-03's May 7 expiration date looming, Gov. Brown unilaterally extended the state of emergency another 60 days, to July 6. Gov. Brown did not get the necessary approval from the Legislature to extend the state of emergency via Order 20-24, and even if she had, she would have gotten it well beyond the 30-day limit prescribed in Article X-A, § 6(2). Because Gov. Brown exceeded the statutory and constitutional limits on her emergency powers, the Circuit Court properly held that Orders 20-03 and 20-24 – and all other Orders that Gov. Brown issued in response to the Pandemic – to have expired by operation of law and/or be unconstitutional. The Supreme Court should thus affirm the Circuit Court's grant of the Injunction and deny Gov. Brown's mandamus petition.

2. "***There is <u>no</u> pandemic exception*** to the Constitution of the United States or the Free Exercise Clause of the First Amendment." *Berean Baptist Church v. Cooper*, 2020 U.S. Dist. LEXIS 86310 at *3 (E.D.N.C. May 16, 2020) (hereinafter *Berean Baptist*) (emphasis added). The same presumably applies to the Oregon Constitution and its First Amendment equivalents – namely, Article I, §§ 2 ["All men shall be secure in the Natural right, to worship Almighty God in accordance with the dictates of their own consciences" (emphasis added)] and 26 ["No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good"]. If the Governor of Oregon must infringe on constitutionally protected liberties in responding to a public health emergency, she may infringe no more than necessary and cannot do so indefinitely. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905); *see also Wisconsin Legislature v. Palm*, 2020 Wis. LEXIS 121 at *41 (May 13, 2020) (hereinafter *Palm*).

In this case, PRACTITIONERS' constitutionally protected freedoms of religion and assembly have been sharply curtailed, if not prohibited outright, by Orders 20-07, 20-12, and 20-25: All three Orders infringe on far more freedom than is necessary to achieve Oregon's compelling interest in preserving public health and safety in the face of the Pandemic – especially since the overwhelming majority of Oregon counties have few, if any, coronavirus cases and even fewer deaths. Accordingly, the Supreme Court should affirm the Injunction and deny GOVERNOR's mandamus petition.

Statement of Facts and Procedural History

The coronavirus, aka COVID-19, is a novel infectious agent that may cause respiratory disease leading to serious injury or death. Discovered in China in late 2019, the coronavirus spread rapidly, metastasizing into the Pandemic, which made its way into the Pacific Northwest as early as January 2020.[2]

Responding to the imminent threat to public health and safety that the Pandemic presented, on March 8, Gov. Brown issued Order 20-03, which declared a statewide public health emergency in Oregon pursuant to both ORS 433.441 and ORS 401.165 *et seq.* In Order 20-03, Gov. Brown declared that the state of emergency brought on by the coronavirus Pandemic would be in effect for 60 days. Order 20-03 was thus set to expire on its own terms on May 7.

On May 4 – three days before Order 20-03 was set to expire – Gov. Brown unilaterally extended the current public health emergency another 60 days via Order 20-24. Order 20-24 is set to expire on its own terms on July 6.

Soon after issuing Order 20-03, Gov. Brown began issuing a series of related executive orders aimed at limiting the spread of the coronavirus and thereby

[2] Hereinafter all references to dates will be to dates in 2020 unless noted.

preserving the public health and safety. Chief among these orders, for purposes of this case, are Orders 20-07, 20-12, and 20-25. According to the Center for Disease Control and Prevention ("CDC"), the coronavirus is most easily spread through close contact between persons – "close" being defined as approximately six feet.[3] The term "social distancing," which refers to maintaining a distance of six feet between persons from different households, has thus entered the modern lexicon. All three Orders are aimed at limiting the size of gatherings so proper "social distancing" can be maintained:

- Order 20-07 prohibits gatherings of 25 persons or more.
- Order 20-12 prohibits "[n]on-essential social and recreational gatherings of individuals outside of a home or place of residence … regardless of size" where social distancing cannot be maintained. EO 20-12 at ¶ 1.a. Order 20-12 does not define which gatherings are "essential" and which are not. *Id.* However, Order 20-12 refers to "celebrations[ ] or other similar gatherings" – a definition broad enough to include religious worship services. *Id.* Violations of Order 20-12 are punishable by 30 days in jail and/or a $1,250 fine. *See* ORS 401.990 [declaring violations of Gov. Brown's emergency orders to be a Class C misdemeanor]; *see also* ORS 161.615(3) [declaring 30 days to be the maximum sentence for a Class C misdemeanor] and 161.635(1)(c) [declaring $1,250 to be the maximum fine for a Class C misdemeanor]. Order 20-12 concludes by stating that it shall remain in effect until Gov. Brown terminates it.
- Gov. Brown issued Order 20-25 after PRACTITIONERS – a group consisting of 16 religious entities (14 churches, a ministry, and a Christian

[3] *See* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html.

school, collectively the "CHURCHES") and 31 individuals (collectively the "Congregants") – commenced this proceeding. In fact, Gov. Brown issued the Order on May 14, the same day that the Circuit Court heard the motion for the Injunction that the Circuit Court ultimately granted PRACTITIONERS. Unlike Orders 20-07 and 20-12, Order 20-25 specifically refers to "faith-based gatherings" and limits such gatherings to 25 persons or fewer, provided that proper social distancing and other health guidelines can be observed at such gatherings. *See* EO 20-25 at ¶ 3.a. Like Order 20-12, Order 20-25 is backed up with the threat of 30 days in jail or a $1,250 fine for failure to comply. EO 20-25 at ¶ 2.

PRACTITIONERS have complied with Gov. Brown's Orders for several reasons, not the least of which is obedience the biblical command set forth in Romans 13:1: "Let every soul be subject to the governing authorities." To begin with, CHURCHES did not want their congregants to risk incurring jail time or fines for leaving home to attend worship services or other faith-based gatherings. Many Congregants likewise did not want to leave their homes to attend faith-based gatherings for fear of being arrested.

Second, limitations on gathering sizes created logistical problems for some CHURCHES: Whereas some larger CHURCHES could easily accommodate more than 25 people while still observing social-distancing requirements due to the sizes and/or layouts of their houses of worship, the 25-person requirement hamstrung their ability to do so. Some smaller CHURCHES, meanwhile, could not host gatherings even if they wanted to because they could not meet social-distancing requirements. Either way, many CHURCHES felt forced to choose between complying with the biblical commands to "[r]emember the Sabbath day, to keep it

holy" [Exodus 20:8] and to not forsake the assembling of believers [Hebrews 10:25], on one hand, and obeying Gov. Brown's Orders on the other.

Third, at the outset of the Pandemic, many, if not all, PRACTITIONERS shared Gov. Brown's concerns about having too many people too close together indoors, thereby increasing the risk of spreading the coronavirus, especially to the persons most vulnerable to it, such as the elderly. Many PRACTITIONERS still share Gov. Brown's concerns. This is especially true of the CHURCHES, which may face civil liability for failing to follow CDC and Oregon Health Authority ("OHA") guidelines if a member of their congregations becomes infected with the coronavirus. The CHURCHES thus have every incentive to follow CDC and OHA guidelines once they can resume meeting. Congregants likewise have every incentive to follow CDC and OHA guidelines based on the biblical command to "love your neighbor as yourself." Matthew 24:38.

Fourth, PRACTITIONERS believed any restrictions Gov. Brown placed on their free exercise of religion would be temporary. However, that has not been the case: Order 20-12 concludes by stating that the Order "will remain[ ] in effect until terminated by the Governor." EO 20-12 at p. 8. In other words, pursuant to Order 20-12, CHURCHES cannot hold worship services; CHURCHGOERS cannot leave their homes to attend them; either group of PRACTIONERS could face fines or jail time if they do; and this will be the case until Gov. Brown decides otherwise. Given that Gov. Brown has already extended the duration of what was supposed to be a 60-day emergency until July 6, PRACTITIONERS have no reason to expect Gov. Brown to terminate Order 20-12 anytime soon.

Reinforcing PRACTITIONERS' belief that their constitutional rights will continue to be trampled indefinitely are two things: First, Order 20-25 outlines GOVERNOR's three-phase plan to reopen Oregon in a manner that "will balance

important health outcomes with the need to restore and strengthen Oregon's social and economic well-being." EO 20-25 at ¶ 13. The three-phase plan makes ***no*** mention of how quickly PRACTITIONERS will fully be able to exercise their freedoms of religion and assembly. *Id.* at ¶¶ 14-22. Second, in a webinar with religious leaders on May 12, state officials acting on Gov. Brown's behalf paid lip service to the leaders' concerns about how soon their rights will be restored: On one hand, the state officials told the religious leaders:

> "Faith leaders and faith communities have significant impact in the lives of our community members, especially in times of crisis. Faith leaders ***should be viewed as valued partners and stakeholders in an effort to most effectively serve the needs of Oregonians***.
>
> "Faith communities are a source of healing – emotionally, physically and mentally for the members they serve. Faith communities are sought out as a source of hope and strength during challenging times. … Faith communities deliver valuable social services that meet specific community needs."

Office of Gov. Kate Brown, *COVID-19 Faith Leader Webinar*, pp. 5-7 (May 12, 2020) (viewed at https://files.constantcontact.com/d1037590101/252d8cce-8d70-4812-98ee-53c6ef818092.pdf on May 21, 2020) (emphasis added).

On the other hand, state officials told the religious leaders at the webinar, "We will be living with the virus until there is immunity, which is ***many months off***." *Id.* at p. 9 (emphasis added). State officials also told faith leaders that "[e]very restriction we lift increases transmission [of the coronavirus] and will increase cases." *Id.* In other words, through the state officials, Gov. Brown essentially communicated to the state's religious leaders her intent to keep restricting religious freedom in the name of preserving public health and safety until ***she*** decides it is safe for them to freely exercise their faith again.

Gov. Brown makes this assertion even though the danger presented by the Pandemic appears to be subsiding in most Oregon counties – if, in fact, the Pandemic posed much of a threat at all: At this writing, there have been just 144 coronavirus-related deaths – out of a population of 4.2 million – statewide. *See* https://govstatus.egov.com/OR-OHA-COVID-19 (viewed on May 20, 2020). Twenty-four of Oregon's 38 counties have had zero deaths, and nine more have had fewer than 10. *Id.* Even in the seven counties where the number of coronavirus cases exceeds 100, the survival rate is very high. *Id.* Still, no matter how low – statistically speaking – the risk of spreading or contracting the coronavirus may be in a given county, PRACTITIONERS in all Oregon counties are subject to the same restrictions pursuant to Gov. Brown's Orders.

With no firm commitment from Gov. Brown as to how soon they can freely practice their religion, PRACTITIONERS were compelled to bring this legal action. PRACTITIONERS thus filed suit in the Circuit Court on May 7 and moved for a temporary restraining order ("TRO") the same day. The Circuit Court opted not to grant a TRO, but instead moved straight to a hearing on a preliminary injunction, which took place May 14. The Circuit Court granted the Injunction on May 18, and Gov. Brown appealed the ruling hours later, requesting and receiving a temporary stay of the Injunction soon thereafter.

ARGUMENT

I. Gov. Brown Cannot Exceed Statutory and Constitutional Limits on Her Emergency Powers, as She Has Done From the Outset of This Case.

While Gov. Brown's ability to respond swiftly and immediately to a public health emergency "is very broad and far-reaching, there are limits to the valid exercise of the power." *U.S. Auto Services Club v. Van Winkle*, 128 Or. 274, 283 (1929) (hereinafter *U.S. Auto*). In enacting ORS 433.441(5) and Or. Const. art. X-

A, § 6(1)-(2), respectively, both the Legislature and Oregon voters imposed on Gov. Brown time limits and procedural safeguards that strike an appropriate balance between giving the Governor leeway to act swiftly and unilaterally when swift, unilateral action is needed to protect Oregonians and ensuring that any infringement on Oregonians' constitutionally protected rights, however necessary, is limited in scope and duration, as it must be. *See Jacobson*, 197 U.S. at 28 [declaring that a state may not infringe on individual rights "beyond what (is) reasonably required for the safety of the public"]. Gov. Brown cannot exceed the constitutional and statutory limits on her power, even when acting with the best intentions. *See U.S. Auto*, 128 Or. at 283-84 ["(H)owever broad the scope of the police power may be, it is always subject to the rule that the Governor may not exercise any power that is expressly or impliedly forbidden to (her) by the state Constitution"].

Yet that is what Gov. Brown has done here: Gov. Brown has failed to observe time limits and follow procedures prescribed in statutory and constitutional provisions that she is obligated to comply with. In the process, Gov. Brown has unduly restricted PRACTITIONERS' ability to practice their faith according to the dictates of their consciences. If Gov. Brown need not comply with statutory and constitutional time limits and procedures – specifically, those set forth in ORS 433.441(5) and Or. Const. art. X-A, § 6(1)-(2) – under the circumstances presented here, no present or future Governor of Oregon will ever be bound to follow them. This Supreme Court should thus affirm the Circuit Court's Injunction prohibiting enforcement of Gov. Brown's Orders statewide.

A. ORS 401.165 *et seq.* is Not a Means by Which GOVERNOR Can Skirt Statutory or Constitutional Limits on Her Emergency Powers.

Where statutes conflict with one another or with the Oregon Constitution, the relevant statutes and constitutional provisions should be construed together to

produce a harmonious whole. *Cal-Roof Wholesale, Inc. v. State Tax Comm'n*, 242 Or. 435, 443 (1966). When harmony cannot be produced between conflicting statutes, the one that is more specific ***must*** prevail over the more general one. *Hansen v. Abrasive Eng'g & M'fing*, 317 Or. 378, 393 (1993) (emphasis added).

In this case, in response to the Pandemic, Gov. Brown declared a public health emergency, invoking both ORS 433.441 and ORS 401.165 *et seq.* *See* EO 20-03 at pp. 1-2; *see also* Baker Cnty. Circuit Ct. Dec. 1, 2 (May 18, 2020) (hereinafter "Dec."). As the Circuit Court noted, when Gov. Brown invoked provisions of ORS 433.441, she became bound by its provisions. *See* Dec. at 2 [noting that Gov. Brown "utilized provisions of ORS 433.441 in her original executive order (see Executive Order 20-03 sec. 1 and 3) and later orders"] and 4 ["(W)hen the Governor utilized provisions of ORS 433.441 in her executive order, she triggered all the provisions of ORS 433.441"]. Those provisions include the time limits set forth in ORS 433.441(5). *Id.* at 4.

Combining and applying the rules cited *supra* in *Cal-Roof Wholesale* and *Hansen* – i.e., "statutes are to be read to work together with the more specific statute governing" – the Circuit Court observed that while ORS 401.165 *et seq.* prescribes no window in which Gov. Brown may use her emergency powers broadly, ORS 433.441(5) does. Dec. at 4-5. Under the latter statute, "a state of public health emergency expires when terminated by a declaration of the Governor ***or no more than 14 days after the date the public health emergency is proclaimed***" (emphasis added). In other words, any public health emergency that Gov. Brown might declare automatically expires after 14 days. *Id.* ORS 433.441(5) lets Gov. Brown unilaterally extend the 14-day period before it expires, but only for another 14 days at maximum. Because ORS 433.441(5) is the more

specific statute, the Circuit Court properly found it to be controlling in this case. Dec. at 4-5 [citing *Colby v. Larson*, 208 Or. 121 (1956)].

If Gov. Brown needed more time beyond the 28 total days allotted under ORS 433.441(5) to respond to the Pandemic, Gov. Brown could – and should – have gotten a time extension from the Legislature, as Or. Const. art. X-A, § 6 requires. Article X-A, § 1 lets Gov. Brown declare a "catastrophic disaster" within the State of Oregon, and subsection 2(d) of that provision defines "catastrophic disaster" to include public health emergencies. Under Article X-A, § 6(1), the catastrophic disaster would have been in existence for 30 days, and under § 6(2), Gov. Brown could have extended the time she needed to respond to the Pandemic with the approval of three-fifths of each house of the Legislature.

Gov. Brown did not follow either of the procedures set forth in ORS 433.441(5) and Article X-A, § 6(2): In declaring a state of emergency via Order 20-03, Gov. Brown announced that the Order would terminate after 60 days. *See* EO 20-03 at p. 3. As the Circuit Court noted, "This is well beyond the maximum 28 days allowed under ORS 433.441(5)." Dec. at 4. Then, with Order 20-03's expiration date looming, Gov. Brown unilaterally extended the state of emergency another 60 days, from May 7 to July 6, via Order 20-24. Two of Gov. Brown's other orders, 20-12 and 20-25, are to remain in effect until Gov. Brown decides to terminate them. *See* EO 20-12 at p. 8 and EO-25 at ¶ 27.

At the Circuit Court's hearing on the Injunction, Gov. Brown attempted, unsuccessfully, to justify her broad use of her emergency powers by asserting that (1) ORS 433.441 and Article X-A of the Oregon Constitution are just tools in a toolbox, along with ORS 401.165 *et seq.*, that she may use to respond to a public health emergency, and (2) she chose the one – ORS 401.165 *et seq.* – that would allow her the greatest flexibility in responding to the Pandemic. However, the

emergency powers granted to Gov. Brown under ORS 401.165 *et seq.* are not, in fact, as broad as she would like to believe:

> "It is declared to be the policy and intent of the Legislative Assembly that preparations for emergencies and governmental responsibility for responding to emergencies ***be placed at the local level***. The state shall prepare for emergencies, but shall not assume the authority or responsibility for responding to an emergency ***unless the appropriate response is beyond the capability of the city and county in which the emergency occurs***, the city or county fails to act, or the emergency involves two or more counties."

ORS 401.032(2) (emphasis added)

In declaring a statewide public health emergency pursuant to Order 20-03 and effectively shutting down places of worship under penalty of criminal sanctions pursuant to Order 20-12, Gov. Brown effectively took away the ability of each of Oregon's 38 counties, and the cities within those counties, to appropriately respond to the Pandemic in a manner corresponding to the danger level in their jurisdictions. While the Pandemic has affected more than two Oregon counties, the fact that the highest number of cases and deaths is concentrated in the counties encompassing what is essentially the greater Portland and Salem metropolitan areas, while the number of cases and deaths across the rest of the state are significantly lower, indicates that Gov. Brown's statewide Orders are overreaching in the extreme, thereby violating the spirit and intent, if not the letter, of the law.

Furthermore, as stated *supra*, "however broad the scope of the police power may be, it is always subject to the rule that the Governor may not exercise any power that is expressly or impliedly forbidden to [her] by the state Constitution" and laws of Oregon. *U.S. Auto*, 128 Or. at 283-84. This is true even with regard to ORS 401.192(1), which declares that "[a]ll existing laws, ordinances, rules and orders inconsistent with ORS 401.165 to ORS 401.236 shall be inoperative during

any period of time and to the extent such inconsistencies exist": It should be self-evident that no Governor of Oregon is permitted, pursuant to ORS 401.165 *et seq.*, to use an emergency declaration to indefinitely suspend federal or state constitutional provisions within Oregon's borders or suspend laws that curtail the Governor's emergency powers. ORS 401.165 *et seq.* likewise cannot reasonably be read to allow the Governor to dispense with the time limitations set forth in ORS 433.441(5) because she finds them too restrictive with regard to her ability to respond to an emergency. Dec. at 5 ["Although ORS 433.441(4) indicates that nothing in ORS 433.441 to 433.452 limits the authority of the Governor to declare a state of emergency under ORS 401.165, it also does not suspend the time limitations of" ORS 433.441(5)].

If this Supreme Court allows Gov. Brown to invoke ORS 401.165 *et seq.* to use her emergency powers as broadly as she sees fit, regardless of other related statutory and constitutional provisions, no present or future Governor of this state will ever observe the time limits and procedures set forth in ORS 433.441(5) and Article X-A, § 6: Human nature dictates that a Governor will deem it more expedient to choose the path that does not involve time limits and leaves the Legislature – which might not grant the approval that the Governor seeks – out of the decision-making process. This Supreme Court should thus hold Gov. Brown accountable for failing to observe statutory and constitutional procedure by affirming the Injunction and denying Gov. Brown's mandamus petition.

B. Because Gov. Brown Did Not Follow the Law in Issuing Her Orders, it Would Be Unjust to Criminally Punish Those Who Violate Her Orders.

A very recent decision of another state's supreme court is instructive in this case: In *Palm*, cited *supra* and decided one day before the Circuit Court heard

PRACTITIONERS' motion for the Injunction in this proceeding, the Wisconsin Supreme Court struck down a stay-at-home order substantially similar to GOVERNOR's Order 20-12. *Palm*, 2020 Wis. LEXIS 121 at **1, 3-4. In deeming the stay-at-home order unenforceable, Wisconsin's high court held as follows:

> We do not conclude that Palm was without any power to act in the face of this pandemic. However, Palm ***must follow the law that is applicable to statewide emergencies***. We further conclude that Palm's order confining all people to their homes, forbidding travel and closing businesses exceeded the statutory authority … upon which Palm claims to rely.

Id. at *4 (emphasis added).

Wisconsin's high court noted in *Palm* that "the Governor's emergency powers are premised on the inability to secure legislative approval given the nature of the emergency. For example, if a forest fire breaks out, there is no time for debate. Action is needed." *Id.* at *41. The same is true here: ORS 433.441(5) and Article X-A, § 6(1) of the Oregon Constitution each give Gov. Brown roughly one month to act unilaterally to nip a public health emergency in the proverbial bud. *See also* Or. Const. art. X-A, § 1(5) [noting Oregon voters' intent for Governor to "manage the ***immediate*** response to" a public health emergency (emphasis added)]. However, Wisconsin's high court also observed in *Palm*, 2020 Wis. LEXIS 121 at *41, that "in the case of a pandemic, which lasts month after month, the Governor ***cannot rely on emergency powers indefinitely***" (emphasis added). That is what Gov. Brown seeks to do here: As indicated by her statements in Orders 20-12 and 20-24 that both Orders shall remain in effect until she terminates them, as well as her statement to Oregon's faith leaders that restrictions on churches will not likely be lifted for several months [Brown, *COVID-19 Faith Leader Webinar*, p. 9], Gov. Brown is seeking to use her emergency powers indefinitely in response to the

Pandemic. This, she cannot lawfully do: "'[W]hile the law may take periodic naps during a pandemic, we will not let it sleep through one.'" *Berean Baptist*, 2020 U.S. Dist. LEXIS 86310 at *27 [quoting *Roberts v. Neace*, 2020 U.S. App. LEXIS 14933 at *10 (6th Cir. May 9, 2020)].

The stay-at-home order in *Palm* also mirrors Gov. Brown's Orders here in that the order in *Palm* carried with it the threat of criminal sanctions for non-compliance. *Palm*, 2020 Wis. LEXIS 121 at *1; *see also* EO 20-12 and EO 20-24. Wisconsin's high court invalidated the order in *Palm* because the state official in that case failed to follow the law, just as the Circuit Court did with Gov. Brown here. *Palm*, 2020 Wis. LEXIS 121 at *3; Dec. at 4-5. Because the state official in *Palm* did not follow Wisconsin law in issuing her order, Wisconsin's high court held that "there can be no criminal penalties for violation of" that order. *Palm*, 2020 Wis. LEXIS 121 at *42. The same applies here: Because Gov. Brown did not follow Oregon law when issuing her Orders in response to the Pandemic – starting with Order 20-03, the Order that declared a public health emergency in Oregon to begin with – it would be unjust to enforce them.

Gov. Brown "cannot confer upon [her]self the power ***to dictate the lives of law-abiding individuals*** as comprehensively" as she has done here "without reaching beyond the executive branch's authority." *Palm*, 2020 Wis. LEXIS 121 at *121 (Roggensack, C.J., concurring) (emphasis added). The Circuit Court thus rightly invalidated Gov. Brown's Orders in issuing the Injunction, and the Oregon Supreme Court should uphold the Injunction accordingly.

II. Gov. Brown Has Infringed on PRACTITIONERS' Religious Rights Far More Than is Necessary to Achieve Oregon's Compelling Interest in Preserving Public Health and Safety.

"This is a hard and difficult time. A new virus sweeps the world,

> ravages our economy and threatens our health. Public officials … make minute-by-minute decisions with the best of intentions and the goal of saving the health and lives of our citizens.
>
> "But what of that enduring Constitution in times like these? Does it mean something different because society is desperate for a cure or prescription?"

Frankfort Tabernacle Baptist Church v. Beshear, 2020 U.S. Dist. LEXIS 81534 at *1 (E.D. Ky. May 8, 2020) (hereinafter *Frankfort Tabernacle*).

The answer to the above question is an emphatic "no": As stated *supra*, "[t]here is ***no*** pandemic exception to the Constitution of the United States or the Free Exercise Clause of the First Amendment." *Berean Baptist*, 2020 U.S. Dist. LEXIS 86310 at *3 (emphasis added); *see also Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) (hereinafter *Milligan*) ["The Constitution of the United States is a law for rulers and people … and covers with the shield of its protections all classes of men, ***at all times, and under all circumstances***" (emphasis added)]. America's constitutional jurisprudence could not be clearer on this point – even *Jacobson v. Massachusetts*, the U.S. Supreme Court case that permits some infringement on individual liberties when dealing with public health emergencies, warns against excessive infringement on said constitutionally protected rights:

> According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. … The mode or manner in which those results are to be accomplished is within the discretion of the State, ***subject, of course … only to the condition that no rule prescribed by a State***, nor any regulation adopted by a [State] under the sanction of state legislation, ***shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument***.

Jacobson, 197 U.S. at 25 (emphasis added).

Jacobson, cited *supra*, involved a compulsory vaccination law enacted to prohibit the spread of smallpox. *Id.* at 27-28. While *Jacobson* affirms that states may infringe on constitutional rights to the extent necessary to protect public health and safety, America's highest court also cautioned courts to "guard ***with firmness every right appertaining to*** life, ***liberty***, or property as secured to the individual by the Supreme Law of the Land" – i.e., the U.S. Constitution. *Id.* at 38 (emphasis added). In other words, while protecting the public health and safety of Oregonians is a compelling government interest of the highest order, Gov. Brown may not infringe on Oregonians' constitutionally protected freedoms for any longer, or to any greater degree, than is necessary to serve that interest. *Id.* Indeed, whether, and to what degree, a state's infringement on constitutionally protected rights is justified depends on the necessities of the case: "[I]t might be that an acknowledged power of a [state] to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, ***or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere*** for the protection of such persons." *Jacobson*, 197 U.S. at 28 (emphasis added).

Because Gov. Brown's Orders go far beyond what is reasonably required to protect Oregonians, PRACTITIONERS were compelled to seek relief in the Circuit Court. Incidentally, PRACTITIONERS are not alone: Churches in at least two other states, Kentucky and North Carolina, have taken their respective governors to federal court on the ground that the governors' actions in response to the Pandemic violated the churches' constitutionally protected freedoms of religion and assembly. In both cases – which were decided within the past two weeks – the churches won. Discussed extensively below, the two cases are instructive as to how this Supreme

Court can – and should – strike an appropriate balance between protecting public health and safety in the face of the Pandemic and minimizing, if not eliminating, any infringement on Oregonians' constitutionally protected freedoms of religion and assembly.

A. *Frankfort Tabernacle*

The first of those cases, decided on May 8, was *Frankfort Tabernacle*, cited *supra*. At the Circuit Court's hearing on PRACTITIONERS' motion for the Injunction, Gov. Brown's counsel argued that when he goes to "Freddy's" – i.e., his local Fred Meyer supermarket – the store has measures in place to ensure that customers engage in proper social distancing. It is ironic that Gov. Brown's counsel mentioned Fred Meyer because that supermarket chain is part of the Kroger chain of grocery stores. *See* https://jobs.kroger.com/fred-meyer/go/Fred-Meyer/587600/. In *Frankfort Tabernacle*, the court specifically mentioned Kroger:

> "There is ample scientific evidence that COVID-19 is exceptionally contagious. But ***evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking***. If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services ***which, unlike the foregoing, benefit from constitutional protection***."

Frankfort Tabernacle, 2020 U.S. Dist. LEXIS 81534 at *15 (emphasis added).

Frankfort Tabernacle is furthermore relevant here for several reasons. First, the church in *Frankfort Tabernacle* had "a sincerely-held religious belief that online services and drive-in services do not meet the Lord's requirement that the church meet together in person for corporate worship." *Id.* at **4-5. PRACTITIONERS have likewise asserted that Gov. Brown's Orders infringe on their freedom to worship in accordance with the dictates of their conscience, which includes their freedom to assemble as a corporate body. *See* Pls.' Second Amended Verified

Compl., ¶ 103 (May 12, 2020) (hereinafter "SAVC"). Like the church in *Frankfort Tabernacle*, PRACTITIONERS consider it essential to gather for corporate worship "and want to invoke the Constitution's protection on this point." *Frankfort Tabernacle*, 2020 U.S. Dist. LEXIS 81534 at **1-2. PRACTITIONERS actually hope to invoke the protections of both the Oregon and United States constitutions with regard to their religious freedoms. SAVC at ¶ 103 [citing Or. Const. art. I, §§ 2 and 26, and U.S. Const. amend. I.]

Second, *Frankfort Tabernacle* affirms that gubernatorial action which is not neutral toward religion must be justified by a compelling government interest. *Frankfort Tabernacle*, 2020 U.S. Dist. 81534 at *13 [quoting *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (hereinafter *Lukumi*)]. Here, Order 20-25, unlike GOVERNOR's previous Orders, makes specific reference to "faith-based gatherings." *See* EO 20-25 at ¶ 3.a. Order 20-25 prohibits faith-based gatherings that exceed 25 people. *Id.* While the same restriction also applies to cultural and civic gatherings, this does not mean that Order 20-25 is neutral toward religion: The Free Exercise Clause of the U.S. Constitution's First Amendment "protects against government hostility which is masked as well as overt." *Lukumi*, 508 U.S. at 534. Allowing CHURCHES to host gatherings of up to 25 people is essentially Gov. Brown condescendingly "throwing the dog a bone," so to speak – especially since many CHURCHES have houses of worship large enough to accommodate gatherings well over 25 people while still observing social distancing guidelines. Worse yet, Gov. Brown likely would not have thrown that bone had PRACTITIONERS not taken Gov. Brown to court.

Third, the governor in *Frankfort Tabernacle* allowed liquor stores to remain open, just as Gov. Brown did here. *Frankfort Tabernacle*, 2020 U.S. Dist. LEXIS 81534 at *4; EO 20-12 at ¶ 2 [deeming "bars, taverns, brew pubs, wine bars … or

other similar establishments that offer food or drink," including marijuana dispensaries, to be essential]. Never mind the well-documented social ills that alcohol and/or hallucinogenic drug usage cause: Marijuana and liquor stores tend to be fairly small in size, not allowing for very much social distancing. By contrast, PRACTITIONERS face greater restrictions with regard to worship services and other gatherings, even though (1) as stated *supra*, churches can often seat more than 25 people while still observing social distancing requirements, and (2) religion can have a very positive effect on individuals' spiritual, mental, and emotional health, as Gov. Brown herself has acknowledged. Brown, *COVID-19 Faith Leader Webinar*, pp. 5-7.

Fourth, and related to that last point, the governor in *Frankfort Tabernacle* "evince[d] an intent to continue enforcing the orders at issue." *Frankfort Tabernacle*, 2020 U.S. Dist. LEXIS 81534 at *7. Gov. Brown has done likewise here – and for an indefinite period of months to boot. Brown, *COVID-19 Faith Leader Webinar*, p. 9. The court in *Frankfort Tabernacle* invalidated the Kentucky governor's orders because the court felt that the governor had violated the religious rights of the church in that case long enough: "Even viewed through the state-friendly lens of *Jacobson*, the prohibition on religious services presently operating in the Commonwealth is 'beyond what was reasonably required for the safety of the public.'" *Frankfort Tabernacle*, 2020 U.S. Dist. LEXIS 81534 at *13 [quoting *Jacobson*, 197 U.S. at 28]. The Circuit Court ruled likewise in granting the Injunction, and this Supreme Court should do the same here.

B. *Berean Baptist*

The plaintiffs in *Berean Baptist* challenged orders that North Carolina's governor issued in response to the Pandemic for many of the same reasons that PRACTITIONERS are challenging Gov. Brown's Orders here:

> "[D]isparate, unequal, discriminatory, unfavored, hostile, and most restrictive treatment of Plaintiffs' religious and other First Amendment gatherings over other, secular, gatherings; their congregants need comfort from their church after they have been forced to remain in their homes for weeks and weeks; ***the ever-lengthening infringement by the [o]rders upon their God-commanded duty to corporately assemble for worship in their houses of worship***; and their concern over the State's interference in the very form and method of their most important of their ecclesiastical functions – religious worship."

Berean Baptist, 2020 U.S. Dist. LEXIS 86310 at *8 (emphasis added) [citing the plaintiffs' complaint].

Like *Frankfort Tabernacle*, *Berean Baptist* is relevant here for several reasons. First, Order 20-12 refers to "non-essential social and recreational gatherings." EO 20-12 at ¶ 1.a. While Gov. Brown does not specify in Order 20-12 which social and recreational gatherings she deems "non-essential," the court in *Berean Baptist*, 2020 U.S. Dist. LEXIS 86310 at *24, noted that in 15 states, "Governors trusted the people of their states and exempted religious gatherings from ***any attendance limitations*** during this pandemic" (emphasis added). Those 15 states include Pennsylvania, West Virginia, Ohio, Michigan, North Dakota, South Dakota, Utah, Colorado, Arizona, Texas, Arkansas, Tennessee, South Carolina, Georgia, and Florida. *Id.* at fn. 1. The *Berean Baptist* court struck down the North Carolina governor's orders because the governor in that case "failed to cite any peer-reviewed study showing that religious interactions in those 15 states have accelerated the spread of COVID-19 in any manner distinguishable from non-religious interactions." *Id.* Unless Gov. Brown can make such a showing here, her efforts to overturn the Circuit Court's Injunction must fail.

Furthermore, as the *Berean Baptist* court pointed out, "common sense suggests that religious leaders and worshipers (whether inside or outside of North

Carolina) have every incentive to behave safely and responsibly whether working indoors, shopping indoors, or worshiping indoors." *Berean Baptist*, 2020 U.S. Dist. LEXIS 86310 at **24-25. Indeed, it is perhaps the utmost show of hostility toward people of faith, including PRACTITIONERS, for Gov. Brown to treat them as if they lack the common sense – nay, decency – to behave safely and responsibly by complying with CDC and OHA guidelines. As stated *supra*, the Free Exercise Clause of the First Amendment prohibits Gov. Brown from displaying such hostility toward people of faith. *Lukumi*, 508 U.S. at 534. The *Berean Baptist* court properly recognized this: "How can 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?" *Berean Baptist*, 2020 U.S. Dist. LEXIS 86310 at *22. Like the plaintiffs in *Berean Baptist*, PRACTITIONERS here "simply want the Governor to afford them the same treatment as they and their fellow non-religious citizens receive when they work at a plant, clean an office, ride a bus, shop at a store, or mourn someone they love at a funeral." *Id.* at **25-26.

Berean Baptist is also relevant because, like Gov. Brown's Orders here, the North Carolina governor's orders carried with them the threat of criminal sanctions. *Berean Baptist*, 2020 U.S. Dist. LEXIS 86310 at *18 ["The Governor's counsel conceded that it would be a sheriff or other law enforcement officer who would decide whether the religious entity or individual" was complying with the governor's orders]; *see also* EO 20-12 at ¶ 1.e and EO 20-25 at ¶ 24. Indeed, Orders 20-12 and 20-25 raise the dark specter of police raiding churches, determining whether the churches are complying with gathering-size limitations and social-distancing requirements, and arresting pastors and/or congregants of churches who fail to comply with Gov. Brown's Orders. The *Berean Baptist* court recognized this dark specter: "A leader of a religious entity or a worshiper, under

pain of criminal prosecution for a … misdemeanor, has to answer to a sheriff or other local law enforcement officer" as to whether a church is doing as its state's governor says. *Berean Baptist*, 2020 U.S. Dist. LEXIS 86310 at *18. Such a specter should not exist in a state whose constitution expressly declares that "[a]ll men shall be ***secure*** in the Natural right" – i.e., free from fear of government persecution – "to worship Almighty God according to the dictates of their own consciences." Or. Const. art. I, § 2 (emphasis added).

The *Berean Baptist* court ultimately "trust[ed] worshipers and their leaders to look after one another ***and society*** while exercising their free exercise rights just as they and their fellow citizens (whether religious or not) do when engaged in non-religious activities." *Berean Baptist*, 2020 U.S. Dist. LEXIS 86310 at *28 (emphasis added). That is all PRACTITIONERS are asking for here – for Gov. Brown, and this Supreme Court, to trust them. This Supreme Court can best demonstrate its trust for PRACTITIONERS by affirming the Circuit Court's Injunction and denying Gov. Brown's mandamus petition.

III. PRACTITIONERS Have Met the Requirements for a Preliminary Injunction.

Under Or. R. Civ. P. 79(A)(1)(a), plaintiffs seeking preliminary injunctions must show that they are "entitled to the relief demanded in a pleading, and such relief, or any part thereof, consists of ***restraining the commission or the continuance of some act***, the commission or the continuance of which during the litigation would produce injury to the party seeking relief" (emphasis added). ORS 28.080 states that "[f]urther relief based on a declaratory judgment may be granted ***whenever necessary or proper***" (emphasis added).

In granting injunctive relief to PRACTITIONERS, the Circuit Court applied the four-part test in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7

(2008), which Gov. Brown's counsel raised during oral argument. *See* Dec. at 5 [citing *Winter*]. Under *Winter*, 555 U.S. 7 at 20, to obtain a preliminary injunction, a plaintiff must prove four things: (1) A likelihood of success on the merits of the plaintiff's case; (2) a likelihood of suffering irreparable harm; (3) a balance of equities that tips in the plaintiff's favor; and (4) an injunction is in the public interest. Saving the first factor for last, each factor will be addressed in turn below:

A. PRACTITIONERS Can Show Irreparable Harm.

"[T]he loss of First Amendment freedoms, ***for even minimal periods of time***, ***unquestionably*** constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis added); *see also* Dec. at 5 [citing *Elrod*].

Here, Gov. Brown's Orders – 20-12 and 20-25 in particular – have infringed on PRACTITIONERS' constitutionally protected freedoms of religion and assembly from the moment they were issued. Even granting that some infringement on their religious rights might have been necessary at the outset of the Pandemic, and perhaps during the maximum 28 days allotted under ORS 433.441(5), PRACTITIONERS have been irreparably harmed every day since Gov. Brown declared the current public health emergency. SAVC at ¶ 104; Dec. at 5. Furthermore, PRACTITIONERS stand to be irreparably harmed every day for the foreseeable future absent injunctive relief. Brown, *COVID-19 Faith Leader Webinar*, p. 9 [declaring GOVERNOR's intent to keep her restrictions on faith-based gatherings in place for "many months off"]. PRACTITIONERS can thus establish, and have established, irreparable harm.

B. The Balance of Equities Tips in PRACTITIONERS' Favor.

While protecting public health and safety is a compelling public interest of the highest order, Gov. Brown cannot infringe on Oregonians' constitutionally protected freedoms for any longer, or to any greater degree, than is necessary to

serve that interest. *Jacobson*, 197 U.S. at 25. Indeed, modern courts recognize that *Jacobson*, cited *supra*, does not give states free rein to trample on constitutionally protected rights under the guise of responding to emergencies. *See Frankfort Tabernacle*, 2020 U.S. Dist. 81534 at *13 [noting that despite "the state-friendly lens of *Jacobson*," states may not exercise their emergency powers "beyond what (is) reasonably necessary for the safety of the public" (quoting *Jacobson*, 197 U.S. at 28)]. Because Gov. Brown can achieve Oregon's compelling interest in protecting public health and safety while restricting PRACTITIONERS' constitutionally protected religious rights to a far lesser degree than she has, the balance of equities tips in PRACTITIONERS' favor.

C. The Public Interest Weighs in Favor of the Injunction.

"Protecting religious liberty and conscience is obviously in the public interest." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018). The Circuit Court acknowledged this. Dec. at 6 ["The public interest is furthered by allowing people to fully exercise their right to worship"]. PRACTITIONERS can thus meet the public interest requirement for the Injunction.

D. PRACTITIONERS Have Demonstrated a Likelihood of Success on the Merits.

As the Circuit Court stated in granting the Injunction, PRACTITIONERS "have demonstrated that the Governor was beyond her statutory authority when she exceeded the ORS 433.441(5) timelines required pursuant to a public health proclamation." Dec. at 5. In fact, it is beyond dispute that Gov. Brown did not follow the procedures outlined in ORS 433.441(5), as Gov. Brown's Order declaring a public health emergency in response to the Pandemic, Order 20-03, declared that the emergency would be in effect for 60 days – well beyond the initial 14 days, and maximum of 28, allotted under ORS 433.441(5). As demonstrated

supra, PRACTITIONERS can also show that they have been irreparably harmed by Gov. Brown's failure – if not outright refusal – to follow prescribed statutory and constitutional procedures. PRACTITIONERS can thus demonstrate a likelihood of success on the merits – and thereby meet all four requirements for a preliminary injunction. Accordingly, the Supreme Court should affirm the Circuit Court's grant of the Injunction and deny Gov. Brown's mandamus petition.

CONCLUSION

"No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the U.S. Constitution's] provisions ***can be suspended during any of the great exigencies of government***." *Milligan*, 71 U.S. at 120-21 (emphasis added). The same applies to the provisions of the Oregon Constitution – Article I, §§ 2 and 26 in particular. Because Gov. Brown has exceeded her statutory and constitutional authority under the circumstances presented here, the best – if not only – way to ensure that Gov. Brown respects Oregonians' constitutionally protected rights henceforth during the remainder of the Pandemic is for this Supreme Court to affirm the Injunction that the Circuit Court granted PRACTITIONERS and deny Gov. Brown's mandamus petition. That is what this Supreme Court should do.

Dated: May 22, 2020

PACIFIC JUSTICE INSTITUTE

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE REQUIREMENTS

I hereby certify that (1) this brief complies with the word-count limitation set forth in ORAP 9.05(3)(a) and (2) that the word count of this brief is 8,315 words. I further hereby certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(1)(d)(ii) and ORAP 5.05(3)(b)(ii).

DATED: May 22, 2020

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CERTIFICATE OF FILING

I hereby certify that on or about May 22, 2020, I filed the original of this PLAINTIFFS-ADVERSE PARTIES' MEMORANDUM IN OPPOSITION TO DEFENDANT-RELATOR'S MANDAMUS PETITION via electronic filing through the court's e-filing system at the following address:

- Appellate Court Administrator
  ATTN: Records Section
  Oregon Court of Appeals
  1163 State St.
  Salem, OR 97301-2563

DATED: May 22, 2020

PACIFIC JUSTICE INSTITUTE
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CERTIFICATE OF SERVICE

STATE OF OREGON)
)
) ss.
)
COUNTY OF MARION)

I am employed in the County of Marion, State of Oregon. I am over the age of eighteen and not a party to the within action; my business address is 1850 45th Ave. NE, Suite 33, Salem, OR 97305.

On May 22, 2020, I served the following documents on the interested parties by placing a true copy thereof enclosed in sealed envelope(s) addressed to said parties:

PLAINTIFFS-ADVERSE PARTIES' MEMORANDUM IN OPPOSITION TO DEFENDANT-RELATOR'S MANDAMUS PETITION

PLEASE SEE ATTACHED SERVICE LIST

__X__BY MAIL: I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. postal service on that same date with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

_____BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the office of the addressee(s).

_____BY FACSIMILE TRANSMISSION: The facsimile machine I used complied with California Rules of Court 2003(3) and no error was reported by the machine. Pursuant to rule 2005(i), I caused the machine to print a record of the transmission, a copy of which is attached to this proof of service.

_____BY FEDERAL EXPRESS: I caused the above-referenced document(s) to be delivered via Federal Express, for delivery to the above address(es).

__X__(State) I declare under penalty of perjury under the laws of the State of Oregon that the above is true and correct.

_____(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 22, 2020, at Salem, Oregon.

/s/ RAY D. HACKE
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