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IN THE SUPREME COURT
of the
UNITED STATES

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EAGLE COVE CAMP & CONFERENCE CENTER, INC., a Wisconsin non-stock corporation, ARTHUR G. JAROS, JR., as Co-Trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, and as Trustee of the Arthur G. Jaros, Sr. Declaration of Trust and as Trustee of the Dawn L. Jaros Declaration of Trust, WESLEY A. JAROS, as Co-Trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, and RANDALL S. JAROS, as Co-Trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust

*Plaintiffs/Appellants/Cross-Respondents/
Petitioners,*

v.

COUNTY OF ONEIDA, *Defendant/Respondent,*

TOWN OF WOODBORO, *Defendant/Cross-Appellant/Respondent,*

and

ONEIDA COUNTY BOARD
OF ADJUSTMENT, *Defendant.*

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

November 13, 2020

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QUESTIONS PRESENTED

- 1) Did the Wisconsin Court of Appeals Deprive and Did the Wisconsin Supreme Court's Refusal to Accept the Case for Review Permit the Deprivation of Petitioners of their Property in the Form of Monetary Sanctions Without Affording Procedural Due Process of Law by the Court of Appeals' Reversing, Without Notice or Prior Opportunity for Petitioners to Be Heard, the Circuit Court's Denial of Sanctions on Grounds Not Raised in Woodboro's Circuit Court Motion for Sanctions and Based upon the Court of Appeals' Reliance on its Own Unbriefed, 4-prong *Sua Sponte* Analysis Where Each Prong of such Analysis Was Plainly Erroneous?
- 2) Did the Court of Appeals Err in Holding *sua sponte* that Wisconsin law, rather than federal law, governs the claim preclusive effect of the dispositive ruling(s) of a federal court made with respect to the same transactional claim and Did the Wisconsin Supreme Court Participate in that Error by Letting Stand that Error of Federal Law?
- 3) In Light of a Change in Federal Case Law Favorable to the Plaintiffs-Petitioners Which Had the Effect of Abrogating an Earlier Unfavorable Ruling on the Merits Made During the Federal Court Phase of Judicial Proceedings on Plaintiffs' Case, Did the Wisconsin Courts of Review Deny the Plaintiffs-Petitioners Equal Protection of the Laws by Allowing a Continuing Restraint Through Affording the Abrogated Federal Court Ruling Prospective Preclusive Effect on Plaintiffs-Petitioners Religious Exercise to Stand While the Same Restraint Does Not Apply to All Other Future Similarly-Situated Religious Land Use Applicants Within Woodboro?
- 4) By Dispensing with Oral Argument contrary to WIS. STAT. §809.22(2), by an Unreasoned Summary Denial of a Motion for Reconsideration, and by Refusing to Address Numerous Issues and Arguments Raised on an Appeal as of Right, Did the Wisconsin Court of Appeals Deny Petitioners their Liberty Interest in and to Fair Adjudicative Process and/or in and to Free Exercise of their Religion Without Affording them Procedural Due Process of Law and Did the Wisconsin Supreme Court Participate in that Denial by Letting Stand the Decision of the Wisconsin Court of Appeals?

LIST OF ALL PARTIES

(1) Petitioner Eagle Cove Camp & Conference Center, Inc., a Wisconsin non-stock corporation, was a plaintiff in the trial court and an appellant in the Wisconsin Court of Appeals and Wisconsin Supreme Court. Its corporate disclosure statement is enclosed.

(2) Petitioner Arthur G. Jaros, Jr., as co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, as trustee of the Arthur G. Jaros, Sr. Declaration of Trust and of the Dawn L. Jaros Declaration of Trust, and in his personal capacity, was a plaintiff in the trial court and an appellant and cross-respondent in the Wisconsin Court of Appeals and Wisconsin Supreme Court.

(3) Petitioner Wesley A. Jaros, as co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, was a plaintiff in the trial court and appellant and cross-respondent in the Wisconsin Court of Appeals and Wisconsin Supreme Court.

(4) Petitioner Randall S. Jaros, as co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, and in his personal capacity, was a plaintiff in the trial court and appellant and cross-respondent in the Wisconsin Court of Appeals and Wisconsin Supreme Court.

(5) Respondent Town of Woodboro, Wisconsin, was a defendant in the trial court and respondent and cross-appellant in the Wisconsin Court of Appeals and Wisconsin Supreme Court.

(6) Respondent County of Oneida, Wisconsin, was a defendant in the trial court and a respondent in the Wisconsin Court of Appeals and Wisconsin Supreme Court.

(7) Oneida County Board of Adjustment was a defendant in the trial court.

CORPORATE DISCLOSURE STATEMENT

EAGLE COVE CAMP & CONFERENCE CENTER, INC. is a Wisconsin non-stock corporation and has no shareholders. Therefore, it has no parent corporation and no publicly held company owns any interest in the corporation.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE
OPINIONS AND ORDERS ENTERED IN THIS CASE¹

The November 19, 2019 Decision² of the Wisconsin Court of Appeals, District III, is reported at 2020 WI App 1, 3889 Wis.2d 624, 937 N.W.2d 293, 2019 Wis.App.LEXIS 618, 2019 WL 6121352. That court's December 12, 2019 order³

¹As set forth in this Statement of the Case, this "case" has pended both in the federal and Wisconsin state court systems, having arisen under the same set of transactions and occurrences as a comparison of the complaints in both forums will confirm (Appendices CC and GG). Where proceedings in the federal and state court systems were conducted on the same set of transactions and occurrences, the Seventh Circuit Court of Appeals has written:

Furthermore, *it is clear that only one constitutional "case" is present here*, even though the Montano parties have a number of theories supporting their claim. (*Montano v. City of Chicago*, 375 F.3d 593 at 600 (7th Cir. 2004), *emph. added*)

"Case" is a concept contained in U.S. Constitution, Article III, §2 (hence, *Montano's* formulation that "only one constitutional 'case' is present here") and is defined as a "justiciable controversy" that "consists of an actual dispute between parties over their legal rights that remain in conflict *at the time the case is presented* and must be a proper matter for judicial determination" and is a term that describes "the structure by which actual, conflicting claims of individuals must be brought before a federal court for resolution if the court is to exercise its jurisdiction to consider the questions and provide relief."

(<https://legal-dictionary.thefreedictionary.com/Case+or+Controversy>) Thus, a "case" originates at the time acts or omissions occur giving rising to a plausible claim for relief. The commencement of litigation creates an "action" and/or "proceeding" at the time when the "case" is first submitted to the judicial system.

This view that only a single case has been and is extant is consonant with text of F.R.Civ.P 1, 2 and 3 that describes the judicial events taking place in a U.S. District Court as a "civil action" or "proceeding" but not as a "case."

Therefore, this part of the Petition contains citations to both the federal and Wisconsin state court phases of the "case."

²Appendix B.

³Appendix Q.

denying reconsideration and the Wisconsin Supreme Court's June 16, 2020 order⁴ denying Petitioners' Petition for Review are not reported.

The order⁵ of the Seventh Circuit Court of Appeals dated January 25, 2017 in docket #16-3194 is officially reported at 674 Fed.Appx.566 and unofficially reported as 2017 U.S. App. LEXIS 1305. Petitioners' petition for rehearing *en banc* was denied by an order of that court dated February 27, 2017. This Court thereafter denied certiorari on October 2, 2017 as reported at 138 S.Ct. 129, 199 L.Ed.2d 33, 2017 U.S. LEXIS 5179, 86 U.S.L.W. 3150, 2017 WL 2444569.

The district court's opinion and order⁶ in docket #10-118 dated August 11, 2016, as unofficially reported at 2016 U.S. Dist. LEXIS 156786, denied Petitioners' F.R.Civ.P. 54(b), 60(b)(5) and 60(b)(6) motions for relief from its February 1, 2013 summary judgment ruling.

The original opinion⁷ of the Seventh Circuit Court of Appeals dated October 30, 2013 in docket #13-1274 is officially reported at 734 F.3d 673 (7th Cir. 2013) and is unofficially reported as 2013 U.S. App. LEXIS 22151. An order⁸ of that court dated December 10, 2013 denied Petitioners' petition for rehearing by the panel and *en banc*. This court thereafter denied certiorari on May 5, 2014 as reported at 572

⁴Appendix A.

⁵Appendix M.

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⁸Appendix N.

U.S. 1101, 134 S. Ct. 2160, 188 L.Ed.2d 1126, 2014 U.S. LEXIS 3146, 82 U.S.L.W. 3650.

The district court's original memorandum opinion and order⁹ in docket #10-118 dated February 1, 2013, (i) granting the motions for summary judgment of the Respondents on Counts I - X; (ii) dismissing pursuant to 28 U.S.C. §1367(c)(3) Count XI without prejudice to refile same in the Wisconsin state court system; and (iii) denying Petitioners' cross-motion for summary judgment as to liability on Count I--Total Exclusion Violation under the Religious Land Use and Institutionalized Persons Act of 2000--was not published. An unpublished judgment¹⁰ was entered thereon on February 5, 2013.

JURISDICTIONAL STATEMENT

On June 16, 2020, the Wisconsin Supreme Court entered its order denying Petitioner's Petition for Review that sought review of the Wisconsin Court of Appeals November 20, 2019 Decision and December 1, 2019 Order denying reconsideration. This petition for writ of certiorari is filed within one hundred fifty (150) days of June 16, 2020, per Supreme Court Rule 13(1), including especially its last sentence, as modified by this Court's COVID-19-related Order dated March 19, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

⁹Appendix I.

¹⁰Appendix J.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS
INVOLVED

NOTE: Verbatim text of each provision appears at Appendix NN.

United States Constitution, Amendment I

United States Constitution, Amendment XIV, Section 1

42 U.S.C. §1983

42 U.S.C. §2000cc, *et seq.*

F.R.Civ.P. 54(b)

Wis. STATS. 59.69

Wis. STATS. 60.10

Wis. STATS. 60.22

Wis. STATS. 60.62

Wis. STATS. 61.35

Wis. STATS. 62.23

Wis. STATS. 802.05

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Wis. STATS. 895.044

Oneida County Zoning & Shoreland Protection Ordinance ("OCZSPO")

STATEMENT OF THE CASE¹¹

INTRODUCTION

Plaintiffs Jaros, are brothers, co-trustees of a charitable trust, and directors of Eagle Cove Camp & Conference Center ("ECC&CC")—both IRS-§501(c)(3)-approved. ECC&CC was formed to develop a new year-round Christian camp on thirty-four acres¹² of land with 550' of frontage on 400-acre, clear water Squash Lake in Wisconsin's "Northwoods" within Defendants' jurisdictions.¹³

The brothers' Christian faith, per their Biblical stewardship understanding ("first fruits" and offerings "without blemish"¹⁴), compelled them to dedicate and convert that acreage – family-owned over sixty years – to full-time Christian ministry as a Bible camp, serving youth, including those medically disabled, older teens and adults.¹⁵ Arthur and Randall will teach Christian education classes at the camp.¹⁶ The federal courts found "undisputed":

¹¹"R#" throughout this Brief refers to the Index issued by the Oneida County Circuit Court Clerk. "DCD" refers to the federal district court docket number for 10-cv-118 (W.D. Wis. 2010) in the original, predecessor federal proceeding, as explained at p. 16, *infra*.

¹²Approximately twenty-nine acres owned by the charitable corporation and approximately five acres owned by the charitable trust. The camp also has permission to passively use twenty-four acres of contiguous land held jointly under the two trust declarations.. R#77|App.88.1.

¹³R#77 | App.88-89.

¹⁴Arthur Jaros Deposition, DCD##83,84 at p.245.

¹⁵R.#77|App.89.1-90.

¹⁶Circuit Court Amended Complaint, ¶28 at App. 358-359; same as federal Amended Complaint at R.#24|App. 281, ¶ 19.

Eagle Cove believes that their religion mandates that the Bible camp must be on the subject property ... [and] that they must operate the Bible camp on a year-round basis. (R.#87|App.117)

A) County & Town Land Use Regulatory Scheme

The parcel is subject to the Town's and County's laws and regulations, being located in zoning districts "2" and "4," per the zoning map for Woodboro.¹⁷ Per STATS. §§60.10(2)(c) and 60.22(3), the Town's electorate has conferred "Village Powers" upon its Board,¹⁸ vesting it with land use planning power. STATS. §§ 60.22(3), 61.35, 62.23. On 4/14/2009, the Town adopted a Comprehensive Plan,¹⁹ a/k/a "Master Plan,"²⁰ incorporating its 1997 Land Use Plan^{21 22} to serve as a future development planning guide.²³ Defendants consistently interpreted the Town's Land Use Map as forbidding year-round religious camps throughout Woodboro.²⁴

During 2000, the County adopted, per STATS. §59.69(5)(d), a comprehensive revision to its existing zoning ordinance ("OCZSPO") that created thirteen zoning

¹⁷App. 90.1, App. 117, App. 652.

¹⁸ DCD#61-7; Circuit Court Amended Complaint, ¶66 at App. 368; federal Amended Complaint, ¶53 at App. 291.

¹⁹Circuit Court Amended Complaint, ¶80 at App. 371;; federal Amended Complaint, ¶67 at App. 294.

²⁰STAT. §§ 66.1001(1)(a)2, 66.1001(2)(h).

²¹DCD#63-20.

²²734 F.3d at 676 at App. 116; DCD# 63-20, p. 11.

²³WIS. STATS. §§ 60.62(4), 62.23(2); DCD#63-19, Chapter 7(D), ECF pp. 60 ff; DCD#103-40.

²⁴R.77|App. 95; R.86|App.99.1.

districts²⁵ and included twenty zoning maps, one for each town.²⁶ Woodboro's zoning map²⁷ reflected its 1997 Land Use Plan²⁸ and continues to reflect it as incorporated into its 2009 Comprehensive Plan. The 1997 Plan provided no location for Plaintiffs' religious land use.²⁹ Statutorily, the OCZSPO took effect in shoreland areas throughout the County's unincorporated areas including part of Plaintiffs' property upon County Board enactment.³⁰ The OCZSPO took effect for non-shoreland areas including part of Plaintiffs' property only upon Woodboro Board's additional approval (5/8/2001 Resolution³¹).

Within each zoning district, three use categories are provided:³²

- (1) Permitted-as-of-right;
- (2) Administrative Review; and
- (3) Conditional.

OCZSPO denominates no "religious camps" use. Instead, Defendants treated

²⁵R.77 | App. 90.1; R.90 | App.637 (§ 9.20).

²⁶DCD#103-3 to 103-22.

²⁷DCD#103-21.

²⁸DCD#63-20.

²⁹DCD#63-19, Chapter 7(D), ECF pp. 60 ff.; DCD#103-40.

³⁰R.90 | App.636(§ 9.12(B))

³¹*Id.*; R.77 | App.90.1; R.87 | App.116; DCD#61-6.

³²R.77 | App.91; R.90 | App.638.

Plaintiffs' year-round Bible camp use as a "recreational camp"³³ which aren't permitted-as-of-right in any zoning district—instead `ed by §§9.25 and 9.28 as administrative review uses *only in zoning Districts 5, "Recreational," and 10, "General Use."*³⁴ Therefore, there is nowhere within Oneida County where Plaintiffs could construct their camp as-of-right.

The camp's easterly lakefront portion is District 2, "Single Family Residential;" the westerly portion abutting U.S. 8 is District 4, "Residential and Farming."³⁵ "Churches" and "schools" are listed conditional uses for various districts, including Districts 2 and 4.³⁶ *None of Woodboro was zoned District 5 or 10* under the zoning map³⁷ included in the OCZSPO adopted by the Town's Board³⁸ and which map was required to and did³⁹ incorporate the Town's own land use map.

³³R.2 | App.76.

³⁴R.77 | App.95; R.90 | App.643-644; R.90 | App.645.

³⁵R.77 | App.95; R.87 | App.117.

³⁶R.77|App.94; R.90|App.641; R.90|App.642. Other listed uses in districts 2 and/or 4 appear at R.77 | App.93.1; R.90 | App.640-641; R90 | App.642-643. The County acknowledged, and substantial evidence was presented, that these permitted uses could've equal or greater impacts to the relevant land use interests at issue. [As admitted by the Defendant County's Seventh Circuit Brief in #13-1274 at p. 52 and at p. 53, footnote 9. *See also*, Plaintiffs' expert report at DCD#132, p. 249, County staff report at DCD#63-51, p. 12; DCD#77-5 at 22, 23; OCZSPO §§ 9.22; 9.24 at Appndx NN | R.90 | App.640-643; and Business-zoned districts at Squash Lake (Appendix OO at App. 652 | R.82), such evidence presented to the Seventh Circuit by Appellants' Brief at pp. 50-51 and 54-58 and by Reply Brief, pp. 42-48 in #13-1274.]

³⁷R.77 | App.95.

³⁸R.77 | App.90.1 (DCD#61-6).

³⁹R.77 | App.92.1.

STATS. §59.69(1). Consequently, year-round Bible camp use is totally excluded from Woodboro.

B) Rezone Effort (2005)

County staff initially advised Plaintiffs during 2005 that rezoning the camp's land to District 5 or 10 was required.⁴⁰ After proceedings before the Town and County,⁴¹ the County on 6/14/2006 expressly informed the Plaintiffs that the rezoning petition filed in December, 2005⁴² was unnecessary and that the camp could accomplish "most or all of its stated objectives" without rezoning by using CUP procedure.⁴³ As noted, Plaintiffs' "stated objectives" were to construct a single principal structure, year-round Bible camp on long-owned family lands in Woodboro. The zoning committee assured Plaintiffs:

there would be no delay, uncertainty or added expense born [sic] by the parties seeking this rezone ...

given that "religious exercise" is allowed on the property with a conditional use permit in the districts that the property is currently zoned .. .

Consequently, the County Board denied rezoning in August, 2006.⁴⁴

C) Conditional Use Permit Phase (2006 - 2009)

⁴⁰R.77 | App.95.

⁴¹R.87 | App.677.

⁴²R.87 | App.117; DCD#63-29.

⁴³R.85 | App.61.

⁴⁴R.77 | App.97; R.87 | App.117.

Plaintiffs then proceeded through the discretionary CUP process--per the County's zoning denial explanation--which required site-specific design submission.⁴⁵ So, during Fall 2006, Petitioners selected an architectural-engineering team.⁴⁶ The County initiated processing Plaintiffs' December, 2006 CUP application.

Contrary to the federal courts' inferences in favor of the defendants (as the moving parties) that the proposed camp's "sheer size"⁴⁷ was unusually "expansive",⁴⁸ it is rather of only average size for year-round Oneida County camps.⁴⁹

Before continuing CUP application processing, County staff required Plaintiffs to procure site-specific permits from State governmental departments including grading, well-water, sanitary system and ingress/egress.⁵⁰ The camp incurred professional services costs approaching \$200,000, successfully procuring⁵¹

⁴⁵R.77 | App.91, 91.1; R.90 | App.646-647; DCD#63-37.

⁴⁶The design is at R.77 | App.90; R.77 | App.97 and as submitted at DCD## 63-38, 63-44 and 63-45. Instead of multiple cabins (*see*, OCZSPO, § 9.25(C)(3) at R.90 | App.644 and fn. 9 | R.77 | App.93, respectively), ECC&CC's design is a single, larger multi-function lodge. R.77 | App.90.

⁴⁷R.86 | App.105.1.

⁴⁸R.87 | App.121.

⁴⁹DCD#63-53, at ECF p.19 of 27, "clearly of average size for a Bible camp"; DCD#103-1; DCD#103, point 3; DCD#102, point 12.

⁵⁰R.77 | App.97.1.

⁵¹R.76 | App.66; DCD##77-23, 77-24, 77-25.

those State governmental permits between Autumn 2006 and late 2008.⁵² The design complied with objective minimum acreage and dimension requirements applicable to Recreation Camps,⁵³ a revised design submitted in May 2009 voluntarily reduced the height to the single family residence 35' limit,⁵⁴ and County staff informed the P&Z Committee favorably of the camp's resolution of all of the staff's "technical concerns."⁵⁵ But at its July meeting, the Committee denied ECC&CC's application, concluding ECC&CC's use wouldn't be "compatible with ... local plans ..."⁵⁶ and found that ECC&CC's use would impair or diminish neighboring properties, despite acknowledging there was "nothing to base" that finding upon.⁵⁷ It ignored WDNR's findings that ECC&CC's Bible camp's design was fully consistent with the statutory requirement of preserving "scenic natural beauty" – in contrast to other uses on Squash Lake, including an apartment complex (its largest building openly perched overlooking the lake), numerous riparian parcels zoned Business, and homes with manicured lawns extending to the lakeshore.⁵⁸

Remarkably, after ECC&CC spent years and \$200,000 following the Committee's direction to pursue a CUP because rezoning wasn't necessary, the

⁵²R.77 | App.97.1; DCD#144-5, pp. 13, 14, Schedule A, Columns O, Q-7.

⁵³R.90 | App.651.

⁵⁴DCD#63-46; DCD#110-4, p. 24, *see*, fn. 13 | R.77 | App.97.1.

⁵⁵DCD#110-4, p.24.

⁵⁶OCZSPO§ 9.42(E)(3) at R.77|App.91.1-92; R.90|App.649.

⁵⁷R.75.

⁵⁸R.91|App.607; R.82|App.652; R.75|App.69.

Committee reversed its position in July, 2009, concluding⁵⁹ that rezoning was necessary after all⁶⁰ and that ECC&CC's Bible camp wasn't compatible with the Town's Land Use Plan.⁶¹

Plaintiffs' BOA appeal was unsuccessful.⁶²

D) District Court Proceeding (2010 - 2013)

Plaintiffs commenced their civil action on 3/10/2010 in District Court (W.D.Wis.).⁶³ Count III raised RLUIPA's⁶⁴ "Substantial Burdens" ground (42 U.S.C. §2000cc(a)).⁶⁵ Count XI raised Wisconsin's state law certiorari review ground.⁶⁶ Count VIII, "Wisconsin Constitution," included various grounds, including the "No Preference" Clause. (SA20).

Defendants each filed summary judgment ("S.J.") motions on all counts.⁶⁷ On 2/2/2013, the District Court granted them S.J. on all counts except for Count XI, "Wis. STATS. §59.694(10) Certiorari Review".⁶⁸

⁵⁹R.75|App.75ff.

⁶⁰Transcript at DCD#110-4, pp. 71-72; *see*, R.75|App.78, point "7."

⁶¹Transcript at DCD#110-4, pp. 63; *see*, R.75|App.77 at "3."

⁶²R.75 | Appendix H.

⁶³DCD#1.

⁶⁴"Religious Land Use and Institutionalized Persons Act of 2000."

⁶⁵Federal question jurisdiction existed per 28 U.S.C. § 1331.

⁶⁶R.86 | App.99.1.

⁶⁷R.77 | App.82; R.86 | App.99.1.

⁶⁸DCD #155; R.77 | Appendix I.

Regarding Count VIII, “Wisconsin Constitution,” the Opinion at p.48 (App. 110.1), after having cited earlier at p. 40 (App. 106.1) to *Coulee Catholic Schools v. LIRC*, 320 Wis.2d 275 (S.Ct. 2009), summarily rejected Plaintiff’s requested relief under the Wisconsin Constitution, concluding that Article I, § 18’s protections aren’t in any way “greater than its federal counterpart, much less RLUIPA’s additional protections.” Yet, *Coulee Catholic Schools* reads:

The protections ...in the Wisconsin Constitution [pertaining to religious liberty] are far more specific. [W]ith regard to the rights of conscience, this clause contains extremely strong language, providing expansive protections for religious liberty. *** [W]e are required to give effect to the more explicit guarantees

The Opinion also ignored Wisconsin Constitution’s “No Preference” clause Plaintiffs pleaded.⁶⁹

Count I⁷⁰ charged Defendants with violating RLUIPA’s “total exclusion” provision⁷¹ by totally excluding year-round religious camps from Woodboro. Plaintiffs pointed out RLUIPA’s rule of construction in favor of “broad protection of religious exercise.” 42 U.S.C. §2000cc-3(g). The District Court’s Opinion, p. 28, however, refused to follow case development (*First Korean Church of New York, Inc. v. Cheltenham Twp. ZHB*) construing RLUIPA’s ban on total exclusion favorably to Plaintiffs.

Count III charged Defendants with violating RLUIPA’s “Substantial Burden” provision (42 U.S.C. §2000cc(a)(1)). The Opinion, p. 37, also rejected that

⁶⁹Appendix QQ.

⁷⁰Appendix CC.

⁷¹42 U.S.C. §2000cc(b)(3)(A).

count, holding that “a substantial burden is one that renders religious exercise ‘effectively impracticable.’”

E) First Appeal:⁷² U.S. Court of Appeals (2013)

The Seventh Circuit affirmed S.J. on 10/30/2013,⁷³ concluding, as a matter of law, with respect to Count III (RLUIPA Substantial Burden), that a jury couldn’t find the foregoing facts imposed a substantial burden on Plaintiffs’ religious exercise⁷⁴ because:

A substantial burden under RLUIPA ‘is one that necessarily bears direct, primary and fundamental responsibility for rendering religious exercise ... effectively impractical.

Its Opinion stated that although it’s undisputed that:

Eagle Cove believes that their religion mandates that the Bible camp must be on the subject property . . . and that they must operate the Bible camp on a year-round basis ... R.87 | App.117.

[i]t is not the land use regulations that create a substantial burden, but rather Eagle Cove’s insistence” that the camp “be placed on the subject property. R.87 | App.121.

It also held that no substantial burden upon Plaintiffs’ religious exercise arose because the Plaintiffs “had the opportunity to seek out other properties” for building their camp outside of Woodboro “but chose not to do so”⁷⁵ despite its finding that Plaintiffs’ forgoing their property’s conversion to religious use in favor of relocating would’ve violated their religious beliefs. Those courts didn’t consider

⁷²DCD#157.

⁷³R.87 | Appendix K | 734 F.3d 673.

⁷⁴R.87 | App.119; R.87 | App.123; R.77 | App.87.1.

⁷⁵R.87 | App.121; R.87 | App.122.

uncontroverted evidence such search would've likely been futile.⁷⁶

Under Count III, RLUIPA "Substantial Burden," the appeals court also held that even if Plaintiffs' religious exercise were substantially burdened, "the County had a *compelling interest*" "in preserving the rural and rustic character of the Town as well as the single-family development around Squash Lake"⁷⁷ ignoring WDNR's finding that ECC&CC's use wouldn't negatively impact aesthetics.⁷⁸

Regarding Count VIII:

Eagle Cove believes that the protection offered under Article 1, § 18 of the Wisconsin Constitution is greater than that offered under federal law. *** Even accepting that Eagle Cove has a sincere belief and that it is burdened by the OCZSPO, the County has demonstrated that it has a compelling state interest in preserving the rural nature around Squash Lake achieved by the least restrictive means possible (a neutral zoning ordinance).

The panel cited to no authority that aesthetic values ever facially rise to the level of a "compelling governmental interest," again ignoring WDNR's no-aesthetic-impact finding.

The appellate panel also ignored the Wisconsin Constitution's "No Preference" clause.

Plaintiffs' rehearing petition was denied 12/10/2013.⁷⁹

F) Concurrent Wisconsin Circuit Court (2014 -2015) & U.S. Supreme Court (2014) Proceedings

⁷⁶As set forth in detail at pp. 19-26 of Seventh Circuit Reply Brief (7th Cir. doc. #33) in #13-1274.

⁷⁷R.87 | App.122.

⁷⁸R.75 | Appendix E at App. 69.

⁷⁹R.87 | App.131.

During pendency of Plaintiffs' Rehearing Petition, they commenced their one-count state court action⁸⁰ for state law certiorari review against the BOA on what was federal Count XI.

After rehearing denial, Plaintiffs 3/13/2014 Petition for Writ of Certiorari (#13-1099) was denied 5/5/2015 (134 S.Ct. 2160).

On 8/29/2014, Plaintiffs filed a Circuit Court Amended Complaint⁸¹ adding fifteen additional counts, each seeking declaratory relief,⁸² grounded in divers provisions of Wisconsin law, various of which grounds hadn't been presented by the federal Amended Complaint and joining the Town and County. Each count's nature is tabularly summarized.⁸³

The Amended Complaint contains express allegations referencing the Wisconsin Constitution's "No Preference" Clause. (SA20)

On 10/2/2014, the Town moved to dismiss the entire action, falsely alleging the District Court "reached the merits of the state law claims and dismissed them on their merits."⁸⁴ In contrast, the County Defendants only moved for partial judgment on the pleadings.⁸⁵ On 10/31/2014, the Town moved for sanctions.⁸⁶

⁸⁰R.1.

⁸¹R.10 | Appendix GG.

⁸²R.10 at p.1.

⁸³Appendix GG, p. 6. Per ¶234, Count IV is misdescribed as being under the "No Preference" Clause .

⁸⁴R.16.

⁸⁵R.21.

⁸⁶Appendix KK.

On 1/23/2015 after complete briefing⁸⁷ and 12/12/2014 oral argument, the Circuit Court denied Woodboro's motions but struck the additional, newly-added state law declaratory counts (Counts II - XVI) on the basis of Claim Preclusion, thereby limiting the Plaintiffs' state court proceeding to its original state law certiorari review count first raised by federal court Count XI.⁸⁸

On 2/13/2015, Plaintiffs sought reconsideration,⁸⁹ arguing⁹⁰ the court had misimposed claim preclusion. After briefing,⁹¹ a 4/22/2015 oral ruling denied that motion.⁹²

Unbeknownst to anyone, the previous day, the Seventh Circuit decided *Schlemm v. Wall*.⁹³ Schlemm alleged infringement of his religious liberty protected by RLUIPA's "substantial burden" provision. Its panel concluded that the court's 2013 panel had applied an incorrect standard in affirming S.J. in *Eagle Cove*. Shepard's case citator reported the 2013 ECC&CC Opinion as "Overruled in part as stated in *Schlemm v. Wall*"⁹⁴

In granting Defendants S.J. on ten counts, the District Court had written:

⁸⁷Including Plaintiffs' submission of "Corrected Combined Response" filed by leave granted 12/12/2014 (R##45;46) to the twin Motions to Dismiss.

⁸⁸R.48 | Appendix C.

⁸⁹R.49.

⁹⁰R.50.

⁹¹R.55; R.56, R.57.

⁹²Appendix O.

⁹³R.88 | 784 F.3d 362 (7th Cir. 4/21/2015).

⁹⁴R.59 | pp.8-9.

The court has no reason to doubt plaintiffs', and particularly the Jaros brothers', sincere belief that they have been called to build a Bible camp on the land in issue - and is aware of the years, talents and money spent, as well as dedication shown, in pursuit of that belief. Patently obvious is this court's inability to discern whether plaintiffs' utter lack of success to date is God's way of telling them -- through admittedly-imperfect, secular institutions --to look elsewhere for a more acceptable location. Ultimately, only God knows if they should continue to knock at this particular door or look for an open window somewhere else. What appears substantially more certain ... is that plaintiffs have *no right to relief under RLUIPA*, the U.S. Constitution *or the Wisconsin Constitution*. R.77 | App.87.1.

Plaintiffs on 5/13/2015 dispatched their Renewed Motion for Reconsideration⁹⁵ and supporting memorandum⁹⁶ that referenced the *Schlemm* development and apprising the Circuit Court of their federal court filing described in H), *infra*. The Renewed Motion was continued generally.

- G) District Court Motions for Relief re: S.J. on Federal Count III, RLUIPA Substantial Burden (2015 - 2016)

Plaintiffs contemporaneously filed their F.R.Civ.P. 54(b) and 60(b)(6) Motion for Relief⁹⁷ from S.J. on Count III, seeking vacatur thereof. On 6/13/2015, Plaintiffs filed their Supplemental F.R.Civ.P. 60(b)(5) Motion.⁹⁸ On 8/11/2016, the District Court denied those motions.⁹⁹

- H) Second Appeal: U.S. Court of Appeals (2016 - 2017) & U.S. Supreme Court (2017)

On 1/25/2017, the Seventh Circuit summarily affirmed the foregoing

⁹⁵R.58.

⁹⁶R.59.

⁹⁷R.94.

⁹⁸R.95.

⁹⁹Appendix L.

denial.¹⁰⁰ Petition for Rehearing was denied 2/27/2017. Plaintiffs Petition for Writ of Certiorari¹⁰¹ was denied 10/2/2017.¹⁰²

I) Reactivation of Circuit Court Proceeding (2017 - 2018)

On 11/22/2017, the Circuit Court permitted submission of Plaintiff's Amended and Updated Memorandum¹⁰³ supporting their still-pending Renewed Motion for Reconsideration. It explained that, notwithstanding the federal courts' refusal to vacate the Count III S.J., Plaintiffs should be granted relief under Wisconsin law *from the prospective preclusive effect of that judgment* found to exist by the 1/23/2015 ruling. Additional briefing ensued.¹⁰⁴ By 2/21/2018 oral ruling,¹⁰⁵ the court denied the Renewed Motion for Reconsideration; a Judgment¹⁰⁶ was filed 4/4/2018 in the Town's and County's favor, dismissing them and leaving only the BOA as party-defendant.

J) Appeal to the Wisconsin Court of Appeals ("WCA") (2018 - 2019)

Notice of Appeal was filed 5/15/2018.¹⁰⁷ Woodboro cross-appealed denial of its sanctions motion.

¹⁰⁰Appendix M.

¹⁰¹R.80&79.

¹⁰²138 S.Ct. 129.

¹⁰³R#84 including Exhibit A being the 2017 U.S. Supreme Court Petition for Writ of Certiorari in #16-1444 (R.80&R.79 and its Appendix and Exhibit B (R.81) being the Shepard's federal case Citation Report.

¹⁰⁴R.98-100.

¹⁰⁵R.124 | Appendix P.

¹⁰⁶R.107 | Appendix R.

¹⁰⁷R.110.

On 11/19/2019, after declining oral argument (Appendix PP), the Decision at Appendix B was rendered denying the Plaintiffs-Appellants relief but, with respect to Woodboro's Cross-Appeal, imposing sanctions against Plaintiffs-Appellants for Woodboro's defense expenses at both court levels on a 4-prong *sua sponte* analysis--presented by Woodboro neither to the Circuit Court in its motion for sanctions nor to the WCA in its briefing--and thereby reversing and remanding the sanctions denial. Plaintiffs-Appellants' 12/9/2019 Motion for Reconsideration was denied on 12/12/2019.¹⁰⁸

K) Appeal to the Wisconsin Supreme Court (2020)

On January 13, 2020, Petitioners timely filed their WIS.STAT. 809.62 Petition for Review with the Wisconsin Supreme Court. That Petition was denied without comment on June 16, 2020.¹⁰⁹

L) On Remand to the Oneida County Circuit Court (2020)

On September 21, 2020, after having been advised of the Plaintiffs-Petitioners' intent to petition this court for a writ of certiorari, the Circuit Court entered money judgment pursuant to the Court of Appeals' remand in the amount of \$33,096.22.¹¹⁰ The Judgment states in relevant part:

The Court grants judgment to the Town of Woodboro for attorneys' fees and costs reasonably incurred by the Town for August 2020 in this action, and for any appeal or further litigation of the claims made by plaintiffs in this action. (App. 606)

M) U.S. Supreme Court Rule 14(1)(g)(i) Required Demonstration of the Raising

¹⁰⁸Appendix Q.

¹⁰⁹Appendix A.

¹¹⁰Appendix LL.

of Federal Grounds in the Wisconsin State Courts Below

1) The federal question pertaining the lack of Claim Preclusion as provided by F.R.Civ.P. 54(b), last sentence, was raised below as follows:

- a) in the Oneida County Circuit Court on February 13, 2015 and May 14, 2015 as set forth in Appendix S.
- b) in the Wisconsin Court of Appeals on November 20, 2018 and December 9, 2019 as set forth in Appendix T ; and
- c) in the Wisconsin Supreme Court on January 13, 2020 as set forth in Appendix U.

2) The federal constitutional question pertaining to denial to Petitioners by Wisconsin judicial action of their right to Equal Protection of the Laws in the context of F.R.Civ.P. 54(b) was raised below as follows:

- a) in the Oneida County Circuit Court on February 16, 2018 as set forth in Appendix V;
- b) in the Wisconsin Court of Appeals on July 23, 2018 and November 20, 2018 as set forth in Appendix W; and
- c) in the Wisconsin Supreme Court on January 13, 2020 as set forth in Appendix X.

3) The federal constitutional question pertaining to the deprivation of Petitioners' property through the imposition of sanctions by the Wisconsin Court of Appeals without affording procedural due process of law and that was let stand by the Wisconsin Supreme Court was raised below as follows:

- a) in the Wisconsin Court of Appeals on December 9, 2019 as set forth in Appendix Y; and

- b) in the Wisconsin Supreme Court on January 13, 2020 as set forth in Appendix Z.

4) The federal constitutional question pertaining to a denial-of-procedural-due-process violation in the deprivation of Petitioners' liberty interest in, and right to, fair state appellate adjudicative process by the Wisconsin Court of Appeals through its arbitrary and capricious failure to even mention or ever address substantial appellate arguments adduced by Petitioners in their appeal as of right accompanied by that Court's denial of Petitioner's statutory right to be heard at oral argument and which denial and deprivation were let stand by the Wisconsin Supreme Court was raised below as follows:

- a) in the Wisconsin Court of Appeals on December 9, 2019 as set forth in Appendix AA; and
- b) in the Wisconsin Supreme Court on January 13, 2020 as set forth in Appendix BB.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Introduction

As set forth in their two previous Petitions to the Honorable Court for Writs of Certiorari (#13-1099 and #16-1444) and as again set forth in the instant Statement of the Case, the Eagle Cove Plaintiffs-Petitioners began their 15-year long effort to convert their long-owned family riparian lands to religious use beginning in 2005. Conversion to religious use is supposed to be within the rubric of the Religious Land Use & Institutionalized Persons Act of 2000¹¹¹ and that Act is supposed to be “construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.”¹¹² But their efforts have met with utter hostility--perhaps unparalleled since RLUIPA’s adoption during 2000-- in a secularized America that is frequently hostile toward religion and especially the Christian religion--from the elected officials of Oneida County and the Town of Woodboro, Wisconsin, from the lower federal courts, and from the Wisconsin courts of review.

- As recounted in the Statement of the Case at pp. 9-12, *supra*, Oneida County put Eagle Cove through a multi-year “chase-your-tail” run-around that cost Eagle Cove hundreds of thousands of dollars of development costs to utterly no avail after having been assured that “most or all of its stated objectives”—to build and operate a year-round Bible camp featuring one principal structure--could be accomplished with “no delay, uncertainty or added expense” without the necessity of

¹¹¹42 U.S.C. §2000cc-5(7)(B).

¹¹²42 U.S.C. 2000cc-3(g).

rezoning simply by using Conditional Use Permit (“CUP”) procedure.¹¹³

- The federal District Court then proceeded to grant the defendant governments summary judgment on all federal grounds, construing RLUIPA as narrowly as possible including employing the “effectively impracticable” standard (at App. 103.1) to establish “substantial burden” on religious exercise and drawing inferences in favor of the moving defendants instead of against them. (App. 104-105)
- In the course of the ruling, the District Judge engaged in theological discourse as to what God may have had in mind for the Plaintiffs. (App. 87.1)
- The District Judge also referenced a leading Wisconsin Supreme Court case that stands for the proposition that Wisconsin’s constitutional protections for free exercise of religion are greater than those afforded by the U.S. Constitution but instead concluded exactly the opposite, namely, that Wisconsin’s protections of religious liberty are no different than under federal law. (App. 106.1; 110.1)
- The Eagle Cove Plaintiffs expressly pleaded in both their federal and state court Complaints the Wisconsin constitutional provision that forbids governments from preferring one more of worship or one type of religious establishment over another. (Appendix QQ) Every court, federal and state, has refused to discuss this provision and instead rested on the proposition that Plaintiffs could have succeeded if only they would settle for a “church” or “school” rather than a “Bible camp.”
- The Seventh Circuit Court of Appeals affirmed the grant of summary judgment in favor of the Defendants on the *sua sponte* and shocking basis that the local governments were merely applying “facially neutral zoning regulations” (App.

¹¹³R.85 | App.61.

121) without that Court realizing that RLUIPA was purposefully enacted to override this Court's precedent in *Employment Division v. Smith*, 494 U.S. 872 (1990), in the two areas covered by the Act: religious land use and the religious rights of institutionalized persons.

- Even more shocking, the Seventh Circuit also blamed Eagle Cove's own admittedly sincere religious faith for creating the burden on its own religious exercise! (p. 14, *supra*)

- Then, one and one-half years after the Seventh Circuit Court of Appeals had affirmed the District Court's grant of summary judgment against the Eagle Cove plaintiffs in Fall, 2013, it acknowledged in an unrelated Spring, 2015 religious liberties case also under RLUIPA that it should not have employed the "effectively impracticable" standard against Eagle Cove. (p. 17, *supra*)

- With the Eagle Cove case still pending in state court on matters left unadjudicated by the federal District Court, Eagle Cove sought relief from the federal summary judgment ruling against it on the basis that the Seventh Circuit had, itself, announced its abrogation. Yet, the District Court and Seventh Circuit both refused to vacate the grant of summary judgment in favor of the defendant governments on Eagle Cove's RLUIPA Substantial Burden count. (pp. 18-19, *supra*)

- In the Wisconsin state court system, Plaintiffs have been precluded from proceeding against the County and Town based on the imposition of "claim preclusion" even though there has never been and still has not been a complete adjudication of all of the rights and liabilities of all of the parties. (pp. 16-19, *supra*)

- To cap matters off, the Town of Woodboro sought sanctions against Eagle Cove for Eagle Cove's carefully supported and highly detailed arguments as to why

claim preclusion can not be properly interposed. The Circuit Court properly denied sanctions. (p. 16, *supra*) But on Woodboro's appeal of the denial of sanctions to the Wisconsin Court of Appeals (p. 19, *supra*), that Court without warning to Eagle Cove developed, *sua sponte*, a faulty four-prong analysis that it used to reverse the denial of sanctions on grounds never asserted by Woodboro in its sanctions motion. (p. 19-20, *supra*) As a result, Eagle Cove has now suffered a greater than \$30,000 penal sanction in its effort to practice its sincerely held religious beliefs. (p. 20, *supra*)

- On top of this, the state trial court has now shockingly promised to impose a further penal sanction on Eagle Cove for prosecuting this Petition irrespective of the merit of its content. (p. 20, *supra*)

The longsuffering Eagle Cove Plaintiffs-Petitioners now throw themselves on the mercy of our nation's highest court with the fervent hope that their cherished constitutional right to practice their religious faith in the form of a Bible camp, free from government harassment and intimidation, will at last be protected.

- I) **Wisconsin's Courts of Review Deprived Petitioners of their Property Without Affording Procedural Due Process of Law in Reversing, Without Prior Notice or Opportunity for Petitioners to Be Heard--that Included Unlawful Dispensing With of Oral Argument-- the Circuit Court's Denial of Woodboro's Sanctions Motion on Grounds Not Raised in Woodboro's Circuit Court Sanctions Motion and in Resting the Reversal on a Four-Prong *Sua Sponte* Analysis Not Briefed in the Parties' Appellate Briefs and Where Such Four-Prong Analysis Was Plainly Erroneous.**

Woodboro's Circuit Court sanctions motion (Appendix KK) was based solely on its argument that Petitioners' arguments opposing claim preclusion were

meritless in that either claim preclusion (App. 600 - App. 601) or finding-of-fact-based issue preclusion (App. 601 - App. 602) principles were applicable. However, Woodboro's sanctions motion did not allege that Woodboro was an improper party to be joined where the state court Amended Complaint (Appendix GG): (i) charged Woodboro with adoption¹¹⁴ of a zoning ordinance that was constitutionally infirm on its face¹¹⁵ which negatively impacted Eagle Cove's ability to develop its camp; and (ii) sought declaratory relief on account of such facial infirmities.¹¹⁶ The Circuit Court disagreed with Woodboro's effort to sanction the Eagle Cove Plaintiffs, making multiple express findings.¹¹⁷

Woodboro's cross-appeal from the denial of sanctions asserted the same (and no other) grounds in its brief (Appendix II) except to now note at App. 506 that the Seventh Circuit U.S. Court of Appeals, in its discussion of conditional use permits, had correctly stated that "the County, not Woodboro, exercises jurisdiction." Any significance--in regards Woodboro's Circuit Court sanctions effort--of its observation was rebutted by Eagle Cove.¹¹⁸

The Wisconsin Court of Appeals' Decision didn't reverse the Circuit Court's *findings*, stating:

... the circuit court found that some of Eagle Cove's argument for

¹¹⁴ App. 370, ¶74.

¹¹⁵ App. 399 (Count II); App. 403 (Count III); App. 404 (Count IV); App. 405 (Counts V and VI); App. 406 (Counts VII and VIII); App. 410 (Count XII); App. 411 (Counts XIII and XIV).

¹¹⁶ App. 415-416, Prayers iv and v.

¹¹⁷ Appendix C, pp. 12-14.

¹¹⁸ Appendix JJ at App 567, last paragraph, through App. 571.

avoiding claim preclusion arguably demonstrated good faith ...

(Decision ¶74 at App. 40)

But the Decision then reversed and remanded the sanctions denial under STATS. §895.055(2)(b), irrespective of the content of Woodboro's Circuit Court sanctions motion, by engaging--after refusing to afford the oral argument mandated by WIS. STATS. §809.22(2)--in a four-part unbriefed *sua sponte* analysis provoked by Woodboro's comment.

However, notice and hearing are basic elements of the constitutional requirement of due process of law. *Powell v. Alabama*, 287 U.S. 45 (1932).

Moreover:

Appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.
(*Jefferson v. Upton*, 560 U.S. 284 at 301, Scalia, J., dissenting).

As is now explained, the *sua sponte* determination of the Wisconsin Court of Appeals as let stand by the Wisconsin Supreme Court are in conflict the requirements of procedural due process of law per *Powell v. Alabama*.

Picking up on that brief comment of Woodboro's, the Court of Appeals wrote:

Even aside from the applicability of claim preclusion, it should have been obvious to Eagle Cove that the Town had no authority over the land use decisions that thwarted its desired Bible camp. (App. 40)

The Court of Appeals' four-prong *sua sponte* justifying analysis was as follows.

Prong A) "Although Eagle Cove notes the Town did approve the County zoning ordinance with respect to the non-shoreland areas, Eagle Cove does not argue the Town had any authority to grant or deny its rezoning or

CUP applications.” (fn. 24, last paragraph, at App. 40);

- Prong B) “Alternatively, Eagle Cove suggests the County was a mere instrumentality of the Town because the County was required to adopt the Town’s land use plan under Wis. Stat. §59.69(1). The subsection discussing the relationship between a county’s development plan and a town’s master plan is §59.69(3)(b), not subsec. (1), and it states a county’s development plan must incorporate a town’s master plan only in counties [unlike Oneida County] with a population of at least 485,000.” (App. 40)
- Prong C At Decision ¶73 at App. 39, it was noted that the Seventh Circuit U.S. Court of Appeals had found that “Woodboro chose to be subordinate to Oneida’s zoning ordinance, and thereby *relinquished* its jurisdiction over land use regulations to the County.” (emph. added)
- Prong D At Decision ¶74, fn. 24, first paragraph, “... the Seventh Circuit’s decision does not mention any unique attributes of an as-applied challenge; rather the court noted that “Eagle Cove’s ‘total exclusion’¹¹⁹ argument ‘was predicated, and in fact depends, on the assumption that Woodboro has jurisdiction to implement land use regulations on the subject property.’ *** the court ... flatly rejected that contention. *** Eagle Cove fails to explain why any arguable distinction between its as-applied and facial challenges makes a difference as to the issue of the Town’s land use authority.”

Each prong ((A)-(D)) of the Court of Appeals’ *sua sponte* analysis was erroneous and/or irrelevant, was never briefed, and was addressed by Point H of Petitioners’ Motion to Reconsider (App. 239). The Court of Appeals denied Petitioners any opportunity, including by its dispensing with oral argument, to address its erroneous thought processes and concepts that were privately being formulated.

Specifically, the Court of Appeals’ *sua sponte* analysis erred as follows.

- Prong A) Ground A is correct but irrelevant. Referring to WIS. STATS. §59.69(5)(c) and/or (d) relied upon by the Plaintiffs, the Seventh Circuit also wrote: “In this case, Woodboro *was able to exercise its*

¹¹⁹RLUIPA-based per Appendix CC, Count I, p. 47.

jurisdiction in approving the OCZSPO. ‘A county ordinance enacted under this section shall not be effective in any town until it has been approved by the town board.’ ” 734 F.3d at 680. The “land use decision” by Woodboro complained of by Plaintiffs (Appendix 12, ¶¶55, 68-74) was Woodboro’s very approval of the OCZSPO including its exclusionary zoning map responsible for the complete exclusion of year round Bible Camps from the whole town. This was the basis of the facial challenges noted above under Wisconsin law against the OCZSPO that was adopted by both the County and Town. Thus, the Decision’s statement that the “Town had no authority over the land use decisions that thwarted its desired Bible camp” is palpably erroneous. But for Woodboro’s adoption action, the OCZSPO wouldn’t have been applicable to bar development of a year round Bible camp on ECC&CC’s non-shoreland land. Because facial invalidation of the OCZSPO including its zoning map challenged both County and Town approval actions, Petitioners did not wrongly join Woodboro as a interested party.

Prong B) The Decision is hyperbolically inaccurate in attributing to Petitioners the position that the County is the Town’s “mere instrumentality.” More importantly, footnote 24’s second paragraph at App. 40 incorrectly reasons, *sua sponte*, that WIS. STATS. 59.69(3)(b) -- not 59.69(1) -- is the relevant statute. The Court of Appeals *sua sponte* reference to a county’s “development plan” was *dehors* the record so,

contrary to the Decision's discussion, §59.69(3)(b) was wholly inapposite, not merely populationally inapplicable. §59.69(1)'s text unquoted by the Wisconsin Court of Appeals reads:

[the county's] board may plan for the physical development¹²⁰ and zoning¹²¹ ... as set forth in this section and shall incorporate therein ... the official map of any ... village

It was undisputed¹²² Woodboro exercised village powers in adopting its own official map that, when incorporated into the county's zoning ordinance, facially barred Appellants' religious use from the entire Town and that the declaratory relief sought by the Amended Complaint was to facially invalidate¹²³ the zoning scheme based upon the exclusionary map.¹²⁴

Prong C) As just noted in Ground A), the Seventh Circuit also expressly wrote: "In this case, Woodboro was able to exercise its jurisdiction in approving the OCZSPO." In incompletely quoting the Seventh Circuit Opinion, the Decision failed to consider the importance of the word "relinquished" that the Seventh Circuit employed. That is, Woodboro did exercise land use authority in adopting the

¹²⁰§59.69(3).

¹²¹§59.69(5) exercised by Oneida County.

¹²²App. 368-370, ¶¶66-74.

¹²³Appendix GG's Counts II-VI, VIII, XII-XIV.

¹²⁴Petitioners have a good faith argument that "the official map of any ... village." includes the official map adopted by a town that has been granted and is exercising village powers.

OCZSPO—the very action complained of by Plaintiffs—but in doing so “relinquished” certain as-applied powers to the County (e.g. CUP approval) on a going-forward basis. Thus, the sentence quoted by the Decision was not relevant.

Prong D) First, the Decision’s reference to the Seventh Circuit’s view of Woodboro’s authority with respect to the operation of RLUIPA’s ban on total exclusion is irrelevant to the facial challenges to total exclusion made by the Amended Complaint *based on the unique provisions of Wisconsin law*.¹²⁵ Second, the Decision errs in alleging that the Seventh Circuit’s decision doesn’t mention any unique attributes of an as-applied challenge; to the contrary, the Seventh Circuit, rightly or wrongly, considered the RLUIPA Total Exclusion challenge to be viable only as an “as-applied” challenge as evidenced by its discussion at length of the Town’s lack of authority over CUP applications (734 F.3d at 680).¹²⁶

Therefore, the Decision erred in concluding *sua sponte* that Woodboro “had no authority over the land use decisions that thwarted its desired Bible camp.”

The Decision at ¶72 (App. 39) also points to the mandatory “shall” language

¹²⁵ Appellants’ (opening) Wisconsin Court of Appeals Brief (Appendix HH), App. 458-459.

¹²⁶ The Seventh Circuit also imprecisely stated Wisconsin law: “Whether or not the town approves a *change in zoning* is merely one of the factors considered by the County in making its determination.” Contrariwise, STATS. 59.69(5)(e)(3), (3m) and (6) grants to towns absolute veto power over a zoning change favored by a county. Petitioners also provided authority to the Wisconsin Court of Appeals at Appellants’ (opening) Brief, Appendix HH, p. 42 that Wisconsin courts aren’t bound by erroneous pronouncements of Wisconsin law by the federal courts.

of STATS. 895.044(2)(b) to reverse the sanctions denial but ignores STATS. 895.044(1)'s permissive "may" language. The Decision doesn't consider that §895.044(2)(b)'s "shall" only applies "Upon either party's motion made at any time during the proceeding... ." The Decision nonsensically without authority assumes that the motion's content (i.e., grounds) are irrelevant such that a court can impose sanctions *sua sponte* without notice and opportunity for the Cross-Respondent to defend against grounds outside the sanctions motion.

But, notice and hearing are basic elements of the constitutional requirement of due process of law. *Powell v. Alabama*, 287 U.S. 45 (1932).

Moreover, the Wisconsin Court of Appeals could have raised its own grounds at oral argument thereby comporting with the requirements of procedural due process of law.¹²⁷ Instead, by violating the "only if" requirement of STATS. 809.22(2), it unlawfully denied¹²⁸ Cross-Respondents notice and opportunity to be heard at oral argument. To wit:

- (1) §809.22(2)(a)(1) and (2) weren't satisfied because Woodboro's arguments as the [cross] "appellant" weren't found to be violative of either;
- (2) §809.22(2)(a)(3) wasn't satisfied because the sanctions issue didn't involve questions of fact; and
- (3) §809.22(2)(b) wasn't satisfied because the WCA's resort to unbriefed *sua sponte* grounds to impose sanctions proves the briefs didn't fully

¹²⁷U.S. Constitution, Amendment Fourteen, §1.

¹²⁸3/5/2019 Notice (Appendix PP at App. 653).

develop the “theories and legal authorities” over Woodboro’s “issue on appeal,” namely, the sanctions denial.

In fact, what the Wisconsin Court of Appeals did was to impose both sanctions for services of Woodboro’s attorneys at both the Circuit Court (Decision, ¶75 at App. 41) and appellate (Decision, ¶76 at App. 41) levels on its own theories noted above. Imposition of sanctions by a court on its own initiative is governed by STATS. 802.05(3)(a)(2) that requires the court to afford the proposed “sanction-ee” to show cause why he shouldn’t be sanctioned. If it be thought that unilateral sanctions for appellate level services is authorized by STATS. 895.044(5), Petitioners maintain:

1) §895.044(5) must be read in *pari materia* with §802.05(3)(a)(2)’s requirement of opportunity to defend and be heard; or

2) else, §895.044(5)--as applied to a case, as here, where no sanctions motion was filed in the Court of Appeals, where the Circuit Court sanctions motion didn’t assert grounds raised *sua sponte* by the reviewing court, and where oral argument wasn’t afforded, then §895.044(5) – constitutes an unconstitutional taking of Petitioners’ liberty and/or property without the affording of procedural due process.

II) The Court of Appeals Erred in Holding *sua sponte* at Decision, ¶27, that Wisconsin law, rather than federal law, governs the claim preclusive effect of the dispositive ruling(s) of a federal court made with respect to the same transactional claim.

The Wisconsin Court of Appeals’ Decision (Appendix B) ignored argument at Appellants’ Combined Brief (Appendix JJ) at p. 2 including footnotes 5 and 6 that demonstrated federal law governs the preclusive effect of a federal court ruling on

the merits. Restatement 2d of Judgments, §87 provides that:

Federal law determines the effects under the rules of *res judicata* of a judgment of a federal court.

F.R.Civ.P. 54(b), in turn, provides in relevant part:

[A]ny order or other decision ... that adjudicates fewer than all ... the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the *entry of a judgment adjudicating ... all the parties' rights and liabilities*. (emph. added)

The federal District Court expressly determined not to adjudicate all of the parties rights and liabilities (App. 111; App. 112) and therefore its rulings--particularly those that erroneously and egregiously misstated Wisconsin's heightened constitutional protections¹²⁹ for, and of, the free exercise of religion--didn't have preclusive effect per F.R.Civ.P. 54(b). The dismissal without prejudice of the Wisconsin state law certiorari count didn't constitute an adjudication of all the parties' rights and liabilities. In holding to the contrary, Wisconsin's reviewing court are in conflict with *Blair v. Cleveland Twist Drill*, 197 F.2d 842 at 845 (7th Cir. 1952) referenced at Appellants' Combined Brief, p.2, fn. 5 at App. 537.

The Wisconsin Court of Appeals' error in rejecting the supremacy of federal law concerning the preclusive effect of federal court judgments was pointed out at the top of p. 3 of the Motion to Reconsider (App. 212) which was inexplicably denied without analysis. The Decision's *sua sponte* "cf." reference to *Wisconsin Pub. Serv. Corp. v. Arby Constr., Inc.* is inapposite; that case dealt with rulings of a federal court exercising diversity-of-citizenship jurisdiction (2012 WI 87 at *P30) not, as

¹²⁹Compare text of *Coulee Catholic Schools v. LIRC*, 2009 WI 88 at *60 re: greater Wisconsin constitutional free exercise protection with the District Court's reference to it at p. 40 and its disregard of Coulee's heightened protections at p. 48.

here, federal question jurisdiction involving merits rulings under RLUIPA and the U.S. Constitution.

The refusal of Wisconsin's courts of review to recognize the supremacy of federal law and to address and/or apply F.R.Civ.P. 54(b) led the court below to the incorrect imposition of claim preclusion that has sorely abridged Eagle Cove's religious liberties by thwarting development of its Bible camp.

III) In Light of a Change in Federal Case Law Directly Applicable to the District Court Outcome, the Courts Below Denied the Plaintiffs-Petitioners Equal Protection of the Laws by Allowing a Continuing Restraint on Their Religious Exercise to Stand While Prohibiting the Same Restraint from All Future Similarly Situated Land Use Applicants Within Woodboro.

The Seventh Circuit U.S. Court of Appeals acknowledged in *Schlemm v. Wall*, 784 F.3d 362 at 364 (2015) that it had misapplied RLUIPA's definition of "substantial burden" in imposing the "effectively impracticable" standard against Eagle Cove and that, applying the correct standard, it would have reversed, instead of affirming, the District Court's grant to the Eagle Cove defendants of summary judgment on federal Count III, "RLUIPA Substantial Burden." The Wisconsin state courts below imposed claim preclusion, notwithstanding the abrogation of the holding in Eagle Cove by the Seventh Circuit itself, on the Eagle Cove plaintiffs as they continued to press their never fully adjudicated case in the state court system.

Petitioners set forth their argument based upon the equal protection texts of the U.S. and Wisconsin Constitutions as their Argument I(C) at Appellants' (opening) Brief, pp. 35-37 and at Appellants' Combined Brief, p. 13. In short, any other post-*Schlemm* Bible camp applicants in the Town of Woodboro presenting the same religious camp development plan would be governed by the religious liberties-

protective *Schlemm* outcome but the Eagle Cove plaintiffs are subjected to preclusive effect of erroneous, liberties-restrictive and now-abrogated federal court rulings issued in 2013 pre-*Schlemm*. This disparate treatment of persons within the same class of religious organizations presents an important question of federal law involving federal-state judicial comity that has not been, but should be, settled by this Court, namely:

- Where some but not all of a plaintiff's rights are adjudicated on the merits in a federal court forum but the action as to the remaining alleged rights are dismissed without prejudice in favor of continuing the action in a state court forum; and

- Where, while the action is being maintained by the plaintiff in the state court forum on rights unadjudicated in the federal forum, the federal adjudication is abrogated in whole or in part, without being reversed, by the federal courts as having been erroneously made;

- Then, is the plaintiff prospectively bound by preclusive effect of the erroneous, abrogated federal adjudication while all other persons similarly-situated are not so bound?

The Wisconsin Court of Appeals declined to accept the equal protection argument on the bases that: it was "difficult to comprehend"; the continuing disparate restraint on religious liberty was merely "hypothetical"; and "finality" would be undermined. Its Decision prejudiced the Eagle Cove plaintiffs by preventing them from proceeding for relief against the defendants County and Town; the Wisconsin Court of Appeals never considered that the federal proceeding did not provide finality—a core requirement for claim preclusion to have any *prima*

facie applicability--but instead expressly reserved to Plaintiffs the right to proceed in Wisconsin's Circuit Court.

- IV) By Dispensing with Oral Argument contrary to STATS. 809.22(2), by an Unreasoned Summary Denial of a Motion for Reconsideration, and by Refusing to Address Issues and Arguments Raised on an Appeal as of Right, the Court of Appeals Denied Petitioners their Liberty Interest in and to Fair Adjudicative Process and/or in and to Free Exercise of their Religion Without Affording them Procedural Due Process of Law.

Although state governments aren't constitutionally required to provide for appellate review,¹³⁰ when a choice to provide it is made, then adjudicative state action of the reviewing courts is subject to constitutional protections of due process and equal protection. *M.L.B. v. S.L.J.*, 519 U.S. 102 at 110 (1996)

Petitioners appealed to the Wisconsin Court of Appeals "as of right" per WIS. STAT. 808.03(1); the appeal brought before that court all judgments, orders and ruling "adverse to the appellant." WIS. STATS. 809.10(4).

If that court had issued a four word "Decision" reading: "Plaintiffs-Appellants' appeal is denied," could there be any doubt Plaintiffs would've been denied meaningful appellate review and that such conduct would constitute arbitrary state action that did not comport with the requirements of procedural due process of law?

The Wisconsin Court of Appeals' Decision failed and that court, in inexplicably denying Eagle Cove's Motion to Reconsider, refused to even mention and therefore address the following issues and arguments raised by the Petitioners'

¹³⁰Contrariwise, "availability of judicial review" is one of eleven essential due process elements. (Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 at 1279-1295 (1975)).

Appeal as of Right:

- 1) Their argument¹³¹ from *Parks* and Restatement §25;
- 2) Their argument¹³² that, even if Claim Preclusion had *prima facie* applicability, an additional exception prohibits its imposition to the extent imposition constitutes a “Continuing Restraint” on Plaintiffs’ religious liberties exercise.
- 3) Their argument¹³³ that the Circuit Court made an erroneous finding regarding what Plaintiffs would never litigate.
- 4) Their argument¹³⁴ that the District Court outcome didn’t yield a coherent disposition such that Claim Preclusion shouldn’t be imposed per Restatement §26(1)(f).¹³⁵

Moreover, notice and hearing are basic elements of the constitutional requirement of due process of law. *Powell v. Alabama*, 287 U.S. 45 (1932). Imposition of sanctions (Argument I, *supra*) on grounds raised *sua sponte* without benefit of oral argument and/or compliance with STATS. 802.05(3)(a)(2)– either of which procedures could’ve afforded Cross-Respondents due process– coupled with

¹³¹ App. 457-459.

¹³² Argument I(B)(3) at Appellants’ (opening) Brief, pp.30-31 (App. 459-460); Appellants’ Combined Brief, p. 9 (App. 544); Motion to Reconsider, Point F (App. 256).

¹³³ Argument III at Appellants’ (opening) Brief, pp. 45-47 (App. 474-476); Motion to Reconsider, Point G (App. 256).

¹³⁴ Argument I(B)(4) at Appellants’ (opening) Brief, pp. 31-32 (App. 460-461); Appellant’s Combined Brief, pp. 9-10 (App. 544-545).

¹³⁵ Decision, ¶60, p. 31 (App. 33) incorrectly posits, without reasons, that the §26(1)(f) argument is “merely duplicative.”

an unreasoned, arbitrary denial of Reconsideration Point H—denied the Petitioners procedural due process of law and conflicts with the requirements of *Powell v. Alabama*.

CONCLUSION

As set forth herein, the decision of the Wisconsin Court of Appeals below as let stand by the Wisconsin Supreme Court contravenes important constitutional precepts of procedural due process of law and of equal protection of the laws.

Accordingly, the Court should grant a writ of certiorari to review and reverse the Order of the Wisconsin Supreme Court that declined to review the federal issues raised by the Decision of the Wisconsin Court of Appeals, and remand the matter to the Wisconsin Supreme Court with instructions that it reverse the Decision of the Wisconsin Court of Appeals with respect to the federal issues raised including the Court of Appeals' imposition of sanctions against the Petitioners and with such other relief as is fair and just in the circumstances.

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