



## 2023 Enrolled Joint Resolution 11

A proposed constitutional amendment on the freedom to gather in places of worship during a state of emergency

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## Introduction

The 2023 Wisconsin Legislature adopted on first consideration [2023 Senate Joint Resolution 54](#), published as 2023 Enrolled Joint Resolution 11, which would amend the Wisconsin Constitution to prohibit the state or any political subdivision of the state from ordering the closure of or forbidding gatherings in places of worship in response to a state of emergency. The proposal is now eligible for second consideration by the 2025 Wisconsin Legislature.

Legislative passage of a constitutional amendment on first consideration is the first step in the process of amending the constitution. Under Wis. Const. art. XII, § 1, amendments to the constitution must be adopted by two successive legislatures and then ratified by the voters in a statewide referendum.<sup>1</sup> On first consideration, a proposed amendment to the constitution is offered as a joint resolution in either the assembly or the senate. A joint resolution, unlike a bill, need not be submitted to the governor for approval, but must pass both houses in identical form to be effective. If the assembly and the senate both adopt the joint resolution, the Legislative Reference Bureau must publish the proposed constitutional amendment on the Internet, no later than August 1 preceding the next general election.<sup>2</sup>

In the next succeeding legislature, the proposed amendment may be offered on second consideration. Once again, the proposal takes the form of a joint resolution and may be offered in either the assembly or the senate. A second consideration joint resolution proposes the identical amendment that was proposed by the first consideration joint resolution and also specifies the date of the election at which the proposed amendment will be submitted to the voters and the wording of the question that will appear on the ballot. If the assembly and the senate both adopt the joint resolution without making changes to the proposed amendment, the proposed amendment is submitted to the voters. If voters ratify the amendment, the constitution is amended.

## Current law

Wis. Const. art. I, § 18, establishes the freedom of worship, providing the following:

The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

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1. Every Wisconsin legislature convenes in January of an odd-numbered year and adjourns in January of the next succeeding odd-numbered year.

2. Wis. Stat. § 35.07.

This section was included in the state constitution as originally ratified in 1848 and was subsequently modified in 1982 to include gender-neutral language.<sup>3</sup> Its language recalls the language of the First Amendment of the U.S. Constitution, which provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” However, Wisconsin courts have generally found that “The Wisconsin Constitution offers more expansive protections for freedom of conscience than those offered by the First Amendment.”<sup>4</sup>

## Background

Following the onset of the COVID-19 pandemic in March 2020, state and local public health officials issued various emergency orders limiting public gatherings, which included religious services. At the state level, such orders generally cited Wis. Stat. § [252.02 \(3\)](#), which authorizes the Department of Health Services to “close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.”<sup>5</sup> At the local level, such orders generally cited Wis. Stat. § [252.03 \(2\)](#), which authorizes local health officers to “do what is reasonable and necessary for the prevention and suppression of disease” and “forbid public gatherings when deemed necessary to control outbreaks or epidemics.”<sup>6</sup>

A series of court decisions lifted most limitations on public gatherings. In *Wisconsin Legislature v. Palm* (2020), the Wisconsin Supreme Court rendered unenforceable most provisions of a statewide emergency order, reasoning that these provisions should have been promulgated as administrative rules.<sup>7</sup> In *James v. Heinrich* (2021), the court held that a local health official’s order closing schools, including private religious schools, infringed upon the “fundamental right to the free exercise of religion” granted by the state constitution. The court’s decision discussed at length the standard that the court applied in finding the order unconstitutional.<sup>8</sup>

Together, these decisions constrained the authority of public health officials to limit public gatherings such as religious services. However, they left open the question of whether the Department of Health Services or any other public official or agency could—whether by emergency order or administrative rule—limit religious services during a future state of emergency.

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3. See [1982 Enrolled Joint Resolution 29](#), as ratified by voters in November 1982.

4. *Noesen v. State Dep’t of Regulation & Licensing, Pharmacy Examining Bd.*, 2008 WI App 52, ¶ 25, citing *Peace Lutheran Church & Acad. v. Vill. of Sussex*, 246 Wis. 2d 502, ¶ 14, and *State v. Miller*, 202 Wis. 2d 56, 66.

5. See, for example, Wisconsin Department of Health Services, [Emergency Order #28: Safer at Home Order](#), April 16, 2020, <http://www.content.govdelivery.com>.

6. Public Health Madison & Dane County, [Emergency Order #3](#), May 22, 2020, <http://www.publichealthmdc.com>.

7. *Wisconsin Legislature v. Palm*, 2020 WI 42.

8. *James v. Heinrich*, 2021 WI 58, ¶¶ 38–48.

## Proposed amendment

Senator Cory Tomczyk introduced [2023 Senate Joint Resolution 54](#), which proposes to modify Wis. Const. art. I, § 18, to insert the following language:

[N]or shall the state or a political subdivision of the state order the closure of or forbid gatherings in places of worship in response to a state of emergency at the national, state, or local level, including an emergency related to public health.

In his testimony before the Senate Committee on Licensing, Constitution and Federalism, Senator Tomczyk expressly related this change to the COVID-19 pandemic: “During the pandemic, we saw places of worship forcibly closed at a time when many needed their faith communities and spiritual advisors most.”<sup>9</sup> His cosponsors, Representatives Ty Bodden and Karen Hurd, characterized the emergency orders that prompted such closures as infringing upon the people’s constitutional right to practice religion freely. In addition, they noted “the mental health strain . . . inflicted on residents who were unable to access their place of worship and spiritual leaders.”<sup>10</sup> Against this backdrop, Senator Tomczyk explained that the amendment clarifies that neither the state nor any of its political subdivisions may close places of worship—such as churches, synagogues, and mosques—during any future state of emergency.<sup>11</sup>

On November 7, 2023, the senate approved the resolution on a vote of 21 to 10, with two senators not voting. The assembly subsequently approved the resolution on February 22, 2024, on a vote of 63 to 33, with three representatives not voting. For the amendment to be adopted, the senate and the assembly must approve an identical resolution during the 2025 legislative session. If adopted, Wisconsin voters must vote to approve or reject the proposed amendment.

## Other states

Several states have amended their state statutes in response to emergency orders limiting religious services during the COVID-19 pandemic, often to bar the state from prohibiting or limiting religious services during a declared emergency.<sup>12</sup> However, only two states—Texas and Louisiana—have amended their constitutions to this end.

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9. Wis. Legis. Council, [Hearing Materials for 2023 SJR 54](#), Testimony of State Sen. Cory Tomczyk, Senate Comm. on Licensing, Constitution and Federalism, *SJR 54: The Freedom to Gather in Places of Worship During a State of Emergency (First Consideration)* (July 18, 2023), 1, <https://docs.legis.wisconsin.gov>.

10. Wis. Legis. Council, [Hearing Materials for 2023 SJR 54](#), Testimony of State Reps. Ty Bodden and Karen Hurd, Senate Comm. on Licensing, Constitution and Federalism, *SJR 54: The Freedom to Gather in Places of Worship During a State of Emergency (First Consideration)* (July 18, 2023), 2–4, <https://docs.legis.wisconsin.gov>.

11. Testimony of State Sen. Cory Tomczyk, [Hearing Materials for 2023 SJR 54](#).

12. We identified at least 14 states. See Ark. Code Ann. § [12-75-134](#), Ariz. Rev. Stat. Ann. § [41-1495.01](#), Fla. Stat. § [252.64](#), Ind. Code § [10-14-3-12.5](#), Kan. Stat. Ann. § [48-925](#), Ky. Rev. Stat. Ann. § [39A.100](#), Mont. Code Ann. § [10-3-102](#), N.H. Rev. Stat. Ann. ch. [546-C](#), N.D. Cent. Code § [23-01-05](#), Okla. Stat. tit. [51 § 253](#), S.C. Code Ann. § [1-33-20](#), Tenn. Code Ann. § [58-2-107](#), Utah Code Ann. § [26-23b-104](#), and Va. Code Ann. § [44-146.17](#).

On November 2, 2021, Texas voters approved the addition of a new section of the Texas Constitution to read as follows:<sup>13</sup>

This state or a political subdivision of this state may not enact, adopt, or issue a statute, order, proclamation, decision, or rule that prohibits or limits religious services, including religious services conducted in churches, congregations, and places of worship, in this state by a religious organization established to support and serve the propagation of a sincerely held religious belief.

Louisiana voters also approved an amendment to their state constitution on October 14, 2023.<sup>14</sup> However, unlike the Texas amendment, this amendment did not bar the state or any of its political subdivisions from prohibiting or limiting religious services. Rather, the amendment declared “The freedom to worship in a church or other place of worship” to be a “fundamental right that is worthy of the highest order of protection.” The amendment further provided that a court must apply strict scrutiny in any legal challenge brought against official state or local government acts alleged to have infringed upon this freedom.

Although Arkansas legislators approved a resolution to amend the state constitution, voters rejected the proposed change on November 8, 2022. The proposed amendment would have barred the state and any of its political subdivisions from burdening a person’s freedom of religion, unless the burden furthered a compelling government interest and was the least restrictive means of furthering that compelling government interest.<sup>15</sup> ■

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13. See Tex. Const. art. I, § 6-a, as well as [2021 Tex. SJR 27](#).

14. See La. Const. art. XII, § 17, as well as [2023 La. SB 63](#).

15. See [2021 Ark. SJR 14](#).

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# State of Wisconsin



2023 Senate Joint Resolution 54

## ENROLLED JOINT RESOLUTION 11

*To amend* section 18 of article I of the constitution; **relating to:** the freedom to gather in places of worship during a state of emergency (first consideration).

*Resolved by the senate, the assembly concurring, That:*

SECTION 1. Section 18 of article I of the constitution is amended to read:

[Article I] Section 18. The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries; nor shall the state or a political subdivision of the state order the closure of or forbid gatherings in places of worship in response to a state of emergency at the national, state, or local level, including an emergency related to public health.

*Be it further resolved, That* this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for three months previous to the time of holding such election.

Representative Robin J. Vos  
Speaker of the Assembly

Senator Chris Kapenga  
President of the Senate

February 28, 2024

Date

Richard A. Champagne  
Acting Senate Chief Clerk