STATE OF WISCONSIN
SUPREME COURT
Case No. 2020AP001446

ST. AMBROSE ACADEMY, INC.,
ANGELA HINELINE, JEFFREY HELLER,
ELIZABETH IDZI, JAMES CARRANO,
LAURA MCBAIN, SARAH GONNERING,
ST. MARIA GORETTI CONGREGATION,
NORA STATSICK, ST. PETER'S CONGREGATION,
ANNE KRUCHTEN, BLESSED SACRAMENT CONGREGATION,
AMY CHILDS, BLESSED TRINITY CONGREGATION,
COLUMBIA/DANE COUNTY, WI INC., LORETTA HELLENBRAND,
IMMACULATE HEART OF MARY CONGREGATION,
LORIANNE AUBUT, ST. FRANCIS XAVIER'S CONGREGATION,
MARY SCOTT, SAINT DENNIS CONGREGATION, and
RUTH WEIGEL-STERR,

Petitioners,

v.

JOSEPH T. PARISI and JANEL HEINRICH,

Respondents.

RESPONSE TO PETITION FOR ORIGINAL ACTION
AND EMERGENCY MOTION FOR TEMPORARY INJUNCTIVE RELIEF

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Respondents, Joseph T. Parisi, in his Official Capacity as County Executive of Dane County, and Janel Heinrich, in her Official Capacity as Director of Public Health Madison & Dane County, through their attorneys, Municipal Law and Litigation Group, S.C., hereby respond to the above Petition by incorporating herein in full, for the convenience of the Court and to avoid unnecessary duplication, the entirety of the Response to Petition for Original Action and Emergency Motion for Temporary Injunctive Relief and the Affidavit of Ms. Heinrich, in *Wisconsin Council of Religions and Independent Schools v. Janel Heinrich*, Appeal No. 2020AP001420 pending before this Court and raising substantially identical issues. In addition, these Respondents submit the following.

INTRODUCTION

The Respondents are sympathetic to the frustrations evoked by the Petitioners about their expectations for the school-year. The experiences of everyone – individual, businesses and institutions – dealing with the COVID-19 pandemic these past six months is one of frustration. Everyone wants to spring-forward. Health Order No. 9 is designed to move the Dane County community forward and it does this by, among other things, treating all schools the same based on metrics that allow for phasing in of school classes beginning with K-2nd for in-person instruction first.

Order # 9 has established Dane County-specific metrics, which set targets for various grade levels as to when they can resume in-person instruction. The targets are as follows.[1]

[1] https://publichealthmdc.com/coronavirus/data

Grade levels	Target for Possibly Resuming In-Person Pupil Instruction	Status
K-2	A 14-day average of 54 or fewer cases per day, sustained for four weeks	Met on August 18, may open per Emergency Order #9
3-5	A 14-day average of 39 or fewer cases per day, sustained for four weeks	Clock started on August 22, which was the first day the 14-day average was 39 or less (average was 38.9 for the 14-day period of August 9-22). The next 14-day average will be for August 16 to August 29, and the average will be posted to our website on September 3.
6-12	A 14-day average of 19 or fewer cases per day, sustained for four weeks	Not met

Dane County COVID-19 Data Snapshot

Thereunder, kindergarten through second grade has currently met their target, and thus under Order # 9 are allowed to resume in-person pupil instruction. Additionally, grades third through fifth have met the target for one week. If over the next three weeks, the 14-day average stays under 39 cases per day, third through fifth grade will be allowed to resume in-person instruction. Once the data shows a 14-day average of 19 or fewer cases per day for four weeks, then sixth through twelfth grade can resume in-person instruction. The statutory powers under Wis. Stat. § 252.03(1) and (2) allow PHMDC to decide on what the metrics will be, as they allow PHMDC to take "all measures necessary to prevent, suppress and control communicable diseases. . . ." Here, PHMDC has put forth the plan to allow for in-person instruction for children based on the data in Dane County.

PHMDC's metrics are based on the Harvard Global Health Institute's model (below) for deciding when to re-open in-person grades. The Harvard model focuses on creating a "pandemic resilient learning space" to keep learners, educators, and all other staff safe. Harvard notes a pandemic resilient space can mean different things for different students of different ages, that is: "keeping levels of risk low for young children via pandemic resilient teaching and learning spaces is more readily achievable than doing so for high school age students and the adult

educators and staff in the school building." [2] To get to a near zero case incidence level, jurisdictions need to first understand the severity of the outbreak they are responding to. To determine their COVID level, they should access case incidence levels. These COVID levels help decision-makers know where they are in terms of community spread and, therefore, underlying population risk.[3] The green level aligns with the CDC's low incidence plateau threshold. The levels also communicate the intensity of effort needed for control of COVID at varying levels of community spread.[4] The Harvard model ultimately notes that districts may have to open in various stages for various grade levels.[5]

Covid Risk Level	Case Incidence	
Red	>25	daily new cases per 100,000 people
Orange	10<25	daily new cases per 100,000 people
Yellow	1<10	daily new cases per 100,000 people
Green	<1	daily new case per 100,000 people

PHMDC has adopted this approach because they are trying to phase in students gradually, as opposed to allowing everyone back into schools all at once, which could result in a rise of positive cases. Epidemiologists are increasingly opining COVID-19 is airborne, with spreading more likely to occur indoors not only when an individual coughs and sneezes, but when a group of individuals are breathing for extended periods of time collectively in the same

[2] This Harvard four-page report is found here: https://globalepidemics.org/wp-content/uploads/2020/07/pandemic_resilient_schools_briefing_72020.pdf at p. 1.

[3] *Id*. p. 2
[4] *Id*.
[5] *Id.* p. 4

room.[6] By implementing a gradual approach, PHMDC is trying to protect the virus from spreading to parents, adult guardians, etc., at an alarming rate. DHS has stated that ""asymptomatic or sub-clinical infection in children is [] commonly reported."[7] Thus, there are concerns children will have the virus and return home to infect others who are at greater risk of developing severe complications from COVID-19. The CDC confirmed that children "likely have the same or higher virtual loads in the nasopharynx compared with adults and . . . can spread the virus effectively in households and camp settings."[8] It is inevitable as to when an infected student will pass the coronavirus in the school setting.[9]

By implementing a planned gradual approach to allowing in-person instruction, PHDMC is attempting to avoid the disruption of education for children, as over 600 schools around the country have opened only to have confirmed COVID-19 cases.

During the beginning of the COVID-19 outbreak, every school including Petitioners abruptly switched to a virtual universe this past spring (or some totally closed). Petitioners concede that was reasonable at the time. Pet. Br. p. 22, 40. Since the end of the 2019-2020 school year, they used these summer months hoping for in-person but planning contingencies including virtual learning for the 2020-2021 school year.[10] Since the implementation of the Safer-at-Home Order, many in the "faith communities have adapted to the emergency situation by following the Order, protecting and ministering to their flocks, and finding meaningful new ways to religiously connect and re-connect." Amicus Brief of Faith Voices for Justice, *Chapman*

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[6] https://www.wsj.com/articles/key-to-preventing-covid-19-indoors-ventilation-11598953607; https://ohsonline.com/articles/2020/05/18/a-covid-analysis-goes-viral-how-the-virus-spreads-indoors-outdoors-and-in-other-spaces.aspx?admgarea=ht.ConstructionSafety

[7] https://www.dhs.wisconsin.gov/publications/p02757.pdf

[8] https://thehill.com/opinion/education/512539-is-it-safe-for-children-to-come-home-once-the-school-day-is-over

[9] https://www.businessinsider.com/doctor-schools-reopen-fall-likely-closed-by-end-of-october-2020-8

[10] Petitioners admit as much: "Petitioner Schools made the difficult decision to switch from in-person instruction to distance learning, with many schools making this decision even before the State announced mandatory school closures." Pet. Br. p. 22.

v. Palm, 20AP828 p. 4; see also *Id*. p. 20 et seq. (recounting the 1918 Spanish Flu, the wave of infections over the course of a year, Wisconsin's effort to combat it and the rise of the statutory system to combat infectious disease).

Health Order No. 9 does not introduce virtual learning in a way unanticipated as what occurred this past spring. Schools in Dane County had already anticipated virtual learning might happen again.[11] Each week, since March, PHMDC has been holding conference calls with the school districts. In April 2020, PHMDC encouraged schools to offer virtual learning for summer school. As early as June 25, 2020, PHMDC explicitly asked that all schools plan for both hybrid and 100% virtual education models. Specifically, they asked that schools "plan for both a hybrid model and a virtual model, because even if schools start off as a hybrid model, community data metrics and/or school outbreaks might cause schools to switch to being 100% virtual." Again, on July 14, 2020, PHMDC stated that schools "should still be prepared for changes and be ready to institute in-person, hybrid, and 100% virtual models at any time throughout the year given the unpredictable nature of the virus, local data metrics, and changes to school guidance." On August 4, 2020, PHMDC was still informing schools to "plan for both an all virtual option and in-person options . . . that follow the PHMDC physical distancing, masking, and cohorting school requirements."

Moreover, despite DHS guidance noted by Petitioners from "DHS Releases School Guidance to Assist Local and Tribal Health Departments," Pet. Resp. p. 9, states that "school administrators should work closely with their health department to determine the least disruptive

[11] Since the start of summer, PHMDC has been telling schools they may have to close, and when they are allowed to open they will need to have protective measures in place. Thus, whatever financial resources have been expended is not wasted and even if a claimant believed such expenses were wrongly incurred under government action, it is doubtful it would rise to a claim of constitutional dimension. Indeed, all of these things are required under the Order so none of these Petitioners are spending money doing anything that is not otherwise required of them. Additionally, PHMDC is not "approving" reopening plans as suggested, Pet. Br. p. 41; rather, these Petitioners are complying with the Health Orders.

level of temporary closure or dismissal needed to transition to virtual learning, to halt outbreak transmission."[12]

By trying to minimize the total number of schoolchildren commingling in a school building for a long period of a school day, the local health officer has chosen to phase in a first group of students for in-person education based on the data and metrics about the community spread of this disease and that group being the least susceptible to the virus and the least likely to be spreaders of the virus. Those metrics show a plan to next move 3rd to 5th grade into in-person as discussed above. Under Wis. Stat. § 252.03(1) & (2), the Legislature has empowered the local health officer to make such reasonable and necessary decisions, including gong even further to "forbid public gatherings" which would be tantamount to fully closing the schools, something the local health officer has not done in Health Order No. 9.

I. THIS COURT SHOULD REJECT THE PETITIONERS' REQUEST FOR ORIGINAL ACTION.

Petitioners' arguments about local Health Order No. 9's lack of narrow tailoring (or whether it is unreasonable/unnecessary) undermine the criteria to take an original action. Their arguments speak to contested issues of fact about the efficacy of a local health order in the Dane County community and whether the local health officer reasonably and necessarily calibrated the health order based on communicable disease data in her community. Health Order No. 9 is applicable only to Dane County. Petitioners criticisms of the health order's differential terms for schools (as compared to other businesses, establishments or institutions) reveals the factual intensity of their case because it asks this Court to declare whether the local health order is or is not necessary to prevent, suppress and control communicable diseases and how it should be calibrated within and across a community's people, businesses and institutions. To find Health

[12] https://www.dhs.wisconsin.gov/publications/p02757.pdf at p. 23-24.

Order No. 9 unreasonable and unnecessary or lacking in narrow tailoring, this Court would be required to wade into fact-finding about the nature of the disease, epidemiology data and metrics, human behavioral factors involving spread and mitigation of the disease and whether children are prone to COVID-19 and/or prone to be spreaders of the disease into their families or the community. As the Court's Internal Operating Procedure § III(B)(3) states, "[t]he Supreme Court is not a fact-finding tribunal, and although it may refer issues of fact to a circuit court or referee for determination, it generally will not exercise its original jurisdiction in matters involving contested issues of fact." The Petitioners here are looking for the kind of "speedy and authoritative determination" for which original jurisdiction is inappropriate. See *Petition of Heil*, 230 Wis. 428, 446, 284 N.W. 42 (1938). Their constitutional and statutory challenges can be brought in Dane County Circuit Court, which can issue injunctive relief and render a decision, as frequently occurs in many cases that present public and constitutional controversies, for sifting and winnowing of the factual and legal issues before appellate review takes place.

II. DURING THIS COVID-19 PANDEMIC, THE WISCONSIN STATUTES ALLOW THE LOCAL HEALTH ORDER TO PHASE INTO THE NEW SCHOOL YEAR WITH SELECT GRADES FOR IN-PERSON EDUCATION.

Petitioners argue the County is a limited creature of the legislature acting under Wis. Stat. § 252.03 and, by overreliance on the concept of *expressio unius*, the Legislature did not grant authority to a local health officer to "close schools."

Section 252.03 is the codification of the Legislature's broad grant of police power to the local health officer to control communicable disease. "The police power of the state is the inherent power of the government to promote the general welfare." *In Interest of Reginald D.*, 193 Wis. 2d 299, 308, 533 N.W. 2d 181 (1995). "It covers all matters having a reasonable relation to the protection of the public health, safety or welfare." *Id.* For over a century, this

Court has recognized the legislative right to bestow power to local boards to control health risks posed by communicable diseases:

> The statutes were unquestionably framed upon the fact that such *boards must act immediately and summarily in cases of the appearance of contagious and malignant diseases, which are liable to spread and become epidemic*, causing destruction of human life. Under such circumstances it has been held that *the Legislature under the police power can rightfully grant to boards of health authority to employ all necessary means to protect the public health*, and, if necessary, go to the extent of destroying private property when the emergency demands. ….. The power to summarily abate nuisances was fully recognized and established as a principle of the common law, upon the ground that the *requirement of preliminary formal legal preceedings and a judicial trial would result in defeating the beneficial objects sought to be attained*. Within this principle, "quarantine and health laws have been enacted from time to time from the organization of state governments, authorizing the summary destruction of imported cargo, clothing, or other articles by officers designated, and no doubt has been suggested as to their constitutionality."

Lowe v. Conroy, 120 Wis. 151, 97 N.W. 942, 944 (1904). In considering *Lowe* (and other cases including *Jacobson v. Massachusetts*), the Court re-affirmed these powers to control tuberculosis:

> The evidence and findings in the instant case, this legislation, and these decisions, go to show a widespread recognition of the danger of infection from bovine tuberculosis and of the efficacy of the tuberculin test. When there are conflicting scientific beliefs or theories in such matters it is for the city council to determine upon which theory it will base its police regulations, and unless it is clearly and manifestly wrong it is not for the courts to interfere on the ground that the scientific theory on which the ordinance is based is incorrect or unsound. *Jacobson v. Massachusetts*….. We also consider the enactment of such ordinances, generally speaking, within the power of the common council of the city of Milwaukee ….

Adams v. City of Milwaukee, 144 Wis. 371, 129 N.W. 518, 520 (1911). In affirming, the United States Supreme Court wrote:

> But plaintiff overlooks the allegation of his complaint. His allegation is not that his cows are free from infectious or contagious disease, but only 'so far as he is able to learn or discover.' And the allegation of his willingness to withdraw

> tainted milk from sale depends upon the same contingent knowledge or information. *He overlooks also the findings of the courts against the sufficiency of his information, and their demonstration of the necessity of the tests established by the ordinance. But even if the necessity of the tests be not demonstrated and the beliefs which induced them may be disputed, they cannot be pronounced illegal*. *[W]e expressed the deference which must be accorded to local beliefs, saying that we would not overthrow an exercise of police power based on them to protect health merely because of our adherence to a contrary belief.* It will be observed, therefore, that the contention of plaintiff is without foundation, and that the ordinance is not an arbitrary and unreasonable deprivation of property in a wholesome food, but *a regulation having the purpose of and found to be necessary for the protection of the public health*.
>
> *The police power of the state must be declared adequate to such a desired purpose*. It is a remedy made necessary be plaintiff acting in disregard of the other provisions of the ordinance,-that is, failing to have his cows tested and their milk authenticated, as prescribed. The city was surely not required to let the milk pass into consumption and spread its possible contagion. This seems to be the alternative for which plaintiff contends, and might occur.

Adams v. City of Milwaukee, 228 U.S. 572, 582–583, 33 S. Ct. 610, 613, 57 L. Ed. 971 (1913). See also *State ex rel. Nowotny v. City of Milwaukee*, 140 Wis. 38, 121 N.W. 658, 659 (1909) ("[e]xecutive boards or officers, who can deal at once with the emergency under general principles laid down by the lawmaking body."); *see also Dougan v. Bd. Of Com'rs of Shawnee County*, 141 Kan. 554, 43 P.2d 223 (Kan. 1935) ("To be of real value health authorities must have authority to take such action as is necessary to prevent a health menace which is reasonably likely to occur under the facts and circumstances applicable thereto.").

Consistent with this Legislative grant of power, Section 252.03 is not a mere "subsection," as Petitioners minimize it, statutorily conditioned upon DHS's power under Section 252.02, statutorily limited by omission of an enumerated reference for "close schools," or statutorily anchored by relation to the enumerated reference for "forbid public gatherings." As the Attorney General notes in *WRCIS v. Heinrich*, 2020AP001420 at Section II(B), "[t]he Department of Health Services and local officials have concurrent statutory authority to close schools." A textual reading of the two statutes leads to the conclusion that "Wisconsin Stat. § 252.02

expressly mentions a few other powers that Wis. Stat. § 252.03 does not." *Id*. p. 9. And, further, as the Attorney General also notes, the interpretation offered by the Petitioners strains Section 252.03's plain language to combat infectious diseases for two reasons: (1) the common understanding of the power to "forbid public gatherings" includes preventing children gathering in a classroom, *Id*. p. 10; and (2) "prohibiting in-person instruction is clearly a measure that falls within this broad statutory language." *James v. Heinrich*, 2020AP1419 p. 8. Quite simply, there is nothing "conspicuously omitted" from Section 252.03, Pl. Br. p. 45, because the Legislature did not have to enumerate a list of tools available to the local health officer; instead, the Legislature commanded that the local health officer "shall promptly take all measures necessary to prevent, suppress and control communicable diseases" *and* "do what is reasonable and necessary"

Finally, Health Order No. 9 reflects a proper exercise of the statutory power to "do what is reasonable and necessary for the prevention and suppression of disease." It is not a complete shutdown of the school system; learning is still happening under this Order virtually and in other ways.[13] Religious studies are not prohibited; to the contrary, religious teachings, instructions and missions are all allowed and can be accomplished virtually and in other ways.[14] "Holy Communion at Mass, confessing their sins to a priest through the Sacrament of Reconciliation, and praying together," Pet. Br. p. 4, or "the opportunity to receive Holy Communion at weekly Masses and frequent confessions before a Catholic priest, frequent communal prayer throughout the day, and opportunities to go on retreats and service missions throughout the area," Pet. Br. p. 17, may all take place elsewhere. While such may not take

[13] The Health Order does not compel Petitioners to enroll in virtual-learning curriculums offered outside their schools; that is their personal choice. Pet. Br. p. 15 (discussing available virtual learning courses like at Sky Zone).
[14] As Petitioners point out, prior orders were clarified to avoid any First Amendment free-exercise claims. Pet. Br. p. 11 (citing A-63–68). Any assertion of "overtly discriminatory" actions is baseless and adamantly denied.

place in school by *all* grades comingling in the school building at the same time for the length of a school day, PHMDC's data and metrics are designed to phase in the other grades in order to get to that point.

Additionally, nothing in Health Order No. 9 directs parents how to educate their children in accordance with their sincere religious beliefs including through religious education. They can still educate their children in the Catholic faith in home, virtually, at church, in worship groups that meet the capacity limits or the like, including youth settings. Nor is Health Order No. 9's challenged terms a shutdown of the community. It does not forbid travel or close businesses. It only limits in-person instruction to begin the school year with K-2 and, once metrics are met, phasing in of other grades.

III. PETITIONERS' HAVE NOT SHOWN A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS BECAUSE NEITHER THEIR STATUTORY NOR CONSTITUTIONAL ARGUMENTS HEED THE TOLERANCE GIVEN LOCAL HEALTH AUTHORITIES DURING A PUBLIC HEALTH CRISIS UNDER *JACOBSON V. MASSACHUSETTS.*

By arguing their State constitutional claims under the usual judicial standards, Petitioners seek this Court's adjudication in a vacuum. During this pandemic, when federal judges have been utilizing the *Jacobson* framework, Petitioners have not properly supported their request for injunctive relief by entirely ignoring the *Jacobson* framework. If they cannot overcome *Jacobson*, as here, the constitutional analysis stops.

This Court follows federal constitutional analysis where appropriate and, further, has applied *Jacobson*'s framework in Wisconsin. *See Adams v. City of Milwaukee,* 144 Wis. 371, 129 N.W.2d 518, 520 (1911) (applying *Jacobson* deference to police-power requirement of tuberculin testing of

milk); *Froncek v. City of Milwaukee*, 269 Wis. 2d 276, 281, 69 N.W.2d 242 (1955) (applying *Jacobson* deference to police-power fluoridation of water supply).[15]

Here, these Petitioners, like their counterparts in the *James* and *WCRIS* cases, fail to show success on their claims under *Jacobson*. They concede Respondents have a compelling interest in fighting the pandemic. Pet. Br. p. 3, 40. The Order undoubtedly relates to public health and safety because it minimizes the risk of virus transmission by limiting gathering size, a point they begrudgingly admit by their own steps to try to implement smaller class sizes. *Id*. p. 26-27. As noted elsewhere, the Health Order still allows for various religious activity.

Moreover, Petitioners have not shown that in-person school instruction does not pose a serious threat of spreading COVID-19 to children and teachers, their families or to the larger community. They have not introduced any medical testimony or evidence to challenge the efficacy of this Health Order. If they did, they might undermine their right to original jurisdiction before this Court and/or they would still have to grapple with *Jacobson*'s deference to the local health officer analysis of the epidemiological science and data.

Instead, Petitioners miss the boundaries of *Jacobson*'s framework when arguing "[t]he benefits of reopening for in-person education are profound, given this educational method's clear superiority over virtual learning." Pet. Br. p. 16. Of course everyone wants a return to the benefits of in-person education, but that has nothing to do with how to reduce the spread of the

[15] See also *County of Kenosha v. C & S Management, Inc*., 223 Wis.2d 373, 393, 588 N.W.2d 236 (1999) (free speech, due process and equal protection - "Since there is no substantial difference between the two constitutions, we will henceforth refer only to the Fourteenth amendment of the United States constitution."); *Rao v. WMA Securities, Inc.*, 310 Wis.2d 623, 647-648, 752 N.W.2d 220 (2008) (right to jury trials - "This court, in construing Article I, Section 5 of the Wisconsin Constitution, may look for guidance to federal decisions interpreting the Seventh Amendment."); *Madison Teachers, Inc., v. Walker*, 358 Wis.2d 1, 851 N.W.2d 337 (2014) (contract clause - "In interpreting the Contract Clause of the Wisconsin Constitution, the Wisconsin Supreme Court has relied upon the decisions of the United States Supreme Court for guidance."); *State v. Ninham*, 2011 WI 33, ¶ 45, 333 Wis.2d 335, 797 N.W.2d 451 (2011) (excessive bail, fines, cruel and unusual punishment -- "Generally, we interpret provisions of the Wisconsin Constitution consistent with the Supreme Court's interpretation of parallel provisions of the federal constitution.").

virus which is the statutory task imposed upon PHMDC. Everyone wants to return to school, concerts, bars, movie theaters, and everything else, but neither Section 252.03 nor *Jacobson* (and arguably not even traditional constitutional analysis) make such value assumptions constitutionally dispositive when trying to suppress a community disease. Assuming it is true that virtual learning is not as good for some as in-person education, it is equally true virtual learning is good at disease management and, as such, limiting the influx of students for in-person education is well within constitutional and statutory tolerances.

Petitioners have not shown how this Health Order is a plain invasion of their constitutional rights. Accordingly, under *Jacobson*, there is no judicial second-guessing.

IV. HEALTH ORDER NO. 9 DOES NOT INFRINGE UPON FREEDOM OF WORSHIP OR PARENTAL RIGHTS.

Even if Petitioners can overcome *Jacobson*'s analysis and overcome the general rule to avoid constitutional adjudication where possible, *State v. Hale*, 2005 WI 7, ¶ 42, 277 Wis. 2d 593, 606, 691 N.W.2d 637 ("[n]ormally this court will not address a constitutional issue if the case can be disposed of on other grounds."), their arguments do not have a likelihood of success.

Foremost, Health Order No. 9 is neither aimed at nor does it have any disparate impact on any of the Catholic schools associated with this Petition, any school of any religious affiliation nor any religious activity or religious education whatsoever. As the Attorney General points out in the amicus brief in *James v. Heinrich*, 2020AP1419 p. 7:

> it is critical to note that this local measure does not prohibit any religious instruction or worship—it merely changes the venue. Students at religious private schools can still participate in the same religious curriculum they otherwise would, except at home rather than in the classroom. Petitioner offers no explanation for why receiving religious instruction in this manner burdens their ability to exercise their religious beliefs. In other words, petitioner does not establish a basis for applying *Coulee*, since she has not shown that Emergency Order 9 "rise[s] to the level of control or interference with the free exercise of religion."

Petitioners amplify their counterparts' arguments about the lack of narrow tailoring. They first argue their schools have safe re-openings plans – as if to say the local health officer can look the other way – and that no other county in Wisconsin has pursued this approach to phase-into the school year with grades K-2nd proceeding first for in-person instruction.[16] Pet. Br. p. 40-41. Section 252.03's powers do not evaporate when community members say they will comply with some, but not all, of a local health officers strategic and comprehensive health plan that to takes "all measures necessary to prevent, suppress and control communicable diseases." The fact that Petitioners believe Dane County's COVID-19 infection rates are better than other communities with "far higher" rates supports the local health officer's decision to do what is "reasonable and necessary" to achieve prevention, suppression and control of the disease. The Dane County local health director is successfully moving her community out of a communicable disease; her statutory power allows her to see that through, not stop one mile short of completing the marathon.

Next, Petitioner's argue that Order # 9 allows scores of other businesses to conduct in-person operations, including bars, salons, barber shops, gyms, fitness centers, water parks, pools, bowling alleys, and movie theaters, who all may open their doors to the public, subject to various capacity limitations and social-distancing guidelines. Pet. Br. p. 41-42.

[16] Petitioners overlook the school districts in Madison and Milwaukee that are closed for in-person instruction. And, they overlook the fact that the State of Wisconsin, not Dane County, has charge over the university system in Dane County.

However, each one of these entities are fundamentally different from schools, not to mention the fact that many of them have additional restrictions that do not apply to schools or for which schools cannot comply with[17]:

- Plaintiff's are incorrect in stating that bars may open their doors to the public. Under Order # 9, bars remain closed for in person gatherings and customers are only allowed to enter bars for the purposes of orders, pick-up, and payment of food or beverage or while in transit.
- Salons and barber shops are fundamentally different from schools, as a person comes into a salon/barber shop alone, they sit in one place have contact with only one person and leave. There is no comingling, and chairs are naturally spaced out so as to keep at least six feet of distance between customers.
- Additionally, the same can be said with gyms and fitness centers – customers come in, use equipment, and then leave. Socialization or fraternization may occur between some for brief points of time, but the general patrons' purpose of their visit is to tend to their physical health or exercise and leave the facility, not commingling with individuals of a classroom size for the length of a school-day.
- Water parks and pools are extremely different from schools as they are generally outdoors, which limits the spread of the virus, and people come in small group, generally with their families and stick with those small groups. There is not a level of comingling as there is in schools.

[17] Under Order No. 9, water parks, pools, movie theatres, and bowling alleys are subject to the mass gathering restrictions. Additionally, water parks, pools, movie theatres, bowling alleys, gyms, fitness centers, salons, and spas are subject to a physical distancing restriction, which requires that members who are not in the same household or living unit to be physically distanced. Restaurants are limited to six customers per table who are members of the same household or living unit and all tables must be six feet apart. And child care and youth settings must have "no interaction or contact between individual groups or classrooms."

- Bowling alleys and movie theaters are similarly distinguishable in that people do not visit these establishments to comingle with others in large groups like a class-size for day-long periods like in school. People generally come with family or friends and stick with their group. Under Order No. 9, these establishments must can be set up so that parties do not mix.

Schools, akin to mass gatherings, are fundamentally different than the above establishments as there is much, much more comingling. Like mass gatherings, which are defined under PHMDC's health order as "a planned event with a large number of individuals in attendance, such as a concert, festival, meeting, training, conference, performance, show, or sporting event," offer more opportunities for person-to-person contact, and therefore, pose a greater risk of COVID-19 transmission. The purpose of a mass gathering is to draw a large number of individuals to a single location and results in a large number of individuals arriving, attending, and departing at approximately the same time and increases opportunities for spreading the virus. This is exactly what happens in schools.

In schools, children all walk through the hallways at the same times during the day, they have their lockers right next to each other in the hallways, and they all eat lunch at the same times, not to mention commingling in single classrooms for much of the day. A child from one family will naturally interact with many other children from other households, and then at the end of the day they return to their families. Thus, there is much more potential for a child to pick up the virus from others they have not been comingling with before.

Petitioners believe the carve-out for childcare and youth setting is not just lacking in narrowness, but arbitrary. Pet. Br. p. 42. Childcare does not involve the same numbers of children comingling all day long. Rather, it is generally smaller groups without comingling, as

childcare centers naturally operate in smaller group sizes with "pods" that limit mixing between children, which helps limit widespread outbreaks. Likewise, youth programs also have smaller groups of children.

Petitioners do not offer any alternatives demonstrating they can address PHMDC's concerns about *all* these children in *all* grades *comingling* in classrooms for *extended* periods during the school day when growing epidemiological scientific evidence and data shows risks with airborne spreading of the COVID-19 virus. The thoroughness of their plans, Pet. Br. p. 29, albeit laudable, do not address this concern with less restrictive alternative means.

Finally, the availability of face coverings is an obvious good step, but its benefits and use in the school-age population are not yet fully understood. Evidence on the benefits and harms of children wearing masks to mitigate transmission of COVID-19 and other coronaviruses is limited. A study of mask wearing during seasonal influenza outbreaks in Japan noted that the use of masks was more effective in higher school grades (9-12 year old children in grades 4-6) than lower grades (6-9 year old children, in grades 1-3).[18] One study, conducted under laboratory conditions, suggested that children between five and 11 years old were significantly less protected by mask wearing compared to adults, possibly related to inferior fit of the mask.[19] Other studies found evidence of some protective effect for influenza for both source control and protection in children, although overall compliance with consistent mask wearing, especially

[18] Uchida M, Kaneko M, Hidaka Y, et al. Effectiveness of vaccination and wearing masks on seasonal influenza in Matsumoto City, Japan, in the 2014/2015 season: An observational study among all elementary schoolchildren. Prev Med Rep. 2017;5:86-91. Epub 2016/12/17. Available at: https://doi.org/10.1016/j.pmedr.2016.12.002

[19] van der Sande M, Teunis P, Sabel R. Professional and home-made face masks reduce exposure to respiratory infections among the general population. PLoS One. 2008;3(7):e2618. Epub 2008/07/10. Available at: https://doi.org/10.1371/journal.pone.0002618

among children under the age of 15, was poor.[20] So far, the effectiveness and impact of masks for children during play and physical activity have not been studied.

V. THE BALANCE OF HARMS DISFAVORS GRANTING INJUNCTIVE RELIEF

Without reasonable probability of ultimate success, the balance of equities tilts heavily in favor of denying preliminary relief. Petitioners say "the County will not suffer harm if this Court enjoins the unconstitutional and unlawful School-Closure Order." Pet. Br. p. 48. If higher COVID-19 case counts and increased death toll in the community are not irreparable harm, nothing is. Petitioners assume there is no harm to the community by their request, just as much as they seem to assume they have suffered irreparable harm. But, schools are not closed, instruction can take place and socialization can continue. While it may not occur in the most-ideal way, the balance of harms to the community swings in favor protecting the greater community at this stage of the COVID-19 pandemic, just as it did in *Illinois Republican Party v. Pritzker*, 2020 WL 3604106, *7 (N.D.Ill July 2, 2020):

> Granting Plaintiffs the relief they seek would pose serious risks to public health. Plaintiffs contend that in-person speech is most effective, and their communications are hampered by gathering limits. But the current state of our nation demands that we sacrifice the benefits of in-person interactions for the greater good. Enjoining the Order would risk infections amongst members of the Illinois Republican Party and its regional affiliates, as well as their families, friends, neighbors, and co-workers. …. Plaintiffs ask that they be allowed to gather—without limitation—despite the advice of medical experts and the current rise in infections. The risks in doing so are too great. The Court acknowledges that Plaintiffs' interest in gathering as a political party is important, especially leading up to an election. But this interest does not outweigh the Governor's interest in protecting the health of Illinois' residents during this unprecedented public health crisis. Moreover, Plaintiffs may still engage in a number of expressive activities like phone banks, virtual strategy meetings, and, as of Friday, June 26, gatherings like fundraisers and meet-and-greet coffees that do not exceed fifty people. …As the Governor suggested, allowing Plaintiffs to gather would open the floodgates to challenges from other groups that find in-person gatherings most effective. It would also require that the Court turn a blind eye to the increase

[20] Advice on the use of masks for children in the community in the context of COVID-19; UNICEF and World Health Organization, August 21, 2020. Available at: https://apps.who.int/iris/rest/bitstreams/1296520/retrieve

in infections across a high majority of states, which as of July 1, 2020 includes Illinois. An injunction that allows Plaintiffs to gather in large groups so that they can engage in more effective speech is simply not in the public interest. Such relief would expand beyond any gatherings and negatively impact non-parties by increasing their risk of exposure.

CONCLUSION

For the above reasons, the Court should deny the petition for original action and motion for temporary injunction.

Dated this 2nd day of September, 2020.

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CERTIFICATION

This brief complies with the word count of Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font, and file a motion herewith. The length of this brief is 5,545 words.

Dated this 2nd day of September, 2020.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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