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IN THE SUPREME COURT OF WISCONSIN

Nos. 2020AP1419-OA, 2020AP1420-OA, 2020AP1446-OA

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WISCONSIN COUNCIL OF RELIGIOUS AND INDEPENDENT SCHOOLS, SCHOOL CHOICE WISCONSIN ACTION, ABUNDANT LIFE CHRISTIAN SCHOOL, HIGH POINT CHRISTIAN SCHOOL, LIGHTHOUSE CHRISTIAN SCHOOL, PEACE LUTHERAN SCHOOL, WESTSIDE CHRISTIAN SCHOOL, CRAIG BARRETT, SARAH BARRETT, ERIN HAROLDSON, KENT HAROLDSON, KIMBERLY HARRISON, SHERI HOLZMAN, ANDREW HOLZMAN, MYRIAH MEDINA, LAURA STEINHAUER, ALAN STEINHAUER, JENNIFER STEMPSKI, BRYANT STEMPSKI, CHRISTOPHER TRUITT and HOLLY TRUITT, *PETITIONERS*,

v.

JANEL HEINRICH, in her official capacity as Public Health Officer and Director of Public Health of Madison and Dane County, and PUBLIC HEALTH OF MADISON AND DANE COUNTY, *RESPONDENTS*.

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ST. AMBROSE ACADEMY, INC., ANGELA HINELINE, JEFFERY 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, in his official capacity as County Executive of Dane County and JANEL HEINRICH, in her official capacity as Director, Public Health, Madison & Dane County, *RESPONDENTS*.

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SARA LINDSEY JAMES, *PETITIONER*,

v.

JANEL HEINRICH, in her capacity as Public Health Officer of Madison and Dane County, *RESPONDENT*.

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NON-PARTY BRIEF OF THE CITY OF MILWAUKEE

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## **INTEREST OF THE CITY OF MILWAUKEE**

The City of Milwaukee’s Health Department (“MHD”) is a level III local health department pursuant to the provisions of Wis. Stat. Ch. 251 and other pertinent provisions of state and local law. Under both state and local law, MHD has an obligation to ensure the health and safety of both its residents and visitors. This is especially true during the unprecedented global pandemic we are all faced with today. To that end, MHD has issued multiple health orders aimed at preventing and suppressing the spread of COVID-19 and, in doing so, saving lives. The City of Milwaukee has an interest in clarifying what authority MHD has to control the spread of a communicable disease under Wis. Stat. Ch. 252. The City of Milwaukee believes that this can be done through the issuance of a wide array of reasonable and necessary restrictions and also through the closure of individual premises experiencing an outbreak.

### **INTRODUCTION**

Wis. Stat. § 252.03(2) authorizes a local health officer to “do what is reasonable and necessary for the prevention and suppression of” a communicable disease. Wis. Stat. § 252.03(2). Local health officers have another, separate tool to control outbreaks of communicable diseases: the authority to

“direct persons who own or supervise real or physical property or animals and their environs, which present a threat of transmission of any communicable disease [...], to do what is reasonable and necessary to abate the threat of transmission”, which includes the authority to temporarily close a location that is infected or suspected of being infected with a communicable disease where a local health officer determines doing so is the least restrictive means abate the threat. Wis. Admin. Code § DHS 145.06(6). The authority to act under Wis. Admin. Code § DHS 145.06(6) originates from Wis. Stat. § 252.02(4), not Wis. Stat. § 252.03, and thus any restrictions applicable to the authority in Wis. Stat. § 252.03 would not apply to Wis. Admin. Code § DHS 145.06(6) and vice versa.

### **ARGUMENT**

#### **I. THE AUTHORITY OF A LOCAL HEALTH OFFICER TO CLOSE LOCATIONS WITH A COMMUNICABLE DISEASE OUTBREAK ORIGINATES IN WIS. STAT. § 242.02(4), NOT WIS. STAT. § 252.03.**

A local health officer’s authority to quarantine an individual location because of an active or suspected outbreak of a communicable disease pursuant to Wis. Admin. Code § DHS 145.06(6) stems not from Wis. Stat. § 252.03, but rather from the authority delegated to a local health officer by DHS

under Wis. Stat. § 252.02(4). Petitioners argue that even if a local health officer is authorized to preemptively close all schools to in-person education under Wis. Stat. § 252.03, doing so must meet the “least restrictive” means test set forth under Wis. Admin. Code § DHS 145.06(5). Petitioners’ Opening Brief, pages 54-56. This argument completely ignores that Wis. Admin. Code § DHS 145.06(5) was not issued to interpret Wis. Stat. § 252.03(2). Rather, it is a rule delegating authority from DHS to local health officers to control localized outbreaks issued pursuant to DHS’s authority under Wis. Stat. § 252.02(4). Therefore, the “least restrictive” means test does not apply to actions taken under Wis. Stat. § 252.03.

Chapter 145 of the DHS regulations is “promulgated under the authority of ss. 252.02(4), 252.06(1), 252.07(1p) and (11), 252.10(1), 252.10(6)(a) and (b), 252.11(1) and (1m), 254.51(3) and 990.01(5g), Stats.” Wis. Admin. Code § DHS 145.01. None of the other statutes listed in Wis. Admin. Code § DHS 145.01 authorizes DHS to issue rules and orders related to the quarantine of locations, therefore it is clear that the authority for Wis. Admin. Code § DHS 145.06(6) originates in



Wis. Stat. § 252.02(4).<sup>1</sup> Wis. Stat. § 252.02(4), authorizes DHS to “promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, for the control and suppression of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease and for the sanitary care of jails, state prisons, mental health institutions, schools, and public buildings and connected premises. Wis. Stat. § 252.02(4)(emphasis added). And while there is a reference to Wis. Stat. § 252.03 contained within Wis. Admin. Code § DHS 145.06(6), the reference denotes who is authorized to act, not under what authority they are acting. Wis. Admin. Code § DHS 145.06(6)(“Officials empowered under [...] 252.03 (1) and (2), Stats., may direct persons who own or supervise real or physical property [...] which present a threat of transmission

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<sup>1</sup>See Wis. Stat. § 252.06(1)(rulemaking authority related to the isolation and quarantine of individuals infected with a communicable disease); Wis. Stat. § 252.07(1p) and (11)(rulemaking authority related to controlling tuberculosis); Wis. Stat. § 252.10(1)(rulemaking authority related to public health dispensaries); Wis. Stat. § 252.10(6)(a) and (b)(rulemaking authority related to reimbursements for public health dispensaries); Wis. Stat. § 252.11(1) and (1m)(rulemaking authority related to sexually transmitted diseases); Wis. Stat. § 254.51(3)(rulemaking authority related to animal-borne and vector-borne diseases); and Wis. Stat. § 990.01(5g)(related to the construction of rules and laws).

of any communicable disease under sub. (1), to do what is reasonable and necessary to abate the threat of transmission.”).

None of the parties to this action appear to argue that DHS lacks the authority to close an individual location, including a school, in response to an active outbreak. DHS clearly has that authority. *See* Wis. Stat. § 252.02(3) and (4). DHS also has the authority to empower a local health officer via rule or order to act to control a communicable disease in the same manner DHS is able to. *See* Wis. Stat. § 250.04 (“The department may promulgate and enforce rules and issue and enforce orders governing the duties of all local health officers and local boards of health and relating to any subject matter under the department's supervision that are necessary to provide efficient administration and to protect health.”); Wis. Stat. § 252.02(4)(DHS may “promulgate and enforce rules or issue orders [...] for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease and for the sanitary care of jails, state prisons, mental health institutions, schools, and public buildings and connected premises.”); *Superb Video v. Cty. of Kenosha*, 195 Wis. 2d 715, 724, 537 N.W.2d 25, 28–29 (Ct. App. 1995)(“Moreover, by providing at § [252.02(4)], that

rules or orders adopted by DHSS supersede local rules or ordinances which conflict, the legislature has implicitly recognized the authority of local health authorities to regulate in the same area.”). DHS has conveyed its authority to control outbreaks of communicable diseases at individual locations including schools, whether that be by closure or some other means, to local health officers under Wis. Admin. Code § DHS 145.06(6).

DHS did not convey this authority upon local health officers without any procedural safeguards in place. In order for a local health officer to take actions to control an outbreak at a location through any means under Wis. Admin. Code § DHS 145.06(6), including but not limited to a temporary closure, the local health officer must petition a court of record to order compliance. To that end, DHS requires that the local health officer demonstrate: “(a) That the petition is supported by clear and convincing evidence of the allegation; (b) That the respondent has been given the directive in writing, including the evidence that supports the allegation, and has been afforded the opportunity to seek counsel; and (c) That the remedy proposed is the least restrictive on the respondent which would

serve to correct the situation and to protect the public's health.”

Wis. Admin. Code § DHS 145.06(5).

Wis. Admin. Code § DHS 145.06(6) was issued under Wis. Stat. § 252.02(4) as a means to allow a local health officer to combat an ongoing or suspected outbreak of a communicable disease, not as a means to interpret the “reasonable and necessary” language in Wis. Stat. § 252.03. Any argument to the contrary is misplaced. Indeed, any argument that the scope of a local health officer’s authority to preemptively close all schools to in-person instruction under Wis. Stat. § 252.03 has an effect on the ability of a local health officer to close or otherwise regulate individual schools experiencing an active or suspected outbreak under Wis. Admin. Code § DHS 145.06(6), is similarly misplaced. Any decision in this case should reflect the same.

**II. WIS. STAT. § 252.03(2) ALLOWS A LOCAL HEALTH OFFICER TO PLACE REASONABLE AND NECESSARY RESTRICTIONS ON SCHOOLS.**

The authority granted to a local health officer under Wis. Stat. § 252.03(2) to prevent and suppress communicable diseases is necessarily broad. In addition to the authority granted to a local health officer to control localized outbreaks

once they happen under Wis. Admin. Code § DHS 145.06(6), local health officers are authorized to “do what is reasonable and necessary for the prevention and suppression of” communicable diseases. Wis. Stat. § 252.03(2). This grant of authority allows a local health officer to implement reasonable safety measures related to occupancy limits, social distancing, sanitation standards, and the like. There is no indication that the authority to issue these sort of precautionary measures stops at the school house doors.

Communicable diseases vary widely both in how they are treated, but also how they are spread. As a result, the Legislature wisely granted local health officers broad authority under Wis. Stat. § 252.03(2) to defend against them. When confronted with an airborne respiratory disease that also spreads by contact, such as COVID-19, a local health officer may determine, as they have done all over the nation, that mandating increased sanitation of high-touch surfaces, limiting the number of people in certain locations and their proximity to each other, and mandating the use of facemasks are some of the best ways to slow the spread of that communicable disease. Local health officers confronted with a potential outbreak of another type of communicable disease need the authority to

react in other, sometimes varied, ways. For example, Legionnaires' disease is spread by breathing in freshwater mist containing the Legionella bacteria.<sup>2</sup> Legionnaires' disease often grows in hot tubs and rooftop water towers.<sup>3</sup> Therefore, a "reasonable and necessary" preventative measure to combat the spread of Legionnaires' disease might be to mandate increased sanitation of hot tubs, rooftop water towers, and other potential sources of contamination jurisdiction-wide. It might even require a temporary ban on the use of the same. Another deadly communicable disease, monkeypox, is related to smallpox and can be spread by close contact with infected individuals but also through bites and scratches from infected animals.<sup>4</sup> If a local health officer were to identify an outbreak of monkeypox in their jurisdiction, they may determine that it is "reasonable and necessary" to halt all sales of a certain kind of animal or animals that are suspected of spreading monkeypox to prevent future outbreaks from occurring. Of course, these are but a few examples. There are a broad array

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<sup>2</sup> <https://www.cdc.gov/legionella/fastfacts.html> (last visited November 13, 2020).

<sup>3</sup> <https://www.cdc.gov/legionella/outbreaks.html> (last visited November 13, 2020).

<sup>4</sup> <https://www.cdc.gov/poxvirus/monkeypox/transmission.html> (last visited November 13, 2020).

of communicable diseases and the means by which each spreads can vary widely from disease to disease. The authority granted to a local health officer to prevent and suppress this broad array of diseases needs to remain just as broad.

The sort of regulations aimed at slowing the spread of COVID-19 being implemented by MHD, Respondent, and a multitude of other jurisdictions across the nation are not only reasonable and necessary, but evidence shows they are effective.<sup>5</sup> After the Statewide Safer at Home order was lifted, MHD implemented its Moving Milwaukee Forward Safely plan, which placed restrictions on a variety of sectors that are designed to slow the spread of COVID-19.<sup>6</sup> These restrictions

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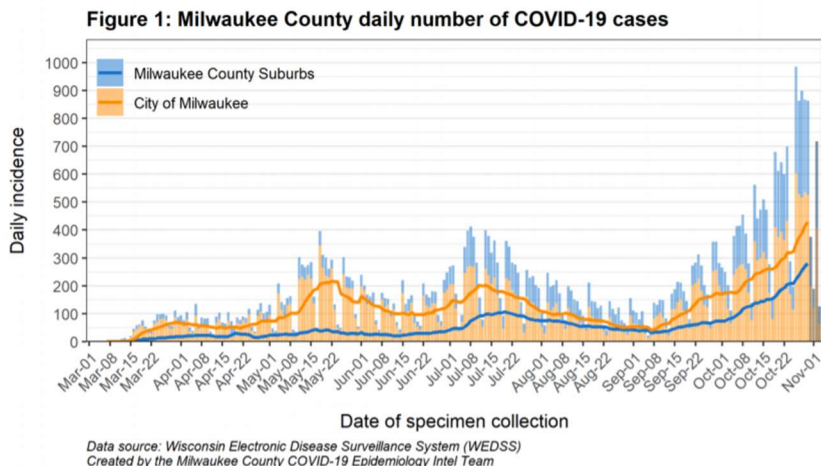
<sup>5</sup> While MHD has not mandated that all schools be closed to in-person education in its current health order, MHD's order does resemble Respondent's in many material respects related to occupancy limits, social distancing, and other restrictions and requirements designed to increase safety standards. A copy of MHD's current order is available at: <https://city.milwaukee.gov/ImageLibrary/Groups/healthAuthors/ADMIN/PDFs/PressReleases/2020/2020-English/MediaReleaseTheCityofMilwaukeePhase4.2Order.pdf> (last visited Nov. 12<sup>th</sup>, 2020.)

<sup>6</sup> Milwaukee has released a variety of health orders since May of 2020: Order #1, released May 14<sup>th</sup>, 2020, is available at: <https://city.milwaukee.gov/Order1MovingMilwaukeeForward>; Order # 2, released May 21<sup>st</sup>, 2020, is available at: <https://milwaukee.gov/Order2MovingMilwaukeeForward>; Order #3, released June 4<sup>th</sup>, 2020, is available at: <https://milwaukee.gov/Order3MovingMilwaukeeForward>; Order #4, released June 26<sup>th</sup>, is available at: <https://city.milwaukee.gov/ImageLibrary/MKE-Health1/MMFSOrder4-6.26.20.pdf>; Order #4.1, released July 30<sup>th</sup>, 2020, is available at: <https://city.milwaukee.gov/ImageLibrary/MKE-Health1/COVID->

include, among other things, mandating social distancing, increasing sanitation standards, and implementing occupancy limits. At the same time, the suburban communities in Milwaukee County began to fully reopen without restrictions. As they did, the proportion of total cases attributed to the suburban communities within Milwaukee County began increasing relative to the City of Milwaukee.<sup>7</sup> This proportional increase started to occur on June 1st, two or three weeks after suburban communities within Milwaukee County reopened. *Id.* This trend indicates a correlation with Milwaukee County suburban communities reopening without

19/MMFSOrder4.1-7.30.20.pdf; Order # 4.2, which is the current health order and was released October 26<sup>th</sup>, 2020, is available at the link provided in footnote 2 (all last visited November 12<sup>th</sup>, 2020).

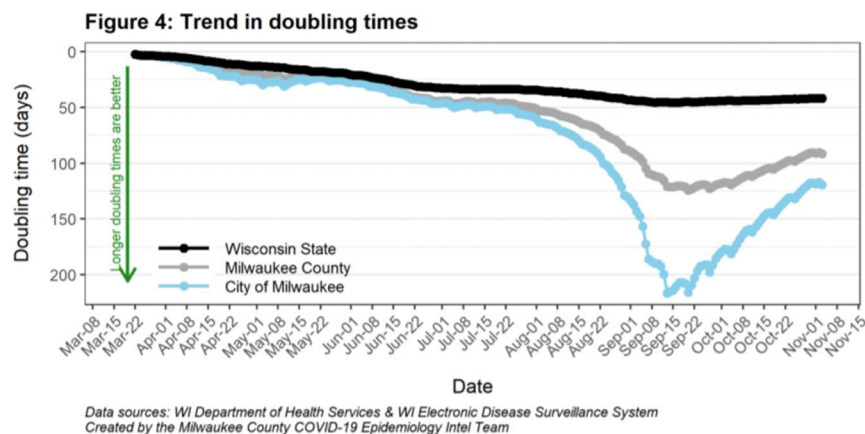
<sup>7</sup> Below graph available at: [https://county.milwaukee.gov/files/county/COVID-19/EPI-Data-Reports/WeeklyReport\\_Nov5.pdf](https://county.milwaukee.gov/files/county/COVID-19/EPI-Data-Reports/WeeklyReport_Nov5.pdf) (last visited November 12<sup>th</sup>, 2020).





restrictions in mid-May based upon COVID-19's two-week incubation period. Further, although both the City of Milwaukee and Milwaukee County had much higher doubling rates (the time it takes for the number of cases to double) at the outset of the COVID-19 pandemic, the doubling rates of both the City of Milwaukee and Milwaukee County (roughly half of the population of which is made up of residents of the City of Milwaukee) have been consistently improving relative to the State as a whole.<sup>8</sup> A majority of the State has not implemented the sort of restrictions MHD and Respondents have during most, if not all, of the current pandemic. The trend in doubling rates provides further evidence of the effectiveness of the restrictions implemented by MHD. These restrictions are

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See Milwaukee County COVID-19 Data Summary (dated November 5<sup>th</sup>, 2020) at page 4, available at:

[https://www.milwaukee.gov/files/county/COVID-19/EPI-Data-Reports/WeeklyReport\\_Nov5.pdf](https://www.milwaukee.gov/files/county/COVID-19/EPI-Data-Reports/WeeklyReport_Nov5.pdf) (last visited November 12, 2020).

similar to the restrictions set forth in Respondents' orders in most respects. Therefore, it is reasonable to assume Respondents' measures are also effective. Data shows that the sort of restrictions being implemented by MHD and Respondent pursuant to their authority under Wis. Stat. § 252.03 are not only reasonable and necessary, but they are effective.

Assuming, *in arguendo*, that this Court determines that Wis. Stat. § 252.02(3) acts as an exception to a local health officer's broad authority to prevent and suppress communicable diseases under Wis. Stat. § 252.03, that decision should be narrowly tailored to the preemptive closure of all schools to all in-person education. Petitioners argue that the authority to "close schools" granted to DHS under Wis. Stat. § 252.02(3) clearly evidences that the legislature did not intend to convey the authority to "close schools" to local health officers under Wis. Stat. § 252.03(2). Petitioners' Opening Brief, pages 25-28. Although Wis. Stat. § 252.02(3) provides DHS with the authority to "close schools" to control outbreaks, it remains silent as to the authority of DHS to issue regulations aimed at preventing and suppressing the spread of communicable diseases that fall short of a full closure to all in-

person education at all schools. These restrictions could include requiring schools to develop an individualized safety plan, mandating increased cleaning within schools, increasing handwashing for students and staff, limiting class sizes to ensure physical distancing, mandating hybrid in-person and remote education models, prohibiting certain high risk activities that might increase the spread of diseases, and many other measures designed to prevent the spread of COVID-19. Nothing in Wis. Stat. § 252.02(3) prohibits a local health officer from implementing these sort of restrictions or vests authority to do the same solely with DHS. Any decision creating an exception to the broad grant of authority given to local health officers under Wis. Stat. § 252.03 should make the bounds of such an exception clear.

### **CONCLUSION**

For the reasons set forth above, the Court should rule in favor of the Respondents and in accordance with the law as outlined herein.

*(signature on next page)*

Dated this 16th day of November, 2020.

Respectfully submitted,



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### CERTIFICATE AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Wis. Stat. § (Rule) 809.19(8)(b), (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 2,708 words.

Dated this 16th day of November, 2020.

Signed:



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

I hereby certify that when an electronic copy of this motion and brief is submitted to this Court, it will comply with the requirements of Wis. Stat. § 809.19(12) and will be identical in content to the text of the paper copy of the motion and brief. A copy of this certificate is included with the paper copies of the motion and brief that are submitted for filing with the Court and served on all parties.

Dated this 16th day of November, 2020.

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