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

In the Supreme Court of Wisconsin

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*.

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*.

SARA LINDSEY JAMES, *PETITIONER*,

v.

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

Original Actions

BRIEF OF RESPONDENTS

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ISSUES PRESENTED

1. In 2020, Wisconsin faces a global pandemic unseen for over a hundred years involving a respiratory virus that spreads when individuals congregate and speak, cough or sneeze. The question presented is whether a local health officer's statutory mandate to "promptly take all measures necessary to prevent, suppress and control communicable diseases" and to "do what is reasonable and necessary for the prevention and suppression of disease," pursuant to Wis. Stat. § 252.03(1) & (2), allows her to issue a health order that the school year may begin with in-person schooling for some grades while other grades phase into in-person learning as the epidemiological data and metrics show suppression and control of the disease?

2. Whether such a health order violates Petitioners' fundamental right to the free exercise of religion under Article I, § 18 of the Wisconsin Constitution when the health order contains an express exception for religious exercise, when Petitioners remain free to practice their faith including religious instruction and religious education, when Petitioners have relaxed their religious practice to avoid the communicable disease, when they recognize that their schools could be closed in some circumstances, and when the Petitioners were prepared for the possibility that there may not be in-person education in the new school year due to the pandemic and engaged in virtual learning for several months when the pandemic began?

3. Whether such a health order violates Petitioners' fundamental right to direct the education and upbringing of their children under Article I, § 1 of the Wisconsin Constitution when the health order does nothing more than direct certain grades to begin the school year in-person while other grades will be phased into in-person instruction as the communicable disease metrics allows?

INTRODUCTION

Constitutional norms and statutory mandates allow the government to do certain things to protect society from a pandemic. This was true when the country experienced the 1918 influenza pandemic. It remains true today in the midst of the COVID-19 pandemic according to Supreme Court Chief Justice John Roberts, whose Court declined an opportunity to enjoin a California health order that limited attendance at places of worship to 25% of a building's capacity or 100 attendees, whichever was fewer, although secular businesses received more lenient capacity limits. Chief Justice Roberts' concurrence said "those restrictions appear consistent with the Free Exercise Clause" because:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613-1614 (2020).

Arriving at our shores earlier this year, COVID-19 is an airborne respiratory virus that travels from person-to-person particularly when individuals commingle for extended periods, talking, laughing, sneezing or coughing. The virus' asymptomatic features, common for many especially among children, causes a deleterious proliferation that has inflicted 228,862 and killed 2,047 in Wisconsin, threatens to overwhelm medical support structures, and impacts society's economic well-being.

Earlier this year, schools were shut down due to the virus. Schools planned various contingencies during the summer, including returning to on-line/virtual learning. For Dane County schools, the local health director determined, short of a full shut-down, the first wave of schoolchildren to re-enter schools, in mass, should be limited to three grades of students to start the year, with subsequent phasing-in of other grades as the epidemiological data showed suppression and control of the virus. Acting neutrally and community-wide, she avoided the constitutional claims she is accused of, all while acting within the statutory safeguards of her Legislative mandate under Wis. Stat. § 252.03.

ORAL ARGUMENT AND PUBLICATION

This Court has scheduled oral argument for December 8, 2020. By granting Petitioners' Petitions for Original Action, this Court has indicated that this case is appropriate for publication.

FACTUAL BACKGROUND

To supplement Petitioners' Factual Background, Respondents add the following.

COVID-19 spreads through three modes that are not mutually exclusive: respiratory droplets produced when an infected person coughs, sneezes, or talks ("airborne transmission"); though close personal contact, such as touching or shaking hands with an infected person or touching a contaminated surface; and through exposure to virus-containing respiratory droplets exhaled by a person in close proximity, usually within 6 feet. Statement Undisputed Facts ("SUF") ¶ 109. As to the first method, the Center for Disease Control ("CDC") has determined COVID-19 can spread via airborne transmission by way of respiratory droplets that can linger in the air for minutes or hours, some traveling far from their source depending on the droplet size. *Id.*

Problematically, asymptomatic individuals – commonly children – may carry and spread the virus. Social distancing, good

hygiene and avoiding gatherings indoors are all recommended ways to reduce the risk according to the CDC and World Health Organization. *Id.* ¶ 112.

This coronavirus pandemic hit Wisconsin in February 2020 and was in its sixth month when this controversy arose. Now, nine months later, it is currently spiraling out-of-control in Wisconsin. The trajectory of COVID-19 this calendar year is reflecting its centennial cousin. The deadly 1918 influenza pandemic also had a seemingly controlled Spring, a flattening summer, and then roared back in the fall and winter of 1918. Wisconsin is a seasonal state, with the start of the school year coinciding with cold weather, primarily indoor activity, and the flu season.

There is critical need for local health officers to be the boots on the ground during this pandemic, preventing, controlling, and suppressing its spread, as there has been extreme State-level legislative gridlock. In April 2020, the Wisconsin Legislature challenged DHS's Emergency Order # 28, the extended "Safter at Home Order," contending the statewide health order exceeded statutory powers and statewide rulemaking authority. This Court declared it invalid, except as it related to school closures (effectively continuing school closures through the end of the 2019-

2020 academic year). SUF ¶ 124. Since then, DHS, the Governor and the Legislature have not collaborated to pass any health-related measures relative to COVID-19.[1]

Public Health Madison Dane County (PHMDC) issued nine post-*Palm* health orders. SUF ¶¶ 108-109, 125, 131-141. PHMDC has issued multiple orders because they have been constantly analyzing the virus' daily metrics on the population in order to make the best decisions for their residents and to calibrate the epidemiological data with necessary measures to slow its spread. *Id.* ¶¶ 108-109, 125, 131-141.

These Orders informed schools that a return to virtual learning may re-occur. SUF ¶ 146. Since the end of last school year, PHMDC planned for contingencies, including virtual learning for the new school year. *Id.* Since March 2020, PHMDC has held weekly conference calls with school districts. *Id.* In April, PHMDC encouraged schools to offer virtual learning for summer school. *Id.* By June, PHMDC asked all schools to plan for both hybrid and

[1] In April 2020, the Wisconsin Legislature passed measures to obtain federal funding, relaxing some requirements for unemployment benefits, and provided some businesses plan protections and other relief for businesses and the economy including various provisions for schools affected by closures. 2019 Assembly Bill 1038, Introduced on 4/13/2020, LRB-6089/1, pg. 5, https://docs.legis.wisconsin.gov/2019/related/proposals/ab1038.pdf

100% virtual education models "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." *Id.* In July and August, PHMDC again announced 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." *Id.*

PHMDC awaited orders from DHS regarding the new school year. SUF ¶ 142. However, after receiving no guidance or direction, PHMDC issued Emergency Order #9 on August 21, 2020 in an attempt to get a grip on the pandemic by allowing for in-person instruction in phases. *Id.*

PHMDC did not issue a "school closure order." Rather, it used available epidemiological information available, including data showing a downward trend of the number of COVID-19 positive cases, and decided to phase in-person instruction to maintain suppression and control. SUF ¶ 145. Data for the 14-day average of infections, from the weeks leading up to the issuance of the Order, revealed the following: on July 13, 2020 - 98 cases/day; on July 20th - 80; on July 27th - 63; on August 3rd - 50; on August

10th - 47; on August 20th - 45; and on August 27th (week of Order #9) – 41. See *PHMDC Coronavirus Data Snapshot*.[2] The data showed a downward trend from July and PHMDC reasonably concluded the trend might continue. *Id*. Also, SUF ¶ 155 graphs daily new cases: 5/31 of 9, 6/30 – 141, 7/31 – 54, 8/31 – 51, 9/30 – 147 and, now, 10/29 – 333. See also SUF ¶ 185 (Wisconsin's infection increase).

When the order was issued, K-2 had met PHMDC data threshold of 54 or fewer cases/day, sustained for four weeks. SUF ¶ 147. The first week following the issuance of Order #9, third through fifth grade, met their target of sustaining a 14-day average of 39 or fewer cases/day and were on their way to being phased in under the order.[3] Unfortunately, the following week, on September 10th, the numbers increased to a 14-day average of 94 cases. See *supra PHMDC Coronavirus Data Snapshot*. Four days later, this court granted the Petitioner's temporary injunction. The data following that order showed near two-fold increase in the 14-day average for positive cases. On September 17th, the 14-day

[2] https://publichealthmdc.com/coronavirus/data#Snapshot (select month, see "Epidemiology" page)
[3] *Id.*

average was 170.[4] Since mid-September, the 14-day average for Dane County has been in the 100s. It is now in the 200s.

Order #9 applies equally to private and public schools alike. SUP ¶ 164.

The Respondents are acting to curb the pandemic and treat the situation seriously, based on COVID-19's epidemiological science and data. *Id.* ¶ 192. The CDC recognizes the lowest risk for schools is to engage in virtual-only classes, activities, and events, further stating "it is important to adopt and diligently implement actions to slow the spread of COVID-19 inside the school and out in the community." *Id.* ¶ 174. Like the CDC, the American Academy of Pediatrics prefers in-person learning, but acknowledges "the current widespread circulation of the virus will not permit in-person learning to be safely accomplished in many jurisdictions." *Id.* ¶ 178.

The increase in children testing positive has steadily risen in Dane County since August. Case counts for children ages 0 to 17 in a seven-day average have risen from 4.4 on August 21st to 7.6 on September 13th to 13.3 on October 5th to 39.4 on October 30th. *Id.*

[4] *Id.*

As of October 27, 2020, DHS reported 82-84% of hospital beds and 19% of the ventilators are in use statewide and likewise for Dane County, which has a growing trajectory of positive cases at 43% and a very high burden for hospitals.[5]

ARGUMENT

I. RESPONDENTS HAVE THE STATUTORY AUTHORITY TO ISSUE SCHOOL-CLOSURE ORDERS.

A. The Statutory Text of Section 252.03 Mandates Local Health Officers To "Promptly Take All Measures Necessary to Prevent, Suppress and Control Communicable Diseases" and to "Do What is Reasonable and Necessary for the Prevention and Suppression of Disease." Such Measures Include Closing Schools.

For the benefit of public health and welfare, the Legislature mandates that local health officers "shall promptly take all measures necessary to prevent, suppress and control communicable diseases," including to "do what is reasonable and necessary for the prevention and suppression of disease." Wis. Stat. § 252.03(1) & (2). Petitioners bring their lawsuit, not under concepts of preemption, but under the rules of statutory interpretation.

[5] https://www.dhs.wisconsin.gov/covid-19/capacity.htm

"Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶¶ 46, 271 Wis.2d 633, 681 N.W.2d 110. Scope, context, structure, and purpose are important. *Id.,* ¶¶ 45-46, 49. Surrounding or "closely-related statutes" help reach a sound interpretation and "avoid absurd or unreasonable results." *Id.* Courts must read statutory language "to give reasonable effect to every word, in order to avoid surplusage." *Id.*, ¶ 46; see also *Antonin Scalia & Bryan A. Garner, Reading Law*: The Interpretation of Legal Texts 176 (2012) ("Because legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant.").

Petitioners acknowledge the importance of "broader statutory context." *Petitioners' Brief p.* 24, 27. They acknowledge § 252.03 contains "general authorizations." *Id.* at 31-32. They also concede, within the broader statutory context involving several other statutes, local health officers may close schools. *Id.* at 35.

The current statutory language flows from the statute's original legislative development in 1923, just a few years removed

from the 1918 Pandemic. The Legislature recognized the need for swift and broad local action when creating local health authorities, and this serves Wisconsin well because there are instances where the communicable disease is not statewide or, as here, DHS has not yet acted. As the Attorney General notes in *WRCIS v. Heinrich*, 2020AP001420 p. 9, "[t]he Department of Health Services and local officials have concurrent statutory authority to close schools." The Legislature's broad empowerment of local health officers can be seen in its amendments. Chapter 252's annotated history reveals 1981 Act 291, which removed predecessor language that the local health officer act "subject to the approval of his board." By removal, the Legislature gave local health officers more autonomy to do what is reasonable and necessary for the prevention and suppression of disease, and to achieve those goals by acting "promptly" without bureaucratic delay.

Against this backdrop, Petitioners focus on the words "close schools" which appears within Wis. Stat. § 252.02 for DHS but not within Wis. Stat. § 252.03 for local health officers. Petitioners rely on "*expressio unius est exclusio alterius*." *Petitioners' Brief p.* 26. Since "close schools" language is absent, Petitioners argue the local health officer has no such power and, notwithstanding the

legislative mandate to promptly take *all* necessary measures, can only "inspect schools."

The Wisconsin Supreme Court has previously rejected such perfunctory analysis when interpreting the important statutory commands of Ch. 252, and it should do so again. In *City of Milwaukee v. Washington*, 2007 WI 104, 304 Wis. 2d 98, 735 N.W.2d 111 the absence of a specific word or phrase was not dispositive when interpreting Wis. Stat. § 252.07(9)(a). The question there was whether said statute permits confinement to a jail for a person with tuberculosis. Rather than focusing its analysis on whether the statute used certain words, "we begin with the statutory language, considering the meaning of operative terms singly, and in relation to the statute as a whole." *Id.* ¶ 33. The Court embraced the statute's various parts, applied commonly accepted meanings and allowed the statutory language to be interpreted "broad enough" to serve its purpose:

> *While Wis. Stat. § 252.07(9)(a) does not explicitly authorize placement in jail of persons with noninfectious tuberculosis who are noncompliant with a prescribed treatment regimen, the plain language of the statute also does not preclude such a placement.* The statute authorizes confinement to a "facility," a word not defined in Chapters 250 (health administration) or 252 (communicable diseases) of the statutes, nor in the tuberculosis subchapter of the administrative code. We therefore turn to a dictionary to ascertain the meaning of the word. … Under this commonly accepted meaning of the term, *"facility" is broad enough to encompass many placement options, including jail.*

Id. ¶¶ 33-34 (emphasis added).

Here, like the result in *Washington*, it cannot be said the plain language of § 252.03 excludes closing schools any more than it excludes taking other measures like closing churches, businesses, offices, or retail stores. The plain language is a general mandate to act: "promptly take all measures necessary to prevent, suppress and control communicable diseases" and "do what is reasonable and necessary." It does so without illustrating examples and without direct reference to or by the Administrative Code. Section 252.03 comfortably falls within this Court's holding in *Washington* that such statutory language does not "preclude" certain action and is "broad enough" to encompass non-enumerated action.

Moreover, aside from following the same analytical approach on the same chapter as a matter of *stare decisis*, this case should not be decided by *expressio unius* because such dispositive use makes *Kalal*'s rules of statutory interpretation pointless.[6] The

[6] The rule of *expressio unius* is not a ""Procrustean standard to which all statutory language must be made to conform'." *Bothum v. State, Dep't of Transp.*, 134 Wis.2d 378, 381–82, (Ct. App. 1986) (quoted sources omitted). "[I]t is always to be applied with caution, keeping in mind that its sole purpose is to aid in searching for the real intention which the language in question was

doctrine "properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved." *Antonin Scalia & Bryan Garner*, Reading Law: The Interpretation of Legal Texts, §10, p. 107 (2012). There is no list of things in relation to §252.02's "close schools" reference for DHS, or to §252.03's broad powers to local health officers. Nothing in §252.02(3)'s "close schools" grant to DHS can reasonably lead to the conclusion that the Legislature intended a related restriction on local health officers, particularly in light of the mandate to local health officers to *prevent* communicable diseases. See also *CH2M Hill, Inc. v. Black & Veatch*, 206 Wis. 2d 370, 379–80, 557 N.W.2d 829, 833 (Ct. App. 1996) (perfunctory statutory analysis would "introduce an element of rigidity which is not warranted when the very purpose for which statutory interpretive rules exist is to glean legislative intent. To plumb the meaning of a statutory subsection our considerations ought not leave 'context' and 'common sense' on the courthouse steps.").

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used to express." *State v. Milwaukee Light, Heat & Traction Co.,* 166 Wis. 178, (1917) (quoted sources omitted).

Section 252.03's language is plain. "If the meaning of the statute is plain, we ordinarily stop the inquiry." *Kalal,* 2004 WI 58, ¶ 45. It contains common and ordinary terms like "shall," "take all measures," "reasonable," "necessary," "prevent," "suppress," and "control," all common words used by this Court in describing the common law involving public health at the time. See, e.g., *Lowe v. Conroy*, 120 Wis. 151, 97 N.W. 942, 944 (1904) ("The statutes were unquestionably framed upon the fact that [health] 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"). None are technical nor terms of art. Its language is not contingent upon or limited by the power to "forbid public gatherings." Rather, the textual placement of "forbid public gatherings" is just one measure local health officers may deploy within the context of reasonableness and necessity to prevent and combat disease in their territory. The "reasonable and necessary"

and "all measures necessary" commands would be meaningless surplusage if the only power was to forbid public gatherings.

Moreover, this plain language – "shall promptly take all measures necessary to prevent, suppress and control communicable diseases" and "do what is reasonable and necessary" – does not appear in the powers afforded DHS under § 252.02. Such statutory commands are not present with such force in the Legislature's grant of authority to DHS under § 252.02. And, §252.03(1) states local health officers "shall" act, as compared to DHS which "may" act under § 252.02(3) & (4). See *State v. Cox*, 2018 WI 67, ¶ 13, 382 Wis. 2d 338, 913 N.W.2d 780 ("We have long said that '[w]hen the words 'shall' and 'may' are used in the same section of a statute, one can infer that the legislature was aware of the different denotations and intended the words to have their precise meanings.'")(quoted source omitted). Petitioners have not disputed that "shall" carries presumptively mandatory action. In sum, this means local health officers must do something, which makes sense given that the local officer, unlike DHS, must act upon seeing a communicable disease, not sit back to evaluate a state-wide impact.

There are other textual differences from DHS's authority which reveal breadth to local health officers' power under § 252.03(1) & (2). "Prevent" appears in the mandate for local heath officers to prevent communicable diseases, but it is absent in relation to DHS's power under § 252.02. "Suppress" appears twice for local health officers and once for DHS, whereas "control" is commonly used between both. The local health officer's mandate to "prevent" and "suppress," therefore, make her the boots on the ground to combat communicable diseases.

Petitioners cannot explain how closing schools for controlling outbreaks and epidemics is reserved exclusively to DHS when many statutes reveal the Legislature considered school closures to be within the measures available to local health officer. Repeated reference to school closures by local health officers can be found in Wis. Stat. §§ 115.01, 115.7915, 118.38, 118.60, 119.23 and 120.12. By way of example, under § 115.01(10)(b), local health officers have the power to close schools. Subsection (b) states: "School days are days on which school is actually taught and the following days on which school is not taught: …[d]ays on which school is *closed by order of a local health officer, as defined in s. 250.01(5)*…." (emphasis added). The plain language of the statute

is unmistakable; local health officers may close schools. The Legislature subsequently added the power of DHS to do so, in a 2009 amendment.[7] The Legislature first recognized that local health officers had the power to close schools, and only later, recognized DHS shares similar power.[8]

The statutes contain other recognition that closing schools falls comfortably within the general grant of powers afforded local public health officers. The legislative chapter governing school district government and school board duties also reflects in plain terms that local health officers have the power to close schools. Specifically, Wis. Stat. § 120.12(27)(a) incorporates § 115.01(10)(1)(b), thereby allowing schools closure by local health officers. The history of § 120.12(27)(a) reveals 2009 Assembly Bill 557, providing LRB analysis regarding its creation. "Under current law, a school district administrator may close a school …because of a threat to the health or safety of the pupils or school personnel.

[7] 2009 Wisconsin Act 42, Assembly Bill 316, Enacted 11/6/2009, pg. 6, https://docs.legis.wisconsin.gov/2009/related/acts/42.pdf

[8] The Wisconsin Legislative Council Act Memo from 2009 Wisconsin Act 42, 2009 Assembly Bill 316, summarizes the changes made in Act 42. 2009 Wisconsin Act 42, 2009 Assembly Bill 316, Wisconsin Legislative Council Amendment Memo on Emergency Management, pg. 4, https://docs.legis.wisconsin.gov/2009/related/lcactmemo/act042.pdf

In addition, a local health officer … may close a school to control outbreaks and epidemics."[9]

This past Spring, in 2019 Assembly Bill 1038, the Legislature incorporated local health officers' power to close schools in light of the relief schools would need when there were closures due to the COVID-19 pandemic. See, e.g., Wis. Stat. § 115.7915(8m) (special needs programs); § 118.38(4)(a) (waivers of school board/district requirements); § 118.60(12) (parental choice programs); and § 119.23(12) (Milwaukee parental choice program). Each recognized school closure by local health officers.[10]

These statutes refute Petitioners claim that only DHS can close schools during a pandemic. The local health officer's legislative mandate to prevent, control, and suppress a disease, inclusive of closing schools to achieve that end, is evident by the Legislature's repeated statutory references in these statutes.

Petitioners' argument that "schools are a matter of statewide concern" in the State Constitution, *Petitioners' Brief p.* 28 (discussing Article X, §§ 1 and 3 of the Wisconsin Constitution) and

[9] 2009 Assembly Bill 557, Introduced 11/10/2009, LRB – 3182/4, pg. 1, https://docs.legis.wisconsin.gov/2009/related/proposals/ab557.pdf

[10] 2019 Assembly Bill 1038, Introduced 4/13/2020, LRB-6089/1, pg. 5, https://docs.legis.wisconsin.gov/2019/related/proposals/ab1038.pdf

"the Legislature's decision to empower DHS, and only DHS, to preemptively close schools in response to an outbreak," *id.*, is belied by the fact that the Legislature repeatedly recognizes local health officers' power includes school closures and did so as recently as six months ago. [11] The Legislature sees such power as reasonable and necessary. It is a "basic precept of statutory construction that the legislature is presumed to act with full knowledge of existing laws." *State v. Gordon*, 111 Wis.2d 133, 145, 330 N.W.2d 564 (1983).

In a powerful way, these school-closure statutes referenced above "change the analysis." *Petitioners' Brief p.* 33. If all these statutes said only DHS could close schools, Petitioners' interpretation of § 252.03's general mandate of power to a local health officer might have appeal. Since Petitioners agree with the importance of evaluating § 252.03(1) & (2)'s general grant of power in the "broader statutory context," they cannot conveniently

[11] Petitioners are incorrect to argue the Wisconsin Constitution at Article X, §§ 1 and 3 create a "context" that empowers only DHS to close schools. Section 1 says public instruction supervision shall be vested in a state superintendent "and such other officers as the legislature shall direct." Petitioners do not point this out, and they cannot reconcile it with the fact the Legislature allows both DHS and local health officers to close schools. Section 3 is inapplicable here; it speaks to creation of school districts across the states and says nothing about operation, closure or suppressing a public health disease. It is not even a mandate directed toward specific district schools or school districts. *Zweifel v. Joint Dist. No. 1, Belleville*, 76 Wis. 2d 648, 653, 251 N.W.2d 822 (1977).

overlook context where the Legislature recognizes local health officers' powers include school closure. It is true these additional statutes do not *imply* anything about the scope of a local health officers' authority, *Petitioners' Brief p.* 22, because these statutes *explicitly* declare local health officers have the power to close schools.

There is also no dispute between the parties that this Court may look outside of the contested statute to determine its meaning, for the Petitioners themselves draw from other statutes in Ch. 252 and unrelated Administrative Code provisions. As much is required when evaluating any statute, even if it means traveling to other chapters to discern its meaning. Statutory language is interpreted "not in isolation but as part of a whole; in relation to the language of surrounding *or closely-related statutes*…" *Kalal*, 2004 WI 58, ¶ 45 (emphasis added). See also, e.g., *Covenant Healthcare Sys., Inc. v. City of Wauwatosa*, 2011 WI 80, 336 Wis. 2d 522, 551, 800 N.W.2d 906 (where statutory chapter did not contain definition, court determined its meaning from other chapters); *CH2M Hill*, 206 Wis.2d at 379–380 (statutory interpretation conducted between two different chapters)

The ability to "inspect schools" is not dispositive in the analysis. Because the plain language to "inspect schools and other public buildings" is confined by its subsequent clause – and thus limited in its scope – "to determine whether the buildings are kept in a sanitary condition." Wis. Stat. § 252.03(1) (emphasis added). The statutory reference to "inspect schools," therefore, has no connection to "disease," unlike the general grants of power created by § 252.03(1) & (2). The definition of "sanitary" relates to health, of or used in the disposal of waterborne waste or characterized or readily kept in cleanliness; by contrast, the definition of "unsanitary" means "unclean enough to endanger health."[12] Inspecting a school for sanitary conditions might be one thing; a centurial global pandemic is quite another – it is a communicable disease triggering other provisions of the local health officer's powers under Wis. Stat. § 252.03(1) & (2).

Moreover, it cannot be that the plain language and context of § 252.03(1)'s "inspect schools" directs a local health officer to "STOP" and do nothing if she finds unsanitary conditions that spread communicable disease. Something must be done. The

[12] Merriam-Webster Dictionary (20 Oct 2020), unsanitary. https://www.merriam-webster.com/dictionary/unsanitary

Legislature mandated her to "promptly take all measures necessary to prevent, suppress and control communicable diseases" and granted related authority to "do what is reasonable and necessary." Such a local health officer could determine consistent with such statutory empowerment that she should close half the school, close the whole school or, as here, let only some classes enter first. Such action is not only a reasonable interpretation of the plain language of § 252.03, but it harmonizes the Ch. 252's legislative structure for (1) DHS to handle statewide matters; (2) DHS to step into local affairs if the local health officer fails act in her local community (per Wis. Stat. § 252.03(3)); and (3) local health officers to address a local concern and take necessary measures, especially if DHS has not acted.

The "bedrock principle of statutory interpretation" about the more "specific" statute trumping the general one, *Petitioners' Brief p.* 29, does not aid Petitioners' cause. Under Petitioner's own textual analysis of § 252.02 versus § 252.03, they are not comparing two statutes on the same matter – according to them, only the former statute allows school closure. Because their own interpretation disclaims these two statutes cover the same topic, there is nothing to be reconciled with this principle. Instead, this

"bedrock principle" should be used to reconcile whether Wis. Stat. §§ 115.01, 115.7915, 118.38, 118.60, 119.23 and 120.12 – all of which allow a local health officer to close schools – are the more specific statutes over § 252.03(1) & (2). It necessarily follows Respondents acted properly within those statutes.

B. Petitioners' Invite a Strained Interpretation of the Statutes and Absurd Results.

Petitioners concede local health officers can close schools under a host of statutes, but to avoid application in this case, they toss aside their own statutory interpretation and assemble a baffling argument limiting local health officers' power "at the very most" to *temporary* closures of *individual* schools in *contexts unrelated to outbreaks and epidemics*. *Petitioners' Brief p.* 35.

The Attorney General found 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, *WRCIS v. Heinrich*, 2020AP001420 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.

Moreover, a cardinal rule of statutory interpretation requires that statutes be construed so as to avoid absurd results. Petitioners believe local health officers can close schools for unsanitary kitchens and locker rooms, *Petitioners' Brief p.* 35-36, toxic or hazardous release, *id.* at 36, poison or asbestos or lead concerns, *id.* at 37, or a rat infestation, *id.* – and perhaps they would concede Legionnaire's disease in the water or an Ebola outbreak – but just not due to the COVID-19 pandemic involving a highly contagious viral threat that has already killed thousands, exists across community boundaries and infests when people congregate, talk, laugh, sing, cough, or sneeze, thereby spreading the virus between them and into the general community when they return to their homes, local business and other places.

When Petitioners say local health officers can close schools for sanitary conditions under Wis. Stat. § 251.06(3)(f), they fail to acknowledge § 251.06(3) does not – anywhere – reference "close schools." When they say Wis. Stat. § 254.59 gives local health officials the authority to "order the abatement or removal" of a "human health hazard" from any "private premises," once again they fail to acknowledge the statutory text does not explicitly state "close school." When they point to statutes for "pests, rodents, and

animal-borne health hazards, lead poisoning; and asbestos…among other things," *Petitioners' Brief p.* 37, once again none of those statutes explicitly allow school closure.

Petitioners hyperbole that the "statutory scheme [allowing only DHS to close schools] ensures that a decision of this magnitude, with such profound impacts on constitutional rights, is made at the statewide level, based upon a uniform, rational policy toward balancing the needs of children obtaining a quality education with the need to control outbreaks and epidemics," *Petitioners' Brief p.* 2, means local health officers could never close schools, which is irreconcilable with their own arguments about when local health officers can close schools. Further, Petitioners cannot offer any logical explanation why "presumably," *id*. at 36, there can be school closure under these situations, but not under § 252.03(1) & (2) during a pandemic.

Given the mandate for local health officers to prevent communicable diseases, it is an unreasonable interpretation to say health orders are solely limited to one-by-one school closure. Discretion in the measure taken is not the enemy. One-by-one school closure is not the sole remedy expressed nor envisioned by these statutes. Singular closures of entire schools would be less

lenient than phasing-in some classes throughout all schools. Surely Petitioners would not want the entire school closed to all students across all grade levels. The approach taken here falls comfortably within statutory powers to do what is "reasonable and necessary." Moreover, Petitioners narrow reading of § 252.03 fails to account for the differences between a singular situation – like Legionnaire's disease that may affect one school's water supply – as opposed to a community-wide communicable disease. Closing only one school would do little to curb disease in the balance of the community. Further, Respondents would be susceptible to claims and lawsuits arguing the local health officer flexed power unreasonably by closing only one school when all the other schools are equally exposed.

A local health officer's power, inclusive of closing school, comports with Ch. 252's dual empowerment for both DHS at a statewide level, but also her power to address matters of local concern. The Petitioners' interpretation does not account for how local health officers and DHS should act if there is a single county disease outbreak. It is not plausible to say only DHS can close schools in that instance. Petitioners state, "[f]or example, as relevant here, DHS would, of course, never have closed only Dane

County schools, given that other parts of the State have much higher COVID-19 rates." *Petitioners' Brief p.* 28. But, Petitioners assume DHS has not left it to each community to make this decision, especially after its statewide order was struck down in *Palm*. That decision set the stage for DHS to either defer to local health officers' mandate to prevent and control communicable diseases or pursue rule-making steps for statewide orders. After *Palm*, clearly DHS has charted a course: let local health officers handle pandemic prevention and control in their communities as authorized by § 252.03.

Additionally, the statutes must be interpreted as a whole to avoid absurd or unreasonable results, which would include reading them in harmony so that § 252.03 does not render all the other statutes meaningless. If § 252.03 were read to remove the power of local health officers to close schools, then all the other statutes referring to such power would be rendered "pure applesauce." See *King v. Burwell*, 576 U.S. 473 (2015) (J. Scalia dissenting).

C. Section 252.03 Has Safeguards Such that Local Health Officers Cannot do Anything and Everything and Does Not Create Constitutional Structural Concerns at Issue in *Palm*.

Respondents do not seek a legal ruling that Wis. Stat. § 252.03(1) & (2) encompasses "anything and everything" or gives "carte blanche authority." *Petitioners' Brief p.* 30-31.

The scope of power, safeguards and compatibility with constitutional structure resides within the statutory text. Under § 252.03(1) & (2), local health officers shall only do what is (1) reasonable, (2) necessary, (3) related to the presence of communicable disease in her territory, (4) subject to reporting obligations to DHS and her governing body; and (5) within temporal limitations, that is, *promptly* to "prevent" and "suppress" the communicable disease and its terminus when the communicable disease is under "control."

By giving the text of Wis. Stat. §252.03(1) & (2) its common, ordinary, and accepted meaning, the Court affirms the statute's safeguards. The first limitation requires action by the "local health officer," not a rank-and-file public employee but a statutorily prescribed office (discussed more fully below).

Next the statutory text mandates local health officers shall "promptly" act, meaning in a prompt manner, without delay, very quickly or immediately upon the emergency of a communicable disease.[13] "Measures" means "a step planned or taken as a means to an end."[14] The measures must be both "reasonable" and "necessary." The former is ubiquitous in law; the entirety of Fourth Amendment jurisprudence sits on the bedrock of "reasonableness."[15] "Necessary" means "not always import[ing] an absolute physical necessity . . . it frequently imports no more than that one thing is convenient or useful or essential to another."[16]

Sections 252.03(1) and (2) contain additional guardrails. Local health officers shall prevent, suppress, and control communicable diseases. They can only act with respect to "communicable disease." Prevent means "to stop from happening;

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[13] Merriam-Webster Dictionary (10/24/2020), promptly. https://www.merriam-webster.com/dictionary/promptly

[14] Merriam-Webster Dictionary (10/24/2020), measures. https://www.merriam-webster.com/dictionary/measures

[15] *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) ("reasonableness 'is predominantly an objective inquiry.' We ask whether 'the circumstances, viewed objectively, justify [the challenged] action.' If so, that action was reasonable 'whatever the subjective intent' motivating the relevant officials. This approach … promotes evenhanded, uniform enforcement of the law.")

[16] Black's Law Dictionary (11th ed. 2019), necessary. See also *McCulloch v. Maryland*, 17 U.S. 316, 1819 WL 2135, 4 L.Ed 579, (1819) ("to employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.").

to hinder or impede."[17] Suppress means "to put a stop to, put down, or prohibit; to prevent (something) from being seen, heard, known, or discussed."[18] Control means "to exercise restraining or directing influence over; to have power over; to reduce the incidence or severity of especially to innocuous levels; to incorporate suitable controls in."[19] Thus, local health officers must stop, hinder, impede, and put down the communicable disease. The front line includes these officers.

Procedural safeguards and constitutional structure are also explicitly stated in the reporting obligations under both Wis. Stat. § 252.03(1) & (2). Under § 252.03(1), upon the appearance of a communicable disease, she must report to both DHS and her governing body; that is, "make a full report to the appropriate governing body and also to the department." When she takes action (i.e., promptly take all measures necessary to prevent, suppress and control communicable diseases), she "shall report to the appropriate governing body the progress of the communicable diseases and the measures used against them, as needed to keep

[17] Black's Law Dictionary (11th ed. 2019), prevent.
[18] Black's Law Dictionary (11th ed. 2019), suppress.
[19] Merriam-Webster Dictionary (10/24/2020), control. https://www.merriam-webster.com/dictionary/control

the appropriate governing body fully informed.…" *Id.* Additionally, under § 252.03(2), she "shall advise [DHS] of measures taken," and if she fails to act DHS steps in. Through these reports to her governing body and DHS, the Legislature created a check on whether she is acting reasonably and necessarily.

The concerns in *Palm* about improper delegation of power and compatibility within the constitutional structure are creative arguments to obfuscate and confuse whether Order #9's provisions do what is "reasonable and necessary" for the prevention and suppression of disease. First, as Petitioners must concede, the local health officer is not acting statewide by issuing an order to everyone in Wisconsin to stay at home, forbid travel and close business, subject to criminal penalties, all "far beyond what is authorized in [DHS's power under] § 252.02(4)" and in contravention of rulemaking under the State administrative procedure act (Wis. Stat. Ch. 227 for state agencies whose rules/orders affect every citizen). *Palm*, ¶¶ 7 & 49. Order #9 does not contain any of those terms, nor any criminal penalties, nor does it exceed § 252.03's authority as explained above. Although forfeitures are provided, SUF ¶ 170, they are constitutionally

acceptable, see *State ex rel. Keefe v. Schmiege*, 251 Wis. 79, 85-86, 28 N. W. 2d 345 (1947).

Second, local governments, unlike state agencies, have direct oversight of employees like the local health officer. The Mayor and County Executive (a named defendant here) oversee her; she serves at their pleasure subject to City Council and County Board action. SUF ¶ 125. Both the City Council, County Board and PHMDC's Board (made up of elected officials and citizens) chart policies, program service priorities and compliance with the local health officer's statutory obligations. *Id*., ¶ 126. PHMDC's Board supervises the local health officer and fulfills "Level III" services, the most robust level for a public health agency. Wis. Admin. DHS §§ 140.06, 140.08.

This is very much unlike State government, and there is a very real legislative control over the local health officer's power to issue "reasonable and necessary" orders. The health officer is not free to willy-nilly issue orders, because orders that do not sit well with the governing bodies place her job on the line. The fear in *Palm* of a rogue bureaucrat freewheeling with power is absent at the local level because such people are shown the door or face restrictions or elimination through simple Resolutions or

Ordinances. The local health officer serves without civil service protection, can be terminated with or without cause and not just at the next election. Local health officers only wield power as the local governing bodies allow to let stand.[20]

Third, Chapter 68 of the Wisconsin Statutes includes express provisions for the review of a decision by a municipal officer, municipal employee, or agent acting on behalf of a municipality. See Wis. Stat. § 68.01. There is a difference between no safeguard being available (in *Palm*) and, as here, where a party simply ignores the available administrative review process.

Fourth, as noted, § 252.03 has built-in safeguards which § 252.02 does not share.

When Petitioners speak of the "best way to operationalize Section 252.03(3)'s" language, the inherent guardrails of § 252.03 provides that answer, not crude efforts to "operationalize" things

[20] Under pressure to their health orders, several local health officers have resigned, including Milwaukee County (https://abcnews.go.com/US/outgoing-milwaukee-health-commissioner-faced-racism-threats-work/story?id=72901404); Sauk County and Shawano-Menominee County (https://www.wpr.org/resigning-sauk-county-health-officer-says-leaders-rejected-science-undermined-pandemic-response); Lafayette County (https://www.swnews4u.com/local/government/matye-resigns-as-lafayette-county-health-department-director/); and the City of Cudahy (https://www.jsonline.com/story/communities/south/news/cudahy/2020/08/19/head-cudahys-health-department-resigning/3398321001/);. See also https://www.nytimes.com/2020/06/22/us/coronavirus-health-officials.html ("Health Officials Had to Face a Pandemic. Then Came the Death Threats.").

by engrafting inapplicable provisions from Wis. Admin. Code § DHS 145.06(5). *Petitioners' Brief p.* 55. Section 145.06(5) is inapplicable for several reasons. That Code section does not address § 252.03(1)'s "promptly take all measures necessary to prevent, suppress and control communicable diseases" mandate nor § 252.03(2)'s "do what is reasonable and necessary for the prevention and suppression of disease," although the Chapter's general purpose confirms the local health officer's power includes intervention, prevention and control of "outbreaks." § DHS 145.02. Instead, § DHS 145.06(5) is directed at persons whose "substantiated condition" poses a threat or "whose suspected condition" poses a threat to others. Moreover, § DHS 145.06(5) relates back to § DHS 145.06(4), involving *individual* persons "known to have or is suspected of having a contagious medical condition which poses a threat to others" – not an overarching situation involving a communicable disease. In that narrow situation, the health officer may issue various orders "as appropriate." *Id*. When the individual is noncompliant with those orders, then the health officer may petition the court to order compliance if, *inter alia*, "the remedy proposed is the least restrictive on the [individual] which would serve to correct the

situation and to protect the public's health." § DHS 145.06(5)(c). This case does not involve such an individual nor petitioning the Circuit Court for orders against such an individual.

Finally, DHS Ch. 145 never uses or discusses "least restrictive" anywhere else, meaning it has neither definition nor context that would enlighten courts or litigants how to apply it. Interestingly, in the very next subsection, § DHS 145.06(6), the Code allows the local health officer "to do what is reasonable and necessary to abate the threat of transmission" against "persons who own or supervise real or physical property…which present a threat of communicable disease." Of note – without minimizing the fact that "owners or supervisors of property" would include school districts – the "least restrictive" language is not carried over. It is omitted. The *solitary* and *scant* reference to "least restrictive" in Admin. Ch. DHS 145 is not surprising; nothing in the statutory chapters (250-252) uses a "least restrictive" test or reference thereto. Petitioners cite no case law to operationalize a Statute by reliance on an inapposite, obscure and solitary reference in the Administrative Code.

The Respondents do not believe "all measures necessary" and "do what is reasonable and necessary" grants unfettered

power. Such an interpretation would be inconsistent with the statutory text as outlined above and it would imperil similar language found elsewhere in the statutes and Administrative Code. Of importance, it is found in Wis. Stat. § 252.04(5) concerning DHS's power, which states "[w]here the use of any pesticide results in a threat to public health, the department shall take all measures necessary to prevent morbidity or mortality." As another example, the phrase is also found in Wis. Stat. § 805.06(5) concerning referees which states "the referee has and shall exercise the power to regulate all proceedings . . . and to do all acts and take all measures necessary or proper for the efficient performance of duties under the order." This statute has not been rejected as impermissibly granting overbroad power.[21] Further, the Administrative Code ATCP § 93.585(1)(a), with respect to leaks of flammable or hazardous liquids, states "the owner or operator or any contractor performing work under this chapter shall take all measures necessary to stop the leak..."[22]

[21] In *Rose v. Rose*, 2017 WI App 7 ¶¶ 37-38, 373 Wis. 2d 310, 895 N.W. 2d 104 (unpublished), the court considered the phrase "all measures necessary," finding it gives the referee broad powers to include unenumerated actions.
[22] WI ADC s ATCP 93.585 Responding to a leak, sill, overfill or release.

Similarly broad legislative grants of authority can be found under Wis. Stat. § 23.11 governing "general powers" to the Department of Natural Resources which has "such further powers as *may be necessary or convenient* to enable it to exercise the functions and perform the duties required of it by this chapter and by other provisions of law." (emphasis added). In *Rehse v. Industrial Com'n*, 1 Wis.2d 621, 85 N.W.2d 378 (1957), the Court did not find such language suspect but found it "sufficiently broad" in order to allow the Conservation Commission (i.e., DNR) to carry out its duties. Additional instances in which the statutes have language of "reasonable and necessary":

- Wis. Stat. § 194.43 - Department of Transportation "may prescribe reasonable and necessary rules and regulations for the safety of operation of private motor carriers."
- Wis. Stat. § 157.055(2)(a) - public health authority may "issue and enforce orders that are reasonable and necessary to provide for the safe disposal of human remains…."
- Wis. Stat. § 196.02(1) - Railroad Commission's powers are "broad, comprehensive, and all inclusive."
- Wis. Stat. § 279.03 – Lower Fox River Remediation Authority "has all of the powers necessary or convenient to carry out the purposes and provisions of this chapter."
- Wis. Stat. § 118.31(3) – general school operations - "reasonable and necessary force" for certain purposes.
- Wis. Stat. §895.529 – "reasonable and necessary" force for self-defense or defense of others.
- Wis. Stat. § 59.70(13)(a)(13) County Mosquito Control District Commission to perform "acts that are

reasonable and necessary to carry out the functions of the commission."

- Wis. Stat. § 349.16 (3)(a) – vehicle exemption "if the exemption or limitation is reasonable and necessary to promote the public health, safety, and welfare."
- Wis. Stat. § 66.0433(3) – municipalities may "adopt reasonable and necessary regulations regarding the location of licensed premises"
- Wis. Stat. § 103.005(1) - Department of Workforce Development "shall adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities…."
- Wis. Stat. § 196.58(b) - municipalities may require public utility additions to its physical plant "as shall be reasonable and necessary in the interest of the public…"

Legislative use of phrases like "take all measures necessary" or "reasonable and necessary" does not necessarily mean judicial reversal. In the context of public health, such language was not suspect in *Superb Video v. County of Kenosha*, 195 Wis.2d 715, 537 NW 2d 25 (Ct. App. 1995), where the court evaluated the powers of local health boards under predecessor statutes. There, the court considered three statutes: (1) Wis. Stat. § 140.09(6)(1991-1992) ("It may adopt such rules for its own guidance and for the government of the health department *as may be deemed necessary to protect and improve public health*") (emphasis added); (2) Wis. Stat. § 141.015(6)(1991-1992) ("shall *take such measures* as shall be most effectual for the preservation of the public health.")

(emphasis added); and (3) Wis. Stat. § 141.02(2) (1991-1992) ("shall provide such additional rules and regulations *as are necessary for the preservation of health*, to prevent the spread of communicable diseases....") (emphasis added). Under these statutes containing similarly worded grants of general authority, the court found the county had the authority to enact a local regulation to preserve public health.

D. The Health Order Does Not Need to Cite Every Statute.

Petitioners offer no legal authority for the proposition the health order cite every statute relied upon or implicated. Nothing in Ch. 252 requires a local health officer to have legal training, to have health orders declare every statute implicated therein or to read like a legal document. The health order could have been silent with reference to State Statutes, could have mentioned every implicated statute or, as here, could have cited § 252.03's mandate to act. Time being of the essence in controlling pandemics, there is no basis to assert the need for exhaustive legal citations.

E. Emergency Order #9's Provisions for Schools Are Reasonable and Necessary.

Petitioners concede stopping COVID-19 spread raises a compelling government interest. *Petitioners' Brief p.* 3. This

compelling government interest leaves little wiggle room to evade the conclusion that Order #9's school provisions fall within § 252.03's statutory boundaries to do what is "reasonable and necessary."

This conclusion should not be undone by protestations that a health order is unnecessary to protect Petitioners because they can undertake precautions of their own choosing and have done so consistent with selected attributes of local, state and federal health orders. For example, Petitioners argue the schools have safe re-opening plans. But, this does not override the local health officer's legislative mandate to prevent *and* suppress *and* control the disease, which obviously requires more from her than rubber-stamping actions of individual schools. Section 252.03's powers do not become unreasonable and unnecessary when community members say they have complied with some, but not all, of a local health officer's comprehensive plan based upon their own interpretation of the nature of the disease and epidemiological data. Petitioners also argue no other county has pursued the health order's phased-in approach, but this argument puts this Court at the pinnacle of making policy judgments about the disease, epidemiological data, public health studies and measures,

hospital resources, all the classic decisions to be made by local officials as prescribed by Section 252.03. Moreover, some counties have declined creation of or empowerment of local health officials for political, policy or budgetary reasons; counties pursue different health strategies, as Petitioners note; and counties are politically diverse. This Court is not suited to decide such policy decisions, especially in an original action. The local health officer used her authority to develop a plan that balanced continuity of schooling, the well-being of students and families and flattening the spread of disease, and Petitioners lack any evidence her employer believes she overstepped her boundaries. It is a stretch to say Order #9's school provisions are unreasonable and unnecessary simply because some disagree, no matter how laudable or virtuous their objections. Reasonable and necessary, not popularity, is the standard established by the Legislature.

Even viewing Order #9 against Petitioners rule – school closures may occur only individually and temporarily – it would still be valid. The order could have, but never did, permanently shutdown every grade of every school for the entire year. Rather, to slow the spread of the virus, it phased in-person schooling for

three grades to begin the school year and, subsequently, followed by others as metrics allow.

Order #9 cannot be deemed unreasonable and unnecessary through DHS § 145.06(5)(c). As noted above, that administrative code section is inapplicable and does not enlighten the inquiry.

Petitioners argue Order #9 allows scores of other businesses to conduct in-person operations, subject to capacity limitations and social-distancing. As discussed below, these entities are fundamentally different from schools, not to mention they face additional restrictions specific to how the virus spreads within their establishment, that do not apply to schools or for which schools cannot comply with:[23]

- 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.

[23] Under Order #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 members outside 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. Childcare and youth settings must have "no interaction or contact between individual groups or classrooms."

- For salons and barber shops, unlike schools, patrons enter alone or with a few others, they sit in one place, have contact with only one person and leave. There is no gathering of a large group of individuals in one room, there is no comingling of such individuals for the duration of a school day, and chairs (and appointment schedules) allow social distancing between customers (and the amount of customers).
- Similarly, as to gyms and fitness centers: customers come in, use equipment, and then leave. Socialization may occur between some intermittingly, but most patrons focus on their individual health or exercise and leave the facility, not commingling with others in the same room 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 arrive in small groups, generally with their families and stick with those small groups. There is not a level of comingling as there is in schools.

- Bowling alleys and movie theaters are similarly distinguishable. These establishments must be set up to avoid individuals mixing who are not in the same household. Patrons 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, see the movie or play a game and then leave.
- The same can be said for other businesses that are allowed to open under Emergency Order #9. With most of the businesses there is brief contact among patrons. There is not full day intermingling like in school.

Schools are fundamentally different than the above establishments as there is much more comingling over sustained time, precisely the concern of the CDC, WHO and DHS. Schools are more akin to 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." Both schools and mass gatherings offer more opportunities for person-to-person contact, and therefore, pose a greater risk of COVID-19

transmission. The effect of mass gatherings draws people 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 viral spread. This is exactly what happens in schools.

Generally, schoolchildren walk through the hallways in groups, use hallway lockers among each other, and eat lunch as a group, plus commingling while enclosed in classrooms during the day. A child from one family will naturally interact with many other children from other households, and then return to their families. There is much greater potential for such individuals to pick up the virus from others.

Although all universities and higher education institutions may remain open for in-person operation, they are fundamentally different from K-12 schools. Classes at higher education institutions are shorter (one to two hours), not commonly in the same buildings nor with hallway commingling among lockers, and students have diverse classes, meals, destinations, and schedules. There is thus less prolonged exposure time between individuals and less opportunity for viral spread. Additionally, single adults living on their own represent the majority of people attending

universities and higher education institutions. Thus, these adults are not bringing the virus home to their families every day for further infection and spread.

Petitioners believe different treatment of childcare/youth settings lacks narrowness and shows arbitrariness. Childcare does not involve the same numbers of children comingling all day long. Under Order #9, it must be 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. Further, Order # 9 limits the number of individuals in childcare and youth settings to groups or classrooms of no more than fifteen children. In childcare settings, children are not going into hallways, switching class, and comingling with children, the same way comingling happens in schools. Rather, it is much more controlled and operates in smaller groups. These size restrictions are not found within Order #9 in the school setting.

Petitioners do not offer any alternatives demonstrating they can address PHMDC's communicable disease concerns about all these children in all grades comingling in classrooms for extended periods during the day when epidemiological evidence and data shows risks with COVID-19, an airborne, contact or droplet

spreading virus. The thoroughness of their plans, albeit laudable, does not address this concern.

II. EMERGENCY ORDER #9 IS CONSTITUTIONAL.

A. *Jacobson v. Massachusetts* Controls the Constitutional Inquiry

The constitutional analysis here involves *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), where the Supreme Court created a framework that provides for minimal judicial interference with state officials' reasonable determinations during a public health crisis. The Court rejected a claim that the state's compulsory vaccination law, enacted amidst a smallpox epidemic in Massachusetts, violated the defendant's Fourteenth Amendment right "to care for his own body and health in such way as to him seems best." *Id*. at 26. The Supreme Court explained:

> There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned." …The possession and enjoyment of all rights are subject to such

> reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.

Id. (quoted sources omitted). Thus, the "liberty secured by the Constitution ... does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Id*. Rather, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id*. at 27. In describing government's role to combat an epidemic, the Court explained, "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Id*. at 29. "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id*. at 27.

Importantly, the Court narrowly described the scope of judicial review:

> If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, *has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law,* it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 31 (emphasis added). This test does not allow judicial second-guessing. *Id*. at 28, 30. While "individual rights secured by the Constitution do not disappear during a public health crisis," the government may "reasonably restrict[]" rights during such times. *Id*. at 29.

Petitioners cannot evade *Jacobson*'s standards under cover of Wisconsin Constitutional claims. Generally, this Court follows federal constitutional analysis where appropriate so that State constitutional rights are consistent with counterpart federal provisions. *State v. Jennings*, 2002 WI 44 ¶ 39, 252 Wis. 2d 288, 647 N.W. 2d 142.[24] Moreover, Wisconsin constitutional law has applied *Jacobson* and shares the same constitutional principles. In *Adams v. City of Milwaukee*, 144 Wis. 371, 129 N.W.2d 518, 520

[24] 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); *Rao v. WMA Securities, Inc.*, 310 Wis.2d 623, 647-648, 752 N.W.2d 220 (2008) (right to jury trials); *Madison Teachers, Inc., v. Walker*, 358 Wis.2d 1, 851 N.W.2d 337 (2014) (contract clause); *State v. Ninham*, 2011 WI 33, ¶ 45, 333 Wis.2d 335, 797 N.W.2d 451 (2011) (excessive fines/punishment).

(1911), the Court applied *Jacobson*'s deference to police-power requirements for tuberculin testing. Again, in *Froncek v. City of Milwaukee*, 269 Wis. 276, 281, 69 N.W.2d 242 (1955), the Court applied *Jacobson*'s deference to fluoridation of water supply. *Jacobson*'s constitutional foundation was partly built on *Mugler v. Kansas,* 123 U.S. 660, and *Mugler* received prior application by the Wisconsin Supreme Court:

> Power to determine such questions so as to bind all must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. *It belongs to that department to exert what are known as the police powers of the state and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.*

State v. Pierce, 163 Wis. 615, 158 N.W. 696, 700 (1916) (emphasis added). In another case, the Wisconsin Supreme Court relied on *Mugler* to make the develop the same *Jacobson* formulation:

> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty––to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. *If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.*

State v. Redmon, 134 Wis. 89, 114 N.W. 137, 141 (1907) (quoting *Mugler*) (emphasis added).

In fact, even before *Jacobson,* the Wisconsin Supreme Court adopted the hard, but necessary, balancing of individual liberties against public health and welfare. Seven years before *Jacobson* relied upon *Beer Co. v. Massachusetts,* the Wisconsin Supreme Court did so in *Chicago, M. & St. P.R. Co., v. City of Milwaukee,* 97 Wis. 418, 72 N.W. 1118 (1897). In *Chicago, M & St. P.R. Co.,* the Court stated:

> [T]he police power at least extends to the protection of the lives, health and property of citizens, and the promotion of good order and good morals.' In our judgment that is broad enough to cover the whole ground of police jurisdiction. When we say that, under it, the legislative branch of the government may constitutionally enact all reasonable regulations to promote the health, comfort, morals and peace of society, and the safety of the individual members thereof, there is little more that can be said on the subject.

Id. (citing *Beer Co.*).

These Wisconsin authorities, like *Jacobson*, reject Petitioners' assertion that there is no police power "which is above the Constitution, or which justifies reasonable or any violation of express constitutional prohibitions or manifest implied ones.'" *Petitioners' Brief p.* 50. For this assertion, Petitioners cite *Redmon*, which does not support the proposition (for the reasons quoted above). Petitioners also cite to *State ex rel. Carter v. Harper*, 182 Wis. 148, 196 N.W. 451, 453 (1923), which states: "[b]y thus

protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare." Similarly, Petitioners cite *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 107 N.W. 500, 502 (1906), but this Court recognized government's purpose and the balancing of interests includes the police power to make regulations reasonably necessary and conductive to the public welfare.

Jacobson, like any case, can be questioned.[25] Even so, until the Supreme Court overrules *Jacobson*, it remains good law and it governs here.

Indeed, rather than overruling *Jacobson*, the United States Supreme Court has consistently relied on *Jacobson* as settled law. See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (citing to *Jacobson*); *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (state and federal legislatures wide discretion to pass legislation where there is medical and scientific uncertainty); *United States v. Salerno,* 481 U.S. 739, 748 (1987)("[w]e have

[25] See, e.g., *Cnty. of Butler v. Wolf*, 2020 WL 5510690, at *6-10 (W.D. Pa. Sept. 14, 2020) (declining to apply Jacobson); *Page*, 2020 WL 4589329, at *7-8 (noting criticism).

repeatedly held the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."); *Washington v. Glucksberg*, 521 U.S. 702, 742 (1997) (citing *Jacobson*, stating Court has upheld legislation imposing punishment on persons refusing vaccination); *Kansas v. Hendricks*, 521 U.S. 346, 346 (1997) ("an individual's constitutionally protected liberty interest in avoiding physical restraint may be overridden even in the civil context"); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992) ("a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims"); *Mills v. Rogers*, 457 U.S. 291, 299 (1982) ("the substantive issue involves a definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it").

The Seventh Circuit has consistently followed *Jacobson. See Democratic Nat'l Comm. v. Bostelmann*, No. 20-2835, 2020 WL 5951359, at *2 (7th Cir. Oct. 8, 2020) ("Deciding how best to cope with difficulties caused by disease is principally a task for the elected branches of government. This is one implication of *Jacobson* and has been central to our own decisions that have

addressed requests for the Judicial Branch to supersede political officials' choices about how to deal with the pandemic"); *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020) ("The district court appropriately looked to *Jacobson* for guidance, and so do we. …At least at this stage of the pandemic, *Jacobson* takes off the table any general challenge to [the health order] based on the Fourteenth Amendment's protection of liberty.").

Not surprisingly, then, the overwhelming majority of courts have resolved constitutional challenges to COVID-19-related health measures by reliance on *Jacobson*. For instance, in *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 343 (7th Cir. 2020), churches challenged a public health order prohibiting "[a]ll public and private gatherings of any number of people occurring outside a single household or living unit are prohibited" and also "any gathering of more than ten people is prohibited…." Exceptions were made "[t]o engage in the free exercise of religion, provided that such exercise must comply with Social Distancing Requirements and the limit on gatherings of more than ten people in keeping with CDC guidelines for the protection of public health." *Id*. Religious organizations were included in the list of "essential" functions exempt from the 10-person capacity limit. *Id*. However,

the churches contended "these rules burden the free exercise of their faith, which requires adherents to assemble in person, and discriminates against religious services compared with the many economic and charitable activities that the Governor has exempted from the ten-person limit." *Id*. The Seventh Circuit followed the framework set forth in *Jacobson* and found the health order constitutionally tolerable. See also *Illinois Republican Party v. Pritzker*, 2020 WL 3604106, *4 (N.D.Ill July 2, 2020) ("*Jacobson* … provides for minimal judicial interference with state officials' reasonable determinations."); *Cassell v. Snyders*, 2020 WL 2112374, at *6-7 (N.D. Ill. May 3, 2020) (COVID-19 qualifies as a public health crisis under *Jacobson*; therefore, "the traditional tiers of constitutional scrutiny do not apply").

Federal courts outside of the Seventh Circuit have also applied *Jacobson*. See, e.g., *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (faulting district court for failing to apply *Jacobson* analysis); *League of Indep. Fitness Facilities & Trainers,* 814 F. App'x at 127-28 ("the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts"); *In re Abbott*, 954 F.3d at 786 (*Jacobson* is "the controlling Supreme

Court precedent that squarely governs judicial review of rights-challenges to emergency public health measures"); *Page v. Cuomo*, 1:20-CV-732, 2020 WL 4589329, at *8 (N.D.N.Y. Aug. 11, 2020) ("courts across the country have nearly uniformly relied on *Jacobson's* framework to analyze emergency public health measures put in place to curb the spread of coronavirus") (collecting cases); *Altman v. Cty. of Santa Clara*, No. 20-CV-02180-JST, 2020 WL 2850291 (N.D. Cal. June 2, 2020) (county shelter-in-place orders); *Gish v. Newsom*, No. EDCV20755JGBKKX, 2020 WL 1979970, at *2 (C.D. Cal. Apr. 23, 2020) (county prohibition on gathering sizes).

Thus, *Jacobson* remains good law. Age alone has not diminished its precedential value. *Bimber's Delwood, Inc., v. James*, No. 20-CV-1043S, 2020 WL 6158612, at *7 (W.D.N.Y. Oct. 21, 2020) (referring to *Jacobson* as a "century-old historical principle [that] has been reaffirmed just this year by a chorus of judicial voices"); *Altman v. Cnty. of Santa Clara*, Case No. 20-cv-02180-JST, 2020 WL 2850291, at *7 (N.D. Ca. June 2, 2020) (*Jacobson* is not "arcane constitutional jurisprudence" but "remains alive and well—including during the present pandemic").

B. Under *Jacobson,* Emergency Order #9 is Constitutional.

Under *Jacobson*, the Court must uphold Order #9 unless it has (1) "no real or substantial relations" to public health or is (2) "beyond all question, a plain, palpable invasion of rights secured by the federal law."

First, Petitioners concede a compelling interest in fighting the pandemic. *Petitioners' Brief p.* 3, 40, 44. Order #9 has a real and substantial relation to the current public health crisis, since reducing the total numbers of individuals coming into buildings and in close contact with others who gather and comingle minimizes the risk of an airborne respiratory virus trying to jump from host-to-host as they talk, move about, or participate in school activities.

Petitioners do not attack the legitimacy and seriousness of the current pandemic or underlying data and circumstances that prompted this health order's provisions. While they insinuate COVID-19 is overstated in its impact in schools and in hospitals, such assertions fail under the latitude courts afford public health authorities in these times. The stipulated facts contain the epidemiological data and nature of this virus, as well as the way it

began to flatten this past summer, which led the local health officer to reasonably conclude she was nearing "suppression" and "control" over it, just ahead of the school year, cold weather and flu season. She made the public health decision, based on data and her statutory commands, to fight COVID-19's viral spread by phasing in the influx of schoolchildren.

Jacobson's framework neither allows judicial second-guessing nor Petitioners' inclusivity arguments. Like other litigants around the country, Petitioners argue Order #9 contains dissimilar treatment of other establishments. These are false equivalencies as discussed earlier. Absolute policy precision among diverse people, businesses and institutions is not required, feasible, or practical. Courts "do not evaluate orders issued in response to public health emergencies by the standard that might be appropriate for years-long notice-and-comment rulemaking." *Elim*, 962 F.3d at 347.

Petitioners arguments that they can safely reopen under their comprehensive plans is not qualitatively different than the assertions of Jacobson. He offered eleven (or more) "offers of proof" or "propositions" to challenge the reasonableness, necessity and wisdom of vaccination laws. *Jacobson*, 197 U.S. at 24. The Court

found them reflective of contrary medical theories for which Massachusetts must pick between. *Id*. at 30. Only the State whose purpose is "protecting the public collectively against such danger" and "to guard the public health and safety" – not an individual litigant, the courts nor juries – could make this policy choice. *Id*. at 30, 31. For this reason, the Supreme Court formulated the real/substantial relations and plain/palpable invasion of rights test.

Second, Petitioners cannot show how Order #9's school limitations are "beyond all question, a plain, palpable invasion" of their constitutional rights. To the contrary, Order #9 carves out religious protection. The order does not prohibit students from praying or any other religious exercise, belief or mission. Nor is there anything in the order prohibiting mass, confession or other religious exercises. Petitioners experienced a complete school shutdown for several months with the statewide order, and they do not claim that experience violated their religious liberty. Further, for several months the Catholic dioceses in Wisconsin granted a Sunday dispensation and they have allowed virtual services, drive-up services and other alternatives. Against this backdrop, and without forgetting three grades could return for in-

person learning immediately followed by other grades as metrics allowed, this order cannot be said to be a plain, palpable invasion of rights.

PHMDC's challenged order does not ban, single out, or show hostility against religion. The Order does not favor one religion over another; it does not favor any particular expression or viewpoints over another; and it does not favor one similarly situated group over another. It imposes neutral and generally applicable rules to guide the community through this pandemic, guide the first group of children safely back into school, and then guide the balance of classes back into school.

C. Emergency Order #9 Does Not Violate Wisconsin Constitution's Freedom of Conscience Clause.

Even outside of *Jacobson*'s analysis, a "private right to ignore generally applicable laws" is a "constitutional anomaly," for reasons recognized in arguably the most influential modern free exercise case authored by the late Justice Scalia:

> Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind — ranging from compulsory military service, to the payment of taxes; to health and safety regulation

> such as manslaughter and child neglect laws, *compulsory vaccination laws*, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. *The First Amendment's protection of religious liberty does not require this*.

Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 US 872, 888-889 (1990) (emphasis added).

Wisconsin's religious exercise clause also does not require what religious objectors demand. "While words used may differ, both the federal and state constitutional provisions relating to freedom of religion are intended and operate to serve the same dual purpose of prohibiting the 'establishment' of religion and protecting the 'free exercise' of religion." *State ex rel. Holt v. Thompson*, 66 Wis.2d 659, 676, 225 NW 2d 678 (1975). Wisconsin Constitution Article 1, Section 18 states: "the right of every person to *worship* Almighty God according to the *dictates of conscience* shall never be infringed." (emphasis added). This "worship" clause involves homage and adoration to God, "both spiritual and visible, private and public, by individuals, families, and communities…[and] is abundantly commanded in His word.'" *State ex rel. Weiss v. Dist Bd. of Sch. Dist*., 76 Wis. 177, 44 N.W. 967, 979 (1890).

But, activities of individuals, even when religiously based, are often subject to regulation by government in the exercise of its undoubted power to promote the health, safety and general welfare, as recognized in the seminal case law preceding *Smith*. The concurring justices in *Wisconsin v. Yoder,* 406 U.S. 205 (1972) observed "[t]he challenged Amish religious practice here does not pose a substantial threat to public safety, peace, or order; if it did, analysis under the Free Exercise Clause would be substantially different." 406 U.S. at 239 n. 1 (White, J., concurring) (citing *Jacobson*). Years earlier, the Court said:

> [F]or "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.

Sherbert v. Verner, 374 U.S. 398, 402-403 (1963). In *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944) (emphasis added) the Supreme Court stated:

> But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. *Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds.* [citing Jacobson] *The right to practice religion freely does not include liberty to expose the*

> *community or the child to communicable disease or the latter to ill health or death.*

Wisconsin courts, too, say Section 18 is not an unfettered right that allows citizens creative arguments to bypass generally applicable laws. "[T]he constitutional freedom of religion is absolute as to beliefs but not as to the conduct, which may be regulated for the protection of society." *State v. Neumann,* 348 Wis.2d 455, 516, 832 N.W.2d 560 (2013) (citing *Smith*). In addressing the criminal convictions of the parents who treated their 11-year-old's undiagnosed serious illness with prayer, this Court rejected their invocation of parental fundamental rights to make decisions for their children about religion and to direct the care of their child. Those rights were not "beyond limitation.'" *Id.* ¶¶ 116-117. Following *Prince v. Massachusetts*, this Court held parents were not free to expose their child to risks in contravention of the public interest "in the name of religion." *Id.* ¶ 113-115.

Petitioners have not explained how strict scrutiny review supersedes rational basis review where, as here, Order #9's contested provisions are neutral and generally applicable. Petitioners attempt a clever argument. They make highly generalized assertions about how constitutional liberties can *never*

be infringed and label *Jacobson* an outlier, i.e., "exceedingly." *Petitioners' Brief p.* 50. Plaintiffs then dismiss the full constitutional contours of the case law. By adopting their approach, they get judicial expansion of their free exercise rights in such a way that there could never be regulation of any kind, including health orders, even in the "rare case" under strict scrutiny. *Id.* p. 41. They will get the "win" Jacobson never got.

A "neutral, generally applicable regulatory law" is subject only to ordinary rational basis review under *Smith*, 494 U.S. at 880, even if religious practice is incidentally burdened. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). See also *L.L.N. v. Clauder*, 209 Wis. 2d 674, 209 n. 6, 563 N.W.2d 434 (1997). Courts afford a presumption of validity and sustain a law if the burden imposed is rationally related to a legitimate state interest. In *Smith*, the Court rejected Free Exercise Clause claims of Native American church adherents who ingested peyote as a sacrament; they sought exemption from a statute that prohibited the use of peyote in secular or religious practices. 494 U.S. at 874. When laws are not targeted at specific religious groups or specific types of religious practice, "'[t]he teaching of *Smith* is that a state can determine that a certain harm should be prohibited generally,

and a citizen is not, under the auspices of her religion, constitutionally entitled to an exemption.'" *Roman Catholic Diocese of Brooklyn v. Cuomo*, 2020 WL 6120167, *6 (E.D.N.Y. 10/16/20) (rejecting free exercise challenge to capacity limits set by health order). By contrast, a law that "single[s] out acts of worship for 'distinctive treatment,'" triggers strict scrutiny analysis, as discussed in *Hialeah*. Strict scrutiny applies only when, unlike here, a challenge is brought against "[a] law burdening religious practice that is not neutral or not of general application…." *Hialeah,* 508 U.S. at 546.

Here, Order #9 deserves rational basis treatment because it is generally applicable and neutral. By its terms, the Order did not focus on Petitioners' schools, parochial schools generally, or just private schools; it focused on all schools equally.[26] The proportionality of students impacted by Order #9 shows neutrality: 90.77% affected are enrolled in public schools. SUF ¶ 166. As the

[26] "Since the onset of COVID-19 in the winter of 2020, some public health authorities have identified religious gatherings as environments well suited to the transmission of the virus." *Roman Catholic Diocese*, 2020 WL 6120167, *6. "Among the other problematic features of religious gatherings, congregants arrive and leave at the same time, physically greet one another, sit or stand close together, share or pass objects, and sing or chant in a way that allows for airborne transmission of the virus." *Id.* (citing CDC Guidance, Considerations for Communities of Faith, (May 23, 2020)).

Attorney General points out, "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." Amicus Brief *James v. Heinrich*, 2020AP1419 p. 7 (8/31/20).

Petitioners "recognize that they and their students engaged in religious practices outside of school or church, [and] that these practices are not limited by Dane County's orders…." SUF ¶¶ 81, 102. "They also acknowledge that virtual learning and phasing-in classes does not prohibit or preclude their free rights to engage in other religious exercises or practices or live out that mission in other contexts, including attending church service or Mass on Saturdays and/or Sundays or engaging in religious studies." SUF ¶ 102. These stipulated facts make sense – the teachings of Christ are not bound by buildings. "For where two or three are gathered in My name, there am I among them." Matthew 18:20. From the Vatican to the largest churches in America, all have streamed religious services virtually and all have adjusted their practices and missions, whether dispensation from mass or, for some at least, pursuing their school year on-line. See SUF ¶¶ 102, 159.

Order #9 exempts "Religious Entities and Groups," allowing the free exercise and practice of religion. *Id*. It does not prohibit religious education; religious teachings, instructions, and missions are all allowed under the order. *Id*. Anyone can educate their child in religious faith. Additionally, any burden on religious beliefs is no greater than what Petitioners endured earlier this year when in-person schooling was fully closed, what they experience with capacity limits at weekend mass and when they modify their practices in other ways due to COVID-19 modifications.

Because Order #9's provisions are equal to all schools and permits religious education, it falls well within rational basis approval. While health orders vary, since *South Bay,* nearly every court to consider these controversies has upheld COVID-related restrictions unless there was targeted religious treatment.[27]

[27] In addition to the Supreme Court, the Seventh Circuit and other federal cases discussed earlier, and the recent *Roman Catholic Diocese* case discussed above, see also *Calvary Chapel Lone Mountain v. Sisolak*, 2020 WL 3108716, *4 (D. Nev. June 11, 2020) (declined to apply strict scrutiny where houses of worship were subject to the same 50-person cap as comparable secular activities like "lectures, museums, movie theaters, specified trade/technical schools, night-clubs and concerts," even as casinos were permitted to operate at 50% capacity); *Legacy Church, Inc. v. Kunkel*, 2020 WL 3963764, at *__ (D.N.M. July 13, 2020) (declined strict scrutiny to a restriction limiting mass gatherings, including religious gatherings, to 25% of maximum occupancy while allowing restaurants, gyms, and pools to operate at 50% capacity. The court found the restriction was neutral because it did not target houses of worship due to "their religious nature, but because they involved masses of people in closed spaces and in close proximity.").

In their formulation of strict scrutiny, Petitioners omit the full contours of *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n.*, 2009 WI 88, 320 Wis.2d 275, 768 N.W.2d 868 (2009), which held that telling a religious ministry who it must accept as a minister was categorically outside the power of the government because such an order would take an official position on "Catholic faith and worldview." Here, PHMDC is not directing beliefs or telling any of the Petitioners what their religions dictate. It is regulating conduct of county residents with school age children, irrespective of religious beliefs.

Accepting that Petitioners "have the sincere belief that they must educate their children in their religious faith," does not mean Petitioners are constitutionally burdened without in-person schooling in a pandemic. The Order does not prevent religious education at a religious institution, nor does it prevent parents from providing religious instruction at home. The argument that children must go to school to attend mass, interact with clergy, or receive the sacraments ignores the express exemption. Anyone, including a school-age child, can enter the church, whether in the vestibule, nave, sanctuary or classroom. They can also practice

their religion in their homes, demonstrating that Order #9 does not infringe upon a person's right to worship.

Petitioners assert that Order #9 plainly burdens them from "access to core religious practices." *Petitioners' Brief* p. 44. However, all of these things are carved out as an exception. There is nothing in the Order that prohibits students from praying, daily mass and confession, or a priest's presence in a classroom for those three grades beginning the school year (and for those grades that will follow).

Under the *Coulee* analysis, there is an obvious compelling state interest in mitigating the spread of COVID-19 and ending this pandemic. "Public safety and the protection of human life is a state interest of the highest order." *State v. Miller*, 196 Wis.2d 238, 249, 538 N.W.2d 573 (Ct. App. 1995) (aff'd on other grounds). The government already regulates worship gatherings if they jeopardize public health. See, e.g., *Peace Lutheran Church & Academy v. Village of Sussex,* 2001 WI App 139, ¶ 22, 246 Wis.2d 502, 631 N.W.2d 229 ("any burden the Fire Prevention Code may have on the sincerely held beliefs of the Church is outweighed by the compelling interest in preserving life and property"); *Christ College, Inc. v. Bd. of Sup'rs, Fairfax Cty.,* 944 F.2d 901 (4th Cir.

1991) (rejecting the argument that fire safety policies that limited the number of people who could be inside a church "impinged on [a church's] first amendment rights to the free exercise of religion.").

Nor can Petitioners show there are "less restrictive means" to achieve PHMDC's compelling interest like the plaintiffs were able to demonstrate in *Miller*. 196 Wis. 2d at 246. Petitioners argue the Order is not the least restrictive means compared to other entities. As discussed above, those entities present fundamentally different circumstances from schools in terms of how they operate, how persons attend the premises and how viral spread occurs over time and place, not to mention the fact that many of them have additional restrictions which are inapplicable to schools or for which schools cannot comply with.

Petitioners argue narrow tailoring is lacking because they believe their schools have extremely detailed safety reopening plans and PHMDC has an "unprecedented" approach despite other counties with higher COVID-19 rates. *Petitioners' Brief p.* 47. The former invites judicial substitution of health policy guidelines and for invalidation of every neutral public health law when citizens assert they can fend for themselves and will comply with some, but not all, aspects of public health measures. The latter sells one

shoe. Like Chief Justice Roberts, Justices Kavanaugh, Thomas and Gorsuch all agreed there was "substantial room to draw lines, especially in an emergency" and the "State could impose reasonable occupancy caps across the board." *S. Bay*, 140 S. Ct. at 1614. There is no lesser alternative, as seen by what happens with relaxed or no measures – acceleration of infections. SUF ¶¶ 155, 185. Until the injunction in this case, on the heels of state university students return to school (a state decision), PHMDC trended along suppression of the disease; Ms. Heinrich had statutory power to see that through, not stop one mile short of completing the marathon. Maintaining disease control – until the vaccine finish line – required phasing re-entry into the school year, not allowing the entire student, staff and faculty population to re-enter during a viral pandemic as cold weather sets in, the flu season begins and everyone spends the majority of their days inside. Perhaps a more narrowly tailored order could have waited until October or November, but neither Section 252.03 nor constitutional law countenances public health measures that are too little or too late.

Petitioners also argue the Order is not the least restrictive means because it could have "focused only on schools that do not

have such detailed reopening plans." *Petitioners' Brief p.* 47. Even if § 252.03 gives this choice, individual plans would need to be vetted and monitored separately, would necessitate additional orders, and would increase community-wide confusion. Local health departments have limited resources and providing the white glove service desired by Petitioners takes away time from testing, contract tracing, coordination with medical and health authorities and monitoring epidemiological data. Moreover, focusing orders on particular schools would risk claims of free exercise violations or, perhaps, "the Establishment Clause fire." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 482 (2009) (Scalia, J., concurring). A community-wide plan steers clear of those pitfalls.

Petitioners detailed safety response plans do not address the gathering of many persons for a long period of time in buildings and classrooms. PHMDC started with the youngest, the least susceptible to the virus (SUF ¶ 167), allowing that limited group to re-enter with needed personnel. By contrast, the more students allowed to re-enter, all at the same time and with all those additional teachers and faculty, the more the virus can spread overwhelming the health care system, as clearly evidenced by the

skyrocketing COVID-19 positivity rates that Wisconsin now experiences as the school year unfolds. Guidance can be found in *Cassell v. Snyders*, 2020 WL 2112374, *12-13 (N.D. Ill. 2020):

> The remaining question is whether the ten-person limit is the "least restrictive means" of pursuing that goal. … But Plaintiffs have failed to spotlight, and the Court has not found, any less restrictive rules that would achieve the same result as the prohibition on large gatherings. …
>
> Considering the seriousness of the continuing COVID-19 pandemic, the threat of additional infections in the context of large gatherings, and the avenues for religious worship, prayer, celebration, and fellowship that the April 30 Order does allow, the Court finds that no equally effective but less restrictive alternatives are available under these circumstances....

University of Wisconsin-Madison's return to classes does not mean this health order lacks narrow tailoring. First, PHMDC has no control over that decision – it's a State decision, one fueling massive increase in virus spread. Local health officers cannot stop State university students from filling campus, no more than she can direct the state/federal judiciary on what to do with courthouses. However, they can, consistent with their grant of statutory authority, stop entire local schools from returning with full attendance at every level at once. Second, narrow tailoring means the government interest can be met, *Petitioners' Brief p.* 41 (citing *Miller*), and clearly the full influx of UWM students

demonstrated the public health interest of prevention, suppression and control was not "met."

For these reasons, even if this court applies strict scrutiny, Order # 9 survives, just like similar orders in *Cassell* and *Illinois Republican Party v. Pritzker,* 2020 WL 3604106 (N.D. Ill., July 2, 2020). There, plaintiffs challenged a COVID-19 order which prohibited any gathering of more than ten people. The order was narrowly tailored and evoked the least restrictive means when balancing free exercise with encouraging practices adhering to public health guidelines. See also *Legacy Church, Inc v. Kunkel*, 2020 WL 1905586 (D.New Mexico 2020) (health order satisfied strict scrutiny analysis); *Ass'n of Jewish Camp Operators v. Cuomo*, 2020 WL 3766496, (N.D.N.Y. 2020) (same).

Similar to *Illinois Republican Party,* Order #9 is narrowly tailored for reasons previously stated. Its exemptions reinforce this conclusion: (1) health care operations (2) public health operations (3) human service operations (4) infrastructure operations, and (5) manufacturing; and (6) government functions. These exemptions are emergency or governmental functions or otherwise necessary to public health. These exemptions demonstrate the order eliminates the increased risk of COVID-19

transmission when people gather while only exempting necessary functions to protect health, safety, and welfare.

D. Emergency Order #9 Does Not Infringe Parental Rights to Direct the Educational Upbringing of Their Children.

This claim by Petitioners, going so far as to assert there is a "ban" on "securing in-person education for their children," *Petitioners' Brief p.* 23, should be rejected. Nothing in Order #9 excludes children from religious schools or controls educational choice. Neither does it address children's upbringing or educational plans. Order #9's provisions address protecting children, parents, and the entire community from COVID-19. In operation, schools can open for in-person instruction for grades K-2. The remaining grades are waiting in-line to be phased-in, as a way to suppress and control the disease. For any child that Petitioners believe will struggle with virtual learning as "totally inadequate" for their needs, *Petitioners' Brief p.* 53, such students can request an individualized education program ("IEP") and receive in-person instruction (if the school approves). Petitioners' theory may have more clout in the months to come, if there is a vaccine, if the pandemic is controlled, and if Respondents ordered online courses only without having any data to support it.

Petitioners cannot mean their asserted right precludes any school closure for any reason because they have unilaterally concluded in-person education is vastly superior. This right would be overreaching, for they acknowledge there are several statutes that explicitly recognize local health officers' power to close schools. Plus, in addition to DHS's statutory power to close schools, the Legislature understood religious instruction *outside* of school was plausible when amending, in 1972, Wis. Const. Art. X, Sec. 3 regarding the release of students for religious instruction.

Although parents possess the constitutional right to direct the upbringing and education of their own children, as noted above the state has a "wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Prince v. Massachusetts*, 321 U.S. at 167.

Parental rights to direct the educational upbringing of children in contravention of local health laws is not a "fundamental right" of such robust dimensions claimed by Petitioners, such that they can guarantee how education is delivered to them. Their right "to direct the upbringing and education of their children" does not translate into a fundamental right to engage their children in instruction wherever and however they chose, or how they have

previously received it, when public health is also at stake. Petitioners cannot extrapolate such a fundamental right from *Pierce, Yoder, Meyer,* and *Parham* since those cases are distinguishable and inapplicable here. They involved governmental infringement on visitation, custody, or state-imposed education. None them spoke to a state's power in a public health emergency. Indeed, *Parham,* 442 U.S. 584, 603 (1979), noted "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." See also *Six v. Newsom*, 2020 WL 2896543, C.D. California (May 22, 2020) (lawsuit alleged health orders violated parental right to direct their son's education; the court did not know "what to make of the [plaintiffs'] characterization of their constitutional rights.").

Nor do any of the cases and arguments Petitioners rely upon lead to application of strict scrutiny. Rather, rational basis review should be utilized, assuming their claims pass the *Jacobson* analysis. See also *Peterson v. Kunkel,* 2020 WL 5878407, (D. New Mexico 10/2/2020) (rejecting strict scrutiny review for claims of fundamental right to education); *Page v. Cuomo,* 2020 WL 4589329 (N.D.N.Y. 8/11/2020) (same).

This Court should have reluctance to declare the Petitioners asserted fundamental rights given the public health emergency of this case, the different constitutional balancing required by *Jacobson*, and the unsettled legal decisions in this area. Following United States Supreme Court precedent, this Court has not attempted "to define 'the totality of the relationship of the juvenile and the state,'" and has noted "in a variety of contexts that 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" *City of Milwaukee v. K.F.*, 145 Wis.2d 24, 45, 426 N.W.2d 329 (1988). "Significantly, the state's augmented authority over children has been recognized as most appropriately exercised with respect to activities carried out in public places where the dangers to the juvenile are the greatest." *Id*. (citing *Prince v. Massachusetts*). This Court concluded:

> [W]hile parental interests in rearing children without state or municipal interference may be impinged upon by the ordinance, we concur with the United States Supreme Court that where "[a]cting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control...."

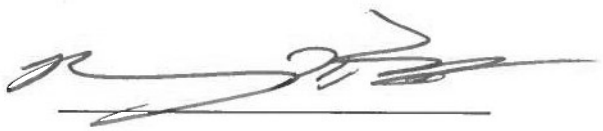
Id. at 46.

CONCLUSION

This Court should uphold Emergency Order #9 and dismiss this action. Petitioners rights do not supersede the rest of their citizen neighbors.

Dated: November 2, 2020

Respectfully submitted,



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font, and the Court's briefing order dated September 16, 2020. The length of the brief is 16,452 words.

Dated November 2, 2020

Remzy D. Bitar

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

I further certify that:

The 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.

Dated November 2, 2020.

Remzy D. Bitar