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STATE OF WISCONSIN  
Nos. 2020AP1419-OA, 2020AP1420-OA, 2020AP1446-OA

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

v.

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

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*.

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**LEAGUE OF WISCONSIN MUNICIPALITIES' AMICUS CURIAE BRIEF**

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Original Actions

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## INTRODUCTION

The League of Wisconsin Municipalities (League) is a non-profit, non-partisan voluntary association of 592 Wisconsin cities and villages cooperating to improve and aid the performance of local government. We sought to file an amicus brief in this case because we are concerned that this Court may interpret local health officer authority under Wis. Stat. § 252.03 in a manner that negatively impacts municipal health departments'<sup>1</sup> authority to effectively respond to communicable disease in the community. This prospect is particularly concerning as local health officers wrestle with the daunting question of how to best protect residents and prevent COVID-19 from spreading within their jurisdictions.

We disagree with Petitioners' assertion that local health officers lack authority under § 252.03 to restrict school operations or close schools if the local health officer deems such restrictions reasonable and necessary. Such a conclusion is not supported by the plain language of § 252.03. It also runs counter to the statutory framework governing response to communicable disease, which the legislature specifically designed to require a prompt response by a local health officer with

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<sup>1</sup> Although most municipalities are served by county health departments pursuant to Wis. Stat. § 251.02, 16 municipalities operate their own health department or partner with the county or other municipalities: Appleton, De Pere, Eau Claire, Franklin, Greenfield, Hales Corners, Madison, Menasha, Milwaukee, North Shore, Oak Creek, South Milwaukee/St. Francis, Wauwatosa, West Allis, Racine and Watertown.

broad powers who is accountable to both DHS and the governing body. This Court should be wary of improperly circumscribing local health officer authority at a critical time when the state legislature has taken a hands-off approach and left local governments and local health departments standing alone on the front line to wage the battle against COVID-19.

### ARGUMENT

#### **WISCONSIN STAT. § 252.03'S PLAIN TEXT AND STRATEGIC DESIGN TO REQUIRE LOCAL HEALTH OFFICERS TO PROMPTLY TAKE ALL MEASURES NECESSARY TO PREVENT, SUPPRESS, AND CONTROL COMMUNICABLE DISEASE INCLUDES AUTHORITY TO RESTRICT IN-PERSON EDUCATION AND CLOSE SCHOOLS.**

Wisconsin Stat. § 252.03(1) provides that local health officers “*shall promptly take all measures necessary* to prevent, suppress and control communicable diseases . . . .” (emphasis added). This statutory language establishes a clear requirement for local health officers to proactively respond to a communicable disease, such as COVID-19, that is present in their jurisdiction. Moreover, Wis. Stat. § 252.03(2) authorizes local health officers to “do what is reasonable and necessary for the prevention and suppression of disease . . . .” A local health officer’s authority is tempered only by the “necessary” and “reasonable and necessary” language in subsections (1) and (2), respectively. Accordingly, local health officers have broad power to react to a

communicable disease in any manner so long as it is reasonable and necessary.

The legislature's decision to grant such broad authority to local health officers to deal with communicable diseases is a sensible one. "Government action to further public health goals sometimes must be both rapid and drastic to be successful. Epidemics of disease can not only kill many people quickly, but can also have a ruinous impact on a society." Allan J. Jacobs, *Is State Power to Protect Health Compatible with Substantive Due Process Rights?*, 20 *Annals Health L.* 113, 113 (2011). Local health officers are best positioned to rapidly and effectively address a communicable disease that presents within their jurisdiction. The state undoubtedly plays an important role as well, but a communicable disease is most likely to be introduced to a state in a finite locale – e.g., a single municipality or county – and then spread from there.

[O]ne of the most important of all health regulations is that directed to the exclusion of communicable diseases and the keeping of such diseases, when they have once gained an entrance, *within the smallest possible limits*, and providing for the establishment and enforcement of regulations by which their general dissemination shall be prevented and their continued existence rendered improbable or impossible.

39 Am. Jur. 2d Health § 60 (emphasis added).

Petitioners argue that, based on the respective language of Wis. Stat. §§ 252.02(3) and 252.03(1), only DHS has the authority to close schools and local health officers may only inspect schools to determine whether they are kept in a sanitary condition (see Petitioners' brief at p. 26). However, Petitioners' reading of this language is misguided for two reasons. First, Petitioner's reading ignores the fact that the "inspect schools" language is the last sentence of Wis. Stat. § 252.03(1) and comes after the statutory mandate to take all measures necessary to prevent, suppress and control communicable diseases. Second, the applicable language of § 252.03(1) states "[t]he local health officer may inspect schools and other public buildings within his or her jurisdiction as needed to determine whether the buildings are kept in sanitary condition." This language should not be read as a limit on what measures a local health officer may take to meet his or her statutory duty of preventing, suppressing, and controlling communicable diseases. Rather, it is more appropriate to read this language as statutory authorization to enter schools and other public buildings without the known presence of a communicable disease. Such a reading is supported by the Legislature's amendment to the statutory language in 1981,

The local health officer ~~shall~~ may inspect the ~~schoolhouses~~ schools and other public buildings within his ~~district, with sufficient~~



frequency or her jurisdiction as needed to determine whether ~~such~~ the buildings are kept in a sanitary condition.

Laws of 1981 Chapter 291. To interpret this *permissive* language otherwise would result in a nonsensical restriction on the *mandatory* language to “take all measures necessary” and would directly undermine the legislature’s clear grant of broad authority to local health officers to take the immediate steps necessary to address a communicable disease.

Although local health officers’ powers in responding to communicable disease are broad and undefined, they are not unfettered. Local health officers are unelected officials but that does not mean they are unaccountable. Local health officers are required to report to both the governing body and DHS regarding the presence of communicable diseases and the measures taken in response. Rules promulgated by DHS under Wis. Stat. § 252.02(4) for the control and suppression of communicable diseases also supersede conflicting or less stringent local regulations, orders and ordinances. Wis. Stat. § 252.02(4). Moreover, local health officers are appointed officials. As appointed officers, local health officers are subject to removal from office. Therefore, although a local health officer does indeed have broad statutory authority to respond to a communicable disease, one who

oversteps the bounds of his or her duties is subject to removal if necessary.

Under § 252.03, local health officers play a critical role in controlling communicable disease. The legislature purposely designed § 252.03 so that the appearance of communicable disease in a territory is met with a prompt, measured response from a local health official who is required by Wis. Stat. § 251.06 to have significant expertise and training. Although DHS has general supervision and authority for public health under Wis. Stat. § 250.04, the use of local health officers as “the boots on the ground” (see Respondents’ brief at pp. 13 and 26) responding to communicable disease in the officer’s territory, rather than waiting for response by a state agency or legislative body, is a strategic choice. That strategy allows for prompt, broad, decisive action deemed reasonable or necessary by the local health officer after the officer has investigated the local circumstances and reported back to DHS and the governing body. It also illustrates the legislature’s understanding that bodies like state agencies that are subject to rulemaking procedures, and deliberative bodies like legislatures, are not nimble or well-suited to make quick decisions or respond quickly to changing conditions. The need for health officials to have broad powers and be able to respond quickly to matters involving public health was recognized early on by the Wisconsin Supreme Court in a 1909 case

involving the City of Milwaukee's health commissioner revoking a license to sell milk. The Court stated as follows:

A health officer who is expected to accomplish any results must necessarily possess large powers and be endowed with the right to take summary action, which at times must trench closely upon despotic rule. The public health cannot wait upon the slow processes of a legislative body, or the leisurely deliberation of a court. Executive boards or officers, who can deal at once with the emergency under general principles laid down by the lawmaking body, must exist if the public health is to be preserved in great cities.

*State ex rel. Nowotny v. City of Milwaukee*, 140 Wis. 38, 121 N.W. 658, 659 (1909).

The Court's words in *Nowotny* ring true today and the legislature's agreement with the principles espoused therein are reflected in § 252.03's grant of broad authority to local health officers and mandate for a prompt response when communicable disease is present in their territory. Initially, local boards of health were responsible for action but in 1982 the legislature further streamlined response to communicable disease when it amended § 252.03's predecessor to move away from decisions by local boards of health and give local health officers authority on the front end. A look at precisely how the statute was amended is telling:

143.03 (title) Duties of local health officers. (1) Every local health officer, upon the appearance of any communicable disease in his or her territory, shall immediately investigate all the circumstances; and make a full report to ~~his board~~ the appropriate governing body and also to the

~~department; he shall at all times. The local health officer shall promptly take such all measures for the prevention, suppression and control of any such disease as he deems needful and proper subject to the approval of his board necessary to prevent, suppress and control communicable diseases, and shall report to his board the appropriate governing body the progress of such the communicable diseases and the measures used against them, with such frequency as needed to keep the board appropriate governing body fully informed, or at such intervals as the secretary may direct. The local health officer shall may inspect the schoolhouses schools and other public buildings within his district, with sufficient frequency or her jurisdiction as needed to determine whether such the buildings are kept in a sanitary condition.~~

(2) Local ~~boards~~ of health officers may do what is reasonable and necessary for the prevention and suppression of disease; may forbid public gatherings when deemed necessary to control outbreaks or epidemics, ~~and under direction of the department, shall furnish antitoxin free to indigent persons suffering from communicable disease and shall advise the department of measures taken.~~

Laws of 1981 Chapter 291.

Given § 252.03's broad grant of authority and purposeful design allowing for a prompt response, and the various statutes cited by Respondents authorizing local health officers to close schools, this Court should not view the lack of express authority for local health officials to close schools in § 252.03 as precluding local health officers from restricting school operations or closing schools if deemed necessary and reasonable. Such a decision would run counter to § 252.03's strategic design.

## CONCLUSION

Because Petitioners' arguments are not supported by the plain language of Wis. Stat. § 252.03 and run counter to the strategic statutory framework governing response to communicable disease, we urge this Court to refrain from holding that local health officers lack the authority to restrict school operations or close schools and to affirm Respondents' order.

Respectfully submitted November 20, 2020.

League of Wisconsin Municipalities

By:



Claire Silverman (State Bar #1018898)  
Maria Davis (State Bar #1099072)

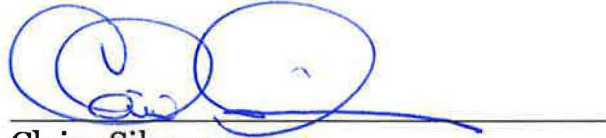
### **CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 1909 words.

I further certify that the electronic brief submitted in compliance with the requirements of sec. 809.19(12) is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate is included with the paper copies of this brief filed with the Court and mailed this day to all parties.

Dated: November 20, 2020.



Claire Silverman