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STATE OF WISCONSIN

IN SUPREME COURT

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

WISCONSIN COUNCIL OF RELIGIONS 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 TRUIT, *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*.

**NON-PARTY BRIEF IN SUPPORT OF RESPONDENTS BY
MADISON METROPOLITAN SCHOOL DISTRICT AND
MONONA GROVE SCHOOL DISTRICT AS AMICI CURIAE**

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Amicus Curiae Madison Metropolitan School District (MMSD) represents approximately one-third of the public school students affected by Emergency Order #9 issued by Public Health Madison & Dane County (PHMDC). Monona Grove School District operates seven schools in Dane County. MMSD and Monona Grove (collectively, “the School Districts”) join in supporting PHMDC’s authority under Wis. Stat. § 252.03 to close schools. The Respondents were authorized by statute to issue an order temporarily suspending in-person instruction for students in grades 3-12 in Dane County. Therefore, the Court should uphold Emergency Order #9 as a valid action well within a local health officer’s broad authority to prevent, suppress and control communicable diseases like COVID-19.

As explained below, with a disease this new and complex, whose spread affects both students and adult members of the community, school districts look to and rely

on the guidance provided via emergency orders such as the one issued by PHMDC. In this unique situation, a central authority with broad expertise is the best source for a decision of this magnitude. Moreover, Wisconsin's statutory framework empowers school boards to cooperate with their local health officers on matters affecting the public health of students and the wider community, and explicitly contemplates school closures ordered by a local health officer. The Petition should be denied and the temporary injunction lifted.

ARGUMENT

- I. School districts rely on local health officers to make decisions on COVID-19 given their significantly greater expertise on the subject.**
 - A. Local health officials are more knowledgeable than school officials about the health impacts of COVID-19.**

COVID-19 was first recognized as a threat to human health in December 2019, and the disease quickly spread around the world. *SUF ¶ 107*. The first case in Dane County was confirmed February 5, 2020, and the second March 10, 2020. *SUF ¶ 117*. However, the rate of infection has increased considerably in the past two months. As of November 9, Wisconsin is averaging 5,639 new cases a day, more than 2,300 Wisconsinites have died from COVID-19, and more than 2,000 Wisconsinites are currently in the hospital with it.¹

In short, this disease is a serious and growing threat, but it is still relatively new to public health officials and scientists. Although it is being studied intensively, there is much about it that remains unknown or under debate. Even

¹ Sophie Carson, *Wisconsin hospitals caring for more than 2,000 COVID-19 patients as state ranks among worst in U.S. for new cases*, Milwaukee Journal Sentinel, Nov. 9, 2020
<https://www.jsonline.com/story/news/2020/11/09/wisconsin-coronavirus-state-reports-4-300-new-cases-17-deaths-monday/6221256002/> (last visited Nov. 16, 2020).

the CDC is “still learning how it behaves” and is refining guidance for prevention of the disease. SUF ¶ 109.

One aspect of the disease that is not yet well-understood is the effect that it has on young people. SUF ¶ 150. Scientists continue to examine and debate how readily children contract the virus and how often they transmit the disease to their siblings, adult family members, and teachers. SUF ¶ 192. Moreover, because the disease is so new, not much is known about the long-term effects of the illness on future health.

Given the complexity of this disease and the alarming trajectory of the case counts, public health decisions relating to COVID-19 are best made by those armed with the most extensive knowledge about the disease. Local health officers such as those at PHMDC have access to more expertise, evidence, and scientific studies to make these decisions than authorities with school districts do. Individual school districts

simply do not have the same resources or breadth of experience on this subject. Schools are the experts in education, and PHMDC is the expert in communicable diseases.

PHMDC was made for a crisis of this sort. One of PHMDC's main purposes is to support community health initiatives.² Its website explains how it does so:

We work to provide our community with: information to support data-informed decisions; strategies and technical assistance to implement programs and policies that are designed to improve health; and evaluation expertise to measure what's working.³

PHMDC supports community health initiatives in several ways, including through epidemiology and data analysis, as well as health policy.⁴ PHMDC describes its role

² Pub. Health Madison & Dane Cty., *About Us*, <https://www.publichealthmdc.com/documents/PHMDC%20One-Page%20Overview.pdf> (last visited Nov. 16, 2020).

³ *Community Initiatives*, Pub. Health Madison & Dane Cty., <https://www.publichealthmdc.com/community-initiatives> (last visited Nov. 16, 2020).

⁴ *About Us*, *supra*.

in epidemiology and data analysis as being to “[c]ollect, organize, analyze, and communicate health-related data to assess community health, track health trends, prevent diseases, and inform policies and programs to improve health.”⁵ With respect to health policy, the role of PHMDC is to “[t]rack and analyze policies that impact health, and work with partners in multiple sectors, to incorporate health considerations into decision-making.”⁶

In short, PHMDC was created for precisely the types of decisions necessitated by the emergence of COVID-19. Wis. Stat. § 252.03. School districts were created to educate children. Wis. Stat. § 118.01.

Moreover, PHMDC has far more resources and experience available to it to inform its decisions than school districts do. PHMDC has a staff of over 350 people that have

⁵ *Id.*

⁶ *Id.*

specific training and education related to communicable diseases. Four out of the five members of its Executive Leadership Team have Masters Degrees in Public Health.⁷ Among that number is Respondent Janel Heinrich, the Director of PHMDC.⁸ PHMDC has significantly more expertise at its fingertips than any school district in Dane County and possibly any district in the state.

It is not feasible for an individual school district to replicate the expertise of a local health officer performing the duties established in Wis. Stat. § 252.03. Even though much information about COVID-19 is publicly available, the process of sorting good information from bad is better left to scientists and health care professionals with the appropriate background. School districts cannot afford to hire their own

⁷ *Leadership*, Pub. Health Madison & Dane Cty., <https://www.publichealthmdc.com/about/leadership> (last visited Nov. 16, 2020).

⁸ *Id.*

public health experts to advise them, nor is there a reason for them to do so when local health officers are available.

Science's understanding of the virus is constantly evolving and therefore better interpreted by an expert.

School districts have limited financial resources.

Public health departments have limited financial resources.

The most sensible way to utilize those resources is for each of them to concentrate on their own area of expertise. That means school districts should be able to rely on local health officers to provide guidance on such things as closure orders for health-related reasons in accordance with Wis. Stat.

§ 252.03.

B. Local health officials are able to provide a broader perspective on school closure decisions.

Furthermore, PHMDC has a broader focus than a school district. Opening schools does not just affect the health of students. A disease like COVID-19 can spread rapidly,

even among people without symptoms (SUF ¶ 113) inside and outside of schools. School districts want to be responsible members of their communities, and they have to look to local health officials to let them know when opening schools could be dangerous for public health generally. PHDMC can consider the impact of opening schools on the community as a whole and look beyond its impact on children. Because they are not elected officials, PHDMC employees are less subject to political pressure. In contrast, schools are subject to the control of school boards.

In addition, given the circumstances surrounding the spread of disease, closure of a single school district may not be sufficient to reduce the rate of transmission. Left to their own discretion, districts in the same county may make different closure decisions using the same data. Closing some schools while other schools nearby are still open may not be sufficient to stop the spread of illness. Local health officers

see the bigger picture and consider the risk of reopening on the county as a whole.

In fact, closing one school district may lead parents to simply switch their kids to a different school district. This response means that the health risk is not actually lessened, just moved over a few miles. And the school district that behaved responsibly suffers financially as a result, and finances should not play a role in closing schools because of infectious diseases. Making closure decisions at the county level provides more stability for the parents, kids, and schools.

Moreover, a central public health authority with full knowledge of local conditions can act with more urgency than an individual school district. COVID-19 can be spread by asymptomatic carriers, and it may be appropriate to close schools *before* an issue arises. If many individuals in a community are ill and some of those individuals are outside

the school system, then a school district may not know about the full extent of the illness. A county-level public health authority would have a more complete picture. Individual districts may not be as aware of what is going on in other districts as county health officials.

On the other hand, the big picture can only go so far out. By being closer to the source of the outbreak, local public health officials may be better positioned than state officials to determine whether school closures are appropriate in their specific counties. Thus, there are circumstances in which a local health officer, familiar with local conditions, may be a better judge of what institutions should be shut down than a state official. As a result, as discussed below, state statutes provide some flexibility as to the source of an emergency order. PHMDC is one entity authorized to issue such an order.

II. Emergency Order # 9 is within PHMDC's broad authority under Wis. Stat. § 252.03 to implement all measures necessary to control communicable diseases, including temporarily suspending in-person instruction.

The Wisconsin Legislature requires local health officers to “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). To understand what powers the Legislature granted to local health officers under Wis. Stat. § 252.03, the Court must examine surrounding and closely-related statutes to understand the context and structure of the statute as a whole. *State ex rel. Kalal*, 2004 WI 58, ¶¶ 45-46, 49, 271 Wis. 2d 633, 681 N.W.2d 110. Pertinent to this case, statutes that predate the COVID-19 outbreak and address closely related subject matter, namely health-driven school closures, support that

both local health officers *and* DHS may close schools. *See* Wis. Stat. §§ 115.01(10)(b); 120.12(27).

A. The duties of Wisconsin school boards explicitly contemplate closure of schools by local health officers.

Duties of school boards related to school closings and reopenings include:

SCHOOL CLOSINGS AND REOPENINGS.

(a) Within 24 hours of a school being closed for a reason specified in s. 115.01 (10) (b) or (c) or by the department of health services under s. 252.02 (3), notify the department. The notice shall include the reason for the closure.

Wis. Stat. 120.12(27)(a) (Emphasis added.) Among specified reasons for school closings is closure “by order of a local health officer” or the department of health services. Wis. Stat. § 115.01(10)(b). Petitioners’ argument that *only DHS* is empowered to close schools in response to an outbreak makes no sense when the Wisconsin Legislature has given school boards explicit duties arising from school closings ordered by public health officers, as well as by DHS. Petitioners’ reliance

on Article X, §§ 1, 3 of the Wisconsin Constitution for the notion Wisconsin schools are to be managed primarily on a “uniform” statewide basis is at odds with Wis. Stat. § 115.01(3), which states that the “school district is the territorial unit for school administration.” Already individual schools and school districts across Wisconsin are adopting virtual learning models or other disease control strategies based on local conditions. *SUF ¶¶ 159-162*. As a practical matter, it makes more sense for school closure decisions to occur at the district or county level, rather than at the state level, depending on the course of the virus in the community.

In Wisconsin, school administration, as well as many matters of public health, are left to local control by school districts and local health officers, respectively. Wis. Stat. §§ 120.12, 252.03. Direction at the state agency level is also possible and may, at times, supersede local orders. See Wis. Stat. § 252.02(4) (“Rules that are promulgated and orders that

are issued under this subsection supersede conflicting or less stringent local regulations, orders or ordinances.”) However, in prioritizing orders of DHS over local orders, the legislature implicitly recognizes the authority of local health authorities to regulate in the same area as DHS. *Superb Video v. Cty. of Kenosha*, 195 Wis. 2d 715, 724, 537 N.W.2d 25, 28 (Ct. App. 1995). As long as local action is not in conflict with statewide action, it is permissible. *Id.*

As the 2020-21 school year began, DHS provided no direct orders to school districts as to school closings or any other issues related to control of the COVID-19 outbreak. SUF ¶¶ 142, 164. In the absence of superseding statewide orders from DHS, PHMDC issued Emergency Order #9 on August 21, 2020, to provide clarity and direction to local schools and school districts. SUF ¶¶ 142, 144. Rather than close all schools in Dane County, PHMDC considered research on COVID-19 in school-aged children, as well as

community data, and determined that K-2 education could occur in person, while instruction for grades 3-12 was to proceed virtually. SUF ¶ 145. Ordering temporary suspension of in-person instruction for many area students, resulting in the closure of some area schools, is an example of “what is reasonable and necessary for the prevention and suppression of disease” in Dane County under the broad grant of authority in Wis. Stat. § 252.03(2).

Although DHS has not provided direct orders to Wisconsin school districts for the 2020-21 school year, it recently published guidelines for school districts that anticipate local closure orders:

School Districts

School administrators and public health officials should consider temporarily halting in-person instruction across a school district when:

- The local, county, state or the federal government recommend closure.
- The number of absences among school and district staff is impeding vital district functions.

- Contact tracing is being conducted to identify close contacts and additional cases from multiple schools (for example, in response to a large outbreak linked to a multi-school sporting event).
- Other outbreak mitigation measures were implemented, and were ineffectual at halting transmission at schools in the district.⁹

Clearly, DHS's understanding of the statutory powers of local health officers to temporarily halt in-person instruction across a school district differs from Petitioners' overly restrictive reading.

B. Wisconsin Statutes direct school districts to cooperate with local health officers on matters of public health.

The Wisconsin Legislature requires school districts to cooperate with and obtain direction from their local health departments on multiple matters of public health—not only during an outbreak. For a school district, which offers

⁹ WI Dep't Health Servs., *Guidelines for the Prevention, Investigation, and Control of COVID-19 Outbreaks in K-12 Schools in Wisconsin*, 22 (Oct. 2020), <https://www.dhs.wisconsin.gov/publications/p02757.pdf>.

instruction to all children in an area, the local health department, which is responsible for the health and safety of all children in an area, is an essential point of contact.

Schools or school districts and local health departments routinely interact in the following areas:

1. Immunization of children. In cooperation with local health departments, school boards are required to develop and implement a plan for obtaining evidence of completed immunizations from each student. Wis. Stat. § 120.12(16)(b). Public and private schools are subject to the same requirements. For the purposes of immunization, “school” means “any public or private elementary, middle, junior or senior high school, which provides educational instruction to students in any grade kindergarten through 12,” Wis. Admin. Code DHS 144.02(8).

2. Nurses and dentists. School districts are empowered to employ qualified public health nurses, school nurses, registered nurses and licensed dentists who shall cooperate with the local board of health and the department of health services. Wis. Stat. § 120.13(11).
3. Sanitation. The local health officer may inspect schools within his or her jurisdiction to determine whether the buildings are kept in a sanitary condition. Wis. Stat. § 252.03(1).
4. Communicable diseases. If a teacher, school nurse, or principal of any school or child care center knows or suspects that a communicable disease is present in the school or center, he or she shall at once notify the local health officer. Wis. Stat. § 252.21.

5. Health examinations. In counties having a population of less than 750,000, the school board may require periodic health examinations of pupils by physicians, under the supervision of local health departments and the department of health services. Wis. Stat. § 118.25(3).

As shown, school districts and local health departments routinely work together to achieve public health goals that serve both children, as well as the community at large. Local cooperation to obtain compliance with immunization requirements is a chief example of how local public health departments have leveraged schools' near-universal reach within the youth population to protect the entire population from dangerous communicable diseases. *See* Wis. Stat. §§ 112.12(16), 252.04(2). As a communicable disease spread by asymptomatic carriers and as yet uncontrolled by community vaccination (SUF ¶ 113),

COVID-19 mandates a flexible arsenal of measures implemented by local health departments in tandem with area schools and school districts (SUF ¶ 150), among other community stakeholders, to achieve the Legislature's stated goal of prevention, suppression and control. *See* Wis. Stat. § 252.03(1) & (2). Temporary closures of public facilities, schools included, that pose heightened risks of disease transmission (SUF ¶¶ 114-115) are necessary and reasonable under the circumstances.

CONCLUSION

The Court should hold that Emergency Order No. 9 is a lawful exercise of the authority of a local health officer to temporarily close school buildings to prevent, suppress, and control communicable disease, and it should lift the

temporary injunction enjoining Respondents from enforcing
it.

Dated this 16th day of November, 2020.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the Rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,994 words.

Dated: November 16, 2020.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(2)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated: November 16, 2020.

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