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SUPREME COURT OF WISCONSIN

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

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 STEINHAEUER, ALAN STEINHAEUER, 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., ANGELINA HINELINE, JEFFREY HELLER, ELIZABETH IDZI, JAMES CARRANO, LAURA MCBAIN, SARAH GONNERING, ST. MARIA GORETTI CONGREGATION, NORA STATSICK, ST. PETER'S CONGREGATION, ANNE KRUCHTEN, BLESSED SACRAMENT CONGREGATION, AMY CHILDS, BLESSED TRINITY CONGREGATION, COLUMBIA/DANE COUNTY, WI INC., LORETTA HELLENBRAND, IMMACULATE HEART OF MARY CONGREGATION, LORIANNE AUBUT, ST. FRANCIS XAVIER'S

CONGREGATION, MARY SCOTT, SAINT DENNIS
CONGREGATION AND RUTH WEIGEL-STERR, *PETITIONERS*,

v.

JOSEPH T. PARISI, 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 OF MADISON TEACHERS INC.,
WISCONSIN ASSOCIATION OF LOCAL HEALTH
DEPARTMENTS AND BOARDS, WISCONSIN EDUCATION
ASSOCIATION COUNCIL, MILWAUKEE TEACHERS'
EDUCATION ASSOCIATION, RACINE EDUCATORS UNITED,
KENOSHA EDUCATION ASSOCIATION, and
GREEN BAY EDUCATION ASSOCIATION
UNDER WIS. STAT. § 809.19(7)**

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INTRODUCTION

Amici Curiae Madison Teachers, Inc., Wisconsin Association of Local Health Departments and Boards (“WAHLDAB”), Wisconsin Education Association Council, Milwaukee Teachers’ Education Association, Racine Educators United, Kenosha Education Association, and the Green Bay Education Association represent two groups of workers on the front-line of the COVID-19 public health battle. While WAHLDAB members work to mitigate the spread of this novel coronavirus, educators are dealing with the implications of the disease, which upended their workplaces, on a daily basis. Through this brief, both groups share their perspectives on the need to keep schools and the greater community safe by recognizing the statutory authority of local health officers to take prompt, necessary actions to control the spread of communicable diseases, as accomplished under Executive Order #9 (“the Order”), issued by Respondent Heinrich.

ARGUMENT

I. Local health officers have broad and longstanding authority to issue orders to protect the public health during an outbreak of a communicable disease, which includes limiting in-person instruction at schools.

The Wisconsin Legislature has delegated broad police power to local health officers to control communicable diseases. A decade before the 1918 influenza pandemic, this Court recognized the unique need for health officers to have a nimble hand to deal with public health crises:

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.

State ex rel. Nowotny v. City of Milwaukee, 140 Wis. 38, 121 N.W. 658

(1909); *see also Jacobson v. Massachusetts*, 197 U.S. 11, 25, 27, (1905)

(recognizing validity of legislative delegation to local health boards

and stating: “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.”).

The broad power recognized in *Nowotny* is codified in Wisconsin's statutes. Local health officers "may do what is reasonable and necessary for the prevention and suppression of disease" and "shall promptly take all measures necessary to prevent, suppress and control communicable diseases." Wis. Stat. § 252.03(1), (2). Their power is not unlimited; any measures taken must be *reasonable* and *necessary to prevent, suppress and control* the communicable *disease*. Further, their actions are directly checked by their governing bodies and the Department of Health Services ("DHS"). Wis. Stat. §§ 250.04(1)(b), 252.02, 252.03.¹

The Legislature wisely ratified the *Nowotny* Court's recognition that often "public health cannot wait upon the slow processes" when it directed local health officers to act quickly to stop communicable diseases and save lives. Also, the Legislature directed local health officers to take "*all*" necessary measures to

¹ A Joint Legislative Council committee reviewed these authorities after the September 11, 2001 attacks to ensure "the capacity of the public health system and the *adequacy of state laws to enable that system to detect and respond quickly to a terrorist act or public health emergency.*" See Joint Legislative Council, *Special Committee on Public Health System's Response to Terrorism and Public Health Emergencies, Staff Brief 02-04* (Aug. 27, 2002) (emphasis added).

prevent, suppress and control communicable diseases, without further limitation.

In 1982, the Legislature amended Wis. Stat. § 143.03 (which has since been renumbered to § 252.03). 1981 c. 209, § 23. The statute was amended to give local public health officers more autonomy to take action and report to the board, instead of getting prior approval from the board. *Id.* Further, the word “all” replaced the word “such” in describing what measures the officer was to take in dealing with communicable diseases. *Id.*

“In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute.” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. “All words and phrases shall be construed according to common and approved usage.” Wis. Stat. § 990.01(1)(e). Courts must read statutory language “to give reasonable effect to every word, in order to avoid surplusage.” *Kalal*, 2004 WI 58, at ¶46. “Because legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether

redundant.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012).

“Well-established canons of law soundly . . . favor[] an interpretation that will ‘produce sensible, desirable results, since that is surely what the legislature must have intended. But it is precisely because people differ over what is sensible and what is desirable that we elect those who will write our laws – and expect courts to observe what has been written.’” *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶77, n. 14 (R. Bradley, J., concurring) (citing Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 22). “Hyperbolic concerns about the consequences of judicial interpretation of the law cannot override our duty to say what the law is and not what we may wish it to be.” *Id.*, citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Although Petitioners may wish local health officers did not have the authority to limit in-person instruction at schools, the Legislature has tasked local public health departments with taking

all necessary measures, and this most certainly includes limiting in-person instruction or partially closing schools when needed.

“All” is not defined in statute. In determining the ordinary meaning of undefined words, courts may consult a dictionary to aid in statutory construction. *County of Dane v. Labor & Indus. Review Comm'n*, 2009 WI 9, ¶ 23, 315 Wis. 2d 293, 759 N.W.2d 571.

Consistent with common understanding, the dictionary defines “all” to mean: “the whole, entire, total amount, quantity, or extent of.”

All, **Miriam-Webster Dictionary**.² “[T]he use of the word ‘all’ [as a modifier] suggests an expansive meaning because ‘all’ is a term of great breadth.” *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 336 (4th Cir. 2012) (internal citation omitted). In short, the

Legislature has tasked local health officers with using the whole universe of necessary measures to deal with communicable diseases.

The Legislature did not reserve certain measures or authority to the Department. The statute does not say: “except only the Department has the authority to close schools.” As demonstrated

² Available at: <https://www.merriam-webster.com/> (viewed November 13, 2020).

elsewhere in statutes, the Legislature has shown its awareness that local health officers are authorized to close schools. *See, e.g.,* Wis. Stat. § 115.01(10)(b) (counting as school days the days school is closed “by order of local health officer”).

Local health officers are the experts – upon which communities should rely to make determinations about protecting local public health, including limiting the spread of communicable diseases at schools.

The legislative delegation of authority to local health officers to control communicable diseases is well-supported and makes sense, given the expertise within public health departments, *see* Wis. Stat. § 251.06(a); their relationship with DHS, other local health officers, and the CDC; their proximity to local health care providers; and their need to act quickly, as recognized in *Nowotny*, 140 Wis. 38.

Schools do not have the same expertise, knowledge base, or resources as local public health departments. Moreover, they do not have the same obligation to protect the health of the entire county, which goes well beyond students. In communities throughout

Wisconsin and the Midwest, school districts have struggled to adequately protect students and educators; facing a shortage of available teachers and making sudden switches to virtual learning, adding to the turmoil of this pandemic.³

II. The Order, as it relates to schools, is reasonable and necessary.

As described in Section I above, the Order's remote learning provision is lawful if it meets the clear criteria of Section 252.03 – it must be reasonable and necessary to prevent, suppress or control COVID-19 in Dane County. Although the scope of Respondents' authority under this statute is expressly limited, it need not meet the "least restrictive means" test set forth in Wis. Admin. Code § DHS 145.06(5), which applies to *individuals* who are *already known to have, or suspected of having*, the contagion and persons *who own or supervise real or physical property or animals and their environs*.

Wis. Admin. Code §§ DHS 145.06(4), (5), (6). Such circumstances

³ Lee Enterprises, *Midwest schools scramble as COVID-19 surge sweeps region*, Wisconsin State Journal (November 16, 2020), available at https://madison.com/news/state-and-regional/midwest-schools-scramble-as-covid-19-surge-sweeps-region/article_d4a3df7b-1b9d-5395-bdba-e40821a85a10.html.

have nothing to do with general remote learning orders directed to school officials.

The remote learning order is, therefore, lawful, as it is fairly deemed reasonable and necessary in mitigating the grave and unique risks of this exploding pandemic.

A. In-person instruction involves risk to students, teachers, staff, families and the broader community.

The remote learning provision is reasonable and necessary as a crucial element of protecting the entire Dane County community. Petitioners are both deeply cynical and factually incorrect in suggesting otherwise.

Petitioners subtly attempt to invert the value, held deeply in our society, that children must, if anything, receive *more* protection than adults, not less. As the basis for this inversion, Petitioners posit statements about lower COVID-19 infection and death rates and typically milder symptoms experienced by children as compared to adults, according to preliminary figures. (Pet. Br. at 18-19.)

The cynical upshot of Petitioners' statements is that because the average child seems – in the admittedly incomplete understanding of the scientific community thus far⁴ – to be somewhat less vulnerable than the average adult to this virus, the government must do *less* to try to protect children than it does to protect adults. This flies in the face of not only universal parental instinct, but universal jurisprudence.

Courts have long recognized “the greater authority of the state or municipality regarding the regulation of the activities of children” and the government’s possession, in “acting to guard the general interest in youth’s well-being,” of “a wide range of power for limiting [even] parental freedom and authority in things affecting the child’s welfare.” *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 46, 426 N.W.2d 329 (1988) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166, (1944)). This authority stems from not only “the peculiar vulnerability of children,” but, among other factors, “their inability

⁴ Russell M. Viner et al. *Susceptibility to SARS-CoV-2 Infection Among Children and Adolescents Compared With Adults*, JAMA Pediatrics (2020). DOI: 10.1001/jamapediatrics.2020.4573.

to make critical decisions in an informed, mature manner.” *Id.* at 45 (citing *Prince*, 321 U.S. at 168.) The U.S. Supreme Court has long recognized that the government’s police power is appropriately exercised in protecting the young. *See, e.g., Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). And, Wisconsin “has a long tradition of honoring its obligation to protect its children from others and from themselves.” *State v. Fisher*, 211 Wis. 2d 665, 674, 565 N.W.2d 565 (Ct. App. 1997).

The Order is plainly in keeping with that tradition. Children do not exercise control over where they attend school. Neither are they as able as most adults to weigh the risks presented by an invisible virus, to control natural impulses that militate *against* social distancing, or to make informed decisions about how to comport themselves *at* school so as to protect themselves from infection. Naturally, then, school-aged children are in many ways uniquely vulnerable as virus vectors and are worthy of government concern.

This is especially true when considering the uniquely virus-friendly environments that schools present. Schools distinctively function as mass gatherings in which large numbers of people arrive, attend, and depart simultaneously, mingling in various large groups throughout the day in crowded classrooms and hallways, for significant periods of time – in other words, ideal physical settings for virus spreading. (See SUF ¶¶111-114.) Thus, even if children are somewhat less physically susceptible to COVID-19, it would still be reasonable for health officers to impose restrictions on their schooling that are not placed on adults and adult activities.

Equally troubling is Petitioners' willingness to ignore the risk that in-person instruction poses to adults, including teachers, staff, immediate and extended families, and the broader community. Potential points of transmission between and among students, educators, and staff (while teaching in groups, tutoring individually, disciplining, comforting, counseling, etc.) can occur not only in classrooms, but in hallways, restrooms, lunch rooms, and outside of

the school building itself – in lines and other gatherings and on buses.

Holding in-person instruction also enables transmission to occur in countless ways between and among family members of students, teachers, staff, and others. For example, anyone involved in the complex system of student transport may be put at risk, including city bus drivers and members of the public who happen to ride city buses with students and who have nothing else to do with schools. Further, older students may have part-time jobs that cause them to interact with members of the community, including in health care settings.

To all these adults, school-age children may pose a particularly dangerous threat because their infectiousness may be hidden. Asymptomatic individuals may still carry and spread the virus, and “asymptomatic infection in children is common.” (stipulated undisputed facts (“SUF”) ¶193.)

One out of every four educators falls in a high-risk category making them more vulnerable to COVID-19. (SUF ¶193.) Using a

broader definition supplied by the CDC, a more recent study found that 51.4 percent of school employees are at increased risk for severe COVID-19.⁵

Further, 44.2 million high-risk American adults overall – or 29.2 percent of the 151.3 million American adults with increased COVID-19 susceptibility – have a direct or within-household connection to schools; in other words, they live with school-aged children or school employees.⁶

It is little wonder that the architects of the nation’s first pandemic preparedness policy, created under President George W. Bush, viewed school closures as an indispensable feature of *any* response plan and “perhaps the most important of all the social distancing options” under consideration.⁷ Our local health officials are justified in following that policy.

⁵ Thomas M. Selden, Terceira A. Berdahl, and Zhengyi Fang, *The Risk Of Severe COVID-19 Within Households Of School Employees And School-Age Children*, Health Affairs 39, No. 11 (September 17, 2020), <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2020.01536>.

⁶ *Id.*

⁷ Eric Lipton and Jennifer Steinhauer, *The Untold Story of the Birth of Social Distancing*, The New York Times (April 22, 2020), <https://nyti.ms/2XXFKF0>.

B. The pandemic in Wisconsin is a deepening crisis.

Local remote learning orders are not only reasonable policy responses; their necessity is also increasingly urgent. Recent data shows that cases among Wisconsin school-aged children are on the upswing. (SUF ¶ 149.) CDC data show that incidence among adolescents is approximately double that among the youngest school-age children. (SUF ¶150.) Even so, there are significant numbers of documented cases in this latter group within Dane County. (SUF ¶145.)

More than 61,000 children in the U.S. were diagnosed with COVID-19 during the week ending November 2, 2020.⁸ Pediatric cases now represent 11.1 percent of all cases in the U.S., a proportion that has risen steadily since mid-April, when they accounted for only 2 percent of cases.⁹ Since the school year began, young people

⁸ Erika Edwards, *More than 61,000 children got COVID-19 last week, a record*, (Nov. 2, 2020), <https://www.nbcnews.com/health/health-news/more-61-000-children-got-covid-19-last-week-record-n1245851>.

⁹ *Id.*

in grade school and college have accounted for a disproportionate amount of recent infections.¹⁰

These risks are not uniform across populations. Certain minority groups and children with underlying conditions have increased risk for severe illness associated with COVID-19, including multisystem inflammatory syndrome in children (MIS-C), acute COVID-19, hospitalization, and death. (SUF ¶¶150-51.)

The pandemic's alarming acceleration is highlighted by its growth in the brief amount of time since the parties stipulated to facts in mid-October. For instance, on October 12, Wisconsin's COVID-19 case counts were at a then-all-time high, with a seven-day average of 2,238 cases per day.¹¹ (SUF ¶185.) In stark contrast, on November 13, the number of new COVID-19 cases in a single day

¹⁰Andrew Mollica, Daphne Chen, Erin Caughey, Matthew Piper and Eric Litke, *Pandemic Watch: Tracking Coronavirus in Wisconsin*, Milwaukee Journal Sentinel (Nov. 15, 2020), <https://projects.jsonline.com/topics/coronavirus/tracking/covid-19-cases-testing-and-deaths-in-wisconsin.html>.

¹¹ This amount was an 83% increase over the prior two weeks, and more than double the case counts of the state of New York, despite Wisconsin having one third New York's population. (SUF ¶ 185.)

reached 7,777, with a seven-day average of 6,422 cases per day.¹²

Similarly, on October 9, there were 907 COVID-19 patients in Wisconsin hospitals, constituting “near crisis levels.” (SUF ¶¶186, 188.) As of November 13, there are 2,096.

In Dane County, as of November 12, the 14-day average for *new* daily cases is 364. This is well above the County’s target for in-person school for any grade.¹³ Statewide, 498 schools, colleges, or day care centers have reported two or more confirmed cases through October 14.¹⁴

Against these alarming numbers, virtual learning is both a safer *and* an effective alternative to in-person instruction. (SUF ¶148.) Weighed in the balance, it is clear that Respondents justly concluded that, in order to suppress this pandemic, it is reasonable

¹² Emily Hamer, *Wisconsin adds more than 6,000 new COVID-19 cases again; 2,637 have died*, Wisconsin State Journal (Nov. 15, 2020), https://madison.com/wsj/news/local/wisconsin-adds-more-than-6-000-new-covid-19-cases-again-2-637-have-died/article_939a7636-2b92-521a-8a35-05ed0a5f09c7.html.

¹³ The target numbers are 54 or fewer per day for grades K-2, 39 or fewer for grades 3-5, and 19 or fewer for grades 6-12. <https://publichealthmdc.com/coronavirus/data>.

¹⁴ Mollica et al., *Pandemic Watch*.

and necessary to select that alternative and temporarily require virtual learning for some students.

CONCLUSION

Wisconsin's educators want to teach their students. Yet they know all too well the dangers posed to students, school staff, and the community by in-person instruction during the present, unprecedented COVID-19 outbreak. Both educators and health officers understand that it is the latter, not school administrators, who are best equipped to determine when and where suspending in-person instruction is reasonable and necessary to control a pandemic. Wisconsin's Legislature knew that as well when it vested that power in those health officers. Therefore, this Court should conclude that Executive Order #9 is lawful, and deny Petitioners' request for a permanent injunction.

Respectfully submitted this 16th day of November, 2020.

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CERTIFICATIONS

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. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 2,998 words.

I further certify that I have submitted an electronic copy of this brief, 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.

I further certify that three true and correct copies of this nonparty brief were sent via U.S. Mail to all parties of record.

Dated this 16th day of November, 2020.

/s/ Aaron G. Dumas

Aaron G. Dumas