RECEIVED
09-04-2020
CLERK OF WISCONSIN
SUPREME COURT

CASE NO. 2020AP001420 – OA

IN THE SUPREME COURT OF WISCONSIN

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.

NON-PARTY BRIEF OF PROFESSOR RYAN J. OWENS IN SUPPORT OF PETITIONERS

Ryan J. Owens
3553 Richie Road
Verona, WI 53593
(314) 420-0518
professor.ryan.owens@gmail.com
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

Professor Ryan J. Owens is a resident of Dane County, a professor of political science who studies legal institutions, and an affiliate law faculty at the University of Wisconsin-Madison. He has one son who attends Edgewood Campus School (7th grade) in Madison, Wisconsin and another with an Individualized Education Program (IEP) who attends Middleton High School.

STATEMENT OF THE ISSUE

Does Emergency Order #9, issued by Public Health Madison and Dane County (PHMDC), violate Wis. Stat. § 252.03(2)'s "reasonable and necessary" requirement? Because the facts cited in the Order's explanatory rationale do not reasonably support the PHMDC's decision to shut down all in-person public and private schools for grades 3-12, does Emergency Order #9 violate Wis. Stat. § 252.03(2)? If Wisconsin law does not currently impose a hard look requirement on agency or municipal action, should it?

ARGUMENT

Introduction

This court should grant the *Emergency Petition for an Original Action* and clarify what requirements Wisconsin or federal law impose on state agencies or local health care officials when they issue orders. Respectfully, this court should overturn Emergency Order #9 because it is unreasonable on its

face. Second, it should determine that the facts cited in Order #9 fail to support the Order. Finally, the court might wish to consider whether judicial review under Wisconsin law incorporates a "hard look" requirement for agency or municipal actions. Such review would find Emergency Order #9 to be unreasonable, arbitrary, and capricious. A hard look requirement would generate important safeguards for Wisconsin residents while maintaining flexibility for local health officers and agencies to perform their duties.

1. On Its Face, Order #9 Fails Wis. Stat. § 252.03(2)'s "Reasonable and Necessary" Requirement.

Wis. Stat. § 252.03(2), on which PHMDC relies, declares: "Local 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 shall advise the department of measures taken." While the language of this statute appears broad, it is important to note the statute's requirement the local health officer's actions be *reasonable and necessary*.

Order #9 is unreasonable on its face. An order's reasonableness and necessity must be judged, in part, by comparing and contrasting what it allows and what it prohibits. If the order contains internal inconsistencies and logical curiosities, its reasonableness is suspect. *See, e.g.*, *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984) ("The patent overinclusiveness and

underinclusiveness of § 399's ban undermines the likelihood of a genuine governmental interest.") Petitioners' *Memorandum in Support of Emergency Petition* does an excellent job pointing out the internal inconsistencies of Order #9—those arguments need not be reiterated here. Suffice it to say, the notion that the PHMDC prohibits a seventh grader from attending his school in-person yet allows him physically to visit movie theatres, retail stores, salons, gyms, and other public and private locations is unreasonable on its face.

2. The Facts Cited in Order #9 Fail to Support the PHMDC's Order.

This court should also hold Order #9 to be unreasonable because the facts cited in the Order's explanatory rationale (defined loosely) do not reasonably support the PHMDC's decision to shut down all in-person public and private schools for grades 3-12. As the court stated in *Liberty Homes Inc. v. Dep't of Industry, Labor, & Human Relations*, 136 Wis. 2d 368, 393, 401 N.W.2d 805 (1987), courts must examine whether an agency's choice "is reasonably supported by any facts in the record." And even if one believes that a local health officer is not an agency under state law, PHMDC is still subject to due process concerns such as the avoidance of arbitrariness. In *State ex rel. Wasilewski v. Bd. of Sch. Dirs. of Milwaukee*, 14 Wis. 2d 243, 111 N.W.2d 198 (1961)—the case on which the Attorney General relies for the proposition that municipal entities do not fall under Chapter 227 —this court held that when

interpreting whether a board "acted according to law," a judge must examine the relevant statutes as well as "the common-law concepts of due process and fair play and avoidance of *arbitrary action*." 14 Wis. 2d at 263 (emphasis added).

The facts cited by the PHMDC do not reasonably lead to the policy conclusion that in-person public and private schooling should be shut down. If anything, the facts PHMDC employs to justify Order #9 tilt heavily toward *opening* schools. A reader suffers whiplash after observing the disconnect between the facts stated and the Order's policy. Consider each of the words in the Order's explanatory passage:

> ORDER: This remains a critical time for Dane County to decrease the spread of COVID-19, keep people healthy, and maintain a level of transmission that is manageable by healthcare and public health systems. . .

One presumes all parties agree that policymakers should seek to minimize the negative effects of COVID-19, using all reasonable, legal means possible.

> ORDER: . . .While research on school-aged children continues to emerge and evolve, a number of systematic reviews have found that school-aged children contract COVID at lower rates than older populations. This is particularly pronounced among younger school-aged children. . .

Even though the Order does not cite which "systematic reviews" have found that school-aged children contact COVID at lower rates than adults, the fact that PHMDC recognizes this scientific consensus is important. Based on

the language so far, one wonders whether the Order will open schools, particularly since the (at-greater-risk) older population has been "permitted" by PHMDC to go to restaurants, taverns, retail stores, and elsewhere.

> ORDER: . . .Locally, as of August 20, 2020, nine (9) percent of all COVID cases were among children aged 0-17 in Dane County. This population comprises 22% of the county population overall. . .

This language is framed as more positive news and shows again that younger people are unlikely to contract COVID. Minors represent 22% of Dane County's population but only 9% of positive cases. This seems to reiterate the scientific consensus cited above that school aged children are at low risk of contracting COVID (to say nothing about being less likely to manifest serious or life-threatening symptoms.)

> ORDER: . . .Cases among 0-4 year olds comprised 1.3% of all cases; 5-10 year olds comprised 2.7% of overall cases; and 11-17 year olds comprised 5.3% of all cases. . .

The Order highlights that only 5.3% of the oldest cohort of school-aged children (11-17 year olds) even test positive for COVID. (Again, the Order tells us nothing about the rates of serious or life threatening cases among this group.)

> ORDER: . . .Outbreaks and clusters among cases aged 5-17 have been rare; of the 401 cases within this age group, 32 (8.0%) were associated with an outbreak or cluster. . .

Only 32 out of 401 positive cases stemmed from an outbreak. The rest were distributed stochastically. So, few areas presumably to isolate.

> ORDER: . . .A recent analysis also showed a higher proportion of adults with COVID in Dane County had symptoms compared to school-aged children and that the most common risk factor among school-aged children was household contact with a confirmed case. . .

Students are unlikely to contract COVID from their peers. Troublingly, to the extent they do contract COVID, they tend to get it from family members at home, *with whom they will spend more time because of the Order's lockdown*.

> ORDER: . . .No deaths among children who have tested positive for COVID-19 have occurred in Dane County. . .

By now the point obtains. Though COVID is a serious risk that officials must take seriously, "the science" shows that school-aged children are at the least risk of contracting COVID. According to the Order, not only are students unlikely to contract or spread COVID, none have died from it. By now, a reader would be excused for believing the Order is about to open schools.

But then in a shockingly abrupt about-face, the PHMDC declares:

> ORDER: . . .Based upon the foregoing, I, Janel Heinrich, Public Health Officer of Madison and Dane County, by the authority vested in me by the Laws of the State, including, but not limited to, Wis. Stats. Secs. 252.03(1), (2) and (4), order the following as necessary to prevent, suppress, and control the spread of COVID-19 . . . [closing the public and private schools for all students in grades 3-12].

The PHMDC's policy choice is not reasonably supported by any of the facts it cites. The explanatory language of this Order (extremely low risk for young people) does not connect to the policy outcome (shut down nearly all in-person schooling). No reasonable person could read the statistics provided and reasonably expect a complete shutdown of schools. The facts cited in the

Order's introductory rationale do not reasonably support the PHMDC's decision to shut down all in-person public and private schools for grades 3-12.

3. The Court May Wish to Apply Hard Look Review to Interpret Wis. Stat. § 252.03(2)'s Reasonableness Requirement.

This court could analyze Order #9's reasonableness a third way as well. It could employ a "hard look" approach that would require agencies (and non-agency municipal actors) to provide a rational explanation for their decisions. Key to this requirement is that the decision maker must actually provide a written rationale for its decision that weighs and balances competing alternatives.

Unlike federal law, Wisconsin has not adopted a hard look standard that requires an agency or officer to cogently explain its reasoning. *Liberty Homes Inc.*, 136 Wis. 2d 368. According to the court of appeals, *Liberty Homes* "does not hold that courts may invalidate agency rulemaking as arbitrary and capricious if the agency does not explain the reasons for its rulemaking;" instead, it "requires only that the record contain facts that reasonably support the agency rulemaking at issue." *Wis. Federated Humane Societies, Inc. v. Stepp*, 2014 WI App 90, ¶ 47. This court may wish to revisit that issue and require that agencies and municipal actors of the sort here meet a minimal requirement of articulating a satisfactory explanation for their actions, or cogently explaining why they exercised their discretion in a given manner.

Motor Vehicle Manuf. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). That is, tell the people why you did what you did—and didn't do.

Requiring administrative officials to proffer legitimate, rational, non-pretextual reasons for their actions is a fundamental part of administrative law. It protects citizens' liberties, keeps officials from acting arbitrarily, and enhances the courts' powers of judicial review. And though judicially created rules are not often desired, they are less threatening when used to prevent unelected officials from arbitrarily shutting down schools and large swaths of the economy—and particularly when, as here, they issue orders at the last minute in what appears to be bad faith (at least vis-à-vis private schools). Courts take a hard look at agency decision making to ensure that agencies faithfully examine their options before settling on an outcome. The standard is a narrow one and does not presume that courts will substitute their judgement for policymakers; rather, it ensures that policymakers do not act unreasonably and arbitrarily.[1]

Federal courts have employed a hard look approach for decades with success. In *State Farm*, 463 U.S. 29, the seminal case on hard look review, the

[1] A hard look doctrine might make even greater sense in cases such as these, where the state argues its administrative procedures act does not apply. If the state is arguing that an official who (ostensibly) wields such great power is not an agency and therefore not subject to Chapter 227's requirements, the court should decide whether other provisions safeguard Wisconsin's citizens from arbitrary action. *See, e.g., Wasilewski*, 14 Wis. 2d at 263 (when interpreting whether a municipal board or agency "acted according to law," one must examine the relevant statutes as well as "the common-law concepts of due process and fair play and avoidance of arbitrary action.")

United States Supreme Court held that an agency must show that it responsibly examined the issues involved when it created a rule. An agency must explain to a court's satisfaction why it resolved each contested issue as it did. In that case, the Court struck down a National Highway and Traffic Safety Administration rule because agency officials settled on a policy decision without examining alternative policies. Agency officials withdrew regulations imposing automatic seatbelts but neglected to examine the safety benefits of airbag technology. In so doing, the agency "failed to present an adequate basis and explanation for rescinding the passive restraint requirement…" *State Farm*, 463 U.S. at 34. Federal agencies must examine the relevant data and articulate a satisfactory explanation for its action. If an agency cannot offer a reasoned explanation for its actions, courts will strike down the agency action. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

The Supreme Court recently employed hard look review to scrutinize executive action in *Department of Homeland Security et al. v. Regents of the University of California et al.*, 140 S. Ct. 1891 (2020). There, the Court analyzed whether the Secretary of Homeland Security violated the Administrative Procedure Act by failing to explain adequately her decision to revoke the Deferred Action for Childhood Arrivals (DACA) policy. Writing for the majority, Chief Justice Roberts chastised the DHS Secretary for not clearly enunciating the agency's rationale. The Court demanded that executive

officials explain their rationale, do so clearly, and do so using the record materials before them. Enforcing these requirements "serves important values of administrative law." *See DHS v. Regents* 140 S. Ct. at 1909. Chief Justice Roberts wrote:

> Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. 140 S. Ct. at 1916.

Applying a hard look standard here would lead to the conclusion that Order #9 is unreasonable, arbitrary, and capricious. PHMDC does not appear to have examined alternatives to shutting down in-person public and private schooling. It could have analyzed hybrid educational approaches as many school districts across the state have employed, to address teacher safety and student learning. The Order reveals none of that consideration. It could have allowed at least private schools to reopen, based on their smaller class sizes which met social distancing requirements. The Order reveals none of that consideration. Order #9 provides absolutely no evidence that PHMDC considered alternatives to shutting down private schools (or made attempts for public schools). It is a perfunctory statement with no rationale linking its policy conclusion to the data. PHMDC did not offer a reasoned explanation for its action. It provided statistics showing that students are at low risk of COVID and then proceeded to ignore the science and quash in-person schooling.

Wisconsin and Dane County face serious challenges. We must work together reasonably and honestly to respond to COVID. Emergency Order #9, however, falls short of Wisconsin law and should be vacated.

CONCLUSION

The court should grant the petition, issue the preliminary injunction, and vacate Order #9.

Respectfully submitted,

Ryan J. Owens
Counsel of Record
Wis. Bar. No. 1037983
3553 Richie Road
Verona, WI 53593
(314) 420-0518
professor.ryan.owens@gmail.com
Counsel for Amicus Curiae

September 4, 2020

CERTIFICATE AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,891 words (Cover Page through Conclusion), as counted by Microsoft Word.

CERTIFICATION REGARDING ELECTRONIC BRIEF PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 809.19(12), Stats. 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.

CERTIFICATE OF SERVICE

I certify that on September 4, 2020, I caused three copies of the foregoing nonparty brief to be served upon counsel of record by placing the same in the U.S. Mail, first class postage.

Richard M. Esenberg, et al.
Wisconsin Institute for Law & Liberty
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202-3141

Marcia A. MacKenzie, et al.
Dane County Corp. Counsel
210 MLK Jr. Blvd., Room 419
Madison WI 53703-3345

CERTIFICATES SIGNED:

Ryan J. Owens
3553 Richie Road
Verona, WI 53593
(314) 420-0518
professor.ryan.owens@gmail.com
Counsel for Amicus Curiae