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

REPLY BRIEF OF ST. AMBROSE ACADEMY, INC. *ET AL.*

[Attorneys for St. Ambrose Academy, Inc. et al. on following page]

ANDREW M. BATH
THOMAS MORE SOCIETY
309 W. Washington St.
Suite 1250
Chicago, IL 60606
P: (312) 782-1680
F: (312) 782-1887
abath@thomasmoresociety.org

ERICK KAARDAL
MOHRMAN, KAARDAL & ERICKSON, P.A.
150 South Fifth Street,
Suite 3100
Minneapolis, MN 55402
P: (612) 341-1074
F: (612) 341-1076
kaardal@mklaw.com

MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street,
Suite 3900
Chicago, Illinois 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Attorneys for St. Ambrose Academy, Inc. et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statutes And Rules

Regulation

Other Authorities

INTRODUCTION

The St. Ambrose Petitioners will focus their Reply Brief on the arguments that the School-Closure Order is unconstitutional (and, for closely related reasons, unlawful under Wis. Admin. Code § DHS 145.06), leaving the other Petitioners to address the powerful argument that the Order exceeds Respondents' authority under Wis. Stat. § 252.03. Respondents have no meaningful answer to Petitioners' constitutional arguments, instead spending page after page discussing federal cases under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). But this Court in *Coulee Catholic Schools v. Labor and Industry Review Commission*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868, interpreted the Wisconsin Constitution to give broad protections to religious-liberty rights, not the paltry rational-basis protection in *Smith*. Because Respondents do not ask this Court to abandon *Coulee* for *Smith*, and in light of the School-Closure Order's obvious lack of tailoring—including its inexplicable favoring of colleges and their crowded dorms over primary and secondary schools—that Order is both unconstitutional and unlawful.

ARGUMENT

I. Under The Only Cogent Reading Of Sections 252.02 And 252.03, Only DHS Has The Authority To "Close Schools" To "Control Outbreaks And Epidemics"

The Legislature provided the Department of Health Services ("DHS") with the exclusive power to "close schools"

to "control outbreaks and epidemics," Wis. Stat. § 252.02(3), while giving Respondents only the power to "inspect schools" to ensure "sanitary" conditions, Wis. Stat. § 252.03(1). *See* Opening Br.25–28. The St. Ambrose Petitioners respectfully submit that Respondents have offered no cogent account for this stark statutory difference and, further, incorporate the other Petitioners' replies to Respondents as to this argument.

II. Respondents' School-Closure Order Violates The Freedom Of Conscience Clauses

Wisconsin's Freedom of Conscience Clauses, unlike the federal Free Exercise Clause, establish a strict-scrutiny regime for laws burdening "sincerely held religious belief[s]." *Coulee*, 2009 WI 88, ¶ 61; Opening Br.39–41. As Petitioners explained, the Order's prohibition on in-person education burdens their right to provide religious instruction for their children, since it prevents these children from participating in core religious exercise at school, like attending Mass, sharing in "communal prayer" with teachers and classmates, and having a priest in the classroom daily. *See* Opening Br.43–44. That triggers strict scrutiny under *Coulee*, which scrutiny the Order cannot possibly satisfy. Opening Br.44. The Order inexplicably allows colleges to reopen, including their crowded dorms, along with movie theaters, daycares, and more besides. Opening Br.44–47. Further, the Order closes Petitioner Schools despite their comprehensive reopening plans, which plans they developed according to Respondents' own strict guidelines. Opening Br.47.

Respondents' primary argument for avoiding the Order's unconstitutionality is to invoke the wrong body of law. Respondents rely on inapposite *federal* case law interpreting the *federal* Constitution, citing and/or quoting *six* federal cases articulating or applying the federal rational-basis standard under *Smith*. Resp.Br.70–75, 78. But Petitioners never "assert[ed] any federal constitutional claim," only a state constitutional claim under *Coulee*. Opening Br.39 n.8.

It is understandable why Respondents run away from the Wisconsin Constitution. Our State's Constitution "provides *much broader* protections for religious liberty than the First Amendment." *Coulee*, 2009 WI 88, ¶ 66 (emphasis added). The Wisconsin Constitution explicitly adopts the more-protective strict-scrutiny standard articulated by the U.S. Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), notwithstanding the fact that the U.S. Supreme Court had, by the time of *Coulee*, replaced that standard in *Smith* with a less-protective rational-basis standard, *see State v. Miller*, 202 Wis. 2d 56, 66–69, 549 N.W.2d 235 (1996); Opening Br.39–41. It is irrelevant, therefore, that the federal cases that Respondents cite throughout their brief decline to enjoin COVID-19-related orders on federal free-exercise grounds, after applying the overly deferential *Smith* test. *See* Resp.Br.74–75, 77 & n.27. Notably, when a federal court did confront COVID-19 restrictions in a case governed by a *Coulee*-like strict-scrutiny standard—in a case arising in Washington D.C., where the Religious Freedom Restoration

Act, 42 U.S.C. § 2000bb, mandates application of *Sherbert*, not *Smith*, by statute—the federal court invalidated the relevant restrictions as unlawfully burdening religious exercise, *Capitol Hill Baptist Church v. Bowser*, No. 20-CV-02710, 2020 WL 5995126, at *1 (D.D.C. Oct. 9, 2020).

Despite Respondents' reliance on inapplicable federal case law like *Smith*, they have not asked this Court to overrule its well-settled precedent and adopt the federal approach. *See* Resp.Br.70–84. Therefore, they have waived any argument that this Court's established strict-scrutiny standard does not control here. *See Mueller v. TL90108, LLC*, 2020 WI 7, ¶¶ 22–23, 390 Wis. 2d 34, 938 N.W.2d 566. Regardless, *Smith* would not comport with the Wisconsin Constitution's "far more specific" textual guarantee of the free exercise of religion, *Coulee*, 2009 WI 88, ¶ 60, and it has received much-deserved criticism in any event, even under the federal Constitution, *see, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., respecting denial of certiorari); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1111 (1990); Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 4; Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 Or. L. Rev. 563, 598–99 (2006).

The limited Wisconsin cases that Respondents cite do not change the governing standard in Wisconsin from *Coulee* (and *Sherbert*) to *Smith*. Respondents cite *State ex rel. Holt*

v. Thompson, 66 Wis.2d 659, 675–78, 225 N.W.2d 678 (1975), and *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N.W.967, 975 (1890), but those are pre-*Coulee* decisions that do not discuss the standard for a Freedom of Conscience Clauses claim. Resp.Br.71. Respondents cite the *dissenting* opinion in *L.L.N. v. Clauder*, 209 Wis. 2d 674, 716 & n.6, 563 N.W.2d 434 (1997) (A.W. Bradley, J., dissenting), without revealing that they are citing a dissent. Resp.Br.74. In any event, *L.L.N.* is a pre-*Coulee* decision, which considers only the federal Free Exercise Clause. Finally, they cite *State v. Neumann*, 2013 WI 58, 348 Wis. 2d 455, 832 N.W.2d 560, but that case considered a challenge to a jury instruction, not a freestanding claim that a law "violates the[ ] free exercise of religion." *Id.* ¶¶ 122–23; Resp.Br.73.

Respondents' extended discussion of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), likewise does not support abandoning this Court's controlling, text-based strict-scrutiny approach to the Freedom of Conscience Clauses. Resp.Br.57–70. None of the Wisconsin cases that Respondents cite on this score alters Petitioners' well-supported claim that "no police-power rationale could save this Order," given the Wisconsin Constitution's "specific guarantee" of freedom of conscience. Opening Br.50. These cases simply considered whether a law fell *outside* of the government's police power. Resp.Br.59–62; *see Adams v. City of Milwaukee*, 144 Wis. 371, 129 N.W.2d 518, 521 (1911); *Froncek v. City of Milwaukee*, 269 Wis. 276, 281–82, 285, 69 N.W.2d 242 (1955); *State v. Redmon*, 134 Wis.

89, 114 N.W. 137, 140–41, 143–44 (1907). One considered the police power in relation to the federal constitution. Resp.Br.61; *Chicago, M. & St. P.R. Co. v. City of Milwaukee*, 97 Wis. 418, 72 N.W. 1118, 1119–20, 1122 (1897). And with *State v. Pierce*, 163 Wis. 615, 158 N.W. 696, 700 (1916), Respondents *again* cite the dissenting opinion for support, without properly noting this in their brief. Resp.Br.60.

When Respondents finally turn to defending the School-Closure Order itself, their arguments only further demonstrate that the Order fails *Coulee*'s demanding strict-scrutiny test; and, indeed, the Order is so irrational that it would fail any standard of review.

The Order plainly burdens Petitioners' religious exercise: in-person education directly furthers Petitioner Parents' education of their children in their religious faith, as required by that faith, and permits the School Petitioners to inculcate religious values. *See supra* pp. 2. Respondents claim that Petitioners are not burdened because they already "endured" virtual learning "early this year." Resp.Br.77. But private parties making their own *voluntary* decision to curtail their free exercise, in response to a new pandemic, does not suggest that the State can thereafter *coerce* those parties to continue to do the same curtailment many months later, after they have invested the substantial resources needed to develop their safe reopening plans. *See* SUF ¶ 87. Respondents attempt to minimize the Order's burden by noting that it leaves Petitioners free to exercise their religion

in other respects, such as by "attending church service or Mass on Saturdays and/or Sundays," Resp.Br.76–78. *Coulee* considers whether a law burdens a *particular* religious practice of the religious claimant—here, Petitioners' utilizing in-person education to instruct their children in their faith—not whether the law leaves the religious claimant (in the government's estimation) on the whole free to practice their faith to a sufficient degree. *See* 2009 WI 88, ¶ 61. Finally, Respondents' citation of the Gospel of Matthew—asking this Court to authoritatively declare that "the teachings of Christ are not bound by buildings"—does not negate the Order's burden either. Resp.Br.76. *Coulee* requires this Court to accept *Petitioners'* own "sincerely held religious belief[s]," not the *government's* characterization of those beliefs based on its own interpretation of Scripture. 2009 WI 88, ¶ 61.

Respondents' claims that the Order satisfies the narrow-tailoring requirement likewise fail, especially with regard to the Order's treatment of other schooling. Respondents initially claim that the Order's exemption for "all universities and higher education institutions" does not defeat narrow tailoring because those institutions "are fundamentally different from K–12 schools" with respect to "further infection and spread." Resp.Br.55–56. Then, Respondents drop this obviously false facade when they admit, several pages later, that "University of Wisconsin-Madison's return to classes" is "*fueling massive increase in virus spread*." Resp.Br.83 (emphasis added); *see also*

Resp.Br.81. The latter concession—that colleges and universities' reopening for in-person instruction is fueling COVID-19 spread—underscores the unconstitutionality of the Order permitting this type of reopening, while shutting down Petitioners' religious schools. Further, Respondents admit that students in grades K–2—no less than students in grades 3–12—"comingl[e] over sustained time" at school, thereby exhibiting "much greater potential" to "pick up the virus from others." Resp.Br.54–55. Nevertheless, the Order allows grades K–2 to reopen for in-person instruction. JA5.

Respondents' attempts to justify the Order's exemptions for non-schooling activities are unpersuasive. Respondents assert that "[b]owling alleys and movies theaters" may open because "[p]eople generally come with family or friends and stick with their group" and "then leave," without explaining why such co-mingling—drinking and interacting in bowling allies, for example—is not likely to lead to COVID-19 spread. Resp.Br.54.

Respondents also cannot adequately explain why, unlike with these other activities, the Order applies to Petitioner Schools despite their safe reopening plans. *See* Opening Br.47; *compare, e.g.*, SUF ¶ 92 (Petitioner reopening plan that "limit[s] student movement and interaction throughout the building"), *with* Resp.Br.55 (asserting that, "[g]enerally, schoolchildren walk through the hallways in groups"). Respondents' remarkable claims that the Wisconsin Constitution *prohibits* them from crafting an order that only

allows the reopening of those schools with comprehensive reopening plans like Petitioners also fail. Resp.Br.81–82. Nothing about the fair, individualized review of a religious school's reopening plan, based on public-health criteria, would burden free-exercise rights or impermissibly establish a religion. Respondents had *already* set out detailed reopening standards for schools to follow before they inexplicably changed course at the last minute with the Order, just as they have issued safe-reopening guidelines for many other organizations. JA4–15. *Respondents have never claimed that Petitioners failed to meet these standards*, calling "[t]he thoroughness of the[se] plans" "laudable." *See* Resp.Br.57.

Finally, while Respondents argue that Petitioners are claiming "that there could never be regulation of any kind" limiting "their free exercise rights," Resp.Br.74, Petitioners submit that, consistent with *Coulee*, the government may substantially burden free-exercise rights *where it passes strict scrutiny*, 2009 WI 88, ¶ 61. Thus, as *Peace Lutheran Church and Academy v. Village of Sussex*, 2001 WI App 139, 246 Wis.2d 502, 631 N.W.2d 229, held, the government may require certain health-and-safety measures that burden religion, such as the installation of a fire-suppression system in a church, when those measures serve a "compelling interest" that "cannot be met by any less restrictive alternative." *Id.* ¶ 22; Resp.Br.79 (citing *Peace Lutheran*). Again, the School-Closure Order does not meet that standard.

III. The School-Closure Order Violates The Fundamental Rights Of Parents To Direct The Upbringing And Education Of Their Children

The Order also violates the Wisconsin Constitution's protection of parents' "inherent rights" to "direct the upbringing and education of children under their control." Opening Br.51 (citing, among other authorities, *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶ 15, 387 Wis. 2d 1, 927 N.W.2d 486); Wis. Const. art. 1, § 1. As Petitioners explained, the Order imposes a "direct[ ] and substantial[ ]" burden on Petitioner Parents' fundamental rights by prohibiting them from securing the vastly superior in-person education for their children. Opening Br.52–53 (quoting *A.A.L.*, 2019 WI 57, ¶ 22). Indeed, for many children, remote learning is an entirely inadequate substitution. Opening Br.53. This Court reviews such direct and substantial infringements on parents' rights under "strict scrutiny review," *A.A.L.*, 2019 WI 57, ¶ 22, which the Order does not satisfy for the reasons already given above, *supra* pp. 7–9; Opening Br.53–54.

Respondents falsely assert that Petitioners are claiming the right to "preclude[ ] *any* school closure for *any* reason," or to access education "*wherever* and *however* they cho[o]se[.]" Resp.Br.86 (emphases added). Petitioners' claim is far more modest. Opening Br.50–52. They argue for the right to be free from "*direct[ ] and substantial[ ]*" interreference in education from the State, subject to the government satisfying strict scrutiny. *A.A.L.*, 2019 WI 57, ¶ 22 (emphasis added). Less significant intrusions from

short-term school closures, perhaps for a "thorough cleaning of an unsanitary kitchen" in the school, Opening Br.36, would not qualify as direct and substantial burdens. Further, Respondents could impose even direct and substantial burdens on Petitioners—thus allowing Respondents to act in response to "a public health emergency," Resp.Br.87—so long as Respondents' orders are truly narrowly tailored to furthering a compelling interest. *A.A.L.*, 2019 WI 57, ¶ 22; *compare supra* pp. 7–9.

Respondents' invocation of the State's general authority to protect children's wellbeing fails for similar reasons. Resp.Br.86–88. The Order here is a *direct and substantial* encroachment on parents' fundamental rights to direct their children's education, unlike the far less intrusive regulation of children like the 11:00 p.m. curfew at issue in *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 426 N.W.2d 329 (1988).

Finally, Respondents assert that "[n]othing in Order #9 excludes children from religious schools or controls educational choice," Resp.Br.85, which is obviously wrong. As Respondents themselves admitted in the Statement of Undisputed Facts, this Order "*does not allow for the opening of in-person education for grades 3–12*," SUF ¶ 147 (emphasis added), which is apparent from the Order's plain text, JA5. Respondents also claim that Petitioners could avoid this direct and substantial burden by acquiring an "individualized education program" for their children, which would apparently grant them in-person education. Resp.Br.85. Yet,

those plans are available only for a "child with a disability," Wis. Stat. § 115.787(1); *see* JA1, which does not apply to the vast majority of Petitioners' children, *see* Opening Br.53, and would not provide the in-person learning experience that Petitioner Parents have chosen for their children.

IV. The School Closure Order Violates Wis. Admin. Code § DHS 145.06's "Least Restrictive" Mandate, Which Operationalizes Section 252.03(3)'s "Reasonable And Necessary" Requirement

The Order is also unlawful because it is not the "least restrictive" means to "protect the public's health," as required by Wis. Admin. Code § DHS 145.06(5)(c). Opening Br.54–56.

Respondents do not meaningfully argue that the Order actually satisfies Rule 145.06(5)(c)'s least-restrictive analysis. *See* Resp.Br.43–45, 52. Instead, they predominantly argue that Rule 145.06(5)(c) does not apply here for various reason, but those arguments fail.

First, Respondents claim that Rule 145.06 does not apply to Section 252.03 because the Rule does not specifically quote certain statutory terms from that Section. Resp.Br.44. But the Rule affirmatively states that it applies to officials designated in Section 252.03(1); that is, local health officers like Respondents. Wis. Admin. Code § DHS 145.06(4), (6).

Second, Respondents argue that Rule 145.06 is inapposite because some of the provisions in Rule 145.06*(4)* and *(5)* apply to "*individual* persons." Resp.Br.44–45. Yet, Petitioners explained that it is Rule 145.06*(6)* that plainly establishes Rule 145.06's applicability here. Opening Br.54–

55. That crucial subsection applies the relevant provisions of Rule 145.06 to "persons who own or supervise real . . . property," with no limitation to "individual persons," thus including persons like Petitioner Schools. *See* Opening Br.54–55 (quoting Wis. Admin. Code § DHS 145.06(6)). Indeed, Respondents themselves concede that Rule 145.06(6) "would include school districts," clearly showing Rule 145.06's applicability to the School-Closure Order. Resp.Br.45. Further, Rule 145.06(6) explicitly incorporates by reference "the provisions of [Rule 145.06] sub. (5)," thereby adopting the "least restrictive" language in that subsection, Wis. Admin. Code § DHS 145.06(6), contrary to Respondents' claims that Rule 145.06(6) imposes only a capacious "reasonable and necessary" standard, Resp.Br.45.

Finally, Respondents argue that Rule 145.06(5)'s "least restrictive" language "has neither definition nor context that would enlighten courts or litigants how to apply it." Resp.Br.45. But this is the *same phrase and test* that *Coulee* itself employs to describe the governing strict-scrutiny standard for Freedom of Conscience Clauses claims. 2009 WI 88, ¶ 61 ("[W]e have generally applied the compelling state interest/least restrictive alternative test.").

CONCLUSION

This Court should hold that the School-Closure Order is unlawful and unconstitutional, and it should enter an order permanently enjoining Respondents from enforcing it.

Dated: November 16, 2020.

Respectfully submitted,

ANDREW M. BATH
State Bar No. 1000096
THOMAS MORE SOCIETY
309 W. Washington St.
Suite 1250
Chicago, IL 60606
P: (312) 782-1680
F: (312) 782-1887
abath@thomasmoresociety.org

ERICK KAARDAL
State Bar No. 1035141
MOHRMAN, KAARDAL & ERICKSON, P.A.
150 South Fifth Street,
Suite 3100
Minneapolis, MN 55402
P: (612) 341-1074
F: (612) 341-1076
kaardal@mklaw.com

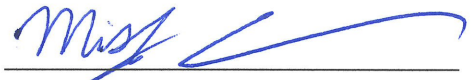
MISHA TSEYTLIN
State Bar No. 1102199
Counsel of Record
KEVIN M. LEROY
State Bar No. 1105053
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street,
Suite 3900
Chicago, Illinois 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com

Attorneys for St. Ambrose Academy, Inc. et al.

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 this brief is 2,958 words.

Dated: November 16, 2020.



MISHA TSEYTLIN
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, Illinois 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

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:

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 opposing parties.

Dated: November 16, 2020.

MISHA TSEYTLIN
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, Illinois 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com