

FILED
11-16-2020
CLERK OF WISCONSIN
SUPREME COURT

No. 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-TERR, *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 WISCONSIN FAITH VOICES FOR JUSTICE AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS

Wisconsin Faith Voices for Justice (Faith Voices) is a diverse interfaith coalition representing Christian, Jewish, Muslim, Unitarian, Buddhist, Hindu, Sikh, Pagan, Baha'i, and Quaker faith leaders with congregations located throughout Wisconsin. As people of faith, the members believe saving lives is the highest value. In the Jewish Tradition, *pikuach nefesh*—saving a life—is paramount above all other commandments. For Christians, the invocation to 'love your neighbor as yourself' means showing love for each other by staying at home and keeping each other safe. The faith-driven imperative to look out for the most vulnerable in our society leads Faith Voices to support all actions that do exactly that. This virus most cruelly affects the most vulnerable in society including the elderly and the immune-compromised, and it disproportionately affects communities of color.

Faith Voices members minister to these vulnerable communities. Members include leaders of predominantly elderly congregations and historically African American churches whose congregants face a disproportionate risk of harm as Wisconsin's health crisis continues to intensify. Faith Voices believes public health measures such as Emergency Order #9 not only align with faith and values—they are essential to the wellbeing of faith communities.

SUMMARY OF ARGUMENT

The COVID-19 pandemic poses a serious threat to human life. As Wisconsin's infection rates reach record highs, it is important now more than ever to listen to public health experts and abide by the safety standards they crafted using the best information available. Emergency Order #9—which halts in-person academic instruction—was designed to save lives by slowing the spread of the disease. Enjoining this measure risks contributing to this worsening crisis.

Faith Voices supports Petitioners' right to provide their students with a Christian education. But Faith Voices believes Petitioners may do so within the context of virtual instruction until transmission rates drop to levels where schools may open to all grade levels without endangering students and the community. Schools may offer religious services virtually, as Faith Voices' congregations and congregations across the world have done. And any religious practices that Petitioners' religious

beliefs dictate must be practiced in-person may be so practiced without violating the Emergency Order.

ARGUMENT

I. EMERGENCY ORDER #9 PROTECTS HUMAN LIFE.

Among the central tenets uniting Faith Voices' diverse faith communities is the moral imperative to protect human life. COVID-19 has already claimed the lives of hundreds of thousands of Americans, and the virus appears to be only escalating in Wisconsin. When considering whether to enjoin public officials from implementing a measure designed to slow the transmission of this deadly virus, the Court must weigh the grave threat to human life posed by such an injunction in its equitable analysis.

A. COVID-19 REPRESENTS AN ESCALATING THREAT TO PUBLIC HEALTH.

The novel COVID-19 virus is a severe acute respiratory illness that poses an enormous threat to human life due to its highly contagious nature. The virus has claimed the lives of over 200,000 Americans,¹ including at least 1,600 Wisconsin residents.² While the virus threatens all members of our community, the most socially vulnerable have borne the hardest impact. The elderly are particularly at risk; individuals over the age of seventy account for roughly 73% of Wisconsin's COVID-19 deaths.³ Furthermore, African Americans, who form 6.1% of Wisconsin's population, contribute to 14.9% of COVID-19 deaths in the state, while Hispanics, who form 5% of the state's population, contribute to 9.7% of COVID-19 deaths.⁴

¹ Center for Disease Control National Center for Health Statistics, Provisional Death Counts for Coronavirus Disease 2019, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm> (last visited Oct. 24, 2020).

² Wisconsin Department of Health Services, COVID-19: Wisconsin Summary Data. Available at <https://www.dhs.wisconsin.gov/covid-19/data.htm> (last visited Oct. 24, 2020).

³ Wisconsin Department of Health Services, *COVID-19: Wisconsin Deaths*, <https://www.dhs.wisconsin.gov/covid-19/deaths.htm#demographics>, (last visited Oct. 24, 2020).

⁴ Wisconsin Department of Health Services, *African Americans in Wisconsin: Overview*, <https://www.dhs.wisconsin.gov/minority-health/population/hispanlatino-pop.htm> (last visited, Oct. 24, 2020); Wisconsin Department of Health Services, *Hispanic/Latinos in Wisconsin: Overview*, <https://www.dhs.wisconsin.gov/minority-health/population/hispanlatino-pop.htm> (last visited Oct. 24, 2020); Wisconsin Department of Health Services, *COVID-19: Wisconsin Deaths*, <https://www.dhs.wisconsin.gov/covid-19/data.htm>, (last visited Oct. 24, 2020).

At the time the parties submitted their Stipulation of Undisputed Facts (hereinafter “Stipulated Facts”), “[c]oronavirus cases in Wisconsin [were] at an all-time high.” (Stipulated Facts ¶ 185.) There was then a daily average of 2,238 cases, “an increase of 83 percent from the average two weeks earlier.” (Stipulated Facts ¶ 185.) Unfortunately, the crisis has since become dramatically worse. On November 10, 2020, a record 7,073 people tested positive for the virus, cementing a daily average of nearly 6,000 cases—over four times the average six months ago.⁵ That same day, Dane County reached its own grim milestone when the county’s hospitals had 159 patients hospitalized for COVID-19.⁶

B. IN-PERSON EDUCATION THREATENS THE HEALTH OF STUDENTS, TEACHERS, FAMILIES, AND THE BROADER COMMUNITY.

Although children (particularly younger children) appear less likely to contract COVID-19, children are not immune from the virus.⁷ (See Stipulated Facts ¶ 150.) The Milwaukee Journal Sentinel reports that “[y]oung people in grade school and college have accounted for a disproportionate amount of [Wisconsin’s] recent infections since the start of school,” though that proportion is declining.⁸ The infection rate among adolescents appears significantly higher than that among younger children (Stipulated Facts ¶ 150), which is reflected in Public Health Madison and Dane County’s prioritizing the return of younger grades to school. (Stipulated Facts ¶ 147.) And while infected children are less likely to develop severe symptoms, factors such as race, ethnicity, and the presence of preexisting conditions are more prevalent among

⁵ David Wahlberg, *With continued high COVID-19 cases and deaths, Wisconsin at 'tipping point'*, Wisconsin State Journal, (Nov. 12, 2020), https://madison.com/wsj/news/local/health-med-fit/with-continued-high-covid-19-cases-and-deaths-wisconsin-at-tipping-point/article_b71844a7-9b5e-5274-a80b-07ce535afbb0.html.

⁶ *Id.*

⁷ The lower incident of positive COVID-19 tests among children may be partially attributable to the fact that infected children are more likely to be asymptomatic, and asymptomatic individuals are less likely to be tested than symptomatic individuals. Laura F. Garabedian and Rebecca Lee Haffajee, *Do Children Really Transmit COVID-19 Less Than Adults? The Evidence Is Questionable*, The RAND Blog (Aug. 31, 2020), <https://www.rand.org/blog/2020/08/do-children-really-transmit-covid-19-less-than-adults.html>.

⁸ Andrew Mollica, Daphne Chen, Erin Caughey, Matthew Piper and Eric Litke, *Tracking coronavirus in Wisconsin*, Milwaukee Journal Sentinel, <https://projects.jsonline.com/topics/coronavirus/tracking/covid-19-cases-testing-and-deaths-in-wisconsin.html> (last visited Nov. 12, 2020).

children hospitalized for COVID-19 or admitted to an intensive-care unit. (Stipulated Facts ¶ 150.)

The return of in-person instruction threatens not only students, but anyone students come in contact with including teachers and family members. As discussed above, children and adolescents appear less likely to become infected than adults, but research has not demonstrated that children or adolescents who carry the virus are less likely to transmit it.⁹ Partial results of an ongoing CDC study show that COVID-19 spreads rapidly within households, regardless whether the virus was introduced by a child or an adult.¹⁰ Studies in Korea and India suggest that school aged children may be major drivers of COVID-19 infection in those countries.¹¹ As each infected individual may transmit the virus to others they come in contact with, rescinding Emergency Order #9's moratorium on in-person academic instruction risks turning schools into vectors for community spread.

II. EMERGENCY ORDER #9 DOES NOT BURDEN PETITIONERS' RELIGIOUS BELIEFS.

Faith Voices wholeheartedly agrees with Petitioners' conviction that "all Christians have a right to a Christian education" (Pet'r Opening Br. 41), just as Faith Voices believes all people of faith have a right to educate their children consistent with their religious beliefs. But the experience of Faith Voices has shown that the public health measures instituted in response to this crisis have not interfered in the effectiveness of religious ministry or instruction. More specifically, Faith Voices submit that in the context of a severe pandemic, it does not unduly

⁹ One study showed that infected children between the ages of five and seventeen carry similar viral loads as adults, suggesting that children may be just as contagious. See Taylor Heald-Sargent, William J. Muller, and Xiaotian Zheng, et al, *Age-Related Differences in Nasopharyngeal Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Levels in Patients With Mild to Moderate Coronavirus Disease 2019 (COVID-19)*, JAMA Pediatrics, (Jul. 30, 2020), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2768952?s=09>.

¹⁰ See Carlos G. Grijalva, Melissa A. Rolfes, Yuwei Zhu, and Huong Q. McLean et al., *Transmission of SARS-COV-2 Infections in Households — Tennessee and Wisconsin, April–September 2020*, 69 Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report 1631, (2020). Available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6944e1.htm>.

¹¹ See Young Joon Park, Young June Choe, Ok Park, and Shin Young Park et al., *Contact Tracing during Coronavirus Disease Outbreak, South Korea, 2020*, 26 Emerging Infectious Diseases 10, (2020). Available at https://wwwnc.cdc.gov/eid/article/26/10/20-1315_article#r11; Ramanan Laxminarayan, Brian Wahl, Shankar Reddy Dudala, and K. Gopal et al., *Epidemiology and Transmission Dynamics of COVID-19 in two Indian States*, Science Magazine (Sept. 30, 2020), <https://science.sciencemag.org/content/early/2020/09/29/science.abd7672>.

burden the free exercise of religion to temporarily halt in-person academic instruction until transmission rates fall to the metrics identified by public health officials. To the contrary, Faith Voices believes that compliance with Emergency Order #9 is essential for faith communities to survive and thrive.

A. EMERGENCY ORDER #9 DOES NOT INTERFERE WITH PETITIONER'S ABILITY TO ENGAGE IN CORE RELIGIOUS PRACTICES.

Petitioners assert that in-person academic instruction is essential to their religious beliefs, but they do explain why or how their religious beliefs are incompatible with virtual instruction. They simply assert, without explanation or support, that “[o]nly within the context of in-person instruction may students engage in core religious practices like attending Mass and Adoration of the Eucharist, sharing in communal prayer throughout the day, or frequenting confessions before a Catholic priest.” (Pet’r Opening Br. 44 (brackets and quotation marks omitted).)

But Petitioners do not specify whether it is their sincere religious belief that these practices are only valid when conducted in person, or whether Petitioners simply believe they would be logistically challenging to implement in a digital setting. The only religious belief directly asserted in Petitioners’ brief is “the sincere belief that they must educate their children in their religious faith.” (Pet’r Opening Br. 41.) It is Petitioners’ burden to identify a sincere religious belief and show that it is burdened by the order. *See, Coulee Catholic Sch. v. Labor & Indus. Review Comm’n, Dep’t of Workforce Dev.*, 2009 WI 88, ¶ 61, 320 Wis. 2d 275, 312. “It is not sufficient . . . to show that the [Order] burdens [Petitioners] in some way. The burden must be related to the exercise of a religious belief.” *Kollasch v. Adamany*, 99 Wis. 2d 533, 550, (Ct. App. 1980), rev’d on other grounds, *Kollasch v. Adamany*, No. 79-1579, 104 Wis. 2d 552, (1981).

Faith Voices’ congregations, and congregations across the globe, have observed a wide variety of religious services virtually in the wake of the global public health emergency. *See generally Legislature v. Palm*, No. 2020-AP-000765, *Amicus Brief of Wisconsin Faith Voices for Justice*, April 29, 2020 (hereinafter Faith Voices Amicus Brief in *Legislature v. Palm*). Group prayer, meditation, Mass, Bible study, and other services have continued online. Faith leaders have also adapted religious ceremonies to a virtual format, including brisses, weddings, funerals,

and confirmations. Holy days such as Passover Seder and Ramadan Iftars have been celebrated remotely with participants reciting prayers over Zoom. While some congregants miss embracing each other on days of celebration or mourning, the overwhelming feedback from constituents is that virtual and distance ministries fulfill their spiritual needs.

Petitioners also argue the Emergency Order “prohibits Petitioner Schools from ensuring their students’ regular access to core religious practices, including daily prayer as a class, the presence of the priest in their classroom daily, regular Mass attendance with an opportunity to participate in fulfilling several ministerial roles, or access to Confession.” (Pet’r Opening Br. 43–44 (quotation marks omitted).) Faith Voices believes Petitioner Schools can students’ access to these practices without violating the order.

Whenever possible, School Petitioners should ensure student’s access to core religious practices by offering them online. To the extent Petitioners’ religious beliefs require certain practices be conducted in person, Petitioners may ensure students’ access to these practices without holding all academic instruction in person.

Petitioners recognize that Emergency Order #9 specifically exempts religious organizations from mass gathering restrictions, allowing them to hold in-person religious services. (Stipulated Facts ¶ 165.) School Petitioners further acknowledge that their students have access to religious services outside of school, that many of their students do attend religious services outside of school, and that nothing in the Order prevents students from attending in-person services. (Stipulated Facts ¶ 102.) School Petitioners are primarily parochial schools directly affiliated with a church or parish, oftentimes sharing the same grounds or even the same building. The Emergency Order does not prohibit students participating in in-person religious practices at those churches or any other, nor does it appear to prohibit School Petitioners coordinating access to these services. Thus, the choice between distance learning and access to core religious practices is a false dilemma.

B. PETITIONERS DO NOT SHOW THAT THEIR RELIGIOUS BELIEFS ARE BURDENED BY VIRTUAL ACADEMIC INSTRUCTION.

Even assuming certain religious practices must be conducted in person, Petitioners do not adequately explain why the Freedom of Conscience Clause requires *all* coursework take place on school grounds. Faith Voices understands the value Parent Petitioners place on selecting a school that will “educate their children in their religious faith.” (Pet’r Opening Br. 41.) But nothing about distance learning prevents Petitioner Schools from teaching core subjects from a faith-based perspective.

Many religious schools offered virtual faith-based education for years even before the current public health crisis. For example, the Archdiocese of Miami Virtual Catholic School offers a fully online Catholic education for individual students and collaborates with other schools that wish to supplement in-person instruction with additional online courses.¹² Our Lady of Mount Carmel Catholic School in Carmel, Indiana has for years offered occasional virtual education days to its K–8th grade students in preparation for “a future where they need to be comfortable using technology for school or work.”¹³ And the Arrupe Virtual Learning Institute collaborates with Catholic high schools across the country to offer students subjects including Mandarin, computer engineering, and Catholic theology that many parochial schools cannot efficiently offer in-person due to their small class sizes.¹⁴

¹² According to their mission statement, the school’s “virtual learning environment is adaptable to meet the needs of all school communities or individual students, while also reinforcing Catholic values.” And their “innovative curriculum,” endorsed by the United States Conference of Catholic Bishops “ignites not only a passion for learning, but also for living and better understanding our Catholic faith . . . Christ is at the center of all we do.” ARCHDIOCESE OF MIAMI - VIRTUAL CATHOLIC SCHOOL, <http://www.adomvirtual.com/about.html> (last visited Oct. 24, 2020).

¹³ Stephen Beale, *In Wake of Coronavirus, Catholic Schools Get Creative With Distance Learning*, National Catholic Register (Apr. 3, 2020), <https://www.ncregister.com/features/in-wake-of-coronavirus-catholic-schools-get-creative-with-distance-learning>.

¹⁴ ARRUPE VIRTUAL LEARNING INSTITUTE, <https://www.arrupevirtual.org/> (last visited Oct. 24, 2020). Camden Catholic High School, located in Cherry Hill, New Jersey, began offering students “Virtual Learning Opportunities” in 2006. In 2019, Camden Catholic partnered with Arrupe to expand its online offerings, and since the pandemic the school has transitioned fully online. One parent of a Camden Catholic student praised the “seamless transition” to remote learning. CAMDEN CATHOLIC SCHOOL, <https://www.camdencatholic.org/2020/04/24/virtual-learning/> (last visited, Oct. 24, 2020).

Not only may School Petitioners continue to offer a faith-centered curriculum through virtual learning, other benefits of a religious education can transition online as well. Even in a virtual environment, students still have access to teachers who “encourage [students] to imitate a life of virtue and service to Christ and His Church, not only by word but also by action.” (Pet’r Opening Br. 42 (citation and quotation mark omitted).) Faith Voices simply does not understand—and Petitioners fail to explain—why educators cannot model Christian virtues in a virtual classroom.

Similarly, nothing about remote learning stifles Petitioners’ efforts to “make disciples of all nations.” (Pet’r Opening Br. 43.) Many School Petitioners offer service or mission trips for their students, and Petitioners acknowledge Emergency Order #9 does not prohibit this. (Stipulated Facts ¶ 102.) Additionally, virtual and long-distance evangelism significantly predate the COVID-19 pandemic and in many respects allow ministries to reach a larger audience. *See generally* Faith Voices Amicus Brief in *Legislature v. Palm*, (explaining that members report virtual services were better attended than in-person services ever were, and that online ministries reached more people than ever before, including the geographically distant, the disabled, shut-ins, and those “who, for whatever reason, are hesitant to enter our buildings.”)

Faith Voices recognizes that the religious education Parent Petitioners chose for their children is “inherently communal.” (*See* Joint Appendix, 20.) Faith Voices’ congregations are inherently communal as well, and faith leaders initially feared that communal aspect might suffer without in-person gatherings. But just as social distancing measures forced them to become more creative, they also found themselves acting more intentionally. As a result, clergy report that the sense of community in their congregations actually became *stronger* following the transition to virtual ministry, with congregants receiving more spiritual support than ever before. *See generally*, Appendix to Faith Voices Amicus Brief in *Legislature v. Palm*. As one faith leader, the Reverend Dr. Christian D. Boyd, wrote to this Court earlier this year, “social distancing has not required spiritual distancing.” Appendix to Faith Voices Amicus Brief in *Legislature v. Palm* at 13. Faith Voices wholeheartedly agrees.

CONCLUSION

Everyone would like to see in-person academic instruction resume as soon as public safety allows. The best way to ensure this is to defer to the guidance of public health experts such as Janel Heinrich, who are far better positioned than faith leaders or courts to determine when students can return to classrooms without threatening the community and aggravating—or extending—this crisis. Faith Voices does not believe this Emergency Order burdens the free exercise of Petitioners' religious beliefs. Among the tenets shared by Faith Voices' diverse members are the moral imperatives to preserve human life and protect our communities—particularly those in our communities whose circumstances place them at greater risk of infection and death. For these reasons, the Court should deny Petitioners' request for a permanent injunction and reinstate Emergency Order #9's suspension of in-person academic instruction.

Dated November 13, 2020.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby 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. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served upon the parties.

Dated November 13, 2020.



Barry J. Blonien
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(8)(B)–(C)

I hereby certify that this brief conforms to the Requirements of Wis. Stat. §§ 809.19(8)(b)–(c) for a brief produced with proportional serif font. The length of this brief is 2,997 words.

Dated November 13, 2020.



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