

RECEIVED
08-31-2020
CLERK OF WISCONSIN
SUPREME COURT

No. 2020AP001420 - OA

IN THE SUPREME COURT OF WISCONSIN

WISCONSIN COUNCIL OF INDEPENDENT
AND RELIGIOUS SCHOOLS, et al.,

PETITIONERS,

v.

JANEL HEINRICH, in her official capacity as
Director of Public Health Madison & Dane County,
et al.

RESPONDENTS.

**NON-PARTY BRIEF OF THE
LIBERTY JUSTICE CENTER
IN SUPPORT OF PETITIONERS**

Daniel R. Suhr
Counsel of Record
Reilly Stephens
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
dsuhr@libertyjusticecenter.org
Counsel for Amicus Curiae

TABLE OF CONTENTS

Table of Authorities	2
Statement of Interest	3
Statement of the Issue	4
Argument	4
Introduction	4
Equal Protection	5
Conclusion	15
Certificates	17

TABLE OF AUTHORITIES

Cases

<i>Batte-Holmgren v. Comm’r of Pub. Health</i> , 914 A.2d 996, (Conn. 2007)	4
<i>City of Ladue v. Gilleo</i> , 512 U.S. 43 (1994)	14
<i>Carthan v. Snyder</i> , 384 F. Supp. 3d 802 (E.D.Mich. 2019)	13
<i>Coulee Catholic Sch. v. Labor & Indus. Review Comm’n</i> , 2009 WI 88.....	6
<i>Hosanna-Tabor Ev. Luth. Church & Sch. v. EEOC</i> , 565 U.S. 171 (2012) ...	6
<i>Mayo v. Wis. Injured Patients & Families Comp. Fund</i> , 2018 WI 78...5, 6, 7	
<i>Michels v. Lyons</i> , 2019 WI 57	6
<i>Our Lady of Guadalupe Sch. v. Morrissey-Berru</i> , 140 S. Ct. 2049 (2020)....	6
<i>State v. Denny</i> , 2017 WI 17.....	4
<i>State v. Jeremy P.</i> , 2005 WI App 13	14
<i>United States v. Carolene Prod. Co.</i> , 304 U.S. 144 (1938).....	13
<i>Vanguard Outdoor, LLC v. City of L.A.</i> , 648 F.3d 737 (9th Cir. 2011)	14
<i>Vieth v. Jubelirer</i> , 541 U.S. 267 (2004)	7

Other Authorities

Ky. Op. Atty. Gen. 20-13 (Aug. 19, 2020)	7
Tx. Atty. Gen. Guidance (July 17, 2020).....	7

STATEMENT OF INTEREST

The Liberty Justice Center (LJC) is a national non-partisan, non-profit public-interest law firm based in Chicago, Illinois. Supporting educational freedom is one of the four pillars of LJC's practice, with such cases currently pending before the South Carolina Supreme Court (*Adams, et al., v. McMaster, et al.*, No. 2020-001069, representing Defendant Palmetto Promise Institute) and Tennessee Court of Appeals (*Metro Government of Nashville and Davidson Co. et al. v. Tennessee Department of Education, et al.*, No. M2020-00683-COA-R9-CV (C), representing Intervenor-Defendants Greater Praise Christian Academy, et al.). Additionally, Liberty Justice Center has provided legal advice or representation on educational freedom issues in Arizona, Missouri, North Carolina, Oklahoma, and Vermont.

From time to time, Liberty Justice Center also participates in important educational freedom cases on an amicus basis. LJC filed briefs at the *cert.* and merits stages in *Espinoza v. Montana Department of Revenue*, the latter of which was cited in Justice Alito's opinion. 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring).

STATEMENT OF THE ISSUE

Is there a rational basis for the Director's classification closing in-person education for primary and secondary schools while permitting child-care centers and colleges and universities to reopen for in-person education and services?¹

ARGUMENT

Introduction

"[A] core purpose of the constitutional guarantee of equal protection is to prevent lawmakers from shielding the politically powerful from legislative burdens that have been imposed on other groups that are similarly situated, but politically weak." *Batte-Holmgren v. Comm'r of Pub. Health*, 914 A.2d 996, 1017 (Conn. 2007) (Sullivan, C.J., dissenting).

Director Heinrich's order violates this basic constitutional promise of equal treatment. Much of the science about COVID-19 is still developing, but these two things we know: (1) Young children are substantially less likely to get infected or to be seriously harmed by infection. (2) Young adults congregated together in residential college or university settings are disproportionately likely to get infected. Yet Director Heinrich has ordered that elementary, middle, and

¹ Petitioners do not make an equal-protection claim in their petition or opening brief. Amicus, however, believes this is an important argument that applies to all elementary and secondary schools in Dane County – public, religious, and independent – and that it allows the Court to resolve this case on a straightforward, rational-basis review. Amici may introduce new issues for the Court to review at the petition stage. See *State v. Denny*, 2017 WI 17 ¶¶ 120, 127 n.6 (Abrahamson, J., dissenting) (citing *Coyne v. Walker*, 2016 WI 38).

high schools must close for in-person instruction, while permitting colleges and universities to go forward with in-person education and to reopen their dorm buildings. This is not merely lacking in a rational basis, it is straight-up anti-rational in the face of the scientific data.

How do you explain such an irrational decision? Simple: political power. The public-sector teachers unions want the public schools closed. They also want the private schools closed because they do not want students and parents fleeing to an in-person alternative. The University of Wisconsin, by contrast, wants to reopen for in-person learning. We should not be surprised, then, that an order was issued permitting the more dangerous circumstance but barring the lesser circumstance. That may make sense politically, but it is a denial of equal protection to the private independent and religious schools that wish to reopen. The Court should grant the petition and the preliminary injunction.

The Wisconsin Constitution's equal protection clause protects all citizens against irrational classifications, particularly in the exercise of their fundamental rights and especially when government irrationally favors the politically powerful.

Wisconsin's equal protection clause enjoys primacy of place in our Constitution: Article I, Section 1. *Mayo v. Wis. Injured Patients & Families Compensation Fund*, 2018 WI 78, ¶ 35. The function of the clause is simple: to ensure that similarly situated persons and groups receive similar treatment (to quote the façade of the U.S. Supreme Court: "Equal Justice Under Law."). When the

government draws lines that treat similar groups *dissimilarly*, the government must prove a compelling interest and narrow tailoring if the classification affects fundamental rights. *Id.* at 28. If the government draws lines that do not affect a fundamental right, the government must still prove a “reasonable basis” for its classification. *Id.* at 29.

Director Heinrich’s order forcing schools to offer only virtual learning for grades 3 thru 12 while permitting day-care centers to be open and giving colleges *carte blanche* to offer in-person learning affects the fundamental rights of parents to make educational decisions for their children. *See generally Michels v. Lyons (In re A.A.L.)*, 2019 WI 57. And to the extent that it closes religious private schools, it affects the fundamental right of those schools and the parents who choose those schools to exercise their religious liberty through an in-person educational ministry. *See generally Coulee Catholic Sch. v. Labor & Indus. Review Comm’n*, 2009 WI 88. *See also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020) (“[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.”); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565

U.S. 171, 192 (2012). Petitioners address these arguments at length in their Memorandum of Law, and Amicus will not repeat these arguments here.²

If Petitioners are right that this classification affects fundamental rights (which they are), then the differentiation of elementary/secondary schools from day-care centers and colleges/universities obviously flunks strict scrutiny. *See Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004) (strict scrutiny is “a standard imposing a strong presumption of invalidity”). But even if Petitioners are wrong about its arguments from religious liberty and parental rights (which they are not), the Director’s Order would not even pass rational basis scrutiny. It is, in fact, anti-rational in its treatment of higher education versus primary and secondary education. It is “patently arbitrary,” “irrational,” and undermines the government’s own important interest in combatting COVID-19. *See Mayo*, 2018 WI 78, ¶¶ 40-41.

The Director’s own order opens with these facts:

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. Locally, as of August 20, 2020, nine (9) percent of all

² Other than to point out that the attorneys general of Kentucky and Texas have said, in formal published guidance, that health orders purporting to close religious schools are a violation of religious liberty and parents’ rights under the U.S. Constitution and cognate state provisions of law. Ky. Op. Atty. Gen. 20-13 (Aug. 19, 2020), available at https://www.scribd.com/document/472989201/OAG-20-13#fullscreen&from_embed; Tx. Atty. Gen. Guidance (July 17, 2020), available at <https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/2020.07.17%20Letter%20to%20Religious%20Schools%20re%20COVID%2019%20Orders%20-%20Final.pdf>.

COVID cases were among children aged 0-17 in Dane County. This population comprises 22% of the county population overall. 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. 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. 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. No deaths among children who have tested positive for COVID-19 have occurred in Dane County.

Pet. Appx. 101. Yet in spite of this data, showing conclusively that infection rates among children are lower, that “outbreaks and clusters” among children are “rare,” and that no deaths have occurred among children in Dane County, Director Heinrich nevertheless has ordered schools closed for in-person learning for grades 3-12. Pet. Appx. at 105.

How do other educational service providers fare under her order? On the one end of the age spectrum, day-care centers, including summer-care or after-school care centers that serve children in grades 3 thru 12, may open as long as they observe certain class-size limits and physical distancing. Pet. Appx. 104. On the other end of the student spectrum, colleges and universities are allowed to reopen, and may determine for themselves, without any oversight by the Director, “policies and practices for safe operations.” Pet. Appx. 107. They may even reopen residential dorms, as long as they have in place “strict policies that ensure safe living conditions.” *Id.* The standards for such “strict

policies” are not delineated, in sharp contrast to the specificity of the Order’s other sections. *See, e.g.*, Pet. Appx. 104 (specific standards for day-care centers); Pet. Appx. 105-07 (specific standards for K-2 schools); Pet. Appx. 107-09 (specific standards for businesses).

Dane County is home to several institutions of higher education: the University of Wisconsin (Madison); Madison Area Technical College; and Edgewood College. UW-Madison is a humongous school, with over 43,000 students, drawn from across the United States and over 130 foreign countries.³ Though its larger lecture-based classes will occur remotely, it will allow classes of up to 50 students to meet in person (thus otherwise exceeding the Order’s indoor mass gatherings cap of 10).⁴ It has 21 dorm buildings, which house over 8,000 students⁵; many more live nearby in large, privately owned apartment complexes. Edgewood College is home to over 2,000 students, many of whom live in its eight residence halls and over 10 percent of whom hail from states or countries other than Wisconsin.⁶

³ Spring 2020 Enrollment Report, UW-Madison, Tables 2 and 17, available at https://registrar.wisc.edu/wp-content/uploads/sites/36/2020/03/report-enrollment-2020spring_Final.pdf.

⁴ Compare “Smart Restart: Academic Instruction,” UW-Madison, available at <https://smartrrestart.wisc.edu/plan/#academic-instruction> with Pet. Appx. 104.

⁵ “Residence Halls,” UW-Madison, available at <https://www.housing.wisc.edu/residence-halls/assignments/>.

⁶ “Fast Facts,” Edgewood College, available at https://edgewood.edu/docs/default-source/aboutdocs/fast-facts/quick-facts19-20.pdf?sfvrsn=d1f0c68e_10; “Residence Life & Housing,” Edgewood College, available at <https://www.edgewood.edu/student-life/housing>.

And what do we know about colleges and COVID? They're basically just as bad as cruise ships and nursing homes.⁷ Fully half of the colleges in the United States surveyed by the *New York Times* have reported at least one case; in total, they have seen over 26,000 cases since March. "Tracking Coronavirus Cases at U.S. Colleges and Universities," N.Y. Times (Aug. 26, 2020).⁸ The *Times* reports: "Many colleges have reported major spikes in recent weeks as dorms have reopened and classes have started. The University of North Carolina at Chapel Hill sent most undergraduates home after clusters popped up in campus housing. Notre Dame delayed in-person classes as students tested positive by the dozens, then the hundreds." *Id.* Indicators for especially high case numbers are those campuses that have large student populations and affiliated medical schools or hospitals, *id.*; UW-Madison has both. Colleges are also problematic because young people tend to go out in bars and restaurants, which increases spread. Tara Parker-Pope, "A Virus Walks Into a Bar..." N.Y. Times (June 25, 2020) ("Around the country, bars are becoming a common source of coronavirus outbreaks. In Louisiana, at least 100 people tested posi-

⁷ Katie Mack & Gavin Yamey, "After Cruise Ships and Nursing Homes, Will Universities Be the Next COVID-19 Tinderboxes?," Time.com (July 16, 2020), available at <https://time.com/5867395/will-universities-be-next-covid-19-tinderboxes/>.

⁸ Available at <https://www.nytimes.com/interactive/2020/us/covid-college-cases-tracker.html>.

tive for the virus after visiting bars in the Tigerland district, a popular destination for Louisiana State University students.”).⁹ They also have residential dorms, which are hotbeds of outbreaks. Graeme Wood, “There’s No Simple Way to Reopen Universities,” *The Atlantic* (April 27, 2020)¹⁰ (“A single COVID-19 case could turn a college dorm into a small landlocked cruise ship . . .”). That’s not to say that it is impossible for a college or university to safely reopen with appropriate policies and procedures in place.¹¹ Rather, it’s to say that the data on COVID-19 spread from colleges and universities is a lot more alarming than the data for elementary and secondary school-aged children.

Yet Director Heinrich allows Edgewood College to reopen its classrooms, cafeterias, and dorms with safety plans that it develops entirely within its discretion in place, yet prevents Edgewood Campus School right next door from reopening to serve its students. Why?

The answer is obvious: political power. UW-Madison wields a lot of political power in Dane County. Including its affiliated medical system, it is by far the

⁹ Available at <https://www.nytimes.com/2020/06/25/well/live/coronavirus-spread-bars-transmission.html>.

¹⁰ Available at <https://www.theatlantic.com/ideas/archive/2020/04/colleges-are-weighing-costs-reopening-fall/610759/>.

¹¹ See, e.g., Tommy G. Thompson, “UW System Campuses’ Fall Preparations,” *UW System* (Aug. 26, 2020), available at <https://www.wispolitics.com/wp-content/uploads/2020/08/200826TOMMY.pdf>.

largest employer in the county.¹² It generates billions of dollars a year in tuition revenue, research grants, state aid, and other dollars that flow into the local economy.¹³ It is overseen by a former governor, it is led by a former U.S. cabinet secretary, and it has an army of inside lobbyists and outside advocates pushing on its behalf.¹⁴ It publicly announced its intention to reopen in-person prior to Emergency Order # 9,¹⁵ and Director Heinrich has not dared to order its closure after that announcement.

Private schools in Dane County don't wield that kind of political power. In fact, they're running up against a different power-player that wants to see them shut down. Wisconsin's teachers unions have made clear that they want schools closed for the fall. Annysa Johnson & Molly Beck, "Teachers unions in largest districts call on Tony Evers to require schools start virtually," Milw. J. Sentinel (July 20, 2020).¹⁶ *See generally* Dana Goldstein and Eliza Shapiro,

¹² Dane County Profile, https://danedocs.countyofdane.com/webdocs/PDF/capd/CountyProfile_2005.pdf.

¹³ 2019-2020 Data Digest, Univ. of Wisc.-Madison, available at <https://uwmadison.app.box.com/s/4xmnrquref7eub7krtgfej7irgtw2kqr> (total UW-Madison budget is \$3.18 billion).

¹⁴ "State Relations, UW-Madison, available at <https://staterelations.wisc.edu/about-us/>; "State Relations," UW System, available at <https://www.wisconsin.edu/offices/office-of-the-president/state-relations/#staff>; Vidushi Saxena, "Badger Advocates looks to bridge gap between UW, Legislature," Badger Herald (Sept. 27, 2016), available at <https://badgerherald.com/news/2016/09/27/badger-advocates-looks-to-bridge-gap-between-uw-legislature/>.

¹⁵ "University announces Smart Restart plan to reopen in fall," UW-Madison (June 17, 2020), available at <https://news.wisc.edu/university-announces-smart-restart-plan-to-reopen-in-fall/>.

¹⁶ Available at <https://www.jsonline.com/story/news/education/2020/07/20/teachers-unions-in-the-largest-districts-call-on-evers-to-mandate-virtual-only-instruction-for-start/5469040002/>.

“Teachers Are Wary of Returning to Class, and Online Instruction Too,” N.Y. Times (July 29, 2020)¹⁷ (“Unions are threatening to strike if classrooms reopen, but are also pushing to limit live remote teaching. Their demands will shape pandemic education.”). Madison Teachers, Inc., has led that charge. Scott Girard, “Madison Teachers Inc. demands virtual school to start year,” Capital Times (July 16, 2020).¹⁸ The very next day after the union’s public announcement of its stance, Metropolitan Madison Public Schools’ board acceded to their demand, announcing that the district would offer only virtual education when school resumes in September. Scott Girard, “Madison School District will begin year with all-virtual instruction,” Capital Times (July 17, 2020).¹⁹ Suburban Dane County public school districts promptly followed suit.²⁰ So when Director Heinrich issued her order late on a Friday afternoon days before the school

¹⁷ Available at <https://www.nytimes.com/2020/07/29/us/teacher-union-school-reopening-coronavirus.html>.

¹⁸ Available at https://madison.com/wsj/news/local/education/local_schools/madison-teachers-union-demands-fully-virtual-start-to-school-year/article_51e70df9-e7bb-5624-b3be-805701a07dd9.html.

¹⁹ Available at https://madison.com/ct/news/local/education/local_schools/updated-madison-school-district-will-begin-year-with-all-virtual-instruction/article_1f2c5e2e-a209-5c4f-994b-e805f7effd73.html.

²⁰ Logan Wroge, “Sun Prairie, Middleton-Cross Plains districts will start school year all online amid COVID-19 pandemic,” Wis. State J. (July 21, 2020), available at https://madison.com/wsj/news/local/education/local_schools/sun-prairie-middleton-cross-plains-districts-will-start-school-year-all-online-amid-covid-19/article_83de0401-c5f8-58fa-847c-f0ed8bcff4fe.html; Melissa Parish, “Verona School District plans virtual start to school year,” Channel 3000 (July 27, 2020), available at <https://www.channel3000.com/verona-school-district-plans-virtual-start-to-school-year/>.

year began, it was only independent and religious schools which she was targeting—the public schools had already closed on their own accord.

In addition to demanding that the public schools close for the fall, the teachers unions have also made clear that private independent and religious schools must be forcibly closed. They know that if parents are given the option for an in-person private school or a virtual public school, many will seize the in-person alternative and leave the public school. Evie Blad, “Private Schools Catch Parents’ Eye as Public School Buildings Stay Shut,” *Ed. Week* (Aug. 6, 2020).²¹ So they are making no secret of their plan: they want to stop the competition by getting their pals in government to close the private schools as well. A columnist for Real Clear Education lays it out: “Teachers unions all across America are successfully shutting down public schools in the name of COVID-19. Now, under the guise of ‘equality,’ they’re trying to shut down private schools, as well.” Ashley McGuire, “If Public Schools Are Closed, Should Private Schools Have to Follow?,” *Real Clear Educ.* (Aug. 14, 2020).²² *See* Simon Romero, *et al.*, “If Public Schools Are Closed, Should Private Schools Have to Follow?” *N.Y. Times* (Aug. 5, 2020).²³

²¹ Available at <https://www.edweek.org/ew/articles/2020/08/06/private-schools-catch-parents-eye-as-public.html>.

²² Available at https://www.realcleareducation.com/articles/2020/08/14/if_public_schools_are_closed_should_private_schools_have_to_follow_110451.html.

²³ Available at <https://www.nytimes.com/2020/08/05/us/schools-reopening-private-public.html>.

The *Wall Street Journal* rightly labels this “school opening extortion.” Editorial, “School-Opening Extortion,” *Wall St. J.* (Aug. 3, 2020).²⁴ The Journal lays it out: “These public unions are also lobbying their political allies to keep public charter and private schools closed. . . . The teachers unions have a cynical interest in forcing their competitors to shut down. What a humiliation it would be if charter and private schools reopen and demonstrate that in-person education can be done with the right risk mitigation. Or if parents unsatisfied with the public schools’ response to the coronavirus decide a private school would be better for their child.”

What does all this political-power analysis have to do with the law? “[C]ourts act with greater vigilance when equal protection claims affect the politically powerless.” *Carthan v. Snyder*, 384 F. Supp. 3d 802, 846 (E.D.Mich. 2019) (citing *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938)). See *State v. Jeremy P.*, 2005 WI App 13, ¶ 26. That vigilance is necessary here, where one politically powerful group has secured total discretion to reopen, while another politically powerful group is seeking the closure of a competitor. These power dynamics explain the otherwise irrational actions of the Director in issuing an order that flies in the face of the scientific data.

²⁴ Available at <https://www.wsj.com/articles/school-opening-extortion-11596496376>.

When the government's policy undermines its own claimed interest, it exposes the fallacy of its classification. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (exemptions from restrictions can "diminish the credibility of the government's rationale for restricting speech in the first place" and demonstrate that restrictions are not narrowly tailored); *see also Vanguard Outdoor, LLC v. City of L.A.*, 648 F.3d 737, 742 (9th Cir. 2011) (similar). This classification is arbitrary and irrational, and the Court should accept the petition and strike it down.

CONCLUSION

The Court should grant the petition, issue the preliminary injunction, and order the parties to address the equal-protection issue in their briefing on the merits.

Respectfully submitted,



Daniel R. Suhr
Counsel of Record
Wis. Bar No. 1065568
Reilly Stephens
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
dsuhr@libertyjusticecenter.org
Counsel for Amicus Curiae

AUGUST 28, 2020

CERTIFICATE AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,021 words, as counted by Microsoft Word.

CERTIFICATE AS TO ELECTRONIC FILING

Pursuant to R. App. Pro. 809.19(12)(F), I hereby certify that I have submitted an electronic copy of this non-party brief in compliance with the requirements of Rule 809.19(12). I also certify that this electronic brief is identical in content and format to the printed form of the brief filed today. 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 August 28, 2020, I caused three copies of the foregoing non-party 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., Romo 419
Madison WI 53703-3345

CERTIFICATES SIGNED:



Daniel R. Suhr
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
dsuhr@libertyjusticecenter.org
Counsel for Amicus Curiae