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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

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ISSUES PRESENTED

1. Whether the School-Closure Order exceeds the Dane County health officer's statutory authority under Wis. Stat. § 252.03?

2. Whether the School-Closure Order violates Petitioners' fundamental right to the free exercise of religion under Article I, § 18 of the Wisconsin Constitution?

3. Whether the School-Closure Order violates Petitioners' fundamental right to direct the education and upbringing of their children under Article I, § 1 of the Wisconsin Constitution?

4. Whether indefinitely closing all public and private schools in Dane County to in-person student instruction for grades 3 through 12 is "reasonable and necessary for the prevention and suppression" of COVID-19 and/or "necessary to prevent, suppress and control" COVID-19?

INTRODUCTION

These consolidated cases challenge the authority of an unelected local bureaucrat to upend the education plans of thousands of families and schools by the stroke of a pen, without regard to any statewide education policy or the parents' and schools' constitutional rights. Dane County's eleventh-hour closure of in-person private schooling for grades 3 through 12 ("School-Closure Order") made the County the only locality in this State to prohibit in-person schooling, even though several other counties have much higher COVID-19 rates, while pulling the rug from under parents and schools who had planned all summer for a safe reopening of in-person education for the fall.

The non-uniform situation that the School-Closure Order would have created, absent this Court's intervention—putting students in Dane County at a severe educational disadvantage as compared to their peers in other parts of the State—is exactly why the Legislature only empowered a statewide agency, not local officials, with the authority to "close schools" to "control outbreaks and epidemics." Wis. Stat. § 252.02(3). That statutory scheme ensures that a decision of this magnitude, with such profound impacts on constitutional rights, is made at the statewide level, based upon a uniform, rational policy toward balancing the needs of children obtaining a quality education with the need to control outbreaks and epidemics. Notably, the relevant statewide agency, Wisconsin Department of Health Services

("DHS"), has not adopted any school closure policy for the fall (even though it had closed schools statewide in the spring), no doubt out of recognition that any such closure would be unjustified, given current knowledge of COVID-19 and conditions, and would thus be plainly unconstitutional.

Respondents paid no heed to the constitutional implications of their Order, providing several *additional* bases for invalidating that Order. The Wisconsin Constitution gives "expansive protections for religious liberty," *Coulee Catholic Schools v. Labor & Industry Review Commission*, 2009 WI 88, ¶ 60, 320 Wis. 2d 275, 768 N.W.2d 868, and "has traditionally accorded parents the primary role in decisions regarding the education and upbringing of their children," *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998), such that an order burdening either right must pass strict scrutiny. The Order clearly burdens both these rights, and it cannot possibly satisfy strict scrutiny (or, indeed, any level of scrutiny). While stopping the spread of COVID-19 is compelling, the Order is not narrowly tailored to that end, including because it permits the reopening of colleges and their dorms, daycare centers, movie theatres, and much more. For the same reason, even if local health officials did have statutory authority to "close schools" (and they do not), the Order is not "reasonable and necessary," Wis. Stat. § 252.03(2), to control the spread of COVID-19.

ORAL ARGUMENT AND PUBLICATION

This Court has scheduled oral argument for these consolidated cases for December 8, 2020. By granting Petitioners' Petitions for Original Action, this Court has indicated that this case is appropriate for publication.

STATEMENT OF THE CASE

I. The Parties

A. Petitioners are parents with children in private Dane County Schools ("Parent Petitioners"), private Dane County schools themselves ("School Petitioners"), and membership associations representing private schools throughout Wisconsin, including in Dane County ("Association Petitioners"). *See generally* Joint Stipulation of Facts ("SUF") ¶¶ 1–103. Where necessary, Petitioners in *WCRIS v. Heinrich* will be referred to as "WCRIS Petitioners," Petitioners in *St. Ambrose Academy v. Parisi* will be referred to as "St. Ambrose Petitioners," and Petitioner in *James v. Heinrich* will be referred to as "James Petitioner."

When Respondent Janel Heinrich issued Emergency Order #9, closing all schools in Dane County for in-person instruction for students in grades 3–12, School Petitioners had either already opened and were offering in-person instruction or were planning to do so, and Parent Petitioners each already had children attending in-person instruction or were planning on sending their children to obtain in-person instruction in the coming school year. *See id.* ¶¶ 4, 6–7, 89,

99. Indeed, in consultation with health professionals and guidance from state and federal authorities, these schools variously invested significant resources (financial and otherwise) into ensuring that opening in the current environment could be done safely, adopting safety precautions that included, for example, the use of face coverings, other medical and cleaning supplies, and personal protective equipment; social distancing; training staff on updated cleaning, hygiene, and instruction protocols and policies; screening policies for students and health staff; reorganizing school space; building new classroom spaces; surveying families as to their preferences for learning in the fall; and creating contingency plans for virtual learning—among other safety and precautionary things. *See, e.g.*, *id.* ¶¶ 4 (James Petitioner), 14, 17, 18, 27–28, 34–35 (WCRIS Petitioners), 89, 91–98 (St. Ambrose Petitioners).[1]

Further, for all Parent Petitioners and School Petitioners asserting a Freedom of Conscience Clauses claim, the decision to obtain in-person instruction for their children or to provide such instruction, respectively, is motivated by their sincere religious convictions. That is, Petitioners include religious schools and religious believers—here, Christians and Catholics—who have the sincere religious belief that they must educate their children in their religious

[1] The Joint Stipulation of Facts further discusses School Petitioners' reopening plans in great detail.

faith. *See id.* ¶¶ 5, 48, 62, 100–01. For example, certain of the Petitioners believe that "all Christians have a right to a Christian education," which obliges them to provide such an education to their children, *id.* ¶ 100; another Parent Petitioner "sincerely believes it is essential that [her children] receive a faith-based education" "in person" and "together with others as part of the body of Christ," *id.* ¶ 5; and other Parent Petitioners similarly believe that "[a]ttending school and participating in its religious activities in-person is an important part of the exercise of their faith," and that "receiv[ing] in-person religious instruction" is "a vital part of their child's religious formation," *id.* ¶¶ 48, 62.

These Petitioner Parents have fulfilled this religious calling for their children by choosing a school for them which corresponds to the parents' own convictions, *see, e.g.*, *id.* at ¶¶ 5, 48, 62, 100, thereby providing their children with teachers who, for example, "encourage them to imitate a life of virtue and service to Christ and His Church," not only by word but also by action, *id.* ¶ 63. In short, these Petitioner Parents' religious faith compelled them to send their children to Petitioner Schools, so that they may receive a religious education. Correspondingly, certain Petitioner Schools have the religious mission to teach these children in the faith. *See* ¶ 101; ¶ 63 ("St. Ambrose Academy's mission is to 'assist parents in the formation of their children by providing a classical education rooted in the Catholic faith.'").

Petitioners further believe that *in-person* instruction is vital to the education of their children, including their religious education and upbringing. For example, as the St. Ambrose Petitioner Schools explain, their "religious mission depends on in-person attendance to be fully realized," *id.* ¶ 86, including the mission "to go make disciples of all nations," *id.* ¶ 73; *see also, e.g.*, *id.* ¶ 71 (St. Francis Xavier Congregation's school is a "Christ-centered environment that develops the student spiritually, intellectually, emotionally, and socially."). Moreover, only within the context of in-person instruction may students engage in core religious practices incorporated into their school curricula. These practices include, for example, Holy Communion at weekly Mass, *id.* ¶¶ 63 (St. Ambrose), 71 (St. Francis Xavier), 73 (Immaculate Heart of Mary Congregation), 75 (Blessed Trinity Congregation), 77 (Blessed Sacrament Congregation), 79 (St. Peter's Congregation), 81 (St. Maria Goretti Congregation), 84 (St. Dennis Congregation (weekly Mass or prayer)), confessions before a Catholic priest, *id.* ¶¶ 63 (St. Ambrose), 77 (Blessed Sacrament Congregation), 79 (St. Peter's Congregation), 81 (St. Maria Goretti Congregation); Adoration of the Eucharist, *id.* ¶¶ 71 (St. Francis Xavier), 73 (Immaculate Heart of Mary Congregation), 79 (St. Peter's Congregation), 81 (St. Maria Goretti Congregation); daily prayer, *id.* ¶¶ 63 (St. Ambrose), 71 (St. Francis Xavier), 75 (Blessed Trinity Congregation), 77 (Blessed Sacrament Congregation), 81 (St. Maria Goretti Congregation), 84 (St.

Dennis Congregation); the presence of a "priest in [the] classroom daily," *id.* ¶ 81 (St. Maria Goretti Congregation); and in-person religious instruction, *id.* ¶¶ 5 (James), 48 (Barretts), 62 (Truitts), 71 (St. Francis Xavier). Such in-person education is essential to developing the "spirituality of communion," which is "the living breath of the educational community." *Id.* ¶ 86.

B. Respondents are Joseph T. Parisi, the County Executive of Dane County; Janel Heinrich, the Public Health Officer and Director of Public Health of Madison & Dane County ("PHMDC"); and PHMDC, a city-county health department serving the City of Madison and the rest of Dane County. *Id.* ¶¶ 104–06. Respondent Heinrich issued Emergency Order #9, the subject of this suit. *Id.* ¶ 105. PHMDC is responsible for administering the Order. *Id.* ¶ 106.

II. Factual Background

A. COVID-19 And Statewide Closure Orders

In December 2019, a novel strain of the coronavirus was detected, now named COVID-19, which has spread throughout the world. *Id.* ¶ 107. COVID-19 is a severe acute respiratory illness that spreads through direct, indirect, or close contact with infected people via mouth and nose secretions of saliva, respiratory secretions, or secretions droplets. *Id.* ¶ 108.

On January 20, 2020, the World Health Organization declared COVID-19 to be a Public Health Emergency of

International Concern. *Id.* ¶116. Madison and Dane County experienced the first diagnosis of coronavirus in the State, and the 12th confirmed case in the United States, on February 5, 2020. The second case in Madison and Dane County was on March 10, 2020. *Id.* ¶ 117.

On March 12, 2020, Governor Evers issued his first COVID-19-related Executive Order, declaring a public-health emergency throughout the State and directing DHS to issue "all necessary and appropriate measures" to combat COVID-19's spread. *Id.* ¶ 119; *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 5, 391 Wis. 2d 497, 942 N.W.2d 900. That state of emergency expired 60 days later on May 11, 2020, and the Legislature did not vote to extend this 60-day period under Wis. Stat. § 323.10. SUF ¶ 119.[2]

On March 13, 2020, Secretary-Designee Andrea Palm, the head of DHS, issued her own emergency order mandating, as relevant here, "the closure of all public and private Wisconsin schools for purposes of [in-person] pupil instruction," with an anticipated reopening date of April 6, 2020. *See id.* ¶ 121.

On March 24, 2020, Governor Evers and Secretary-Designee Palm issued the "Safer at Home" Order, imposing certain restrictions and extending the closure of "public and private K–12 schools" for in-person pupil instruction to April

[2] All of the State's emergency orders are available at https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx.

24, 2020. *Id.* ¶ 122; *see Palm*, 2020 WI 42, ¶ 6. The Governor and Secretary-Designee rested this "Safer at Home" order on the authority in Wis. Stat. § 252.02(3) and (6), the statute delineating the Department of Health Services' powers and duties, among other authorities. *See Palm*, 2020 WI 42, ¶¶ 5–9. SUF ¶ 122.

On April 16, 2020, Secretary-Designee Palm issued another "Safer at Home" Order, which generally purported to extend the core restrictions of the original "Safer at Home" Order for another month, until May 26, 2020. Emergency Order #28 at 21 (Apr. 16, 2020); *Palm*, 2020 WI 42, ¶ 7. This Order also mandated that "[p]ublic and private K–12 schools shall remain closed for pupil instruction . . . for the remainder of the 2019–2020 school year," although "[s]chools may continue to facilitate distance learning or virtual learning." SUF ¶ 123. Secretary-Designee Palm again purported to rely on Wis. Stat. § 252.02 as the legal basis for this order. Emergency Order #28 at 2; *Palm*, 2020 WI 42, ¶ 7. SUF ¶ 123.

This Court invalidated most of Secretary-Designee Palm's extension of the "Safer at Home" Order in *Legislature v. Palm*. 2020 WI 42, ¶ 3. However, the Court did not apply its holding to the order's provision closing schools for in-person instruction for the remainder of the 2019–20 term. *Id.* ¶ 3 n.6. Thus, that school-closure provision ended by the order's own terms on the last day of each school's respective 2019–20 term, which generally fell in late May through June. SUF ¶ 124.

B. Dane County's Post-*Palm* Emergency Orders

Through Respondent Heinrich, PHMDC issued nine orders after the invalidation of Order # 28 in *Palm*. *Id.* ¶ 128. A brief discussion of these orders provides helpful context for the School-Closure Order in dispute.

The County's first post-*Palm* order—issued on May 13, 2020, immediately after this Court decided *Palm*, and denominated Emergency Order #1—largely "adopt[ed] the provisions contained within" the "Safer at Home" order that *Palm* invalidated. *Id.* ¶ 131. This order purported to close public and private K–12 schools although: (1) the County's emergency-closure statute does not mention the authority to close schools; and (2) schools remained closed under the DHS "Safer At Home" order, pursuant to this Court's decision in *Palm*. *Id.* ¶ 131.

The County's second post-*Palm* order, Emergency Order #2 issued May 18, 2020, continued the mandate that "[p]ublic and private K–12 schools shall remain closed for [in-person] pupil instruction"; provided that they may provide distance or virtual learning services; provided that universities may remain open only to facilitate distance learning and perform essential activities and research; and allowed "[c]hild care settings"—daycares, licensed recreational and educational youth camps, and certain public-school programs—to remain open, limited to 50 children per program. *Id.* ¶ 132.

The County's third and fourth emergency orders again maintained the closure of K–12 schools, but then allowed universities to "determine policies and practices for safe operations," including by opening dormitories with "strict policies that ensure safe living conditions[,]" so long as these universities "maintain[ed] physical distancing to the greatest extent possible." *Id.* ¶ 133. The PHMDC orders also removed the 50-child cap on the opening of child-care settings from the second order, replacing it with other requirements like a 15-child-per-classroom limit. *Id.* ¶ 134. Emergency Order #4 also allowed all businesses to open up subject to a 25% capacity limit and allowed religious entities to open subject to the 25% capacity limitation. *Id.* ¶ 135.

In its Fifth Emergency Order, issued on June 15, 2020, the County provided that "[p]ublic and private K–12 schools are open for [in-person] pupil instruction . . . as of July 1, 2020," so long as the schools "abide by" detailed reopening plans that the County required the schools to develop. *Id.* ¶ 136. To hold in-person instruction, these schools had to develop and implement: "a written hygiene policy and procedure"; "a written cleaning policy and procedure"; "a written protective measure policy and procedure," which mandates social distancing "whenever possible," requires employees to wear face coverings (provided by the school if needed), and ensures that "student and staff groupings are as static as possible" to avoid "mixing" groups together; "a written action plan for a COVID-19 outbreak at the school";

and staff training on these procedures. *Id.* This order also maintained the provisions for the reopening of universities in the third and fourth orders and expanded the opening of "[c]hild care settings"—now labeled "[c]hild care and youth settings"—to include "sports activities." *Id.* Emergency Order #5 also increased business capacity as well as religious operations to 50%. *Id.* ¶ 137.

With respect to schools, the sixth, seventh, and eighth emergency health orders largely continued this status quo, including carrying over the fifth order's requirement that schools develop and implement a written COVID-19 outbreak plan, which "must include a strategy to communicate school closures, return to virtual learning or other time sensitive issues," although these orders also further regulated classroom capacities for childcare and youth settings. *Id.* ¶¶ 138–41.

Emergency Order #6 allowed for a mass gathering inside a commercial facility with 50 people, allowed for a mass gathering outside with 100 people, and focused on bars by requiring them to provide seated service only and six feet apart to keep spacing between individuals and slow the spread. *Id.* ¶ 139.

Emergency Order # 7 lowered the number of individuals allowed for both a mass gathering inside as well as a mass gathering outside. Emergency Order # 7 also restricted bars from having in-person congregation indoors, and restaurants were limited to 25% capacity indoors. *Id.* ¶140.

Emergency Order #8 continued a set of requirements directed toward safely beginning the school year in person, including the use of masks, social distancing, and other limitations. *Id.* ¶141.

C. The 2020-21 School Year And Emergency Order #9

1. There have been no direct orders from the DHS regarding the 2020–21 school year. *Id.* ¶ 142. On its website, DHS has listed a "school outbreak guidance" as well as a "Wisconsin's Education Forward Plan," which includes a multitude of suggestions and recommendations about sanitation, social distancing, and the like. *Id.* Likewise, there have been no direct orders or direction for schools from the Center for Disease Control ("CDC"), but those institutions have issued guidance, suggestions, and recommendations. *Id.*

On August 19, 2020, the Department of Health Services released its most-current guidance on the reopening of schools for the upcoming school year. *Id.* ¶ 143. This guidance recognizes that "[s]chool closures may have detrimental impacts on [students'] educational growth, access to school lunch and special education programs, and school-based health services," and recommends a variety of safety measures for schools to take to reduce the spread of COVID-19 if they reopen. *Id.* For example, the guidance recommends regular "disinfection of the environment"; prompt and aggressive "prevention and control measures" when symptoms are spotted; social distancing and limiting close

interactions; and other measures like separating students into smaller cohorts to reduce contacts, using face coverings, frequent hand washing, using physical barriers, and maximizing time outdoors. *Id.*[3]

Finally, the Wisconsin Department of Public Instruction ("DPI") has issued interim guidance for keeping school staff and students safe in schools, consistent with the DHS Guidelines discussed above. It stated that "[s]chool and district administrators should work closely with their local health department to determine the least disruptive level of temporary closure or dismissal needed, or transition to be virtual learning, to halt outbreak transmission." *Id.* ¶ 179.

2. PHMDC issued Emergency Order #9 after 5:00 p.m. on Friday, August 21, with an effective date of Monday, August 24 at 12:01 a.m. *Id.* ¶ 164. Many private schools, including some Petitioner Schools, had been planning for months to reopen on that Monday or shortly thereafter—or were already open. *Id.* ¶¶ 144, 164. The Order provides that "[p]ublic and private school buildings and grounds are only open for in-person student instruction for grades

[3] On October 6, 2020, Secretary-designee of DHS Andrea Palm issued Emergency Order # 3 limiting the size of certain public gatherings. Although this new order appears to have been adopted in a manner forbidden by this Court's ruling in *Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, it remains instructive that schools were expressly excepted from these limitations. *See* Emergency Order #3 at 2. c. iii (Oct. 6, 2020), *available at* https://content.govdelivery.com/attachments/WIGOV/2020/10/06/file_attachments/1564232/EmO03-LimitingPublicGatherings.pdf (last visited October 11, 2020).

kindergarten through second (K-2)." Petitioners' Joint Appendix ("JA") 5.[4] Any person who violates Emergency Order #9 shall be subject to a penalty of not more than one thousand dollars $1,000, and "[e]ach and every day of violation shall constitute a separate offense." SUF ¶ 170.

While Emergency Order #9 closes schools, it allows numerous other businesses and organizations to remain open for in-person activities, with restrictions. *Id.* ¶ 168. It continues to allow all higher-education institutions to open, even as to their dormitories, subject to certain conditions such as maintenance of physical distancing and use of mask coverings. *Id.* The Order also continues to allow "[c]hild care and youth settings" to open, which includes "all licensed, recreational, and educational camps, licensed and certified childcare providers, unregulated youth programs, licensed-exempt public school programs, and four-year old kindergarten (4k)." *Id.* The Order further allows many other businesses to conduct in-person operations, including bars, salons, barber shops, gyms, fitness centers, water parks, pools, bowling alleys, and movie theaters, subject to various capacity limitations and social-distancing guidelines. *Id.* ¶ 169.

[4] On September 1, PHMDC issued an amendment to Emergency Order #9, allowing in-person instruction for qualifying students with disabilities and/or Individualized Education Programs. SUF ¶ 171. The Order, as amended, went into effect on September 2, 2020. *Id.*

Dane County's School-Closure Order makes it an isolated outlier in Wisconsin. No other county in the State has adopted Dane County's approach and *banned* in-person instruction at private schools, *id.* ¶ 154, allowing each private school to choose for itself whether it will be open for in-person instruction, all-remote learning, or a hybrid model, *see id.* ¶¶ 154, 156. That is, all counties other than Dane County have permitted in-person schooling. *Id.* ¶ 156. Even Milwaukee County—home to the largest school district in the State, and which has a higher per capita COVID-19 rate than Dane County—is allowing private schools to decide whether they would like to have in-person instruction, provided the schools submit a school safety plan and receive approval from the health department for its plan and continues to comply with the same. *Id.*

Finally, outside of Wisconsin, numerous entities have recommended that schools open for in-person instruction in the fall. *Id.* ¶172. The CDC has stated that "[e]veryone's goal" should be "to prioritize the reopening of schools as safely and as quickly as possible given the many known and established benefits of in-person learning." *Id.* The CDC has similarly explained that "in-person learning is in the best interest of students, when compared to virtual learning." *Id.* ¶ 174. And the American Academy of Pediatrics has issued a statement that "strongly advocates" for the "goal of having students physically present in school." *Id.* ¶ 175.

D. COVID-19 And School-Aged Children

The introduction to Emergency Order #9 itself notes that "school-aged children contract COVID at lower rates than older populations"; that, "[l]ocally, as of August 20, 2020, nine (9) percent of all COVID cases were among children aged 0–17 in Dane County"; that "[o]utbreaks and clusters among cases aged 5-17 have been rare"; and that "[n]o deaths among children who have tested positive for COVID-19 have occurred in Dane County." JA1. Indeed, as to this last point, no one in the State of Wisconsin under the age of 20 has died from COVID-19. SUF ¶ 153.

When children do get sick, DHS has observed that "[t]he majority of children infected with COVID-19 experience milder illness than adults and are much less likely than adults to require hospitalization or intensive care." *Id.* ¶ 180. Similarly, the CDC has explained that "[a]nalysis of pediatric COVID-19 hospitalization data from 14 states from early March to late July 2020 found the cumulative rate of COVID-19–associated hospitalization among children was over 20 times lower compared to adults." *Id.* ¶ 173.

Although data is still being collected, early studies cast significant doubt on the necessity of school closures to combat COVID-19 effectively. A recent study that collected data from 191 countries from February 10, 2020, to September 29, 2020, concluded that "[n]o consistent pattern emerges between school status and COVID-19 infection rates," calling it a "[m]yth" that "[s]chool closures lower infections, and openings

lead to rising cases." *Id.* ¶ 192. Thus, the CDC has concluded that "the best available evidence from countries that have reopened schools indicates that COVID-19 poses low risks to school-aged children." *Id.* ¶ 173. Closer to home, a study in the United States that collected data from more than 550 schools in 46 States across a two-week period "found minimal evidence that the novel coronavirus is transferring inside K-12 school buildings." *Id.* ¶ 192.

III. Procedural Background

Between August 25–28, 2020, the James Petitioner, the WCRIS Petitioners, and the St. Ambrose Petitioners each filed Petitions For An Original Action in this Court, challenging the lawfulness of Emergency Order #9's School-Closure Order. *Id.* ¶¶ 194–96. Petitioners claimed, *inter alia*, that the School-Closure Order was not authorized by and/or violated the Wisconsin Statutes, *see* Wis. Stat. § 252.03, and violated their state constitutional rights to the free exercise of religion, *see* Wis. Const. art. I, § 18, and to direct the education and upbringing of their children, *see* Wis. Const. art. I, § 1. The WCRIS and St. Ambrose Petitioners moved for temporary injunctions, simultaneous to filing their Petitions. SUF ¶¶ 195–96.

On September 10, 2020, this Court granted the three original action petitions, consolidated the cases, and granted temporary injunctive relief, enjoining Respondents from enforcing the School-Closure Order—thereby allowing School

Petitioners to immediately reopen for in-person instruction. *Id.* ¶ 200; JA17. This Court explained that "Petitioners are likely to succeed on the merits of their argument that the Order's broad closure of schools in this case is not within the statutory grant of power to local health officers in Wis. Stat. § 252.03." JA20. While the Legislature had, in Section 252.02(3), granted DHS the power "to close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics," this power was "conspicuously omit[ted]" in the grant of authority to local health officers. JA19. Because "[b]oth Wis. Stat. § 252.02 and Wis. Stat. § 252.03 were drafted at the same time and by the same legislature, . . . no historical quirk or later amendment . . . suggest[ed] anything other than the legislature granted DHS and local health officers different powers." JA19. Respondent Heinrich's attempt to locate her authority in the ability to "do what is reasonable and necessary for the prevention and suppression of disease" or to "forbid public gatherings" similarly failed. JA20. The former argument "would render every other grant of power in the statute mere surplusage" and raised constitutional concerns; the latter disregarded the fact that the Legislature had, in its grant to DHS, clearly distinguished between the power to forbid public gatherings and the power to close schools. *Id.*

Analyzing the other injunction factors, the Court concluded that Petitioners had shown that no legal remedy was available and that failure to grant an injunction would

cause irreparable harm, characterizing the potential for harm to Petitioners from the loss of in-person education as "[u]nquestionabl[e]." *Id.* And on the equities, the Court noted the Respondents' "substantial interest in protecting the health and safety of Dane County residents," but found that justification wanting in light of Petitioners' "substantial interests in advancing childhood education and providing students a stable and effective learning environment"; the efforts Petitioners put toward reopening safely; the voluntary decision Petitioners made to assume the health risks of reopening; and the fact that the Order was "broad," "without apparent precedent," and likely illegal. JA20–21. The Court's temporary-injunction order did not fully analyze Petitioners' constitutional claims.

STANDARD OF REVIEW

Given that these consolidated cases are original actions, this Court decides all issues in the first instance. *See Palm*, 2020 WI 42, ¶ 10. The scope of a local health officer's authority and the meaning and application of constitutional rights are questions of law that this Court would review de novo if this case had arisen in an appellate posture. *Serv. Employees Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 28, 393 Wis. 2d 38, 946 N.W.2d 35.

SUMMARY OF ARGUMENT

I. Local health officials lack the power to "close schools" to "control outbreaks and epidemics," as that power is given

exclusively to DHS, in order to ensure a statewide school-closure policy. Wis. Stat. §§ 252.02, 252.03. As that is the only source of authority Respondents relied upon for the Order, no further analysis is necessary. The additional statutes that Respondents belatedly invoke to justify the Order do not give them *any* authority whatsoever, nor do they imply anything more than that local health officials may have limited authority to temporarily close a particular school, in contexts other than "control[ling] outbreaks and epidemics."

II. Even if Respondents had the authority to close schools to "control outbreaks and epidemics," the particular Order here is substantively unlawful due to its lack of narrow tailoring, for three independently sufficient reasons.

First, the School-Closure Order violates Petitioners' free-exercise rights, as protected by the Wisconsin Constitution's Freedom of Conscience Clauses. Petitioners have a sincere, religious obligation to educate their children in their faith traditions, and in-person education is vital to fulfilling that religious duty. By banning such in-person education, the School-Closure Order burdens Petitioners' religious exercise and so must clear strict-scrutiny review. Yet, the School-Closure Order cannot survive such scrutiny—or, indeed, even a lower level of review—because it lacks any meaningful tailoring for two independently sufficient reasons: (a) the Order allows numerous other businesses and organizations—including colleges and their crowded dorms—to open their doors for in-person operations; and (b) the Order

prohibits School Petitioners from reopening, although they have comprehensive, safe reopening plans.

Second, the School-Closure Order violates Petitioners' fundamental right to direct the upbringing and education of their children. Under Article I, Section 1 of the Wisconsin Constitution, parents have the primary role to make decisions regarding their children's education, and any government action that directly and substantially interferes with this parental authority must survive strict scrutiny. By banning parents from securing in-person education for their children, an education that these parents have concluded is vastly superior to remote learning, the School-Closure Order imposes a direct and substantial burden on parental rights. This Order does not survive strict scrutiny, for the same reasons articulated in the Conscience Clauses discussion.

Finally, the School Closure Order is not "reasonable and necessary," Wis. Stat. § 252.03(3), because it is not the "least restrictive means" to secure the County's public-health goals, as required by Wis. Admin. Code § DHS 145.06 and Wis. Stat. § 251.06(3)(a). Even if DHS could rely on the more general grants of authority in Section 252.03 (and they cannot), orders like the School-Closure Order must be "reasonable and necessary," which, under Rule 145.06, DHS interprets to impose a "least restrictive means" test on county orders. The School-Closure Order is not the "least restrictive means" because it closes School Petitioners—which have detailed,

safe reopening plans—and it allows colleges and universities (and their dorms) to reopen.

ARGUMENT

I. Respondents Lacked Statutory Authority To Issue The School-Closure Order

Local health departments and officials, like Respondents, are "creature[s] of the legislature and . . . ha[ve] only those powers that the legislature by statute provided." *Jackson Cty. v. State Dep't of Nat. Res.*, 2006 WI 96, ¶ 16, 293 Wis. 2d 497, 717 N.W.2d 713 (citing Wis. Const. art. IV, § 22). Respondents relied exclusively on Section 252.03 for their claimed authority to issue the School-Closure Order, but, as this Court has already recognized, a straightforward interpretation of that provision reveals that the power to "close schools" to "control outbreaks and epidemics" is given *exclusively* to DHS, and Respondents therefore lack that authority. As this Court further noted, Respondents cannot rely on more general grants of authority to circumvent the specific provisions detailing a clear division of authority over schools during outbreaks and epidemics. After this Court's preliminary ruling, Respondents attempted to justify the order by citing various ancillary and irrelevant statutes, none of which they relied on to issue the Order and none of which confer any authority on local health officials. This post-hoc justification fails for multiple reasons.

To understand these issues, it is helpful to begin with a brief overview of the broader statutory context. Wisconsin's

public health system consists of both state and local health officials, and is covered in Chapters 250–256 of the Wisconsin Statutes. The Wisconsin DHS is in charge of overseeing all health policy in the State, and it is required by statute to "[s]erve as the state lead agency for public health." Wis. Stat. § 250.03(1)(b). Local health departments have more limited jurisdiction and powers and are required to "report to the Department [of Health Services.]" Wis. Stat. § 251.04(4). Chapter 250 establishes the general structure, powers, and duties of DHS, and Chapter 251 the structure, powers, and duties of local health departments and officials. Chapters 252–256 then address specific kinds of public health hazards and provide more detailed divisions of authority between state and local officials in those discrete contexts: Chapter 252 covers "Communicable Diseases"; Chapter 253 deals with "Maternal and Child Health"; Chapter 254 reaches various "Environmental Health" hazards, including, among others, "toxic substances," Wis. Stat. §§ 254.11–30, "animal-borne" diseases, *id.* §§ 254.50–52, and "human health hazards," *id.* §§ 254.55–595; and finally, Chapter 256 addresses "Chronic Diseases and Injuries."

A. Sections 252.02 And 252.03, When Read Together And In Context, Empower Only DHS To "Close Schools" To "Control Outbreaks And Epidemics"

Within the "Communicable Diseases" chapter, two adjacent sections set forth the powers of both DHS and local health officials in relation to, specifically, "control[ling]

outbreaks and epidemics." Wis. Stat. §§ 252.02; 252.03. Section 252.02 grants to DHS the power to "close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." Wis. Stat. § 252.02(3). Section 252.03, by contrast, "conspicuously omits," *see* JA19, the power to "close schools," instead giving local health officials *only* the authority to "*inspect* schools and other public buildings within his or her jurisdiction as needed to determine whether the buildings are kept in a sanitary condition," Wis. Stat. § 252.03(1).

Read together, the obvious logical inference from these provisions is that, within the realm of "control[ling] outbreaks and epidemics," the Legislature intended that DHS—and *only* DHS—would have the authority to "close schools." That conclusion is a straightforward application of the "expressio unius est exclusio alterius" canon of statutory construction; as this Court has put it in another case, "the legislature's failure to specifically confer [a] power is evidence of legislative intent not to permit the exercise of the power." *Groh v. Groh*, 110 Wis. 2d 117, 125, 327 N.W.2d 655 (1982); Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation Of Legal Texts* at 107–11 (2012). That doctrine has extra force where, like here, the statute in question "is part of a comprehensive legislative plan," *Groh*, 110 Wis. 2d at 125, such as "a chapter of carefully . . . enumerated powers" that "specifically define[s] the authority of appropriate officers" in a particular context, *see State ex rel. Harris v. Larson*, 64 Wis. 2d 521,

527, 219 N.W.2d 335 (1974). Moreover, this Court recently applied this doctrine in another COVID-related case, *Wisconsin Legislature v. Evers*, No. 2020AP608-OA, explaining that because "the Legislature provided the Governor the authority to suspend administrative rules in paragraph (4)(d) [of the relevant statute], the logical inference with respect to paragraph (4)(b) is that the Legislature has not granted him the authority to suspend or rewrite statutes in the name of public safety." JA30.

The fact that local health officers retain the power to "inspect schools" during an outbreak strongly reinforces the logical inference that they lack the power to "close schools." The Legislature clearly had schools in mind when it drafted Section 252.03, and it decided to allow local officials to inspect schools, but reserved closure for DHS. As this Court observed, Sections 252.02 and 252.03 "were drafted at the same time and by the same legislature, so no historical quirk or later amendment . . . suggest[s] anything other than the legislature granted DHS and local health officers different powers." JA19.

That local health officers lack the authority to "close schools" to "control outbreaks and epidemics" not only follows directly from the text of sections 252.02 and 252.03, it is also consistent with the broader statutory and constitutional context. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. As noted above, the public health statutes make DHS the "lead agency

for public health." Wis. Stat. § 250.03(1)(b). Reinforcing that point, the very first section of Chapter 251 (which covers *local* health officials) declares the Legislature's finding that "the provision of public health services in this state is a matter of statewide concern." Wis. Stat. § 251.001.

Schools are also a matter of statewide concern, as evidenced by, among other things, Article X, § 3 of the Wisconsin Constitution, requiring that the "the establishment of district schools . . . shall be as nearly uniform as practicable," as well as Article X, § 1, establishing a *state* superintendent over public instruction. Within this context, the Legislature's decision to empower DHS, and *only* DHS, to preemptively close schools in response to an outbreak makes complete sense. The Legislature logically concluded that a decision as weighty and constitutionally fraught as the closure of schools should not be left to local control, letting students in some parts of the state be put at a grave disadvantage to their peers, even though a statewide policy to "control outbreaks and epidemics" would not justify that different treatment. Wis. Stat. § 252.02(3). For example, as relevant here, the DHS would, of course, never have closed only Dane County schools, given that other parts of the State have much higher COVID-19 rates. SUF ¶ 156.

B. The General Grants Of Authority In Section 252.03 Do Not Override The Specific Division Of Authority With Respect To Schools

Respondents have argued that, notwithstanding the glaring absence of any authority to "close schools" in Section 252.03, the School-Closure Order was nevertheless permitted by the more general authorizations in subparagraphs (1) and (2), to "take all measures necessary to prevent, suppress and control communicable diseases" and to "do what is reasonable and necessary for the prevention and suppression of disease." Resp. to Pet. for OA & Emergency Mot. for TI 17–23, *WCRIS v. Heinrich*, No. 2020AP1420 (Wis. Aug. 28, 2020). This interpretation suffers numerous fatal flaws.

First, it violates the bedrock principle of statutory interpretation that "specific language trumps [more] general language." *In re Paternity of Palmersheim*, 2004 WI App 126, ¶ 27, 275 Wis. 2d 311, 685 N.W.2d 546. In other words, "where a specific statutory provision leads in one direction and a general statutory provision in another, the specific statutory provision controls." *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 2005 WI 159, ¶ 23, 286 Wis. 2d 252, 706 N.W.2d 110. Respondents cannot rely on these broad, generic authorizations to override the specific provisions establishing a clear division of authority over schools during epidemics: local health officials may "inspect" schools, Wis. Stat. § 252.03(1), but only DHS may "close" them "to control outbreaks and epidemics," *id.* § 252.02(3).

Second, as this Court recognized, interpreting the general provisions to "encompass anything and everything," including contexts addressed by other, more specific provisions, "would render every other grant of power in the statute mere surplusage." JA20. Section 252.02 contains equivalent broad language to the portions Respondents invoke from Section 252.03, *see* Wis. Stat. § 252.02(6) ("The department may authorize and implement all emergency measures necessary to control communicable diseases."), and if that language includes the power to close schools, then the separate provision giving DHS explicit authority to "close schools," *id.* § 252.02(3), would be completely unnecessary.

Third, a broad interpretation of the general provisions in Section 252.03 "that gives carte blanche authority to a local health officer to issue any dictate she wants, without limit, would call into question its compatibility with our constitutional structure." JA20 (citing *State ex rel. Adams v. Burdge*, 95 Wis. 390, 399–400, 70 N.W. 347 (1897)). Wisconsin's Constitution vests the legislative power exclusively in the Senate and Assembly, Wis. Const. art. IV, § 1, and the Legislature may not simply give that power away, *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717 (1931).

In *Wisconsin Legislature v. Palm*, 2020 WI 42, this Court explained that Section 252.02(6)—a provision equivalent to the portions of Section 252.03 that Respondents rely on—could not be interpreted as "an 'open-ended grant' of

police powers to an unconfirmed cabinet secretary" without any procedural safeguards because such an interpretation would be "constitutionally suspect" as an improper delegation of legislative authority. *Id.* ¶¶ 31–33. Although the Court did not define the precise scope of section 252.02(6), it emphasized that "statutes with imprecise terminology that purport to delegate lawmaking authority to an administrative agency" "cannot [be read] expansively." *Id.* ¶ 55. In part to avoid the delegation problem, the Court held that generally applicable orders issued pursuant to Section 252.02(6) must be promulgated through emergency rulemaking procedures, giving the Legislature a seat at the table. *Id.* ¶¶ 31–42, 58.

There is no equivalent procedural safeguard available here—Chapter 227 only applies to state agencies, Wis. Stat. § 227.01(1). So Section 252.03's general grants of authority to "do what is reasonable and necessary" and to "take all measures necessary" must be interpreted even more narrowly than Section 252.02(6), especially where, like here, an order comes "at the expense of fundamental liberties," *Palm*, 2020 WI 42, ¶ 31, *see infra* Part II.[5] As in *Palm*, this Court does

[5] While the Legislature can delegate some legislative power to local government to address local issues within their respective jurisdictions, *see*, *e.g.*, *State ex rel. Dunlap v. Nohl*, 113 Wis. 15, 88 N.W. 1004, 1006 (1902), both the Wisconsin Constitution and statutes make clear that, even at the local level, legislative power is confined to the local legislative body. In counties, the county board is vested with "powers of a local, legislative and administrative character," Wis. Const. art. IV, § 22; Wis. Stat. § 59.03, and "[t]he powers of a county as a body corporate can only be exercised by the board, or in pursuance of a resolution adopted or

not need to resolve the precise scope of the general authorizations in Section 252.03; it is sufficient to simply "give[ ] full meaning and effect" to the school-related provisions, JA19, namely that the power to "close schools" to "control outbreaks and epidemics" is reserved to DHS.

Finally, to the extent there is any ambiguity in interpreting Section 253.03, the Court should resolve that in Petitioners' favor, under the constitutional-avoidance canon, given Petitioners' powerful constitutional claims against the Order, *infra* Part II, and the structural problems just described, *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 64, 357 Wis. 2d 469, 851 N.W.2d 262; *accord In re Certified Questions From United States Dist. Court , W. Dist. of Michigan, S. Div.*, ___ N.W.2d___, No. 161492, 2020 WL 5877599, at *34 & n.18 (Mich. Oct. 2, 2020) (Viviano, J., concurring in part and dissenting in part) (invoking canon in

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ordinance enacted by the board," Wis. Stat. § 59.02. The county executive, on the other hand, along with the departments and officials supervised by the county executive, including local health officials, *see* Wis. Stat. § 251.06(4)(b), have only the "executive" power to "enforce[ ] and administer[ ]" ordinances and laws within the county, Wis. Stat. § 59.17. Unlike a local health officer, the county board is directly elected and therefore accountable to the people. Wis. Stat. §§ 59.10; 251.06(4)(b). Thus, local government presents similar separation-of-powers boundaries and issues. *See*, *e.g.*, 68 Op. Att'y Gen. 95 (1979) (noting that a "county executive may not intrude" when a county committee is "exercising quasi-legislative authority delegated directly by the Legislature."). Consequently, even a delegation to local officials permitted by the statutes (as this one is not) would have to be accompanied by adequate direction and procedural safeguards as would the exercise of that delegation at the local level.

course of concluding that Michigan Governor lacked statutory authority to issue COVID-19-related executive orders).

C. None Of The Additional Statutes Respondents Cite Change The Analysis In Any Way

In their motion to vacate the temporary injunction, Respondents cited five additional statutes that they claim "authorize local health officers to close schools." Motion To Vacate The TI 2, *James v. Heinrich*, No. 2020AP1419, *et al.* (Wis. Sept. 15, 2020) (hereinafter "Motion To Vacate"). This post-hoc defense of the Order fails for multiple reasons.

As a preliminary matter, the School Closure Order did not invoke—or even mention—any of these statutes as a source of authority for the challenged order closing all schools in Dane County in response to COVID-19. Rather, the Order cites only Wis. Stat. §§ 252.03(1), (2) and (4) as its legal basis. JA1. Thus, Respondents have waived any argument that any of these statutes give them any authority to close schools to "control outbreaks and epidemics."

The School Closure Order's lack of reliance on these provisions was, in any event, entirely sensible because none of them confer *any* authority upon local health officials whatsoever. Wis. Stat. § 115.01(10)(b), for example, is the definition of a "school day" for purposes of various school statutes and regulations; Wis. Stat. § 120.12(27)(a) imposes a duty on *school boards* to provide certain notice to the Department of Public Instruction; and the remaining sections simply create exceptions to the requirements of certain

programs for schools closed "[d]uring the public health emergency declared on March 12, 2020," *see* Wis. Stat. § 115.7915(8m) (special needs scholarship program); Wis. Stat. § 118.60(12) (parental choice program); Wis. Stat. § 119.23(12) (Milwaukee parental choice program).[6]

The recently amended sections that Respondents cite are especially inapt, for a number of reasons. First, by their very terms, they only apply "[d]uring the public health emergency declared on March 12, 2020, by executive order 72," which ended 60 days later. Wis. Stat. §§ 115.7915(8m); 118.60(12); 119.23(12). Thus, even if they could be read to confer authority as an adjunct to the Governor's use of *his* statutory emergency-declaration authority—and they cannot be so read—that authority has expired on May 11.[7] Second, these statutes were enacted quickly, in the midst of crisis, and the purpose of these provisions (and, accordingly, the

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[6] Respondents also cited Wis. Stat. § 118.38(4)(a), which gives DPI the authority, between March 12, 2020 and October 31, 2020, to temporarily waive requirements imposed on schools, but they misquoted the statute. The enacted version does not contain any of the phrases underlined in footnote 11 of Respondents' Motion To Vacate referencing schools being "closed by [a] local health officer." Instead, the enacted version replaced that language with the time period between March 12, 2020 and October 31, 2020.

[7] That conclusion is not altered by second or third or "extended" emergencies recently declared by the Governor and whose validity are at issue in *Lindoo v. Evers*, Case No. 2020CV219, currently pending in the Polk County Circuit Court. Even if the Governor can repeatedly extend or declare "new" emergencies arising from the same underlying circumstances, the referenced statutes are explicitly operative only during the emergency declared on March 12 which expired on May 11, 2020.

Legislators' attention) was not directed to the scope of local health officials' authority, but to providing regulatory relief to schools that were closed during the crisis—and which had already been closed by DHS orders. *See* SUF ¶¶ 121–22. Thus, these provisions cannot plausibly be read as a *sub silencio* amendment to Section 252.03, giving local health officers a power that they previously lacked.

Respondents' newly cited provisions suggest, at the *very most*, that local health officers may have authority to temporarily close individual schools in contexts *unrelated* to "control[ling] outbreaks and epidemics," and under authority granted in statutes not relied upon by Respondents here. As noted above, health officials have responsibilities over a variety of health hazards; "communicable diseases" is just one category. *See* Wis. Stat. chs. 253–256. Without providing a comprehensive catalogue of other statutes, unrelated to "control[ling] outbreaks and epidemics," Wis. Stat. § 252.02(3), there are multiple other contexts where local health officials might have authority to temporarily close a school. These other statutes—unidentified and not relied upon—are entirely irrelevant to the present legal dispute, but they illustrate why Respondents' additional citations do not change the analysis.

Section 251.06, for example, authorizes local health officers to "[i]nvestigate and supervise the *sanitary conditions* of all premises within the jurisdictional area of the local health department." Wis. Stat. § 251.06(3)(f) (emphasis

added). This could, perhaps, permit a local health department to temporarily close a school building to "supervise" a thorough cleaning of an unsanitary kitchen, gym, locker room, or bathroom.

Another section, Wis. Stat. § 254.59, gives local health officials the authority to "order the abatement or removal" of a "human health hazard" from any "private premises," where "human health hazard" is defined to include any "substance, activity or condition that is known to have the potential to cause acute or chronic illness, to endanger life, to generate or spread infectious diseases, or otherwise injuriously to affect the health of the public." Wis. Stat. §§ 254.01; 254.59(1). If the hazard is not removed by the owner, the health department can enter the premises and abate the hazard itself. Wis. Stat. § 254.59(2). So, for example, if a local health department discovered a toxic or hazardous substance in an old school building, it could presumably temporarily close the building to remedy the problem. But again, any such order would be *temporary,* limited to the *particular* school, and directed at a specific, identified hazard. It cannot include a prophylactic closing of schools to "control outbreaks and epidemics." Wis. Stat. § 252.02(3). That power has been given to DHS, but withheld from local public health authorities.

Various other statutes give local health officials authority to either "enforce" certain DHS rules, or to enact and enforce their own rules, with respect to *specific* health

hazards school buildings might face and which may be revealed by inspection, including: pests, rodents, and animal-borne health hazards, *see* Wis. Stat. § 254.51(4), (5); lead poisoning, Wis. Stat. §§ 254.154, 254.168(6); and asbestos, *see* Wis. Stat. § 254.21 (allowing DHS to promulgate rules for asbestos abatement in schools); Wis. Stat. § 254.152 (allowing DHS to designate a local health department as its agent to enforce these rules), among other things. Under these provisions, a local health department might be able to temporarily close a particular school building to address a rat infestation, or to remediate a lead-paint or asbestos problem.

Additionally, local health officers are to enforce DHS's policies, and if they do not, then DHS "shall take charge, and expenses thus incurred shall be paid by the county or municipality." Wis. Stat. § 252.03(3). That is, once ordered to close schools *by DHS*, the local health officer must then affirmatively act to close schools and enforce the DHS order. If they do not, DHS steps in and does this work, charging its expenses back to the local government. Of course, Respondents do not argue this situation applies to them—and they could not, because they issued the challenged order on their own.

These examples show that the statutory references in Wis. Stat. §§ 115.01(10) and 127.12(27) to "days on which school is closed by order of a local health officer" do not imply anything about the scope of a local health officers' authority to "close schools" to "control outbreaks and epidemics." The

proper place to answer that question is Section 250.03, which explicitly addresses local health officers' authority with respect to outbreaks of communicable diseases. And the only authority local health officers have under that section is to "*inspect* schools and other public buildings within his or her jurisdiction as needed to determine whether the buildings are kept in a sanitary condition." Wis. Stat. § 252.03(1).

II. The School-Closure Order Is Also Substantively Unlawful, For Lack Of Sufficient Tailoring, For Three Independently Sufficient Reasons

The School-Closure Order claims the breathtaking authority to close indefinitely all private schools in Dane County, including religious schools. Even assuming that Dane County could ever issue such an order, *but see supra* Part I, the Wisconsin Constitution's Conscience Clauses, the Wisconsin Constitution's protection of parents' rights to direct the upbringing of their children, and the relevant statute would then all require that, when taking such a drastic step, Dane County would need to satisfy the strict scrutiny test's narrow tailoring test. Given that Dane County cannot even arguably satisfy that test, or, indeed, even the inapplicable rational tailoring standard, the Order is also substantially unlawful for three independent reasons.

A. The Freedom Of Conscience Clauses[8]

1. Under the Wisconsin Constitution's Freedom of Conscience Clauses, "[t]he right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted." Wis. Const. art. I, § 18. This is "the strongest possible language in the protection of this right," which mandates "expansive protections for religious liberty." *Coulee Catholic Schools*, 2009 WI 88, ¶¶ 59–60. And while these Clauses "serve[ ] the same dual purposes as the Establishment Clause and Free Exercise Clause of the U.S. Constitution," *id.* ¶ 60, their "specific and expansive language[ ] provides much broader protections for religious liberty than the First Amendment," *id.* ¶ 66. This broader protection of the Wisconsin Constitution's Freedom of Conscience Clauses extends to even "neutral and generally applicable [ ] laws." *DeBruin v. St. Patrick Congregation*, 2012 WI 94, ¶ 26 n.8, 343 Wis. 2d 83, 816 N.W.2d 878 (plurality op.) (citing *Coulee*, 2009 WI 88, ¶¶ 3, 39 n.13).

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[8] As explained at the temporary-injunction stage, Petitioners do not assert any federal constitutional claim in this case, and they affirmatively disclaim reliance on any federal constitutional provisions. *See* Combined Mem. In Supp. Of Emergency Pet. For OA & Emergency Mot. for TI 35 n.22, *St. Ambrose Academy, Inc.*, No. 2020AP1446 (Aug. 28, 2020). Petitioners' claims rest solely on the Wisconsin Constitution and Wisconsin statutes.

The Freedom of Conscience Clauses apply to both religious organizations like religious schools and to parents seeking to educate their children in their religious tradition. So, religious organizations like the Catholic and Christian schools here possess free-exercise rights and may bring a Freedom of Conscience Clauses claim in their own right. *Coulee Catholic Schools*, 2009 WI 88, ¶ 58; *e.g.*, *id.* ¶ 1. For parents, the Clauses protect their right to raise their children according to their sincere religious beliefs, which includes the provision of a religious education. *State v. Yoder*, 49 Wis. 2d 430, 438, 182 N.W.2d 539 (1971) (considering "solely a parent's right of religious freedom"); *see Coulee Catholic Schools*, 2009 WI 88, ¶ 66. That is, parents have the "right of religious freedom to bring up [their] children as [they] believe[ ] God dictates." *Yoder*, 49 Wis. 2d at 438.

A claim under the Freedom of Conscience Clauses comprises four elements. The religious believer must, as an initial matter, prove "(1) that it has a sincerely held religious belief, and (2) that such belief is burdened by the application of the state law at issue." *Coulee Catholic Schools*, 2009 WI 88, ¶ 61. Then, "[u]pon this showing, the burden shifts to the [government] to prove (3) that the law is based upon a compelling state interest (4) that cannot be served by a less restrictive alternative"—that is, to satisfy strict scrutiny. *Id.*

Most relevant here, to survive strict scrutiny, the government must show that the law is *narrowly tailored* to serve a compelling state interest. *Matter of Visitation of A.*

A. L., 2019 WI 57, ¶ 2, 387 Wis. 2d 1, 927 N.W.2d. That is a demanding test, such that "it is the rare case" where "a law survives strict scrutiny." *State v. Oatman*, 2015 WI App 76, ¶ 12, 365 Wis. 2d 242, 871 N.W.2d 513 (citation omitted). The government must show "that its interests cannot be met by alternative means that are less restrictive of the challengers' free exercise of religion." *State v. Miller*, 202 Wis. 2d 56, 70, 549 N.W.2d 235 (1996). If "a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt v. Hobbs*, 574 U.S. 352, 365 (2015) (citations omitted); *Miller*, 202 Wis. 2d at 70–71.

2. The School-Closure Order plainly burdens Petitioners' sincerely held religious beliefs and their right to raise their children in their religious traditions and, just as clearly, cannot satisfy any level of scrutiny—let alone the demanding strict-scrutiny test.

a. Petitioners satisfy their initial burden under *Coulee Catholic Schools* to demonstrate that the School-Closure Order burdens their sincere religious beliefs. Petitioners are religious schools or religious believers, such as Christians and Catholics, and have the sincere belief that they must educate their children in their religious faith.[9] For example, the Catholic and Christian Petitioners believe that "all Christians have a right to a Christian education," which obliges them to

[9] The James Petitioner, the St. Ambrose Petitioners, and Petitioner Parents Barretts and Truitts of the WCRIS Petitioners are asserting a Freedom of Conscience Clauses Claim.

provide such an education to their children. SUF ¶ 100; *see also id.* ¶¶ 5, 48, 62. Petitioner Parents have fulfilled this for their children by choosing a school for them which corresponds to the parents' own convictions, *see id.* ¶¶ 64, 72, 74, 76, 78, 80, 83, 100; *see also id.* ¶¶ 5, 48, 62, thereby providing their children with teachers who, for example, "encourage them to imitate a life of virtue and service to Christ and His Church," not only by word but also by action, *id.* ¶ 63. That is, Petitioner Parents' religious faith compelled them to send their children to Petitioner Schools, so that they may receive a religious education. *See, e.g.*, *id.* ¶¶ 5, 48, 62, 100. And St. Ambrose Petitioner Schools, correspondingly, have the religious mission to teach these children in the faith. *See id.* ¶ 63 ("St. Ambrose Academy's mission is to 'assist parents in the formation of their children by providing a classical education rooted in the Catholic faith.'"); *see also id.* ¶¶ 71 (St. Francis), 73 (Immaculate Heart of Mary), 75 (Blessed Trinity), 77 (Blessed Sacrament), 79 (St. Peter's), 81 (St. Maria Goretti), 84 (St. Dennis). Respondents have, correctly, declined to dispute Petitioners' sincerity, *see id.* ¶¶ 5, 48, 62, 100; *see also, e.g.*, Resp'ts Resp. to Pet. for OA and Emergency Mot. for TI 13–18, *St. Ambrose Academy, Inc.*, No. 2020AP1446 (Sept. 2, 2020), and Respondents have conceded that both Petitioner Schools and Petitioner Parents have standing to assert their Freedom of Conscience Clauses claims here, SUF ¶ 103.

Parents sending their children to religious schools for in-person instruction furthers these free-exercise rights. As the St. Ambrose Petitioner Schools explain, for example, their "religious mission depends on in-person attendance to be fully realized," *id.* ¶ 86, including for their call "to go make disciples of all nations," *id.* ¶ 73. Only 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 frequent[ing] confessions before a Catholic priest." *E.g.*, *id.* ¶¶ 63, 71, 81. Such in-person education is essential to developing the "spirituality of communion," which is "the living breath of the educational community." *Id.* ¶ 86. Or, as this Court correctly recognized in its Temporary Injunction Order, the religious education that "[Petitioner] parents . . . chose for their children" is inherently "communal," and it includes "religious and spiritual formation," "in-person instruction," and the building up of "relationships with teachers and other students." JA20.

The School-Closure Order's prohibition on Petitioner Schools from opening for in-person education directly "burden[s]" their free exercise rights. *Coulee Catholic Schools*, 2009 WI 88, ¶ 61. This Order prohibits these schools from opening their doors to students and fulfilling their religious mission to develop these students "spiritually, intellectually, emotionally, and socially." SUF ¶ 71; *see id.* ¶¶ 6, 48, 100; *see* JA21 (recognizing that the School-Closure

Order eliminates Petitioner Schools' "opportunity to provide in-person instruction for classes"). Further, it 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. SUF ¶¶ 63, 71, 81. That the School-Closure Order also imposes significant financial penalties on schools that reopen makes that burden even plainer, as such punishment *always* qualifies as a burden on religious belief. *Miller*, 202 Wis. 2d at 60, 69; *Yoder*, 49 Wis. 2d at 437.

b. Because the School-Closure Order burdens Petitioners' free-exercise rights, as protected by the Wisconsin Constitution's Conscience Clauses, Respondents may only enforce this Order against Petitioners if the Order satisfies strict scrutiny, which it cannot do. Specifically, while Respondents have a compelling interest in slowing the spread of the COVID-19 virus, mandatory closure of all private schools is not tailored to further that interest for two reasons, *accord* JA21 ("The [School-Closure] Order itself is both broad and without apparent precedent.").

First, the County's order is not narrowly tailored (or even rationally tailored) for the independent reasons that it permits *many* other organizations and businesses to open their doors to in-person services, and Respondents have no possible justification for not tailoring its approach to treat

Petitioner Schools on at least the same terms as these other institutions and businesses.

Most obviously and fatal to Respondents' argument, Emergency Order #9 permits all universities and higher-education institutions to open, including their "congregate living situations" and "dormitories," with only the imposition of "strict policies that ensure safe living conditions," social distancing, and compliance with any mask/face-covering mandates. JA7. Respondents have no plausible argument that permitting these universities and colleges to open, while closing Petitioners' schools, is tailored in any way to prevent COVID-19's spread—let alone tailored sufficiently to satisfy strict scrutiny. Tellingly, at the temporary-injunction stage, Respondents' *only* argument to the contrary was that, in their view, the County lacked legal authority to close the University of Wisconsin-Madison. *See, e.g.*, Resp'ts *St. Ambrose Academy* TI Resp. at 14 n.16. Even if that were correct (and Respondents failed to cite any authority for support), it is legally irrelevant here because the Order allows *all* colleges and universities within the County to reopen for in-person instruction, not just the University of Wisconsin. *See* JA7.

Emergency Order #9 also allows "child care and youth settings" to open for in-person activities—which may serve children of any age—a category including "all licensed, recreational, and educational camps, licensed and certified childcare providers, unregulated youth programs, licensed-

exempt public school programs, and four-year old kindergarten." JA4. Those institutions and programs need only limit the classroom capacity to 15 children, prevent interaction between cohorts and different staff groups, and maintain social distancing. *Id.* Perhaps most telling as to Emergency Order #9's arbitrariness—to say nothing of its lack of *narrow* tailoring—is that it allows Petitioner Schools to use their facilities *as a childcare and youth setting*. This means that Petitioner Schools may welcome their students in-person (in groups of 15 per classroom), following requirements *less* protective than their current reopening plans, so long as they do *not* provide these students with religious, in-person education. *See* JA4.

Emergency Order #9 also allows myriad businesses to open for in-person services to customers and to undertake other face-to-face operations. Bars, salons, barber shops, gyms, fitness centers, water parks, pools, bowling alleys, and movie theaters may open their doors to the public. JA8–13. The County cannot make any plausible showing that permitting these face-to-face businesses, all the while shuttering Petitioners' schools, is tailored in any way—let alone narrowly tailored—to slowing the spread of COVID-19. Indeed, the distinctions that Respondents attempted to draw between these businesses and Petitioner Schools in its temporary-injunction briefing were so insubstantial as to fail even rational-basis review, to say nothing of strict scrutiny. *See, e.g.*, County's Resp. to Pet. for OA & Emergency Mot. for

TI Relief 14–16, *St. Ambrose Academy*, No. 2020AP1446 (Wis. Sept. 2, 2020).

Second, the School-Closure Order is not narrowly tailored, *Miller*, 202 Wis. 2d at 70, because Petitioner Schools all have extremely detailed reopening plans, *see supra* pp. 4–5, which allow for safe reopening according to the safety standards that the County itself found sufficient up until the week prior to Emergency Order #9. *See, e.g.*, SUF ¶ 136 (detailing elements of County's required reopening plan for schools). A narrowly tailored order would have, at minimum, focused only on schools that do not have such detailed reopening plans.

Petitioner Schools' reopening plans, as a *legal* matter, satisfy the safety standards that the County itself approved before it abruptly issued the School-Closure Order. Thus, this Court found "noteworthy" in its Temporary Injunction Order that "Petitioners went to great lengths—and expended non-negligible sums—to provide students, teachers, and staff the ability to resume in-person instruction with safety precautions in place." JA21 & n.4 ("months-long preparations"). Further, that no other county in this State has ordered the closure of private schools with county-approved reopening plans—including counties that have had far higher COVID-19 rates than Dane County—places beyond any reasonable dispute that the County has no plausible argument that its "broad" and seemingly unprecedented Order is narrowly tailored. JA21.

3. With all respect, the positions in Justice Dallet's dissent from the Court's Temporary Injunction Order, as well as the arguments presented by the Attorney General at the temporary-injunction stage, are incorrect.

Justice Dallet argued in her dissenting opinion that Petitioners did not have a likelihood of success on the merits of their Freedom of Conscience Clauses claim because "Emergency Order #9 *does not favor secular activities over religious ones*." JA25 (Dallet, J., dissenting) (emphasis added). Even were this so, Wisconsin's Freedom of Conscience Clauses prohibit the government from burdening the free exercise of religion even with "neutral and generally applicable [ ] laws," so the fact that Emergency Order #9 applies to both secular and religious activities is of no moment. *DeBruin*, 2012 WI 94, ¶ 26 n.8 (plurality op.) (citing *Coulee*, 2009 WI 88, ¶¶ 3, 39 n.13). While the *federal* Free Exercise Clause may not extend its protections to such neutral laws of general applicability, *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879–80 (1990), this Court has explicitly held that the Freedom of Conscience Clauses "provide[ ] much broader protections for religious liberty than the First Amendment," *Coulee Catholic Sch.*, 2009 WI 88, ¶ 66.

Justice Dallet's further observation that Emergency Order #9 "specifically exempts religious exercise from its restrictions on in-person gatherings" likewise does not defeat Petitioners' claims. JA25. That exemption applies to

"Religious Entities and Groups," which would not include Petitioner Schools, given the Order's far more specific School-Closure Provision. *Martineau v. State Conservation Comm'n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970). Further, no constitutional principle allows the County to burden Petitioner's free-exercise rights simply because the County is not also burdening some of the free-exercise rights of others.

The Attorney General, for his part, claimed at the temporary-injunction stage that the School-Closure Order "does not prohibit any religious instruction or worship—it merely changes the venue . . . at home rather than in the classroom." AG TI *Amicus* Br. at 7. This is a manifest misunderstanding of the nature of Petitioners' religious beliefs and practices. Petitioners meticulously explained that their religious beliefs compel them to seek religious education for their children, which includes in-person religious worship, reception of the Sacraments, and in-person communal prayer, for example. SUF ¶¶ 63, 71, 81, 86. Some of those essential practices, like the reception of the Sacraments, simply cannot take place "at home," since they *require* in-person interactions with priests or other ministers. *E.g.*, *id.* ¶ 63 ("receiv[ing] Holy Communion"; "confessions before a Catholic priest"). And for all other practices, the School-Closure Order forces Petitioners to "lose the full benefits" of them, JA20, thus burdening Petitioners' free-exercise rights regardless.

The Attorney General also argued that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), requires the Court to

review the School-Closure Order under an exceedingly deferential standard reserved for the government's exercise of the "police power"—not under *Coulee Catholic Schools*' strict-scrutiny standard. AG TI *Amicus* Br. 4–6. Yet, this Court has repeatedly made clear that "[t]here is no such thing as a police power which is above the Constitution, *or which justifies reasonable or any violation of express constitutional prohibitions* or manifest implied ones." *E.g.*, *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 107 N.W. 500, 502 (1906) (emphasis added); *State ex rel., Carter v. Harper*, 182 Wis. 148, 196 N.W. 451, 453 (1923) ("It goes without saying that the [County] may not, in the exercise of its police power, pass a law expressly prohibited by the Constitution."); *State v. Redmon*, 134 Wis. 89, 114 N.W. 137, 139–40 (1907). Here, the Conscience Clauses are "express constitutional prohibitions," *Chittenden*, 107 N.W. at 502; *Coulee Catholic Schools*, 2009 WI 88, ¶ 66 ("specific and expansive language[ ]"), stating that the free-exercise of religion "shall *never* be infringed" or "interfere[d] with," Wis. Const. art. I, § 18 (emphasis added). Since the School-Closure Order violates this specific guarantee under the *Coulee Catholic Schools*' standard, no police-power rationale could save this Order, citations of *Jacobson* notwithstanding.

B. Fundamental Right Of Parents To Direct The Upbringing And Education Of Their Children

1. Article 1, § 1 of the Wisconsin Constitution provides that "all people are born equally free and independent, and

have certain inherent rights; among these are life, liberty and the pursuit of happiness." One of the most fundamental and longest recognized "inherent rights" protected by Article 1, § 1 is the right of parents to "direct the upbringing and education of children under their control." *See, e.g.*, *A.A.L.*, 2019 WI 57, ¶ 15 (citation omitted); *Jackson*, 218 Wis. 2d at 879; *Barstad v. Frazier*, 118 Wis. 2d 549, 567, 348 N.W.2d 479 (1984); *Wisconsin Indus. Sch. for Girls v. Clark Cty.*, 103 Wis. 651, 79 N.W. 422 (1899).[10]

This right ensures that parents retain the "primary role in decisions regarding the *education* and upbringing of their children." *Jackson*, 218 Wis. 2d at 879 (emphasis added). Given the importance of parents' right to direct the education and upbringing of their children, any governmental action that "directly and substantially implicates" this right is "subject to strict scrutiny review." *A.A.L.*, 387 Wis. 2d 1, ¶ 22. The mere fact that "the decision of a parent . . . involves risks does not automatically transfer the power to make that

[10] While this Court in *A.A.L.* analyzed a parents' rights claim under the Fourteenth Amendment to the United States Constitution—which is not at issue in this case and Plaintiffs do not invoke, *see supra* p. 39 n.7—this Court has long recognized that parents' rights are also protected by the Wisconsin Constitution. *See Jackson,* 218 Wis. at 835 ("Wisconsin has traditionally accorded parents the primary role in decisions regarding the education and upbringing of their children."); *Barstad*, 118 Wis. 2d at 567. Indeed, Justices R. Bradley and Kelly noted in *A.A.L.* that, as an original matter, Article 1, Section 1 provides an even stronger basis for parents' rights than the Fourteenth Amendment. 2019 WI 57, ¶¶ 60–61 and n. 16.

decision from the parents to some agency or officer of the state." *Parham v. J. R.*, 442 U.S. 584, 603 (1979).

The U.S. Supreme Court has found a violation of parents' rights under the U.S. Constitution—which is arguably *less* protective of such rights than the Wisconsin Constitution at issue here, *see supra* p. 51 n.10—where the state interferes with a parent's decision about where to send their children to school, *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925), whether their children attend school past eighth grade, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and what language their children are taught in school, *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Meyer*, the Court held that parents' rights include the right to "engage [a teacher] so to instruct their children" as they see fit. 262 U.S. at 400. And in *Pierce*—a case involving a State's attempt to interfere with parents sending their children to private schools—the Court famously explained that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535.

2. Here, the School-Closure Order plainly "directly and substantially implicates," *A.A.L.*, 2019 WI 57, ¶ 22, Petitioner Parents' parental rights by prohibiting them from securing in-person education for their children: an education that Petitioner Parents have concluded is vastly superior to virtual learning, both in terms of educational and spiritual quality.

See SUF ¶ 86, 88. While local entities may have the authority to close their *own* schools, forcing their students to suffer from inadequate "Zoom learning," they substantially burden parent's rights when they take away *any* option for them to send their children to in-person schooling, including to private school at their own expense.

Every child has different educational needs, and for many children, virtual learning will not only be less effective, it will be totally inadequate to "prepare [them] for additional obligations." *Pierce*, 268 U.S. at 535; *see, e.g.*, SUF ¶ 60 (Petitioner Parent Truitt explaining that her child "has a mild learning disability that requires smaller classes and one-on-one, in person instruction for the child's academic success"); SUF ¶ 64 (Petitioner Parents "emphasiz[ing] the importance of in-person instruction" for their children). Parents are simply "in the best position" to know what their children need in terms of a "proper nurture, education, and training," *Jackson*, 218 Wis. 2d 835, ¶ 57, and therefore must be permitted to "engage [a school] so to instruct their children" as they see fit. *Meyer*, 262 U.S. at 400. In short, many parents rightly believe that in-person instruction is critical to whether their children succeed or fail educationally.

Respondents cannot justify the School-Closure Order's "direct[ ] and substantial[ ]" infringement by satisfying "strict scrutiny review." *A.A.L.*, 387 Wis. 2d 1, ¶ 22. As already explained above, the School-Closure Order is not narrowly tailored for two independently sufficient reasons: First, it

allows numerous other organizations and businesses to open for in-person services, including all universities and higher-education institutions, and even as to their crowded dormitories. *Supra* pp. 45–47. Second, the Order prohibits in-person education at Petitioner Schools, although these schools can reopen safely according to their detailed reopening plans. *Supra* pp. 4–5, 47–48. So, because of its lack of narrow tailoring, the School-Closure Order cannot satisfy strict scrutiny to justify its infringement on Petitioner Parents fundamental parental rights.

C. Section 252.03(3)'s "Reasonable And Necessary" Requirement And Wis. Admin. Code § DHS 145.06's "Least Restrictive" Mandate

Section 252.03(3)'s general grant of authority (which, again, cannot be relied upon here, *supra* Part I), also imposes the limitation that any order must be "reasonable and necessary." DHS regulations interpret the "reasonable and necessary" language to impose a "least restrictive means" test that Dane County's orders—including the School-Closure Order—must satisfy. *See* Wis. Stat. § 251.06(3)(a) ("A local health officer shall . . . [a]dminister the local health department in accordance with state statutes *and rules*" (emphasis added)); *Jackson Cty.*, 2006 WI 96, ¶ 16, ("A county is a creature of the legislature[.]"). Rule 145.06 of the DHS Administrative Code defines the "[a]uthority" of Dane County to "control communicable diseases." Wis. Admin. Code § DHS 145.06. Under this Rule, local health officials "may direct

persons who own or supervise real . . . property" that "present[s] a threat of transmission of any communicable disease . . . to do what is reasonable and necessary to abate the threat of transmission," *id.* § 145.06(6), quoting the language from Wis. Stat. § 252.03(3). Any "directive" under Rule 145.06(6) against owners of real property must, in turn, comply with Wis. Admin. Code § DHS 145.06(5), which governs the enforcement of such orders through judicial process. *Id.* § 145.06(6); *see id.* § DHS 145.06(5). Under Rule 145.06(5), the County may *only* obtain judicial relief if it "ensure[s]" that "the remedy proposed is the *least restrictive* on the [owner] which would serve to correct the situation and protect the public's health." *Id.* § DHS 145.06(5)(c). Even if this were not made explicit in DHS's regulation, a least-restrictive means test is the best way to operationalize Section 252.03(3)'s "reasonable and necessary" language.

Here, the School-Closure Order is not the "least restrictive" means on School Petitioners (who are owners of real property) for the County "to protect the public's health," for two independently sufficient reasons. Wis. Admin. Code § DHS 145.06(5)(c). As Petitioners explained more fully above with respect to their Freedom of Conscience Clauses claims, the School-Closure Order fails the least-restrictive means requirement because: (1) the Order allows many other entities and businesses to reopen, including universities, colleges, and the crowded dorms at those higher-education institutions, *supra* pp. 45–47; and (2) the Order applies to School

Petitioners even though each may reopen safely according to their comprehensive reopening plans, which plans the County itself concluded were, as a legal matter, sufficient for safe reopening as late as the week before it issued the School-Closure Order, *supra* pp. 4–5, 47–48. Because of the Order's failure to satisfy this "least restrictive" means regulatory requirement in Rule 145.06(5), Dane County would have no authority to enforce the School-Closure Order against Petitioner Schools.

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: October 12, 2020.

Respectfully submitted,

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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 13,057 words.

Dated: October 12, 2020.

ANTHONY LOCOCO

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: October 12, 2020.

ANTHONY LOCOCO