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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*.

Nos. 2020AP1419-OA, 2020AP1420-OA, 2020AP1446-OA

**NON-PARTY BRIEF IN SUPPORT OF RESPONDENTS BY *AMICI CURIAE*
GOVERNOR TONY EVERS AND SECRETARY-DESIGNEE OF
DEPARTMENT OF HEALTH SERVICES ANDREA PALM**

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STATEMENT AND INTEREST OF AMICI CURIAE

Wisconsin law charges *amici curiae* with executing and enforcing laws protecting the health and safety of Wisconsin citizens. The Governor of Wisconsin, Tony Evers, is the State's highest-ranking executive official. He is responsible for executing and enforcing the State's laws. Wis. Const. art. V, §§ 1, 4. Governor Evers appointed Andrea Palm as Secretary-Designee of the Department of Health Services (DHS), the state administrative agency charged with "general supervision throughout the state of the health of citizens." Wis. Stat. §§ 15.001(2)(a)-(d), 250.04.

Wisconsin law requires local public health officials and *amici* to protect the health and safety of Wisconsin citizens. *Id.* §§ 250.03, 252.02, 252.03, 250.04(1). *Amici* thus have an interest in the division of responsibilities between state and local government with respect to communicable diseases, especially while the COVID-19 pandemic is infecting and killing thousands of Wisconsinites. Wisconsin ranks #5 in the nation in the number

of new cases per capita. *Amici* write to provide this Court with additional statutory and historical context for the roles of state and local officials in public health emergencies. In addition, *amici* explain the practical reasons behind the laws' structure.

INTRODUCTION

Amici agree with Respondents that Janel Heinrich, Public Health Officer of Madison and Dane County, has authority to issue orders like Emergency Order #9, which prohibits “in-person student instruction” for most students in grades 3 through 12. JA 5-6.¹

Wisconsin statutes are clear that local health officials are the mandatory first line of defense against communicable diseases. They must “promptly take all measures necessary to prevent, suppress and control communicable diseases.” Wis. Stat. § 252.03(1); *see also id.* § 251.04(7) (“A local board of health shall assure that measures are taken to provide an environment in which individuals can be healthy.”). DHS, on the other hand,

¹ Students who “may need to receive in-person instruction” due to a “disability and/or an Individualized Education Program (IEP)” can do so. *Id.*

need not respond to communicable diseases *unless* local health officials fail to act, and the locality must reimburse the State. *Id.* §§ 252.03(3), 250.04(2)(b). The Legislature enumerated actions that DHS “may” take with respect to communicable diseases, including “clos[ing] schools and forbid[ding] public gatherings,” *id.* § 252.02(3), but these permissive powers do not intrude upon local health officers’ ability and mandatory responsibility to take necessary measures unless the local “regulations, orders or ordinances” are “conflicting or less stringent” than the State’s, *id.* § 252.02(4).

Petitioners’ position that local health officials cannot take action affecting schools (beyond inspection) is absurd. The Legislature did not intend for DHS to be responsible for issuing orders tailored to the circumstances at the over 2,000 schools within 421 school districts in Wisconsin.² And a single statewide order is not appropriate in every case. Recent outbreaks of communicable disease in the State have been sporadic or

² DPI, *Wisconsin Public Schools at a Glance* (2019-20), https://dpi.wi.gov/sites/default/files/imce/eis/pdf/schools_at_a_glance.pdf.

localized. And some experts recommend “targeted mitigation,” such as local orders, to control the spread of COVID-19.³

This Court must reject Petitioners’ attempt to turn the statutory structure of the state and local government response to communicable diseases on its head by vesting in DHS exclusive authority to take measures affecting schools.

ANALYSIS

I. DHS shares authority to issue orders affecting schools with local health officials.

Chapter 252 of the Wisconsin Statutes outlines the “Duties of Local Health Officers” and the “Powers and Duties of” DHS related to communicable diseases. As discussed at length in the parties’ briefs, Wis. Stat. § 252.03(1) orders local health officials to “promptly take all measures necessary to prevent, suppress and control communicable diseases.” Local health officials “may [also] do what is reasonable and necessary for the prevention and

³ Melissa Quinn & Emily Tillett, *Gottlieb warns of “dangerous tipping point” as virus spread accelerates*, CBS News (Oct. 25, 2020), <https://www.cbsnews.com/news/scott-gottlieb-coronavirus-dangerous-tipping-point-face-the-nation/>.

suppression of disease.” *Id.* § 252.03(2). Wis. Stat. § 252.02(3) states that DHS “*may* close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.” *Id.* (emphasis added).

Not only is Order #9 permissible under the plain text of Section 252.03, *see* Respondents’ Br. at 18-57, but the broader statutory structure and context, including the statutes about DHS’s duties and powers, also indicate that DHS and local health officials share authority to issue orders affecting schools within their jurisdictions. The Legislature expected that local health officials would issue such orders when necessary “to prevent, suppress and control communicable diseases” or “reasonable and necessary for the prevention and suppression of disease” within their territories. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. In addition, it would be unreasonable to vest exclusive authority to issue orders related to the communicable-disease circumstances at over 2,000 schools across the State in the Department. *See id.*

A. Local health officials are able to take measures affecting schools within their jurisdictions because they are the mandatory first line of defense against communicable disease.

Wisconsin statutes put local health officials on the frontlines of communicable-disease investigation and response. The statutes create a structure where local health officials exercise all powers related to communicable-disease investigation and response and DHS collects and monitors information, steps in to fill gaps (e.g., inspect vessels and conveyances that travel across localities), sets statewide or regional floors, and builds on local officials' actions.

Investigation. Local health officials have primary and mandatory responsibility for investigating communicable diseases in their jurisdictions and Wisconsin law protects them from interference with this process. “Every local health officer, upon the appearance of any communicable disease in his or her territory, *shall immediately investigate* all the circumstances and make a full report to the appropriate governing body and also to the department.” Wis. Stat. § 252.03(1) (emphasis added). “No

person may interfere with the investigation under this chapter of any place or its occupants by local health officers or their assistants.” *Id.* § 252.03(4).

Local health officials are the first to receive information about infected persons from health care providers. A “health care provider ... who knows or has reason to believe that a person treated or visited by him or her has a communicable disease, or having a communicable disease, has died, shall report the appearance of the communicable disease or the death” first “to the local health officer.” *Id.* § 252.05(1). The local health officer then reports the information to the Department. *Id.*

The Department, in contrast, is under no obligation to investigate the circumstances surrounding the appearance of communicable disease. The Department “*may* establish systems of disease surveillance and inspection to ascertain the presence of any communicable disease,” *id.* § 252.02(1), but can choose to rely on reports from local health officials and others, *see id.* § 250.04(3)(a). The Legislature specified that the Department may,

with “a special inspection warrant ... enter any ... vessel or conveyance,” which could move across local jurisdictions, “to inspect [it] and remove therefrom any person affected by a communicable disease.” *Id.* § 252.02(1).

Response. Local health officials must respond to communicable diseases, whereas the Department need only act if local officials “fail” to take necessary action (and the locality has to foot the bill). Wis. Stat. § 252.03(3). The State may of course choose to set a statewide or regional floor or build on local officials’ actions, *id.* § 252.02(3), (4) & (6), but these permissive powers do not detract from the mandatory responsibility local officials have to respond to communicable diseases.

Upon the appearance of “any communicable disease in his or her territory,” “[t]he local health officer *shall promptly take all measures necessary to prevent, suppress and control communicable diseases.*” *Id.* § 252.03(1) (emphasis added). The local health officer “shall report to the appropriate governing body,” e.g., the county board, “of the “progress of the

communicable diseases and the measures used against them.” *Id.* Local health officials “may [also] do what is reasonable and necessary for the prevention and suppression of disease” and “shall advise the department of measures taken.” *Id.* § 252.03(2).

The Department does not have to do anything to respond to communicable diseases unless “*the local authorities fail to enforce the communicable disease statutes and rules.*” *Id.* § 252.03(3) (emphasis added). Then “the department shall take charge, and expenses thus incurred shall be paid by the county or municipality.” *Id.* In that way, the locality remains ultimately responsible.

The Department *may* act on matters of statewide concern, to fill gaps, and/or to add on to what local officials are doing. In addition to removing infected people from vessels and conveyances that could travel across or outside of local jurisdictions, *id.* § 252.02(1), DHS may “close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.” *Id.* § 252.02(3). “The department may

authorize and implement all emergency measures necessary to control communicable diseases,” and, in an emergency, “may provide those sick with a communicable disease with medical aid and temporary hospital accommodation.” *Id.* § 252.02(2), (6). The Department “*may* promulgate and enforce rules or issue orders for guarding against the *introduction* of any communicable disease into the state, for the control and suppression of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease and for the sanitary care of jails, state prisons, mental health institutions, schools, and public buildings and connected premises.” *Id.* § 252.02(4) (emphasis added). When the Department chooses to act, its rules and orders “supersede conflicting or less stringent local regulations, orders or ordinances,” setting a floor. *Id.*

As a result, local health officials have the first opportunity to take the measures necessary to respond to communicable diseases, including issuing orders affecting schools, and DHS

retains the power to fill gaps, build on local officials' actions, and/or act on a statewide basis where appropriate.

B. It would make no sense to vest exclusive authority for actions affecting schools in the Department of Health Services.

This Court must interpret statutes to “avoid absurd or unreasonable results.” *Kalal*, 2004 WI 58, ¶ 46.

Here, in the context of communicable diseases, it would be absurd to vest exclusive authority to issue orders affecting the over 2,000 K-12 schools in Wisconsin across 421 school districts in one single department. Many communicable diseases were not and will not be widespread or uniform enough to justify a single solution across thousands of K-12 schools. Some recent outbreaks in Wisconsin were very localized, such as the July 2013 tuberculosis outbreak in Sheboygan County, which affected several schoolchildren.⁴ The CDC classified Wisconsin's outbreak

⁴ See, e.g., Richard Knox, *Tuberculosis Outbreak Shakes Wisconsin City*, NPR (July 18, 2013), <https://www.npr.org/sections/health-shots/2013/07/18/200871130/tuberculosis-outbreak-shakes-wisconsin-city>.

during the first wave of H1N1 in 2009 as “sporadic.”⁵ The virus “disproportionately affected Milwaukee residents”—“rates of hospitalization, ICU admission, and death were 7–15-fold greater than elsewhere in Wisconsin.”⁶ Also, “schools in the small town of Lodi, Wis., shut down for a week after a handful of kids got sick [on Thursday or Friday] and quickly spread [H1N1] to as much as one-quarter of the school population” by “Monday or Tuesday.”⁷ But some small towns reported no cases. In addition to the infection rate, other factors that vary from locality to locality include the availability of health care, the capacity of the health care system,⁸ classroom sizes to allow for physical distancing, and the prevalence of internet access to facilitate remote learning.

⁵ Lorna Benson, *Why does Wisconsin lead nation in H1N1 cases?*, MPRNews (June 5, 2009), <https://www.mprnews.org/story/2009/06/05/why-does-wisconsin-lead-nation-in-h1n1-cases>.

⁶ Shaun A. Truelove et al., *Comparison of Patients Hospitalized with Pandemic 2009 Influenza A (H1N1) Virus Infection During the First Two Pandemic Waves in Wisconsin*, 203 *J. of Infectious Diseases* 828, 828-29, 832 (2011), <https://academic.oup.com/jid/article-pdf/203/6/828/18064634/jiq117.pdf>.

⁷ *Supra* n.5.

⁸ Wis. Dep’t of Health Servs., Hospital Capabilities, <https://www.dhs.wisconsin.gov/covid-19/hosp-data.htm#capabilities>.

And it would be unreasonable to expect the Department of Health to Services to “promulgate and enforce rules” or “issue orders” tailored to the circumstances of the 421 school districts and 2,000+ individual schools across the State of Wisconsin. The Department of Health Services has only about 425 employees working on public health issues, including communicable diseases, and most of these employees are located in Madison. It is reasonable to leave this tailoring to the 85 local health departments distributed across Wisconsin’s 72 counties, whose employees must investigate the circumstances around the communicable disease and can easily travel to those schools or might already be familiar with their layouts.

Moreover, DHS cannot provide the “prompt[]” response to communicable disease that Wisconsin law expects. Under this Court’s precedent, the Department would have to utilize emergency rulemaking procedures to take certain actions in response to communicable diseases. *See Wis. Legislature v. Palm*, 2020 WI 42, ¶ 24, 391 Wis. 2d 497, 942 N.W.2d 900 (involving

order under Wis. Stat. § 252.02(4) from Secretary Palm “applicable to all people during the course of COVID-19”). The emergency rulemaking process takes a minimum of 20 days. *See* Wis. Stat. § 227.24; *see also* Brief of Wisconsin Public Health Association et al., *Wis. Legislature v. Palm*, No. 2020AP000765-OA (Wis.), Appendix B. In addition, it would take extra time for DHS employees to learn the relevant circumstances in these localities. As mentioned above, DHS relies on the reports of local health officials, among others, to surveil and track communicable disease in the State, and most public health FTEs are located in Madison, far away from many Wisconsin schools. Many communicable diseases could spread to hundreds of Wisconsinites in 20+ days. For example, one can catch COVID-19 after just fifteen minutes of exposure to an infected person,⁹ and many other viruses are even more contagious. It would be nonsensical

⁹ *See* CDC, Public Health Recommendations, <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>.

to hamstring our public officials in the fight against these diseases.

CONCLUSION

Preventing local health officials from taking any action related to schools in their jurisdictions (beyond inspecting them) would run counter to the statutory structure of shared power between them and DHS and the clear statutory mandate that local officials *must* “promptly take all measures necessary to prevent, suppress and control communicable diseases.” Such a holding would leave Wisconsin students, teachers, and those who come into contact with them without guaranteed protection from communicable disease. This Court should reject Petitioners’ unfounded attempt to constrain local officials, Wisconsin’s mandatory first line of defense against communicable disease.

Dated: November 16, 2020

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b)-(d) for a non-party brief produced with a proportional serif font. The length of this brief is 2,390 words.

Dated: November 16, 2020



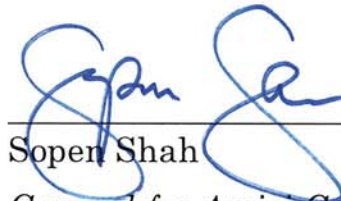
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CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: November 16, 2020



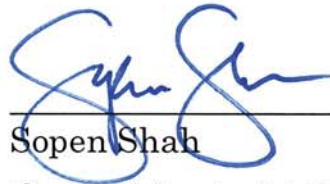
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CERTIFICATE OF SERVICE

I certify that on this 16th day of November, 2020, I caused a copy of this brief to be served upon all parties via U.S. mail and e-mail.

Dated: November 16, 2020



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