FILED
11-17-2020
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1419-OA, 2020AP1420-OA, and 2020AP1446-OA

SARA LINDSEY JAMES,

Petitioner,

v.

JANEL HEINRICH, in her capacity as Public Health Officer of Madison and Dane County,

Respondent,

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 capacity as Public Health Officer of Madison and DANE COUNTY 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.

AMICUS BRIEF OF
ATTORNEY GENERAL JOSH KAUL

JOSHUA L. KAUL
Attorney General of Wisconsin

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

COLIN A. HECTOR
Assistant Attorney General
State Bar #1120064

Attorneys for Wisconsin
Attorney General, Josh Kaul

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6219 (CTR)
(608) 266-8407 (CAH)
(608) 294-2907 (Fax)
rothct@doj.state.wi.us
hectorca@doj.state.wi.us

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. This Court should apply a deferential standard of review to this public health measure. 2

II. Even if a stricter level of scrutiny might apply to this public health measure, Petitioners offer insufficient reason to invalidate it. 8

CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

City of Washburn v. Ellquist,
242 Wis. 609, 9 N.W.2d 121 (1943) 3

Coulee Catholic Schools v. LIRC,
2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868..... 4, 8

Elim Romanian Pentecostal Church v. Pritzker,
962 F.3d 341 (7th Cir. 2020)..... 5, 6

Gard v. Wisconsin State Elections Board,
156 Wis. 2d 28, 456 N.W.2d 809 (1990) 10

Illinois Republican Party v. Pritzker,
973 F.3d 760 (7th Cir. 2020)..... 6

In re Abbott,
954 F.3d 772 (5th Cir. 2020)..... 6

In re Rutledge,
956 F.3d 1018 (8th Cir. 2020)..... 6

Page

Jacobson v. Commonwealth of Massachusetts,
197 U.S. 11 (1905) 4, 5, 6, 7

Jana-Rock Const., Inc. v. New York State Dep't of Econ. Dev.,
438 F.3d 195 (2d Cir. 2006) 10

Michels v. Lyons,
2019 WI 57, 387 Wis. 2d 1, 927 N.W.2d 486..... 2

Prince v. Massachusetts,
321 U.S. 158 (1944) 2, 7

South Bay United Pentecostal Church v. Newsom,
140 S. Ct. 1613 (2020) 5, 7, 9

State ex rel. Weiss v. District Board of School District No. 8 of City of Edgerton,
76 Wis. 177, 44 N.W. 967 (1890)..... 2

State v. Miller,
202 Wis. 2d 56, 549 N.W.2d 235 (1996) 6, 7, 9

State v. Neumann,
2013 WI 58, 348 Wis. 2d 455 2

State v. Peck,
143 Wis. 2d 624, 422 N.W.2d 160 (Ct. App. 1988)..... 3

Terminiello v. City of Chicago,
337 U.S. 1 (1949) 11

The Florida Star v. B.J.F.,
491 U.S. 524 (1989) 10

Williams-Yulee v. Florida Bar,
575 U.S. 433 (2015) 10, 11

Wisconsin v. Yoder,
406 U.S. 205 (1972) 3

INTRODUCTION

Our constitutional rights provide the bedrock of a free society, but Petitioners may not exercise them in a way that places the community at risk during a hundred-year pandemic. Petitioners ask this Court to let them do just that and override the reasonable judgment of local policymakers that temporarily restricting some in-person schooling—both secular and religious—will slow the spread of COVID-19.

This Court recognizes that public health regulations are not invalid just because they incidentally burden a constitutional right. Petitioners do not identify a single case where this Court has invalidated such a regulation despite evidence supporting its efficacy. Moreover, courts traditionally recognize their institutional limitations by deferring to policymakers entrusted with protecting public health. Only when a measure is patently arbitrary or unreasonable should the judiciary step in.

Restricting in-person instruction easily passes muster under either this deferential standard or a more exacting scrutiny. The measure is plainly consistent with the scientific consensus about how to slow the spread of COVID-19. Moreover, it reasonably balances public health against constitutional freedoms by allowing both in-person worship and remote religious schooling to continue.

Petitioners offer no scientific evidence that either controverts the efficacy of in-person instruction restrictions or shows that their proffered alternatives would be as effective. Instead, they argue that the order is constitutionally infirm because it did not bar other in-person activities. But our constitution allows policymakers to combat COVID-19 one step at a time, which is exactly what Dane County has done.

ARGUMENT

I. This Court should apply a deferential standard of review to this public health measure.

People may not exercise constitutional freedoms in a way that endangers public health and safety. Although the freedom of religion "is absolute as to beliefs," it is "not as to the conduct, which may be regulated for the protection of society." *State v. Neumann*, 2013 WI 58, ¶ 125, 348 Wis. 2d 455 (citation omitted). It therefore "does not include liberty to expose the community or the child to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). Likewise, parents' freedom to raise their children may be restricted "[w]here a child's physical … health or welfare is in jeopardy." *Michels v. Lyons*, 2019 WI 57, ¶ 24, 387 Wis. 2d 1, 927 N.W.2d 486; *see also Neumann*, 348 Wis. 2d 455, ¶ 113 ("The family itself is not beyond regulation in the public interest, as against a claim of religious liberty." (citation omitted)).

The Court first recognized this "do no harm" principle in *State ex rel. Weiss v. District Board of School District No. 8 of City of Edgerton*, 76 Wis. 177, 44 N.W. 967 (1890). It acknowledged that our constitution "bar[s] … the state … from the infringement, control, or interference with the individual rights of every person." *Id.* at 978 (Cassoday, J., concurring). But it noted a caveat:

> [T]he exercise of such rights … cannot be so extended as to interfere with the exercise of similar rights by other persons, nor so far as to prevent the legitimate exercise of the police powers of the state in preserving order .... Such statutes come within no constitutional prohibition ….

Id. at 978–79 (citation omitted).

This Court applied that caveat in *City of Washburn v. Ellquist*, 242 Wis. 609, 9 N.W.2d 121 (1943), upholding a regulation on door-to-door solicitations against a religious freedom challenge by Jehovah's Witnesses who relied on such solicitations to proselytize. Although "[t]he rights guaranteed under the constitutional amendments should be jealously protected … at the same time due consideration must be given to the duty and obligation of municipalities to give proper protection to their citizens." *Id.* at 614. Also key to the regulation's validity was that—like Dane County's measure—"no discriminatory power [was] placed in the hands of public officials, no fee or tax [was] demanded, no religious tests are involved, and it [did] not unreasonably obstruct or delay the activity of appellant." *Id.*

Another public safety regulation like Dane County's was upheld in *State v. Peck*, 143 Wis. 2d 624, 422 N.W.2d 160 (Ct. App. 1988). There, a priest who viewed marijuana-smoking as a sacrament was prosecuted; he responded that the criminal regulation violated his free exercise rights. Because the state had a "compelling interest" in "[p]reserving ... public health and safety," the court declined to "substitute [its] own judgment" for policymakers' "rational basis" that the regulation served this interest. *Id.* at 634–35. And *Peck* distinguished *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972), since the Amish there who obtained an exemption from compulsory education laws "did not pose any threat of harm to either the health of Amish children or 'to the public safety, peace, order, or welfare.'" *Peck*, 143 Wis. 2d at 632 (citation omitted). *Peck* also explained that "the power of a parent, even when linked to a free exercise claim, may be subject to limitation ... if it appears that parental decisions will ... have a potential for significant social burdens." *Id.* (citation omitted).

Even in *Coulee Catholic Schools v. LIRC*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868, which did not involve a public safety regulation, this Court reiterated that "[e]ach person's right to believe as he wishes and to practice that belief according to the dictates of his conscience *so long as he does not violate the personal rights of others*, is fundamental to our system." *Id.* ¶ 32 (citation omitted) (emphasis added).

When exercising constitutional freedoms would violate this "do no harm" principle—like here, where in-person schooling increases the risk of spreading COVID-19—a crucial question arises: Who has the primary duty to adjudge the necessity of restricting those freedoms to protect public health? Courts have long declined to assume that responsibility, recognizing that democratically accountable policymakers are entrusted with broad latitude to decide what behavior presents an undue risk of spreading disease.

This deference to policymakers began over a century ago, when the U.S. Supreme Court rejected a constitutional challenge to mandatory vaccinations in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). The court observed that "in every well-ordered society … the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Id.* at 29. That principle applies especially during pandemics: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease …." *Id.* at 27.

Jacobson declined to "usurp the functions of another branch of government" by second-guessing the self-defense measures adopted by policymakers. *Id.* at 28. The court recognized that it lacked "sound principles" to review the choice of vaccinations to "meet and suppress the evils of

a[n] … epidemic that imperiled an entire population." *Id.* at 30–31. Therefore, it was "no part of the function of a court ... to determine which one of two modes was likely to be the most effective for the protection of the public against disease." *Id.* at 30. In this deferential posture, the court simply confirmed mandatory vaccinations were not "arbitrary" or "unreasonable." *Id.* at 31–35.

So, while the COVID-19 pandemic is a new one, the framework for analyzing constitutional challenges to public health measures that combat disease is not. Courts have routinely applied *Jacobson* and refused to second-guess regulations that policymakers have adopted to fight this pandemic.

Most recently, the U.S. Supreme Court in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), declined to enjoin an executive order that restricted in-person religious services to fight COVID-19. Chief Justice Roberts, concurring, explained that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *Id.* (second alteration in original) (citing *Jacobson*, 197 U.S. at 38). When those officials act in areas "'fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *Id.* (citation omitted). And "[w]here those broad limits are not exceeded," the judiciary should not "second-guess[ ]" such measures due to its lack of "background, competence, and expertise to assess public health." *Id.* at 1613–1614.

Courts have followed Chief Justice Roberts' lead. For instance, *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), rejected a religious freedom challenge to an order restricting the size of in-person gatherings to combat COVID-19. The court declined to second-guess policymakers' decision to restrict some

in-person activity but not others, citing *Jacobson*: "[W]e do not evaluate orders issued in response to public-health emergencies by the standard that might be appropriate for years-long notice-and-comment rulemaking." *Id.* at 347.[1]

Petitioners respond that *Jacobson* represents a "deferential standard reserved for the government's exercise of the 'police power.'" (Pet. Br. 49–50.) Not so. *Jacobson* rejected a Fourteenth Amendment challenge to a vaccination requirement. Both *South Bay* and *Elim* rejected religious freedom challenges to COVID-19 restrictions. And many other cases have applied *Jacobson*'s deferential framework to constitutional challenges. *See supra* note 1. All addressed whether regulations violated enumerated constitutional rights; none applied the demanding standard of review that Petitioners proffer.

To be sure, invoking public safety does not automatically defeat constitutional challenges; an "arbitrary" or "unreasonable" regulation that has "no real or substantial relation to [its] objects" cannot survive scrutiny. *Jacobson*, 197 U.S. at 31.

This Court applied that basic test in *State v. Miller*, 202 Wis. 2d 56, 549 N.W.2d 235 (1996), invalidating a law requiring Amish carriages to display a red-and-orange

---

[1] *See also Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020) (rejecting First Amendment challenge to a COVID-19 order, explaining that "[t]he district court appropriately looked to *Jacobson* for guidance, and so do we"); *In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020) (describing *Jacobson* as providing the "framework governing emergency public health measures," noting that it "allows the state to restrict ... one's right to ... publicly worship"); *In re Rutledge*, 956 F.3d 1018, 1027 (8th Cir. 2020) (holding that *Jacobson* supplies the "framework for reviewing constitutional challenges to state actions taken in response to a public health crisis").

slow-moving vehicle sign that conflicted with their religious beliefs. Although the state cited public safety, it "was unable to put forth any concrete evidence that the [slow-moving vehicle] symbol actually serve[d] the interest of promoting public safety better than" a readily-available alternative that did not interfere with Amish religious beliefs. *Id.* at 72–73. So, *some* evidence must show that the challenged regulation protects public safety "better than" less restrictive alternatives. *Id.* at 72.

Two key principles thus emerge to guide this Court's review here. First, constitutional freedoms may not be exercised "regardless of the injury that may be done to others," *Jacobson*, 197 U.S. at 26, such as by "expos[ing] the community or the child to communicable disease." *Prince*, 321 U.S. at 166–67. Second, since the judiciary generally "lacks the background, competence, and expertise to assess public health," courts should not "second-guess[ ]" measures meant to combat a deadly pandemic that are subject to "reasonable disagreement." *South Bay*, 140 S. Ct. at 1613–14.

As Respondents ably explain, the emergency order easily clears this low bar. It is a scientific consensus that in-person schooling, whether secular or religious, poses a heightened risk of spreading COVID-19.[2] Equally important, Petitioners may still deliver remote religious instruction and their students may still attend in-person worship outside school—including the "core religious practices" of which Petitioners say they are being deprived. (Pet. Br. 43.) That is

---

[2] *See, e.g.*, Centers for Disease Control and Prevention, *Operating schools during COVID-19: CDC's Considerations*, available at https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html (describing virtual-only classes as "lowest risk").

an eminently reasonable effort by local officials to balance public health against religious freedom and parental rights, and it deserves this Court's deference.

II. Even if a stricter level of scrutiny might apply to this public health measure, Petitioners offer insufficient reason to invalidate it.

This public health measure would also survive a more demanding level of scrutiny. Leaving aside whether the measure burdens any constitutional rights, Petitioners concede that "Respondents have a compelling interest in slowing the spread of the COVID-19 virus"—they contend only that the order "is not tailored to further that interest." (Pet. Br. 44.)[3]

Petitioners, however, never offer a "less restrictive alternative," *Coulee*, 2009 WI 88, ¶ 61, that could prevent COVID-19 from spreading throughout our school communities as effectively as temporarily restricting in-person instruction. Instead, they assert that "Petitioner Schools all have extremely detailed reopening plans ... which allow for safe reopening." (Pet. Br. 47.) But they offer no evidence that these reopening plans would adequately protect the health of students, teachers, staff, and their surrounding communities. Petitioners' position amounts to "take our word for it."

Petitioners' word is not enough. Consider *Miller*, the only time this Court has invalidated a neutral public safety measure on religious freedom grounds. There, the state failed to show that its slow-moving-vehicle sign "serve[d] the interest of promoting public safety better than" the proffered

[3] Petitioners' tailoring arguments regarding their religious freedom and parental rights are identical, and so this section addresses them together. (Pet. Br. 53–54.)

alternative, which the challengers supported with expert testimony regarding the alternative's efficacy. 202 Wis. 2d at 72–73. Here, by contrast, Dane County has offered plenty of evidence to show that barring in-person instruction will better protect school communities from COVID-19 than allowing it. (Resp. Br. 12–17; SUF ¶¶ 107–18, 142–63, 167, 174–76, 182–93.) But Petitioners, unlike the challengers in *Miller*, offer no evidence that their "detailed reopening plans" would protect public health as well as barring in-person instruction.

And even if Petitioners had offered some such evidence, this Court would remain ill-equipped to balance it against Dane County's. Even for public health officials, evaluating whether ever-changing COVID-19 conditions support opening schools is an area "fraught with medical and scientific uncertainties." *South Bay*, 140 S. Ct. at 1613 (citation omitted). For a judiciary that "lacks the background, competence, and expertise to assess public health," *id.* at 1614, that task borders on the impossible—especially given the complete lack of scientific evidence from Petitioners.

Rather than offer this Court any scientific evidence, Petitioners rely on ways the public health order is purportedly underinclusive. (Pet. Br. 44–47.) In essence, they assert that Dane County has not gone far enough because it allows in-person activity to continue at other institutions and businesses. This argument fails for two main reasons.

First, even if restricting other in-person activities might also contain COVID-19, that is irrelevant to the issue here: Whether Dane County's compelling interest in protecting its school communities can be served by a *less* restrictive alternative (not a *more* restrictive one). That analysis compares an in-person instruction ban to Petitioners' proposed in-person safety measures. Whether a *more* restrictive measure that also bars *other* in-person interactions might also combat COVID-19 does not enter this equation.

That is because "[a] State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015). This Court recognized that principle in *Gard v. Wisconsin State Elections Board*, 156 Wis. 2d 28, 456 N.W.2d 809 (1990), finding that loopholes in a political fundraising contribution regulation "[did] not justify abandoning" the provision and "throwing away the baby with the bath water." *Id.* at 66. Here, too, Dane County may combat COVID-19 one step at a time, even if this one measure cannot by itself halt the spread of COVID-19.

Underinclusiveness may sometimes be relevant, at least where it "raises serious doubts" about whether the government "is, in fact, serving" with the challenged measure "the significant interests which [it] invokes in support of" it. *The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). Likewise, underinclusiveness may sometimes indicate the government is "motivated by a discriminatory purpose." *Jana-Rock Const., Inc. v. New York State Dep't of Econ. Dev.*, 438 F.3d 195, 212 (2d Cir. 2006).

But Petitioners do not seriously dispute that barring in-person instruction serves the compelling interest of combatting COVID-19. Nor is it irrational to bar some in-person instruction while allowing qualitatively different in-person activities to continue. (Resp. Br. 52–57.) And Petitioners do not suggest that Dane County's decision to bar *all* in-person instruction is somehow a cloaked effort to discriminate against religion. At bottom, Petitioners simply assume a "freestanding 'underinclusiveness limitation'" applies, without offering any authority or substantive reasons to support one. *Williams-Yulee*, 575 U.S. at 449 (citation omitted).

Second, Petitioners' underinclusiveness argument would thrust public health officials on the horns of an impossible dilemma. Since this pandemic started, policymakers' efforts to combat it have repeatedly been challenged as *too* restrictive. Now that Dane County officials have taken a *less* restrictive approach, they come under fire from the opposite direction.

"Damned-if-you-do, damned-if-you-don't" is no way to guide public health officials during a pandemic. As Justice Robert Jackson memorably put it, "[t]here is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). That is exactly why the principle that "[a] State need not address all aspects of a problem in one fell swoop" must apply with heightened force during deadly pandemics like this one. *Williams-Yulee*, 575 U.S. at 449.

As Wisconsin's experience shows, this pandemic cannot be stopped all at once. Policymakers must try different methods to slow its spread, balanced against the need to maintain an open and functioning society. Invalidating measures on the sole basis that *other* tools might also be used would be illogical and cripple Wisconsin's ability to defend itself against a deadly disease. Fortunately, our constitution does not require that self-destructive result.

CONCLUSION

This Court should reject Petitioners' constitutional challenge to Emergency Order 9.

Dated this 13th day of November 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Colin Roth

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

COLIN A. HECTOR
Assistant Attorney General
State Bar #1120064

Attorneys for Wisconsin
Attorney General, Josh Kaul

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6219 (CTR)
(608) 266-8407 (CAH)
(608) 294-2907 (Fax)
rothct@doj.state.wi.us
hectorca@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2999 words.

Dated this 13th day of November 2020.

Colin Roth

_____

COLIN T. ROTH
Assistant Attorney General

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 this 13th day of November 2020.

Colin Roth

_____

COLIN T. ROTH
Assistant Attorney General