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SUPREME COURT

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

In the Supreme Court of Wisconsin

WISCONSIN COUNCIL OF RELIGIOUS AND INDEPENDENT SCHOOLS, SCHOOL CHOICE WISCONSIN ACTION, ABUNDANT LIFE CHRISTIAN SCHOOL, HIGH POINT CHRISTIAN SCHOOL, LIGHTHOUSE CHRISTIAN SCHOOL, PEACE LUTHERAN SCHOOL, WESTSIDE CHRISTIAN SCHOOL, CRAIG BARRETT, SARAH BARRETT, ERIN HAROLDSON, KENT HAROLDSON, KIMBERLY HARRISON, SHERI HOLZMAN, ANDREW HOLZMAN, MYRIAH MEDINA, LAURA STEINHAUER, ALAN STEINHAUER, JENNIFER STEMPSKI, BRYANT STEMPSKI, CHRISTOPHER TRUITT and HOLLY TRUITT, *PETITIONERS*,

v.

JANEL HEINRICH, in her official capacity as Public Health Officer and Director of Public Health of Madison and Dane County, and PUBLIC HEALTH OF MADISON AND DANE COUNTY, *RESPONDENTS*.

ST. AMBROSE ACADEMY, INC., ANGELA HINELINE, JEFFERY HELLER, ELIZABETH IDZI, JAMES CARRANO, LAURA MCBAIN, SARAH GONNERING, ST. MARIA GORETTI CONGREGATION, NORA STATSICK, ST. PETER'S CONGREGATION, ANNE KRUCHTEN, BLESSED SACRAMENT CONGREGATION, AMY CHILDS, BLESSED TRINITY CONGREGATION, COLUMBIA/DANE COUNTY, WI INC., LORETTA HELLENBRAND, IMMACULATE HEART OF MARY CONGREGATION, LORIANNE AUBUT, ST. FRANCIS XAVIER'S CONGREGATION, MARY SCOTT, SAINT DENNIS CONGREGATION and RUTH WEIGEL-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

**REPLY BRIEF OF WISCONSIN COUNCIL OF
RELIGIOUS AND INDEPENDENT SCHOOLS, ET AL.**

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ARGUMENT

I. Local Health Officials Lack the Statutory Authority to Close Schools

As Petitioners explained in their opening brief, and as this Court has already recognized, the Legislature has given the power to “close schools” to “control outbreaks and epidemics” exclusively to the State Department of Health Services (DHS) and not to local health officials. Opening Br. 24–28; JA19. This conclusion follows directly from the text of two adjacent statutes addressing DHS’s and local health officials’ authority during epidemics, via the *expresio unius* canon: DHS’s powers explicitly include “clos[ing] schools,” whereas local officials’ do not, instead containing only the power to “inspect schools.” Wis. Stat. §§ 252.02, 252.03.

A. Respondents Have No Good Answer to the Clear Division of Authority as to Schools

Respondents have no counter to this straightforward application of the *expresio unius* canon. The only case they cite in response, *City of Milwaukee v. Washington*, 2007 WI 104, 304 Wis. 2d 98, 735 N.W.2d 111, is completely irrelevant to the issue here. Resp. Br. 21. In that case, this Court considered whether Wis. Stat. § 252.07(9)(a), which authorizes confinement of a tuberculosis patient “in a facility,” permitted confinement in a jail. The Court held that “the term ‘facility’ is broad enough to encompass many placement options, including jail.” *Id.* ¶ 34. But there was no question about who had the authority; the statute explicitly

empowers *both* state and local health officials. Wis. Stat. § 252.07(9)(a) (“The department *or a local health officer* may ...”). Nor was there any adjacent provision giving someone else authority to confine a patient to a jail.

Respondents’ only other response is that the *expresio unius* canon should not apply because DHS’s power to “close schools” is not part of a “list of things” and therefore, they conclude summarily, there is no indication “that the Legislature intended a related restriction on local health officers.” Resp. Br. 22–23. Respondents do not explain this logical leap, and it is hard to understand. In any event, Respondents have no answer to (and do not even discuss) this Court’s cases explaining that the canon not only does apply, but even has special force, where a statutory scheme distributing powers among various officials confers a specific power on one official but not another. Opening Br. 26–27 (citing *Groh v. Groh*, 110 Wis. 2d 117, 125, 327 N.W.2d 655 (1982) and *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974)).

Most of Respondents’ brief is devoted to arguing that, notwithstanding the clear division of authority with respect to schools, local health officials may nevertheless “close schools” to “control outbreaks and epidemics” under the more general grants of authority in section 252.03.¹ Resp. Br. 18–19, 24–26. Only a few points warrant a response.

¹ Respondents also argue, in a single sentence, that the School-Closure Order could fall within their authority to “forbid public

First, in response to Petitioners' point that the specific school-related provisions trump the more general grants of authority, Opening Br. 29, Respondents argue that sections 252.02 and 252.03 do not "cover the same topic," Resp. Br. 32, and therefore, they conclude, the specific-trumps-the-general canon should not apply. As before, Respondents' chain of reasoning is unclear, but it does not matter because the starting premise is false: both sections address powers during epidemics (one for DHS and one for local health officials), both contain broad, generic grants of authority, and both contain more specific provisions with respect to schools, assigning to DHS the power to "close schools" to "control outbreaks and epidemics" and to local officers the power only to "inspect schools."

Second, Respondents point to the difference between "shall" and "may" (along with various other minor differences between sections 252.02 and 252.03), Resp. Br. 25–26, but none of this goes to the *scope* of local health officers' authority. In other words, even if Respondents are correct that local officers are the "boots on the ground" with respect to some types of responses during a pandemic, with respect to *schools*, their only "on the ground" role is inspection, with closure reserved for DHS.

gatherings." Resp. Br. 33. But section 252.02(3) treats the powers to "close schools" and to "forbid public gatherings" as separate things, *in the same sentence*. Regardless, a classroom in a private school is not a "public gathering" under any reasonable interpretation of that phrase.

Finally, in response to this Court's remark that an overly broad reading of the general grant of authority in section 252.03 would "call into question its compatibility with our constitutional structure," JA 20; Opening Br. 30–32, Respondents devote a lengthy portion of their brief to making it seem like there are more limits on this authority than there are, Resp. Br. 38–43, 45–49. But all of this is a sideshow. This Court does not need to decide (and was not deciding) in this case the extent of the general grants of authority in Wis. Stat. § 252.03(1) and (2) or whether those sections violate the non-delegation doctrine. The important point is one of constitutional avoidance; that the general provisions in section 252.03 cannot be interpreted so broadly as to override the clear division of authority over schools.

That said, many of the "safeguards" Respondents point to are not really meaningful safeguards. The word "promptly," for example, Resp. Br. 39, imposes no limit at all on *what* local officials can do, but simply urges speed in whatever they do. The phrase "to prevent, suppress and control communicable diseases," Resp. Br. 39–40, while it fixes the ultimate goal of any action taken pursuant to this section, also does not provide a meaningful limit because *any* limitation on human behavior that reduces the contact people have with others will "prevent" some communicable disease, such as the flu or common cold. And the fact that local health officers must report to their local governing body and can be discharged, Resp. Br. 40–42, also does not resolve the problem; legislative

bodies sometimes delegate their authority precisely because they want to avoid accountability for difficult choices, and the non-delegation doctrine exists to prevent that. *See Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting); *id.* at 2131 (Alito, J. concurring); *Paul v. United States*, 140 S. Ct. 342 (2019) (Statement of Kavanaugh, J., respecting denial of writ of certiorari) (collecting cases).

The only substantive limit in section 252.03 is the phrase “reasonable and necessary,” as Respondents in the end appear to recognize, offering up a list of other statutes using similar phrases as a defense of that as a meaningful limit. Resp. Br. 45–48. But none of these examples have anywhere near the breadth and scope that Respondents claim section 252.03 has. To take just the first example Respondents cite, section 805.06(5) only applies when there has been a “use of” pesticides that risks causing death, a limited and isolated event. Here, in stark contrast, Respondents have invoked section 252.03 to limit or prohibit all sorts of normal and otherwise lawful activity for the past seven months and without any end in sight. That troubling assertion of power explains why a majority of the Michigan Supreme Court recently held that a similarly broad grant of authority, using the same language, violated the non-delegation doctrine. *In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div.*, __ N.W.2d __, No. 161492, 2020 WL 5877599, at *12–*23 (Mich. Oct. 2, 2020). In any event, to reiterate, this Court does not need to resolve this issue here

because, whatever the scope of section 252.03's general provisions, the specific school-related portions make clear that local health officers cannot close schools to control outbreaks and epidemics.

B. The Additional Statutes Respondents Cite Are Irrelevant

Perhaps recognizing that they lack any persuasive counter interpretation of section 252.03, Respondents lean heavily on their theory that various other statutes—none of which they based the challenged order upon—somehow establish that local health officers do have authority to “close schools” to “control outbreaks and epidemics,” even though that authority is textually given only to DHS. Resp. Br. 27–30, 33. As Petitioners already explained, none of these statutes are authority-conferring at all (as to *anyone*, much less local health officials); instead, they are merely definition sections and exceptions to certain regulatory requirements. Opening Br. 33–35. Respondents have no response to that, but they nevertheless continue to assert that “all of [these statutes] allow a local health officer to close schools,” an assertion disproved by reading them. Further, the statutes do not answer the question here, which is not whether local health officers *ever* have authority to close a school, but whether they have authority to “close schools” to “control outbreaks and epidemics,” where that power is given to DHS.

The most charitable interpretation of Respondents' argument is that, while these statutes do not directly confer

any authority, they should still inform the interpretation of section 252.03, *see* Resp. Br. 28, but even this argument fails because none of these statutes refer to a local health officer closing a school *pursuant to section 252.03*. Opening Br. 35–38. They obliquely mention “days on which school is closed by order of a local health officer,” *e.g.*, Wis. Stat. § 115.01(10), but do not give any further indication about what context or source of authority is being referenced. There are a whole host of other statutes and contexts in which local health officials might have authority to temporarily close a particular school, and Petitioners surveyed a few, Opening Br. 35–37, so the statutes Respondents cite do not permit any inference about local health officials’ authority *under section 252.03*.

Respondents apparently misunderstand the point, heavily emphasizing their view that Petitioners “concede ... [that] local health officers may close schools.” Resp. Br. 19, 33. To be clear, Petitioners have not and do not concede that local health officials can close schools *pursuant to section 252.03* to “to control outbreaks and epidemics.” *See* Resp. Br. 19, 33. Local officials *may* be able to close a particular school under statutes that Respondents did not and could not invoke here, due to some other health-related concern—but with respect to *controlling outbreaks and epidemics*, the division of authority over schools is quite clear.

Respondents then retort that these other statutes do not reference closing schools either, Resp. Br. 34–35, but they *do* refer to “all premises within the jurisdictional area,” Wis.

Stat. § 251.06(3)(f) (supervising sanitary conditions), and any “private premises,” Wis. Stat. § 254.59 (abatement of human health hazards), and school buildings are obviously “premises.” These statutes do not apply here—Respondents do not argue otherwise—because they require a local health officer to first “find a human health hazard,” Wis. Stat. § 254.59, or “[un]sanitary conditions” to resolve, Wis. Stat. § 251.06. Thus, when Petitioners explained that other statutes may allow a local health officer to *temporarily* close a *particular* school in response to an identified health hazard, they were not “assembl[ing]” a limitation “to avoid application in this case,” Resp. Br. 33, they were just explaining how these other statutes work.

These other statutes also reveal the flaw in Respondents’ absurdity argument. Resp. Br. 33–37. If a local health officer inspects a school during a pandemic (as she can do under Wis. Stat. § 252.03(1)), and “finds unsanitary conditions,” she does not have to “STOP’ and do nothing,” *see* Resp. Br. 31; she can respond to that particular hazard, in that particular school, as authorized under other provisions not at issue here. Indeed, that seems to be exactly what the Legislature had in mind, given that the power to inspect schools in section 252.03(1) uses the exact same language (“sanitary condition”) as in section 251.06(3)(f). What she cannot do is invoke the broad, generic language in 252.03 to preemptively close all schools “to control outbreaks and epidemics,” as that power has been given exclusively to DHS.

II. The Order Also Violates Constitutional Rights and is not “Reasonable and Necessary”

The *WCRIS* Petitioners join in full the arguments raised by the *St. Ambrose* Petitioners on the other issues.

CONCLUSION

This Court should hold that the School-Closure Order is unlawful and unconstitutional and enter an order permanently enjoining Respondents from enforcing it.

Dated: November 16, 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 2,050 words.

Dated: November 16, 2020.

A handwritten signature in black ink, appearing to read "Luke Berg", is written over a horizontal line.

LUKE N. BERG

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)**

I hereby certify that:

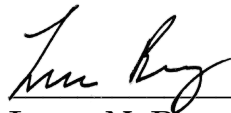
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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: November 16, 2020.

A handwritten signature in black ink, appearing to read "Luke Berg", is written over a horizontal line.

LUKE N. BERG