STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1419-OA

SARA LINDSEY JAMES,

Petitioner,

v.

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

Respondent.

# AMICUS BRIEF OF ATTORNEY GENERAL JOSH KAUL IN OPPOSITION TO PETITION FOR AN ORIGINAL ACTION

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Attorney General Kaul submits this amicus brief in support of respondent Dane County. Attorney General Kaul has a unique and important interest in cases involving matters of public concern and challenges involving the U.S. or state constitution, and has appeared before this Court in every matter this spring challenging the government's response to COVID-19. The Attorney General believes this short brief will be helpful to the Court in considering the petition given the Department of Justice's longstanding interests affected by this case and experience in similar proceedings.

## INTRODUCTION

For months, the nation has been in the grips of a lethal pandemic, which has fundamentally changed our day-to-day lives. Loved ones have died, businesses have suffered unprecedented losses, and communities have struggled to maintain ties in a world where close contact puts others at risk. But while this disease poses unique dangers to Wisconsinites, it is not the first public health emergency the state has faced. For over a century, Wisconsin has maintained a public health infrastructure that empowers local health officials to be a critical line of defense, barring public gatherings and swiftly taking any actions that are reasonable and necessary to suppress spreading diseases. That is precisely what Dane County did here, barring in-person school instruction in order to prevent outbreaks of COVID-19.

Petitioner invites this Court to enjoin Emergency Order 9 and hobble local officials in fighting deadly diseases, contrary to common sense and the plain meaning of Wis. Stat. § 252.03. The Court should decline this invitation for several reasons.

First, because the petition cannot be resolved without wading into a host of contested factual issues, this Court should decline to exercise its original jurisdiction. Second, petitioner has not shown a likelihood of success on the merits: Emergency Order 9 easily satisfies the deferential standard for constitutional challenges under *Jacobson v. Commonwealth of Massachusetts*; even if it did not, there is a compelling reason to stop in-person schooling since it presents a substantial risk of additional COVID-19 outbreaks; and the order falls squarely within the authority given to local officials under Wis. Stat. § 252.03. Finally, the *Palm* has no application here, as local officials are not subject to Wis. Stat. ch. 227 rulemaking procedures and nothing in that decision addresses a local order that closes in-person schooling.

## REASONS THE PETITION SHOULD BE DENIED

### I. This case will require substantial factual development regarding complex medical issues.

This Court is rightfully hesitant to assume original jurisdiction over cases that require complicated factual development. *See In re Exercise of Original Jurisdiction*, 201 Wis. 123, 128, 229 N.W. 643 (1930) ("This court will, with the greatest reluctance, grant leave for the exercise of its original jurisdiction . . . where questions of fact are involved."); *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 19, 334 Wis. 2d 70, 798 N.W.2d 436 (original actions appropriate if there are "no issues of material fact that prevent the court from addressing the legal issues presented"); *see also* Sup. Ct. Internal Operation Procedures (IOP) § III(B)(3).

At the core of this case lies a dispute over the medical efficacy of closing schools in Dane County to combat the spread of COVID-19. As discussed more below, religious freedom under the Wisconsin Constitution is not unlimited

and can be restricted reasonably in certain circumstances, requiring factual development.

Because reasonable leeway is given to governmental decision making during a pandemic, a court might *uphold* a decision to close schools based on little factual development. For the petitioner to prevail, however, she would need to demonstrate that the facts here justify overcoming that reasonable leeway. That endeavor would be inappropriate in an original action.

To prove that the restriction is unnecessary to the point of being unconstitutional, petitioner would need to show that in-person school instruction does not pose a serious threat of spreading COVID-19 to children and teachers, or to the larger community. That and more would need to be proven by petitioner before concluding that closing schools violates the Constitution under the circumstances. Indeed, as the United States Supreme Court recognized in a similar context, "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter . . . ." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (Mem.) (C.J. Roberts, concurring).

The trial court is precisely where contested factual issues like these should be resolved. There, the parties could develop the record on the complex medical issues that this case presents, an effort that will likely require expert testimony from both sides. Then, the factfinder can do its job and the case can proceed on the ordinary appellate track. That is how complicated factual cases typically proceed, not by judicial fiat, and this one should be no different.

This Court's decision to accept original jurisdiction over the *Palm* case does not counsel differently. Given the issues presented in *Palm*—whether the state-wide Safer-at-Home

order amounted to an unpromulgated rule and whether it exceeded the Department of Health Services' statutory authority—that case did not involve any disputes over the order's medical necessity. This case will be very different, precisely because the substantive constitutional challenge here requires an analysis of that necessity.

Because difficult factual issues cannot be dodged here, the Court should not exercise original jurisdiction over this case.

## II. The petitioner does not have a meaningful chance of success on the merits.

This Court also should decline to exercise original jurisdiction because the petitioner is not likely to succeed on the merits.

### A. In the midst of a deadly pandemic, the Wisconsin Constitution permits reasonable restrictions.

Courts have long given public officials deference in suppressing diseases during a public health crisis. Over a century ago, the United States Supreme Court observed that "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). In upholding mandatory smallpox vaccinations, the *Jacobson* Court emphasized the threat that unvaccinated individuals pose to others, and it recognized that during pandemics the balancing of individual liberties must shift. *Id.* at 26. "Real liberty for all could not exist," the Court observed, where people may exercise liberty over their person "regardless of the injury that may be done to others." *Id.*

Applying this principle, the Court asked whether the mandatory vaccination requirement was "arbitrary" or "unreasonable"—i.e., whether the requirement had "no real or substantial relation to [its] objects, or is, beyond all question, a plain, palpable invasion of rights secured by fundamental law." *Id.* at 31. Vaccinations easily passed the test, as they were a common method of eradicating diseases. *Id.* at 27–28. Critically, the Court refused to compare vaccination against other potential measures, noting that "[i]t is no part of the function of the 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.

*Jacobson*'s analysis applies with full force to measures designed to combat COVID-19. This virus, just like smallpox, presents a deadly epidemic that threatens the safety of the public, including schoolchildren and teachers who gather in confined classrooms. And because asymptomatic people can carry and spread the virus, public health experts recognize that restricting substantial gatherings of people in confined, indoor spaces is a critical tool to control the spread of the virus by preventing asymptomatic transmission.

For those reasons, as Chief Justice Roberts recognized in *United Pentecostal*, courts owe substantial deference to COVID-19 measures even when challenged on First Amendment Free Exercise grounds. There, the court declined to enjoin on First Amendment grounds a California state-wide order limiting church attendance. Chief Justice Roberts explained that the United States Constitution "principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States to 'guard and protect.'" *United Pentecostal*, 140 S. Ct. at 1613 (quoting *Jacobson*, 197 U.S. at 38). He stressed that when those officials act in areas "'fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *Id.*

(quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). And he cautioned that "[w]here those broad limits are not exceeded," they should not be second-guessed by the judiciary. *Id.* at 1613–1614.[1]

Applying this deferential framework to petitioner's free exercise claim, Emergency Order 9 easily passes constitutional muster. Schools across the country have discontinued in-person classes to slow the spread of COVID-19 and thereby prevent illness and death among our nation's schoolchildren and teachers.[2] It therefore cannot be said that the measure is "arbitrary" or "unreasonable" or that it has "no real or substantial relation" to curbing the spread of COVID-19. *Jacobson*, 197 U.S. at 31.

And even if the traditional free exercise analysis derived from *Coulee Catholic Schools v. LIRC*, 2009 WI 88, ¶ 61, 320 Wis. 2d 275, 768 N.W.2d 868, applied here, Emergency Order 9 would survive. Where government action burdens a sincerely held religious belief, *Coulee* requires a showing "that the law is based upon a compelling state

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[1] Courts around the county have applied *Jacobson* in resolving challenges to similar COVID-19 orders. *See PCG-SP Venture I LLC v. Newsom*, No. 20-1138 JGB (KKx), 2020 WL 4344631, at *4–5 (C.D. Cal. June 23, 2020) (observing courts across the county have applied *Jacobson* to COVID-19 emergency orders and collecting cases); *Ass'n of Jewish Camp Operators v. Cuomo*, __ F. Supp. 3d __, 2020 WL 3766496, at *8 (N.D.N.Y. July 6, 2020) (same).

[2] *See, e.g.*, *COVID-19 outbreaks close nine Tennessee schools as reopenings continue, state says,* News Channel 5 (Aug. 25, 2020, 8:40 PM) https://www.newschannel5.com/news/newschannel-5-investigates/covid-19-outbreaks-close-nine-tennessee-schools-as-reopenings-continue-state-says; *Tucson school, program close due to COVID-19 cases,* KOLD NEWS 13 (Aug. 25, 2020, 4:39 PM) https://www.kold.com/2020/08/25/tucson-school-program-close-due-positive-covid-cases/.

interest . . . that cannot be served by a less restrictive alternative." *Id.* But that analysis turns in part on the nature of restriction: "[T]he constitutional freedom of religion is absolute as to beliefs but 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, 832 N.W.2d 560; *see also Coulee*, 2009 WI 88, ¶ 65.

First, it is critical to note that this local measure does *not* prohibit any religious instruction or worship—it merely changes the venue. Students at religious private schools can still participate in the same religious curriculum they otherwise would, except at home rather than in the classroom. Petitioner offers no explanation for why receiving religious instruction in this manner burdens their ability to exercise their religious beliefs. In other words, petitioner does not establish a basis for applying *Coulee*, since she has not shown that Emergency Order 9 "rise[s] to the level of control or interference with the free exercise of religion." *Coulee*, 2009 WI 88, ¶ 61.

Even if she had, avoiding illness and death from the spread of a disease in schools is undoubtedly a compelling interest, and medical experts and policymakers across the country have decided it is sometimes best served in certain states and communities by prohibiting in-person instruction. Whatever burden on religious practice that online instruction (as opposed to in-person) imposes, it is far outweighed by the government's interest in combatting COVID-19.

### B. Statutory language permitting health officials to forbid "public gatherings" extends to private schools.

Petitioner also has little chance of succeeding on their claim that Emergency Order 9 exceeds local health officials' statutory authority. That is because Wis. Stat. § 252.03(1)–(2)

easily encompasses an order prohibiting in-person instruction. Subsection (1) provides that local health officers may "take all measures necessary to prevent, suppress and control communicable diseases." And subsection (2) empowers local health officers to "do what is reasonable and necessary for the prevention and suppression of disease" and to "forbid public gatherings when deemed necessary to control outbreaks or epidemics." Based on the available medical evidence—and especially the fact that asymptomatic people may transmit COVID-19—prohibiting in-person instruction is clearly a measure that falls within this broad statutory language.

Petitioner argues that the provision allowing health officials to ban "public gatherings" does not extend to private schools, but that completely ignores the statute's broader language that allows for "all measures necessary" to combat communicable diseases. Again, prohibiting in-person instruction at both public and private schools is a reasonable and necessary measure—under certain circumstances—to combat COVID-19.

In any event, the phrase "public gatherings" is broad enough to cover gatherings of people in private schools. Consider how the same phrase "public gatherings" is used in Wis. Stat. § 252.02(3), which provides that state health officials "may . . . forbid public gatherings in *schools, churches*, and other places to control outbreaks and epidemics." All churches obviously are private, yet the statute lists them as an example of a location where "public gatherings" may be restricted. And the statute lists "schools" as another place where "public gatherings" occur. So, since "public gatherings" occur at churches and schools, they surely occur at private religious schools, too.

Petitioner also suggests that the only power local health officials have over schools is to "inspect" them to "determine whether the buildings are kept in a sanitary condition," which is one of the enumerated duties in Wis. Stat. § 252.03(1). But that enumerated mandate cannot be read as an implied restriction on the broader power to take "all measures necessary" to combat communicable diseases. What if local officials inspected a school and found it was unsanitary? The statute itself answers the question. Assuming the unsanitary condition contributed to communicable disease spread, local officials could then take "all measures necessary" to address the problems they uncovered. It would be absurd to conclude the reverse—that the *only* places local officials could not take measures to combat communicable diseases are schools, simply because the statute expressly says they must inspect schools.

This is a classic belt-and-suspenders statute where powers in different parts of it naturally overlap. The Legislature simply chose to enumerate school inspections, one subset of the broader power to take "all measures necessary" to combat infectious diseases. Where no limiting language exists, this Court should not insert it at petitioner's request.

### C. *Palm* does not apply to this local order.

Last, Petitioner contends that this Court's decision in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, forbids local health officials from prohibiting in-person instruction, but they misread the decision. At bottom, *Palm* rested on a holding that the state-wide safer-at-home order was an invalid "general order" based on administrative rulemaking provisions in Wis. Stat. ch. 227 that apply only to state agencies, not local governments.

Wisconsin Stat. ch. 227 sometimes requires state agencies to engage in rulemaking. But that chapter applies only to state agencies, not local municipalities: it is triggered only when an "agency" acts, which is "a board, commission, committee, department or officer *in the state government*." Wis. Stat. § 227.01(1). In turn, those covered state agencies sometimes must engage in a rulemaking process before acting. In Wis. Stat. ch. 227, a "rule" is defined as a "regulation, standard, statement of policy, or general order of general application that has the force of law and that is *issued by an agency*." Wis. Stat. § 227.01(13). Again, it is critical to recognize that a "rule" exists only when "issued by an agency," *id.*—that is, a department "in the state government." Wis. Stat. § 227.01(1).

Consistent with the statutory text, the supreme court has confirmed that municipal entities do not fall under Wis. Stat. ch. 227. *See State ex rel. Wasilewski v. Bd. of Sch. Dirs. of Milwaukee*, 14 Wis. 2d 243, 264, 111 N.W.2d 198 (1961) (holding that a municipal board was not "part of the state government" for purposes of Wis. Stat. ch. 227).

Based on this Court's view in *Palm* of the safer-at-home order's state-wide effect, it concluded that DHS had issued "a general order of general application within the meaning of Wis. Stat. § 227.01(13)" and thus that "the rulemaking procedures of Wis. Stat. § 227.24 . . . were required to be followed." *Palm*, 391 Wis. 2d 497, ¶ 42. Because DHS had not followed those procedures, the order was largely invalid. *Id.* ¶ 58.

But because Wis. Stat. ch. 227's rulemaking procedures do not apply when local governments act, Dane County's order is not subject to invalidation as a "general order of general application." Dane County is not an "agency" under Wis. Stat. § 227.01(13), and therefore it need not engage in Wis. Stat. ch.

227 rulemaking. The supreme court's rulemaking holding in *Palm* thus does not apply to this local action.

Moreover, *Palm*'s alternative holding that the statewide safer-at-home order exceeded the Department of Health Services' statutory authority does not apply here either. The Court concluded that, under Wis. Stat. § 252.02, "confining all people to their homes, forbidding travel and closing businesses" was not authorized. *Palm*, 391 Wis. 2d 497, ¶ 59. That ruling did not address local powers under Wis. Stat. § 252.03. Further, even if it had, the measure at issue here—prohibiting in-person instruction—is a completely different kind of restriction (and a much more modest one). It falls well within the statutory language, and nothing in *Palm* says otherwise.

## CONCLUSION

The petition for an original action should be denied.

Dated this 28th day of August 2020.

Respectfully submitted,

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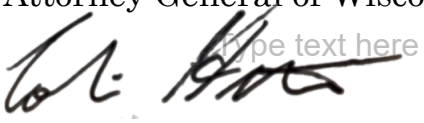


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## CERTIFICATION

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 2905 words.

Dated this 28th day of August 2020.

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## 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 28th day of August 2020.

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