

STATE OF WISCONSIN  
IN SUPREME COURT

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Case No. 2020AP1420-OA

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WISCONSIN COUNCIL OF RELIGIONS 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 TRUIT,

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.

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**MOTION FOR LEAVE TO FILE 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.

Petitioners invite 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, petitioners have 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

### **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. And petitioners expressly

contest whether this measure is “necessary” as a matter of statutory interpretation. (*See* Pet. Mem. at 18–21.)

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 petitioners to prevail, however, they 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, petitioners 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 petitioners 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, and this one should be no different.

This Court’s decision to accept original jurisdiction over *Wisconsin Legislature v. Palm*, 2020 WI42, 391 Wis. 2d

497, 942 N.W.2d 900 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 petitioners do not have a meaningful chance of success on the merits.**

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

**A. In the midst of a deadly pandemic, the Wisconsin Constitution permits reasonable restrictions like these.**

Courts have long given public officials deference when acting to suppress 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 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 constitutional 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.<sup>1</sup>

Applying this deferential framework to petitioners’ free exercise claim and educational freedom claims, 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.<sup>2</sup> 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.

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<sup>1</sup> 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).

<sup>2</sup> *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/news-channel-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/>.

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 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. Petitioners offer no explanation for why receiving religious instruction in this manner burdens their ability to exercise their religious beliefs. In other words, petitioners do not establish a basis for applying *Coulee*, since they have 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 they had, avoiding illness and death from the spread of disease in schools is undoubtedly a compelling interest, and medical experts and policymakers across the country have decided it is best served in certain states and communities by prohibiting in-person schooling. Whatever burden on religious practice online instruction imposes, it is far outweighed by the government’s interest in combatting COVID-19.

And while petitioners argue that the measure fails because it is both under-inclusive and over-inclusive (Pet. Mem. 19–20), these arguments simply second-guess the difficult line-drawing decisions that public health officials must make when combating this novel pandemic.

For instance, they say the order is over-inclusive because other places like stores and offices remain open for public gatherings, which purportedly shows that in-person school closings are not necessary. But health officials could reasonably decide that primary and secondary schools present a heightened risk due to the close proximity of students and teachers in enclosed classrooms for long periods. And the petitioners say the order is under-inclusive because buildings remain open for other purposes, like food distribution and the provision of health care services. Again, the prolonged contact that necessarily occurs during in-person classes presents different risks than these other uses of school buildings. And as for allowing kindergarteners, first graders, and second graders to attend in-person class, officials could reasonably decide that the need to personally instruct our youngest children outweighs the risks involved. Constitutional litigation is ill-equipped to second-guess these line-drawing decisions in the midst of a deadly pandemic.

The same basic analysis applies to petitioners' educational freedom claim. Again, the local officials here have not interfered with parents' rights to direct their children's education in any meaningful way. Children in Dane County will still attend school, just through virtual classes. Petitioners offer no authority where Wisconsin courts have recognized a potential constitutional right to in-person classes. And even if such a right existed, the measures here satisfy constitutional scrutiny for the same reasons explained above.

**B. The Department of Health Services and local officials have concurrent statutory authority to close schools.**

Petitioners alternatively assert that the Department of Health Services is the only government entity empowered to close schools, not also local health officials. They contrast Wis. Stat. § 252.02(3), which specifically empowers the Department of Health Services to “close schools,” with Wis. Stat. § 252.03, which does not expressly mention a power to close schools. From this contrast, petitioners conclude that the latter statute does not authorize school closures.

That argument, again, ignores how the broad language in Wis. Stat. § 252.03 authorizing “all measures necessary”—a natural reading of which allows restrictions on in-person schooling—contains no exceptions of the sort petitioners desire. *Cf. Moya v. Aurora Healthcare, Inc.*, 2017 WI 45, ¶ 21, 375 Wis. 2d 38, 894 N.W. 2d 405 (finding “stand-alone category” contained “no limitations beyond those expressly written). They offer no principle of statutory interpretation that supports reading an implicit limitation into that broad language simply because another statute expressly mentions one measure that might fall within it.

Indeed, petitioners’ argument proves too much. Wisconsin Stat. § 252.02 expressly mentions a few other powers that Wis. Stat. § 252.03 does not—for instance, the power to “provide those sick with a communicable disease with medical aid and temporary hospital accommodation.” Wis. Stat. § 252.02(2). Does that mean local officials cannot take such action if the Department of Health Services does not? Or consider the power under Wis. Stat. § 252.02(1) to “establish systems of disease surveillance and inspection.” It would make little sense to conclude that by expressly granting that power to the Department of Health Services, the Legislature somehow implicitly withdrew that power

from local health officials. Yet petitioners' line of reasoning would lead to that absurd conclusion.

Such an analysis would be particularly unwise when interpreting statutes meant to combat infectious diseases. Again, belt-and-suspenders statutes are entirely expected and reasonable to ensure that public health officials have all the powers they need to control novel pandemics like this one. Simply put, the Legislature drafted broad statutes because it wanted health officials to have broad powers during public health emergencies. Adopting petitioners' parsimonious reading of these statutes turns that obvious purpose on its head.

Equally flawed is petitioners' position that local officials' authority under Wis. Stat. § 252.03(2) to forbid "public gatherings" does not authorize them to forbid in-person education. In petitioners' view, "[c]hildren attending school does not constitute a public gathering." This strains the English language beyond the breaking point. Any common understanding of a "public gathering" includes children gathering in a classroom. Indeed, the Legislature indicated as much when, in Wis. Stat. § 252.02(3), it listed "schools" as a place where the Department of Health Services may forbid "public gatherings." Petitioners seem to think this enumeration somehow extends only so far as barring school plays and voting but not also barring in-person instruction. But they offer no principle of ordinary English that supports such a distinction. Instead, they rely on the same position that listing the specific power to "close schools" somehow implicitly limits the meaning of forbidding "public gatherings"—but that again ignores the belt-and-suspenders nature of these public health statutes.

When petitioners finally acknowledge the broad language in Wis. Stat. § 252.03(2) allowing local officials to "do what is reasonable and necessary for the prevention and

suppression of disease,” they try to narrow that broad language by vaguely referencing the constitutional provision that the “legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable . . . .” Wis. Const. Art. X, § 3. Yet they concede that this provision “does not mandate absolute equality” and that “local conditions” may justify difference among school districts. That is exactly why allowing local officials to forbid in-person instruction in their districts fits comfortably within the constitutional and statutory scheme. This kind of local control is entirely appropriate when confronting a pandemic like this one.

### CONCLUSION

The petition for an original action should be denied.

Dated this 28th day of August 2020.

Respectfully submitted,

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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 2825 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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