**IN THE SUPREME COURT OF WISCONSIN**

No. _____

SCHOOL CHOICE WISCONSIN ACTION, WISCONSIN COUNCIL OF RELIGIOUS & INDEPENDENT SCHOOLS, EVERGREEN ACADEMY, RACINE CHRISTIAN SCHOOL, RACINE LUTHERAN HIGH SCHOOL, ST. JOHN'S LUTHERAN CHURCH & SCHOOL, TRINITY LUTHERAN SCHOOL, ETHAN BICKLE, ANDREA THUNHORST, RYAN THUNHORST, AND ELAINE WILSON,

*Petitioners*,

v.

DOTTIE-KAY BOWERSOX, IN HER OFFICIAL CAPACITY AS PUBLIC HEALTH OFFICER AND PUBLIC HEALTH ADMINISTRATOR OF THE CITY OF RACINE PUBLIC HEALTH DEPARTMENT

AND

CITY OF RACINE PUBLIC HEALTH DEPARTMENT,

*Respondents*.

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# MEMORANDUM IN SUPPORT OF EMERGENCY PETITION FOR AN ORIGINAL ACTION AND EMERGENCY MOTION FOR A TEMPORARY INJUNCTION

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## ISSUES PRESENTED

1. Whether Wis. Stat. § 252.03 empowers a local health officer to issue an order closing schools for in-person instruction?

2. Whether the City of Racine Public Health Department's order closing all public and private schools buildings to in-person student instruction is "reasonable and necessary for the prevention and suppression" of COVID-19 and/or "necessary to prevent, suppress and control" COVID-19?

3. Whether the City of Racine Public Health Department's school closure order unconstitutionally infringes upon the state constitutional rights of parents to direct the education and upbringing of their children? *See* Wis. Const. art. I, § 1.

4. Whether the City of Racine Public Health Department's school closure order unconstitutionally infringes upon the state constitutional rights of parents and schools to the free exercise of religion? *See* Wis. Const. art. I, § 18.

## INTRODUCTION

With the stroke of a pen, Respondents (collectively "Respondents" or "RPHD") have upended the lives of children, parents, schoolteachers, and staff throughout the City of Racine. The order issued by RPHD, referred to here as the "School Closure Order," violates state statutes and is unconstitutional.

As discussed in the attached Petition, this Court should grant this Petition, immediately enjoin Respondents from enforcing the School Closure Order, and then hold this case in abeyance pending a decision in *James v. Heinrich*, No. 2020AP1419 (Wis. 2020), *WCRIS v. Heinrich*, No. 2020AP1420 (Wis. 2020), and *St. Ambrose Academy, Inc.*, No. 2020AP1446 (Wis. 2020) [hereinafter *James*].

Petitioners, as parents, schools, and associations representing schools, are greatly harmed by this unlawful order. Failure of this Court to act will cause detrimental harm to families and schools throughout Racine. And this Court has already indicated in *James* that an injunction is appropriate; the facts of this case do not differ in any material respect from *James*.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because this case is of substantial and continuing public interest and may result in the enunciation of new rules of law, this case is appropriate for oral argument and publication.

## STATEMENT OF THE CASE

### I. Statutory Background

Respondents derive their power from state statute and state regulations, and possess only those powers granted by statute. See *Milwaukee Police Ass'n v. City of Milwaukee*, 2018 WI 86, ¶19, 383 Wis. 2d 247, 914 N.W.2d 597. In this case, it is important to note that the Respondents are local health officers and that their powers are different from and less than those available to the State Department of Health Services ("DHS"). The statutory powers of DHS and the Respondents are as follows.

#### A. State Department of Health Services

DHS is the state agency in charge of overseeing all health policy in the state, and is required by statute to "[s]erve as the state lead agency for public health." Wis. Stat. § 250.03(1)(b).

DHS is also granted certain powers to control outbreaks and epidemics. Relevant here, DHS "may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." Wis. Stat. § 252.02(3). This is not to say that these powers are unlimited. As this Court recently held, certain of its orders may only be promulgated by rule and are limited to those actions typically undertaken to limit the spread of infectious disease. *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900. And, of course, all actions of governmental bodies are subject to a variety of constitutional limitations.

But the question of limits on authority is subsequent to a determination of whether the power exists in the first instance. DHS is explicitly given the authority under state law to close schools and to forbid public gatherings in schools. As we shall see, local health officials are not.

**B. Local Health Officers**

Like DHS, local health officers are also granted certain statutory powers to control outbreaks and epidemics. But those powers are different from and less than those of DHS. For example, under Wis. Stat. § 252.03(1):

> (1) 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. The local health officer shall promptly take all measures necessary to prevent, suppress and control communicable diseases, and shall report to the appropriate governing body the progress of the communicable diseases and the measures used against them, as needed to keep the appropriate governing body fully informed, or at such intervals as the secretary may direct. The local health officer may inspect schools and other public buildings within his or her jurisdiction as needed to determine whether the buildings are kept in a sanitary condition.

It is noteworthy that under sub. (1), local health officers have the power to inspect schools but not the power to close them. Given that the legislature explicitly granted the authority to close schools to the DHS under appropriate circumstances, the failure to grant a similar authority to local health officers under a parallel provision of the statutes implies that these local officials lack that

power. *See, e.g.*, *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶27, 301 Wis. 2d 321, 733 N.W.2d 287 ("Under the doctrine of *expressio unius est exclusio alterius*, 'the express mention of one matter excludes other similar matters [that are] not mentioned.'" (quoting *Perra v. Menomonee Mut. Ins. Co.*, 2000 WI App 215, ¶12, 239 Wis.2d 26, 619 N.W.2d 123); *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974) ("The chapter reflects the legislature's desire to specifically define the authority of appropriate officers. Where there is evidence of such enumeration, it is in accordance with accepted principles of statutory construction to apply the maxim, expressio unius est exclusio alterius; in short, if the legislature did not specifically confer a power, it is evidence of legislative intent not to permit the exercise of the power.").

Under Wis. Stat. § 252.03(2), local health officers have additional powers. Specifically,

> (2) Local health officers may do what is reasonable and necessary for the prevention and suppression of disease; may forbid public gatherings when deemed necessary to control

> outbreaks or epidemics and shall advise the department of measures taken.

Again, the contrast between §§ 252.02(3) and 252.03(2) is instructive. The former says that DHS may close schools and "public gatherings" in schools, suggesting that the normal operation of schools is not "a public gathering." Local health officials may only limit "public gatherings" and are not authorized to close schools. As will be shown in more detail below, children attending in-person education in schools are not attending a public gathering.

## II. Factual Background

### A. Statewide Health Orders

In February of this year the COVID-19 pandemic hit our country. On March 12, Wisconsin Governor Tony Evers issued Executive Order #72 declaring a statewide public health emergency due to COVID-19. Governor Evers and DHS then issued a number of emergency orders designed to contain the spread of COVID-19.

On May 11, the state of emergency declared by Governor Evers expired. All gubernatorial emergencies, including public health emergencies are limited to sixty days unless extended for a single additional sixty-day period by a joint legislature of the legislature. Wis. Stat. § 323.10. But COVID-19 has continued to spread throughout Wisconsin.

**B. City of Racine Health Order**

Health officers in several communities, including the City of Racine, have issued local emergency orders, requiring the wearing of face coverings, limiting the capacity of businesses, and more.

Relevant here, on August 21, more than six months after the COVID-19 crisis began in Wisconsin, the local health officer with jurisdiction in Madison and Dane County issued an emergency order which relied on Wis. Stat. § 252.03 and, among other things, forbade the opening of schools for in-person instruction in grades 3 through 12. On September 10, 2020, this Court enjoined that order and assumed jurisdiction of three actions challenging it.

Those cases are still pending; oral argument is scheduled for Tuesday, December 8, 2020.[1]

On November 12, 2020, Respondent Bowersox issued an order relying on Wis. Stat. § 252.03 and providing as follows:

> Public and private K-12 school buildings within the boundaries of the City of Racine and the Villages of Elmwood Park and Wind Point shall be closed from November 27, 2020, through January 15, 2021, inclusive. This closure applies to all students, faculty, staff, and administrative personnel. Schools may continue to facilitate distance learning or virtual learning. Schools may continue to be used for Essential Government Functions, emergency services, building maintenance, and food distribution.

Petitioners are a group of parents whose children cannot attend school as planned, schools who cannot educate those children in person, and associations of schools whose members' educational programs are being impaired by the order.

Petitioner schools were open and were offering in-person instruction at the time Respondent Bowersox issued the School

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[1] *See* https://www.wicourts.gov/sc/orasch/DisplayDocument.pdf?content=pdf&seqNo=298882.

Closure Order, and Petitioner parents were sending their children to obtain in-person instruction at that time.

Petitioners bring this action to challenge the legality of the School Closure Order, which prohibits in-person instruction in the City of Racine.

## STANDARD OF REVIEW

Because the parties seek to file this case as an original action, the Court is not sitting in review of any lower court decision. The Court is asked to interpret provisions of the state constitution and the Wisconsin statutes. These are questions of law. *See, e.g.*, *State v. Hamdan*, 2003 WI 113, ¶19, 264 Wis. 2d 433, 665 N.W.2d 785.

## ARGUMENT

### I. THIS COURT SHOULD GRANT THIS PETITION FOR AN ORIGINAL ACTION

Assumption of jurisdiction is warranted in this case. For the sake of simplicity and due to the exigency of the matter, the Petitioners will not restate the discussion, appearing in the accompanying Petition, of the reasons why this case is appropriate

for this Court's original action jurisdiction. In brief, this case is of exceeding public importance involving as it does questions regarding the rights of parents to educate their own children, the rights of schools to provide that education, and the authority of local health officials to infringe upon these rights; prompt and definitive resolution by this Court of those questions is needed to ensure stability for the children already in the middle of a school year; and no fact-finding by this Court is necessary.

Moreover, recognizing the statewide importance of ensuring that sweeping government actions to combat COVID-19 do not go unchecked but instead receive rapid, thorough, and definitive review by the Wisconsin judiciary, this Court recently exercised its original jurisdiction in analogous circumstances. *See Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900. Indeed, and more specifically, by granting the *James* consolidated actions, this Court has already indicated that it believes that the very issues raised in this case warrant the Court's exercise of its original action jurisdiction.

Here, the School Closure Order is an affront to this Court's authority. Like Dane County's Order #9, Racine's school closure order relies on Wis. Stat. § 252.03 despite this Court's recent admonition that that statute does not appear to provide authority for an action so "broad and without apparent precedent." *James*, Order at 5 (Wis. Sept. 10, 2020). And the School Closure Order seeks to prevent activity—the in person education of children—that this Court indicated should proceed while it examines the meaning of § 252.03, given the equitable consideration that "[o]verriding the choices of parents and schools, who . . . undoubtedly care about the health and safety of their teachers and families, intrudes upon the freedoms ordinarily retained by the people under our constitutional design." *Id.*

Racine's School Closure Order interferes with this Court's exercise of original action jurisdiction. Were the Petitioners to seek relief in Racine County Circuit Court, it is unclear how the parties would be expected to proceed given the possibility of conflicting actions between that court and this one. As this Court

has written, "Since it was the clear mandate of the constitution that the supreme court be the supreme judicial tribunal of the state, it follows that when original jurisdiction is taken it excludes the jurisdiction of every inferior tribunal to deal with the same subject matter and thus to dissipate or weaken the original jurisdiction." *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 49 (1938).

In order to protect the exercise of its original action jurisdiction in *James*, this Court should likewise exercise original action jurisdiction here to ensure a uniform treatment in this state of closure orders based on § 252.03.

## II. THIS COURT SHOULD IMMEDIATELY ENJOIN THE SCHOOL CLOSURE ORDER

The standards for the issuance of a temporary injunction are well-known. A temporary injunction may be issued when (1) the movant has shown a reasonable probability of ultimate success on the merits, (2) the movant lacks an adequate remedy at law; (3) the movant can show irreparable harm; and (4) a balancing of the equities favors issuing the injunction. *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979);

*Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). Wisconsin courts have sometimes also said that the purpose of the proposed injunction must be to maintain the status quo and treat that consideration as an additional factor.[2] *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. The Petitioners can meet this burden and the Court should grant the motion for a temporary injunction.

### A. This Court Need Not Analyze the Temporary Injunction Factors as this Case is Materially Indistinguishable from the *James* Consolidated Cases

For the sake of completeness and to avoid any allegation of waiver, the Petitioners analyze the temporary injunction factors below. However, this Court need not and should not re-analyze those factors here, as it already examined them in the *James* cases

[2] The Petitioners do not believe that this actually is or should be a necessary factor for obtaining a temporary injunction and some cases do not mention it as a factor. *See, e.g.*, *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶22, 301 Wis. 2d 266, 732 N.W.2d 828 (only factors listed are likelihood of success on the merits, a likelihood of irreparable harm, and an inadequate remedy at law). The availability of injunctive relief does not turn on which party has the power to resist a legal command and thus claim to represent the status quo.

and as this case is indistinguishable from *James* in all material respects. That is, the same reasoning the Court provided in its September 10, 2020 order to support its decision to enjoin the Dane County school closure order applies here.

In particular:

- This Court concluded that the *James* Petitioners were likely to succeed on the merits of their claim that Dane County's "broad closure of schools . . . is not within the statutory grant of power to local health officers in Wis. Stat. § 252.03." *James*, Order at 4. Yet § 252.03 is the basis of RPHD's order as well. *See* School Closure Order at 2.[3]
- This Court concluded that the Petitioners had shown no available legal remedy and the presence of irreparable harm, given that "[u]nquestionably, denying students in-person education has the potential to harm the educational institution-Petitioners, as well as the parent-Petitioners and

[3] The Order also briefly references Wis. Admin Code § DHS 145.06(6). That regulation partially quotes, and by its own terms is an application of, Wis. Stat. § 252.03.

their children"; that "many parents irreparably lose the full benefits of the communal education they chose for their children, including in-person instruction, relationships with teachers and other students, and religious and spiritual formation"; that Petitioners "maintain that distance and technology-based learning is less than ideal, if not harmful, for many students"; and that "Petitioners will not have a second opportunity to provide in-person instruction for classes currently underway." *James*, Order at 4. The same is true here.

- This Court weighed the *James* Respondents' interests "in protecting the health and safety of Dane County residents" but found that the equities favored the Petitioners because of the Petitioners' "interests in advancing childhood education and providing students a stable and effective learning environment," the lengths the Petitioners went to to safely resume in-person instruction, the voluntary decision of the schools and parents to assume the health

risks of in-person instruction, and the order's "intru[sion] upon the freedoms ordinarily retained by the people under our constitutional design," namely its nullification of the "choices of parents and schools, who also undoubtedly care about the health and safety of their teachers and families." *Id.* at 5. Again, the exact same equities are present in this case.

- Finally, the Court explained that an injunction would preserve the status quo given that, at the time the Dane County order was issued, "Petitioners had either already begun school or had conducted months-long preparations to begin school in the days following." *Id.* Likewise, the Petitioners in this case had all begun in-person instruction before RPHD issued its School Closure Order.

Respondents have shown complete disregard for the preservation of scarce judicial resources. This Court has already examined these legal matters and indicated that school closure orders premised on Wis. Stat. § 252.03 are not appropriate while

the *James* cases are pending. For the Court's benefit, the Petitioners will reanalyze the relevant factors below, but again this Court need not reweigh the factors to conclude that an injunction is appropriate.

### B. The Petitioners Can Show a Reasonable Probability of Ultimate Success on the Merits

Wisconsin law is plainly on the Petitioners' side in this dispute. The authority that the Respondent Bowersox has invoked as a local officer does not exist in Wisconsin law. Even if Wis. Stat. § 252.03, the statute cited as authority in the School Closure Order, did authorize a city-wide shutdown of schools for in-person instruction, it sets forth prerequisites that are not met here. And finally, whatever the statutes may say, Wisconsin's Constitution protects parents' rights to direct the education and upbringing of their own children and parents' and schools' rights to the free exercise of religion. The state may not infringe upon those rights as it has done here without meeting strict scrutiny. The Respondents cannot meet that burden.

i. Wis. Stat. § 252.03 Does Not Authorize the School Closure Order

As a public health officer and a local public health agency, Respondents derive their powers from state law. But state law authorizes DHS and *only* DHS to close schools. While the statute authorizes local health officers to take other actions, it does not authorize them to close schools. Wisconsin's Constitution requires 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. This has, from time to time, been interpreted to confer upon all Wisconsin's children a statewide "right to an equal opportunity for a sound basic education." *Vincent v. Voight*, 2000 WI 93, ¶3, 236 Wis. 2d 588, 614 N.W.2d 388. Whatever the nature or justiciability of this right and acknowledging that Wisconsin has chosen to confer substantial control over education, the Legislature clearly considered who should have the awesome responsibility to close schools and decided against granting it to local health officers.

a) *Powers of DHS*

As discussed *supra*, DHS is the state agency in charge of overseeing all health policy in the state, and is required by statute to "[s]erve as the state lead agency for public health." Wis. Stat. § 250.03(1)(b).

As part of its powers as the lead agency for public health in Wisconsin, DHS is also granted certain extraordinary powers that local health agencies are not in order to control outbreaks and epidemics. Specifically, relevant to this case, DHS "may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." Wis. Stat. § 252.02(3). That is, DHS is explicitly given the authority under state law to both close schools and to forbid public gatherings in schools. Further, because DHS is given both of those powers they must mean two different things. That is, DHS can close schools entirely, i.e., prevent in-person education, or DHS can alternatively allow schools to be open for in-person education but prohibit public gatherings at schools (school plays, voting, public meetings, athletic or other competitions, etc.)

b) *Powers of Local Health Officers and Departments*

Respondent City of Racine Public Health Department is a local health department under Wis. Stat. § 251.02. Respondent Bowersox is a local health officer under Wis. Stat. § 251.06.

The Respondents have the emergency powers granted to them under Wis. Stat. § 252.03 but no more than that. In issuing the School Closure Order, Respondents specifically cite to Wis. Stat. § 252.03 as granting them the authority to issue the order. However nothing in § 252.03 allows them to issue the School Closure Order.

First, DHS is *expressly* authorized to close schools under Wis. Stat. § 252.02(3), but local health officers are only expressly authorized to *inspect* schools "to determine whether the buildings are kept in a sanitary condition." Wis. Stat. § 252.03(1). Here, the Legislature clearly made a policy choice to expressly give the power to shut down schools to DHS and DHS alone. Given the distinction between DHS's express power to close schools and the lack of the grant of that power to local health officers, nothing else

in the statute should be construed to grant the Respondents a power that the Legislature denied to them. Local governments cannot supersede state law. *See, e.g.*, *See, e.g.*, *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 433, 293 N.W.2d 540 (1980) ("[O]rdinances may not "'infringe the spirit of a state law or . . . general policy of the state.'") (citing *Fox v. Racine*, 225 Wis. 542, 545, 275 N.W. 513 (1937)).

Second, while a local health officer may forbid public gatherings when necessary to control outbreaks or epidemics, that power does not include the power to forbid in-person education. Children attending school does not constitute a public gathering. That is clear from the language in § 252.02(3) which grants DHS the power to both "close schools" and to "forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." Because DHS is given both of those powers they must mean two different things. That is, DHS can both close schools entirely, i.e., prevent in-person education, or DHS can alternatively allow schools to be open for in-person education but

prohibit public gatherings at schools (school plays, voting, public meetings, athletic or other competitions, etc.). Local public health officers, at most, have only the latter power.

Third, the fact that local health officers have the power to "do what is reasonable and necessary for the prevention and suppression of disease" cannot be read so broadly as to grant it the powers that were granted exclusively to DHS. To do so would be to undercut the entire legislative scheme created by the Legislature in this area. "Where a specific statutory provision leads in one direction and a general statutory provision in another, the specific statutory provision controls." *Marder v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2005 WI 159, ¶23, 286 Wis. 2d 252, 706 N.W.2d 110. Here, the specific provision—that only DHS may close schools—controls.

As noted above, this understanding of the statutory scheme is further bolstered when considered in context with other constitutional provisions. For example, Wisconsin's Constitution requires 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. Within the context of the constitutional mandate to keep schools "as nearly uniform as practicable," the Legislature's decision to empower only DHS, a statewide authority, to close schools rather than individual local health officers, makes sense. This does not mean that all school districts must adopt the same policy. Schools' obligations under Art. X, § 3 do not mandate absolute equality. Nor, for the same reason, does it mean that DHS, when it can and does close schools, must do so uniformly without regard to local conditions. It means only that the statewide importance of public education suggests that the grant of the statutory authority to close schools to DHS and the studied refusal to grant the same authority to local health officials means what it says. It is what you'd expect. Local health officials lack the statewide accountability of DHS and the responsibility for education of local school officials. It makes sense for the legislature to have treated these various categories of officials differently.

Since, as the Legislature intended, Respondents lack explicit authority to close schools, the School Closure Order is ultra vires and void.

ii. Even if Wis. Stat. § 252.03 Authorizes the Closure of Schools by Respondents in Some Circumstances, those Circumstances Are Not Present Here

If this Court concludes that Wis. Stat. § 252.03 authorizes the Respondents to close schools in some circumstances, it should still ensure that the Respondents have met that statute's prerequisites. And the Respondents have not done so. § 252.03(1) permits local health officers to "take all measures *necessary* to prevent, suppress and control communicable diseases." (Emphasis added.) Similarly, § 252.03(2) authorizes these officers to do what is reasonable and *necessary* for the prevention and suppression of disease. (Emphasis added.) Necessity, a considerable threshold, is the trigger of the statute.

Petitioners understand that, in the context of an original action, the existence of a factual dispute is disfavored. But there is no factual dispute here. The Respondents' own actions to date

establish that the School Closure Order is *not* borne of necessity. This is apparent when examining the School Closure Order in the context of the other orders the Respondents have issued.[4]

Institutions of higher education, childcare centers, offices, restaurants, retail establishments, gyms, fitness facilities, martial arts, bowling alleys, pool halls, funplexes, miniature golf, skating/roller rinks, dance studios, yoga studios, gymnastics clubs, salons, tattoo parlors, hotels, places of worship, and many other entities are permitted to operate so long as their employees and patrons comply with various guidelines including practicing social distancing or wearing face coverings. Yet—despite the fact that according to the Racine Health Department's own data, less than 5% of all COVID cases in the Department's jurisdiction are among children aged 0-9 and only approximately 11% are among children

[4] *See* City of Racine, *Safer Racine* (Nov. 12, 2020), *available at* https://www.racinecoronavirus.org/wp-content/uploads/2020/11/COVID-19-Safer-Racine-v18.pdf. This document summarizes restrictions on Racine residents, but does not appear to provide the text of the orders that imposed those restrictions. Petitioners were unable to locate those orders on Racine's website. A copy of the *Safer Racine* document is included in the Appendix to the accompanying petition.

and teenagers aged 10-19—children may not go to their schools. And this is so even though many schools, like the Petitioner schools, are following meticulous hygiene, cleaning, safety, and protective measure policies and procedures.

The Respondents cannot reasonably argue that the complete closure of private schools in Racine is necessary to suppress COVID-19 when this shutdown is so utterly at odds with the approach it has taken to other activities and industries. Wis. Stat. § 252.03 imposes tight controls on the authority of local health officers to act, and the Respondents have breached those restrictions here.

iii. The School Closure Order Violates Article I, § 1 of the Wisconsin Constitution

Even if Wis. Stat. § 252.03 authorizes the School Closure Order, and even if the Respondents complied with the terms of that statute, the Wisconsin Constitution prohibits what the Respondents have done here. Wisconsin parents possess the constitutional right to direct the education of their own children, and state actors have no ability to simply shut down private

education without establishing absolute necessity. The Respondents cannot meet that burden.

Article 1, § 1 of the Wisconsin Constitution provides: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness." The Wisconsin Supreme Court has interpreted Article 1, § 1 as providing "the same equal protection and due process rights afforded by the Fourteenth Amendment to the United States Constitution." *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶35, 383 Wis. 2d 1, 914 N.W.2d 678.

One of the oldest and most fundamental liberty interests protected by both Article 1, § 1 and the Fourteenth Amendment is the right of parents to direct the care and upbringing of their children, including their education. *See, e.g.*, *Matter of Visitation of A. A. L.*, 2019 WI 57, ¶5, 387 Wis. 2d 1, 927 N.W.2d 486; *Barstad v. Frazier*, 118 Wis. 2d 549, 567, 348 N.W.2d 479 (1984); *In Interest of D.L.S.*, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983); *Troxel v.*

*Granville*, 530 U.S. 57, 65 (2000) (plurality op.); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925).

The U.S. Supreme Court has described this right as "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953), and "established beyond debate as an enduring American tradition," *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). In *Pierce*, a case in which the Supreme Court invalidated state attempts to close off parents from the ability to send their children to private schools, the Supreme Court famously explained that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535.

Given the importance of parents' right to parent, any governmental action that "directly and substantially implicates a fit parent's fundamental liberty interest in the care and

upbringing of his or her child" is "subject to strict scrutiny review." *A. A. L.*, 387 Wis. 2d 1, ¶22.

The School Closure Order obviously directly and substantially interferes with the right of the parent Petitioners to direct the education of their children. These parents chose to send their children to school to receive in-person education. They have done so because they believe that in-person instruction is important to their child's upbringing. They are not claiming that government provide them with any form or instruction or that anyone else be compelled to do something that they do not wish to do. They simply ask that they be permitted to direct their child's upbringing and to use a service that their private school is willing to provide.

The Respondents have barred them from doing so. The state has no competence to tell parents that six hours in front of a computer screen is "just as good" as face-to-face contact with parents and peers and as direct education, formation, and socialization. That is not a decision for the state to make.

So, under Wisconsin law, because parents have a fundamental right to direct the education of their children, the impairment of that right must be narrowly tailored to advance a compelling state interest. *A. A. L.*, 387 Wis. 2d 1, ¶¶18, 22. But the School Closure Order fails strict scrutiny. While the Petitioners do not dispute that the state may have a compelling government interest in preventing the spread of dangerous diseases, the Order is clearly not narrowly tailored to the accomplishment of that goal for the reasons stated in the previous section.

As discussed, it goes much farther than is necessary to reasonably prevent the spread of COVID-19. The Respondents' actions demonstrate that much less intrusive alternatives are available, and it offers those alternatives to entities ranging from institutions of higher education to childcare centers to tattoo parlors to hotels. Indeed, as noted, the Petitioner schools have been following meticulous hygiene, cleaning, safety, and protective

measure policies and procedures that up until recently satisfied the Respondents, as explained in the accompanying affidavits.

The State is not entirely powerless to regulate private schools to meet difficult challenges. But when it does so it is intruding into the sphere that has long been recognized by the courts as sacred: the zone of parental rights. It must therefore tread cautiously, ensuring that its actions are carefully adapted to interfere no more than necessary with parental control over the education of their children. The blatant logical inconsistencies of the Respondents' actions do not meet this standard. Schools have been singled out. The Respondents are using a sledgehammer where it is required to use a scalpel. The Order fails strict scrutiny and is void.

iv. The School Closure Order Violates Article I, § 18 of the Wisconsin Constitution

Finally, the decision of certain of the Petitioners to seek or provide in-person schooling is partially motivated by religious considerations. (*See* Affidavit of Andrea Thunhorst; Affidavit of Pete Van Der Puy; Affidavit of David Burgess; Affidavit of Paul

Martinson; Affidavit of Pamela Amling.) In other words, it is an exercise of faith. By prohibiting this instruction, the Respondents are interfering with, for example, in-person religious instruction and formation; Christian fellowship or community prayers; and chapel service and the provision of sacraments. Wisconsin's Constitution provides strong safeguards against government actions burdening such exercises of faith, and the Respondents have transgressed them here.

Article I, § 18 of the Wisconsin Constitution provides in part that "The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted . . . ." Explaining that "the drafters of our constitution created a document that embodies the ideal that the diverse citizenry of Wisconsin shall be free to exercise the dictates of their religious beliefs," the Wisconsin Supreme Court has interpreted Article I, § 18 to provide stronger religious liberty protections than those provided by the federal Free Exercise Clause. *State v. Miller*,

202 Wis. 2d 56, 65-66, 549 N.W.2d 235 (1996) (state could not force Amish to display traffic emblem on their buggies).

Specifically, where state action burdens a Wisconsinite's free religious exercise, the state must show "that the law is based on a compelling state interest . . . which cannot be served by a less restrictive alternative"—in other words, strict scrutiny. *See id.* at 66.

As explained, certain of the Petitioners made the decision to seek or provide in-person instruction for religious reasons. This can hardly be gainsaid; the choice of school and manner of instruction is fundamental to a child's religious education and formation. But the School Closure Order substantially burdens that religious exercise, barring parents and schools from this religious option. Article I, § 18 demands a compelling justification of the government before it can intrude into this kind of religious decision-making. The Petitioners have already shown how the School Closure Order does not meet strict scrutiny and how less restrictive alternatives short of a complete shutdown of in-person

instruction are available here. The Order therefore violates Article I, § 18 and is void.

### C. The Petitioners Lack an Adequate Remedy at Law

To obtain a temporary injunction, a movant must also "show that no adequate legal remedy is available, i.e., that the injury cannot be compensated by damages." *Kohlbeck v. Reliance Const. Co.*, 2002 WI App 142, ¶13, 256 Wis. 2d 235, 647 N.W.2d 277; *Allen v. Wisconsin Public Service Corp.*, 2005 WI App 40, ¶30, 279 Wis. 2d 488, 694 N.W.2d 420 ("Irreparable harm is that which is not adequately compensable in damages").

Here, there are no legal remedies available to the Petitioners. Money damages obviously cannot replace lost in-person instructional and socialization time, which is why the Petitioners do not seek and cannot obtain damages to remedy the wrong here. Additionally, the violations of the parent Petitioners' constitutional rights to direct the education of their children and of certain of the parent and school Petitioners' rights to the free exercise of religion are irreparable harms. Indeed, "[w]hen an

alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary." Wright & Miller, 11A Fed. Prac. & Proc. § 2948.1 (3d. ed.). Irreparable harm should be presumed here.

The only way to right these wrongs is for this Court to declare the School Closure Order unlawful and to issue an injunction prohibiting its enforcement.

**D. The Petitioners Face Irreparable Harm**

"Injunctions are not to be issued without a showing of . . . irreparable harm but at the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile." *Werner*, 80 Wis. 2d at 520.

For the reasons already discussed in the previous section, absent a temporary injunction the Petitioners will forever lose valuable instructional and socialization time and will suffer the violation of their constitutional rights. That is, without a

temporary injunction, the Petioners' request for relief is rendered futile.

### E. The Equities Favor the Petitioners

The Petitioners, again, do not dispute that government actors have an interest in preventing the spread of dangerous diseases. But, as this Court noted in the *James* cases, the Petitioners have an interest "in advancing childhood education and providing students a stable and effective learning environment." *James*, Order at 5. To further this interest, the Petitioners have invested significant time and resources to ensure that in-person instruction may be conducted safely. As was again noted by this Court in *James*, it is not as though the parents and schools involved do not care about the health of students, teachers, and families—and in our constitutional order, these types of decisions are typically entrusted to the people, not local bureaucrats.

Finally, a factor not present in *James* is present here: the Respondents do not come before this Court with clean hands.

Unlike the *James* Respondents, the Respondents in this case were well aware of this Court's ruling that Wis. Stat. § 252.03 likely does not provide the authority they seek to exercise. But the Respondents calculated that they could impose this shutdown before the Court is able to issue a final decision in *James*. That behavior should not be rewarded.

### F. Immediate Preliminary Relief is Needed to Maintain the Status Quo

In the context of a temporary injunction, the *status quo* does not mean the facts as they exist on the date of the request for an injunction or the date the Court considers the injunction, but rather it means the facts as they existed prior to the defendant's illegal conduct. For example, in *Shearer v. Congdon*, 25 Wis. 2d 663, 131 N.W.2d 377 (1964), one of the seminal Wisconsin cases setting forth the standards for a temporary injunction, the plaintiff sought an injunction requiring the owner of property to keep a private drive-way open to the plaintiff based on the plaintiff's claim of a prescriptive easement.

The facts of the case were that the plaintiff had historically had access to the road but on February 6, 1964, the defendants installed a gate to prevent the plaintiff and the public from using the road. The trial court issued an injunction on March 17, 1964 (more than a month after the gate was in place) requiring the defendants to keep the road open to the plaintiff. *Shearer,* 25 Wis. 2d at 665.

The state of the facts as of March 17th (the date of the injunction) was that the defendant had installed the gate but the court did not find that the facts on March 17th constituted the "*status quo*" but rather that the state of facts prior to the defendants' alleged unlawful conduct of installing the gate was the "*status quo*."

Here, of course, the request for an injunction was made before the effective date of the School Closure Order, but even if it were otherwise, the *status quo* consists of the state of facts that would exist if the Respondents followed the law and not issued the unlawful order. The *status quo* is that private schools were

operating and parents were sending their children to those schools for in-person instruction before the School Closure Order was issued. The Respondents destroyed this *status quo* by issuing its order barring in-person instruction. An injunction is needed to preserve that state of affairs and permit parents, children, and staff to resume their educational plans.

## CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant the Petition, immediately enjoin Respondents from enforcing the School Closure Order and hold this Petition in abeyance pending a decision in the *James* consolidated cases.

Dated this 19th day of November, 2020.

Respectfully Submitted,

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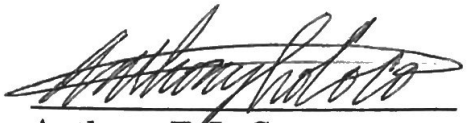
## CERTIFICATE OF SERVICE

A copy of this Memo is being served on all opposing parties via electronic mail and first-class mail.

Dated: November 19, 2020



Anthony F. LoCoco