

**FILED**

AUG 26 2020

CLERK OF SUPREME COURT  
OF WISCONSIN

**IN THE SUPREME COURT OF WISCONSIN**

No. \_\_\_\_\_

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 AND SARAH BARRETT, ERIN AND KENT HAROLDSON,  
KIMBERLY HARRISON, SHERI AND ANDREW HOLZMAN, MYRIAH  
MEDINA, LAURA AND ALAN STEINHAUER, JENNIFER AND BRYANT  
STEMPSKI, AND CHRISTOPHER AND HOLLY TRUITT,

*Petitioners,*

v.

JANEL HEINRICH, IN HER OFFICIAL CAPACITY AS PUBLIC HEALTH  
OFFICER AND DIRECTOR OF PUBLIC HEALTH OF MADISON & DANE  
COUNTY

AND

PUBLIC HEALTH OF MADISON & DANE COUNTY,

*Respondents.*

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**EMERGENCY PETITION FOR AN ORIGINAL ACTION  
AND APPENDIX**

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ANTHONY LOCOCO (WI Bar No. 1101773)  
LUCAS VEBBER (WI Bar No. 1067543)  
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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 for select grade levels?

2. Whether indefinitely closing all public and private schools buildings to in-person student instruction for grades 3 through 12 is “reasonable and necessary for the prevention and suppression” of COVID-19 and/or “necessary to prevent, suppress and control” COVID-19 where, among other things, less than 10% of all COVID cases in Dane County were among children aged 0-17 and no deaths have occurred among those children testing positive in the County?

3. Whether Emergency Order #9 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 Emergency Order #9 unconstitutionally infringes upon the state constitutional rights of parents to the free exercise of religion? *See* Wis. Const. art. I, § 18.

### INTRODUCTION

5. This case challenges the authority of one unelected bureaucrat to upend the education plans of thousands of students and families and their schools located throughout Dane County via the stroke of a pen.

6. That pen stroke occurred on a Friday afternoon just days before a number of schools in Dane County were planning to reopen after months of meticulous planning. Without warning, Respondents issued Emergency Order #9, which among other things, prohibits schools throughout Dane County from offering in-person instruction to students in grades 3 through 12, causing significant hardship, confusion, and chaos for families, students, teachers and administrators throughout the County.

7. This case is about whether or not the statutes and state constitution allow this unilateral action. Petitioners ask this

Court to declare that they do not and to enjoin Section 4 of Emergency Order #9, and to allow thousands of students to go back to school and to allow schools throughout Dane County to execute education and safety plans that have been in the works for months.

### **PARTIES**

8. Petitioners are a group of parents of students in Dane County schools, several of the schools themselves, and several membership associations representing schools throughout Wisconsin, including in Dane County.

9. Petitioner Wisconsin Council of Religious and Independent Schools (“WCRIS”) is a membership based association of religious and independent schools. Petitioner WCRIS maintains its principal office at 110 East Main Street, Suite 802, in the City of Madison, Dane County, Wisconsin. Petitioner WCRIS has member schools throughout Wisconsin, including members throughout Dane County. Because of Emergency Order #9, WCRIS members in Dane County may only offer in person instruction to students in kindergarten through 2<sup>nd</sup>

grade, and are prohibited from offering in-person instruction at any other grade level.

10. Petitioner School Choice Wisconsin Action is a membership based association of schools enrolled in one of Wisconsin's parental choice programs. School Choice Wisconsin Action maintains its principal office at 350 Bishops Way, Suite 104, in the City of Brookfield, Waukesha County, Wisconsin. School Choice Wisconsin Action has members throughout Wisconsin, including members in Dane County. Because of Emergency Order #9, School Choice Wisconsin Action members in Dane County may only offer in person instruction to students in kindergarten through 2<sup>nd</sup> grade, and are prohibited from offering in-person instruction at any other grade level.

11. Petitioner Abundant Life Christian School is a school located at 4901 East Buckeye Road, in the City of Madison, Dane County, Wisconsin. Petitioner Abundant Life Christian School serves approximately 259 students in kindergarten through 12<sup>th</sup> grade. Because of Emergency Order #9, Abundant Life Christian

School is not allowed to offer in-person instruction to students in grades 3-12.

12. Petitioner High Point Christian School is a school located at 7702 Old Sauk Road, in the City of Madison, Dane County, Wisconsin. Petitioner High Point Christian School serves approximately 272 students in preschool through 8<sup>th</sup> grade. Because of Emergency Order #9, High Point Christian School is not allowed to offer in-person instruction to students in grades 3-8.

13. Petitioner Lighthouse Christian School is a school located at 6402 Schroeder Road, in the City of Madison, Dane County, Wisconsin. Petitioner Lighthouse Christian School serves approximately 199 students in K4 through 8<sup>th</sup> grade. Because of Emergency Order #9, Lighthouse Christian School is not allowed to offer in-person instruction to students in grades 3-8.

14. Petitioner Peace Lutheran School is a school located at 1007 Stonehaven Drive, in the City of Sun Prairie, Dane County, Wisconsin. Peace Lutheran serves approximately 125 students in

kindergarten through 8<sup>th</sup> grade. Because of Emergency Order #9, Peace Lutheran School is not allowed to offer in-person instruction to students in grades 3-8.

15. Petitioner Westside Christian School is a school located at 6815 Schneider Road, in the City of Middleton, Dane County, Wisconsin. Westside Christian School serves approximately 157 students in prekindergarten through 8<sup>th</sup> grade. Because of Emergency Order #9, Westside Christian School is not allowed to offer in-person instruction to students in grades 3-8.

16. Petitioners Craig and Sarah Barrett reside at 6610 Ridge Point Run, in the City of Sun Prairie, Dane County, Wisconsin. The Barretts are the parents of three children who will be entering 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> grade this upcoming school year. Because of Emergency Order #9, the Barrett's 3<sup>rd</sup> and 6<sup>th</sup> graders will not be allowed to attend school in-person.

17. Petitioners Erin and Kent Haroldson reside at 642 Perry Center Road, in the Town of Perry, Dane County, Wisconsin. The Haroldsons are the parent of a child who will be entering 3<sup>rd</sup>



grade this upcoming school year. Because of Emergency Order #9, the Haroldsons' child will not be allowed to attend school in-person.

18. Petitioner Kimberly Harrison resides at 3205 Bailey Road, in the City of Sun Prairie, Dane County, Wisconsin. Petitioner Harrison is the parent of two children who will be entering 4<sup>th</sup> and 6<sup>th</sup> grade this upcoming school year. Because of Emergency Order #9, Petitioner Harrison's children will not be allowed to attend school in-person.

19. Petitioners Sheri and Andrew Holzman reside at 3931 Mueller Road, in the Village of Windsor, Dane County, Wisconsin. The Holzmanns are the parents of three children who will be entering 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> grades this upcoming school year. Because of Emergency Order #9, the Holzmanns' children will not be allowed to attend school in-person.

20. Petitioner Myriah Medina resides at 46 Apple Hill Drive, in the Village of Blue Mounds, Dane County, Wisconsin. Petitioner Medina is the parent of one child who will be entering

7<sup>th</sup> grade this upcoming school year. Because of Emergency Order #9, Petitioner Medina's child will not be allowed to attend school in-person.

21. Petitioners Laura and Alan Steinhauer reside at 3718 Arapaho Court, in the City of Verona, Dane County, Wisconsin. The Steinhauers are the parents of a child who will be attending 5<sup>th</sup> grade this upcoming school year. Because of Emergency Order #9, the Steinhauers' child will not be allowed to attend school in-person.

22. Petitioners Jennifer and Bryant Stempski reside at 1836 Barrington Drive, in the City of Sun Prairie, Dane County, Wisconsin. The Stempskis are the parents of three children who will be attending 2<sup>nd</sup>, 5<sup>th</sup> and 7<sup>th</sup> grades this upcoming school year. Because of Emergency Order #9, the Stempskis' 5<sup>th</sup> and 7<sup>th</sup> graders will not be allowed to attend school in-person.

23. Petitioners Christopher and Holly Truitt reside at 6217 Harvest Lane, in the Village of De Forest, Dane County, Wisconsin. The Truitts are the parents of a child who will be

entering 10<sup>th</sup> grade this upcoming school year. Because of Emergency Order #9, the Truitts' child will not be allowed to attend school in-person.

24. As set forth herein and in the accompanying memorandum and affidavits, the Petitioners are harmed by Order #9, among other ways, by being unable to attend or operate schools, by financial loss, and by injury to constitutional rights.<sup>1</sup>

25. Respondent Janel Heinrich is the Public Health Officer and Director of Public Health of Madison & Dane County, and is named in her official capacity. Respondent Heinrich maintains her principal office at 210 Martin Luther King Jr. Blvd., Room 507, in the City of Madison, Dane County, Wisconsin. Respondent Heinrich issued Emergency Order #9 that is the subject of this Petition.

26. Respondent Public Health of Madison & Dane County is a city-county health department serving the City of Madison and

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<sup>1</sup> Fourteen of the fifteen affidavits are signed and notarized. Due to the exigency of the matter, one affidavit is unsigned. Counsel for Petitioners intend to supplement with an identical but signed and notarized affidavit at the earliest possible opportunity.

the rest of Dane County. Respondent Public Health of Madison & Dane County maintains its principal office at 210 Martin Luther King Jr. Blvd., Room 507, in the City of Madison, Dane County, Wisconsin. Respondent Public Health of Madison & Dane County is the entity responsible for administering Emergency Order #9, which is the subject of this Petition.

#### STATEMENT OF FACTS

27. 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.

28. On May 11, the state of emergency declared by Governor Evers expired, but COVID-19 has continued to spread throughout Wisconsin.

29. Days later on May 13, in *Legislature v. Palm*, 2020 WI 42, 942 N.W.2d 900, this Court found that certain orders issued by

DHS were, in fact, rules that were not promulgated via that statutory rulemaking process, and thus, were invalid.

30. Following that, health officers in several communities, including Dane County, have issued local emergency health orders, requiring the wearing of face coverings, limiting the capacity of businesses, and more.

31. On July 7, Respondents issued “Emergency Order #8” which, among other things, mandated the wearing of face coverings throughout Dane County.

32. On July 30, Governor Evers issued Executive Order #82, proclaiming for a second time that a statewide public health emergency related to COVID-19 exists.

33. On August 21, more than six months after the COVID-19 crisis began in Wisconsin, and approximately 60 hours before most of the Petitioners (or their children, or member schools) were scheduled to begin in person instruction, Respondent Heinrich issued Emergency Order #9 which, among other things, forbids the opening of schools for in-person instruction in grades 3 through 12.

A true and correct copy of Emergency Order #9 is attached hereto as Exhibit A.

34. The legality of Emergency Order #9, and specifically section 4 which relates to schools, is the subject of this Petition.

35. 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.

36. Petitioner schools have either already opened and were offering in-person instruction or were planning to open on August 24 for in person instruction.

37. Petitioners bring this action to challenge the legality of those provisions of Emergency Order #9, Section 4, which prohibit in-person instruction in grades 3 through 12.

#### **STATEMENT OF RELIEF SOUGHT**

38. This Court should grant this petition, immediately enjoin respondents from enforcing those provisions of Emergency Order #9 which purport to prohibit schools from providing in-

person instruction to pupils in grades 3-12, declare those provisions void, and permanently enjoin them.

### REASONS WHY THIS COURT SHOULD TAKE JURISDICTION

39. This case involves significant questions relating to the authority of local public health officers to totally shut down the in-person education of children, a matter of paramount import for parents as well as one of constitutional dimension.

40. The issue in this case is whether the Wisconsin statutes permit a local health authority to completely close schools to in-person instruction simply on its say-so that the public health requires it and, if they do, whether the Wisconsin Constitution permits a local health authority to issue such an order.

41. 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.

42. This Court should do the same here. On the eve of a new school year, with virtually no notice, and contrary to the reasonable expectations of the Petitioners, Respondents Heinrich and Public Health of Madison and Dane County (collectively “PHMDC”) simply barred the Petitioners from sending their children to school and operating those schools for in-person instruction.

43. PHMDC did so on the apparent belief that the mere invocation of the word “COVID-19,” like an incantation, imbued it with the authority to significantly intrude upon one of the most fundamental obligations parents have to their children: ensure their education and formation. But no statute authorizes what PHMDC has done, and even if the Legislature had authorized such a radical action, the state constitution requires that such a substantial burden on the right of parents to direct the education of their children and to freely exercise their religion by choosing a religious school be supported by the most exceptional of justifications. PHMDC cannot meet that standard.



44. PHMDC admits that less than 10% of all COVID cases in Dane County involve children aged 0-17 and it admits *no* deaths have occurred among those children testing positive in the County. Further, its own actions to date—including Order #9 itself—establish that far less extreme alternatives are available.

45. Aside from the public importance of the questions raised in this case, this case is appropriate for this Court's original action jurisdiction because time is of the essence.

46. The new school year is already upon Wisconsin, and the state's children need certainty as soon as possible. Litigating this case through the ordinary process could result in multiple reversals, seriously disrupting student, parent, and teacher class and work schedules.

47. Resolution by this Court in the first instance, on the other hand, will give all parties involved the finality needed to ensure that students' educations are disturbed as little as possible in a fraction of the time. *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938) (original jurisdiction appropriate where "the

questions presented are of such importance as under the circumstances to call for [a] speedy and authoritative determination by this court in the first instance”).

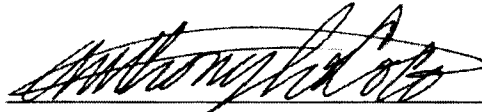
48. Finally, and as shown in the accompanying Memorandum, the questions in this case are legal—they relate to the interpretation of the state constitution and the Wisconsin Statutes. This Court will not need to resolve any factual disputes better suited for a circuit court’s attention. *See, e.g. State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 683, 264 N.W.2d 539 (1978) (disposition via original action was appropriate insofar as “no fact-finding procedure [was] necessary”).

### CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant this Emergency Petition for an Original Action, immediately enjoin Respondents from enforcing those provisions of Emergency Order #9 which purport to prohibit schools from providing in-person instruction to pupils in grades 3-12, declare those provisions void, and permanently enjoin them.

Dated this 26th day of August, 2020.

Respectfully Submitted,



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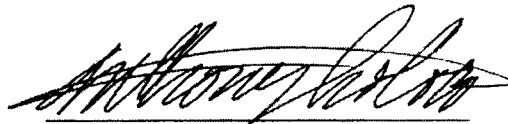
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*Attorneys for Petitioners*

**CERTIFICATE OF SERVICE**

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

Dated: August 26, 2020

A handwritten signature in black ink, appearing to read "Anthony F. LoCoco", written over a horizontal line.

Anthony F LoCoco