

No. 2020AP001419 - OA
No. 2020AP001420 - OA
No. 2020AP001446 - OA

IN THE SUPREME COURT OF WISCONSIN

Sarah Lindsey James,

PETITIONER,

V.

Janel Heinrich, in her official capacity as Public Health Officer
of Madison and Dane County,

RESPONDENT.

**NON-PARTY BRIEF OF THE
LIBERTY JUSTICE CENTER, ALASKA POLICY FORUM,
PELICAN INSTITUTE FOR PUBLIC POLICY, ROUGHRIDER
POLICY CENTER, NEVADA POLICY RESEARCH INSTITUTE,
AND RIO GRANDE FOUNDATION,
IN SUPPORT OF PETITIONERS**

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[Caption Continues on Inside Cover]

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.

St. Ambrose Academy, Inc., Angela Hineline, Jeffery Heller, Elizabeth Idzi, James Carrano, Laura McBain, Sarah Gonnering, St. Maria Goretti Congregation, Nora Statsick, St. Peter's Congregation, Anne Kruchten, Blessed Sacrament Congregation, Amy Childs, Blessed Trinity Congregation, Columbia/Dane County, WI Inc., Loretta Hellenbrand, Immaculate Heart of Mary Congregation, Lorianne Aubut, St. Francis Xavier's Congregation, Mary Scott, Saint Dennis Congregation and Ruth Weigel-Sterr,

PETITIONERS,

v.

Joseph T. Parisi, in his official capacity as County Executive of Dane County and Janel Heinrich, in her official capacity as Director, Public Health, Madison & Dane County,

RESPONDENTS.

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STATEMENT OF INTEREST

The Liberty Justice Center (LJC) is a national public-interest law firm based in Chicago. Supporting educational freedom is one of the four pillars of LJC's mission. *See, e.g., Espinoza v. Montana Dep't of Rev.*, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring) (citing LJC amicus brief).

Alaska Policy Forum is a 501(c)(3) nonprofit think tank dedicated to empowering and educating Alaskans and policymakers by promoting policies that grow freedom for all. Its vision is an Alaska that continuously grows prosperity by maximizing individual opportunities and freedom.

The Pelican Institute is a nonpartisan research and educational organization, think tank, and the leading voice for free markets in Louisiana. The Institute's mission is to conduct research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government.

The Roughrider Policy Center is North Dakota's leading advocate for free markets and educational choice. The center believes that maintaining in-person educational options is critical, both for general learning and particularly for students with special needs.

The Nevada Policy Research Institute (NPRI) is a nonpartisan education and research organization dedicated to the principles of economic and individual freedom based in Las Vegas, Nevada. The Institute's primary areas of focus

are education, labor, government transparency and fiscal policy. NPRI is a non-profit, tax-exempt 501(c)(3) organization.

The Rio Grande Foundation is a free market public policy research institute based in Albuquerque, New Mexico. It has a strong interest in reopening the national and state economies including various public and private educational systems.

Based in Denver, the Independence Institute is the second-oldest state think tank, and is founded on the eternal truths of the Declaration of Independence. Its scholarship and amicus briefs have been cited in ten United States Supreme Court cases, and decisions from this court and the Seventh Circuit.

STATEMENT OF THE ISSUE

Is Director Heinrich's order closing in-person education for primary and secondary schools, while permitting child-care centers and colleges to reopen for in-person education and services, "reasonable" and "necessary" within the meaning of Wis. Stat. § 252.03?

ARGUMENT

Introduction

Much of the science about COVID-19 is still developing, but these two things we know: (1) Young children are substantially less likely to get infected or to be seriously harmed by infection. *See* Benjamin Lee and William V. Raszka,

COVID-19 Transmission and Children: The Child Is Not to Blame, Pediatrics, Vol. 146 No. 2 (August 2020).¹ (2) Young adults congregated together in residential university settings are disproportionately likely to get infected. Henry T. Walke, et al., *Preventing and Responding to COVID-19 on College Campuses*, J. Am. Medical Ass'n, (September 29, 2020).² Yet Director Heinrich has ordered that elementary, middle, and high schools must close for in-person instruction, while permitting colleges and universities to go forward with in-person education and to reopen their dorm buildings. This is not merely unreasonable and unnecessary, it is straight-up anti-rational in the face of the scientific data.

How do you explain such an unreasonable decision? Simple: political power. The public-sector teachers unions want the public schools closed. They also want the private schools closed because they do not want students and parents fleeing to an in-person alternative. The University of Wisconsin, by contrast, wanted to reopen for in-person learning. We should not be surprised, then, that an order was issued permitting the more dangerous circumstance but barring the lesser circumstance. The end result is a policy both over- and under-inclusive. There is no reasonable necessity to justify banning independent schools

¹ Available at <https://pediatrics.aappublications.org/content/146/2/e2020004879>.

² Available at <https://jamanetwork.com/journals/jama/fullarticle/2771319>.

like Petitioners from engaging in lower-risk activity while allowing politically favored institutions to do as they wish.

The Director’s order exceeds the grant of authority in Wis. Stat. § 252.03 because it is both over- and under-inclusive and therefore not reasonably necessary for the suppression of the COVID-19 pandemic.

Wis. Stat. § 252.03 lays out standards by which local health officers may exercise their authority to protect the public. Section 252.03(1) provides that they shall “take all measures necessary to prevent, suppress and control communicable diseases,” while § 252.03(2) allows that they “may do what is reasonable and necessary for the prevention and suppression of disease.” This is a standard the Director cannot meet.

When this Court recently analyzed the substantively similar language of a neighboring provision, Wis. Stat. § 252.02, it declined to construe a grant of “necessary” authority as “open-ended grant’ of police powers to an unconfirmed cabinet secretary.” *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 31. Interpreting this statute, this Court should make clear her authority is circumscribed to those reasonable necessities that are grounded in a coherent understanding of the underlying science.

If Petitioners are right that this classification affects fundamental rights (which they are), then the differentiation of elementary/secondary schools from day-care centers and colleges/universities obviously flunks strict scrutiny. But even if Petitioners are wrong about their arguments from religious liberty and

parental rights (which they are not), the Director’s Order is still deficient because the chosen policy is not a reasonable or necessary exercise of her authority. It is, in fact, anti-reasonable, and anti-rational, in its treatment of higher education versus primary and secondary education. This is exactly the sort of “arbitrary, unreasonable or oppressive conduct” that this Court should examine with skepticism. *Palm*, 2020 WI 42, ¶ 31.

The Director’s own order opens with this fact: “While research on school-aged children continues to emerge and evolve, a number of systematic reviews have found that school-aged children contract COVID at lower rates than older populations.” She then breaks down the data specific to Dane County. WCRIS Pet. Appx. 101. These data show conclusively that infection rates among children are lower, that “outbreaks and clusters” among children are “rare,” and that no deaths have occurred among children in Dane County. *Id.* Director Heinrich nevertheless has ordered schools closed for in-person learning for grades 3-12. *Id.* at 105.

How do other educational service providers fare under her order? On the one end of the age spectrum, day-care centers, including summer-care or after-school care centers that serve children in grades 3 thru 12, may open as long as they observe certain class-size limits and physical distancing. *Id.* at 104. On the other end of the student spectrum, colleges and universities are allowed to

reopen, and may determine for themselves, without any oversight by the Director, “policies and practices for safe operations.” *Id.* at 107. They may even reopen residential dorms, as long as they have in place “strict policies that ensure safe living conditions.” *Id.* The standards for such “strict policies” are not delineated, in sharp contrast to the specificity of the Order’s other sections. *See, e.g., id.* at 104 (specific standards for day-care centers); *id.* at 105-07 (specific standards for K-2 schools); *id.* at 107-09 (specific standards for businesses).

Dane County is home to several institutions of higher education: the University of Wisconsin (Madison); Madison Area Technical College; and Edgewood College. UW-Madison is a humongous school, with over 43,000 students, drawn from across the United States and over 130 foreign countries.³ Though its larger lecture-based classes can occur remotely, it chose to allow classes of up to 50 students to meet in person (thus otherwise exceeding the Order’s indoor mass gatherings cap of 10).⁴ It has 21 dorm buildings, which house over 8,000 students⁵; many more live nearby in large, privately owned apartment

³ Spring 2020 Enrollment Report, UW-Madison, Tables 2 and 17, available at https://registrar.wisc.edu/wp-content/uploads/sites/36/2020/03/report-enrollment-2020spring_Final.pdf.

⁴ *Compare* “Smart Restart: Academic Instruction,” UW-Madison, available at <https://smartrestart.wisc.edu/plan/#academic-instruction> *with* WCRIS Pet. Appx. 104.

⁵ “Residence Halls,” UW-Madison, available at <https://www.housing.wisc.edu/residence-halls/assignments/>.

complexes. Edgewood College is home to over 2,000 students, many of whom live in its eight residence halls and over 10 percent of whom hail from states or countries other than Wisconsin.⁶

The not-so-good news we already know: At UW-Madison, more than 3,800 students and 300 employees have tested positive for the virus, with the rate of positive tests among students exceeding *ten percent* in mid-September.⁷ This is a huge portion of the City’s overall rate: “1,901 people have tested positive this month [September]. More than 70 percent are UW students or staff.”⁸ These numbers are only as low as they are because the University itself chose to shut down in-person activity and quarantine students in mid-September, and asked in desperation that students who could move out of the dorms do so — and that suspension of in-person instruction has since been reversed.⁹

⁶ “Fast Facts,” Edgewood College, available at https://edgewood.edu/docs/default-source/aboutdocs/fast-facts/quick-facts19-20.pdf?sfvrsn=d1f0c68e_10; “Residence Life & Housing,” Edgewood College, available at <https://www.edgewood.edu/student-life/housing>.

⁷ University of Wisconsin Madison COVID-19 Response Dashboard, as updated November 11, 2020, available at <https://covidresponse.wisc.edu/dashboard/>.

⁸ @MayorofMadison (Sept. 9, 2020), available at <https://twitter.com/MayorOfMadison/status/1303799097749577734>.

⁹ See Elyssa Cherney, “University of Wisconsin at Madison will restart in-person classes but asks students to move out of dorms if they can,” Chicago Tribune (September 23, 2020), available at <https://www.chicagotribune.com/coronavirus/ct-university-of-wisconsin-madison-covid-19-20200923-bhj7y4s4rjhknh27cw7ptdcpce-story.html>.

And this sort of disaster is par for the course for colleges around the country: they're basically as vulnerable as cruise ships and nursing homes.¹⁰ Of the more than 1,700 colleges in the United States surveyed by the *New York Times*, only 70 have reported zero cases; in total, campuses have seen over 252,000 cases since March, with more than 38,000 added since early October. "Tracking Coronavirus Cases at U.S. Colleges and Universities," *N.Y. Times* (November 12, 2020).¹¹

Colleges are also problematic because young people tend to go out in bars and restaurants, which increases spread. Tara Parker-Pope, "A Virus Walks Into a Bar..." *N.Y. Times* (June 25, 2020).¹² They also have residential dorms, which are hotbeds of outbreaks. Graeme Wood, "There's No Simple Way to Re-open Universities," *The Atlantic* (April 27, 2020).¹³ That's not to say that it is impossible for a college or university to safely reopen with appropriate policies and procedures in place. Rather, it's to say that the data on COVID-19 spread from colleges and universities is a lot more alarming than the data for elementary and secondary school-aged children.

¹⁰ Katie Mack & Gavin Yamey, "After Cruise Ships and Nursing Homes, Will Universities Be the Next COVID-19 Tinderboxes?," *Time.com* (July 16, 2020), available at <https://time.com/5867395/will-universities-be-next-covid-19-tinderboxes/>.

¹¹ Available at <https://www.nytimes.com/interactive/2020/us/covid-college-cases-tracker.html>.

¹² Available at <https://www.nytimes.com/2020/06/25/well/live/coronavirus-spread-bars-transmission.html>.

¹³ Available at <https://www.theatlantic.com/ideas/archive/2020/04/colleges-are-weighing-costs-reopening-fall/610759/>.

The Director’s counter-arguments in her brief defending this distinction are completely unavailing. She argues universities “are fundamentally different from K-12 schools” because “[c]lasses at higher education institutions are shorter (one to two hours), not commonly in the same buildings nor with hallway commingling among lockers, and students have diverse classes, meals, destinations, and schedules.” Respondent Merits Brief at 55. These facts, of course, will likely lead to *more* spread, not less. In an elementary school, for instance, a student is in a consistent group of 20 or so students for the entire day, thus limiting his exposure to a small, defined number of constant classmates. In a university, a student might be in three or four classes throughout the day, in different buildings, and in an entirely different set of classes with different classmates the next day. At a time when the government’s advice is to draw one’s circle as tightly as possible¹⁴, a university class schedule allows for exposure to a much larger number of people than an elementary school. And yet that exposure is not the passing exposure of a retail establishment, but still the sustained exposure of a one- to two-hour class or discussion group.

The Director continues in her brief by saying that at universities, “single adults living on their own represent the majority of people” and “these adults

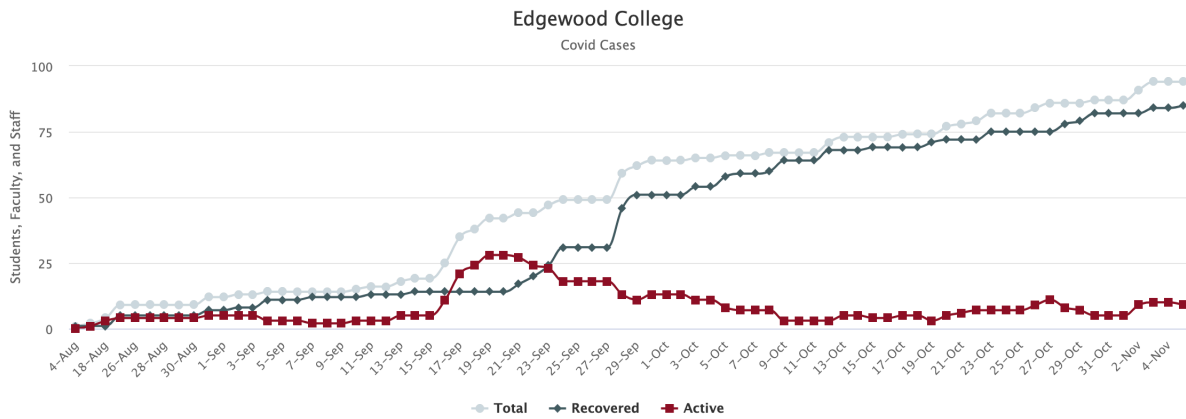
¹⁴ Caroline Dade, “We can prevent deaths’: Gov. Evers urges people to stay home, limit interactions,” WKOW (Oct. 27, 2020), available at <https://wkow.com/2020/10/27/we-can-prevent-deaths-gov-evers-urges-people-to-stay-home-limit-interactions/>.

are not bringing the virus home to their families every day for further infection and spread.” Respondent Merits Brief at 55-56. Again, this statement belies common sense. A K-12 student returning home exposes one or two parents and a few siblings. A university student returning to a dorm exposes roommates, floormates, everyone in the cafeteria, everyone in the fitness center, and everyone in a common bathroom. Even a university student returning to an off-campus apartment still exposes roommates and is much more likely to eat out at a restaurant for meals than a K-12 student in a family home.

Later the Director argues that she could not close the UW because it is a state institution, and thus cannot be held responsible for the lack of narrow tailoring in her order. Respondent’s Merits Brief at 83. Setting aside the legal basis of this claim,¹⁵ this phenomenon of campus spread is not limited to the UW. A letter from the president of Edgewood College to the entire study body and staff dated September 17, 2020, opens, “We are at the precipice. We are experiencing a significant spike in positive COVID-19 cases among our students. For those of you who have been monitoring, the spike is obvious on our online dashboard.”¹⁶ The spike is indeed obvious:

¹⁵ “Memorandum Regarding Authority of PHMDC to Enforce COVID-19 Emergency Orders on State-Owned Property Within the City,” Office of the City Attorney (Aug. 4, 2020), available at https://www.cityofmadison.com/sites/default/files/news/attachments/authority_of_city_ordinances_on_state_owned_property_final.pdf.

¹⁶ Andrew Manion, “Dear students and colleagues,” Edgewood College (Sept. 17, 2020), available at <https://www.edgewood.edu/covid-19/a-spike-in-positive-cases>.



Total: Total number of cases (Active and Recovered) among Students, Faculty, and Staff since tracking began.

Active: Positive cases not yet recovered.

Recovered: Able to resume normal activities.

* Numbers include students on and off campus

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Director Heinrich allows Edgewood College to reopen its classrooms, cafeterias, and dorms with safety plans that it develops entirely within its discretion in place, yet prevents Edgewood Campus School right next door from reopening to serve its students. She also permits Madison Area Technical College to remain open despite over two dozen cases,¹⁸ and satellite and adult-learning campuses in Madison for Cardinal Stritch University, Concordia University Wisconsin, Herzing University, Lakeland University, and Upper Iowa University. Though these Catholic and Lutheran colleges are open, Catholic and Lutheran K-12 schools are closed. Why?

¹⁷ Edgewood College COVID-19 Dashboard, available at <https://www.edgewood.edu/covid-19/a-spike-in-positive-cases>.

¹⁸ Kelly Meyerhofer, "MATC to continue mostly online learning for spring semester, reports 25 COVID cases," Wis. State J. (Oct. 14, 2020), available at https://madison.com/wsj/news/local/education/university/matc-to-continue-mostly-online-learning-for-spring-semester-reports-25-covid-cases/article_7e759c50-58fc-580f-8a79-515f77ee61d3.html.

A simple answer is because the teachers union wishes it to be so. Wisconsin's teachers unions have made clear that they want schools closed for the fall. Annysa Johnson & Molly Beck, "Teachers unions in largest districts call on Tony Evers to require schools start virtually," *Milw. J. Sentinel* (July 20, 2020).¹⁹ Madison Teachers, Inc., has led that charge. Scott Girard, "Madison Teachers Inc. demands virtual school to start year," *Capital Times* (July 16, 2020).²⁰ The very next day after the union's public announcement of its stance, Metropolitan Madison Public Schools' board acceded to their demand, announcing that the district would offer only virtual education when school resumes in September. Scott Girard, "Madison School District will begin year with all-virtual instruction," *Capital Times* (July 17, 2020).²¹ Suburban Dane County public school districts promptly followed suit.²² So when Director Heinrich issued her order late on a Friday afternoon days before the school year

¹⁹ Available at <https://www.jsonline.com/story/news/education/2020/07/20/teachers-unions-in-the-largest-districts-call-on-evers-to-mandate-virtual-only-instruction-for-start/5469040002/>.

²⁰ Available at https://madison.com/wsj/news/local/education/local_schools/madison-teachers-union-demands-fully-virtual-start-to-school-year/article_51e70df9-e7bb-5624-b3be-805701a07dd9.html.

²¹ Available at https://madison.com/ct/news/local/education/local_schools/updated-madison-school-district-will-begin-year-with-all-virtual-instruction/article_1f2c5e2e-a209-5c4f-994b-e805f7effd73.html.

²² Logan Wroge, "Sun Prairie, Middleton-Cross Plains districts will start school year all online amid COVID-19 pandemic," *Wis. State J.* (July 21, 2020), available at https://madison.com/wsj/news/local/education/local_schools/sun-prairie-middleton-cross-plains-districts-will-start-school-year-all-online-amid-covid-19/article_83de0401-c5f8-58fa-847c-f0ed8bcff4fe.html; Melissa Parish, "Verona School District plans virtual start to school year," *Channel 3000* (July 27, 2020), available at

began, it was only independent and religious schools which she was targeting — the public schools had already closed on their own accord.

In addition to demanding that the public schools close for the fall, the teachers unions have also made clear that private independent and religious schools must be forcibly closed. They know that if parents are given the option for an in-person private school or a virtual public school, many will seize the in-person alternative and leave the public school. Evie Blad, “Private Schools Catch Parents’ Eye as Public School Buildings Stay Shut,” *Ed. Week* (Aug. 6, 2020).²³ So they are making no secret of their plan: they want to stop the competition by getting their pals in government to close the private schools as well. Ashley McGuire, “If Public Schools Are Closed, Should Private Schools Have to Follow?,” *Real Clear Educ.* (Aug. 14, 2020).²⁴ See Simon Romero, *et al.*, “If Public Schools Are Closed, Should Private Schools Have to Follow?” *N.Y. Times* (Aug. 5, 2020).²⁵

The *Wall Street Journal* rightly labels this “school opening extortion.” Editorial, “School-Opening Extortion,” *Wall St. J.* (Aug. 3, 2020).²⁶ The *Journal*

<https://www.channel3000.com/verona-school-district-plans-virtual-start-to-school-year/>.

²³ Available at <https://www.edweek.org/ew/articles/2020/08/06/private-schools-catch-parents-eye-as-public.html>.

²⁴ Available at https://www.realcleareducation.com/articles/2020/08/14/if_public_schools_are_closed_should_private_schools_have_to_follow_110451.html.

²⁵ Available at <https://www.nytimes.com/2020/08/05/us/schools-reopening-private-public.html>.

²⁶ Available at <https://www.wsj.com/articles/school-opening-extortion-11596496376>.

lays it out: “These public unions are also lobbying their political allies to keep public charter and private schools closed. . . . The teachers unions have a cynical interest in forcing their competitors to shut down. What a humiliation it would be if charter and private schools reopen and demonstrate that in-person education can be done with the right risk mitigation. Or if parents unsatisfied with the public schools’ response to the coronavirus decide a private school would be better for their child.”

What does all this political-power analysis have to do with the law? “[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose.” *Porter v. State*, 2018 WI 79, ¶ 71 (R.G. Bradley & Kelly, Js., dissenting) (quoting *Craigmiles v. Giles*, 312 F.3d 220, 222 (6th Cir. 2002)). These power dynamics explain the otherwise irrational actions of the Director in issuing an order that flies in the face of the scientific data.

When the government’s exemptions undermine its own claimed interest, it exposes the fallacy of its classification. *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (exemptions “diminish the credibility of the government’s rationale” and demonstrate that restrictions are not narrowly tailored). This classification is arbitrary and irrational, and its disparate treatment of educational institution show its purpose is more politics than science.

CONCLUSION

The Court should find that Emergency Order #9 fails the statutory requirements of reasonable and necessary regulation.

Respectfully submitted,



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CERTIFICATE AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,954 words in the body, as counted by Microsoft Word.

CERTIFICATE AS TO ELECTRONIC FILING

Pursuant to R. App. Pro. 809.19(12)(F), I hereby certify that I have submitted an electronic copy of this non-party brief in compliance with the requirements of Rule 809.19(12). I also certify that this electronic brief is identical in content and format to the printed form of the brief filed today. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all parties.

CERTIFICATE OF SERVICE

I certify that on November 17, 2020, I caused three copies of the foregoing non-party brief to be served upon counsel of record by placing the same in the U.S. Mail, first class postage.

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