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August 26, 2020

VIA HAND DELIVERY
Wisconsin Supreme Court
Office of the Clerk
110 East Main Street
P.O. Box 1688
Madison, WI 53701

RE: *WCRIS v. Heinrich*, Case No. 2020APXXXX-OA

Dear Clerk:

Enclosed for filing in the above-referenced case, please find:

- Ten (10) copies of the Emergency Petition for an Original Action and Appendix
- Ten (10) copies of Petitioners' Emergency Motion for a Temporary Injunction with supporting affidavits
- Ten (10) copies of Petitioners' Memorandum in Support of Emergency Petition for an Original Action and Emergency Motion for a Temporary Injunction

Also provided is a check in the amount of $195.00 for filing. Service upon all parties will be made by certified mail. Specifically, one (1) copy of this cover letter; one (1) copy of the emergency petition; one (1) copy of the emergency motion with supporting affidavits; and one (1) copy of the memorandum will be sent to each individual on the attached list via first-class mail.

Thank you for your time and attention to this matter.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
Attorneys for Petitioners

/s/ electronically signed by *Anthony LoCoco*
Anthony LoCoco
Encl
cc w/encl: (see attached list)

LIST OF SERVICE

One (1) copy of this cover letter; one (1) copy of the emergency petition; one (1) copy of the emergency motion with supporting affidavits; and one (1) copy of the memorandum will be served upon the Respondents by mailing the same, via certified mail, to the following:

Janel Heinrich
210 Martin Luther King Jr. Blvd., Room 507
Madison, WI 53703

Public Health Madison & Dane County
210 Martin Luther King Jr. Blvd., Room 507
Madison, WI 53703

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.

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

(ATTORNEYS LISTED ON NEXT PAGE)

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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

With the stroke of a pen on a Friday afternoon Respondents Heinrich and Public Health Madison and Dane County (collectively "Respondents" or "PHMDC") have upended the lives of thousands of Dane County residents. The order issued by PHMDC, known as "Emergency Order #9" violates state statutes and is unconstitutional.

This Court should grant this original action, immediately issue an emergency injunction staying Emergency Order #9, hold the order invalid, and permanently enjoin it, as discussed herein.

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 Dane County to continue indefinitely.

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, 258, 914 N.W.2d 597, 602. 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 latter 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.

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. The ability of the Governor to declare a second public health emergency arising from the same pandemic is currently being challenged in the Circuit Court for Polk County. *Lindoo v. Evers*, Case No. 2020CV219 (Polk Cty Cir. Ct. 2020).

B. Dane County Health Order

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

Relevant here, on Friday, August 21, 2020, more than six months after the COVID-19 crisis began in Wisconsin, and approximately just 60 hours before most of the Petitioners were scheduled to begin in-person school instruction, Respondents issued Emergency Order #9 which, among other things, forbids the opening of schools for in-person instruction in grades 3 through 12. See Emergency Order #9, § 4(d).

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

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 authority of local health officials and the rights of parents to educate their own children; prompt and definitive resolution by this Court of those questions is needed to ensure stability for the children already beginning the new school year; and no fact-finding by this Court is necessary.

II. THIS COURT SHOULD IMMEDIATELY ENJOIN PHMDC EMERGENCY ORDER #9(4)

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; and (3) the movant can show irreparable harm. *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 519-20, 259 N.W.2d 310, 313-14 (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 a fourth factor.[1] *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 659, 883 N.W.2d 154, 161. The Petitioners can meet this burden and the Court should grant the motion for a temporary injunction.

A. 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 PHMDC has invoked as a local officer does not exist in Wisconsin law. Even if Wis. Stat. § 252.03, the statute cited as authority in Order #9, did authorize a county-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

[1] 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, 277, 732 N.W.2d 828, 834 (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.

to the free exercise of religion. The state may not infringe upon those rights as it has done here without the most compelling of justifications. PHMDC cannot meet that burden.

i. Wis. Stat. § 252.03 Does Not Authorize Order #9(4)

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 PHMDC is a joint city-county health department under Wis. Stat. § 251.02(1m), governed by a city-county board of health pursuant to Wis. Stat. § 251.04(1). Respondent Heinrich 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 Emergency Order #9, Respondents specifically cite to Wis. Stat. § 252.03(1), (2) and (4) as granting them the authority to issue the order. However nothing in § 252.03 allows them to issue the challenged provisions of Emergency Order #9.

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, 544 (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." That is, DHS is explicitly given the authority under state law to both close schools and to forbid public gatherings in schools. 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, 267, 706 N.W.2d 110, 118. 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 challenged provisions of Emergency Order #9 (which purport to close schools) are ultra vires and void.

ii. Even if Wis. Stat. § 252.03 Authorizes the Closure of Schools by PHMDC 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 PHMDC has 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. PHMDC's own order establishes that Order #9(4) is *not* borne of necessity. It is both drastically over-inclusive, that is, far *more* restrictive than is necessary to combat COVID-19, and drastically under-inclusive, that is, if PHMDC really thought that school closures were necessary, it would not be permitting a number of other activities allowed under the order.

Order #9(4) is over-inclusive: institutions of higher education, offices, stores, gyms, hotels, campgrounds, museums, movie theaters, religious entities, libraries, community centers, and many other entities are permitted to operate so long as their employees and patrons comply with reasonable, commonsense requirements such as practicing social distancing or wearing face

coverings. Yet—despite the fact that according to PHMDC's own data, less than 10% of all COVID cases in Dane County are among children aged 0-17 and no deaths have occurred among those children testing positive in the County—children in grades 3 through 12 may not go to their schools.

Order #9(4) is also under-inclusive: the same school buildings shut for in-person instruction of grades 3 through 12 are open for kindergarteners, first graders, and second graders; for staff; for food distribution; for the provision of health care services; for child care; for youth programs; and for government functions. So the same third grader who is prohibited from attending in-person classes may enter the same building for child care.

PHMDC cannot reasonably argue that the complete closure of private schools in Dane County for grades 3 through 12 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 PHMDC has breached those restrictions here.

iii. Order #9(4) Violates Article I, § 1 of the Wisconsin Constitution

Even if Wis. Stat. § 252.03 authorizes Order #9, and even if PHMDC complied with the terms of that statute, the Wisconsin Constitution prohibits what PHMDC has 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. PHMDC 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.

Order #9(4) obviously directly and substantially interferes with the right of the parent Petitioners to direct the education of their children. These parents had prepared to send their children to school to receive in-person education. They have done so because they believe that in-person instruction is essential 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.

PHMDC has 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 Order #9(4) 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, Order #9(4) is clearly not narrowly tailored to the accomplishment of that goal. For the reasons stated in the previous section, it is both over-inclusive and under-inclusive.

As discussed, it is over-inclusive because it goes much farther than is necessary to reasonably prevent the spread of COVID-19. Order #9 itself demonstrates that much less intrusive alternatives are available, and it offers those alternatives to entities ranging from institutions of higher education to community centers. And the Order is also under-inclusive, allowing school buildings to be used for all kinds of activities including in-person instruction (for grades K-2) and childcare.

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 when parental control over the education of their children. The blatant logical inconsistencies of Order #9(4) do not meet this standard. PHMDC is using a sledgehammer where it is required to use a scalpel. The Order fails strict scrutiny and is void.

iv. Order #9(4) Violates Article I, § 18 of the Wisconsin Constitution

Finally, certain of the parent Petitioners have made the decision to send their children to private religious schools for religious reasons. (*See* Affidavit of Chris Truitt; Affidavit of Craig Barrett.) In other words, it is an exercise of faith. Wisconsin's Constitution provides strong safeguards against government actions burdening such actions, and PHMDC has 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 parent Petitioners made the decision to send their children to a religious school specifically because of their religious nature. This can hardly be gainsaid; the choice of school is fundamental to a child's religious education and formation. But Order #9(4) substantially burdens that religious exercise, barring parents 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 Order #9(4) 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.

B. 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, 246, 647 N.W.2d 277, 282, *Allen v. Wisconsin Public Service Corp.*, 2005 WI App 40, ¶30, 279 Wis. 2d 488, 505, 694 N.W.2d 420, 429 ("Irreparable harm is that which is not adequately compensable in damages").

Here, there are no legal remedies available to the Plaintiff. 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 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 Order #9(4) unlawful and to issue an injunction prohibiting its enforcement.

C. 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 Plaintiff's request for relief is rendered futile.

D. 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, 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."

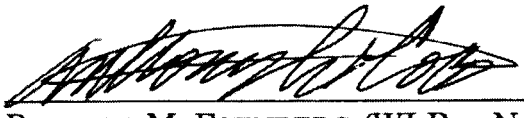
Here, by analogy, the *status quo* consists of the state of facts that would exist if the PHMDC followed the law and not issued the its unlawful order. The *status quo* is that private schools were able to and planning on opening and parents planned to send their children to those schools for in-person instruction. PHMDC 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 move forward with their plans for the coming school year.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant the 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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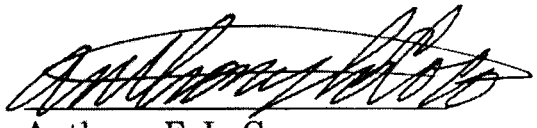
CERTIFICATE OF SERVICE

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

Dated: August 26, 2020



Anthony F. LoCoco