



OFFICE OF THE CLERK

# Supreme Court of Wisconsin

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You are hereby notified that the Court has entered the following order:

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No. 2020AP1911-OA      School Choice Wisconsin Action v. Bowersox

On November 19, 2020, the petitioners, School Choice Wisconsin Action, et al., filed an emergency original action petition that presented these issues to the court:

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 order issued by Dottie-Kay Bowersox (Bowersox) 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 order issued by Bowersox closing all public and private school buildings to in-person student instruction unconstitutionally infringes upon the state constitutional rights of parents to direct the education and upbringing of their children?
4. Whether the City of Racine Public Health Department order issued by Bowersox closing all public and private school buildings to in-person student instruction unconstitutionally

infringes upon the state constitutional rights of parents and schools to the free exercise of religion?

On November 25, 2020, this court issued an order that: (1) granted the emergency original action petition; (2) granted the petitioners' accompanying emergency motion to temporarily enjoin a November 12, 2020 order from City of Racine Public Health Administrator Bowersox, that closed public and private school buildings within her jurisdiction from November 27, 2020 through January 15, 2021; (3) held the action in abeyance pending the court's decision in three consolidated original action petitions relating to Dane County Emergency Order #9: James v. Heinrich, No. 2020AP1419; Wis. Council of Religious and Indep. Schools, et al. v. Heinrich, et al., No. 2020AP1420; and St. Ambrose Academy, Inc. v. Parisi, et al., No. 2020AP1446 (collectively, "James"); and (4) held a motion to intervene filed by Racine Educators United in abeyance until further order of the court.

According to the filings, shortly after this court issued its November 25, 2020 order, Bowersox advised school administrators of this court's decision to temporarily enjoin her school closure order. This communication noted, however, that this court's decision "does not alter the status of the City of Racine Safer Racine Ordinance which is applicable only for the City of Racine. Within this ordinance, school buildings will remain closed from November 27, 2020 through January 15, 2021."<sup>1</sup>

In response, on November 30, 2020, the petitioners filed an "Emergency Motion For Clarification And/Or For Leave To Amend The Emergency Petition For An Original Action

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<sup>1</sup> The "Safer Racine Ordinance," appears at § 54-33 of the City of Racine Ordinances. It states in pertinent part:

(a) The Safer Racine COVID-19 Pandemic Response Standards are adopted and the standards therein apply to business and public activities within the City of Racine. The Safer Racine COVID-19 Pandemic Response Standards shall be published on the City of Racine website and are incorporated into this section as if fully set forth herein.

(b) The common council grants the public health administrator authority to modify the Safer Racine COVID-19 Pandemic Response Standards as necessary to respond to changing COVID-19-related public health conditions. The public health administrator must base any modifications on then-current guidance from the World Health Organization, the Centers for Disease and Prevention, and the Wisconsin Department of Health Services. The public health administrator shall report any such modifications to the common Council, in writing, within five days of the effective date of such modifications.

The ordinance has a sunset date of June 30, 2021.

And/Or To Hold Respondents In Contempt Of Court And For Remedial Sanctions" (the "Motion for Clarification"). The respondents, Bowersox and the City of Racine Public Health Department, opposed the Motion for Clarification. The petitioners filed a reply. The Motion for Clarification remains pending.

Following our June 11, 2021 decision in James v. Heinrich, 2021 WI 58, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_, we directed the parties to file simultaneous letter-briefs discussing the impact of the James decision on the issues raised in the original action.

In their letter-brief, the petitioners ask us to declare that the James court's exclusio unius reading of Wis. Stat. § 252.03 invalidates the November 12, 2020 school closure order. The petitioners assert that we should require briefing on the merits of any alleged alternative source of authority for the school closure order. They seek a finding of contempt and the imposition of remedial sanctions for such contempt. They propose additional briefing, discovery, and possibly appointment of a special prosecutor to pursue punitive sanctions.

In their letter-brief, the respondents argue that James is not dispositive because, unlike the Dane County order at issue in James, Bowersox's order "was specific, tailored, and limited in time to a period of anticipated heightened COVID-19 transmission." The respondents also argue that the James court did not consider the full array of statutes that recognize the power of both local health officers and the Department of Health Services to close schools. See James, 2021 WI 58, ¶25 n.14. They note that the James decision does not affect any issues raised in the pending Motion for Clarification, namely, the Safer Racine Ordinance.

We first address the Motion for Clarification, because it affects the scope of the action before us. The Motion for Clarification requests the following relief: a clarification that this court's November 25, 2020 order prohibited the school closure notwithstanding the existence of the Safer Racine Ordinance; and/or leave to amend the original action petition to add claims and parties related to the ordinance; and/or the imposition of remedial contempt sanctions against the respondents.

We deny these requests. Petitioners' original action petition challenged, and this court's November 25, 2020 order addressed only Bowersox's Racine Public Health Department order of November 12, 2020 that was "to take effect at 12:01 AM, November 27, 2020 and to remain in effect until January 15, 2021, at 11:59 PM." Our November 25th order referred to the temporary injunction we entered prior to our decision in James, wherein that injunction relied on Wis. Stat. § 252.03. We did not refer to an ordinance in our November 25th order. Moreover, we granted the original action petition, on an emergency basis, in reliance on petitioners' representations that this case was virtually identical to and would be controlled by James.<sup>2</sup> However, a distinguishing

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<sup>2</sup> See Original Action Petition at 15 (stating, "a decision in James . . . is likely to dispose of the issues in this case"); Original Action Memo. at 2 (stating, "the facts of this case do not differ

feature of this case—an ordinance-based school closure—was not present in James. Allowing petitioners to add claims and parties related to the Safer Racine Ordinance would materially change the scope of this original action proceeding and would take the litigation beyond what we reasonably anticipated when we granted the original action petition. We note, too, that the legality of the Safer Racine Ordinance is currently being evaluated in different case before the court of appeals, Yandel v. City of Racine, No. 2020AP1137.<sup>3</sup>

Having denied petitioners' Motion for Clarification, the original action stands before us as it was originally pled. The first issue presented is whether Wis. Stat. § 252.03 empowers a local health officer to issue an order closing schools for in-person instruction. In James, we concluded that the answer to that question is no. Pursuant to James, the respondents' reliance on Wis. Stat. § 252.03 as a basis to close schools was in error, and we therefore declare that the November 12, 2020 school closure order is invalid.<sup>4</sup> We also note that to the extent we addressed issues under Article I, § 18 of the Wisconsin Constitution in James, that decision controls the claims made herein. These determinations obviate the need to address other issues presented in the original action petition.

As for petitioners' remaining requests in their letter-brief regarding James (i.e., for additional briefing regarding the ordinance, for a contempt hearing, for the imposition of "an alternative purge condition under Wis. Stat. § 784.04(1)(a) or (e)," and for the possible appointment of a special prosecutor to pursue punitive contempt sanctions), we deny these requests for the same reasons we denied the petitioners' Motion for Clarification. We additionally note that the challenged school closure expired months ago, on January 15, 2021; the temporary injunction enjoining the November 12, 2020 school closure order has lapsed; and the Safer Racine Ordinance was scheduled to sunset on June 30, 2021.

IT IS ORDERED that the Motion for Clarification (including the petitioners' request for a finding of and sanctions for contempt) is denied; and

IT IS FURTHER ORDERED that, pursuant to our holding in James v. Heinrich, 2021 WI 58, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.2d \_\_\_, the respondents' reliance on Wis. Stat. § 252.03 as a basis to close schools was in error, and the November 12, 2020 school closure order is invalid; and

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in any material respect from James"); Original Action Memo. at 15 (stating, "this case is indistinguishable from James in all material respects").

<sup>3</sup> We are not deciding anything on the merits of the Racine Ordinance.

<sup>4</sup> Our decision above makes consideration of the intervention motion by Racine Educators United unnecessary.

IT IS FURTHER ORDERED that, to the extent we addressed issues under Article I, § 18 of the Wisconsin Constitution in James v. Heinrich, 2021 WI 58, \_\_ Wis. 2d \_\_, \_\_ N.W.2d \_\_, that decision controls the claims made herein; and

IT IS FURTHER ORDERED that Racine Educators United's motion to intervene is denied; and

IT IS FURTHER ORDERED that any requests by the parties not specifically addressed in this order are deemed denied.

REBECCA FRANK DALLET, J. (*concurring*). The other separate writings contain several factual mischaracterizations. To begin with, we have never enjoined the closure of local schools generally. We enjoined only the enforcement of Bowersox's November 12, 2020 school closure order because it relied on Wis. Stat. § 252.03. See School Choice Wis. Action v. Bowersox, No. 2020AP1911-OA (S. Ct. Order issued Nov. 25, 2020). The separate writings recast this unpublished temporary injunction order as a substantive decision that any closure of local schools is unconstitutional. See Justice Rebecca Grassl Bradley's concurrence/dissent, ¶¶4-5. But a temporary injunction order indicates only that a claim is likely to succeed on the merits; such orders do not decide the merits. See Werner v. A. L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977).

The separate writings fail to appreciate that a different source of authority may lead to a different legal conclusion. When the City of Racine subsequently closed its schools, it did so via a local ordinance unrelated to Bowersox's order. We have said nothing about a common council's authority to close schools via an ordinance. Indeed, the legality of that ordinance is the subject of pending litigation at the court of appeals. See Yandel v. City of Racine, No. 2020AP1137. Accordingly, Bowersox amending a public health standard, which the City of Racine's Common Council incorporated via local ordinance, does not run afoul of our temporary injunction order.

Lastly, the separate writings also mischaracterize the parties' arguments and Bowersox's post-injunction behavior. Nowhere in Bowersox's briefs, motions, letters, or other filings with the court has she suggested that "a local ordinance can override state law." Nor did Bowersox—or anyone else—attempt to enforce the November 12, 2020 school closure order after we enjoined that order. Only by reshaping the facts of this case can the separate writings conclude that Bowersox should be held in contempt, or that a contempt hearing is even necessary.

I am authorized to state that Justices ANN WALSH BRADLEY and JILL J. KAROFISKY join this concurrence.

ANNETTE KINGSLAND ZIEGLER, C.J. (*concurring in part, dissenting in part*). I agree with the order in almost all respects and join the order except to the extent that it denies petitioners' request for a contempt hearing and to the extent it denies petitioners' Motion for Clarification. I

do not join those portions of the order<sup>5</sup> and respectfully dissent in part because Bowersox appears to have intentionally resisted and disobeyed an order of this court. Consequently, a contempt proceeding is appropriate and should occur.

A party may be found in contempt for "intentional . . . [d]isobedience, resistance or obstruction of the authority, process or order of a court." Wis. Stat. § 785.01(1)(b). As we have previously stated, "A party's unwillingness to obey a court order is the very definition of contempt." Ash Park, LLC v. Alexander & Bishop, Ltd., 2010 WI 44, ¶¶78, 324 Wis. 2d 703, 783 N.W.2d 294; see also generally Christensen v. Sullivan, 2009 WI 87, ¶¶48-78, 320 Wis. 2d 76, 768 N.W.2d 798 (examining Wisconsin contempt law).

Here, the City of Racine enacted the "Safer Racine Ordinance" on June 23, 2020. Many months later, on November 12, 2020, Bowersox, the City of Racine Public Health Administrator, issued an order to close schools to curb the spread of COVID-19. In response, this action commenced, and on November 25, 2020, we enjoined enforcement of that order. Despite a court order, Bowersox apparently continued to require schools to close, supposedly relying on the Safer Racine Ordinance. But relying on differing authority generally cannot overcome a court order to not engage in an action. Bowersox requiring schools to remain closed, regardless of the source of authority, appears to directly contradict the court's injunction order and shows that Bowersox intentionally disobeyed, resisted, and obstructed the court's order. Accordingly, a contempt proceeding is not only appropriate but protects the integrity of the court. See Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450 (1911) ("If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery.").

For the foregoing reasons, I respectfully concur in part and dissent in part.

I am authorized to state that Justices PATIENCE DRAKE ROGGENSACK and REBECCA GRASSL BRADLEY join this writing.

REBECCA GRASSL BRADLEY, J. (*concurring in part, dissenting in part*). Justice Rebecca Dallet's concurrence betrays a startling ignorance of the facts, law, and pleadings in this matter, as the record reflects.<sup>6</sup> This court assumed original jurisdiction over this case on November

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<sup>5</sup> I do not address the issue of the petitioners' Motion for Clarification because I join Justice Rebecca Grassl Bradley's concurrence/dissent, which addresses that issue.

<sup>6</sup> While accusing her colleagues of "mischaracterizations," Justice Dallet makes several misstatements of her own:

25, 2020, holding the matter in abeyance pending this court's decision in three consolidated original action petitions relating to Dane County Emergency Order #9: (1) James v. Heinrich, No. 2020AP1419-OA; (2) Wis. Council of Religious and Indep. Schools, et al. v. Heinrich, et al., No. 2020AP1420-OA; and (3) St. Ambrose Academy, Inc. v. Parisi, et al., No. 2020AP1446-OA (collectively, "James"). During the pendency of this matter, we temporarily enjoined the Racine Public Health Department School Building Closure Order dated November 12, 2020. See School

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- No one "fail[s] to appreciate that a different source of authority may lead to a different conclusion." Justice Dallet's concurrence, ¶2. As Chief Justice Annette Ziegler clearly explains, it is Bowersox's defiance of this court's order prohibiting her from closing schools that should subject her to contempt proceedings: "relying on differing authority generally cannot overcome a court order to not engage in an action. Bowersox requiring schools to remain closed, regardless of the source of authority, appears to directly contradict the court's injunction order and shows that Bowersox intentionally disobeyed, resisted, and obstructed the court's order." Chief Justice Ziegler's concurrence-dissent, ¶3.
- No one said our "unpublished temporary injunction order [w]as a substantive decision that any closure of local schools is unconstitutional." Justice Dallet's concurrence, ¶1.
- No one said that "Bowersox—or anyone else—attempt[ed] to enforce the November 12, 2020 school closure order after we enjoined that order." Id., ¶3. Following this court's order enjoining her from closing schools, Bowersox created a new order closing only those schools located in the City of Racine, but that order was otherwise substantively identical to the November 12, 2020 school closure order. Justice Dallet apparently overlooks the fact that the enjoined order did not rely solely on Wis. Stat. § 252.03 to close schools, but invoked all "authority vested in [Bowersox] by the laws of the State of Wisconsin, including but not limited to Section 252.03[.]"

Justice Dallet misunderstands the difference between the Safer Racine ordinance and Bowersox's orders in contending that "[w]hen the City of Racine subsequently closed its schools, it did so via a local ordinance unrelated to Bowersox's order." The word "schools" does not even appear in the ordinance (see note 7 below); it was Bowersox's order alone that closed schools. The Safer Racine ordinance is not "unrelated" to Bowersox's order; the language of that ordinance professes to serve as the very source of Bowersox's authority to enter the order in the first place. That ordinance explicitly "grants the public health administrator authority to modify the Safer Racine COVID-19 Pandemic Response Standards as necessary to respond to changing COVID-19-related public health conditions." City of Racine, WI, Ordinance ch. 54, § 33. The first page of every "Standards" order explicitly says it was "produced by the City of Racine Department of Public Health" and the eleventh page of every order explicitly says "[t]his order is enforceable by the City of Racine Police Department and the City of Racine Department of Public Health." Bowersox is the administrator of the Department of Public Health and therefore was responsible both for producing and enforcing her orders.

Choice Wis. Action v. Bowersox, No. 2020AP1911-OA (S. Ct. Order issued Nov. 25, 2020). We explained that the "reasoning" underlying "the temporary injunction entered in James" "applies to the facts as presented to us" in "this case." Id.

In James, we "temporarily enjoin[ed] those provisions of [Dane County's] Emergency Order #9 which purport to prohibit schools throughout Dane County from providing in-person instruction to students and enjoin enforcement thereof." James, S. Ct. Order issued Sept. 10, 2020. We explained:

[Wisconsin Stat. § 252.02] subsection (3) grants DHS power to "close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." The powers and duties entrusted to local health officers, however, are different. In the very next section, Wis. Stat. § 252.03, the legislature conspicuously omits the power to "close schools" in its grant of authority to local health officers. Local health officers may similarly "forbid public gatherings when deemed necessary to control outbreaks or epidemics" and are given authority to "inspect schools . . . to determine whether the buildings are kept in a sanitary condition." § 252.03(1)–(2). But the explicit power to "close schools" is statutorily absent.

This differential grant of power must be given full meaning and effect. See State v. Dorsey, 2018 WI 10, ¶29, 379 Wis. 2d 386, 906 N.W.2d 158 (holding that the provision of a specific statutory exception "implies that no other exceptions are intended") (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107–11 (2012) ("The expression of one thing implies the exclusion of others (expressio unius est exclusio alterius).")).

Id. In addition to the lack of a statutory basis for local health officers to close schools, we also noted that "[o]verriding the choices of parents and schools, who also 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.

On November 30, 2020, petitioners in this case filed an "Emergency Motion For Clarification And/Or For Leave To Amend The Emergency Petition For An Original Action And/Or To Hold Respondents In Contempt Of Court And For Remedial Sanctions." Triggering petitioners' Motion was an email sent by Respondent Bowersox—on the same day this court enjoined her school closure order—notifying school administrators in the City of Racine that under "the City of Racine Safer Racine Ordinance" "school buildings will remain closed from November 27, 2020 through January 15, 2021." Nothing in the Safer Racine Ordinance, however, either imposes or authorizes school closures. Instead, that Ordinance "grants the public health administrator authority to modify the Safer Racine COVID-19 Pandemic Response Standards as



necessary to respond to changing COVID-19-related public health conditions." City of Racine, WI, Ordinance ch. 54, § 33.<sup>7</sup>

In their Emergency Motion, petitioners argued that the school closure orders—regardless of the source of Bowersox's claimed authority—infringed their constitutional rights and flouted the court's order enjoining the closing of schools because the court already determined that the authority to close schools resides with DHS, not local health officers, per state statute. Bowersox circumvented this court's prior order by proclaiming a new source of authority to enter the exact same order this court declared she had no authority to make or enforce. In response to petitioners' Emergency Motion, Bowersox argued that "[i]rrespective of this Court's ultimate determination as to its interpretation of a local health officer's authority under Wisconsin Statutes section 252.03, Respondent Bowersox is the local health officer, and a statutory officer, of the City of Racine as defined by Wisconsin Statutes sections 62.09(1)(a) and 250.01(5). She has been empowered by the Racine Common Council to carry certain ordinances into effect, including Safer Racine." In so arguing, Bowersox suggests that a local ordinance can override state law, even though this court had already explained that under governing state statutes, "only DHS is given the power to 'close schools.'" James, S. Ct. Order issued Sept. 10, 2020.

On the very day Bowersox invoked these extraordinary powers, we had just ruled that interpreting the Wisconsin Statutes to confer "carte blanche authority to a local health officer to issue any dictate she wants, without limit, would call into question its compatibility with our constitutional structure." Id.; Bowersox, S. Ct. Order issued Nov. 25, 2020. If the Wisconsin

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<sup>7</sup> The "Safer Racine" ordinance provides in full as follows:

Sec. 54-33. Safer Racine.

(a) The Safer Racine COVID-19 Pandemic Response Standards are adopted and the standards therein apply to business and public activities within the City of Racine. The Safer Racine COVID-19 Pandemic Response Standards shall be published on the City of Racine website and are incorporated into this section as if fully set forth herein.

(b) The common council grants the public health administrator authority to modify the Safer Racine COVID-19 Pandemic Response Standards as necessary to respond to changing COVID-19-related public health conditions. The public health administrator must base any modifications on then-current guidance from the World Health Organization, the Centers for Disease and Prevention, and the Wisconsin Department of Health Services. The public health administrator shall report any such modifications to the common Council, in writing, within five days of the effective date of such modifications.

(c) Sunset. This ordinance shall remain in effect until 11:59 p.m., June 30, 2021, unless extended or earlier terminated or modified by the common council .

Legislature cannot constitutionally confer such limitless powers on a local health officer, it seems Bowersox would have at least paused before asserting that a local governmental body could do so.

Troublingly, the constitution plays no part in the majority's decision to deny petitioners' Emergency Motion. In this order, the majority declares that "[a]llowing petitioners to add claims and parties related to the Safer Racine Ordinance would materially change the scope of this original action proceeding and would take the litigation beyond what we reasonably anticipated when we granted the original action petition." So what? It is not petitioners' fault that Bowersox elected to defy this court's order enjoining her from closing schools. Petitioners allege that respondents, regardless of their claimed source of authority for the school closures, infringed the state constitutional rights of parents to direct the education and upbringing of their children, as well as the state constitutional rights of parents and schools to the free exercise of religion. Petitioners, as well as the people of Wisconsin, deserve to have these monumental issues of statewide significance heard and decided by the state's highest court. Instead, the majority's order denying petitioners' Motion disregards the constitution altogether.

Rather than entertaining the parties' arguments and either enforcing its prior order or recognizing the newly-asserted authority, the majority denies petitioners' Emergency Motion because "a distinguishing feature of this case—an ordinance-based school closure—was not present in James," nor was it presented to this court until Bowersox ignored our order that temporarily enjoined Racine school closures. The majority neglects to mention that no ordinance enacted by the City of Racine addresses school closures by the local health officer or otherwise; therefore, at the time petitioners filed this original action, there would have been no reason whatsoever for petitioners to challenge an ordinance that was silent on school closures. To date, the City of Racine has never passed any ordinance regarding school closures.

Among other consequences, the majority's apathy caused petitioners to suffer the very irreparable harm the court's injunction was entered to prevent, and more broadly signals to litigants that they may defy this court's orders with no reaction whatsoever from the court. The majority thereby harms the court's institutional authority, rendering it a feckless body unwilling to enforce its own orders. While I concur with the majority order insofar as it declares the November 12, 2020 school closure order invalid under Wis. Stat. § 252.03 and under Article I, § 18 of the Wisconsin Constitution, and denies Racine Educators United's motion to intervene, I dissent from the order to the extent it denies petitioners' Motion for Clarification and petitioners' request for a finding of and sanctions for contempt. I join Chief Justice Annette Kingsland Ziegler's concurrence/dissent on the issue of contempt.

I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER and Justice PATIENCE DRAKE ROGGENSACK join this writing.

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Sheila T. Reiff  
Clerk of Supreme Court