

**In the Supreme Court of Wisconsin**

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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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On Petition For Original Action  
Before this Court

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**COMBINED MEMORANDUM IN SUPPORT OF PETITIONERS'  
EMERGENCY PETITION FOR ORIGINAL ACTION AND  
EMERGENCY MOTION FOR TEMPORARY INJUNCTION**

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## ISSUES PRESENTED

1. Whether Dane County's School-Closure Order violates Petitioners' fundamental rights to the free exercise of religion and the liberty right to guide the upbringing of their children, as protected by the Wisconsin Constitution.

2. Whether the School-Closure Order exceeds Dane County's statutory authority.

## INTRODUCTION

Dane County's eleventh-hour closure of in-person private schooling for students in grades 3 through 12 ("School-Closure Order") is an outlier in every respect. It is an outlier among all of Wisconsin's counties, as Dane is the only county to prohibit in-person schooling, even though many other counties have higher COVID-19 rates. It is an outlier among the County's own regulation of other facilities within its borders, as the County continues to permit in-person operations of universities and their crowded dormitories, childcare facilities, daycare centers, bars, movie theatres, and more. The Order is even an outlier from the approach that the County repeatedly told private schools that it would follow until late last Friday, inducing these schools to spend hundreds of thousands of dollars to create safe reopening plans consistent with the County's instructions. The Order also sets the metrics for when private schools may reopen at such a level as to ensure that schools will likely not reopen for months, causing ongoing devastation for children, parents, and schools.

The Order is unconstitutional and unlawful, justifying this Court's use of its original-action authority to take jurisdiction over this case and to issue an emergency injunction. Petitioners also respectfully submit that this Court opining on *both* the constitutional and statutory defects in the Order will provide important guidance to citizens and

Wisconsin public officials, while forwarding the *publici juris* core of this Court's original-action jurisdiction.

The Order violates parents' constitutional rights to religious exercise and to direct the upbringing of their children, as well as the schools' rights to inculcate religious values. As this Court recognized in *Coulee Catholic Schools v. Labor & Industry Review Commission*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868, the Wisconsin Constitution's Freedom of Conscience Clauses give "expansive protections for religious liberty," such that an order burdening religious exercise must pass strict scrutiny. Here, the Order burdens both Petitioner Parents' free-exercise rights to obtain a religious education for their children, and Petitioner Schools' rights to further their religious missions. The County cannot possibly satisfy strict scrutiny. While stopping the spread of COVID-19 is compelling, the School-Closure Order is obviously not narrowly tailored to further that interest, including because it bans schools from reopening where the schools have implemented the County's own safe reopening plans, and because it permits the reopening of colleges, universities, daycare centers, movie theatres, and much more.

The Order also exceeds the County's statutory authority. As a creature of the Legislature, the County has only those powers granted to it by the Legislature. Section 252.03 of the Wisconsin Statutes, in turn, provides that the County may "inspect schools," with *no mention* of closing schools. Wis. Stat. § 252.03(1). That is in direct



contrast to the State Department of Health Services' grant of authority in Section 252.02—*the immediately preceding section*—which provides that this state agency “*may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.*” Wis. Stat. § 252.02(3) (emphasis added). So, under bedrock statutory-interpretation principles, the Department of Health Services has the power to close schools, but the County does not. This division of authority is consistent with the Wisconsin Constitution's primacy of a *state-wide* policy toward the education of its children. Wis. Const. art. X, § 1.

Considerations of irreparable harm and the equities strongly support immediately enjoining this Order, as Petitioners show through the affidavit evidence submitted with this Motion. Petitioners respectfully suggest that a review of the affidavits paints a powerful picture of the spiritual and educational devastation that the County's Order will inflict, if not enjoined. The Order has gutted parents' and schools' ability to provide religious instruction, undermining their mission to give children in-person education, while harming low-income Petitioners who cannot afford to send their kids to learning pods that wealthy parents are taking advantage of. By banning in-person education, the Order prevents Petitioners' children from attending school and, for example, receiving Holy Communion at Mass, confessing their sins to a priest through the Sacrament of Reconciliation, and praying together in the community of fellow students and

teachers. Petitioner Schools stand ready to reopen following careful plans that are consistent with all public-safety guidance, including the County's own guidance as of a week ago.

Given that many of the Petitioner Schools and their Petitioner Parents had planned to start in-person instruction this week, in reliance on the County's own words and orders, and given that the remainder of the schools had scheduled reopening for the week of September 7, **Petitioners respectfully request that this Court issue an emergency temporary injunction by no later than Friday, September 4.** To that end, Petitioners respectfully suggest that the County and any *amici* file their briefs by Monday, August 31, with Petitioners filing any reply brief by Tuesday, September 1.

### **ORAL ARGUMENT AND PUBLICATION**

Given that the School-Closure Order is devastating Petitioners every day that it remains in effect, this Court should not await oral argument to issue an emergency injunction blocking the Order. The importance of the issues justifies oral argument and publication of a precedential opinion in due course thereafter.

### **STATEMENT OF THE CASE**

#### **A. Statewide COVID-19 Closure Orders**

On March 12, 2020, Governor Evers issued his first COVID-19-related Executive Order, declaring a public-health emergency throughout the State and directing the

Department of Health Services to issue “all necessary and appropriate measures” to combat COVID-19’s spread. A-24; *Wis. Legislature v. Palm*, 2020 WI 42, ¶5, 391 Wis. 2d 497, 942 N.W.2d 900. That state of emergency expired 60 days later on May 11, 2020, and the Legislature did not vote to extend this 60-day period under Wis. Stat. § 323.10. The day after this first COVID-19 order, Secretary-Designee Andrea Palm, the head of the Wisconsin Department of Health Services, issued her own emergency order mandating, as relevant here, “the closure of all public and private Wisconsin schools for purposes of [in-person] pupil instruction,” with an anticipated reopening date of April 6, 2020. *See* Emergency Order #1 (March 13, 2020).<sup>1</sup>

On March 24, 2020, Governor Evers and Secretary-Designee Andrea Palm issued the “Safer at Home” Order, imposing certain restrictions and extending the closure of “public and private K–12 schools” for in-person pupil instruction to April 24, 2020. Emergency Order #12 at 3, 16 (March 24, 2020);<sup>2</sup> *see Palm*, 2020 WI 42, ¶ 6. The Governor and Secretary-Designee rested this “Safer at Home” order on the authority in Wis. Stat. § 252.02(3) and (6), the statute delineating the Department of Health Services’ powers and

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<sup>1</sup> Available at <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx> (all websites last accessed Aug. 27, 2020).

<sup>2</sup> Available at <https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf>.

duties, among other authorities. Emergency Order #12 at 2; *see Palm*, 2020 WI 42, ¶¶ 5–9.

On April 6, 2020, the Governor issued another Executive Order that “purport[ed] to, among other things, suspend in-person voting for the [Spring Primary] election” scheduled for the following day. Order at 1, *Wis. Legislature v. Evers*, No. 2020AP608-OA (Apr. 6, 2020). This Court, exercising its original jurisdiction, enjoined most of that order the same day that it was issued. *Id.*

On April 16, 2020, Secretary-Designee Palm issued another “Safer at Home” Order, which generally purported to extend the core restrictions of the original “Safer at Home” Order for another month, until May 26, 2020. Emergency Order #28 at 21 (Apr. 16, 2020);<sup>3</sup> *Palm*, 2020 WI 42, ¶ 7. This order also mandated that “[p]ublic and private K–12 schools shall remain closed for pupil instruction . . . for the remainder of the 2019–2020 school year,” although “[s]chools may continue to facilitate distance learning or virtual learning.” Emergency Order #28 at 5. Secretary-Designee Palm again purported to rely on Wis. Stat. § 252.02 as the legal basis for this order. Emergency Order #28 at 2; *Palm*, 2020 WI 42, ¶ 7.

This Court invalidated most of Secretary-Designee Palm’s extension of the “Safer at Home” Order in *Legislature v. Palm*. 2020 WI 42, ¶ 3. However, the Court did not apply

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<sup>3</sup> Available at <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx>.

its holding to the order’s provision closing schools for in-person instruction for the remainder of the 2019–20 term. *Id.* ¶ 3 n.6. Thus, that school-closure provision ended by the order’s own terms on the last day of each school’s respective 2019–20 term, which generally fell in late May through June. *See* Wis. Dep’t Pub. Instr., *Public School Calendars*.<sup>4</sup>

The Governor again ordered another state of emergency due to COVID-19 via Executive Order on July 30, 2020. Executive Order #82 (July 30, 2020).<sup>5</sup> That same day, the Governor issued his “mask mandate,” requiring all individuals over age five to wear a “face covering” whenever they are near individuals not of their household and indoors or otherwise outside of the home. Emergency Order, Face Coverings at 2 (July 30, 2020).<sup>6</sup> Certain Wisconsin residents and taxpayers have recently challenged the Governor’s extension of the state of emergency in the Polk County Circuit Court. *Lindoo et al. v. Evers*, 2020-CV-000219 (August 25, 2020).

On August 19, the Department of Health Services released its most-current guidance on the reopening of schools for the fast-approaching school year, Wis. Dep’t of Health

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<sup>4</sup> Available at <https://dpi.wi.gov/cst/data-collections/school-directory/calendar> (link to 2019–2020 Excel file).

<sup>5</sup> Available at <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx>.

<sup>6</sup> Available at <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx>.

Servs., *DHS Releases School Guidance to Assist Local and Tribal Health Departments* (Aug. 19, 2020);<sup>7</sup> A-27–62. This guidance recognizes that “[s]chool closures may have detrimental impacts on [students’] educational growth, access to school lunch and special education programs, and school-based health services,” A-31, and recommends a variety of safety measures for schools to take to reduce the spread of COVID-19 if they reopen, A-31–33. For example, the guidance recommends regular “disinfection of the environment”; prompt and aggressive “prevention and control measures” when symptoms are spotted; social distancing and limiting close interactions; and other measures like separating students into smaller cohorts to reduce contacts, using face coverings, frequent hand washing, using physical barriers, and maximizing time outdoors. A-30.

## **B. Dane County’s Emergency Orders**

### **1. Dane County Emergency Orders #1–#8**

“Public Health Madison & Dane County” is the local health department for Dane County and has issued nine Emergency Orders related to COVID-19. *See* Public Health Madison & Dane County (“PHMDC”), *Current Order*.<sup>8</sup>

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<sup>7</sup> Available at <https://www.dhs.wisconsin.gov/news/releases/081920.htm>.

<sup>8</sup> Available at <https://publichealthmdc.com/coronavirus/forward-dane/current-order> (bottom of page).

The County’s first order—issued immediately after this Court decided *Palm*—largely “adopt[ed] the provisions contained within” the “Safer at Home” order that *Palm* invalidated. Order of Public Health Madison & Dane County (May 13, 2020).<sup>9</sup> This order purported to close public and private K–12 schools even though: (1) the County’s emergency-closure statute does not mention the authority to close schools; and (2) schools remained closed under the DHS “Safer At Home” order, under this Court’s decision in *Palm*.

The County’s second order continued to mandate that “[p]ublic and private K–12 schools shall remain closed for [in-person] pupil instruction”; provided that universities may remain open only to facilitate distance learning and perform essential activities and research; and allowed “[c]hild care settings”—daycares, licensed recreational and educational youth camps, and certain public-school programs—to remain open, limited to 50 children per program. PHMDC Emergency Order #2 at 3, 13, 16 (May 18, 2020).<sup>10</sup>

The County’s third and fourth emergency orders again maintained the closure of K–12 schools, but then allowed universities to “determine policies and practices for safe operations,” including by opening dormitories with “strict policies that ensure safe living conditions[,]” so long as these

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<sup>9</sup> Available at [https://publichealthmdc.com/documents/2020-05\\_Adopting\\_Safer\\_at\\_Home.pdf](https://publichealthmdc.com/documents/2020-05_Adopting_Safer_at_Home.pdf).

<sup>10</sup> Available at [https://publichealthmdc.com/documents/2020-05-18\\_Order\\_2.pdf](https://publichealthmdc.com/documents/2020-05-18_Order_2.pdf).

universities “maintain[ed] physical distancing to the greatest extent possible.” PHMDC Emergency Order #3 at 3 (May 22, 2020);<sup>11</sup> PHMDC Emergency Order #4 at 3 (June 5, 2020).<sup>12</sup> These orders also removed the 50-child cap on the opening of child-care settings from the second order, replacing it with other requirements like a 15-child-per-classroom limit. PHMDC Emergency Order #3 at 3; PHMDC Emergency Order #4 at 3. The County issued its fourth emergency order to remedy overtly discriminatory capacity limits on religious entities, thus avoiding a threatened religious-liberty lawsuit from the Roman Catholic Diocese of Madison. *See* A-63–68.

In its fifth emergency order, issued on June 12, 2020, the County provided that “[p]ublic and private K–12 schools *are open* for [in-person] pupil instruction . . . as of July 1, 2020,” so long as the schools “abide by” detailed reopening plans that the County required the schools to develop. A-73–74 (emphasis added).<sup>13</sup> To hold in-person instruction, these schools had to develop and implement: “a written hygiene policy and procedure”; “a written cleaning policy and procedure”; “a written protective measure policy and procedure,” which mandates social distancing “whenever

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<sup>11</sup> Available at [https://publichealthmdc.com/documents/2020-05-22\\_Order\\_3.pdf](https://publichealthmdc.com/documents/2020-05-22_Order_3.pdf).

<sup>12</sup> Available at [https://publichealthmdc.com/documents/2020-06-05\\_Order\\_4.pdf](https://publichealthmdc.com/documents/2020-06-05_Order_4.pdf).

<sup>13</sup> Available at [https://publichealthmdc.com/documents/2020-06-12\\_Order\\_5.pdf](https://publichealthmdc.com/documents/2020-06-12_Order_5.pdf).



possible,” requires employees to wear face coverings (provided by the school if needed), and ensures that “student and staff groupings are as static as possible” to avoid “mixing” groups together; “a written action plan for a COVID-19 outbreak at the school”; and staff training on these procedures. *Id.* This order also maintained the provisions for the reopening of universities in the third and fourth orders, A-74, and expanded the opening of “[c]hild care settings”—now labeled “[c]hild care and youth settings”—to include “sports activities,” A-72.

The sixth, seventh, and eighth orders largely continued this status quo, A-85–87; A-98–100; PHMDC Emergency Order #8 at 3–7 (July 7, 2020),<sup>14</sup> although these orders further regulated classroom capacities for childcare and youth settings. The eighth order also imposed a face covering requirement in the County that is largely consistent with the Governor’s mask mandate discussed above. *See* PHMDC Emergency Order #8 at 3; *supra* p. 8.

## **2. Emergency Order #9, Including The School-Closure Order**

The School-Closure Order, issued as part of Emergency Order #9, provides that *only* “grades kindergarten through second grade (K-2)” may open for in-person education, while grades 3–12 must remain closed, both for “[p]ublic and private

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<sup>14</sup> Available at [https://publichealthmdc.com/documents/2020-07-07\\_Order\\_8.pdf](https://publichealthmdc.com/documents/2020-07-07_Order_8.pdf).

school buildings and grounds.” A-12. So, private schools may only provide virtual learning to their students in those grades. *Id.* The County issued this Order after business hours on Friday, August 21, with an effective date of Monday, August 24 at 12:01 a.m. Many private schools—including some Petitioner Schools—had been planning for months to reopen on that Monday or shortly thereafter. PHMDC, *Schools Required To Start Grades 3-12 Virtually* (Aug. 21, 2020, 5:18 p.m.);<sup>15</sup> A-110–11.

Along with the Order, the County released “school metrics” that it will use “to guide decisions for reopening all grades for in-person instruction.” A-116. Under these metrics, “[i]n order to *consider* reopening grades 3–5, Dane County must sustain at or below a 14-day average of 39 cases per day for four consecutive weeks.” *Id.* (emphasis added). For grades 6–12, they “may be able to return to in-person instruction after an *additional* four weeks at or below a 14-day average of 19 cases per day.” *Id.* (emphasis added).

While Executive Order #9 closes schools, it allows numerous other activities. Executive Order #9 continues to allow all higher-education institutions to open, even as to their dormitories. A-14. The Order also continues to allow “[c]hild care and youth settings” to open, which includes “all licensed, recreational, and educational camps, licensed and

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<sup>15</sup> Available at <https://publichealthmdc.com/news/schools-required-to-start-grades-3-12-virtually>.

certified childcare providers, unregulated youth programs, licensed-exempt public school programs, and four-year old kindergarten (4k).” A-11. The Order allows public and private 3–12 grade schools to use their buildings “as child care and youth settings.” A-12. So, under the Order itself, a private 3–12 school may welcome 15 students in each classroom to run a recreational or education camp, a daycare, and youth program, but may not provide these students with in-person religious instruction. A-11–14. And the Order allows scores of other businesses to conduct in-person operations, including bars, salons, barber shops, gyms, fitness centers, water parks, pools, bowling alleys, and movie theaters, subject to various capacity limitations and social-distancing guidelines. A-14–21.

Consistent with previous orders, the County may enforce violations of Emergency Order #9 with up to \$1,000 in penalties, A-22 (citing Madison Municipal Ordinance Sec. 7.05(6),<sup>16</sup> and Dane County Ordinance Sec. 46.40(2)), and “[e]ach and every day of violation shall constitute a separate offense,” Madison Mun. Ord. § 7.05(7).

Given the incongruous nature of the School-Closure Order aspect of Emergency Order #9, businesses have capitalized on parents’ need to ensure that their students complete the virtual-learning curriculum, while still fulfilling

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<sup>16</sup> Available at [https://library.municode.com/wi/madison/codes/code\\_of\\_ordinances?nodeId=COORMAWIVOICH1--10\\_CH7PUHE\\_7.05INH\\_ECOCCPROWABHENU](https://library.municode.com/wi/madison/codes/code_of_ordinances?nodeId=COORMAWIVOICH1--10_CH7PUHE_7.05INH_ECOCCPROWABHENU).

their own employment obligations. Businesses like Sky Zone, which operates a trampoline park, have created a “virtual schooling support program” where students will complete their virtual-learning curriculum at the park and then take “fun breaks” in the park with other students, all under the supervision of Sky Zone’s “Sky Counselors.” A-125–27; *see also* A-129–31 (similar program offered at martial-arts center). Parents must pay a fee to enroll their students in these virtual-learning-monitoring programs. *E.g.*, A-125–27.

### **3. The School-Closure Order Makes Dane County An Outlier**

Dane County’s School-Closure Order makes it the only County in the State to have closed all in-person schooling, including private schooling. Other counties are broadly permitting in-person schooling. Even Milwaukee County—home to the largest school district in the State, *see* MPS, *District Enrollment And Demographics*,<sup>17</sup> and a much higher COVID-19 rate than Dane County, A-134–69—attempted to close all private schools for the Fall, *see* City of Milwaukee Phase 4.0 Order (July 17, 2020),<sup>18</sup> and then modified its plan

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<sup>17</sup> Available at <https://mps.milwaukee.k12.wi.us/en/District/About-MPS/School-Board/Office-of-Accountability-Efficiency/Public-Items-Emjay/District-Enrollment.htm>.

<sup>18</sup> Available at <https://city.milwaukee.gov/ImageLibrary/MKE-Health1/COVID-19/MMFSP4Update7.17.20.pdf>.

to “allow” certain reopenings after swift public outcry. A-163–70; City of Milwaukee Phase 4.1 Order at 10 (July 30, 2020).<sup>19</sup>

Dane County issued its Order despite the recommendations from numerous entities to open schools for in-person instruction in the Fall. The benefits of reopening for in-person education are profound, given this educational method’s clear superiority over virtual learning. *E.g.*, A-171–85; A-187–92. Thus, the Centers for Disease Control and Prevention (“CDC”) have stated that “[e]veryone’s goal” should be “to prioritize the reopening of schools as safely and as quickly as possible given the many known and established benefits of in-person learning.” CDC, *Operating Schools During COVID-19: CDC’s Considerations* (Aug. 21, 2020).<sup>20</sup> And the American Academy of Pediatrics also “strongly advocates” for the “goal of having students physically present in school.” A-195. The Wisconsin Department of Public Instruction has issued interim guidance for keeping school staff and students safe in schools, consistent with the DHS Guidelines discussed above. Wis. Dep’t of Pub. Instr., *Interim*

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<sup>19</sup> Available at <https://city.milwaukee.gov/ImageLibrary/MKE-Health1/COVID-19/MMFSOrder4.1-7.30.20.pdf>.

<sup>20</sup> Available at [https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Fschools-childcare%2Fguidance-for-schools.html](https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Fschools-childcare%2Fguidance-for-schools.html).

*COVID-19 Infection Control And Mitigation Measures For Schools* (Aug. 5, 2020).<sup>21</sup>

**C. Petitioner Schools Are Prepared To Reopen For Safe, In-Person Instruction To Continue The Religious Education Of Their Students**

1. Petitioner St. Ambrose Academy is a classical Catholic school located in Madison, with 111 students in grades 6–12. A-316. St. Ambrose’s student body comprises students from all socioeconomic backgrounds, with more than half of school families receiving significant tuition assistance or an employee discount. *Id.* (“St. Ambrose Academy has not turned away interested families for lack of ability to pay[.]”). Petitioner Parents with children at St. Ambrose Academy have emphasized the importance of this financial aid. *See* A-547; A-509; A-503; A-498. St. Ambrose Academy’s mission is to “assist parents in the formation of their children by providing a classical education rooted in the Catholic faith.” A-316. To that end, the school deeply incorporates Catholicism, providing students with regular access to the Sacraments, including the opportunity to receive Holy Communion at weekly Masses and frequent confessions before a Catholic priest, frequent communal prayer throughout the day, and opportunities to go on retreats and service missions throughout the area. A-317–18. Further,

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<sup>21</sup>Available at [https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Interium\\_COVID-19\\_Infection\\_Control\\_and\\_Mitigation\\_Measures\\_for\\_Schools.pdf](https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Interium_COVID-19_Infection_Control_and_Mitigation_Measures_for_Schools.pdf).

teachers closely mentor students to foster a deep love of Jesus Christ and encourage them to imitate a life of virtue and service to Christ and His Church. A-317. Petitioner Parents from St. Ambrose Academy all send their children to this school for religious reasons, and emphasize the importance of in-person instruction to St. Ambrose Academy's educational model, including its religious education. A-501; A-496; A-507; A-395–96; A-545; A-487.

Petitioner St. Francis Xavier Congregation's school is a "Christ-centered environment that develops the student spiritually, intellectually, emotionally, and socially." A-512–13. St. Francis Xavier pursues this Catholic mission through daily religion classes, weekly Mass and Adoration of the Eucharist, and prayer throughout the day. *Id.* The school serves grades K through 8 and serves rural families and single parent homes, and ensures that all families who desire an education at the school will receive one, regardless of their ability to pay tuition. A-512. Parents of St. Francis Xavier students value its "essential religious education" and its generosity with tuition aid, including Petitioner Parent Scott. A-584, A-586. She is a single mother, working "multiple lower-income jobs," who specifically chose St. Francis Xavier for her children because of its religious education. A-584. She receives financial aid from St. Francis Xavier, without which her children would not be enrolled. A-587.

Petitioner Immaculate Heart of Mary Congregation is located in Monona and has a school of approximately 174

students, who attend early-childhood programs through grade 8. A-551–52. Its mission is “to go make disciples of all nations,” and its students attend Mass each week, pray in Adoration before the Blessed Sacrament, engage in works of service, and strive “to literally be Jesus’ disciples in the world.” A-551–52. Immaculate Heart of Mary “has made great efforts to reach out to Hispanic families,” and has a scholarship program that “offers a Catholic education to anyone who desires it.” A-551. Petitioner Parent Aubut’s children attend Immaculate Heart of Mary because of its religious education, and she receives essential financial aid from the school so that her children may enroll. A-270, A-273–74.

Petitioner Blessed Trinity Congregation seeks to provide its students with a “holistic and Christ-centered education,” which includes praying throughout the day, attending Mass twice each week as a school, and studying the Bible and other Catholic texts. A-277–78. The school offers Catholic education to grades 4K through 8 and has students from both rural and urban areas. A-277. Parents send their children to Blessed Trinity specifically for its religious education, including Petitioner Parent Hellenbrand. A-491.

Petitioner Blessed Sacrament Congregation is located in Madison and has students in grades 3K through 8. A-402. Blessed Sacrament serves students of all ethnic and socioeconomic backgrounds and also provides scholarships for needy families to attend its school. *Id.* The school offers “a



robust and complete religious education program,” where students attend Mass weekly, pray throughout the day, visit the Church, and receive the Sacrament of Reconciliation. A-402–03. Petitioner Parent Childs sends her daughter to this school specifically to receive a religious education, and she receives necessary financial aid from the school in order to do so. A-419.

Petitioner St. Peter’s Congregation has 60 students from all socioeconomic backgrounds in pre-kindergarten through fifth grade, and it has a “strong tradition of Catholic education.” A-451. Its students attend Mass three times per week, with the school offering the Sacrament of Confession before each Mass, and students have the opportunity to attend Adoration before the Blessed Sacrament weekly. A-452. Parents of St. Peter students are drawn to the school specifically for its excellent Catholic education, A-451, including Petitioner Parent Kruchten, A-538–39. Petitioner Parent Kruchten’s family receives necessary financial aid from the school, without which her children could not be enrolled. A-541. Moreover, Petitioner Parent Kruchten’s spouse lost his job due to COVID-19, which further strained her family’s finances. A-541–42. Nevertheless, the family stretched their budget to purchase the necessary uniforms and school supplies for in-person education for the coming school year. *Id.*

Petitioner St. Maria Goretti Congregation is located in Madison and enrolls approximately 400 students in

kindergarten through 8th grade, from diverse economic backgrounds. A-422. Its mission is “rooted in faith,” “academic excellence,” and “service to the community.” A-422. The school’s students engage in daily prayer, have the priest in their classroom daily, attend Mass twice each week, and have access to Adoration, Confession, and other regular devotions. A-422–23. Petitioner Parent Statsick has two children at St. Maria Goretti Congregation, which she chose specifically for its Catholic education. A-590–91.

Petitioner St. Dennis Congregation is located on Madison’s east side, and it has a diverse student body of 265 students in grades K4 through 8. A-291. St. Dennis invites students and their families to be educated and nurtured through Gospel values and academic excellence, and to that end has regular prayer throughout the day and a weekly Mass or prayer in its parish Church. Petitioner Parent Weigel-Sterr has a child attending St. Dennis, and she chose the school for its religious education. A-597.

Petitioner Schools’ religious mission depends on in-person attendance to be fully realized. As St. Ambrose explains, for example, the “*community experience . . . is a mark of educational activity,*” thus, the “spirituality of communion must become the living breath of the educational community.” A-318–19 (quoting Congregation for Catholic Education, “Educating Together in Catholic Schools”); *see, e.g.*, A-427–28; A-591–92; A-512–13; A-585; A-451–52.

Still, when the COVID-19 pandemic initially spread, Petitioner Schools made the difficult decision to switch from in-person instruction to distance learning, A-319–20; A-423; A-513; A-291–92; A-452; A-278, with many schools making this decision even before the State announced mandatory school closures, A-319–20; A-423; A-513; A-291–92.

That virtual-learning curriculum, while as successful as such a program can be in the circumstances, was simply no match for these schools’ in-person educational experience. As Plaintiff Parents explain, they already have witnessed firsthand the setbacks to their children’s development in the prior school year, especially in instances where those students suffered from any learning disabilities that were further hindered by mandated remote learning. *See, e.g.*, A-503 (explaining harm to educational development of 4th grader with special language processing needs who has now “fall[en] behind in her development of reading comprehension skills”); A-395–96 (noting that “[r]emote learning severely hinders the effectiveness of [the dialogical] approach” to education); A-508–09 (noting child’s ADHD has “caused additional stress and anxiety” where difficult to focus on each teacher’s remote instruction); A-539–40 (parent describing children’s “struggle[ ] to stay focused and engaged” when forced to spend many hours a day in front of a screen and that difficulties posed by distance learning “caused my children to fall behind in their studies”); A-600 (difficulties with remote learning caused children to fall behind in their studies in the Spring,

impacting “their self-esteem and sense of mastery of the materials”); A-593–94; A-503.

Given this experience from their families and in light of their religious-education mission, all Petitioner Schools have prepared extensive reopening plans to ensure the safe return of their students for the upcoming term, consistent with the public-health guidelines issued—and repeatedly updated—by the County, A-321–22, A-325–26, A-329–59; A-292–95, A-299–314; A-404–07, A-410–15; A-279–81, 284–89; A-424–27, A-430–49; A-453–57, A-460–85; A-514–17, A-520–37; A-553–57, A-561–76. These reopening plans generally establish policies and procedures with respect to hygiene, cleaning, social distancing and protective measures. A-322–25; A-293–95; A-405–07; A-280–81; A-425–26; A-454–56; A-515–17; A-554–56.

Each of these schools’ plans, and the other improvements that the schools made in response to the County’s orders, are described immediately below.

For St. Ambrose Academy, its reopening plan includes frequent handwashing, hand sanitizer in each classroom, and cleaning and disinfecting protocols throughout the building, including high-touch areas. A-322–23. Students and staff must wear face coverings, as required by state and local orders, with the exemptions and exceptions detailed therein, A-323–24, and the school will provide personal protective equipment to all staff, A-323. There are additional protocols for sanitizing if an individual infected with COVID-19

occupies the premises, A-323, and St. Ambrose Academy rented an additional nearby building to nearly double available classroom space, thereby allowing for social distancing throughout the school. A-324. During its in-person summer workshop for 15 students who attended class from 10 a.m. to 2 p.m. for five days, the school successfully implemented a “test run” of plan implementation. A-326. St. Ambrose Academy expects to spend over \$80,000 in developing its reopening plans, plus personnel-time costs. A-321–22.

For St. Francis Xavier, its reopening plan requires all staff and students to wear reusable face coverings that are provided by the school and washed daily. A-515–16. The plan also requires everyone to practice social distancing, which St. Francis Xavier has helped facilitate by reasonably limiting the capacity and layout of classrooms and public spaces and modifying schedules for daily activities to limit student movement and interaction throughout the building. A-515–16. The school has also invested significantly in improving safety and reducing the possibility of COVID-19 transmission, including “adding additional hand washing sinks and stations, upgrading HVAC system filters (and keeping windows open and ceiling fans on whenever possible), and purchasing individual supplies and equipment that will not be shared between students/cohorts.” A-516. Finally, the school hosted a week-long in-person summer camp for a group of 10 middle school students under the protocols adopted in

the reopening plan. A-517. The program provided “the critical educational services [the] students so desperately needed without resulting in a single case of COVID-19 on the school campus.” A-517. St. Francis Xavier has invested over \$7,500 in its reopening plan. A-514.

For Immaculate Heart of Mary, its reopening plan includes training staff and students on proper prevention techniques, including frequent hand washing, hand sanitation protocols, social distancing, and cough and sneeze etiquette. A-554–55. Students and staff must wear reusable face coverings that are provided by the school and disinfected daily. *Id.* To aid students and staff in their mandatory social distancing, the school reasonably limited the capacity and layout of classrooms and public spaces and modified schedules for daily activities to limit student movement and interaction throughout the building. *Id.* To protect and improve the safety of everyone in the building, the school has significantly altered its facilities, including: removal of excess furniture and shared supplies and objects; replacing water fountains with bottle-filling stations; addition of partitions in the school office; purchase of materials for individual disposable food service/bag lunches; creation of separate spacing for classes on the playground; providing increased air circulation and ventilation; and a thorough plan for student drop off and pick-up. A-555–56. Finally, implementing the reopening plan’s policies and protocols, the school hosted a Summer camp program where five to twelve children, entering first grade

through sixth grade, “could safely attend a full day of programming and activities that kept them active and engaged.” A-557. Immaculate Heart of Mary also facilitated over 45 middle and high school students for a two-week mission trip in July, which, again due to the staff and participants following the applicable public orders and strict protocols of the reopening plan, was successful in keeping everyone healthy and safe. A-558. Immaculate Heart of Mary has spent over \$17,500 on its reopening plan. A-553.

For Blessed Trinity School, its reopening plan requires all students and staff to practice social distancing, frequently wash and sanitize hands, and wear face coverings indoors. A-280. To assist in that effort, the school will provide face coverings, hand sanitizer, and disinfecting wipes and reasonably modify schedules for daily activities to limit student movement and interaction throughout the building. *Id.* It also will screen any entrant to its school for a fever, asking anyone with a temperature of over 99.5 degrees to return home. A-280–81.

For Blessed Sacrament Parish and School, its reopening plan includes training staff and students on proper prevention techniques; requiring them to wear facemasks at all times; and practice social distancing—which the school has facilitated by limiting the capacity and layout of classrooms and public spaces and modifying schedules to limit student movement and interaction. A-405–06. The school has also made numerous alterations to its facilities to improve safety

and reduce the possibility of COVID-19 transmission, including: implementing smaller class sizes in separated learning cohorts, additional hand sanitizing stations throughout the school, a safety procedure to close off areas used by those who are sick, and staggered start and pick up times. A-406–07. Blessed Sacrament has spent over \$70,000 on this plan. A-404–05.

For St. Peter Catholic Parish & School, its reopening plan requires all students and staff to wear face coverings, provided by the school and disinfected daily, and to practice social distancing facilitated by the school’s modified schedules. A-454–55. The school will also train staff and students on proper prevention techniques, such as frequent handwashing, social distancing, and cough and sneeze etiquette. *Id.* Further, the school has devoted significant resources to improve safety by moving classes outside, replacing drinking fountains with bottle-filling stations, removing furniture and other shared objects, requiring daily temperature checks, limiting the number of parents or other guests in school building, and creating an isolation room for sick individuals. A-455–56. Finally, implementing the reopening plan’s policies and protocols, the school hosted three separate in-person summer religious programs, where during 3 weeks of sessions, 89 students participated. A-457. These summer programs provided “the critical educational services [the] students so desperately needed without resulting in a single case of COVID-19 on the school campus.”



*Id.* St. Peter’s has spent over \$31,400 on its reopening plan. A-453–54.

For St. Maria Goretti Catholic Church, its reopening plan requires all students and staff to wear face coverings at all times and to practice social distancing, which St. Maria Goretti will facilitate by reasonably limiting the capacity of classrooms and public spaces. A-425. Students will also be required to wash their hands upon entry into the classrooms and all other appropriate times. *Id.* The school has made alterations to its facilities, including: marking off hallways, removing nonessential furniture, converting dining halls into classrooms, and expanding entrances. A-425–26. Finally, implementing the reopening plan’s policies and protocols, the church “has resumed normal religious services since June 6, 2020 without a known case on the parish campus.” A-427. The school also hosted two mission weeks for approximately 35 students, who stayed on campus from morning until late evening, which provided “the religious instruction opportunities our students so desperately needed without resulting in a single case of COVID-19 on the campus.” *Id.* St. Maria Goretti has spent over \$90,000 on its reopening plan. A-424.

And, for St. Dennis School, its reopening plan requires all students and staff to wear face coverings at all times and wash their hands with soap and water and use hand sanitizer upon entry into the classrooms. A-293–94. The school has purchased “electro-spray machines to disinfect classrooms

during lunch hours and overnight,” and disinfecting wipes are provided and used to regularly clean frequently touched surfaces. *Id.* The school has also helped facilitate social distancing by reasonably limiting the capacity of classrooms and public spaces and modifying schedules for daily activities to limit student movement and interaction throughout the building. *Id.* The school has also made numerous alterations to its facilities to improve safety and reduce the possibility of COVID-19 transmission, including: converting water fountains into bottle refill stations, creating outdoor teaching areas, removing rugs and other high contact items, installing disinfectant machines in every room, plexiglass in public office spaces, air filters in different classrooms, and upgrades on exhaust fans for the gymnasium and bathroom facilities. A-294–95. When the school implemented these policies and protocols during the summer day care and extended care programs with an average of 24 kids per week in attendance, the school had no incidents of a COVID-19 positive test result on the school campus. A-296–97. St. Dennis has spent over \$30,000 on its reopening plan. A-293.

The thoroughness of these plans is why Petitioner Parents uniformly support their schools’ reopenings, knowing that their children will learn in-person, in a safe environment. A-399; A-489; A-498; A-504; A-509; A-548; A-274; A-419–20; A-493; A-542–43; A-588; A-594; A-600–01.

2. On Wednesday, August 26, 2020, Petitioners delivered a letter to the County threatening this legal action

if the County fails to rescind Emergency Order #9's school-closure provisions by noon, today, Friday, August 28, 2020. As of this filing, Petitioners have received no response, thus they have filed their Emergency Petition for an Original Action and Emergency Motion for Temporary Injunctive Relief with this Court, in original-jurisdiction posture.

### STANDARD OF REVIEW

This Court may grant temporary-injunctive relief, exercising its original-jurisdiction, when the petitioner demonstrates: “(1) a reasonable probability of success on the merits; (2) a lack of adequate remedy at law; (3) that the movant will suffer irreparable harm in the absence of an injunction; and (4) that a balancing of the equities favors issuing the injunction.” *Evers*, No. 2020AP608-OA at 4 (citing *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)); *see also* Order Granting Temporary Injunctive Relief, *Jefferson v. Dane County*, No. 2020AP557-OA (Wis. Mar. 31, 2020) (granting temporary injunction in original-jurisdiction posture against Dane County). Here, Petitioners' likelihood of success on the merits on their two claims depends largely on questions of law—namely, correct interpretation of the Wisconsin Constitution's free-exercise and parental-rights protections, and of Wis. Stat. § 252.03—which this Court would review de novo in appellate-jurisdiction posture. *E.g.*,

*Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 23, 383 Wis. 2d 1, 914 N.W.2d 678.

## ARGUMENT

### I. This Case Presents Urgent Legal Issues That Warrant This Court’s Original Jurisdiction

A. When considering whether to grant a Petition for an Original Action, Wis. Const. art. VII, § 3, this Court takes into account several factors, most importantly whether “the questions presented are of [great, statewide] importance,” such as issues of “*publici juris*”—that is, of rights belonging to the public. *Petition of Heil*, 230 Wis. 428, 443–46, 284 N.W. 42 (1939); *Wis. Prof’l Police Ass’n v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807 (“significantly affect[ ] the community at large”). This Court also considers whether the Petition raises any “exigency,” *Heil*, 230 Wis. at 447, which includes considering whether failure to exercise original jurisdiction will cause the petitioner “great and irreparable hardship,” *Application of Sherper’s, Inc.*, 253 Wis. 224, 228, 33 N.W.2d 178 (1948). Finally, the Court is more likely to grant a Petition where it may reach “a speedy and authoritative resolution,” due to limited material factual disputes. *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 683, 264 N.W.2d 539 (1978); *see also Bartlett v. Evers*, 2020 WI 68, ¶ 25, n.11, 945 N.W.2d 685 (opinion of Roggensack, C.J.).

This Court has now three times held that unlawful executive action associated with COVID-19 justify this Court’s exercise of its original jurisdiction, under the factors

discussed above. *Evers*, 2020AP608-OA at 4; *Palm*, 2020 WI 42, ¶ 11; *Jefferson*, No. 2020AP557-OA at 2–3.

B. This Petition plainly warrants this Court exercising its original-action jurisdiction.

Petitioners’ constitutional claims raise legal questions that invoke the most fundamental of *publici juris* rights, *Heil*, 230 Wis. at 443–46, namely, the right to the free exercise of religion, *see Coulee Catholic Schools*, 2009 WI 88, ¶¶ 32–33; *see also State v. Yoder*, 49 Wis. 2d 430, 437, 182 N.W.2d 539 (1971), and the right of parents “to direct the upbringing and education of children under their control,” *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶ 15, 387 Wis. 2d 1, 927 N.W.2d 486 (citation omitted); Wis. Const. art. I, § 1. By prohibiting Petitioner Schools from providing in-person education—including as to core religious studies and practices—to Petitioner Families, the Order violates Petitioners’ fundamental free-exercise and parental rights, which violations justify immediate consideration from this Court. *Infra* Part II.A.1. The threat of these fundamental-rights violations transcends Dane County and extends to the State as a whole. *Heil*, 230 Wis. at 443–46; *Lightbourn*, 2001 WI 59, ¶ 4. Whether private schools may reopen, and stay reopened, for the already-begun school term is deeply consequential. Without an authoritative resolution on the legality of the County’s Shutdown Order here, that Order will become a roadmap for counties in every part of the State to deprive parents of their constitutional rights.

Petitioners’ statutory claim—whether *any* Wisconsin county in the State may lawfully order the closure schools, or whether such authority lies with the Department of Health Services alone, *infra* Part II.A.2—likewise raises an important *publici juris* question, *Heil*, 230 Wis. at 443–46. Counties across the State may look to Dane County’s outlier order as a guide to close the private schools within their boundaries. Thus, these counties and “the community at large” would benefit from this Court deciding now whether a county possesses the statutory authority to issue such shutdown orders. *Lightbourn*, 2001 WI 59, ¶ 4.

Beyond the fundamental importance of the issues raised in the Petition, this case unquestionably involves extreme “exigency.” *Heil*, 230 Wis. at 447. For many Petitioner Schools, the coming school year is fast approaching—just days away from the date of this filing. A-279-80 (September 1, 2020); A-559 (same); A-514 (same); A-316 (September 8, 2020); A-424 (same). For Petitioners St. Dennis School, St. Peter School, and Blessed Sacrament School, *the school year has already begun*. A-293 (August 24, 2020); A-454 (same); A-404–05 (August 26, 2020). Given this timeline—caused *solely* by the County’s eleventh-hour Order—there is no way for Petitioners to obtain a “prompt and authoritative” ruling from this Court through the ordinary course of litigation. *Citizens Utility Bd. v. Klauser*, 194 Wis. 2d 484, 488 n.1, 534 N.W.2d 608 (1995); *Application of Sherper’s*, 253 Wis. at 228. Indeed, this case raises the

same exigencies as the other COVID-19-related cases that this Court has recently decided in original-action posture, all of which invalidated unlawful emergency executive action like the Order here. *See Evers*, 2020AP608-OA at 4; *Palm*, 2020 WI 42, ¶ 11; *Jefferson*, No. 2020AP557-OA at 2–3.

Finally, the Court may resolve Petitioners’ claims without need for a “fact-finding procedure.” *Klecza*, 82 Wis. 2d at 683. Petitioners’ claims turn on questions of law, dealing with the proper interpretation of the Wisconsin Constitution’s free-exercise and parental-rights protections, and the plain-text meaning of Section 252.03. *See infra* Part II.A. The material facts that Petitioners have presented in support of these merits-based arguments are not subject to any reasonable dispute, such as the objective features of Emergency Order #9 and affidavits from Petitioner Families detailing the importance of in-person instruction to their sincere religious beliefs. *See infra* pp. 37–39. Similarly, the actual Petition for Original Action also limits its factual claims to these kinds of factual allegations, which are not subject to genuine factual dispute. While the argument section of this Motion includes cites of additional factual materials *in the irreparable harm and equities sections, infra* Part II.B, the need for such facts about actual harms and benefits in deciding the equitable portion of a motion for temporary injunction is always unavoidable. Once this Court decides the temporary injunction motion, its inquiry will be limited to deciding questions of law, with the only relevant

facts being issues not subject to reasonable dispute, such as to the sincerity of Petitioners' religious beliefs.

## **II. The Court Should Grant Emergency Temporary-Injunctive Relief Against The School-Closure Order**

### **A. Petitioners Have A High Likelihood Of Success On The Merits**

#### **1. The Order Violates The Freedom Of Conscience Clauses And The Liberty Right Of Parents To Raise Their Children**

Petitioners are exceedingly likely to prevail on their arguments that the School-Closure Order violates their religious and parental rights under the Wisconsin Constitution.<sup>22</sup>

a.i. The Wisconsin Constitution's Freedom of Conscience Clauses provide that "[t]he 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." Wis. Const. art. I, § 18. This is "the strongest possible language in the protection of this right," that provides "expansive protections for religious liberty." *Coulee Catholic Schools*, 2009 WI 88, ¶¶ 59–60. So, while these Clauses "serve[ ] the same dual purposes as the Establishment Clause and Free Exercise Clause of the U.S. Constitution," *id.* ¶ 60,

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<sup>22</sup> To be absolutely clear, Petitioners do not bring any federal constitutional claim in the present case, and affirmatively disclaim reliance on any federal constitutional provisions. Petitioners' claims are grounded entirely in the Wisconsin Constitution and Wisconsin statutes.



their “specific and expansive language[] provides *much broader protections for religious liberty than the First Amendment*,” *id.* ¶ 66 (emphasis added). Notably, the Wisconsin Constitution’s Freedom of Conscience Clauses protect the free exercise of religion even against “neutral and generally applicable [] laws.” *DeBruin v. St. Patrick Congregation*, 2012 WI 94, ¶ 26 n.8, 343 Wis. 2d 83, 816 N.W.2d 878.

The protections of the Wisconsin Constitution’s Freedom of Conscience Clauses extend to both religious organizations like Catholic schools and to parents who seek to educate their children in their religious tradition. As for religious organizations like Catholic schools, they possess free-exercise rights, and so may bring a Freedom of Conscience Clauses claim in their own right. *Coulee Catholic Schools*, 2009 WI 88, ¶ 58; *e.g.*, *id.* ¶ 1. As for parents, the Clauses protect their right to raise their children in accordance with their sincere religious beliefs, including through a religious education. *Yoder*, 49 Wis. 2d at 438 (considering “solely a parent’s right of religious freedom”); *see Coulee Catholic Schools*, 2009 WI 88, ¶ 66. Parents have the “right of religious freedom to bring up [their] children as [they] believe[] God dictates.” *Yoder*, 49 Wis. 2d at 438.

A Wisconsin Constitution Freedom of Conscience claim comprises four elements. The religious adherent must initially prove “(1) that it has a sincerely held religious belief, and (2) that such belief is burdened by the application of the

state law at issue.” *Coulee Catholic Schools*, 2009 WI 88, ¶ 61. Then, “[u]pon this showing, the burden shifts to the [government] to prove (3) that the law is based upon a compelling state interest (4) that cannot be served by a less restrictive alternative”—that is, to satisfy strict scrutiny. *Id.* Most relevant here, to survive strict scrutiny, the law must be narrowly tailored to serving a compelling state interest. *A.A.L.*, 2019 WI 57, ¶ 2. This is a demanding test, and “it is the rare case” where “a law survives strict scrutiny,” *State v. Oatman*, 2015 WI App 76, ¶ 12, 365 Wis. 2d 242, 871 N.W.2d 513 (citation omitted). The government must show “that its interests cannot be met by alternative means that are less restrictive of the challengers’ free exercise of religion.” *State v. Miller*, 202 Wis. 2d 56,70, 549 N.W.2d 235 (1996). If “a less restrictive means is available for the Government to achieve its goals, the Government must use it.” *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015) (citations omitted); *Miller*, 202 Wis. 2d at 70–71.

ii. While it is not necessary to decide the issue here, because all of Petitioner parents send their children to Petitioners schools to obtain a *religious* education, there is a strong argument that infringement upon parents’ decisions as to how to educate their children should be subject to the same demanding standard even outside of the religious context. As this Court recently explained, a parent has “a fundamental liberty interest in the care and upbringing of [his or her] child” which includes the right “to direct the upbringing and

education of children under their control.” *A.A.L.*, 2019 WI 57 ¶ 15 (citation omitted). And “[a] statute which directly and substantially infringes upon a fundamental liberty interest must withstand strict scrutiny: it must be narrowly tailored to serve a compelling state interest.” *Id.*

b. The School-Closure Order plainly burdens Petitioners’ sincerely held religious beliefs and their right to raise their children as they see fit and, just as clearly, fails to satisfy any level of scrutiny, let alone strict scrutiny.

i. Petitioners satisfy their initial burden under *Coulee Catholic Schools* to demonstrate that the School-Closure Order burdens their sincere religious beliefs. Petitioners are all Catholic schools or adherents of Catholicism, and so have the sincere belief that they must educate their children in the Catholic faith, given that “all Christians . . . have a right to a Christian education.” A-219. Petitioner Parents have fulfilled this for their children by “choos[ing] a school for them which corresponds to [the parents’] own convictions,” A-229, thereby providing their children with teachers who live “in imitation of Christ” and “reveal the Christian message not only by word but also by every gesture of their behavior,” A-241. That is, Petitioner Parents’ religious faith compelled them to send their children to Petitioner Schools, so that they may receive a Catholic education. A-271; A-394–95; A-416–17; A-486–87; A-491 A-495–96; A-501; A-507; A-538–39; A-545; A-584; A-590–91; A-597. And Petitioner Schools, correspondingly, have the religious mission to teach these

children in the faith. *See* A-219; *see also* A-316 (“It is the mission of St. Ambrose to assist parents in the formation of their children by providing a classical education rooted in the Catholic faith.”); A-290–91; A-402; A-277–78; A-422–23; A-451–52; A-512–13; A-551–52.

Parents sending their children to Catholic schools for in-person instruction furthers these free exercise rights. “Being together as a school community is crucial to living out th[e] mission” of a Catholic school, which is to “go make disciples of all nations.” A-551–52; A-271. Moreover, only within the context of in-person instruction may students “attend Mass and Adoration” of the Eucharist, or share in communal prayer. A-513; A-585; A-316–17. Such in-person education is essential to developing the “spirituality of communion,” which is “the living breath of the educational community.” A-318–19; A-501.

The School-Closure Order’s prohibition on Petitioner Schools from opening for in-person education imposes a direct “burden” on their free exercise rights. *Coulee Catholic Schools*, 2009 WI 88, ¶ 61. This Order prevents these schools from opening their doors and fulfilling their religious mission to develop the student “spiritually, intellectually, emotionally, and socially,” A-512. Further, it prohibits Petitioner Schools from ensuring their students’ regular access to Catholic practices and the Sacraments, such as “daily prayer” as a class, “daily presence of the priest in the classroom,” regular “Mass attendance with an opportunity to

fulfill several ministerial roles,” or access to Confession. A-422–23; A-277–78; A-403. The School-Closure Order’s significant financial penalties for reopening makes that burden even more plain, since such punishment always qualifies as a burden on religious belief. *Miller*, 202 Wis. 2d at 60, 69; *Yoder*, 49 Wis. 2d at 437.

ii. Given that the School-Closure Order imposes a substantial burden on Petitioners’ free-exercise rights (as well as Petitioner parents’ rights to raise their children as they see fit), *supra* Part II.A.1.b.i, the County may only enforce the Order against Petitioners if it satisfies strict scrutiny, which it cannot do. In particular, while the County has a compelling interest in slowing the spread of COVID-19—and while the DHS’s closure may have been justified in March, at the early stages of this pandemic, when much of the state was closed, *see* A-319–20 (explaining the school’s closure at this time, even before the “Safer at Home” Order); A-291–92 (same); A-423 (same); A-513 (same); A-403 (closure at time of that order); A-278 (same); A-452 (same); A-552 (same)—mandatory closure *now* is not tailored to further that interest for two reasons.

*First*, the County will be unable to show that its School-Closure Order is narrowly tailored, *Miller*, 202 Wis. 2d at 70, because Petitioner Schools all have extremely detailed reopening plans, *see supra* pp. 17–28, which allow for safe reopening, *according to the safety standards that the County itself found sufficient up until one week ago. See, e.g.,* A-73–

74 (detailing elements of County’s required reopening plan for schools). That is, Petitioner Schools’ reopening plans, as a *legal* matter, satisfy the safety standards that the County itself approved before it abruptly issued the School-Closure Order. That no other county in this State has ordered private schools that have county-approved reopening plans closed—even counties that have far higher COVID-19 rates than does Dane County—further shows beyond any serious dispute that the County will have no plausible argument that its outlier Order is narrowly tailored.

*Second*, the County will be unable to show that its order is narrowly tailored, *Miller*, 202 Wis. 2d at 70, for the independent reasons that Emergency Order #9 permits *numerous* other organizations and businesses to open their doors to in-person services, and the County will have no plausible justification for not tailoring its approach to treat Petitioners schools at least as favorably as these other institutions and business.

Emergency Order #9 permits all universities and higher-education institutions to open their “congregate living situations” and “dormitories” with only the imposition of “strict policies that ensure safe living conditions,” social distancing, and compliance with mask mandates. A-14. The County will have no plausible argument that permitting these universities and colleges to open, but closing Petitioners’ schools, is tailored in any way to preventing the spread of

COVID-19, let alone tailored sufficiently to satisfy strict scrutiny.

Next, Emergency Order #9 allows “child care and youth settings” to open for in-person activities—which may serve children of any age—a category including “all licensed, recreational, and educational camps, licensed and certified childcare providers, unregulated youth programs, licensed-exempt public school programs, and four-year old kindergarten.” A-11. Those institutions and programs need only limit the classroom capacity to 15 children, prevent interaction between cohorts and different staff groups, and maintain social distancing. *Id.* Perhaps most telling as to Emergency Order #9’s arbitrariness—to say nothing of its lack of *narrow* tailoring—is that it allows Petitioner Schools to use their facilities *as a childcare and youth setting*. This means that Petitioner Schools may welcome their students in-person (in groups of 15 per classroom), following requirements *less* protective than their current reopening plans, so long as they do *not* provide these students with religious, in-person education. *See* A-11–13.

Finally, Emergency Order #9 allows myriad businesses to open for in-person services to customers and to undertake other face-to-face operations. Bars, salons, barber shops, gyms, fitness centers, water parks, pools, bowling alleys, and movie theaters may open their doors to the public. *Id.* at 14–21. The County will not be able to make any plausible showing that permitting these face-to-face businesses, but

shuttering Petitioners schools, is tailored in any way, let alone narrowly tailored, to slowing the spread of COVID-19.

## 2. The School-Closure Order Exceeds The County's Statutory Authority

“A county is a creature of the legislature and as such, it has only those powers that the legislature by statute provided.” *Jackson Cty. v. State Dep't of Nat. Res.*, 2006 WI 96, ¶16, 293 Wis. 2d 497, 717 N.W.2d 713 (citing Wis. Const. art. IV, § 22). Here, the County's School-Closure Order exceeds its statutory authority because the authority to “close schools” for public health reasons, Wis. Stat. 252.02, belongs by state law only to the Department of Health Services.

a. “It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning.” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. “[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *Id.* Statutory interpretation “begins with the language of the statute” in order to ascertain its meaning, considering both the “context” and “structure of the statute in which the operative language appears.” *Id.* ¶¶ 45–46.

Under the *expressio unius est exclusio alterius* canon, “the legislature's failure to specifically confer [a specific] power is evidence of legislative intent not to permit the exercise of the power.” *Groh v. Groh*, 110 Wis. 2d 117, 125,



327 N.W.2d 655 (1982); Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation Of Legal Texts* at 107–11 (2012). Applying this manner of reasoning in another, recent COVID-related case, this Court explained that because “the Legislature provided the Governor the authority to suspend administrative rules in paragraph (4)(d) [of the relevant statute], the logical inference with respect to paragraph (4)(b) is that the Legislature has not granted him the authority to suspend or rewrite statutes in the name of public safety.” *Evers*, 2020AP608-OA at 3.

b. Applying these statutory principles here leads to the straightforward conclusion that a county, including Dane County, has no lawful authority to close schools to prevent public outbreaks, and that this power belongs exclusively by statute to the State’s Department of Health Services.

The statutory contrast, under *expressio unius est exclusio alterius* canon, could hardly be clearer. Under Wis. Stat. § 252.02, the Department of Health Services “*may close schools* and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics.” Wis. Stat. § 252.02(3) (emphasis added). By contrast, the very next subsection provides: “[t]he local health officer”—as relevant, the county—“*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.” Wis. Stat. § 252.03(1) (emphasis added). There is no language within

this subsection authorizing a county health officer to *close* schools because of a communicable disease.

So, because the power to close schools in the event of an outbreak is expressly granted to the Department of Health Services under Section 252.02, and is conspicuously omitted from the very next subsection governing local health officials, the “logical inference” is that the Legislature has not granted counties the authority to close schools under these circumstances. *Evers*, 2020AP608-OA at 3. Notably, this Court’s decision in *Palm* presumably refused to enjoin the school-closure aspect of Secretary-Designee Palm’s purported extension of the “Safer at Home” Order for this reason, *Palm*, 2020 WI 42, ¶ 3 & n.6: Section 252.02 provides DHS the authority to close schools, so long as DHS acts consistent with all other constitutional and statutory mandates.

This reading of Sections 252.02 and 252.03 reaches an entirely reasonable result. The Legislature logically concluded that a decision as weighty and constitutionally fraught as the closure of schools is a matter of statewide concern, which localities should not control. Accordingly, the Legislature granted the State Department of Health Services the ability to close schools because of public health, while counties are limited to *inspecting* schools in their county’s schools, to ensure that they are kept in sanitary condition, so as to limit the spread of disease. This approach of granting the authority to close schools only to a statewide agency is also consistent with the primacy that the Wisconsin Constitution

places on a state-wide policy toward the education of its children. *See, e.g.*, Wis. Const. art. X, § 1.

To the extent § 252.03 has any ambiguity, the Court should resolve that in Petitioners' favor, under the constitutional-avoidance canon, given Petitioners' powerful constitutional claims against the Order. *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 64, 357 Wis. 2d 469, 851 N.W.2d 262. As Petitioners showed above, *supra* Part II.A.1, the County's belief that it had the authority to close schools has led it to adopt an order that violates the constitutional rights of both parents and schools. The State Department of Health Services has not taken this approach, in likely recognition of the current state of COVID-19 in Wisconsin, the numerous safety measures that schools have taken after a summer of preparation, and the fatal constitutional issues that would doom any such order, regardless of the issuing authority. In short, the State appears to understand that there is no public health or constitutional basis to close Petitioners' schools. This shows that, at the minimum, this Court should read the counties' authority under § 252.03 to avoid the type of county-based infringement of constitutional rights that is occurring here.

**B. Petitioners Are Suffering Irreparable Harm From The School-Closure Order, And The Public Interest Favors Temporary-Injunctive Relief**

Petitioners satisfy the other three equitable factors necessary to obtain temporary-injunctive relief: irreparable

harm to the movant in the absence of an injunction and its lack of an adequate remedy at law, the competing irreparable harm of the nonmovant, and the public interest. *See Evers*, No. 2020AP608-OA at 4 (citing *Pure Milk Products Coop.*, 90 Wis. 2d at 800; *Werner*, 80 Wis. 2d at 520; *State v. Crute*, 2015 WI App 15, ¶39, 360 Wis. 2d 429, 860 N.W.2d 284).

First, Petitioners will suffer irreparable harm in the absence of injunctive relief, for which they have no remedy at law. By forcing Petitioners to close the planned reopening of their schools to in-person instruction, the School Shutdown Order has already infringed, and will continue to infringe, on Petitioners' religious liberty.

As for the irreparable harms to Petitioner Parents, the Shutdown Order prohibits them from fully realizing their religious obligation to educate their children in their faith. A-271; A-394–95; A-416–17; A-486–87; A-491; A-495–96; A-501; A-507; A-538–39; A-545; A-584; A-590–91; A-597. Satisfying that obligation depends on in-person instruction, as these Parents have chosen Catholic schools for their children so that they may receive Holy Communion at Mass, confess their sins to a priest through the Sacrament of Confession, join with the community of students and teachers to pray together, and otherwise “achieve the full religious and spiritual benefit of these sacred activities.” A-487; A-545; A-316–17; A-403.

As for the Petitioner Schools' irreparable harms, the School-Closure Order blocks them from fulfilling their religious mission to educate their students in the Catholic

faith, including through in-person religious worship, reception of the Sacraments, communal prayer, and role-modeling. A-316–18; A-422–23; A-451–52.

Beyond this, Petitioners’ children will also suffer grave harms from a forced virtual-learning curriculum. In-person education is vastly superior to virtual learning in terms of educational outcomes, as the recent negative experiences with wide-scale virtual learning this past Spring made all too clear. A-171–85; *see* A-541; A-503. This is why institutions like the CDC and the American Academy of Pediatrics strongly endorse a return to in-person learning, so that children may once again enjoy “the many known and established benefits” of this method. A-255; A-194–215. Many Petitioner Parents are of limited financial means who receive scholarships and/or make deep financial sacrifices to secure this essential religious education for their children, thus their only avenue for in-person education is through the Petitioner Schools. A-509; A-498; A-547; A-503–04.

Second, the County will not suffer harm if this Court enjoins the unconstitutional and unlawful School-Closure Order. The reopening plans that Petitioner Schools have adopted are comprehensive, consistent with all public health guidelines, and go far beyond what the County has required for many other types of institutions and businesses that remain open for in-person service. Petitioners’ plans have written hygiene policies and procedures and written cleaning policies and procedures. These include, for example, frequent

handwashing, accesses to hand sanitizer, and regular cleaning of high-touch areas. A-322–23; A-516; A-280; A-405; A-454–55; A-425; A-293–94. These plans also have written protective measure policies and procedures, mandating, among other things, social distancing and limited mixing of cohorts. A-515–16; A-554–55; A-280; A-405–07; A-455–56; A-425–26; A-293–94; *see also* A-324 (for St. Ambrose, nearly doubling building space). Students and staff must wear face coverings as required by state and local orders, with the exemptions and exceptions detailed therein. A-323; A-515; A-554; A-280; A-405; A-454; A-425; A-293. And many schools provided the face coverings to students and staff. A-323; A-515; A-545; A-280. The reopening plans have a written action plan for a COVID-19 outbreak at the school. A-321; A-300–03; A-414; A-287–88; A-435; A-466–67, A-480; A-527–28; A-570. And they ensure that staff are trained on all these procedures. A-554–55; A-405–06; A-454–55.

Finally, and relatedly, the public interest also favors an injunction since, again, Petitioner Schools may reopen in a manner fully consistent with the County’s previous emergency orders. Petitioner Schools invested significant financial resources in implementing their reopening plans, *see, e.g.*, A-321 (\$80,000); A-450 (\$31,400); A-421 (\$90,000), and it is deeply inequitable for the County to tell Petitioner Schools repeatedly *for months* that they may reopen under these expensive, comprehensive plans, only to abruptly reverse course on the eve of reopening.

## CONCLUSION

This Court should grant the Petition for an Original Action and issue an emergency order temporarily enjoining the enforcement of the School-Closure Order.

Dated: August 28, 2020.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Misha Tseytlin", with a long horizontal flourish extending to the right.

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## CERTIFICATE OF SERVICE

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

Dated: August 28, 2020.

  
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MISHA TSEYTLIN