Nos. 2020AP1419-OA, 2020AP1420-OA, 2020AP1446-OA

SUPREME COURT OF WISCONSIN

WISCONSIN COUNCIL OF RELIGIONS AND INDEPENDENT SCHOOLS, SCHOOL CHOICE WISCONSIN ACTION, ABUNDANT LIFE CHRISTIAN SCHOOL, HIGH POINT CHRISTIAN SCHOOL, LIGHTHOUSE CHRISTIAN SCHOOL, PEACE LUTHERAN SCHOOL, WESTSIDE CHRISTIAN SCHOOL, CRAIG BARRETT, SARAH BARRETT, ERIN HAROLDSON, KENT HAROLDSON, KIMBERLY HARRISON, SHERI HOLZMAN, ANDREW HOLZMAN, MYRIAH MEDINA, LAURA STEINHAUER, ALAN STEINHAUER, JENNIFER STEMPSKI, BRYANT STEMPSKI, CHRISTOPHER TRUITT AND HOLLY TRUIT, *Petitioners,*

v.

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

ST. AMBROSE ACADEMY, INC., ANGELA HINELINE, JEFFERY HELLER, ELIZABETH IDZI, JAMES CARRANO, LAURA MCBAIN, SARAH GONNERING, ST. MARIA GORETTI CONGREGATION, NORA STATSICK, ST. PETER'S CONGREGATION, ANNE KRUCHTEN, BLESSED SACRAMENT CONGREGATION, AMY CHILDS, BLESSED TRINITY CONGREGATION, COLUMBIA/DANE COUNTY, WI INC., LORETTA HELLENBRAND, IMMACULATE HEART OF MARY CONGREGATION, LORIANNE AUBUT, ST. FRANCIS XAVIER'S CONGREGATION, MARY SCOTT, SAINT DENNIS CONGREGATION and RUTH WEIGEL-STERR, *Petitioners*,

v.

JOSEPH T. PARISI, in his official capacity as County Executive of Dane County and JANEL HEINRICH, in her official capacity as Director, Public Health, Madison & Dane County, *Respondents*.

SARA LINDSEY JAMES, *Petitioner*,

v.

JANEL HEINRICH, in her capacity as Public Health Officer of Madison and Dane County, *Respondent*.

NON-PARTY BRIEF ON BEHALF OF THE FREEDOM FROM RELIGION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Brendan Johnson
State Bar No. 1118908
Attorney for Freedom From Religion Foundation, Inc.
10 N. Henry St.
Madison, WI 53703
(608) 256-8900

Patrick C. Elliott
State Bar No. 1074300
Attorney for Freedom From Religion Foundation, Inc.
10 N. Henry St.
Madison, WI 53703
(608) 256-8900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Regulations

Other authorities

The Freedom From Religion Foundation submits this non-party brief in support of Respondents.

INTEREST OF *AMICUS CURIAE*

The Freedom From Religion Foundation ("FFRF") is a national non-profit organization whose primary purposes are to educate about nontheism and to preserve the constitutional principle of separation between religion and government. FFRF has more than 33,000 members, including nearly 1,500 Wisconsin members. FFRF's headquarters is in Madison, Wisconsin. FFRF has expertise and a special interest in the proper application of constitutional principles relating to religion and government.

INTRODUCTION

This case arises in during the worldwide COVID-19 pandemic. Wisconsin stands out as a hotspot with some of the highest rates of viral transmission anywhere,[1] and Dane County has been among the hardest hit counties. Wisconsin's has opened its first field hospital,[2] and over 850,000 children have tested positive for the pathogen across the U.S.[3] As local health officials scrambled to install a framework to protect the populace from a

[1] Mary Spicuzza, State Fair Park field hospital admits first coronavirus patient as Wisconsin sets a record for deaths amid surge in cases, MILWAUKEE JOURNAL SENTINEL, https://bit.ly/352xWVq (last visited Oct. 29, 2020).
[2] Id.
[3] More than 61,000 children got Covid-19 last week, a record, NBC NEWS, https://nbcnews.to/32kyT9O (last visited Nov. 3, 2020).

rampant contagion, this Court exercised original jurisdiction over this controversy. This brief solely addresses Petitioners' religious liberty claims.

Nondiscriminatory public health measures during a pandemic cannot be subject to strict scrutiny. The nature of judicial review and the adversarial system means that review of health measures will be infused with hindsight criticism. Executive officials cannot know every contingency and future scientific fact. Therefore, it would be a fortuitous coincidence for health officials to issue an order that is truly "the least restrictive means" of preventing viral spread. Prevention necessarily requires limits on religious gatherings because SARS-CoV-2 does not stop when humans have entered a private religious school. Because litigants will always allege that restrictions are broader than necessary, because courts lack medical expertise, and because facts change quickly on the ground during a pandemic, regulations will *always* appear to be more restrictive than necessary. If Wisconsin courts are required to apply strict scrutiny on every pandemic-related religious liberty claim, health orders issued to save lives will either be effective or constitutional, but not both.

This Court should rule in favor of Respondents for three reasons: First, the Court should apply rational basis review, which the Order easily survives. Second, Dane County citizens' right to live is as important as Petitioners' free

conscience rights. Finally, this Court should apply the constitutional avoidance canon and rule on statutory grounds.

I. Strict scrutiny should not apply to measures taken to prevent the spread of a deadly pandemic.

When faced with standard freedom of conscience claims, Wisconsin courts typically apply the framework from State v. Miller, requiring "that the law is based on a compelling state interest, which cannot be served by a less restrictive alternative." 202 Wis. 2d 56, 66, 549 N.W.2d 235, 240 (1996). This framework comes from the language of federal free exercise cases and tracks the language of strict scrutiny. See Sherbert v. Verner, 374 U.S. 398, 407 (1963). But this Court has recognized that strict scrutiny does not apply to all state restraint on religious organizations, noting that "[g]eneral laws related to building licensing, taxes, social security, and the like are normally acceptable," in addition to "employment discrimination laws" for employees not subject to the ministerial exception. Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev., 320 Wis. 2d 275, 313–14, 768 N.W.2d 868, 887 (Wis. 2009). This comes into special focus when a "general law" like the Order is challenged on freedom of conscience grounds.

We do not address whether government encroachment on rights of conscience should be subject to strict scrutiny in "normal" cases. Rather, during a deadly global pandemic, we must recognize that "[t]he right to practice religion freely does not include liberty to expose the community or

the child to communicable disease or the latter to ill health or death." Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

The COVID-19 crisis gripping our country, state, and Dane County is *anything but* normal, and courts across the country have responded by applying rational basis review in recognition of this fact. The Amish Respondents in State v. Miller argued that compliance with the law "would be in direct violation of the Ordnung," which "would constitute a sin for which they would be subject to shunning or excommunication." 202 Wis. 2d at 70. None of the Petitioners in this case faces as severe a penalty (excommunication) for observing their religion at home instead of at school, and Order #9 is crafted to give more leeway to religious practice than it does to similar secular gatherings.

For these reasons, the square peg of the present case should not be crammed into the round hole of standard freedom of conscience analysis and the strict scrutiny standard that comes along with it.

a. Courts across the country have upheld government orders like Emergency Order #9 and applied rational basis review in so doing.

Claims of infringement on religious liberty have been commonplace during the pandemic, and numerous courts, including the U.S. Supreme Court, have upheld orders similar to or more restrictive than Emergency Order #9. In doing so, these courts have consistently shunned the strict

scrutiny of the Sherbert test. The U.S. Supreme Court explains that the Sherbert test does not merit widespread application and that the Court has "never invalidated any governmental action on the basis of the Sherbert test except the denial of unemployment compensation." Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 883 (1990). This Court should not apply reasoning originally intended for unemployment compensation cases to the life-saving measures issued during the COVID-19 pandemic.

When faced with claims of government violation of religious liberties during the pandemic, numerous courts, in considering the current historically abnormal and dangerous circumstances, have applied rational basis review, looking to the wide latitude to act decisively emphasized in Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905). This Court should likewise refrain from applying strict scrutiny.

Because the Order deals with a rapidly changing and volatile health crisis, the best and most commonly applied standard in similar cases is rational-basis review, which requires that a court uphold the action "unless it is 'patently arbitrary' and bears no rational relationship to a legitimate government interest." Blake v. Jossart, 370 Wis. 2d 1, 20–21, 884 N.W.2d 484, 494 (Wis. 2016) (internal quotations omitted). Application of this standard recognizes that "[i]t is no part of the function of a court or a jury to

determine which one of two modes was likely to be the most effective for the protection of the public against disease," Jacobson, 197 U.S. at 30. It grants officials the leeway to save lives in situations that change more quickly than a measured and deliberative function like judicial review can respond. A broad consensus of courts now applies rational basis review to claims like Petitioners' religious liberty claims, and that broad consensus has consistently upheld government action intended to save lives during the pandemic.

In South Bay Pentecostal Church v. Newsom, the U.S. Supreme Court declined to grant injunctive relief to enjoin enforcement of an order "limit[ing] attendance at places of worship to 25% of building capacity or a maximum of 100 attendees." 140 S. Ct. 1613 (2020). Chief Justice Roberts explained that when health officials "act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad," and that the judiciary, which "lacks the background, competence, and expertise to assess public health" should not second-guess them. Id. at 1614 (internal quotations omitted). Because California's order treated religious entities the same as similarly situated secular entities, the Court applied the "broad latitude" standard of Jacobson and denied the motion for injunctive relief. Id.

The Court's reasoning in Newsom is instructive here: while Wisconsin elects its judiciary, it certainly does not elect judges on the basis of their independent "background, competence, and expertise to assess public health"

measures. Local health officials like Ms. Heinrich, however, *are* selected for these traits. Therefore, this Court should grant her office the "broad latitude" to safeguard the health of the public recognized by Chief Justice Roberts in Newsom, and it should refrain from interfering with that power in response to claims that religious liberty trump public safety.

In Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341 (7th Cir. 2020), the Seventh Circuit declined to grant a preliminary injunction suspending an Illinois order limiting public gatherings to no more than ten people, holding that the lower court properly applied rational basis review. Id. at 344. Judge Easterbrook echoed the epidemiological consensus, stating that "[e]xperts think that, without controls, each infected person will infect two to three others, causing an exponential growth in the number of cases. Because many of those cases require intensive medical care, infections could overwhelm the medical system." Id. at 342. The statement foretold Wisconsin's future, which has, since this Court took original jurisdiction over this case, seen the erection of its first field hospital at the State Fairgrounds.[4]

In Legacy Church, Inc. v. Kunkel, the District of New Mexico heard challenges to an emergency health order which "restricted places of worship from gathering more than five people within a single room or connected

[4] Latoya Dennis, Wisconsin Opens A Field Hospital At State Fair Grounds As Coronavirus Cases Spike, NPR, https://n.pr/3kublGz (last visited Oct. 25, 2020) (interviewing a local doctor who notes that "rationing care is now a possibility").

space[.]”455 F. Supp. 3d 1100, 1108 (D.N.M. 2020). The plaintiff, a “mega-church,” alleged that the order violated its “rights under the Free Exercise Clause of the First Amendment[.]” Id. The court denied the motion for a TRO because the “important government interests hav[e] nothing to do with religion” and because it was “both neutral and generally applicable, and there is no evidence of animus against Christianity in particular or against religion in general.” Id. at 1142. Thus, the order “is subject to rational basis review, which it satisfies.” Id.

All of the above cases applying rational basis review or the Jacobson standard do so in recognition of the gravity of the pandemic and another key point: the separation of powers favors the executive making decisions in “areas fraught with medical and scientific uncertainties,” where deference to its expertise “must be especially broad,” Marshall v. United States, 414 U.S. 417, 427 (1974), like the Order in this case.

Furthermore, the cases above[5] dealt with restrictions on actual in-person *worship* in churches, unlike the Order in this case. Emergency Order #9 favors religion, even stating that “[r]eligious entities are exempt from mass gathering requirements for religious services and religious practices only.” PUBLIC HEALTH MADISON & DANE COUNTY, Emergency Order #9

[5] The Eastern District of New York cites over twenty additional cases in Footnote 7 of its ruling in Roman Catholic Diocese of Brooklyn, New York v. Cuomo, 2020 WL 6120167 (E.D.N.Y. Oct. 16, 2020).

Amendment (2020). Notably, the Order fails to grant the same latitude to similarly situated secular gatherings.

Applying rational basis review, the Order convincingly clears the hurdle. The Order describes its goals as "to decrease the spread of COVID-19, keep people healthy, and maintain a level of transmission that is manageable by health care and public health systems." Emergency Order #9 Amendment at 1. The parties have described these as "compelling interests"—exceeding the minimum of "legitimate government interest," Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989), required to survive rational basis review. And the actions compelled by the Order are undoubtedly rationally related to serving that interest, as Sars-CoV-2 spreads readily in crowds and through social interactions, as occur in school settings.

For these reasons, the Court should apply the rational basis standard to the Order and rule in Respondents' favor with respect to Petitioners' religious liberty claims.

b. Applying strict scrutiny to freedom of conscience claims during a pandemic leads to nonsensical outcomes.

When facing a virus previously unknown to science, it is not clear that a court could even determine what amounts to the "least restrictive means" of achieving a compelling government interest. For example, when SARS-CoV-2 began its initial spread across the United States, scientists emphasized how long the virus could survive on surfaces, fearing transmission through contact

with doorknobs and the like. We have since learned that it rarely spreads through contact and is much more likely to spread through respiratory droplets, especially when people are in continuous proximity indoors. Given the differing presumptions about transmission in the early stages of the pandemic, the perceived "least restrictive means" would have then focused more on cleaning surfaces than the "least restrictive means" would now that we know more. Assuming *arguendo* that strict scrutiny applies to all freedom of conscience claims, even during a pandemic, courts would find that *different* measures qualified as the "least restrictive means" of preventing viral transmission, despite applying that standard to *the same* virus during *the same* pandemic. Rather than applying an inconsistent standard to quickly changing pandemic, this Court should follow the consensus of courts across the country and apply rational basis review.

II. Dane County residents' right to life is jeopardized by Petitioners' in-person education.

Much has been made about the alleged weight of the Order's burden on Petitioners' religious liberty. Petitioners would have the Court consider this case in a vacuum, ignoring that the first right enumerated in the Wisconsin Constitution is the right to life. See WIS. CONST. art. I § 1. While Petitioners may be inconvenienced by health measures requiring their children to learn virtually, other members of the public may lose their lives because of the inevitable viral transmission when thousands of children in

Petitioners' private schools gather in classrooms and hallways. This will be the case even if they follow social distancing guidelines, which exist to curtail spread, but cannot do so as effectively as isolation from group activities such as in-person schooling, as the Order provides.

A constitutional ruling that the Order does not apply to Petitioners on religious grounds will send a clear message to the citizens of Dane County: "We are willing to sacrifice some of you so that Petitioners do not have to settle for virtual religious instruction. We will not grant the same privilege to parents whose children are enrolled in the now-closed public schools. Petitioners' rights to choose in-person instruction supersedes others' right to life."

If the Court rules that strict scrutiny applies in this instance, the implications should be very clear for the future as well: a constitutional right to free exercise and freedom of conscience functionally trumps every health order preventing the spread of communicable disease. Because the Court's jurisprudence has eschewed any aspect of balancing in favor of constitutional scrutiny, rights of this nature cannot turn on how deadly a pandemic becomes.

This standard must apply equally in the presence of Sars-CoV-2 or the Ebola virus, a pathogen with a precedented fatality rate of up to 90 percent.[6]

[6] Ebola virus disease, WORLD HEALTH ORGANIZATION, https://bit.ly/2If3C18 (last visited Oct. 28, 2020).

If we knew that opening all school grades would spread Ebola and that people would die, there would be nothing that county health officials could do under the Petitioners' proposed test—even if private schools refused to follow any preventative measures.

The Smith-Jacobson framework lacks this problem because it turns on neutrality and fairness towards practice of faith. That framework positions courts to perform one of their most important functions—that of checking executive power, not usurping it. That framework allows the executive to move swiftly to save lives so long as it does so in a fair and non-discriminatory manner.

Since the Court exercised its jurisdiction over this case, our state's public health has taken a drastic turn for the worse, and Wisconsin is now one of the worst places in the U.S. for COVID-19 response outcomes. It took Wisconsin until September 20, 2020 to reach the unfortunate benchmark of 100,000 recorded cases of COVID-19[7] but only 36 days to record its next 100,000 cases.[8] This highlights the importance of regulatory agility for local officials to enforce policies that prevent the spread of Sars-CoV-2 and the avoidable deaths that will come with it.

[7] Jordyn Noennig, Wisconsin has now reported more than 100,000 total cases of COVID-19, MILWAUKEE JOURNAL SENTINEL, https://bit.ly/3eCe0Mf (last visited Oct. 29,2020).
[8] Data: In Just 36 Days, Wisconsin's Coronavirus Case Totals Doubled From 100K to 200K, NBC CHICAGO, https://bit.ly/2IbgJk5 (last visited Oct. 29, 2020).

The Wisconsin Constitution certainly protects religious liberty. But it does not place minor burdens on religious practice above the very right to life.

III. The Court should not set constitutional precedent if the case can be decided on statutory or other grounds.

This Court has adopted constitutional avoidance canon in many instances, stating that it "does not normally decide constitutional questions if the case can be resolved on other grounds." Gabler v. Crime Victims Rights Bd., 376 Wis. 2d 147, 184, 897 N.W.2d 384, 402 (Wis. 2017). Here, unlike in Gabler, "the constitutionality of [the] statute is" *not* "essential to the determination of the case." 376 Wis. 2d at 184. For this reason, this Court should not rule on constitutional grounds if the case can be resolved based on a statutory basis.

CONCLUSION

Petitioners' claims cannot survive the proper standard: rational basis review. The focus on alleged encroachment on religious liberty misses the point that other Wisconsinites have an equally important right to life. For these reasons, the Court should rule in favor of Respondents on Petitioners' religious liberty claims, or leave the constitutional questions for another day.

Respectfully submitted on this 10th day of November, 2020.

Brendan Johnson Patrick C. Elliott

State Bar No. 1118908
Attorney for Freedom From
Religion Foundation, Inc.
PO Box 750
Madison, WI 53701
(608) 256-8900

State Bar No. 1074300
Attorney for Freedom From
Religion Foundation, Inc.
PO Box 750
Madison, WI 53701
(608) 256-8900

Counsel for Non-Party Amicus Curiae

CERTIFICATION AS TO FORM

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) and the Court's order in this matter dated September 10, 2020, for a brief produced with a proportional font. The length of this brief is 2,967 words.

Dated: November 10, 2020.

_____

Patrick C. Elliott

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that when an electronic copy of this brief is submitted to this Court, it will comply with the requirements of Wis. Stat. § 809.19(12) and will be identical in content to the text of the paper copy of the brief. A copy of this certificate is included with the paper copies of the brief that are submitted for filing with the Court and served on all parties.

Dated: November 10, 2020

_____

Patrick C. Elliott