

**RECEIVED**

AUG 25 2020

CLERK OF THE COURT  
OF WISCONSIN

No. \_\_\_\_\_

In the Supreme Court of Wisconsin

Sara Lindsey James,

Petitioner,

v.

Janel Heinrich,

in her capacity as

Public Health Officer of Madison

and Dane County,

Respondent.

---

PETITION FOR AN ORIGINAL ACTION

---

## BACKGROUND

This is a case about fundamental rights of children and the awesome power of government. At issue is whether one unelected official has the power to order children to “stay home” from school whether or not they are sick, or to prohibit them from gathering in-person with other children to receive a religious education.

The Respondent is the Public Health Officer of Madison and Dane County, Janel Heinrich. Officer Heinrich is acting outside the plain limits of her authority under the Wisconsin Statutes, has issued an “order” that infringes upon the fundamental rights to an education and to worship under the Wisconsin Constitution, and in a manner contrary to a recent decision of this Court.

Petitioner urgently requests the Wisconsin Supreme Court, pursuant to Wisconsin Statutes § 809.70 and Article VII, Section 3(2) of the Wisconsin Constitution, to take original jurisdiction.

## STATEMENT OF THE ISSUES PRESENTED

1. Whether a local health officer in this state has the power to limit the rights of children from attending school in-person, and to “order” parents that their children must “stay home” from school, regardless of whether those children are sick.
2. Whether a local health officer in this state has the power to limit private gatherings of children, families and other adults in private schools, on private property, for religious purposes.
3. Whether this Court should enjoin Officer Heinrich’s “Emergency” Order No. 9, and any other subsequent order based on the same material claim to power, as outside the scope of a local health officer’s authority under Chapter 252 of the Wisconsin Statutes, and violative of the principles set forth by this court in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.

## STATEMENT OF FACTS

Petitioner Sara Lindsey James resides in the City of Fitchburg Dane County. (Appendix, Affidavit of Sara Lindsey James, ¶¶ 1-2.) She is a single parent with sole legal custody and full-time placement of two children. (*Id.*, ¶ 3.) She enrolled the children in the school for the 2020-2021 School Year at Our Redeemer Lutheran School in the City of Madison. (*Id.*, ¶ 4.) Her children are in the 4<sup>th</sup> and 7<sup>th</sup> Grades. (*Id.*, ¶ 5.)

School administrators worked with Officer Heinrich's agency in order to reopen the school with strict safety precautions in place. (*Id.*, ¶ 9., School to Parent Communications.) Officer Heinrich's agency provided a set of requirements necessary to begin the school year in person, including the use of masks, social distancing and other limitations. (*Id.*)

The children began school, in person, on August 19, 2020. (*Id.*, ¶ 6.) After these children returned to the classroom, Officer Heinrich ordered every private, religiously-based school in Dane County to close every classroom in grades 3 through 12. (*Id.*) Officer Heinrich

did this late in the afternoon on Friday, August 21, 2020 through “Emergency Order No. 9.” (*Id.*, ¶ 8.)

It is common knowledge that children throughout the State of Wisconsin begin school at this time of year; there is no known “emergency” that caused Emergency Order No. 9 to be issued after they already had returned to the classroom. Officer Heinrich has entered nine different “Emergency” Orders in the past three months, and pursuant to Emergency Order No. 9, these children now must stay home to receive their education. (*Id.*, ¶¶ 8, 10.)

Ms. James chose to enroll her children in a religious school because she sincerely believes it is essential that they receive a faith-based education. (*Id.*, ¶ 7.) She believes that it is essential that her children’s education take place “in person” and “together with others as part of the body of Christ.” (*Id.*) Officer Heinrich’s order prevents the children from attending any in-person, faith based, private school anywhere in Dane County. (*See id.*, ¶ 10 and “Emergency Order 9.”)

## STATEMENT OF RELIEF SOUGHT

Petitioners respectfully request this Court to issue an order to:

(a) immediately and permanently enjoin enforcement of “Emergency Order No. 9” and any subsequent order based on the same material claim to power;

(b) enjoin Officer Heinrich from creating any other “order” to close private schools or restrict any other private gatherings; and

(c) order Officer Heinrich to comply within the specific, statutory limitations on her authority: to “inspect schools and other public buildings within [her] jurisdiction as needed to determine whether the buildings are kept in a sanitary condition” and, upon outbreaks or epidemics, to “forbid *public* (as opposed to private) gatherings.” Wis. Stat. 252.03(2) (emphasis added).

## STATEMENT OF REASONS THE COURT SHOULD TAKE JURISDICTION

This Emergency Petition meets the criteria for this Court's exercise of its original jurisdiction under Article VII, Section 3 of the Wisconsin Constitution. While Ms. James is but one parent and her children are but two students, Officer Heinrich's ninth emergency order significantly impacts each and every child from 3<sup>rd</sup> - 12<sup>th</sup> grade and pulled the rug out from each of their families. *See, e.g., "Private schools push back against Dane County schools order; legal challenges expected,"* by Logan Wroge, Wisconsin State Journal, August 25, 2020.<sup>1</sup>

The impact is not limited to private schools, and impacts every public school with any plans to offer any in person services. *Id.* "With no exemptions for students with disabilities written into the health department's order, [Mt. Horeb School District Superintendent Steve]

---

<sup>1</sup> [https://madison.com/wsj/news/local/education/local\\_schools/private-schools-push-back-against-dane-county-schools-order-legal-challenges-expected/article\\_caedbbc0-4891-5e52-a37f-aa3fdffbd757.html#tracking-source=home-top-story-1](https://madison.com/wsj/news/local/education/local_schools/private-schools-push-back-against-dane-county-schools-order-legal-challenges-expected/article_caedbbc0-4891-5e52-a37f-aa3fdffbd757.html#tracking-source=home-top-story-1)

Salerno said the district won't be able to offer face-to-face services to children with special needs in the third grade and up." *Id.*

This is one of those "exceptional cases" in which a decision by the court would "significantly affect[] the community at large."

*Wisconsin Professional Police Ass'n v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807.

1. Emergency Order No. 9 infringes upon fundamental rights under the Wisconsin Constitution, including the right to an education and the right to freedom of worship.

A child's right to an education is a state constitutional right in the State of Wisconsin, and as such it does not "disappear during a public health crisis." *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis.2d 497, 942 N.W.2d 900, ¶ 53 (citation omitted). Nor does the right to freedom of worship protected under Article I, Section 18 of the Wisconsin Constitution.

"Article I, Section 18 operates as a perpetual bar to the state from the infringement, control, or interference with the rights of conscience .... [I]ndividuals also have the right to practice their religious faith in groups, as collections of individuals, and to form



houses of worship and faith-based organizations committed to achieving their faith-based ends. The Wisconsin Constitution uses the strongest possible language in the protection of this right. It provides that the right to worship as one is so convinced ‘shall *never* be infringed. It goes even further, stating, ‘nor shall *any control of, or interference with*, the rights of conscience be permitted.’ It is difficult to conceive of language being stronger than this. The Wisconsin Constitution, with its specific and expansive language, provides much broader protections for religious liberty than the First Amendment.” *Coulee Catholic Schools v. Labor and Industry Review Comm.*, 2009 WI 88, ¶¶ 62, 58, 59, 66, 768 N.W.2d 868 (italicized emphasis in original, internal citations omitted).

Emergency Order No. 9 infringes on these rights under the Wisconsin Constitution. It prohibits individuals from “practic[ing] their religious faith in groups, as collections of individuals” and it both takes “control of” and “interferes” with their rights to do so. That interference must be promptly enjoined.

- ii. The Wisconsin Statutes do not allow a local health officer to restrict private gatherings, or to close schools.

In enacting Section 252.03, the Legislature could not have intended to grant a local health officer the power to infringe these rights. And on the face of the statutes, the Legislature did not.

With respect to Office Heinrich's power over schools, the statutes allow that she "may inspect schools and other public buildings within [her] jurisdiction as needed to determine whether the buildings are kept in a sanitary condition." Wis. Stat. § 252.03(1). Emergency Order No. 9 far exceeds this grant of power.

Aside from the power to inspect schools for sanitary conditions, Chapter 252's specific grant of power to the Commissioner is limited: in order to control the spread of disease, Chapter 252 says that the Commissioner may "forbid *public* gatherings." Wis. Stat. 252.03(2) (emphasis added). But Emergency Order No. 9 regulates *private* gatherings, on *private* property, in *private* schools. Dictating to a private school where, when and how it may educate its students, and who it may educate (only children younger than the third grade) is

not within the grant of authority given to Officer Heinrich by the Wisconsin Statutes.

III. Officer Heinrich's Ninth Emergency Order runs counter to this Court's decision in *Wisconsin Legislature v. Palm*.

In *Wisconsin Legislature v. Palm*, this Court evaluated Chapter 252 of the Wisconsin Statutes, the same chapter under which Officer Heinrich claims power. The powers granted to Office Heinrich are similar to (and in some cases, less than) those granted by the statutes to Secretary Palm.<sup>2</sup> Chapter 252 of the Wisconsin Statutes states:

252.03 Duties of local health officers.

(1) Every local health officer, upon the appearance of any communicable disease in his or her territory, shall immediately investigate all the circumstances and make a full report to the appropriate governing body and also to the department. The local health officer shall promptly take all measures necessary to prevent, suppress and control communicable diseases, and shall report to the appropriate governing body the progress of the communicable diseases and the measures used against them, as needed to keep the appropriate governing body fully informed, or at such intervals as the secretary may direct. The local health officer may inspect schools and

---

<sup>2</sup> The Dane County Ordinances repeat, but do not add to, the authority given to a local health officer to "forbid public gatherings when deemed necessary to control outbreaks or epidemics." Dane County Ordinances, § 46.40(1); accord Wis. Stat. 252.03(2).

other public buildings within his or her jurisdiction as needed to determine whether the buildings are kept in a sanitary condition.

(2) Local health officers may do what is reasonable and necessary for the prevention and suppression of disease; may forbid public gatherings when deemed necessary to control outbreaks or epidemics and shall advise the department of measures taken.

*See Wis. Stat. § 252.03(1), (2).*

Chapter 252 does contain some broad language that, read broadly and in isolation, may suggest that both the State Department of Health Services and a local health officers may have unlimited power to impose restrictions. As to the State Department of Health Services, Chapter 252 indicates that the State Department of Health Services “may authorize and implement all emergency measures necessary to control communicable diseases.” Wis. Stat. § 252.02(6). As to local health officers, Chapter 252 states that they may “take all measures necessary to prevent, suppress and control communicable diseases” and “may do what is reasonable and necessary for the prevention and suppression of disease.” Wis. Stat. § 252.03 (1), (2).

This Court rejected Secretary Palm’s attempt to use that broad language to justify broad restrictions similar to those put in place by

Officer Heinrich. *See, e.g., Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis.2d 497, 942 N.W.2d 900, ¶¶ 43, 45, 48, 49, 50. The Court reasoned that the “all emergency measures necessary” language in Chapter 252 must be read in context, and with a temporal component. While emergency powers are appropriate when there is no time for deliberation or debate, “in the case of an ongoing pandemic, which lasts month after month,” the government may not “rely on emergency powers indefinitely.” *Id.*, ¶ 41.

More specifically with respect to schools, Chapter 252 indicates (and this Court recognized) that Secretary Palm would have some authority to “close schools.” But Chapter 252 does not give the Commissioner any such authority, whether applied to a public school or a private school. As the Court stated in *Palm*, an unelected official has no authority to create law applicable to all people who enter his or her jurisdiction, or to promulgate a rule of general application in that jurisdiction. That “kind of controlling, subjective judgment asserted by one unelected official” cannot be “imposed in Wisconsin.”

*Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis.2d 497, 942 N.W.2d 900, ¶¶ 1, 24, 28.

## CONCLUSION

Petitioner’s children began the 2020 School Year in the classroom with other students, and are now required to stay home by the ninth emergency order of a single, unelected official. That order effectively bans *any* in-person, communal, faith-based education, infringing on both the fundamental right to an education and the fundamental right to gather together to worship in a group with other believers. The order is unreviewable and unchecked by anyone, other than by suit. Original jurisdiction is most appropriate given the need for a “prompt and authoritative” determination. *See Citizens Utility Board v. Klauser*, 194 Wis. 2d 484, 488 n.1, 534 N.W.2d 608 (1995); *see also Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938) (“the questions presented are of such importance as under the circumstances to call for a [ ] speedy and authoritative determination by this court in the first instance”).

Petitioner respectfully requests that this Court take original jurisdiction of this action.

Dated this 25th day of August, 2020

Joseph W. Voiland  
Veterans Liberty Law  
519 Green Bay Road  
Cedarburg, WI 53012  
262.343.5397  
[jwvoiland@yahoo.com](mailto:jwvoiland@yahoo.com)  
State Bar No. 1041512



Brent Eisberner  
Levine Eisberner LLC  
14 West Mifflin Street, Suite 206  
Madison, WI 53703  
888.367.8198  
[brent@leattys.com](mailto:brent@leattys.com)  
State Bar No.: 1098038

Bernardo Cueto  
PO Box 68  
Onalaska, WI 54650  
608.797.8123  
[bernardo@wislawyer.com](mailto:bernardo@wislawyer.com)  
State Bar No: 1076013