



## OFFICE OF THE CLERK

**Supreme Court of Wisconsin**

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November 25, 2020

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

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

Pending before the court is an emergency petition for an original action under Wis. Stat. § (Rule) 809.70, an emergency motion for temporary injunction, and a supporting legal memorandum, filed on behalf of petitioners, School Choice Wisconsin Action, et al. The respondents, Dottie-Kay Bowersox, in her official capacity as Public Health Officer and Public Health Administrator of the City of Racine Public Health Department, and the City of Racine Public Health Department, filed a response in opposition to the emergency petition for an original action and to the emergency motion for a temporary injunction. A motion to intervene filed by Racine Educators United, together with a brief and supporting affidavit, are also before the court.

IT IS ORDERED that the petition for leave to commence an original action is granted and this court assumes jurisdiction over this action;

IT IS FURTHER ORDERED that the original action shall be held in abeyance pending this court's decision in three consolidated original action petitions relating to Dane County Emergency Order #9: (1) James v. Heinrich, Case No. 2020AP1419; (2) Wis. Council of Religious

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and Indep. Schools, et al. v. Heinrich, et al., Case No. 2020AP1420; and (3) St. Ambrose Academy, Inc. v. Parisi, et al., Case No. 2020AP1446 (collectively, "James"), which are scheduled for oral argument before this court on December 8, 2020;

IT IS FURTHER ORDERED that, during the pendency of this matter, Racine Public Health Department School Building Closure Order dated November 12, 2020, scheduled to take effect at 12:01 AM, November 27, 2020, and to remain in effect until January 15, 2021, at 11:59 PM, is temporarily enjoined, effective the date of this order. Although the temporary injunction entered in James was not a final adjudication on the merits and solely sought to maintain the status quo between the parties before us in that case, its reasoning applies to the facts as presented to us here, at this stage of this case. James, Nos. 2020AP1419-OA, 2020AP1420-OA, 2020AP1446-OA, unpublished order (Wis. Sept. 10, 2020); and

IT IS FURTHER ORDERED that the motion to intervene together with accompanying brief and affidavit filed by Racine Educators United, shall be held in abeyance until further order of this court.

REBECCA FRANK DALLET, J. (*dissenting*). This court is not "a performing bear, required to dance to each and every tune" litigants play for it. State v. Waste Mgmt. of Wisconsin, Inc., 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). The majority's frequent exercise of original action and injunctive authority has transformed the court into the preferred forum for Wisconsinites to second-guess public-health policy choices. The adjudication of fact-intensive disputes over local policies instead belongs in circuit court in front of locally elected judges. This court should not accept this original action or enjoin the City of Racine Public Health Department's health order. I therefore dissent.

This court has turned into a one-stop shop for undoing local policymaking by discounting longstanding limitations on our original jurisdiction and injunctive-relief authority. On the former, this court historically has respected two principles counseling against its exercise: do not intervene in wholly local disputes and do not resolve questions of disputed fact. See In re Exercise of Original Jurisdiction of Supreme Court, 201 Wis. 123, 128, 229 N.W. 643 (1930); Petition of Heil, 230 Wis. 428, 440, 284 N.W. 42 (1938) ("A case, although involving a question publici juris, will not come within the original jurisdiction if it be only local in effect . . ."); Attorney General v. City of Eau Claire, 37 Wis. 400, 445-46 (1875).

This petition fails on both accounts. First, the public-health measures implemented by the City of Racine Public Health Department do not affect the state at large. Rather, challenges to those measures fit squarely within the jurisdiction of Racine's local circuit court. Second, the petition asks fact-intensive questions about whether these specific public-health measures are "reasonable and necessary for the prevention and suppression" of COVID-19, and whether such measures are narrowly tailored in light of alleged constitutional issues. By imprudently exercising jurisdiction over a local, fact-intensive dispute, this court signals an unfounded mistrust in our circuit courts to do their jobs.

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The majority also contravenes a bedrock principle of this court's equitable authority to not issue injunctions lightly. See Werner v. A. L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). If it were following existing precedent, as it must, the majority would have given full consideration to whether Petitioners met their burden on demonstrating four factors: (1) a reasonable probability of success on the merits; (2) a lack of an adequate remedy at law; (3) an irreparable harm absent an injunction; and (4) a balance of the equities favoring the issuance of the injunction. See, e.g., Pure Milk Products Coop. v. Nat'l Farmers Org., 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); Werner, 80 Wis. 2d at 520.

The majority's order, however, contains no analysis of these petitioners' claims. Rather, the majority defers to its three-month-old order granting the same relief to a different group of petitioners. See Order, James v. Heinrich, Nos. 2020AP1419-OA, 2020AP1420-OA, 2020AP1446-OA (September 10, 2020). The majority takes no account of the additional legal authority presented here or of the significant factual differences between the two cases. I dissented from the majority's analysis in James for reasons that apply with even more force here, namely that Petitioners have not met their burden on the first and fourth factors.

The petitioners here challenge a local health officer's authority, pursuant to Wis. Stat. § 252.03, to close school buildings for a limited period of time. The majority previously concluded in the James order that § 252.03 could not support such authority because of the school-closure authority delegated to the Department of Health Services in § 252.02(3). Recently enacted provisions, however, indicate that the legislature understood its chosen text in § 252.03 as authorizing local health officials to temporarily close schools to abate the spread of disease. See Wis. Stat. §§ 115.01(10)(b), 115.7915(8m), 118.38(2)(bm), 118.60(12), 19.23(12), and 120.12(27); Wis. Adm. Code § PI8.01(4); Wisconsin Legislative Council Amendment Memorandum to 2019 Assembly Bill 1038, Assembly Amendment 4. At the very least, this moves the parties' competing interpretations of § 252.03 out of the realm of certainty necessary to sustain a preliminary injunction.

Petitioners' constitutional claims likewise do not have a reasonable probability of success on their merits. Neither the right to free religious exercise nor the right to direct the education of one's children has ever been recognized as entitling an individual to in-person instruction in all circumstances. See Akin v. Kewaskum Cnty. Sch. Joint Sch. Dist., 64 Wis. 2d 154, 159-60, 218 N.W.2d 494 (1974) (noting that an injunction should not issue when the right in question is not "established").

While it is enough to deny the temporary injunction absent a reasonable probability of success on the merits, I also raise concern with the majority's failure to weigh the equities of issuing this injunction in this particular case. The health order in this case is limited to the temporary closure of school buildings (until January 15), a time inclusive of pre-scheduled holiday breaks. It does not preclude virtual learning plans already in place for most of the students in the City of Racine. The City of Racine Public Health Department states that its order takes into account both a spike in COVID-19 infections that will likely occur between Thanksgiving Day and New Year's Day and a two-week, post-New Year's incubation period. While parents have legitimate concerns

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for their children's educational and spiritual wellbeing in the face of these temporary closures, the Racine area is, according to its public health officer, at a critical level of community spread of COVID-19, a potentially deadly virus. A full weighing of the equities favors the short closure of school buildings in order to protect the health of teachers, staff, students, and their families.

The majority continues to dance to the tune of every litigant with a local grievance, trampling over precedent and practice to freely grant those litigants the ultimate relief they seek before any actual hearing on the merits. That is especially troubling when the equities weigh so heavily in favor of protecting the public's health. I therefore dissent.

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

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Sheila T. Reiff  
Clerk of Supreme Court