STATE OF WISCONSIN SUPREME COURT

Case Nos. 2020AP1420-OA, 2020AP001446-OA, 20201419-OA

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. FANCIS 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.

NONPARTY BRIEF OF INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF NONPARTY

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to securing the constitutional protections necessary for individual liberty. One of IJ's primary missions is protecting the right to economic liberty, and IJ has litigated dozens of cases for this purpose. In Wisconsin, IJ has won challenges to a town's bans on food trucks, the state's ban on the sale of home-baked goods, and Milwaukee's cap on taxi cabs. *White Cottage Red Door, LLC v. Town of Gibraltar*, No. 18-CV-191 (Door Cnty. Cir. Ct., Sep. 3, 2020); *Kivirist v. Dep't of Agric., Trade & Consumer Prot.*, No. 16-CV-06 (Lafayette Cnty. Cir. Ct., May 31, 2017); *Ibrahim v. City of Milwaukee*, No. 11-CV-15178 (Mil. Cnty. Cir. Ct., Apr. 16, 2013). That mission is implicated here because, as discussed more fully below, this case implicates this Court's longstanding recognition that the Wisconsin Constitution will not countenance regulations or laws that seek to protect special interests from competition rather than protecting the general public.

One of IJ's other primary missions is defending educational choice. IJ has represented parents in more than 30 school-choice lawsuits in the past 30 years, including all three school-choice cases decided by the U.S. Supreme Court. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). In this Court, IJ successfully defended Milwaukee's landmark school-choice program. *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998). That mission is implicated here because the order challenged here deprives parents of the ability to choose from diverse options in exercising their right (and, indeed, duty) to educate their children—and it does so in the context of a global pandemic that has made the need for these diverse options only more compelling.

INTRODUCTION

As this Court has recognized, parents have a "fundamental liberty" interest in "direct[ing] 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 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925)). Dane County's Emergency Order #9 ("School-Closure Order")—as enacted on August 24, 2020 and amended on September 1, 2020—infringes this right. Under the Order, parents cannot send their children in grades 3–12 to private schools for in-person instruction, even though they could send those same children to the same facilities for daycare or summer camps. This discrimination cannot withstand constitutional scrutiny—Petitioners have persuasively argued that the School-Closure Order triggers (and fails) strict scrutiny.[1]

As Amicus explains here, the Order would still be unconstitutional even if the rational-basis test applied. That is because the Order is a purely protectionist measure, and protectionism is not a legitimate government interest under the Wisconsin Constitution. Indeed, this Court has instructed that

[1] While Petitioners have asserted a Freedom of Conscience claim, the School-Closure Order independently triggers strict scrutiny because parents have a fundamental right to direct the education of their children. *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶ 15.

courts must regard public-welfare justifications for protectionist laws with "skepticism." Amicus requests that the Court reaffirm this precedent in finding the School-Closure Order unconstitutional.

ARGUMENT

Protectionist governmental restrictions on Wisconsinites' rights are unconstitutional even where the state's rational-basis test applies. That is because protecting one group from competition by another is not a "legitimate exercise of police power." *State ex rel. Week v. Wis. State Bd. of Exam'rs in Chiropractic,* 252 Wis. 32, 36, 30 N.W.2d 187 (1947) (invalidating a continuing education requirement for chiropractors when only one association could offer the educational program, as "the state was acting for the benefit of the association primarily").

In determining whether a challenged law is unconstitutionally protectionist, Wisconsin courts have applied a three-part framework. First, courts consider evidence that protectionism is at play. Second, if protectionism is at play, courts skeptically evaluate the government's alternative rationales for a law. Third, with this

skepticism in mind, courts scrutinize record evidence to determine whether the law actually relates to a legitimate goal. As discussed below, this Court—and lower courts—have used this framework to invalidate protectionist laws under the rational-basis test.

Under this precedent, the School-Closure Order is unconstitutional. As the Order's history shows, there is evidence that Dane County banned private schools to protect a teachers' union from competition. This Court should consequently be skeptical that the Order relates instead to other justifications, like public health. Given that schools do not pose a bigger threat to public health than daycares or summer camps do, the Order's discrimination between shuttered schools and open facilities is irrational. Thus, the Order cannot satisfy the rational-basis test.

A. Wisconsin Courts Have Repeatedly Invalidated Protectionist Restrictions Under the Rational-Basis Test.

Wisconsin courts have consistently recognized that protectionist laws cannot pass constitutional muster. As Amicus has seen firsthand in its cases, these courts have used the rational-basis

test to invalidate anticompetitive restrictions on food trucks, home bakers, and taxicab drivers, among others.

This Court's leading precedent on protectionism – *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee,* 105 Wis. 2d 203, 313 N.W.2d 805 (1982) – is illustrative. There, Milwaukee enacted an ordinance requiring that, to be eligible for liquor licenses, applicants would have to make half of their profits or more from on-the-premises liquor sales. *Id.* at 204. This meant that liquor stores could get a license, but grocery stores could not. *Id*. at 205.

The Court struck down Milwaukee's ordinance in three steps. First, the Court flagged the ordinance's anticompetitive roots. It noted that "the ordinance was supported by special interest groups," *id*. at 209, including a trade association of liquor retailers, *id*. at 210 n.5, "as an anti-competitive measure to keep large retail stores out of the retail liquor business." *Id*. at 209–10.

Second, the Court recognized that the government's asserted rationales for the ordinance were pretexts. When a grocery store challenged the ordinance, the City of Milwaukee predictably denied

that the law was protectionist. *Id.* at 210. Counsel for the city imagined that if a license holder had more than half of its income at stake, it would be more likely to protect its license by diligently enforcing and obeying liquor laws. *Id*. at 208. Counsel likewise speculated that the requirement would reduce the number of places where people could buy alcohol. *Id.* at 210. Rather than taking these rationales at face value, the Court declared that it "should receive with some skepticism" city counsel's two "post hoc hypotheses about legislative purpose." *Id.* at 211 (quotation marks and citations omitted).

Third, with this skepticism in mind, the Court examined the record in finding that the challenged ordinance did not "accomplish [its] articulated goals[.]" *Id*. at 212 (finding "glaring absence in the record"). The challenged ordinance did not promote compliance with liquor laws, especially considering that some retailers ineligible for liquor licenses "appear[ed] equally, if not more" law-abiding than those eligible. *Id*. at 212–13. And the ordinance did not reduce the number of places where alcohol was available, as the ordinance

did not limit the number of liquor licensees. *Id*. at 212. The Court thus invalidated the ordinance as unconstitutionally protectionist under both substantive due process and equal protection. *Id*. at 218.

Lower courts have repeatedly applied *Grand Bazaar Liquors* in invalidating protectionist laws. *See, e.g.*, *Wis. Wine & Spirit Inst. v. Ley*, 141 Wis. 2d 958, 966, 416 N.W.2d 914 (Wis. Ct. App. 1987) (holding grandfather clause of liquor-license restriction was unconstitutional). In fact, circuit courts have applied *Grand Bazaar Liquors* – and its three-part framework – in three cases litigated by Amicus. *White Cottage Red Door, LLC v. Town of Gibraltar*, No. 18-CV-191 (Door Cnty. Cir. Ct., Sep. 3, 2020); *Kivirist v. Dep't of Agric., Trade & Consumer Prot.*, No. 16-CV-06 (Lafayette Cnty. Cir. Ct., May 31, 2017); *Ibrahim v. City of Milwaukee*, No. 11-CV-15178 (Mil. Cnty. Cir. Ct., Apr. 16, 2013) (all included in this brief's appendix ("App.")).

For example, in *White Cottage Red Door*, a court used this framework in striking down a pair of anticompetitive food-truck ordinances. There, a town chaired by a restaurant owner banned food trucks after the plaintiffs opened one. App. at 7, 11–12. After

the plaintiffs sued, the town enacted a new ordinance prohibiting food trucks in its downtown area where brick-and-mortar restaurants were located. *Id*. at 7.

The court declared these ordinances unconstitutional under *Grand Bazaar Liquors*. First, the court noted the town ordinances' protectionist history—restaurateurs, including two on the town's governing board, wanted food trucks banned "to eliminate competition with their businesses." *Id*. at 12. Second, where the government asserted traffic safety, town "character," and property-tax collection as bases for its ordinances, the court considered them "hypothesized post hoc rational[e]s." *Id*. at 13. Third, the court scrutinized the record in finding that the ordinances did not actually further these rationales. Because food trucks did not "impact traffic or congestion any differently" than brick-and-mortar restaurants with outdoor operations did, the ordinances did not rationally relate to traffic safety. *Id*. at 14. Likewise, the town's "fact-free speculative justification" concerning town "character" failed. *Id*. And the town's tax rationale was unavailing given that "[p]rivate property

from which mobile food businesses or trucks might operate" was taxable. *Id*. at 14–15. The town's vending ordinances thus violated substantive due process and equal protection.

Kivirist similarly shows this three-part framework in action. Plaintiffs there challenged the state's ban on selling home-baked goods. *Id*. at 19–20. In striking down the ban, the court first noted that the record was "replete" with evidence of protectionism, like lobbying by commercial bakeries and groceries. *Id*. at 27. Next, where the government claimed the ban was justified by food safety concerns, the court viewed these concerns with "skepticism." *Id*. at 26–27. Finally, after examining the record, the court found that home-baked goods were as safe—or safer—than homemade foods already allowed for sale, like popcorn or syrup. *Id*. at 40–44. The court thus held that the ban was irrational and violated home bakers' rights under both substantive due process and equal protection. *Id*. at 44.

This three-part framework also applied in *Ibrahim*. There, cab drivers challenged Milwaukee's cap on taxicab permits. *Id*. at 55–58.

The court considered evidence showing that the cap's purpose was to enrich existing permit holders, who had lobbied for the cap to "cut[] off competing businesses from entering the field." *Id.* at 66. Given this evidence, the court evaluated the city's stated objective—increasing professionalism among the taxi industry—with a critical eye. *See id*. at 65–66. The court determined that this objective was supported by neither logic nor the record. *Id*. The law thus violated both substantive due process and equal protection.

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As these cases all show, protectionism is an illegitimate interest under the Wisconsin Constitution. And where there is evidence that a law is protectionist, a court must be skeptical as to any asserted rationales and it must carefully probe the record to determine whether they hold water.

B. The School-Closure Order Is Unconstitutionally Protectionist.

As demonstrated above, Wisconsin courts have not hesitated to protect people's right to sell (and choose to buy) food-truck meals

or home-baked cakes or rides from taxi companies, and they have not hesitated to hold that these rights may not be legislated away simply to protect one favored group from competition. The same should hold true for schools and parents, particularly as parents' need for more diverse educational options has only increased in light of the ongoing global pandemic. As discussed below, the Order fails the rational-basis test under the three-part framework from *Grand Bazaar Liquors*.

First, there is evidence that Dane County enacted the School-Closure Order to protect Madison public schools – and their teachers' union, Madison Teachers Inc. – from private-school competition. Shortly before the Order, the union demanded that schools stop in-person education for at least the first quarter of the 2020–21 school year. Logan Wroge, *Madison teachers union demands fully virtual start to school year*, Wis. St. J. (Jul. 17, 2020), https://madison.com/wsj/news/local/education/local_schools/madison-teachers-union-demands-fully-virtual-start-to-school-year/article_51e70df9-e7bb-5624-b3be-805701a07dd9.html. Meanwhile,

the union was part of a group of unions that demanded a moratorium on charter schools and vouchers.[2] As a newspaper summarized one staffer's views, "leadership in Wisconsin's largest teachers unions fear they will look foolish if they aren't open and . . . private schools have in-person classes."[3] Given the union pressure behind the School-Closure Order, there is evidence of protectionism here.[4] *See Grand Bazaar Liquors*, 105 Wis. 2d at 209 (holding law was protectionist in intent where it was "supported by special interest groups as an anticompetitive measure").

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[2] Adam Rogan, *Will Gov. Evers order schools to close statewide in fall? At least one Republican fears he will*, Kenosha News (Aug. 4, 2020), https://www.kenoshanews.com/news/local/will-gov-evers-order-schools-to-close-statewide-in-fall-at-least-one-republican-fears/ article_e784de6b-9a44-554e-a9f4-3a214a1410f9.html.

[3] *Id*.

[4] There is other evidence that school-closure orders turn on protectionism rather than public-health considerations. For example, in his review of 738 school districts' data on reopening schools, education researcher Corey DeAngelis found that reopening decisions were "statistically unrelated" to COVID-19 risk. Corey DeAngelis, *Cannibalizing private life*, Wash. Examiner (Sep. 3, 2020, 11:00 AM), https://www.washingtonexaminer.com/opinion/cannibalizing-private-life. In contrast, the relationship between union power and reopening decisions is significant—while "36% of school districts in right-to-work states have decided to offer full-time, in-person instruction this fall," only "10% of school districts in states that previously required union membership as a condition of employment made the same decision." *Id*.

Second, given this evidence, this Court "should receive with some skepticism" any alternative rationales Respondents assert for the law. *Id*. at 211. While Respondents will likely invoke "public health" as a basis for the School-Closure Order, that rationale is best understood as a "post hoc hypothes[i]s about legislative purpose" here. *Id*.

Third, applying skepticism to the School-Closure Order, the Order fails the rational-basis test. That is because the Order's arbitrary discrimination between schools and activities that are allowed – like daycare and educational camps – does not actually advance public health.

As the Court's *Grand Bazaar Liquors* decision shows, the government cannot justify a discriminatory restriction on one group or activity unless it poses a unique concern. *See id*. at 212–13. In defending Milwaukee's limitation of liquor licenses to retailers who made at least half their profits from liquor, the city's counsel posited that these retailers were more law abiding than others. *Id*. at 204, 208. But the Court rejected this argument because retailers without

liquor licenses "appear[ed] equally, if not more" law abiding than licensees and that there was no evidence to the contrary. *Id*. at 212–13. Because both types of retailers had a similar interest in complying with the law, the government's discriminatory restrictions against one of these groups had no rational basis.

The holding of *Grand Bazaar Liquors* rings just as true here given that in-person schooling is virtually identical to what Dane County allows, like in-person daycare or educational camps.[5] After all, the same children who cannot attend in-person school together can congregate in other ways. While the School-Closure Order categorically bans in-person schooling for children in grades 3 through 12, the Order allows in-person "[c]hild care settings and youth settings" for groups of up to 15 children.[6] In fact, those

[5] As Petitioners have pointed out, the School-Closure Order also allows scores of other businesses to conduct in-person operations, including salons, barber shops, gyms, fitness centers, water parks, pools, bowling alleys, and movie theaters, subject to various capacity limitations and social-distancing guidelines. *See* School-Closure Order, § 6(d)–(f).

[6] *See* School-Closure Order, § 4(a) (defining "[c]hild care settings and youth settings" to "include all licensed, recreational, and educational camps, licensed and certified childcare providers, unregulated youth programs, [and] licensed-exempt public school programs").

children can even assemble at the *same spaces* where school is prohibited, so long as they are there for "child care and youth settings."[7] This disparity holds even at schools that have taken extensive precautions like outdoor classes, social distancing, removal of high-contact items, installation of disinfectant machines and plexiglass, and upgrades to filtration and exhaust systems. It strains credulity to believe that children pose more of a public-health risk when attending these spaces for schooling than when attending these spaces for "child care and youth settings." Thus, the School-Closure Order's discrimination against in-person schooling is not rationally related to public health.

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The School-Closure Order's disconnection from a legitimate interest in public health is unsurprising. That is because the Order is

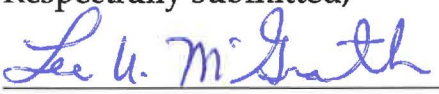
[7] S*ee* School-Closure Order, § 4(d) ("Public and private kindergarten through twelfth grade schools may be used for food distribution, health care services, as child care and youth settings, for pickup of student materials, and for government functions.").

really related to an illegitimate interest: protectionism. As such, the Order is unconstitutional.

CONCLUSION

The School-Closure Order is unconstitutional under any applicable standard of review. While the Order infringes fundamental rights, like parents' right to direct their children's education, the Order fails the rational-basis test too.

Respectfully submitted,



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CERTIFICATION OF BRIEF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief produced with a proportional font. The length of this brief is 2,825 words.

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CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 809.19 (12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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