No. 2021AP1343

In the Wisconsin Court of Appeals

DISTRICT IV

JEFFREY BECKER, ANDREA KLEIN, AND
A LEAP ABOVE DANCE, LLC,
PLAINTIFFS-APPELLANTS,

v.

DANE COUNTY, JANEL HEINRICH, AND PUBLIC HEALTH OF
MADISON & DANE COUNTY,
DEFENDANTS-RESPONDENTS

On Appeal from the Dane County Circuit Court,
The Honorable Jacob Frost, Presiding,
Case No. 21CV143

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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ISSUES PRESENTED

1. Whether state law permits local health officials to unilaterally issue enforceable restrictions on otherwise lawful activity without adoption by the local governing body (e.g., county board)?

The Circuit Court held that Wis. Stat. § 252.03's general provisions to "do what is reasonable and necessary" and to "take all measures necessary" give local health officials "broad authority" to "control conduct" and "to do so forcefully" through enforceable general orders, App. 13–19, despite numerous textual indications that local health officials do not have this power.

2. Whether Dane County Ordinance § 46.40(2) and/or Wis. Stat. § 252.03, violate Article IV, § 22 of the Wisconsin Constitution and the non-delegation doctrine?

The Circuit Court held that an open-ended grant of police power to a local health official to adopt whatever restrictions she deems "reasonable and necessary" for as long as the COVID pandemic persists does not violate the non-delegation doctrine, App. 20–29, even though the Wisconsin Supreme Court already held that an equally broad interpretation of § 252.02's similar language would violate the non-delegation doctrine unless any such restrictions receive legislative oversight through the rulemaking process.

INTRODUCTION

Since May 2020, Respondent Heinrich, Dane County's local health officer, has issued a series of orders dictating all aspects of life in Dane County, including, most egregiously, banning indoor gatherings, even in private homes, and, presently, requiring masks in all indoor spaces open to the public, even on two-year-olds. To issue these orders, Respondent Heinrich has relied on Wis. Stat. § 252.03 and Dane County Ordinance § 46.40(2), which Dane County adopted during the current crisis to give her orders the force of law. Yet § 252.03 does not empower local health officials to issue enforceable general orders; indeed, Dane County adopted its ordinance precisely because there is no enforcement mechanism for such orders anywhere in state law. The Wisconsin Supreme Court has now twice held that the provisions Respondent Heinrich relies on, and nearly identical language in a sister statute, "cannot be reasonably read as an open-ended grant of authority," authorizing "anything and everything." *James v. Heinrich*, 2021 WI 58, ¶ 21–22, 960 N.W.2d 350; *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶¶ 31–42, 391 Wis. 2d 497, 942 N.W.2d 900 (252.02 is not "an 'open-ended grant' of police powers to an unconfirmed cabinet secretary"). Consistent with those holdings, numerous statutes indicate that local health officers have no power to unilaterally impose restrictions during a pandemic, but instead the local legislative body must adopt any restrictions, as many other jurisdictions have shown can be done.

Accordingly, all of Respondent Heinrich's orders, as well as Dane County Ordinance § 46.40(2), violate state law. Dane County's ordinance also violates the non-delegation doctrine, Article IV, § 22 of the Wisconsin Constitution, and Wis. Stat. §§ 59.02 and 59.03, by attempting to delegate legislative authority vested exclusively in the county board to Respondent Heinrich. Alternatively, if Wis. Stat. § 252.03 does operate as an "open-ended grant of police powers" to local health officials, then

the statute itself violates the non-delegation doctrine and the Wisconsin Constitution. Either way, Respondent Heinrich's orders are all illegal. This Court should reverse the Circuit Court's decision holding otherwise.

ORAL ARGUMENT AND PUBLICATION

This case warrants both oral argument and publication, as it involves important issues about the scope of local health officials' authority under § 252.03 and the separation of powers at the local level.

STATEMENT OF THE CASE

A. Legal and Factual Background

In March 2020, in response to the then-emerging COVID-19 pandemic, Governor Tony Evers declared a state of emergency and issued an order, pursuant to his emergency powers under Wis. Stat. § 323.12, shutting down much of ordinary life throughout Wisconsin for 60 days. *Palm*, 2020 WI 42, ¶ 5. When the emergency declaration was about to expire without extension by the Wisconsin Legislature, the Secretary of the Department of Health Services (DHS) issued a new, equivalent order, this time pursuant to Wis. Stat. § 252.02. *Palm*, 2020 WI 42, ¶¶ 5–8. The Wisconsin Legislature challenged the order on the ground that it met the definition of a "rule" and therefore should have been promulgated as such, and the Wisconsin Supreme Court agreed, invalidating and enjoining the order. *Id*. ¶¶ 15, 58–59.

In addition to holding that the order met the definition of a "rule," the Supreme Court also explained that, if Wis. Stat. § 252.02 were interpreted as "an 'open-ended grant' of police powers to an unconfirmed cabinet secretary," that statute would violate the non-delegation doctrine. *Palm*, 2020 WI 42, ¶¶ 31–42. The Court avoided the non-delegation problem by holding that, to be enforceable, general health orders purporting to regulate an array of normal activities during a

pandemic must go through the rulemaking procedures of Chapter 227, thereby giving the Legislature oversight. *Id*. ¶ 3.

After the Supreme Court's decision, Governor Evers did not pursue a new emergency rule. *See* Riley Vetterkind, *Evers administration won't pursue new COVID-19 restrictions amid impasse with GOP*, Wisconsin State Journal (May 19, 2020).[1] In the wake of *Palm*, many local health departments considered whether to adopt their own local orders. *See* Mitchell Schmidt, *Some Wisconsin counties rescind local stay-at-home orders, Dane County order to stay in place*, Wisconsin State Journal (May 16, 2020).[2] But, as explained in detail below, the Wisconsin statutes do not authorize local health officials to regulate or prohibit normal activities via order. *Infra* Part I.

In light of this, most local health departments in Wisconsin did not attempt to impose their own orders, but chose instead only to encourage voluntary compliance with DHS and CDC recommendations. *See* Schmidt, *supra*. In other jurisdictions, the local governing body (county board, city council, etc.) adopted temporary restrictions directly in ordinances via the normal local legislative process. Milwaukee and Eau Claire, for example, each adopted mask mandates in ordinances. *E.g.*, Alison Dirr, *Milwaukee Common Council approves requiring masks in*

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[1] https://madison.com/wsj/news/local/govt-and-politics/evers-administration-wont-pursue-new-covid-19-restrictions-amid-impasse-with-gop/article_86186768-a9a4-5ff2-947c-db0caeaf9767.html

[2] https://madison.com/wsj/news/local/govt-and-politics/some-wisconsin-counties-rescind-local-stay-at-home-orders-dane-county-order-to-stay-in/article_3b4d1e92-4f00-5348-ab15-72ba8fc572da.html

public spaces, Milwaukee Journal Sentinel (July 13, 2020)[3]; Milwaukee Ordinances § 62-8; City of Eau Claire, *Local Mask Ordinance Goes Into Effect* (Mar. 31, 2021)[4]; City of Eau Claire Ordinances § 8.04.031.[5] A few jurisdictions adopted ordinances containing a framework for the local health officer to propose restrictions, while retaining the governing body's legislative role. Winnebago County, for example, adopted an ordinance providing that its local health officer can issue recommended restrictions, but that these are "advisory only" until approved by the county board, and are subject to durational limits. Alex Groth, *Winnebago County Board votes to approve ordinance to give health officer enforcement powers to fight spread of COVID-19*, Oshkosh Northwestern (Nov. 18, 2020)[6]; Winnebago County Ordinances § 11.08.[7]

In stark contrast to these approaches that are consistent with the separation of powers at the local level, Dane County simply handed the keys to the county over to its local health officer, indefinitely. To address the lack of any enforcement mechanism under state law for a general order issued by a local health officer, the Dane County Board in May 2020 adopted Dane County Ordinance § 46.40, which preemptively makes any order Respondent Heinrich issues enforceable, as follows: "It

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[3] https://www.jsonline.com/story/news/local/milwaukee/2020/07/13/milwaukee-common-council-approves-mask-requirement/5363137002/

[4] https://www.eauclairewi.gov/Home/Components/News/News/9625/

[5] https://www.eauclairewi.gov/home/showpublisheddocument/34742/637479382672230000

[6] https://www.thenorthwestern.com/story/news/2020/11/18/winnebago-county-votes-approve-give-health-officer-enforcement-powers-fight-spread-covid-19/6332487002/

[7] https://www.co.winnebago.wi.us/sites/default/files/uploaded-files/chapter11_rev_2021.pdf

shall be a violation of this chapter to refuse to obey an Order of the Director of Public Health Madison and Dane County entered to prevent, suppress or control communicable disease pursuant to Wis. Stat s. 252.03." *Id*. § 46.40(2).

Since then, Respondent Heinrich has issued a series of orders unilaterally dictating all aspects of life in Dane County. *See* Public Health Madison & Dane County, *Current Order* (section entitled "Past Orders").[8] To issue and enforce those orders, Respondent Heinrich has relied entirely on the generic authorizations in Wis. Stat. § 252.03 to "take all measures necessary to prevent, suppress and control communicable diseases" and "do what is reasonable and necessary for the prevention and suppression of disease," and, for enforcement, on Dane County Ordinance § 46.40(2). The Dane County Board has never affirmatively voted on or ratified any of these orders. *See* R. 27 ¶ 34.[9] And these orders were often issued with little to no warning, significantly disrupting businesses, schools, and life in Dane County.

To give a few examples, in late August 2020, the Friday before many private schools were set to reopen, Respondent Heinrich issued an order attempting to close all schools in Dane County for grades 3 and above. *See* Emergency Order #9, § 4.d.[10] One week before Thanksgiving 2020, Respondent Heinrich issued an order prohibiting all indoor

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[8] https://www.publichealthmdc.com/coronavirus/current-order

[9] Respondents' answer "den[ies] Plaintiffs' description as complete or correct," R. 35, ¶ 34, but Respondents have never identified any action by the Dane County Board affirmatively adopting any of the restrictions Respondent Heinrich has issued. And the lack of any vote by the Dane County Board approving these restrictions is a matter of public record.

[10] https://publichealthmdc.com/documents/2020-08-21_Order_9.pdf

gatherings between individuals not in the same immediate household, effectively banning small Thanksgiving gatherings in private homes among family and loved ones. Emergency Order #10, § 3.[11] That same order (and multiple subsequent orders) prohibited or restricted most youth sports activities in Dane County, including outdoors. *Id*. § 4.c. Respondent Heinrich has also imposed capacity restrictions, physical distancing requirements, cleaning requirements, and a variety of other restrictions on various categories of businesses and locations. *E.g.*, *id*.; *see* App. 10. The current order (as of October 4), requires masks in all indoor spaces open to public, including on two-year olds. Face Covering Emergency Order #2.[12]

This summer, the Wisconsin Supreme Court held that Respondent Heinrich's attempt to close schools in Emergency Order #9 was unlawful because Wis. Stat. § 252.03 does not give local health officers such power. *James v. Heinrich*, 2021 WI 58. The Court explained that "[t]he power to take measures 'reasonable and necessary' cannot be reasonably read as an open-ended grant of authority." *Id*. ¶ 21. And the combination of a specific grant of authority to *DHS* to "close schools" in Wis. Stat. § 252.02, along with the "conspicuous absence" of a similar grant to local health officials in § 252.03, "confirm[ed] that the legislature withheld this authority from local health officers." *Id*. ¶¶ 19–20.

B. Procedural Background

Plaintiffs-Appellants Becker and Klein filed this action on January 20, 2021. R. 4. The heart of their claims is that an unelected local health officer cannot unilaterally issue enforceable general orders regulating or prohibiting otherwise lawful conduct during a pandemic, but that any

[11] https://publichealthmdc.com/documents/2020-11-17_Order_10.pdf

[12] https://www.publichealthmdc.com/documents/2021-09-09_Order_18.pdf

such restrictions must be adopted by the local legislative body, and therefore all of the COVID-related orders Defendant Heinrich has issued (or will issue, if based on Wis. Stat. § 252.03 and Dane County Ordinance § 46.40(2)) are unlawful and unenforceable, and that Dane County's ordinance attempting to make such orders enforceable is invalid. R. 4:21 ("Request for Relief"). Plaintiffs immediately filed a motion for a temporary injunction, R. 16, and for summary judgment, R. 18, with a single combined brief in support of both, R. 17.

A few days after they filed the complaint, Respondent Public Health of Madison and Dane County (PHMDC) filed an enforcement action against Appellant A Leap Above Dance, LLC (A Leap Above), seeking nearly $24,000 in fines for a single event that PHMDC alleges violated the indoor gathering ban in place in November and December 2020. R. 27, ¶ 5; *Public Health Madison & Dane County v. A Leap Above Dance*, No. 21CV177 (Dane Cty. Cir. Ct.). Shortly thereafter, A Leap Above joined this action as a Plaintiff. R. 27. PHMDC then dismissed its enforcement action, and Dane County re-filed it as a counterclaim in this case. R. 42:16–19.

The Circuit Court heard arguments on Appellants' temporary injunction motion in March, and issued a decision and order in May denying the motion. R. 69; App 6–30. The Court's decision rejected Petitioners' legal claims on the merits. The court held that Wis. Stat. § 252.03's general provisions to "do what is reasonable and necessary" and to "take all measures necessary" give local health officials "broad authority" to "control conduct" and "to do so forcefully" through enforceable general orders, App. 13–18, despite numerous textual indications to the contrary. *Infra* Part I.A. The court also held that the combination of Dane County Ordinance § 46.40(2) and Wis. Stat. § 252.03—which together create an open-ended grant of police power to Respondent Heinrich to adopt whatever restrictions she deems

"reasonable and necessary" for as long as the COVID pandemic persists—is not a non-delegation problem, App. 20–29, even though the Wisconsin Supreme Court already held in *Palm*, 2020 WI 42, ¶¶ 31–42, that an equally broad interpretation of 252.02's similar language would violate the non-delegation doctrine unless any such restrictions receive legislative oversight through the rulemaking process.

Given that the Circuit Court's temporary injunction decision rejected Appellants' legal claims on the merits, Appellants asked the Circuit Court to enter summary judgment for the Respondents so that they could appeal. R. 80. Two months later, the court issued an order granting Respondents summary judgment and dismissing Petitioners' claims. R. 90. Appellants filed this appeal shortly thereafter.[13]

The following day, Dane County moved to stay the enforcement action (counterclaim) against A Leap Above until this appeal is resolved, "agree[ing]" with Appellants that "if Plaintiffs' appeal succeeds, the counterclaim will ultimately need to be dismissed." Dkt. 100:2.[14] On August 16, the Circuit Court granted Dane County's request for a stay until this appeal is resolved. Dkt. 111. Multiple other enforcement

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[13] This appeal (No. 21AP1343) is an appeal as of right, since the order finally disposed of Plaintiffs Becker's and Klein's claims against all three Defendants, and A Leap Above's claims against Defendants Heinrich and PHMDC. A Leap Above filed a separate petition for permissive appeal as to the dismissal of its claims against Dane County, given the pending counterclaim (which is only between Dane County and A Leap Above), and asked this Court to consolidate the two. *See* No. 21AP1382. This Court has not yet ruled on that petition or request to consolidate. If this Court does grant that petition and consolidate the two, A Leap Above intends to rely on this brief as its opening brief.

[14] Citations to "Dkt." are to the docket entries in the Circuit Court. Because these events occurred after Appellants filed their notice of appeal, they are not part of the record on appeal. However, this Court can take judicial notice of subsequent proceedings in the Circuit Court. *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 6 n.2, 262 Wis. 2d 720, 665 N.W.2d 155.

actions have also been put on hold until the issues in this appeal are resolved. *See Dane County v. Tyrol Holdings, LLC*, No. 21FO548 (Dane Cty. Cir. Ct.); *Public Health of Madison & Dane County v. D.L. Spirits, Inc.*, 20CV2466 (Dane Cty. Cir. Ct.).

STANDARD OF REVIEW

The issues in this case are purely legal, which this Court reviews de novo. *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 28, 393 Wis. 2d 38, 946 N.W.2d 35.

ARGUMENT

I. Local Health Officials Do Not Have Authority to Issue Enforceable General Orders

Both Respondent Heinrich's orders, *infra* Part I.A, and Dane County Ordinance § 46.40(2), *infra* Part I.B, violate multiple state laws indicating that local health officers do not have authority to issue orders like those Respondent Heinrich has issued.

A. All of the Orders Respondent Heinrich Has Issued Are Unlawful and Unenforceable

As legal authority for the numerous orders she has issued, Respondent Heinrich has relied entirely on Wis. Stat. § 252.03, in particular on the general directives to local health officials to "take all measures necessary to prevent, suppress and control communicable diseases" *id*. § 252.03(1), and to "do what is reasonable and necessary for the prevention and suppression of disease," *id*. § 252.03(2) (referred to collectively as the "reasonable and necessary" provisions). Yet those provisions do not empower local health officials to unilaterally issue enforceable general orders.

A foundational principle of statutory interpretation is that "statutory language is interpreted in the context in which it is used; not

in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. There are many textual indications that the "reasonable and necessary" provisions do not, by themselves, authorize enforceable orders.

First, Wis. Stat. § 252.02, the adjacent and analogous provision for DHS, not only contains similarly broad language authorizing "all emergency measures necessary to control communicable diseases," *id.* § 252.02(6), but also *separately* and *explicitly* authorizes DHS to "issue orders," *id.* § 252.02(4), whereas § 252.03, by contrast, does not anywhere authorize local health officers to "issue orders." This contrast suggests that the general power to "issue orders" was intentionally withheld from local health officers. Further reinforcing the point, § 252.02 also allows DHS to "issue orders" that are specific to "any city, village, or county" and "serv[e] [them] upon the local health officer," indicating that, if localized "orders" are needed to combat a pandemic, only DHS (or the local governing body, *see infra*) can issue them, *not* a local health officer.

In *James v. Heinrich*, 2021 WI 58, the Wisconsin Supreme Court held that Wis. Stat. § 252.03's "reasonable and necessary" provisions do not include the power to "close schools," for multiple reasons relevant here. First, the Court explained that those generic authorizations "cannot be reasonably read to encompass anything and everything," because otherwise they would swallow the rest of the statute, rendering the specific grants of authority "entirely redundant." *Id.* ¶¶ 22–23. And, given that Wis. Stat. § 252.02 specifically authorizes DHS to "close schools," while a similar grant of authority is "conspicuous[ly] absen[t]" from § 252.03, the two statutes "when read in conjunction" "confirm[ ] that the legislature withheld this authority from local health officers." *Id.* ¶¶ 19–20. The same is true with respect to the power to "issue orders":

§ 252.02 explicitly grants that authority to DHS, while § 252.03 "conspicuously" omits any such grant of authority to local health officers.

Second, and providing a similar contrast, Wis. Stat. § 323.14 authorizes *the county board* during any emergency to "*order*, by ordinance or resolution, whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government." The county executive may "exercise" this emergency "order" authority if the board "is unable to meet promptly," but any action taken by the county executive is "subject to ratification, alteration, modification, or repeal by the governing body as soon as that body can meet." Wis. Stat. § 323.14(4)(b). Section 323.14's use of the word "order," which is absent from § 252.03, further indicates that section 252.03's "reasonable and necessary" provisions do not include the power to issue enforceable orders. This statute also reveals that the Legislature expects the local legislative body to be actively involved during a crisis, not to simply hand over its policy-making role to one unelected official.

Third, Wis. Stat. § 252.25, which provides a penalty for "violation[s] of law relating to health," omits any reference to orders issued by a local health officer, instead providing penalties only for violating a "*state* statute or rule," a "county, city or village *ordinance*," or a "*departmental* [DHS] order." There is no other statue that provides a penalty or enforcement mechanism for general "orders" issued by a local health officer, as even the Wisconsin Counties Association has recognized. R. 19:66 ("Neither the statutes nor the administrative code provide for a detailed enforcement mechanism of a local health officer's general order."). Thus, Wis. Stat. § 252.25 further reinforces the contrast between Wis. Stat. §§ 252.02 and 323.14, which authorize DHS and the county board respectively to issue "orders" during health crises, and § 252.03, which does not, indicating that the Legislature intentionally withheld this power from local health officials.

Fourth, Wis. Stat. § 251.06, which outlines the general duties and powers of local health officers, authorizes such officers to "[e]nforce *state* public health statutes and rules" and "any ordinances that *the relevant governing body enacts*," but does not give a local health officer authority to enforce her own general orders.[15] Again, this statute is consistent with the inclusion of the power to issue "orders" in Wis. Stat. §§ 252.02 and 323.14, and its exclusion from § 252.03. The Circuit Court relied on Wis. Stat. § 251.06 as *support* for its conclusion that local health officers can issue enforceable orders, heavily emphasizing the words "shall" and "enforce" in this statute. App. 13–14. But the Court ignored the language describing *what* local health officers can enforce, which is the key point: only "*statutes* and *rules*," and "*any ordinances* the relevant governing body enacts"—*not* the local health officer's own orders.

Fifth, multiple other statutes *do* give local health officers power to issue more limited kinds of orders, and provide a means to enforce those orders. Section 252.06 authorizes local health officials to issue "isolation and quarantine" orders targeted at a particular individual, and provides an enforcement mechanism, *id.* § 252.06(5) ("all necessary means to enforce"). Similarly, Wis. Stat. § 254.59 authorizes local health officials to "order the abatement or removal" of a known "human health hazard" in a particular building, and provides an enforcement mechanism, *id.*

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[15] Wis. Stat. § 251.06(3)(c) also authorizes a local health officer to enforce "regulations that the local board of health adopts," but nothing in the powers of the local board of health authorizes it to issue regulations that prohibit, limit, or penalize otherwise lawful activity. Wis. Stat. § 251.04. The only "regulations" authorized by that section are "for [the local board of health's] own guidance and for the governance of the local health department." *Id.* § 251.04(3). In any event, none of the orders issued by Defendant Heinrich thus far have been adopted as "regulations" by the Dane County Board of Health. *See* Emergency Order #10, *supra*, at p. 1 ("I, Janel Heinrich, … order the following …"); Face Covering Emergency Order #2, *supra*, at p. 1 (same).

§ 254.59(4)–(5) (authorizing fines, costs, and forcible abatement by the local health officer). Wis. Admin. Code § DHS 145.06 implements these statutes and creates a procedure for local health officers to petition a court to require a particular person or owner of a specific piece of property to comply with an order *directed at that person or property*. Wis. Admin. Code § DHS 145.06 (4)–(6). These provisions show that the Legislature knew how to authorize enforceable orders when that is what it intended.

The Circuit Court's decision does not grapple with or address these textual indications that local health officers lack authority to issue enforceable general orders. Instead, the Court simply reasoned that "all measures" sounds "expansive" and therefore that phrase "must include the power to compel conduct" and "to do so forcefully," including to "control" any conduct that might cause "the spread of disease" (which would cover all human interactions). App. 15–17. The Wisconsin Supreme Court has already twice rejected that simplistic and constitutionally problematic interpretation. In *James*, the Court held that § 252.03's "reasonable and necessary" provisions "cannot be reasonably read as an open-ended grant of authority," "encompass[ing] anything and everything." 2021 WI 58 ¶ 21-22. Likewise, in *Palm*, the Court interpreted § 252.02's similar authorization to take "all emergency measures necessary," and, without "defin[ing] the precise scope of DHS authority under" that language, nevertheless held that it does not include the power to "confin[e] people to their homes, forbid[ ] travel [or] clos[e] businesses." 2020 WI 42, ¶¶ 45–59. As explained above, the best interpretation of § 252.03's "reasonable and necessary" provisions is that they do not independently authorize any type of enforceable order.

Contrary to the Circuit Court, this does not mean that local health officers can never "compel action." App. 14. They can still "compel obedience with state public health *law* and local *ordinances*," App. 15;

see Wis. Stat. § 251.06 (authorizing local health officers to enforce "statutes," "rules," and "ordinances"). So, for example, a health officer could enforce a mask mandate adopted in an ordinance by the local governing body, as Milwaukee and Eau Claire have done. *Supra* pp. 10–11. Local health officers can also issue certain types of orders targeted at a particular individual or property and compel compliance with those orders. App. 12 n.1; *supra* pp. 19–20. And local health officers can "forbid *public* gatherings." Wis. Stat. § 252.03(2). But beyond these specific grants for certain limited types of orders, the "reasonable and necessary" provisions do not include the general power to issue orders to "control" any type of conduct that might spread disease. App. 16.

This interpretation also does not render the "all measures necessary" language meaningless. *Contra* App. 16. There are all sorts of things local health officials can do that do not require enforcement: contact tracing, testing, voluntary vaccination, promoting and providing masks, developing and proposing restrictions for the local governing body to adopt, etc. And, of course, "all measures" includes all of the enforcement authority that is explicitly granted elsewhere. The purpose of the "reasonable and necessary" provisions is to establish the *duty* of local health officers to act "promptly" in the face of communicable diseases, using the tools available to them. But those tools do not include the power to unilaterally dictate and "control" any and all human conduct for as long as any threat from any communicable disease exists.

B. Dane County Ordinance § 46.40(2) Violates or Is Preempted by State Law

Counties have "no inherent power to govern," but instead are "totally [ ] creature[s] of the legislature," and therefore their "powers must be exercised within the scope of authority ceded to [them]." *Milwaukee Cty. v. Milwaukee Dist. Council 48-Am. Fed'n of State, Cty. & Mun. Employees, AFL-CIO*, 109 Wis. 2d 14, 33, 325 N.W.2d 350 (Ct. App.

1982); *Jackson Cty. v. State, Dep't of Nat. Res.*, 2006 WI 96, ¶ 16, 293 Wis. 2d 497, 717 N.W.2d 713 (citation omitted); *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 21, 373 Wis. 2d 543, 892 N.W.2d 233. A "necessary corollary to this principle is that a [county] may not create authority *ex nihilo*, either for itself or its divisions." *Wisconsin Carry*, 2017 WI 19, ¶ 22.

Accordingly, a local ordinance is preempted by state law if: (1) "the legislature has expressly withdrawn the power of municipalities to act"; (2) "the ordinance logically conflicts with the state legislation"; (3) "the ordinance defeats the purpose of the state legislation"; or (4) "the ordinance goes against the spirit of the state legislation." *Wisconsin Carry*, 2017 WI 19, ¶ 64 (quoting *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984)).

As explained in detail above, multiple state statutes indicate that local health officers do not have authority to unilaterally issue enforceable orders regulating and penalizing otherwise lawful conduct during a pandemic. Yet Dane County Ordinance § 46.40(2) tries to give the Dane County health officer this power by preemptively making enforceable any order she deems reasonable and necessary. This ordinance therefore violates or is preempted by Wis. Stat. §§ 252.02, 252.03, 251.06, 252.25 and/or 323.14, by attempting to give Respondent Heinrich authority the Legislature intentionally withheld.

In addition to all of the statutes already described, Dane County Ordinance § 46.40(2) also violates or is preempted by Wis. Stat. § 66.0113. That statute authorizes a county board to "by ordinance adopt and authorize the use of a citation under this section to be issued for violations *of ordinances*." Contrary to this statute, Dane County's ordinance authorizes citations for violations of any *order* the local health officer issues, allowing her to create her own fines and write her own municipal code. Illustrating that the Dane County Board has effectively

handed over unlimited police power, when Defendant Heinrich issued her ban on all indoor gatherings in private homes just before Thanksgiving, she simultaneously issued a press release threatening "fine[s] of up to $1,000" for "anyone hosting a gathering." *New Public Health Order Prohibits Indoor Gatherings, Limits Outdoor Gatherings to 10 People*, Public Health Madison & Dane County (Nov. 17, 2020).[16]

In *Palm*, the Wisconsin Supreme Court explained that criminal penalties cannot be imposed for "violation of an administrative agency's directive" unless the prohibited conduct is "set out with specificity in [a] statute" or "properly promulgated rule," because otherwise it would allow a single, unelected official to unilaterally "defin[e] the elements" of new, prohibited conduct. 2020 WI 42, ¶¶ 37–40. That same principle is embodied in the text of Wis. Stat. § 66.0113—that any prohibited conduct must be "factually defined" in an *ordinance*, not in an order from a single unelected official. As in *Palm*, Dane County's ordinance "stands [Wis. Stat. § 66.0113] on its head," by "endow[ing] [the Dane County health officer] with the power to create [municipal] penalties for violations of" whatever orders she deems "reasonable and necessary" to prevent the spread of COVID-19. *Palm*, 2020 WI 42, ¶ 39.

The Circuit Court did not sufficiently analyze Wis. Stat. § 66.0113, instead concluding in one sentence that there is "no law saying that an ordinance cannot compel compliance with an LHOs orders." Section 66.0113 is that law—it only allows municipalities to authorize citations "for violations *of ordinances*." App. 19. There is nothing in Dane County Ordinance § 46.40(2) to violate; it is a pass-through, incorporating by

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16 https://publichealthmdc.com/news/new-public-health-order-prohibits-indoor-gatherings-limits-outdoor-gatherings-to-10-people

reference any order the local health officer issues. *Palm* explains that this is not permitted. 2020 WI 42 ¶¶ 37–40.

The Circuit Court attempted to distinguish *Palm* first by pointing to minor textual differences between § 252.02 and § 252.03, App. 18, without explaining how these differences are relevant to *Palm*'s core point that prohibited conduct cannot be defined solely in an order, but "must be set out with specificity in [a] statute [or rule] to give fair notice" (or, at the local level, an ordinance). *See* 2020 WI 42 ¶ 37.

The Circuit Court also attempted to distinguish *Palm* on the basis that violating the order there could result in criminal penalties. But ordinances are the local means to prohibit conduct, since municipalities cannot create crimes. *See* Wis. Stat. §§ 66.0107, 66.0113, 939.12; *State v. Thierfelder*, 174 Wis. 2d 213, 222 (1993). And ordinances are subject to the same due process and "fair notice" requirements that *Palm* emphasized. *Compare* 2020 WI 42, ¶ 37, *with City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 16, 291 N.W.2d 452 (1980) ("A statute *or ordinance* is unconstitutionally vague if it fails to afford proper notice of the conduct it seeks to proscribe or if it encourages arbitrary and erratic arrests and convictions."); *City of Madison v. Baumann*, 162 Wis. 2d 660, 672, 470 N.W.2d 296 (1991). As the enforcement action initially filed against A Leap Above shows, the fines could be enormous (seeking $24,000 for a single event). Complaint, *Public Health Madison & Dane County v. A Leap Above Dance*, No. 21CV177 (Jan. 25, 2021, Dane Cty. Cir. Ct.). And a person can be *imprisoned* for failing to pay a fine. Wis. Stat. § 66.0109.

II. Dane County Ordinance § 46.40(2) and/or Wis. Stat. § 252.03 Violate the Non-Delegation Doctrine and Constitutional and Statutory Provisions Vesting Local Legislative Authority in the County Board

The non-delegation doctrine, at a high level, is the proposition that a legislative body may not "delegate any of the powers which peculiarly

and intrinsically belong to [it]." *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717, 718 (1931). It is based on separation-of-powers principles and the recognition that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, ... may justly be pronounced the very definition of tyranny." *Palm*, 2020 WI 42, ¶¶ 66–67 (Bradley, J., concurring) (quoting Federalist No. 47 (James Madison)). Separating policy-making from enforcement is well recognized to be liberty enhancing: "After more than two hundred years of constitutional governance, that tripartite separation of independent governmental power remains the bedrock of the structure by which we secure liberty in both Wisconsin and the United States." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 3, 376 Wis. 2d 147, 897 N.W.2d 384.

Both the Wisconsin Constitution, Wis. Const. art. IV, § 22, and the Wisconsin Statutes, Wis. Stat. §§ 59.02, 59.03, vest local legislative authority exclusively in the county board, and the Wisconsin Supreme Court has interpreted these provisions to prevent both county boards and the Legislature itself from delegating local legislative authority to other local officials. *Infra* Part II.A. Either Dane County Ordinance § 46.40(2), *infra* Part II.B, or Wis. Stat. § 252.03 itself, if this Court agrees with the Circuit Court's broad interpretation of that provision, *infra* Part II.C, violate the non-delegation doctrine, by attempting to give the Dane County health official power to unilaterally impose and enforce whatever restrictions she deems "reasonable and necessary" for as long as the pandemic persists.

A. The Non-Delegation Doctrine Applies at the Local Level

While the non-delegation doctrine has more frequently been applied to guard the boundaries of the legislative and executive branches

at the state or federal level, it applies equally at the local level, for multiple reasons.

First, the Wisconsin Supreme Court has already so held. In *French v. Dunn County*, for example, the Supreme Court explained that "[t]here are, doubtless, powers vested in the county board which could not be delegated to any committee. Powers which are legislative in their character … must be exercised under the immediate authority of the board." 58 Wis. 402, 17 N.W. 1, 2 (1883); *see also Duluth, S.S. & A.R. Co. v. Douglas Cty.*, 103 Wis. 75, 79 N.W. 34, 35 (1899); *State ex rel. Nehrbass v. Harper*, 162 Wis. 589, 156 N.W. 941, 942 (1916) ("[A] common council cannot re-delegate legislative power properly delegated to it."); 2A McQuillin Mun. Corp. § 10:45 (3d ed.) ("The rule is well settled that legislative power cannot be delegated by a municipality, unless expressly authorized by the statute conferring the power.")

Second, both the Wisconsin Constitution and the Wisconsin Statutes create similar separation-of-powers divisions at the local level, such that local legislative authority is vested only in the elected governing body. *See generally Schuette v. Van De Hey*, 205 Wis. 2d 475, 480, 556 N.W.2d 127 (Ct. App. 1996). Article IV, § 22 of the Wisconsin Constitution provides that the "legislature may confer *upon the boards* of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe." The Wisconsin Supreme Court has held that this provision prevents *even the legislature* from "empower[ing] a county board to delegate to the electors of the county a power by the Constitution expressly delegated to the county board itself." *Marshall v. Dane Cty. Bd. of Sup'rs*, 236 Wis. 57, 294 N.W. 496, 496 (1940); *Meade v. Dane Cty.*, 155 Wis. 632, 145 N.W. 239, 243 (1914).

The statutes also provide that "the *board* of any county is vested with all powers of a local, legislative and administrative character," Wis.

Stat. § 59.03, and that "[t]he powers of a county as a body corporate can only be exercised by the board, or in pursuance of a resolution adopted or ordinance enacted by the board," Wis. Stat. § 59.02. This language is significant in that it mirrors the constitutional language "vest[ing]" the legislative power in the Legislature. *See* Wis. Const. art. IV, § 1. The Wisconsin Supreme Court, interpreting the predecessor to Wis. Stat. § 59.02, explained that, while this section "contemplates that some powers of a county board may be exercised by a committee pursuant to resolution," "[t]here are, however, limitations on the power of the board to delegate even administrative functions." *First Sav. & Tr. Co. v. Milwaukee Cty.*, 158 Wis. 207, 148 N.W. 22 (1914). A subsequent attorney general opinion, also interpreting Wis. Stat. § 59.02, further explains that, although "[p]owers of a ministerial or administrative nature … can be delegated," powers that are "legislative in nature [ ] c[an] not be delegated to a committee." 61 Att'y. Gen. Op. 214, 215–16 (1972).

Third, the application of the non-delegation doctrine at the local level logically follows from the nature and source of local legislative authority. As noted above, counties are "creature[s] of the legislature," and any powers they have "must be exercised within the scope of authority ceded to [them]." *State ex. rel. Conway v. Elvod*, 70 Wis. 2d 448, 450, 234 N.W.2d 354 (1975); *Jackson Cty.*, 2006 WI 96, ¶ 16; *Wisconsin Carry*, 2017 WI 19, ¶ 21. Since the limited legislative authority local governments have comes from the Legislature, *see State ex rel. Dunlap v. Nohl*, 113 Wis. 15, 88 N.W. 1004, 1006 (1902), it necessarily comes with the same restrictions, including that it may not be re-delegated to unelected officials without sufficient substantive and procedural limits.

Finally, the same considerations that support the non-delegation doctrine at the state or federal level apply at the local level. The non-delegation doctrine serves to ensure that policy-making is done (1) by

elected officials, who are directly accountable to the people, *Palm*, 2020 WI 42, ¶ 28, and (2) by a multi-member body, to prevent the accumulation of too much power in any one person, *see Koschkee v. Taylor*, 2019 WI 76, ¶ 53, 387 Wis. 2d 552, 929 N.W.2d 600 (R.G. Bradley, J., concurring). As at the state level, the legislative process at the local level checks an excess of law-making and promotes deliberation, accountability, and transparency. Allowing an unelected local official to wield legislative power unilaterally circumvents these checks.

B. Dane County's Ordinance Unlawfully Transfers Local Legislative Authority Vested in the County Board to an Unelected Local Official

As currently applied by the Wisconsin Supreme Court,[17] the non-delegation doctrine prohibits "[a] delegation of legislative power to a subordinate agency [unless] the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or agency acts within that legislative purpose." *Palm*, 2020 WI 42, ¶ 33 (quoting *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971)). While the Supreme Court in recent years has emphasized more heavily procedural safeguards against delegation of legislative power, "the nature of the delegated power still plays a role," since the question is ultimately one of degree. *Panzer v. Doyle*, 2004 WI 52, ¶¶ 52–58, 79 & n.29, 271 Wis. 2d 295, 680 N.W.2d 666 (noting that a legislative body "may not delegate too much, thereby fusing an overabundance of power in the recipient branch.")

[17] While Dane County Ordinance § 46.40(2) (and/or Wis. Stat. § 252.03) violate the non-delegation doctrine as currently applied, Appellants preserve the argument that the doctrine should be re-evaluated and expanded. Appellants do not brief that issue here because this Court cannot overrule the existing precedents about the scope of that doctrine.

Applying this doctrine in *Palm*, the Wisconsin Supreme Court explained that the combination of Wis. Stat. § 252.02 (6), allowing the DHS secretary to "implement all emergency measures necessary to control communicable diseases," and Wis. Stat. § 252.25, making any "departmental order" criminally enforceable, together would pose a delegation problem if they allowed the DHS secretary to unilaterally impose enforceable prohibitions via order. *Palm*, 2020 WI 42, ¶¶ 31–42. Such an interpretation of those provisions, the Court explained, would amount to "an open-ended grant of police powers to an unconfirmed cabinet secretary," violating the non-delegation doctrine. *Id.* ¶ 31 (citation omitted). The Court avoided the non-delegation problem by holding that, to be enforceable, general health orders purporting to regulate an array of normal activities during a pandemic must go through the rulemaking procedures of Chapter 227, thereby giving the Legislature oversight. *Id.* ¶ 3.

This case presents the exact same type of non-delegation problem. Like § 252.02, § 252.03 authorizes local health officers to "do what is reasonable and necessary" for the prevention and suppression of disease. Unlike § 252.02, however, § 252.03 *does not* authorize local health officials to "issue orders." *Supra* Part I. Thus, this seemingly broad grant of authority is not by itself a delegation problem—that is, unless this Court concludes that § 252.03 *does* authorize local health officials to unilaterally issue such orders. *Infra* Part II.C.

Dane County Ordinance § 46.40(2), on the other hand, attempts to convert § 252.03 into "an open-ended grant of police powers" to an unelected local official, *Palm*, 2020 WI 42 ¶ 31, by preemptively making enforceable any order that the local health officer deems "reasonable and necessary" to control the spread of disease. The majority in *Palm* focused on § 252.25, which imposes criminal penalties for violating a DHS order, in the context of its discussion of the non-delegation doctrine. *Palm*, 2020

WI 42, ¶¶ 33–42. And Justice Hagedorn in dissent noted that, in a direct non-delegation challenge, Wis. Stat. § 252.25 would be the proper target. *Id*. ¶¶ 256–58 (Hagedorn, J., dissenting). As in *Palm*, Dane County's ordinance "endows [the Dane County health officer] with the power" to unilaterally "defin[e] the elements" of new, prohibited conduct and to "create [ ] penalties" for that conduct. *See Palm*, 2020 WI 42 ¶¶ 36–39. By attempting to convert a grant of authority without any enforcement mechanism into one backed by threat of citation, Dane County has transferred to the local health officer the power "to make laws," *Schuette*, 205 Wis. 2d at 480–81—which is properly vested in the county board.[18]

Palm is directly on point and dictates the outcome in this case. However, even putting *Palm* aside and applying the non-delegation doctrine anew, the ordinance clearly violates that doctrine (and Wis. Const. art. IV, § 22 and Wis. Stat. §§ 59.02; 59.03).

Prohibiting, regulating, and penalizing otherwise lawful activity is a quintessential exercise of legislative power. *See Palm*, 2020 WI 42, ¶¶ 31–42; *Schuette*, 205 Wis. 2d at 480–81; *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) ("When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to prescribe the rules by which the duties and rights

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[18] This does not mean that any provision creating a penalty for disobeying an administrative order would violate the non-delegation doctrine. Whether an automatic enforcement mechanism is a non-delegation problem depends on the underlying substantive grant of authority. If the grounds for and/or scope of an order is sufficiently constrained, there is no problem with making such orders automatically enforceable. *See Palm*, 2020 WI 42, ¶ 255 n.21 (Hagedorn, J., dissenting) (listing examples); *e.g.*, Wis. Stat. § 97.43 (making enforceable orders to correct particular kinds of discharges of certain types of agricultural chemicals). But when the underlying grant of authority is so broad, an automatic enforcement mechanism converts such a grant into the power to legislate.

of every citizen are to be regulated, or the power to prescribe general rules for the government of society." (citations omitted)).

And Dane County's ordinance does not provide any procedural limits whatsoever on the exercise of this power. There are no durational limits, either on the length of any given order or on how long Defendant Heinrich can continue to single-handedly control all aspects of life within Dane County—and as a result she has been doing so since May 2020. Nor is there any form of oversight by the county board equivalent to the rulemaking procedures the Wisconsin Supreme Court required in *Palm*. And there is no question that such oversight is possible. The Wisconsin Counties Association has suggested various "methods of providing legislative oversight" by the governing body in light of the non-delegation doctrine. *See* R. 19:71–73. To give just one concrete example, Winnebago County recently adopted an ordinance providing that any general health order is "advisory only until reviewed and reaffirmed or revised and affirmed by the Winnebago County Board of Supervisors at its next regularly-scheduled meeting date or within 14 days, whichever is earlier," and contains durational limits. *Supra* p. 11 and n.7.

The lack of any procedural safeguards is especially problematic given the near unlimited scope of the substantive grant the ordinance makes enforceable—whatever the health officer deems "reasonable and necessary" to combat the pandemic. An assignment to the health officer to do what she thinks best (combined with the power to enforce it) is not a direction to carry out legislative policy formulated by the county board but an unlimited license to *create* that policy through the officer's *own* exercise of discretion. It is nothing but the announcement of a "vague aspiration[ ]," *Gundy,* 139 S.Ct. at 2133 (Gorsuch, J., dissenting), making her a mini-county board empowered to issue any prohibition to fight COVID-19 (or any other disease). The breathtaking scope of this grant is evidenced by the restrictions Defendant Heinrich has already imposed:

capacity limits, mask mandates, restrictions on physical activities, including outdoors, and even prohibiting family and close friends from seeing one another in their private homes, *supra* pp. 12–13. In sum, by preemptively making the health officer's orders enforceable, the county board has given away near unlimited legislative power.

The Michigan Supreme Court recently found a non-delegation violation in an analogous context—the Michigan governor's emergency powers to address COVID-19. *In re Certified Questions From United States Dist. Ct. , W. Dist. of Michigan, S. Div.*, 506 Mich. 332, 958 N.W.2d 1 (2020). There it explained that allowing Michigan's governor "free rein to exercise a substantial part of our state and local legislative authority—including police powers—for an indefinite period of time," namely the ability to "promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property," constituted an unlawful delegation of legislative power to the executive. *Id*. at 371–72. "The powers conferred by" state law, the court added, "simply cannot be rendered constitutional by the standards 'reasonable' and 'necessary,' either separately or in tandem." *Id.*

The enforcement action against A Leap Above reveals the danger inherent in allowing a single unelected official to act as both drafter and enforcer of her own municipal code. Respondents allege that A Leap Above violated the indoor gathering ban in Emergency Order #10, *see* R. 42:17, but that order contained a seemingly applicable exception for "unregulated youth programs," Emergency Order #10, § 4.a (R. 42:23). Respondent Heinrich and the Health Department, however, argue that youth dance lessons are not a "youth program," but a "sport," citing a *separate guidance document* that they posted on their blog. R. 42:17. In other words, Respondent Heinrich asserts the power to not only write and enforce sweeping restrictions, but also to reinterpret her own confusingly drafted orders in separate guidance documents—and then

rely on that reinterpretation for her own enforcement efforts. This is exactly why legislative and executive powers are separated into different branches; and why the non-delegation doctrine exists to prevent the merging of these powers into one person.

The Circuit Court held that the "reasonable and necessary" language "is no broader than other grants upheld against non-delegation challenges," App. 27, but without discussing any examples or distinguishing the two *closest* examples, *Palm* and *In re Certified Questions*, where the Wisconsin Supreme Court and Michigan Supreme Court respectively found non-delegation problems with nearly identical provisions. It is also well established that the narrower the delegated power, the more room there is for an imprecise standard like "reasonableness." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *Panzer*, 2004 WI 52, ¶ 52, 79 n.29. But when the delegation is as broad as it is here—effectively, to impose whatever restrictions Defendant Heinrich deems "reasonable and necessary" for as long as there is a risk of COVID spread (now going on a year and a half)—"reasonable" and "necessary" are not sufficient constraints. *See Palm*, 2020 WI 42, ¶¶ 45–55 (rejecting the DHS secretary's argument that her interpretation would not give her "limitless power" because "the statute requires an action to be necessary.").

The Circuit Court also found "ample procedural safeguards" to "ensure each [local health officer] acts within the bounds of her delegated authority," App. 28–29, but none that the Court identified avoid the non-delegation problem. The fact that a county health officer is appointed by the county executive and confirmed by the board, and can be removed by the county executive, App. 28, is not a sufficient "procedural safeguard" to cure a vast transfer of legislative power to an executive official. The

exact same was true of the DHS secretary in *Palm*: she is nominated by the governor and confirmed by Senate, and dismissible by the governor. Wis. Stat. §§ 15.05(1)(a); 15.19. More importantly, the county executive is the head of the *executive* branch of local government, Wis. Stat. § 59.17(2), and the very purpose of the non-delegation doctrine is to prevent the merging of legislative and executive powers into one person or branch, *see Gabler*, 2017 WI 67, ¶¶ 3–4. If "supervision" by the head of the *executive* branch were sufficient for the Legislature or County Board to transfer its legislative power to an executive branch official, the non-delegation doctrine would be meaningless.

Nor is the requirement to "report all actions" to the county board sufficient. App. 28. Again, the county board has no power to remove or supervise the local health officer; only the county executive has that power. Wis. Stat. § 59.17(2)(br). Even if the county board could fire or override a local health officer that goes too far, legislative bodies sometimes delegate their authority precisely to avoid accountability for difficult choices, and the non-delegation doctrine exists to prevent that. *See Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting); *id*. at 2131 (Alito, J. concurring).

Finally, "judicial review" is also not a sufficient procedural constraint. App. 26, 29. The problem lies, again, in the nebulous "reasonable and necessary" standard. How is a court to evaluate whether a local health officer's orders are "reasonable and necessary"? That amorphous "standard" is so devoid of any workable constraints that courts could not meaningfully (much less promptly) police its abuse. To give just one example, Respondent Heinrich concluded that it was "reasonable and necessary" to ban small gatherings *in private homes* over Thanksgiving—and gave only a week's notice. *Supra* pp. 12–13. A court could not possibly resolve a fact-intensive dispute over whether such an order is "reasonable and necessary" in a week's time; indeed, it

took four months to get a temporary injunction decision on the *purely legal* issue raised in this case. What is "reasonable and necessary" is inherently a policy judgment. That is why it is so important for courts to enforce the proper separation of powers, to ensure that such legislative decisions are reserved for the legislative body.

C. Alternatively, Wis. Stat. § 252.03 Violates the Non-Delegation Doctrine

As explained above, Wis. Stat. § 252.03's "reasonable and necessary" provisions do not authorize a local health officer to unilaterally issue an enforceable, general order regulating or prohibiting otherwise lawful conduct. *Supra* Part I. However, to the extent this Court disagrees and concludes that Wis. Stat. § 252.03, by itself, *does* allow local health officers to issues enforceable general orders, then Wis. Stat. § 252.03 would violate the non-delegation doctrine, for all of the same reasons explained above.

In short, as the Wisconsin Supreme Court put it in *Palm*, the Legislature may not delegate legislative power in a way that creates "an open-ended grant of police powers to an unconfirmed [official]." 2020 WI 42, ¶ 31. Moreover, under Article IV, § 22 of the Wisconsin Constitution, the Legislature may only "confer *upon the boards* of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe." This provision prevents the Legislature from delegating local legislative power elsewhere, even via statute. *See Marshall*, 294 N.W. at 496; *Meade*, 145 N.W. at 243.

* * * * *

All of this is not to say that policies to cope with COVID-19 are unnecessary. The question is *who* gets to make such policy decisions and *how*. If the health officer is permitted to decide indefinitely, on her own,

how to address the spread of disease—or any other emergency—that necessarily involves the making of law. The Constitution and statutes say that only the county board can legislate, even during a crisis, as the body to which the Legislature has delegated local legislative power. And there are simple fixes—the Dane County Board can either adopt reasonable restrictions in an ordinance directly, like Milwaukee and Eau Claire have done, or, like Winnebago County, adopt a framework that includes direct oversight by the board. Requiring the county board to ultimately make these policy decisions promotes transparency, accountability, and deliberation, and will allow residents of Dane County who are harmed by these restrictions to be heard by their elected representatives about the restrictions.

CONCLUSION

The decision of the Circuit Court should be reversed.

Dated: October 4, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 8,914 words.

Dated: October 4, 2021.

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