Nos. 2021AP1343, 2021AP1382

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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ARGUMENT

I. Respondents Have No Good Answer to *Palm*, *James*, or the Many Textual Indications § 252.03 Does Not Authorize Enforceable Orders

The first question in this case is whether Wis. Stat. § 252.03's general "reasonable and necessary" provisions include the power to unilaterally issue enforceable orders. Plaintiffs identified multiple textual indications that those provisions do not include such power: closely related statutes for both DHS (§ 252.02) and county boards (§ 323.14) contain explicit authorizations to "issue orders," whereas nothing in § 252.03 authorizes "orders"; § 252.25 provides a penalty and enforcement mechanism for violations of *DHS* orders and local *ordinances*, with no mention of "orders" by local health officials, nor is there any enforcement mechanism anywhere else in state law; the statute surveying local health officers' powers references enforcing *state* statutes and rules, and local *ordinances*, but not their own orders; and multiple other statutes expressly give local health officials power to issue other, more limited types of orders and provide an enforcement mechanism. Pls. Br. 16–21.

Respondents have no good answer to these statutes. With respect to each, they just assert their desired conclusion that § 252.03's "reasonable and necessary" provisions *do* authorize enforceable orders, and therefore, they claim, these other statutes are irrelevant. Resp. Br. 25–29. But that response is circular; the very question is what type of "measures" those general provisions allow. Section 252.03 does not *say* that local health officials can "issue orders" (unlike § 252.02, which does). Respondents cannot point to anything indicating that the "measures" contemplated in § 252.03(1) include enforceable orders, whereas Plaintiffs have identified several textual indications that they do not.

The Wisconsin Supreme Court's decisions in *Wisconsin Legislature v. Palm* and *James v. Heinrich* also control the outcome here, as Plaintiffs explained. Pls. Br. 17, 20, 23–24. In *Palm*, the Court held that indistinguishable language in § 252.02 ("all emergency measures necessary") is not "an 'open-ended grant' of police powers to" the DHS secretary, 2020 WI 42, ¶ 31, and does not allow her to unilaterally issue enforceable orders, *id.* ¶¶ 36–39, 45–47. Likewise, in *James*, the Court held the very provisions at issue here "cannot reasonably be read as an open-ended grant of authority," 2021 WI 58, ¶ 21, but instead must be interpreted in light of, and are limited by, the "discrete powers" explicitly given to local officials, *id.* ¶¶ 18, 22.

Respondents barely acknowledge *Palm* and *James*. Their sole characterization of *James* is directly refuted by the opinion. They assert that, in *James*, "the powers to forbid gatherings and inspect buildings were found [by the Court] to be illustrative, not exhaustive," citing paragraph 18. Resp. Br. 9. Yet in that very paragraph, the Court explained that § 252.03 contains "a series of discrete powers," that under the doctrine of *expresio unius*, any power "not specifically confer[red] … is not authorized," and because § 252.03 "omitted the power to close schools, local health officers do not possess that power"—notwithstanding the "reasonable and necessary" provisions. Likewise, § 252.03 does not "specifically confer" a power to issue enforceable orders, nor does it authorize any of the things Respondent Heinrich has attempted to do through her orders, like banning *private* gatherings in homes and businesses, setting capacity limits on businesses, restricting youth sports, imposing cleaning and distancing requirements, or requiring masks (as in the current order[1]). Pls. Br. 12–13.

[1] Face Covering Emergency Order #5, Public Health Madison & Dane County, https://publichealthmdc.com/documents/2021-11-23_Order_21.pdf

As for *Palm*, Respondents attempt to distinguish that case by pointing to immaterial differences between §§ 252.02 and 252.03. Resp. Br. 22–23. Section 252.03's "take all measures" provision uses "shall," they emphasize, while § 252.02's version says "may." But this difference has nothing to do with the *scope* of what those provisions authorize. It simply indicates that the Legislature imposed a duty on local health officials to respond promptly using the powers available to them—the question is what those powers are. Respondents also highlight that § 252.02 adds the qualifier "*emergency*" to the "measures" that can be taken, and therefore, they claim, local health officials' power is broader, as it includes "*non*-emergency" measures. Resp. Br. 23. But Respondents do not explain how the word "emergency" is relevant to *Palm*'s core holding that such general authorizations cannot be read as "an 'open-ended grant' of police powers" to one unelected official. 2020 WI 42, ¶ 31. If anything, the absence of the word "emergency" in § 252.03 makes *Palm*'s holding apply with even more force—if local health officials can issue any orders "necessary" to prevent the spread of disease, even in "non-emergency" situations, it would "raise [more] serious constitutional questions" than in *Palm*. *Id.* ¶ 31.

Respondents are wrong that Plaintiffs' interpretation would render the "reasonable and necessary" provisions "idle and nugatory." Resp. Br. 9. As Plaintiffs explained, these provisions authorize all sorts of things that do not require enforceable orders and penalties. Pls. Br. 21. And, importantly, they establish that local health officials have a *duty* to act "promptly" using the tools available to them.

Respondents cite *Superb Video v. Cty. of Kenosha*, 195 Wis. 2d 715, 537 N.W.2d 25 (Ct. App. 1995), but that case is mostly distinguishable, and the remainder supports Plaintiffs. There, the Court of Appeals held that the Kenosha board of health could adopt certain local health regulations under two statutes that have since been repealed. *See* 1993

Wis. Act 27, §§ 269–270. Notably, the case involved *regulations*—not orders—and they were adopted by the health *board*—not unilaterally imposed by the local health officer.[2] One of the statutes the Court relied on (§ 141.02 (1991–92)) *explicitly* authorized local health officers to adopt "rules and regulations" (again, not orders), unlike the current analogue (§ 251.06), which does not authorize rules, regulations, or orders. And, critically, that statute provided that "[a]ll proposed rules and regulations shall be reported to the [city] council by [the local health officer], and if the council approves the same by a vote of a majority of its members, they shall have the force and effect of ordinances, including penalty for violation." Wis. Stat. § 141.02(2).[3] In other words, the statute reflected the exact principle Plaintiffs raise here—that the county board must approve any COVID restrictions before they can be enforced.

For similar reasons, the statutory history, *see* Resp. Br. 12–13, actually supports Plaintiffs' position. Respondents cite a statute, referenced in *James*, which, they claim, gave local health officers "the power to *order* and execute what is reasonable and necessary for the prevention and suppression of disease." Resp. Br. 12 (citing 2021 WI 58, ¶ 29 (citing § 1, ch. 159, Laws of 1919)). The law they cite, however, applied to "local board[s] of health"—not individual health officers—and any "orders" required the "consent of the state board of health."[4] In any event, the Legislature repealed this statute a few years later when it

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[2] All of Respondent Heinrich's orders have been issued by her and her alone. *See, e.g.*, Emergency Order #10 at 2 ("I, Janel Heinrich, … order the following …"), https://www.publichealthmdc.com/documents/2020-11-20_Order_10amendment.pdf.

[3] The other statute at issue, which applied to local health boards, Wis. Stat. § 146.015 (1991–92), did not have the same requirement. Notably, however, it required health boards to be composed "wholly or partially" from the council's "own members"; thus a regulation imposed by the health board was effectively an act of the local governing legislative body.

[4] 1919 Wis. ch. 159, § 1, *available at* https://docs.legis.wisconsin.gov/1919/related/acts/159.pdf.

overhauled the public health statutes in 1923. *See* 1923 ch. 448, § 16.[5] That act created Wis. Stat. §§ 143.02 and 143.03, the predecessors to §§ 252.02 and 252.03, which reflected the same contrast as today: § 143.02 authorized the state board of health to "adopt and enforce rules and regulations … for the control and suppression" of communicable disease, which could be "made applicable to the whole or any specified part of the state," whereas § 143.03 did not contain a similar authorization for local health officials. 1923 ch. 448, § 13a.[6] Notably, § 141.02 (described above) was adopted at the same time and *did* explicitly authorize local officials to adopt "rules and regulations … to prevent the spread of communicable disease," but required "[a]ll *proposed* rules and regulations" to be "reported to" and "approve[d]" by the city council before they could be enforced. Wis. Stat. § 141.02(2) (1923–24); *id*. § 141.03(4). That statute was repealed in 1993, and its replacement (§ 251.06) did not contain a similar grant of authority.

At a few points, Respondents appear to suggest that § 252.03's authorization to "forbid public gatherings" supports Respondent Heinrich's many orders, Resp. Br. 10, 15-16, but this limited power does not support most of what Respondent Heinrich has ordered: it does not, for example, include the power to ban *private* gatherings in homes or businesses, to set capacity limits on businesses, to decide which sports can be played and which cannot, or to require masks. Pls. Br. 12–13. And the fact that this is explicit in the text illustrates that the Legislature knew how to authorize proscriptive orders when it so intended.

With respect to Dane County Ordinance § 46.40(2), Pls. Br. 21–24, Respondents argue that it is not preempted because no statute *expressly* withdraws a county's power to adopt ordinances in this area, whereas

[5] *Available at* https://heinonline.org/HOL/P?h=hein.ssl/sswi0169&i=913

[6] *Available at* https://heinonline.org/HOL/P?h=hein.ssl/sswi0169&i=909

other statutes in other areas do. Resp. Br. 17–20. But this ignores three of the four grounds for preemption: the first is an *express* withdrawal of authority, but ordinances are also preempted if they "conflict with," "defeat the purpose of," or "go against the spirit of" state law. Pls. Br. 22. State statutes create a clear division of authority between DHS and local health officials: the former can "issue orders," including localized orders for a single "county," Wis. Stat. § 252.02(4), whereas § 252.03 "omits" such power. *See James*, 2021 WI 58, ¶ 18. Dane County's ordinance clearly "conflicts with" this structure. Indeed, later in its brief, Respondents concede that, if "a county delegated powers and duties to [a local official] in a manner different than provided by [statute]," "significant preemption questions would arise." Resp. Br. 34. That is exactly the problem. Dane County's ordinance delegates power to Respondent Heinrich that state law withheld.

Dane County's ordinance is not only preempted by all the statutes described above, but also by Wis. Stat. § 66.0113. Pls. Br. 22–24. Respondents have little to say in response, thought they admit that the ordinance "makes it a violation to violate *the local health officer's health orders*." Resp. Br. 28. That is the point—§ 66.0113 only authorizes citations "for violations *of ordinances*," not for violations of health orders.

II. Respondents Cannot Distinguish *Palm*'s Non-Delegation Analysis

As Plaintiffs argued, either Dane County Ordinance § 46.40 or Wis. Stat. § 252.03 violates the non-delegation doctrine. Pls. Br. 24–36. If, as Respondents contend, § 252.03 empowers local health officials to unilaterally issue enforceable orders regulating any type of human activity that spreads communicable disease, *but see supra* Part I, that statute violates the non-delegation doctrine for the exact same reasons the Wisconsin Supreme Court articulated in *Palm* with respect to such an interpretation of § 252.02 (were it not for the Court's saving

construction that any enforceable restrictions must be adopted through the rule-making process). 2020 WI 42, ¶¶ 31–42. Alternatively, since § 252.03 does not authorize enforceable orders, Dane County Ordinance § 46.40 violates the non-delegation doctrine by attempting to give Respondent Heinrich power that *Palm* held cannot be delegated to a single, unelected official. *Id*.

Respondents mostly attempt to avoid the issue. Much of their response is devoted to arguing that Dane County's ordinance cannot violate the non-delegation doctrine because § 252.03 directly gives local health officials this power. Resp. Br. 31–33. That is wrong, *supra* Part I, but even if correct, it just means the non-delegation problem lies in § 252.03. Pls. Br. 35. They also suggest the non-delegation doctrine is a "myth," Resp. Br. 39, but that cannot square with the Wisconsin Supreme Court's reliance on it in *Palm* just last year.

When they get to the merits, Respondents have no good answer to *Palm*. They note the order there applied statewide, but Respondent Heinrich's orders have been just as disruptive for the people in Dane County (if not more so): Order #10, for example, banned gatherings *even in private homes* over Thanksgiving; and Respondent Heinrich has been issuing ever-changing orders for over a year and half. Pls. Br. 12–13, 23. Respondents also point to the criminal penalties in *Palm*, but fines can be similarly coercive: Respondent Heinrich threatened $1000 fines for anyone "hosting a gathering" over Thanksgiving; and PHMDC sought $24,000 fines from A Leap Above for a single event. Pls. Br. 14, 23–24.[7]

Finally, Respondents assert that § 252.03 has "different statutory terms and features, including built-in safeguards," than § 252.02, Resp. Br. 43–44, but they do not identify anything meaningful. The word

[7] The review procedures in chapter 68, Resp. Br. 42, do not apply to Respondent Heinrich's orders. *See* Wis. Stat. §§ 68.02, 03.

"promptly," for example, *id.*, imposes no limit at all on *what* local officials can do. Nor are there any other "temporary limitations"—after all, Respondent Heinrich continues to issue orders to this day, a year and half in. The phrase "to prevent, suppress and control communicable diseases," *id.*, likewise provides no meaningful limit, because *any* limitation on human behavior that reduces human contact will "prevent" some communicable disease—as evidenced by the breadth of the orders already issued. Pls. Br. 12–13. And a "reporting" requirement also has no teeth: it does not require advanced notice to the public, any opportunity for public input, or any review or approval by elected officials, and the "reporting" can even happen after the fact. At bottom, all that's left are the words "reasonable" and "necessary," which *Palm* already recognized are insufficient. *See Palm*, 2020 WI 42, ¶¶ 31–35, 45–47. Thus, *Palm* controls the non-delegation issue in this case.

Respondents cite a few older cases, but none help them. *State v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928) involved a much more limited delegation: the "insignificant" power to "disapprov[e]" "unreasonable" insurances rates and contractual terms proposed by private insurers. 220 N.W. at 941–42. Because the power at issue was *disapproval* of *unreasonable* rates and terms, flexibility in the word "reasonable" operated to *limit* the agency's discretion. *Id.* at 945 (reversing Commissioner's decision to set aside certain rates). As has long been recognized, 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). But when the delegation is as broad as it is here—effectively, to impose whatever restrictions Defendant Heinrich chooses, for as long as she wants—"reasonableness" is not a sufficient constraint. *See Palm*, 2020 WI 42, ¶¶ 45–47; *In re Certified Questions From United States Dist. Ct., W. Dist. of Michigan, S. Div.*, 506 Mich. 332, 371, 958 N.W.2d 1 (2020).

As for *State ex rel. Nowotny v. City of Milwaukee*, 140 Wis. 38, 121 N.W. 658, 659 (1909), Resp. Br. 41–42, that case did not consider a delegation of legislative power, but a quintessential executive function: the health commissioner's power to revoke a milk license for "selling impure milk." *Id.* at 658–59. The Court carefully distinguished license revocation from "the power to prohibit [some activity] entirely in the municipality," explaining that revocation "does not prohibit the business, but regulates it in the truest sense by keeping it in the hands of law-abiding licensees." *Id.* at 659–60. Likewise, in certain limited circumstances, state law authorizes local health officers to issue and enforce orders targeted at a particular individual or property found to pose an immediate health risk, Pls. Br. 19–20, but does not permit a health officer to unilaterally and indefinitely dictate all of life during a pandemic.

Respondents cite *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 221 N.W. 860 (1928), for the proposition that legislative bodies can delegate to an official the power to "ascertain some fact" that triggers a law. Resp. Br. 31. That is unquestionably true, but beside the point. As *Zilisch* explained, only the legislative body can decide "whether or not there shall be a law," the "purpose or policy to be achieved by the law," and "the limits within which the law shall operate." *Id.* at 863. The Dane County Board could, like the Milwaukee Common Council, adopt a mask ordinance establishing when and where masks must be worn and what the exceptions are, but then allow the health officer to "ascertain facts" that affect the duration of that requirement. *See* Milwaukee Ordinances §§ 62-8. What the county board cannot do is give Defendant Heinrich carte blanche authority to impose and enforce whatever restrictions she wants for as long as she wants.

Finally, Respondents' argument that a ruling in Plaintiffs favor would call into question "much or all of municipal government" simply

misunderstands the scope of Plaintiffs' claims. Resp. Br. 34. The Wisconsin Legislature can of course assign many duties and powers to local officials, like the "city clerk"—it just cannot delegate *legislative* power to a single unelected official, whether a state official or a local administrative official. It can delegate some local legislative power to the county board, but only to it, as the local legislative body. Wis. Const. art. IV, § 22; Pls. Br. 26. Likewise, the county board cannot re-delegate the legislative power vested in it to other local officials. Pls. Br. 26–28. So either the Legislature violated the non-delegation doctrine when it adopted § 252.03, or the Dane County board violated it when it adopted its ordinance § 46.40.

CONCLUSION

The decision of the Circuit Court should be reversed.

Dated: December 15, 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 2,999 words.

Dated: December 15, 2021.

Electronically signed by Luke N. Berg
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