Nos. 2021AP1343, 2021AP1382

In the Wisconsin Supreme Court

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

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

PETITIONERS' RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

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ARGUMENT

Respondents' supplemental brief focuses primarily—almost entirely—on arguing that this case is not a proper vehicle to address the non-delegation doctrine. Resp'ts. Suppl. Br. 3–11. That is wrong, but their reasoning is also less than clear.

Initially, Respondents' theory seems to be that the non-delegation doctrine applies only at the state and federal level, and never at the local level. Resp'ts. Suppl. Br. 3 ("[The non-delegation doctrine] needs to be vetted in a case involving state agencies, not local government."). But shortly thereafter, Respondents appear to concede that the non-delegation doctrine *does* apply at the local level (just not in this case, apparently, for other reasons, *see infra* pp. 3–4). On page 5, for example, they assert that "local legislation *is the policy-driven prerogative of the legislative body*." And on page 6: "[T]he statutes … focus the county boards on legislative policymaking only. … County boards handle policy formation." Indeed, the very treatise Respondents quote at length, Resp'ts. Suppl. Br. 5–6, says that "[t]he rule is well settled that legislative power cannot be delegated by a municipality, unless expressly authorized by the statute conferring the power." 2A McQuillin Mun. Corp. § 10:45 (3d ed.).

Petitioners' primary brief already fully addresses why the non-delegation applies at the local level, so Petitioners will not repeat those arguments in detail here. Pet'rs. Opening Br. 25–28. Briefly, however, the application of the non-delegation doctrine at the local level is supported by the Wisconsin Constitution, art. IV § 22, Wisconsin statutes, Wis. Stat. §§ 59.02; 59.03; numerous cases, Pet'rs. Opening Br. 25–28 (listing them), attorney general opinions, 61 Att'y. Gen. Op. 214, 215–16 (1972), and the underlying principles behind the doctrine. Respondents focus on some factual differences between this case and some of the cases Petitioners cited (*French*, *Duluth S.S.*, and *Nehrbass*,

Resp'ts. Suppl. Br. 9–10 n.8), but these distinctions all go to the *application* of that doctrine; they are irrelevant to the preliminary question of whether the doctrine applies at the local level; these cases show beyond dispute that it does.

Petitioners explained in their supplemental brief that, if anything, the non-delegation doctrine should apply even more stringently at the local level, because what qualifies as an important policy question is necessarily more granular at the county or city level; after all, local legislative bodies exist precisely to decide more localized and in-the-weeds policy questions. Pet'rs. Suppl. Br. 14. McQuillin gives some examples, noting that courts have found "legislative" questions at the local level to include "the establishment of the grade of a sidewalk or street; the construction of sewers, as to dimensions, manner, etc.; generally duties required to be performed by ordinance; and the fixing of the time when and within which public work is to be done." 2A McQuillin Mun. Corp. § 10:45 (listing cases). Whether to have a mask mandate, capacity limits, sports restrictions, and even restrictions on gatherings in *private homes and businesses* are obviously major policy questions for people in Dane County—way more significant than the "grade of a sidewalk." These questions can and must be answered by the County Board, the local legislative body.[1]

After quickly retreating from their initial theory, Respondents switch to arguing that the non-delegation doctrine is irrelevant here because, in their view, § 252.03 directly assigns to local health officials the power to unilaterally and indefinitely issue any enforceable restrictions on human behavior they deem "reasonable and necessary" to prevent the spread of disease. Resp'ts. Suppl Br. 4. The interpretation of

[1] That is not to suggest that the County Board necessarily could do all of this. Banning gatherings in private homes, for example, raises all sorts of other legal issues.

§ 252.03's "reasonable and necessary" provisions is the first question in this case—but the answer to it has no bearing on whether the non-delegation doctrine is at play here, because there is a non-delegation violation *either way*. If, as Respondents contend, Wis. Stat. § 252.03 directly confers this much power on local health officials (notwithstanding all the textual indications to the contrary, Pet'rs. Opening Br. 16–21), then the statute itself violates the non-delegation doctrine. It does not matter that the delegation is to a local administrative official rather than a state administrative official; what matters is the concentration "of all powers, legislative, executive, and judiciary, in the same hands." Federalist 47; *see 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).

While it has long been recognized that the Legislature can delegate to local government the "power to legislate over minor and detail subjects for local government," *State ex rel. Dunlap v. Nohl*, 113 Wis. 15, 88 N.W. 1004, 1006 (1902), the Wisconsin Constitution vests this local legislative power in "the boards of supervisors of the several counties of the state," Wis. Const. art. IV § 22, for the exact same reason that legislative power at the state level is vested in the Legislature—to ensure that policy-making is done by a multi-member, elected body that is directly accountable to the people.

If, on the other hand, this Court agrees with Petitioners that Wis. Stat. § 252.03's "reasonable and necessary" provisions do *not* give local health officials the power to unilaterally issue enforceable restrictions, then Dane County Ordinance § 46.40 violates the non-delegation doctrine. It preemptively makes any order Respondent Heinrich issues enforceable, giving her the power to make law. Indeed, if there is any doubt that this ordinance transferred power from the County Board to the local health officer, the Board adopted it in May 2020, just days after

this Court's decision in *Palm*, *see* 2020 OA-002, Dane County Board (adopted May 21, 2020),[2] precisely because "[n]either the statutes nor the administrative code provide for a detailed enforcement mechanism of a local health officer's general order," as Wisconsin counties recognized, R. 19:66 (Wisconsin Counties Association memorandum).

Not only does the ordinance create an enforcement mechanism where one is lacking under state law, Respondents have also suggested that its ordinance independently supplies the *substantive* authority for general local health orders. In their main response brief, they argue that "[t]he County Board exercised its own independent police powers to adopt an ordinance prohibiting violation of an order entered by the local health officer to suppress a communicable disease." Resp'ts. Br. 16 (invoking "home rule"); *id*. ("The Dane County Board … adopted Ordinance § 46.40 completely independent of the local health officer's authority under Wis. Stat. § 252.03."). Thus, Dane County's ordinance, § 46.40, violates the non-delegation doctrine even if this Court holds that § 252.03's "reasonable and necessary" provisions do not authorize enforceable general orders.

A few other arguments warrant a brief response. First, Respondents argue that the orders "flow from policies of the BOHMDC [Board of Health of Madison and Dane County], which in turn owes its existence for implementation of health policy to the City Council and County Board." Resp'ts. Suppl. Br. 7. The Board of Health is irrelevant to this case. None of the orders were issued or voted on by the Board—Respondents have never argued otherwise—they were all issued by

[2] https://dane.legistar.com/LegislationDetail.aspx?ID=4538159&GUID=7D18AD89-C8A1-4B26-9DD1-CA0A8DBAF6C4

Respondent Heinrich alone. *See* Emergency Order #10[3] (R. 42:21) (Nov. 17, 2020) (the order A Leap Above is charged with violating), ("I, Janel Heinrich, … order the following …"); Face Covering Emergency Order #7[4] (current order) (same). Even if it had voted on the restrictions, the Board of Health is not the County Board either, nor does it have authority to impose enforceable, general restrictions on private conduct. *See* Wis. Stat. § 251.04. Its role is to provide general oversight of the health department. *Id*. § 251.04(3) (authorizing regulations "for its *own guidance* and for the *governance of the local health department*.").

Nor does the County Board have control or oversight of the Board of Health. Its eight members are appointed entirely by the Madison Mayor and County Executive, only one of which is a County Board member. *See* IGA[5] § VI.A.2. Notably, the agreement creating the Board of Health implicitly recognizes that enforceable restrictions require approval by the County Board. Section 3 of the agreement, entitled "Powers and Duties," says that BOHMDC "may adopt rules implementing policies *adopted by the Common Council and County Board*." IGA § IV.A.3. And the "enforcement" provision references enforcement of "state public health statutes, public health rules, and City and County public health ordinances." IGA § IV.A.3.g.

Respondents also reference a recent County Board resolution regarding the ongoing mask mandate, as though that shows the County Board is sufficiently exercising its policy-making role. Resp'ts. Suppl. Br.

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

[4] https://publichealthmdc.com/documents/2022-01-26_Order_23.pdf

[5] The Intergovernmental Agreement creating the Board of Health is available at https://madison.legistar.com/View.ashx?M=F&ID=6227822&GUID=AF212C76-B27C-497F-9621-02BB00846E40.

10–11. It does not. The resolution was *non-binding*; it would have simply "*urged*" the health department to pull back the mandate. Resp'ts. Suppl. Br. 10. Indeed, Dane County's position, as expressed to the paper by Dane County's corporate counsel, is that "the County Board *doesn't have the power to end the mask mandate*." Pet'rs. Suppl. Br. 16. And it took *6 months* and complicated procedural maneuvering for the County Board to even consider that non-binding resolution or hear public input.[6] Emily Hamer, *Dane County Board might consider proposal to end mask mandate*, Wis. State Journal (Dec. 2, 2021).[7] If Dane County wants to have a mask mandate, it can do so, but the County Board needs to *affirmatively adopt* such a requirement, not only ensure that all of the important protections of the local legislative process are followed (notice, transparency, public input, deliberation, etc.) but also so that the people of Dane County know who to hold accountable.

Finally, Respondents argue that there is no evidence in this case of a "concentrat[ion] [of] all governmental power into" Respondent Heinrich's hands or any "tyrannical laws … executed in a tyrannical manner." Resp'ts. Suppl. Br. 6. To the contrary, the enforcement action against A Leap Above reveals exactly that. A Leap Above is charged with violating the ban on all indoor gatherings (even in *private homes and businesses*) in Emergency Order #10, by allowing its youth dancers, in small groups, wearing masks, to video-record Nutcracker ballet dances they had been practicing for months, since they could not perform them due to the ban. R. 42:16–19. That order contained an *exception* for "child

[6] The Board of Health voted to suspend the resolution indefinitely, and during that meeting, would not take public comment on the resolution. *See Dane County health board votes to postpone proposal to pause mask mandate*, WKOW (Dec. 1, 2021), https://www.wkow.com/news/dane-county-health-board-votes-to-postpone-proposal-to-pause-mask-mandate/article_9752509e-531d-11ec-a96f-5f59e18d6b5f.html.

[7] https://madison.com/wsj/news/local/govt-and-politics/dane-county-board-might-consider-proposal-seeking-to-end-mask-mandate/article_1b79c43d-fe08-582d-99e1-62087a01ef99.html

care and youth settings," including "unregulated youth programs," R. 42:23, which A Leap Above reasonably believed it fell into, R. 56:6–9, yet the Department has taken the position that youth dance classes are instead a "sport," citing a separate guidance document they posted on their blog, R. 42:17—and then filed a *$24,000* enforcement action for the single day the dancers recorded their dances. Petr's. Opening Br. 14. In other words, Respondent Heinrich asserts the power not only to write and enforce sweeping restrictions, but to also reinterpret her own poorly drafted orders in separate guidance documents and blog posts, and then rely on that reinterpretation for her own enforcement efforts.

If this Court ever needed an example of the kind of "tyranny" that can result from concentrating legislative and executive power into one person's hands to illustrate why the non-delegation doctrine is so critical, the enforcement action against A Leap Above would be Exhibit A.

CONCLUSION

The decision of the Circuit Court should be reversed.

Dated: February 15, 2022.

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 1,939 words.

Dated: February 15, 2022.

LUKE N. BERG

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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.

Dated: February 15, 2022.

LUKE N. BERG