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

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANTS

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ARGUMENT

I. This Court Should Reinvigorate Wisconsin's Non-Delegation Doctrine

In our system of government, at the local level as at the state level, lawmaking is vested in the legislative, not the executive, body. This comports with traditional separation of powers concerns, avoiding the dangerous concentration of power in one individual, and promoting liberty, transparency, and accountability. For various reasons, legislative bodies may wish to "delegate" power to a coordinate branch (usually the executive branch). The "non-delegation doctrine" governs whether and to what extent these delegations may occur.

In their main brief, Appellants argue that either Dane County Ordinance § 46.40 or Wis. Stat. § 252.03 violate the non-delegation doctrine as currently framed by this Court. Opening Br. 24–36. The purpose of this supplemental brief is to call for a reinvigoration of Wisconsin's non-delegation doctrine. Although this Court once enforced real, substantive limitations on wholesale, inter-branch transfers of core constitutional power, more recent cases have been more accepting of the abdication of legislative responsibility. As the facts of this case illustrate, the time has come for this Court to revitalize these crucial safeguards on the separation of powers, the "essential precaution in favor of liberty." The Federalist No. 47.

A. Background on the Non-Delegation Doctrine

The history of the non-delegation doctrine in Wisconsin has been covered repeatedly by this Court. *E.g.*, *Fabick v. Evers*, 2021 WI 28, ¶¶ 63–68, 396 Wis. 2d 231, 956 N.W.2d 856 (Bradley, J., concurring); *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶¶ 101–107, 391 Wis. 2d 497, 942 N.W.2d 900 (Kelly, J. concurring); *Panzer v. Doyle*, 2004 WI 52, ¶¶

54–56, 271 Wis. 2d 295, 680 N.W.2d 666; *Gilbert v. State, Med. Examining Bd.*, 119 Wis. 2d 168, 184–86, 349 N.W.2d 68 (1984).

Briefly, this Court in the early years enforced meaningful substantive restrictions on delegations of power. *E.g.*, *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N.W. 738, 741 (1896) ("[A] law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the … delegate of the legislature.")

State v. Burdge, 95 Wis. 390, 70 N.W. 347 (1897), provides an instructive example of how this doctrine was originally understood by this Court, and one striking in its similarity to this case. There, the Beloit school board prohibited several children who had not received smallpox vaccination from attending school, relying on a state board of health rule. 70 N.W. at 347–48. This Court considered whether the state board could rely on a seemingly broad grant of authority—"to make such rules and regulations, and to take such measures as may in its judgment be necessary for the protection of the people of the state from … dangerous contagious diseases"—where the Legislature had not itself made vaccination compulsory. *Id.* at 348–49.

Premising its decision on non-delegation principles, the Court concluded that the rule was unlawful. *Id.* at 350. It explained:

> The powers of the state board of health, though quite general in terms, must be held to be limited to the enforcement of some statute relating to some particular condition or emergency in respect to the public health … . That no part of the legislative power can be delegated by the legislature to any other department or body is a fundamental principle of constitutional law, essential to the integrity and

> maintenance of the system of government established by the constitution.

Id. at 349–50. The crucial distinction was "between the delegation of power to make the law, which necessarily involves a discretion as to *what* it shall be, and conferring authority or discretion as to its execution, to be exercised *under* and in *pursuance of* the law." *Id.* at 350 (emphasis added). In other words, there had to be "some substantive provision of law to be administered and carried into effect." *Id.*

Unfortunately, that robust, constitutionally faithful approach has not endured. In *State v. Whitman*, this Court commented that the non-delegation doctrine as then understood was "rigid and inflexible" and announced a supposed consensus among "courts, Legislatures, and executives, as well as students of the law," that "there is an overpowering necessity for a modification of the doctrine of separation and nondelegation of powers of government." 196 Wis. 472, 220 N.W. 929, 933, 939 (1928). The Court then concluded that the Legislature *could* delegate legislative power to administrative agencies. *Id.* at 942. In response to arguments that this change was "fraught with danger," the Court noted that the Legislature retained power to "withdraw powers which have been granted, prescribe the procedure through which granted powers are to be exercised, and, if necessary, wipe out the agency entirely." *Id.* at 942.

Assuming that the question of delegation was an "all or nothing" proposition, *Whitman* planted the seeds for a "shift[ ] [of] focus away from the nature of the power delegated through scrutiny of the delegating standard's language and more toward the safeguards surrounding the delegated power." *Gilbert*, 119 Wis. 2d at 185. Under current case law, "*broad grants* of legislative powers will be permitted where there are procedural and judicial safeguards against arbitrary, unreasonable, or oppressive conduct of the agency," *Westring v. James*,

71 Wis. 2d 462, 468, 238 N.W.2d 695 (1976). As of 2004, this Court candidly declared that while "the nature of the delegated power still plays a role in Wisconsin's nondelegation doctrine," "[t]he presence of adequate procedural safeguards is the paramount consideration." *Panzer*, 2004 WI 52, ¶ 79 & n.29.

Although it ultimately found that the Governor's exercise of his delegated authority was unlawful, the *Panzer* court held that a statute that "did not provide guidance" or even "express clear policy objectives," but handed all "policy choices [to] the governor" over gaming compacts was not unconstitutional beyond a reasonable doubt, 2004 WI 52, ¶¶ 66–71, even though the only "procedural safeguards" were the Legislature's ability to repeal or modify the statute and to "appeal to public opinion." *Id*. ¶ 71. *Panzer* illustrates the weakness of this lax approach. Having once abdicated its authority, the legislature cannot take it back without the Governor's acquiescence or a supermajority of both houses. Perhaps this is unobjectionable if one views legislative power as branch prerogative that can be freely relinquished. It is far more troubling if one recognizes that the separation of powers protects the *public* subject to those powers, and not the privileges of those who exercise them. The ability to subsequently change the statute provides no "safeguard" whatsoever when the delegation is motivated by passing off responsibility for difficult policy choices. *Gundy v. United States,* 139 S. Ct. 2116, 2134, 204 L. Ed. 2d 522 (2019) (Gorsuch, J., dissenting).

B. This Court Should Return to First Principles

The switch to a nondelegation doctrine "primarily concerned with the presence of procedural safeguards," *Panzer*, 271 Wis. 2d 295, ¶ 55, was a mistake. It is fundamentally inconsistent with the Wisconsin Constitution's "vest[ing]" of "[t]he legislative power" in the Legislature, and the Legislature alone, Wis. Const. art. IV, § 1, to permit

administrative agencies to engage in lawmaking without specific, meaningful direction.

This is not a mere "formalist" concern. Madison characterized the separation of powers as an "essential precaution in favor of liberty." The Federalist No. 47. It is based in a clear-eyed view of human limitations and an epistemic humility about the capacity of any one decision-maker to get things right. It is a device by which "[a]mbition [is] made to counteract ambition." The Federalist No. 51. The checks and balances of power provided by divided government—"arrang[ing] the several offices in such a manner as that each may be a check on the other"—are critical to this auxiliary protection. *Id.*; *see also City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) ("One of the principal authors of the Constitution famously wrote that the 'accumulation of all powers, legislative, executive, and judiciary, in the same hands, … may justly be pronounced the very definition of tyranny.'"); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he separation of powers [is] a vital guard against governmental encroachment on the people's liberties"); *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 4, 376 Wis. 2d 147, 897 N.W.2d 384.

This essential division of power means that each branch must accept the responsibilities of its assigned role and be wary of deferring to or basing its decision on the actions of another. As this Court has observed, "[e]ach branch's core powers reflect 'zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding. As to these areas of authority, … *any* exercise of authority by another branch of government is unconstitutional.'" *Gabler*, 2017 WI 67, ¶ 31. Because the duty of each branch to "jealously guard[ ]" its authority is not an institutional prerogative but a constitutional obligation, *id.* ¶ 34, judicial enforcement of this separation of powers is a constitutional imperative.

In this regard, and with respect, the *Whitman* Court had no warrant to conclude that administrative agencies could exercise "the legislative power" and that the "boundaries" of the non-delegation doctrine should be identified with reference to criteria like "common sense and the inherent necessities of governmental co-ordination." *Whitman*, 196 Wis. at 940 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)). The framers of our state constitution have already determined those necessities and enshrined them there. If that view of government has become outdated, that document can be amended by the people, but until that time, the state separation of powers must be preserved.

In sum, a return to first principles, and reviving substantive—as opposed to procedural—limits on delegating legislative authority, would be more faithful to the sole vesting of the legislative power in legislative bodies, a sounder protection of individual liberty, and an appropriate restraint on law-making by executive officials. As many commentators have noted, the "intelligible principle" test—which is similar to this Court's "ascertainable purpose" requirement, *see Fabick*, 2021 WI 28, ¶¶ 62–66 (Bradley, J., concurring)—has "utterly failed to provide meaningful constraint on assignment of broad, uncabined power to others to make the sort of basic policy choices that traditionally have been understood … [as] exercises of the legislative power." Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol'y 147, 183–184 (2017); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1231 (1985) ("The test has become so ephemeral and elastic as to lose its meaning.").

This case illustrates those conclusions well: *no* amount of procedural safeguards could sufficiently cabin the utterly unguided grant of authority in this case, the power to do whatever Respondent

Heinrich deems "reasonable and necessary for the prevention and suppression of disease," Wis. Stat. § 252.03, that is, to make policy as if drafting and signing ordinances herself. Where, as here, the power that is delegated is virtually unlimited, no procedural safeguard can be adequate because there is no meaningful legislative direction that process can enforce. "Do what you will" does not admit of procedural enforcement or safeguarding.

The assumption that a re-invigorated non-delegation doctrine would prevent legitimate legislative flexibility has been undermined by experience. As this Court noted in *Panzer*, Wisconsin is "on the permissive end of the spectrum when it comes to legislatively delegated power" and among only a "handful of states to follow the 'procedural safeguard' approach of Professor Kenneth Culp Davis." *Panzer*, 2004 WI 52, ¶ 54 n.21 (citing two well-known state surveys of the non-delegation doctrine). A more recent survey found that that the doctrine "continues to thrive" in many states, identifying 19 states with "a strong nondelegation doctrine." Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J. L. Econ, & Org. 27, 31–32 (2018).[1] It found four states "particularly active … with at least one invalidation per decade." *Id.* at 44. The Michigan Supreme Court, for example, found a non-delegation violation in a case very similar to this. *In re Certified Questions From United States Dist. Ct., W. Dist. of Michigan, S. Div.*, 506 Mich. 332, 357–372, 958 N.W.2d 1 (2020); *see also* Hon. Jeffrey S. Sutton, *Who Decides?: States as Laboratories of Constitutional Experimentation* (2021).

This Court, to its credit, has recently taken a more active role in preserving the separation of powers. *E.g.*, *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685; *Serv. Emps. Int'l Union, Loc. 1 v. Vos*,

[1] *Available at* https://academic.oup.com/jleo/article/34/1/27/4877009.

2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35; *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21; *Gabler*, 2017 WI 67. And multiple Justices on this Court have called for reinvigorating the non-delegation doctrine. *See*, *Fabick*, 2021 WI 28, ¶¶ 61–68 (Bradley, J., concurring); *Palm*, 2020 WI 42, ¶¶ 87–120 (Kelly, J, concurring); *see also id.* ¶ 252 (Hagedorn, J., dissenting).

A majority of United States Supreme Court Justices have also written in favor of reviving the non-delegation doctrine at the federal level. In *Gundy*, four of the eight sitting Justices openly called for a reevaluation of the doctrine, and Justice Kavanaugh (who did not participate in *Gundy*) subsequently wrote that "Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases." *Paul v. United States*, 140 S. Ct. 342 (2019) (Statement of Kavanaugh, J., respecting denial of writ of certiorari) (collecting cases). More recently, a six-member majority invalidated OSHA's vaccine mandate for large employers under the "major questions doctrine," which is "closely related to … the nondelegation doctrine." *NFIB v. OSHA*, 142 S. Ct. 661 (2022).

The time is ripe for this Court to return to first principles and re-invigorate the non-delegation doctrine in Wisconsin.

C. A Constitutionally Faithful Non-Delegation Test

The primary challenge in breathing new life into the non-delegation doctrine, of course, is what is the test? As many jurists and commentators have long recognized, defining the boundaries between legislative and executive power is not a task that lends itself to "formulaic rules," but instead calls for "general principles." *Panzer*, 2004 WI 52, ¶ 49; *Palm*, 2020 WI 42, ¶ 105 (Kelly, J., concurring). This complexity calls for humility. Appellants do not purport to propose an all-encompassing test that will resolve all non-delegation questions. It is

sufficient—and appropriate—for this Court to announce the general principles that must guide non-delegation analysis, allowing future cases to further develop the doctrine by applying it to unique factual settings as they arise.

But the critical starting point is to re-align the framework for the Court's analysis with the underlying constitutional mandate that legislative power must be exercised by the legislative body to which it is assigned. The Court's current doctrinal focus on the existence of "adequate" procedural safeguards does not do that. This Court should abandon that framework and start anew.

To begin to operationalize this, the first question to ask is whether the delegated power involves "the formulation of generally applicable rules of private conduct." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring); *Gundy*, 139 S. Ct at 2133 ("[T]he framers understood [legislative power] to mean the power to adopt generally applicable rules of conduct governing future actions by private persons"). This is exactly where this Court used to start. *See Whitman*, 220 N.W. at 938 (1928) (describing "legislative power" as "mak[ing] a rule of conduct for which a citizen may be penalized if he disobeys it."). The realm of non-delegable legislative power may extend beyond this—that can be fleshed out later—but this question gets to heart of how close the delegated power is to the legislative branch's "core powers." *Gabler*, 2017 WI 67, ¶ 31.

And it can rule many things out. The power to issue orders on a case-by-case basis, with respect to one individual or property at a time, for example, does not involve "generally applicable rules," but a typical

executive function.[2] Thus, local health officers' powers to issue isolation and quarantine orders under § 252.06, or health-hazard-abatement orders under § 254.59, are not non-delegation problems. *See also State ex rel. Nowotny v. City of Milwaukee*, 140 Wis. 38, 121 N.W. 658, 659–60 (1909) (distinguishing license revocation from "the power to prohibit [some activity] entirely in the municipality"). And a generic authorization to "do what is reasonable and necessary," as long as the "what" does not include *enforceable* restrictions on private conduct, also would not raise non-delegation problems. This first question might rule out other categories too, such as delegations to set rules for the "internal operations" of agencies or the courts. *See* A.J. Jeffries, *Making the Nondelegation Doctrine Work: Toward A Functional Test for Delegations*, 60 U. Louisville L. Rev. 237, 243–50 (2021) (discussing this and other examples); *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717, 718 (1931).[3]

If the delegated power involves setting generally applicable rules regulating private conduct, the next—and "most important[ ]"—question is "did [the legislative body], and not the Executive Branch, make the policy judgments?" such that whatever is left can be characterized as merely "fill[ing] up the details." *Gundy*, 139 S. Ct. at 2136, 2141 (Gorsuch, J., dissenting). This is the central principle, and it follows from

[2] If the standard to be enforced on a case-by-case basis is too indeterminate, it would raise similar separation-of-powers concerns, but ones perhaps better analyzed under the vagueness doctrine. *See Gundy*, 139 S. Ct. at 2142; *but see Superior Guillou v. State, Div. of Motor Vehicles*, 127 N.H. 579, 580–581, 503 A.2d 838 (1986) (invalidating a vague license revocation statute under the non-delegation doctrine).

[3] *Gundy* identifies two other preliminary questions that might be relevant in non-delegation cases, but aren't as relevant here. For instance, the Legislature can make a law conditional "upon some certain act or event … [determined] by some other department, body, or officer." *Burdge*, 95 Wis. at 350; *cf. Gundy*, 139 S. Ct. at 2137 (Gorusch, J., dissenting) (citing same rule). So, for example, a county board could adopt a mask mandate to be triggered by some threshold case level, allowing the local health officer to decide when that threshold has been met.

the plain text of the Wisconsin Constitution vesting legislative authority in the Legislature alone (or, at the local level, the county board, Wis. Const. art. IV, § 22). It is also consistent with how this Court started. *See In re Griner*, 16 Wis. 423, 424 (1863) (drawing the same line between "important subjects" and "fill[ing] up the details."). In 1897, just a few decades after the Wisconsin Constitution was ratified, this Court declared this the "true test and distinction whether a power is strictly legislative, or whether it is administrative"—whether the delegation "involves a discretion as to *what* [the law] shall be" or just "discretion as to its execution, to be exercised *under* and in *pursuance of* the law." *Burdge*, 70 N.W. at 350.

An important sub-question here is the *scope* of the power delegated, because the broader the delegated power, the more the "details" implicate major policy determinations. Thus, courts have recognized that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 475 (2001); *In re Certified Questions*, 506 Mich. at 360–362 (listing cases). A corollary is the major questions doctrine, an interpretive cannon that narrowly construes seemingly broad delegations, forcing the Legislature to "speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *NFIB*, 142 S. Ct. at 665 (citation omitted); *Whitman*, 531 U.S. at 468 ("Congress … does not … hide elephants in mouseholes."). There is an important caveat, however. Regardless of the scope of the delegation, the legislative body still must make all major policy decisions *in the domain* in question. The Legislature could not say to an agency, "go regulate unicycles," simply because hardly anyone rides one.

The "durational scope" is also relevant, because, "as common sense would suggest, [ ] the conferral of indefinite authority accords a greater

accumulation of power than does the grant of temporary authority." *In re Certified Questions*, 506 Mich. at 362–63 (listing cases). Section 323.14, for example, allows the county executive to issue enforceable orders for a short period of time, but requires the county board to act "as soon as that body can meet," to either "ratif[y], alter[ ], modif[y], or repeal[ ]" such orders. A locality could adopt a similar ordinance for its health officer, as Winnebago County has done. Opening Br. 11. Such short-term, emergency provisions ensure that the legislative body retains its "policy-making" role "to guide … through a prolonged crisis," while "conferr[ing] limited executive power to act unilaterally" for a very short time. *Fabick*, 2021 WI 28, ¶ 36 n. 16. But the fact that a regulated condition will not last forever does not permit un-cabined delegation. Exigency and emergency are exceptions and not the rule.

There are good reasons why the non-delegation doctrine should apply more stringently as the relevant legislative body becomes more localized. A county board exists precisely to address local policy issues and to be more deeply involved in the "details." Likewise, the Wisconsin Legislature can get further into the weeds than Congress. So too with respect to the acceptable "durational scope" in emergency statutes: the Wisconsin Legislature can react far more quickly than Congress; and a county board more quickly than the State Legislature. Wisconsin's emergency statutes even recognize this. *Compare* Wis. Stat. §§ 323.10, .12 (allowing the governor 60 days during an emergency to "issue orders") *with* Wis. Stat. § 323.14 (requiring the county board to act "as soon as that body can meet").

Finally, this Court should not abandon entirely its reliance on "procedural safeguards." These are still relevant, but only to the extent that they ensure that the critical policy decisions are actually being made by the Legislature. Thus, for example, an affirmative ratification requirement by the county board (as in § 323.14, or as in Winnebago

County's ordinance, *see supra*) is highly relevant, whereas the mere ability to subsequently withdraw the delegation, *Panzer*, 2004 WI 52, ¶ 71, is not.

These principles provide a strong starting point for this Court to return to analyzing non-delegation questions consistent with our constitutional design. There will of course continue to be difficult cases. And this Court in future cases can expound further; scholars continue to identify sources of law that this Court may be able to draw on. *E.g.*, Gary Lawson, *Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework for the Public-Law Puzzle of Subdelegation* (May 2020), forthcoming in American Enterprise Institute (proposing reliance on the private law of agency delegations).[4] But many cases will fall clearly on one or the other side of the examples above show. Indeed, this very case falls far outside the boundaries of permissible delegation.

II. Under a Substantive Non-Delegation Doctrine, Either the Ordinance or Statute Is Unconstitutional, and the Orders Are Invalid and Unenforceable

As the Appellants explained in their previous brief, either Dane County Ordinance § 46.40(2) or Wis. Stat. § 252.03 violate the non-delegation doctrine by empowering the Dane County health officer to unilaterally issue and enforce *any set of restrictions* that she deems "reasonable and necessary" to control the spread of disease. Applying the principles outlined above is straightforward here.

First, the power Respondent Heinrich claims (either through the ordinance or statute) is, unquestionably, to formulate "generally applicable rules of private conduct," *Dep't of Transp.*, 575 U.S. at 70 (Thomas, J., concurring). Her orders have included mask mandates,

[4] *Available at* https://ssrn.com/abstract=3607159

sports restrictions, business capacity limits, and even forbidding gatherings in private homes. Opening Br. 12–13.

Next, the county board has not made any of the policy decisions, such that only details are left. What restrictions will be imposed, how long they will imposed, to whom they will apply, what the exceptions will be—all of that is given to Respondent Heinrich to decide in the first instance, by herself, with the stroke of a pen.

The scope of the delegation is also extraordinarily broad. Respondent Heinrich claims the power to impose whatever restrictions she deems "reasonable and necessary" to prevent the spread of disease—but of course, nearly all human activity risks spreading disease, so the board has effectively handed over control of all of life in Dane County (again, even in private homes). And there is no durational limit. Respondent Heinrich has been issuing ever-changing restrictions for nearly two years now, most recently extending the mask mandate until March 1. *See* Face Covering Order # 7 (Jan. 26, 2022).[5]

Finally, there are no procedural safeguards of the kind that require the county board to ultimately decide the major policy questions at stake. Indeed, Dane County's counsel told the paper that, in their view, "the County Board doesn't [even] have the power to end the mask mandate." Emily Hamer, *Dane County Board will debate mask mandate, hear public comments*, Wisconsin State Journal (Dec. 17, 2021).[6]

Burdge illustrates how to analyze this case. There, a non-legislative body had single-handedly decided that non-vaccinated

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

[6] https://madison.com/wsj/news/local/govt-and-politics/dane-county-board-will-debate-mask-mandate-hear-public-comments/article_c31e79c8-f45f-567e-a206-e73b07be9bdc.html

children were to be excluded from public school. *Burdge*, 70 N.W. at 351. The delegating language was "very general," authorizing "the state board of health 'to make such rules and regulations and to take such measures as may, in its judgment, be necessary for the protection of the people from ... dangerous contagious disease.'" The Court emphasized that "[t]here is no statute in this state authorizing compulsory vaccination, nor any statute which requires vaccination as one of the conditions of the right or privilege of attending the public schools," and this was such an important policy decision that it was "safe to say" it "lies strictly and solely within the domain of legislative authority." *Id.* at 349–51.

So too here. Whether a county should have mask mandates, capacity limits, sports restrictions, etc. are major policy questions that ultimately must be resolved by the local legislative body.

CONCLUSION

The decision of the Circuit Court should be reversed.

Dated: February 1, 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 4,397 words.

Dated: February 1, 2022.

LUKE N. BERG