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IN THE SUPREME COURT OF WISCONSIN

Nos. 2021AP1343, 2021AP1382

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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

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

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JOINT NON-PARTY BRIEF FOR  
THE CITY OF MILWAUKEE AND LEAGUE OF WISCONSIN MUNICIPALITIES

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### **INTEREST OF AMICI**

The City of Milwaukee’s Health Department (“MHD”) is a level III local health department pursuant to the provisions of Wis. Stat. Ch. 251 and other pertinent provisions of state and local law. MHD has an obligation to protect its residents and visitors from communicable diseases. To that end, MHD issued multiple health orders aimed at preventing and suppressing the spread of COVID-19. The City of Milwaukee (“the City”) believes that MHD-issued health orders were reasonable and necessary. The City has an interest in ensuring that MHD continues to have the authority to control the spread of communicable diseases under Wis. Stat. Ch. 252 now and in the future.

The League of Wisconsin Municipalities is a non-profit, non-partisan association of cities and villages. Most League members are served by county health departments pursuant to Wis. Stat. § 251.02 but 16 municipalities operate their own health department or partner with the county or other municipalities.<sup>1</sup> We share the City’s interest in preserving local

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<sup>1</sup> Appleton, De Pere, Eau Claire, Franklin, Greenfield, Hales Corners, Madison, Menasha, Milwaukee, North Shore, Oak Creek, South Milwaukee/St. Francis, Wauwatosa, West Allis, Racine, and Watertown.

health officer authority to quickly respond to combat communicable disease under § 252.03, which mandates that local health officers “promptly take all measures necessary to prevent, suppress and control communicable diseases, and . . . report to the appropriate governing body the progress of the communicable diseases and the measures used against them . . . .” We also share the City’s concern that any holding by this Court that Wis. Stat. § 252.03 is an unlawful delegation of legislative authority will serve to unravel the structure of local government in Wisconsin.

### **INTRODUCTION**

Wisconsin Stat. § 252.03(2) authorizes a local health officer to “do what is reasonable and necessary for the prevention and suppression of” a communicable disease. Wis. Stat. § 252.03(2). The Legislature wisely vested this broad authority with local health officers in 1982 to allow them to respond to existing and emerging threats that can vary widely and spread rapidly. These powers are not granted in a vacuum, however, and local health officers must act in concert with local lawmakers to effectuate this grant of authority in a meaningful way. Any argument that this broad grant of authority violates the non-delegation doctrine ignores this

reality and risks calling a multitude of other delegations of authority into question. For these reasons, along with those contained in Respondents' pleadings, this Court should affirm the lower court's decision.

### ARGUMENT

**I. LEGISLATIVE HISTORY DEMONSTRATES THAT THE LEGISLATURE REMOVED THE AUTHORITY TO DO WHAT IS "REASONABLE AND NECESSARY" TO COMBAT COMMUNICABLE DISEASES FROM LOCAL BOARDS OF HEALTH AND GAVE IT TO LOCAL HEALTH OFFICERS.**

The oversight and authority previously given to local boards of health to combat communicable diseases was taken away from the more cumbersome boards and given directly to local health officers. Petitioners ask this Court to re-write Wis. Stat. § 252.03 and, in doing so, ignore both the plain language and legislative history of the statute that empowers local health officers to take reasonable and necessary steps to combat communicable diseases. Doing so would endanger residents and visitors now and in the future.

When examining statutes, courts should give credence to the legislative history underlying a statute, including amendments made to the same. *See Muniz v. Hoffman*, 422



U.S. 454, 468, 95 S. Ct. 2178, 2186, 45 L. Ed. 2d 319 (1975) (“Just as Sec. 3692 may not be read apart from other relevant provisions of the labor law, that section likewise may not be read isolated from its legislative history and the revision process from which it emerged, all of which place definite limitations on the latitude we have in construing it.”) Courts are to presume that the Legislature intends amendments to have a “real and substantive effect.” *Stone v. INS*, 514 U.S. 386, 397 (1995); *see also Kleber v. CareFusion Corp.*, 914 F.3d 480, 486 (7th Cir. 2019) (“A mountain of precedent supports giving effect to statutory amendments.”).

Prior to 1982, local authority to “do what is reasonable and necessary for the prevention and suppression of disease” existed in local boards of health, not local health officers. Wis. Stat. § 143.03(2) (1979) (later renumbered as Wis. Stat. § 252.03(2)). Local health officers’ duties were limited to “investigating the circumstances attendant upon the appearance of the disease, and making report” to the local board. *Collier v. Town of Scott*, 124 Wis. 400, 102 N.W. 909, 909 (1905). While the Wisconsin Supreme Court recognized the obvious, that the authority “to take such measures as may be deemed necessary for the prevention, suppression, and

control of [communicable] disease [...] involves the exercise of discretion,” the legislature at that time clearly intended that this discretion rested with local boards of health, not local health officers. *Id.* The Wisconsin Supreme Court rightfully recognized that the decision of where to vest this authority, and indeed whether to vest the authority with anyone at all, was not a question for courts but instead was for the Legislature to decide. *Id.* at 910.

Then, in 1982, as part of 1981 Assembly Bill 711, the Legislature made a policy decision to shift the discretionary authority contained in Wis. Stat. § 143.03 (now § 252.03) away from local boards of health and, instead, vest that authority with local health officers directly. 1981 Assembly Bill 711, Section 23. Wisconsin Stat. § 143.03(1), which previously required that any measures taken pursuant to a local health officer’s duty be subject to the approval of the local board of health, was amended to remove any requirement that the local board of health approve the measures taken. *Id.* Further, in Subsection 2 of Wis. Stat. § 143.03, the authority to “do what is reasonable and necessary for the prevention and suppression of disease” was taken away from the board of health and expressly given to the local health officer. *Id.* Even the title of

1981 Assembly Bill 711 was listed in the Assembly and Senate Journals of the time as “Relating to revising the laws concerning local health agencies and communicable diseases and granting rule-making authority.”<sup>2</sup> The Legislature’s obvious intent was to remove the broad rule-making authority from local boards of health and vest that same broad rule-making authority with local health officers.

## **II. THE AUTHORITY TO COMBAT COMMUNICABLE DISEASES MUST BE BOTH BROAD AND EXPEDIENT.**

The need for health officials to quickly respond to communicable diseases as they emerge has been made clear over the course of the past twenty months, but it did not take the COVID-19 pandemic to understand what many, including the Legislature in 1982, already knew: “Government action to further public health goals sometimes must be both rapid and drastic to be successful. Epidemics of disease can not only kill many people quickly, but can also have a ruinous impact on a society.” Allan J. Jacobs, *Is State Power to Protect Health*

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<sup>2</sup> Journal Of The Assembly [April 1, 1982] at 3185 (WI); <https://docs.legis.wisconsin.gov/1981/related/journals/assembly/19820401.pdf> (last visited January 26, 2022).

*Compatible with Substantive Due Process Rights?*, 20 Annals Health L. 113, 113 (2011).

This Court need only look back two months for an example of the speed with which communicable diseases can travel in an ever-more-interconnected world. The recent Omicron variant of COVID-19 was initially identified in South Africa on November 24, 2021.<sup>3</sup> On December 4<sup>th</sup>, less than two weeks later, the Wisconsin Department of Health Services announced an individual in Wisconsin had contracted the Omicron variant while travelling in South Africa.<sup>4</sup> Within four weeks of arriving in Wisconsin, the Omicron variant accounted for a majority of all COVID-19 cases within the state.<sup>5</sup> Communicable diseases travel at the speed of an airplane and do not always leave time for the prolonged, deliberative

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<sup>3</sup> Centers for Disease Control, Science Brief: Omicron (B.1.1.529) Variant; <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/scientific-brief-omicron-variant.html> (last viewed January 21, 2022).

<sup>4</sup> WI DHS, First Case of the Omicron Variant Identified in Wisconsin; <https://www.dhs.wisconsin.gov/news/releases/120421.htm> (last visited January 21, 2022).

<sup>5</sup> Data on the percentage of COVID-19 cases attributable to a particular variant available at page 7 of an MHD presentation made to the City of Milwaukee Public Safety and Health Committee is available here: <https://milwaukee.legistar.com/View.ashx?M=F&ID=10386877&GUID=0B69BB86-22DF-4555-84C1-9A0436EFB13E> (last visited January 24, 2021).

process involved in creating legislation. Local health experts' actions to combat these deadly and virulent threats need to be just as fast-changing as the diseases they are fighting. The Legislature recognized this long ago and wisely vested local health officers with broad authority to act swiftly.

The duty placed on a local health officer under Wis. Stat. § 252.03(1) to prevent and suppress communicable diseases and the related authority granted under Wis. Stat. § 252.03(2) are necessarily broad. Vesting that authority with public health experts rather than the local governing body makes sense as the decisions and “issues involved may be highly technical and difficult for non-scientists, including lawyers and judges, to understand. These issues may require comprehension of complex biological processes or understanding of mathematically sophisticated statistical inferences.” Jacobs at 114-115. This is because communicable diseases vary widely both in how they are treated and spread.

Not every communicable disease is best dealt with through masks, so a specific statute or ordinance mandating mask wearing for all communicable diseases would be ineffective in many cases. For example, monkeypox is spread by close contact with infected individuals and through bites

and scratches from infected animals.<sup>6</sup> A “reasonable and necessary” response to an outbreak of monkey pox would be to halt all sales of a certain species of animal that is suspected of spreading the disease immediately. Although it may be possible to pass such a law in response to an outbreak, by the time the Legislature went through its deliberative process and passed a ban on the sale of certain animals, a sufficient number of individuals could become infected from the animals and begin passing the disease through human-to-human contact. This could potentially result in many hundreds or thousands of infected individuals, including those who never came into contact with any of the animals suspected of carrying the disease.

Monkeypox is a single example of a particular communicable disease, but there are nearly 100 communicable diseases already recognized by DHS, not counting those that are not yet discovered. *See* Ch. DHS 145 Appx. A. Local health officers are required to be qualified in their field and therefore have the requisite experience to decide how to best deal with this wide variety of diseases. Wis. Stat. § 251.06. There are a

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<sup>6</sup> <https://www.cdc.gov/poxvirus/monkeypox/transmission.html> (last visited January 31 2022).

broad array of communicable diseases and the means by which each spreads can vary widely from disease to disease, meaning the authority to prevent these diseases needs to be just as broad.

**III. THE LEGISLATURE DELEGATED AUTHORITY TO LOCAL HEALTH OFFICERS TO ISSUE ORDERS AND AN ORDINANCE ENFORCING THOSE ORDERS IS AN ENFORCEMENT MECHANISM, NOT A DELEGATION OF AUTHORITY.**

Ordinances making a local health officer's orders enforceable are not a delegation of legislative authority and do not need to be. The Wisconsin Legislature already delegated that authority to local health officers via Wis. Stat. § 252.03. As discussed in Part II, the Legislature's delegation of authority to local health officers, instead of the board of health or governing body, is sensible given the technical expertise and swift reaction needed to appropriately respond to an emergent communicable disease. Such ordinances evidence additional legislative support for the health officers' orders and provide a mechanism for enforcing those orders.

Petitioners correctly point out that state law does not provide any mechanism for a local health officer to enforce his or her orders issued under Wis. Stat. § 252.03. Local health officers cannot issue fines without an ordinance creating the

violation, which the governing body must adopt. Wis. Stat. § 66.0113(1). Accordingly, Respondents and the City enacted ordinances to allow enforcement of their respective health officers' orders. Petitioners mischaracterize these ordinances as open-ended delegations of authority to an unelected official when they simply add teeth to the local health officer's existing authority as delegated by the Legislature.

Moreover, local health officers are not unaccountable for their actions. Section 252.03(1) requires that health officers dealing with communicable disease report to the appropriate governing body and keep the body apprised of measures taken and progress. Additionally, the Legislature provided a check on the local health officer's authority via the removal statutes in Wis. Stat. §§ 17.10, 17.12(1)(c), and 17.13, and a local health officer can be removed from office if desired.

Since the onset of COVID-19, the City's lawmakers have supported MHD's ability to issue health orders under Wis. Stat. § 252.03. *See* Milwaukee Common Council File No.



211528<sup>7</sup>; *see also* Common Council File No. 200967.<sup>8</sup> This includes passing an ordinance allowing citations for anyone violating an MHD health order<sup>9</sup> and a subsequent increase in the applicable fine.<sup>10</sup>

**IV. APPLICATION OF THE NON-DELEGATION DOCTRINE TO A LOCAL HEALTH OFFICER'S AUTHORITY TO ISSUE ORDERS UNDER WIS. STAT. § 252.03 HAS THE POTENTIAL TO UNRAVEL THE FRAMEWORK OF LOCAL GOVERNMENT IN WISCONSIN.**

If this Court rules that the non-delegation doctrine prohibits the Legislature from vesting local health officers with broad authority to take “reasonable and necessary” steps to

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<sup>7</sup> Resolution approving this amicus brief and expressing that “the authority vested in health officers [under 252.03] is essential to the practical need to act swiftly and nimbly to deal with a variety of communicable diseases” and “removing the authority of health officers to issue orders without needing to go to the local governing body prior to doing so would have wide-ranging negative consequences.” Available at <https://milwaukee.legistar.com/LegislationDetail.aspx?ID=5383159&GUID=5363F3A5-7EB8-4412-869C-95D037A0322C> (last viewed January 31<sup>st</sup>, 2022).

<sup>8</sup>“The Common Council is in support of the City of Milwaukee and its Health Department continuing to implement and enforce reasonable restrictions and measures applicable to businesses, organizations, and individuals in order to continue to slow the spread of COVID-19 under s. 252.03, Wis. Stats” Available at <https://milwaukee.legistar.com/LegislationDetail.aspx?ID=4683599&GUID=AD9A8A77-59EF-4483-A697-624740A748C5> (last viewed January 31<sup>st</sup>, 2022).

<sup>9</sup> Milwaukee Common Council File No. 191963; available at: <https://milwaukee.legistar.com/LegislationDetail.aspx?ID=4421363&GUID=605CE227-1B5F-4C85-8BA3-15F46F02DDA0>

<sup>10</sup> Milwaukee Common Council File No. 200984; available at: <https://milwaukee.legistar.com/LegislationDetail.aspx?ID=4689870&GUID=026C6629-C6E6-4F5D-977A-1270A4106B2A>

combat communicable diseases, such ruling would have widespread deleterious effects on not only the ability to respond to a communicable disease, but on other core functions of local government as well.

There are numerous instances where the Legislature has vested local legislative authority elsewhere. For example, police and fire commissions in first-class cities have extremely broad authority to “prescribe rules for the government of the members of each department.” Wis. Stat. § 62.50(3)(a). They also have the authority to “prescribe general policies and standards for the departments” and “adopt rules to govern the selection and appointment of persons employed in the police and fire departments.” Wis. Stat. § 62.50(1m), (b).

Additionally, the Legislature has delegated broad authority to police and fire commissions for other cities and villages, giving them exclusive authority over hiring and discipline within police and fire departments. Wis. Stat. §§ 62.13, 61.65. Even the manner of selecting the members of a police and fire commission is analogous to the way that a local health officer is selected; they are appointed by the executive and confirmed by the local governing body. Wis. Stat. § 62.50(1h); *see also* Wis. Stat. §§ 61.65(3g)(d), 62.13(1).

Municipal library boards are another example of the Legislature granting broad authority to a board instead of the municipality's governing body. Like local health officers, library board members are appointed by the mayor or village president and then confirmed by the governing body. Wis. Stat. § 43.54(1). As with police and fire commissions, library boards are vested with significant authority and autonomy. The library board has exclusive control over the expenditure of moneys collected, donated or appropriated for the library fund, and “exclusive charge, control and custody of all lands, buildings money or other property devised, bequeathed, given or granted to, or otherwise acquired or leased by, the municipality for library purposes.” Wis. Stat. § 43.58(1) (emphasis added). The library board is required to supervise the administration of the public library and appoint a librarian and has authority over the duties and compensation of library employees. Wis. Stat. § 43.58(4).

The Wisconsin Statutes are replete with similarly broad grants of authority vested with local officials, boards and commissions. *See e.g.*, Wis. Stat. § 200.45(1)(a) (granting rulemaking authority to metropolitan sewerage district commissions in 1<sup>st</sup> class cities); Wis. Stat. § 198.14(15)

(granting municipal power districts broad authority); Wis. Stat. § 66.0127(1)(b) (broad rulemaking authority for municipal hospital boards); Wis. Stat. § 62.69(2)(d) (broad rulemaking authority granted to the commissioner of public works in first class cities with a water utility; Wis. Stat. § 30.38(8)(a) (granting “exclusive control over the commercial aspects of the day-to-day operation of the public harbor and public harbor facilities” to local harbor boards); Wis. Stat. § 27.08(2) (granting city park boards broad authority to “govern, manage, control, improve and care for” public parks and pleasure drives, and “secure the quiet, orderly and suitable use and enjoyment thereof by the people; also to adopt rules and regulations to promote those purposes.”).

If this Court rules that the broad grant of authority given to local health officers under Wis. Stat. § 252.03 violates the non-delegation doctrine, it will call into question the numerous other grants of authority to local officials and local boards and many of the rules and regulations localities have operated under that are created by these local boards and officers. Applying the non-delegation doctrine in such a fashion will necessarily have widespread unforeseen consequences on local government operations.

## CONCLUSION

For the reasons set forth above, the Court should rule in favor of the Respondents and in accordance with the law as outlined herein.

Dated this 1<sup>st</sup> day of February, 2022.

Respectfully submitted,



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### CERTIFICATE AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Wis. Stat. § (Rule) 809.19(8)(b), (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 2,941 words.

Dated this 1<sup>st</sup> day of February, 2022.

Signed:



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

I hereby certify that when an electronic copy of this motion and brief is submitted to this Court, it will comply with the requirements of Wis. Stat. § 809.19(12) and will be identical in content to the text of the paper copy of the motion and brief. A copy of this certificate is included with the paper copies of the motion and brief that are submitted for filing with the Court and served on all parties.

Dated this 1<sup>st</sup> day of February, 2022.

Signed:



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