No. 2020AP1343

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 AND DANE COUNTY,
DEFENDANTS-RESPONDENTS

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

RESPONSE BRIEF

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INTRODUCTION

Wisconsin's Legislature created a dual system of statewide and local health officers to combat a pandemic. Through Wis. Stat. § 252.03, the Legislature delegated to local health officers, not governing bodies, the power to "promptly take all measures necessary to prevent, suppress and control communicable diseases," among other powers and duties. The local health officer for Public Health for Madison and Dane County ("PHMDC") acted in response to the COVID-19 pandemic by issuing emergency health orders, and Dane County acted in response to the pandemic by adopting an ordinance to encourage compliance with those orders. Because the emergency health orders and Dane County's ordinance fall squarely within statutory and constitutional powers and without infringement of the non-delegation theory, the Dane County Circuit Court properly dismissed Plaintiffs-Appellants' lawsuit and the Court of Appeals should affirm that decision.

ORAL ARGUMENT AND PUBLICATION

Oral Argument and publication are unnecessary under Wis. Stat. 809.09(1)(c).

STATEMENT OF THE CASE

The Petitioners in this case are not contesting the nature of COVID-19, the pandemic, its seriousness nor the restrictions being implemented to overcome the pandemic. R. 17, p. 3. "This case is not

about what restrictions are appropriate during the ongoing COVID pandemic, which is admittedly serious." *Id.* "Plaintiffs do not object to and do not challenge many of the restrictions in the current health order." *Id.* Instead, they challenge (1) whether state law permits local health officers to issue emergency health orders during a pandemic and (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. Brief of Appellant, p. 7.

A novel strain of coronavirus, SARS-CoV-2 (commonly COVID-19), spread throughout the world in 2020, creating the most widespread global pandemic since the 1918 Spanish Flu. R. 44, p. 4. As a result, international, national, state and local emergency health orders have been issued with a variety of restrictions on human behavior and daily life in order to control and suppress the virus. *Id.*

The Center for Disease Control ("CDC") determined COVID-19 is a severe acute respiratory illness. R. 44, p. 4. COVID-19 can spread through exposure to respiratory droplets carrying infectious virus. *Id.* Respiratory droplets are produced during exhalation, e.g. breathing, speaking, singing, coughing, sneezing, and span a wide spectrum of sizes. *Id.*

After the Supreme Court invalidated the State's Safer at Home Order in *Wisconsin State Legislature v. Palm*, 2020 WI 42, 391 Wis.2d 497, 942 N.W. 2d 900, combatting the pandemic fell to local governments. Following *Palm*, Public Health of Madison & Dane County ("PHMDC") issued a number of health orders in an attempt to fight the spread of the coronavirus. R. 44, p. 9.

PHMDC is the statutorily mandated local health department for two governmental entities, Dane County and the City of Madison.[1] PHMDC and its Board of Health for Madison and Dane County ("BOHMDC") – which the Plaintiffs-Appellants never joined as a necessary and indispensable party to this action – were created in 2007 pursuant to the authority provided by Wis. Stat. § 251.02(1m) and under the terms of an Intergovernmental Agreement ("IGA") entered into between the governing bodies of the City of Madison and Dane County pursuant to Wis. Stat. § 66.0301. In other words, those governing bodies, after careful study, consideration and deliberation, made a legislatively authorized policy decision to pool resources and utilize those statutory mechanisms to create a joint health department.[2] As noted, Wis. Stat. §

[1] A "local health department" is statutorily defined to include a city-county health department, per Wis. Stat. § 251.01(5). The Legislature has found the provision of public health services to be a matter of statewide concern, Wis. Stat. § 251.001, and, consequently, established "local health department" at the county level by way of Wis. Stat. § 251.02.

[2] IGA, Preamble. The IGA can be found online at https://madison.legistar.com/View.ashx?M=F&ID=6227822&GUID=AF212C76-B27C-497F-9621-02BB00846E40

251.02(1m) allows for governing bodies to "jointly establish a city-county health department."

Further, through Wis. Stat. § 251.06(4)(b), the legislature authorized the County Executive to appoint and supervise the local health officer, subject to county board confirmation of the appointment and subject further to "the local board of health shall be only a policy-making body determining the broad outlines and principles governing the administration of the county health department."

Ms. Heinrich, as the PHMDC Director, is the statutorily mandated local health officer defined by Wis. Stat. § 251.01(5)[3] and credentialed by Wis. Stat. § 251.06.[4] She is accountable to the County Executive and, in turn, the County Board, the Mayor, and the Common Council, as set forth in Wis. Stat. § 251.06(4)(b). The IGA further sets forth who supervises the local health officer. In this case, the local health officer is appointed by both the County Executive and the Mayor and confirmed by both the City Council and the County Board. In 2012, Ms. Heinrich was appointed as the local health officer and was re-confirmed by the both the City Council and the County Board on May 19, 2020.

Additionally, the local health officer for PHMDC is supervised by the BOHMDC. The BOHMDC is the policy-making body pursuant to

[3] Under Wis. Stat. § 251.01(5), "local health officer" means "the health officer who is in charge of a local health department."
[4] Said statute provides educational and other requirements for a "local health officer."

Wis. Stat. § 250.01(3), which has been expressly declared in the IGA.[5] The BOHMDC oversees the Director, to wit: "Director. The Mayor and the County Executive jointly shall appoint the Local Health Officer whose title shall be Director of the PHMDC, subject to confirmation of the Common Council and the County Board. The BOHMDC *shall provide supervision of the Director* and shall be responsible for any personnel decisions, other than the appointment and dismissal, regarding the Director."[6] PHMDC and Ms. Heinrich is thus subject to the control of the City and County by the operation of the IGA and aforementioned statutes.[7]

PHMDC implements and manages the policies set by those governing bodies (whose policy control exists through ordinances, budgets and the IGA),[8] as well as the policies of BOHMDC.[9] The BOHMDC assures enforcement of state and local health statutes and rules, adoption of City/County policies, determines program services priorities and measures are taken to provide an environment where individuals can be healthy and carries out its statutory obligations as a board of public health.[10] The eight-member BOHMDC is made up of one County Board Supervisor, one Common Council member, three Dane

[5] IGA, Section I (A).
[6] IGA, Section VI(B)(3)(a) (emphasis added).
[7] IGA, Section III.
[8] IGA, Sections V(B).
[9] IGA, Section I (D).
[10] IGA, Section I(D), VI(A)(3), VI (A)(3), and VI (A)(3)(a), (d), (e), (f) & (h).

County Residents and three City of Madison residents.[11] The BOHMDC has all the powers as set forth in Chapter 251.[12] The BOHMDC may delegate authority to the Director, including implementation of program services.[13] The BOHMDC also oversees finance and budgets of the PHMDC.[14] The City and County created PHMDC to offer the services of a Level III local health department as specified in Wis. Stat. § 251.05 (see also Wis. Admin. DHS §§ 140.06, 140.08).[15] Specifically, PHMDC's program services "shall address the varying needs of diverse populations within Dane County."[16]

STANDARD OF REVIEW

The issues in this case are purely legal, which this Court reviews de novo. See *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 OFFICERS HAVE AUTHORITY UNDER WIS. STAT. § 252.03 TO ISSUE HEALTH ORDERS

Wis. Stat. § 252.03(1) mandates that a "local health officer shall promptly take all measures necessary to prevent, suppress and control

[11] IGA, Section VI(2).
[12] IGA, Section V(A).
[13] IGA, Section VI(B)(3)(a). See also Section VI(B)(3)(b). "Program Services" means "services related to public health provided either directly to the citizens of Dane County or to other persons by contracts." Agreement at Section I(K).
[14] IGA, Section VIII.
[15] IGA, Section VI (A)(4).
[16] IGA, Section VII (A).

communicable diseases." Additionally, § 252.03(2) states the "[l]ocal health officers may do what is reasonable and necessary for the prevention and suppression of disease; forbid public gatherings when deemed necessary to control outbreaks or epidemics . . . ."

A. The Plain Language of Section 252.03 Supports the Local Health Officer's Actions.

When interpreting an ordinance, courts look for the "plain meaning" of a statute based on its text, context and structure. *Wisconsin Carry Inc. v. City of Madison,* 2017 WI 19, ¶ 20, 373 Wis.2d 543, 892 N.W. 2d 333. "[S]tatutory interpretation 'begins with the language of the statute.' ... [It] 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...." *Id*. Courts examine "the statute's contextualized words, put them into operation, and observe the results to ensure we do not arrive at an unreasonable or absurd conclusion." *Id*.

Unlike technical terms or terms of art, Section 252.03's language contains common and ordinary terms like "shall," "take all measures," "reasonable," "necessary," "prevent," "suppress," and "control," all common words used by courts in describing the common law involving public health at the time. See, e.g., *Lowe v. Conroy*, 120 Wis. 151, 97 N.W. 942, 944 (1904) ("The statutes were unquestionably framed upon

the fact that [health] boards must act immediately and summarily in cases of the appearance of contagious and malignant diseases, which are liable to spread and become epidemic, causing destruction of human life. Under such circumstances it has been held that the Legislature under the police power can rightfully grant to boards of health authority to employ all necessary means to protect the public health").

In *James v. Heinrich*, 2021 WI 58, 960 N.W. 2d 350, "[a]s recognized since the founding of our nation, "it is no more the court's function to revise by subtraction than by addition[.]" 2021 WI 58, ¶ 23 (internal citations omitted). Further, the Court stated, "in the words of Thomas M. Cooley: '…courts must . . . lean in favor of a construction which will render every word operative, rather than on which may make some idle and nugatory.'" *Id*. (citing Scalia & Garner, supra, at 174 (*quoting Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819) (per Marshall, C.J.) and Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 58 (1868)).

In *James*, the Supreme Court interpreted Wis. Stat. § 252.03 to conclude as follows:

> The statute lists a series of discrete powers afforded local health officers in order to address communicable diseases. Local health officers may, for example, "forbid gatherings when deemed necessary to control outbreaks or epidemics," and "inspect schools and other public buildings . . . as needed to determine whether

> the buildings are kept in a sanity condition." Wis. Stat. § 252.03(1) and (2).

James, 2021 WI 58, ¶18. The powers to forbid gatherings and inspect buildings were found to be illustrative, not exhaustive. *Id*. The Supreme Court in *James* concluded "reasonable and necessary" could not include the "extraordinary power" to close schools because it would render the specific statutory language relating to "inspect schools" superfluous. *James*, 2021 WI 58, ¶ 21. This case does not involve extraordinary power like closing schools or buildings but involves a limitation on public gatherings that comfortably falls within the statutory mandate to do what is "reasonable and necessary" to fight a pandemic.

The local health officer has independent statutory authority under Wis. Stat. § 252.03 to "take all measures necessary to prevent, suppress and control communicable diseases" and to "do what is reasonable and necessary for the prevention and suppression of disease." The words "reasonable and necessary" as well as "all measures necessary" should not be made idle and nugatory and must be interpreted to give effect to Wis. Stat. § 252.03. If the local health officer only has the authority to perform the few specific things explicitly stated in the statute, like inspect schools or forbid public gatherings, then the "reasonable and necessary" and "all measures necessary" commands in the statute would be meaningless surplusage.

Petitioners' argue the provisions in § 251.03(1) and (2) are not meant to include the authority to issue enforceable orders regulating private activity, such that the Dane County Ordinance is wrongfully expanding the local health officers' powers. As noted by the Circuit Court, Judge Frost presiding, in his decision: the Petitioner's "argument makes no sense." Dkt. 69, pg. 6. The Petitioners argue the provisions are instead meant to cover things that do not require enforcement such as promoting or providing masks, offering testing and vaccination, contact tracing or developing proposed ordinances/resolutions for the governing body to consider. *Pet. Br.* p. 21. However, the plain language of § 252.03 refutes this proposition. The lower court found the Petitioner's argument "ignores the unambiguous statutory language bestowing broad authority on the LHO to act to control communicable disease and would require that I declare this unambiguously broad grant of authority actually bestowed effectively no power in the LHO." Dkt. 69, pg. 6. As indicated by Judge Frost, the Petitioner's arguments cannot be squared with § 252.03's mandate to act, including by illustration its directive that a local health officer's authority includes the tool to forbid public gatherings. The Legislature certainly could not have meant for the local health officer to enforce her power to forbid public gatherings, but not the power to enforce the provision. "The Legislature's use of 'enforce' unambiguously demonstrates an LHO can compel compliance

with the public health laws. This must go beyond educating and advising, as though actions may convince people to act a certain way, but certainly do not compel obedience to the laws." Dkt. 69, pg. 10.

Also, Petitioners cite no authority of any court to support their interpretation, nor do they address other cases rejecting similar efforts to limit the statutory language of Chapter 252 when some challenged action did not come with the express terms of the involved statute. In *City of Milwaukee v. Washington*, 2007 WI 104, ¶¶ 33-34, 304 Wis.2d 98, the absence of a specific word or phrase was not dispositive when interpreting Wis. Stat. §252.07(9)(a). This Court embraced the statute's various parts, applied commonly accepted meanings and allowed the statutory language to be interpreted "broad enough" to serve its purpose. A similar analytical approach was taken in *White v. City of Watertown*, 2019 WI 9 (Jan. 31, 2019), where the Court discussed Wis. Stat. § 990.01, which instructs us on the proper construction of statutes. That statute says, "[i]n the construction of Wisconsin laws the words and phrases which follow shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the legislature[.]" In *White*, it was contended Wisconsin's fencing law in Chapter 90 applied only to towns, since there was little or ambiguous reference to cities, but the Supreme Court found, when reviewing the provisions at issues and "when read in light of § 990.01(42)," Chapter 90

unambiguously authorized the city to administer the fencing law's enforcement procedures.

Here, like the statutory analysis undertaken in *Washington* and *White*, it cannot be said the plain language of § 252.03 excludes forbidding gatherings, private or otherwise, any more than it excludes taking other measures. Section 252.03 comfortably falls within *Washington*'s analysis that such language does not "preclude" certain action that is "broad enough" to encompass nonenumerated action.

The legislative history of Section 252.03 also shows the power to issue a health order requiring face coverings falls comfortably within the purpose and scope of the language of the statute. "In delineating the duties of local health officers," in the statute's earliest incarnation in 1883, "the legislature mandated that local health officers 'take such measures for the prevention, suppression, and control of the diseases.'" *James*, 2021 WI 58, ¶27 & n. 17. In 1919, following the aftermath of the Spanish Flu, "the legislature expanded the powers of local health officers to include the following: … [t]he power 'to order and execute what is reasonable and necessary for the prevention and suppression of disease.'" *Id*., ¶29. "This language mirrors the powers accorded the State Board of Health…" *Id*. This language therefore empowered local health officers to act, and to act in more ways than just inspecting buildings or forbidding gatherings. If the legislature wanted to so limit the local

health officer, it has had multiple opportunities to do so in the past 125 years like it did with schools; but in every instance, it elected to keep the general grant of power to do what is reasonable and necessary to suppress a pandemic.

Contrary to the Petitioner's Brief at p. 8, Respondents do not ask that Wis. Stat. § 252.03(1) & (2) be interpreted to encompass "anything and everything." Such an interpretation would be inconsistent with the statutory text as outlined above. Plus, it would imperil similar language found elsewhere in legislative laws. Similar language is found in Wis. Stat. § 252.04(5) concerning DHS's power, which states "[w]here the use of any pesticide results in a threat to public health, the department shall take all measures necessary to prevent morbidity or mortality." In the context of public health, broad statutory language met with approval in *Superb Video v. County of Kenosha*, 195 Wis.2d 715, 537 NW 2d 25 (Ct. App. 1995), where the court evaluated the powers of local health boards under predecessor statutes with similarly broad wording, as follows: (1) Wis. Stat. § 140.09(6)(1991-1992) ("It may adopt such rules for its own guidance and for the government of the health department as may be deemed necessary to protect and improve public health") (emphasis added); (2) Wis. Stat. § 141.015(6)(1991-1992) ("shall take such measures as shall be most effectual for the preservation of the public health.") (emphasis added); and (3) Wis. Stat. § 141.02(2) (1991-1992)

("shall provide such additional rules and regulations as are necessary for the preservation of health, to prevent the spread of communicable diseases....") (emphasis added).

Similarly broad legislative grants of authority can be found under Wis. Stat. § 23.11 governing "general powers" to the Department of Natural Resources, which has "such further powers as may be necessary or convenient to enable it to exercise the functions and perform the duties required of it by this chapter and by other provisions of law." (emphasis added). See *Rehse v. Industrial Com'n*, 1 Wis.2d 621, 85 N.W.2d 378 (1957)(such language was permissibly broad enough in order to allow the Conservation Commission (i.e., DNR) to carry out its duties). Additional instances in which the Legislature empowers or delegates with language like "reasonable and necessary" include:

- Wis. Stat. § 194.43 - Department of Transportation "may prescribe reasonable and necessary rules and regulations for the safety of operation of private motor carriers."
- Wis. Stat. § 157.055(2)(a) - public health authority may "issue and enforce orders that are reasonable and necessary to provide for the safe disposal of human remains…."
- Wis. Stat. § 196.02(1) - Railroad Commission's powers are "broad, comprehensive, and all inclusive."
- Wis. Stat. § 279.03 – Lower Fox River Remediation Authority "has all of the powers necessary or convenient to carry out the purposes and provisions of this chapter."
- Wis. Stat. § 118.31(3) – general school operations - "reasonable and necessary force" for certain purposes.
- Wis. Stat. § 805.06(5), concerning court-ordered referees: "the referee … shall exercise the power to regulate all proceedings . . . and to do all acts and take all measures

necessary or proper for the efficient performance of duties under the order."[17]

- Wis. Stat. §895.529 – "reasonable and necessary" force for self-defense or defense of others.
- Wis. Stat. § 103.005(1) - Department of Workforce Development "shall adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities…."
- ATCP § 93.585(1)(a), as to leaks of flammable or hazardous liquids, states "the owner or operator or any contractor performing work under this chapter shall take all measures necessary to stop the leak...."

B. Dane County's Ordinance Does Not Violate Nor Is It Preempted by Any Wisconsin Statute.

Petitioners' lawsuit challenges Dane County Ordinance § 46.40, which states:

> (1) *Duty of Director, Public Health Madison and Dane County*. Pursuant to Wis. Stat. ss. 252.03(1) & (2) the Director of Public Health Madison and Dane County shall promptly take all measures necessary to prevent, suppress and control communicable diseases within Dane County including forbidding public gatherings when deemed necessary to control outbreaks with epidemics.
>
> (2) *Public Health Orders.* It 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.

Consistent with Wis. Stat. § 252.03, Dane County Ordinance § 46.40(1) repeats what the Legislature has already declared – PHMDC's

[17] In *Rose v. Rose*, 2017 WI App 7 ¶¶ 37-38, 373 Wis.2d 310, 895 N.W. 2d 104 (unpublished), the court considered the phrase "all measures necessary," finding it gives the referee broad powers to include unenumerated actions

Director "shall promptly take all measures necessary to prevent, suppress and control communicable diseases within Dane County, including forbidding public gatherings when deemed necessary to control outbreaks or epidemics." Section 46.40(2) – the particular provision challenged in this lawsuit – is equally valid.

The Dane County Board, in exercise of its police powers, adopted Ordinance § 46.40 completely independent of the local health officer's authority under Wis. Stat. § 252.03 in the manner alleged by Petitioners. Dane County Ordinance § 46.40 was not adopted by the County Board pursuant to legislative authority granted in Wis. Stat. § 252.03. That statute grants no authority to the County Board. Rather, it grants independent authority to a local health officer mandating they "take all measures necessary" and "do what is reasonable and necessary" to suppress and control communicable disease. The 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. The law is sufficiently robust to allow the Dane County Board to pass this Ordinance; that is, pursuant to its Ch. 59 home rule authority, the County Board "is vested with all powers

of a local, legislative and administrative character." Wis. Stat. § 59.03(2)(a).[18]

There are no preemption concerns by way of Dane County's Ordinance. Municipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with, but rather complement, state law. *Johnston v. City of Sheboygan,* 30 Wis.2d 179. 184, 140 N.W. 2d 247, 250 (1966). A local ordinance is not preempted unless the following occurs: (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. Simply because a municipal legislative act treats a subject also addressed by the legislature does not mean the former has been preempted: "[M]unicipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with ... the state legislation." *City of Milwaukee v. Childs Co*., 195 Wis. 148, 151, 217 N.W. 703 (1928).

[18] The legislature has conferred upon counties a broad grant of administrative and organizational home rule in Wis. Stat. § 59.03(2)(a). Although recognizing this power is more limited than municipal home rule granted to cities, the supreme court has recognized that it remains a broad grant of power. *Jackson County v. DNR*, 2006 WI 96, ¶¶ 17-19, 293 Wis.2d 497. Petitioner's suggest home rule powers of counties are limited; however, courts have construed these powers relatively broadly. Moreover, Chapter 59 "shall be liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational power." Wis. Stat. § 59.04.

Dane County Ordinance § 46.40 does not implicate any of these preemption factors. As noted above, its language does not interfere with § 252.03's grant of power to the local health officer. In fact, the County Ordinance tracks much of the language and supports the Legislative mandate to the local health officer compelling said officer to act in a pandemic.

In determining whether there is preemption, this court is not without guidance because there are several instances where the Legislature has expressly and unambiguously preempted or limited local government action. For example, Wis. Stat. § 66.0404 governs the siting of cell towers. It contains numerous terms, precisely how the application process shall take place, what must be contained in the application, and *25 specific limitations on local government authority*. See Wis. Stat. § 66.0404(4)(a-w).

Another example is Wis. Stat. § 66.0409(3-4) where the legislature curtailed local government power over concealed carry of weapons. The only avenues for local governments to regulate weapons are specifically spelled out in the statute, such as the imposition of sales tax, restricting the discharge of a firearm and the prohibition of the possession of a weapon in municipal buildings, or the enforcement of zoning regulations for shooting ranges when it would have an impact on the public health and safety. The Legislature removed local power to

regulate everything from sales, to transfers, to transportation and many other aspects. See Wis. Stat. § 66.0409(2).

The Legislature's sweeping removal of local power occurred with Wisconsin's biggest industry, agriculture. Passed in 2003 at Wis. Stat. § 93.90 (and the related rules implementing the law adopted by the Department of Agriculture, Trade and Consumer Protection in 2006 (ATCP 51)), the State's livestock facility siting law establishes local approval standards for new and expanding livestock operations. The Legislature's broad removal of local power begins at the outset: "This section is an enactment of statewide concern for the purpose of providing uniform regulation of livestock facilities." Wis. Stat. § 93.90(1). The law curtails local government regulation in a variety of ways, such as: creating special rules for zoning, creating special rules for treatment through conditional uses, prohibiting more stringent standards (as further set forth in ATCP 51.10(3) and Wis. Stat. § 93.90(3)(ar)), and even requiring reasonable and scientifically defensible findings of fact adopted by the political subdivision's governing authority that clearly show local siting standards are needed to protect public health or safety.

Other examples include Wis. Stat. §62.23(7)(de), governing conditional use permits in land use;[19] Wis. Stat. § 66.0602, imposing levy

[19] The Wisconsin legislature enacted major changes to local zoning authority laws in 2017 that were urged and promoted by homeowners, developers and other supporters as a "homeowners" bill of rights. Significantly, 2017 Wisconsin Act 67, impacts the

limits; Wis. Stat. § 66.0502 prohibiting municipalities from enacting or enforcing local residency ordinances (i.e., short term rentals); Wis. Stat. § 66.0401, governing solar and wind energy regulation; and Wis. Stat. § 440.465 limiting local control over transportation companies like Uber.

Here, however, the Legislature's regulation of communicable diseases and the mandate to the local health officer (in Wis. Stat. § 252.03) stands in stark contrast to the Legislature's sweeping removal of local power in these other contexts. In these other areas as noted above, the Legislature's statewide regulatory framework has various and extensive subject matter components that are expressly meant to curtail almost any exercise of local power, thereby creating statewide uniformity. On the one hand, the Legislature granted DHS certain powers and enforcement under § 252.02 for which the local health officer does not share and, on the other hand, the Legislature granted the local health officer her own delegated power under § 252.03 for which DHS does not share.[20]

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conditional use permit ("CUP") authority of all local governments, including cities and villages. The Legislature entirely retooled this area of the law to require any CUP "condition imposed must be related to the purpose of the ordinance and be based on substantial evidence," Wis. Stat. §62.23(7)(de)2.a; CUP requirements and conditions "must be reasonable and, to the extent practicable, measurable …." Wis. Stat. §62.23(7)(de)2.b; and "if an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the city ordinance or those imposed by the city zoning board, the city shall grant the conditional use permit." Wis. Stat. §62.23(7)(de)2.a. (emphasis added).

[20] The statutory language under Section 252.03 is not limited by Petitioner's interpretation of Administrative Code § DHS 145.06(4). *Pl. Br.* p. 14. That Code provision states, when a local health officer knows that a person has or is suspected of

Moreover, Wis. Stat. §§ 252.02, 252.03, 251.06, 252.25, and 323.14, all of which are cited by Petitioners, are in most cases silent on local regulation. Instead, in some of these statutory provisions, the Legislature mandates local health officers to act. Clearly, the Legislature has not expressly withdrawn the power of the County to pass the challenged ordinance and for the local health officer to implement emergency health orders. Dane County's Ordinance does not conflict with, defeat the purpose of, or run contrary to the spirit of any of these statutes.

The Petitioners argue "multiple state statutes indicate that local health officers do not have authority to unilaterally issue enforceable orders . . . ." Petitioner's Brief pg. 22. As previously noted, Petitioners miss the point. In this situation, the local health officer is not acting unilaterally but under her statutorily mandated power to act to suppress a pandemic. The County Board has merely exercised its police power authority through Ordinance § 46.40 to penalize violations of the local health officer's order, pursuant to its home rule authority over

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having a contagious medical condition which poses a threat to others, the official may direct that person to comply with as appropriate. Whereas the governing statute here is a broad mandate to act and to do so broadly in the community in order to suppress and control a communicable disease, a local health officer who needs to focus on a single individual is empowered to do so under a different authority (DHS § 145.06, and subject to that authority's requirements contained therein).

health that is expressly granted in Wis. Stat. § 59.03(2). Further, Dane County's Ordinance coexists with these statutes.

1. Dane County Ordinance § 46.40 Neither Violates nor is Preempted by Wis. Stat. § 252.02.

Among the faulty comparisons, Petitioners first look at Wis. Stat. § 252.02 to allege error with Dane County Ordinance § 46.40. Aside from Petitioners unsupported statement that Dane County Ordinance is preempted by Wis. Stat. § 252.02, they offer no support, evidence, or analysis to support their contention. Petitioner's Brief, pg. 22. Nothing in Dane County Ordinance § 46.40 conflicts with or violates Wis. Stat § 252.02. Section § 252.02 lays out the powers and duties of the stated health department, whereas Dane County Ordinance § 46.40 involves only the powers of the local health officer.

As the Supreme Court discussed in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis.2d 497, 942 N.W. 2d 900, the statute at issue therein, § 252.02, critically differs from the statute at issue here § 252.03. Wis. Stat. § 252.02(4) from *Palm* has no counter part in § 252.03. Sections 252.02(4) and (6) use the permissive "may" when explaining DHS' authority, whereas Section 252.03 uses the word "shall" when discussing the key duties of the local health officer. Further, as indicated by the district court, the "Legislature's grant of authority to the LHO is greater than to DHS." Decision, pg. 13. "An LHO shall take all measures

necessary, emergency and non-emergency. DHS can only take emergency measures." *Id.* Thus, Dane County Ordinance § 46.40 neither violates nor is preempted by Wis. Stat. § 252.02.

2. Dane County Ordinance § 46.40 Neither Violates nor is it Preempted by Wis. Stat. § 251.06 or Wis. Stat. § 252.03.

Next, Petitioners look at Wis. Stat. § 251.06 to allege error with Dane County Ordinance § 46.40(2). Section 251.06 sets forth the general duties and powers of local health officers. It states in pertinent part that a local health officer shall:

> (a) Enforce state public health statutes and rules.
> (c) Enforce any regulations that the local board of health adopts and any ordinances that the relevant governing body enacts, if those regulations and ordinances are consistent with state public health statutes and rules.
>
> …
>
> (f) Investigate and supervise the sanitary conditions of all premises within the jurisdictional area of the local health department.

Petitioners argue Wis. Stat. § 251.06 gives local health officers only the power to enforce state public health rules and any ordinances the relevant governing body enacts but does not give a local health officer the authority to enforce his or her own general orders. Petitioner's argument is misplaced, first and foremost, because it is not supported by the plain language (of either Wis. Stat. §§ 251.06 or 252.03). Such a limited view of the local health officer's power cannot be attributed to

the plain language of § 251.06 and is belied by the plain language of § 252.03. Nor do Petitioners cite any legal authority for the argument Section 251.06 operates in such fashion. Further, there is nothing in Dane County Ordinance § 46.40 that conflicts with, defeats the purpose of, or goes against the spirit of Wis. Stat. § 251.06.

Petitioners' argument, like others, overlooks the fact that § 252.03 creates a legislative mandate to the local health officer for which the Dane County Ordinance does not impinge. Section 252.03 not only grants the local health officer the power to act, but it also is the more specific statute than the generic list of duties in § 251.06(3). Section 252.03 must control. See *State ex rel. Hensley v. Endicott,* 2001 WI 105, ¶¶ 19-21, 245 Wis.2d 607, 629 N.W. 2d 686 (if two or more statutes conflict, the more specific statute controls). The plain language in § 252.03 does not reflect any express or implied limitation that a health order can only be targeted at a particular individual or property. The plain language is actually far broader, as recognized by the language itself and cases like *Washington,* where the Court interpreted a similar statute as being "broad enough" to empower health authorities to act. 2007 WI 104, ¶¶ 33-34.

Enforcing PHMDC's health orders falls within the legislatures broad mandate in Wis. Stat. § 252.03(1) & (2) for a local health officer to act. The mandates in these subsections are sufficiently clear and do not

support Petitioners' strained interpretations of inapposite statutory provisions.

Here, Director Heinrich's orders have been issued under the authority of Wis. Stat. § 252.03, not Wis. Stat. § 251.06, and pursuant to the authority granted to her by the IGA governing PHMDC and its supervising body, the BOHMDC. Dane County's Ordinance § 46.40(2) simply reflects the authority granted by Section 252.03, and as overseen by the IGA and the BOHMDC, to wit: "[i]t shall be a violation . . . to refuse to obey an Order of the Director of [PHMDC] entered to prevent, suppress or control communicable disease pursuant to Wis. Stat. s. 252.03."

3. Dane County Ordinance § 46.40 Neither Violates nor is it Preempted by Wis. Stat. § 252.25.

Dane County Ordinance § 46.40 complements Wis. Stat. § 252.25, which states:

> Any person who willfully violates or obstructs the execution of *any* state *statute* or *rule*, county, city or village ordinance or departmental *order* under this chapter and relating to the public health, *for which no other penalty is prescribed*, shall be imprisoned for not more than 30 days or fined not more than $500 or both.

Wis. Stat. § 252.25 (emphasis added). Petitioner's argue Wis. Stat. § 252.25 conspicuously omits any reference to orders issued by a local health officer, and instead provides penalties only for violating a "state statute or rule." Petitioner's reliance on Wis. Stat. § 252.25 is misplaced.

In Wis. Stat. § 252.25, the legislature provided for a statutory penalty including jail time for violation of a state statute or rule, state order, or county, city or village ordinance regarding public health. Dane County Ordinance § 46.40 merely extends *a civil forfeiture penalty* – not jail time – for violation of a local health officer's order regarding communicable disease. Moreover, the plain language of Section 252.25 envisions "any" state or local statute, rule or order, as well as envisioning local consequences *when no other penalty* is prescribed in Chapter 252. Petitioners point to any other penalty prescribed by Chapter 252 that supports any of their theories. In sum, there is nothing in the Dane County Ordinance that conflicts with Wis. Stat. § 252.25.

4. Dane County Ordinance § 46.40 Neither Violates nor is it Preempted by Wis. Stat. § 323.14.

Petitioners also believe the general emergency statutes in Ch. 323 "reveal" that only the governing body can govern a pandemic crisis. *Pl. Br.* p. 16-17. They look to Wis. Stat. § 323.14:

> (1) Ongoing Duties
> (a)
> 1. Each county board shall designate a head of emergency management. In counties having a county executive under s. 59.17, the county board shall designate the county executive or confirm his or her appointee as county head of emergency management.
>
> (4) Powers during an emergency.
>
> (a) *The emergency power of the governing body conferred under s. 323.11 includes the general authority 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 in the emergency* and includes the power to bar, restrict, or remove all unnecessary traffic, both vehicular and pedestrian, from the highways, notwithstanding any provision of chs. 341 to 349.
>
> (b) *If, because of the emergency conditions, the governing body of the local unit of government is unable to meet promptly, the chief executive officer or acting chief executive officer of any local unit of government shall exercise by proclamation all of the powers conferred upon the governing body under par. (a) or s. 323.11 that appear necessary and expedient. The proclamation shall be subject to ratification, alteration, modification, or repeal by the governing body as soon as that body can meet, but the subsequent action taken by the governing body shall not affect the prior validity of the proclamation.* (emphasis added)

Wis. Stat. § 323.14 does not address Section 252.03's more specific legislative mandate to the local health officer. As explained above, they actually support the County's Ordinance. There is no conflict between Dane County Ordinance § 46.40 and Wis. Stat. § 323.14, rather there is coexistence. As Judge Frost noted the fact that: "the Legislature empowered and demands a LHO act in the face of a communicable disease AND separately empowered local government units to act in the face of an emergency is neither shocking nor instructive." Dkt. 69, pg. 15. Additionally, like the other inapposite statutes they cite, once again Petitioners offer no case law authority that this statute actually supports their arguments. Nothing in Ch. 323 overrides Ch. 252's separate and specific delegation of authority to the local health officer to

suppress a communicable disease, but that is the obvious consequence of what Petitioners ask of this court.

5. Dane County Ordinance § 46.40 Neither Violates nor is Preempted by Wis. Stat. § 66.0113.

Plaintiffs argue nothing in Wis. Stat. § 66.0113 authorizes citations for a general order issued unilaterally by a local health officer. Wis. Stat. § 66.0113 is entitled "Citations for certain ordinance violations" and states in pertinent part:

> (1) ADOPTION; CONTENT.
> (a) Except as provided in sub. (5), the governing body of a county, town, city, village, town sanitary district or public inland lake protection and rehabilitation district may by ordinance adopt and authorize the use of a citation under this section to be issued for violations of ordinances, including ordinances for which a statutory counterpart exists.

(emphasis added). Plaintiffs argument is a total red herring. The plain language of the statute supports Dane County's Ordinance. The County Ordinance only makes it a violation to violate the local health officer's health orders. Wis. Stat. § 66.0113 pertains to adoption of the use of citations in general by a county, and not authority to adopt an ordinance regarding a specific violation. The County Board has done this in adopting Chapter 2 of the Dane County Ordinances, entitled "Use Of Citations For Certain Ordinance Violations." They have authorized the issuance of citations for violations of Chapter 46 in Dane County Ordinance § 2.02(8).

Moreover, Plaintiffs fail to properly consider additional authority that actually supports the emergency health orders here, namely Wis. Stat. § 323.14(4)(a), which authorizes "a governing body to order, by ordinance or resolution, whatever is necessary and expedient of the health, safety, protection, and welfare of persons and property . . ." Plaintiffs instead twist Section 323.14 to suggest only the local governing body can suppress and control a pandemic, Petitioner's Brief pg. 18, a proposition belied by the specific statutory mandate to the local health officer under § 252.03.

II. THERE IS NO "NON-DELEGATION DOCTRINE PROBLEM.

A. Non-Delegation Does Not Apply Here.

This case does not involve "non-delegation" theory. There is not one scintilla of fact showing the County Board has surrendered, delegated or contracted away its legislative functions and powers, nor that the State Legislature has done so either. Petitioners admit the "seemingly broad grant of authority" they challenge under Wis. Stat. § 252.03 "is not by itself a non-delegation problem …" *Pl. Br.* p. 29 (emphasis added).

The Wisconsin Constitution, unlike other state constitutions, does not address delegation theory. Non-delegation theory is a common law creation and involves separation of powers principles between the State Legislature and other branches or subordinate state agencies and,

almost never at the local government level. Article IV, sec. 1 of the Wisconsin Constitution provides, "The legislative power shall be vested in a senate and assembly." "Taken literally, this provision would bar any delegation of legislative power to administrative agencies. However, this court has long recognized that the delegation of the power to make rules and effectively administer a given policy is a necessary ingredient of an efficiently functioning government." *Gilbert v. Medical Examining Board*, 119 Wis.2d 168, 184, 349 N.W.2d 68 (1984). "Under the nondelegation doctrine, one branch of government may delegate power to another branch, but it may not delegate too much, thereby fusing an overabundance of power in the recipient branch." *Panzer v. Doyle*, 2004 WI 52, ¶ 52, 271 Wis.2d 295, 680 N.W.2d 666.

Thus, delegation of powers is primarily concerned with the extent to which the Legislature has abdicated its core functions, especially when it comes to state agency ruling making. See *Koschkee v. Taylor*, 2019 WI 76, ¶¶ 17-20, 387 Wis.2d 552, 929 N.W.2d 600 ("We have long recognized that 'the delegation of the power to make rules and effectively administer a given policy is a necessary ingredient of an efficiently functioning government.' ….. However, while the breadth of government legislation has resulted in some delegation of legislative power to agencies, such agencies remain subordinate to the legislature with regard to their rulemaking authority.").

Here, as opposed to the State Legislature directing the County Board under Wis. Stat. § 252.03, the State Legislature created a specific mandate *directed to the local statutory office holder, here the public health officer,* to "promptly take all measures necessary to prevent, suppress and control communicable diseases," including to "do what is reasonable and necessary for the prevention and suppression of disease." Wis. Stat. § 252.03(1) & (2). Such mandate to act by the Legislature to a local government official is distinguishable from the non-delegation relied upon by Petitioners involving the State branches and separation of powers. The Legislature "can make a law to become operative on the happening of a certain contingency or on the ascertainment of a fact upon which the law makes or intends to make its own action depend." *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 221 N.W. 860, 863 (1928). In 1928, the Wisconsin Supreme Court said "[t]his has been the settled law of Wisconsin for more than half a century." *Id.* "A law otherwise unobjectionable is not invalid simply because power is given to some local officials or body of electors to determine the existence of a fact upon which it shall go into effect in the given locality, if the law itself is a complete law upon the statute books. *This is not the delegation of power to make a law, but simply the delegation of power to determine or ascertain some fact upon which the action of the law which is complete in itself is to depend*." *Id.* (emphasis added).

The Legislature's creation of a "necessary" and "reasonableness" type mandate in § 252.03 does not create "non-delegation" problems and must be presumed constitutional.[21] "As has been said many times, in many cases administrative officers or bodies must act, not only within the field of their statutory powers, but in a reasonable and orderly manner. … The rule of reasonableness inheres in every law, and the action of those charged with its enforcement must in the nature of things be subject to the test of reasonableness." *State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 943 (1928) (no delegation violation when Legislature mandated insurance commissioner to exercise reasonable discretion). "The standard of reasonableness prescribed by the rating law is sufficiently definite, and legislative power is not delegated to the commissioner of insurance by reason of there being no enumeration or definition of the factors which the commissioner may consider in finding the fact of whether a rate is reasonable or otherwise." *Id*. at 933. When the Legislature declares a purpose in granting power, "[i]t would be practically impossible for the Legislature to prescribe definite standards to meet the varying situations which arise…" *Id*. at 943.

The power under § 252.03 lies with the local health officer, statutorily, not with the County Board and not with the City Council.

[21] "[A] strong presumption of constitutionality attaches to all legislative acts." *Milwaukee County v. District Council*, 109 Wis.2d 14, 24, 325 N.W.2d 350 (Ct. App. 1982).

For that matter, even if they tried, the County Board and the City Council could not revise the powers granted to the local health officer by the State under § 252.03. Certainly, the County Board and City Council, if so inclined and if dissatisfied with the work of the local health officer, could exercise employment controls over the health officer, cut off or minimize financial appropriation or even abolish the health department, but § 252.03 clearly delegates the power to act against preventing, suppressing and controlling a communicable disease lies with the health officer, not the local governing bodies. The Legislature made that clear in 1923, and again in 1982 when it amended § 252.03 (formerly Wis. Stat. § 143.03) by 1981 c. 209, § 23, wherein the statute was amended to give local public health officers more autonomy to take action and report to the board, instead of getting prior approval from the board. *Id*.

Petitioners' argument that the local governing body has not voted on or approved the local health officer's orders completely misunderstands the statutory framework. The power is not granted by the State to the local governing bodies, or from the local governing bodies to the health officer. The local governing body's role, referenced three times under § 252.03, is merely to be the recipient of the health officer's reports – nothing more.

There are many parallels to this issue in municipal government. It is very common for no delegation of authority to be made by local

governing bodies to municipal officers, because the powers of the offices are statutory. The duties of the City Clerk, City Treasurer, Chief of Police, City Attorney and Comptroller are statutorily defined. Wis. Stat. §§ 62.09(9) - (14).[22]

Petitioners argue the local public officers, who are granted specific powers by the State Legislature, are not able to exercise power absent the specific approval of the governing body. If that argument would succeed, much or all of municipal government in the State of Wisconsin would have been improperly exercised throughout the history of the State, to date. Statutory powers apply to many municipal offices, with no local delegation of power required. If the powers of such offices are addressed locally, at all, they are commonly addressed merely by reference to State law. For example, the City of Madison City Clerk is delegated the powers granted by State law: "The office of City Clerk is hereby established to perform the duties of Clerk as provided in Wis. Stat. § 62.09(11)." (Section 3.05, City of Madison Municipal Ordinance.).

Were it otherwise, significant preemption questions would arise. Suppose a county delegated powers and duties to the Clerk of Circuit Court in a manner different than provided by Wis. Stat. § 59.40, such as

[22] The same is true of the County Administrator, Wis. Stat. § 59.18(2); County Clerk, Wis. Stat. § 59.23(2); County Treasurer, Wis. Stat. § 59.25(3); County Comptroller Wis. Stat. § 59.255(2); Sheriff, Wis. Stat. § 59.27; County Coroner, Wis. Stat. § 59.34(1); Assessor, Wis. Stat. § 70.10; and Weed Commissioner, Wis. Stat. § 66.0517(3), among others. Even the Clerk of Circuit Court has specific statutory authority, pursuant to Wis. Stat. § 59.40.

to say the Clerk must receive permission of the local governing body before exercising the statutory powers of the office. Such a delegation would exceed the powers of the local governing body. *Crawford County v. WERC*, 177 Wis.2d 66, 78, 501 N.W.2d 836 (Ct.App.1993) (county "authority does not extend to bargaining away the statutory power of the clerk of court"). The State gave those powers to the public offices, not to the local governing body, so there is nothing for the local governing body to delegate. The local governing body has an employment role in many cases, setting salaries and conducting performance evaluations, and terminating employment when appropriate. But the powers of the office are statutory.

Indeed, in the related context of what deference to give local government decisions, the Supreme Court specifically declined to borrow from its jurisprudence on deference to state administrative agencies. *Ottman v. Town of Primrose,* 2011 WI 18, 332 Wis.2d 3, 796 N.W. 2d 411, ¶ 63. "[W]e decline to graft that framework wholesale onto our framework for reviewing municipal decisions." *Id.* ¶ 64. The "framework for reviewing administrative agency decisions, which grew out of the division of authority between the judicial and executive branches of state government and the interpretation of state law, does not fit comfortably with the division of authority between the state

judiciary and the local government in interpretating local laws." *Id.* ¶ 65.

Petitioners' entire delegation argument is not just a red herring, but an overreach into limited availability of injunctive relief and a transparent invitation to judicially re-engineer or invalidate § 252.03. There is reason why the doctrine has received very little attention – because it has no application under the circumstances here. Chapter 252 so clearly creates two frontlines of defense against communicable disease by DHS *and* local health officers, it cannot be the case that Petitioners' "non-delegation" theory slices § 252.03 (or local enacting ordinances) thereby halving the State's defense. In the "great borderlands of power," the "constitution does not…hermetically seal the branches from each other. The separation of powers doctrine 'envisions a system of separate branches sharing many powers …, a system of `separateness but interdependence, autonomy but reciprocity. …Shared powers lie at the intersections of these exclusive core constitutional powers…." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶46, 382 Wis.2d 496, 914 N.W.2d 21 (internal citations and quotes omitted).

Here, the exclusive power of the City Council and County Board have not been delegated to the local health officer, nor does § 252.03 delegate the State Legislature's exclusive powers to the local health officer. In every instance, the City Council, County Board and State

Legislature still set public policy, make the law, determine taxation, audit the other branches, judge the qualification of its members, and, for some of these legislative bodies, override the executive's actions, impeach civil officers from another branch, establish tribunals or courts, and originate constitutional amendments. None of that has been taken, let alone shared, by a local public officer who takes separate *mandated* action, reportable to her governing bodies and DHS, to prevent, suppress or control a pandemic.

Petitioners' yearning for non-delegation theory cannot be sustained by *French*, *Duluth* and *Nehrbass*. *French* has never been considered for "non-delegation" theory by any authority relied upon by Petitioners. It involved a county board delegating a farm purchase to a committee. The passage cited by Petitioners requires full context:

> *The action taken seems to conform to both the letter and spirit of the law in respect to the execution of corporate authority, unless there is something in the nature of the act to be performed which rendered it essential it should be executed by the entire board*. There are, doubtless, powers vested in the county board which could not be delegated to any committee.

French v. Dunn Cty., 58 Wis. 402, 17 N.W. 1, 2 (1883) (emphasis added). Here, the State Legislature, not the City Council or County Board, mandated the local health officer to act and her actions do not involve legislative character, such as levying taxes or other aforementioned core powers. *Duluth S.S. & A.R. Co. v. Douglas Cty.*, 103 Wis. 75, 79 N.W.

34, 34 (1899) similarly confines itself to a county delegating power to a committee, not a State Legislative mandate to a county officer. *State ex rel. Nehrbass v. Harper*, 162 Wis. 589, 156 N.W. 941 (1916) involved a city code that required neighboring property owners, not the governing body, to grant consent for certain residential land uses (there, a proposed garage). There, the city delegated the most classic legislative power or discretion (i.e., to evaluate a proposed land use's impact on the public health, welfare or the like). "No attempt is made to place it upon the ground of public welfare, public health, or any other interest which the public might have in the matter; but the determination is left to the desire, whim, or caprice of the adjacent owners." *Id*. at 942. These cases lack any statutory mandate to a local officer and lack any discernible basis from which to exploit "non-delegation" theories into invalidation of Section 252.03 or the County Ordinance.[23]

Petitioners' reliance on such turn-of-the 20th century case law does not show the likelihood of success of their motion for two reasons. First, the aforementioned case law from that period does not support

[23] Other cases cited by Petitioners in their brief are distinguishable and do not support their non-delegation argument. In *Marshall v. Dane County Bd. of Supervisors,* 236 Wis. 57, 294 N.W. 496 (1940), the legislature had adopted a statute that allowed electors to file a petition with the board requiring ordinances or resolutions to go to a referenda. The court held that this was an unconstitutional delegation of the county board's legislative authority. *Id.* Additionally, *First Sav. & Tr. Co. v. Milwaukee Cty.* 158 Wis. 207, 148 N.W. 1093 (1914), involved the delegation authority to a county board committee. The facts and holdings of these cases have no applicability here. The county board did not even delegate its authority; it exercised it and adopted an ordinance under their expressly granted organizational and administrative home rule authority.

their views. Second, at the time, and in the same context of local health authorities fighting a communicable disease, the United States Supreme Court would have approved § 252.03's validity and its application under the circumstances here, to wit:

> …It is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety.
>
> ***
>
> … To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. …

Jacobson v. Massachusetts, 197 U.S. 11, 25, 27-28 (1905); see also *State v. Normand*, 85 A. 899, 900, 902 (N.H. 1913) (approving power to local boards of health to make "all necessary rules and regulations" which might advance the goal of preventing unhealthy disease conditions).

The inapplicability of the non-delegation theory here lends support to the viewpoint the doctrine is a myth and is being manipulated by the Petitioners to reverse the Legislature's decision to control a pandemic outbreak by swift action by the local health officer. As succinctly found by Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379 (2017): "Drawing from our own dataset of more than two thousand nondelegation cases,

we show that there was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power." *Id.*

Judge Frost, too, found both the State and Federal Supreme Courts rarely use non-delegation theory to overturn legislation. Dkt. 69, pg. 25. Congress may "confer substantial discretion on executive agencies to implement and enforce the laws." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoted source omitted). "So we have held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Id.* "Given that standard, nondelegation inquiry always begins (and often almost ends) with statutory interpretation." *Id.* "We have sustained authorizations for agencies to set 'fair and equitable' prices and 'just and reasonable' rates." *Id.* at 2129 (quoted source omitted). "We more recently affirmed a delegation to an agency to issue whatever air quality standards are 'requisite to protect the public health.'" *Id.* (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001)). *Whitman* observed that in over a hundred years, the Supreme Court has "found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the

entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Id*. at 474.

The Wisconsin Legislature has delegated broad police power to local health officers to control communicable diseases. "A health officer who is expected to accomplish any results must necessarily possess large powers and be endowed with the right to take summary action, which at times must trench closely upon despotic rule. The public health cannot wait upon the slow processes of a legislative body, or the leisurely deliberation of a court." *State ex rel. Nowotny v. City of Milwaukee*, 140 Wis. 38, 121 N.W. 658 (1909). The broad power recognized in *Nowotny* is codified – local health officers "may do what is reasonable and necessary for the prevention and suppression of disease" and "shall promptly take all measures necessary to prevent, suppress and control communicable diseases." Wis. Stat. § 252.03(1), (2).

The legislative delegation of authority to local health officers to control communicable diseases is clear. As Judge Frost stated in his opinion, local health officers "are the boots on the ground charged to prevent, suppress and control the spread of communicable diseases. The statutory purpose could hardly be clearer." Dkt. 69, pg. 22. Such delegation is well-supported and makes sense, given the expertise within public health departments, see Wis. Stat. § 251.06(a); their relationship with DHS, other local health officers, and the CDC; their

proximity to local health care providers; and their need to act quickly, as recognized in *Nowotny*, 140 Wis. 38.

Nor is § 252.03 "non-delegation" suspect because it operates – thankfully – in only infrequent, contingent circumstances, such as a 100-year pandemic. See *State v. Wakeen*, 263 Wis. 401, 407, 57 N.W.2d 364, 367 (1953) ("legislature may enact a statute, the operation of which is dependent on the happening of a contingency fixed therein").

The concerns in *Palm*, 2020 WI 42, about improper delegation of power and compatibility within the constitutional structure are creative arguments to obfuscate whether Order #10's provisions do what is "reasonable and necessary" for the prevention and suppression of disease. First, the local health officer is not acting statewide by issuing an order to everyone to stay confined at home, forbid travel and close business, subject to criminal penalties, all "far beyond what is authorized in [DHS's power under] § 252.02(4)" and in contravention of rulemaking under the State administrative procedure act (Wis. Stat. Ch. 227 for state agencies whose rules/orders affect every citizen). *Palm*, 2020 WI 42 ¶¶ 7, 49. Order #10 does not contain any of those terms, nor any criminal penalties. Second, Chapter 68 of the Wisconsin Statutes includes express provisions for the review of a decision by a municipal officer, municipal employee, or agent acting on behalf of a municipality.

See Wis. Stat. § 68.01. Third, § 252.03 has different statutory terms and features, including built-in safeguards, which § 252.02 does not share.

B. Even if Nondelegation Applies, Section 252.03 has Procedural Safeguards.

Finally, even if the court were to agree the non-delegation theory applies here, something Defendants strongly dispute, Petitioners use of it does not have a likelihood of success. In using the doctrine, "[w]e normally review both the nature of delegated power and the presence of adequate procedural safeguards, giving less emphasis to the former when the latter is present." *Panzer*, 2004 WI 52, ¶ 55. As to the former, "[w]e indicated that the legislature delegated power lawfully when it 'laid down the fundamentals of a law,' such that the recipient of the delegated power was merely filling in the details." *Id*., ¶ 54. As to the latter, "the nondelegation doctrine … is now primarily concerned with the presence of procedural safeguards that will adequately assure that discretionary power is not exercised unnecessarily or indiscriminately." *Id*., ¶ 55. In *Panzer*, the Court found procedural safeguards even if the statue "is not a model of legislative delegation, its purpose is ascertainable, and in most situations, there are safeguards available to alter the policy choices made by the governor." *Id*., ¶ 72.

All such standards are met. For the benefit of public health, the Legislature mandates local health officers "shall promptly take all measures necessary to prevent, suppress and control communicable

diseases," including to "do what is reasonable and necessary for the prevention and suppression of disease." Wis. Stat. § 252.03(1) & (2). The legislature made clear the purpose of the statutes under which it delegated authority to a local health officer, as noted in Wis. Stat. § 251.001, which states "[t]he legislature finds that the provision of public health services in this state is a matter of statewide concern." Dkt. 29, pg. 22. As noted by Judge Frost in his opinion: [t]he remainder of Ch. 251 fulfils this purpose of protecting the public health by establishing systems to combat the appearance and spread of communicable disease. Namely, Ch. 251 establishes local health departments, local boards of health, and LHOs." Dkt. 69, pg. 22.

Further, the scope of power, safeguards and compatibility with constitutional structure resides within the statutory text. Under Wis. Stat. 252.03(1) & (2), local health officers shall only do what is (1) reasonable, (2) necessary, (3) related to the presence of communicable disease in her territory, (4) subject to reporting obligations to DHS and her governing body; and (5) within temporal limitations, that is, *promptly* to "prevent" and "suppress" the communicable disease and its terminus when the communicable disease is under "control." The first limitation requires action be taken by the statutory office of "local health officer." "Any measures taken must be both "reasonable" and "necessary." The former is ubiquitous in law; in addition to *State v.*

Whitman and the other authorities above, the entirety of Fourth Amendment jurisprudence sits on the bedrock of "reasonableness."[24] "Necessary" means "not always import[ing] an absolute physical necessity . . . it frequently imports no more than that one thing is convenient or useful or essential to another."[25] Local health officers can only act with respect to "communicable disease." When there is communicable disease, they can only "prevent" ("to stop from happening; to hinder or impede"),[26] "suppress" ("to put a stop to, put down, or prohibit; to prevent (something) from being seen, heard, known, or discussed"),[27] or "control" ("to exercise restraining or directing influence over; to have power over; to reduce the incidence or severity of especially to innocuous levels; to incorporate suitable controls in)."[28]

Procedural safeguards and constitutional structure are also explicitly stated in the reporting obligations under both Wis. Stat. 252.03(1) & (2). Upon the appearance of a communicable disease, the local health officer must report to both DHS and her governing body. When she takes action, she shall report to the appropriate governing

[24] *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011).
[25] Black's Law Dictionary (11th ed. 2019), necessary. See also *McCulloch v. Maryland*, 17 U.S. 316, 1819 WL 2135, 4 L.Ed 579, (1819) ("to employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.").
[26] Black's Law Dictionary (11th ed. 2019), prevent.
[27] Black's Law Dictionary (11th ed. 2019), suppress.
[28] Merriam-Webster Dictionary (10/24/2020), control. https://www.merriam-webster.com/dictionary/control

body and keep them "fully informed." She shall also advise DHS of "measures taken," and if she fails to act DHS steps in.

CONCLUSION

For the above reasons, this Court should affirm the circuit court decision.

Dated: November 30, 2021.

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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 10,797 words.

Dated: November 30, 2021.

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