No. 2021AP1343, 2021AP1382

In the Wisconsin Supreme Court

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

v.

DANE COUNTY, JANEL HEINRICH, and PUBLIC HEALTH OF MADISON AND DANE COUNTY, DEFENDANTS-RESPONDENTS

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

RESPONDENTS' RESPONSE BRIEF TO PETITIONERS' SUPPLEMENTAL BRIEF

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ARGUMENT

"A party challenging the constitutionality of a statute bears a very heavy burden in overcoming the presumption of constitutionality." *Mayo v. Wisconsin Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 27, 383 Wis. 2d 1, 24, 914 N.W.2d 678. Petitioners have not overcome this standard by arguing pre-20th century nondelegation theory properly balanced constitutional order, nor have they offered any workable standard by which legislative bodies could realistically address pandemics or other occurrences. Pet. Br. p. 11-14.

Following statehood, the "early years" of this court's jurisprudence on delegation of power do not reflect "meaningful substantive restrictions," as Petitioners argue, Pet. Br. p. 3-4, which would have invalidated Dane County Ordinance § 46.40 or Wis. Stat. § 252.03. One of the early cases, *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N.W. 738, 741 (1896), did not prohibit delegation. Rather, it found "the proper distinction is this: 'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action to depend.'" *Id.* at 739.

The Supreme Court followed this demarcation several years later in *State v. Burdge*, which Petitioners hastily pronounce as an "instructive example of how this doctrine was originally understood by this Court." Pet. Br. p. 4. There, the Court contemplated how the state board of health rule, could have been sustained, to wit:

> It cannot be doubted but that under appropriate general provisions of law, in relation to the prevention and suppression of dangerous and contagious diseases, authority may be conferred by the legislature upon the state board of health or local boards to make reasonable rules and regulations for carrying into effect such general provisions, which will be valid, and may be enforced accordingly. The making of such rules and regulations is an administrative function, and not a legislative power, but there must first be some substantive provision of law to be administered and carried into effect.

95 Wis. 390, 70 N.W. 347, 350 (1897). The board's rule also lacked circumstances of an epidemic justifying the rule. *Id.* at 351.

In both *Dowling* and *Burdge*, there were no substantive provisions of law to be administered and carried out. For those reasons, the laws before the courts fell into the first prohibited category (to make law). The insurance commissioner in *Dowling* implemented a law that allowed him in his "judgment and discretion" to develop insurance policies without approval by the legislature or governor, without filing it with the secretary of state and for which he could enforce by the penal section of the act. 65 N.W. at 741. "He was not required by the act to perform any mere administrative or executive duty, or to determine any matter of fact for the purpose of executing or carrying the act into effect." *Id.* Similarly, the board of health's vaccination rule in *Burdge* came without any statute authorizing vaccination or making it a school-attendance condition.

Here, in the words of *Dowling*, the following is occurring: "conferring authority or discretion as to [the law's] execution, to be exercised under and in pursuance of the law." 65 N.W. at 7369. The legislature has delegated the ability to act (investigate and take all measures necessary) on a particular subject (communicable disease) upon the happening of a particular event (such disease in her community); to act reasonably and necessarily; and subject to reporting obligations at the state and local level, as well as having the statutorily requisite subject matter expertise. In addition to these reporting obligations, adequate interplay exists with the governing bodies at the local level. None of these substantive and procedural features were present in *Dowling* or *Burdge*. It is doubtful those courts would have stricken these laws, particularly given the legislative mandate, its police power purpose, and the local level oversight. Indeed, Petitioners largely overlook the local government interplay with PHMDC and BOHMDC; they never sued BOHMDC and never conducted any discovery about the local government structure and oversight. At this stage, they are left with an erroneous news account that the County Board lacks the power to end the mask mandate. To the contrary, the County Board can, and has, considered as much.

Nor are these features present in other cases relied upon by Petitioners, such as the Michigan Supreme Court's sharply divided decision, Pet. Br. p. 9, where the Governor's emergency health orders were too broad in scope, omitted any durational limits and lacked sufficient standards. That decision has not been roundly accepted as the nondelegation theory roadmap. Considering it, the Michigan federal court rejected nondelegation challenges to county COVID-19 health orders as unlikely to succeed because state statutes required such action, as they do here. *Libertas Classical Ass'n v. Whitmer*, 498 F. Supp. 3d 961, 965 (W.D. Mich. 2020) ("[I]mportant here, Justice Viviano [who

concurred in part and dissented in part] noted the provisions of Michigan's Public Health Code that address public health issues generally and more specifically communicable diseases and epidemics.").

Similarly, *Grisham v. Romero*, 483 P.3d 545 (N.M. 2021), found public health statutes permitting health authorities to "close any public place and forbid gatherings" does not work a fundamental disruption of the balance of powers between the branches of government in the context of this public health crisis. See also *Beshear v. Acree*, 615 S.W.3d 780, 813 (Ky. 2020) (rejecting nondelegation challenge to governor's various COVID-19 pandemic orders); *Desrosiers v. Governor*, 158 N.E. 3d 827 (Mass. 2020) (Governor's pandemic orders did not violate separation of powers because statutes provided authority, Governor was executing the laws by issuing the orders, and issuance of the orders did not deprive legislature of ability to enact pandemic-related legislation); *Newsom v. Superior Ct.*, 63 Cal. App. 5th 1099, 1115, 278 Cal. Rptr. 3d 397, 407 (2021) (governor's orders regarding "vote-by-mail ballots" did not violate nondelegation theory, even if the statute lacked express standards, because "the Legislature does not unconstitutionally delegate legislative power when the statute provides standards to direct implementation of legislative policy.... '[S]tandards for administrative application of a statute need not be expressly set forth; they may be implied by the statutory purpose.'").

Indeed, the early years of this Court recognized that endowing public health with authority did not trample the constitutional framework, to wit:

> The public health cannot wait upon the slow processes of a legislative body, or the leisurely deliberation of a court. Executive boards or officers, who can deal at once with the emergency under general principles laid down by the lawmaking body, must exist if the public health is to be preserved in great cities. *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983.

State ex rel. Nowotny v. City of Milwaukee, 140 Wis. 38, 121 N.W. 658, 659 (1909). In *Lowe*, a 1904 decision involving a health officer's order regarding anthrax, the Court found proper Legislative police power in the existence of laws whose commands mirrored present-day Section 252.03's language "shall promptly take all measures necessary to prevent, suppress and control communicable diseases" and "do what is reasonable and necessary for the prevention and suppression of disease."

Thus, the case law does not support the assertion that "robust, constitutionally faithful approach" existed in the early years of this court's

jurisprudence, Pet. Br. p. 5, to have suddenly evaporated in 1928 when this Court decided *State v. Whitman*. By 1928, nondelegation theory in this State evolved like many legal doctrines do, but its roots were never pulled out. The Court in *Whitman* followed Chief Justice Marshall's "fill up the details" tolerance for delegation:

> In 1863, having under consideration the draft law, this court quoted with approval the following language by Chief Justice Marshall ...:
>
> > "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the Legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details. * * *
>
> ...[T]he maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.

Id. at 939-940. This Court repeatedly considered Chief Justice Marshall's observations about the "boundaries of the power," finding that they "are to be determined according to common sense and the inherent necessities of governmental co–ordination." *Id.* at 940. "It only leads to confusion and error to say that the power to fill up the details and promulgate rules and regulations is not legislative power. Chief Justice Marshall indicated the basis upon which controversies in this field should be determined when he indicated that there are two sorts of legislative power—one of which may be delegated, and one of which may not." *Id.* at 941.

A "modification" or "reinvigoration" of the nondelegation doctrine, as the Petitioners argue, would have a significant impact on regulatory governance and would unravel local government's framework. Delegations of power pervade modern American governance, at both the federal and state levels, because legislatures cannot swiftly or capably address every situation for themselves. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (noting that "in our increasingly complex society, replete with ever changing and more technical problems . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives").

The Founders envisioned an ordered society with delegation. The Federal Constitution does not forbid delegation, nor does Wisconsin's. "For members of the early Congress, building the administrative capacity need to fulfill the new national government's critical responsibilities was not a quest to trace out hard constitutional boundaries between the branches. It was a dynamic, improvisational, and only partially successful experiment in governance, in which Congress sought to mobilize the limited resources available to it in order to meet the myriad challenges the nation faced."[1] Other scholars have found "[t]he founding generation didn't share anything remotely approaching a belief that the constitutional settlement imposed restrictions on the delegation of legislative power" because:

> ... The early federal Congresses adopted dozens of laws that broadly empowered executive and judicial actors to adopt binding rules of conduct for private parties on some of the most consequential policy questions of the era with little if any guidance to direct them. Yet the people who drafted and debated the Constitution virtually never raised even policy objections to delegation as such, even as they feuded bitterly over many other questions of constitutional meaning.[2]

The increasing complexity of society requires delegation in order to facilitate legislative policy-setting. "[T]he 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). The "sheer size and complexity of the federal regulatory enterprise defeats rational, coordinated, democratically responsive decision making by any single entity, be it the . . . members of Congress or the . . . people in the Cabinet and Executive Office of the President."[3] As much can be said at the state level. Further, agency action at any level occurs in the open, subject to open government laws and citizen participation. "Agency

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[1] Kevin Arlyck, Delegation, Administration, and Improvisation, 97 Notre Dame L. Rev. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802760

[2] Mortenson, Julian Davis, and Nicholas Bagley. "DELEGATION AT THE FOUNDING." *Columbia Law Review*, vol. 121, no. 2, Columbia Law Review Association, Inc., 2021, pp. 277–368, https://www.jstor.org/stable/27002094. See also David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 83 Mich. L. Rev. 1223, 1231 (1985) ("Many authors have concluded that a delegation doctrine with substance is unthinkable because it would prevent government from functioning. .... This Article does not, however, find in the Constitution a mandate to keep all power in Congress, only legislative power.").

[3] Cynthia R. Farina, Deconstruction Nondelegation, Harvard Journal of Law & Public Policy, Vol. 33

decision making is often far more broadly participatory, transparent, and publicly justified than is congressional or presidential action."[4]

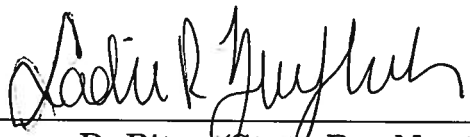
For all these reasons, Petitioners' nondelegation tests and inquiries, Pet. Br. p. 11-14, should not replace or be added to this Court's current standard, i.e., to look for the presence of an ascertainable purpose and sufficient procedural safeguards, even if the legislation is not a model of perfection. See *Panzer v. Doyle,* 2004 WI 52, ¶¶ 54, 72. That current standard fits well with all the legal authorities above, whether in or outside of Wisconsin or pre- or post-20th Century. Applied here, there is an ascertainable purpose in the laws at issue. Petitioners do not quarrel with the current pandemic, nor purpose of these laws. Nor could they, for they have been long recognized as necessary by the Supreme Court (*Jacobson*) and this Court (*Burdge*). Ample procedural safeguards are in place, as well as local government oversight.

CONCLUSION

For all these reasons, the nondelegation doctrine should neither be amplified in this case nor utilized to invalidate the health orders and ordinance.

Dated: February 15, 2022.

Respectfully submitted,



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[4] *Id.* at 101.

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 letter-brief is 2,199 words.

Dated this 15th day of February, 2022.

Signed,

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that the electronic copy of Respondents' Supplemental Brief, filed today, is identical in content and format to the printed form of the brief.

Dated this 15th day of February, 2022.

Signed,

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