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

SUPPLEMENTAL BRIEF OF DEFENDANTS-RESPONDENTS

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ARGUMENT

I. This Case is Not Suitable for Addressing the Non-Delegation Doctrine.

Petitioners' concern with this Court's consistent upholding of broad delegations of legislative power to administrative agencies, as seen in several cases, needs to be vetted in a case involving state agencies, not the local government, given the non-trivial differences between state and local government.[1]

Every nondelegation case relied upon by Petitioners involves state agencies and state government, or nondelegation theory at the federal level, except in very few instances at the local level.[2] In every such case the wellspring of concern involves balancing the separation of powers at the state government level, with its co-equal three branches comprising the Executive, Legislative (in Wisconsin, a bicameral body composed of the upper house Wisconsin State Senate and the lower Wisconsin State Assembly) and Judicial branches.

The City Council and County Board are not a bicameral body, and they do not delegate to "agencies." They are general purpose units of local government, like the almost two thousand other units of local government, who determine their local affairs through a maze of powers bestowed on them by the State Constitution, State Statutes or common law such as "home rule authority."[3]

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[1] Since 1928, this Court has consistently upheld broad delegations of legislative power to administrative agencies. See, e.g., *State v. Lambert,* 68 Wis. 2d 523, 229 N.W. 2d 622 (1975); *Schmidt v. Dep't of Local Affairs & Dev.,* 39 Wis. 2d 46, 158 N.W. 2d 306 (1968); *Clintonville Transfer Line, Inc. v. PSC,* 248 Wis. 59, 21 N.W. 2d 5 (1945).

[2] The Petitioners have previously looked to the cases of *French*, *Duluth* and *Nehrbass* to argue for nondelegation doctrine's extension at the local level; they are discussed further below.

[3] See generally Andrea Brauer, Wisconsin Legislator Briefing Book, Chapter 22, Municipal and County Government, p. 1 (2019-20), https://docs.legis.wisconsin.gov/misc/lc/briefing_book/ch22_municipal.pdf.

As to home rule authority, she summarizes this area of the law. "Under Wis. Const. art. XI, s. 3 (1), cities and villages may determine their local affairs and government, subject only to the Wisconsin Constitution and to legislative enactments of statewide concern that uniformly affect every city or village." *Id.* p. 6. "Often confused with constitutional home rule is the broad statutory authority of cities and villages to exercise police powers, sometimes referred to as 'statutory home rule.' Statutory home rule is a broad grant of authority to be exercised for the good order of the city or village, commercial benefit, and public health, safety, and welfare. The exercise of statutory home rule can be preempted, either expressly or impliedly, by state legislation." *Id.* p. 7.

At the city level, the mayor, clerks, treasurer or finance director, assessor, police chief and many others are all statutory office holders, some elected and some appointed by the governing bodies, all of whom have designated roles by the State Legislature involving specified commands of duties and responsibilities. At the county level, various positions and their duties are similarly prescribed by statute, and other individuals serve as a constitutionally elected officer, such as Clerk, Clerk of Courts, Treasurer, District Attorney and Sheriff. Any accounting of the workings of local government would also have to include police and fire commissions, utility districts and many other quasi-governmental entities. For such individuals or entities, the Legislature or Constitution mandates specific duties and powers, just like the local health officer. By contrast, the statutes set the city common councils, village boards, town boards and county boards as the legislative bodies, but those statutes do not grant elected representatives individual duties and responsibilities because they act *as a body* to set overall policy. While the local legislative body could make certain policy choices – such as to adopt a city-manager form of government, to abolish its police department, or to discontinue certain services performed by some of the individual elected or appointed officeholders – the governing bodies cannot modify the Legislature's mandate that certain duties and powers belong to such individual or entity.[4] In other words, the City Council cannot take all of the duties, powers and responsibilities of the clerk, tax assessor or police chief and either micro-manage them in their own right or require review of every particular action. Nor could the county board do so at the county level. County Board authority is only granted by the legislature in statutes, *Jackson County v. State*, 2006 WI 96 ¶16, 293 Wis. 2d 497, 717 N.W. 2d 713, and it does not include daily administration or management of affairs, most of which has been moved to the county executive to oversee.[5] See also, e.g., *Beal v. Supervisors of St. Croix County*, 13 Wis 500 (1861) (forbidding the county board from revoking county

[4] This Court's request for supplementation did not request a deep dive into the myriad laws surrounding local governments, and to do so would require extensive briefing.

[5] In 1985, the legislature made the position of appointed County Administrator the chief administrative officer of the county, with authority to appoint and supervise department heads. Wis. Stat. § 59.10. In those counties that do not have either an Executive or a County Administrator, the law further required those counties to designate an Administrative Coordinator within 2 years to be responsible for coordinating all administrative and management functions. Wis. Stat. § 59.19.

officer powers conferred by statute); *Maier v. Racine County*, 1 Wis 2d 384, 84 NW2d 76 (1957) (county boards have only such powers as are conferred upon them by statute, expressly or by clear implication); *Schuette v. Van De Hey*, 205 Wis 2d 475, 556 NW2d 127 (Ct App. 1996) (approving of the Attorney General Opinion at 68 Wis. Op. Att'y Gen. 92 (1979) (OAG 32 - 79), stating the governmental concept that the county board's function is primarily as a policy making and legislative and the county executive is administrator and manager).

In distinguishing between legislative and executive actions, a prominent municipal treatise provides as follows:

> Municipal corporations ordinarily are vested with legislative and executive powers, the latter being sometimes referred to as administrative or ministerial powers or duties. Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them, or appoint the agents charged with the duty of such enforcement. If it can be shown that the particular act could not have been done without a law or ordinance, such act is considered as legislative. The crucial test for determining what is legislative and what is administrative has been said to be whether the ordinance is one making a new law, or one executing a law already in existence.

2A McQuillin Mun. Corp. sec. 10:6 (3d ed.) (footnotes omitted). At the local level, the line-drawing between legislation and executive action boils down to the fact that local legislation is the policy-driven prerogative of the legislative body. There is no over-stepping or intrusion on that body when an officer is implementing ministerial actions or undertaking secondary steps bestowed by the body or the State Legislature, to wit:

> [T]he complexities of modern life often impel legislatures to confer on executive and administrative departments the authority to make rules and regulations in order to enforce and achieve the policy intended. Thus, the making of such rules and regulations by executive and administrative departments sometimes become not a matter of mere law enforcement but of secondary law creation. However, so long as the determination of the legislative principle remains within the control of the legislative body, the determination of the secondary structure that ensures and assists

> the establishment of the principle is not legislation. The idea is that the creative element delegated is exclusively limited to arrangements and procedures consistent with the substantive principle. Further, when administrative agencies are delegated regulatory power, legislative action by the agency to establish general rules and guidelines may be necessary as a condition precedent to exercise the powers in individual cases.

Id. Counties are no different. While once county boards carried out both legislative and executive functions, the statutes were amended in the 1960s to focus the county boards on legislative policymaking only. See generally 68 Wis. Op. Att'y Gen. 92 (1979) (OAG 32 - 79); 1985 Act 29 s.1164. County boards handle policy formulation, the most important being the annual budget; in turn, those policies allow county staff to run the day-to-day operations consistent with the duties and responsibilities granted to them by the county board or State Legislature.

When considering separation of powers in *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, the Court discussed the doctrine's political theory, history and application, yet in every instance its theory, history and application concern the workings of federal and state government, not local government nor a legislative command to a local office holder. In terms of political theory, the nondelegation theory avoids the Framers' concern that "the concentration of governmental power presented an extraordinary threat to individual liberty." *Id.*, ¶ 4. It avoids the Founders' fear of shared powers that may lead to "tyrannical laws" that are executed in a "tyrannical manner." *Id.*, ¶ 5.

Here, Petitioners have presented no evidence that PHMDC has concentrated all governmental power into its hands and away from the City Council and County Board, nor has done so in a tyrannical way. There is no evidence in this case that those local governing bodies have been precluded from any legislative work, or that their legislative work is subservient to PHMDC in any way. Or, that the PHMDC is carrying out all governmental power in a tyrannical way. Nor could they. This particular suit challenges restrictions involving sports-related activities in order to control the pandemic spread of a respiratory infection. Whether considering those restrictions, or the restriction to wear a mask, it cannot be considered tyrannical when every international, national, state and local health authority around the world has implemented similar measures. Reinvigorating non-delegation theory should not be put on the factual bedrock of this case.

Even when looking at the two categories of separation of powers (exclusive powers and shared powers), *Gabler,* 2017 WI 67, ¶ 30, the application of nondelegation at the local level under the scenario here would not make sense. At the federal and state government levels, "[e]ach branch has exclusive core constitutional powers into which other branches may not intrude." *Id.*, ¶ 30. One branch may not assault the powers of the other. *Id.* Not so here – the health orders of PHMDC flow from policies of the BOHMDC, which in turn owes its existence for implementation of health policy to the City Council and County Board of Supervisors under a cooperative agreement between those local governments.[6] The PHMDC health orders do not interfere with or intrude upon any of the core powers of the City Council or of the County Board. There is no "assault" of one branch by the PHMDC; for instance, PHMDC does not review for purposes of affirming or disallowing any Council or County Board ordinances or resolutions. Once again, the Petitioners offer no evidence that the PHMDC has usurped the "central prerogatives of another [branch]." *Miller v. French*, 530 U.S. 327, 341 (2000).

Moreover, because the branches are not "hermetically' sealed," *Miller*, 530 U.S. at 341, "shared" powers may or may not run afoul of separation concerns. The federal constitution envisions "a system of 'separateness but interdependence, autonomy but reciprocity.'" *Gabler,* 2017 WI 67, ¶ 34 (quoted source omitted). The Wisconsin constitution similarly envisions "a calibrated structure of powers shared between the branches." *Id.* "In its shared powers decisions, this court has acknowledged that some legislative actions affecting the courts do not contravene the separation of powers. But 'the legislature is prohibited from unduly burdening or substantially interfering with the judicial branch.'" *Id.*, ¶ 35. (quoted source omitted). The controversy before the Court in *Gabler* shows concerns with "shared" powers is not present here. There, "the legislature transgressed the constitutional boundaries of its powers by authorizing the Crime Victims Rights Board (the Board) to investigate and adjudicate complaints against judges, issue reprimands against judges, and

[6] Respondents Brief at p. 3-6 discusses the creation and governance of the PHMDC and BOHMDC. PHMDC and its BOHMDC (which Petitioners never made a 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 entered into between the governing bodies of Madison and Dane County, pursuant to Wis. Stat. § 66.0301. In other words, those governing bodies after careful consideration and deliberation, including studies, utilized those statutory mechanisms to create the joint health department.

seek equitable relief and forfeitures through civil actions against judges." *Gabler,* 2017 WI 67, ¶ 2. The issue before the Court was: "May an executive agency, acting pursuant to authority delegated by the legislature, review a Wisconsin court's exercise of discretion, declare its application of the law to be in error, and then sanction the judge for making a decision the agency disfavors?" *Id.*, ¶ 36. The Court answered:

> Applying separation of powers principles, we conclude that the answer to this question is unequivocally no. Any other response would unconstitutionally permit an executive entity to substitute its judgment for that of the judge—effectively imposing an executive veto over discretionary judicial decision-making and incentivizing judges to make decisions not in accordance with the law but in accordance with the demands of the executive branch in order to avoid a public rebuke reinforced with the imprimatur of a quasi-judicial board.

Id.

Here, it is not emphatically the province of the City Council or County Board to legislate health restrictions to "prevent, suppress and control communicable diseases." The City Council and County Board could legislate health policy, such as creating or dismantling BOHMDC and PHMDC, banning the implementation of any emergency health order, budgeting resources to those bodies or, as here, legislating by way of ordinances and approval of cooperative agreements that effectuate a policy choice for BOHMDC and PHMDC to fulfill the roles of the local health officer as envisioned by Wis. Stat. § 252.03 and discouraging noncompliance with health orders of the local health officer.[7]

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[7] Like Dane County's Ordinance, City of Madison has Ordinance Section 7.41 states:

> Any person who shall in any way resist any Director of Public Health Madison and Dane County or other officer whose duty it shall be to carry out the provisions of this chapter, while acting in the performance of his/her duty, or who shall resist any such officer in the quarantining or placarding of any house, or who shall remove, deface, or mutilate any placard on said premises, or who shall refuse to obey any order of Public Health Madison and Dane County or Director of Public Health Madison and Dane County issued pursuant to and under authority of the Statutes of the State of Wisconsin or the ordinances of the City of Madison, shall be subject to a fine of not less

Section 252.03 does not deprive the City Council or County Board from engaging such policy-making; rather, it allows the local health officer, as the person most knowledgeable on matters of health and science, to "take all measures necessary to prevent, suppress, and control communicable diseases." This 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 *State ex rel. Nowotny v. City of Milwaukee,* 140 Wis. 38, 121 N.W. 658 (1909). It also comports with the few rulings of this Court involving nondelegation type issues at the local level, none of which cast doubt upon the local health officer's ability to develop local emergency health orders as seen here.[8]

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than twenty dollars ($20) nor more than two hundred dollars ($200) for each offense.

https://library.municode.com/wi/madison/codes/code_of_ordinances?nodeId=COORMAWIVOICH1--10_CH7PUHE_7.41PEREDIPUHEMADACONECOORPUHEMADACO

[8] The first, *French v. Dunn Cty.*, 58 Wis. 402, 17 N.W. 1, 2 (1883), involved a county board delegating a farm purchase to a committee, provided that the cost did not exceed $3,000. The court deemed the Plaintiff's argument that the county board improperly delegated authority to the committee as "unsound." *Id.*

The second, *Duluth S.S. & A.R. Co. v. Douglas Cty.*, 103 Wis. 75, 79 N.W. 34, 34 (1899), involved a county tax levy. The court held that a county board may delegate purely ministerial or executive power to a committee and its action, within the scope of such delegated power, will bind the county. *Id.* at 35. The court stated that the power with which the committee were clothed was purely ministerial and executive, and held that municipal boards commonly act though committees in such matters, and without judicial condemnation. The committee was the mere instrument of the board to carry out or execute its will, not to pass upon and determine a matter resting in its discretion. *Id.* The Court further held that a county board, having determined, on condition, to appeal from a judgment against it to the supreme court, may properly delegate to a committee of its members authority to investigate as to the existence of the condition and to further act in regard to the appeal according to the wish of the board; and the delegated power to cause the appeal to be taken in such a case carries with it, by implication, power to employ an attorney for that purpose, the district attorney of a county not being obliged to attend to its litigation in the supreme court. *Id.* at 34.

The third, *State ex rel. Nehrbass v. Harper*, 162 Wis. 589, 156 N.W. 941, 942 (1916), was a mandamus action to compel the city inspector of buildings to issue a permit for the erection of a garage for the storage and repair of automobiles. A local ordinance allowed review of the land use proposal by the local residential owners – not the city council. *Id.* Thus, the private owners, not the governing body, could make a dispositive determination of the permit

Nor is there undue burden or substantial interference on the State Legislature, or even upon the City Council or County Board of Supervisors. See *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67 ¶ 34. Petitioners point to no instance where BOHMDC or PHMDC has impaired the functioning of the City Council or County Board on matters relating to the health and well-being of the community during the pandemic. There is no evidence offered by the Petitioners involving effective vetoing of the governing bodies, rebuking of those bodies or substitution of judgment and discretion for those bodies. Rather, Petitioners offer pure speculation that effective governance requires the Council and County Board to be the sole health authorities, as if the City Council and County Board erred in creation of BOMHDC and PHMDC. It is Petitioners speculation that nondelegation theory is their gateway to responsive, transparent and accountability from the Council and County Board that they cannot get or are not getting from the BOHMDC. Nothing could be further from the truth. As shown by the recent BOHMDC meeting, the community at any time can approach their local elected officials and ask them to pull back the reigns. Petitioners offer no evidence that they have ever attempted to do so. At its August 20, 2021 County Board of Supervisors meeting, three County Board Supervisors proposed Resolution 157 entitled, "Urging The Director Of Public Health Madison Dane County To Pull Back Her Emergency Order Until Public Input And The Consent Of The Governed Has Been Achieved," which asked PHMDC to "immediately pull back their emergency order" mandating face coverings.[9] The County Board referred the Resolution to BOHMDC, which at its regular meetings considered this Resolution as it does all Dane County Board Resolutions. After considering it

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application. The State Statutes (currently Wis. Stat. s. 62.23) delegated that power to the City Council, not for it to delegate away to private citizens. The court found this delegation of power to adjacent property owners, without any restriction or limitation whatever, vests in such property owners the power to say as a matter of discretion that another property owner shall not be permitted to use his property in a certain way. *Id.* No attempt was made by the City in its delegation to implement any standards grounded in public welfare, public health, or any other interest which the public might have in the matter; instead, the determination by the residents was left to the desire, whim, or caprice of the adjacent owners. *Id.*

[9]Dane County 2021 RES-157,
https://dane.legistar.com/View.ashx?M=F&ID=9725236&GUID=36CC9783-C88B-470C-85FE-E73716B193F2
Legislation Details:
https://dane.legistar.com/ViewReport.ashx?M=R&N=Master&GID=404&ID=5091161&GUID=F72C8D52-6795-4894-8F23-3A396BE901B1&Title=Legislation+Details

on September 1 and again on December 1, 2021, the BOHMDC unanimously passed a motion to postpone the Resolution indefinitely in committee.[10] The Resolution then came before the County Board on January 6, 2022, which rejected it 30-4.[11] The Resolution received over four hours of public input with 80 registered to speak during public comment and with an additional 670 individuals registering their position, that is: 527 people registered in opposition to the Resolution and 123 registered in support.[12] Elected representatives vote based on such public input at a public meeting, but also based on what they know of their constituents' policy preferences gained through various means of constituent engagement. The overwhelming vote against the Resolution belies Petitioners' concerns and contentions that nondelegation theory needs to be deployed in this case to get the County Board to listen to them. This is what democracy looks like at the local level, and Petitioners cannot dislike democracy because the County Board voted against their policy interests by affirming the PHMDC's course of action to continue emergency health orders.

Because the BOHMDC can pull back the reigns, and because the governing bodies could pull back the reigns on BOHMDC, this case is not the suitable candidate for this Court to determine whether and to what extent the nondelegation theory should be applied, let alone reinvigorated, due to concerns with overabundance of power in the recipient branch." *Panzer v. Doyle*, 2004 WI 52, ¶ 52, 271 Wis.2d 295, 680 N.W.2d 666. As noted above, the City Council and County Board have not abdicated their core functions; the BOHMDC is subservient to the Council and Board.

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[10] BOHMDC 12/1/21 Minutes at p. 4:
https://madison.legistar.com/View.ashx?M=F&ID=10372288&GUID=3E86DE85-7A0A-40BC-8C2B-962FE90B11F8
Said minutes were approved 1/5/22:
https://madison.legistar.com/View.ashx?M=F&ID=10436955&GUID=0562B562-A151-4448-9CC4-07CBAB3A16C8

[11] County Board Minutes 1/6/22 at p. 10-11:
https://dane.legistar.com/View.ashx?M=M&ID=903589&GUID=2AA8F7CF-0DFD-4578-B513-B0D71DC97D91

[12] *Id.*; See also Allison Garfield, Dane County Board votes down resolution to overturn mask mandate, The Cap Times, https://captimes.com/news/government/dane-county-board-votes-down-resolution-to-overturn-mask-mandate/article_8c68304d-e583-54c0-83e4-4fd6be92e366.html ("After nearly four hours of public comment, the Dane County Board of Supervisors voted 29-4 early Friday morning against a controversial resolution urging health officials to repeal the local mask mandate.")

II. Even if the Nondelegation Doctrine Had Application in this Case, Courts Apply it Flexibly with General Rules, not with an Ironclad Categorical Rule Invalidating any Perceived Action that Could be Determined by the Legislature.

Courts have historically recognized that any limit on legislative power to delegate must take into account "common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 406 (1928). Policy-making by a legislature cannot be done without some delegation. See *Mistretta v. United States,* 488 U.S. 361 (1989) ("in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

This Court has acknowledged that the doctrine is difficult to apply, stating: "[i]n reality, governmental functions and powers are too complex and interrelated to be neatly compartmentalized" such that this Court analyzes separation of powers claims "not under formulaic rules but under general principles . . . ." *Panzer v. Doyle,* 2004 WI 52, ¶ 49. Quoting the U.S. Supreme Court, the Wisconsin Supreme Court has stated:

> The separation of powers doctrine was *never intended to be strict and absolute.* Rather, the doctrine envisions a system of "separateness but interdependence, autonomy but reciprocity" . . . . This subtle balancing of shared powers, coupled with the sparing demarcation of exclusive powers, has enabled a deliberately unwieldy system of government to endure successfully for nearly 150 years.

State ex rel. Friedrich v. Circuit Court for Dane County, 192 Wis. 2d 1, 11-12 (1995) (quoting *Youngstown Steel & Tube Co. v. Sawyer,* 343 U.S. 579 (1952) (emphasis added.)

As early as 1928, the Wisconsin Supreme Court recognized that the legislature could delegate legislative power to administrative agencies. *State ex rel. Wis. Inspection Bureau v. Whitman,* 196 Wis. 472, 220 N.W. 929, (1928). In *Whitman,* the legislature had given authority to the Insurance Commissioner to disapprove regulations agreed upon by groups of insurance companies, without prescribing any standards for the commissioner's exercise of this authority. *Id.* at 943 This Court upheld the statute as a valid delegation, concluding that the legislature's general purpose must have been to achieve

uniformity in insurance company practices, and allowed for the proper delegation by incorporating a standard of reasonableness into the statute. *Id.*

Current Wisconsin law states that the delegation of legislative power to a subordinate agency will be upheld, as long as the purpose of the delegating statute is ascertainable and there are procedural safeguards in place. *Panzer,* 2004 WI 52 at ¶ 55 (citing *Gilbert v. State,* 119 Wis. 2d 168 (1984). The procedural safeguards do not have to be a perfect "model," so long as its purpose is ascertainable and "in most situations there are safeguards available to alter the policy choices made." *Panzer,* 2004 WI 52 at ¶ 72. As argued in Respondents' Brief, such standards are met here.

To the extent Petitioners believe reinvigoration of the doctrine means implementing or heightening "substantive" standards, those standards remain flexible and do not work to invalidate the emergency health orders here. Substantive restrictions on delegations of power generally mean, according to *Dowling v. Lancashire Ins. Co.* relied upon by Petitioners, that "a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the ... delegate of the legislature." 92 Wis. 63, 65 N.W. 738, 741 (1896). It cannot be doubted the Legislature's comprehensive creation of Chapter 252 following the early twentieth century pandemics is complete. Nor can it be doubted that Section 252.03's terms are a complete and ministerial command to the local health officer.

CONCLUSION

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

Dated: February 1, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b), (bm), and (c) for a brief. The length of this letter-brief is 4,397 words.

Dated this 1st day of February, 2022.

Signed,

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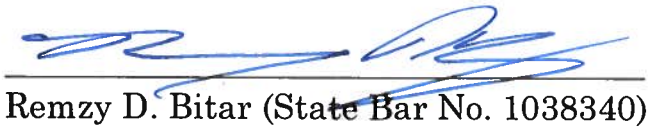
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

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 1st day of February, 2022.

Signed,



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