RECEIVED
02-21-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP1343, 2021AP1382

JEFFREY BECKER, ANDREA KLEIN, and A LEAP ABOVE DANCE, LLC,

Plaintiffs-Appellants,

v.

DANE COUNTY, JANEL HEINRICH, and PUBLIC HEALTH OF MADISON & DANE COUNTY,

Defendants-Respondents.

APPEAL FROM A FINAL DECISION OF THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JACOB FROST, PRESIDING, CASE NO. 21CV143

NONPARTY BRIEF OF GOVERNOR TONY EVERS AND ATTORNEY GENERAL JOSH KAUL

JOSHUA L. KAUL
Attorney General of Wisconsin

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Governor Tony Evers and Attorney General Josh Kaul

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0020
(608) 294-2907 (Fax)
keenanbp@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

The Appellants provide no convincing argument for reconsidering the nondelegation doctrine. This case is not a good vehicle for changing the nondelegation doctrine given the unique nature of the delegation at issue here. In addition, the doctrine does not need reexamining, and Appellants' proposal—which does not even suggest a legal standard this Court would apply—does not provide the Court sufficient guidance as to what its effects would be. Nor have they provided any persuasive reasons for overturning long-standing precedent.

ARGUMENT

I. This case is a poor vehicle for reevaluating the nondelegation doctrine

This would be a strange case for this Court to reconsider the nondelegation doctrine because it presents an unusual example of delegation. This Court's nondelegation jurisprudence comes from the separation of powers based on Article IV, section 1, which provides that "[t]he legislative power shall be vested in a senate and assembly." Similarly, the federal cases that Appellants rely on are based on the grant of legislative power to Congress in Article I. *See Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). The Legislature traditionally delegates legislative powers to administrative agencies in the executive branch and not, as here, to local officials. Further, the nature of the legislative power, and the executive agency to which that power has been delegated, factors into nondelegation analysis. As this Court has said, "deference" to the Legislature's decision to delegate "is readily understandable when the legislature delegates power to an administrative agency because the agency is a creation of the legislature itself." *Panzer v. Doyle*, 2004 WI 52, ¶ 56, 271 Wis. 2d 295, 680 N.W.2d 666

Here, the exact nature of the delegation being challenged is unclear. Appellants are challenging orders issued by Dane County's public health officer. The public health officer, however, has issued those orders under a state statute, Wis. Stat. § 252.03. Thus, this would seem to be a delegation by the Legislature to the local health officials. Yet Appellants focus much attention on a Dane County ordinance and argue that the public health officer is exercising the legislative power of the county board. The unusual facts of this case do not lend themselves to reexamining a legal doctrine that ordinarily is not applied to circumstances like those here.

In fact, this case is so outside of the norm that Appellants needed a separate subsection of their initial brief to argue that the doctrine even applies at the local level. (Appellants' Br. 25–28.) The first set of cases the Appellants cite do not deal with the Legislature delegating power to a county official, but instead whether county boards can act through a committee of the whole board, *French v. Dunn County*, 58 Wis. 402, 17 N.W. 1, 2 (1883); *Duluth, S.S. & A.R. Co. v. Douglas County*, 103 Wis. 75, 79 N.W. 34, 35 (1899), or whether a city could delegate power to private individuals, *State ex rel. Nehrbass v. Harper*, 162 Wis. 589, 156 N.W. 941, 942 (1916).

Moreover, Appellants do not rely on Article IV, section 1 but on Article IV, section 22.[1] And again, the cases the Appellants cite do not involve the Legislature delegating power to a county official, but instead county boards delegating to committees of the board, *First Savings & Trust*

---

[1] While Appellants also rely on Wis. Stat. §§ 59.02–59.03, it is difficult to see how one set of statutes would prevent the Legislature from enacting a different, more specific, statute that granted certain powers to county officials rather than the county board.

Co. v. Milwaukee County, 158 Wis. 207, 148 N.W. 22 (1914), or taking powers specifically reserved for county boards and putting them to popular votes, *Marshall v. Dane County Board of Supervisors*, 236 Wis. 57, 294 N.W. 496, 496 (1940). To the extent there is a constitutional problem with the delegation here, it involves Article IV, section 22. This provision, however, is not the basis for this Court's nondelegation doctrine.

Thus, whether the delegation at issue here violates a nondelegation doctrine applicable to municipalities is different from the normal question presented of whether a delegation to a state agency or another branch of state government violates the nondelegation doctrine derived from Article IV, section 1. In fact, Appellants even propose a different standard for delegations among local governments than for the state government. (Appellants' Suppl. Br. 14.)

As noted above, this different context is important because delegations to state agencies work differently than delegations to local officials. Under current nondelegation doctrine, the rulemaking procedure—which involves legislative oversight during the process—is different from a delegation to local officials where there is no such process. Even Appellants—who want this Court to deemphasize procedural safeguards—admit that procedural safeguards would remain relevant. (Appellants' Suppl. Br. 14–15.) The unique delegation at issue here counsels against using this case to reexamine a long-standing legal doctrine that normally applies in different contexts.

II. Appellants have not shown the nondelegation doctrine needs to be revisited.

This Court does not need to revisit the nondelegation doctrine. Appellants' primary arguments are that the challenged order was not authorized by the relevant statutes,

(Appellants' Br. 16–20), and that the challenged ordinance violates or is preempted by state law (Appellants' Br. 21–24). To the extent this Court agrees, there is no need to decide unnecessary issues. *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 26, 382 Wis. 2d 1, 913 N.W.2d 131 ("An appellate court should decide cases on the narrowest possible grounds.")

Further, Appellants argue that the challenged ordinance and Wis. Stat. § 252.03 violate the current nondelegation doctrine. (Appellants' Br. 24–35.) Their request to reexamine the nondelegation doctrine primarily takes aim at the doctrine's reliance on procedural safeguards, but their primary brief argues that the challenged ordinance fails under that part of the existing standard. (Appellants' Br. 33–34.) Should the Court agree, there is no reason to revisit the nondelegation doctrine. *Voters with Facts*, 382 Wis. 2d 1, ¶ 26.

And Appellants rely heavily on this Court's decision in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, which did not revisit the nondelegation doctrine. Reconsidering the nondelegation doctrine could call *Palm* into question because—given the lack of a clear standard proposed by Appellants—even rulemaking may not be sufficient to satisfy the new, undefined doctrine they ask this Court to adopt. As Justice Hagedorn asked in *Palm*:

> If we are to return to a vision of the separation of powers that does not allow delegation from one branch to another how in the world can we support that proposition and at the same time hold that Secretary Palm is required to submit to rulemaking, a process that is premised, lo and behold, on the delegation of legislative power to the executive branch?
>
> *Id.* ¶ 252.

Appellants are requesting that this Court revisit a legal doctrine that, in their own view, has been in existence for over ninety years. (Appellants' Suppl. Br. 5.) Stare decisis "ensures that existing law will not be abandoned lightly." *Hennessy v. Wells Fargo Bank, N.A.*, 2022 WI 2, ¶ 27, 968 N.W.2d 684. For this reason, a departure "from stare decisis requires special justification." *Id.* Appellants have made no effort to show that they meet the factors this Court considers when asked to overturn precedent. *See id.* ¶ 28. For example, the nondelegation doctrine is a "settled body of law," which weighs against overruling precedent. *Id.* Appellants simply ignore the factors necessary for this Court to change existing legal doctrine.

III. The Court should not revisit a long-standing doctrine when the effects of doing so are unclear.

Given that Appellants do not even suggest a legal standard for the Court to apply, it is difficult to determine what effect, if any, their proposal would have in the real world. Appellants claim that "defining the boundaries between legislative and executive power is not a task that lends itself to 'formulaic rules,' but instead calls for 'general principles.'" (Appellants' Suppl. Br. 10 (quoting *Panzer*, 271 Wis. 2d 295, ¶ 49.) Appellants present their argument in a way that suggests their proposal would result in dramatic changes, although the lack of a concrete legal standard makes the results of their proposal difficult to determine. For example, in this case Appellants claim they would win even under the current doctrine.

In some ways, their proposed principles seem to merely to reshift the weight placed on the factors already in the current doctrine.

The current nondelegation doctrine focuses on the nature of the power being delegated. *Panzer*, 271 Wis. 2d 295, ¶ 55. It focuses less on the nature of the power being delegated when there are adequate procedural safeguards. *Id.* For example, delegations to state agencies to make rules are subject to less scrutiny by the courts because administrative agencies, while part of the executive branch, are creations of the Legislature and the Legislature can suspend administrative rules. *Id.* ¶ 56. However, the courts apply "a stricter standard when the legislature delegates power directly to another branch of government." *Id.* ¶ 57. These delegations "must be scrutinized with heightened care to assure that the legislature retains control over the delegated power." *Id.* ¶ 58.

Appellants do not abandon reliance on procedural safeguards; in fact, they admit they would remain relevant as a principle. (Appellants' Suppl. Br. 14–15.) They would like more emphasis on whether the Legislature made the policy judgment behind the challenged conduct. (Appellants' Suppl. Br. 12–13.) But the current test requires that "the purpose of the delegating statute is ascertainable," *Panzer*, 271 Wis. 2d 295, ¶ 55, which does require that the Legislature have made a policy judgment of some sort. Where the line between a delegation where the Legislature made the policy judgment and where the delegated purpose was ascertainable, but there was no policy judgment, is not clear. This is why Justice Scalia characterized all delegation questions as questions of degree. "Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judgments applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree." *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

And given that it is a question of degree, that debate can be left largely to the Legislature, not the courts. "Congress is no less endowed with common sense than we are, and better equipped to inform itself of the 'necessities' of government," and "the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political[ ]." *Id.* Otherwise, courts make separation of powers decisions based on what the Court thinks the law "*ought* to be." *Morrison v. Olson*, 487 U.S. 654, 734 (1988) (Scalia, J., dissenting). The current doctrine places emphasis on procedural safeguards "to assure that the legislature retains control over the delegated power." *Panzer*, 271 Wis. 2d 295, ¶ 58. Thus, delegations where the Legislature does not retain control can be attacked under the current doctrine, and delegations where the Legislature retains sufficient control can be left to the Legislature.

Lastly, the Court should not revisit the doctrine because the effects of the Appellants' proposal are not at all clear. To the extent Appellants' principles would not result in a significant difference in laws being struck down, then there is no need to revisit the doctrine. To the extent Appellants' principles would result in a large number of laws being struck down—which seems to be the intent of "reinvigorating" a doctrine, although this is not expressly stated—this would be "a dramatic holding that could call into question all kinds of laws." *Palm*, 391 Wis. 2d 497, ¶ 255 (Hagedorn, J., dissenting). Can the Legislature still delegate rulemaking

power to state agencies?[2] If so, does the fact that the Legislature retains a certain amount of control over the rulemaking process still satisfy this newly announced doctrine? If this Court is going to revisit the nondelegation doctrine, then it "should be clear-eyed about where this logic takes us and what else it applies to." *Id.* ¶ 258 (Hagedorn, J., dissenting). Appellants' proposal is not at all clear about where it would take this Court, and therefore the Court should not take their invitation to revisit the nondelegation doctrine.

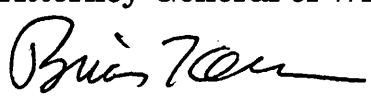
CONCLUSION

For the foregoing reasons, the Court should not reexamine the nondelegation.

Dated this 21st day of February 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Governor Tony Evers
and Attorney General Josh Kaul

---

[2] Appellants' supplemental brief refers to "the formulation of generally applicable rules of private conduct," as a "realm of non-delegable legislative power." (Appellants' Suppl. Br. 11) This would appear to invalidate most, if not all, rules in the Wisconsin Administrative Code because they have the force of law and regulate private conduct. But Appellants then appear to allow that this type of power could be delegated if the executive branch makes the policy judgments, among other principles. (Appellants' Suppl. Br. 12.) This power seems not to be truly "non-delegable," but delegable in certain instances, although with unclear rules as to when delegation is allowed.

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0020
(608) 294-2907 (Fax)
keenanbp@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2199 words.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) (2019-20).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of February 2022.

BRIAN P. KEENAN
Assistant Attorney General