

RECEIVED
02-01-2022
CLERK OF WISCONSIN
SUPREME COURT

No. 2021AP001382

IN THE SUPREME COURT OF WISCONSIN

Jeffrey Becker and Andrea Klein,

Plaintiffs,

A Leap Above Dance, LLC,

Plaintiff-Appellant,

v.

Dane County,

Defendant-Respondent,

Janel Heinrich and Public Health of

Madison and Dane County,

Defendants.

**NON-PARTY BRIEF OF THE
LIBERTY JUSTICE CENTER
IN SUPPORT OF PLAINTIFF-APPELLANT**

Daniel R. Suhr
LIBERTY JUSTICE CENTER
141 W. Jackson St., Ste. 1065
Chicago, IL 60604
(312) 263-7668
dsuhr@libertyjusticecenter.org
Counsel for Amici Curiae

TABLE OF CONTENTS

Table of Authorities 2

Statement of Interest 3

Argument 3

 Introduction 3

 The Ordinance and Order together are an unconstitutional delegation
because the substantive power granted is great while the procedural
safeguards are few. 4

Conclusion 10

Certificates 11

TABLE OF AUTHORITIES

Cases

<i>AllEnergy Corp. v. Trempealeau Cty.</i> , 2017 WI 52.....	5
<i>Barenblatt v. United States</i> , 360 U.S. 109 (1959).....	10
<i>Cal. Bankers Ass’n v. Shultz</i> , 416 U.S. 21 (1974).....	9, 10
<i>Carter v. Welles-Bowen Realty, Inc.</i> , 736 F.3d 722 (6th Cir. 2013).....	8
<i>Detroit Int’l Bridge Co. v. Gov’t of Can.</i> , 883 F.3d 895 (D.C. Cir. 2018).....	7
<i>Gundy v. United States</i> , 139 S. Ct. 2116 (2019).....	11
<i>Gutknecht v. United States</i> , 396 U.S. 295 (1970).....	9
<i>Int’l Refugee Assistance Project v. Trump</i> , 883 F.3d 233 (4th Cir. 2018)....	9, 11
<i>Int’l Union v. OSHA</i> , 938 F.2d 1310 (D.C. Cir. 1991).....	7
<i>Kent v. Dulles</i> , 357 U.S. 116 (1958).....	9
<i>Koschkee v. Taylor</i> , 2019 WI 76.....	5
<i>Mich. Gambling Opposition v. Kempthorne</i> , 525 F.3d 23 (2008).....	7, 11
<i>Michigan v. United States EPA</i> , 213 F.3d 663 (D.C. Cir. 2000).....	6, 7
<i>Midwest Inst. of Health v. Gov. of Mich.</i> , 958 N.W.2d 1, (Mich. 2020).....	6, 10
<i>Overton v. Bazzetta</i> , 539 U.S. 126 (2003).....	8
<i>Owens v. Republic of the Sudan</i> , 531 F.3d 884 (D.C. Cir. 2008).....	7
<i>Touby v. United States</i> , 500 U.S. 160 (1991).....	8
<i>United States v. Bozarov</i> , 974 F.2d 1037 (9th Cir. 1992).....	8
<i>United States v. Nichols</i> , 784 F.3d 666 (10th Cir. 2015).....	7, 8
<i>United States v. Robel</i> , 389 U.S. 258 (1967).....	9
<i>United States v. Touby</i> , 909 F.2d 759 (3d Cir. 1990).....	11
<i>Whitman v. American Trucking Ass’ns, Inc.</i> , 531 US 457 (2001).....	6, 8
<i>Wis. Legislature v. Palm</i> , 2020 WI 42.....	5, 11

Statutes

City of Madison Ord. 7.05.....	8
Wis. Stat. § 800.095.....	8

STATEMENT OF INTEREST

The Liberty Justice Center is a national public-interest law firm based in Chicago. The Liberty Justice Center is actively litigating cases to ensure that constitutional and legal guarantees are observed during the pandemic. The Center is also litigating to preserve the separation-of-power principles embodied in the nondelegation doctrine. *National Horsemen's Benevolent and Protective Association v. Black*, 5:21-cv-00071-H (N.D. Tex.).

STATEMENT OF THE ISSUE

Does Director Heinrich's Order violate the constitution's separation of powers because it is made pursuant to an unconstitutional delegation of lawmaking authority?

ARGUMENT

Introduction

The nondelegation doctrine is a theme primarily played in the background of this Court's jurisprudence for several years. *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 87 (Kelly, J., concurring); *Koschkee v. Taylor*, 2019 WI 76, ¶ 49 (Bradley, J., concurring). Perhaps this is because the Court has lacked the right vehicle to address it. *See AllEnergy Corp. v. Trempealeau Cty. Env't & Land Use Comm.*, 2017 WI 52, ¶ 133 (Ziegler, J., concurring in the mandate). Yet among the federal bench and academic community, it is a topic of great conversation. *See, e.g., Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J.,

dissenting); Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L. J. 1490 (2021).

Here interest meets opportunity, as a major matter of substantial public importance, affecting one of the major economic engines of the state, squarely presents the core question: did this Court mean what it said when it held, “the nature of delegated power [still] plays a role in judicial review of legislative delegations” and “[w]e normally review both the nature of delegated power and the presence of adequate procedural safeguards. . .” *Panzer v. Doyle*, 2004 WI 52, ¶ 55 (emphasis added).

The Ordinance and Order together are an unconstitutional delegation because the substantive power granted is great while the procedural safeguards are few.

The nondelegation doctrine is guided by two questions: the amount of discretion conferred and the scope of authority or power conferred. The two questions operate in conjunction, as though on a sliding scale: “[T]he degree of agency discretion that is acceptable varies according to the scope of the power . . . conferred.” *Whitman v. American Trucking Ass’ns, Inc.*, 531 US 457, 475 (2001). *Accord Panzer*, 2004 WI 52, ¶ 55 (the Court “giv[es] less emphasis to the [scope of the power granted] when the [procedural safeguards are] present”).

A delegation that is very narrow in scope, with a precise principle, may carry with it a very broad grant of authority, while a regulation that exercises

great power must be bound by very specific procedural safeguards. *Michigan v. United States EPA*, 213 F.3d 663, 680 (D.C. Cir. 2000). “In other words, it is one thing if a statute confers a great degree of discretion, i.e., power, over a narrow subject; it is quite another if that power can be brought to bear on something as immense as an entire economy.” *Midwest Inst. of Health, PLLC v. Governor of Mich. (In re Certified Questions from the United States Dist. Court)*, 958 N.W.2d 1, 19 (Mich. 2020). Thus, the nondelegation doctrine operates in conjunction with the major questions canon. *Nat’l Fed’n of Indep. Bus. v. DOL*, 142 S. Ct. 661 (2022).

What are the indicators of narrow discretion (i.e., of procedural safeguards)? First, the legislative body can be very specific in defining the “intelligible principle” that is to guide the administrative officer. Alternatively, it may require “a number of threshold [factfinding] determinations that in practice appear to have confined the statute to a modest role,” only permitting action after certain initial triggering standards are met. *Michigan*, 213 F.3d at 680. *Accord Owens v. Republic of the Sudan*, 531 F.3d 884, 891 (D.C. Cir. 2008).

What are the indicators of narrow power? The rule can be cabined by a specific geographic area, *Detroit Int’l Bridge Co. v. Gov’t of Can.*, 883 F.3d 895, 902 (D.C. Cir. 2018), or a single industry. *Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991). It can govern a very small, discrete topic. *Mich. Gambling Opposition v.*

Kemphorne, 525 F.3d 23, 38 (2008) (Brown, J., dissenting) (describing *Whitman* as the canonical example of narrow delegation: the rule defined a particular type of grain elevator).

By contrast, a regulation exercises “immense” power when it regulates the entire economy. *Int’l Union, United Auto., Aerospace & Agric. Implement Workers*, 938 F.2d at 1317 (“the scope of the regulatory program is immense, encompassing all American enterprise”); *United States v. Nichols*, 784 F.3d 666, 675-76 (10th Cir. 2015) (Gorsuch, J., dissenting from rehearing en banc). “While Congress need not provide any direction to the EPA regarding the manner in which it is to define ‘country elevators,’ which are to be exempt from new-stationary-source regulations governing grain elevators, see § 7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy.” *Whitman*, 531 U.S. at 475.

In addition to these two core considerations, the Court has also recognized two additional factors which may mitigate or heighten the degree of judicial scrutiny brought to bear on a delegation.¹

¹ Some courts have suggested a third factor, namely the power to define the elements of a crime and then impose a criminal sanction. *United States v. Nichols*, 784 F.3d 666, 672 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc) (“the Court has repeatedly and long suggested that in the criminal context Congress must provide more meaningful guidance than an intelligible principle.”); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J., concurring) (“the Constitution may well also require Congress to state more than an ‘intelligible principle’ when leaving the definition of crime to the executive”); *United States v.*

First, the Supreme Court has applied a higher standard of judicial scrutiny when a delegation affects fundamental rights. The U.S. Supreme Court has required that delegations of authority “that potentially authorize the executive to encroach on fundamental rights ‘be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.’” *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 327 (4th Cir. 2018) (Wynn, J., concurring), *vacated* 138 S. Ct. 2710 (2018) (quoting *Greene v. McElroy*, 360 U.S. 474, 507 (1959)). *Accord Gutknecht v. United States*, 396 U.S. 295, 306-07 (1970); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (“Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. We

Bozarov, 974 F.2d 1037, 1043 (9th Cir. 1992) (“broad delegations might be more suspect in cases involving criminal sanctions”). The Supreme Court has expressly declined to adopt this factor as part of its jurisprudence. *Touby v. United States*, 500 U.S. 160, 166 (1991).

Here obviously no one goes immediately to jail or faces a misdemeanor, so the sanctions are not in themselves criminal. But they are enforced by the police with a maximum penalty of \$1,000. City of Madison Ord. 7.05(1) & (7). Moreover, if someone does not pay the penalty, they may be jailed for up to 90 days. *See Wis. Stat. § 800.095(1)(b)(1)*.

hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.”); *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) (“The area of permissible indefiniteness [of delegation] narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights . . . The numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake.”); *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 93 (1974) (Brennan, J., dissenting) (“That vice . . . is the delegation of power to the Secretary in broad and indefinite terms under a statute that lays down criminal sanctions and potentially affects fundamental rights.”).²

Second, courts have applied lesser scrutiny to regulations that have a limited time duration. “Of course, an unconstitutional delegation is no less unconstitutional because it lasts for only two days. But it is also true, as common sense would suggest, that the conferral of indefinite authority accords a greater

² To any who would say concern about delegation is only for judicial conservatives, I would highlight these and similar opinions. *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 90-91 (1974) (Douglas, J., dissenting) (“I also agree in substance with my Brother Brennan’s view that the grant of authority by Congress to the Secretary of the Treasury is too broad to pass constitutional muster. . . . These omnibus grants of power allow the Executive Branch to make the law as it chooses in violation of the teachings of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, as well as *Schechter*, that lawmaking is a congressional, not an Executive, function.”); *id.* at 93 (Marshall, J., dissenting). See also *Barenblatt v. United States*, 360 U.S. 109, 140 n.7 (1959) (Black, J., dissenting).

accumulation of power than does the grant of temporary authority.” *Midwest Inst. of Health, PLLC*, 958 N.W.2d at 19. Thus, “In *Gundy*, for example, the plurality [by Justice Kagan] thought it relevant to the delegation analysis in that case that the statute accorded the executive ‘only temporary authority.’” *Id.* (quoting *Gundy*, 139 S. Ct. at 2130).

How does Director Heinrich’s order fare under this case law? Not well. “Under established nondelegation doctrine, a standardless delegation must be quite narrow.” *Mich. Gambling Opposition*, 525 F.3d at 38 (Brown, J., dissenting). This delegation is entirely standardless: it requires no fact-finding, it sets no triggering thresholds, it has no specifics much beyond “go forth and keep us safe.” And yet it is an immense power to regulate the entire economy of the state’s second-largest county, plus everything else in life (schools, sports, non-profits, religious organizations, family holiday gatherings). A delegation is unconstitutional when it infuses “an overabundance of power in the recipient branch,” *Panzer*, 2004 WI 52, ¶ 52, as the county board did here.

Moreover, both additional considerations weigh against the Order: it regulates the exercise of fundamental rights, and has no temporal limit. “When broad power is delegated with few or no constraints, the risk of an unconstitutional delegation is at its peak.” *Int’l Refugee Assistance Project*, 883 F.3d at 293 (Gregory, C.J., concurring). See *United States v. Touby*, 909 F.2d 759, 779 (3d Cir. 1990) (Hutchinson, J., dissenting). This Order has passed that point of

unconstitutionality: it checks all four boxes for laws that exceed constitutional boundaries.

In this way, it is in contrast to other Wisconsin statutes delegating administrative authority that are already on the books. *See Palm*, 2020 WI 42, ¶ 255 & n.21 (Hagedorn, J., dissenting). Justice Hagedorn's examples each point to a narrow delegation of power over a specific industry or zone, and many are guided by more precise standards or triggers. Moreover, most operate in the commercial space and so do not affect fundamental rights. This is in stark contrast with Director Heinrich's order, which exercises incredible power that infringes on fundamental rights without any real standards.

CONCLUSION

The Court should clarify its nondelegation doctrine by reinforcing its previous holdings that procedural safeguards alone are not sufficient. This Court's recent renewed and repeated emphasis on the separation-of-powers demands as well a substantive threshold which ensures legislative power remains in legislative hands.

Respectfully submitted,

Daniel R. Suhr
Counsel of Record
Wis. Bar No. 1065568
LIBERTY JUSTICE CENTER

190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
dsuhr@libertyjusticecenter.org
Counsel for Amicus Curiae

FEBRUARY 1, 2022

CERTIFICATE AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,140 words in the body, as counted by Microsoft Word.

CERTIFICATE AS TO ELECTRONIC FILING

Pursuant to R. App. Pro. 809.19(12)(F), I hereby certify that I have submitted an electronic copy of this non-party brief in compliance with the requirements of Rule 809.19(12). I also certify that this electronic brief is identical in content and format to the printed form of the brief filed tomorrow. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all parties.

CERTIFICATE OF SERVICE

I certify that on February 1, 2022, I entrusted the original and 22 copies of this brief to a commercial delivery service for delivery within three days to the Court's clerk. Three copies of the brief are being served upon counsel of record by placing the same in the U.S. Mail, first class postage.

Richard M. Esenberg, et al.
Wisconsin Institute for Law & Liberty
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202-3141

Marcia A. MacKenzie, et al.
Dane County Corp. Counsel
210 MLK Jr. Blvd., Romo 419
Madison WI 53703-3345

CERTIFICATES SIGNED:

Daniel R. Suhr