No. _____

In the Supreme Court of Wisconsin

GYMFINITY, LTD., JEFFREY BECKER, and ANDREA KLEIN
PETITIONERS,

v.

DANE COUNTY, CITY OF MADISON, JANEL HEINRICH, in her official capacity as Public Health Officer and Director of Public Health of Madison & Dane County, and PUBLIC HEALTH OF MADISON & DANE COUNTY,
RESPONDENTS.

MEMORANDUM IN SUPPORT OF EMERGENCY PETITION FOR AN ORIGINAL ACTION AND EMERGENCY MOTION FOR A TEMPORARY INJUNCTION

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ISSUES PRESENTED

1. Whether Dane County Ordinance § 46.40(2), Madison Ordinance § 7.06(6) (and/or Wis. Stat. § 252.03[1]) violate the non-delegation doctrine?

2. Even aside from the non-delegation violation, whether Emergency Order #10's ban on all indoor gatherings in private homes, and ban on all indoor sports activities, effectively closing many businesses, exceeded the authority granted in Wis. Stat. § 252.03?

3. Whether Emergency Order #10's limit on any private, in-person gathering violates constitutional rights to freedom of association?

4. Whether Emergency Order #10's ban on all indoor gatherings in private homes, and ban on all indoor sports activities, effectively closing many such businesses, while allowing all other businesses to stay open and people to gather in those businesses, is "reasonable and necessary"?

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[1] As explained below, Petitioners' position is that the ordinances, and not section 252.03, are the proper targets of the non-delegation claim. To the extent this Court disagrees, however, Petitioners also challenge section 252.03.

INTRODUCTION

Dane County and the City of Madison have unlawfully delegated near limitless legislative power to their local health officer to do whatever she deems "reasonable and necessary" to combat the COVID-19 pandemic, without any duration or oversight from the county board or city council, and she has seized that power since May to rule the city and county by decree. This Court has already enjoined one abuse of that delegation, when the health officer attempted to shut down private schools just before they were set to reopen. *WCRIS v. Heinrich*, No. 2020AP1420.

Just as egregiously, on November 17, one week before Thanksgiving, Dane County's health officer again invoked that unlawful delegation to unilaterally ban all indoor gatherings in private homes, among any individuals not within the same immediate household (like extended family, significant others, etc.) and has threatened Madison and Dane County residents with a $1,000 fine for hosting any such gatherings. She has also banned all indoor sports activities, regardless of the nature the activities, the size of the facility,

or the precautions taken, effectively closing sports-related businesses like gymnastics gyms, hockey rinks, and indoor soccer fields, even though these have been operating safely and other businesses in much smaller buildings can continue to operate. Neither the Dane County board nor the Madison common council voted on or approved these dramatic prohibitions.

But for the unlawful delegation, none of this would be possible. Under the framework in state law, prohibitions and limits like this could not be enforced unless they were enacted in an ordinance by the local governing body. The Dane County board, however, has adopted an ordinance purporting to preemptively make enforceable any order that its local health officer adopts. The City of Madison, likewise, has interpreted a generic "health nuisance" ordinance to do the same thing.

These ordinances blatantly violate the non-delegation doctrine, as this Court has already recognized in *Wisconsin Legislature v. Palm*, where it emphasized that endowing an unelected administrative official with the power to unilaterally "defin[e] the elements" of new, prohibited conduct

and to "create [ ] penalties" for that conduct would pose a non-delegation problem. 2020 WI 42 ¶¶ 36–39, 391 Wis. 2d 497, 942 N.W.2d 497; *see id.* ¶ 251 (Hagedorn, J., dissenting) (noting that the proper target of a non-delegation challenge would be the enforcement mechanism).

Petitioners here challenge two things. First, they challenge the Order issued on November 17 to the extent that it bans any indoor gathering and bans all indoor sporting activities. That Order is invalid not only because it is based on an unlawful delegation, but also for a variety of other reasons: it exceeds the statutory authority given to health officers in section 252.03, it violates constitutional rights to freedom of association, and it is not "reasonable and necessary" under any definition of those terms. Second, Petitioners also challenge the underlying ordinances that enabled this as a violation of the non-delegation doctrine, to prevent these abuses from recurring.

This case warrants this Court's original action jurisdiction not only to remedy the immediate harms from the abuse of power in the most recent order, but also because,

with respect to Petitioners' non-delegation challenge to the underlying ordinances, only this Court can provide clarity on how the non-delegation doctrine functions generally and, more specifically, how it applies at the local level, issues that counties around the state are currently wrestling with.

Petitioner respectfully ask this Court to do as it did in *WCRIS v. Heinrich*—to issue a temporary injunction to allow private gatherings and sports to continue, and then to issue a briefing schedule that will allow more fulsome analysis of the non-delegation doctrine and the other issues.

ORAL ARGUMENT AND PUBLICATION

Because they seek immediate, temporary relief, Petitioners do not request oral argument with respect to their motion for an immediate injunction of the portions of Emergency Order #10 that bans all indoor gatherings in private homes and ban all indoor sports, shutting down sports-related businesses. However, with respect to their underlying non-delegation challenge to the Dane County and Madison ordinances that allowed this, they do seek both oral argument and publication, in the ordinary course. Petitioners

ultimately ask this Court both to revisit and reinvigorate the non-delegation doctrine and to clarify that the doctrine applies equally at the local level as at the state level, issues that warrant both argument and publication.

STATEMENT OF THE CASE

Petitioners incorporate the background facts in their Emergency Petition.

STANDARD OF REVIEW

Because the parties seek to file this case as an original action, the Court is not sitting in review of any lower court decision. The Court is asked to interpret provisions of the state constitution and the Wisconsin statutes. These are questions of law. *See*, *e.g.*, *State v. Hamdan*, 2003 WI 113, ¶ 19, 264 Wis. 2d 433, 665 N.W.2d 785.

ARGUMENT

I. This Court Should Grant This Original Action

There are multiple compelling reasons to grant this Petition for an Original Action. As noted above, Petitioners challenge two things: Emergency Order #10, to the extent that it bans indoor gatherings and bans any indoor sports

activity, effectively closing such businesses, and the underlying ordinances (and/or statute) that Emergency Order #10 relies upon. Both aspects of this challenge warrant this Court's original action jurisdiction.

A. This Court Should Take This Case to Promptly Remedy the Blatant Abuse of Power

Emergency Order #10 contains draconian restrictions, banning all indoor gatherings in private homes on the eve of a holiday and shutting down all indoor sports-related businesses. This is now the third time Dane County has attempted to dramatically change the rules at the last minute, and this Court has enjoined it from doing so twice before. *See Jefferson v. Dane County*, No. 2020AP557-OA (enjoining an attempt to alter election rules on the eve of an election); *WCRIS v. Heinrich*, No. 2020AP1420-OA (enjoining an attempt to shut down private schools on the eve of their reopening). The abuse of power here is also substantially similar to the abuses this Court found unlawful and enjoined in an original action posture in *Palm*, 2020 WI 42. This Court

should take this case to promptly remedy this abuse of power and to prevent immediate and irreparable harm.

B. This Court Should Take This Case to Reinvigorate the Non-Delegation Doctrine

In our system of government, at the local level as at the state level, lawmaking is vested in the legislative, not the executive, body. This comports with traditional separation of powers concerns, avoiding the dangerous concentration of power in one individual and promoting liberty, transparency, and accountability. However, and for various reasons, there are circumstances under which the legislative body may wish to "delegate" power to a coordinate branch (usually the executive branch), such as the authority to promulgate administrative rules. The "non-delegation doctrine" governs whether and to what extent these delegations may occur.

Constitutional limits on the "delegation" of legislative authority to the executive fall into two broad categories. The first can be seen as a "substantive" limit on a legislative body's

ability to transfer authority to the executive.[2] This limitation prevents the legislative body from delegating the "legislative power," which is vested solely in it, in the first place. Instead, when the legislative body wants to authorize the executive branch to take some action, it is required to provide adequate substantive direction to the executive so that it can be said that the executive is simply carrying out legislative policy. If there is adequate substantive direction, then there has not been a "delegation" of legislative power because the legislative body is still making the policy decisions in question.

The second category instead emphasizes the need for procedural safeguards on the exercise of legislative power by the executive. In this view, a greater degree of law- or rulemaking authority may be exercised by the executive branch if it is sufficiently limited by procedural safeguards. This "procedural" limit is less concerned with what the

[2] For clarity, the non-delegation doctrine is discussed in its traditional setting—the state level—in this section. It will be discussed in the context of local governments below.

executive is permitted to do, than how they are permitted to do it.

In Wisconsin, the doctrine is currently understood to permit delegations of legislative power so long as "the purpose of the delegating statute is ascertainable and there are *procedural* safe-guards to insure that the board or agency acts within that legislative purpose," *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971) (emphasis added). However, it was once much more robust, with courts enforcing *substantive* restrictions on delegations of power. *See e.g.*, *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N.W. 738, 741 (1896) ("[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."); *see also State v. Burdge*, 95 Wis. 390, 70 N.W. 347, 350 (1897) (prior to making rules and regulations "there must first be some substantive provision of law to be administered and carried into effect").

A return to first principles, and reviving substantive limits on delegation of legislative authority, would be more

faithful to the sole vesting of the legislative power in legislative bodies, a much sounder protection of individual liberty, and an appropriate restraint on law-making by executive officials. Both substantive and procedural protections are necessary.

This case illustrates this principle well: *no* amount of procedural safeguards could sufficiently cabin the utterly unguided grant of authority in this case, namely the ability of Respondent Heinrich to do whatever she deems "reasonable and necessary for the prevention and suppression of disease," Wis. Stat. § 252.03, that is, to make policy as if drafting and signing ordinances herself.

Thus, although (as discussed below) the ordinance (and/or statute) relied on by the Respondents constitute an unlawful delegation of power under either this Court's original *or* current understanding of permissible legislative delegations of power, this Court should take the opportunity

in this case to reexamine, and reinvigorate, the non-delegation doctrine.[3]

Although this Court has tended to emphasize procedural safeguards against non-delegation, it has also noted that "the nature of the delegated power still plays a role." *Panzer v. Doyle*, 2004 WI 52, ¶ 79 & n.29, 271 Wis. 2d 295, 680 N.W.2d 666. Where, as here, the power that is delegated is virtually unlimited—the Health Department may do whatever is reasonable and necessary without further limitation—no procedural safeguard can be adequate because there is no meaningful legislative direction that process can enforce. "Do what you will" does not admit of procedural enforcement or safeguarding. That the legislative body could pass law countermanding the local health officer is not a procedural safeguard against law-making by the executive branch. It is law-making undertaken to repeal law made by executive officials.

[3] The Supreme Court of the United States has indicated that it is similarly considering revisiting the non-delegation doctrine's federal analogue. *See generally Gundy v. United States,* ___ *U.S.* ___, 139 S. Ct. 2116 (2019).

In theory, a legislative body can always pass a law overruling that made by an executive officer. But the fact that a legislative body can "take back" delegated authority does not protect against an unwarranted delegation. It amounts to giving away legislative authority, and this is something that no legislative body—be it the State Legislature, the Dane County board or the Madison common council—may do.

C. This Court Should Clarify How the Non-Delegation Doctrine Applies at the Local Level

While this Court has extensively discussed the application of the non-delegation doctrine at the state level, the doctrine's application at the local level has received comparatively little attention, such that there is confusion among the counties about how it applies locally, and specifically to health-related ordinances and orders.

Prior to this Court's recent "shift[ ] [in] focus," *Gilbert v. State, Med. Examining Bd.*, 119 Wis. 2d 168, 185, 349 N.W.2d 68 (1984), it was clear that the non-delegation doctrine applied equally at the local level as at the state level. In *French v. Dunn*, for example, this Court explained that

"[t]here are, doubtless, powers vested in the county board which could not be delegated to any committee. Powers which are legislative in their character … must be exercised under the immediate authority of the board." 58 Wis. 402, 17 N.W. 1, 2 (1883); *see also Duluth, S.S. & A.R. Co. v. Douglas Cty.*, 103 Wis. 75, 79 N.W. 34, 35 (1899). Likewise, with respect to cities, this Court held that "a common council cannot re-delegate legislative power properly delegated to it" by the Legislature. *State ex rel. Nehrbass v. Harper*, 162 Wis. 589, 156 N.W. 941, 942 (1916).

But as a result of this Court's more recent cases, it is less clear now how the doctrine applies at the local level. A recent analysis by the Wisconsin Counties Association noted that there is significant uncertainty about how the non-delegation doctrine applies at the local level, *see* Wisconsin Counties Association, *Guidance in Implementing Regulations Surrounding Communicable Disease* 37–39 (August 2020),[4] and the differences between the ordinances counties have

[4] https://www.wicounties.org/uploads/legislative_documents/guidance-communicable-diseases-final.pdf

passed or proposed in the wake of *Palm* illustrate that there is confusion about this issue, *see* Petition ¶¶ 49–50.

This Court should take this opportunity to reaffirm that the non-delegation doctrine applies equally at the local level as at the state level, for at least three different reasons.

First, the applicability of the non-delegation doctrine at the local level logically follows from the nature and source of local legislative authority. It is well established that counties and cities are "creature[s] of the legislature" and that any powers they have "must be exercised within the scope of authority ceded to it." *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 450, 234 N.W.2d 354 (1975); *Jackson Cty. v. State, Dep't of Nat. Res.*, 2006 WI 96, ¶ 16, 293 Wis. 2d 497, 717 N.W.2d 713; *Black v. City of Milwaukee*, 2016 WI 47, ¶ 23, 369 Wis. 2d 272, 882 N.W.2d 333. Since the limited legislative authority local governments have comes from the Legislature, *see State ex rel. Dunlap v. Nohl*, 113 Wis. 15, 88 N.W. 1004, 1006 (1902), it necessarily comes with the same restrictions, including that it may not be delegated to unelected officials without sufficient substantive and procedural limits.

Second, both the Wisconsin Constitution and the Wisconsin Statutes create similar separation-of-powers divisions at the local level, such that local legislative authority is vested in the elected governing body—the county board or city council. With respect to counties, Article IV, § 22 of Wisconsin Constitution provides the "legislature may confer *upon the boards* of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe." The Legislature has similarly provided that (subject to certain exceptions) "the *board* of any county is vested with all powers of a local, legislative and administrative character," Wis. Stat. § 59.03, and that "[t]he powers of a county as a body corporate can only be exercised by the board, or in pursuance of a resolution adopted or ordinance enacted by the board," Wis. Stat. § 59.02. This language is significant in that it mirrors the constitutional language originally "vest[ing]" the legislative power in the Legislature. *See* Wis. Const. art. IV, § 1. Similarly, with respect to cities, the statutes place local legislative authority

in the hands of the common council. Wis. Stat. §§ 62.11(5); 66.0101; *see also id*. §§ 66.0107(1); 66.0113.

Finally, the same considerations that support the non-delegation doctrine at the state or federal level apply at the local level. Ensuring that only the local legislative body can enact legislation checks an excess of law-making, promotes deliberation, accountability, and transparency, and prevents the accumulation of too much power in any one person. Allowing an unelected county executive official the ability to wield legislative power unilaterally circumvents these checks.

D. An Original Action is the Proper Vehicle

This case presents a classic example of the type of action that should be resolved by this Court in the first instance rather than before a circuit court, for several reasons.

First, and perhaps most importantly, only this Court possesses the authority to reinvigorate the substantive requirements of the non-delegation doctrine and to definitively develop that doctrine in the local government context in light of preexisting case law.

Second, this issue is of statewide importance given that multiple counties already have, or are currently considering, modifying their ordinances to expand the powers of their local health officers and departments, and given the importance of separation of powers questions involving the division of governmental authority among the branches of government (state or local).

Third, given the ongoing and evolving nature of the pandemic, it also important that the question of the degree to which counties and cities can delegate their policy-making role to their local health officers is resolved as efficiently as possible. *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938) (original jurisdiction appropriate where "the questions presented are of such importance as under the circumstances to call for [a] speedy and authoritative determination by this court in the first instance").

Finally, the questions in this case are legal—they relate to the interpretation of the state constitution and the Wisconsin Statutes. This Court will not need to resolve any factual disputes better suited for a circuit court's attention.

See, e.g. State ex rel. Kleczka v. Conta, 82 Wis. 2d 679, 683, 264 N.W.2d 539 (1978) (disposition via original action was appropriate insofar as "no fact-finding procedure [was] necessary").

II. This Court Should Enjoin Emergency Order #10 to the Extent That it Bans Any Indoor Gathering and All Indoor Sport Activities

The standard for a temporary injunction is well-known. A temporary injunction may be issued when (1) the movant has shown a reasonable probability of ultimate success on the merits, (2) the movant lacks an adequate remedy at law; (3) the movant can show irreparable harm; and (4) a balancing of the equities favors issuing the injunction. *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). Wisconsin courts have sometimes also said that the purpose of the proposed injunction must be to maintain the status quo and treat that consideration as an additional factor. *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154. The Petitioners meet this

burden and the Court should grant the motion for a temporary injunction.

A. Petitioners Have a High Likelihood of Success

1. The Ordinances On Which the Order Relies Violate the Non-Delegation Doctrine

While Petitioners' full non-delegation challenge to the underlying ordinances (and/or statute) that allowed Emergency Order #10 will require an in-depth analysis that is not possible at the temporary-injunction stage, *see supra* Part I.B–C, it is nevertheless clear at this stage that Petitioners have a significant likelihood of success on their non-delegation claim, because this Court already identified the non-delegation problem in *Palm*.

In *Palm*, this Court explained that the combination of Wis. Stat. § 252.02(6), allowing the DHS secretary to "implement all emergency measures necessary to control communicable diseases," and Wis. Stat. § 252.25, making any "departmental order" criminally enforceable, together would pose a delegation problem if they allowed the DHS secretary both to unilaterally create new, prohibited conduct via order

and to enforce those prohibitions through criminal penalties. *Palm*, 2020 WI 42 ¶¶ 31–42. The Court avoided the non-delegation problem by holding that, to be enforceable, general health orders purporting to regulate an array of normal activities during a pandemic must go through the rulemaking procedures of Chapter 227, thereby giving the Legislature oversight. *Id.* ¶ 3. This case presents the exact same type of non-delegation problem, but without an equivalent procedural save.

Like section 252.02(6), section 252.03 authorizes local health officers to do what is "reasonable and necessary" for the prevention and suppression of disease. This seemingly broad grant of authority is not by itself a non-delegation problem because the statutes, by design, do not provide any enforcement mechanism for general orders issued pursuant to this authority, as explained in more detail in the Petition.[5] Petition ¶¶ 21–30.

[5] This does not render 252.03 meaningless; there are all sorts of things that a health officer can do that do not require enforcement, such as providing free masks or testing, promoting masks and other sanitary practices, etc.

Section 252.25, for example, the primary enforcement mechanism for "violations of law relating to health," conspicuously omits any reference to local health orders, instead providing penalties only for violations of "any state statute or rule, county, city or village ordinance, or departmental order." And section 251.06, establishing the duties of local health officers, authorizes such officers to "[e]nforce *state* public health statutes and rules" and "any ordinances that *the relevant governing body enacts*," but does not give a local health officer authority to enforce his or her own orders.

The statutes *do* provide an enforcement mechanism for local health orders targeted at a particular individual or property (such as isolation or quarantine orders). Wis. Stat. § 252.06(4), (5); *see also id.* § 254.59. Collectively, these provisions mean that any limits or prohibitions on activity must be enacted in an ordinance by the county board or city council, respectively, as is already the norm under municipal law. *See* Wis. Stat. § 66.0113 (authorizing "*the governing body*

of a county, town, city, [or] village" to authorize citations "for violations *of ordinances*.")

Dane County Ordinance § 46.40 and Madison Ordinance § 7.05(6) (as interpreted by the City of Madison), violate the non-delegation doctrine by preemptively making enforceable any order that the local health officer deems "reasonable and necessary" to control the pandemic. Dane County's ordinance simply states that "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." Madison Ordinance § 7.05(6) provides generically that "[i]t shall be unlawful for any individual to create or permit a health nuisance," and the City has interpreted the phrase "health nuisance" to cover any activity the local health officer decides is "reasonable and necessary" to control a pandemic. *See* Emergency Order #10 at 16. Neither of these ordinances provide any procedural limits, and the substantive standard they incorporate from section

252.03, "reasonable and necessary," is a wholly inadequate substantive delegation.

While the substantive language is found in section 252.03, the ordinances are the proper target of a non-delegation challenge, both as to the substantive and procedural defects, because they convert what would otherwise be unenforceable into something enforceable. *See Palm*, 2020 WI 42 ¶ 251 (Hagedorn, J., dissenting) (noting that Wis. Stat. § 252.02 would be the proper target of a non-delegation challenge).[6]

To further illustrate the point, whether an automatic enforcement mechanism violates the non-delegation doctrine depends on the underlying substantive grant of authority. If the grounds for and/or scope of an order is sufficiently constrained, there is no problem with making such orders enforceable. *See id*. ¶ 255 n.21 (Hagedorn, J., dissenting) (listing examples); *e.g.*, Wis. Stat. § 97.43 (making enforceable

[6] However, to the extent this Court disagrees, or concludes that orders issued pursuant to Section 252.03 are enforceable on their own, then Section 252.03 itself violates the non-delegation doctrine.

orders to correct particular kinds of discharges of certain types of agricultural chemicals). But when the underlying grant of authority is not sufficiently constrained, an automatic enforcement mechanism converts such a grant into the power to legislate.

Thus, through these ordinances, Dane County and the City of Madison have transferred to their local health officer the power "to make laws," *Schuette v. Van De Hey*, 205 Wis. 2d 475, 480–81, 556 N.W.2d 127 (Ct. App. 1996)—which is properly vested in the county board and city council, respectively. As in *Palm*, the ordinances "endow[ ] [the Dane County health officer] with the power" to unilaterally "defin[e] the elements" of new, prohibited conduct and to "create [ ] penalties" for that conduct. *See Palm*, 2020 WI 42 ¶¶ 36–39.[7]

[7] Respondents will likely argue that, unlike in *Palm*, the ordinances do not impose *criminal* penalties. While it is true that a municipal citation is not a criminal penalty, it is the highest penalty a county and city can impose, given that local government cannot create crimes, *see State v. Thierfelder*, 174 Wis. 2d 213, 222 (1993); Wis. Stat. § 939.12, and it is therefore reserved for the local legislative body. Wis. Stat. §§ 59.02, 66.0113. Moreover, the Health Department has threatened fines of $1000 for anyone who violates the Order, by no means an insignificant penalty.

The ability to order and enforce whatever the health officer deems "reasonable and necessary" to combat the pandemic is a standardless delegation of almost unlimited scope. It is not a direction to carry out legislative policy formulated by the Dane County board but an unlimited license to *create* that policy through the officer's *own* exercise of discretion. It is nothing but the announcement of a "vague aspiration" and an assignment to the health officer to do what she thinks best. *Gundy,* 139 S.Ct. at 2133 (Gorsuch, J., dissenting).

It neither defines nor limits the measures that can be taken, much less provides guidance as to when more severe measures can be taken. It places no limit on the duration or geographic scope of restrictive measures and provides no guidance for the health officer to make such determinations. A general grant of the authority to "do what you think is necessary" clearly flunks any such test. It makes the health officer a mini-county board and common council empowered to issue any prohibition to fight COVID-19 (or any other disease). In sum, by preemptively making the health officer's

orders enforceable, the county board and common council have given away unlimited, unilateral legislative power.

Indeed, the Michigan Supreme Court recently came to a similar conclusion in the analogous context of analyzing emergency powers exercised by Michigan's governor to address COVID-19. *In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div.*, No. 161492, 2020 WL 5877599 (Mich. Oct. 2, 2020). There it explained that allowing Michigan's governor "free rein to exercise a substantial part of our state and local legislative authority—including police powers—for an indefinite period of time," namely the ability to "promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property," constituted an unlawful delegation of legislative power to the executive. *Id.* at *18. "The powers conferred by" state law, the court added, "simply cannot be rendered constitutional by the standards 'reasonable' and 'necessary,' either separately or in tandem." *Id.*

Thus, under traditional non-delegation law, the Ordinances are clearly invalid. But even when viewed under

the modern, more lenient non-delegation doctrine, the Ordinances remain unlawful as they lack "procedural and judicial safeguards against arbitrary, unreasonable, or oppressive conduct," *Westring v. James*, 71 Wis. 2d 462, 468, 238 N.W.2d 695 (1976) (emphasis added).

As discussed in the Petition, a variety of procedural safeguards are available, including durational limits, board override or approval provisions, stricter substantive requirements for when an order may be entered and what exceptions must be allowed, or a requirement that the health officer make factual findings. But none of these provisions are present in the ordinances. Instead, the power granted the health officer is virtually unrestricted.

All of this is not to say that policies to cope with COVID-19 are unnecessary. The question is *who* gets to make such policy decisions and *how*. If the health officer is permitted to indefinitely decide by decree how to address the spread of disease—or any other emergency—that necessarily involves the making of law. Our Constitution and statutes say that the Dane County board and Madison common council must do

that, as the local legislative bodies to whom the Legislature has delegated local legislative power.

2. Section 252.03 Does Not Authorize a Ban on All Indoor Gatherings or Permit Closing All Sports-Related Businesses

Even putting aside the non-delegation problem, the ban on indoor gatherings and closure of sports-related businesses exceeded the Health Department's authority under section 252.03, for multiple reasons.

First, this Court has already held that equivalent provisions in section 252.02 do not go this far. In *Palm*, this Court considered the scope of the Wisconsin Department of Health Services' authority under section 252.02's grant of authority to "implement all measures necessary to control communicable disease." Wis. Stat. § 252.02(6); 2020 WI 42 ¶¶ 54–55, 59. Without fully defining the scope of that authority, the Court held that section 252.02 does not allow DHS to "clos[e] businesses" or to "confin[e] all people to their homes." *Palm*, 2020 WI 42, ¶¶ 4, 59.

The operative language Respondents invoke in section 252.03 is nearly identical to that in section 252.02, so the same restriction applies; that is, whatever section 252.03 allows, it does not permit local health officers to close businesses or confine people to their homes. *Compare* Wis. Stat. § 252.03(1) ("all measures necessary to prevent, suppress, and control communicable disease") *with* Wis. Stat. § 252.02(6) ("all emergency measures necessary to control communicable disease").

Yet Emergency Order #10 effectively does both. Under its section covering "Courts, Field, and Sports," the Order says that "[a]ll activities in this section for all individuals are considered Mass Gatherings," and in the very next sentence that "Inside Mass Gatherings of any individuals under this Section who are not from the same household are prohibited." In other words, the Order bans all sport-related activities indoors. If there were any doubt about this from the text of the Order, the Health Department's press release confirms it, stating that "in-person games, sports, competitions, [and]

group exercise classes" are "considered mass gatherings" and that "indoor mass gatherings … are prohibited." Pet. Ex. D.

By prohibiting all indoor sports activities, the Order closes all businesses whose business is indoor sports, such as gymnastics facilities, hockey rinks, and indoor soccer fields, many of which can and have been operating as safely, if not more safely, than many other businesses in Dane County. Petitioner Gymfinity, for example, an 18,466 square-foot gymnastics gymnasium, exists to provide gymnastics education, training, and classes. Orkowski Aff. ¶ 2. The Order prohibits the vast majority of its business, such that Gymfinity expects to lose roughly 40,000 in revenue in the next month due to the order. Orkowski Aff. ¶¶ 35–36. Similarly, the soccer and hockey clubs that Petitioners Becker's and Klein's children participate in immediately shut down after the Order was issued. Becker Aff ¶ 10; Klein Aff. ¶ 30.

Furthermore, by banning any and all indoor gatherings, the Order effectively "confin[es] people to their homes" during the Thanksgiving holiday. While many people have relatives

and loved ones outside Dane County that they can visit during the holiday, many others do not, isolating them during an important holiday.

The Order also exceeds the authority under Section 252.03 by purporting to ban *private* gatherings in private homes and businesses, which is not permitted under the statute. Section 252.03(2) authorizes local health officials to "forbid *public* gatherings," but nowhere authorizes a ban on *private* gatherings. Presumably the Health Department relies on the more general language to "do what is reasonable and necessary," but interpreting that language to allow a ban on any gathering, public or private, effectively reads out of the statute the limitation to "public" gatherings. This Court does not need to decide what constitutes a "public gathering," because whatever that phrase covers, it certainly does not include a small private gathering in a private home, nor does it include private sports-related activities offered in a private business.

3. The Gathering Ban Violates Constitutional Rights to Freedom of Association

Respondents claim the extraordinary authority to ban gatherings of *any* size on *private* property if those gatherings are between individuals who are not members of the same household. That is, the Dane County Health Department believes it may intrude into the very homes of its citizens and tell them who may and may not visit there. Fortunately, the Wisconsin Constitution does not permit such an outrageous order.

Article I, §§ 3 and 4 of the Wisconsin Constitution guarantee Wisconsinites associational freedoms coextensive with those protected by the First Amendment of the federal constitution. *See Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 23 & n.9, 358 Wis. 2d 1, 851 N.W.2d 337.[8] In particular, Wisconsinites possess both "'intrinsic' freedom of association, which protects certain intimate human relationships," and

[8] To be clear, Petitioners raise only claims under the Wisconsin Constitution. Federal cases are nevertheless relevant given this Court's holding that the rights are coextensive.

"'instrumental' freedom of association, which protects associations necessary to effectuate First Amendment rights." *Id.* at ¶ 25.[9] Both are implicated here.

First, the Supreme Court has "long recognized" that associational rights protect "the formation and preservation of certain kinds of highly personal relationships [with] a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). These protected forms of association presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id*. at 619–620. Although the Court has not held that these protected

[9] An additional source of such rights is Article 1, § 1 of the Wisconsin Constitution, which provides that "[a]ll people are born equally free and independent, and have certain *inherent* rights; among these are life, *liberty* and the pursuit of happiness." While this Court has in the past interpreted this section as coextensive with the Fourteenth Amendment, *see Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 35, 383 Wis. 2d 1, 914 N.W.2d 678, as an original matter it is much broader because, unlike the federal Constitution, it "expressly incorporates the people's 'inherent right' to 'liberty.'" *Matter of Visitation of A. A. L.*, 2019 WI 57, ¶ 61 n.16, 387 Wis. 2d 1, 927 N.W.2d 486 (Bradley, J., concurring).

associations are limited to family members, *see Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987), "[t]he personal affiliations that exemplify these considerations … are those that attend the creation and sustenance of a family," such as "cohabitation with one's relatives," *Roberts*, 468 U.S. at 619.

Petitioner Klein here, like many Dane County residents, simply wants to gather with her parents, uncle, and brother to celebrate Thanksgiving, as well as to process her grandmother's recent death and celebrate her life, Klein Aff. ¶¶ 6–16, yet Respondents would deny her family that right. In so doing, they have intruded upon that "private realm of family life which the state cannot enter." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499 (1977) (plurality opinion) (quoting *Prince v. Massachusetts*, 321 U.S. 158 (1994)).

Second, Wisconsinites possess "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Madison Teachers*, 358 Wis. 2d 1, ¶25 (quoting *Roberts*, 468 U.S. at 617–18). That

is, this freedom is "an indispensable means of preserving other individual liberties," *id.* (quoting *Roberts*, 468 U.S. at 618). Gathering with close family to celebrate Thanksgiving, as has been done on this continent since before the founding of this country, surely qualifies. *See Roberts*, 468 U.S. at 622 ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

While "the right to associate for expressive purposes is not … absolute," government must show that its infringement was "adopted to serve compelling state interests … that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623.

Respondents clearly cannot meet this standard. The Order permits all businesses (except sports-related businesses) to remain open. Thus, it permits coworkers to gather indoors at work and allows strangers to be near one another in grocery stores, retails shops, and other commercial

establishments, yet it bans grandparents from visiting their grandchildren, adults from caring for their ailing parents or other relatives, and non-co-habiting couples from seeing one another, in their private homes. Such an Order is not narrowly tailored, rationally tailored, or even rational at all.

4. The Bans Are Neither Reasonable Nor Necessary

Finally, and for similar reasons, the bans on all indoor gatherings in private homes, and on all indoor sports-related businesses, regardless of the nature of the activities, size of the facilities, or precautions taken, are not "reasonable and necessary," Wis. Stat. § 252.03(2), under any definition of those terms. That is evident, without any factual findings required, simply by comparison to what the Order otherwise allows. The Order allows bars, restaurants, salons, retail stores, grocery stores, and all other businesses to remain open. It is in no way reasonable or necessary to allow a 1,000 square foot retail or coffee shop to remain open, while shutting down an 18,000 square foot gymnastics gymnasium, Orkowski Aff. ¶ 2, or a 30,000 square foot indoor soccer

facility, Becker Aff. ¶ 6. Many of these facilities can, and have been, operating safely.

To give just one example, Petitioner Gymfinity has gone to extensive efforts to protect against the spread of COVID-19, including a rigorous screening protocol before anyone may enter the gym (questionnaire, temperature checks, hand washing), masks at all times, social distancing everywhere possible, adjusted schedules and rotations to limit contact, dividing the gym into discrete sections, a thorough cleaning regime between classes and between station rotations during classes, hand washing after every time an instructor touches a student, nightly disinfectant spray, a weekly antiviral chemical "bomb" advertised to kill 99.9% of viruses, custom-made foot pulls on doors to allow hands-free opening, and a variety of other things. Orkowski Aff. ¶¶ 11–31. As a result of these efforts, Gymfinity to date has not had any COVID-19 cases linked to its gymnastics classes that its owner is aware of. Orkowski Aff. ¶ 31.

Likewise, the ban on all indoor gatherings in private homes, between close family and friends, while allowing

coworkers to gather at work and strangers to gather in grocery stores, restaurants, and other retail shops is also patently unreasonable and unnecessary. The Dane County Health Department cannot reasonably allow people to shop on Black Friday, while prohibiting them from seeing their loved ones, in their own homes, on Thursday.

B. Petitioners Will Suffer Irreparable Harm Without an Injunction

The breadth of Emergency Order #10 is extraordinary, and the harms it will cause are immediately apparent. Thanksgiving is one of the most precious holidays to gather with family, share a meal, and celebrate all that is good, and such moments are critical for emotional and spiritual health, especially during the extended isolation caused by this pandemic. Yet the Order prohibits these precious moments, none of which can be regained.

The private gathering ban will also result in deep inequities. If the Order is not enjoined, families with means or property outside Dane County can and likely will simply leave the county to gather elsewhere. Only those who have

nowhere else to go will be forced to either isolate at home or risk a $1000 fine.

And, to the extent the gathering ban is enforced, any enforcement will be, at best, arbitrary, and, at worst, discriminatory or retaliatory. Undoubtedly many people will disregard the order; and, as a result, who ends up being targeted for enforcement will be left to the whim of local officials.

Studies are beginning to show the immense toll isolation during this pandemic is taking. One recent study found that 13,200 more people have died from Alzheimer's and dementia than expected since the shutdowns began. *See* William Wan, *Pandemic isolation has killed thousands of Alzheimer's patients while families watch from afar*, Washington Post (Sept. 16, 2020).[10] Others have found increases in suicide rates, substance abuse, and other mental health issues. *See* Yalda Safai, *Predictions of more suicides,*

[10] https://www.washingtonpost.com/health/2020/09/16/coronavirus-dementia-alzheimers-deaths/?arc404=true

overdoses and domestic abuse during COVID are coming true, ABC News (Oct. 28, 2020).[11]

Petitioner Klein's grandmother, for example, recently passed away, and she believes her death was hastened by isolation. Klein Aff. ¶¶ 8–9. Petitioner Klein intended to host a small gathering with her parents, her uncle, and her brother, who would otherwise be alone, not only to celebrate the holiday, but also to process her grandmother's passing and celebrate her life. Klein Aff. ¶¶ 6–8, 11–12. Petitioner Klein is deeply concerned about the mental toll on her children, her family, and herself if they are unable to gather. Klein Aff. ¶¶ 11–15. Yet the Order creates fear that they will be fined if they do. Klein Aff. ¶ 16.

The harms from the total ban on all indoor sports activities are also obvious. The order operates as a de facto closure of any business whose business is indoor sports activities, such as gymnastics studios, hockey rinks, and

[11] https://abcnews.go.com/Health/predictions-suicides-overdoses-domestic-abuse-covid-coming-true/story?id=73836752

indoor soccer fields. Many of these facilities are large and can, and have been, operating safely.

Petitioner Gymfinity, for example, an 18,466 square foot gymnastics studio, exists to provide gymnastics education, training, and classes, and the Order prohibits the vast majority of its business. Orkowski Aff. ¶ 2. As a result of the Order, Gymfinity expects to lose roughly $40,000 in revenue, just in the next month. Those losses are irreparable, due to government immunity doctrines. *See generally Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 298–301, 240 N.W.2d 610 (1976); *see also Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable."). Likewise, the hockey and soccer clubs that Petitioners Klein's and Becker's children participate in were forced to immediately shut down in response to the Order. Becker Aff. ¶ 10; Klein Aff. ¶ 30.

The indoors sports ban harms the young people those facilities serve. Gymfinity provides training to four young

women in high school who are competing for scholarship opportunities, and Emergency Order #10 prevents these young women from continuing their training regime, which, in turn, jeopardizes their participation in the 2020–21 gymnastics season and threatens their college recruitment and scholarship opportunities. Orkowski Aff. ¶¶ 8–10.

Similarly, for Petitioners Becker and Klein, sports like soccer and hockey provide one of the most important outlets for their children to develop physically, mentally, and socially. Klein Aff. ¶¶ 18–20, 29–31; Becker Aff ¶¶ 5, 11–13. Both have already seen the damaging effects of isolation on their children and anticipate further decline due to the sports ban. Klein Aff. ¶¶ 18–20, 29–31; Becker Aff. ¶¶ 5, 12.

The benefits of sports for children and adolescents are widely known. According to a recent report from the American Academy of Pediatrics, the benefits include not only "physical skills, such as hand-eye coordination, functional movement skills and strength," but also "academic, self-regulatory, and general life skills," "better overall mental health," a "decrease in cardiovascular risk, overweight, and obesity," "improved

social identity and social adjustment," "higher cognitive performance" in school," and a variety of other things. *See* American Academy of Pediatrics Council on Sports Medicine and Fitness, *Organized Sports for Children, Preadolescents, and Adolescents* (June 2019).[12] And the physical, mental, emotional, and social benefits of sports are that much more important now, during a pandemic, as they provide one of the few outlets for young people.

Many sports can be conducted safely, even indoors. Gymfinity has implemented extensive precautionary measures and has not had any COVID incidents to date. Orkowski Aff. ¶¶ 11–32. Likewise, the soccer and hockey teams Petitioner Klein's and Becker's children participate in have also taken numerous precautions, and they are not aware of any COVID incidents originating from those teams or activities. Klein Aff. ¶ 21–21; Becker Aff. ¶¶ 8–9. Gymnastics gymnasiums, hockey rinks, indoor soccer fields, and the like, are often huge facilities: Gymfinity's is 18,466

[12] https://pediatrics.aappublications.org/content/143/6/e20190997

square feet, Orkowski Aff. ¶ 2, the Madison 56ers' indoor facility is roughly 30,000 square feet, Becker Aff. ¶ 6. There is no reason whatsoever that indoor sports facilities cannot continue to safely operate.

An injunction is also necessary to preserve the status quo. Until last week, one week before Thanksgiving, people were allowed to visit and care for their family and loved ones in their own homes. And indoor sports facilities were safely holding practices, trainings, and games, providing children the physical outlet they need. The Order dramatically altered the status quo, and only an injunction can restore it.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant this Emergency Petition for an Original Action and immediately enjoin Order #10 to the extent that bans all indoor gatherings and prohibits all indoor sports activities.

Dated: November 23, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Memorandum is being served on all opposing parties via first-class mail and electronic mail.

Dated: November 23, 2020.

LUKE N. BERG