

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH __

DANE COUNTY

JEFFREY BECKER
[REDACTED]
[REDACTED]

ANDREA KLEIN
[REDACTED]
[REDACTED]

Plaintiffs,

v.

Declaratory Judgment
Case Code: 30701
Case No. 21-CV-

DANE COUNTY
210 Martin Luther King Jr. Blvd., Room 426
Madison, WI 53703

JANEL HEINRICH, in her official capacity as Public
Health Officer and Director of Public Health of Madison &
Dane County,
210 Martin Luther King Jr. Blvd., Room 507
Madison, Wisconsin 53703

PUBLIC HEALTH OF MADISON & DANE COUNTY
210 Martin Luther King Jr. Blvd., Room 507
Madison, Wisconsin 53703

Defendants.

COMPLAINT

Plaintiffs Jeffrey Becker and Andrea Klein, by their undersigned attorneys at the Wisconsin Institute for Law & Liberty, hereby allege as follows:

INTRODUCTION

1. The Dane County Board is the body vested with local legislative authority in Dane County, yet, through a certain ordinance, it has transferred its legislative power to the local health

officer for as long as she deems necessary to prevent the spread of COVID-19, without any duration or oversight by the county board, and she has used that authority since May to rule all aspects of life in Dane County. This transfer of power violates the non-delegation doctrine—the principle that legislative bodies may not cede their policy-making role to unelected and unaccountable officials without sufficient constraints—as well as various state statutes and constitutional provisions. Plaintiffs ask this Court to declare this ordinance illegal and to enjoin enforcement of any orders issued in reliance on it.

2. This case is not about what restrictions are appropriate during the ongoing COVID pandemic, which is admittedly serious. It is about who decides and how. Plaintiffs do not object to and do not challenge many of the restrictions in the current health order. But Plaintiffs believe that some of the restrictions are unreasonable and unnecessary, and they would lobby their elected representatives for reasonable changes were it not for the unlawful delegation. Because all of these decisions are being made by a single, unelected and unaccountable official, however, Plaintiffs have no other option but to file this lawsuit to restore the proper balance of power.

PARTIES

3. Plaintiff Jeffrey Becker is a taxpayer and resident of Dane County, [REDACTED] Wisconsin. Plaintiff Becker and his children have been directly impacted by the restrictions in the Dane County Health Department’s ongoing COVID-related orders, especially the sports-related restrictions.

4. Plaintiff Andrea Klein is a taxpayer and resident of Dane County, residing at [REDACTED] Wisconsin. Plaintiff Klein and her children have been directly impacted by the restrictions in the Dane County Health Department’s ongoing COVID-related orders, especially the sports-related restrictions.

5. Defendant Dane County is a county of the State of Wisconsin, established pursuant to Wis. Stat. §§ 2.01, 59.01. Dane County maintains and enforces the ordinance challenged herein. Dane County Ordinance § 46.40; *see* Wis. Stat. § 59.02. Dane County's principal office is located at 210 Martin Luther King Jr. Blvd., Room 426, in the City of Madison, Wisconsin.

6. Defendant Janel Heinrich is the Public Health Officer and Director of Public Health of Madison & Dane County, and is named in her official capacity. Defendant Heinrich maintains her principal office at 210 Martin Luther King Jr. Blvd., Room 507, in the City of Madison, Wisconsin. Defendant Heinrich has issued all of the Dane County Health Department's COVID-related health orders, including the current order, Emergency Order #12. Defendant Heinrich has spent taxpayer funds to develop, publicize, and enforce these orders.

7. Defendant Public Health of Madison & Dane County ("Health Department") is a city-county health department serving the City of Madison and the rest of Dane County. Defendant Public Health of Madison & Dane County maintains its principal office at 210 Martin Luther King Jr. Blvd., Room 507, in the City of Madison, Wisconsin. Defendant Public Health of Madison & Dane County is the entity responsible for administering Defendant Heinrich's COVID-related health orders, including the current order, Emergency Order #12. Defendant Public Health of Madison & Dane County has spent taxpayer funds to help develop and implement these orders.

JURISDICTION AND VENUE

8. This is an action for declaratory and injunctive relief under Wis. Stat. §§ 806.04 and 813.01.

9. Venue in this Court is proper pursuant to Wis. Stat § 801.50(2).

STATEMENT OF FACTS

10. In March 2020, in response to the then-emerging COVID-19 pandemic, Governor Tony Evers declared a state of emergency and issued an order, pursuant to his emergency powers under Wis. Stat. § 323.12, shutting down much of ordinary life throughout Wisconsin for 60 days. *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 2, 391 Wis. 2d 497, 942 N.W.2d 900.

11. When the emergency declaration was about to expire without extension by the Wisconsin Legislature, the Secretary of the Department of Health Services (DHS) issued a new, equivalent order, this time pursuant to Wis. Stat. § 252.02. *Id.* ¶¶ 5–8.

12. The Wisconsin Legislature challenged the order on the ground that it met the definition of a “rule” and therefore should have been promulgated through the rulemaking procedures in Chapter 227, allowing legislative oversight, and the Wisconsin Supreme Court agreed, invalidating and enjoining the order. *Palm*, 2020 WI 42, ¶¶ 15, 58–59.

13. In addition to holding that the order met the definition of a “rule,” the Supreme Court also explained that 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 violate the non-delegation doctrine if they were interpreted to allow the DHS secretary both to 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.

14. After the Supreme Court’s decision, Governor Evers did not pursue a new emergency rule. See Riley Vetterkind, *Evers administration won’t pursue new COVID-19 restrictions amid impasse with GOP*, Wisconsin State Journal (May 19, 2020).¹

15. In the wake of *Palm*, many local health departments considered whether to adopt their own local orders pursuant to the analogous, and seemingly broad, authority in Wis. Stat. § 252.03 to “do what is reasonable and necessary for the prevention and suppression of disease.”

16. But the Wisconsin statutes do not provide any enforcement mechanism for a broad local health order that purports to regulate or prohibit normal activities.

17. A recent analysis by the Wisconsin Counties Association noted that “[n]either the statutes nor the administrative code provide for a detailed enforcement mechanism of a local health officer’s general order.” See Wisconsin Counties Association, *Guidance in Implementing Regulations Surrounding Communicable Disease* 27–40 (August 2020).²

18. In light of this, counties and cities have taken one of three approaches since *Palm*.

19. First, many local governments simply rescinded their orders in favor of encouraging voluntary compliance with DHS and CDC recommendations and have not since adopted any new orders. See Mitchell Schmidt, *Some Wisconsin counties rescind local stay-at-home orders, Dane County order to stay in place*, Wisconsin State Journal (May 16, 2020).³

¹ https://madison.com/wsj/news/local/govt-and-politics/evers-administration-wont-pursue-new-covid-19-restrictions-amid-impasse-with-gop/article_86186768-a9a4-5ff2-947c-db0caef9767.html

² Available at <https://www.co.dodge.wi.gov/home/showpublisheddocument?id=39868>

³ https://madison.com/wsj/news/local/govt-and-politics/some-wisconsin-counties-rescind-local-stay-at-home-orders-dane-county-order-to-stay-in/article_3b4d1e92-4f00-5348-ab15-72ba8fc572da.html

20. In other jurisdictions, the local governing body (county board, city council, etc.) adopted COVID-related restrictions in ordinances via the normal local legislative process. *See, e.g., Alison Dirr, Milwaukee Common Council approves requiring masks in public spaces, Milwaukee Journal Sentinel (July 13, 2020).*⁴

21. A handful of jurisdictions, like Dane County, preferred to allow the local health officer to continue to make these critical policy decisions on her own, and, to address the lack of any enforcement mechanism in state law, proposed ordinances to expand their local health officer's powers. *See generally MacIver Institute, UPDATED: County Governments Seeking Great Powers For Public Health Bureaucrats, Despite Public Opposition (Aug. 4, 2020).*⁵

⁴ <https://www.jsonline.com/story/news/local/milwaukee/2020/07/13/milwaukee-common-council-approves-mask-requirement/5363137002/>

⁵ <https://www.maciverinstitute.com/2020/08/county-governments-seeking-great-powers-for-public-health-bureaucrats-despite-wi-supreme-court-safer-at-home-decision/>

22. These proposed ordinances faced significant backlash, and many were tabled or scrapped entirely, *see generally id.*, including in Chippewa,⁶ Dodge,⁷ Eau Claire,⁸ Jefferson,⁹ Oconto,¹⁰ and St. Croix¹¹ counties.

23. Only three counties that Plaintiffs are aware of (Dane, Door,¹² and Pierce¹³) have adopted ordinances preemptively making any order of the local health officer enforceable without limits or oversight by the county board.

24. And only Dane County's local health officer has issued orders in reliance on such an ordinance, that Plaintiffs are aware of.

⁶ Carla Rogner, *Chippewa County votes down health ordinance as dozens protest*, WEAU 13 News (Sept. 17, 2020), <https://www.weau.com/2020/09/17/chippewa-county-votes-down-health-ordinance-as-dozens-protest/>

⁷ See Ken Thomas, *Dodge County weighs COVID ordinance: Approval not likely before December*, Daily Citizen (Oct. 6, 2020), https://www.wiscnews.com/bdc/news/local/dodge-county-weighs-covid-ordinance-approval-not-likely-before-december/article_17339330-024b-528c-ac05-3b563828883e.html

⁸ Sarah Seifer, *Eau Claire County's coronavirus health order knocked down*, Leader-Telegram (Oct. 15, 2020), https://www.leadertelegram.com/covid-19/eau-claire-county-s-coronavirus-health-order-knocked-down/article_08cfebc2-bffa-5846-8ae3-a99b58df2346.html

⁹ Steve Sharp, *County board nixes health ordinance*, Daily Jefferson County Union (Jul. 15, 2020), https://www.dailyunion.com/news/county-board-nixes-health-ordinance/article_64dae5eb-6c9f-56c1-8d87-4111e4795ced.html

¹⁰ Warren Bluhm, *County Board delays vote on emergency powers*, New Media Inc. (May 26, 2020), <https://newmedia-wi.com/content/county-board-delays-vote-emergency-powers>

¹¹ Rebecca C. Mariscal, *St. Croix County COVID ordinance fails in 9-10 vote*, RiverTowns (Nov. 18, 2020), <https://www.rivertowns.net/news/government-and-politics/6767946-St.-Croix-County-COVID-ordinance-fails-in-9-10-vote>.

¹² Door County Ordinance ch. 38, § 3, available at <https://www.co.door.wi.gov/DocumentCenter/View/2653/Chapter-38---Emergency-Declaration-by-County-Board-and-Authority-and-Duties-of-Local-Health-Officer>

¹³ Pierce County Ordinance § 120-2, available at https://www.co.pierce.wi.us/Ordinances_Resolutions/Ord_Res%202020/Ord_Res_2020.pdf (pages 5–6).

25. Winnebago County, by contrast, in November adopted an ordinance providing that any order of the local health officer is “advisory only” until approved by the county board, and contains durational limits.¹⁴

26. Dane County Ordinance § 46.40, the ordinance challenged herein, was adopted by the Dane County Board on May 21, 2020, signed by the county executive on May 22, and published on June 1. A true and accurate copy of that ordinance is attached to this Complaint as Exhibit A.

27. As relevant here, subsection (2) of the ordinance provides 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.”

28. Dane County’s ordinance stands in stark contrast to the recommendations of the Wisconsin Counties Association, which has suggested various “methods of providing legislative oversight” by the local legislative body in light of the non-delegation doctrine. *See* Guidance, *supra* ¶ 17, at 37–39.

29. To give examples of the types of oversight available, Eau Claire’s proposed ordinance¹⁵ (which was *rejected* by the Eau Claire county board, *see supra* n. 8), contained both “substantive” and “procedural” safeguards, including a county board override provision, a

¹⁴ Alex Groth, *Winnebago County Board votes to approve ordinance to give health officer enforcement powers to fight spread of COVID-19*, Oshkosh Northwestern (Nov. 18, 2020), <https://www.thenorthwestern.com/story/news/2020/11/18/winnebago-county-votes-approve-give-health-officer-enforcement-powers-fight-spread-covid-19/6332487002/>; *see* Winnebago County Ordinance No. 96-102020, available at https://www.co.winnebago.wi.us/sites/default/files/CountyClerk/OtherDocuments/096-102020_amend_0.pdf.

¹⁵ Available at <https://www.co.eau-claire.wi.us/home/showdocument?id=37798>

durational limit (absent extension by the county board), a separate, maximum durational limit even with county board approval, stricter substantive requirements for when an order may be entered and what exceptions must be allowed, and a requirement that the local health officer make various findings to support the factual and scientific basis for any order.

30. And, as noted above, Winnebago County’s ordinance provides that any orders from the local health officer are advisory only until adopted by the county board.

31. In reliance on Dane County’s ordinance, Defendant Heinrich has since May issued a series of orders imposing an array of restrictions on private activity.¹⁶

32. The Dane County Board has not voted on or ratified any of these orders, instead allowing Defendant Heinrich and the Dane County Health Department to control indefinitely all aspects of life in Dane County.

33. Illustrating the breathtaking scope of the unlawful delegation, on November 17, one week before Thanksgiving, Defendant Heinrich issued Emergency Order #10, prohibiting all indoor gatherings between individuals not in the same immediate household, effectively banning small Thanksgiving gatherings in private homes among family and loved ones.¹⁷

34. The Health Department issued a press release on the same day as the Order, threatening “fine[s] of up to \$1,000” for “anyone hosting a gathering.”¹⁸

¹⁶ See *Current Order*, Public Health, Madison & Dane County (see section entitled “Past Orders”), <https://publichealthmdc.com/coronavirus/forward-dane/current-order>

¹⁷ Emergency Order #10, Public Health Madison & Dane County (Nov. 17, 2020), https://publichealthmdc.com/documents/2020-11-17_Order_10.pdf

¹⁸ *New Public Health Order Prohibits Indoor Gatherings, Limits Outdoor Gatherings to 10 People*, Public Health Madison & Dane County (Nov. 17, 2020), <https://publichealthmdc.com/news/new-public-health-order-prohibits-indoor-gatherings-limits-outdoor-gatherings-to-10-people>

35. Emergency Order #10 also banned all indoor sports within Dane County, regardless nature of the activities, size of the facility, or protective measures taken, effectively shutting down sports-related businesses like gymnastics gymnasiums, indoor soccer fields, and hockey rinks. *See* Emergency Order #10 at § 4.c.v, *supra* n. 17.

36. Yet the order continued to allow other businesses to operate, confusingly allowing gyms and fitness centers to remain open at 50% capacity.

37. The Health Department attempted to resolve the obvious conflict in a blog post, where it explained that “[i]ndoor gyms, courts, swimming pools can operate at 50% capacity *as long as no scheduled activities are taking place.*”¹⁹

38. On November 23, the Plaintiffs in this action filed a petition for original action with the Wisconsin Supreme Court, raising the non-delegation claim raised here, as well as other claims against the indoor gathering ban and ban on indoor sports activities. *Gymfinity v. Dane County*, No. 2020AP1927-OA.

39. On December 15, while that Petition was outstanding, Defendant Heinrich issued a new order (Emergency Order #11), withdrawing the indoor gathering and indoor sports bans and replacing them with a 10-person limit on indoor gatherings and “scheduled” indoor sports activities.

40. On December 21, the Wisconsin Supreme Court denied the petition for an original action in a 4-3 decision, a true and accurate copy of which is attached to this Complaint as Exhibit B. The three dissenting Justices would have granted the petition, and Justice Hagedorn, who concurred in the denial, agreed that the petition presented “important statutory and constitutional

¹⁹ Public Health Madison & Dane County, *What’s Allowed in Emergency Order #10* (Nov. 19, 2020), <https://publichealthmdc.com/blog/whats-allowed-in-emergency-order-10>

questions that deserve judicial scrutiny,” in particular the non-delegation claim, but concluded that the case should begin in circuit court.

41. On January 11, Defendant Heinrich issued Emergency Order #12, the current order, which lasts for 28 days. A true and accurate copy of this order is attached to this Complaint as Exhibit C.

42. The current order continues to impose significant restrictions, including on sports, of particular concern to Plaintiffs.

43. Order #12 imposes a 10-person limit on “scheduled” indoor sports activities (like soccer and hockey practices, etc.), regardless of the size of the facility or precautions taken, while simultaneously imposing only a 50% capacity limit on other gyms for *unscheduled* activities, without justifying how such a distinction prevents the spread of COVID-19. Order § 3.b; 5.e; *see supra* par. 37.

44. The Order also prohibits any “[g]ames and competitions” for “medium and high-risk sports,” even outdoors, while allowing games for “low-risk” sports. Order § 3.b.

45. The Order itself does not specify which sports the Dane County Health Department deems “low-risk” and which it deems “medium and high-risk.”

46. Instead, the Dane County Health Department has issued a separate “guidance” document (Sports Guidance) listing which sports fall into which categories. A true and accurate copy of that guidance document is attached to this Complaint as Exhibit D.

47. According to the Sports Guidance, “medium-risk” sports include soccer, basketball, baseball, volleyball, ultimate Frisbee, doubles tennis, “cycling in a group,” “running in a close group,” and various other sports. Ex. F. “High-risk” sports include football, hockey, lacrosse,

rugby, boxing, judo, karate, taekwondo, wrestling, pairs figure skating, ice dancing, group dance, and group cheer. Ex. F.

48. Plaintiff Becker is the father of four children, three of whom participate in the Madison 56ers, a soccer club based in Dane County, with a large indoor facility in Oregon, Wisconsin. As a direct result of the Dane County Health Department's sports restrictions, described further below, his children's soccer teams have been unable to compete within Dane County, requiring significant time and expense to travel outside Dane County to compete. Furthermore, the 10-person limit on all "scheduled" indoor sports activities has significantly reduced the available practice time for the 56ers' members.

49. Plaintiff Klein is the mother of three boys, two of whom participate in the Stoughton Youth Hockey Association. As a direct result of the Dane County Health Department's sports restrictions, described further below, her children's hockey teams have been unable to compete within Dane County, causing them significant time and expense to drive outside Dane County to compete.

50. Plaintiffs believe the sports-related restrictions are both unreasonable and unnecessary, for multiple reasons.²⁰

51. Recent research from the University of Wisconsin School of Medicine and Public Health found that "participation in sports is not associated with an increased risk of COVID-19

²⁰ To be clear, Plaintiffs' claims do not rely on, nor do they intend to litigate, anything in paragraphs 51–56 below. Plaintiffs raise purely legal issues and affirmatively disclaim reliance on anything in these paragraphs. Plaintiffs include these paragraphs to show that there are good arguments against the sports restrictions, arguments they would raise with their elected representatives, but for the unlawful delegation.

among Wisconsin high school student-athletes,” based on a survey of 207 schools in Wisconsin that allowed sports during the fall.²¹

52. Another study from UW Madison, of soccer specifically, surveyed 124 clubs from 34 states, serving over 90,000 soccer players, and found only *one case* of COVID-19 “reportedly traced to transmission during soccer.”²²

53. Dane County is the only county in Wisconsin that Petitioners are aware of to place such severe restrictions on outdoor sports.

54. According to Forward Madison, Madison’s professional soccer team, it is “the only one of 70 active men’s pro soccer teams in the U.S. that isn’t allowed to practice in its home market,” and only one of two teams that cannot play competitive games. Todd D. Milewski, *Uncertainty of where it’ll play 2021 season weighs on Forward Madison FC*, Wisconsin State Journal (Oct. 16, 2020).²³

55. 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

²¹ *COVID-19 in Wisconsin High School Athletics: Study Summary*, <https://ortho.wisc.edu/wp-content/uploads/2020/10/WI-HS-Sports-COVID-19-Summary.pdf>

²² *COVID-19 in Youth Soccer Study: Executive Summary*, <https://ortho.wisc.edu/wp-content/uploads/2020/09/COVID-19-in-Youth-Soccer.pdf>

²³ https://madison.com/wsj/sports/soccer/uncertainty-of-where-itll-play-2021-season-weighs-on-forward-madison-fc/article_101d7969-bab5-5168-a8e3-0ccf1a33d277.html

of Pediatrics Council on Sports Medicine and Fitness, *Organized Sports for Children, Preadolescents, and Adolescents* (June 2019).²⁴ 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.

56. Rather than shutting down athletics, the ban on competitions for most team sports has instead pushed many teams to travel outside Dane County to compete—which may be *worse* for the spread of COVID-19. See Greg Dixon, *Sun Prairie will permit winter sports competitions outside Dane County starting Jan. 23*, Wisconsin State Journal (Jan. 11, 2021) (reporting that the Sun Prairie, “Belleville, Waunakee, DeForest, Verona, McFarland, Monona Grove, Mount Horeb, Oregon, Stoughton, Wisconsin Heights and Deerfield” school districts “recently approved competing outside the county”).²⁵

57. But for the unlawful delegation to the local health officer, Plaintiffs could—and would—lobby their elected representatives for more reasonable limits and restrictions.

CAUSES OF ACTION

CLAIM ONE: Violation of Wis. Stat. §§ 251.06, 252.25, and 252.03

58. Plaintiffs reallege and incorporate the preceding allegations of the complaint.

59. Counties have “no inherent power to govern,” but instead are “totally [] creature[s] of the legislature,” and therefore their “powers must be exercised within the scope of authority ceded to [them].” *Milwaukee Cty. v. Milwaukee Dist. Council 48-Am. Fed’n of State, Cty. & Mun. Employees, AFL-CIO*, 109 Wis. 2d 14, 33, 325 N.W.2d 350 (Ct. App. 1982); *Jackson Cty. v. State*,

²⁴ <https://pediatrics.aappublications.org/content/143/6/e20190997>

²⁵ https://madison.com/wsj/sports/high-school/sun-prairie-will-permit-winter-sports-competitions-outside-dane-county-starting-jan-23/article_b149c63e-4998-5c8e-9cd9-131ca2a6fa42.html

Dep't of Nat. Res., 2006 WI 96, ¶ 16, 293 Wis. 2d 497, 717 N.W.2d 713 (citation omitted); *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 21, 373 Wis. 2d 543, 892 N.W.2d 233.

60. A “necessary corollary to this principle is that a [county] may not create authority *ex nihilo*, either for itself or its divisions.” *Wisconsin Carry*, 2017 WI 19, ¶ 22.

61. Multiple public-health-related statutes indicate that local health officers do not have authority to unilaterally issue enforceable general orders regulating and penalizing otherwise lawful conduct.

62. Wis. Stat. § 251.06 gives local health officers authority to enforce “*state* public health statutes and rules” and “any ordinances that the relevant governing body enacts, if those regulations and ordinances are consistent with state public health statutes and rules,” *id.* § 251.06(c), (d), but does not give a local health officer authority to issue and enforce her own orders regulating or prohibiting otherwise lawful conduct.

63. Similarly, Wis. Stat. § 252.25, entitled “[v]iolation of law relating to health,” provides certain penalties for violating “any *state* statute or rule, county, city or village *ordinance* or *departmental* [DHS] order,” but does not provide any penalties for an order issued by a local health official.

64. Nothing in Wis. Stat. § 252.03 authorizes local health officers to issue enforceable general orders regulating and penalizing otherwise lawful conduct. The only mention of enforcement references “enforc[ing] the communicable disease *statutes* and *rules*.” Wis. Stat. § 252.03(3).

65. Section 252.03 also does not, anywhere, use the word “order,” unlike section 252.02, the DHS analogue, which does, *id.* § 252.02(4). This contrast is consistent with the lack of any reference to enforcement of a local “order” in Wis. Stat. § 252.25.

66. Dane County Ordinance § 46.40(2) violates these statutes by purporting to expand the authority of the local health officer by making any order that she issues automatically enforceable.

CLAIM TWO: VIOLATION OF WIS. STAT. § 66.0113

67. Plaintiffs reallege and incorporate the preceding allegations of the complaint.

68. Wis. Stat. § 66.0113 authorizes “the governing body of a county ... [to] by ordinance adopt and authorize the use of a citation under this section to be issued for violations of *ordinances*” (not orders of local administrative officials).

69. Nothing in Wis. Stat. § 252.03 authorizes citations for a general order issued unilaterally by a local health officer.

70. Dane County Ordinance § 46.40(2) violates Wis. Stat. § 66.0113 by authorizing a citation for violations of any order issued by the local health officer.

CLAIM THREE: State Law Preemption

71. Plaintiffs reallege and incorporate the preceding allegations of the complaint.

72. A local ordinance is preempted by state law if: (1) “the legislature has expressly withdrawn the power of municipalities to act”; (2) “the ordinance logically conflicts with the state legislation”; (3) “the ordinance defeats the purpose of the state legislation”; or (4) “the ordinance goes against the spirit of the state legislation.” *Wisconsin Carry*, 2017 WI 19, ¶ 64 (quoting *Anchor Sav. & Loan Ass’n v. Equal Opportunities Comm’n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984)).

73. As described above, Wis. Stat. §§ 251.06, 252.25, 252.03, and 66.0113, all indicate that a local health officer may not unilaterally issue and enforce general orders prohibiting, regulating, and penalizing otherwise lawful conduct.

74. In addition to those provisions, Wis. Stat. § 323.14, covering emergencies generally, further indicates the Legislature’s intention that the county board will play a role during a crisis. That section provides that “the emergency power of the governing body conferred under s. 323.11 includes the general authority to *order*, by *ordinance or resolution*, whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government.” The county executive may “exercise” the county board’s emergency powers if the board “is unable to meet promptly,” but any action taken by the county executive is “subject to ratification, alteration, modification, or repeal by the governing body as soon as that body can meet.” *Id.* § 323.14(4)(b).

75. Nothing in Wis. Stat. § 252.03 authorizes citations for a general order issued unilaterally by a local health officer.

76. Dane County Ordinance § 46.40 “logically conflicts with,” “defeats the purpose of,” and “goes against the spirit of” these statutes by enabling the Dane County health officer to unilaterally issue and enforce any order she deems reasonable and necessary to prevent the spread of COVID-19 without any involvement or oversight by the local governing body.

CLAIM FOUR: Violation of the Non-Delegation Doctrine

77. The non-delegation doctrine, at a high level, is the proposition that a legislative body may not “delegate any of the powers which peculiarly and intrinsically belong to [it].” *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717, 718 (1931).

78. Local government is structured similarly to state government, dividing power between a multiple-member legislative body with local legislative authority (the county board), Wis. Stat. §§ 59.01; 59.02; 59.10–15, and an executive branch headed by a single, executive official (county executive or administrator) tasked with enforcement and administration of the duly

enacted ordinances and laws, Wis. Stat. §§ 59.17(2); 59.18(2). *See Schuette v. Van De Hey*, 205 Wis. 2d 475, 480, 556 N.W.2d 127 (Ct. App. 1996).

79. While the non-delegation doctrine has traditionally been applied to guard the boundaries of the legislative and executive branches at the state level, it applies equally at the local level. *See French v. Dunn Cty.*, 58 Wis. 402, 17 N.W. 1, 2 (1883) (“There 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.”); *State ex rel. Nehrbass v. Harper*, 162 Wis. 589, 156 N.W. 941, 942 (1916) (“[A] common council cannot re-delegate legislative power properly delegated to it.”); *see also* 61 Att’y. Gen. Op. 214, 215–16 (1972).

80. Prohibiting, regulating, and penalizing otherwise lawful private activity is a quintessential exercise of legislative power. *See Palm*, 2020 WI 42, ¶¶ 31–42; *Schuette*, 205 Wis. 2d at 480–81.

81. As currently applied by the Wisconsin Supreme Court, the non-delegation doctrine prohibits “[a] delegation of legislative power to a subordinate agency [unless] the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or agency acts within that legislative purpose.” *Palm*, 2020 WI 42, ¶ 33 (quoting *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971)).²⁶

²⁶ While the ordinance challenged herein violates the non-delegation doctrine as currently framed, Plaintiffs hereby preserve arguing for an expanded non-delegation doctrine, should this case reach the Wisconsin Supreme Court, given that multiple U.S. Supreme Court and Wisconsin Supreme Court Justices have recently called for a reconsideration of that doctrine. *See Koschkee v. Taylor*, 2019 WI 76, ¶¶ 42–57, 387 Wis. 2d 552, 929 N.W.2d 600 (R.G. Bradley, J., concurring); *Palm*, 2020 WI 42, ¶¶ 101–07 (Kelly, J., concurring); *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting); *id.* at 2131

82. Dane County Ordinance § 46.60(2) violates the non-delegation doctrine by preemptively making enforceable any order that the Dane County health officer deems “reasonable and necessary” to control the pandemic, without sufficient substantive and procedural safeguards, effectively “endow[ing] [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.

83. While the authorization to “do what is reasonable and necessary” is found in Wis. Stat. § 252.03, the ordinance is the proper target of a non-delegation challenge because it converts what would otherwise be unenforceable into something enforceable. *Supra* Claim One; *see Palm*, 2020 WI 42, ¶¶ 33–42 (emphasizing the enforcement mechanism in the context of the non-delegation doctrine); *id.* ¶¶ 256–58 (Hagedorn, J., dissenting) (noting that Wis. Stat. § 252.25 would be the proper target of a non-delegation challenge); *see also Gundy*, 139 S. Ct. at 2144–45 (Gorsuch, J., dissenting).

84. However, to the extent this Court disagrees, or concludes that general orders regulating otherwise lawful conduct issued pursuant to Wis. Stat. § 252.03 are enforceable on their own, then § 252.03 itself violates the non-delegation doctrine.

CLAIM FIVE: Violation of Article IV, § 22

85. Plaintiffs reallege and incorporate the preceding allegations of the complaint.

86. Article IV, § 22 of the Wisconsin Constitution provides that “[t]he 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.”

(Alito, J. concurring); *Paul v. United States*, 140 S. Ct. 342 (2019) (Statement of Kavanaugh, J., respecting denial of writ of certiorari) (collecting cases).

87. The Wisconsin Supreme Court has held that this provision means “the legislature c[an] not empower a county board to delegate to the electors of the county a power by the Constitution expressly delegated to the county board itself.” *Marshall v. Dane Cty. Bd. of Sup’rs*, 236 Wis. 57, 294 N.W. 496, 496 (1940); *Meade v. Dane Cty.*, 155 Wis. 632, 145 N.W. 239, 243 (1914).

88. In the same way, Dane County Ordinance § 46.40 (or Wis. Stat. § 252.03, *supra* par. 83–84) violates Article IV, § 22, by transferring local legislative authority vested in the Dane County Board to the local health officer.

CLAIM SIX: Violation of Wis. Stat. §§ 59.02 and 59.03

89. Plaintiffs reallege and incorporate the preceding allegations of the complaint.

90. Wis. Stat. § 59.03(2) provides that “the *board* of any county is vested with all powers of a local, legislative and administrative character.”

91. Wis. Stat. § 59.02(1) further provides 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,” following the legislative procedure set forth therein (majority vote of a quorum of the board).

92. The Wisconsin Supreme Court, interpreting the predecessor to Wis. Stat. § 59.02, explained that, while this section “contemplates that some powers of a county board may be exercised by a committee pursuant to resolution,” “[t]here are, however, limitations on the power of the board to delegate *even administrative* functions.” *First Sav. & Tr. Co. v. Milwaukee Cty.*, 158 Wis. 207, 148 N.W. 22 (1914).

93. A subsequent attorney general opinion, also interpreting Wis. Stat. § 59.02, further explains that, although “[p]owers of a ministerial or administrative nature ... can be delegated,”

powers that are “legislative in nature [] c[an] not be delegated to a committee.” 61 Att’y. Gen. Op. 214, 215–16 (1972).

94. Dane County Ordinance § 46.40 violates Wis. Stat. §§ 59.02 and 59.03 by transferring legislative power to the local health officer, power that is “vested” in the board and can “only be exercised by” it.

REQUEST FOR RELIEF

Plaintiffs therefore request the following relief:

A. Declare that Dane County Ordinance § 46.40(2) is unconstitutional, unlawful, and preempted by state law, for any or all of the reasons above (or, alternatively, declare that Wis. Stat. § 252.03 itself violates the non-delegation doctrine, *see supra* pars. 83–84).

B. Declare that any order issued by Defendant Heinrich, including Emergency Order #12, that is based upon Wis. Stat. § 252.03, may not be enforced via citation under Dane County Ordinance § 46.40(2).

C. Enjoin the Defendants from issuing any citations under Dane County Ordinance § 46.40(2) for violations of Emergency Order #12 or any other orders issued based upon Wis. Stat. § 252.03.

D. Award costs and any such other relief as the Court deems appropriate.

Dated: January 20, 2021

Respectfully Submitted,

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Attorneys for Plaintiffs

any time and to issue a cease operations order if unsanitary conditions are found to exist. The department shall cause any such order to be posted in a prominent and conspicuous place on the premises.

[History: cr., Sub. 1 to OA 11, 1987-88, pub. 10/03/87; (1) am., OA 17, 2000-01, pub. 01/16/01, eff. 01/17/01; (1) and (2) am., 2016 OA-48, pub. 11/25/16.]

46.38 RETURNED CHECKS. In the event a check accepted in payment of a fee is returned as NSF (insufficient funds in account) or because the account is closed, the applicant shall pay a Twenty Dollar (\$20.00) handling fee. Failure to reimburse the county for the returned check or to pay the handling fee shall result in the revocation of the applicant's license effective ten (10) days after mailing, by certified mail, of a revocation notice to the applicant at his or her last known address. A permittee whose license is revoked under this section shall submit an application for and obtain a new license before recommencing operations.

[History: cr., OA 44, 1987-88, pub. 05/28/88.]

[46.39 reserved.]

[History: 46.40 cr., Sub. 2 to OA 1, 1997-98, pub. 07/18/97; (2)(b) and (4) am., Sub. 1 to OA 1, 1999-2000, pub. 06/01/99; (1) am., OA 6, 2002-03, pub. 08/13/02; 46.40 rep., OA 38, 2009-10, pub. 11/25/09, eff. 01/01/10.]

46.40 PREVENTION, SUPPRESSION AND CONTROL OF COMMUNICABLE DISEASES.

(1) *Duty of Director, Public Health Madison and Dane County.* Pursuant to Wis. Stat. ss. 252.03(1) & (2) the Director of Public Health Madison and Dane County shall promptly take all measures necessary to prevent, suppress and control communicable diseases within Dane County, including forbidding public gatherings when deemed necessary to control outbreaks or epidemics.

(2) *Public Health Orders.* 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.

(3) *Physicians to Report Existence of Communicable Diseases.* A physician knowing or having reason to know that a person treated or visited by him or her has a communicable disease, or having such disease, has died, shall report the same to the Director of Public Health Madison and Dane County within 24 hours in compliance with Wis. Stat. s. 252.05(1).

(4) *Quarantine.* No person, whether afflicted with any communicable disease as defined in chapter 252 of the Wisconsin Statutes, or not, shall visit or depart from any premises which shall have been quarantined by the Director of Public Health Madison and Dane County until given permission by such Director of Public Health Madison and Dane County.

(5) *Removal of Persons Afflicted With Communicable Disease.* The Director of Public Health Madison and Dane County is authorized to order the removal of a person afflicted with a communicable disease to a place of quarantine or other separate place if it can be done without danger to the person's health.

[History: cr., 2020 OA-2, pub. 06/01/20.]

[46.41 – 46.44 reserved.]

[History: 46.42 cr., Sub. 1 to OA 1, 1999-2000, pub. 06/01/99; 46.42 rep., OA 38, 2009-10, pub. 11/25/09, eff. 01/01/10.]

46.45 LAND DISPOSAL OF SEPTAGE. This section is enacted under the authority of section 281.48(5m), Wis. Stats.

(1) Except as provided in sub. (3), no person may dispose of septage by landspreading unless the person is certified as an operator of a septage servicing vehicle by the Wisconsin Department of Natural Resources.

(2) Except as provided in sub. (3), no person may dispose of septage by landspreading except upon lands for which an annual septage landspreading permit has been issued by the department.

(3) A farmer may dispose of septage by spreading it upon land owned or leased by the farmer if all of the following criteria are met:

(a) The septage is removed from a septic tank that is located on the same parcel where the septage is landspread;

(b) Prior to landspreading the septage, the farmer provides the department with documentation that there is sufficient land area available for disposal; and

(c) The removal and disposal of the septage complies with all applicable statutes, administrative rules and the provisions of this chapter governing the removal and landspreading of septage including, but not limited to, soil requirements, the set back, timing and seasonal restrictions, and pathogen control and vector reduction requirements included therein.

OFFICE OF THE CLERK



Supreme Court of Wisconsin

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December 21, 2020

To:

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You are hereby notified that the Court has entered the following order:

No. 2020AP1927-OA Gymfinity, Ltd. v. Dane County

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, an appendix, an emergency motion for a temporary injunction, and supporting legal memorandum having been filed on behalf of petitioners, Gymfinity, Ltd., et al.; and a response and appendix in opposition to the petition for original action having been filed on behalf of respondent, Dane County, et al.; and a non-party brief in support of the petition for leave to commence an original action having been filed on behalf of the Liberty Justice Center; and additional letters having been filed by counsel for respondents and counsel for petitioners;

IT IS ORDERED that the petition for leave to commence an original action is denied; and

IT IS FURTHER ORDERED that the emergency motion for a temporary injunction is denied as moot.

BRIAN HAGEDORN, J. (*concurring*). This court is designed to be the court of last resort, not the court of first resort. That is why we have historically been receptive to original actions only rarely.¹ I hope we return there again.

But these are unusual times. The COVID-19 pandemic has raised unique policy and legal challenges. Governments around the world and here at home have responded by attempting to exercise power that appears without parallel in my lifetime, exposing already deep disagreements over the role of government. Unsurprisingly, the pushback has been passionate and persistent.

I have been supportive of this court’s efforts to grant COVID-related original actions and decide them expeditiously. These cases have raised vital questions regarding the nature and limits of the tools available to those we’ve entrusted with leading our state. They have also raised discrete and dispositive legal issues where fact-finding would not be needed.

This petition raises similarly significant issues; however, multiple claims would seem to turn on questions of fact. At the very least, factual issues stand a good chance of being a barrier to deciding all the questions presented. I am also concerned that inserting ourselves into early-stage litigation of local regulations where the possible applications are complex and unknown could entrap us in the tangled web of passing judgment on all kinds of local restrictions for as long as COVID-19 endures. We are simply not equipped for that; circuit courts are.²

That said, the petitioners present important statutory and constitutional questions that deserve judicial scrutiny. The petitioners also offer arguments calling on this court to enforce a more vigorous separation of powers to better align government operations with our constitutional order. If these issues reach this court in an appropriate case and procedural context, we can address them at that time.

For now, however, I agree with the court’s determination to deny the petition for original action. In my judgment, this case presents complicated legal issues across a number of claims involving disputed questions of fact. It would be imprudent and potentially counter-productive to weigh in at this time.

¹ See In re Exercise of Original Jurisdiction of Supreme Court, 201 Wis. 123, 128, 229 N.W. 643 (1930) (per curiam) (“This court will with the greatest reluctance grant leave for the exercise of its original jurisdiction in all such cases, especially where questions of fact are involved.”).

² Petition of Heil, 230 Wis. 428, 448, 284 N.W. 42 (1939) (“This court is primarily an appellate court, and it should not be burdened with matters not clearly within its province if it is to discharge in a proper and efficient manner its primary function. Mere expedition of causes, convenience of parties to actions, and the prevention of a multiplicity of suits are matters which form no basis for the exercise of original jurisdiction of this court.”).

PATIENCE DRAKE ROGGENSACK, C.J. (*dissenting*). While this court has recently received a barrage of petitions to commence original actions, when it is presented to us that fundamental personal liberty is suppressed by an unelected official, we must act. Waiting until the matter proceeds through a circuit court and the court of appeals will be justice denied.

I. BACKGROUND

On November 17, 2020, Janel Heinrich, public health officer for Madison and Dane County, issued Emergency Order #10 (EO #10), which bans all indoor gatherings, including gatherings in private homes, among individuals who are not within the same immediate household. EO #10 became effective November 20, 2020 and expired December 16, 2020. EO #10 defines "Mass Gatherings" as "any gathering of individuals that are not members of the same household or living unit." It then provides that "A Mass Gathering inside any property is prohibited." A violation of EO #10 is a violation of Madison Municipal Ordinance Sec. 7.05(6) and Dane County Ordinance Sec. 46.40(2). It also subjects violators to a \$1,000 forfeiture.

On December 15, 2020, Heinrich issued Emergency Order #11 (EO #11), which is effective December 16, 2020 and expires January 13, 2021. EO #11 defines Mass Gatherings as a "planned event" such as a festival, meeting or party. "Individuals that are members of the same household or living unit do not count towards the Mass Gathering numbers in their own household or living unit."³ Heinrich also directs, "A Mass Gathering inside any property is permitted with ten (10) individuals or less not including employees. Individuals must maintain physical distancing."⁴

Gymfinity, Ltd. is a Wisconsin business that operates a gymnastics gymnasium in Fitchburg. It avers that Heinrich's order prohibits it from conducting its gymnastics education, training and classes, even though it has taken extensive efforts to protect against the spread of COVID-19.

Jeffrey Becker, who resides in Verona, is the father of four children who participate in a soccer club based in Dane County. He alleges that his children have been impacted by the sports restrictions and he and his children have been impacted by the restrictions of their personal associations with others.

Andrea Klein resides in Stoughton and is the mother of three boys, two of whom participate in Stoughton Youth Hockey Association, that are negatively affected by Heinrich's order. She also claims her personal liberty is affected by the restrictions on private gatherings.

Petitioners claim that Heinrich's order goes beyond her authority under Wis. Stat. § 252.03(2) to "do what is reasonable and necessary for the prevention and suppression of disease." They assert that the statute is limited to "public gatherings," and therefore, she has no authority to

³ EO #11, par. 2.

⁴ EO #11, par. 2 a.

regulate private gatherings. Petitioners contend that Heinrich infringes on constitutionally protected rights of association and on personal liberty protections that apply to one's home. Petitioners further contend that Heinrich's \$1,000 fine contravenes Wis. Stat. § 66.0113, which permits the governing body of a county or city to authorize the use of citations for violations of municipal ordinances but it does not permit fines to be created by a local administrative official.

Petitioners urge us to accept their petition for original action because there is a need to reaffirm the requirement of procedural safeguards when an executive is exercising legislative power. Watchmaking Examining Bd. v. Husar, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971); Dowling v. Lancashire Ins. Co., 92 Wis. 63, 74-75, 65 N.W. 738 (1896). They assert that a decision from us is urgently needed because there has been little attention given to administrative acts of local administrative officials.

Petitioners ask us to enjoin Heinrich's order to the extent that it limits all indoor gatherings for private sporting activities and to the extent that it regulates private gatherings of one's family members in one's home when all family members do not reside in the same household. Petitioners assert that there is no basis in Wis. Stat. § 252.03(2) to regulate private gatherings in businesses or homes. They assert that the ban on private gatherings violates constitutional rights to freedom of association and invades upon constitutionally protected rights of personal liberty.

II. DISCUSSION

There are many reasons why we should grant this petition for original action. Heinrich's regulation began with EO #10 and continues with EO #11. Heinrich likely will continue to issue subsequent orders regulating private conduct in one's business and home until a court tells her to stop. However, it is not necessary to dwell on each reason because Petitioners' focus on her regulation of the fundamental personal liberty interests exercised inside one's home is, in and of itself, sufficient to require that we accept this petition for original action.

Petitioners contend that EO #11 continues to suppress fundamental, personal liberty by defining "Mass Gatherings" as "a planned event" such as a "festival" or a "party." It continues to regulate who and how many people Dane County residents can have in their own homes. "A Mass Gathering inside any property is permitted with ten (10) individuals or less not including employees."⁵ It regulates how far apart from each other guests in one's home must be during planned events. "Individuals must maintain physical distancing."⁶ The order goes on to direct that "[i]ndividuals that are members of the same household or living unit do not count towards the Mass Gathering numbers in their own household or living unit."⁷ Apparently, EO #11 applies to

⁵ EO #11, par. 2. a.

⁶ Id.

⁷ Id., par 2.

Christmas Eve and Christmas Day parties, and it directs how many people one can permit to attend Christmas Eve and Christmas Day dinners in one's own home.

Petitioners contend that we have longstanding protections against orders such as EO #10 and EO #11 under both state and federal law.

They point us to Article I, Section 1 of the Wisconsin Constitution, which provides, "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

"An inherent right to liberty means all people are born with it; the government does not bestow it upon us and it may not infringe it." Porter v. State, 2018 WI 79, ¶52, 382 Wis. 2d 697, 913 N.W.2d 842 (R. Bradley, J., dissenting). There is a long history in the law wherein many decisions "have respected the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Supreme Court considered an ordinance that limited the "occupancy of a dwelling unit to members of a single family." Id. at 496. The ordinance narrowly defined "family." Id. A woman had been living with her son and two grandsons, and one of the grandsons fell outside of the definition of "family." Id. at 497. The ordinance was enforced, and grandmother was convicted of a crime. Id. at 496. However, the ordinance did not survive Supreme Court review. The United States Supreme Court explained that "the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns." Id. at 506.

When intimate human relationships are at issue, the United States Constitution protects them as a fundamental element of personal liberty. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). Furthermore, "[f]amily relationships, by their nature, involve 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 620. "[T]he safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life." Griswold v. Connecticut, 381 U.S. 479, 495 (1965).

Wisconsin law is in accord. "The safeguarding of the home is a vital public interest. That references to the right to be undisturbed in one's own home are brief, almost casual, in United States Supreme Court decisions must be taken to mean that this fundamental right is considered beyond challenge, not needing frequent defense." City of Wauwatosa v. King, 49 Wis. 2d 398, 405, 182 N.W.2d 530 (1971).

"There is no pandemic exception . . . to the fundamental liberties the Constitution safeguards." Wis. Legislature v. Palm, 2020 WI 42, ¶53, 391 Wis. 2d 497, 942 N.W.2d 900. "[I]ndividual rights secured by the Constitution do not disappear during a public health crisis."

These individual rights, including the protections in the Bill of Rights . . . are always in force and restrain government action." Id. (quoting Statement of Interest, Temple Baptist Church v. City of Greenville, No. 4:20-cv-64-DMB-JMV, 2020 WL 1932929 (N.D. Miss. April 14, 2020), ECF No. 6)).

III. CONCLUSION

Because personal liberty interests must be protected when brought to this court's attention, and it is argued to us that Heinrich's orders repeatedly contravene personal liberty interests, I would grant the petition to commence an original action in this matter. Accordingly, because the majority decides otherwise, I respectfully dissent.

I am authorized to state that Justices ANNETTE KINGSLAND ZIEGLER and REBECCA GRASSL BRADLEY join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

ORDER OF PUBLIC HEALTH MADISON & DANE COUNTY

DATE OF ORDER: January 11, 2021
Goes into effect January 13, 2021 at 12:01 a.m.

EMERGENCY ORDER #12

Since Emergency Order #11, Dane County has experienced both downward and upward trajectories in the number of people testing positive for COVID-19. The downward trajectory reached a low-point on December 26th with a 7-day average of 121 testing positive—a level not seen since early October. Recently, the trajectory has started to turn back upward, leaving us with a 7-day average similar to when Emergency Order #11 went into effect—200 as of January 7. Part of the reason for the increase is a notable outbreak within the Department of Corrections facility in Oregon (198 people testing positive December 22—January 4), but the upward trend remains even if this outbreak was not included in trajectory calculations. An important distinction between December 16 (when Emergency Order #11 went into effect) and now is that the level of people hospitalized and in the ICU with COVID has continued to decrease. As of January 11, 71 people were hospitalized with COVID in Dane County hospitals and 24 were in the ICU with COVID. The number of people in the hospital and ICU with COVID was at 132 and 40, respectively, on December 16. Our community continues to see the lingering effects of the mid-November surge in cases, as December saw the highest number of COVID-related deaths in a single month—79 people—thus far in the pandemic. As of January 10, a gathering of ten people in Dane County currently has an 18% chance that at least one COVID-19 positive person will be present. This chance increases to 26% for a group size of 15, 39% for a group size of 25. When order #11 was enacted, these risks were 22%, 30%, and 46% respectively. While progress is being made, there is still reason for caution.

This Order also continues the face covering requirements and limitations on taverns for the reasons explained in Order 8.

Based upon the foregoing, I, Janel Heinrich, Public Health Officer of Madison and Dane County, by the authority vested in me by the Laws of the State, including, but not limited to, Wis. Stats.

Secs. 252.03(1), (2) and (4), order the following as necessary to prevent, suppress, and control the spread of COVID-19:

1. Face Coverings. Face covering means a piece of cloth or other material that is worn to cover the nose and mouth completely. A face covering includes but is not limited to a bandana, a cloth face mask, a disposable or paper mask, a neck gaiter, or a religious face covering. A face covering does not include face shields, mesh masks, masks with holes or openings, or masks with vents.

a. Face Covering Required. Every individual, age five (5) and older, shall wear a face covering when:

- i.** In any enclosed building where other people, except for members of the person's own household or living unit are present.
- ii.** In line to enter any enclosed building.
- iii.** Driving or riding in any vehicle where other people, except for members of the person's own household or living unit are present.
- iv.** Outdoors at a restaurant or tavern.

Face coverings are strongly recommended in all other settings, including outdoors when it is not possible to maintain six (6) feet physical distancing.

Children between the ages of two (2) and five (5) are encouraged to wear a face covering when six (6) feet physical distancing is not possible. Children under the age of two (2) should never wear a face covering.

b. Exceptions. Individuals who are otherwise required to wear a face covering may remove the face covering in the following situations:

- i.** While eating or drinking.
- ii.** When communicating with an individual who is deaf or hard of hearing and communication cannot be achieved through other means.
- iii.** While obtaining a service that requires the temporary removal of the face covering, such as dental services.
- iv.** While sleeping.
- v.** While swimming or on duty as a lifeguard.

- vi. When engaging in work where wearing a face covering would create a risk to the individual, as determined by government safety guidelines.
 - vii. When necessary to confirm the individual's identity, including when entering a financial institution.
 - viii. When federal or state law or regulations prohibit wearing a face covering.
 - c. The following individuals are exempt from the face covering requirement in Section 1.a. of this Order:
 - i. Children under the age of 5.
 - ii. Individuals who are unconscious, incapacitated, or otherwise unable to remove the face covering without assistance.
 - iii. Individuals with medical conditions, intellectual or developmental disabilities, mental health conditions, or other sensory sensitivities that prevent the individual from wearing a face covering.
- 2. **Mass Gatherings.** A Mass Gathering is a planned event such as a concert, festival, meeting, training, conference, performance, show, sporting event, or party. Individuals that are members of the same household or living unit do not count towards the Mass Gathering numbers in their own household or living unit.
 - a. **Mass Gatherings Inside.** A Mass Gathering inside any property is permitted with ten (10) individuals or less not including employees. Individuals must maintain six (6) feet physical distancing.
 - b. **Mass Gatherings Outside.** Mass Gatherings Outside. A Mass Gathering outside is permitted with fifty (50) individuals or less not including employees. Individuals must maintain six (6) feet physical distancing.
- 3. **Child care, youth, education, public spaces, and sports.**
 - a. **Child care and youth settings.**
 - i. Child care settings and youth settings must continue to follow licensing and certification ratio requirements.
 - ii. Child care settings and youth settings include all licensed, recreational, and educational camps, licensed and certified

- childcare providers, unregulated youth programs, licensed-exempt public school programs, and four-year old kindergarten (4k).
- iii. Individual groups or classrooms may not contain more than fifteen (15) children if the children are under age eighteen (18).
- iv. There should be no interaction or contact between individual groups or classrooms.
- v. To the greatest extent possible, minimize amount of staff interaction between groups.
- vi. For youth ages five (5) and above, maintain at least six (6) feet physical distancing to the greatest extent possible.

b. Courts, Fields, and Sports.

- i. All courts and fields are open.
- ii. Six (6) feet physical distancing between individuals not from the same household or living unit must be maintained to the greatest extent possible for low risk sports. Six (6) feet physical distancing between individuals not from the same household or living unit must be maintained at all times for medium and high risk sports. Games and competitions are allowed for low risk sports with six (6) feet physical distancing maintained to the greatest extent possible. Low-risk sports are sports that can be done individually, or with physical distancing, or no to minimal sharing of equipment or the ability to clean the equipment between use.
- iii. Games and competitions are not allowed between teams for medium and high-risk sports. Games and competitions within teams are allowed for medium and high-risk sports if the games and competitions are modified to ensure six (6) feet physical distancing is maintained at all times. Medium risk sports are sports that involve close, sustained contact, but with protective equipment in place that may reduce the likelihood of respiratory particle transmission between participants or intermittent close contact or group sports or sports that use equipment that can't be cleaned between participants. High risk sports are sports that involve close, sustained contact between individuals, lack significant protective barriers, and have a high probability that respiratory particles will be transmitted between individuals.

- iv. All activities in this section for all individuals must abide by the Mass Gathering numbering requirements in Section 2 of this Order.

- c. **Schools.** Public and private kindergarten through twelfth grade schools must abide by the following:
 - i. Develop and implement a written hygiene policy and procedure that includes:
 1. Establishing expectations that employees and students who have a fever or other symptoms of COVID-19 do not come or remain at school.
 2. Establishing hand-washing expectations and ensuring supplies are available to employees and students.
 3. Describing proper cough and sneeze etiquette.
 - ii. Develop and implement a written cleaning policy and procedure that includes:
 1. Guidelines for cleaning and disinfecting frequently touched surfaces multiple times a day.
 2. Guidelines for cleaning common areas between use.
 3. Protocols for cleaning and disinfecting in the event of a positive COVID-19 case on site.
 - iii. Develop and implement a written protective measure policy and procedure that includes:
 1. Ensuring students ages five (5) and older wear face coverings when indoors and on buses.
 2. Ensuring employees are provided with and wear a face covering when indoors and on buses.
 3. Ensuring students and employees with face coverings are at least six (6) feet from others to the greatest extent possible when indoors and on buses.
 4. Ensuring that students who cannot wear a face covering maintain at least six (6) feet distancing at all times from other students when indoors and on buses.
 5. Ensure that students who cannot wear a face covering maintain six (6) feet distancing from employees to the greatest extent possible when indoors and on buses.

6. Ensuring that employees who cannot wear a face covering maintain at least six (6) feet distancing at all times from other employees when indoors and on buses.
 7. Ensuring that employees who cannot wear a face covering maintain six (6) feet distancing from students to the greatest extent possible when indoors and on buses.
 8. Ensuring students and employees are at least six (6) feet from other students and employees to the greatest extent possible outside.
 9. Ensuring that student and employee groupings are as static as possible by having the same group of students stay with the same employees as much as possible. Restrict mixing between groups as much as possible.
 10. Common areas such as cafeterias, auditoriums, and gymnasiums can be used as classrooms, to provide food, as child care and youth settings, and for government functions. Student groupings should be in distinct spaces within common areas and students groupings many not mix with other student groupings.
- iv. Implement PHMDC's action plan for COVID-19 case(s) at the school. Available at https://publichealthmdc.com/documents/school_action_plan.pdf
- v. Document staff receipt, acknowledgement, or training on the policies in Sections 3.c.i-3.c.iv of this Order.
- vi. Post PHMDC's Workplace requirements for employers and workers guidance document in a prominent location where all employees may access and view. Available at <https://publichealthmdc.com/coronavirus/forward-dane/requirements> (English, Spanish, and Mandarin versions are included)
- d. **Continuing education and higher education institutions.** Continuing education and higher education institutions may determine policies and practices for safe operations. However, these institutions may not open congregate living situations including dormitories without strict policies that ensure safe living conditions. These institutions must maintain six

(6) feet physical distancing to the greatest extent possible. These institutions must comply with Section 1 of this Order.

- 4. Businesses.** All businesses are subject to the following requirements:
 - a.** Limit capacity to 50% of approved capacity levels.
 - b.** Develop and implement a written hygiene policy and procedure that includes:
 - i.** Ensuring employees who have a fever or other symptoms of COVID-19 will not be allowed to work.
 - ii.** Establishing hand-washing expectations and ensuring supplies are available to employees.
 - iii.** Describing proper cough and sneeze etiquette.
 - c.** Develop and implement a written cleaning policy and procedure that includes:
 - i.** Guidelines for cleaning and disinfecting frequently touched surfaces multiple times a day.
 - ii.** Guidelines for frequently wiping down any shared equipment, such as work spaces, credit card machines, lunchroom items, carts, and baskets.
 - iii.** Guidelines for cleaning common areas and equipment between use or shift changes.
 - iv.** Protocols for cleaning and disinfecting in the event of a positive COVID-19 case on site.
 - d.** Develop and implement a written protective measure policy and procedure that includes:
 - i.** Ensuring individuals are at least six (6) feet from others whenever possible.
 - ii.** Ensuring employees are provided with and wear face coverings at all times when required under Section 1 of this Order.

- e. Document staff receipt, acknowledgement, or training on the policies in Sections 4.b.-4.d of this Order.
- f. **Limit staff and customers in offices, facilities, and stores.** All businesses should, to the greatest extent possible, facilitate remote work and other measures that limit the number of individuals present at an office, facility, or store. Businesses to the greatest extent feasible should:
 - i. Offer online or virtual services, including for, meeting with clients, providing counsel, or other professional services.
 - ii. Hold meetings and collaborate online or by phone.
 - iii. Alternate work teams or stagger shifts.
- g. **Safe business requirements when remote work is not possible.** All businesses are required to take the following measures to limit exposure to COVID-19 to staff, customers, and the public when remote work is not possible:
 - i. Where possible, offer curbside pick-up, curbside drop-off, and delivery of goods and services.
 - ii. Where possible, offer online or phone payments, appointments, and reservations.
 - iii. Ensure spacing of chairs in waiting rooms to ensure six (6) feet physical distancing is maintained between individuals.
- h. Meetings, trainings, and conferences are considered Mass Gatherings and must comply with Section 2 of this Order.
- i. Adhere to PHMDC requirements and strongly consider implementing the PHMDC recommendations and guidelines.
- j. Businesses must establish lines outside to regulate entry, with markings indicating where customers should stand to remain six (6) feet apart from one another while waiting to enter. Businesses should also offer alternatives to lines, including allowing customers to wait in their cars for a text message or phone call and scheduling pick-ups or entries to stores. Businesses must

designate entrance and exit points and manage traffic flow such that customers remain six (6) feet apart from one another whenever possible

- k. Post PHMDC's "Workplace Requirements for Employers and Workers" guidance document in a prominent location where all employees may access and view. Available at <https://publichealthmdc.com/coronavirus/forward-dane/requirements>
 - l. Follow all Equal Employment Opportunity Commission guidelines with regards to face coverings.
 - m. Post PHMDC's "Face Covering" sign (or a similar sign) about face coverings being required that is visible upon entering the property. All residential properties (e.g., apartment buildings and condominiums) that have shared common indoor spaces (e.g., mailrooms, lobbies, hallways) are required to post PHMDC's "Face Covering" sign (or a similar sign) about masks being required that is visible upon entering the property. Available at <https://publichealthmdc.com/coronavirus/forward-dane/requirements>
5. **Industry-specific requirements.** In addition to complying with Section 4, the following businesses have additional requirements:
- a. **Stores that sell food or groceries**, including grocery stores, bakeries, farm and produce stands, supermarkets, food banks and food pantries, convenience stores, and other establishments engaged in the retail sale of groceries, prepared food, alcoholic and non-alcoholic beverages. Such establishments shall:
 - i. Encourage pickup and delivery options.
 - ii. Prohibit customer self-dispensing of unpackaged bulk food items (e.g., condiments, or foods where the use of tongs, or scoops are used). Beverage stations, coffee grinding stations, and unpackaged foods stored in bins with gravity fed or auto-dispensing levers and unpackaged bakery behind barriers (i.e. doors) where deli gloves or wax paper is used for dispensing are exempt from this requirement.
 - i. Except for produce areas, cease any customer self-service operations of all unpackaged food, such as salad bars, and buffets.

- ii. Limit indoor dine-in capacity to 25% of approved seating capacity levels. Space tables and chairs to ensure at least six (6) feet physical distancing between customers who are not members of the same household or living unit. Limit each table to customers who are members of the same household or living unit.
- iii. Outdoor seating is allowed. Space tables and chairs to ensure at least six (6) feet physical distancing between customers who are not members of the same household or living unit. Limit each table to members of the same household or living unit.
- iv. Sampling of food is prohibited.

b. Restaurants and taverns. Restaurants and taverns shall:

- i. “Restaurant” has the meaning as defined in Wis. Stats. Ch. 97.01 (14g) and whose sale of alcohol beverages accounts for 50% or less of the establishment’s gross receipts. A “tavern” is an establishment in which alcohol beverages are sold for consumption on said premises and whose sale of alcohol beverages accounts for 51% or more of the establishment’s gross receipts. “Tavern” includes breweries, brewpubs, wineries and distilleries. Wis. Stat. Sec. 125.07(3)(a)6 presumes that an establishment operated under both a Class “B” or “Class B” license or permit and a license under Wis. Stat. Sec. 97.30 for a restaurant, is a tavern. This presumption may be rebutted by competent evidence. To determine whether an establishment is a restaurant or a tavern, gross receipts for the period July 1, 2020 to December 31, 2020 will be considered. A restaurant or tavern shall provide receipts showing their gross sales of food and alcohol to PHMDC within seventy-two hours of a request by PHMDC for said receipts.
- ii. Encourage pick-up and delivery options.
- iii. Cease any customer self-service operations of all unpackaged food, such as salad bars and buffets. Beverage stations are exempt from this requirement.
- iv. At restaurants, limit indoor dine-in capacity to 25% of approved seating capacity levels. Space tables and chairs to ensure at least six (6) feet physical distancing between customers who are not members of the same household or living unit. Limit each table to members of the same household or living unit.
- v. Customers may enter taverns only for the purposes of ordering, pick-up, and payment of food or beverage or while in transit.
- vi. Outdoor seating is allowed. Space tables and chairs to ensure at least six (6) feet physical distancing between customers who are

not members of the same household or living unit. Limit each table to members of the same household or living unit.

- vii. In restaurants, maintain at least six (6) feet between each stool for customers that are not members of the same household or living unit.
- viii. Customers must be seated at all times when not in transit.
- ix. Sampling of food is prohibited.

c. Retail stores. Retail stores shall:

- i. Limit the number of individuals in the business (excluding employees) up to 50% of approved capacity levels.
- ii. Retail stores larger than 50,000 square feet must offer at least two hours per week of dedicated shopping time for vulnerable individuals. Vulnerable individuals include people over sixty-five (65) years of age, people that are pregnant, people in long-term care facilities, people with compromised or weakened immune systems, and people with serious underlying health conditions including high blood pressure, chronic lung disease, serious heart conditions, liver disease, kidney disease requiring dialysis, diabetes, obesity, or asthma.
- iii. Sampling of goods (ex. food or make-up) is prohibited.

d. Salons and spas. Facilities including hair salons, barber shops, nail salons, day spas, electrolysis providers, waxing salons, eyebrow-care establishments, tattoo and piercing parlors, body art establishments, tanning facilities and similar facilities shall:

- i. Limit the number of customers or clients to 50% of approved capacity levels.
- ii. Space customer or client chairs, tables, or stations at least six (6) feet apart from each other.

e. Gyms and fitness centers. Gyms, fitness centers, and similar facilities shall:

- i. Provide materials for members to disinfect equipment before and after exercise at each piece of equipment or station.

- ii. Limit the number of individuals in the business (excluding employees) to 50% of the approved capacity limit.
 - iii. Increase frequency of cleaning of all equipment, common areas, locker rooms, and restrooms.
 - iv. To the extent possible, space equipment at least six (6) feet apart, especially for treadmills and other high-exertion aerobic fitness equipment.
 - v. Use floor markings to indicate spacing of individuals, particularly in areas where individuals congregate or cluster including drinking fountains, the front desk or reception area, and cleaning stations.
 - vi. Group exercise classes may only be offered if six (6) feet physical distancing can be maintained at all times and there is no person-to-person contact. Group exercises classes are considered Mass Gatherings and must comply with Section 2 of this Order.
 - vii. Activities where six (6) feet physical distancing cannot be maintained are not allowed unless they are between individuals from the same household or living unit.
 - viii. Saunas and steam rooms are closed.
- f. **Places of amusement and activity.** Places of amusement and activity including water parks, licensed public or private swimming pools, aquariums, zoos, museums, bowling alleys, amusement parks, outdoor miniature golf, movie theaters, theaters, concert and music halls, golf courses, and similar places shall:
- i. To the extent possible, all reservations and payments must be made in advance online or by phone.
 - ii. Businesses shall limit the number of individuals on the premises (excluding employees) to 50% of approved capacity limits. Events such as, but not limited to, concerts, festivals, carnivals, fairs, parades, movies, performances, and shows are considered Mass Gatherings and must comply with Section 2 of this Order.
 - iii. Seating, stations, or recreational areas must be spaced to ensure at least six (6) feet of physical distancing between individuals not within the same household or living unit.
 - iv. All equipment provided or rented should be cleaned in between each customers use.

- g. Drive-in Activities.** Drive-in movie theaters and other drive-in activities may occur, with the following restrictions:
 - i.** Drive-in activities may offer outdoor seating. Outdoor seating at drive-in activities are considered Mass Gatherings and must comply with Section 2 of this Order.
 - ii.** Individuals not participating in Section 5(g)(i) may leave their vehicles to purchase or pick up food or drink or to use the restroom, however they must remain in their vehicles at all other times.
 - iii.** Any food or drink sales must comply with Sections 5.b. ii., iii., and ix.
 - iv.** Food may be delivered to individuals patrons waiting in their vehicles.
 - v.** To the extent possible, reservations and payments should be made in advance online or over the phone.
 - vi.** Individuals inside vehicles at drive-in activities are exempt from Section 2 of this Order.

6. Health care operations, public health operations, human services operations, infrastructure operations, manufacturing and government functions. These operations, as defined in Emergency Health Order #2, are required to only follow Sections 1, 4.b through 4.g. and 4.i. through 4.m. of this Order. Long-term care and assisted living facilities must follow all applicable Wisconsin Department of Health Services recommendations, all applicable U.S. Centers for Disease Control and Prevention recommendations, and all applicable Centers for Medicare and Medicaid Services recommendations for prevention of COVID-19 in these facilities.

7. Religious Entities and Groups. Religious entities and groups are entities that are organized and operated for a religious purpose. Examples include, but are not limited to mosques, synagogues, temples, religious studies, churches and nondenominational ministries. Religious entities and groups shall comply with Sections 1, 4.a. through 4.g. and 4.i through 4.m. of this Order. Religious entities are exempt from Mass Gathering requirements for religious services and religious practices only. Religious entities are not exempt from the Mass Gathering requirements for other events outside of a religious service or practice such as picnics or staff meetings.

8. Businesses must follow all regulatory and licensing requirements. If this Order contains provisions that are more restrictive than otherwise permitted in any regulatory or licensing requirement, the provisions of this Order shall control.

ENFORCEMENT AND APPLICABILITY

9. **Enforcement.** Violation or obstruction of this Order is a violation of Madison Municipal Ordinance Secs. 7.05(6) and 7.41 and Dane County Ordinance Sec. 46.40(2), and any subsequent or similar ordinance adopted by a local municipality in conformity therein.
10. **Severability.** If any provision of this Order or its application to any person or circumstance is held to be invalid, then the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.
11. **Duration.** This Order shall become effective Wednesday, January 13, 2021 at 12:01 a.m. This Order shall remain in effect until February 10, 2021 at 12:01 a.m.

IT IS SO ORDERED.



Janel Heinrich
Health Officer, Public Health Madison & Dane County

SPORTS GUIDANCE

Frequently asked questions about how to play sports safely according to [current orders](#).

Is it okay to hold sport competitions?

- Yes, for low risk sports with physical distancing maintained to the greatest extent possible and in compliance with gathering limits.
- Medium and high risk sports game and competitions between teams are not allowed. Medium risk and high risk sports may play games if the games are played within teams and games are modified to ensure 6 feet physical distancing at all times.

Is it okay to hold practices?

Practices, drills, catch, instructional lessons, etc. are allowed with 6 feet physical distancing for medium and high risk sports. Practices, drills, catch, and instructional lessons, etc. are allowed with physical distancing maintained to the greatest extent possible for low risk sports.

If I wear a mask or face covering, can I play sports and be in contact closer than 6ft?

No.

How big can my group be?

Youth sports, sport camps, and adult sports need to adhere to mass gathering limits outlined in the [current order](#).

What is considered a low, medium, and high risk sport?

High risk sports are sports that involve close, sustained contact between individuals, lack significant protective barriers, and have a high probability that respiratory particles will be transmitted between individuals. Examples: Rugby, boxing, judo, karate, taekwondo, wrestling, pair figure skating, ice dancing, football, lacrosse, hockey, group dance, group cheer.

Medium risk sports are sports that involve close, sustained contact, but with protective equipment in place that may

reduce the likelihood of respiratory particle transmission between participants or intermittent close contact or group sports or sports that use equipment that can't be cleaned between participants. Examples: Bobsled, doubles luge, multi-person rowing, multi-person kayaking, multi-person canoeing, water polo, group gymnastics, doubles tennis, synchronized diving, artistic swimming, fencing, cycling in a group, running in a close group, modern pentathlon, group sailing, volleyball, soccer, basketball, baseball/softball, short track, speed skating in a group, curling, ultimate Frisbee, bike polo.

Low risk sports are sports that, without modification, are played individually or played with physical distancing and where there is no to minimal sharing of equipment or the ability to clean the equipment between use is available. Examples: Archery, shooting/clay target, individual running events, individual cycling events, individual swimming, swim relays, diving, individual gymnastics, individual canoeing, individual kayaking, individual rowing, individual diving, equestrian jumping, dressage or eventing, golf, individual sailing, skateboarding, weightlifting, alpine skiing, nordic skiing, biathlon, single luge, freestyle skiing, individual speed skating, snowboarding, ski jumping, singles figure skating, singles tennis, individual dance, pole vault, high jump, long jump, marathon, triathlon, cross country, track and field, disc golf, badminton, bowling.

What is considered a team?

- A team should be understood as what is commonly considered a team for various sports. Most leagues and organized sporting events have a maximum number of players allowed for each team. If the commonly understood size of a team is over the mass gathering limits under the Order, the size of the team must be reduced to abide by the limits.
- Unofficial clubs, associations, membership organizations, pick-up games, or other entities that do not have specified teams, but are instead comprised of individuals, should

create sub-teams that remain the same. As noted in the Order, medium and high risk games are only allowed within teams if they are modified to ensure physical distancing. Medium and high-risk games are not allowed between teams. These teams must abide by the mass gathering limits under the Order.

Are there additional things we should consider when playing inside?

- We encourage you to play outside as much as possible.
- If playing inside, ensure ventilation systems or fans operate properly. Increase circulation of outdoor air as much as possible, for example by opening windows and doors. Do not open windows and doors if doing so poses a safety or health risk (e.g., risk of falling or triggering asthma symptoms) to players or others using the facility.

How often should equipment be sanitized?

Between each use.

Are there additional measures we can take to reduce risk?

- We do not recommend leaving the County to compete in activities not allowed in Dane County.
- Minimize equipment sharing, and clean and disinfect shared equipment between use by different people to reduce the risk of COVID-19 spread.
- Do not let players share towels, clothing, or other items they use to wipe their faces or hands.
- Size of the team. Sports with a large number of players on a team may increase the likelihood of spread, compared to sports with fewer team members. Consider decreasing team sizes, as feasible.
- Actively encourage sick staff, families, and players to stay home. Develop policies that encourage sick employees to stay at home.
- Do not allow spitting and encourage everyone to cover their coughs and sneezes with a tissue or use the inside of their elbow.
- Do not allow physical contact such as high fives, handshakes, fist bumps, or hugs.
- Limit the number of players sitting in confined player seating areas (e.g., dugouts) by allowing players to spread out.

- Younger children could sit with parents or caregivers, instead of in a dugout or group area.
- Identify adult staff members or volunteers to help maintain physical distancing among youth, coaches, and spectators.
- Space players at least 6ft apart on the field while participating in the sport (e.g., during warmup, skill building activities, simulation drills).
- Provide physical guides, such as signs and tape on floors or playing fields, to make sure that coaches and players remain at least 6ft apart.
- Wash hands after play: If soap and water are not readily available, use alcohol-based hand sanitizer.

Can locker rooms be open?

If possible, close shared spaces such as locker rooms, otherwise, stagger use and [clean and disinfect](#) between use.

What should we do if a staff member or participant becomes sick?

Check out guidelines on our [‘What to Do if You are Sick or Possibly Exposed’](#) webpage.

Can concession stands be open?

Yes, they would need to follow the guidelines for restaurants [in the order](#).

Why can UW sports teams compete?

Public Health Madison & Dane County does not have authority over the UW-Madison campus, including Camp Randall football stadium.