No. _____

In the Supreme Court of Wisconsin

BRYANT STEMPSKI,
PETITIONER,

V.

JANEL HEINRICH, DANE COUNTY, CITY OF MADISON, AND
PUBLIC HEALTH OF MADISON & DANE COUNTY,
RESPONDENTS.

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

WISCONSIN INSTITUTE FOR LAW AND LIBERTY, INC.

Richard M. Esenberg
Daniel P. Lennington
Lucas T. Vebber
330 E. Kilbourn Ave., Suite 725
Milwaukee, WI 53202-3141
Phone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Dan@will-law.org
Lucas@will-law.org

Attorneys for Petitioner

TABLE OF CONTENTS

ISSUES PRESENTED

1. Whether a local health official has the authority to issue a county-wide mask mandate under Wis. Stat. § 252.03 as interpreted by *James v. Heinrich*, 2021 WI 58, 960 N.W.2d 350.

2. If the statute authorizes such a mask mandate, whether the laws purporting to authorize the "Face Covering Emergency Order," constitute an unlawful delegation of legislative power to an executive official.

INTRODUCTION

A local health official has yet again attempted to impose a breathtakingly broad restriction on all Dane County residents and visitors. This time, Respondent Janel Heinrich has ordered universal masking for anyone two years old or older, anytime they are indoors with someone other than their family members, and regardless of vaccination status in a county with the highest vaccination rate in Wisconsin.

Almost precisely one year ago, the same local health official issued a similarly broad order, attempting to close all schools, public and private, in Dane County. But this Court struck down that order quickly, temporarily enjoining Respondent Heinrich's school-closure order and setting the case for briefing before ultimately ruling against Respondents on the merits. *James v. Heinrich,* 2021 WI 58, 960 N.W.2d

350. Respondent Heinrich again relies on the same authority, Wis. Stat. § 252.03, claiming unlimited power to do anything "reasonable and necessary." This Court should again step in and enjoin this order: last time it was schools, this time it is masks, next time it could be vaccine passports and permanent masking. Respondents' power is not unlimited, and the residents of Dane County deserve protection from these unchecked mandates.

Petitioner here challenges two things. First, he challenges whether the local health officer even had the authority to issue the Face Covering Emergency Order (herein "the Order"), under Wis. Stat. § 252.03 as interpreted by this Court in *James v. Heinrich,* 2021 WI 58, 960 N.W.2d 350. The Order is invalid because it exceeds the statutory authority given to health officers in Wis. Stat. § 252.03. Second, to the extent that 252.03 allows this kind of virtual limitless grant of power, that statute and related local ordinances violate the non-delegation doctrine.

This case warrants this Court's original action jurisdiction not only to remedy the immediate harms from the abuse of power, yet again, by the local health officer in Dane County, but also because, with respect to Petitioner's non-delegation challenge to the underlying ordinances, only this Court can provide clarity on how the non-delegation applies in this instance.

Petitioner respectfully asks this Court to do as it did in *James v. Heinrich*—to issue a temporary injunction prohibiting the Face Covering Emergency Order from being enforced, and then to issue a briefing schedule that will allow more fulsome analysis of the issues presented.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because he seeks immediate, temporary relief, Petitioner does not request oral argument with respect to their motion for an immediate injunction of the Order. However, with respect to his underlying challenge to local health officer authority under Wis. Stat. § 252.03 and alternatively or in addition, Petitioner's non-delegation challenge to the Dane County and Madison ordinances (and Wis. Stat. § 252.03) which allowed this, he does seek both oral argument and publication, in the ordinary course.

STATEMENT OF THE CASE

Petitioner incorporates the background facts which are laid out in their Emergency Petition for an Original Action filed simultaneously with this memorandum.

STANDARD OF REVIEW

Because Petitioner seeks 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, Petitioner challenges two things: The Order, insofar as the local health officer lacked authority to issue it, and alternatively, or in addition to, the underlying ordinances (and/or statute) that the Order 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

Respondents Janel Heinrich and Dane County have developed an extensive history of issuing significant public health orders with little or no notice and this Court has declared their actions unlawful twice before. *See Jefferson v. Dane County*, 2020 WI 90 (declaring unlawful an attempt to alter election rules on the eve of an election); *James v. Heinrich*, 2021 WI 58 (declaring unlawful and enjoining an attempt to shut down private schools on the eve of their reopening).

The abuse of power here is substantially similar to the abuses this Court found unlawful and enjoined in an original action posture in *James v. Heinrich*, 2021 WI 58. This Court should take this case to promptly remedy this abuse of power and to prevent immediate and irreparable harm.

B. Local Health Officers Lack Authority Under Wis. Stat. § 252.03 to Issue Blanket Masking Requirements

This Court has recently made clear that Wis. Stat. § 252.03 does *not* confer unlimited powers. In interpreting that statute, this Court ruled against the very same health officer who is a respondent here when she tried to shut down private schools just before they were set to reopen almost exactly one year ago in *James v. Heinrich*, 2021 WI 58. In that case, this Court held that Wis. Stat. § 252.03 only confers a "series of discrete powers" upon health officials, and if the power is not "specifically conferred," then "that power is not authorized." *Id.* at ¶18 (citations omitted).

Contrary to Respondent Heinrich's claims in issuing the Order challenged herein, Wis. Stat. § 252.03 doesn't provide her with "an open-ended grant of authority." *Id.* at ¶21. "What is reasonable and necessary cannot be reasonably read to encompass anything and everything." *Id.* at ¶22. Moreover, just as "[n]othing in the text of the statute confers upon

local health officers the power to close schools," Id. ¶ 22, nothing in the text of the statute confers upon local health officers the authority to issue a countywide mask mandate.

C. In the Alternative, or in Addition to, 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 body, 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.[1] 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 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

[1] 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.

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.[2]

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

[2] 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).

procedural safeguard against law-making by the executive branch. It is law-making undertaken to repeal law made by executive officials.

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.

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. An 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),[3] and the differences between the ordinances counties have passed or proposed in the wake of *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, illustrate that there is confusion about this issue.

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

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

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, this issue is of statewide importance given the ongoing and evolving nature of the pandemic and the possibility (if not likelihood)

that other local health officers will seek to invoke similar orders. Further, this case is of statewide importance given the significant separation of powers issues involving the division of governmental authority among the branches of government (state or local).

Second, only this Court possesses the authority to give a definitive answer on the interpretation of Wis. Stat. § 252.03 and only this Court may 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.

Third, given the *still* 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 the Order

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

A. Petitioner Has a High Likelihood of Success

1. The Face Covering Emergency Order Is Not Authorized by Wisconsin Statute

Section 252.03 of the Wisconsin Statutes grants specific powers to local health officials. They must "investigate" the circumstances of the

"appearance of a communicable disease;" they must "make a full report to the appropriate governing body" along with the "progress of the communicable diseases and the measures used against them"; they may "inspect schools or other public buildings"; and "may forbid public gatherings" and "advise the department of measures taken." Wis. Stat. § 252.03(1) & (2).

This statute also contains seemingly broad provisions sprinkled within these specific powers. For example, a local health officer must "take all measures necessary to prevent, suppress and control communicable diseases" and "may do what is reasonable and necessary for the prevention and suppression of disease." Wis. Stat. § 252.03(1) & (2). The question for this Court, as it was in *James*, is whether these two seemingly unlimited grants of power are enough to swallow the specific powers otherwise granted in the text.

In *James*, Respondent Heinrich attempted to close all schools in Dane County. At the outset, the Court noted: "Nowhere in this statute did the legislature give local health officers the power to 'close schools'." *James*, 2021 WI 58, ¶ 18. "The statute lists a series of discrete powers afforded to local health officers in order to address communicable diseases." *Id*. The Court noted the specific grants of power, such as the power to "forbid gatherings" and "inspect schools." *Id.* Citing the

doctrine of *expressio unius est exclusio alterius*, the Court explained that the "express mention of one matter excludes other similarly matters that are not mentioned." *Id.* (citations omitted). Under this doctrine, if "the legislature did not specifically confer a power, the exercise of that power is not authorized." *Id.* "Because the legislature expressly granted local health officers discrete powers under Wis. Stat. § 252.03, but omitted the power to close schools, local health officers do not possess that power." *Id.*

The same is true in this case. The statute does not confer upon local health officials the power to require masks. And so, it is not permitted under the doctrines cited by this Court. If Respondent Heinrich does not have the power to close schools under Wis. Stat. § 252.03, then she does not have the power to order a countywide mask mandate.[4]

In response, Respondent Heinrich argued in *James* that the "reasonable and necessary" powers provision gave her *more* power than those specifically listed. Yet the Court has already rejected that argument: "Heinrich's interpretation of local health officers' 'reasonable

[4] Although the Court noted that the power to close schools was given to a state agency, that point was merely illustrative and supportive of the textual argument, not dispositive. *See James*, 2021 WI 58, ¶ 19.

and necessary' powers violates the fundamental principle that specific statutory language controls over more general language." *Id.* at ¶ 21. "If Heinrich's argument were current, then the general provision would essentially afford local health officials any powers necessary to limit the spread of communicable diseases." *Id.* at ¶ 22. As this Court aptly noted, "this cannot be. What is reasonable and necessary cannot be reasonably read to encompass anything and everything." *Id.*

Here, Respondent Heinrich again offers the "anything and everything" argument just like she did in *James*. Last time it was schools; this time it is a mask mandate; next time it is a vaccine passport. What comes after that is up to Respondent Heinrich's imagination and the current zeitgeist of "safetyism." This must stop once and for all—Respondent Heinrich has no power to order two-year olds to "mask up." The only powers available to Respondent Heinrich are those specifically enumerated in Wis. Stat. § 252.03. *James* already decided this issue.

2. The Ordinances on Which the Order Relies Violate the Non-Delegation Doctrine

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 § 252.02(6), § 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.[5]

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

[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.

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." Neither of these ordinances provide any procedural limits, and the substantive standard they incorporate from § 252.03, "reasonable and necessary," is a wholly inadequate substantive delegation.

While the substantive language is found in § 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)

[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.

(listing examples); *e.g.*, Wis. Stat. § 97.43 (making enforceable 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. 2020 WI 42, ¶¶ 36–39.[7]

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

[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.

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 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). 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.

B. Petitioner Meets the Other Injunction Factors

This Court has previously enjoined unlawful government orders in the context of this pandemic. *See, e.g., Palm,* 2020 WI 42; *Fabick v. Evers*, 2021 WI 58, 396 Wis. 2d 231, 956 N.W.2d 856; *James v. Heinrich*, 2021 WI 58. Like in those cases, Petitioner here meets the injunction factors and the injunction should issue.

This Court has said that where public employees are engaged in unlawful behavior, an injunction may be issued without a further showing of irreparable harm. *Cf. Joint School Dist. No 1, City of Wisconsin Rapids v. Wisconsin Rapids Educ. Ass'n*, 70 Wis. 2d 292, 310, 234 N.W.2d 289 (1975) ("That unlawful activity may be enjoined in the absence of an express showing of irreparable damage has been recognized by this court."). That is exactly what has happened here—as

Petitioner has made clear, the Order is unlawful, and any actions to implement or enforce it are likewise unlawful behavior. The injunction may issue without any further showing of irreparable harm.

However, even if that were not the case, Petitioner can still show irreparable harm. Petitioner is a taxpayer, himself (and all taxpayers) are harmed by the unlawful expenditure of funds in support of the Order. These wasted expenditures cause irreparable harm. Further, Petitioner is subject to the Face Covering Emergency Order, and beginning at midnight tonight he will be forced to wear a mask in any enclosed public place where others are present whether he's at his childrens' school or while attending a service at his Church. Once subjected to this requirement, there is no time machine that he could enter that can un-harm him. The damages done by this harm are not measurable.

An "irreparable" injury is one which is "not adequately compensable in damages." *Pure Milk Prod. Co-op*, 90 Wis. 2d at 800. "The remedy at law may be inadequate because of the difficulty or impossibility of measuring the damages." *Lakeside Oil Co. v. Slutsky*, 8 Wis. 2d 157, 168, 98 N.W.2d 415 (1959); *see also Simenstad v. Hagen*, 22 Wis. 2d 653, 664, 126 N.W.2d 529 (1964). Petitioner meets these factors for four reasons: (1) There is no way to go back in time so Petitioner would not have been required to comply with the Face Covering

Emergency Order; (2) Petitioner here cannot seek damages against the Respondents for a refund of the unlawfully spent tax dollars; (3) Even if he could seek damages, the injuries caused here cannot be compensated by damages; and (4) Even if they could be compensated by damages, such damages would be impossible to measure. For these reasons, the injury is irreparable.

Additionally, a balancing of the equities weighs in favor of an injunction. Petitioner seeks to enforce the law and bring an end to unlawful government mandates. Respondent wants to enforce those unlawful mandates. The equities clearly favor Petitioner.

Finally, an injunction is also necessary to preserve the status quo. Until midnight tonight, all public places in Dane County are allowed to decide for themselves if they will require masks, and any individual is free to wear one anywhere they would like, if they so choose. The Order dramatically altered the status quo by requiring face coverings, and only an injunction can restore it.

CONCLUSION

Petitioner requests that this Court grant this emergency petition for an original action, immediately enjoin Respondents from enforcing the Order, declare Wis. Stat. § 252.03 unconstitutional, and permanently enjoin Respondents from acting thereunder.

DATED this 18th day of August, 2021.

Respectfully Submitted,

WISCONSIN INSTITUTE FOR LAW AND LIBERTY, INC.

Richard M. Esenberg (WI Bar No 1005622)
Daniel P. Lennington (WI Bar No.)
Lucas T. Vebber (WI Bar No. 1067543)
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202-3141
Phone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Dan@will-law.org
Lucas@will-law.org

Attorneys for Petitioner