

No. 2021AP1343

In the Wisconsin Supreme Court

JEFFREY BECKER, ANDREA KLEIN, AND A LEAP ABOVE
DANCE, LLC
PLAINTIFFS-APPELLANTS-PETITIONERS,

v.

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

PETITION FOR BYPASS

RICK ESENBERG
LUKE N. BERG
DANIEL P. LENNINGTON
ANTHONY F. LOCOCO
Wisconsin Institute for
Law & Liberty
330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202

*Attorneys for Plaintiffs-
Appellants-Petitioners*

TABLE OF CONTENTS

INTRODUCTION	1
ISSUES PRESENTED	2
BACKGROUND	3
REASONS TO GRANT BYPASS.....	7
CONCLUSION	11

INTRODUCTION

On August 27, this Court denied, 4-3, a petition for original action raising similar issues to those raised in this case: whether state law authorizes local health officials to unilaterally issue enforceable general orders without any involvement of the local governing body; and whether Dane County Ordinance § 46.40(2) (or Wis. Stat. § 252.03), and any orders issued in reliance thereon, violate the non-delegation doctrine. *Stempski v. Heinrich*, No. 21AP1434. While the majority did not comment on the reason for the denial, that denial may have been based on the view, expressed in Justice Hagedorn’s concurrence in the denial of a similar action last fall, that these issues should be presented to the Dane County Circuit Court first. *See* Order Denying Original Action at 2, *Gymfinity Ltd. v. Dane County*, No. 2020AP1927 (Dec. 21, 2020) (Hagedorn, J., concurring).

This case presents the same questions as in *Stempski* and *Gymfinity*, but in a different “procedural context,” *id.*—the claims have already fully gone through the Dane County Circuit Court. While the Court of Appeals has not yet weighed in, this case meets every one of this Court’s criteria for bypass: the issues require this Court’s “law defining and law development” role, *see Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), and are ultimately bound for this Court “regardless of how the Court of Appeals might decide the issues,” *see* Internal Operating Procedures at 8. Only this Court can “provide a clear, definitive and controlling ruling” as to the proper interpretation of Wis. Stat. § 252.03 and related statutes. *See* Certification Opinion at 22, *State v. Mattox*, No. 2015AP158 (Feb. 10, 2016). And, with respect to the non-delegation issue, only this Court can adopt “a more vigorous separation of powers to better align government operations with

our constitutional order.” Order Denying Original Action at 2, *Gymfinity*, No. 2020AP1927 (Hagedorn, J., concurring). As Justice Hagedorn noted in *Gymfinity*, the issues raise “important statutory and constitutional questions that deserve judicial scrutiny” and that this Court “can address” “[i]f [they] reach this court in an appropriate case and procedural context.” *Id.*

There is also “a clear need to hasten the ultimate appellate decision,” Internal Operating Procedures at 8, given that Respondent Heinrich continues to subject Dane County to unlawful orders. And multiple Dane County residents, including Petitioner A Leap Above, currently have unlawful enforcement actions hanging over their heads—and will until this Court resolves the issues presented in this case (those enforcement actions have been stayed until this appeal is resolved). These issues must ultimately be decided by this Court, and they should be decided now, rather than forcing Petitioners to wait another year for the Court of Appeals, only for this case to inevitably come back to this Court regardless of what the Court of Appeals decides. Further delay will only waste judicial time and resources, waste significant taxpayer funds as Respondents are forced to brief these issues an extra time at the Court of Appeals, and force Petitioners and other Dane County residents to continue to be subject to unlawful orders and enforcement actions.

ISSUES PRESENTED

1. Whether state law permits local health officials to unilaterally issue enforceable restrictions on otherwise lawful activity without adoption by the local governing body (e.g., county board)?

The Circuit Court held that Wis. Stat. § 252.03’s general provisions to “do what is reasonable and necessary” and to “take all measures necessary” give local health officials “broad authority” to “control conduct” and “to do so forcefully” through enforceable general orders, App. 11–16, despite numerous textual indications that local health officials do not have this power. *See* R. 48:2 (summarizing eight such indications).

2. Whether Dane County Ordinance § 46.40(2), any orders issued by Respondent Heinrich in reliance thereon, and/or Wis. Stat. § 252.03, violate Article IV, § 22 of the Wisconsin Constitution and the non-delegation doctrine?

The Circuit Court held that an open-ended grant of police power to a local health official to adopt whatever restrictions she deems “reasonable and necessary” for as long as the COVID pandemic persists does not violate the non-delegation doctrine, App. 18–27, even though this Court already held in *Palm* that an equally broad interpretation of § 252.02’s similar language would violate the non-delegation doctrine unless any such restrictions receive legislative oversight through the rulemaking process.

BACKGROUND

Since May 2020, Respondent Heinrich has issued a series of orders unilaterally dictating all aspects of life in Dane County,¹ including, most egregiously, banning almost all indoor

¹ *See* <https://publichealthmdc.com/coronavirus/current-order> (section entitled “Past Orders”).

gatherings,² and, most recently, requiring masks in all indoor spaces open to the public, including on two-year-olds.³ To issue these orders, Respondent Heinrich has relied on Dane County Ordinance § 46.40(2), which attempts to give her legislative power vested in the county board by preemptively making any order she issues enforceable via citation. Dane County adopted that ordinance because state law does not provide any enforcement mechanism for general orders issued by a local health officer—precisely because the Legislature never gave local health officers such power. Rather, numerous statutes indicate that the Legislature expects the local governing body (the county board or city council) to vote on and approve any restrictions during a crisis, *see* R. 48:2 (summarizing eight textual indications), as many other jurisdictions have shown can be done. *See, e.g., Alison Dirr, Milwaukee Common Council approves requiring masks in public spaces, Milwaukee Journal Sentinel* (July 13, 2020).⁴

In November 2020, after Respondent Heinrich adopted the indoor gathering ban, Petitioners Becker and Klein (with one other party) filed a petition for original action, raising, among other issues, the two questions presented in this case, but this Court denied the petition 4-3. *Gymfinity, Ltd. v. Dane County*, 2020AP1927. Three Justices found “many reasons [to] grant this petition for original action.” Order Denying Petition at 4, No. 2020AP1927. Justice Hagedorn, concurring in the denial,

² Order #10, https://publichealthmdc.com/documents/2020-11-20_Order_10amendment.pdf

³ Face Covering Emergency Order, https://publichealthmdc.com/documents/2021-08-17_Order_17.pdf

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

emphasized that the petition “present[ed] important statutory and constitutional questions” that ultimately should be addressed by this Court “if [they] reach this court in an appropriate case and procedural context,” but expressed concern that an original action would make this Court the “court of first resort,” and the case may involve “factual issues” best resolved by a Circuit Court. *Id.* at 2.

In January 2020, Petitioners Becker and Klein re-filed a simplified version of the case in Circuit Court, raising only the two issues presented in this petition for bypass. R. 4; 27. Their complaint seeks a declaration that any orders Respondent Heinrich has *or will* issue are unenforceable unless adopted by the county board, and an injunction against enforcement of any past *or future* orders. R. 27:22–23.

A few days after they filed the complaint, Respondent Public Health of Madison and Dane County (PHMDC) filed an enforcement action against Petitioner A Leap Above Dance, LLC (A Leap Above), seeking nearly \$24,000 in fines for a single event that PHMDC alleges violated the indoor gathering ban in place in November–December 2020. R. 27, ¶ 5; *Public Health Madison & Dane County v. A Leap Above Dance*, No. 21CV177 (Dane Cty. Cir. Ct.). Shortly thereafter, A Leap Above joined this action as a Plaintiff. R. 27. PHMDC then dismissed its enforcement action, and Dane County re-filed it as a counterclaim in this case. R. 42:16–19.

Petitioners moved for a temporary injunction (and for summary judgment) in January, immediately after filing this case. R. 16–18. The Circuit Court heard arguments in March, and then issued a decision and order in May—after most of the restrictions had expired—denying Petitioners’ temporary injunction motion. R. 69; App 4–28.

The Circuit Court’s injunction decision rejected Petitioners’ legal claims on the merits. The court held that Wis. Stat. § 252.03’s general provisions to “do what is reasonable and necessary” and to “take all measures necessary” give local health officials “broad authority” to “control conduct” and “to do so forcefully” through enforceable general orders, App. 11–16, despite numerous textual indications to the contrary. R. 48:2. The court also held that the combination of Dane County Ordinance § 46.40(2) and Wis. Stat. § 252.03—which together create an open-ended grant of police power to Respondent Heinrich to adopt whatever restrictions she deems “reasonable and necessary” for as long as the COVID pandemic persists—is not a non-delegation problem, App. 18–27, even though this Court already held in *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶¶ 31–42, 391 Wis. 2d 497, 942 N.W.2d 900, that an equally broad interpretation of 252.02’s similar language would violate the non-delegation doctrine unless any such restrictions receive legislative oversight through the rulemaking process.

Given that the Circuit Court rejected Petitioners’ legal claims on the merits, Petitioners asked the Circuit Court to enter summary judgment for the Respondents so that they could appeal. R. 80. Two months later, the court issued an order granting Respondents summary judgment and dismissing Petitioners’ claims. R. 90.

A few days later, on August 4, Petitioners filed a notice of appeal, as of right, from the dismissal of Petitioners Becker’s and Klein’s claims against all Defendants, and from the dismissal of Petitioner A Leap Above’s claims against Defendants Heinrich and

PHMDC. R. 94.⁵ The following day, Dane County filed a motion to stay the enforcement action against A Leap Above (filed as a counterclaim) until this appeal is resolved, which the Circuit Court granted, Dkts. 100, 111.⁶ Multiple other enforcement actions have also been put on hold until the issues in this appeal are resolved. *See Dane County v. Tyrol Holdings, LLC*, No. 21FO548 (Dane Cty. Cir. Ct.); *Public Health of Madison & Dane County v. D.L. Spirits, Inc.*, 20CV2466 (Dane Cty. Cir. Ct.).

REASONS TO GRANT BYPASS

This case meets all of this Court's criteria for bypass. First, a majority of this Court has already noted that the issues presented ultimately warrant this Court's review. *See Order Denying Original Action, Gymfinity Ltd. v. Dane County*, No. 2020AP1927 (Dec. 21, 2020). In *Gymfinity*, Justice Hagedorn explained in a concurrence that Petitioners there (two of which are Plaintiffs-Appellants here) "present[ed] important statutory and constitutional questions that deserve judicial scrutiny." *Id.* at 2.

⁵ A Leap Above filed a separate petition for permissive appeal as to the dismissal of its claims against Dane County, given the pending counterclaim (which is only between Dane County and A Leap Above), and asked the Court of Appeals to consolidate the two appeals. *See* Petition for Permissive Appeal, *A Leap Above Dance, LLC v. Dane County*, No. 21AP1382. The Court of Appeals has not yet ruled on that petition, although Respondents appear not to oppose it (the deadline to respond has passed without opposition from Respondents; and *they* sought a stay of the counterclaim until this appeal is resolved). This appeal (No. 21AP1341) by itself fully presents the issues, since the order appealed from is final as to Petitioners Becker and Klein and as to A Leap Above's claims against Respondents Heinrich and PHMDC. However, if this Court grants this petition for bypass, it may also wish to take jurisdiction over No. 21AP1382, under Wis. Stat. § 809.61.

⁶ Since these two events occurred after the notice of appeal, they are not included in the record on appeal.

And *this Court's* review will ultimately be necessary because Petitioners “call[] on this court to enforce a more vigorous separation of powers to better align government operations with our constitutional order”—which, of course, only this Court can do. The concurrence explained that this Court “can address [these issues]” “[i]f [they] reach this Court in an appropriate case and procedural context,” but an original action posed two problems: it would make this Court the “court of first resort,” and the issues could “turn on questions of fact.” *Id.*

This case presents neither of those problems. As a majority of this Court in *Gymfinity* suggested they should, Petitioners litigated their claims fully in Dane County Circuit Court first. Petitioners now seek this Court’s review, not as the “court of first resort,” but as an appellate court. And there are no “factual issues,” as revealed by the Circuit Court’s opinion, which focuses entirely on the law. App. 4–28.

While the Court of Appeals has not yet weighed in, this case meets all of this Court’s criteria for bypass. These issues are ultimately bound for this Court “regardless of how the Court of Appeals might decide the issues,” *see* Wisconsin Supreme Court Internal Operating Procedures at 8. Only this Court can “provide a clear, definitive and controlling ruling” on the proper interpretation of Wis. Stat. § 252.03 and related statutes. *See* Certification Opinion at 22, *State v. Mattox*, No. 2015AP158 (Feb. 10, 2016).⁷ And, with respect the non-delegation issue, only this Court can adopt “a more vigorous separation of powers to better align government operations with our constitutional order.” Order

⁷ <https://www.wicourts.gov/ca/cert/DisplayDocument.pdf?content=pdf&seqNo=161309>

Denying Original Action at 2, *Gymfinity*, No. 2020AP1927 (Hagedorn, J., concurring).

There is also a “clear need to hasten the ultimate appellate decision,” Internal Operating Procedures at 8, given that Respondent Heinrich continues to impose unlawful orders on Dane County, with no sign of stopping. *See* Face Covering Emergency Order (in effect until Sept. 16, 2021).⁸ These orders are often issued with little warning (just two days for the most recent order), making it exceedingly difficult for businesses, schools, and individuals in Dane County to plan and operate effectively. *Id.* Dane County and PHMDC have also filed multiple, unlawful enforcement actions based on past orders—including a particularly outrageous one against Petitioner A Leap Above (for violating PHMDC’s unexpected interpretation of its own poorly drafted and internally contradictory order, *see* R. 56:6–9)—and multiple of those enforcement actions have been stayed until the important preliminary questions in this appeal are resolved. *Supra* p. 7. If this Court does not take this case now, Petitioner A Leap Above and others will have these illegal enforcement actions hanging over them for much longer—possibly a full year—until this case inevitably comes back to this Court again.

This Court’s Internal Operating Procedures also note that a petition for bypass will “usually ... meet[] one or more of the criteria for review [in] Wis. Stat. § 809.62(1).” Internal Operating Procedures at 8. This case meets almost *all* of those criteria. It involves a “real and significant question of ... state constitutional law,” Wis. Stat. § 809.62(1r)(a), as Justice Hagedorn’s concurrence in *Gymfinity* already noted. It “will help develop, clarify or

⁸ https://publichealthmdc.com/documents/2021-08-17_Order_17.pdf

harmonize the law,” Wis. Stat. § 809.62(1r)(b), namely the proper interpretation of Wis. Stat. § 252.03, and the proper application of the non-delegation doctrine in the local government context. It “calls for the application of a new doctrine,” Wis. Stat. § 809.62(1r)(c)1; that is, a re-invigorated non-delegation doctrine. It involves “a novel [question], the resolution of which will have statewide impact,” Wis. Stat. § 809.62(1r)(c)2, in particular what Wis. Stat. § 252.03 allows local health officers to do, which has increasing relevance statewide as we head into the fall and winter. The questions are “question[s] of law ... that [are] likely to recur unless resolved by [this Court],” Wis. Stat. § 809.62(1r)(c)3—again, multiple enforcement actions are awaiting a final resolution of this appeal, and Respondents are likely to continue to issue orders and enforce them in the meantime.

Respondents may argue that this petition should be denied as premature because it is being filed before the briefs on appeal. One secondary source says that “Supreme court orders have stated a policy, not reflected in any rule, that a petition for bypass filed before the respondent’s brief is filed will be dismissed as premature,” Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, § 24.3, and at least one old case briefly notes this Court having denied a bypass petition for this reason, *see N. Side Bank v. Gentile*, 129 Wis. 2d 208, 214, 385 N.W.2d 133 (1986). As Heffernan’s treatise notes, this practice is “not reflected in any rule”—Wis. Stat. 809.60 says only that a petition for bypass may be filed “*no later than* 14 days following the filing of the respondent’s brief.” Nor is it reflected in this Court’s Internal Operating Procedures. *See* pp. 8–9.

However, to the extent that has been and still is this Court’s practice, this case warrants an exception, for multiple reasons.

First, this Court is already fully aware of what the issues in this case are about, given the close relationship between this case and the *Stempski* and *Gymfinity* original actions. Second, as noted above, there is a need for an expedited decision from this Court, given that Respondent Heinrich continues to impose unlawful orders on Dane County. Third and finally, because only this Court can adopt “a more vigorous separation of powers to better align government operations with our constitutional order,” Order Denying Original Action at 2, *Gymfinity*, No. 2020AP1927 (Hagedorn, J., concurring), it will waste the litigants’ time and resources (half of which is paid for by taxpayers) to first brief this case for the Court of Appeals, only then to come back with a renewed petition for bypass, and, if granted, re-brief the case for this Court.

CONCLUSION

This Court should grant this Petition for Bypass.

Dated: September 7, 2021.

Respectfully submitted,

RICK ESENBERG (#1005622)
rick@will-law.org



LUKE N. BERG (#1095644)
luke@will-law.org

DANIEL P. LENNINGTON (#1088694)
dan@will-law.org

ANTHONY F. LoCOCO (#1101773)
alococo@will-law.org

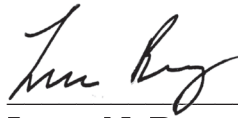
WISCONSIN INSTITUTE FOR
LAW & LIBERTY
330 E. Kilbourn Ave.,
Suite 725
Milwaukee, WI 53202
Phone: (414) 727-7361

*Attorneys for Plaintiffs-Appellants-
Petitioners*

CERTIFICATION

I hereby certify that this petition for bypass conforms to the rules contained in Wis. Stat. §§ 809.81 for a petition produced with a proportional serif font. The length of this petition is 2,879 words.

Dated: September 7, 2021.

A handwritten signature in black ink, appearing to read "Luke Berg", written in a cursive style.

LUKE N. BERG

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)**

I hereby certify that:

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

I further certify that:

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

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

Dated: Sept. 7, 2021.



LUKE N. BERG