STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

JEFFREY BECKER, ANDREA KLEIN, and A LEAP ABOVE DANE, LLC,

Plaintiffs,

v. Case No. 21-CV-143

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

Defendants.

BRIEF OF A LEAP ABOVE DANCE IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM

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INTRODUCTION

The counterclaim filed by Dane County against A Leap Above is legally invalid and should be dismissed for seven independently sufficient reasons. As an initial matter, the ordinance and health order Dane County relies on are unlawful and unenforceable because: (1) they violate or are preempted by multiple statutes indicating that local health officers cannot unilaterally issue enforceable orders generally regulating otherwise lawful conduct during a pandemic, and (2) they violate the non-delegation doctrine and certain constitutional and statutory provisions by transferring local legislative power vested exclusively in the county board to the local health director without sufficient direction or constraints. These issues were raised by Plaintiffs (including A Leap Above), prior to the counterclaim against A Leap Above. They have been fully argued and are awaiting a decision by this Court.

But even putting those two issues aside, the counterclaim should be dismissed for five additional reasons. First, the two sections of Order #10 ("the Order") Dane County invokes did not apply to A Leap Above, by the Order's own terms. Second, even if those sections did apply to A Leap Above, the event in question was at most a single violation under the text of the Order and ordinances. Third, the Order was so poorly drafted, unclear, and internally inconsistent that it is void for vagueness and cannot be enforced against A Leap Above. Fourth, the restrictions violated the First Amendment and Article I, Section 3 of the Wisconsin Constitution, both facially and as applied to the conduct alleged in the counterclaim. Finally, Wis. Stat. § 252.03 does

not permit a local health officer to ban *private* gatherings in a business. For any or all of these reasons, this Court should dismiss the counterclaim.

BACKGROUND

On January 20, Plaintiffs Becker and Klein (who are not parties to the counterclaim) filed this declaratory judgment action, arguing that Dane County Ordinance § 46.40(2) is unlawful and that none of the orders Defendant Heinrich has issued or will issue in reliance on it are enforceable. Dkt. 4.

Five days later, on January 25, the Health Department filed an enforcement action against A Leap Above Dance, seeking nearly $24,000 in fines under Dane County Ordinance § 46.40(2) for an event on December 13, 2020 that the Health Department alleges violated Order #10.[1] *Public Health Madison & Dane County v. A Leap Above Dance*, No. 21CV177 (Dane Cty. Cir. Ct.). The complaint alleged that A Leap Above "recorded" dances from *The Nutcracker* ballet indoors, in violation of Section 3.a (the "Gathering Ban"), which prohibited "A Mass Gathering inside any property." *See* Complaint (Dkt. 2) at 21, No. 21CV177.

The Order, however, contained various exceptions to the Gathering Ban. As relevant here, Section 4.a of the Order permitted "child care and youth settings" to continue to operate as long as "individual groups or classrooms [do] not contain more than fifteen (15) children." Order § 4.a.iii., iv. The Order defined "child care and youth settings" to include "unregulated youth programs," and the Wisconsin Department of

[1] Available at https://www.publichealthmdc.com/documents/2020-11-20_Order_10 amendment.pdf

Children and Families puts dance classes into this category. *Infra* Part III. The Order also permitted businesses to continue to operate at 50% capacity. Order § 5. The Order's only attempt to resolve the obvious conflict between a 50% capacity limit for businesses and an indoor gathering ban is in subsection 5.h, which says that "meetings, trainings, and conferences are considered mass gatherings," suggesting that other types of gatherings in businesses are not considered mass gatherings.

On February 2, A Leap Above joined this action as a plaintiff. Dkt. 27. The amended complaint explains that A Leap Above "permitted its dancers in small groups to record dances they had been practicing from the Nutcracker," that "pictures of these dances can be found online at A Leap Above Dance's Facebook page,"[2] and that "the pictures show that the dancers were masked and socially distanced to the extent possible." Dkt. 27, ¶ 42. While the counterclaim characterizes this as a "performance" of the Nutcracker, Dkt. 42:16,[3] ¶ 6, Dane County's answer admits that A Leap Above simply "recorded videos of its dancers in groups" and that the pictures show what took place. Dkt. 42:7, ¶ 42.[4]

On February 23, the Health Department voluntarily dismissed its enforcement action filed against A Leap Above. Notice of Voluntary Dismissal (Dkt. 9), No.

[2] https://www.facebook.com/media/set/?vanity=aleapabovedance&set=a.3925086054182041

[3] Page numbers on "Dkt." citations refer to the court-stamped page numbers, rather than the pagination at the bottom of the filings.

[4] As the pictures show, there was no audience. If the counterclaim survives the motion to dismiss, A Leap Above's owner Natalie Nemeckay will explain further that even parents were required to stay outside, and the groups were carefully scheduled over five or six hours to prevent contact or interaction, consistent with the rules for "unregulated youth programs."

21CV177. That case had been filed by a City of Madison attorney, who does not have jurisdiction to enforce a *county* ordinance. *See* Dane County Ordinance § 46.28(1) ("The *corporation counsel* shall prosecute all violations of this chapter.")

On February 26, Defendant Dane County refiled the enforcement action as a counterclaim against A Leap Above. Dkt. 42:16–19 (cited hereafter as "Counterclaim"). As before, the counterclaim alleges that A Leap Above violated the Gathering Ban in Section 3.a of Order #10, but now also alleges it violated the social distancing requirements applicable to "sporting events" in Section 4.c of the Order. Counterclaim ¶¶ 11–14. It is important to highlight, however, that the counterclaim *does not* allege that A Leap Above ever exceeded the 15-person limit applicable to "unregulated youth programs." It could not because, as the pictures show, A Leap above did not exceed that limit.

ARGUMENT

When evaluating the sufficiency of a complaint, courts "accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. Courts may not "add facts in the process of construing a complaint" and must look only to the facts actually alleged. *Id.* Importantly, courts must "accurately distinguish pleaded facts from pleaded legal conclusions." *Id.* "[L]egal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss." *Id.* "In order to satisfy ... § 802.02(1)(a),

a complaint must plead facts, which if true, would entitle the plaintiff to relief" and "plausibly suggest a violation of applicable law." *Id.* at ¶¶ 21, 29–31.

I. Dane County Ordinance § 46.40(2) and the Order Violate or Are Preempted by Various State Statutes

The counterclaim against A Leap Above must be dismissed because state law does not permit local health officials to issue enforceable general orders, and thus Dane County Ordinance § 46.40(2), the Order, and the enforcement action against A Leap Above are unlawful. Plaintiffs (including A Leap Above) have fully argued these issues in their briefs in support of a temporary injunction and summary judgment and at a hearing on March 3. Dkts. 17:14–19; 48:3–7. A Leap Above will not repeat those arguments, but incorporates them here as grounds for dismissing the counterclaim against it.

II. Dane County Ordinance § 46.40(2) (or Wis. Stat. § 252.03) and the Order Violate the Non-Delegation Doctrine and/or Various Constitutional and Statutory Provisions Vesting Local Legislative Authority in the County Board

The counterclaim must also be dismissed because Dane County Ordinance § 46.40(2) violates the non-delegation doctrine and various constitutional and statutory provisions by allowing Defendant Heinrich to exercise local legislative authority that is vested exclusively in the county board, and thus the ordinance, the Order, and the enforcement action against A Leap Above are unlawful.[5] Plaintiffs

[5] As Plaintiffs have explained, the ordinance is the proper target of these arguments; but to the extent this Court disagrees, Plaintiffs have argued in the alternative that Wis. Stat. § 252.03 itself violates the non-delegation doctrine and Article IV, § 22 of the Wisconsin Constitution.

(including A Leap Above) have fully argued these issues in their briefs in support of a temporary injunction and summary judgment and at a hearing on March 3. Dkts. 17:19–27; 48:7–12. A Leap Above will not repeat those arguments, but incorporates them here as grounds for dismissing the counterclaim against it.

III. By the Order's Own Terms, the Gathering Ban and Sporting Event Restrictions Did Not Apply to A Leap Above

The counterclaim alleges that A Leap Above violated two provisions of Order #10: Subsection 3.a, which provides that "A Mass Gathering inside any property is prohibited" (the "Gathering Ban"); and Subsection 4.c.ii, which required "physical distancing" to "be maintained at all times" for sporting events like "games and competitions" (the "Sporting Event Restrictions"). By the Order's own terms, neither of these sections applied to A Leap Above.

With respect to the Gathering Ban, the Order contains two relevant exceptions from that ban. First, the Order exempts "child care and youth settings," defined to include, among other things, "unregulated youth programs." Order § 4.a.ii. The Order did not prohibit gatherings in "child care and youth settings," instead allowing "individual groups or classrooms" with 15 or fewer children. *See* Order §§ 4.a.iii, iv. Under Wisconsin state law, dance studios like A Leap Above are categorized as "unregulated youth programs." Regulations issued by the Wisconsin Department of Children and Families list various types of "excluded" (i.e. unregulated) "child care" "arrangements," and *first* in its list are "[g]roup lessons to develop a talent or skill, such as dance or music." Wis. Admin. Code § DCF 252.03(1). The counterclaim does not allege that A Leap Above violated the Order's 15-person limit for "child care and

youth settings" (because it did not). For this reason alone, Claim One in the counterclaim should be dismissed.

Second, the Order also exempts "businesses." Under Subsection 5, businesses were permitted "50% of approved capacity levels." Order § 5.a. The Order's only application of the gathering ban to businesses says that "meetings, trainings, and conferences are considered mass gatherings," suggesting other types of gatherings are not. Order § 5.h. A Leap Above is a business: it is a limited liability company operating as a dance studio and registered with the Department of Financial Institutions. *See* Dep't of Fin. Insts., File No. L036864 (noting that "A Leap Above Dance, LLC" is a domestic limited liability company in good standing).[6] The counterclaim does not allege that A Leap Above exceeded 50% of its approved capacity levels, or that the event in question was a "meeting," "training," or "conference." Therefore, Claim One should also be dismissed because A Leap Above is a "business" and the counterclaim does not allege any violations applicable to "businesses."

The Sporting Event Restrictions also did not apply to the activity alleged in the counterclaim. Section 4.c of the Order did not contain any definition of the types of activities it covered. The only activity addressed in the text of the Order is "games and competitions." And Dane County's *own counterclaim* characterizes Section 4.c as applying to "sporting events." Counterclaim ¶¶ 12–13. The counterclaim alleges that A Leap Above hosted a "performance" of the Nutcracker on December 13. A Leap

[6] https://www.wdfi.org/apps/CorpSearch/Details.aspx?entityID=L036864&hash=1288956685

Above disputes that characterization, *see supra* p. 3 and n. 4, but even if that description were accurate, a "performance" of the Nutcracker is quite obviously not a "game," "competition," or "sporting event." And there is nothing else in the text of Section 4.c of the Order that would make that Section applicable to such an event.

Dane County's counterclaim alleges that group dance was classified as a sport in a "Sports Guidance" document issued by the Health Department. Counterclaim ¶ 11. But Dane County Ordinance § 46.40(2) does not prohibit violating a "guidance document" issued by the Health Department; it only prohibits violating "an *Order* of the Director of Public Health Madison and Dane County." And there is nothing in the text of the Sports Restrictions in Section 4.c of the Order that suggests they would apply to a "performance" of the Nutcracker. Additionally, as explained above, A Leap Above fell into a separate sub-category within Section 4 of the Order—for "child care and youth settings"—which provides an additional basis for concluding that the sports restrictions did not apply to it. For these reasons, Claim Two of the counterclaim must also be dismissed.

As an aside, the fact that Defendant Heinrich believes she can not only write and enforce sweeping restrictions, but also *reinterpret* her own poorly drafted orders in separate guidance documents and blog posts—and then rely on that reinterpretation for her own enforcement efforts—further highlights the non-delegation problem that Plaintiffs have raised in their case in chief, *supra* Part II, as well as the vagueness problem raised below, *infra* Part V.

Even if this Court concludes that the application of the Order to A Leap Above is unclear, it should resolve any ambiguity in A Leap Above's favor, for two reasons: first, as a matter of constitutional avoidance, given the serious constitutional issues at stake if this enforcement action proceeds, *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 52, 376 Wis. 2d 147, N.W.2d 384; *supra* Part II; *infra* Parts V, VI; and second, under the rule of lenity and canon of strict construction, which require ambiguous penal provisions to be construed in favor of the defendant to ensure fair "notice as to what conduct is [prohibited]." *State v. Christensen*, 110 Wis. 2d 538, 546–47, 329 N.W.2d 382 (1983); *State v. Guarnero*, 2015 WI 72, ¶¶ 26–27, 363 Wis. 2d 857, 867 N.W.2d 400.[7]

IV. Even if the Gathering Ban and Sporting Event Restrictions Did Apply to A Leap Above, Neither the Order Nor the Ordinance Permit More Than One Count

The counterclaim alleges that A Leap Above violated both the Gathering Ban and the Sporting Event Restrictions multiple times ("at least eight") on a single day during one event, where each separate violation corresponds to a different "segment" of the Nutcracker. *See* Counterclaim ¶¶ 7, 10, 14, 16, p. 18 (seeking "a forfeiture of

[7] These doctrines have traditionally been employed when interpreting criminal statutes, but they should apply even more forcefully to a penal code drafted unilaterally by an unelected official. After all, their *raison d'être* is to require clarity *from the legislative body*. *Christensen*, 110 Wis. 2d at 546–47 ("[S]ince the power to declare what conduct is subject to penal sanctions is legislative rather than judicial, it would risk judicial usurpation of the legislative function for a court to enforce a penalty where the legislature had not clearly and unequivocally prescribed it.")

$200 per violation of DCO § 46.40(2) that occurred on December 13, 2020"). Neither the Order nor the relevant ordinances provide any basis for a separate violation per "segment" at a single event.

Taking the Order first, the text of the Gathering Ban simply says that "a mass gathering inside any property is prohibited." Order § 3.a. Similarly, the Sporting Event Restrictions apply to "games and competitions," or, in Dane County's words, to "sporting events." Nothing in either section of the Order indicates that a single event becomes *multiple* gatherings or "sporting events" if the participants are divided into smaller groups to minimize interactions. Instead, other sections of the Order indicate that is exactly what *should* be done. Order § 4.a (directing youth settings to divide participants into groups of fifteen or less and to avoid "interaction between groups"); Order § 4.d.iii.9 (requiring schools to "restrict mixing between groups as much as possible."). Dane County's interpretation not only has no basis in the text and is inconsistent with other sections of the Order, it also creates whiplash: according to Dane County's theory, if A Leap Above had all its dancers in one room at the same time, it would have been subject to one $200 fine for a single "gathering"; but by dividing its dancers into separate small groups to minimize interactions, as it was elsewhere told to do for reasons of safety, its penalties *multiplied*. Such an interpretation is patently unreasonable.

Even putting aside the text of the Order itself, Dane County's ordinances provide a separate basis for this being, at most, one violation. The counterclaim alleges a violation of Dane County Ordinance § 46.40(2). A separate provision in that

same chapter says that "any person violating any provision of this chapter shall forfeit not less than $50 nor more than **$**200 *for each day* that a violation exists." Dane County Ordinance § 46.27(1) (emphasis added).

Even accepting all the allegations in the counterclaim as true, A Leap Above allegedly held one event on one day: December 13, 2020. Therefore, even if this Court concludes that the Gathering Ban and Sporting Event Restrictions applied to A Leap Above (and they did not, *see supra* Part III), this was at most one violation, and this Court should dismiss every fine above one (or at least clarify that this was, at most, one violation).

V. The Order Was Void for Vagueness as Applied to A Leap Above

A statute or ordinance is unconstitutionally vague if its terms are so "obscure that men of ordinary intelligence must necessarily guess as to its meaning and differ as to its applicability." *Milwaukee v. Wilson*, 96 Wis. 2d 11, 16, 291 N.W.2d 452 (1980). The law "must be sufficiently definite so that potential offenders who wish to abide by the law are able to discern when the region of proscribed conduct is neared and those who are charged either with enforcing or applying it are not relegated to creating their own standards of culpability instead of applying the standards prescribed in the law." *Id*. The "principles underlying the void for vagueness doctrine ... stem from concepts of procedural due process." *State v. Popanz*, 112 Wis. 2d 166, 172, 332 N.W.2d 750 (1983). "Due process requires that the law set forth fair notice of the conduct prohibited or required and proper standards for enforcement of the law and adjudication." *Id*.

Even more clarity is required when an ordinance or statute (or here, order) is applied to First Amendment protected activities. The Wisconsin Supreme Court has explained that, when an ordinance "impinges on First Amendment rights," the "burden of establishing the constitutionality of [the] ordinance … is upon its proponent." *City of Madison v. Baumann*, 162 Wis. 2d 660, 669, 470 N.W.2d 296 (1991); *see also id.* at 673 ("A vague statute, when it impinges upon fundamental First Amendment rights, is not enforceable for, by definition, a vague statute is of such a nature that persons cannot know their rights and responsibilities."). Dancing and other creative musical endeavors are undoubtedly protected by the First Amendment. *See, e.g., id.* at 668 (finding that a "musical presentation" was protected by the First Amendment); *infra* Part VI.

The Ordinance certainly does not provide "fair notice of the conduct prohibited or required," *id.*—it simply incorporates by reference whatever the health officer decides to prohibit via order, or, in Dane County's view, by guidance document or blog post. *See Palm*, 2020 WI 42, ¶ 37, 40. That form of incorporation-by-reference is unlawful for the reasons explained in Parts I–II, but if it were permissible, the vagueness doctrine would necessarily require any *orders* to be sufficiently clear, since the actual prohibitions are contained in them, rather than the ordinance.

And the Order was so poorly drafted and riddled with inconsistencies that it failed to provide the constitutionally required "fair notice," and is therefore void for vagueness as applied to A Leap Above. Again, the text of the Order exempts "unregulated youth programs" from the gathering ban, and separately allows

businesses to operate at 50% capacity as long as they do not host any "meetings, trainings, or conferences." Dane County has apparently concluded that A Leap Above does not fit into these categories, but the Order does not anywhere provide fair notice that these exemptions would not apply to a dance studio, which is unquestionably both an "unregulated youth program" and a "business." Nor does the Order indicate anywhere that dances from *The Nutcracker* would qualify as a "game," "competition," or "sporting event."

The Order and ordinances also do not provide fair notice—or any indication whatsoever—that the host of a gathering could receive a separate fine for separate "segments" or groups. As explained above, both the Order and ordinances indicate that a gathering would be, at most, a single violation. *Supra* Part IV. It is patently unreasonable, and totally at odds with basic principles of fair notice and due process, for Dane County to seek thousands of dollars in fines for a single event, especially one that fell within multiple exceptions.

Because the Order's application to A Leap Above was, at best, completely unclear, it is void for vagueness and may not be enforced against it.

VI. The Restrictions Violated the First Amendment, Both Facially and as Applied to the Conduct Alleged in the Counterclaim

The Gathering Ban and Sporting Event Restrictions did not apply to A Leap Above, by the Order's own terms, *supra* Part III, but even if they did, they violated

the First Amendment,[8] both facially and as applied to the conduct alleged in the counterclaim.

In an as-applied First Amendment challenge, courts first assess whether the conduct being punished is protected by the First Amendment, and if it is, whether the statute or prohibition is content-based or content-neutral. *State v. Baron*, 2009 WI 58, ¶ 14, 318 Wis. 2d 60, 769 N.W.2d 34. If the prohibition is content-neutral, as here, *the government* bears the burden of proving that the prohibition survives intermediate scrutiny as-applied to the protected conduct. *Id.* To survive intermediate scrutiny, the prohibition must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *State v. Crute*, 2015 WI App 15, ¶ 26, 360 Wis. 2d 429, 860 N.W.2d 284.

There is no question that the conduct alleged in the counterclaim—"perform[ing]" dances from *The Nutcracker* in small groups, *see* Counterclaim ¶¶ 6–7 (or video-recording dances, *see supra* p. 3 and n. 4)—was expressive conduct protected by the First Amendment. *See, e.g., Baumann*, 162 Wis. 2d at 668 (finding that a "musical presentation" was protected by the First Amendment); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Nat'l Endowment for the Arts v. Finley*, 524

[8] The ban, if it applied to the conduct alleged in the counterclaim, would also violate Article I, Section 3 of the Wisconsin Constitution, which the Wisconsin Supreme Court has generally interpreted as coextensive with the First Amendment. *See State v. Breitzman*, 2017 WI 100, ¶ 50, 378 Wis. 2d 431, 904 N.W.2d 93. Any reference herein to the "First Amendment" is intended to apply equally to Article I, Section 3.

U.S. 569, 602 (1998) (Souter, J., dissenting) ("It goes without saying that artistic expression lies within this First Amendment protection.")

And while preventing the spread of COVID is undoubtedly a significant government interest, the Order was not in any way narrowly tailored to that end. It allowed grocery stores, Order § 6.a, restaurants, *id*. § 6.b, retail stores, *id*. § 6.c, salons and spas, *id*. § 6.d, gyms and fitness centers, *id*. § 6.e, hotels and motels, *id*. § 6.g, and other businesses, *id*. § 5, to continue to operate subject to capacity limits. It also permitted "child care and youth settings" to operate with groups of 15 or less indoors. *Id*. § 4.a. As explained above, A Leap Above fit this category, but even if Dane County believes it did not, there is no rational explanation for why it did not. And the Order did not require absolute social distancing at all times in these settings. *Id*. § 4.a.vii (requiring distancing in "youth settings" only "to the greatest extent possible"); *id*. § 4.d.iii.3 (same for schools). If other "youth programs" could safely operate with groups of 15 or less, there is no reason a dance studio like A Leap Above could not as well. *See Hund v. Cuomo*, No. 20-CV-1176, 2020 WL 6699524, at *8–*9 (W.D.N.Y. Nov. 13, 2020) (holding that a COVID restriction applied to some but not other types of live music failed intermediate scrutiny).

Finally, if the Order applied to A Leap Above such that it could not even video record dances from *The Nutcracker* in small groups, while wearing masks, the Order was invalid for the additional reason that it did not "leave open ample alternative channels for communication of the information." *Clark*, 468 U.S. at 293.

The Order was also facially unconstitutional because it was manifestly overbroad. A statute or ordinance (or here, order) is unconstitutionally overbroad "when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate." *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 52, 363 Wis. 2d 1, 866 N.W.2d 165. Put differently, a prohibition is invalid if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010); *State v. Stevenson*, 2000 WI 71, ¶¶ 12–14, 236 Wis. 2d 86, 613 N.W.2d 90.

The gathering ban plainly sweeps in an enormous amount of constitutionally protected conduct. In addition to protecting directly expressive conduct and activities (like dance), both the United States Supreme Court and the Wisconsin Supreme Court have "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 25, 358 Wis. 2d 1, 851 N.W.2d 337. Likewise, "the First Amendment protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). And these rights are especially protected in

the home. *See Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499–500 (1977); *City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1971) ("[T]he right to be undisturbed in one's own home" is a "fundamental right [that] is considered beyond challenge.").

Yet the gathering ban prohibited indoor gatherings in even *private homes* among individuals not within the same immediate household (while allowing gatherings in businesses). To give just a few examples, it prevented grandparents from visiting their grandchildren, adults from caring for their ailing parents, non-co-habiting couples from seeing one another, and close friends and relatives from gathering to celebrate and worship together on Thanksgiving. Indeed, stopping Thanksgiving gatherings was the primary purpose of the ban—it was issued one week before Thanksgiving. Such a sweeping order is plainly overbroad and unconstitutional on its face.

VII. State Law Does Not Permit Banning Private Gatherings

Plaintiffs' primary argument in the declaratory judgment action (incorporated in Part I) is that the general authorizations in Section 252.03 to "do what is reasonable and necessary" and to "take all measures necessary" do not include the power to issue any enforceable orders. However, if this Court disagrees with that argument, such that those provisions do allow *some* enforceable orders, this Court should still hold that Section 252.03 does not allow local health officials to prohibit *private* gatherings in a home or business.

As Plaintiffs have acknowledged, Wis. Stat. § 252.03 allows local health officials to "forbid *public* gatherings," but does not anywhere grant authority to forbid *private* gatherings not open to the public. If local health officials could nevertheless invoke the general authorizations to forbid any private gathering whatsoever, public or not, the statutory limit to "*public* gatherings" would be no limit at all, but instead meaningless surplusage. It is a hornbook principle of statutory interpretation that statutes may not be interpreted to render one of the terms meaningless: "[statutes] should be construed to give effect to each and every word, clause and sentence and a construction that would result in any portion of a statute being superfluous should be avoided wherever possible." *Wagner v. Milwaukee Cty. Election Comm'n*, 2003 WI 103, ¶ 33, 263 Wis. 2d 709, 666 N.W.2d 816.

No "public gathering" is alleged in the counterclaim; Dane County does not allege that the event was open to the public or to anyone other than the dancers who came to the studio to record their dances (because it was not). Therefore, the Gathering Ban, to the extent it applied to this event, exceeded the authority under Wis. Stat. § 252.03(2), and the counterclaim based on it must be dismissed.

CONCLUSION

A Leap Above respectfully asks this Court to dismiss the counterclaim.

Dated: March 18, 2021

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