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IN THE SUPREME COURT OF WISCONSIN

Case No. 20-AP-765-OA

WISCONSIN LEGISLATURE,

Petitioner,

V.

SECRETARY-DESIGNEE ANDREA PALM, JULIE WILLEMS VAN DIJK AND NICOLE SAFAR, IN THEIR OFFICIAL CAPACITIES AS EXECUTIVES OF WISCONSIN DEPARTMENT OF HEALTH SERVICES,

Respondents.

NON-PARTY BRIEF OF AMICI CURIAE, INDEPENDENT BUSINESS ASSOCIATION OF WISCONSIN, DOUBLE DECKER AUTOMOTIVE, INC., AND SHEAR XCELLENCE, LLC, IN SUPPORT OF THE EMERGENCY PETITION FOR AN ORIGINAL ACTION AND IN SUPPORT OF THE EMERGENCY MOTION FOR A TEMPORARY INJUNCTION

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INTEREST OF AMICI CURIAE

Amicus Independent Business Association of Wisconsin ("IBAW"), was formed in 1973 to serve the needs and interests of small, independent businesses in Wisconsin. IBAW has approximately 190 members located throughout Wisconsin and is the leading advocacy group for small business in this state.[1] IBAW members have suffered significantly from the business shut-downs required by the Safer at Home orders. In many cases they have had to lay-off employees and if the shut-down continues much longer, some will likely have to permanently close their doors.

Amicus Double Decker Automotive, Inc., is an automobile repair shop located in Pleasant Prairie. As an automobile repair shop, *amicus* is an essential business under the Safer at Home orders, but due to the economic conditions caused by the shut-down, *amicus*' business is down substantially and *amicus* has had to reduce its hours of operation and its employees are suffering

[1] The Wisconsin Institute for Law & Liberty is a member of IBAW.

because they are compensated on an hourly and commission basis. The reduction in business has caused all of them to lose pay.

Amicus Shear Xcellence LLC, is a hair salon located in Grafton, WI. *Amicus* has only one employee, a licensed cosmetologist, who operates by appointment only. *Amicus* builds in time between appointments so that there is no overlap between customers. *Amicus* has been completely shut down since the beginning of the Safer at Home orders, even though *amicus* operates its business in a manner where social distancing between customers is standard.

Small businesses in this state, whether deemed "essential" or not, are suffering significant financial harm from the economic shut-down caused by the Safer at Home orders and *Amici* submit this brief is support of the Legislature's position that the Respondents do not have the power to unilaterally continue this shut-down.

INTRODUCTION

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.
>
> - James Madison, *Federalist No. 47*

Wisconsin's Constitution clearly vests the legislative power in the Senate and Assembly. Wis. Const. Art. IV, §1. The Legislature may not simply give that power away. *In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717, 718 (1931). The constitutional separation of powers is not for the benefit of those who hold those powers; it is the bedrock of liberty. *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, ¶45 (plurality opinion). For that reason, each branch must "jealously guard" and exercise its constitutional responsibilities. *Gabler v. Crime Victims Rights Board*, 2017 WI 67, ¶31.

In particular, this Court "must be assiduous in patrolling the borders between the branches. This is not just a practical matter

of efficient and effective government. We maintain this separation because it provides structural protection against depredations on our liberties." *Tetra Tech EC, Inc.*, 2018 WI 75, ¶ 45 (plurality opinion).

Most separation of powers cases address excessive concentrations of power that, while raising serious constitutional questions, do not rise to the level of tyranny. But the claims of authority made by the Respondents in this case (hereafter "DHS"), come perilously close. This not because it is unnecessary for state government to formulate a strong response to the spread of COVID-19 or even due to the merit (or lack of merit) of the particular response that DHS has chosen. The problem here is the breadth of authority that DHS claims to possess. DHS claims the authority under Chapter 252 to unilaterally shut down thousands of businesses throughout this state and forbid families from visiting each other. DHS says that it can restrict religious worship, prohibit public assemblies and limit all but "essential" intrastate travel. It claims the authority to enforce these *diktats* by criminal

prosecution. Further, DHS purports to exercise this authority in the absence of a declared public health emergency. Indeed, DHS says it can be exercised even after the Legislature has declined to extend a declared public health emergency pursuant to Wis. Stat. §323.10.

DHS' claimed authority is unlimited in its extent, indefinite in its duration and free of legislative oversight, save a repeal or amendment of Chapter 252. Put differently, only a supermajority of the Legislature can check DHS's plenary authority.

The Legislature has explained that it did not, as a matter of law, delegate such sweeping power to DHS. *Amici* agree with the Legislature's reading of Wis. Stat. §§252.02(3), (4) and (6) and will not repeat those arguments. *Amici* file this brief to show that, if DHS's interpretation of Chapter 252 is correct, the statutes in question constitute an unconstitutional delegation of legislative power to the executive.

ARGUMENT

On March 12th, in light of the spread of COVID-19 in Wisconsin, the Governor issued Executive Order #72 declaring a public health emergency pursuant to Wis. Stat. §323.10. The declaration activated certain "emergency" powers for the Governor and other executive branch agencies for a period not to exceed 60 days (expiring May 11, 2020), unless rescinded or extended by the Legislature. The Governor's emergency powers under Chapter 323 are not at issue here.

On March 24th, acting at least in part on the Governor's emergency powers, DHS issued Emergency Order #12 (also known as the "Safer at Home" order) imposing extraordinary restrictions on the liberty of Wisconsinites with the goal of slowing the spread of COVID-19. With the expiration of the Governor's emergency declaration set to occur on May 11th, and the original "Safer at Home" order set to expire on April 24th, DHS issued a new order (Emergency Order #28) on April 16th essentially extending the "Safer at Home" order through May 26th at 8:00 a.m. Shortly

thereafter, DHS issued Emergency Order #31 (the so-called "Badger Bounce Back Plan") on April 20th. That order creates what DHS calls "a phased approach to re-opening [Wisconsin's] economy and society" but that re-opening is only based upon "the state" at some point in the future achieving a set of goals developed by DHS. The goals are set forth with varying degrees of clarity and DHS alone gets to determine when they have been met.

When DHS issued the original "Safer at Home" order, it explained that its authority to do so came from "the authority of Wis. Stat. §§252.02(3) and (6) and all powers vested in [DHS] through Executive Order #72, and at the direction of Governor Tony Evers." Thus, in its original order, DHS was not purporting to act independently of Governor Evers or solely under Chapter 252, but rather at the Governor's direction and with the powers vested in him by the declaration of a public health emergency. Thus, the original order was subject to the time limitation and legislative oversight applicable to a public health emergency.

But when DHS issued the second Safer at Home order and the related Badger Bounce Back order, it could no longer rely upon the Governor's declaration of a public health emergency because those orders extended past the 60-day expiration of the emergency. So DHS said only the extension of the Safer at Home order and the Badger Bounce Back order were based on "the authority vested in [DHS] by the Laws of the State, including but not limited to Section 252.02(3), (4), and (6).

DHS claims that those provisions grant it the authority to impose all of the extraordinary restrictions on personal and economic liberty set forth in the extended Safer at Home order and the Badger Bounce Back order. DHS claims that it has that authority indefinitely and without the substantive limitations, procedural safeguards and legislative oversight that would accompany rule-making. *Amici* do not believe that Chapter 252 gives DHS this extraordinary power. But if this Court disagrees, and gives these statutes the broad reading contended for by DHS, then the statute is unconstitutional.

I. Separation of powers imposes limits on the delegation of legislative powers to administrative agencies.

DHS claims that Chapter 252 empowers it to impose whatever legal restrictions it deems appropriate to stem the spread of infectious disease. It says, in effect, that the Legislature has empowered DHS to make whatever laws DHS deems necessary. Such a broad grant of legislative power would be unconstitutional.

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 the Legislature's ability to transfer authority to the executive. This substantive limit focuses on whether "legislative power" has been delegated in the first place, asking whether the Legislature has provided 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 Legislature 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 rule making authority may be exercised by an agency if it is sufficiently limited by procedural safeguards. This "procedural" limit on agencies is less concerned with what agencies are permitted to do, than how they are permitted to do it.

As explained below, "substantive" limits on agency power have been rarely enforced, with most courts, including this Court, instead attempting to limit overbroad delegations by insisting on procedural safeguards. But the U.S. Supreme Court seems increasingly open to enforcing substantive limits, and this Court should as well. The case for substantive limits was most recently made by Justice Neil Gorsuch in his dissent in *Gundy v. United States*, ___ U.S. ___, 139 S. Ct. 2116, 2133–35 (2019).

Justice Gorsuch explained that the framers insisted on a separation of powers because they "believed the new federal government's most dangerous power was the power to enact laws

restricting the people's liberty." *Id.* at 2134. To check an "excess of law-making," they required, as did the framers of Wisconsin's Constitution, bicameralism - with different houses of the legislative branch elected at different times by different constituencies and for different terms of office - and with the requirement that legislation receive the chief executive's approval or obtain enough support to override his veto. *Id.*

Second, Justice Gorsuch explained that the constitution's "detailed processes for new laws were also designed to promote deliberation." *Id.* As Hamilton explained in the Federalist No. 73, "the greater the diversity in the situations of those who are to examine" a law, the fewer "missteps which proceed from the contagion of some common passion or interest."

Third, Justice Gorsuch observed that "[b]y requiring that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear." The people would not only know

whom to hold accountable for the laws but had the power to do so. *Id.*

Delegation of legislative authority cannot be used to avoid these limitations. As Justice Gorsuch observed, "[t]he framers understood, too, that it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Id.*

a. The U.S. Supreme Court is poised to consider reinvigoration of a substantive non-delegation doctrine.

Originally, the U.S. Supreme Court imposed substantive limits on delegation. In *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), the Court required delegations to contain an "intelligible principle", stating: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act by Congress] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409. The Court upheld a delegation from Congress

in that case because the Court found that Congress had described, with clearness, its policy and plan and then authorized a member of the executive branch to carry it out. *Id.* at 405.

That rule requiring Congress to set the policy and requiring intelligible principles to be followed by the agency initially seemed to work. *See Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521-22, 542 (1935). But given a perceived need by some to permit the growth of the administrative state, the rule came under increasing criticism and stopped being used to invalidate delegations. *See Mistretta v. United States*, 488 U.S. 361, 371-372 (1989).

But the U.S. Supreme Court has not entirely abandoned the principle. It has required express authorization of the discretion to decide major policy questions. *Paul v. United States,* 140 S.Ct. 342 (2019) (Statement of Kavanaugh, J., respecting denial of writ of certiorari) (collecting cases). And in *Gundy,* the U.S. Supreme Court gave its strongest indication yet that there is a need to reinvigorate the doctrine with four of the eight justices sitting on

the case outright calling for such reevaluation. *See Gundy*, 139 S.Ct. at 2131 (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); see also *Id.* (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.) ("Justice Alito supplies the fifth vote for today's judgment . . . , indicating . . . that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait."). Justice Kavanaugh (who did not participate in *Gundy*) has stated "Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases." *Paul,* 140 S.Ct. at 342.

b. This Court, likewise, should require substantive limits on the delegation of legislative authority.

Like its federal counterpart, this Court has moved away from substantive limits on delegation and has increasingly allowed delegations of legislative power to the executive branch. In the decades after statehood this Court did not hesitate to strike down delegations of legislative powers to the executive branch, adopting

substantive non-delegation protections. *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.").

In *State v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928), however, this Court moved to a more lenient standard for evaluation of claimed delegations of legislative authority:

> The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate—is a power which is vested by our Constitution in the Legislature, and may not be delegated. When, however, the Legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose . . . .

Id. at 941.

Although this Court has not explicitly foreclosed substantive limits on the delegation of legislative authority, it now permits the delegation of legislative power to the executive so long as "the purpose of the delegating statute is ascertainable and there are procedural safe-guards to insure that the board or agency acts within that legislative purpose," *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971). This Court even approves "broad grants of legislative powers" where there are "procedural and judicial safeguards against arbitrary, unreasonable, or oppressive conduct of the agency," *Westring v. James*, 71 Wis. 2d 462, 468, 238 N.W.2d 695 (1976) (emphasis added) (citing *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 158 N.W.2d 306 (1968)). While "the nature of the delegated power still plays a role in Wisconsin's non-delegation doctrine," "[t]he presence of adequate procedural safeguards is the paramount consideration." *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, ¶79 & n.29; *see also Id.* at ¶¶54-55.

But 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 the Legislature, a much sounder protection of individual liberty, and an appropriate restraint on law-making by agencies. Both substantive and procedural protections are necessary.

c. If Chapter 252 confers unlimited authority on DHS to take whatever steps it wishes to stem the spread of infectious disease, it is unconstitutional.

This case illustrates why a substantive non-delegation doctrine – one that requires the Legislature to make and not to delegate major policy determinations – is required.

Wis. Stat. §252.02(3) states "[t]he department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." DHS reads this to authorize it to require Wisconsinites to stay at home and to forbid any gathering of persons of any size (even two) who do not live together - save for permitted purposes. It supposedly authorizes DHS to close private businesses, forbid private

gatherings, restrict travel and limit a variety of human interactions that cannot be reasonably called "gatherings."

Wis. Stat. §252.02(6) states "[t]he department may authorize and implement all emergency measures necessary to control communicable diseases." DHS reads this to authorized restrictive measures beyond the expiration of a public health emergency.

Finally, Wis. Stat. §252.02(4) authorizes DHS to "promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, [and] for the control and suppression of communicable diseases . . . ." Yet both Stay at Home orders involve neither rule making nor are orders applying pre-existing law.

Put differently, DHS's position is that the Legislature has authorized it to do anything for as long as DHS deems necessary to control infectious diseases. It sees itself as having plenary legislative authority in this area.

Permitting this broad delegation implicates all of the evils the separation of powers is designed to protect against. "Do

whatever you think best" is not a direction to carry out legislative policy but an unlimited license to *create* that policy. It is nothing but the announcement of a "vague aspiration" – control infectious disease – and assignment to DHS of "the responsibility of adopting legislation to realize" this goal. *Gundy,* 139 S.Ct. at 2133 (Gorsuch, J., dissenting). It neither defines nor limits the measures that can be taken, much less provide 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 agency to make such determinations.

If this Court accepts DHS's interpretation of the statutes, then no amount of procedural protection could remedy the usurpation of legislative power being accomplished. If DHS is right, the Legislature has given a single agency the power to completely lock down the state – suspending civil liberties, forbidding almost all human interaction and halting commerce without limitation or guidance other than "control infectious

disease." If that is not a violation of the separation of powers, nothing is.

This Court need not discern an exact standard for non-delegation or even decide whether substantive limitations on the delegation of legislative authority ought to be limited to major policy decisions. Whether and when an executive official can shut down the state is a major policy question.

However, such standards are available. In the past, this Court has said that "a law must be complete … and nothing must be left to the judgment of the . . . delegate of the legislature . . . ." *Dowling*, 65 N.W. at 741, or that "there must first be some substantive provision of law to be administered and carried into effect." *Burdge*, 70 N.W. at 350.

Federal cases have required that the Legislature supply an "intelligible principle" and describe with "clearness … its policy and plan." *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409, 405. More recently, Justice Gorsuch suggested asking a series of questions, "Does the statute assign to the executive only the responsibility to

make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did [the Legislature], and not the Executive Branch, make the policy judgments?" *Gundy,* 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

Under any such test, an interpretation of Wis. Stat. §§252.02(3), (4) and (6) that reads a general grant of the authority to "do what you will" to be broad enough to promulgate and enforce the Safer at Home orders and the Badger Bounce Back order clearly flunks. It makes DHS a mini-legislature empowered to make any law to control infectious disease.

This is not to say that policies to cope with COVID-19 are unnecessary. It is not even to say that some of the particular policies adopted here are not justified. The question becomes *who* gets to make such policy decisions, and *how*. Here, the executive branch through the Governor's emergency powers under Chapter 323 had the power to take immediate emergency action. But if Chapter 252 is a backdoor though which these measures can be

indefinitely extended by an administrative agency, that necessarily involves the making of law. Our Constitution says that the Legislature must do that in accordance with Article IV.

II. Even under existing non-delegation case law the statutory provisions relied upon by DHS are unconstitutional.

Even under current nondelegation law, the powers granted to DHS under Wis. Stat. §§252.02(3), (4) and (6) must be subject to existing procedural safeguards (e.g., those powers may only be exercised during a declared public health emergency and/or they have to be exercised through Chapter 227 rulemaking). If not limited in this way, they lack procedural safeguards altogether and are unconstitutional.

a. DHS may only exercise these powers if they are subject to adequate procedural safeguards.

As noted *supra*, under this Court's current non-delegation jurisprudence, even otherwise permissible grants of legislative powers will be permitted only "where there are procedural and judicial safeguards against arbitrary, unreasonable, or oppressive conduct of the agency," *Westring v. James*, 71 Wis. 2d 462, 468, 238

N.W.2d 695 (1976) (emphasis added) (citing *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 158 N.W.2d 306 (1968)). When Wisconsin courts review the constitutionality of a delegation of legislative power, "[t]he presence of adequate procedural safeguards is the paramount consideration." *Panzer*, 2004 WI 52, ¶79 & n.29; see also id. at ¶¶54-55.

No procedural safeguards have been followed here. DHS claims the right to issue the Safer at Home order and the Badger Bounce Back order without any legislative or public input or oversight. In other words, the statutory provisions DHS cites lack both substantive standards for DHS to follow and procedural safeguards to protect the public.

While, as explained above, it would not replace the lack of substantive guidance, requiring DHS to follow the process and abide by the limitations imposed on rulemaking in Chapter 227 would provide procedural safeguards. DHS has had ample time to comply with Chapter 227—indeed, that chapter even includes

provisions for emergency rulemaking, *see* Wis. Stat. §227.24—but it simply refuses to do so.

Limiting the broad powers claimed under Chapter 252 to the presence of a public health emergency might also provide procedural safeguards in that the declaration may only be in place for sixty days, unless extended by the Legislature, and also may be rescinded by the Legislature at any time. But DHS claims the power to act even in the absence of an emergency.

If the exercise of Chapter 252 powers is not subject to the procedural safeguards supplied by Chapters 227 or 323, then none exist. Whether or not the lack of substantive direction from the Legislature would render authorization of Executive Orders as broad as those at issue here unconstitutional (it would), the absence of any such procedural safeguards certainly does.

CONCLUSION

At times of great fear and uncertainty, a "just-this-once" approach to constitutional interpretation is tempting. But this Court must avoid making bad law which will have lasting

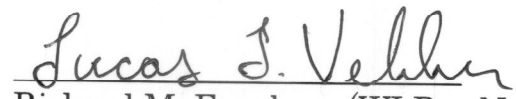
ramifications. *Amici* do not suggest that action to combat the COVID-19 pandemic is impermissible. This case is not about what is to be done but who must be involved and how it must be done. A ruling in favor of the Legislature will not mean the end of reasonable regulatory responses, but the adoption of a plan enacted by the people's representatives and approved by the Governor. If it seems anomalous that a single government bureaucrat can unilaterally confine millions of Wisconsinites to their homes and shutter businesses indefinitely, that's because it is. Our Constitution does not permit the Legislature to empower an executive branch agency to do whatever it chooses for as long as it wants. The Legislature asks this Court to conclude that it did not. But if this Court concludes the Legislature in fact did so, reading Wis. Stat. §§252.02(3), (4) and (6) to authorize the Stay at Home order and the Badger Bounce Back order would be an unconstitutional delegation.

[Signature on Next Page]

Dated: April 28, 2020.

Respectfully submitted,

Wisconsin Institute for Law & Liberty, Inc.



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font, and with this Court's Order dated April 21, 2020. This brief contains 4,241 words, calculated using Microsoft Word.

Dated: April 28, 2020.

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CERTIFICATION REGARDING AN ELECTRONIC BRIEF

I hereby certify that:

I have submitted an electronic copy of this non-party brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all parties.

Dated: April 28, 2020.

Lucas J. Vebber

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CERTIFICATE OF SERVICE

I, Lucas Vebber, attorney for *amici curiae*, hereby certify that on the 28th day of April, 2020, I caused three (3) true and correct copies of the foregoing non-party brief to be served upon counsel of record via U.S. Mail, first-class postage, addressed as follows:

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