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STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2021AP001343, 2021AP001382

JEFFREY BECKER, ANDREA KLEIN AND A LEAP ABOVE DANCE, LLC,
Plaintiffs-Appellants,

v.

DANE COUNTY, JANEL HEINRICH AND PUBLIC HEALTH OF MADISON
& DANE COUNTY, *Defendants-Respondents.*

On Appeal from the Dane County Circuit Court,
The Honorable Jacob Frost, Presiding, Case No. 21CV143

**NON-PARTY BRIEF IN SUPPORT OF
DEFENDANTS-RESPONDENTS BY
AMERICAN MEDICAL ASSOCIATION AND
WISCONSIN MEDICAL SOCIETY AS *AMICI CURIAE***

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Amici Curiae American Medical Association (AMA) and Wisconsin Medical Society (WisMed) represent nearly 10,000 Wisconsin physicians and their patients in efforts to improve the health of the people of Wisconsin in a changing environment. Right now, that environment is an unprecedented and ongoing public health crisis as the state continues to battle COVID-19. SARS-CoV-2, the causative agent of COVID-19, has wreaked havoc in communities across the country, taxed hospitals to the point of rationing care, upended the lives of countless families, and killed more than 930,000 Americans, including more than 11,000 Wisconsinites.

Controlling the COVID-19 pandemic and protecting the lives of vulnerable Wisconsinites requires a layered prevention strategy. And because the emergence of new variants and surges in case counts cause COVID-19 trends to change so quickly, that strategy must be nimble enough to

account for new developments before transmission spirals out of control and overburdens the medical care system. Under these circumstances, the Legislature's purpose in authorizing local health officers—experts on the ground—to make real-time decisions about what measures are necessary to control communicable diseases such as COVID-19 is ascertainable. This Court should therefore affirm the sound judgment below.

ARGUMENT

I. COVID-19 is a highly transmissible disease with the potential for severe medical consequences.

COVID-19 presents a severe risk to public health.

Although most people infected with the virus will experience mild to moderate symptoms, individuals with COVID-19 can become seriously ill or die at any age. As of February 22, 2022, there have been more than seventy-eight million

confirmed cases of COVID-19 in the United States,¹ leading to more than 4,464,000 hospitalizations² and more than 930,000 deaths³—more than twelve times the number of people in the United States who die from influenza in the average two-year span.⁴ Wisconsinites account for more than 1,376,000 of those COVID-19 cases,⁵ and more than 11,000 Wisconsinites have died from COVID-19.⁶

As these numbers indicate, SARS-CoV-2 is highly transmissible. The original strain was more contagious than the flu, and the Delta variant of SARS-CoV-2, the leading strain until recent months, is more than twice as contagious as

¹ *COVID Data Tracker*, CDC, <https://bit.ly/3Du7Glz> (last visited Feb. 22, 2022).

² *COVID Data Tracker Weekly Review*, CDC (last updated Feb. 18, 2022), <https://bit.ly/3EYAdAb>.

³ *COVID Data Tracker*, *supra* note 1.

⁴ See *Disease Burden of Flu*, CDC (last reviewed Jan. 7, 2022), <https://bit.ly/3ocAuZA>.

⁵ See *COVID-19: Wisconsin Cases*, Wis. Dep't of Health Servs. (last updated Feb. 21, 2022), <https://bit.ly/3LzI3UR>.

⁶ See *COVID-19: Wisconsin Deaths*, Wis. Dep't of Health Servs. (last updated Feb. 21, 2022), <https://bit.ly/3GPC4aU>.

previous variants.⁷ The Omicron variant—which now accounts for essentially 100% of new cases in the United States—appears to be more contagious still.⁸ Crucially, more than 50% of the spread of the virus may be from individuals who have no symptoms at the time of transmission.⁹

Even those who recover from COVID-19 may experience debilitating symptoms lasting for several months or more after the acute phase of infection. A systematic review of forty-five studies found that 73% of infected individuals experienced at least one long-term symptom.¹⁰ Another,

⁷ Apoorva Mandavilli, *C.D.C. Internal Report Calls Delta Variant as Contagious as Chickenpox*, N.Y. Times (July 30, 2021), <https://nyti.ms/3EtJXTb>.

⁸ *Omicron Variant: What You Need to Know*, CDC (last updated Feb. 2, 2022, 2021), <https://bit.ly/327xwyr>; *COVID Data Tracker: Variant Proportions*, CDC (last updated Feb. 15, 2022), <https://bit.ly/3gNtqiB>.

⁹ *Science Brief: Community Use of Masks to Control the Spread of SARS-CoV-2*, CDC (last updated Dec. 6, 2021), <https://bit.ly/30inWYx>.

¹⁰ Tahmina Nasserie et al., *Assessment of the Frequency and Variety of Persistent Symptoms Among Patients With COVID-19: A Systematic Review*, 4 JAMA Network Open e2111417, e2111417 (2021), <https://bit.ly/3qocFkk>; see also Karen B. Jacobson et al., *Patients With Uncomplicated Coronavirus Disease 2019 (COVID-19) Have Long-Term Persistent Symptoms and Functional Impairment Similar to Patients with Severe COVID-19: A Cautionary Tale During a Global*

more recent systematic review of fifty-seven studies found that more than half of COVID-19 survivors experienced post-acute sequelae (that is, chronic complications of an acute condition) six months after recovery, including difficulty concentrating, generalized anxiety disorder, general functional impairments, and fatigue or muscle weakness.¹¹ Studies also indicate that COVID-19 is associated with increased risk of adverse neurological and psychiatric outcomes.¹²

Pandemic, 73 *Clinical Infectious Diseases* e826, e826 (2021), <https://bit.ly/3sVce0y> (“‘Long COVID’ has been reported in 87% of hospitalized patients two months post-infection and in 53% of non-hospitalized patients 125 days after diagnosis.”).

¹¹ Destin Groff et al., *Short-term and Long-term Rates of Postacute Sequelae of SARS-CoV-2 Infection: A Systematic Review*, 4 *JAMA Network Open* e2128568, e2128568 (2021), <https://bit.ly/3qskBjR>.

¹² Maxime Taquet et al., *6-month neurological and psychiatric outcomes in 236379 survivors of COVID-19: a retrospective cohort study using electronic health records*, 8 *The Lancet Psychiatry* 416, 423–25 (2021), <https://bit.ly/3DXTbGo>.

II. The Legislature provided an ascertainable purpose.

A. The public health measures required to control severe and highly contagious airborne illnesses are well understood.

Although COVID-19 presents a serious challenge to public health, the different mechanisms available to meet that challenge are well understood. In this context, the Legislature’s decision to compel local health officers to “promptly take all measures necessary to prevent, suppress and control communicable diseases” and authorize them to “do what is reasonable and necessary for the prevention and suppression of disease,” including “forbid[ding] public gatherings when deemed necessary to control outbreaks or epidemics,”¹³ contains an ascertainable purpose¹⁴: it authorizes the locally appointed health experts closest to the

¹³ Wis. Stat. § 252.03(1), (2); *see also* Dane Cnty., Wis. Ordinance § 46.40 (materially similar).

¹⁴ *See Wis. Leg. v. Palm*, 391 Wis. 2d 497, 522, ¶ 33, 942 N.W.2d 900, 913 (2020) (quoting *J.F. Ahern Co. v. Wis. State Bldg. Comm’n*, 114 Wis. 2d 69, 90, 336 N.W.2d 679 (Ct. App. 1983)).

ground to employ long-established measures to reduce the spread of communicable disease.

Although SARS-CoV-2 is a novel virus, the tools for combatting a pandemic are not. A retrospective study of the 1918–1919 influenza pandemic found a “strong association between early, sustained, and layered application of nonpharmaceutical interventions and mitigating the consequences of” that pandemic.¹⁵ The study found that “rapid public health response time was a critical factor in the successful application of nonpharmaceutical interventions,” and that “[l]ate interventions, regardless of their duration or permutation of use, almost always were associated with worse outcomes.”¹⁶ “The cities that implemented nonpharmaceutical interventions earlier had greater delays in

¹⁵ Howard Markel et al., *Nonpharmaceutical Interventions Implemented by US Cities During the 1918–1919 Influenza Pandemic*, 298 JAMA 644, 644 (2007), <https://bit.ly/34Urr9E>.

¹⁶ *Id.* at 651.

reaching peak mortality . . . , lower peak mortality rates . . . , and lower total mortality”¹⁷ These interventions included school closures and public gathering bans,¹⁸ some of the same tools deployed a century later.

As a much more recent study concluded, “[n]o single strategy can control the [COVID-19] pandemic; rather, a multipronged approach using all available evidence-based strategies at the individual and community levels can break transmission chains and address high levels of community transmission; reduce related illnesses, long-term sequelae, and deaths; and mitigate the pandemic’s economic impact.”¹⁹ The strategies surveyed include, among others, universal masking, physical distancing, and applying occupancy limits

¹⁷ *Id.* at 644.

¹⁸ *Id.*

¹⁹ Margaret A. Honein et al., *Summary of Guidance for Public Health Strategies to Address High Levels of Community Transmission of SARS-CoV-2 and Related Deaths, December 2020*, 69 *Morbidity & Mortality Wkly. 1860*, 1866 (2020), <https://bit.ly/3rWdSzq>.

for indoor spaces and social gatherings.²⁰ And although widespread vaccination remains the best—and perhaps only—way to end the COVID-19 pandemic, AMA and WisMed have consistently advocated for other public health measures, such as wearing masks and physical distancing in appropriate cases, to mitigate the damage of COVID-19 while vaccination rates remain insufficient.²¹

²⁰ *Id.* at 1860.

²¹ See, e.g., Press Release, AMA, *AMA statement on Administration's plan to combat COVID-19* (Dec. 21, 2021), <https://bit.ly/3GM26Mh> (“In addition to getting vaccinated, we must each continue taking the evidence-based public health precautions, such as physical distancing and wearing face masks, that we know work to help stop the spread of COVID-19.”); Press Release, AMA, *AMA statement on CDC's updated mask guidance to combat COVID-19 spread* (July 27, 2021), <https://bit.ly/3sFJKI0> (“Wearing a mask is a small, but important protective measure that can help us all stay safer.”); Press Release, WisMed, *WisMed Statement on Legislature Canceling Masking Order* (Feb. 4, 2021), <https://bit.ly/3oQighD> (“[W]e need all of our policy leaders to unify behind the same message: wear a mask to protect yourself and others, prevent additional deaths and restore our economy.”); Press Release, WisMed, *Statement on Gov. Evers' Public Health Emergency, Masking Orders* (Nov. 18, 2020), <https://bit.ly/33ohzEF> (“We can all help ‘bend the curve’ of the virus if we wear masks, wash hands and stay distant from others. This includes avoiding even small groups and staying home when we can.”); Press Release, AMA, *AMA MaskUp campaign to normalize masks in fight against COVID-19* (Aug. 3, 2020), <https://bit.ly/3GLCTBG> (“Along with

B. The comparators Plaintiffs-Appellants cite illustrate the efficacy of the measures used in Dane County.

Although Plaintiffs-Appellants suggest that Dane County should be more like Winnebago, Milwaukee, or Eau Claire, *see* Opening Brief of Plaintiffs-Appellants at 31, 36, the numbers tell a different story. The number of confirmed COVID-19 cases in Dane County throughout the pandemic reflects about 21% of the population; in the other counties, it's around 25%.²² And Dane County also shows a much lower mortality rate for those who contract COVID-19: about 0.39% of COVID-19 cases in Dane County resulted in death;

physical distancing and regularly washing hands or using hand sanitizer, wearing a mask is the easiest way to stop the spread of COVID-19.”)

²² *Compare COVID-19: County Data*, Wis. Dep't of Health Servs., (last updated Feb. 21, 2022), <https://bit.ly/3JtuB2Z> (listing total confirmed COVID-19 cases as 115,342 for Dane County; 43,284 for Winnebago County; 27,183 for Eau Claire County; and 239,881 for Milwaukee County), with *QuickFacts: Milwaukee County, Wisconsin; Eau Claire County, Wisconsin; Dane County, Wisconsin; Winnebago County, Wisconsin*, U.S. Census Bureau, (last visited Feb. 17, 2022), <https://bit.ly/36iH5ML> (listing population as of the April 1, 2020 census as 561,504 for Dane County; 171,730 for Winnebago County; 105,710 for Eau Claire County; and 939,489 for Milwaukee County).

for Winnebago County, the number is 0.72%; for Eau Claire County, 0.59%; and for Milwaukee County, 0.83%.²³

Although each county has its own circumstances, higher COVID-19 rates, and higher mortality rates, are not a model to emulate. The democratically elected Legislature chose to authorize required local health officers to “take all measures necessary to prevent, suppress and control communicable diseases,”²⁴ and Dane County’s local health officer chose measures that likely helped keep the County’s COVID-19 rates below those of its peers. The Court should respect those choices.

²³ *Compare COVID-19: County Data*, *supra* note 22, *with id.* (listing confirmed COVID-19 deaths as 449 for Dane County; 312 for Winnebago County; 160 for Eau Claire County; and 1,980 for Milwaukee County).

²⁴ Wis. Stat. § 252.03(1).

C. Delegation to local health officers enables them to act nimbly to effectively protect the public.

As these numbers—and, in particular, the recent Omicron surge—show, the dangers created by the pandemic can change quickly when a new variant with high transmissibility emerges. From a public health perspective, it is critical that professionals be able to act quickly to address new events in real time. Delegation to local health officers therefore furthers the Legislature’s purpose by permitting them to act nimbly: in other words, the Legislature provided an ascertainable purpose, and allowed local officials to determine how best to achieve it in their jurisdiction.²⁵

As a former senior advisor for public health in a major metropolitan area put it, public health leaders “must be able to rapidly assess new scientific information and synthesize the

²⁵ This distinguishes the provisions at issue in *Palm*, 391 Wis. 2d 497, which purported to authorize one central official to make rules (carrying criminal penalties) for the entire state.

key points for different audiences.”²⁶ During the COVID-19 pandemic, “the volume and velocity of scientific information increased dramatically,” so that “there was often not time for outside experts to come to consensus.”²⁷ This required public health leaders to “go to the primary source and, in real time, make the best interpretation of the data.”²⁸ That process requires meaningful expertise, particularly as public health professionals consulted cutting-edge studies that had not yet gone through the peer review process, and therefore required additional scrutiny.

Relying on non-expert lay politicians—such as a city council—to make each and every decision about the best way to protect Wisconsinites from the potentially severe consequences of COVID-19 would require an immense

²⁶ Jay K. Varma et al., *5 Skills Public Health Officials Need to Combat the Next Pandemic*, Harv. Bus. Rev. (Dec. 2, 2021), <https://bit.ly/34C73dM>.

²⁷ *Id.*

²⁸ *Id.*

learning curve and additional time for consultation with outside experts—time that policymakers may not always have. A local public health officer, however, is uniquely well suited to respond to these challenges quickly.

A quick response is critical. As of December 11, 2021, 92.5% of all cases in the United States were from the Delta variant.²⁹ Just two weeks later, on December 25, 74.3% of cases were from the more transmissible Omicron variant.³⁰ At the peak of the Omicron surge, seven-day averages of cases in Wisconsin leapt from 3,496 on December 25, to 6,308 a week later on January 1, peaking at 18,810 cases just a few weeks later on January 19.³¹

Nimble action is required to give intervention strategies their best chance at working effectively in such an

²⁹ *COVID Data Tracker: Variant Proportions*, *supra* note 8.

³⁰ *Id.*

³¹ *COVID-19: Wisconsin Cases*, *supra* note 5.

environment.³² Plaintiffs-Appellants complain that the local public health officer “has been issuing ever-changing orders for over a year and half [sic].” Reply Br. at 9. Exactly: ever-changing orders evidence a response attuned to the ever-changing nature of the pandemic.

Moreover, in making these quick decisions, public health officers must account for not only the potential case rates and the lives directly affected by contracting COVID-19, but also the entire healthcare ecosystem, which can be overwhelmed by COVID-19 patients. “COVID-19 surges [a]re associated with higher rates of in-hospital mortality among patients *without* COVID-19, suggesting disruptions in care patterns for patients with many common acute and

³² If, as Plaintiffs-Appellants suggest, local governments are sufficiently nimble to address these rapidly changing issues, then they are also sufficiently nimble to pass an ordinance countermanding any specific action from a public health officer that they consider an overreach. Plaintiffs-Appellants cannot, logically, have it both ways.

chronic illnesses.”³³ In Wisconsin, just weeks ago, three urgent care centers in Milwaukee had to temporarily close to “help manage the COVID-19 surge and staff shortages” at other facilities³⁴; the UW Health University Hospital in Madison had to turn away transfers because it was at 100% capacity³⁵; and the Federal Emergency Management Agency had to send a team to help an overwhelmed hospital in Green Bay.³⁶ Medical systems in other states have experienced similar strains, often with tragic results.³⁷ The degree to

³³ See Amber K. Sabbatini et al., *Excess Mortality Among Patients Hospitalized During the COVID-19 Pandemic*, 16 J. Hosp. Med. 596, 596 (2021), <https://bit.ly/3Hs5EEU> (emphasis added).

³⁴ Corrinne Hess, *Wisconsin hospitals are overwhelmed with unvaccinated COVID-19 patients. Some clinics are closing to help meet demand elsewhere.*, Wis. Pub. Radio (Jan. 3, 2022), <https://bit.ly/3Lzp50z>.

³⁵ Rebecca Klopff, *One of the largest hospitals in Wisconsin is at capacity while Green Bay hospital brings in U.S. Navy*, WTMJ-TV (last updated Dec. 29, 2021), <https://bit.ly/3oO5Sif>.

³⁶ Associated Press, *20-Member FEMA Headed to Overwhelmed Green Bay Hospital*, U.S. News (Dec. 21, 2021), <https://bit.ly/3H2Ww8F>.

³⁷ See, e.g., Tim Stelloh, *Alabama heart patient dies after hospital contacts 43 ICUs in 3 states, family says*, NBC News (Sept. 12, 2021), <https://nbcnews.to/3nyOz4t> (describing an Alabaman who died from a cardiac event after dozens of intensive care units in three states turned him down for lack of space during the Delta surge); Mike Baker &

which mitigation measures are needed to help prevent healthcare systems from being overwhelmed are likewise best evaluated with the expertise brought by public health professionals.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants-Respondents' briefs, the Court should affirm the decision below.

Giulia Heyward, *Idaho allows overwhelmed hospitals across the state to ration care if necessary*, N.Y. Times (Sept. 16, 2021), <https://nyti.ms/30Ee0ZP>; Mike Baker, *'Their Crisis' Is 'Our Problem': Washington Grapples With Idaho Covid Cases*, N.Y. Times (Sept. 13, 2021), <https://nyti.ms/3e3vxxi> (describing Idaho hospital's decision to cancel elective procedures and postpone necessary procedures, including excising brain tumors, during the Delta surge).

Dated this 22nd day of February, 2022.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the Rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,742 words.

Dated: February 22, 2022.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(2)

I hereby certify that:

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


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: February 22, 2022.

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