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SUPREME COURT OF WISCONSIN
No. 2020AP765-OA

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Wisconsin Legislature,
Petitioner,

CLERK OF SUPREME COURT
OF WISCONSIN

v.

Secretary-Designee, Andrea Palm; Julie Willems Van Dijk; Nicole Safar, in
their official capacities as executives of Wisconsin Department of Health
Services

Respondents.

**AMICUS BRIEF OF WASHINGTON COUNTY, WISCONSIN
IN SUPPORT OF LEGISLATURE'S EMERGENCY PETITION
FOR ORIGINAL ACTION AND EMERGENCY MOTION
FOR TEMPORARY INJUNCTION**

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STATEMENT OF INTEREST

Washington County (“County”) is a quasi-municipal corporation organized pursuant to Chapter 59 of the Wisconsin Statutes. Its county seat is located in West Bend, and its estimated population as of 2019 was 136,034.¹

Pursuant to Wis. Stat. §251.02(3), Washington County established a joint health department with Ozaukee County known as the Washington Ozaukee Public Health Department. The Washington Ozaukee Health Department has been granted the statutory authority under Chapter 252 of the Wisconsin Statutes and Chapter DHS 145 of the Wisconsin Administrative Code to take necessary measures to prevent, control, and investigate communicable diseases within its jurisdiction.

The County believes that the Wisconsin Department of Health Services (“DHS”) exceeded its authority in issuing Emergency Orders #28 and #34 (“EO #28 and #34”) because it usurped the County’s statutory authority to manage the COVID-19 emergency within its borders contrary to

¹Data available at <https://www.census.gov/quickfacts/fact/table/washingtoncountywisconsin/PST045219#PST045219>.

Chapter 251, 252 and DHS 145. Therefore, the County believes that EO #28 and #34 should be enjoined from enforcement as written.

ARGUMENT

DHS Exceeded its authority in issuing EO #28 and #34 because the primary responsibility for managing a public health crisis is vested by law in the County's local health department.

Municipalities are creations of the state. The state may grant powers to municipalities either through the state Constitution or by legislation. *Van Gilder v. Madison*, 222 Wis. 58, 72-73 (1936). It is well settled in Wisconsin that a county has only those powers expressly conferred upon it by the legislature or necessarily implied from the powers expressly granted or from the nature of the grant of power. *Teunas v. Kenosha County*, 142 Wis.2d 498, 504 (1988). This legislative grant of power includes the authority to establish a local health department which is governed by a local board of health. Wis. Stat. §251.02(3) and Wis. Stat. §251.04. Once established, the local board of health and the local health department have the authority, duty, and power to perform certain functions, and they must do so “within the scope of authority ceded to it by the state.” *Id.* At 504.

Paramount to the issues in this case is the authority of the County under this grant of power to manage a public health emergency within its borders. The Court of Appeals of Wisconsin has expressly recognized this authority. “We conclude that . . . the legislature intended local health boards to have the authority to regulate in matters relating to the preservation of public health and the prevention of communicable diseases.” *Superb Video v. County of Kenosha*, 195 Wis.2d 715, 723 (Ct. App. 1995). It is true that DHS has been granted authority by the legislature to issue rules regarding the suppression and control of communicable diseases that have statewide impact. Wis. Stat. §252.02(4). However, the County is also empowered to regulate these matters within its borders. *Superb Video* at 724.

Pursuant to Wis. Stat. §252.02(4), the County has the *primary* responsibility for taking action to suppress and control the spread of communicable disease. DHS may only impose its will if it issues a *valid* order that conflicts with the County’s local orders or if the local orders are less stringent than those *valid* orders issued by DHS. The County contends that EO #28 and #34 are invalid for reasons set forth in the Petitioner’s brief. However, even if the Court finds that these orders are valid, the plain meaning of Wis. Stat. §252.02(4) dictates that DHS regulation takes a backseat to local control. The County incorporates by reference the

Petitioner's arguments that EO #28 and #34 are invalid because they exceed the Respondents' authority both in terms of subject matter and because statutorily mandated procedures were not followed. But even if the Court finds that EO #28 and #34 do not exceed the Respondents' authority for the reasons proffered by the Petitioner, it should find that they are invalid and enjoin their enforcement because DHS is required to defer to the County's authority to take all necessary measures to manage the COVID-19 health emergency and only step in in instances where local health officials are not satisfying this obligation. Wis. Stat. §252.03(3).

The County acknowledges that controlling the spread of COVID-19 is a matter of statewide concern. However, that fact alone does not relieve the local health department of the power to address the spread of communicable diseases or vest that power in DHS so long as the local response does not conflict with state law. *DeROSSO Landfill Company, Inc. v. City of Oak Creek*, 200 Wis.2d 642, 650 (1996). Therefore, it stands to reason that local control is favored even in matters that affect the whole of the state. Managing a public health crisis is no exception to this rule. In fact, Wisconsin law presumes that health emergencies and the spread of communicable disease will be dealt with on the local level.

The County's authority to address a public health emergency is grounded in Chapter 252 of the Wisconsin Statutes and Chapter DHS 145 of the Wisconsin Administrative Code. Pursuant to Wis. Stat. §252.03(1), the local health officer is required to immediately investigate the appearance of any communicable disease and report his or her findings to the appropriate governing body as well as the department. The department is defined under Wis. Stat. §250.01(2) as the Department of Health Services. Had the local health officer's duties ended with a report to DHS and other governing bodies, presumably the local board of health and, perhaps, the county board, one could argue that the purpose of the report would be to simply alert DHS and activate its powers to take control of the emergency. However, that is not the case. The purpose of the reporting requirement is so that DHS and other appropriate governing bodies are apprised of the situation. Management of the health crisis, on the other hand, is left to the local health officer. Wis. Stat. §252.03(1).

In addition to the ancillary reporting requirement, the local health officer upon the appearance of a communicable disease in his or her jurisdiction "shall promptly take all measures necessary to prevent, suppress and control" the outbreak. Wis. Stat. §252.03(1). Furthermore, the local health officer "may do what is reasonable and necessary for the prevention

and suppression of the disease; may forbid public gatherings when deemed necessary to control outbreaks or epidemics and shall advise the department of measures taken.” Wis. Stat. §252.03(2). In carrying out the duties prescribed under Chapter 252, the legislature has granted the local health officer broad powers.

Chapter DHS 145 sets forth the rules for controlling communicable diseases authorized by Chapter 252. Specifically, DHS §145.02 provides that the scope of this chapter is to establish a surveillance system for controlling the spread of communicable disease. The system is to consist of means of reporting, intervention, prevention, investigation, and control of outbreaks *by local health officers* and DHS. However, DHS fulfills its obligation not in a vacuum, but *in cooperation* with the local health officer. DHS §§145.02 and 145.05(4).

The County does not suggest that the state is entirely powerless to manage the control of communicable disease outbreaks at the local level. However, DHS’s role is to serve as a backdrop to the local health officer when the local health officer is acting appropriately in managing the crisis in his or her jurisdiction, (i.e., complying with his or her statutory duties.) DHS’s authority to regulate at the local level is triggered in instances where local authorities fail to enforce the communicable disease statutes and rules.

Wis. Stat. §252.03(3). In other words, DHS's power to regulate at the local level was limited by the legislature in favor of the County's home rule authority to manage this crisis. The unambiguous limitation of DHS's power in Wis. Stat. §252.03(3) means that any seeming overlap in duties and powers between the County and DHS are to be resolved in the favor of local control even though the COVID-19 outbreak is a matter of statewide concern.

The Respondents argue that they should not have to follow the rule making procedures required by law because the process is slow and incompatible with the duty to quickly respond to an emergency. *Respondents' Response Brief* at 52. However, this argument ignores the fact that local health departments are positioned under the law to quickly respond to a public health emergency on the local level. In fact, the Respondents' entire brief ignores the role of local authorities in addressing public emergencies, further revealing its misunderstanding or misapplication of the law.

Courts have been tasked with the duty of determining whether home rule rules and regulations are valid where the legislature has adopted uniformly applicable statutes regarding matters of statewide concern. In such cases, counties are able to exercise their home rule powers granted under Wis. Stat. §59.03 so long as the actions taken do not conflict with state law.

State ex rel. Ziervogel v. Washington County Bd. of Adjustment, 269 Wis.2d 549, 571-72 (2004). State law defers to local regulation except when the legislature has withdrawn the power of the County to act; when the local regulation logically conflicts with state law; when the local regulation defeats the purpose of the state law; or when local regulation goes against the spirit of or defeat the purpose of spirit of the legislation. *Id.* None of those things have occurred here.

The County recognizes that the validity of a local ordinance is not at issue here, but the argument is analogous. Chapter 252 and DHS 145 expressly confer upon counties the power to regulate the management of a public health emergency. While DHS also has authority to manage public health emergencies to a certain extent, it must stand down so long as the County's crisis plan does not violate the test outlined in the *Ziervogel* case. Absent such violation, the County's home rule authority supersedes DHS's authority.

Simply stated, state law does not authorize DHS to swoop in and wrestle control of the crisis from local authorities without cause. Therefore, the Court should enjoin Emergency Orders #28 and #34 because they are an unlawful overreach of DHS's authority in part because DHS ignores the County's power to manage the crisis within its own borders.

In Washington County, the local health department has taken steps to manage the COVID-19 crisis that directly addresses local needs and concerns in a way that DHS is incapable of by way of its cookie-cutter approach. For instance, it issued a Blueprint for Reopening Washington and Ozaukee Counties on April 20, 2020 (“Blueprint”).² The Blueprint describes measures taken by the County in implementing a system of contact tracing to identify symptomatic individuals and households in a way that DHS cannot on the local level because it does not have the resources to devote to each county, and establishes a county-specific plan for reopening. In fact, it was the Washington Ozaukee Public Health Department, and not DHS, that initiated swift action to address the COVID-10 outbreak at the local level.

For example, the County’s health department acted quickly to bring an end to an outbreak at Village Point Commons in Grafton by contact tracing infected individuals, it issued orders locking down nursing homes and similar facilities before DHS, is distributing personal protective gear, and published a dashboard on its website to inform the public of the location of outbreaks within Washington and Ozaukee counties.³ All of this occurred

² The Blueprint for Reopening Washington and Ozaukee Counties is found at <http://www.washozwi.gov/Portals/WashOzHealthDept/Released%204%2021%2020%2C%20Blueprint%20for%20Reopening%20Washington%20and%20Ozaukee%20Counties%20April%2020%202020.pdf>

³ The dashboard is found at <http://www.washozwi.gov/>

without the need for overreaching DHS involvement because the local health officer acted in accordance with her duties and powers granted under state law.

The Washington Ozaukee Public Health Department also examined the capacity of the health care system in Washington and Ozaukee counties and determined that it is not at capacity in terms of dealing with COVID-19 cases, but warns that cases could surge once the County starts to reopen. To that end, the County is considering whether its County Fair and similar festivals and gatherings should be held, how to safely reopen bars and restaurants, salons, and how to generally maintain the well-being of the community both physically and economically. This thoughtful and localized approach can only be devised and carried out on the local level. If this task were left to DHS, it would likely never get done.

The Blueprint, though County specific in certain regards, does not ignore the wider, statewide issues associated with management of the pandemic. The County does not suggest that some level of cooperation among counties and the state should not occur.

Perhaps regional cooperation among counties would be an advisable approach to deal with localized outbreaks. For instance, there are certain hot spots within the state where thousands of cases of COVID-19 have been

identified such as in southeastern Wisconsin and other parts of the state where relatively few cases exist such as the northern areas of the state where the outbreak is fairly limited.⁴ Consequently, what may be an appropriate response in Washington County such as closing restaurant dining rooms may not be appropriate in a northern county where social distancing may be the most appropriate way of preventing the spread. In any event, it is best left to local health officials to decide the most appropriate response for their own circumstances, while the state is best suited to determine how various statewide amenities may be dealt with such as the state parks or state-owned and operated facilities. In other words, the County should be left to address the pandemic on the local level, while the state does the same on the state level. The statutory scheme intends for the multiple levels of government to compliment one another's role. It is not intended for DHS to seize control from the County, or to issue an endless series of orders in a vacuum without regard for other branches or levels of government.

Either way, the one-size fits all approach taken by DHS is a violation of the law at worst, and a misguided attempt to deal with this crisis at best. The answer to dealing with this pandemic is not found in the overreaching,

⁴ Data obtained from the Washington Ozaukee County Public Health Department's COVID-19 dashboard as of April 27, 2020. <http://www.washozwi.gov>.

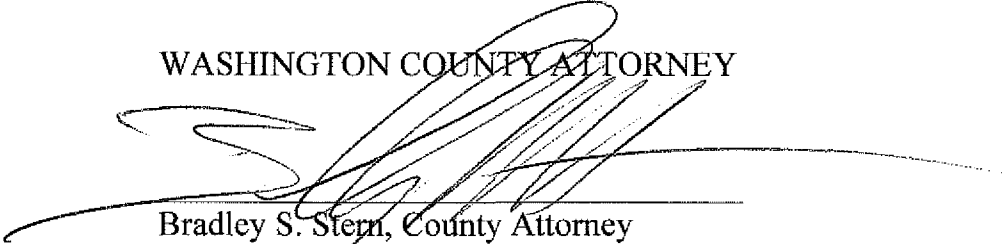
statewide infringement on the people's fundamental freedoms and liberty interests, but in finding that delicate balance between preserving the public's physical, mental and economic well-being county by county as the law intends.

CONCLUSION

For the reasons set forth above and for those set forth in the Petitioner's brief, Washington County respectfully requests this Court enjoin enforcement of Emergency Orders #28 and #34.

Dated this 29th day of April, 2020.

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CERTIFICATION

I certify that this Brief conforms to the rules contained in §809.19(8)(b) and (d), Wis. Stats. that this Brief is produced with a proportional serif font with the length being 2,488 words.

I certify that this Brief conforms to the rules contained in §809.19(12)(f), Wis. Stats., that the electronic copy of this Brief is identical to the text of the paper copy of this Brief.

Dated this 29th day of April 2020.

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