No. 2020AP001927 - OA

IN THE SUPREME COURT OF WISCONSIN

Gymfinity, LTD., Jeffrey Becker and Andrea Klein,

PETITIONERS,

V.

Dane County, City of Madison, Janel Heinrich, in her official capacity as Public Health Officer and Director of Public Health of Madison and Dane County, and Public Health of Madison and Dane County,

RESPONDENTS.

NON-PARTY BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF PETITIONERS

Daniel R. Suhr
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
dsuhr@libertyjusticecenter.org
Counsel for Amici Curiae

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STATEMENT OF INTEREST

The Liberty Justice Center is a national public-interest law firm based in Chicago. Liberty Justice Center is actively litigating cases to ensure that constitutional and legal guarantees are observed even amidst this pandemic. *Illinois Republican Party v. Pritzker*, 1:20-cv-03489 (N.D. Ill.); *Illinois Right to Life Comm. v. Pritzker*, 1:20-cv-03675 (N.D. Ill.); *Ratliff, et al., v. West Ada Education Ass'n*, CV01-20-17078 (4th Jud. District of Idaho).

STATEMENT OF THE ISSUE

Does Director Heinrich's Order violate the constitution's separation of powers because it is made pursuant to an unconstitutional delegation of lawmaking authority?

ARGUMENT

Introduction

This Court, not to mention its clerks and commissioners, is no doubt tiring of original action petitions. This year must be a record. But that there are many does not mean any individual petition fails to meet the Court's standards for *publici juris*. It simply reflects the times in which we live. When we are seeing the greatest mass restrictions on liberty since at least World War II, we should not be surprised that we are also seeing an elevated level of constitutional litigation. Courts were made to safeguard our rights *especially* in times like this, when they are most vulnerable. *See Cty. of Butler v. Wolf*, Civil Action No. 2:20-

cv-677, 2020 U.S. Dist. LEXIS 167544, at *30 (W.D. Pa. Sep. 14, 2020) ("While respecting the immediate role of the political branches to address emergent situations, the judiciary cannot be overly deferential to their decisions. To do so risks subordinating the guarantees of the Constitution, guarantees which are the patrimony of every citizen, to the immediate need for an expedient solution.").

This case is one where the Court should exercise its authority and grant the petition. The nondelegation doctrine is a theme primarily played in the background of this Court's jurisprudence for several years. *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 87 (Kelly, J., concurring); *Koschkee v. Taylor*, 2019 WI 76, ¶ 49 (Bradley, J., concurring). Perhaps this is because the Court has lacked the right vehicle to address it. *See AllEnergy Corp. v. Trempealeau Cty. Env't & Land Use Comm.*, 2017 WI 52, ¶ 133 (Ziegler, J., concurring in the mandate).

Here interest meets opportunity, as a major matter of substantial public importance, affecting one of the major economic engines of the state, squarely presents the core question: did this Court mean what it said when it opined, "the nature of delegated power [still] plays a role in judicial review of legislative delegations" and "[w]e normally review <u>both</u> the nature of delegated power and the presence of adequate procedural safeguards. . . " *Panzer v. Doyle*, 2004 WI 52, ¶ 55 (emphasis added).

The Ordinance and Order together are an unconstitutional delegation because the substantive power granted is great while the procedural safeguards are few.

Nondelegation doctrine is guided by two questions: the amount of discretion conferred and the scope of authority or power conferred.[1] The two questions operate in conjunction, as though on a sliding scale: "[T]he degree of agency discretion that is acceptable varies according to the scope of the power . . . conferred." *Whitman v. American Trucking Ass'ns, Inc.*, 531 US 457, 475 (2001). *Accord Panzer*, 2004 WI 52, ¶ 55 (the Court "giv[es] less emphasis to the [scope of the power granted] when the [procedural safeguards are] present").

A delegation that is very narrow in scope, with a precise principle, may carry with it a very broad grant of authority, while a regulation that exercises great power must be bound by very specific procedural safeguards. *Michigan v. United States EPA*, 213 F.3d 663, 680 (D.C. Cir. 2000). "In other words, it is one thing if a statute confers a great degree of discretion, i.e., power, over a narrow subject; it is quite another if that power can be brought to bear on something as immense as an entire economy." *Midwest Inst. of Health, PLLC v. Governor of Mich. (In re Certified Questions from the United States Dist. Court)*, No. 161492, 2020 Mich. LEXIS 1758, at *29 (Oct. 2, 2020).

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[1] Wisconsin courts have generally tracked federal courts on delegation doctrine. *See, e.g., Gibson Auto Co. v. Finnegan*, 217 Wis. 401, 413, 259 N.W. 420, 425 (1935).

What are the indicators of narrow discretion (i.e., of procedural safeguards)? First, the legislative body can be very specific in defining the "intelligible principle" that is to guide the administrative officer. Alternatively, it may require "a number of threshold [factfinding] determinations that in practice appear to have confined the statute to a modest role," only permitting action after certain initial triggering standards are met. *Michigan*, 213 F.3d at 680. *Accord Owens v. Republic of the Sudan*, 531 F.3d 884, 891 (D.C. Cir. 2008).

What are the indicators of narrow power? The rule can be cabined by a specific geographic area, *Detroit Int'l Bridge Co. v. Gov't of Can.*, 883 F.3d 895, 902 (D.C. Cir. 2018), or a single industry. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991). It can govern a very small, discrete topic. *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 38 (2008) (Brown, J., dissenting) (describing *Whitman* as the canonical example of narrow delegation: the rule defined a particular type of grain elevator).

By contrast, a regulation exercises "immense" power when it regulates the entire economy. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, 938 F.2d at 1317 ("the scope of the regulatory program is immense, encompassing all American enterprise"); *United States v. Nichols*, 784 F.3d 666, 675-76 (10th Cir. 2015) (Gorsuch, J., dissenting from rehearing en banc). "While Congress need not provide any direction to the EPA regarding the manner in

which it is to define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators, see § 7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy." *Whitman*, 531 U.S. at 475.

In addition to these two core considerations, the Court has also recognized two additional factors which may mitigate or heighten the degree of judicial scrutiny brought to bear on a delegation.[2]

First, the Supreme Court has applied a higher standard of judicial scrutiny when a delegation affects fundamental rights, such as the right to intimate association involved in this case[3] (i.e., gathering with one's family and close

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[2] Some courts have suggested a third factor, namely the power to define the elements of a crime and then impose a criminal sanction. *United States v. Nichols*, 784 F.3d 666, 672 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc) ("the Court has repeatedly and long suggested that in the criminal context Congress must provide more meaningful guidance than an intelligible principle."); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734 (6th Cir. 2013) (Sutton, J., concurring) ("the Constitution may well also require Congress to state more than an 'intelligible principle' when leaving the definition of crime to the executive"); *United States v. Bozarov*, 974 F.2d 1037, 1043 (9th Cir. 1992) ("broad delegations might be more suspect in cases involving criminal sanctions"). The Supreme Court has expressly declined to adopt this factor as part of its jurisprudence. *Touby v. United States*, 500 U.S. 160, 166 (1991).
Here obviously no one goes immediately to jail or faces a misdemeanor, so the sanctions are not in themselves criminal. But they are enforced by the police with a maximum penalty of $1,000. City of Madison Ord. 7.05(1) & (7). Moreover, if someone does not pay the penalty, they may be jailed for up to 90 days. *See* Wis. Stat. § 800.095(1)(b)(1).

[3] *See Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (right to intimate and familial association).

friends within one's home). The U.S. Supreme Court has required that delegations of authority "that potentially authorize the executive to encroach on fundamental rights 'be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.'" *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 327 (4th Cir. 2018) (Wynn, J., concurring), *vacated* 138 S. Ct. 2710 (2018) (*quoting Greene v. McElroy*, 360 U.S. 474, 507 (1959)). *Accord Gutknecht v. United States*, 396 U.S. 295, 306-07 (1970); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) ("Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen."); *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness [of delegation] narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights . . . The numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake."); *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 93 (1974) (Brennan, J., dissenting) ("That vice . . . is the delegation of power to

the Secretary in broad and indefinite terms under a statute that lays down criminal sanctions and potentially affects fundamental rights.").[4]

Second, courts have applied lesser scrutiny to regulations that have a limited time duration. "Of course, an unconstitutional delegation is no less unconstitutional because it lasts for only two days. But it is also true, as common sense would suggest, that the conferral of indefinite authority accords a greater accumulation of power than does the grant of temporary authority." *Midwest Inst. of Health, PLLC*, 2020 Mich. LEXIS 1758, at *30. Thus, "In *Gundy*, for example, the plurality [by Justice Kagan] thought it relevant to the delegation analysis in that case that the statute accorded the executive 'only temporary authority.'" *Id*. (quoting *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019)).

How does Director Heinrich's order fare under this case law? Not well. "Under established nondelegation doctrine, a standardless delegation must be

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[4] To any who would say concern about delegation is only for judicial conservatives, I would highlight these opinions from Justice William Brennan, and that Justices William O. Douglas and Thurgood Marshall shared his view. *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 90-91 (1974) (Douglas, J., dissenting) ("I also agree in substance with my Brother Brennan's view that the grant of authority by Congress to the Secretary of the Treasury is too broad to pass constitutional muster. . . . These omnibus grants of power allow the Executive Branch to make the law as it chooses in violation of the teachings of *Youngstown Sheet & Tube Co*. v. *Sawyer*, 343 U.S. 579, as well as *Schechter*, that lawmaking is a congressional, not an Executive, function."); *id*. at 93 (Marshall, J., dissenting). *See also Barenblatt v. United States*, 360 U.S. 109, 140 n.7 (1959) (Black, J., dissenting).

quite narrow." *Mich. Gambling Opposition*, 525 F.3d at 38 (Brown, J., dissenting). This delegation is entirely standardless: it requires no fact-finding, it sets no triggering thresholds, it has no specifics much beyond "go forth and keep us safe." And yet it is an immense power to regulate the entire economy of the state's second-largest county, plus everything else in life (schools, sports, non-profits, religious organizations, family holiday gatherings). A delegation is unconstitutional when it infuses "an overabundance of power in the recipient branch," *Panzer v. Doyle*, 2004 WI 52, ¶ 52, as the county board did here.

Moreover, both additional considerations weigh against the Order: it regulates the exercise of fundamental rights, and has no temporal limit. "When broad power is delegated with few or no constraints, the risk of an unconstitutional delegation is at its peak." *Int'l Refugee Assistance Project*, 883 F.3d at 293 (Gregory, C.J., concurring). *See United States v. Touby*, 909 F.2d 759, 779 (3d Cir. 1990) (Hutchinson, J., dissenting). This Order has passed that point of unconstitutionality: it checks all four boxes for laws that exceed constitutional boundaries.

In this way, it is in contrast to other Wisconsin statutes delegating administrative authority that are already on the books. *See Palm*, 2020 WI 42, ¶ 255 & n.21 (Hagedorn, J., dissenting). Without delving into detail on Justice Hagedorn's examples at this stage of briefing, the overall theme is clear: each is a narrow delegation of power over a specific industry or zone, and many are

guided by more precise standards or triggers. Moreover, most operate in the commercial space and so do not affect fundamental rights. This is in stark, definitive contrast with Director Heinrich's order, which exercises incredible power that infringes on fundamental rights without any real standards or triggers.

CONCLUSION

The Court should accept the petition and decide these important questions of law.

Respectfully submitted,

Daniel R. Suhr
Counsel of Record
Wis. Bar No. 1065568
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
dsuhr@libertyjusticecenter.org
Counsel for Amicus Curiae

NOVEMBER 26, 2020

CERTICATE AS TO FORM AND LENGTH

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. The length of this brief is 2,140 words in the body, as counted by Microsoft Word.

CERTIFICATE AS TO ELECTRONIC FILING

Pursuant to R. App. Pro. 809.19(12)(F), I hereby certify that I have submitted an electronic copy of this non-party brief in compliance with the requirements of Rule 809.19(12). I also certify that this electronic brief is identical in content and format to the printed form of the brief filed tomorrow. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all parties.

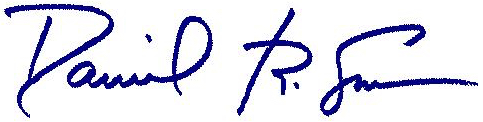
CERTIFICATE OF SERVICE

I certify that on November 27, 2020, I will cause three copies of the foregoing non-party brief to be served upon counsel of record by placing the same in the U.S. Mail, first class postage.

Richard M. Esenberg, et al.
Wisconsin Institute for Law & Liberty
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202-3141

Marcia A. MacKenzie, et al.
Dane County Corp. Counsel
210 MLK Jr. Blvd., Romo 419
Madison WI 53703-3345

CERTIFICATES SIGNED:



Daniel R. Suhr
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
dsuhr@libertyjusticecenter.org