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SUPREME COURT OF WISCONSIN
Appeal No. 2021 AP 1343
Appeal No. 2021 AP 1382
Circuit Court Case No. 2021 CV 0143

JEFFREY BECKER, ANDREA KLEIN, AND A LEAP ABOVE DANCE, LLC,

Plaintiffs-Appellants-Petitioners,

v.

DANE COUNTY, JANEL HEINRICH, AND PUBLIC HEALTH OF MADISON & DANE COUNTY,

Defendants-Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY, HONORABLE JACOB FROST, PRESIDING

BRIEF OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE*

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INTRODUCTION

"When the legislative and executive powers are united in the same person, [. . .] there can be no liberty." Montesquieu, *The Spirit of the Laws* 151–52 (Thomas Nugent trans., Hafner Press 1949).

While emergency orders may be necessary at the onset of a public health crisis, governance by executive unilateral orders can lead to arbitrary policies that violate individual liberty. *See* Luke Wake, *Taking Non-Delegation Doctrine Seriously*, 15 N.Y.U. J.L. & Liberty 3, 13–14 (forthcoming), *available at* https://bit.ly/3HPMDMJ, (observing the Legislature is better equipped than the Executive to weigh competing policy concerns); *id.* at 28–32 (noting the "necessity" argument for open-ended delegations of emergency powers only justifies short-lived emergency orders). The non-delegation doctrine is an important tool to enforce the Constitution's guarantee of separation of powers and the preservation of liberty.

This Court should return to a meaningful non-delegation doctrine that provides substantive limitations on attempts to transfer core constitutional powers and prevents one constitutional branch of government from exercising core powers reserved for another branch. A two-step framework that first analyzes the nature of the delegation, then requires measurable standards and guidelines commensurate with the scope of the power delegated can ensure that legislative and executive powers are not fused in the same person. Pacific Legal Foundation and the NFIB Small Business Legal Center urge this Court to revitalize its non-delegation doctrine to prevent violations of individual liberty.

ARGUMENT

I. Recent Executive Orders Require Courts to Reconsider Their Non-Delegation Precedent

The "nondelegation [doctrine] is ripe for evaluation and experimentation in the states." Ilan Wurman, *Constitutional*

Laboratories: Some Reflections on COVID-19 Litigation in Arizona, 15 N.Y.U. J.L. & Liberty 3, 5 (forthcoming), *available at* https://bit.ly/3JdpgNk. It is widely accepted that the Legislature may not delegate its legislative power to another coordinate branch. *See, e.g.*, *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power to the [executive] is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."). This separation-of-powers principle is often cited but is particularly challenging for courts to enforce, and the "intelligible principle test has been ineffective at reining in broad delegations to the executive." Wurman, *supra*, at 6. The recent surge of litigation surrounding public health orders asserting authority over wide swaths of civil society calls out for a revitalized non-delegation doctrine.

A proliferation of non-delegation scholarship followed Justice Gorsuch's signal in *Gundy* that the Supreme Court is poised to reconsider its own non-delegation doctrine. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *see, e.g.*, Gary Lawson, *A Private-Law Framework for Subdelegation*, *in The Administrative State Before The Supreme Court: Perspectives On The Nondelegation Doctrine* 123 (Peter J. Wallison and John Yoo ed., 2022). The recent exercise of broad emergency powers by executives in response to COVID-19 also increased the non-delegation scholarship devoted to examination of the doctrine in the states. *E.g.*, Daniel Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 Emory L.J. 417 (2022), *available at* https://ssrn.com/abstract=3809905.

Given the on-going separation-of-powers concerns raised by public health responses to COVID-19 and recent doctrinal developments, the Court should revise its non-delegation doctrine to give meaning to the Constitution's separation of powers and guidance to the coordinate branches. Crafting a revitalized non-delegation doctrine in Wisconsin presents an opportunity to harmonize past precedents and set clear constitutional boundaries to guide state actors in the future. As this Court has repeatedly noted, "[e]ach branch has

exclusive core constitutional powers, into which the other branches may not intrude." *Panzer v. Doyle*, 2004 WI 52, ¶ 50. But "[b]eyond these core constitutional powers," courts have found formulaic rules difficult to apply, instead opting to apply general separation-of-powers principles to settle disputes between the branches. *See id.* ¶¶ 49–50. Rather than an inflexible rule, a revitalized non-delegation framework can give meaning to separation-of-powers principles in Wisconsin.

The Court's early non-delegation doctrine focused "on the *nature* of the delegated power" but recently "has focused less on the nature of the delegated power and more on the adequacy of procedural safeguards attending the delegation, so as to prevent arbitrariness in the exercise of the power." *Id.* ¶ 54. But cases such as this one demonstrate that procedural safeguards alone are insufficient to prevent arbitrariness in the exercise of power, let alone protect the core constitutional powers of each branch. While past decisions asserted "the nature of delegated power [. . .] plays a role in judicial review of legislative delegations[,]" the Court "normally review[s] both the nature of delegated power and the presence of adequate procedural safeguards, giving less emphasis to the former when the latter is present." *Id.* ¶ 55. This recent formulation of the non-delegation doctrine fails to sufficiently police even the outer boundaries of the broadest delegations, resulting in the infringement of individual liberties and a slowly eroding separation of powers.

II. Framework for A Revitalized Non-Delegation Doctrine

This case presents the perfect vehicle to revitalize the non-delegation doctrine in Wisconsin through a new framework that ensures the Constitution's implicit promise of the separation of powers. A meaningful non-delegation doctrine would look *first* to the substance or "nature of the delegated power." In some instances, this first step will be dispositive, *e.g.*, when the "power at issue" is a "'core' power reserved to one branch alone." *Id.* ¶ 51. In other instances, the Court can apply separation-of-powers principles to determine whether the scope of authority delegated, the type of the power delegated (*i.e.*, is the delegated power primarily legislative, executive, or judicial), and to whom the power is delegated conflict

with separation-of-powers principles. This substantive first step of the analysis will inform the second step of a revitalized non-delegation inquiry that asks if there are sufficient standards and guidance in the delegation so that the Legislature, delegee, courts, and the public can adequately assess whether the exercise of the delegated power conforms with the Legislature's fundamental policy decisions. Yet even when a "core" constitutional power is not at issue in the delegation, some delegations will result in "fusing an overabundance of power in the recipient branch" that creates a separation-of-powers problem that no accompanying standards or guidance can solve. *See id.* ¶ 52; Plaintiffs-Appellants Supp. Brief at 8 ("*no* amount of procedural safeguards could sufficiently cabin the utterly unguided grant of authority in this case. . .").

If a delegation passes the first step of a revitalized non-delegation framework, the second step asks whether the standards and guidance accompanying the delegation are commensurate and sufficient to protect the separation of powers. As the Michigan Supreme Court recently held, "as the scope of the powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both the *subject matter* and their *duration*, the *standards* imposed upon the Governor's discretion by the Legislature must correspondingly become more detailed and precise." *In re Certified Questions From United States Dist. Ct., W. Dist. of Michigan, S. Div.*, 506 Mich. 332, 363 (2020). Thus, a revitalized non-delegation framework starts with an assessment of the substance of the delegation before engaging in an analysis of the standards and guidelines accompanying the delegation, which must be proportional to the scope of a permissible delegation, to mitigate the risk of "fusing" an "overabundance" of more than one constitutional power in one person or body. *See id.* ("It is therefore impossible to ascertain whether the standards set forth in the EPGA that guide the Governor's discretionary exercise of her emergency powers satisfy the nondelegation doctrine without first assessing the precise scope of these powers.").

III. Recent Legal Scholarship Examining State Non-Delegation Supports a Revitalized Non-Delegation Doctrine

The two-step framework described above is an "administrable [] theory of nondelegation" supported by recent scholarship. *See, e.g.*, Wurman, *supra*, at 5. "[L]egislatures must resolve the 'important subjects,' leaving matters of mere detail to administrators. *Id.* What qualifies as important will depend on the nature of the right or conduct being regulated, the scope of the conduct that is authorized to be regulated, and the breadth of administrative discretion." *Id.* Regulations of "private rights will be more 'important'" under this theory, "than a regulation of public rights; and a regulation of either will be more important than a mere regulation of official conduct." *Id.* at 8. Relevant here, a delegation of power to the executive to regulate private conduct must meet three requirements: (1) the delegation "must be made specifically: the authorization cannot be hidden in a broad and general delegation to regulate in the 'public interest;'" (2) "the range of conduct that the executive may regulate must be narrow;" and (3) "the guiding standards must be more precise than when private rights are not at issue." *Id.* at 12. This "understanding of the nondelegation doctrine is the most consistent with constitutional text and structure, with historical practice, and with judicial precedents" and "[i]mportantly," "does not require the wholesale invalidation of the modern administrative state." *Id.*

Opponents of a revitalized non-delegation doctrine often base their objections on this concern, or the ability of state government to respond to emergencies. But recent legal scholarship of "the states' experience under a more robust doctrine" suggests these concerns are unwarranted. *See* Joseph Postell, *Can the Supreme Court Learn from the State Nondelegation Doctrines?*, *in The Administrative State Before the Supreme Court* 315 (2022). "Even in the states where several nondelegation challenges have been successful in the past few decades, there has not been an avalanche of litigation or widespread invalidation of statutes or regulations[.]" *Id.*; Walters, *supra* (analyzing dataset of over 4,000 state non-delegation cases from 1830–2019 to determine the practical effect of different non-delegation tests; finding no statistically significant difference in the

frequency of invalidation across states, despite the formulation of the test).

Nine states "enforce a relatively vigorous nondelegation doctrine in the regulatory context" that asks "whether statutes contain standards or guidelines that serve to limit agency discretion." Postell, *supra*, at 327 (discussing Alaska, Florida, Kentucky, New Hampshire, Montana, Oklahoma, Pennsylvania, West Virginia, and Vermont). These states followed a common trend over the last 40 years: "statutes sometimes ran afoul of the nondelegation doctrine, but these cases were rare, the circumstances were often extraordinary, and the invalidated statutes were typically crafted in extraordinarily vague terms." *Id.* at 328. Of relevance to the reinvigorated non-delegation doctrine proposed here, in addition to the recent Michigan decision, courts in Alaska,[1] Florida,[2] Pennsylvania,[3] and West Virginia[4] have all analyzed the substance of the delegation when invalidating the statute at issue under their own non-delegation tests. A substantive analysis allowed these courts to police the rare, extraordinary delegations most likely to lead to a violation of constitutional rights.

A revitalized non-delegation framework is adaptable to "many different situations [. . .] even if the scrutiny afforded to delegations changes based on the type of delegation." Benjamin Silver, *Nondelegation in the States*, 75 Vand. L. Rev. __, 9 (2022), *available at* https://bit.ly/3Lmc1eX. This includes situations like the Dane County Board's attempt to re-delegate its authority to issue enforceable health orders to the Local Health Officer in Ordinance § 46.40. For instance, the Iowa Supreme Court analyzed the substance of a delegation before invalidating an attempted re-delegation in two cases. *Id.* at 10–11 (citing *Bunger v. Iowa High School Athletic Association*, 197 N.W.2d 555, 560 (Iowa 1972)) ("while a public board or body may authorize performance of ministerial or administrative functions by others, it cannot re-delegate matters of

[1] *State v. Fairbanks N. Star Borough*, 736 P.2d 1140 (Alaska 1987).

[2] *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978).

[3] *Blackwell v. Com., State Ethics Comm'n*, 523 Pa. 347, 360 (1989).

[4] *In re Dailey*, 195 W. Va. 330 (1995); *Appalachian Power Co. v. Pub. Serv. Comm'n*, 296 S.E.2d 887 (1982).

judgment or discretion"); *id.* at 11 (citing *Gabrilson v. Flynn*, 554 N.W.2d 267, 276 (Iowa 1996)) (holding "[d]etermination of school board access to school records [. . .] is not a ministerial or administrative matter [. . . but] is precisely the type of discretionary decision the legislature has empowered the school board to make"). Similarly, the Local Health Officer's Orders require "precisely the type of discretionary decision[s] the legislature has empowered the [county] board to make" and the Board's attempt at re-delegation in Ordinance § 46.40 fails the non-delegation doctrine.

CONCLUSION

If Wis. Stat. § 252.03 or the re-delegation of power in Ordinance § 46.40 authorizes the Local Health Officer's Orders at issue here, it would violate the non-delegation doctrine proposed above, for all the reasons argued here and in Plaintiff-Appellants' briefs. PLF and NFIB encourage this Court to reconsider and revise its non-delegation doctrine and reverse the decision of the Circuit Court.

Dated this 15th day of February, 2022. Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 20 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 7 pages and 2,135 words.

Dated this 15th day of February, 2022.

BY: *E-Signed by Matthew M. Fernholz*
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(f)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 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 opposing parties.

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