Nos. 2021AP001343, 2021AP1382

SUPREME COURT OF WISCONSIN

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 *AMICUS CURIAE* BRIEF OF LEGAL SCHOLARS IN SUPPORT OF NEITHER PARTY

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STATEMENT OF AMICI'S INTEREST

Amici, identified in the Appendix, are legal scholars with nationally recognized expertise in local government law. They have researched and published both leading casebooks and articles on local government law. Amici have a professional interest in promoting the proper understanding of constitutional and statutory principles of local self-government at issue in this case.

INTRODUCTION

Amici offer this brief to underscore a foundational principle of local government law: The non-delegation doctrine does not require Wisconsin's local governments to follow lockstep the delegation limits that bind Congress or the Wisconsin legislature. Fundamental principles of home rule have long afforded local governments more flexibility to experiment with governmental structures responsive to their local constituents' varied needs and preferences. Whatever this Court might decide regarding a

"reinvigorated" state-level non-delegation doctrine, such a doctrine has no application to the local delegations at issue in this case.

The bedrock principle that separation-of-powers limits apply differently at the local level is rooted in state constitutional and statutory law and reflected in numerous, well-established traditions of local governmental structure foreclosed to Congress or state legislatures. The core reason is simple: Local legislatures are not defined by the same constitutional provisions that limit law-making by Congress or state legislatures. In turn, local legislatures need not be clones of state or federal legislatures. It is beyond dispute, for instance, that local governments may adopt unicameral legislatures that exercise a mixture of both executive and legislative powers. For the same reason, local governments are not subject to the same non-delegation principles limiting grants of power to state or federal agencies. In both cases, case law in Wisconsin and elsewhere has long

established that state constitutional home rule principles provide local governments flexibility in governmental design.

These constitutional arrangements are both sensible and time-honored. Using their flexibility, local governments have delegated broad powers to their officers and agencies in areas ranging from health care to zoning. These delegations foster responsive day-to-day governance while posing little threat to individual liberty or local democracy. Unlike Congress or the state legislature, local governments are tightly constrained in their geographic and subject-matter jurisdiction. Moreover, local legislatures—unicameral bodies with small constituencies, and, in this case, with local legislators' sitting as members of the Board of Health itself—can swiftly reclaim local officials' powers whenever local voters wish them to do so.

Far from promoting democracy, Petitioners' proposed extension of state-level non-delegation principles to local

government assails it. Judicial imposition of a one-size-fits-all straitjacket on local governments centralizes decisions that Wisconsin's voters have deliberately decentralized, including through their 1924 ratification of home-rule amendments to the Wisconsin Constitution and through their elected representatives' adoption of administrative home rule for counties in 1985. Petitioners' proposal invites this Court to overturn those decisions to protect local democratic decision-making from judicially designed non-delegation limits. Expressing no view about whether such limits ought to be reinvigorated with respect to the Wisconsin legislature and state-level agencies, Amici urge this Court to decline such an invitation to substitute judicial doctrine for local democracy.

ARGUMENT

I. Federal and State Constitutional Separation of Powers Principles Do Not Apply to Wisconsin's Local Governments.

The non-delegation doctrine is not a free-floating

principle that applies identically to every level of government. It is instead rooted in specific constitutional texts applicable only to institutions defined by that text. In Wisconsin, the non-delegation doctrine is derived from the tripartite division of powers imposed by Articles IV, V, and VII of the Wisconsin Constitution. *See, e.g., Wisconsin Legislature v. Palm*, 2020 WI 42, ¶¶ 66-69, 391 Wis.2d 497, 536-40, 942 N.W.2d 900, 919-21 (Bradley, J., concurring) (explaining how the Wisconsin Constitution "'avert[s] the accumulation of power by one body'" through a "'diffusion of governmental powers' among three branches of government") (citation omitted); *Flynn v. Dep't of Admin.*, 216 Wis.2d 521, 545-46, 576 N.W.2d 245, 255 (1998) (deriving the non-delegation doctrine from the principle that "[e]ach branch has exclusive core constitutional powers, into which the other branches may not intrude"). Likewise, the federal non-delegation doctrine is derived from the tripartite division of powers among the three federal branches imposed

by Articles I, II, and III of the U.S. Constitution. *See, e.g.*, *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (noting that the non-delegation doctrine is derived from Article I, § 1's vesting of all and only federal legislative power in Congress); *Gundy v. United States*, 588 U.S. ___, 139 S.Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (same).

Local legislatures' powers, by contrast, are not defined by any tripartite division of powers but instead by statutory home-rule provisions enacted pursuant to Article IV, sections 22-23 and Article XI, section 3 of the Wisconsin Constitution. These provisions allow the legislative bodies of counties to exercise a complex mixture of executive and legislative powers unlike those of Congress and the Wisconsin legislature. *See, e.g.*, Wis. Stat. §§ 59.03(1) ("Every county may exercise any organizational or administrative power"); 59.03(2)(a) (the "board of any county is vested with all powers of a local, legislative and

administrative character"); 59.51(1) ("The board of each county shall have the authority to exercise any organizational or administrative power" not otherwise conferred on county executives); *Lipscomb v. Abele*, 2018 WI App 58, ¶45, 384 Wis.2d 1, 26-27, 918 N.W.2d 434, 446-47 (noting that county boards exercise "administrative" powers that might be classified as "executive" by other states' laws). State and federal separation-of-powers principles that are rooted in the strict separation of executive and legislative functions are alien to these well-established traditions of flexibility and diversity in local governmental structure.

Petitioners insist that, "since the limited legislative authority local government have comes from the [State] Legislature…it necessarily comes with the same restrictions [imposed by Article IV on the Wisconsin Legislature]." Plaintiff-Appellants' Opening Br. 27. Such logic, however, implies absurdities that refute the premise. Petitioners' reasoning would, for instance, require city councils and

county boards to have bicameral legislatures, because Article IV, § 1 insists on bicameralism no less than legislative non-delegation. Because Article IV, § 1 applies only to the state legislature, however, Article IV's requirements of bicameralism have no application to powers delegated by the Wisconsin legislature to local governments. By precisely the same logic, Article IV's non-delegation limit also has no automatic application to Wisconsin's local governments.

Petitioners' efforts to impose state and federal separation of powers principles on local governments is inconsistent with common sense as well as constitutional text. Unlike local governments, Congress and the Wisconsin legislature exercise sweeping powers over heterogeneous populations inhabiting large territories with diverse local conditions. To safeguard local self-government and private liberty, therefore, the United States and Wisconsin Constitutions both impose substantial limits on

congressional and state-level law-making processes. It makes little sense to extend these same limits to local legislative bodies that exercise much more limited powers constrained by much narrower geographic limits. The "concern about the tyranny that can arise when one branch of government—the executive, legislative, or judicial—assumes the powers of another" is "diminished for a level of government whose powers are subordinated to higher levels of government or otherwise limited." *Bd. of Cnty Comm'rs v. Padilla*, 804 P.2d 1097, 1102 (N.M. Ct. App. 1990) (holding that separation-of-powers principles governing the New Mexico state legislature are inapplicable to New Mexico counties); Noah M. Kazis, *American Unicameralism: The Structure of Local Legislatures*, 69 Hastings L.J. 1147, 1180-81 (2018) (explaining that, given constraints from higher levels of government and interlocal competition, local governments require fewer limits on policy-making than state and federal counterparts). Indeed, Petitioners'

invocation of federal separation-of-powers principles to define county powers is especially inappropriate given those principles' purpose of safeguarding federalism, thereby protecting rather than limiting state and local experimentation in governmental structures. *See generally* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1328-29 (2001) (describing how separation of powers at the federal level "was designed to safeguard federalism"). Madison did not write *Federalist #51* as an argument for hamstringing county government: He did so to safeguard federalism by constraining Congress' powers to encroach on state and local autonomy in the design of their own self-governing institutions. *See id.*

For these common-sense reasons, state courts routinely hold that, in the words of the Rhode Island Supreme Court, "the separation of powers doctrine is a concept foreign to municipal governance." *Moreau v. Flanders*, 15 A.3d 565, 579 & n.16 (R.I. 2011) (providing citations to authorities

from fourteen states). Petitioners' effort to transform local governments into clones of the federal and state governments flies in the face of this widely held common-sense understanding. In defining the non-delegation principles that ought to govern local governments, therefore, Amici urge this Court to reject Petitioners' mechanical imposition on local governments of principles from state and federal constitutional law.

II. Wisconsin Law Compels A Broad Construction of Local Governments' Organizational Powers to Delegate Authority.

Rather than look to U.S. Supreme Court precedents and the *Federalist Papers* for principles defining county boards' powers, Amici urge this Court to read local non-delegation principles in light of Wisconsin's strong commitment to local democracy embodied in home rule. The powers of local governments are defined the statutory home-rule powers enacted pursuant to Article IV, section 22-23 and Article XI, section 3. Those principles concededly include some non-

delegation constraints that bar county boards from conferring powers that are unconstrained by any legal standards. *See, e.g.,* 2A McQuillin Mun. Corp. § 10:45 (3d ed.) (describing non-delegation principle applicable to local governments). State law requires, however, that those local non-delegation principles be broadly construed to preserve local responsiveness to the diverse preferences of Wisconsin's varied local communities. *See* Wis. Stat. § 59.03(2)(f) ("The powers conferred by this subsection shall be in addition to all other grants of power and shall be limited only by express language"); Wis. Stat. § 59.04 ("To give counties the largest measure of self-government under the administrative home rule authority granted to counties in s. 59.03 (1), this chapter shall be liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power").

Wisconsin's case law underscores this broad construction. As this Court noted in upholding a county's

power to transfer management of a museum to a non-profit corporation in *Hart v. Ament*, 176 Wis.2d 694, 702, 500 N.W.2d 312, 315 (1995), the home-rule provisions of Chapter 59 "reflect a legislative intent to allow county governments to act on matters of local concern in any manner they deem appropriate," because they "have broad authority to direct local matters." As *Hart* makes plain, that broad organizational authority includes broad power to confer or withhold powers from local executive officials. *See also Town of Grant v. Portage Cnty.*, 2017 WI App 69, ¶ 20, 378 Wis. 2d 289, 301, 903 N.W.2d 152, 158 (broadly construing county's taxation power to fund ambulance service, because liberal construction provision "reflect[s] a legislative intent to allow county governments to act on matters of local concern in any manner they deem appropriate"); *Weber v. Town of Saukville*, 209 Wis.2d 214, 225-26, 562 N.W.2d 412, 416-17 (1997) (noting that zoning standards "often lack specificity" to preserve case-by-case flexibility in administration);

Harbick v. Marinette Cnty., 138 Wis. 2d 172, 176, 405 N.W.2d 724, 726 (Ct. App. 1987) (holding that county board had authority to transfer certain account keeping duties from the county clerk to the county auditor because of the statutory provision requiring broad construction of county's power to assign powers to county officers); *Town of Richmond v. Murdock*, 70 Wis.2d 642, 650, 235 N.W.2d 497, 502 (1975) (upholding standard for zoning permits specifying only consistency with "health, safety, morals, comfort, prosperity, and general welfare" of the town). *Cf. Kukor v. Grover*, 148 Wis.2d 469, 504 n.13, 436 N.W.2d 568, 582 n.13 (1989) (limiting state judicial oversight of school finance and noting that "[t]he requirement that local control of schools be retained is of constitutional magnitude and necessarily compelling").

Despite these broad statutory grants of home-rule power and supportive case law, Petitioners suggest that Wisconsin's home-rule statutes impose the same non-

delegation principles on county boards that Article IV, § 1 imposes on the Wisconsin legislature, simply because both provisions use the verb "vest." Memorandum in Support of Emergency Petition 16. In resting their argument on a single word, Petitioners ignore the statutory instructions that county boards' "administrative or organizational powers" be "liberally construed." Wis. Stat. §§ 59.03(1), 59.04. Moreover, those broadly construed "administrative or organizational powers" are conveyed by Wis. Stat. § 59.03(1), a provision that makes no use of the verb "vest" on which Petitioners place so much weight.

Putting aside such verbal minutiae, imposition on counties of state non-delegation limits drawn from Article IV, § 1 simply defies both state constitutional principles and structural common sense: As explained above, state courts have widely recognized that local governmental structure should be governed by limits altogether different from those constraining the far more powerful Congress and state

legislatures.

Petitioners' argument also ignores the historical origins of home rule in Wisconsin, origins rooted in the voters' and state legislature's rejection of judicially defined non-delegation limits that Petitioners now seek to revive. To support their assertion that "the non-delegation doctrine applied equally at the local level as at the state level," Petitioners rely on nineteenth-century precedents like *People v. Dunn*, 58 Wis. 402, 17 N.W. 1 (1883). Petitioners' Memorandum in Support of Emergency Petition 13-14. This call to revive long-abandoned precedents, however, ignores Wisconsin voters' deliberate repudiation of those nineteenth-century non-delegation principles in ratifying the 1924 Home Rule Amendment. In 1912, this Court invoked the strict non-delegation principles on which Petitioners rely to strike down the 1911 Home Rule Act granting broad powers of self-government to Milwaukee. *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 137 N.W.

20, 24 (1912). In response, the voters approved the 1924 Home Rule Amendments authorizing the Wisconsin Legislature to confer broad powers of self-government on cities and villages. Michael E. Libonati, *"Neither Peace Nor Uniformity": Local Government in the Wisconsin Constitution*, 90 Marq. L. Rev. 593, 605-07 (2007) (describing history of home rule in Wisconsin). In 1985, acting in the same spirit of promoting local self-government, the state legislature extended administrative home rule to counties. 1985 Wisconsin Act 29, § 1147 (enacting administrative home rule for counties). By seeking to "reinvigorate" nineteenth century non-delegation principles, Petitioners effectively ignore the will of Wisconsin voters reflected in these long-standing provisions to protect robust home rule.

A broad construction of county boards' powers to assign powers to county health officers is required not only by the text of Wis. Stat. §§ 59.03(2)(f) and 59.04 but also by the practical analysis of non-delegation concerns required by

Panzer v. Doyle, 2004 WI 52, 271 Wis.2d 295, 680 N.W.2d 666. As explained by the *Panzer* Court, non-delegation limits "are designed to promote accountability and deter abuse" by preventing "a ceding of power *that the donor branch may be unable to reclaim*." *Panzer*, 2004 WI 52, ¶ 52 (emphasis added). Critical to any judicial evaluation of whether a delegation is excessive, therefore, is the judicial assessment of the legislature's practical capacity to reclaim power conferred on executive officers. *Panzer* narrowly construed the Governor's statutory power to commit the state to a gaming contract with Indian tribes, reasoning that the gubernatorial veto made legislative reclaiming of delegated power into a "blunt instrument." *See Panzer*, 2004 WI 52, ¶ 71.

The same practical analysis suggests broad construction of local governments' powers to confer authority on local health officials. Local legislatures' authority to reclaim local officials' power is hardly a "blunt instrument" under *Panzer*.

Those legislatures are, again, unicameral bodies governing relatively politically homogenous populations. Nestor M. Davidson, *Localist Administrative Law*, 126 Yale L.J. 564, 613 (2017) (observing that nondelegation concerns about ambiguous delegations are mitigated by "more immediate legislative oversight" provided by local legislatures). Unimpeded by partisan divisions or any veto wielded by local health officers, such legislative bodies can quickly overrule any health officers' actions that generate opposition from local voters. Indeed, city and county legislators actually sit on the Board of Health that oversees the Dane County health officer pursuant to City of Madison Ordinance 7.01(2), insuring close oversight of that officer's actions.

Citing no authority while ignoring *Panzer*'s analysis of legislative capacity to reclaim powers, Petitioners oddly assert that local governments' power to "get into the weeds" of local policy is a reason to impose a *more* stringent non-delegation limit on local governments. Plaintiff-Appellants'

Supp. Br. 14. Under *Panzer*, Petitioners' assertion is exactly backwards: Precisely because local legislators can quickly reclaim power ex post, they enjoy greater latitude to delegate broader powers to local officials. *See Panzer*, 2004 WI 52, ¶¶ 70-71.

Petitioners' request that this Court impose a newly "reinvigorated," one-size-fits-all non-delegation principle on local governments, in sum, is inconsistent with the plain text of the home-rule powers in Chapter 59, the history of Wisconsin's ratification of home rule to loosen judicially crafted non-delegation limits, and *Panzer*'s explicit instructions that non-delegation should be relaxed to the extent that legislatures can easily reclaim delegated powers. Whatever the merit of Petitioners' proposal at the state level, Amici therefore urge this Court to decline their invitation to overhaul existing law with respect to local governments.

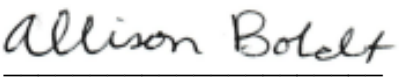
CONCLUSION

For the foregoing reasons, Amici respectfully urge this

Court to construe broadly county boards' power to delegate authority to county health officers. Local governments are not subject to non-delegation limits identical to those that bind the Wisconsin Legislature.

Dated this 22nd day of February, 2022.

Respectfully submitted,



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b), (bm), and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,906 words.

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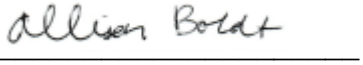

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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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CERTIFICATE OF SERVICE

Copies of this certificate and the foregoing brief have been filed with the court and served via first-class mail on all counsel of record.

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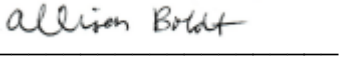

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