

No. \_\_\_\_\_

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**In the Supreme Court of Wisconsin**

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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 &  
Dane County, and PUBLIC HEALTH OF MADISON & DANE COUNTY,  
RESPONDENTS.

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**EMERGENCY PETITION FOR AN  
ORIGINAL ACTION AND APPENDIX**

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## ISSUES PRESENTED

1. Whether Dane County Ordinance § 46.40(2), Madison Ordinance § 7.06(6) (and/or Wis. Stat. § 252.03<sup>1</sup>) violate the non-delegation doctrine?

2. Even aside from the non-delegation violation, whether Emergency Order #10's ban on all indoor gatherings in private homes, and ban on all indoor sports activities, effectively closing many businesses, exceeded the authority granted in Wis. Stat. § 252.03?

3. Whether Emergency Order #10's limit on any private, in-person gathering violates constitutional rights to freedom of association?

4. Whether Emergency Order #10's ban on all indoor gatherings in private homes, and ban on all indoor sports activities, effectively closing many such businesses, while allowing all other businesses to stay open and people to gather in those businesses, is "reasonable and necessary"?

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<sup>1</sup> As explained below, Petitioners' position is that the ordinances, and not section 252.03, are the proper targets of the non-delegation claim. To the extent this Court disagrees, however, Petitioners also challenge section 252.03.

## INTRODUCTION

1. Dane County and the City of Madison have unlawfully delegated near limitless legislative power to their local health officer to do whatever she deems “reasonable and necessary” to combat the COVID-19 pandemic, without any duration or oversight from the county board or city council, and she has seized that power since May to rule the city and county by decree. This Court has already enjoined one abuse of that delegation, when the health officer attempted to shut down private schools just before they were set to reopen. *WCRIS v. Heinrich*, No. 2020AP1420.

2. Just as egregiously, on November 17, one week before Thanksgiving, Dane County’s health officer again invoked that unlawful delegation to unilaterally ban all indoor gatherings, including in private homes, among any individuals not within the same immediate household (like extended family, significant others, etc.) and has threatened Madison and Dane County residents with a \$1,000 fine for hosting any such gatherings. She has also banned all indoor sports activities, regardless of the nature the activities, the

size of the facility, or the precautions taken, effectively closing sports-related businesses like gymnastics gyms, hockey rinks, and indoor soccer fields, even though these have been operating safely, and other businesses in much smaller buildings can continue to operate. Neither the Dane County board nor the Madison common council voted on or approved these dramatic prohibitions.

3. But for the unlawful delegation, none of this would be possible. Under the framework in state law, prohibitions and limits like this could not be enforced unless they were enacted in an ordinance by the local governing body. The Dane County board, however, has adopted an ordinance purporting to preemptively make enforceable any order that its local health officer adopts. The City of Madison, likewise, has interpreted a generic “health nuisance” ordinance to do the same thing.

4. These ordinances blatantly violate the non-delegation doctrine, as this Court has already recognized in *Wisconsin Legislature v. Palm*, where it emphasized that endowing an unelected administrative official with the power

to unilaterally “defin[e] the elements” of new, prohibited conduct and to “create [ ] penalties” for that conduct would pose a non-delegation problem. *Id.* ¶¶ 36–39, 391 Wis. 2d 497, 942 N.W.2d 497; *see id.* ¶ 251 (Hagedorn, J., dissenting) (noting that the proper target of a non-delegation challenge would be the enforcement mechanism).

5. Petitioners here challenge two things. First, they challenge the Order issued on November 17 to the extent that it bans any indoor gathering and bans all indoor sporting activities. That Order is invalid not only because it is based on an unlawful delegation, but also for a variety of other reasons: it exceeds the statutory authority given to health officers in section 252.03, it violates constitutional rights to assembly and association, and it is not “reasonable and necessary” under any definition of those terms. Second, Petitioners also challenge the underlying ordinances that enabled this as a violation of the non-delegation doctrine, to prevent these abuses from recurring.

6. This case warrants this Court’s original action jurisdiction not only to remedy the immediate harms from the

abuse of power in the most recent order, but also because, with respect to Petitioners' non-delegation challenge to the underlying ordinances, only this Court can provide clarity on how the non-delegation doctrine functions generally and, more specifically, how it applies at the local level, issues that counties around the state are currently wrestling with.

7. Petitioner respectfully ask this Court to do as it did in *WCRIS v. Heinrich*—to issue a temporary injunction to allow private gatherings and sports to continue, and then to issue a briefing schedule that will allow more fulsome analysis of the non-delegation doctrine and the other issues.

### **PARTIES**

8. Petitioner Gymfinity, Ltd. is a Wisconsin business that operates an 18,466 square foot gymnastics gymnasium, located at 6300 Nesbitt Road in Fitchburg, Wisconsin. Gymfinity is owned and operated by Jason Orkowski, a resident of Wisconsin. As a direct result of Emergency Order #10's ban on all indoor sports activities, Gymfinity is prohibited from conducting gymnastics education, training, and classes, which is the vast majority of

its business, even though it has gone through extensive efforts to protect against the spread of COVID-19 and to date has not had a single incident. Gymfinity expects to lose roughly \$40,000 in revenue between now and December due to Emergency Order #10.

9. Petitioner Jeffrey Becker is a resident of Dane County, residing at 3145 Timber Lane, Verona, Wisconsin. Petitioner Becker is the father of four children, all of whom participate in the Madison 56ers, a soccer club based in Dane County. Petitioner's children have been directly impacted by the sports restrictions in Emergency Order #10 described below. Additionally, as a resident of Dane County, Petitioner Becker is also subject to the private gathering restrictions in Emergency Order #10.

10. Petitioner Andrea Klein is a resident of Dane County, residing at 3072 Shore View Drive in Stoughton, Wisconsin. Petitioner Klein is the mother of three boys, two of whom participate in the Stoughton Youth Hockey Association. Petitioners' children have been directly impacted by the sports restrictions in Emergency #10 described below.

Additionally, Petitioner Klein is also subject to the private gathering restrictions in Emergency Order #10.

11. Respondent Dane County is a county of the State of Wisconsin, established pursuant to Wis. Stat. §§ 2.01, 59.01. Dane County maintains and enforces the ordinance challenged herein as a violation of the non-delegation doctrine. Dane County Ordinance § 46.40; *see* Wis. Stat. § 59.02. Dane County's principal office is located at 210 Martin Luther King Jr. Blvd., Room 426, in the City of Madison, Wisconsin.

12. Respondent City of Madison is a city of the State of Wisconsin. The City of Madison maintains and enforces the ordinance challenged herein as a violation of the non-delegation doctrine. Madison City Ordinance § 7.05(6). The City of Madison's principal office is located at 215 Martin Luther King Jr. Blvd., in the City of Madison, Wisconsin.

13. Respondent Janel Heinrich is the Public Health Officer and Director of Public Health of Madison & Dane County, and is named in her official capacity. Respondent Heinrich maintains her principal office at 210 Martin Luther



King Jr. Blvd., Room 507, in the City of Madison, Wisconsin. Respondent Heinrich issued Emergency Order #10, which is partially the subject of this Petition.

14. Respondent Public Health of Madison & Dane County is a city-county health department serving the City of Madison and the rest of Dane County. Respondent Public Health of Madison & Dane County maintains its principal office at 210 Martin Luther King Jr. Blvd., Room 507, in the City of Madison, Wisconsin. Respondent Public Health of Madison & Dane County is the entity responsible for administering Emergency Order #10, which is partially the subject of this Petition.

#### **STATEMENT OF FACTS**

15. In March 2020, in response to the then-emerging COVID-19 pandemic, Governor Tony Evers declared a state of emergency and issued an order, pursuant to his emergency powers under Wis. Stat. § 323.12, shutting down much of ordinary life throughout Wisconsin for 60 days. *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 2, 391 Wis. 2d 497, 942 N.W.2d 900.

16. When the emergency declaration was about to expire without extension by the Wisconsin Legislature, the Secretary of the Department of Health Services (DHS) issued a new, equivalent order, this time pursuant to Wis. Stat. § 252.02. *Id.* ¶¶ 5–8.

17. The Wisconsin Legislature challenged the order on the ground that it met the definition of a “rule” and therefore should have been promulgated through the rulemaking procedures in Chapter 227, allowing legislative oversight, and this Court agreed, invalidating and enjoining the order. *Palm*, 2020 WI 42, ¶¶ 15, 58–59.

18. In addition to holding that the order met the definition of a “rule,” this Court also explained that Wis. Stat. § 252.02(6) (allowing the DHS secretary to “implement all emergency measures necessary to control communicable diseases”) and Wis. Stat. § 252.25 (making any “departmental order” criminally enforceable) together would pose a delegation problem if they were interpreted to allow the DHS secretary both to create new, prohibited conduct via order and to enforce those prohibitions through criminal penalties.

*Palm*, 2020 WI 42 ¶¶ 31–42. The Court avoided the non-delegation problem by holding that, to be enforceable, general health orders purporting to regulate an array of normal activities during a pandemic must go through the rulemaking procedures of Chapter 227, thereby giving the Legislature oversight. *Id.* ¶ 3.

19. After this Court’s decision, the Legislature indicated that it preferred local control over a new statewide order, so Governor Evers did not pursue a new emergency rule. See Riley Vetterkind, *Evers administration won’t pursue new COVID-19 restrictions amid impasse with GOP*, Wisconsin State Journal (May 19, 2020).<sup>2</sup>

20. In the wake of *Palm*, many local health departments considered whether to adopt their own local orders pursuant to the analogous, and seemingly broad, authority in Wis. Stat. § 252.03 to “do what is reasonable and necessary for the prevention and suppression of disease.”

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<sup>2</sup> [https://madison.com/wsj/news/local/govt-and-politics/evers-administration-wont-pursue-new-covid-19-restrictions-amid-impasse-with-gop/article\\_86186768-a9a4-5ff2-947c-db0caeaf9767.html](https://madison.com/wsj/news/local/govt-and-politics/evers-administration-wont-pursue-new-covid-19-restrictions-amid-impasse-with-gop/article_86186768-a9a4-5ff2-947c-db0caeaf9767.html)

21. But the Wisconsin statutes, by design, do not provide any *enforcement* mechanism for a broad local health order that purports to regulate or prohibit normal activities. Instead, the statutes require that any such regulations or prohibitions must be adopted in a duly enacted ordinance.

22. Section 252.25, for example, the primary enforcement mechanism for “violations of law relating to health,” conspicuously omits any reference to local health orders, instead providing penalties only for violations of “any *state* statute or rule, county, city or village *ordinance*, or *departmental* order.”

23. Likewise, section 251.06, establishing the duties of local health officers, authorizes such officers to “[e]nforce *state* public health statutes and rules” and “any ordinances that *the relevant governing body enacts*,” but does not give a local health officer authority to enforce his or her own orders.

24. By contrast, the statutes *do* provide an enforcement mechanism for local health orders targeted at a particular individual or property.

25. Section 252.06(4) and (5) provide for enforcement of isolation and quarantine orders issued by a local health officer and directed at a particular individual.

26. Other provisions allow a local health officer to “[i]nvestigate and supervise the sanitary conditions of all premises” within the county, Wis. Stat. § 251.06(3)(f), and provide a mechanism for health officers to “order the abatement or removal” of a “human health hazard” found in a particular building, Wis. Stat. § 254.59.

27. Consistent with these statutory provisions, DHS regulations create a procedure for local health officers to petition a court to require a particular person or owner of a specific piece of property to comply with an order directed at that person or property. Wis. Admin § DHS 145.06(4)–(6).

28. Read together, the upshot of these provisions is that, while local health officers can issue and enforce orders targeted at a particular individual or property, any regulations or prohibitions of otherwise normal activity during a pandemic must be adopted in a local ordinance,

passed by the county board or common council respectively, to be enforceable.<sup>3</sup>

29. This conclusion is consistent with Section 66.0113, which allows “the governing body of a county [or] city ... [to] authorize the use of a citation ... for violations of *ordinances*” (not orders of local administrative officials).

30. This conclusion is also consistent with a recent analysis by the Wisconsin Counties Association, which noted that “[n]either the statutes nor the administrative code provide for a detailed enforcement mechanism of a local health officer’s general order.” *See Wisconsin Counties Association, Guidance in Implementing Regulations Surrounding Communicable Disease 27–40* (August 2020).<sup>4</sup>

31. In light of this framework, counties and cities have taken one of three approaches since *Palm*.

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<sup>3</sup> This does not render the “do whatever is reasonably and necessary” language in section 252.03 superfluous. There are all sorts of things a local health department could do that do not require enforcement, such as promoting or providing masks, offering testing, etc.

<sup>4</sup> [https://www.wicounties.org/uploads/legislative\\_documents/guidance-communicable-diseases-final.pdf](https://www.wicounties.org/uploads/legislative_documents/guidance-communicable-diseases-final.pdf)

32. First, many local governments simply rescinded their orders in favor of encouraging voluntary compliance with DHS and CDC recommendations and have not since adopted any new orders. See Mitchell Schmidt, *Some Wisconsin counties rescind local stay-at-home orders, Dane County order to stay in place*, Wisconsin State Journal (May 16, 2020).<sup>5</sup>

33. In other jurisdictions, the local governing body (county board, city council, etc.) adopted ordinances via the normal local legislative process. See, e.g., Alison Dirr, *Milwaukee Common Council approves requiring masks in public spaces*, Milwaukee Journal Sentinel (July 13, 2020).<sup>6</sup>

34. A handful of jurisdictions, like Dane County, preferred to allow the local health officer to continue to make these critical policy decisions on her own, and, to address the lack of any enforcement mechanism, proposed ordinances to

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<sup>5</sup> [https://madison.com/wsj/news/local/govt-and-politics/some-wisconsin-counties-rescind-local-stay-at-home-orders-dane-county-order-to-stay-in/article\\_3b4d1e92-4f00-5348-ab15-72ba8fc572da.html](https://madison.com/wsj/news/local/govt-and-politics/some-wisconsin-counties-rescind-local-stay-at-home-orders-dane-county-order-to-stay-in/article_3b4d1e92-4f00-5348-ab15-72ba8fc572da.html)

<sup>6</sup> <https://www.jsonline.com/story/news/local/milwaukee/2020/07/13/milwaukee-common-council-approves-mask-requirement/5363137002/>

expand their local health officer's powers. *See generally* MacIver Institute, *UPDATED: County Governments Seeking Great Powers For Public Health Bureaucrats, Despite Public Opposition* (Aug. 4, 2020).<sup>7</sup>

35. These proposed ordinances faced significant backlash, and many were tabled or scrapped entirely, *see*

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<sup>7</sup> <https://www.maciverinstitute.com/2020/08/county-governments-seeking-great-powers-for-public-health-bureaucrats-despite-wi-supreme-court-safer-at-home-decision/>



*generally id.*, including in Chippewa,<sup>8</sup> Dodge,<sup>9</sup> Eau Claire,<sup>10</sup> Jefferson,<sup>11</sup> Oconto,<sup>12</sup> and St. Croix<sup>13</sup> counties.

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<sup>8</sup> Carla Rogner, *Chippewa County votes down health ordinance as dozens protest*, WEAU 13 News (Sept. 17, 2020) <https://www.weau.com/2020/09/17/chippewa-county-votes-down-health-ordinance-as-dozens-protest/>

<sup>9</sup> See Ken Thomas, *Dodge County weighs COVID ordinance: Approval not likely before December*, Daily Citizen (Oct. 6, 2020) [https://www.wiscnews.com/bdc/news/local/dodge-county-weighs-covid-ordinance-approval-not-likely-before-december/article\\_17339330-024b-528c-ac05-3b563828883e.html](https://www.wiscnews.com/bdc/news/local/dodge-county-weighs-covid-ordinance-approval-not-likely-before-december/article_17339330-024b-528c-ac05-3b563828883e.html)

<sup>10</sup> Sarah Seifer, *Eau Claire County's coronavirus health order knocked down*, Leader-Telegram (Oct. 15, 2020) [https://www.leadertelegram.com/covid-19/eau-claire-county-s-coronavirus-health-order-knocked-down/article\\_08cfebc2-bffa-5846-8ae3-a99b58df2346.html](https://www.leadertelegram.com/covid-19/eau-claire-county-s-coronavirus-health-order-knocked-down/article_08cfebc2-bffa-5846-8ae3-a99b58df2346.html)

<sup>11</sup> Steve Sharp, *County board nixes health ordinance*, Daily Jefferson County Union (Jul. 15, 2020) [https://www.dailyunion.com/news/county-board-nixes-health-ordinance/article\\_64dae5eb-6c9f-56c1-8d87-4111e4795ced.html](https://www.dailyunion.com/news/county-board-nixes-health-ordinance/article_64dae5eb-6c9f-56c1-8d87-4111e4795ced.html)

<sup>12</sup> Warren Bluhm, *County Board delays vote on emergency powers*, New Media Inc. (May 26, 2020) <https://newmedia-wi.com/content/county-board-delays-vote-emergency-powers>

<sup>13</sup> Rebecca C. Mariscal, *St. Croix County COVID ordinance fails in 9-10 vote*, RiverTowns (Nov. 18, 2020), <https://www.rivertowns.net/news/government-and-politics/6767946-St.-Croix-County-COVID-ordinance-fails-in-9-10-vote>.

36. Only three counties that Petitioners are aware of (Dane, Door,<sup>14</sup> and Pierce<sup>15</sup>) have adopted ordinances preemptively making any order of the local health officer enforceable without limits or oversight by county board.

37. And only Dane County's local health officer has issued orders in reliance on such an ordinance, the Petitioners are aware of.

38. Winnebago County, by contrast, just recently (November 18) adopted an ordinance providing that any order of the local health officer is "advisory only" until approved by the county board, and contains durational limits.<sup>16</sup>

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<sup>14</sup> Door County Ordinance ch. 38, § 3, available at <https://www.co.door.wi.gov/DocumentCenter/View/2653/Chapter-38---Emergency-Declaration-by-County-Board-and-Authority-and-Duties-of-Local-Health-Officer>

<sup>15</sup> Pierce County Ordinance § 120-2, available at [https://www.co.pierce.wi.us/Ordinances\\_Resolutions/Ord\\_Res%202020/Ord\\_Res\\_2020.pdf](https://www.co.pierce.wi.us/Ordinances_Resolutions/Ord_Res%202020/Ord_Res_2020.pdf) (pages 5–6).

<sup>16</sup> Alex Groth, *Winnebago County Board votes to approve ordinance to give health officer enforcement powers to fight spread of COVID-19*, Oshkosh Northwestern (Nov. 18, 2020), <https://www.thenorthwestern.com/story/news/2020/11/18/winnebago-county-votes-approve-give-health-officer-enforcement-powers-fight-spread-covid-19/6332487002/>; see Winnebago County Ordinance No. 96-102020, available at [https://www.co.winnebago.wi.us/sites/default/files/CountyClerk/OtherDocuments/096-102020\\_amend\\_0.pdf](https://www.co.winnebago.wi.us/sites/default/files/CountyClerk/OtherDocuments/096-102020_amend_0.pdf).

39. Dane County Ordinance § 46.40, the ordinance challenged herein as a violation of the non-delegation doctrine, was adopted by the Dane County board on May 21, 2020, signed by the county executive on May 22, and published on June 1. A true and accurate copy of that ordinance is attached to this Petition as Exhibit A.

40. As relevant here, the ordinance provides that “It shall be a violation of this chapter to refuse to obey an Order of the Director of Public Health Madison and Dane County entered to prevent, suppress or control communicable disease pursuant to Wis. Stat s. 252.03.”

41. As explained in more detail in the supporting memorandum, this ordinance violates the non-delegation doctrine by preemptively making enforceable any order that the Dane County health officer deems “reasonable and necessary” to control the pandemic, with no duration, limit, or oversight by the county board, effectively “endow[ing] [the Dane County health officer] with the power” to unilaterally “defin[e] the elements” of new, prohibited conduct and to

“create [ ] penalties” for that conduct. *See Palm*, 2020 WI 42 ¶¶ 36–39.

42. The City of Madison has an ordinance that makes it “unlawful for any individual to create or permit a health nuisance,” defined as any “substance, activity or condition that is known to have the potential to cause acute or chronic illness, to endanger life, to generate or spread infectious disease, or otherwise injuriously to affect the health of the public.” A true and accurate copy of that ordinance is attached hereto as Exhibit B.

43. Madison has interpreted this ordinance as providing the enforcement mechanism for any order the local health officer deems “reasonable and necessary” to control the pandemic. *See Executive Order #10, infra*, at p. 16 (citing this for enforcement of the order). The City of Madison’s interpretation of this ordinance as preemptively making enforceable any order its local health officer issues violates the non-delegation doctrine for the same reason as Dane County’s ordinance.

44. While the non-delegation doctrine has traditionally been applied at the state level, it applies equally at the local level, for multiple reasons.

45. First, this Court has already so held, albeit long ago. *French v. Dunn Cty.*, 58 Wis. 402, 17 N.W. 1, 2 (1883) (“There are, doubtless, powers vested in the county board which could not be delegated to any committee. Powers which are legislative in their character ... must be exercised under the immediate authority of the board.”); *State ex rel. Nehrbass v. Harper*, 162 Wis. 589, 156 N.W. 941, 942 (1916) (“[A] common council cannot re-delegate legislative power properly delegated to it.”)

46. It also applies as a matter of both statutory and constitutional law, and for additional reasons discussed further in the attached Memorandum.

47. As to counties, article IV, § 22 of the Wisconsin Constitution makes clear that local legislative power is given only to the county board: “The legislature may confer *upon the boards of supervisors of the several counties* of the state such powers of a local, *legislative* and administrative character as

they shall from time to time prescribe.” And the Wisconsin Statutes likewise provide that “all powers of a local, legislative and administrative character” are “vested” with the county board and that “[t]he powers of a county as a body corporate can *only be exercised by the board*, or in pursuance of a resolution adopted or ordinance enacted by the board.” Wis. Stat. §§ 59.02, 59.03(2).

48. Similarly, with respect to cities, the statutes place local legislative authority in the hands of the common council. Wis. Stat. §§ 62.11(5); 66.0101; *see also id.* §§ 66.0107(1); 66.0113.

49. Dane County’s ordinance, and Madison’s interpretation of its health nuisance ordinance, stand in stark contrast to the recommendations of the Wisconsin Counties Association, which has suggested various “methods of providing legislative oversight” by the county board in light of the non-delegation doctrine. *See WCA Guidance, supra* ¶ 30, at 37–39.

50. To give examples of the types of oversight available, Eau Claire’s proposed ordinance<sup>17</sup> (which was *rejected* by the Eau Claire county board, *see supra* n. 10), contained both “substantive” and “procedural” safeguards, including a county board override provision, a durational limit (absent extension by the county board), a separate, maximum durational limit even with county board approval, stricter substantive requirements for when an order may be entered and what exceptions must be allowed, and a requirement that the local health officer make various findings to support the factual and scientific basis for any order. And, as noted above, Winnebago County’s ordinance provides that any orders from the local health officer are advisory only until adopted by the county board.<sup>18</sup>

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<sup>17</sup> Available at <https://www.co.eau-claire.wi.us/home/showdocument?id=37798>

<sup>18</sup> Petitioners do not mean to suggest that these ordinances necessarily resolve the delegation problem, but cite them to illustrate the types of substantive and procedural safeguards available, and to highlight the contrast to Dane County’s ordinance.

51. In reliance on Dane County's ordinance and Madison's interpretation of its ordinance, Respondent Heinrich has since May issued a series of orders imposing an array of restrictions on private activity.<sup>19</sup>

52. Neither the Dane County board nor the Madison common council has voted on or ratified any of these orders, instead content to allow Respondent Heinrich and the Dane County Health Department to rule by decree indefinitely.

53. The most recent order, Emergency Order #10 (the Order), was adopted on November 17 (and amended on November 20), one week before Thanksgiving. A true and accurate copy of the amended order is attached to this Petition as Exhibit C.

54. Of immediate concern, the Order purports to prohibit all indoor gatherings between individuals that are not members of the same household, effectively banning small

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<sup>19</sup> See *Current Order*, Public Health, Madison & Dane County (see section entitled "Past Orders"), <https://publichealthmdc.com/coronavirus/forward-dane/current-order>.



Thanksgiving gatherings in private homes among family and loved ones. Order § 3.

55. The original order on November 17 was poorly drafted and appeared more limited upon an initial reading. The Order prohibited “mass gatherings” “inside any property,” defined as “a planned event with a large number of individuals in attendance.”

56. However, the Health Department interpreted its own order as prohibiting *all* indoor gatherings. The Department issued a press release on the same day as the Order, explaining that the Order “prohibits indoor gatherings of any size.” The press release also threatened “fine[s] of up to \$1,000” for “anyone hosting a gathering.” A true and accurate copy of that press release is attached hereto as Exhibit D.

57. Understandably, people were still confused, so the Health Department amended the Order on November 20 to provide that “A Mass Gathering is any gathering of individuals that are not members of the same household or living unit.”

58. The fact that the Health Department believes it has the power to fluidly interpret its own poorly drafted orders to decide moment-by-moment what is permitted and what is not only serves to highlight the problem with delegating so much power to a single, unelected official.

59. Petitioner Klein, undoubtedly like many other Dane County residents, intended to host a small gathering with her parents, her uncle, and her brother, who would otherwise be alone for the holiday. Petitioner Klein's grandmother recently passed away, and Petitioner Klein believes her death was hastened by isolation. Petitioner Klein's family has not yet had an opportunity to process her passing and celebrate her life, and they hoped to do so together over the Thanksgiving holiday. Petitioner Klein is concerned for her boys', her family's, and her own mental health if they are unable to gather. Yet they risk a substantial fine if they do so.

60. The Order also bans all indoor sports within Dane County, regardless nature of the activities, size of the facility, or protective measures taken, effectively shutting down sports-

related businesses like gymnastics gymnasiums, indoors soccer fields, and hockey rinks. The portion of the order addressing sports says that “All activities in this section for all individuals are considered Mass Gatherings. Inside Mass Gatherings of any individuals under this Section who are not from the same household are prohibited.”

61. Yet the order continues to allow all other businesses to operate.

62. Confusingly, the Order in a separate section allows gyms and fitness centers to remain open.

63. The Health Department attempted resolved the obvious conflict between these provisions in a blog post, where it explained that “[i]ndoor gyms, courts, swimming pools can operate at 50% capacity *as long as no scheduled activities are taking place*, people are using the facility on their own or with members of their own household.” Public Health Madison & Dane County, *What’s Allowed in Emergency Order #10* (Nov. 19, 2020).<sup>20</sup>

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<sup>20</sup> <https://publichealthmdc.com/blog/whats-allowed-in-emergency-order-10>

64. Again, the fact that businesses have to follow the Dane County Health Department's "blog" to determine whether their business can continue to operate only highlights the non-delegation problem.

65. The Order also places severe restrictions on even outdoor sports, limiting any sports-related gatherings to 10 people and prohibiting any "[g]ames and competitions" for "medium and high-risk sports," while allowing games for "low-risk" sports. Order § 4.c.

66. The Order itself does not specify which sports the Dane County Health Department deems "low-risk" and which it deems "medium and high-risk."

67. Instead, the Dane County Health Department has issued a separate "guidance" document (Sports Guidance) listing which sports fall into which categories. A true and accurate copy of that guidance document is attached to this Petition as Exhibit E.

68. According to the Sports Guidance, "medium-risk" sports include soccer, basketball, baseball, volleyball, ultimate Frisbee, doubles tennis, "cycling in a group,"

“running in a close group,” and various other sports. Ex. E. “High-risk” sports include football, hockey, lacrosse, rugby, boxing, judo, karate, taekwondo, wrestling, pairs figure skating, ice dancing, group dance, and group cheer. Ex. E.

69. The Sports Guidance illustrates the irrationality of the indoor sports ban. Even the Dane County Health Department has concluded that sports like tennis, individual dance, and bowling are “low risk,” and yet the Order nevertheless bans these sports indoors, as long as they are “scheduled.”

70. Neither the Order nor the Health Department explain why large indoor sporting facilities, such as gymnastics gyms, soccer fields, hockey rinks, and indoor tennis courts cannot safely conduct practices and scheduled activities, as many of them have been.

71. Recent research from the University of Wisconsin School of Medicine and Public Health found that “participation in sports is not associated with an increased risk of COVID-19 among Wisconsin high school student-

athletes,” based on a survey of 207 schools in Wisconsin that have allowed sports this fall.<sup>21</sup>

72. Another study from UW Madison, of soccer specifically, surveyed 124 clubs from 34 states, serving over 90,000 soccer players, and found only *one case* of COVID-19 “reportedly traced to transmission during soccer.”<sup>22</sup>

73. Dane County is the only county in Wisconsin, that Petitioners are aware of, to prohibit all indoor sports and to place such severe restrictions on outdoor sports.

74. According to Forward Madison, Madison’s professional soccer team, it is “the only one of 70 active men’s pro soccer teams in the U.S. that isn’t allowed to practice in its home market,” and only one of two teams that cannot play competitive games.<sup>23</sup>

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<sup>21</sup> *COVID-19 in Wisconsin High School Athletics: Study Summary*, <https://ortho.wisc.edu/wp-content/uploads/2020/10/WI-HS-Sports-COVID-19-Summary.pdf>

<sup>22</sup> *COVID-19 in Youth Soccer Study: Executive Summary*, <https://ortho.wisc.edu/wp-content/uploads/2020/09/COVID-19-in-Youth-Soccer.pdf>

<sup>23</sup> Todd D. Milewski, *Uncertainty of where it’ll play 2021 season weighs on Forward Madison FC*, Wisconsin State Journal (Oct. 16, 2020).

75. Petitioner Gymfinity is a large, 18,466 square foot gymnastics gymnasium that provides gymnastics education, training, and classes for 1-18 year-olds. Gymfinity has undertaken extensive precautions to protect against the spread of COVID-19, including a rigorous screening protocol before anyone may enter the gym (questionnaire, temperature checks, hand washing), masks at all times, social distancing everywhere possible, adjusted schedules and rotations to limit contact, dividing the gym into discrete sections, an extensive cleaning regime between classes and between station rotations during classes, hand washing after every time an instructor touches a student, nightly disinfectant spray, a weekly antiviral chemical “bomb” advertised to kill 99.9% of viruses, custom-made foot pulls on doors to allow hands-free opening, and a variety of other things. As a result of these efforts, Gymfinity to date has not had any COVID-19 cases linked to its gym.

76. Its owner and operator has also acted as the safety educator for USA Gymnastics for 12 years and sits on

the board of the directors for the United States Gymnastics Club Owners Association.

77. But as a direct result of Emergency Order #10's ban on indoors sports activities, Gymfinity cannot conduct the vast majority of its business, most of which revolves around "scheduled" gymnastics classes and training, and it expects to lose roughly \$40,000 in revenue between now and December due to the Order.

78. Gymfinity provides training to four young women in high school who are competing for scholarship opportunities, and Emergency Order #10 has prevented these young women from continuing their training regime, which, in turn, jeopardizes their participation in the 2020-21 gymnastics season and threatens their college recruitment and scholarship opportunities.

79. Petitioners Becker's three children all participate in the Madison 56ers, a soccer club located in Dane County. The Madison 56ers' primary outdoor facility is in Verona, Wisconsin, at the Reddan Soccer Park, and their primary indoor facility is in Oregon, Wisconsin, at 155 Braun Road.



80. Immediately after the Dane County Health Department issued Emergency Order #10, the Madison 56ers announced that they would be indefinitely suspending all future activities, even though they had been safely operating, and had not had a single case of COVID-19 linked to the teams' activities, that Petitioner Becker is aware of.

81. When Petitioner Becker's children learned that soccer was canceled indefinitely, they became visibly shaken and despondent, as soccer was the primary thing they looked forward to each week. Petitioner Becker has already observed a significant negative effect on his children from Dane County's various restrictions, and he anticipates this Order will further deteriorate their mental, emotional, and physical health.

82. Two of Petitioner Klein's children participate in the Stoughton Youth Hockey Association. The association has taken significant precautions to protect against the spread of COVID-19, include temperature checks, masks, social distancing as much as possible, requiring players to come dressed and ready and limiting what they can bring into the

facility, altering drills and practices to allow more distance on the ice, creating a pod system for games to limit inter-team contact, frequent cleaning and disinfecting of bleachers and chairs, and deep cleaning multiple times a week. As far as Petitioner Klein is aware, the Stoughton Youth Hockey Association has not had a single outbreak of COVID-19 due to its activities.

83. Petitioner Klein's boys have struggled significantly during this year, and hockey has been their primary outlet and source of joy. When they learned that Dane County had prohibited sports, they were absolutely devastated. Petitioner Klein anticipates that losing hockey will have a serious negative impact on their physical and mental health.

84. But for the Dane County board's unlawful delegation to its local health officer, Petitioners could—and would—lobby their elected representatives for more reasonable limits and restrictions.

85. But because these restrictions have been imposed entirely by the say-so of a single unelected and unaccountable

local official, Petitioners have no option but to challenge those restrictions in court.

86. In addition to non-delegation problem, the Order's ban on all indoor private gatherings and ban on all indoors sports activity are also unlawful for a variety of other reasons, as explained in more detail in the attached Memorandum.

87. First, those aspects of the Order exceeded the authority under Wis. Stat. § 252.03. In *Palm*, this Court interpreted analogous language in Wis. Stat. § 252.02 and held that, without defining the full scope of authority under that section, it does not allow “closing businesses” or “confining all people to their homes.” *Palm*, 2020 WI 42, ¶¶ 4, 59. Yet the Dane County Health Department has flouted that holding by closing sports-related businesses like gymnastics studios, hockey rinks, and indoor soccer fields, while allowing all other businesses, many of which operate in much smaller buildings, to remain open. And, by prohibiting any indoor gathering anywhere, it has effectively confined many people to their homes during an important holiday.

88. Second, the ban on all indoor gatherings, even in private homes, blatantly violates fundamental constitutional rights, preventing people from visiting and caring for their loved ones.

89. Third, the bans on gatherings in private homes and shutting down all indoor sports facilities are not “reasonable and necessary,” Wis. Stat. 252.03(2), under any definition of those terms, especially in light of the fact that retail stores, restaurants, bars, salons and spas, hotels and motels, and all other businesses remain open. Under Dane County’s order, people can gather with their coworkers at work, but cannot visit their close relatives in their private homes. Such an order is patently unreasonable and unlawful.

#### **STATEMENT OF RELIEF SOUGHT**

90. Petitioners challenge both Emergency Order #10, to the extent that it bans all indoor gatherings, and to the extent that it bans all indoor sports activities, and also challenge the underlying ordinances (and or statute) that enabled this abuse of authority.

91. As to Emergency Order #10, Petitioners seek an immediate, temporary injunction of that Order to the extent that it bans all indoor gatherings of any size, and to the extent that it bans all indoor sports activities, regardless of the nature of the sporting activities, size of the facility, or protective measures taken.

92. As to the underlying ordinances, Petitioners seek a declaration that Dane County Ordinance § 46.40(2) and Madison Ordinance § 7.06(5) (via the City of Madison's interpretation of it) (or Wis. Stat. § 252.03, *see supra* n. 1), violate the non-delegation doctrine by preemptively making enforceable any order that the Dane County health officer deems "reasonable and necessary" to combat the COVID-19 pandemic, with no duration, limit, or oversight by the Dane County board or Madison common council and without sufficient substantive guidance.

93. Petitioners also seek a declaration that any orders issued in reliance on those ordinances (and/or statute) are unenforceable, as well as a permanent injunction against Dane County, the City of Madison, and the Dane County

Health Department from seeking to enforce any orders issued in reliance on those ordinances.

94. Petitioners respectfully ask this Court to do as it did in *WCRIS v. Heinrich*—to issue a temporary injunction to allow private gatherings and to allow sporting activities to continue, and then to issue a briefing schedule that will allow a more fulsome analysis of the non-delegation doctrine and the other issues.

#### **REASONS WHY THIS COURT SHOULD TAKE JURISDICTION**

95. There are multiple compelling reasons for this Court to grant jurisdiction over this action.

96. First, and most immediately, Emergency Order #10 imposes draconian limits on any private gathering, just before a holiday, and entirely shuts down many sports-related businesses, disrupting one of the few outlets youth have left to maintain their physical, mental, and emotional health.

97. This Court has found in five separate cases that similar abuses of executive authority related to COVID-19 warranted this Court's original action jurisdiction due to the

significance of the issues and the need for prompt resolution. *Wisconsin Legislature v. Evers*, 2020AP608-OA; *Wisconsin Legislature v. Palm*, 2020 WI 42; *Jefferson v. Dane County*, No. 2020AP557-OA; *WCRIS v. Heinrich*, No. 2020AP1420-OA; *Fabick v. Evers*, 2020AP1718-OA.

98. Furthermore, with respect to Petitioners' challenge to the underlying ordinances, only this Court can reinvigorate the substantive requirements of the non-delegation doctrine.

99. While this Court previously applied substantive limits to delegations of power by legislative bodies, *see, e.g., State v. Burdge*, 95 Wis. 390, 70 N.W. 347, 350 (1897), this Court's more recent cases have "shifted the focus away from the nature of the power delegated through scrutiny of the delegating standard's language and more toward the [procedural] safeguards surrounding the delegated power." *Gilbert v. State, Med. Examining Bd.*, 119 Wis. 2d 168, 185, 349 N.W.2d 68 (1984); *Panzer v. Doyle*, 2004 WI 52, ¶ 54, 271 Wis. 2d 295, 680 N.W.2d 666.

100. The United States Supreme Court is poised to reconsider a substantive reinvigoration of the non-delegation doctrine, and this Court should do so as well as a matter of Wisconsin law. In *Gundy v. United States*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2116 (2019), four of the eight sitting Justices openly called for a reevaluation of the non-delegation doctrine, and Justice Kavanaugh (who did not participate in *Gundy*) subsequently wrote that “Justice Gorsuch’s thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.” *Paul v. United States*, 140 S.Ct. 342 (2019) (Statement of Kavanaugh, J., respecting denial of writ of certiorari) (collecting cases).

101. Dane County Ordinance § 46.40(2) and Madison Ordinance § 7.06(5) (as the City of Madison interprets it) not only violate the non-delegation doctrine by lacking any procedural safeguards, but also by relying on wholly insufficient substantive grounds (“whatever is reasonable and necessary”) to support enforceable orders, an argument that



only this Court could accept given this Court's prior precedents.<sup>24</sup>

102. This case also presents an opportunity for this Court to clarify how the non-delegation doctrine applies at the local level.

103. While, as noted above, that result appears to be dictated by this Court's prior precedents (as well as various constitutional and statutory provisions), those precedents are very old and preceded this Court's "shift[ ] ... away" from its prior delegation framework.

104. The Wisconsin Counties Association noted in its recent guidance to counties that there is significant uncertainty about how the non-delegation doctrine applies to

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<sup>24</sup> While the substantive language is found in Section 252.03, that section itself is not a delegation problem because, as explained above, the statutes do not provide any enforcement mechanism for a broad order by a local health officer purporting to regulate or prohibit otherwise lawful conduct. Dane County's and Madison's ordinances purport to make any orders issued pursuant to the broad language in Section 252.03 enforceable, so both the substantive and procedural aspects of a non-delegation challenge are properly directed at the ordinances, rather than the statute. *See Palm*, 2020 WI 42 ¶ 251 (Hagedorn, J., dissenting) (noting that Wis. Stat. § 252.02 would be the proper target of a non-delegation challenge).

counties, *see* WCA Guidance, *supra*, at 38–39, and only this Court can provide that much-needed clarity.

105. This issue is of statewide importance given that multiple counties already have, or are currently considering, modifying their ordinances to expand the powers of their local health officers and departments. *See supra* par. 35 and n. 9.

106. Given the ongoing and evolving nature of the pandemic, it also important that the question of the degree to which county boards and city councils can delegate their policy-making role to their local health officers is resolved as efficiently as possible. *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938) (original jurisdiction appropriate where “the questions presented are of such importance as under the circumstances to call for [a] speedy and authoritative determination by this court in the first instance”).

107. This Court exercised its original jurisdiction in analogous circumstances, recognizing the statewide importance of ensuring that sweeping government actions to combat COVID-19 do not go unchecked but instead receive

review this Court. *See Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.

108. Finally, and as shown in the accompanying memorandum, the questions in this case are legal—they relate to the interpretation of the state constitution and the Wisconsin Statutes. This Court will not need to resolve any factual disputes better suited for a circuit court’s attention. *See, e.g. State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 683, 264 N.W.2d 539 (1978) (disposition via original action was appropriate insofar as “no fact-finding procedure [was] necessary”).

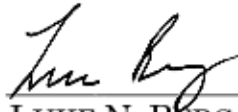
### CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant this Emergency Petition for an Original Action.

Dated: November 23, 2020.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of this Petition is being served on all opposing parties via first-class mail and electronic mail.

Dated: November 23, 2020.

  
\_\_\_\_\_  
LUKE N. BERG

any time and to issue a cease operations order if unsanitary conditions are found to exist. The department shall cause any such order to be posted in a prominent and conspicuous place on the premises.

[History: cr., Sub. 1 to OA 11, 1987-88, pub. 10/03/87; (1) am., OA 17, 2000-01, pub. 01/16/01, eff. 01/17/01; (1) and (2) am., 2016 OA-48, pub. 11/25/16.]

**46.38 RETURNED CHECKS.** In the event a check accepted in payment of a fee is returned as NSF (insufficient funds in account) or because the account is closed, the applicant shall pay a Twenty Dollar (\$20.00) handling fee. Failure to reimburse the county for the returned check or to pay the handling fee shall result in the revocation of the applicant's license effective ten (10) days after mailing, by certified mail, of a revocation notice to the applicant at his or her last known address. A permittee whose license is revoked under this section shall submit an application for and obtain a new license before recommencing operations.

[History: cr., OA 44, 1987-88, pub. 05/28/88.]

[46.39 reserved.]

[History: 46.40 cr., Sub. 2 to OA 1, 1997-98, pub. 07/18/97; (2)(b) and (4) am., Sub. 1 to OA 1, 1999-2000, pub. 06/01/99; (1) am., OA 6, 2002-03, pub. 08/13/02; 46.40 rep., OA 38, 2009-10, pub. 11/25/09, eff. 01/01/10.]

**46.40 PREVENTION, SUPPRESSION AND CONTROL OF COMMUNICABLE DISEASES.**

(1) *Duty of Director, Public Health Madison and Dane County.* Pursuant to Wis. Stat. ss. 252.03(1) & (2) the Director of Public Health Madison and Dane County shall promptly take all measures necessary to prevent, suppress and control communicable diseases within Dane County, including forbidding public gatherings when deemed necessary to control outbreaks or epidemics.

(2) *Public Health Orders.* It shall be a violation of this chapter to refuse to obey an Order of the Director of Public Health Madison and Dane County entered to prevent, suppress or control communicable disease pursuant to Wis. Stat. s. 252.03.

(3) *Physicians to Report Existence of Communicable Diseases.* A physician knowing or having reason to know that a person treated or visited by him or her has a communicable disease, or having such disease, has died, shall report the same to the Director of Public Health Madison and Dane County within 24 hours in compliance with Wis. Stat. s. 252.05(1).

(4) *Quarantine.* No person, whether afflicted with any communicable disease as defined in chapter 252 of the Wisconsin Statutes, or not, shall visit or depart from any premises which shall have been quarantined by the Director of Public Health Madison and Dane County until given permission by such Director of Public Health Madison and Dane County.

(5) *Removal of Persons Afflicted With Communicable Disease.* The Director of Public Health Madison and Dane County is authorized to order the removal of a person afflicted with a communicable disease to a place of quarantine or other separate place if it can be done without danger to the person's health.

[History: cr., 2020 OA-2, pub. 06/01/20.]

[46.41 – 46.44 reserved.]

[History: 46.42 cr., Sub. 1 to OA 1, 1999-2000, pub. 06/01/99; 46.42 rep., OA 38, 2009-10, pub. 11/25/09, eff. 01/01/10.]

**46.45 LAND DISPOSAL OF SEPTAGE.** This section is enacted under the authority of section 281.48(5m), Wis. Stats.

(1) Except as provided in sub. (3), no person may dispose of septage by landspreading unless the person is certified as an operator of a septage servicing vehicle by the Wisconsin Department of Natural Resources.

(2) Except as provided in sub. (3), no person may dispose of septage by landspreading except upon lands for which an annual septage landspreading permit has been issued by the department.

(3) A farmer may dispose of septage by spreading it upon land owned or leased by the farmer if all of the following criteria are met:

(a) The septage is removed from a septic tank that is located on the same parcel where the septage is landspread;

(b) Prior to landspreading the septage, the farmer provides the department with documentation that there is sufficient land area available for disposal; and

(c) The removal and disposal of the septage complies with all applicable statutes, administrative rules and the provisions of this chapter governing the removal and landspreading of septage including, but not limited to, soil requirements, the set back, timing and seasonal restrictions, and pathogen control and vector reduction requirements included therein.

## 7.05 - INSPECTION OF HEALTH CONDITIONS—ACCESS TO PREMISES—POWER TO ABATE HEALTH NUISANCES.

- (1) It shall be the duty of the Director of Public Health Madison and Dane County and Chief of Police and their designee and they shall have the power, whenever they may deem it necessary, and whenever they shall be so required by the Director of Public Health Madison and Dane County in order to promote the public health, to enter upon any premises and into any house to ascertain every nuisance that may exist, and examine into the condition and the number of persons inhabiting such house, and to inspect the cellars, privies, cesspools, and drains of such premises, and to order the dispersion or removal of families or persons from buildings or apartments so much crowded as to be suspected of being infected or liable to be infected with any pestilential or other dangerous disease, and from houses which are not fit for human habitation and to order the abatement and removal of such nuisances in any such house, or on such premises. The Director of Public Health Madison and Dane County, Health Inspector, or any member of the Police Department shall have the right to enter upon any premises and into any house to ascertain whether or not such house or premises are connected with the public sewer system of the City and to examine into the condition and manner of the construction of such sewer connection, and to inspect the cellars, cesspools, privies, drains, and grease-traps on such premises, and in case they find any violation of any ordinance of the City regulating the manner of construction of such sewer connections, or in the manner in which it is being used by the occupants of any building or premises, they shall immediately report such violation to the City Engineer, and the Plumbing Inspector.
- (2) Definition. "Health Nuisance" means a substance, activity or condition that is known to have the potential to cause acute or chronic illness, to endanger life, to generate or spread infectious diseases, or otherwise injuriously to affect the health of the public.
- (3) Unlawful to Refuse Access for Examination of Health Conditions on Premises. It shall be unlawful for any person to refuse to the Director of Public Health Madison and Dane County and his/her designee, or any member of the Police Department, free access to any building or premises for the purpose of examining the health conditions therein or thereon or to hinder or obstruct the free examination of such building or premises.
- (4) Search Warrant. Whenever the Director of Public Health Madison and Dane County or his/her designee shall deem it necessary for the preservation of the health of the inhabitants of the City to enter any building in the City for the purpose of examining into or removing or preventing any health nuisance, source of filth, or cause of sickness, and shall be refused such entry, or the building is unoccupied, the Director of Public Health Madison and Dane County or his/her designee may make complaint under oath to the judge of the County Court of Dane County, stating the facts in the case, and request such court to issue a warrant directing a police officer of the City, commanding the officer to take sufficient aid, and being accompanied by the Director of Public Health Madison and Dane County or his/her designee, to the place where such nuisance, source of filth or cause of sickness complained of may be,

and if upon inspection the same shall, in the judgment of such persons inspecting, exist, to destroy or remove the same under the direction of the Director of Public Health Madison and Dane County.

- (5) Abatement of Health Nuisances. Whenever any health nuisance, source of filth or cause of sickness shall be found on private property, the Director of Public Health Madison and Dane County or his/her designee shall order the owner or occupant thereof to remove or abate the same at the owner's expense within a reasonable time which shall be specified in the notice and if the owner shall refuse or neglect to comply with such order, the owner shall be subject to a fine of not less than ten dollars (\$10) nor more than one hundred dollars (\$100), and each day on which any person shall so refuse or neglect to comply with such order after service of the same may be considered a separate offense and a separate penalty collected therefor. Whenever such owner or occupant shall refuse or neglect to remove or abate said condition, the Director of Public Health Madison and Dane County shall cause the same to be removed or abated and the City shall recover the expenses incurred thereby from the said owner or occupant, or from such other person as shall have caused or permitted the same. In case the owner is absent from the City, notice to the person who receives the rent or has charge of the property shall be deemed notice to the owner. If any owner or occupant is required to remove any nuisance, source of filth or cause of sickness by filling up low or marshy places upon the property owned or occupied by him or her and fails or neglects to do so within the time specified in the notice, then the Director of Public Health Madison and Dane County shall cause such work to be done by the appropriate entity and the cost thereof shall be collected from the owner of the premises. When the Director of Public Health Madison and Dane County or his/her designee shall cause any such health nuisance, source of filth or cause of sickness existing on private property to be removed or abated in accordance with the provisions of this section, and the owner of such property fails to pay for the expense of such removal or abatement, then the costs thereof shall be levied and collected as a special tax upon the lot or land upon which such work was done.
- (6) It shall be unlawful for any individual to create or permit a health nuisance.
- (7) Any person who violates sub. (6) shall be subject to a penalty of not more than one thousand dollars (\$1000). Each and every day of violation shall constitute a separate offense.

(Sec. 7.05 Am. by ORD-08-00120, 10-24-08; ORD-14-00045, 3-6-14; ORD-15-00009, 1-28-15)



## ORDER OF PUBLIC HEALTH MADISON & DANE COUNTY

**DATE OF ORDER:** November 20, 2020  
Goes into effect November 20, at 4:30 p.m.

### EMERGENCY ORDER #10 AMENDMENT

Since October 7<sup>th</sup>, the day before case counts started increasing in the most recent spike, cases of COVID-19 have increased 292%. In the past two weeks (11/1-11/14), there have been 5,758 people who tested positive for COVID. The two weeks (10/18-10/31) prior to that, the count was 3,521 and the two weeks (10/4-10/17) before that the count was 2,341. 32% of people who tested positive reported household contact as their most likely route of exposure. 24% reported close contact with a case as their most likely route of exposure; 32% did not have an identifiable risk factor so were indicated as ‘community acquired;’ 6% were linked to a cluster or outbreak; 1% named travel and 3% named healthcare as their most likely route of exposure. A quarter of people testing positive, regardless of risk factor, indicated they attended a gathering or party in the past two weeks. These proportions have remained stable—in the past month, as cases have reached record high levels, the percentage who report attending a gathering has not changed. According to a university-developed [risk assessment calculator](#), a gathering of ten people in Dane County currently has a 32% chance that at least one COVID-19 positive person will be present. This chance increases to 44% for a group size of 15, and 62% for a group size of 25. In neighboring counties, the risk is even more elevated. The implications of gathering today, even in a small group, are different than they were earlier in the pandemic—the risk is higher because there is more COVID circulating. Gatherings take many forms—from a small gathering of households to a large wedding reception and everything in between. In the [last two weeks](#), there have been 675 people linked to a [cluster](#) in one of the following sectors: assisted living, skilled nursing, workplace, healthcare facility, sports team, school, other public-facing business/services, childcare, church, bar/restaurant, salon, and other. This does not capture everyone with these specific risks, nor does it capture contacts or household members of people who were exposed in these spaces, but it illustrates there is transmission happening widely and broadly at a local level. National data continue to indicate gatherings—particularly

in crowded indoor environments with poor ventilation—remain a significant risk. As gatherings increasingly move inside due to cold weather, it is another way risk continues to be magnified.

This Order also continues the face covering requirements and limitations on taverns for the reasons explained in Order 8.

Based upon the foregoing, I, Janel Heinrich, Public Health Officer of Madison and Dane County, by the authority vested in me by the Laws of the State, including, but not limited to, Wis. Stats. Secs. 252.03(1), (2) and (4), order the following as necessary to prevent, suppress, and control the spread of COVID-19:

- 1. Safety of individuals.** All individuals should take precautions when leaving their homes to ensure their safety, the safety of the members of their household, and the safety of the public.
  - a. All individuals.** For individual safety and the safety of the community, all individuals should:
    - i.** Maintain physical distancing of six (6) feet between individuals who are not members of the same living unit or household, to the greatest extent possible.
    - ii.** Wash hands with soap and water for at least twenty (20) seconds as frequently as possible or use hand sanitizer.
    - iii.** Cover coughs or sneezes (into the sleeve or elbow, not hands).
    - iv.** Frequently clean high touch surfaces and objects.
    - v.** Not shake hands.
    - vi.** Follow all PHMDC requirements.
    - vii.** Consider wearing a face covering when outside.
  - b. Individuals experiencing homelessness.** Individuals experiencing homelessness are strongly urged to obtain shelter.
  - c. Unsafe homes.** Individuals whose homes or residences are unsafe or become unsafe, such as victims of domestic violence, are urged to leave their home and stay at a safe alternative location.
- 2. Face Coverings.** Face covering means a piece of cloth or other material that is worn to cover the nose and mouth completely. A face covering includes but is not limited to a bandana, a cloth face mask, a disposable or paper mask, a neck

gaiter, or a religious face covering. A face covering does not include face shields, mesh masks, masks with holes or openings, or masks with vents.

- a. **Face Covering Required.** Every individual, age five (5) and older, shall wear a face covering when:
- i. In any enclosed building where other people, except for members of the person's own household or living unit are present.
  - ii. In line to enter any enclosed building.
  - iii. Driving or riding in any vehicle where other people, except for members of the person's own household or living unit are present.
  - iv. Outdoors at a restaurant or tavern.

Face coverings are strongly recommended in all other settings, including outdoors when it is not possible to maintain physical distancing.

Children between the ages of two (2) and five (5) are encouraged to wear a face covering when physical distancing is not possible. Children under the age of two (2) should never wear a face covering.

- b. **Exceptions.** Individuals who are otherwise required to wear a face covering may remove the face covering in the following situations:
- i. While eating or drinking.
  - ii. When communicating with an individual who is deaf or hard of hearing and communication cannot be achieved through other means.
  - iii. While obtaining a service that requires the temporary removal of the face covering, such as dental services.
  - iv. While sleeping.
  - v. While swimming or on duty as a lifeguard.
  - vi. When engaging in work where wearing a face covering would create a risk to the individual, as determined by government safety guidelines.
  - vii. When necessary to confirm the individual's identity, including when entering a financial institution.
  - viii. When federal or state law or regulations prohibit wearing a face covering.

- c. The following individuals are exempt from the face covering requirement in Section 2.a. of this Order:
    - i. Children under the age of 5.
    - ii. Individuals who are unconscious, incapacitated, or otherwise unable to remove the face covering without assistance.
    - iii. Individuals with medical conditions, intellectual or developmental disabilities, mental health conditions, or other sensory sensitivities that prevent the individual from wearing a face covering.
- 3. **Mass Gatherings.** A Mass Gathering is any gathering of individuals that are not members of the same household or living unit.
  - a. **Mass Gatherings Inside.** A Mass Gathering inside any property is prohibited.
  - b. **Mass Gatherings Outside.** A Mass Gathering outside is permitted with ten (10) individuals or less not including employees. Individuals must maintain physical distancing.
- 4. **Child care, youth, education, libraries, public spaces, and sports.**
  - a. **Child care and youth settings.**
    - i. Child care settings and youth settings must continue to follow licensing and certification ratio requirements.
    - ii. Child care settings and youth settings include all licensed, recreational, and educational camps, licensed and certified childcare providers, unregulated youth programs, licensed-exempt public school programs, and four-year old kindergarten (4k).
    - iii. Individual groups or classrooms may not contain more than fifteen (15) children if the children are age twelve (12) or under.
    - iv. Individual groups or classrooms cannot contain more than fifteen (15) children if age thirteen (13) to seventeen (17).
    - v. There should be no interaction or contact between individual groups or classrooms.
    - vi. To the greatest extent possible, minimize amount of staff interaction between groups.
    - vii. For youth ages five (5) and above, maintain at least six (6) feet physical distancing to the greatest extent possible.



- b. Public outdoor playgrounds and splash pads.** Public outdoor playgrounds and public splash pads are open. Physical distancing must be maintained.
- c. Courts, Fields, and Sports.**

  - i.** All courts and fields are open.
  - ii.** Physical distancing between individuals not from the same household or living unit must be maintained at all times.
  - iii.** Games and competitions are allowed for low risk sports with physical distancing maintained at all times. Low-risk sports are sports that can be done individually, or with physical distancing, or no to minimal sharing of equipment or the ability to clean the equipment between use.
  - iv.** Games and competitions are not allowed between teams for medium and high-risk sports. Games and competitions within teams are allowed for medium and high-risk sports if the games and competitions are modified to ensure physical distancing is maintained at all times. Medium risk sports are sports that involve close, sustained contact, but with protective equipment in place that may reduce the likelihood of respiratory particle transmission between participants or intermittent close contact or group sports or sports that use equipment that can't be cleaned between participants. High risk sports are sports that involve close, sustained contact between individuals, lack significant protective barriers, and have a high probability that respiratory particles will be transmitted between individuals.
  - v.** All activities in this section for all individuals are considered Mass Gatherings. Inside Mass Gatherings of any individuals under this Section who are not from the same household are prohibited, and outside Mass Gatherings are limited to ten (10) individuals who are not from the same household.
- d. Schools.** Public and private school buildings and grounds are only open for in-person student instruction for grades kindergarten through second (K-2), as well as students in any grade with a disability and/or an Individualized Education Program (IEP) who, due to their unique needs, may need to receive in-person instruction under 34 CFR Secs. 300.320-

300.324 and Wis. Stats. Sec. 115.78(2). Even if open for in-person instruction, public and private schools must provide a virtual option for students in grades K-2. Public and private schools also have the discretion to provide all virtual learning for grades K-2. Staff may be in all public and private school buildings as long as the requirements in section 4.d.i-4.d.iv are met. Public and private kindergarten through twelfth grade schools may be used for food distribution, health care services, as child care and youth settings, for pickup of student materials, and for government functions.\* Public and private kindergarten through twelfth grade schools must abide by the following:

- i. Develop and implement a written hygiene policy and procedure that includes:
  1. Establishing expectations that employees and students who have a fever or other symptoms of COVID-19 do not come or remain at school.
  2. Establishing hand-washing expectations and ensuring supplies are available to employees and students.
  3. Describing proper cough and sneeze etiquette.
- ii. Develop and implement a written cleaning policy and procedure that includes:
  1. Guidelines for cleaning and disinfecting frequently touched surfaces multiple times a day.
  2. Guidelines for cleaning common areas between use.
  3. Protocols for cleaning and disinfecting in the event of a positive COVID-19 case on site.
- iii. Develop and implement a written protective measure policy and procedure that includes:
  1. Ensuring students ages five (5) and older wear face coverings when indoors and on buses.
  2. Ensuring employees are provided with and wear a face covering when indoors and on buses.
  3. Ensuring students and employees with face coverings are at least six (6) feet from others to the greatest extent possible when indoors and on buses.
  4. Ensuring that students who cannot wear a face covering maintain at least six (6) feet distancing at all times from other students when indoors and on buses.

\* On September 10, 2020, the Wisconsin Supreme Court entered [a temporary injunction](#) that allows K-12 schools in Dane County to fully open for in-person instruction. Accordingly, this provision is not currently in effect.

5. Ensure that students who cannot wear a face covering maintain six (6) feet distancing from employees to the greatest extent possible when indoors and on buses.
  6. Ensuring that employees who cannot wear a face covering maintain at least six (6) feet distancing at all times from other employees when indoors and on buses.
  7. Ensuring that employees who cannot wear a face covering maintain six (6) feet distancing from students to the greatest extent possible when indoors and on buses.
  8. Ensuring students and employees are at least six (6) feet from other students and employees to the greatest extent possible outside.
  9. Ensuring that student and employee groupings are as static as possible by having the same group of students stay with the same employees as much as possible. Restrict mixing between groups as much as possible.
  10. Common areas such as cafeterias, auditoriums, and gymnasiums can be used as classrooms, to provide food, as child care and youth settings, and for government functions. Student groupings should be in distinct spaces within common areas and students groupings many not mix with other student groupings.
- iv. Implement PHMDC's action plan for COVID-19 case(s) at the school. Available at [https://publichealthmdc.com/documents/school\\_action\\_plan.pdf](https://publichealthmdc.com/documents/school_action_plan.pdf)
- v. Document staff receipt, acknowledgement, or training on the policies in Sections 4.d.i-4.d.iv of this Order.
- vi. Post PHMDC's Workplace requirements for employers and workers guidance document in a prominent location where all employees may access and view. Available at <https://publichealthmdc.com/coronavirus/forward-dane/requirements> (English, Spanish, and Mandarin versions are included)
- e. **Continuing education and higher education institutions.** Continuing education and higher education institutions may determine policies and practices for safe operations. However, these institutions may not open congregate living situations including dormitories without strict policies

that ensure safe living conditions. These institutions must maintain physical distancing to the greatest extent possible. These institutions must comply with Section 2 of this Order.

- f. **Libraries and community centers.** Libraries and community centers shall comply with the requirements in Sections 2 and 5 of this Order.

5. **Businesses.** All businesses are subject to the following requirements:

- a. Limit capacity to 50% of approved capacity levels.
- b. Develop and implement a written hygiene policy and procedure that includes:
- i. Ensuring employees who have a fever or other symptoms of COVID-19 will not be allowed to work.
  - ii. Establishing hand-washing expectations and ensuring supplies are available to employees.
  - iii. Describing proper cough and sneeze etiquette.
- c. Develop and implement a written cleaning policy and procedure that includes:
- i. Guidelines for cleaning and disinfecting frequently touched surfaces multiple times a day.
  - ii. Guidelines for frequently wiping down any shared equipment, such as work spaces, credit card machines, lunchroom items, carts, and baskets.
  - iii. Guidelines for cleaning common areas and equipment between use or shift changes.
  - iv. Protocols for cleaning and disinfecting in the event of a positive COVID-19 case on site.
- d. Develop and implement a written protective measure policy and procedure that includes:
- i. Ensuring individuals are at least six (6) feet from others whenever possible.



- ii. Ensuring employees are provided with and wear face coverings at all times when required under Section 2 of this Order.
- e. Document staff receipt, acknowledgement, or training on the policies in Sections 5b.-5.d of this Order.
- f. **Limit staff and customers in offices, facilities, and stores.** All businesses should, to the greatest extent possible, facilitate remote work and other measures that limit the number of individuals present at an office, facility, or store. Businesses to the greatest extent feasible should:
  - i. Offer online or virtual services, including for, meeting with clients, providing counsel, or other professional services.
  - ii. Hold meetings and collaborate online or by phone.
  - iii. Alternate work teams or stagger shifts.
- g. **Safe business requirements when remote work is not possible.** All businesses are required to take the following measures to limit exposure to COVID-19 to staff, customers, and the public when remote work is not possible:
  - i. Where possible, offer curbside pick-up, curbside drop-off, and delivery of goods and services.
  - ii. Where possible, offer online or phone payments, appointments, and reservations.
  - iii. Door-to-door solicitation is allowed with physical distancing.
  - iv. Ensure spacing of chairs in waiting rooms to ensure physical distancing is maintained between individuals.
- h. Meetings, trainings, and conferences are considered Mass Gatherings. Inside Mass Gatherings of any individuals under this Section who are not from the same household are prohibited, and outside Mass Gatherings are limited to ten (10) individuals who are not from the same household.
  - i. Adhere to PHMDC requirements and strongly consider implementing the PHMDC recommendations and guidelines.

- j. Businesses must establish lines outside to regulate entry, with markings indicating where customers should stand to remain six (6) feet apart from one another while waiting to enter. Businesses should also offer alternatives to lines, including allowing customers to wait in their cars for a text message or phone call and scheduling pick-ups or entries to stores. Businesses must designate entrance and exit points and manage traffic flow such that customers remain six (6) feet apart from one another whenever possible
  - k. Post PHMDC’s “Workplace Requirements for Employers and Workers” guidance document in a prominent location where all employees may access and view. Available at <https://publichealthmdc.com/coronavirus/forward-dane/requirements>
  - l. Follow all Equal Employment Opportunity Commission guidelines with regards to face coverings.
  - m. Post PHMDC’s “Face Covering” sign (or a similar sign) about face coverings being required that is visible upon entering the property. All residential properties (eg: apartment buildings and condominiums) that have shared common indoor spaces (eg: mailrooms, lobbies, hallways) are required to post PHMDC’s “Face Covering” sign (or a similar sign) about masks being required that is visible upon entering the property. Available at <https://publichealthmdc.com/coronavirus/forward-dane/requirements>
- 6. Industry-specific requirements.** In addition to complying with Section 5, the following businesses have additional requirements:
- a. **Stores that sell food or groceries**, including grocery stores, bakeries, farm and produce stands, supermarkets, food banks and food pantries, convenience stores, and other establishments engaged in the retail sale of groceries, prepared food, alcoholic and non-alcoholic beverages. Such establishments shall:
    - i. Encourage pickup and delivery options.
    - ii. Prohibit customer self-dispensing of unpackaged bulk food items (e.g. condiments, or foods where the use of tongs, or scoops are

used). Beverage stations, coffee grinding stations, and unpackaged foods stored in bins with gravity fed or auto-dispensing levers and unpackaged bakery behind barriers (i.e. doors) where deli gloves or wax paper is used for dispensing are exempt from this requirement.

- i. Except for produce areas, cease any customer self-service operations of all unpackaged food, such as salad bars, and buffets.
- ii. Limit indoor dine-in capacity to 25% of approved seating capacity levels. Space tables and chairs to ensure at least six (6) feet physical distancing between customers who are not members of the same household or living unit. Limit each table to six (6) customers who are members of the same household or living unit.
- iii. Outdoor seating is allowed. Space tables and chairs to ensure at least six (6) feet physical distancing between customers who are not members of the same household or living unit. Limit each table to six (6) customers who are members of the same household or living unit.
- iv. Sampling of food is prohibited.

**b. Restaurants and taverns. Restaurants and taverns shall:**

- i. "Restaurant" has the meaning as defined in Wis. Stats. Ch. 97.01 (14g) and whose sale of alcohol beverages accounts for 50% or less of the establishment's gross receipts. A "tavern" is an establishment in which alcohol beverages are sold for consumption on said premises and whose sale of alcohol beverages accounts for 51% or more of the establishment's gross receipts. "Tavern" includes breweries, brewpubs, wineries and distilleries. Wis. Stat. Sec. 125.07(3)(a)6 presumes that an establishment operated under both a Class "B" or "Class B" license or permit and a license under Wis. Stat. Sec. 97.30 for a restaurant, is a tavern. This presumption may be rebutted by competent evidence. To determine whether an establishment is a restaurant or a tavern, gross receipts for the period July 1, 2019 to June 30, 2020 will be considered. A restaurant or tavern shall provide receipts showing their gross sales of food and alcohol to PHMDC within seventy-two hours of a request by PHMDC for said receipts.
- ii. Encourage pick-up and delivery options.
- iii. Cease any customer self-service operations of all unpackaged food, such as salad bars and buffets. Beverage stations are exempt from this requirement.
- iv. At restaurants, limit indoor dine-in capacity to 25% of approved seating capacity levels. Space tables and chairs to ensure at least

six (6) feet physical distancing between customers who are not members of the same household or living unit. Limit each table to six (6) customers who are members of the same household or living unit.

- v. Customers may enter taverns only for the purposes of ordering, pick-up, and payment of food or beverage or while in transit.
- vi. Outdoor seating is allowed. Space tables and chairs to ensure at least six (6) feet physical distancing between customers who are not members of the same household or living unit. Limit each table to six (6) customers who are members of the same household or living unit.
- vii. In restaurants, maintain at least six (6) feet between each stool for customers that are not members of the same household or living unit.
- viii. Customers must be seated at all times when not in transit.
- ix. Sampling of food is prohibited.

**c. Retail stores. Retail stores shall:**

- i. Limit the number of individuals in the business (excluding employees) up to 50% of approved capacity levels.
- ii. Retail stores larger than 50,000 square feet must offer at least two hours per week of dedicated shopping time for vulnerable individuals. Vulnerable individuals include people over sixty-five (65) years of age, people that are pregnant, people in long-term care facilities, people with compromised or weakened immune systems, and people with serious underlying health conditions including high blood pressure, chronic lung disease, serious heart conditions, liver disease, kidney disease requiring dialysis, diabetes, obesity, or asthma.
- iii. Sampling of goods (ex. food or make-up) is prohibited.

**d. Salons and spas. Facilities including hair salons, barber shops, nail salons, day spas, electrolysis providers, waxing salons, eyebrow-care establishments, tattoo and piercing parlors, body art establishments, tanning facilities and similar facilities shall:**

- i. Limit the number of customers or clients to 50% of approved capacity levels. If capacity level is four (4) or less, one (1) client or customer is permitted.

- ii. Space customer or client chairs, tables, or stations at least six (6) feet apart from each other.
- e. **Gyms and fitness centers.** Gyms, fitness centers, and similar facilities shall:
- i. Provide materials for members to disinfect equipment before and after exercise at each piece of equipment or station.
  - ii. Limit the number of individuals in the business (excluding employees) to 50% of the approved capacity limit.
  - iii. Increase frequency of cleaning of all equipment, common areas, locker rooms, and restrooms.
  - iv. To the extent possible, space equipment at least six (6) feet apart, especially for treadmills and other high-exertion aerobic fitness equipment.
  - v. Use floor markings to indicate spacing of individuals, particularly in areas where individuals congregate or cluster including drinking fountains, the front desk or reception area, and cleaning stations.
  - vi. Group exercise classes are considered Mass Gatherings and are prohibited inside when it involves any individuals who are not from the same household. Group exercise classes outside are limited to ten (10) individuals who are not from the same household.
  - vii. Activities where physical distancing cannot be maintained are not allowed unless they are between individuals from the same household or living unit.
  - viii. Saunas and steam rooms are closed.
- f. **Places of amusement and activity.** Places of amusement and activity including water parks, licensed public or private swimming pools, aquariums, zoos, museums, bowling alleys, amusement parks, outdoor miniature golf, movie theaters, theaters, concert and music halls, golf courses and similar places shall:
- i. To the extent possible, all reservations and payments must be made in advance online or by phone.
  - ii. Businesses shall limit the number of individuals on the premises (excluding employees) to 50% of approved capacity limits. Events



- such as, but not limited to, concerts, festivals, carnivals, fairs, parades, movies, performances, and shows are considered Mass Gatherings. Mass Gatherings inside the business of any individuals under this Section who are not from the same household are prohibited. Mass Gatherings held outside are limited to ten (10) individuals who are not from the same household.
- iii. Tee times, appointments, performances, shows, or other scheduled events must be scheduled to ensure that physical distancing can be maintained between all individuals, not within the same household or living unit, at all times.
  - iv. Seating, stations, or recreational areas must be spaced to ensure at least six (6) feet of physical distancing between individuals not within the same household or living unit.
  - v. All equipment provided or rented should be cleaned in between each customers use.
- g. Lodging**, including hotels, motels, campgrounds, B&B, and vacation rentals.
- i. Prohibit guests from congregating in lobbies or other common areas, including providing adequate space to adhere to physical distancing while queuing for front desk services.
  - ii. Adopt cleaning protocols for guest rooms and common areas based on PHMDC guidelines. Provide training for housekeeping associates for proper handling of linens and cleaning/disinfecting supplies and provide appropriate personal protective equipment.
  - iii. Follow all requirements in Section 6 of this Order.
- h. Drive-in Activities.** Drive-in movie theaters and other drive-in activities may occur, with the following restrictions:
- i. Drive-in activities may not offer outdoor seating.
  - ii. Individuals may leave their vehicles to purchase or pick up food or drink or to use the restroom. Individuals must remain in their vehicles at all other times.
  - iii. Any food or drink sales must comply with Sections 6.b. ii., iii., iv. and x.
  - iv. Food may be delivered to individuals patrons waiting in their vehicles.

- v. To the extent possible, reservations and payments should be made in advance online or over the phone.
  - vi. Drive-in activities are exempt from Section 3 of this Order.
7. **Health care operations, public health operations, human services operations, infrastructure operations, manufacturing and government functions.** These operations, as defined in Emergency Health Order #2, are required to only follow Sections 2, 5.b through 5.g. and 5.i. through 5.m. of this Order. Long-term care and assisted living facilities must follow all applicable Wisconsin Department of Health Services recommendations, all applicable U.S. Centers for Disease Control and Prevention recommendations, and all applicable Centers for Medicare and Medicaid Services recommendations for prevention of COVID-19 in these facilities.
8. **Religious Entities and Groups.** Religious entities and groups are entities that are organized and operated for a religious purpose. Examples include, but are not limited to mosques, synagogues, temples, religious studies, churches and nondenominational ministries. Religious entities and groups shall comply with Sections 2, 5.a. through 5.g. and 5.i through 5.m. of this Order. Religious entities are exempt from mass gathering requirements for religious services and religious practices only. Religious entities are not exempt from the mass gathering requirements for other events outside of a religious service or practice such as picnics or staff meetings.
9. **Leased Premises.** Landlords or rental property managers may enter leased residential premises and show properties if all individuals are wearing face coverings and maintaining physical distancing.
10. Businesses must follow all regulatory and licensing requirements. If this Order contains provisions that are more restrictive than otherwise permitted in any regulatory or licensing requirement, the provisions of this Order shall control.

#### ENFORCEMENT AND APPLICABILITY

11. **Enforcement.** Violation or obstruction of this Order is a violation of Madison Municipal Ordinance Sec. 7.05(6), Dane County Ordinance Sec. 46.40(2) and any

subsequent or similar ordinance adopted by a local municipality in conformity therein.

- 12. Severability.** If any provision of this Order or its application to any person or circumstance is held to be invalid, then the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.
- 13. Duration.** This Order shall become effective Friday, November 20, 2020 at 4:30 p.m. This Order shall remain in effect until December 16, 2020 at 12:01 a.m.

IT IS SO ORDERED.



Janel Heinrich  
Health Officer, Public Health Madison & Dane County



**Emergency Order #10 is in Effect:** This order prohibits indoor gatherings of any size. Outdoor gatherings are permitted with 10 people or less, with physical distancing. >

Español

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New Public Health Order Prohibits Indoor Gatherings, Limits Outdoor Gatherings to 10 People

# New Public Health Order Prohibits Indoor Gatherings, Limits Outdoor Gatherings to 10 People

Tuesday, November 17, 2020 - 11:44am

In response to a substantial, sustained growth in new COVID-19 infections throughout Dane County, Public Health Madison & Dane County is issuing [Emergency Order #10](https://publichealthmdc.com/documents/2020-11-17_Order_10.pdf) [PDF](#) [↗](#) ([https://publichealthmdc.com/documents/2020-11-17\\_Order\\_10.pdf](https://publichealthmdc.com/documents/2020-11-17_Order_10.pdf)) which prohibits indoor gatherings of any size. Outdoor gatherings are permitted with 10 people or less, with physical distancing. The order goes into effect on November 18 at 12:01am.

“This virus does not spread on its own. We spread it. Every gathering – no matter the size – is an opportunity for disease spread and prolongs the pandemic,” said Janel Heinrich, Director of Public Health Madison & Dane County. “We are hopeful that with the community’s cooperation, we can bring our numbers down and avoid more hospitalizations and deaths,” added Heinrich.

[Skip to main content](#) In-person games, sports, competitions, group exercise classes, meetings, trainings, movies, events, and conferences are all considered mass gatherings. Indoor mass gatherings of any people who do not live together are prohibited. Outdoor mass gatherings are limited to 10 people who do not live together, with physical distancing. The previous limit for gatherings was 10 indoors and 25 outdoors, with physical distancing.

The order is in effect until December 16, 2020 at 12:01am and continues to require face coverings and limit the capacity for most businesses to 50%, along with many other provisions.

"Our hospitals are overflowing, our doctors and nurses are running ragged, and everywhere we turn, there is sickness, creating a challenge like none other we have ever seen," said County Executive Joe Parisi. "These new orders, like their predecessors, are designed to call attention to where we are seeing the greatest amount of disease spread and interrupt the virus' quick movement through our community."

This additional order is informed by data collected from contact tracing interviews and compliance checks. People having close contact with others is driving the spread of COVID-19. From October 27 through November 9, 31% of people with COVID-19 reported non-household close contact with another case. Nearly a quarter of people who tested positive attended a gathering or party in the past 2 weeks.

National data also continue to indicate gatherings—particularly in crowded indoor environments with poor ventilation—remain a significant risk. As gatherings increasingly move inside due to cold weather, it is another way risk continues to be magnified.

"We cannot pretend that this is going to be a normal Thanksgiving. We know that many of the people we want to spend time with are very vulnerable to the virus," said Mayor Satya Rhodes-Conway. "We want our loved ones to be around not just for this one holiday, but for all the holidays and special occasions of our lives—the high school graduations, the weddings, and the reunions of the next 25 years, not just the next 25 days."

Dane County is currently averaging 433 cases per day over a 7-day period, which is more than double the number of cases from a month ago.

As of November 17, 174 people are hospitalized with COVID-19 in Dane County, including 48 in the ICU. Hospitals in the southern region are strained, with many at or near capacity. From October 27 through November 9, nine hospitals in our region reported at least one day of critical staffing shortage. One of these hospitals was within Dane County.

"We ask that everyone exercise good judgement and follow the orders. The intention of the order is not to penalize businesses or individuals, but to keep everyone safe during this pandemic," said Heinrich.

The county and City of Madison may issue a fine of up to \$1,000 for every violation of the health order, plus court costs. As a result, anyone hosting a gathering could see significant penalties.

To protect everyone, in addition to not gathering, Public Health asks people to use virtual options, work from home if able, wear a mask, avoid close contact with others, and stay home if you're sick or feel off. Read more on our website: <https://publichealthmdc.com/coronavirus>

<https://publichealthmdc.com/coronavirus>).

## Contacts

Media Inquiries, [communications@publichealthmdc.com](mailto:communications@publichealthmdc.com)  
(<mailto:communications@publichealthmdc.com>)

General Inquiries, [coronavirus@publichealthmdc.com](mailto:coronavirus@publichealthmdc.com)  
(<mailto:coronavirus@publichealthmdc.com>)

## Links

[Public Health Madison & Dane County - Emergency Order #10 PDF !\[\]\(e474458956c9a37fbf9586ddb60a7fa1\_img.jpg\) \(/documents/2020-11-17\\_Order\\_10.pdf\)](#)

[Public Health Madison & Dane County - Current Order Page \(/coronavirus/forward-dane/current-order\)](#)

## Images



**New Order Released**

**The order goes into effect on November 18 at 12:01am**

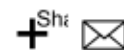
Order #10 prohibits indoor gatherings and limits outdoor gatherings to 10 people or less.

In-person games, sports, competitions, group exercise classes, meetings, trainings, movies, events, and conferences are all considered mass gatherings.

The order is in effect until December 16, 2020 at 12:01am and continues to require face coverings and limit the capacity for most businesses to 50%, along with many other provisions.

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# SPORTS GUIDANCE

Frequently asked questions about how to play sports safely according to [current orders](#).

## Is it okay to hold sport competitions?

- Yes, for low risk sports with 6ft physical distancing.
- Medium and high risk sports game and competitions between teams are not allowed. Medium risk and high risk sports may play games if the games are played within teams and games are modified to ensure 6 feet physical distancing.

## Is it okay to hold practices?

Practices, drills, catch, instructional lessons, etc. are allowed with 6 feet physical distancing. This applies to low, medium, and high risk sports.

## If I wear a mask or face covering, can I play sports and be in contact closer than 6ft?

No.

## Are youth sports allowed?

Yes.

## How big can my group be?

Youth sports, sport camps, and adult sports need to adhere to mass gathering limits of no more than 25 people in a specific area outside (fields, courts, etc.) with 6ft physical distancing and no more than 10 people in a specific area inside with 6ft physical distancing.

## What is considered a low, medium, and high risk sport?

**High risk** sports are sports that involve close, sustained contact between individuals, lack significant protective barriers, and have a high probability that respiratory particles will be transmitted between individuals. Examples: Rugby, boxing, judo, karate, taekwondo, wrestling, pair figure skating, ice dancing, football, lacrosse, hockey, group dance, group cheer.

**Medium risk** sports are sports that involve close, sustained contact, but with protective equipment in place that may reduce the likelihood of respiratory particle transmission between participants or intermittent close contact or group sports or sports that use equipment that can't be cleaned between participants. Examples: Bobsled, doubles luge, multi-person rowing, multi-person kayaking, multi-person canoeing, water polo, group gymnastics, doubles tennis, swimming relays, synchronized diving, artistic swimming, fencing, cycling in a group, running in a close group, modern pentathlon, group sailing, volleyball, soccer, basketball, baseball/softball, short track, speed skating in a group, curling, ultimate Frisbee, bike polo.

**Low risk** sports are sports that, without modification, are played individually or played with physical distancing and where there is no to minimal sharing of equipment or the ability to clean the equipment between use is available. Examples: Archery, shooting/clay target, individual running events, individual cycling events, individual swimming, diving, individual gymnastics, individual canoeing, individual kayaking, individual rowing, individual diving, equestrian jumping, dressage or eventing, golf, individual sailing, skateboarding, weightlifting, alpine skiing, nordic skiing, biathlon, single luge, freestyle skiing, individual speed skating, snowboarding, ski jumping, singles figure skating, singles tennis, individual dance, pole vault, high jump, long jump, marathon, triathlon, cross country, track and field, disc golf, badminton, bowling.

## What is considered a team?

- A team should be understood as what is commonly considered a team for various sports. Most leagues and organized sporting events have a maximum number of players allowed for each team. If the commonly understood size of a team is over the mass gathering limits under the Order, the size of the team must be reduced to abide by the limits.



- Unofficial clubs, associations, membership organizations, pick-up games, or other entities that do not have specified teams, but are instead comprised of individuals, should create sub-teams that remain the same for the duration of Phase 2. As noted in the Order, medium and high risk games are only allowed within teams if they are modified to ensure physical distancing. Medium and high-risk games are not allowed between teams. These teams must abide by the mass gathering limits under the Order.

### Are there additional things we should consider when playing inside?

- We encourage you to play outside as much as possible.
- If playing inside, ensure ventilation systems or fans operate properly. Increase circulation of outdoor air as much as possible, for example by opening windows and doors. Do not open windows and doors if doing so poses a safety or health risk (e.g., risk of falling or triggering asthma symptoms) to players or others using the facility.

### How often should equipment be sanitized?

Between each use.

### Are there additional measures we can take to reduce risk?

- Minimize equipment sharing, and clean and disinfect shared equipment between use by different people to reduce the risk of COVID-19 spread.
- Do not let players share towels, clothing, or other items they use to wipe their faces or hands.
- Size of the team. Sports with a large number of players on a team may increase the likelihood of spread, compared to sports with fewer team members. Consider decreasing team sizes, as feasible.
- Actively encourage sick staff, families, and players to stay home. Develop policies that encourage sick employees to stay at home.
- Do not allow spitting and encourage everyone to cover their coughs and sneezes with a tissue or use the inside of their elbow.
- Do not allow physical contact such as high fives, handshakes, fist bumps, or hugs.
- Limit the number of players sitting in confined player seating areas (e.g., dugouts) by allowing players to spread out.

- Younger children could sit with parents or caregivers, instead of in a dugout or group area.
- Identify adult staff members or volunteers to help maintain physical distancing among youth, coaches, and spectators.
- Space players at least 6ft apart on the field while participating in the sport (e.g., during warmup, skill building activities, simulation drills).
- Provide physical guides, such as signs and tape on floors or playing fields, to make sure that coaches and players remain at least 6ft apart.
- Wash hands after play: If soap and water are not readily available, use alcohol-based hand sanitizer.

### Can locker rooms be open?

If possible, close shared spaces such as locker rooms, otherwise, stagger use and [clean and disinfect](#) between use.

### Are there recommendations if a player bumps into one another on accident or a child breaks physical distancing requirements?

Document that physical distancing was not maintained between the two players since this information could be useful for contact tracing if a staff member or player gets sick. Include the date and names of the players. Anyone involved in the incident should closely monitor their symptoms.

### What should we do if a staff member or participant becomes sick?

Check out guidelines on our [‘What to Do if You are Sick or Possibly Exposed’](#) webpage.

### Can concession stands be open?

Yes, they would need to follow the guidelines for restaurants [in the order](#).

### Why can UW sports teams compete?

Public Health Madison & Dane County does not have authority over the UW-Madison campus, including Camp Randall football stadium.