IN THE SUPREME COURT OF WISCONSIN
Nos. 2021AP1343, 2021AP1382

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

Plaintiffs--Appellants-Petitioners,

v.

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

Defendants-Respondents.

On Appeal from Dane County Circuit Court, case 2021CV143,
The Honorable Jacob Frost, Presiding

BRIEF OF *AMICUS CURIAE* JULIAN DAVIS MORTENSON, PROFESSOR OF CONSTITUTIONAL HISTORY, ON THE FOUNDING ERA UNDERSTANDING OF DELEGATION

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INTEREST OF *AMICUS CURIAE*

Julian Davis Mortenson is the James G. Phillipp Professor of Law at the University of Michigan Law School. A specialist in constitutional history, he has written extensively on executive authority and the separation of powers. Professor Mortenson is the coauthor with Nicholas Bagley of *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021), a leading scholarly examination of constitutional principles regarding Founding-era legislative delegations of authority.[1]

INTRODUCTION

Appellants claim that it is unlawful for the Dane County Health Department to issue orders protecting Dane County residents from the dangers posed by the COVID-19 pandemic because, they say, Dane County and the City of Madison's delegation of such authority to the Health Department violates

[1] Professor Bagley has recently taken a position in government service.

Wisconsin's nondelegation doctrine. They recognize, however, that this Court cannot accept their nondelegation argument without first "[r]einvigorat[ing]" Wisconsin's nondelegation doctrine. (App. Supp. Br. 3) Indeed, to accept Appellants' argument, this Court would need to jettison nearly 100 years of its own nondelegation jurisprudence.

Perhaps recognizing the dearth of evidence supporting such a result under the Wisconsin Constitution, Appellants rely on sources that seek to establish robust nondelegation principles at the federal level under the U.S. Constitution. (App. Supp. Br. 7, 10-15) Under the original understanding of the U.S. Constitution, however, no such doctrine existed.

At the Founding, no recognized barrier existed to legislative delegations of authority on matters of great importance. Eighteenth-century legislatures across the Anglo-American world had long delegated broad discretionary legislative power to agents, who routinely exercised such

power to make generally applicable rules governing private conduct. Consistent with this precedent, legislative delegations pervaded both pre- and post-independence state governance in America.

Moreover, the First Congress enacted sweeping delegations of policymaking authority over the most crucial problems facing the young nation, among them foreign commerce, patent rights, taxation, pensions, refinancing the national debt, regulating the federal territories, raising armies, and calling up the militia. These delegations routinely granted vast discretion to resolve major policy questions with little or no guidance. And they repeatedly permitted the executive branch to devise rules that intruded on private rights and conduct.

Given the vast historical record from the Founding Era, it should be easy to identify concrete, consistent evidence of widely understood limits on legislative delegations—if they

existed. But the proponents of a newly invigorated nondelegation doctrine have been unable to do so. The original meaning of the U.S. Constitution simply provides no support for a strict nondelegation doctrine—or for Appellants' arguments in this case.

ARGUMENT

Appellants' recourse to purported "first principles" relies heavily on historical claims about the U.S. Constitution and academic theory focused on the federal example. (App. Supp. Br. 7, 10-15) But the historical record discussed below shows that the federal Constitution was not understood to contain any such principles. Unless Wisconsin's Founders practiced nondelegation in a way that the federal Founders did not, these "first principles" are a fiction.

I. Legislative Delegations Were Uncontroversial at the Founding.

In the eighteenth century, legislative power was understood to be inherently delegable. Most Americans thought the legislature's authority had already been delegated by the people, *see* James Wilson, *Lectures on Law*, ch. V (1791), *reprinted in* 1 *Collected Works of James Wilson* 427, 557 (Kermit L. Hall & Mark David Hall eds., 2011), and the propriety of further subdelegation was taken for granted, Aequus, *From the Craftsman*, Mass. Gazette & Bos. Newsl., Mar. 6, 1766, *reprinted in* 1 *American Political Writing During the Founding Era 1760-1805*, at 62, 64 (Charles S. Hyneman & Donald S. Lutz, eds., 1983). Indeed, British theory and practice placed no limits on statutory delegations of policymaking authority to agents outside the legislature, and Parliament had a long tradition of making such delegations. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at*

the Founding, 121 Colum. L. Rev. 277, 296-301 (2021); Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* 19 (2016), https://ssrn.com/abstract=2802784.

Consistent with British precedent, legislative delegations were a persistent feature of post-independence state governance in America, including in states that adopted a formal separation of powers. Virginia's constitution, for example, required the "legislative, executive, and judiciary" departments to be "separate and distinct, so that neither exercise the powers properly belonging to the other." Va. Const. of 1776, ¶4. Yet Virginia's legislature "delegated many special powers" to the governor and Council of State, including the power to restrict counterfeiting and "maintain fair prices." Session of Virginia Council of State (Jan. 14, 1778) (editorial note), available at Nat'l Archives: Founders Online

https://founders.archives.gov/documents/Madison/01-01-02-0065 (last visited Feb. 22, 2022).

Collectively, the states "expressly delegated" an immense range of legislative authorities to the Continental Congress. Articles of Confederation of 1781, art. II. That body, in turn, further delegated legislative authority to committees, boards, and officers on a range of subjects. *See* Mortenson & Bagley, *supra*, at 303-04.

To the Founders, there was nothing problematic about legislatures delegating power to the executive branch so long as ultimate control remained with the legislature. The Founders therefore expressed no concern about legislative delegations, even as they emphasized the need to prevent consolidation of power in any one branch. As James Madison explained, liberty was at risk if the "*whole* power of one department" was wielded "by the same hands which possess the *whole* power of another department." *The Federalist No. 47*, at 325-26 (Jacob

E. Cooke ed., 1961). While that danger could arise "if the king ... possessed also the complete legislative power," it was absent where the king "cannot of himself make a law." *Id.* at 326.

In short, consistent with the view that administrative agencies "exercis[e] legislative power that the legislature has chosen to delegate to them by statute" but remain "subordinate to the legislature with regard to their rulemaking authority," *Koschkee v. Taylor*, 2019 WI 76, ¶¶12, 18, 387 Wis. 2d 552, 929 N.W.2d 600, the Founders separated the powers to prevent any one branch from swallowing the others—not to impose limits based on the rigid notion of "legislative" power that Appellants advocate.[2] As the records of the Constitution's

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[2] *See also Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶97, 393 Wis. 2d 38, 946 N.W.2d 35 (Kelly, J.) (agencies exercise a "borrowed rulemaking function"); *Wis. Legislature v. Palm*, 2020 WI 42, ¶194, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting) ("rulemaking is the legislature's attempt to ensure it retains the power to make policy decisions, which is consistent with its constitutional role to say what the law should be").

drafting and ratification make clear, the Founding generation simply was not concerned about legislative delegations.

II. The First Congresses Routinely Delegated Major Policy Questions to the Executive Branch.

In the Republic's first decade, Congress routinely delegated enormous policymaking authority to executive actors on the most pressing questions facing the nation. And tellingly, despite pervasive constitutional debate in the early Congresses, there were virtually no objections on nondelegation grounds.

A. *Quarantine restrictions*

The nation's first quarantine law, enacted in response to a series of yellow fever epidemics, *see* William Hamilton Cowles, *State Quarantine Laws and the Federal Constitution*, 25 Am. L. Rev. 45, 69 (1891), empowered the president "to aid in the execution of quarantine, and also in the execution of the health laws of the states ... *in such manner as may to him appear necessary*." Act of May 27, 1796, ch. 31, 1 Stat. 474,

474 (emphasis added). While the bill provoked fierce debate about the scope of the federal government's commerce power, *see* Mortenson & Bagley, *supra*, at 356-58, there was no delegation-related objection to this sweeping grant of discretionary authority.

B. *Commerce with Native American Tribes*

The First Congress prohibited anyone from conducting "any trade or intercourse with the Indian tribes" without a license issued by the executive branch, and it gave the president complete discretion over the licensing scheme—authorizing "such rules, regulations and restrictions, as ... shall be made for the government of trade and intercourse with the Indian tribes." Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137. Although the president's rules would "govern[]" any person receiving a license "in all things touching the said trade and intercourse," *id.*, the statute said nothing about their content. And Congress gave the president even *more* discretion

regarding "the tribes surrounded in their settlements by the citizens of the United States," authorizing him to waive the license requirement whenever he "deem[ed] it proper." *Id.*

President Washington's use of this authority illustrates the breadth of policymaking discretion the law conferred. His regulations adopted a host of rules that specified *who* could trade, *what* items could be traded, and *where*. *See* Mortenson & Bagley, *supra*, at 341.

This went far beyond letting the president "fill up the details" in the licensing scheme. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting). Rather, "the Executive [had] complete discretion to decide whether, to whom, and why to grant such licenses." Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1543 (2021).

This delegated authority was squarely within Congress's own purview. While the president has military and

diplomatic authority, Congress alone has the legislative power to "regulate Commerce ... with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Even so, there is no evidence anyone raised anything resembling a nondelegation objection.

C. *Police Power in Federal Territories*

One of Congress's first acts "continue[d]" the Northwest Ordinance, which authorized territorial officials to adopt "such laws of the original States, criminal and civil, *as may be necessary, and best suited* to the circumstances of the[ir] district." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 (emphasis added). The statute delegated standardless discretion to executive officials to craft the entire body of laws for the territories.

Notably, Congress did make changes to the Northwest Ordinance "to adapt [it] to the present Constitution," *id.*, that is, to ensure it complied with the new constitutional structure. But in doing so, Congress only tweaked the appointment and

reporting system for territorial officials, leaving unchanged the Ordinance's sweeping delegation of substantive legislative authority. *See* Mortenson & Bagley, *supra*, at 335.

Territorial officials exercised these broad delegated powers, adopting measures ranging from tavern regulations to the probate of wills, from liability for trespassing animals to the suppression of gambling. *See* Mortenson & Bagley, *supra*, at 335. If the Founders allowed a person to be publicly whipped for violating rules that Congress never enacted—as they did here, for instance, for petty larceny, *see id.*—it is difficult to claim they were against delegations of authority over "private conduct." (App. Supp. Br. 11)

When early Congresses created new territories, they routinely empowered officials outside the legislative branch to adopt such rules. *See* Mortenson & Bagley, *supra*, at 334-37. No one protested that non-legislative actors were unconstitutionally making law, although Congress alone is

empowered to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. And if the Founders thought nondelegation had less relevance to territorial government, then surely someone would have said as much. No one did.

D. *The National Debt*

"Delegation was the First Congress's solution to what was arguably *the* greatest problem facing our fledgling Republic: a potentially insurmountable national debt." Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 Ga. L. Rev. 81, 81 (2021) (emphasis added).

In response, Congress authorized the president to borrow up to $12 million in new loans, and to make other "contracts respecting the said debt *as shall be found for the interest of the [United] States*." Act of Aug. 4, 1790, ch. 34, § 2, 1 Stat. 138 (emphasis added). Twelve million dollars was

an immense sum—equaling approximately $1.286 *trillion* today. Chabot, *supra*, at 124. And the only limit on the president's authority was a fifteen-year cap on the life of any restructured loans. Act of Aug. 4, 1790, § 2, 1 Stat. at 139. Key questions about the terms of new loans and the repayment of existing ones were left entirely to the president's discretion. In other words, Congress delegated to the president the power to restructure the nation's foreign debt on terms that he thought best, with parties he thought best, under conditions he thought best. *See* Mortenson & Bagley, *supra*, at 344-45.

The First Congress also delegated broad policymaking authority to refinance the *domestic* debt. *See* Act of Aug. 12, 1790, ch. 47, 1 Stat. 186, 186-87. It vested this authority in the president and four other members of a commission, who could purchase debt "in such manner, and under such regulations as shall appear to them best calculated to fulfill the intent of this act." *Id.* § 2, 1 Stat. at 186. Thus, Congress vested all

responsibility to reduce the public debt in a commission empowered to go far beyond "fill[ing] up the details." *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

By delegating "decisions regarding borrowing and payment policies of the utmost importance to the national economy," Chabot, *supra*, at 82, Congress essentially instructed the executive branch to set national fiscal policy as it saw best. In James Madison's words, the borrowing power alone was a delegation of "great trust," involving the "execution of one of the most important laws." 12 *Documentary History of the First Federal Congress of the United States of America* 1349, 1354 (Linda Grant DePauw et al. eds., 1972).

The debt legislation prompted a constitutional discussion in Congress, where one legislator questioned "whether [Congress was] authorized to delegate such important power." *Id.* at 1349. But Madison and others

supported the delegation, given that Congress had capped the amount to be borrowed, *id.* at 1351, ensuring that it was delegating "*less than* its whole borrowing power." Chabot, *supra*, at 119. This lone objection to the legislation was rejected, ending the constitutional debate.

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These are just a few among myriad examples of such delegations that occurred in the Republic's first decade. Other enacted delegations related to patent rights, remitting penalties of customs and maritime commerce violations, tax enforcement, paying benefits to disabled members of the military, and activating state militias. *See* Mortenson & Bagley, *supra*, at 339-349. And, as with the earlier examples, these delegations on issues of national significance prompted virtually no objections on nondelegation grounds.

III. Modern Proposals for Strict Delegation Limits Hinge on Distinctions that the Founders Rejected.

To explain away this evidence of broad delegations of rulemaking authority in the nation's first decade, proponents of a strict nondelegation doctrine argue that these statutes fall within categories where nondelegation limits supposedly are diminished or nonexistent. These categories include government operations or benefits, as opposed to the regulation of private conduct, and mandates to fill in details, as opposed to resolving "important subjects." (*See* App. Supp. Br. 11-13) Without these carveouts, it is impossible to reconcile Congress's early practice with a robust nondelegation doctrine.

But these exceptions are entirely a modern invention. No one made such distinctions in the Founding era. Nor did anyone invoke them to justify early congressional delegations. On the contrary, even the few legislators who raised delegation concerns in early debates *rejected* these distinctions. *See*

Mortenson & Bagley, *supra*, at 332. These categories are purely *post hoc* rationalizations—distortions of history that mold evidence to fit a conclusion, instead of the other way around.

A. *Private Rights*

Appellants propose a test for nondelegation that would require courts to determine first "whether the delegated power involves 'the formulation of generally applicable rules of private conduct.'" (App. Supp. Br. 11 (quoting *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 70 (2015))

But proponents of nondelegation have been unable to identify a *single* statement from the Founding era that suggests any distinction in delegation limits between legislation that regulates private conduct and legislation that does not.

Indeed, the historical record refutes claims that any such distinction mattered at the Founding. The most substantial debate over delegation occurred in the Second Congress, in

response to a proposal to allow the president to decide the routes of federal post roads. That proposal involved government operations and benefits—not "rules of conduct governing future actions by private persons." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). "If there had been a consensus view that Congress could broadly delegate legislative authority to the executive when 'benefits' were at issue," the objections raised to the proposal "would have been pointless. And the proposal's supporters would likely have invoked the exception, instead of defending the proposal on the ground they actually did." Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 Notre Dame L. Rev. 243, 294 (2021).

Meanwhile, Congress repeatedly delegated broad authority to fashion rules governing private conduct. *See supra* Part II. Yet these bills prompted few (or no) constitutional

concerns, and none on the ground that authority over "private rights" could not be delegated.

B. *"Important Subjects"*

Appellants also propose that this Court consider the "scope of the power delegated." (App. Supp. Br. 13) This argument is premised on a posited distinction between "important policy decisions," which the legislative branch must resolve itself, and "filling up details and finding facts," which it may delegate. *Gundy*, 139 S. Ct. at 2145, 2148 (Gorsuch, J., dissenting). But the distinction lacks any basis in original public understanding.

No evidence from the Founding era has ever been unearthed to support an "important subjects" theory. Even as Congress enacted statute after statute granting immense discretion on crucial issues of national policy—and even as some lawmakers voiced reservations about certain delegations—there is no record of anyone suggesting that

limits on delegation might vary with the subjective importance of the matters delegated.

Indeed, the only evidence that has been offered to support an "important subjects" doctrine at the Founding not only fails to support the theory—it undermines it. Professor Ilan Wurman, for example, cites a single remark made in the Second Congress during the post roads debate, Wurman, *supra*, at 1506-07, which seemed to suggest that the routes of the roads were more "important" than the locations of the post offices along those roads. 3 Annals of Cong. 230 (1791) (Rep. Livermore). But in the same breath, this speaker *foreclosed* any constitutional distinction based on importance: "the Legislative body being empowered by the Constitution 'to establish post offices and post roads,' *it is as clearly their duty to designate the roads as to establish the offices*." *Id.* at 229 (emphasis added).

As shown above, the First Congress delegated major policy questions concerning the nation's most pressing issues with little or no controlling guidance. A rule against delegating "important subjects" thus cannot stand alone: it works only in tandem with other artificial limiting principles like the one discussed above. *E.g.*, Wurman, *supra*, at 1538 (suggesting that "rules of private conduct" are inherently nondelegable "[i]mportant subjects").

CONCLUSION

For the foregoing reasons, this Court should conclude that the federal sources on which Appellants rely do not support their nondelegation argument.

Dated: February 22, 2022.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief, as modified by the request in the accompanying motion for leave to exceed the default word count. The length of this brief is 3,184 words.

Signed:

Douglas M. Poland

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12)(f).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served along with the paper copies of this brief filed with the court and sent to all parties.

Dated this 22nd day of February, 2022.

Jeffrey A. Mandell

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I certify that 22 paper copies of the foregoing Brief of *amicus curiae* Julian Davis Mortenson were hand-delivered to the Clerk of the Supreme Court on February 22, 2022.

I further certify that on February 22, 2022, I sent true and correct email copies of the foregoing Brief of *amicus curiae* Julian Davis Mortenson to counsel of record.

Jeffrey A. Mandell