STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1718-OA

JERE FABICK,

Petitioner,

v.

TONY EVERS, in his official capacity as the Governor of Wisconsin,

Respondent.

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF GOVERNOR EVERS

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INTRODUCTION

Wisconsin Stat. § 323.10 addresses the Governor's authority to respond to emergency conditions, whether viral pandemic, flood, fire, energy crisis, terrorism, or war. On September 22, Governor Evers issued Emergency Order 90, declaring a state of emergency after the explosion of COVID-19 across the State at the start of the school year. Here, Fabick argues that the Governor may issue only one state of emergency order per underlying cause—whatever that cause may be, and regardless of what emergency conditions may exist. That argument is not one for the courts and is inconsistent with the plain language of the statute. And Fabick's constitutional argument ignores the nature of the Governor's power.

First, Wis. Stat. § 323.10 explicitly empowers the Legislature to determine the propriety of an executive order declaring a state of emergency. If the Legislature concludes Governor Evers improperly issued Executive Order 90, the Legislature may revoke it at will.

Second, even if the question were justiciable, the plain statutory language permits the Governor to issue a state of emergency order when he determines that a severe *occurrence* affecting health exists. Fabick's invocation of other aspects of § 323.10 does not change that fact.

Third, Wis. Stat. § 323.10 does not violate nondelegation principles. Fabick's effort to invalidate Wis. Stat. § 323.10 based on hypothetical abuses of power runs against this Court's consistent refusal to hold laws unconstitutional based on hypothetical facts. Moreover, the basic premise of Fabick's argument is wrong. Emergency response is not a core legislative power that the Legislature can delegate only in certain ways; it has long been recognized a shared executive and legislative power, with

the executive having a critical role in recognizing the emergency circumstances and making time-sensitive determinations. And it cannot be that the Legislature has improperly delegated too much authority when it retains full authority to revoke a state of emergency order at will.

ISSUES PRESENTED

1. Is the propriety of Executive Order 90, issued by Governor Evers pursuant to Wis. Stat. § 323.10, a justiciable question?

This Court should answer no.

2. Wisconsin Stat. § 323.10 authorizes a Governor to declare a state of emergency, which is defined as an occurrence. Does Wis. Stat. § 323.10 limit a Governor to only one state of emergency order per underlying common cause?

This Court should answer no.

3. Does Wis. Stat. § 323.10 violate nondelegation principles?

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with all cases before this Court, both are appropriate.

FACTUAL BACKGROUND

I. After Wisconsin bent the curve in May, COVID-19 spread across Wisconsin in June and July 2020.

Wisconsin's exposure to the COVID-19 pandemic began with confirmed cases in February and early March. Governor Evers first declared a COVID-19 state of emergency order on March 12, 2020.[1] By May, with the state of emergency order and other public health measures in place, Wisconsinites had successfully "bent the curve," resulting in a slowed trajectory of spread.[2]

That trajectory reversed itself in June and July. On June 5, more than three months after the first reported case, Wisconsin had 20,249 reported COVID-19 cases.[3] In only six weeks, Wisconsin saw its next 20,000 cases.[4]

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[1] *See* Executive Order 72 (Mar. 12, 2020) (creating state of emergency) All of the Governor's executive orders related to COVID-19 are available online. Wis. Governor Tony Evers, *Executive Orders,* https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx (last updated Oct. 2, 2020).

[2] Wis. Dep't. of Health Servs., *COVID-19: Wisconsin Cases*, https://www.dhs.wisconsin.gov/covid-19/cases.htm (last updated Nov. 5, 2020) (information updated regularly); *see also* Jeffrey Kluger & Chris Wilson, *America is Done with COVID-19. COVID-19 Isn't Done with America*, TIME (June 15, 2020, 1:23 PM), https://time.com/5852913/covid-second-wave/ (discussing states that "bent the curve" and showing Wisconsin's downward trajectory in June).

[3] Affidavit of Dr. Ryan P. Westergaard ("Westergaard Aff.") ¶ 10, (Resp'ts App. 103).

[4] Westergaard Aff. ¶ 10, (Resp'ts App. 103).

II. Governor Evers declared a new state of emergency and implemented a statewide mask mandate, and Wisconsin's daily COVID-19 cases decreased in August 2020.

Given the escalation of COVID-19 cases, on July 30, 2020, Governor Evers issued Executive Order 82.[5] He issued an order mandating the wearing of masks in indoor spaces other than a private residence, with certain exceptions.

Following these actions, Wisconsin's COVID-19 rate decreased substantially. On August 1, Wisconsin's seven-day daily average of new COVID cases was 1,062; by August 31 that number dropped to 678.[6] And the next 20,000 cases took almost four weeks instead of three—with 80,300 cases on September 5.[7]

III. The School year began, and Wisconsin's new COVID-19 cases skyrocketed.

Unfortunately, that progress ended when the school year began. Many communities and college campuses were eager to offer in-person instruction. As K-12 and collegiate schools opened up, the number of new daily COVID-19 cases skyrocketed. By September 15, there were 99,562 total COVID-19 cases—almost 20,000 new cases in only two weeks.[8] On September 17, Wisconsin rose to a record high of 2,034 new cases in one day, and then another record high of

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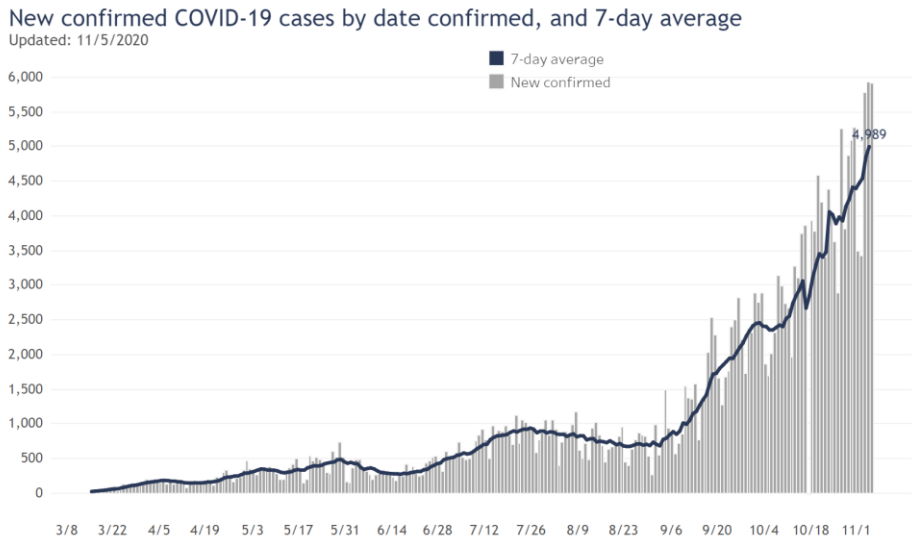
[5] Wis. Governor Tony Evers, *Exec. Order 82, Relating to Declaring a Public Health Emergency* (July 30, 2020), https://evers.wi.gov/Documents/COVID19/EO082-PHECOVIDSecondSpike.pdf

[6] Westergaard Aff. ¶ 11, (Resp'ts App. 104).

[7] Westergaard Aff. ¶ 11, (Resp'ts App. 104).

[8] Westergaard Aff. ¶ 12, (Resp'ts App. 104).

2,534 new cases the very next day.[9] By September 21, the seven-day daily average of new cases had risen to 1,791—more than doubling in a single a month.[10]



[11]

Alarmingly, this surge was at first driven by 18- to 24- year-olds, but quickly spread to the broader community, across the State.[12]

The skyrocketing of COVID-19 spread in September led to a dire October for Wisconsin. We repeatedly shattered our case numbers and death records. As of November 4, 2020, our seven-day daily new case average was 4,839, a more than 500% increase from the daily average on

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[9] Westergaard Aff. ¶12, (Resp'ts App. 104).

[10] Westergaard Aff. ¶12, (Resp'ts App. 104).

[11] Wis. Dep't of Health Servs., *COVID-19: Wisconsin Cases*, https://www.dhs.wisconsin.gov/covid-19/cases.htm (last updated Nov. 5, 2020) (information updated regularly).

[12] Westergaard Aff. ¶ 13, (Resp'ts App. 105).

August 9.[13] One week later, we had 5,262 new cases in a single day.[14] Deaths have tracked the unprecedented surge: as of November, the seven-day average of COVID-19 deaths was 35 a day—more than any single-day death count before mid-October.[15]

IV. In response to September's unprecedented acceleration of cases, Governor Evers issued Executive Order 90 and Emergency Order 1.

To combat the unprecedented acceleration of new COVID-19 cases following the start of the school year, on September 22, 2020, Governor Evers issued Executive Order 90.[16] Pursuant to his authority under Wis. Stat. § 323.10, Governor Evers declared that a public health emergency, as defined under Wis. Stat. § 323.02(16), exists in the State.

Governor Evers designated DHS as the lead agency to respond to the public health emergency. He also authorized the Adjutant General to activate the Wisconsin National Guard as needed to assist in response to the public health emergency, including with providing personnel to support the November 3 general election and operate community testing sites throughout Wisconsin.

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[13] Westergaard Aff. ¶ 12, (Resp'ts App. 104).

[14] Wis. Dep't of Health Servs., *COVID-19: Wisconsin Cases*, https://www.dhs.wisconsin.gov/covid-19/cases.htm (last updated Nov. 5, 2020) (information updated regularly)

[15] Wis. Dep't. of Health Servs., *COVID-19: Wisconsin Deaths*, https://www.dhs.wisconsin.gov/covid-19/deaths.htm (last revised Nov. 5, 2020) (information updated regularly).

[16] Wis. Governor Tony Evers, *EXECUTIVE ORDER #90, Relating to Declaring a Public Health Emergency* (Sept. 22, 2020), https://evers.wi.gov/Documents/COVID19/EO090-DeclaringPublicHealthEmergency.pdf.

Executive Order 90 provides that, "[p]ursuant to Section 323.10," the order "shall remain in effect for 60 days, or until it is revoked by the Governor or by joint resolution of the Wisconsin State Legislature."

On September 22, 2020, Governor Evers also issued a new face covering mandate—Emergency Order 1.[17] It provides for the wearing of face coverings in certain indoor circumstances, and sets forth certain exceptions and exemptions.

STATUTORY BACKGROUND: CHAPTER 323

Chapter 323 provides a statutory scheme to enable state government to efficiently and effectively respond to an emergency. It places the Governor at the helm as director, requiring and empowering him to issue orders to respond to the emergency, and to delegate authority to others to assist.

First, the Governor has the authority to issue an order declaring a state of emergency, including a public health emergency. Wisconsin Stat. § 323.10 provides that the "governor may issue an executive order declaring a state of emergency for the state of any portion of the state if he or she determines that an emergency resulting from a disaster or the imminent threat of a disaster exists."

Wisconsin Stat. § 323.10 also provides that if "the governor determines that a public health emergency exists, he or she may issue an executive order declaring a state of emergency related to public health for the state or any portion of the state and may designate the department of

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[17] Wis. Governor Tony Evers, *EMERGENCY ORDER #1, Relating to Requiring Face Coverings* (Mar. 13, 2020), https://evers.wi.gov/Documents/COVID19/EmO01-SeptFaceCoverings.pdf.

health services as the lead state agency to respond to that emergency."

The statutes distinguish the "state of emergency order" from an "emergency" itself. *See, e.g.,* Wis. Stat. § 323.10 ("The governor may issue an executive order declaring a *state of emergency* . . . if he or she determines that an *emergency* . . . exists"). The "state of emergency" is the condition the Governor declares via order, in response to an emergency, that triggers the emergency procedures of chapter 323.

The statutes place limitations on the duration of a state of emergency order, and give the Legislature power to end or extend it: "A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature. . . . The executive order may be revoked at the discretion of either the governor by executive order or by the legislature by joint resolution." Wis. Stat. § 323.10.

During a state of emergency, the Governor has affirmative duties, and possesses enumerated powers. Wis. Stat. § 323.12(3)–(4). The Governor may "[i]ssue such orders as he or she deems necessary for the security of persons and property." Wis. Stat. § 323.12(4)(b). Additionally, during a state of emergency related to public health, the Governor may call the State National Guard into state active duty to assist in the response. Wis. Stat. § 321.39(1)(a)3.

ARGUMENT

Fabick seeks this Court's review of the Governor's order declaring a state of emergency, arguing that the statutory conditions for such a declaration were not present or that the statute is unconstitutional. His claims are not justiciable, and even if this Court considers them, they both fail on their merits.

I. The propriety of a Governor's state of emergency order is not a justiciable question.

As a threshold issue, Petitioner's case fails because it presents no justiciable controversy suitable for declaratory judgment. He has not alleged a claim of right under Wis. Stat. § 323.10, and the statute does not protect the interests he advances.

A. To bring a declaratory judgment action, a party seeking relief must have a claim of right and a legally protectible interest.

In order to maintain a declaratory judgment action under Wis. Stat. § 806.04, a party must establish that a justiciable controversy exists. *See Milwaukee Dist. Council 48 v. Milwaukee County,* 2001 WI 65, ¶ 37, 244 Wis. 2d 333, 627 N.W.2d 866. This requires that the party seeking declaratory relief have "a claim of right" and "a legal interest in the controversy—that is to say, a legally protectible interest." *Loy v. Bunderson*, 107 Wis. 2d 400, 409, 320 N.W.2d 175 (1982) (citation omitted).

B. Neither element is met here: Wis. Stat. § 323.10 leaves the question of whether the conditions for an emergency are met to the political branches, and Fabick lacks standing to bring suit.

Fabick has neither a claim of right nor a justiciable legal interest in challenging whether the conditions for an emergency under § 323.10 are met. Wisconsin Stat. § 323.10 leaves the question of whether the facts warrant a state of emergency to the political branches, and provides no claim of right for private litigants to seek judicial review of that determination. And Fabick does not have a legally protectable interest in Wis. Stat. § 323.10. He alleges no pecuniary loss that is distinguishable from that of the general public.

1. Wis. Stat. § 323.10 provides no claim of right for a private party to seek review of whether a gubernatorial order under Wis. Stat. § 323.10 satisfies the statute.

Fabick does not have a justiciable claim of right under Wis. Stat. § 323.10. Section 323.10 does not contemplate a judicial remedy through which parties can ask a court to review whether the statutory conditions for an emergency are met. Instead, it creates a single, express remedy for invalidating a Governor's emergency order: by a legislative joint resolution. *See* Wis. Stat. § 323.10. The statutory text demonstrates a legislative determination that controversies concerning the propriety of such an order should be resolved between the legislative and executive branches.

That makes sense. Given the challenging, ever-changing factual circumstances that arise during an emergency, it is natural that the statutory scheme empowers

those branches, rather than the judiciary, to decide how best to proceed.

For example, the Supreme Court has held that matters "intimately related" to "national security are rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292 (1981), and federal courts have generally declined to review "the essentially political questions surrounding the declaration or continuance of a national emergency." *United States v. Amirnazmi*, 645 F. 3d 564, 581 (3rd Cir. 2011) (citation omitted). This, the Third Circuit reasoned, does not "preclude enforcing compliance with statutory dictates," but it further support that the onus is on the legislature, not the courts, to "ensure emergency situations remain anomalous and do not quietly evolve into default norms." *Id.*; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) ("[P]ower to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.").

That is not to say an individual could not challenge an emergency measure based on a particular burden it imposes on him, such as an infringement of his religious liberty. *Cf. United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 578–78 (Cust. & Pat. App. 1975) ("Though courts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency, they will not hesitate to review the actions taken in response thereto or in reliance thereon."); *see also Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905) (setting forth the framework for review of individual liberty challenges during a pandemic). But an individual cannot seek judicial review of whether the statutory conditions for an emergency are met. That determination is reserved for the majority of the people through the Legislature.

Fabick argues that, under his interpretation of § 323.10, Executive Order 90 does not meet the statutory requirements for an emergency because the facts underlying the order are too similar to those underlying the Governor's previous COVID-19-related state of emergency orders. Section 323.10, however, expressly leaves the resolution of that question to the Governor and the Legislature, not the courts.

If the Legislature believes the Governor has issued an improper state of emergency order, it can take immediate action to end it. But it is not Fabick's role to seek that remedy in court.

2. Fabick's status as a taxpayer does not create a legally protected interest.

Separately, Fabick also fails to assert a legally protected interest in the controversy here, because Wis. Stat. § 323.10 does not protect the interests he advances.

This requisite prong to obtain a declaratory judgment is often stated in terms of standing. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 47, 333 Wis. 2d 402, 797 N.W.2d 789. Standing requires a party to show some direct injury or threat of direct injury to a legally protected interest. *Marx v. Morris*, 2019 WI 34, ¶ 74, 386 Wis. 2d 122, 925 N.W.2d 112, *reconsideration denied,* 2019 WI 84, ¶ 75, 388 Wis. 2d 652, 931 N.W.2d 538. This means the interests advanced must rest within the zone of interests protected by the provision under which the claim is brought. *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 49.

Generally, for taxpayers to meet this standard, they must have suffered, or will suffer, some actual "pecuniary loss." *S.D. Realty Co. v. Sewerage Comm'n,* 15 Wis. 2d 15, 21–22, 112 N.W.2d 177 (1961). "[T]he taxpayer must allege and prove a direct and personal pecuniary loss, a damage to

himself different in character from the damage sustained by the general public." *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988).

Fabick does not clear this bar because his interests as a taxpayer do not lie within the zones of interest protected by Wis. Stat. § 323.10. Fabick has not shown any specific pecuniary loss—any loss "different in character from the damage sustained by the general public." *City of Appleton*, 142 Wis. 2d at 877. Instead, he just notes that taxpayer dollars have been used to draft, promote, and enforce the orders he challenges. Put differently, Fabick makes a claim of standing based on broad assertions that would apply to any taxpayer. This, however, would render the particular pecuniary loss requirement meaningless.

The Court should reject Fabick's invitation to allow taxpayer standing to swallow the justiciability limits on the role of the courts in resolving disputes. Rather, consistent with both longstanding principles and the plain language of Wis. Stat. § 323.10, the Court should leave the question of whether a disaster exists to the people's elected representatives in the political branches.

II. Executive Order 90 is consistent with the plain language of Wis. Stat. § 323.10.

Even if this Court concluded that the questions Fabick presents were justiciable, his claims fail. His view that Wis. Stat. § 323.10 allows a governor to issue a state of emergency only once per underlying cause ignores the definition of "disaster," reads other language out of context, and is contrary to the purposes of the statute.

A. Section 323.10 allows the Governor to issue separate state of emergency orders based on occurrences that relate to a single originating cause.

1. Section 323.10 authorizes the Governor to declare a state of emergency, which is defined as an "occurrence."

Fabick's one-and-done view of the Governor's emergency management powers rest on his premise that any number of disasters flowing from a single source is a single emergency for purposes of § 323.10. But the definition of "disaster" in that statute is fundamentally inconsistent with that assumption.

Section 323.10 authorizes the Governor to "issue an executive order declaring a state of emergency for the state or any portion of the state if he or she determines that an emergency resulting from a disaster or the imminent threat of a disaster exists." In turn, "[d]isaster" is defined as "a severe or prolonged, natural or human-caused, *occurrence* that threatens or negatively impacts life, health, property, infrastructure, the environment, the security of this state or a portion of this state, or critical systems, including computer, telecommunications, or agricultural systems." Wis. Stat. § 323.02(6).

The word "occurrence" demonstrates that the Governor may issue separate state of emergency orders for disasters even where those situations relate to a common underlying cause. The meaning of "occurrence" is broad and encompasses circumstances that may be related: "A thing that occurs, happens, or takes place; an event, an incident." *Occurrence*, Oxford English Dictionary (3d ed. 2004). The term is frequently used to describe the recurrence of a

similar event: Merriam-Webster notes that it is "often used with *of*," as in "the repeated *occurrence* of petty theft in the locker room."[18] Hence, the use of "occurrence" encompasses the power to declare subsequent states of emergency that may be related in some way.

In issuing Executive Order 90, Governor Evers determined that September's skyrocketing of new COVID-19 cases to unprecedented levels constituted an occurrence that threatened the health of Wisconsin. *See* Wis. Stat. § 323.02(6). Under the plain language of Wis. Stat. § 323.10, he had the authority to issue a state of emergency order to respond to that disaster.

2. The articles "the" and "an" in the definition of "public health emergency" do not change the analysis.

To avoid the natural reading of "disaster" in the statute, Fabick focuses on articles in the definition of a public health emergency: "*the* occurrence or imminent threat of *an* illness or health condition." (Fabick's Br. 17.) That argument fails.

Fabick's argument skips the central language that empowers the Governor to issue a state of emergency order: the first sentence of § 323.10, which allows the Governor to issue an order if he or she determines that an emergency resulting from "a disaster" or its imminent threat exists. "Disaster" is not defined by a delineated list of emergencies, but rather by "a[n] . . . occurrence" with impacts on "life,

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[18] *Occurrence*, Merriam-Wesbter.com Dictionary, https://www.merriam-webster.com/dictionary/occurrence (last visited Oct. 20, 2020).

health, property, infrastructure, the environment, the security of this state or a portion of this state, or critical systems, including computer, telecommunications, or agricultural systems." Wis. Stat. § 323.02(6).

Fabick offers nothing to dispute that the COVID-19 surge at the start of the school year meets the statutory definition of "disaster." Indeed, if his premise that the indefinite article "an" before occurrence makes the difference, reflecting the Governor's ability to act in response to multiple occurrences relating to an underlying cause, the statutory definition of "disaster" does exactly that. It defines "disaster" as "*a* severe or prolonged, natural or human-caused, occurrence." Wis. Stat. § 323.02(6).

Fabick jumps to the second sentence of Wis. Stat. § 323.10, which addresses a "public health emergency." But that sentence does not define when the Governor may issue a state of emergency order at all. Instead, it gives the Governor a tool for managing that type of emergency, allowing him or her to designate DHS as the lead agency to respond to the crisis.[19]

Rather than interpreting the statute, Fabick points to a sentence from this Court's decision in *Wisconsin Legislature v. Palm*, which did not involve the Governor's authority under Chapter 323, let alone a statutory interpretation analysis of Wis. Stat. § 323.10. (Fabick's

[19] This provision, as well as the next sentence in Wis. Stat. § 323.10, authorizing the Governor to name the Department of Administration the lead agency in responding to an emergency involving computer or telecommunication systems, were added to the original language providing that a Governor may declare a state of emergency if he determines that a disaster or imminent threat of a disaster exists. *Compare, e.g.,* Wis. Stat. § 166.03(1)(b)1 (1999–00), *with* Wis. Stat. § 323.10.

Br. 17–18 (quoting *Palm*, 2020 WI 42, ¶ 41, 391 Wis. 2d 497, 942 N.W.2d 900 ("But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.")).) Fabick argues that allowing a Governor to issue multiple orders relating to a single underlying cause would allow him or her to put the State in an unending state of emergency. That is not the case. "Occurrence" still requires the presence of distinctive dangers or harms. But it reflects the reality that a single cause may work together with dynamic conditions to give rise to a distinctive crisis. On September 22, that crisis was the combination of the COVID-19 pandemic and changed social situations relating to the reopening of schools for in-person instruction.

Unsurprisingly, former Governors have also issued multiple orders that reflect the intersection of an underlying cause and changed facts on the ground. Most recently, Governor Scott Walker so acted on at least two occasions.

First, Governor Walker issued six state of emergency orders loosening regulatory restrictions on propane transportation due to supply shortages and cold weather in the autumn and winter of 2013–2014.[20] These orders, which were based on similar factual circumstances, ran from October 25, 2013, through January 22, 2014. When the underlying propane supply problems were subsequently exacerbated by additional severe winter weather and by a continuation of cold temperatures into the Spring, Governor

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[20] Office of the Wisconsin Governor, Executive Order No. 120 (Oct. 25, 2013); No. 121 (Nov. 7, 2013); No. 122 (Nov. 15, 2013); No. 124 (Nov. 27, 2013); No. 127 (Dec. 13, 2013); No. 128 (Dec. 23, 2013), No. 130 (Jan. 25, 2014), No. 132 (Apr. 17, 2014) Wis. State. Legislature, https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/.

Walker issued two more similar emergency orders on January 25 and April 17, 2014.

Second, Governor Walker issued two successive emergency orders in the autumn and winter of 2016–17, waiving load limits for the petroleum transportation due to a pipeline shutdown and waiting times at supply terminals.[21] The first order declared an energy emergency for the entire state starting on November 4, 2016, and lasting up to 60 days. The second order declared a similar emergency starting on December 30, 2016, and lasting another 60 days. The two orders were based on similar factual circumstances, and the second was justified in part by an increase in demand due to extreme cold.

These examples reflect the reality that a common underlying cause can combine with changing facts to create multiple distinct occurrences. This Court should not jeopardize the important power of governors to respond to such crises, especially as Wisconsin battles a once-in-a-century pandemic.

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[21] Office of the Wisconsin Governor, Executive Order No. 223 (Nov. 4, 2016); No. 227 (Dec. 30, 2016), https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/.

B. Fabick's invocation of other provisions in Wis. Stat. ch. 323 do not change the analysis.

1. The 60-day limitation in Wis. Stat. § 323.10 imposes a durational limit on a particular state of emergency order, but has no bearing on the Governor's discretion to determine that a disaster exists.

Fabick argues that the statute's 60-day limit in Wis. Stat. § 323.10 on a particular order would be meaningless if governors can issue multiple orders relating to a single underlying cause. (*See* Fabick's Br. 21.) That argument assumes that Fabick's understanding of the way the statute operates is correct. In fact, the time limit applies to a particular order, not to the Governor's entire power to issue a state of emergency order.

Fabick assumes that the only purpose of the 60-day limitation is to permanently stop a governor from responding to harms relating to the same underlying cause, no matter what form those harms take. But that is not its purpose. The 60-day limitation does important work: it prevents a long-term emergency order based on a short-term emergency. As the circuit court in *Lindoo* observed, it also imposes "an important check against run-away executive power" by "forc[ing] the governor, before issuing another order, to reexamine the situation and publicly identify existing, present-day facts and circumstances that constitute a public health emergency."[22]

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[22] *Lindoo v. Evers*, No. 20CV219 (Wis. Cir. Ct. Polk Cty.) Decision (Oct. 12, 2020); (Resp'ts App. 113.)

If, for example, a wildfire broke out in a county, the Governor declared a state of emergency for that county, and the emergency response helped contain the fire in two weeks, there would be no need for an emergency response lasting longer than 60 days. The 60-day limitation prevents the Governor from unilaterally imposing an unduly long state of emergency order, or extending a state of emergency where the underlying emergency itself has appeared to be resolved.[23]

The 60-day limitation does what the plain language says it does: it circumscribes the duration of a particular state of emergency order once issued. It does not answer whether a Governor may issue a later state of emergency order as facts on the ground develop.

2. The word "novel" does not change the Governor's ability to respond to a disaster.

Fabick also argues that the word "novel" in the definition of "public health emergency" limits the Governor's ability to respond to disasters involving public health unless they are brand new problems. (*See* Fabick's Br. 17.) He appears to make two different arguments using "novel":

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[23] Indeed, this important purpose also undermines the negative inference the Legislature amicus asks this Court to draw from Wis. Stat. § 323.11. (Leg. Amicus Br. 12.) Wisconsin Stat. § 323.11 provides that a local unit of government may declare "an emergency" (not a state of emergency) that is limited to the "time during which the emergency conditions exist or are likely to exist." A single gubernatorial order, which may have statewide effect—unlike a local order—is appropriately further limited. That limitation, however, does not address the Governor's ability to respond to distinct circumstances arising from an underlying cause previously addressed in a different order.

either that "novel" means the Governor can issue only one order regarding a particular biological agent, because any orders thereafter are not "novel," or that COVID-19 was no longer "novel" by September 22. The word "novel" does not do the work Fabick suggests in either respect.

As to both theories, and discussed above in section II.A., Wis. Stat. § 323.10 empowers the Governor to respond to a "disaster" and defines that term, not based on a delineated list of types of emergencies, but rather based on occurrences of kinds of harms. The term "public health emergency" is relevant only to giving the Governor a particular tool to respond to a type of disaster: delegating specific roles to the Department of Health Services to manage a public health emergency.

Even aside from the fact that "public health emergency" is not part of the definition of "disaster" in Wis. Stat. § 323.10, the word "novel" in the definition of "public health emergency" means neither of the things that Fabick posits.

His first theory, that it means the Governor can issue only an initial, "novel" order, ignores the noun that "novel" modifies in the statute. The adjective "novel" does not modify "order;" it modifies "biological agent." Wis. Stat. § 323.02(16).

His second theory, that the Governor could act only when COVID-19 was "novel" in some lay sense, fails to read the word in context and would prove too much.

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined

words or phrases are given their technical or special definitional meaning." *Id.*

"[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46. Additionally, "Statutory purpose is important in discerning the plain meaning of a statute." *Westmas v. Creekside Tree Service, Inc.*, 2018 WI 12, ¶ 19, 379 Wis. 2d 471, 907 N.W.2d 68 (citing *Kalal*, 271 Wis. 2d 633, ¶ 48).

In Wis. Stat. § 323.02(16), the relevant context for "novel" is the biological context. The word modifies "biological agent." For a biological agent, "novel" means something that presents new conditions—for example, a virus that has "evolve[ed] important new attributes" like "increased virulence." *See* U.S. Army Medical Research Institute of Infectious Diseases (USAMRIID), Medical Management of Biological Casualties Handbook, 143 (8th ed. 2014) (defining "emerging infectious disease," which includes "novel" viruses). For pandemic influenzas, a virus' novelty comes from minor changes in previous viral structure that "result in an altered virus able to circumvent host immunity."[24]

Regarding coronaviruses, even the common cold is a type of coronavirus. So, "[s]cientists use the word 'novel' to distinguish the new form of coronavirus (SARS-CoV-2) currently making people sick from previous types of coronaviruses." As it is a "novel virus" that no one has before

[24] *See* U.S. Army Medical Research Institute of Infectious Diseases (USAMRIID), *Medical Management of Biological Casualties Handbook*, 143 (8th ed. 2014).

been exposed to before its recent emergence, "that means no one has had a chance to build immunity (with the possible exception of people who have recently recovered from COVID-19)."[25]

Thus, the discovery of a biological agent does not mean that it is no longer "novel." Rather, it means that the agent is one that the community has not before confronted such that it does not yet have a meaningful response.[26]

Fabick's view that "novel" simply means "brand new" ignores the proper definition of "novel" in the context of modifying "biological agent." In addition, his argument would prove too much. If a governor can respond only to a brand-new medical situation, Governor Evers should not have been able to declare even Executive Order 72 in March. The world already knew of COVID-19 before March, and Wisconsin saw its first confirmed cases in February.

3. Fabick and the Legislature amicus improperly rely on the legislative history about language not enacted.

Fabick and the Legislature's amicus brief point to a model statute that the Legislature did not adopt. They make

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[25] Lisa Esposito, *Coronavirus Glossary: Defining the Words Used to Describe a Pandemic*, U.S. News: Health (Apr. 2, 2020, 12:16 PM), https://health.usnews.com/conditions/articles/coronavirus-glossary#:~:text=Scientists%20use%20the%20word%20%22,SARS%20and%20MERS) (last accessed Nov. 5, 2020).

[26] *See, e.g.*, Siddharth Sridhar et al., *A Systematic Approach to Novel Virus Discovery in Emerging Infectious Disease Outbreaks*, 17 The Journal of Molecular Diagnostics 3. (May 2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7106266/ (last accessed Nov. 5, 2020) (describing the process for identifying and testing for a novel virus).

various inferences, unsupported by any citations, about why the Legislature may not have adopted that model law.

The "only goals inarguably sought by a legislative majority are those embodied in the enacted text. Even if it were otherwise, we are governed not by the unexpressed or inadequately expressed 'legislative goals' but by *the law*." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 383 (2012). An attempt to find purpose from legislative history—particularly attributing purpose to inaction—"provides great potential for manipulation and distortion." *See id.* at 376. That proves true in this case.

The Legislature points to the canon that, where the legislature chose to include a specific provision from another statute, courts should presume that it intended to omit that particular provision. (Leg. Amicus Br. 3 (citing *Hirschhorn v. Auto-Owners Ins. Co.*, 2012 WI 20, ¶ 34, 338 Wis. 2d 761, 809 N.W.2d 529).) Of course, such a canon cannot displace the statute's plain language. *Hirschhorn*, 338 Wis. 2d 761, ¶ 34. And that canon is inapt here.

First, the legislative history does not comport with the Legislature's narrative. Fabick and the Legislature amicus portray their discussion of the 2001 Model State Emergency Health Powers Act as though (1) the entirety of Wis. Stat. § 323.10 as it now exists were drafted as an alternative to the rejected Model Act, and (2) drafting records reflect that the Legislature gave consideration to the "renewal" structure of the Model Act and then affirmatively rejected it. Neither proposition is correct.

Wisconsin's 60-day limit on a single state of emergency order, with the Legislature retaining the power to revoke a state of emergency, has existed since 1959:

> If he [the governor] determines that an emergency resulting from enemy action exists, may proclaim that a state of emergency exists throughout the state or any part therof. The period of the state of emergency shall not extend beyond 60 days unless extended by joint resolution of the legislature. . . . The proclamation may be revoked by the written order of the governor or by the legislature by joint resolution whenever either deems it appropriate to do so.

Wis. Stat. § 22.01(4)(e) (1959).

Notably, though Wis. Stat. § 22.01 concerned emergency responses to military attacks, the statutes defined "enemy action" as "any hostile action taken by a foreign power which threatens the security of the state of Wisconsin." Wis. Stat. § 22.01(2)(a) (1959). The Legislature did not define the crisis based on one "war" or even one overarching "conflict;" rather, the Legislature provided that the Governor could respond to any particular *action* that threatened Wisconsin.

Wisconsin also had a parallel statute for "an emergency growing out of a natural or man-made disaster," with the only difference being that the state of emergency proclamation was limited to 30 days. Wis. Stat. § 22.02 (1959).

The statute did not yet define "disaster." The Legislature added that definition in 2009 when it reorganized the emergency powers statutes, and, among other things, removed the 60-day/30-day distinctions for military state of emergency orders and others. 2009 Wis. Act. 42, § 280 (definition of "disaster"). The Legislative

Council referred to this statutory definition and another as "minor changes in the chapter."[27]

In 1979, the enemy action and non-enemy action provisions were consolidated, with the provisions governing the declaration, durations, and revocation of a state of emergency remaining unchanged. *See* Wis. Stat. § 166.03(1)(b)1 (1979–80).

So, before 2001, our statutes provided that the Governor could:

> Proclaim a state of emergency for the state or any portion thereof if he or she determines that an emergency resulting from enemy action or natural or man-made disaster exists. The duration of such state of emergency shall not exceed 60 days as to emergencies resulting from enemy action or 30 days as to emergencies resulting from natural or man-made disaster, unless either is extended by joint resolution of the legislature. . . the proclamation may be revoked at the discretion of either the governor by written order or the legislature by joint resolution.

Wis. Stat. § 166.03(1)(b)1 (1999–00).

In 2001 Wisconsin Act 109, the Legislature then amended the statute to give the Governor the ability to designate DHS as the lead agency in the event of a public health emergency:

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[27] Wis. State Legislature, Wisconsin Legislative Council Act Memo, 2009 Wisconsin Act 42, Oct. 13, 2009, https://docs.legis.wisconsin.gov/2009/related/lcactmemo/act042.

> **SECTION 340L.** 166.03 (1) (b) 1. of the statutes is amended to read:
>
> 166.03 **(1)** (b) 1. Proclaim a state of emergency for the state or any portion ~~thereof~~ of the state if he or she determines that an emergency resulting from enemy action or natural or man−made disaster exists. If the governor determines that a public health emergency exists, he or she may declare a state of emergency related to public health and may designate the department of health and family services as the lead state agency to respond to that emergency. The duration of such state of emergency

The Legislature also added the statutory definition of "public health emergency." *See* 2001 Wis. Act. 109, § 340j. The Legislature made no changes to the durational limit of a particular order, or to the balance of power in terms of the Governor declaring an order, or the Legislature's ability to terminate at will.

Neither Fabick nor the Legislature can point to anything that suggests that the Legislature gave any meaningful consideration to the adoption of the gubernatorial "renewal" strucutre of the Model Act. The Legislature amicus notes that 2001 Assembly Bill 850—from which 2001 Wis. Act 109 drew language—"explicitly attempted to adopt some version of the Model Act for Wisconsin." (Leg. Amicus Br. 10–11.) But they do not identify any evidence of that "renewal" provision being considered.

The Model Act involved an expansive code for everything from preparing for the possibility of a public health crisis, to emergency response, to health agency authority, to hospital access, to what to do with dead bodies. The drafting file of 2001 Wisconsin Assembly Bill 850 contains a Legislative Reference Bureau memorandum conducting a section-by-section comparison of the entirety of

the Model Act against Wisconsin law.[28] The drafting file does not reflect *any* actual discussion by the Legislature itself about the "renewal" structure in particular, whether to adopt it, or any drafting of a provision that would have adopted it.

In short, Fabick and the Legislature ask this Court to make a tremendous assumption about a provision the Legislature did not adopt, without any evidence that the Legislature even gave it meaningful consideration. This Court is in no way "fond of" such a practice. (*See* Leg. Amicus Br. 3.)[29]

Further, the Legislature asks this Court to do more than assume, without evidence, that a prior legislature considered particular language and rejected it. That would not help them, because Governor Evers is not advocating for an ever-renewing provision. Instead, they ask the Court to infer from this assumed event what that Legislature must have been thinking at the time: that they "likely agree[d] with critics of the Model Act that it delegates too much unchcecked authority." (Leg. Amicus Br. 9–10). They offer no factual support for this conclusion, either, but use it as a working principle about how to interpret Wis. Stat. § 323.10.

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[28] Drafting File, 2001 Wis. Assembly Bill 150, https://docs.legis.wisconsin.gov/2001/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2001_ab_0850.

[29] This Court is "fond of" recognizing that the Legislature knows how to draft particular language if it wishes to do so. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 36, 341 Wis. 2d 607, 815 N.W.2d 367. That is far different from making significant assumptions based on legislative history.

This effort shows why not to resort to legislative history when the statutory language is plain. We don't know whether the Legislature even looked at the provision in a lengthy model act, much less whether they had a view on a particular provision, or, assuming they looked at the legislation, what motivated a lack of action. To make all those assumptions and employ them to interpret the law departs entirely from proper statutory interpretation. "A reliance on legislative history. . . assumes that the legislature even *had* a view on the matter at issue. This is pure fantasy." Scalia & Garner, Reading Law at 376. This Court should not engage in that fantasy, and should instead interpret the language in the statute.

C. A one-and-done limitation would lead to absurd, dangerous results.

Not only is Fabick's one-and-done limitation inconsistent with the language of the statute, it would also lead to dangerous and absurd results that conflict with the statute's purposes.

Emergencies are inherently unpredictable. Success in the face of a catastrophe can be short lived: floods are revived by new rainfall, fires pick up with a change of winds, droughts increase with new heat waves, propane shortages get worse with cold snaps, and in the case of viruses, human behavior can cause uncontrolled spread. And when things change, the law empowers the Governor to determine whether there is a new emergency occurrence given facts on the ground.

Many calamities properly give rise to a single state of emergency. But not always. Consider, for example, significant flooding caused by torrential rainstorms. The Governor declares a state of emergency related to the flooding, and two months later, a dam—straining to contain

the floodwaters—breaks, causing more towns to be flooded. Under Fabick's interpretation, the Governor would lack statutory authority to declare a new state of emergency, because the same underlying flooding caused a previous state of emergency.

Fabick's one-and-done limitation would also further contradict the very purpose of emergency powers by presenting Governors with an untenable choice: act quickly and use up the single available order, or wait to see how much worse things get down the line? That too is a dangerous and absurd result. A Governor forced to decide between acting swiftly and preserving the emergency powers in case things deteriorate cannot be squared with the purpose of the law.

Attempting to minimize his dramatic attempt to undercut the Governor's ability to respond to an emergency, Fabick suggests that a Governor would have other means to respond to an emergency, including emergency rulemaking. (Fabick's Br. 26–28.) But rulemaking, including emergency rulemaking, does not apply to the Governor. *See* Wis. Stat. § 227.01(1). And it is for good reason that rulemaking is instead for legislative-type action: it establishes forward-looking standards for future events and occurs with time, deliberation, and finality. Even once an emergency rule is eventually approved (assuming that is achieved), the rule cannot change to respond as facts on the ground develop. It would not be a meaningful alternative to the Governor's critical and immediate authority to declare a state of emergency.

Chapter 323 declares its purpose: to prepare the state "to cope with emergencies" by "establish[ing] an organization for emergency management, conferring upon the governor and others specified the powers and duties provided by this chapter." Wis. Stat. § 323.01(1). Fabick's interpretation runs

directly counter to this purpose in a way that jeopardizes the safety of the Wisconsin people, now and in the future. That interpretation cannot be correct.

Governor Evers' issuance of Executive Order 90 comported with the language and purpose of Wis. Stat. § 323.10. Fabick's arguments to the contrary ignore the statutory terms or read the language out of context, and they ignore the purpose of the law.

III. Wisconsin Stat. § 323.10 does not violate nondelegation principles.

Fabick brings what amounts to a facial challenge to Wis. Stat. § 323.10's authorization for the Governor to issue a state of emergency order. While a state of emergency order triggers the Governor's ability to take further actions and issue orders, Fabick does not raise any specific or applied challenge to acts taken under Emergency Order 90. Instead, his challenge concerns the Governor's ability to determine that a state of emergency exists in the first place.

Section 323.10 is consistent with nondelegation principles. Emergency response is a shared area of power between the executive and legislative branches, Wis. Stat. § 323.10 has an ascertainable purpose, and the Legislature retains the power to act. This Court should not consider Fabick's invitation to strike down a law based on events that have not occurred and may never arise.

A. The degree to which the Legislature can assign a role to another branch depends on whether the power at issue is purely legislative or a shared power between the branches.

"Nondelegation" questions typically address whether the Legislature has given away too much of its core

authority to legislate. To evaluate whether a law has that effect, courts must assess whether the delegated power was exclusively a legislative one, or instead was a shared power between the branches. The test for whether the delegation was appropriate depends on whether the power was a core or shared power.

For core powers, courts look at whether the law at issue gives away that power reserved exclusively to one branch of government. *See Panzer v. Doyle*, 2004 WI 52, ¶ 51, 271 Wis. 295, 680 N.W.2d 666. If the law delegates the Legislature's role in writing the law to another branch, it gives away too much power if it delegates legislative power "without standard or guide." *Olson v. State Conversation Comm'n*, 235 Wis. 473, 293 N.W. 262, 266 (1940). If the law affects a core executive power, it is impermissible if the law "authorizes the complete usurpation or substitution of an important executive function." *State ex rel. Unnamed Petitioners v. Connors*, 136 Wis. 2d 118, 143, 401 N.W.2d 782 (1987), *reversed on other grounds*, *State v. Unnamed Defendant*, 150 Wis. 2d 352, 441 N.W.2d 696 (1989). In those cases, the law is struck down unless the court can "apply a limiting construction to a statute . . . to eliminate the statute's overreach, while maintaining the legislation's constitutional integrity." *Panzer*, 271 Wis. 2d 295, ¶ 67.

But if the power is not clearly within a core area of a particular branch—e.g., where the delegation concerns the "great borderlands of power, which are not exclusively judicial, legislative, or executive"—this Court considers "both the nature of the delegated power and the presence of adequate procedural safeguards, giving less emphasis to the former when the latter is present." *Id.* ¶¶ 50, 55 (citation omitted).

For delegations in areas of shared powers, even a "broad and expansive" delegation of power made without

specific guidance is constitutional if there is an "ascertainable purpose" and "the legislature retains the power to act" on the subject matter. *Panzer*, 271 Wis. 2d 295, ¶¶ 65–70.

B. Emergency response is a shared power between the executive and legislative branches, with the executive playing a key role up-front.

Fabick, and the *Lindoo* amici, simply assume that the power to declare a state of emergency is a core legislative power that the Legislature—through Wis. Stat. § 323.10—has given away. That is incorrect. Responding to an emergency (as opposed to proactive legislation) is a shared power between the executive and legislative branches, with the executive necessarily playing a significant role in the determination that emergency conditions exist.

The Wisconsin Constitution puts the Governor front and center as director during emergency circumstances. Wis. Const. art. V, § 4. He is the commander and chief of our State's military. *Id.* He may convene the Legislature on "extraordinary occasions," and "in case of invasion, or danger from the prevalence of contagious disease at the seat of government," may convene them at another location. *Id.* He has the constitutional duty to "take care that the laws be faithfully executed." Wis. Const. art. V, §§ 1, 4.

Courts have long recognized executive power in emergency response. When affirming the Governor's authority in 1867, for example, this Court quoted the U.S. Supreme Court: "We are all of opinion that the authority to decide when the exigency has arisen belongs exclusively to the president . . . We think this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of congress."

Druecker v. Salomon, 21 Wis. 621, 628 (1867) (quoting *Martin v. Mott*, 25 U.S. 19 (1827)).

Most famously, Justice Jackson recognized that during emergencies a "zone of twilight" of concurrent authority may exist between those the executive and legislative branches, particularly where inaction of one branch require action by another. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642–55 (1952) (Jackson, J., concurring); *see also* Jim Rossi, *State Executive Lawmaking in Crisis*, 56 Duke L.J. 237, 240 (2006) (a governor's constitutional powers to take actions during emergency conditions are "concurrent with the legislature's power to adopt law and to spend public money").

Similarly, Hamilton, stressed that during wartime, the "energy of the Executive is the bulwark of the national security." Federalist No. 70 (Alexander Hamilton). Such energy, he explained, necessarily sits with the executive, because to rest that authority in too many individuals impede or "frustrate the most important measures of government, in the most critical emergencies of the state." *Id.* Legislative consideration about future circumstances is often, intentionally, a slow process: "In the legislature, promptitude of decision is oftener an evil than a benefit." *Id.* John Locke also recognized that because "in some Governments the Law-making Power is not always in being," the executive should have latitude to act for the good of society to address unforeseen, pressing circumstances. John Locke, *Second Treatise of Government*, § 160 (Laslett ed. 1988).

C. Section 323.10 is not an improper delegation of authority: there is an ascertainable purpose and procedural safeguards.

The Governor's authority to issue state of emergency orders rests in the "great borderlands" of power shared between the executive and legislative branches. *Panzer*, 271 Wis. 2d 295, ¶ 50 (citation omitted). Thus, this Court focuses on the presence of an "ascertainable purpose" and procedural safeguards. *Id.* ¶ 67.

Wisconsin Stat. § 323.10 passes these tests.

Its purpose is plain: to enable the Governor to declare a state of emergency to respond to emergency conditions. The statute provides guidelines on when the Governor may do so, consistent with the necessary flexibility inherent in disaster response. *Cf. Martin*, 12 Wheaton 19; *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N.W. 929, 943 (1928) ("It would be practically impossible for the Legislature to prescribe definite standards to meet the varying situations which arise in the administration of the securities act.").

And the plain language of Wis. Stat. § 323.10 gives the Legislature a massive procedural safeguard: the ultimate deciding power, without any need to explain or without any executive ability to override. The order declaring a state of emergency "may be revoked at the discretion" of the "legislature by joint resolution." Wis. Stat. § 323.10. The Legislature accordingly "retains the power to act," decisively and definitively. *Panzer*, 271 Wis. 2d 295, ¶ 70. It cannot possibly be that when the Legislature explicitly has the final say on the matter, it has given away too much power.

Moreover, the purpose of the law, and the procedural safeguards embedded in it, apply with equal force to

subsequent states of emergency that relate to each other in some way. As discussed above, Wis. Stat. § 323.10 grew out of wartime powers, which authorized the executive to recognize and respond to disasters "due to an act or war" or "resulting from enemy action." Wis. Stat. § 21.02 (1955); Wis. Stat. § 21.01–02 (1959). The import of that language is simple: multiple disasters can emerge out of underlying sources, such as prolonged military conflict. And an "enemy action," presents the same immediate threat whether an initial strike or subsequent attack.

In extending the law to other emergent harms, the Legislature reinforced that when a crisis occurs—whether unique or related to prior underlying conditions—the Governor is at the helm, but the Legislature has the final say. People may disagree about whether a subsequent state of emergency declaration is good or bad policy, but the role of the Court is to ensure that there are sufficient substantive and procedural guidelines—not to decide what it believes the balance within shared powers ought to be. Wisconsin Stat. § 323.10 is constitutional.

D. This Court should not declare Wis. Stat. § 323.10 facially unconstitutional based on hypothetical abuses of power.

Fabick does not meaningfully wrestle with the nature of emergency authority, or this Court's nondelegation and separation of powers holdings. Instead, he rests his nondelegation argument primarily on a parade of horribles—on hypothetical abuses of power. This Court should reject his arguments for multiple reasons.

First, consistent with the judicial caution shaping this Court's nondelegation jurisprudence, this Court has repeatedly held that it will not decide the constitutionality of a statute on its face based on hypothetical speculation about

possible abusive actions. *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶¶ 40–41, 393 Wis. 2d 38, 946 N.W.2d 35 (facial constitutional challenges often "rest on speculation about what might occur in the future"; courts should accordingly exhibit caution out of "due respect to the other branches of government," and to ensure that the judiciary does not overstep its own constitutional authority); *see also Panzer*, 271 Wis. 2d 295, ¶ 65 (statutes are presumed constitutional and will only be struck down when shown to be unconstitutional beyond a reasonable doubt).

This observation is nothing new. Over a century ago, this Court observed that it "should not approach the important matter of interpreting our Constitution with the assumption that corruption is rampant and that trust and confidence may not safely be reposed in co-ordinate branches of the government." *State ex rel. VanAlstine v. Frear*, 142 Wis. 320, 125 N.W. 961, 966 (1910).

Fabick and the Legislature amicus argue that the Legislature's explicit, important, authority to revoke a state of emergency order is "illusory" because a hypothetical Governor could override the Legislature's decision to revoke an order by issuing a new state of emergency order the next day. (Fabick's Br. 33; Leg. Amicus Br. 16.) Of course, that has not happened, and this Court would have to strike down a statute as unconstitutional based on rank speculation.[30]

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[30] Indeed, the Legislature amicus makes the remarkable suggestion that this Court should step-in because they fear the Governor would thwart any joint resolution they pass. (Leg. Amicus Br. 16.) This Court should not do the Legislature's work, particularly where the Legislature has not attempted to revoke the existing order, and the question involves significant political, fact-driven determinations.

But moreover, such a scenario would present a fundamentally different question—a question that may very well implicate separation of powers problems. As in *Panzer*, there, the Governor's action may be "circumvent[ing] the procedural safeguards that insure that delegated power may be curtailed or reclaimed by future legislative action." 271 Wis. 2d 295, ¶ 78. Even still, in that scenario, it would be the particular act that would be struck down—not the statute itself. *See id.*[31]

Though Fabick does not actually raise any challenges to the statutory provisions addressing what actions a Governor may take *after* he has issued a state of emergency order, Fabick (and the *Lindoo* amici) nevertheless points to the Governor's authority under Wis. Stat. § 323.12(4) to again raise hypothetical fears of abuse. They suggest that these provisions give the Governor essentially unlimited authority.

But they overlook that emergency statutes must necessarily be flexible to account for unknown and unforeseen circumstances. *See, e.g., Whitman*, 220 N.W. at 943 (railroad safety orders were properly "granted in the most general terms, because the nature of the subject-matter does not permit a more precise definition"). They also overlook that the Governor may take only actions directly related to the underlying emergency

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[31] The *Lindo* amici also point to the possibility of a hypothetical corrupt unified executive and legislature that agree to permit a Governor to declare states of emergency in perpetuity where no emergency exists. That, of course, has not happened here, and if it did, it may present separate problems that could be challenged as to the particular actions and inactions. This Court is not and should not be in the business of striking statutes wholesale based on possible abuses not before the Court.

conditions. Put differently, any actions the Governor takes under Wis. Stat. § 323.12(4)—the "exercise of delegated emergency powers"—must be commensurate with "the extent to which the action taken bears a reasonable relation to the power delegated and to the emergency giving rise to the action." *United States v. Yoshia Intern'l, Inc.*, 526 F.2d 560, 579 (Cust. & Pat. App. 1975). In other words, "[t]he nature of the emergency restricts . . . the means of execution."

Lastly, Fabick argues that the Legislature's ability to revoke a state of emergency order at will is not a meaningful procedural safeguard because "[t]he Legislature does not meet year-round." (Fabick's Br. 33.) That the Legislature may have to convene a special session to act is in no way a meaningful limitation on their tremendous revocation power.[32] Indeed, Fabick's dim view of the Legislature's willingness to convene would be even more problematic if his one-and-done view of the Governor's emergency order power were correct. If the Governor can respond to different manifestations of a crisis with successive executive orders only if the Legislature is willing to meet, what does he or she do if an emergency occurs when the Legislature is not in session?[33]

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[32] The *Lindoo* amici note that the two houses of the Legislature may at times be controlled by different political parties. (*Lindoo* Amicus Br. 23.) Partisan political interest is not the relevant check for separation of powers purposes.

[33] The *Lindoo* amici suggest that this Court should wholesale reject its longstanding nondelegation case law because the U.S. Supreme Court may eventually adopt Justice Gorsuch's dissenting viewpoint in *Gundy v. United States*, 139 S. Ct. 2116 (2019). This Court should not upend its nondelegation case law (1) in an expedited original action where (2) the party seeking the

This Court should only address the question that is before it, based on the facts that are before it.

E. The Michigan case Fabick relies on misapplied the U.S. Supreme Court case law and examined a statute and orders that were different from those here.

Lastly, Fabick contends that the Michigan Supreme Court's recent decision in *Midwest Institute of Health, PLLC v. Governor of Michigan*, No. 161492, 2020 WL 5877599, (Mich. Oct. 2, 2020) (unpublished), supports termination of Governor Evers's state of emergency order. (Fabick's Br. 25–26.) That case is unhelpful.

First, the statute and orders at issue were different from those here. The Michigan statute at issue did not provide the legislature with power to revoke the Governor's state of emergency order, and did not provide any temporal limitation on a particular order. Instead, the statute provided that the effects of an order ceased to be in effect "upon declaration by the governor that the emergency no longer exists." *Midwest Inst. of Health, PLLC*, 2020 WL 5877599, *8–9 (citing MCL 10.31(2) and MCL 10.32). And the numerous executive orders the Michigan Governor issued articulated no distinct factual bases.

Further, the *Midwest Institute* court failed to correctly apply the U.S. Supreme Court precedent it relied upon. It failed to consider whether the power at issue was a core

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action did not even raise nondelegation at all, let alone ask this Court to consider adopting the *Gundy* dissent framework, and (3) the underlying authority at issue is fundamentally different than the discretion afforded the Attorney General to determine who should be required to register as a sex offender, at issue in *Gundy*.

legislative power or was instead one shared between the branches.

Relying on *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001), the Michigan court applied a sliding scale test under which the judiciary balances the amount of power against the discretion conferred. *See Midwest Institute of Health, PLLC*, 2020 WL 5877599, at *14. But the court skipped the threshold constitutional question according to *Whitman*: whether "the statute has delegated *legislative* power to the agency." *Whitman*, 531 U.S. at 472 (emphasis added); *see also id.* at 488 (Thomas, J., concurring) ("[t]he proper characterization of governmental power should generally depend on the nature of the power"). *If* such legislative power is delegated, then courts balance the degree of discretion depending on the scope of the power. *Id.* at 475–76.[34]

The Michigan court failed to analyze whether the emergency response power at issue was a core legislative power or instead a shared power. Thus, the court applied the sliding scale test to an area of shared power. Providing its own view of how to allocate that shared power between the

[34] Relying solely on *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N.W. 738 (1896), the *Lindoo* amici claim that this Court's 1928 *Whitman* case broke from this Court's earlier nondelegation jurisprudence. Though *Dowling* contains language stating that "nothing must be left to the judgment of the electors or other appointee or delegate of the legislature," 65 N.W. at 739, this Court's detailed *Whitman* analysis shows that the quoted *Dowling* language is inconsistent with basic separation of powers principles and precedent. *Whitman*, 220 N.W. at 936–43. Moreover, *Dowling* involved a statute the Court found to place whole discretion on what the law "should be" in the hands of someone other than the Legislature. *Dowling*, 65 N.W. at 741.

branches, the court ran afoul of the important caution that, outside of core-power areas, "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree." *Mistretta v. U.S.*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

In the area of shared powers, a court's judgment call based on the degree of authority given improperly empowers courts, not the legislature, to decide the appropriate division of shared powers. The better path is the one taken by this Court, focusing its substantive analysis largely on the question of whether there has been a delegation of a constitutionally committed area. *See Panzer*, 271 Wis. 2d 295, ¶ 51.

* * * * *

Fabick presents a non-justiciable question that is left to the Legislature. But if this Court does consider his challenge, Emergency Order 90 complies with § 323.10. And the statute itself is consistent with the separation of powers and longstanding non-delegation principles.

CONCLUSION

This Court should conclude that the propriety of Executive Order 90 is a nonjusticiable question. If it does not so hold, it should hold that Wis. Stat. § 323.10 allows the Governor to issue multiple state of emergency orders where they address distinct manifestations of an underlying cause and that Wis. Stat. § 323.10 does not violate nondelegation principles.

Dated this 6th day of November 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,477 words.

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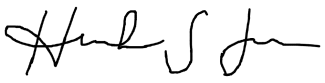

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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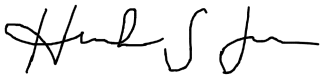

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