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NO. 2020AP1718-OA

In the Supreme Court of Wisconsin

Jeré Fabick

Petitioner,

v.

Tony Evers, in his Official Capacity as the Governor of Wisconsin

Respondent.

PETITIONER'S BRIEF

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INTRODUCTION

The world has been dealing with the effects of the COVID-19 pandemic for most of 2020. There is no question it has had a significant impact on the State of Wisconsin. But a pandemic does not give the executive branch authority to act in violation of the law.

On March 12, 2020, Respondent Governor Tony Evers issued an executive order under Wis. Stat. § 323.10, Wisconsin's Emergency Management statute, declaring a state of emergency in response to the COVID-19 pandemic. Executive Order 72 (Mar. 12, 2020) (Pet. App. 1). Wis. Stat. § 323.10 provides the governor with limited authority to declare a state of emergency in response to a public health emergency. Under the statute, the state of emergency can last only for 60 days and cannot be extended beyond 60 days except by the Wisconsin Legislature through a joint resolution. As such, the state of emergency expired on May 11, 2020.

Rather than following the procedures available under the law to address this pandemic, Governor Evers has instead issued two subsequent executive orders declaring a state of emergency related to COVID-19—Executive Orders 82 and 90—which apply across the entire State of Wisconsin. These orders violate the express limitation in Section 323.10 that “[a] state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution

of the legislature.” Wis. Stat. § 323.10. By issuing multiple orders related to the same public health emergency, Governor Evers has extended the state of emergency well beyond the 60 days permitted by the statute. The existence of an ongoing pandemic does not allow Governor Evers to simply disregard the law. *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶41, 391 Wis. 2d 497, 942 N.W.2d 900 (“[I]n the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.”).

Governor Evers’ actions are impermissible. Petitioner asks this Court to affirm the limited nature of Section 323.10 and declare that Executive Orders 82 and 90 were issued in violation of Wisconsin law and are thus void and unenforceable.

ISSUES PRESENTED

1. Did Governor Evers violate Wis. Stat. § 323.10 when he issued Executive Orders 82 and 90?
2. Alternatively, if Executive Orders 82 and 90 are authorized by Wis. Stat. § 323.10, is the statute an unconstitutional delegation of legislative power to the executive branch?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case is scheduled for oral argument on November 16, 2020. Petitioner respectfully submits that this case warrants publication.

STATEMENT OF FACTS

The policy behind Chapter 323 of the Wisconsin Statutes is to “prepare the state . . . to cope with emergencies resulting from a disaster, or the imminent threat of disaster.” Wis. Stat. § 323.01(1). To do so, Chapter 323 allows the Governor of Wisconsin to temporarily assume extraordinary duties and powers. *See* Wis. Stat. § 323.12(3)–(4). These duties and powers—which include the authority to declare the priority of emergency management contracts over other contracts, “take, use and destroy, in the name of the state, private property for emergency management purposes,” issue orders deemed “necessary for the security of persons and property,” and suspend administrative rules—are triggered by an issuance of an executive order by the governor declaring a state of emergency. Wis. Stat. §§ 323.10, 323.12(4).

Wis. Stat. § 323.10 (“Section 323.10”) allows the governor to declare a state of emergency in response to a public health emergency. A “public health emergency” is defined as:

[T]he occurrence or imminent threat of an illness or health condition that meets all of the following criteria:

- (a) Is believed to be caused by bioterrorism or a novel or previously controlled or eradicated biological agent.
- (b) Poses a high probability of any of the following:
 - 1. A large number of deaths or serious or long-term disabilities among humans.

2. A high probability of widespread exposure to a biological, chemical, or radiological agent that creates a significant risk of substantial future harm to a large number of people.

Wis. Stat. § 323.02(16).

To trigger the emergency procedures in Chapter 323 to address a public health emergency, the governor must issue an executive order “declaring a state of emergency related to public health for the state or any portion of the state.” Wis. Stat. § 323.10. The governor may also “designate the department of health services as the lead state agency to respond to that emergency.” *Id.* The governor cannot declare a state of emergency indefinitely, however. The statute limits it to 60 days “unless the state of emergency is extended by joint resolution of the legislature.” Wis. Stat. § 323.10. No other exception to the 60-day maximum period exists. *Id.*

In February 2020, the novel coronavirus, SARS-CoV-2, began spreading throughout the United States, causing the illness known as COVID-19. On March 12, 2020, Governor Evers, acting pursuant to Section 323.10, issued Executive Order 72, which declared a state of emergency for the State of Wisconsin related to public health in response to the COVID-19 pandemic. Executive Order 72 (March 12, 2020) (Pet. App. 1).

Under Executive Order 72, the Evers administration took numerous unilateral actions affecting all Wisconsin citizens. For instance, the Wisconsin

Department of Health Services issued orders closing schools and restricting public gatherings.¹ Governor Evers also suspended the rules and actions of various administrative agencies.² The state of emergency declared under Executive Order 72 expired on May 11, 2020, 60 days after it was issued. It was not extended by the Wisconsin Legislature.

On July 30, 2020, Governor Evers declared a second state of emergency related to COVID-19 under Section 323.10. Executive Order 82 (July 30, 2020) (Pet. App. 135). Under Executive Order 82, Governor Evers took additional unilateral action, including issuing Emergency Order No. 1. (Pet. App. 138).

On September 22, 2020, Governor Evers declared a third state of emergency related to COVID-19, once again invoking Section 323.10. Executive Order 90 (Sep. 22, 2020) (Pet. App. 142). The state of emergency Governor Evers declared under Executive Order 90—which is currently in effect—is set to expire on November 21, 2020.

¹ See Emergency Order 1 (March 13, 2020) (Pet. App. 3); 4 (March 16, 2020) (Pet. App. 9); 5 (March 17, 2020) (Pet. App. 12); 6 (March 19, 2020) (Pet. App. 15); 8 (March 20, 2020) (Pet. App. 19); 12 (March 25, 2020) (Pet. App. 40); 28 (April 16, 2020) (Pet. App. 91); 31 (April 20, 2020) (Pet. App. 117).

² See Emergency Order 3 (March 15, 2020) (Pet. App. 4); 7 (March 18, 2020) (Pet. App. 17); 9 (March 20, 2020) (Pet. App. 26); 10 (March 21, 2020) (Pet. App. 27); 11 (March 21, 2020) (Pet. App. 28); 13 (March 26, 2020) (Pet. App. 56); 14 (March 27, 2020) (Pet. App. 58); 17 (March 27, 2020) (Pet. App. 60); 18 (March 31, 2020) (Pet. App. 61); 21 (April 3, 2020) (Pet. App. 64); 22 (April 9, 2020) (Pet. App. 73); 23 (April 9, 2020) (Pet. App. 77); 26 (April 13, 2020) (Pet. App. 81); 29 (April 17, 2020) (Pet. App. 112); 30 (April 17, 2020) (Pet. App. 113); 33 (April 24, 2020) (Pet. App. 121); 35 (May 4, 2020) (Pet. App. 123).

All three Executive Orders were issued pursuant to Section 323.10 in response to the same occurrence: the COVID-19 pandemic. (Pet. App. 1, 138, 142). Executive Order 72 was issued to “protect the health and well-being” of Wisconsin residents from the “presence” and “spread” of COVID-19. (Pet. App. 1). Executive Orders 82 and 90 were issued in response to the “growth” of cases caused by the spread of COVID-19 in Wisconsin. (Pet. App. 138, 142).

Petitioner Jeré Fabick is a Wisconsin resident and taxpayer. (Pet. ¶28.) Like every other Wisconsin resident, he is required to follow the mandates of Emergency Order No. 1 and any other orders issued pursuant Governor Evers’ executive orders. Fabick has been subject to Governor Evers’ unlawful use of his emergency powers since Governor Evers issued Executive Order 82 on July 30, 2020.

STATEMENT OF THE RELIEF SOUGHT

Petitioner respectfully requests that this Court:

- a. issue an order permanently enjoining the enforcement of Executive Orders 82 and 90 and all orders and actions stemming from those executive orders;
- b. issue a declaration that Governor Evers’ authority under Section 323.10 to declare a state of emergency in response to a single public health

emergency is limited to a single 60-day period provided under the statute, unless extended by a joint resolution of the Legislature; and

- c. award such other and further relief as is just and proper, including, without limitation and to the extent available, Petitioner's reasonable costs and attorney's fees.

ARGUMENT

I. As a Resident of Wisconsin, Fabick Has Standing to Challenge the Lawfulness of Executive Orders 82 and 90.

This Court has long recognized that taxpayers have standing to seek declaratory and injunctive relief when challenging governmental activities as unlawful. In *Thompson v. Kenosha Cty.*, 64 Wis. 2d 673, 221 N.W.2d 845 (1974) three Wisconsin citizens sought a declaration that a state statute authorizing counties to replace local assessors with a county assessor system was unconstitutional. The defendant, Kenosha County, argued that the plaintiffs did not have standing because the plaintiffs did not allege they were “adversely affected” by the law and thus did not have a “legally protected interest.” *Id.* at 679. This Court rejected that argument, holding that the “complaint stands as a taxpayers’ suit to enjoin illegal governmental expenditure.” *Id.* Although the plaintiffs did not allege that they “suffered any loss,” either “individually or as a class,” their suit was allowed to move forward because “one taxpayer is suing

to vindicate rights of all taxpayers.” *Id.* The court, citing precedent from 1938, noted that

Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss. This is because it results either in the governmental unit(s) having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure. Though the amount of the loss, or additional taxes levied, has only a small effect on each taxpayer, nevertheless it is sufficient to sustain a taxpayer’s suit.

Id. at 680 (quoting *Bechthold v. Waunwatosa*, 228 Wis. 544, 550, 277 N.W. 657 (1938)).

Although the financial impact to the plaintiffs bringing such a taxpayer suit “may be almost infinitesimal,” taxpayer actions nonetheless “have been utilized to contest the validity of a variety of governmental activities accompanied by expenditure of public moneys.” *Thompson*, 64 Wis. 2d at 680 (citation omitted). Indeed, there is a long history of precedent recognizing taxpayer standing to challenge the unlawful expenditure of taxpayer funds.³

³ See, e.g., *Hart v. Ament*, 176 Wis. 2d 694, 700, 500 N.W.2d 312 (1993) (taxpayer challenge to Milwaukee County’s decision to transfer management of the Milwaukee Public Museum to a non-profit, despite evidence such transfer could result in tax savings); *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 436, 424 N.W.2d 385 (1988) (taxpayer challenge to “Frankenstein” veto); *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249 (1988) (taxpayer challenge to statutory scheme for apportionment after annexation of a town); *J.F. Abern Co. v. Wisconsin State Bldg. Comm’n*, 114 Wis. 2d 69, 84, 336 N.W.2d 679 (Ct. App. 1983) (taxpayer challenge seeking to force the Department of Administration to comply with a competitive bidding process and seeking a declaration that the State Building Commission was exercising legislative powers in violation of the Wisconsin Constitution); *Tooley v. O’Connell*, 77 Wis. 2d 422, 439, 253 N.W.2d 335 (1977) (taxpayer challenge to statutory plan for financing city schools from property taxes); *Buse v. Smith*, 74 Wis. 2d 550, 563, 247 N.W.2d 141 (1976) (taxpayer challenge to negative-aid school financing); *State ex rel Sundby v. Adamany*, 71 Wis. 2d

Taxpayer standing to challenge unlawful government action is well-established, as demonstrated by last term's case of *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685. In that original action, taxpayers asserted that Governor Evers exceeded his constitutional authority to partially veto appropriation bills. The State of Wisconsin Defendants did not raise a standing challenge, and this Court did not discuss the question.

Here, Governor Evers and his administration have utilized government funds in promulgating Executive Orders 82 and 90, in that Governor Evers has directed his staffers—public employees—to draft, promote, and enforce the orders. (Pet. App. 137, 145). If Fabick is correct that Governor Evers' orders are unlawful, such actions by the Governor and his administration would necessarily result in wasted public expenditures.

For these reasons, Fabick has standing as a Wisconsin citizen and taxpayer to bring suit and seek declaratory and injunctive relief.⁴

118, 124, 237 N.W.2d 910 (1976) (taxpayer challenge to constitutionality of veto); *Vill. of W. Milwaukee v. Area Bd. of Vocational, Tech. and Adult Ed.*, 51 Wis. 2d 356, 365-66, 187 N.W.2d 387 (1971) (taxpayer challenge to statute allowing for area vocational education districts); *Columbia Cty. v. Bd. of Trs. of Wis. Ret. Fund*, 17 Wis. 2d 310, 116 N.W.2d 142 (1962) (taxpayer challenge to statute mandating all counties join the welfare fund); *Fed. Paving Corp. v. Prudisch*, 235 Wis. 527, 293 N.W. 156 (1940) (taxpayer challenge to statute allowing certain cities to pay funds under contracts later found void).

⁴ As Justice Hagedorn noted in his dissent in *Palm*, individual citizens are better positioned than the Legislature to challenge unlawful executive orders. *Wisconsin Legislature v. Palm*, 391 Wis. 2d 497, ¶240 (“Economic harm to individual citizens and businesses may be real, but it

II. Governor Evers' State of Emergency Declarations under Executive Orders 82 and 90 are Unlawful and Void.

The text of Section 323.10 is clear: “A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature.” When a “public health emergency” such as COVID-19 arises, the governor may declare a state of emergency. Under Section 323.10, the state of emergency ends in one of two ways: (1) the governor’s order is revoked either through legislative action or by the governor himself, and the state of emergency ends; or (2) the governor and the Legislature take no action, the state of emergency lasts for 60 days, and then expires.

There is no dispute that Governor Evers validly declared a state of emergency under Section 323.10 due to COVID-19 through Executive Order 72 from March 12 through May 11, 2020. After Executive Order 72 expired on May 11, 2020, Governor Evers had two choices: (1) seek an extension of the emergency order from the Legislature; or (2) do nothing. Instead, Governor Evers opted to create a third choice not provided for in the statute: multiple unilateral declarations of states of emergency without legislative approval.

This Court recently noted that “[t]he Governor’s emergency powers are

is not harm to the legislature as a constitutional body. And that is the only kind of harm that can establish the standing necessary to raise this claim.”) (Hagedorn, J., dissenting).

premised on the inability to secure legislative approval given the nature of the emergency.” *Palm*, 391 Wis. 2d 497, ¶41. In the case of an unanticipated emergency where “action is needed,” the governor can “declare an emergency and respond accordingly.” *Id.* However, “in the case of a pandemic, which lasts month after month, *the Governor cannot rely on emergency powers indefinitely.*” *Id.* (emphasis added).

The Governor is quite candid in his view that the judicial branch *has no role to play* in adjudicating whether his “third choice” violates Wis. Stat. § 323.10. (Resp’t Resp. at 20-21.) Instead, the Governor views the issue as entirely in the hands of the Legislature. (*Id.* at 22.) If the issue were the validity of Executive Order 72—which was lawfully issued under Wis. Stat. § 323.10—the Governor may be correct. However, the Governor has now put the onus on the Legislature to vote down his unlawful power grab, a remedy that would not actually preclude the Governor from issuing additional unlawful orders. After all, even if the Legislature did revoke Executive Order 90, according to the Governor, there is nothing preventing him from continuing to declare states of emergency under Wis. Stat. § 323.10.

Although Section 323.10 expressly limits Governor Evers’ authority to declare a state of emergency to a period of 60 days, Governor Evers has issued two orders declaring a state of emergency after the time period authorized under

Chapter 323 expired. Instead of requesting an extension of the state of emergency from the Wisconsin Legislature, or acting through the emergency rulemaking process, *Palm*, 391 Wis. 2d 497, ¶¶29, 41 n.14, Governor Evers has unilaterally declared three separate states of emergency related to the COVID-19 pandemic, thereby ignoring the 60-day limit set forth in Section 323.10.⁵ Governor Evers' actions are an unlawful exercise of power in violation of the statute that cannot be permitted to continue.

A. The COVID-19 Pandemic is a Single Public Health Emergency, and Governor Evers May Not Declare a State of Emergency Related to it for More than 60 Days Without Legislative Approval.

The COVID-19 pandemic has existed since February 2020 and is a single public health emergency.⁶ As defined in Chapter 323, a “[p]ublic health

⁵ As this Court stated in *Palm*:

Wis. Stat. § 323.10 authorizes the Governor to invoke special emergency powers for 60 days when the Governor declares an emergency, which Governor Evers did here. We note that 60 days is more than enough time to follow rulemaking procedures pursuant to Wis. Stat. § 227.24. Therefore, emergency circumstances do not justify Palm's failure to follow the Administrative Procedures Act. However, Palm claims that neither rulemaking nor time-constraints inherent to emergency powers restrict her power. That assertion is contrary to the law in the State of Wisconsin.

Palm, 391 Wis. 2d 497, ¶41 n.14.

⁶ See 2019 Novel Coronavirus Outbreak – Update From NIAID's Anthony Fauci, MD, JOURNAL OF AMERICAN MEDICINE Editor Howard Bauchner, M.D., February 7, 2020 interview with Anthony Fauci, M.D., available at <https://edhub.ama-assn.org/jn-learning/audio-player/18217492>.

emergency” is “*the* occurrence or imminent threat of *an* illness or health condition.” Wis. Stat. § 323.02(16) (emphasis added). Moreover, the definition of “public health emergency” includes three forms of “biological agent[s]”: novel, previously controlled, or previously eradicated. Wis. Stat. § 323.02(16)(a). Governor Evers cannot seriously argue that SARS-CoV-2 was controlled or previously eradicated. And it was “novel” only in March when the Governor issued Executive Order 72. Governor Evers, in other words, promotes an interpretation of the statute that grants power to him even where he *admits* that the statutory requirements for a state of emergency do not exist. As such, Governor Evers may not declare a state of emergency lasting more than 60 days, unless approved by the Legislature. Any argument claiming that the current situation is a “new” public health emergency is unmoored from the facts.⁷

This Court has already recognized that the COVID-19 pandemic is a single occurrence that cannot support a state of emergency lasting indefinitely. *Palm*, 391 Wis. 2d 497, ¶41 (“But in the case of a pandemic, which lasts month

⁷ Governor Evers’ administration has implicitly conceded as much. On Tuesday, October 6, 2020, during an update on the pandemic, DHS Secretary-designee Palm stated that the goal in March was to “flatten the curve” and protect “the healthcare system.” She went on to say that the situation is “worse” now, which requires Wisconsin “to think like” it did back in March. *DHS Secretary-designee Palm: ‘We are in a worse place than we were in March’*, WTMJ-4 Milwaukee (Oct. 6, 2020), available at <https://www.tmj4.com/news/coronavirus/dhs-secretary-designee-palm-we-are-in-a-worse-place-than-we-were-in-march>.

after month, the Governor cannot rely on emergency powers indefinitely”). Likewise, in reversing a district court’s decision to alter Wisconsin’s election laws six weeks before the election, the United States Court of Appeals for the Seventh Circuit held that COVID-19 was not a new event requiring such a “last-minute” change to election laws: “A last-minute event may require a last-minute reaction. But it is not possible to describe COVID-19 as a last-minute event. The World Health Organization declared a pandemic seven months ago, the State of Wisconsin closed many businesses and required social distancing last March, and the state has conducted two elections (April and August) during the pandemic.” *Democratic Nat’l Comm. v. Bostelmann*, No. 20-2835, 2020 WL 5951359, at *2 (7th Cir. Oct. 8, 2020).

Despite this fact, Governor Evers has issued three executive orders addressing the same pandemic which use remarkably similar language to describe the public health emergency. In Executive Order 72, Governor Evers found that “a novel strain of the coronavirus was detected” that had spread across the country. E.O. 72. (Pet. App. 1). Since the arrival of the virus, Wisconsin state government had been attempting to stop its spread and “to prepare for the impacts it may have on the state.” *Id.* To do so, Governor Evers believed it necessary for the state to “avail itself of all resources needed to respond and to contain the presence of COVID-19 in the State.” *Id.* The

goal of Executive Order 72, then, was to “protect the health and well-being” of the residents of Wisconsin from the virus.

Although Executive Orders 82 and 90 provide additional detail about the ongoing COVID-19 pandemic, both share the same overriding purpose as Executive Order 72 and use identical language to describe that purpose: protection of the “wellbeing” of residents from COVID-19. E.O. 82, 90 (Pet. App. 135, 142). Further, like Executive Order 72, both subsequent orders adopt the same means of responding to the emergency: containment. Thus, Executive Order 82 calls for “contain[ing] the presence of COVID-19” and Executive Order 90 declares it necessary to “take additional actions to contain the spread of this deadly disease.” E.O. 82, 90 (Pet. App. 135, 142).

B. The Plain Language of Section 323.10 Prevents Governor Evers From Extending a State of Emergency Beyond 60 Days in Response to a Single Public Health Emergency.

The language in Section 323.10 is clear—the governor cannot extend a declaration of a state of emergency based on a public health emergency beyond 60 days, unless an extension is authorized by a joint resolution of the Legislature. Nevertheless, Governor Evers has ignored the limitations of the statute by twice issuing orders declaring a state of emergency without approval “by joint resolution of the legislature.” Wis. Stat. § 323.10. Governor Evers’ Executive Orders 82 and 90 are unlawful.

The statutory interpretation process is well established and begins by examining a statute's plain language. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "If the meaning of the statute is plain," a court's inquiry is finished. *Id.* "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.*

Context is also a key factor in discerning a statute's meaning. *Id.*, ¶46 ("Statutory 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.") If a court's initial analysis yields "a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Id.*

The plain language of Section 323.10 is unambiguous: if the governor "determines that a public health emergency exists," he may issue "an executive order declaring a state of emergency related to public health." Wis. Stat. § 323.10. Once declared, however, the "state of emergency shall not exceed 60 days, *unless* the state of emergency is extended by joint resolution of the

legislature.” Wis. Stat. § 323.10 (emphasis added). No other exception exists under the statute.

The plain meaning of Section 323.10 is further supported by the context in which it occurs. Chapter 323 instructs the government on how to respond to a *single* public health emergency, including when the governor can assume emergency powers. Wis. Stat. § 323.02(16) (defining public health emergency as “*the* occurrence . . . of *an* illness or health condition”) (emphasis added); § 323.12(3) (defining the governor’s duties during an emergency); § 323.12(4) (defining a governor’s powers during an emergency). These emergency powers are limited to a short, fixed time period in response to a single public health emergency. Wis. Stat. § 323.10. To interpret the statute otherwise would allow Governor Evers to invoke multiple states of emergency in response to a single public health emergency, something this Court has already indicated is impermissible. *Palm*, 391 Wis. 2d 497, ¶41 (“[I]n the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely.”) To allow rolling 60-day emergency declarations would ignore Section 323.10’s unambiguous language and undermine the policy behind Chapter 323.

Such an interpretation is consistent with the principle of statutory interpretation known as *expressio unius est exclusio alterius*, which provides “the

expression of one thing excludes another.” *Benson v. City of Madison*, 2017 WI 65, ¶32, 376 Wis. 2d 35, 897 N.W.2d 16. Under this canon, when the legislature specifically enumerates certain exceptions to a statute, a court is to presume the legislature intended to exclude other exceptions. *Id.*; see also *Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 171, 558 N.W.2d 100 (1997) (“It is clear that the legislature knew how to accomplish this goal, since it included similar qualifying language in this very same statute.”). Here, there are numerous ways a declaration of an emergency could be extended, but the Legislature chose to limit a single state of emergency to 60 days “unless the state of emergency is extended by joint resolution of the legislature.” Section 323.10. That the Legislature omitted other methods of extending an emergency—such as by unilateral implementation by the governor—is an indication the Legislature chose not to include such a method. Governor Evers must respect that decision.⁸

⁸ Although the language of the statute is clear, the legislative history of Section 323.10 also confirms that Governor Evers may not extend a state of emergency beyond 60 days by issuing multiple orders. See *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶51, 271 Wis. 2d 633, 681 N.W.2d 110 (“[L]egislative history is sometimes consulted to confirm or verify a plain-meaning interpretation.”). Section 323.10 is based on the Model State Emergency Health Powers Act (MSEHPA) (the “Model Act”), which provides that a state governor may renew an emergency declaration as long as the emergency exists. See 2001 Wis. Act 109, § 340L; 2001 Assembly Bill 850; MSEHPA § 303(a); § 305(b).

Wisconsin explicitly rejected this model, opting instead to provide the Legislature alone with the power to extend a state of emergency. Wis. Stat. § 323.10. Wisconsin courts have repeatedly recognized that where the Legislature considers and then deliberately excludes

Just one month ago, Michigan’s Supreme Court addressed an emergency management statute that, like Wisconsin’s, imposes a temporal limitation on the governor’s exercise of emergency powers. *Midwest Inst. of Health, PLLC v. Gov. of Mich.*, No. 161492, 2020 WL 5877599, __ N.W.2d __ (Mich. Oct. 2, 2020). Michigan’s statute—known as the Emergency Management Act of 1976—allows the governor to issue an executive order declaring a state of emergency “if he or she finds that an emergency has occurred.” MCL 30.403(4). After 28 days, the state of emergency is “terminated, unless a request by the Governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature.” MCL 30.403(4).

Relying on the statutory authority provided by the Michigan Emergency Management Act, Michigan Governor Gretchen Whitmer issued an executive order on March 10, 2020, declaring a “state of emergency” in Michigan as a result of COVID-19. *Midwest Inst. of Health*, 2020 WL 5877599 at *4. Once again relying on the Emergency Management Act, Governor Whitmer issued an executive order on April 1, 2020, declaring another “state of emergency” based on COVID. *Id.* Governor Whitmer sought, and received, legislative

a particular statutory provision, it is understood that the statute was not intended to include that provision. *See, e.g., State v. Hall*, 207 Wis. 2d 54, 89, 557 N.W.2d 778 (1997); *see also, e.g., Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 171–72, 558 N.W.2d 100 (1997);

approval to extend the state of emergency through April 30, 2020. *Id.* Nevertheless, Governor Whitmer—without legislative approval—issued another executive order on April 30, 2020, declaring a third COVID state of emergency under the Emergency Management Act. *Id.*

A group of healthcare providers who were prohibited by Governor Whitmer's orders from performing non-essential medical procedures and a patient prohibited by the same orders from undergoing knee replacement surgery sued in federal court. *Id.* The United States District for the Western District of Michigan certified to the Supreme Court of Michigan the question of whether the "Governor has had the authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 pandemic."⁹ *Id.*

Examining the plain language of MCL 30.403, the Michigan Supreme Court unanimously held that the Emergency Management Act's 28-day

⁹ The district court also certified the question of whether the statutes at issue "violate the Separation of Powers and/or the Nondelegation Clauses of the Michigan Constitution." *Midwest Inst. of Health, PLLC v. Gov. of Mich.*, No. 161492, 2020 WL 5877599, at *4, __ N.W.2d __ (Mich. Oct. 2, 2020). The Supreme Court of Michigan held by a 4-3 vote that a different statute, the Emergency Powers of the Governor Act of 1945, violated the Michigan Constitution because it purports to delegate to the executive branch the legislative powers of state government—including its plenary police powers—and to allow the exercise of such powers indefinitely." *Id.* at *24. Petitioner Fabick has not asserted a constitutional challenge in his Petition to this Court, but, as outlined in Section IV, *infra*, any interpretation of Section 323.10 that would permit the governor to declare states of emergency in perpetuity would pose serious constitutional issues as the Supreme Court of Michigan found. *See Palm*, 391 Wis. 2d 497, ¶31, ("In addition, we employ the constitutional-doubt principle. That is, we disfavor statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration.").

limitation does not grant the Michigan Governor the authority to declare a state of emergency beyond the 28-day period established in the statute without legislative approval:

Because the Legislature here did not approve an extension of the “state of emergency” or “state of disaster” beyond April 30, 2020, the Governor was required to issue an executive order declaring these to be terminated. While the Governor did so, she acted immediately thereafter to issue another executive order, again declaring a “state of emergency” and “state of disaster” under the EMA for the identical reasons as the declarations that had just been terminated—the public-health crisis created by COVID-19. Given that MCL 30.403(3) and (4) required the Governor to terminate a declaration of a state of emergency or state of disaster after 28 days in the absence of a legislatively authorized extension, we do not believe that the Legislature intended to allow the Governor to redeclare under the EMA the identical state of emergency and state of disaster under these circumstances. To allow such a redeclaration would effectively render the 28-day limitation a nullity.

Id. at *6.

This Court has turned to decisions from other state supreme courts for guidance in interpreting similar statutes.¹⁰ The Supreme Court of Michigan correctly (and unanimously) interpreted a similar statute to hold that its Governor does not have the power to unilaterally re-issue state of emergency orders for the same emergency *ad infinitum*. The language of Wisconsin’s statute is substantially similar, and the logic employed by the Michigan Supreme

¹⁰ See e.g., *Bank Mut. v. S.J. Boyer Const., Inc.*, 2010 WI 74, ¶62, 326 Wis. 2d 521, 785 N.W.2d 462; *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶39, 312 Wis. 2d 1, 754 N.W.2d 439; see also *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶103, 373 Wis. 2d 543, 892 N.W.2d 233 (Bradley, A.W., J., dissenting) (“Looking at how other states have interpreted similar statutory language also confirms our plain meaning interpretation.”).

Court is equally applicable here. This Court should likewise apply the plain language of Section 323.10 and hold that the Governor of Wisconsin does not have the power to unilaterally issue rolling emergency declarations without legislative approval for the same underlying emergency.

C. Governor Evers Has Other, Lawful Means By Which He May Address the COVID-19 Pandemic.

Governor Evers is of course not powerless to combat the spread of the virus once the 60 days have elapsed, and this Court has given Governor Evers direction on the appropriate means of doing so within the bounds of the law. Specifically, he could avail himself of the emergency rulemaking procedures found in the Wisconsin Statutes. “We note that 60 days is more than enough time to follow rulemaking procedures pursuant to Wis. Stat. § 227.24.” *Palm*, 391 Wis. 2d 497, ¶41 n.14. The Court’s admonition is all the more pertinent here as Executive Order 82 came more than four *months* after Executive Order 72, which was more than enough time to follow the process established in Wis. Stat. § 227.24. E.O. 82 (Pet. App. 135).

After this Court’s decision in *Palm*, Governor Evers briefly started, but then stopped the rulemaking process, stating “it’s not worth our time.” Sean Ryan, *Governor Evers Drops COVID-19 Rule-Making Proposal to State Legislature*,

Won't Try Again, MILW. BUS. J., May 18, 2020.¹¹ Regardless of his opinion of the utility of the rulemaking process, Governor Evers' priorities do not change the limits that Section 323.10 places on his power to declare a state of emergency.

There are also other means outside the rulemaking process by which Governor Evers can address the COVID-19 pandemic. For instance, Governor Evers can seek an extension of his state of emergency from the Legislature. Governor Evers could also convene the Legislature and make a case for the Legislature to institute emergency relief. *See* Wis. Const. art. V, § 4 (noting that the Governor “shall have the power to convene the legislature on extraordinary occasions” including “danger from the prevalence of contagious disease.”). If the Legislature declines to do so, then the primary policymaking branch of the government does not believe such an act is necessary. *See Koschkee v. Taylor*, 2019 WI 76, ¶20, 387 Wis. 2d 552, 929 N.W.2d 600 (“Legislative change and control of rulemaking are within the constitutional power of the legislature.”).

Governor Evers' evident desire to address the COVID-19 pandemic is of course understandable. But he must follow the law to do so. And because he has exercised his limited authority under Section 323.10, he may no longer

¹¹ Available at <https://www.bizjournals.com/milwaukee/news/2020/05/18/evers-drops-rule-making-proposal-to-legislature.html>.

use the temporary powers granted therein and must instead work with the Legislature. *See Palm*, 2020 WI 42, ¶66 (Bradley, J., concurring) (“The people of Wisconsin never consented to any elected official . . . having the power to create law, execute it, and enforce it.”) (Emphasis original). Consequently, Governor Evers’ second and third Executive Orders declaring states of emergency related to COVID-19 exceed his authority under Section 323.10 and are unlawful and void.

III. The Plain Language of Section 323.10 Avoids an Interpretation that Raises Constitutional Doubts.

This Court should adopt Fabick’s plain reading of Section 323.10 to avoid an interpretation of Section 323.10 that raises constitutional doubts. “Constitutional avoidance is a subset of the axiom that ‘[a]n appellate court should decide cases on the narrowest possible grounds.’” *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 2018 WI 75, ¶160, 382 Wis. 2d 496, 914 N.W.2d 21 (Gableman, J., concurring) (citing *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997)). “Consistent with this rule is the recognition that a court will not reach constitutional issues where the resolution of other issues disposes of an appeal.” *Id.*

Moreover, when a court is “given a choice of reasonable interpretations of a statute, [it] must select the interpretation that results in constitutionality”

of the statute. *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶24, 357 Wis. 2d 469, 851 N.W.2d 262. This is so because this Court “disfavor[s] statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration.” *Palm*, 391 Wis. 2d 497, ¶31. Here, the only reasonable interpretation of Section 323.10 is that Executive Orders 82 and 90 are unlawful. To adopt Governor Evers’ reading of Section 323.10 would not only distort the meaning of the law, but would force this Court to unnecessarily confront the question of the statute’s constitutionality.

For the reasons articulated above, this Court does not need to determine whether Governor Evers’ interpretation of Section 323.10 is an unlawful delegation of legislative authority because the plain reading of Section 323.10 prevents the Governor from engaging in an unlawful exercise of legislative power. However, pursuant to this Court’s request, Fabick will address whether Section 323.10 is an unconstitutional delegation of legislative power to the executive branch if Executive Orders 82 and 90 are authorized by the statute.

IV. If Executive Orders 82 and 90 are Authorized by Section 323.10, Then the Statute is an Unconstitutional Delegation of Legislative Power to the Executive.

In its order granting Fabick’s request for an original action, this Court ordered the parties to consider whether a holding that Executive Orders 82 and 90 are authorized would result in an unconstitutional delegation of power from

the legislative branch to the executive branch. For the reasons stated above, Fabick does not believe the Court needs to resolve this question. Nevertheless, a contrary interpretation would void all procedural safeguards within Section 323.10, causing a constitutional violation.

The Wisconsin Constitution establishes three separate branches of government. Wis. Const. art. IV, V, VII. “By vesting certain powers exclusively within each of the three co-equal branches of government, the drafters of the Wisconsin Constitution recognized the importance of dispersing governmental power in order to protect individual liberty and avoid tyranny.” *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶31, 387 Wis. 2d 511, 10 N.W.2d 180.

Legislative power is vested in the legislature. Wis. Const. art IV, § 1 (“The legislative power shall be vested in a senate and assembly.”); *see also Koschkee*, 2019 WI 76, ¶11 (“Powers constitutionally vested in the legislature include the powers: ‘to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; [and] to fix the limits within which the law shall operate.’”) (citation omitted); *Palm*, 2020 WI 42, ¶91 (Kelly, J., concurring) (“The executive’s constitutionally-vested authority consists of executing the laws, not creating them . . .”). Legislative authority includes “the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to ‘prescrib[e] the rules by which

the duties and rights of every citizen are to be regulated,’ or the power to ‘prescribe general rules for the government of society.’” *Koschkee*, 2019 WI 76, ¶92 (Kelly, J., concurring) (citation omitted).

Wisconsin courts have, in certain instances, allowed the Legislature to delegate its power to the executive branch. *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971). However, the Legislature must limit this delegation so that its purpose is “ascertainable” and there are “procedural safeguards” to ensure the executive branch acts “within that legislative purpose.” *Id.*; see also *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 228 N.W.2d 684 (1983) (noting the Legislature has instituted “sufficient procedural safeguards” to prevent the governor and other administrative officials from acting outside the legislative purpose of a statute for funding state deficits, including a limit on the value of “operating notes” issued to fund an operating deficit and review by a legislative committee before the operating notes are issued).

Here, the governor’s ability to issue an executive order declaring a state of emergency in response to a single public health emergency, and then issue unilateral orders under that executive order that restrict the conduct of private persons within the State of Wisconsin, is a delegation of legislative power. See Wis. Stat. § 323.01(1) (Declaring that the policy behind Wisconsin Statutes

Chapter 323 is “[t]o prepare the state and its subdivisions to cope with emergencies resulting from a disaster, or the imminent threat of a disaster, it is declared to be necessary to establish an organization for emergency management, *conferring upon the governor* and others specified the powers and duties provided by this chapter.” (Emphasis added).).

There are two, and only two, procedural safeguards in Section 323.10: (1) the state of emergency expiring after 60 days; or (2) the Legislature voting to rescind the state of emergency. (Resp’t Resp. at 19-27, 33.) Should this Court accept Governor Evers’ interpretation of Section 323.10, then these two safeguards will be rendered illusory, and the statute will represent an unconstitutional delegation of legislative power to the governor.

As to the first guardrail, if the Court accepts Governor Evers’ interpretation of Section 323.10, then the statute no longer contains a 60-day limit for a state of emergency relating to the same “public health emergency.” Though each “state of emergency” would be nominally limited to 60 days, the ability to issue an unlimited number of executive orders nullifies that limitation. This is not mere conjecture—Governor Evers has already issued three executive orders related to the COVID-19 pandemic. (Resp’t Resp. at 29.) In fact, Executive Order 90 was issued while Executive Order 82 *was still in effect*. Moreover, Governor Evers argues that he is able to issue new emergency orders

because a subsequent “wave constitutes a new, distinct, emergency warranting raising [*sic*] the need for a new state of emergency order.” (*Id.* at 36.) Such an interpretation functionally eliminates the 60-day limitation.

If Governor Evers is correct in his reading of Section 323.10, the second safeguard against abuse of executive power likewise falls by the wayside. The Legislature’s statutory ability to revoke the state of emergency would be rendered illusory because, under Governor Evers’ interpretation, he may issue a new declaration the next day after a joint resolution is passed. The Legislature does not meet year-round. *See* Wis. Stat. § 13.02 (“The legislature shall meet annually.”) And during those parts of the year that the Legislature is not in session, Governor Evers implies he may re-issue executive orders *even if* the Legislature previously revoked it. The result both highlights the absurdity of Governor Evers’ interpretation of Section 323.10 and shows why, if adopted, that interpretation would result in an unconstitutional delegation of legislative power to the executive.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court grant the relief requested in this Brief.

Dated this 2nd day of November, 2020.



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CERTIFICATE OF SERVICE

A copy of this Brief is being served upon all parties via e-mail and first-class mail.

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CERTIFICATION

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

Proportional serif font: Min. printing resolution of 20 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 34 pages and 5938 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)(f)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

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