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NO. 2020AP1718 - 0A

In the Supreme Court of Wisconsin

Jeré Fabick

Petitioner,

v.

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

Respondent.

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Fabick's petition presents a simple issue: May Governor Evers ignore the 60-day time limitation in Wis. Stat. § 323.10 ("Section 323.10") and issue multiple executive orders declaring a state of emergency based on a single public health emergency? The plain language of Section 323.10 is clear that he may not. But Governor Evers asks this Court to hold otherwise by ignoring the statutory language, which explicitly limits a state of emergency to 60 days "unless that state of emergency is extended by joint resolution of the legislature."

Similarly, the Governor also asks this Court to ignore the wording of his own executive orders and to assume that Executive Orders 82 and 90 were meant to address a "disaster." But those orders explicitly rested their authority on a "public health emergency," not a "disaster."

Both claims badly miss their mark, as a recent decision from the Michigan Supreme Court illustrates. There, when faced with the same issue under a similarly-worded statute, the Michigan Supreme Court unanimously held that Michigan's emergency management statute—which contained a 28-day time limit—prohibited the Michigan Governor from unilaterally extending the state of emergency in that state. This Court should likewise follow the

language of Section 323.10 and declare that Executive Orders 82 and 90 are unlawful and void.

ARGUMENT

I. Fabick's Challenge to Executive Orders 82 and 90 is Subject to Judicial Review.

Fabick has petitioned this Court and asked it to declare that Governor Evers' Executive Orders 82 and 90 are unlawful and void because they were issued in violation of Section 323.10. In response, the Governor asserts that Fabick's challenge to Executive Orders 82 and 90 is barred because he has no private cause of action under Section 323.10, and thus cannot meet the first prong of justiciability. (Resp. at 10.) Instead, according to the Governor, the legality of Executive Orders 82 and 90 is a political question that can be resolved only by the legislative and executive branches, and that this Court has no authority to address the legality of his executive orders. (Id.)

To support this argument, the Governor points to several cases describing the judiciary's limited role in reviewing political questions. (Resp. at 11.) These cases, Governor Evers claims, demonstrate that "an individual cannot seek judicial review of whether the statutory condition for an emergency are met." (Id.) Fabick is not challenging the propriety of Executive Order 72. Fabick agrees that COVID-19 was a public health emergency under Wis. Stat.

§ 323.02(16). (Pet. Br. 14.) Instead, the issue is whether the Governor's actions under Section 323.10, specifically his issuance of Executive Orders 82 and 90, are lawful, or whether they violate the time limitation in the statute.

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.

Fabick does not dispute that the Governor validly declared a state of emergency due to COVID-19 under Executive Order 72 from March 12 through May 11, 2020. After Executive Order 72 expired on May 11, 2020, the Governor had two choices: (1) seek an extension of the emergency order from the Legislature; or (2) do nothing. Section 323.10. Instead, the Governor opted to create a third choice not provided for in the statute: continual and unilateral declarations of emergency.

The Governor is quite candid in his view that the judicial branch *has no role to play* in adjudicating whether his "third choice" violates Section 323.10.

(Resp. at 10-12.) Instead, the Governor views the issue as entirely in the hands of the Legislature.¹ (Id.) But the Governor cites to *federal* cases involving discretionary grants of authority over foreign affairs and national security. (Resp. at 11.) Those cases are irrelevant here. Section 323.10 establishes precise requirements for the declaration of a public health emergency and a precise length of time that such emergency may last without legislative approval.

As such, those cases do not stand for the proposition that courts may never be involved in construing statutes involving emergency declarations. For example, in *U.S. v. Amirnasimi*, the court assumed that a national emergency had been properly declared, but then analyzed whether, under the statute, that emergency “terminates automatically when Congress fails to meet in conformance with the language” of the statute. 645 F.3d 564, 578 (3rd Cir. 2011). And, unlike the statute there, Section 323.10 is explicit on how long the Governor’s authorization may last for the same underlying public health emergency.

The Governor’s unlawful orders directly affect all Wisconsin residents, including Fabick, who are required to follow any orders issued pursuant to the

¹ Governor Evers’ position is also remarkable given that, in *Legislature v. Palm*, the Governor’s executive branch appointees argued that the Legislature did not have standing to challenge the Safer at Home Orders. *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶12, 391 Wis. 2d 497, 942 N.W.2d 900

Governor's executive orders. And even the Governor concedes that individuals may challenge "an emergency measure based on a particular burden it imposes." (Resp. at 11.) In bringing his claim, Fabick is asking the judiciary to exercise its judgment as to the legality of the Governor's actions because of the burden those actions impose on him and the rest of the state. The judiciary is the only branch that can resolve this issue.

II. Fabick Meets Wisconsin's Standing Requirement, as Taxpayer Standing in Wisconsin Courts is Not a Difficult Hurdle to Clear.

The Governor also asserts that Fabick cannot meet the third element of justiciability, namely, that he does not have standing to allege a claim of right under Section 323.10. (Resp. at 12.) As set forth below, standing requirements in Wisconsin state courts are quite relaxed, and Fabick has sufficiently established that he has taxpayer standing to maintain a claim for declaratory relief.

"Unlike in federal courts . . . standing in Wisconsin is not a matter of jurisdiction, but of sound judicial policy." *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855. Indeed, "[t]he law of standing in Wisconsin is construed liberally, and even an injury to a trifling interest may suffice." *Id.* (citation omitted). There is no Article III-type standing requirement to bring a case in a Wisconsin state court, as Wisconsin courts are

courts of general jurisdiction. *See State v. Weidman*, 2007 WI App 258, ¶4, 306 Wis. 2d 723, 743 N.W.2d 854. The threshold for standing in Wisconsin state court is “ensuring that the issues and arguments presented will be carefully developed and zealously argued, as well as informing the court of the consequences of its decision.” *McConkey*, 326 Wis. 2d 1, ¶16.

Taxpayer standing in Wisconsin is quite broad. The financial impact on the taxpayer bringing the suit “may be almost infinitesimal.” *Thompson v. Kenosha Cty.*, 64 Wis. 2d 673, 680, 221 N.W.2d 845 (1974). “Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss.” *S.D. Realty Co. v. Sewerage Comm’n of City of Milwaukee*, 15 Wis.2d 15, 22, 112 N.W.2d 177 (1961) (emphasis added).

Governor Evers argues that taxpayer standing cannot be met here because Fabick “has not shown any specific pecuniary loss.” (Resp. at 13.) The Governor is wrong on the law. A taxpayer bringing a claim is not required to explain why the expenditure of funds are impacting him personally. The Wisconsin Court of Appeals has succinctly explained the breadth of this concept:

Defendants contend that Ahern and H & H lack standing because they have not shown that they, as taxpayers, have suffered an actual loss through defendants’ actions, and because they joined this action as merely nominal parties at the [original plaintiff’s] request. Ahern and H & H have standing. Wisconsin taxpayers have standing to contest the constitutionality of statutes

which result in public expenditures. How or why a taxpayer came to be a party is irrelevant to the standing issue.

J.F. Abern Co. v. Wisconsin State Bldg. Comm'n, 114 Wis. 2d 69, 84, 336 N.W.2d 679 (Ct. App. 1983) (citations omitted).

Fabick has standing as a taxpayer to challenge the issuance of Executive Orders 82 and 90.

III. Section 323.10 Does Not Permit the Governor to Issue Executive Orders Declaring a State of Emergency in Excess of 60 Days in Response to the Same Public Health Emergency.

Much of the Governor's statutory interpretation argument relies on his claim that Fabick has ignored the definition of "disaster" under Wis. Stat. 323.02(6). (Resp. at 14, 16.) This is incorrect.

Fabick did not "dispute" whether COVID-19 is a "disaster" because the Governor's executive orders did not proclaim COVID-19 to be a disaster. Executive Orders 72, 82, and 90 all proclaimed the COVID-19 pandemic to be a *public health emergency*—not a disaster. (Pct. App. 1, 137, 145 ("I, Tony Evers . . . Proclaim that a public health emergency, as defined in Section 323.02(16) of the Wisconsin Statutes, exists for the State of Wisconsin)). Thus, it is irrelevant whether the underlying conditions upon which the Governor issued his executive orders constituted a "disaster," because that is not the basis for his executive orders. Despite the fact that his own proclamations declared a state

of emergency based on a public health emergency, the Governor's argument focuses on Chapter 323's definition of disaster.²

For instance, the Governor claims that the use of the word "occurrence" in Chapter 323's definition of "disaster" allows the Governor to issue "separate state of emergency orders for disasters even where those situations relate to a common underlying cause." (Resp. at 14.) This argument fails for two reasons. First, the Governor has never declared COVID-19 to be a "disaster" under Wis. Stat. § 323.02(6). The Governor has only declared the spread of COVID-19 in the state of Wisconsin to be a "public health emergency" under Wis. Stat. § 323.02(16).³ (Pet. App. 1, 137, 145.)

² Governor Evers' decision to label COVID-19 a "public health emergency" rather than a "disaster" was not just appropriate, but the only logical definitional label the Governor could have selected when invoking his emergency powers under Section 323.10. The definition of "disaster" clearly contemplates the examples of fires, floods, or other natural disasters conjured up by the Governor in his response. Indeed, the definition includes references to threats to "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). "Statutory language is interpreted in context, and it must be understood in relation to surrounding language. . . ." *In re Samuel J.H.*, 2013 WI 68, ¶20, 349 Wis. 2d 202, 833 N.W.2d 109. Although COVID-19 has upended daily life in ways previously unimaginable, it cannot be said that the virus represents a threat to physical property in the manner set forth in Chapter 323's definition of "disaster." And even if the Governor had declared a "disaster" based on COVID, the same problem would exist because the statute still refers to "a[n] . . . occurrence" and allows the Governor to declare a state of emergency based on "an emergency" resulting from "a disaster," which is subject to the same 60-day time limit.

³ Governor Evers also points to several executive orders issued by Governor Scott Walker as evidence that Executive Orders 82 and 90 are consistent with historical practice. (Resp. at 17-18.) These orders are distinguishable from Executive Orders 82 and 90. *See, e.g.*, Executive Order No. 120 (Oct. 25, 2013) (declaring a "natural disaster" in response to a propane shortage). Regardless, the now-expired orders have no bearing on the issue before this Court.

Second, the argument ignores Chapter 323's definition of a public health emergency. A public health emergency is:

[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). Section 323.10 then provides that the Governor can issue an executive order declaring a single state of emergency based on a public health emergency, but limits the time period for such a state of emergency to 60 days absent an extension approved by the legislature.⁴

Governor Evers claims that the purpose of the 60-day limitation in Section 323.10 is to “prevent a long-term emergency order based on a short-term emergency.” (Resp. at 19.) This is contradicted by the plain language of

⁴ The Governor claims that Fabick is arguing that the use of the word “novel” “limits the Governor’s ability to respond to disasters involving public health unless they are brand new problems.” (Resp. at 20.) This does not accurately reflect Fabick’s argument. Fabick is simply noting that the Governor cannot claim that a new public health emergency occurred when he issued Emergency Orders 82 and 90, because the Governor was responding to the same novel virus underlying a single public health emergency he declared in Emergency Order 72, which expired after 60 days on May 11, 2020.

Section 323.10, which allows the Governor to declare one state of emergency in response to a single public health emergency. § 323.10 (“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” (Emphasis added)); Wis. Stat. § 323.02(16) (Defining a public health emergency as “*the* occurrence or imminent threat of *an* illness or health condition.”) (Emphasis added)).

The Governor further warns that Fabick’s interpretation of Section 323.10 will lead to “dangerous and absurd” results because he will be rendered powerless in the face of an emergency. (Resp. at 29.) This argument ignores the fact that declaring a state of emergency under Section 323.10 is not the only way for the Governor to respond to an emergency. The Governor can ask the Legislature to extend his emergency order. § 323.10. The Governor can also ask the Legislature to pass new legislation addressing the public health emergency. Further, the Governor’s cabinet secretaries, under the direction of the Governor, can issue emergency rules that will remain in effect for 150 days. Wis. Stat. § 227.24(c). Rather than pursuing these lawful avenues to address the situation, the Governor chose to pursue an avenue that is not lawful.

Finally, it is the Governor’s interpretation of Section 323.10—not Fabick’s—that would lead to dangerous and absurd results. The Governor’s

interpretation of Section 323.10 would allow him, in spite of the express language of the statute prohibiting such an extension, to extend his emergency powers beyond the 60-day limit without legislative approval by declaring an unlimited number of states of emergency.⁵ And while the Governor's desire to address the COVID-19 pandemic is of course understandable, allowing him to do so without any limitation would create a dangerous precedent and allow for an abuse of power. Contrary to the Governor's assertion, there is nothing hypothetical about this abuse of power—the Governor has engaged in such an abuse of power in violation of Wisconsin law by issuing Executive Orders 82 and 90. These executive orders are unlawful and void.⁶

IV. The Governor Misconstrues Fabick's Non-Delegation Argument, an Issue Fabick Has Urged the Court to Avoid in Favor of Deciding the Case on Statutory Grounds.

Governor Evers disingenuously claims that “Fabick brings what amounts to a facial challenge to Section 323.10's authorization for the Governor to issue a state of emergency order.” (Resp. at 31.) This is false. Fabick sought

⁵ In addition, the Governor's position would eliminate judicial review of the lawfulness of such executive orders. (Resp. at 9-13.)

⁶ As described above, the Governor's response fails to address the Michigan Supreme Court's very recent unanimous holding that the time limitation in Michigan's emergency management statute precluded the Michigan Governor from issuing successive state of emergency declarations related to COVID-19. See *Midwest Inst. of Health, PLLC v. Gov. of Mich.*, No. 161492, 2020 WL 5877599, ___ N.W.2d ___ (Mich. Oct. 2, 2020). The Governor's failure to address that issue in his response is not surprising—there is no basis to distinguish the Michigan case from this case.

invalidation of Executive Orders 82 and 90, not of Section 323.10, and has urged this Court to avoid addressing the constitutional non-delegation issue by deciding this case on statutory grounds. (Resp. at 28-29.) As the Governor knows, the Court requested briefing on the question of whether, assuming Executive Orders 82 and 90 were lawful under Section 323.10, those orders amounted to an unconstitutional delegation of legislative power. It was for this reason that Fabick addressed the non-delegation question.

Next, Governor Evers asserts that Fabick is inviting this Court to “strike down a law based on events that have not occurred and may never arise.” (Resp. at 31.) This statement is also false. The issue presented is whether Governor Evers may issue multiple emergency order declarations stemming from the same public health emergency without a joint resolution from the Legislature extending the declaration beyond 60 days. This is not—in the Governor’s words—a “hypothetical abuse[] of power.” (Resp. at 36.) Governor Evers has already declared a state of emergency based on a public health emergency three times stemming from the same pandemic, and those orders have placed the entire state of Wisconsin under a state of emergency for a total of 161 days as of the date of this reply. Despite this, Governor Evers has yet to receive approval from the Legislature for an extension of the state of emergency beyond the 60 days allotted in Section 323.10. Indeed, Governor Evers issued the third

state of emergency *while the second state of emergency was still in effect.*⁷ These are actual, not hypothetical, abuses of power.

According to the Governor, emergency declarations are distinct from “proactive legislation,” and thus the relationship between the executive and legislative branches takes on a different form during an “emergency.” (Resp. at 33.) Fabick agrees. The normal lawmaking process is that the Legislature drafts legislation and presents it to the Governor for his signature. Wis. Const. Art. IV, § 17 (“Enactment of laws”); Wis. Const. Art. V, § 10(1)(a) (“Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor.”). The Governor may veto legislation, but that is a defensive mechanism. Under Section 323.10, the reverse occurs. The Governor may declare a state of emergency for up to 60 days, and the Legislature can end the state of emergency during that time period by passing a joint resolution.

Section 323.10 is a loan of legislative power to the Governor. If Governor Evers’ interpretation is correct, and the executive branch may continually issue new 60-day emergency order declarations for the same public

⁷ Governor Evers issued Executive Order 90 on September 22, 2020, six days before Executive Order 82 expired. Hence, the Governor has issued executive orders that are not even consecutive, but rather are concurrent.

health emergency without legislative approval, then the terms of Section 323.10's loan become unconstitutional.

Although the issues presented in this case concern the executive branch's authority to issue emergency order declarations under Section 323.10, at times it seems as though Governor Evers wishes to argue that his power to declare emergencies flows from Article V of the Wisconsin Constitution. Tellingly, he cites to Justice Robert Jackson's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, which discusses the extent of the President's war powers under Article II of the United States Constitution. 343 U.S. 579, 642-55 (1952). (cited at Resp. at 34.). Governor Evers also draws from Alexander Hamilton's disquisition on the need for a unitary executive branch in Federalist No. 70. (Resp. at 34.) Yet, all three COVID-19 emergency order declarations cited Section 323.10 as the basis for the Governor's authority. (Pet. App. 1, 137, 145.) In short, this Court is not being asked to assess whether Governor Evers has inherent constitutional authority to declare a state of emergency due to COVID-19, and the Governor's attempts to argue otherwise is a misdirection play.

If the Governor is permitted to issue executive orders declaring 60-day states of emergency in perpetuity, Section 323.10 is an unconstitutional delegation of power. However, for the reasons described in Fabick's initial brief

and in Section III above, the Court need not reach that conclusion because the language of the statute limits that delegation of power to one time period of 60 days.

CONCLUSION

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

Dated this 9th day of November, 2020.



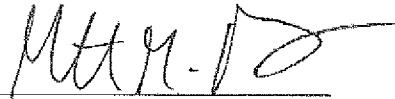
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CERTIFICATE OF SERVICE

A copy of this memorandum 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:

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Dated this 9th day of November, 2020.


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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.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of November, 2020.



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