

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

**In the Wisconsin Supreme Court**

Jeré Fabick

*Petitioner,*

v.

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

*Respondent.*

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**PETITION TO THE WISCONSIN SUPREME COURT TO TAKE  
JURISDICTION OF AN ORIGINAL ACTION**

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## INTRODUCTION

This Petition for an Original Action presents a fundamental question regarding the separation of powers, and whether the law may be suspended indefinitely at the sole discretion of the Governor of Wisconsin. It has been seven months since the World Health Organization declared COVID-19 to be a global pandemic on March 11, 2020. In response, Governor Tony Evers issued an executive order declaring a state of emergency in Wisconsin on March 12, 2020. The source of the Governor's authority to declare such an emergency flows from a statute, Wis. Stat. § 323.10. This law provides that the "state of emergency" is limited to 60 days "unless the state of emergency is extended by joint resolution of the legislature." *Id.* The Wisconsin Legislature did not extend the state of emergency, and so by the plain terms of the statute, the "state of emergency" lapsed in Wisconsin on May 11, 2020.

Nevertheless, the Governor declared a second state of emergency on July 30, 2020, and a third state of emergency on September 22, 2020. Both orders were based on the same circumstances as the initial state of emergency: the COVID-19 pandemic. The Governor never sought approval from the Legislature to declare a second and third state of emergency, and all indications are that the Governor intends to continue declaring states of emergency due to COVID-19 until a court tells him otherwise.

This case presents a novel and pressing question of separation powers: can the executive branch keep Wisconsin in a perpetual state of emergency without authorization from the legislative branch? This is a classic case involving the public interest, as the Governor's authority to declare a state of emergency is a question that

literally impacts every Wisconsin citizen. By ignoring the explicit 60-day limit set forth in Wis. Stat. § 323.10, the Governor has effectively eliminated the Legislature's involvement in the emergency declaration process.

Accordingly, Petitioner Jeré Fabick respectfully petitions the Wisconsin Supreme Court, pursuant to Wis. Stat. § 809.70 and Article VII, Section 3(2) of the Wisconsin Constitution, to take original jurisdiction of this action against Respondent, Wisconsin Governor Tony Evers, to define the limits of the Wisconsin Governor's power under Wis. Stat. § 323.10 to declare multiple states of emergency exceeding 60 days arising from the same public health emergency.

### **PARTIES**

1. Petitioner Jeré Fabick is an adult citizen of the State of Wisconsin and a resident of Waukesha County. He is a Wisconsin taxpayer. Mr. Fabick has standing to bring this claim because, as further outlined herein and in the accompanying Memorandum, Mr. Fabick, like all residents of Wisconsin and anyone else who is present in the State of Wisconsin, is subject to Governor Evers' Executive Orders 82 and 90.
2. Respondent Tony Evers is the Governor of Wisconsin and issued Executive Orders 82 and 90 acting under Wis. Stat. § 323.10. Petitioner Fabick challenges these orders in this petition. Governor Evers' official address is 115 East, State Capitol, Madison, WI 53702. Governor Evers is sued in his official capacity.

### **ISSUE PRESENTED**

3. Whether Governor Tony Evers violated Wis. Stat. § 323.10 when he issued multiple and successive executive orders declaring a state of emergency beyond 60 days in response to the COVID-19 pandemic.

### **STATEMENT OF FACTS**

4. 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).
5. To do so, Chapter 323 allows the Governor of Wisconsin to temporarily assume extraordinary duties and powers. *See* Wis. Stat. § 323.12(3)–(4).
6. These duties and powers—which include the declaration of emergency management contracts, issuing orders deemed “necessary for the security of persons and property,” and suspending 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).
7. 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).

8. To trigger the emergency procedures in Chapter 323, 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.
9. The Governor may also “designate the department of health services as the lead state agency to respond to that emergency.” *Id.*
10. 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.
11. No other exception to the 60-day maximum period exists. *Id.*
12. In February 2020, the novel coronavirus, SARS-COV2, began spreading throughout the United States, causing the disease known as COVID-19.
13. On March 12, 2020, Governor Tony Evers, pursuant to Section 323.10, issued Executive Order 72, declaring a state of emergency related to public health in response to the COVID-19 pandemic. Executive Order 72 (March 12, 2020) (Pet. App. 1).
14. Under Executive Order 72, the Evers administration took numerous unilateral actions affecting all Wisconsin citizens.

15. For instance, the Wisconsin Department of Health Services issued orders closing schools and restricting public gatherings. *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).
16. Governor Evers also suspended the rules and actions of various administrative agencies. *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).
17. 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.
18. 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).

19. Under Executive Order 82, Governor Evers took additional unilateral action, including issuing Emergency Order No. 1. (Pet. App. 138).
20. The second state of emergency expired on September 28, 2020.
21. 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).
22. The third state of emergency—which is currently in effect—is set to expire on November 21, 2020.
23. All three Executive Orders were issued in response to the same occurrence: the COVID-19 pandemic.
24. Executive Order 72 was issued to “protect the health and well-being of its residents” from the “presence” and “spread” of COVID-19.
25. Executive Orders 82 and 90 were issued in response to the “growth” of cases caused by the spread of COVID-19 in Wisconsin.
26. All three orders were issued pursuant to Section 323.10.
27. Petitioner Jeré Fabick is a Wisconsin resident and taxpayer.
28. Petitioner Fabick, like every other Wisconsin resident, is required to follow the mandates of Emergency Order No. 1 and any other orders issued pursuant the Governor’s executive orders.
29. Petitioner Fabick is directly affected by the Governor’s past, present, and future actions under Section 323.10.

**STATEMENT OF THE RELIEF SOUGHT**

30. 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; 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.

**STATEMENT OF REASONS THIS COURT SHOULD TAKE  
JURISDICTION**

31. As discussed in more detail in the Memorandum filed herewith, this case involves issues that significantly affect the Wisconsin community at large.
32. In issuing two executive orders that extend the state of emergency in response to COVID-19 beyond the 60-day limit in the statute, Governor Evers exceeded his statutory authority under Section 323.10. *See Wisconsin Legislature v. Palm*, 2020 WI 42, ¶41 391 Wis. 2d 497, 942 N.W.2d 900.
33. As further discussed in the accompanying Memorandum, in acting beyond his statutory authority, Governor Evers has unlawfully exercised his

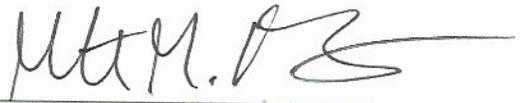
emergency powers under Chapter 323 and used these powers to take actions that have affected every single person in Wisconsin.

34. Given that Governor Evers' unauthorized actions affect the Wisconsin community at large and present an issue of significant statewide concern, it would be an inefficient use of judicial resources to allow this issue to be addressed through the lower courts, a process that could take years.
35. Moreover, statewide clarity on the scope of the Governor's power is needed. Forcing Petitioner or other citizens to litigate this issue through the Wisconsin Circuit Courts could result in a patchwork of rulings, wherein the Governor's emergency powers mean one thing in Waukesha County, and something else in Dane County, by way of example. The matter would be further complicated if multiple appeals of this issue are pending before different Districts in the Wisconsin Court of Appeals.
36. Further, time is of the essence in this matter. The COVID-19 pandemic continues to affect the State of Wisconsin and will for an unknowable period of time. Based on his prior actions and statements, the Governor may continue to issue unlawful orders that indefinitely extend his emergency powers and affect every single Wisconsin resident.
37. Petitioner, as a taxpayer and resident of Wisconsin, will continue to be harmed by the Governor's illegal exercise of his emergency powers.

CONCLUSION

For the reasons set forth above and in the accompanying Memorandum, Petitioner respectfully requests that this Court take jurisdiction of an original action and rule on the legal matters raised herein.

Dated this 15th day of October, 2020.



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**CERTIFICATE OF SERVICE**

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

Dated this 15th day of October, 2020.



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