

No. _____

In the Wisconsin Supreme Court

Jeré Fabick

Petitioner,

v.

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

Respondent.

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

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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 that the pandemic has had a significant impact on the State of Wisconsin, or that COVID-19 has been an ongoing problem in Wisconsin since at least February 2020. But the existence of a crisis does not give the government unlimited authority to act in violation of the law.

On March 12, 2020, 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). Section 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 the 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.” 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 the 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.”). Because the Governor’s exercise of these emergency powers reaches deeply into the personal lives of everyone in this State, the scope of the Governor’s authority under the statute is unquestionably a matter of statewide public interest.

The Governor’s 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.

ARGUMENT

I. This Court Should Grant the Petition Because Governor Evers’ Unlawful Assertion of Executive Authority Presents Significant and Urgent Legal Issues Affecting All Persons in the State of Wisconsin.

Pursuant to the Wisconsin Constitution, this Court “has appellate jurisdiction over all courts and may hear original actions and proceedings.” Wis. Const. art. VII, § 3(2). When deciding whether to grant a petition for an original action, this Court examines whether the case involves issues that, in the Court’s judgment, will “significantly affect[] the community at large.” *Wis. Pro. Police Ass’n v. Lightbourn*, 2001 WI 59, ¶4, 243 Wis. 2d 512, 627 N.W.2d 807 (challenge to statute impacting the interests of 460,000 participants in pension system); *see also In re State ex rel. Atty. Gen.*, 220 Wis. 25, 634, 264 N.W. 633 (1936) (noting the propriety of exercising original jurisdiction in case challenging constitutionality of statutes affecting “innumerable members and employees of industry throughout Wisconsin”) (citation omitted)).

Recognizing the statewide impact of the response to the COVID-19 pandemic, this Court has recently exercised jurisdiction over a number of cases involving extraordinary assertions of government authority. In *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶7, 391 Wis. 2d 497, 942 N.W.2d 900, petitioners challenged Department of Health Secretary-designee Andrea Palm’s “Safer at Home” order.¹ This Court held that it had original jurisdiction over the case because the order affected “every person in Wisconsin, as well as persons who come into Wisconsin, and every ‘non-essential’ business.” *Id.*, ¶11.

Similarly, this Court found it had original jurisdiction over three petitions brought by religious schools and parents challenging a COVID-19-related order that required all students in Dane County in grades 3-12—public and private—to be taught online. *James v. Heinrich*, Nos. 2020-AP-1419, 2020-AP-1420, 2020-AP-1446 (Wis. Sup. Ct. Sept. 10, 2020) (consolidation order). Petitioners in that case requested temporary injunctive relief because the order’s “broad closure of schools . . . is not within the statutory grant of power to the local health officers in Wis. Stat. § 252.03.” *Id.* This Court found Petitioners were likely to succeed on their claim, and temporarily enjoined the prohibition against in-person instruction. *Id.*

¹ Secretary-designee Palm’s order commanded all individuals in Wisconsin “to stay at home or at their place of residence” with certain limited exceptions approved by Palm or risk punishment “by up to 30 days imprisonment, or up to \$250 fine, or both,” and restricted all Wisconsin citizens’ travel, restricted business activity across the state of Wisconsin, closed all Wisconsin K-12 public and private schools, closed all Wisconsin public libraries, and imposed limitations on all religious gatherings. Emergency Order 12. (Pet. App. 40).

This case, like *Palm* and *Heinrich*, satisfies the criteria for original jurisdiction. Original jurisdiction is appropriate when a case “affects innumerable members and employees of industry throughout Wisconsin.” *In re State ex rel. Atty. Gen.*, 264 N.W. at 634. Here, Governor Evers, through his executive orders, has extended his extraordinary powers which allow him to take unilateral actions—including declaring emergency management contracts, issuing orders deemed “necessary for the security of persons and property,” and suspending administrative rules—that affect *every single person* in the State.² Wis. Stat. § 323.12(4)(b). This is precisely the type of dispute that original jurisdiction is intended to address.

This Court can take judicial notice of a current challenge to Executive Order 82 and Emergency Order 1 pending in Polk County Circuit Court, *Lindoo v. Evers*, Polk County Case No. 2020CV219. See *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (court may take judicial notice of CCAP entries). Following Governor Evers’ issuance of Executive Order 90, the plaintiffs filed a motion for a temporary injunction. That motion was denied on October 12, 2020. *Lindoo et al. v. Evers*, No. 20-CV-219 (Wis. Cir. Ct. Polk Cty. Oct. 12, 2020) (Pet. App. 147.) In its decision, the circuit court held that “[n]othing in [Section 323.10] prohibits the governor from declaring successive states of emergency.” *Id.* Petitioner believes the circuit court’s reading of the statute is plainly in error, but the court’s decision may have been impacted by its concern that a single judge in Wisconsin should not decide such a weighty question. As the court wrote, “If granted, the temporary injunction will

² See, e.g., Emergency Order 1 (Aug. 1, 2020) (Pet. App. 138).

affect every person in Wisconsin by a judicial act that usurps the governor’s power to declare a state of emergency and the legislature’s power to end one.” *Id.*

All the more reason for this Court to accept this Petition so it can promptly resolve the question of whether the Governor of Wisconsin has the unilateral authority to declare rolling 60-day emergencies again and again based on the same underlying circumstances.³

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

Petitioner Jeré Fabick is a Wisconsin resident and taxpayer. (Pet., ¶128.) Fabick, like all Wisconsin residents, is subject to 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. The Wisconsin Supreme Court rejected this 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

³ Further, if this Court does not resolve these statewide questions on orders pertaining to COVID-19, there may be inconsistent decisions from the circuit courts regarding to the executive’s authority. Compare *Lindoo v. Evers*, Polk County Case No. 2020CV219, with *Tavern League of Wisconsin, Inc. et al v. Palm et al*, Sawyer County Case No. 2020CV128.

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. Waunwatosha*, 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 train of precedent recognizing taxpayer standing to challenge the unlawful expenditure of taxpayer funds.⁴

⁴ 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 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).

The clarity of the law on taxpayer standing to challenge unlawful government action is 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 the Governor has directed his staffers—public employees—to draft, promote, and enforce the orders. (Pet. App. 137, 145). If Petitioner is correct that the Governor’s orders are unlawful, such actions by the Governor and his administration would necessarily result in wasted public expenditures.

For these reasons, Petitioner has standing as a Wisconsin citizen and taxpayer to bring suit and seek declaratory and injunctive relief.⁵

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

Governor Evers’ extensions of the state of emergency that he declared in March 2020 beyond 60 days are unlawful. On March 12, 2020, Governor Evers exercised his authority under Section 323.10 and issued an executive order declaring a state of

⁵ 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 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).

emergency in response to the spread of COVID-19, a novel illness that can cause a large number of deaths or serious long-term disabilities in humans. E.O. 72 (Pet. App. 1). Governor Evers' state of emergency related to COVID-19 expired on May 11, 2020. Nevertheless, Governor Evers subsequently issued two additional executive orders extending the state of emergency related to COVID-19 well beyond the 60 days permitted in the statute. These extensions were never approved by the Wisconsin Legislature, and consequently are unlawful and void.

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

Although Section 323.10 expressly limits Governor Evers’ authority to declare a state of emergency to a period of 60 days, Governor Evers has twice issued orders extending his emergency powers beyond the statutory time period authorized under Chapter 323. Instead of requesting an extension of the state of emergency from the Wisconsin Legislature, or acting through the emergency rulemaking process, *Palm*, 319 Wis. 2d 497, ¶¶29, 41 n.14, the Governor has unilaterally extended the state of emergency related to the COVID-19 pandemic through two additional executive orders, thereby extending his initial state of emergency beyond the 60-day limit. The

Governor's 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 the Governor May Not Declare a State of Emergency Related to it for More than 60 Days.

The COVID-19 pandemic has existed since February 2020 and is a single occurrence. As such, the Governor may not declare a state of emergency lasting more than 60 days. Any argument claiming that the current situation is a new emergency justifying additional 60-day periods is without merit, as the Governor himself has implicitly conceded.⁶

This Court has already recognized that the COVID-19 pandemic is a single occurrence that cannot support a state of emergency lasting more than 60 days. *Palm*, 391 Wis. 2d 497, ¶41 (“But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely”). And 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

⁶ So too has DHS Secretary-designee Palm. On Tuesday, October 6, 2020, during an update on the pandemic, 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>.

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 and which use remarkably similar language to describe the 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 its arrival, 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, the Governor 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 pandemic, both share the same overriding purpose as Executive Order 72 and even 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 the Governor 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. Nevertheless, Governor Evers has twice ignored the limitations of the statute by issuing orders extending the state of emergency beyond 60 days without an extension “by joint resolution of the legislature.” Wis. Stat. § 323.10. Governor Evers’ Executive Order Nos. 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”); Wis. Stat. § 323.12(3), (4). 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 the Governor to invoke multiple states of emergency in response to a single disaster, 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. That decision must be respected by the Governor.⁷

Just a few weeks ago, Michigan’s Supreme Court addressed a 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

⁷ Although the language of the statute is clear, the legislative history of Section 323.10 also supports the interpretation of the statute that prohibits the Governor from extending the 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”). *See* 2001 Wis. Act 109, § 340L; 2001 Assembly Bill 850. Under the Model Act, a state Governor can declare a state of emergency in response to a public health emergency which, in turn, invokes emergency powers. *See* MSEHPA, § 303(a). The Governor can then renew that declaration indefinitely as long as the public health emergency continues. *Id.*, § 305(b). In other words, under the MSEHPA, there is no limit on how many orders the executive can issue.

When adopting the Model Act in Wisconsin, the Legislature rejected the Governor’s ability to extend a state of emergency indefinitely in favor of a limited exercise of authority. Instead, under Wisconsin law the Legislature *alone* has the power to extend any declared emergency. Wis. Stat. § 323.10. Wisconsin courts have repeatedly recognized that where the Legislature considers and then deliberately excludes a particular statutory provision, it is understood that the statute was not intended to include that provision. *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); *State v. Cooper*, 2016 WI App 63, ¶10, 371 Wis. 2d 539, 885 N.W.2d 390. Thus, the statutory history confirms the plain text of the Section 323.10.

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, Governor Gretchen Whitmer issued an executive order on March 10, 2020, declaring a “state of emergency.” *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.” *Id.* The Governor sought, and received, legislative 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 banned by Governor Whitmer’s orders from performing non-essential medical procedures and a patient barred 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.”⁸ *Id.*

⁸ 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

Examining the plain language of MCL 30.403, the Michigan Supreme Court unanimously held that the Emergency Management Act’s 28-day limitation does not grant the 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.⁹ 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

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 is not asserting a constitutional challenge, but 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.”).

⁹ *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.”).

infinitem. The language of Wisconsin’s statute is substantially similar, and the logic employed by the Michigan Supreme 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.

The Governor 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 directions 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 § 227.24. E.O. 82 (Pet. App. 135).

After this Court’s decision in *Palm*, the Governor 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, 2020.¹⁰ Regardless of his opinion of the rulemaking process, it does not alter the fact that the Governor’s priorities do not change the limits that Section

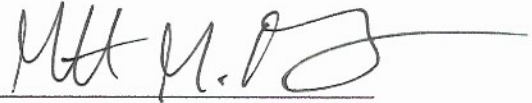
¹⁰ Available at <https://www.bizjournals.com/milwaukee/news/2020/05/18/evers-drops-rule-making-proposal-to-legislature.html>.

323.10 places on his power to declare a state of emergency. Consequently, the Governor's 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.

CONCLUSION

For the reasons set forth above and in the accompanying petition, Petitioner respectfully requests that this Court take jurisdiction of this 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 memorandum is being served upon all parties via e-mail and first-class mail.

Dated this 15th day of October, 2020.



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