

WISCONSIN SUPREME COURT

November 16, 2020

9:45 a.m.

2020AP1718-OA

Jeré Fabick v. Tony Evers

*The Supreme Court accepted jurisdiction over the original action petition filed by Jeré Fabick, which challenged two of Governor Tony Evers executive orders declaring a state of emergency.*

The primary statute at issue in this original action is Wis. Stat. § 313.10, which, as pertinent here, authorizes the governor to declare a state of emergency as follows:

***Declaration by Governor.*** *The governor may issue an executive order declaring a state of emergency for the state or any portion of the state if he or she determines that an emergency resulting from a disaster or the imminent threat of a disaster exists. If the governor determines that a public health emergency exists, he or she may issue an executive order declaring a state of emergency related to public health for the state or any portion of the state and may designate the department of health services as the lead state agency to respond to that emergency. . . . A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature. . . . The executive order may be revoked at the discretion of either the governor or the legislature by joint resolution.*

On March 12, 2020, near the beginning of the effects of the COVID-19 pandemic in Wisconsin, Governor Evers issued Executive Order #72 (EO #72). In that order, the Governor “[p]roclaim[ed] that a public health emergency, as defined in Section 323.02(16) of the Wisconsin Statutes, exists for the State of Wisconsin.” The order cited five statutes as support for the Governor’s declaration, including Wis. Stat. § 323.10. In the order, the Governor designated the Department of Health Services (DHS) to act as the lead agency to respond to the public health emergency and directed DHS to “take all necessary and appropriate measures to prevent and respond to incidents of COVID-19 in the State.” The Governor also suspended all portions of administrative rules that the DHS Secretary determined would prevent, hinder or delay necessary actions to respond to the health emergency.

Over the next 60 days, both the Governor and DHS Secretary-Designee Andrea Palm issued a series of orders based on the Governor’s declaration of a public health emergency. Among other things, those orders closed schools, restricted public gatherings, and suspended certain rules and actions of some state administrative agencies.

EO #72 did not contain any date on which the order was to expire. Under Wis. Stat. § 323.10, a public health state of emergency declared by the Governor may not exceed 60 days. Under that statute, the public health emergency declared under EO #72 expired 60 days after it was issued, on May 11, 2020.

On July 30, 2020, Governor Evers issued Executive Order 82 (EO #82). EO #82 again declared that “a public health emergency, as defined in Section 323.02(16) of the Wisconsin Statutes, exists for the State of Wisconsin.” It cited the four of the five same statutes listed in EO

#72 as authority for that declaration, including Wis. Stat. § 323.10. It also again designated DHS to be the lead state agency to respond. The final paragraph of EO #82 specified an end date for the order: “Pursuant to Section 323.10 of the Wisconsin Statutes, this Public Health Emergency shall remain in effect for 60 days, or until it is revoked by the Governor or by joint resolution of the Wisconsin State Legislature.”

On the same day that he issued EO #82, Governor Evers also issued Emergency Order #1 pursuant to EO #82. That order primarily required anyone present in the state to wear face coverings when in an indoor space or enclosed space if one or more individuals who do not belong to the same household or living unit are present, subject to certain exceptions.

On Sept. 22, 2020, before EO #82 expired, Governor Evers issued Executive Order #90 (EO #90). After describing the status of COVID-19 pandemic, like EO #72 and EO #82, EO #90 declared that a public health emergency existed in the state and designated the DHS as the lead agency to respond to COVID-19. The five numbered provisions of EO #90 were nearly the same as had been set forth in EO #82.

On Oct. 15, 2020, Jeré Fabick filed a petition for leave to commence an original action in the Supreme Court and alleged a statutory claim—that Governor Evers’ issuance of EO #82 and EO #90 exceeded his authority under Wis. Stat. § 323.10. Fabick asserted that EO #72, EO #82, and EO #90 all stem from a single public health emergency, i.e., the COVID-19 pandemic, which has continued to varying degrees but without interruption since at least February of this year. Fabick contended that Wis. Stat. § 323.10 authorizes a governor to declare only one state of emergency (or public health emergency) that relates to a particular illness or pandemic.

Governor Evers has argued in this matter that the question of whether a governor may declare a state of emergency is a matter committed by the statute to the political branches of government (the executive and legislative) and therefore may not be reviewed by the judicial branch. He has further argued that Fabick lacks standing to bring a judicial challenge to his orders declaring a state of emergency. In addition, Governor Evers has contended that EO #82 and EO #90 were authorized by Wis. Stat. § 323.10 because that statute allows a governor to issue separate state of emergency orders based on different occurrences that relate to a single underlying cause, such as the COVID-19 pandemic. Finally, Governor Evers has asserted that Wis. Stat. § 323.10, even if it allows a governor to issue separate state of emergency orders related to the same underlying cause, does not constitute an improper delegation of legislative power.

On Oct. 28, 2020, the Supreme Court granted the petition for leave to commence an original action. In addition to agreeing to resolve the statutory question listed in Fabick’s petition, the Supreme Court added a second question that the parties have addressed in their briefs. Accordingly, the following two questions have been presented for resolution by the Supreme Court in this matter:

1. 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.
2. If Executive Order #82 and Executive Order #90 are authorized by Wis. Stat. § 323.10, whether that statute is an unconstitutional delegation of legislative power to the executive branch.