



## *Fabick v. Evers*

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In *Fabick v. Evers*, 2021 WI 28, the Wisconsin Supreme Court held that the Governor lacks statutory authority to issue multiple declarations of emergency based on the same condition that enabled the Governor to initially declare a state of emergency. The decision holds that various orders issued after the expiration of the Governor's initial declaration of a state of emergency in response to the COVID-19 pandemic were unlawful. In particular, the decision invalidates the Governor's declared state of emergency that had been set to expire on April 5, 2021, including all executive actions and orders issued pursuant to the powers triggered by the emergency declaration, such as the statewide mask mandate.<sup>1</sup>

### BACKGROUND

On March 12, 2020, Governor Evers issued [Executive Order #72](#), declaring a state of emergency related to public health in response to the COVID-19 pandemic, under s. 323.10, Stats. This statute provides that 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.<sup>2</sup>

The statute specifies both of the following regarding the duration of a declared public health 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 any time by the Governor by executive order or by the Legislature by joint resolution.

Executive Order #72 expired on May 11, 2020. On July 30, 2020, the Governor declared a second state of emergency related to the COVID-19 pandemic in [Executive Order #82](#). He then declared states of emergency related to the COVID-19 pandemic again in [Executive Order #90](#) on September 22, 2020, in [Executive Order #95](#) on November 20, 2020, and in [Executive Order #104](#) on January 19, 2021. In each of the new orders, the Governor cited various changing conditions in the COVID-19 pandemic as necessitating the continued state of emergency. On February 4, 2021, the Legislature revoked Executive Order #104 by passing [2021 Senate Joint Resolution 3](#). Later that day, the Governor issued [Executive Order #105](#), declaring a new state of emergency related to COVID-19.

### COURT CHALLENGE

Shortly after Governor Evers issued Executive Order #90, Jeré Fabick, in his capacity as a Wisconsin resident and taxpayer, asked the Wisconsin Supreme Court to declare that both Executive Order #90 and Executive Order #82 were issued unlawfully because they extended the initial state of emergency beyond the 60 days allowed by statute. Following oral argument in the case, but prior to the Court's decision, both Fabick and the Legislature filed motions asking the Court to take judicial notice of subsequently issued executive orders. Specifically, the Legislature asked the Court to invalidate Executive Order #105, arguing that the Governor unlawfully circumvented the Legislature's authority by declaring a new state of emergency after the Legislature revoked the prior state of emergency.

### WISCONSIN SUPREME COURT DECISION

On March 31, 2021, the Wisconsin Supreme Court issued its decision in the case. As a threshold matter, the Court first addressed whether it could adjudicate a challenge to the lawfulness of the Governor's declaration of a state of emergency. The Governor argued that s. 323.10, Stats., "does not contemplate a

judicial remedy through which parties ask a court to review whether the statutory conditions for an emergency are met” because the statute “creates a single, express remedy for invalidating a Governor’s emergency order: by a legislative joint resolution.”<sup>3</sup> The Court concluded, however, that the Legislature’s right to revoke a state of emergency does not preclude a taxpayer from bringing a declaratory judgment action that “contest[s] governmental actions leading to an illegal expenditure of taxpayer funds.”<sup>4</sup>

Having concluded the case met the criteria for the Court to decide it, the Court next addressed the parameters of the Governor’s authority to declare a state of emergency related to public health. The Court observed that the operative statutory language allows the Governor to declare a state of emergency related to public health “[i]f the governor determines that a public health emergency exists.” The Court termed this finding of a public health emergency, which is a defined term, the “enabling condition.” That COVID-19 satisfies the definition of “public health emergency,” the Court stated, is not disputed.

But the Court cautioned that an order declaring a state of emergency based on this enabling condition is nevertheless subject to the statute’s durational limitations. The statute specifies that a state of emergency “shall not exceed 60 days, unless the state of emergency is extended by the legislature,” and may be revoked either by the Governor by executive order, or by the Legislature by joint resolution.

According to the Court, “[t]hese are clear statutory commands ... [that] compel the conclusion that the legislature enacted Wis. Stats. s. 323.10’s time-limiting language to meaningfully constrain the governor’s authority to govern by emergency order.”<sup>5</sup> The plain language of the statute, the Court explained, provides the Governor the authority to exercise expanded powers for the first 60 days of an emergency, but beyond that 60-day period “the legislature reserves for itself the power to determine the policies that govern the state’s response to an ongoing problem.”<sup>6</sup> To interpret the statute otherwise, the Court reasoned, would render the statutory duration-limiting provisions meaningless.

The Court also rejected the Governor’s argument that new circumstances that arose during the COVID-19 pandemic created new sets of enabling conditions. This would also, in the Court’s view, “[read] the duration limitations right out of the law,” because it would allow a governor to skirt the statute’s durational limits by drafting a new order “stating that the challenges or risks are a little different now than they were last month or last week.”<sup>7</sup> While the Court recognized “that determining when a set of facts gives rise to a unique enabling condition may not always be easy,” it observed that “‘the illness or health condition’ caused by a ‘novel... biological agent’ has remained, unabated.”<sup>8</sup>

The Court concluded s. 323.10, Stats., “forbids the governor from declaring successive states of emergency on the same basis as a prior state of emergency,” and declared Executive Orders #82 and #90 unlawful.<sup>9</sup> The Court also held that “the governor may not reissue a new emergency declaration following legislative revocation of a state of emergency declared on the same basis.”<sup>10</sup> Based on that holding, the Court declared Executive Order #105 unlawful, and clarified that “all executive actions and orders issued pursuant to the powers triggered by the emergency declaration are likewise void.”<sup>11</sup>

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<sup>1</sup> Governor Evers first announced an order requiring face coverings, “[Emergency Order #1](#),” on July 30, 2020, in conjunction with the state of emergency declaration under Executive Order #82. That order took effect on August 1, 2020. The Governor issued new orders requiring face coverings, each also called “Emergency Order #1,” in conjunction with Executive Orders #90, #95, #104, and #105. Each of the emergency orders cited s. 323.12, Stats., as a primary source of authority. Among other provisions, that statute empowers the Governor, during a state of emergency declared under s. 323.10, to “Issue such orders as he or she deems necessary for the security of persons and property.” [s. 323.12 (4) (b), Stats.]

<sup>2</sup> “Public health emergency” is defined to mean the occurrence or imminent threat of an illness or health condition that is believed to be caused by a novel or previously controlled biological agent, such as a virus, that poses a high probability of either of the following: (a) a large number of deaths or serious or long-term disabilities among humans; or (b) widespread exposure that creates a significant risk of substantial future harm to a large number of people. [s. 323.02 (3) and (16), Stats.]

<sup>3</sup> Response Brief of Governor Evers, p. 10.

<sup>4</sup> *Fabick v. Evers*, 2021 WI 28, ¶ 10.

<sup>5</sup> *Id.* at ¶ 28.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at ¶ 38.

<sup>8</sup> *Id.* at ¶ 39.

<sup>9</sup> *Id.* at ¶ 36.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at ¶¶ 44-45 and n. 19.