

No. 2020AP1718-OA

In the Supreme Court of Wisconsin

JERÉ FABICK,
PETITIONER,

v.

TONY EVERS, IN HIS OFFICIAL CAPACITY AS
GOVERNOR OF WISCONSIN,
RESPONDENT.

**NON-PARTY BRIEF OF *AMICUS CURIAE*
WISCONSIN LEGISLATURE IN SUPPORT OF PETITIONER**

JESSIE AUGUSTYN
*Counsel for the Senate
Majority Leader*
AUGUSTYN LAW LLC
1360 Regent Street
No. 192
Madison, WI 53715
(715) 255-0817
jessie@augustynlaw.com

STEVE FAWCETT
Counsel for the Assembly Speaker
Room 217 West, State Capitol
Madison, WI 53708
(608) 266-9171
Steve.Fawcett@legis.wisconsin.gov

TABLE OF CONTENTS

INTRODUCTION.....	1
ARGUMENT.....	1
I. The Governor’s Interpretation Of Section 323.10 Would Render The Law An Unconstitutional Delegation Of Legislative Power As Evidenced By His Recent Order Circumventing The Legislature’s Override Authority	1
CONCLUSION	5

TABLE OF AUTHORITIES

Cases

<i>Dairyland Greyhound Park, Inc. v. Doyle</i> , 2006 WI 107	3
<i>In re Certified Questions</i> ,	
-- N.W.2d --, 2020 WL 5877599 (Mich. Oct. 2, 2020)	4
<i>Koshkee v. Taylor</i> ,	
2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600	2
<i>Legislature v. Palm</i> ,	
2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900	3
<i>Panzer v. Doyle</i> ,	
2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666	3, 5
<i>State ex rel. Martin v. Zimmerman</i> ,	
233 Wis. 16, 288 N.W.2d 454	3

Statutes

Wis. Stat. § 323.10	<i>passim</i>
Wis. Stat. § 323.12(4)(b)	2

Other Authorities

Emergency Order 1	3
Executive Order #105	1, 2

INTRODUCTION

Wisconsin's Governor has now issued six state of emergency declarations related to COVID-19. He argues that Section 323.10, which grants authority to pronounce disasters within certain limits, allows him to continue these declarations as long as he sees fit and, now, regardless of whether the Legislature has exercised its statutory ability to revoke his declaration. If there was any doubt as to whether the Governor believed there were limits on his powers under this statute, it evaporated on February 4, when he redeclared an emergency the same day the Legislature voted to revoke that declaration. (Executive Order #105). If the Governor's actions and interpretation of Section 323.10 are correct, then the statute is an unconstitutional delegation of power from the Legislature because it contains no adequate safeguards to protect Wisconsinites from unitary rule.

For this reason and others given by Petitioner, this Court should grant the Petitioner's emergency motion and vindicate Wisconsin's separation of powers.

ARGUMENT

I. The Governor's Interpretation Of Section 323.10 Would Render The Law An Unconstitutional Delegation Of Legislative Power As Evidenced By His Recent Order Circumventing The Legislature's Override Authority

Wisconsin law allows, "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,” but “[a] state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature,” and “[it] may be revoked at the discretion of ... the legislature by joint resolution.” Wis. Stat. § 323.10. On February 4, 2021, the Legislature passed Senate Joint Resolution 3 to revoke the Governor’s most recent disaster declaration. Within hours, the Governor issued another emergency declaration, circumventing the will of the Legislature. Executive Order #105. This was the Governor’s sixth state of emergency related to COVID-19.

Executive Order #105 is clearly unlawful. As with the statutory 60-day expiration of states of emergency, Section 323.10 does not permit the Governor to simply reissue a state of emergency whenever the Legislature, by joint resolution, revokes a previous declaration. Importantly, if Section 323.10 were to permit the Governor to take such action, then the statute would constitute an unconstitutional delegation of the legislative power. *See Non-Party Brief of Wisconsin Legislature* 13–16.

The Governor argues that emergency response is in the zone of shared powers between the executive and legislative branches. *See Resp. Br.* 31–34. But the power that an emergency declaration grants to the Governor is the power to make law, which is, by definition, the legislative power. *See Koshkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600. Once the Governor has declared a state of emergency, the statutes permit him to “[i]ssue such orders as he deems necessary for the security of persons and property.” Wis. Stat. § 323.12(4)(b). These orders have the force of law: they “prescrib[e] a rule of conduct” that “the governing

power in a community recognizes as [one] which it will enforce or sanction.” *State ex rel. Martin v. Zimmerman*, 233 Wis. 16, 288 N.W.2d 454 (1939); *see* Emergency Order 1 (Feb. 4, 2020) (setting a rule of conduct and imposing a civil forfeiture).

The Legislature can delegate its power to make law only if there are adequate procedural and substantive safeguards in place to protect the “checks and balances built into our system of government” and to “deter abuse.” *Panzer v. Doyle*, 2004 WI 52, ¶¶ 52, 54, 271 Wis. 2d 295, 680 N.W.2d 666, *abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107; *Legislature v. Palm*, 2020 WI 42, ¶ 33, 391 Wis. 2d 497, 942 N.W.2d 900. The minimum requirements of such safeguards are heightened when the Legislature purports to delegate its power to another branch of government, as opposed to an administrative agency. *Panzer*, 271 Wis. 2d 295, ¶ 57.

The Governor’s interpretation of Section 323.10 that allows him to reissue an emergency declaration without regard to the 60-day time limit and ignore whether the Legislature has revoked the declaration would be an unconstitutional delegation of legislative power because it would entirely lack any substantive or procedural safeguards. As explained already in this case, Section 323.10 does not provide substantive safeguards because it lacks “adequate standards for conducting the allocated power.” Non-Party Br. of Wisconsin Legislature 14–15 (citing *Palm*, 391 Wis. 2d 497, ¶ 33). And the Governor’s interpretation of Section 323.10 eviscerates any procedural safeguards contained in the statute. Under the Governor’s interpretation, the 60-day limit does not prevent him

from issuing another declaration for the same underlying emergency “as facts on the ground develop,” Resp. Br. 20, a phrase open to limitless interpretation that renders the statute’s 60-day time period meaningless. The remaining safeguard is the Legislature’s ability to revoke the declaration. But if the Governor can simply redeclare a state of emergency immediately upon the Legislature’s revocation of his previous declaration, then this safeguard is likewise meaningless. Thus, if the Governor’s actions—indeinitely redeclaring states of emergency every 60 days and redeclaring a state of emergency immediately after a legislative override—were permitted by the Section 323.10, then the statute would constitute an unconstitutional delegation of the Legislative power. *See also In re Certified Questions*, -- N.W.2d --, 2020 WL 5877599 (Mich. Oct. 2, 2020) (holding that Michigan’s Emergency Powers of the Governor Act was unconstitutional because it contained no meaningful constraints on Governor’s power, including temporal restraints).

The Governor’s own arguments in this very case demonstrate that his latest emergency declaration is unlawful. In arguing that his interpretation of Section 323.10 would not render the statute unconstitutional, the Governor argues that “the Legislature ‘retains the power to act,’ decisively and definitively,” and indeed that “the Legislature has the final say” through Section 323.10’s legislative override provision. Resp. Br. 35–36 (citing *Panzer*, 271 Wis. 2d 295, ¶ 70). As the Governor’s actions on February 4 show, the Legislature does not have the final say, and its “power to act” is only a pro forma resolution that the Governor

can supersede within minutes. Indeed, the Governor has admitted that his actions on February 4 “may very well implicate separation of powers problems” and “may be circumventing the procedural safeguards that insure that delegated power may be curtailed or reclaimed by future legislative action.” Resp. Br. at 38 (citing *Panzer*, 271 Wis. 2d 295, ¶ 78).

To quote the Governor’s briefing: “People may disagree about whether a subsequent state of emergency declaration is good or bad policy, but the role of the Court is to ensure that there are sufficient substantive and procedural guidelines.” Resp. Br. 36. The Governor’s recent actions have shown definitely that, under his interpretation of the statute, there are not. The Governor’s interpretation would therefore render the Section 323.10 unconstitutional, and this Court should reject it. Instead, this Court should hold that the Governor’s actions on February 4 were unlawful because, as with the 60-day expiration of states of emergency, once the Legislature revoked the Governor’s earlier declaration of emergency, Section 323.10 did not permit the Governor to simply redeclare a state of emergency and again arrogate to himself the power to make law.

CONCLUSION

Wisconsin law does not allow the Governor to declare indefinite emergencies or reissue a state of emergency declarations after the Legislature’s revocation. The Legislature respectfully requests that this Court rule in Petitioner’s favor and declare the Orders void and unenforceable.

Dated: February 10, 2021

Respectfully submitted,



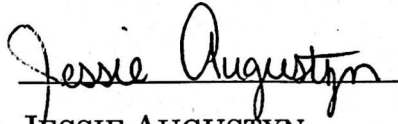
JESSIE AUGUSTYN
State Bar No. 1098680
*Counsel for the Senate
Majority Leader*
Augustyn Law LLC
1360 Regent Street
No. 192
Madison, WI 53715
(715) 255-0817
jessie@augustynlaw.com

STEVE FAWCETT
State Bar No. 1113867
*Counsel for the
Assembly Speaker*
Room 217 West, State Capitol
Madison, WI 53708
(608) 266-9171
Steve.Fawcett@legis.wi.gov

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5 pages and contains 1,243 words, calculated using Microsoft Word.

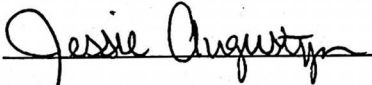
Dated: February 10, 2021.


JESSIE AUGUSTYN

**CERTIFICATION 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 parties.

Dated: February 10, 2021.


JESSIE AUGUSTYN

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2021, I caused three copies of the foregoing brief to be served upon counsel of record via U.S. Mail, first-class postage, addressed as follows:

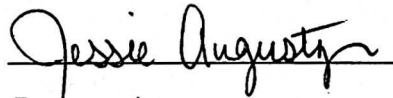
Matthew M. Fernholz
P.O. Box 558
Waukesha, WI 53187-0558

Counsel for Petitioner

Thomas C. Bellavia
Hannah Schieber Jurss
Colin Hector
P.O. Box 7857
Madison, WI 53707-7857

Counsel for Respondents

Dated: February 10, 2021.



JESSIE AUGUSTYN