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**STATE OF WISCONSIN
SUPREME COURT**
No. 2020AP____-OA

CLERK OF SUPREME COURT
OF WISCONSIN

DEREK LINDOO, BRANDON WIDIKER, and JOHN KRAFT

Petitioners,

v.

TONY EVERS, in his official capacity as
Governor of the State of Wisconsin

Respondent.

**CONDITIONAL PETITION TO THE SUPREME COURT OF
WISCONSIN FOR REMOVAL OF A CASE FROM THE
POLK COUNTY CIRCUIT COURT AS AN ORIGINAL
ACTION, OR, IN THE ALTERNATIVE, TO EXERCISE ITS
SUPERINTENDING AUTHORITY AND ASSUME
JURISDICTION OF THAT CASE**

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Petitioners Derek Lindoo, Brandon Widiker, and John Kraft, by their attorneys, the Wisconsin Institute for Law & Liberty, hereby allege as follows:

1. This Court is considering whether to accept jurisdiction of an original action raising the question of “[w]hether 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.” Petition at 4, *Fabick v. Evers*, No. 2020AP1718-OA (Oct. 15, 2020).

2. As the memorandum in support of that petition notes, Memorandum at 6, a lawsuit against the Governor posing that very question is already pending in Polk County Circuit Court. *See Lindoo v. Evers*, No. 20-CV-219 (Wis. Cir. Ct. Polk Cty. 2020). Unlike the *Fabick* Petition, this lawsuit also asserts a second claim: that the Governor’s interpretation of § 323.10, if correct, constitutes an unlawful delegation of legislative power to the executive.

3. Plaintiffs in *Lindoo* are Petitioners here and seek to protect their interests and serve the interests of this Court. While Petitioners are otherwise content to continue to litigate their claims through the normal channels of the judicial system (and plan on doing so), should this Court decide to grant the *Fabick* petition, the Petitioners respectfully request that this Court remove *Lindoo v. Evers* to this Court, accept jurisdiction of the case as an original action, and consolidate it with *Fabick*.

4. Although Petitioners chose not to file *Lindoo* as an original action, this Court may nevertheless exercise its original action jurisdiction, remove *Lindoo* to this Court and, if it chooses, consolidate it with *Fabick*. See Wis. Const. art. VII, § 3(2); Wis. Stat. §809.70; *State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 720, 546 N.W.2d 140 (1996) (per curiam) (noting that the case was before the Court “as an original action pursuant to a petition for removal from the Dane County Circuit Court”).

5. Alternately, it may grant this request pursuant to its superintending authority. See Wis. Const. art. VII, § 3(1); *Arneson*

v. Jezwinski, 206 Wis. 2d 217, 225, 556 N.W.2d 721 (1996) (superintending authority is “indefinite in character, unsupplied with means and instrumentalities, and limited only by the necessities of justice” and “enables the court to control the course of ordinary litigation in the lower courts of Wisconsin”).

6. Regardless of which power it invokes, as discussed more fully below, if this Court assumes jurisdiction of *Fabick*, the interests of justice are best served by removal of *Lindoo v. Evers* and consolidation with *Fabick*. This will best protect the Petitioners interests; best serve the interests of this Court; ensure efficient and complete disposition of the challenges to the Governor’s serial emergency order declarations; and will not prejudice any party or delay this litigation.¹

PARTIES

7. Petitioner Derek Lindoo is a Wisconsin resident and taxpayer. Petitioner Lindoo resides at 915 150th Avenue, in the Town of Apple River, Polk County, Wisconsin. He was and is

¹ If this Court declines to assume jurisdiction of *Fabick*, Petitioners do not ask this Court to remove this case.

required to follow the mask mandates of both the previous and current Emergency Order #1 and any other orders issued by the Governor, based on the emergency powers that are being unlawfully exercised as a result of Executive Orders #82 and #90.

8. Petitioner Brandon Widiker is a Wisconsin resident and taxpayer. Petitioner Widiker resides at 542 115th Street, in the Town of Black Brook, Polk County, Wisconsin. He was and is required to follow the mask mandates of both the previous and current Emergency Order #1 and any other orders issued by the Governor, based on the emergency powers that are being unlawfully exercised as a result of Executive Orders #82 and #90.

9. Petitioner John Kraft is a Wisconsin resident and taxpayer. Petitioner Kraft resides at 1067 80th Avenue, in the Town of Warren, Saint Croix County, Wisconsin. He was and is required to follow the mask mandates of both the previous and current Emergency Order #1 and any other orders issued by the Governor, based on the emergency powers that are being unlawfully exercised as a result of Executive Orders #82 and #90.

10. Respondent Tony Evers is Governor of the State of Wisconsin and is sued in his official capacity. Respondent Evers maintains his office at 115 East, Wisconsin State Capitol, in the City of Madison, Dane County, Wisconsin. Respondent Evers issued the orders that are the subject of this litigation.

STATEMENT OF ISSUES

11. Whether Governor Evers' Executive Orders #82 and #90 exceed the Governor's emergency powers as prescribed in Wis. Stat. §323.10 because these orders were issued after the statutorily imposed 60-day time limit.

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

STATEMENT OF FACTS

13. Wis. Stat. § 323.10 empowers the Governor to determine if a state of emergency exists. An emergency can either be a "disaster" or a "public health emergency." A "public health emergency" is defined as

the 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).

14. Once determined that such a “public health emergency” exists, the Governor may issue an executive order declaring a state of emergency related to public health. But, without regard to the nature of the underlying emergency or its duration, Wisconsin law limits the duration of such a state of emergency declared by the Governor to 60 days unless extended by joint resolution of the Legislature. Wis. Stat. § 323.10.

15. Once a state of emergency has been declared by the Governor, certain emergency powers that are, on their face,

extraordinarily broad become available to the Governor pursuant to statute. He or she can, for example, “issue such orders as he or she deems necessary for the security of persons and property.” Wis. Stat. § 323.12(4). But these powers exist only for the 60-day period following the declaration of the state of emergency. Unless they are extended by the Legislature, they expire without the need for any action.

16. On March 12, 2020, Respondent Evers made an initial determination that a public health emergency existed in Wisconsin due to COVID-19.

17. In order to activate his statutory emergency powers to combat the COVID-19 pandemic, Respondent Evers issued Executive Order #72 declaring a public health emergency.²

18. Executive Order #72 remained in force for a full 60 days, and then expired on May 11, 2020, pursuant to state law.

² Each of the Orders cited in this Petition is publicly available online. See Governor Tony Evers, Executive Orders, <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx> (last visited October 20, 2020).

19. Respondent Evers then issued Executive Order #82 on July 30, 2020 declaring a second state of emergency (approximately two months after the expiration of the first), arising from the same underlying public health condition – the existence and spread of COVID-19.

20. On September 22, 2020, Respondent Evers then attempted, via Executive Order #90, to further extend his emergency powers by declaring a third state of emergency, while the second state of emergency was still pending.

21. Respondent Evers never declared that the pandemic leading to the issuance of Executive Order # 72 was suppressed, eradicated or abated, nor could any reasonable claim be made that it was suppressed, eradicated or abated. It has continued.

22. In fact, even prior to issuing Executive Orders #82 and #90, Respondent Evers attempted to extend his exercise of emergency powers beyond the 60-day period created by Executive Order #72 by directing the Department of Health Services to issue

an order extending his desired measures beyond the expiration of the original public health emergency.

23. Thus, in late April, at the Governor's direction, Secretary-designee of the Department of Health Services, Andrea Palm, issued Emergency Order # 28 substantially extending the "Safer At Home" order beyond the 60-day state of emergency declared by Executive Order # 72, as well as Emergency Order #31, known as the "Badger Bounce Back" order. Both of those emergency orders purported to be in effect well after the expiration of the original state of emergency.

24. In causing these orders to issue, Respondent Evers' administration relied on Chapter 252 of the statutes and argued that they were not subject to the time limits of Chapter 323. This Court invalidated these orders on May 13, 2020, holding that these Chapter 252 powers were not as broad as those exercised in these orders and must be promulgated by rule. *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.

25. As noted above, the COVID-19 pandemic still exists and has existed – unabated and unsuppressed – in Wisconsin since both the declaration and expiration of the state of emergency declared by Executive Order #72.

26. At no time has the 7-day average number of daily infections dipped significantly below the number that existed at expiration of the original state of emergency – a time at which the Governor was arguing for continued extraordinary restrictions.³

27. Further, the number of deaths each day resulting from COVID-19 has remained steady since the beginning of April.⁴

28. COVID-19 has affected different parts of the state differently, and in some cases, drastically differently. Because of this, the Legislature has not extended the statewide state of emergency declared by Executive Order #72, or imposed other state-wide mandates on Wisconsin citizens, but instead has opted

³ See Wisconsin Department of Health Services, *COVID-19: Wisconsin Cases*, <https://www.dhs.wisconsin.gov/covid-19/cases.htm> (last visited October 20, 2020).

⁴ See Wisconsin Department of Health Services, *COVID-19: Wisconsin Deaths*, <https://www.dhs.wisconsin.gov/covid-19/deaths.htm> (last visited October 20, 2020).

for local solutions, imposed by municipal units of government, to deal with the differing impacts of COVID-19 in different parts of the State.

29. As a result of the expiration of Executive Order #72 on May 11, 2020, and the Legislature's decision not to extend it, Respondent Evers has no constitutional or statutory basis to continue to declare or exercise emergency powers related to COVID-19. Whatever laws may be necessary or appropriate to deal with the COVID-19 pandemic may not be unilaterally imposed by the Governor, but, subject to the strictures of the United States and Wisconsin Constitutions, must instead be: (1) passed by the Legislature and signed into law by the Governor; (2) properly promulgated as a rule using the statutory rulemaking process; or (3) enacted via the powers of local governments as properly delegated by the Legislature by statute.

30. Nevertheless, Respondent Evers issued Executive Orders #82 and #90 in which he again declared or extended states of emergency related to public health for the entire state as a result

of the same COVID-19 pandemic that was impacting Wisconsin back in March.

31. In proclaiming and extending new states of emergency related to the COVID-19 pandemic Respondent Evers sought to grant for himself almost an additional four months (and counting) during which he can issue unilateral decrees that would not be permitted under our regular statutory and constitutional order. During that period, he claims the ability to use emergency powers which the law actually denies him because the original state of emergency expired and was not extended by the Legislature.

32. Respondent Evers immediately exercised those new emergency statutory powers to issue Emergency Order #1 purporting to mandate the wearing of a mask by every person throughout the entire State of Wisconsin. Respondent Evers then extended Emergency Order #1 an additional 60 days based upon Executive Order #90.

33. As Wisconsin residents and taxpayers, Petitioners are harmed by Emergency Order #1 because, among other reasons: (a)

Petitioners are being compelled to take an action (wear a mask in certain circumstances when Petitioners would otherwise choose not to wear a mask) by an unlawful order of Respondent Evers; (b) the State is spending taxpayer money to promulgate and enforce Respondent Evers' unlawful mask mandate; (c) Respondent Evers now claims plenary powers; and (d) Respondent Evers has used these claimed emergency powers to deploy the national guard at taxpayers' expense.

34. In response to the Governor's second declaration of a public health emergency, on August 25, 2020, Petitioners (there, Plaintiffs) filed a complaint in Polk County Circuit Court against Respondent (there, Defendant) Governor Tony Evers in his official capacity as Governor of the State of Wisconsin. The complaint challenged the legality of Executive Order #82 (and, by extension, Emergency Order #1) and sought a declaratory judgment stating that the Governor's Executive Order #82 violated the State's statutory and constitutional restrictions and was thus illegal, as well as injunctive relief.

35. However, before the circuit court heard the merits of the Petitioners' claims, as already described, Governor Evers declared a public health emergency for a third time on September 22, 2020.

36. Following this new extension, the Petitioners filed an amended complaint on September 28, 2020, challenging both Executive Orders #82 and #90 (and, by extension, both the first and second Emergency Order #1) and again seeking declaratory and injunctive relief.

37. On the same day, the Petitioners filed a motion for a temporary injunction. Following briefing, the circuit court, the Honorable Michael Waterman presiding, held a hearing on this motion on October 5, 2020. In a written decision dated October 12, 2020, the circuit court denied the Petitioners' request for temporary relief.⁵

⁵ The Circuit Court's decision contains reasoning that is inconsistent with Petitioners' arguments herein. Petitioners respect that decision and wish to expressly note that nothing in this petition is intended to circumvent the ordinary litigation process below. As described, this is a conditional petition intended to preserve the rights of the litigants below in the event this Court grants the *Fabick* petition.

38. A few days later, on October 15, 2020, the *Fabick* Petitioners filed their petition in this Court raising the question presented in *Lindoo v. Evers*.

39. *Lindoo v. Evers* is still pending in Polk County Circuit Court. Most recently, Respondent Evers filed an answer to the Petitioners' amended complaint on October 19, 2020.

STATEMENT OF CLAIM

Statutory Claim

40. In *Lindoo v. Evers*, the Petitioners seek a declaration that Emergency Orders #82 and #90 are void in so far as they purport to extend a state of emergency related to the COVID-19 pandemic and thereby exercise emergency powers after the expiration of the original state of emergency.

41. Respondent Evers has no power to create law unilaterally. The power to make laws is instead vested in the Legislature. Wis. Const. Art. IV, § 1.

42. Although the Legislature has delegated some of its lawmaking power to the Governor by granting the Governor

certain emergency powers upon the declaration of a state of emergency under Wis. Stat. § 323.10, it has also made clear that any such state of emergency is strictly time-limited. Even if the Legislature fails to act, “[a] 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.

43. Thus, when Respondent Evers determined a public health emergency due to the COVID-19 pandemic existed in Wisconsin back in March, 2020, and subsequently declared a state of emergency to deal with it, that state of emergency could not be lawfully extended beyond 60 days unless the Legislature, by joint resolution, approved of such an extension, which the Legislature has not done.

44. Moreover, because § 323.10 provides that the extension must be by “joint resolution” by the Legislature, as opposed to a bill by the Legislature, the decision to approve or not approve the extension belongs exclusively to the Legislature and is not subject to veto by the Governor.

45. During the initial 60-day state of emergency (and even thereafter), Respondent Evers had the option to (1) seek an extension from the Legislature of the state of emergency, (2) propose and negotiate legislation to deal with the pandemic on a long-term basis and/or (3) have the administrative agencies that he controls propose and promulgate rules to deal with COVID-19. Each of these mechanisms would have required Respondent Evers to seek and obtain the input and consent of the public and the Legislature rather than rule unilaterally, and for his own reasons, he chose not to exercise any of these options.

46. Having failed to use the constitutional and statutory methods for creating law, Respondent Evers instead seeks to regain access to unilateral emergency powers by extending the state of emergency relating to COVID-19 past its 60-day limit. But Respondent Evers may not do so except by approval of the Legislature by joint resolution. As noted in *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 41, “in the case of a pandemic, which lasts

month after month, the Governor cannot rely on emergency powers indefinitely.”

47. Respondent Evers’ attempt to extend a “state of emergency” in Wisconsin beyond 60 days without legislative approval exceeds his power under state law. The states of emergency related to the COVID-19 pandemic declared by Executive Order #82 and #90 are ultra vires and void.

48. Further, any contention that either or both Executive Orders #82 and #90 are not an extension of the state of emergency declared by Executive Order #72 but are instead new and different public health emergencies is wrong on its face.

49. The new or extended states of emergency created by Executive Orders #82 and #90 are predicated on the COVID-19 pandemic, the same public health emergency, and no one would contend that the pandemic ever ended or even significantly abated. The law does not permit extension or replication of a state of emergency and the consequent enhancement of gubernatorial

powers because a biological agent has not gone away or even because it has become worse.

50. At no point did Respondent Evers ever declare that the emergency condition was over. At no point, either prior to or subsequent to expiration of the original state of emergency, did the number of daily infections, hospitalizations, or fatalities ever dip substantially below the levels reached during the original order. While one might argue that the pandemic has gotten worse, the time limit on a declared state of emergency is absolute and cannot be evaded because the underlying public health emergency has “gotten worse” or has not gone away or substantially decreased from that present during the emergency.

51. The Governor lacks the power to unilaterally extend a state of emergency or to declare multiple states of emergency to deal with the same problem. Any other conclusion would allow a Governor to ignore the legislative power vested in the Legislature and to evade the 60-day limitation imposed by the Legislature in Wis. Stat. § 323.10.

52. Executive Order #72, Executive Order #82 and Executive Order #90 are all expressly based upon the COVID-19 pandemic in the State of Wisconsin, that is, they address the same “public health emergency.” While the course of the pandemic in Wisconsin has changed over time (with reported cases sometimes going up and sometimes going down), the underlying public health emergency is the same now as it was in March, 2020.

53. There are similar restrictions on the use of emergency powers by executive agencies in other circumstances. For example, when an agency needs to quickly promulgate a rule, it may declare an emergency and adopt a rule through the “emergency rulemaking” process under Wis. Stat. § 227.24. But those rules are only valid for 150 days, unless extended by the Legislature, and an agency may not simply re-issue an emergency rule if the Legislature declines to extend it. A formal Attorney General opinion makes clear that this temporal limitation on emergency rulemaking is a “clear expression of intent that the effectiveness of an emergency rule may not be extended beyond”

the initial effective period simply by re-filing it. 62 Atty. Gen 305, 308 (1973). Likewise, in this case, a state of emergency may not simply be extended beyond the initial 60-day period by re-issuing an executive order.

54. The course of this pandemic – and any other public health emergency for that matter – will always involve changing facts. And if changing facts allow the Governor to unilaterally extend or to declare a “new” emergency and obtain a new 60-day period of emergency powers, then he has been given essentially unlimited power to unilaterally create new laws to be imposed on Wisconsinites via executive fiat.

55. Respondent Evers’ attempt to unilaterally extend or to impose multiple states of emergency in Wisconsin exceeds his power under the Wisconsin Constitution and under state law. The extensions created by the second and third states of emergency related to the COVID-19 pandemic declared by Executive Orders #82 and #90 are ultra vires and void.

56. Unless a court declares that the states of emergency declared by Executive Orders #82 and #90, along with Emergency Order #1 which depends on the legality of Executive Orders #82 and #90, are ultra vires and void, Respondent Evers will continue to exercise the emergency statutory powers beyond the 60-day window in which such powers may have been lawful, in violation of the Wisconsin Constitution and state statutes.

Constitutional Claim

57. If Executive Orders #82 and #90 are authorized by statute, then the Petitioners request a declaration that the statute allowing Executive Orders #82's and #90's states of emergency and, consequently, the mask mandate ordered by Emergency Order #1 is unconstitutional.

58. The Wisconsin Constitution vests the legislative power in the Legislature. Wis. Const. Art. IV, § 1.

59. Courts in Wisconsin have permitted the delegation of legislative power to the executive but only so long as "the purpose of the delegating statute is ascertainable and there are procedural

safeguards to insure that the board or agency acts within that legislative purpose.” *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536, 182 N.W.2d 257 (1971).

60. The ability to declare a public health emergency and the extraordinary emergency powers granted to the Governor during the emergency are both delegations of legislative power to the executive branch with one of the safeguards being that the Governor may only exercise such emergency powers for 60 days unless that period is extended by joint resolution of the Legislature.

61. Those delegated powers may only be lawfully exercised if they are done consistently with the Wisconsin Constitution, which includes the requirement that they comply with the 60-day safeguard contained in the statute. As this Court (quoting the U.S. Department of Justice) recently noted, “[t]here is no pandemic exception . . . to the fundamental liberties the Constitution safeguards.” *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 53, 391 Wis. 2d 497, 942 N.W.2d 900.

62. If Wis. Stat. § 323.10 allows Governor Evers to unilaterally extend the state of emergency beyond 60 days, or to declare new states of emergency for the same public health problem, and to exercise emergency powers otherwise unavailable to him beyond 60 days, then the statute is an unconstitutional delegation of legislative power to the executive.

63. The ability of the legislature to rescind an existing state of emergency cannot be an adequate safeguard for two reasons.⁶ First, it is not the safeguard that the legislature has chosen. A governor may not extend his or her emergency rule unless the legislature chooses to rescind by joint resolution. Put

⁶ Wisconsin's current caselaw on the nondelegation doctrine has recently emphasized procedural safeguards on the delegated power. In the past, courts in Wisconsin have gone further and enforced substantive safeguards. *See, e.g., Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N.W. 738, 741 (1896) (“[A] law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the . . . delegate of the legislature”); *see also State v. Burdge*, 95 Wis. 390, 70 N.W. 347, 350 (1897) (prior to making rules and regulations “there must first be some substantive provision of law to be administered and carried into effect.”). If this Court takes up this issue, Petitioners do intend to argue for a return to such substantive protections. Regardless, § 323.10, if interpreted to authorize the Governor's actions here, violates either understanding of the nondelegation doctrine.

differently, both houses may “opt-in” to the emergency and extend it. They are not required to opt-out.

64. Second, there is an enormous difference between the legislature choosing to extend an emergency and the failure of the legislature to end it. To ignore that difference, would not only mean the legislature can acquiesce in the usurpation of its authority, but that only *one house* of the legislature may do so.⁷

STATEMENT OF RELIEF SOUGHT

65. As explained, Petitioners are otherwise content to continue to litigate their claims through the normal channels of the judicial system (and plan on doing so) and through this petition seek only to protect their own interests and serve the interests of this Court. In the event that this Court decides to grant the *Fabick* petition, the Petitioners respectfully request that this Court

⁷ Indeed, the Legislature may neither acquiesce in a state of emergency extending more than 60 days or itself extend an emergency indefinitely. The Legislature may not simply give its power away. *See In re Constitutionality of Section 251.18, Wis. Statutes*, 204 Wis. 501, 236 N.W. 717, 718 (1931).

remove *Lindoo v. Evers* to this Court, accept jurisdiction of the case as an original action, and consolidate it with *Fabick*.

66. This Court may grant this request pursuant to its original action jurisdiction. See Wis. Const. art. VII, §3(2) (Supreme Court “may hear original actions and proceedings”); Wis. Stat. §809.70. This was done, for example, in *State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 720, 546 N.W.2d 140 (1996) (per curiam), where the Court noted that the case was before it “as an original action pursuant to a petition for removal from the Dane County Circuit Court.”

67. Alternately, the Court may grant this request pursuant to its superintending authority. See Wis. Const. art. VII, § 3(1) (Supreme Court has “superintending and administrative authority over all courts”). This Court has said that this authority is “as broad and as flexible as necessary to insure the due administration of justice in the courts of this state.” *In re Kading*, 70 Wis. 2d 508, 520, 235 N.W.2d 409 (1975). As such, it is “indefinite in character” and “limited only by the necessities of

justice.” *Arneson v. Jezwinski*, 206 Wis. 2d 217, 225, 556 N.W.2d 721 (1996).

68. Importantly, encompassed within its superintending authority this Court has repeatedly said is the power to “control the course of ordinary litigation in the lower courts of Wisconsin.” *Arneson*, 206 Wis. 2d at 226; *see also State ex rel. Fourth Nat. Bank of Philadelphia v. Johnson*, 103 Wis. 591, 79 N.W. 1081, 1087 (1899); *id.* (discussing the superintending authority’s roots in the English court of king’s bench and that court’s ability to “keep[] all inferior jurisdictions within the bounds of their authority” and, among other things, to “remove the proceedings to be determined [there],” (quoting William Blackstone, *Commentaries on the Laws of England*, bk. 3, c. 4, p. 42)).⁸

⁸ It is true that superintending authority is principally used “when an inferior court either refuses to act within its jurisdiction, or acts beyond its jurisdiction to the serious prejudice of the citizen,” *State ex rel. Fourth Nat. Bank of Philadelphia v. Johnson*, 103 Wis. 591, 79 N.W. 1081, 1087 (1899), or to challenge certain other actions of the circuit court, *see, e.g., State ex rel. Ampco Metal, Inc. v. O’Neill*, 273 Wis. 530, 535, 78 N.W.2d 921 (1956); *see generally State ex rel. CityDeck Landing LLC v. Circuit Court for Brown Cty.*, 2019 WI 15, 385 Wis. 2d 516, 922 N.W.2d 832, and here no challenge to the circuit court’s actions is lodged. However, this Court has noted additional circumstances where superintending authority is appropriately invoked: “where the exercise of the superintending control is necessary to the proper

69. In their suit in Polk County, Petitioners seek—and would seek from this Court, if it assumes jurisdiction of this case—(1) a declaratory judgment that the states of emergency related to public health declared by Executive Orders #82 and #90 are ultra vires and void; (2) in the alternative, or in addition, a declaratory judgment that Wis. Stat. § 323.10 is an unconstitutional delegation of legislative power to the executive, and is void; (3) an injunction prohibiting the enforcement of the state of emergency declarations in Executive Orders #82 and #90 and Emergency Order #1; and (4) such other relief as the Court deems appropriate.

exercise of appellate jurisdiction” and, relevant here, “as an aid to the exercise of its original jurisdiction when the latter is invoked to protect the sovereignty of the people or in any action under the so-called ‘prerogative writs.’” *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 44 (1938). And this Court has noted that “whether we choose to exercise our supervisory authority in a given situation is a matter of judicial policy rather than one relating to the power of this court.” *Koschkee v. Evers*, 2018 WI 82, ¶ 12, 382 Wis. 2d 666, 913 N.W.2d 878; *see also id.* at ¶ 8 (“If this power were strictly limited to the situations in which it was previously applied, it would cease to be superintending, since this word definitely contemplates ongoing, continuing supervision in response to changing needs and circumstances.” (quoting *In re Kading*, 70 Wis. 2d 508, 520, 235 N.W.2d 409 (1975))).

STATEMENT OF REASONS THIS COURT SHOULD TAKE JURISDICTION

70. Typically, “[t]he supreme court limits its exercise of original jurisdiction to *exceptional cases* in which a judgment by the court significantly affects the *community at large*.” *Wisconsin Prof'l Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, ¶4, 243 Wis. 2d 512, 627 N.W.2d 807 (emphases added).

71. Although Petitioners chose not to request that the matter proceed as an original action in the first instance, they certainly could have done so. This is certainly an exceptional case that affects the community at large. The legal issues presented involve significant statutory and constitutional questions related to the exercise of gubernatorial power and the delegation of legislative power to the executive, and, as written, Executive Orders #80 and #92 and Emergency Order #1 apply to nearly every person in the State.

72. Moreover, in Emergency Order #1, the Governor mandated the citizenry wear face coverings or face a penalty. While mandating face coverings may be prudent policy, it is

unquestionably a significant exercise of gubernatorial authority. The question this Court is asked to review is whether the Governor possesses such statutory authority as exercised here and, even if he does, whether the legislature is permitted to grant him such expansive emergency powers.

73. As it stands, Wisconsinites will ultimately have spent over 180 days and counting in a state of emergency wherein the Governor is able to rule by decree. Therefore, the importance of the issue merits the Court's prompt review.

74. Despite the foregoing, as noted, Petitioners do not actually ask this Court to take jurisdiction of *Lindoo v. Evers* if it denies the *Fabick* petition. However, if this Court assumes jurisdiction in *Fabick*, then the reasons on which it relies to do so—including, in addition to the above, considerations of expediency and the need for a single, definitive decision, for example—apply equally here, where the identical question of statutory interpretation is posed. And if this Court concludes that the statutory claim is of statewide importance, that reasoning applies

a fortiori to Petitioners' constitutional claim, which asks whether § 323.10 violates the state constitution's apportionment of powers between the legislative and executive branches.

75. Apart from the independent merits of this Court's review of *Lindoo*, if this Court assumes jurisdiction of *Fabick*, the interests of justice are best served by removal of this case and consolidation with *Fabick*.

76. First, that approach will best protect Petitioners' interests, who have already litigated this case through a request for temporary relief and, together with the circuit court, have expended significant resources to do so. Petitioners have raised an additional, constitutional claim not presented in the *Fabick* petition in addition to their statutory claim and it is unclear whether litigation of either claim in the circuit court is permissible if this Court accepts jurisdiction. *See Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 49 (1938) ("Since it was the clear mandate of the constitution that the supreme court be the supreme judicial tribunal of the state, it follows that when original jurisdiction is

taken it excludes the jurisdiction of every inferior tribunal to deal with the same subject matter and thus to dissipate or weaken the original jurisdiction.”) Regardless, even if permitted, a state of affairs in which the Petitioners are litigating statutory and constitutional claims relating to a statute in a lower court while this Court simultaneously entertains a question of that same statute’s interpretation will undoubtedly “dissipate or weaken” this Court’s exercise of jurisdiction and lead to confusion and the waste of judicial resources.

77. On this last point, consolidation of this case with *Fabick* will ensure efficient and complete disposition of the challenges to the Governor’s serial emergency order declarations. If this Court concludes that expeditious and definitive resolution of the question raised in this case is appropriate due to the substantial public health matters and individual liberties at issue, it makes little sense to leave open the possibility that following

decision by this Court a *constitutional* challenge to the very same orders and emergency powers framework will remain pending.⁹

78. Finally, consolidating cases will not prejudice any party or delay this litigation. Respondent Evers is already a defendant in *Lindoo* and the Petitioners have filed this conditional petition promptly.

CONCLUSION

79. For the reasons set forth above, Petitioners respectfully request that, if this Court assumes jurisdiction in *Fabick*, it (1) remove *Lindoo v. Evers* from the Polk County Circuit Court as an original action, or alternatively, exercise its superintending authority and assume jurisdiction of that case; (2) consolidate it with *Fabick*; and (3) grant the declaratory and injunctive relief requested herein.

DATED this 22nd day of October, 2020.

Respectfully submitted,

⁹ For this reason, this Court's ability to suspend *Lindoo v. Evers* while it decides *Fabick* (should it choose to accept that latter case), *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938), would be an inadequate measure.

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CERTIFICATE OF SERVICE

A copy of this Petition is being served on all opposing parties via electronic mail and first-class mail.

Dated: October 22, 2020



Anthony F. LoCoco