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Supreme Court of Wisconsin

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October 28, 2020

To:

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You are hereby notified that the Court has entered the following order:

No. 2020AP1718-OA Fabick v. Evers

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a supporting legal memorandum, and an appendix having been filed on behalf of petitioner, Jeré Fabick, and a response and supplemental appendix in opposition to the petition for original action having been filed on behalf of respondent, Tony Evers, in his official capacity as the Governor of Wisconsin;

IT IS ORDERED that the petition for leave to commence an original action is granted and this court assumes jurisdiction over this action; and

IT IS FURTHER ORDERED that on or before 4:00 p.m. on November 2, 2020, the petitioner shall file a brief in this court; that on or before 4:00 p.m. on November 6, 2020, the respondent shall file a responsive brief; and that on or before 4:00 p.m. on November 9, 2020, the petitioner may file a reply brief or a statement that no reply brief will be filed. All briefs shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.14, 809.80, and 809.81. The parties shall also ensure a paper original and 10 copies of the briefs are received by the clerk of this court within 24 hours of the electronic filing with the following notation on the top of the first page: "This document was previously filed via email;" and

IT IS FURTHER ORDERED that the parties' briefs shall address the following additional issue:

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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; and

IT IS FURTHER ORDERED that any non-party that wishes to file a non-party brief amicus curiae must file a motion for leave of the court to file a non-party brief pursuant to the requirements of Wis. Stat. § (Rule) 809.19(7). Non-parties should also consult this court's Internal Operating Procedure III.B.6.c. concerning the nature of non-parties who may be granted leave to file a non-party brief. A proposed non-party brief must accompany the motion for leave to file it. Any proposed non-party brief shall not exceed 20 pages if a monospaced font is used or 4,400 words if a proportional serif font is used. Any motion for leave with the proposed non-party brief attached shall be filed no later than 4:00 p.m. on November 4, 2020, and shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. The non-party shall also ensure a paper original and 10 copies of the brief are received by the clerk of this court within 24 hours of the electronic filing with the following notation on the top of the first page: "This document was previously filed via email." Any submission by a non-party that does not comply with Wis. Stat. § (Rule) 809.19(7) and any proposed non-party brief for which this court does not grant leave will not be considered by the court; and

IT IS FURTHER ORDERED that the court will hear oral argument in this matter at 9:45 a.m. on Monday, November 16, 2020. Due to the COVID-19 pandemic, oral arguments before the court will be conducted via videoconferencing. The hearing room will not be open to the public. The public may watch proceedings on the Wisconsin Eye website. Counsel in this case will receive instructions from the Clerk's Office prior to the date of the oral argument regarding the procedures for appearing remotely.

REBECCA FRANK DALLET, J. (*dissenting*). I dissent to the grant of this original-action petition. The same legal issue is pending resolution in Polk County Circuit Court. Our original-action jurisdiction is not meant to allow a single, disgruntled taxpayer to jump the line to achieve a desired outcome. The lower courts should be permitted to carry on without unnecessary and premature interruptions.

This is especially true when the only "harm" alleged by the petitioner is that the Governor spent time drafting, promoting, and enforcing an executive order. By accepting this petition absent even the bare minimum requirement that the petitioner allege some personal harm, this court flings open its doors to any and all taxpayers who are merely unhappy with any government official's action. See Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, 2011 WI 36, ¶5, 333 Wis. 2d 402, 797 N.W.2d 789 (explaining that the essence of standing is "whether the interest of the party whose standing is challenged will be injured"); Cohen v. Towne Realty, Inc., 54 Wis. 2d 1, 5, 194 N.W.2d 298 (1972) ("It has been expressed many times by this court, that before an individual can attack the constitutionality of the statute he must demonstrate that its alleged constitutional infirmity has actually affected his rights."). Granting Fabick's petition is the latest step in the majority's efforts to transform this court from one of last resort to the first stop for any discontented Wisconsinite.

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I therefore respectfully dissent.

I am authorized to state that Justice ANN WALSH BRADLEY and Justice JILL J. KAROFSKY join this dissent.

Sheila T. Reiff
Clerk of Supreme Court